

The complaint

Mr B and Ms C are unhappy with what DAS Legal Expenses Insurance Company Limited did after they made two separate claims on their legal expenses insurance policy.

Although the policy is in joint names, as the complaint has been brought by Mr B, for ease I'll mainly refer to him in this decision.

What happened

Ms C was the joint executor of her mother's will. A dispute arose between her and the other executor. She believed he'd misappropriated assets which should have formed part of the estate. In July 2019 both Ms C and the other executor's appointments were ended by court order and the court appointed a solicitor (Mr D) as personal representative of the deceased.

Mr B instructed a solicitor (Mr C) to pursue claims relating to the estate. In August 2022 Mr B sought assistance from DAS with a professional negligence claim against Mr C. A separate claim was made against Mr D in April 2023 in respect of his actions as executor of the estate. DAS turned down the claim relating to Mr D. It didn't think there was a contractual relationship between him and the insured which was required for policy cover to be provided.

However, it agreed the claim against Mr C could be covered and asked a panel solicitor to consider whether it had reasonable prospects of success (a requirement of the policy). It subsequently agreed costs to obtain counsel's opinion on this. The firm advised in March 2023 that counsel had provided a lengthy advice which Mr B had prepared a detailed response to. It asked if DAS would authorise costs for those to be reviewed. DAS agreed if this was required to establish if the case had prospects of success.

In August the panel firm said following the previous update Mr B had provided further information. Reviewing that had already used up most of the costs DAS had previously agreed. And there would be significant additional cost to provide further advice. It also said the previous opinion from counsel had been that the claim didn't have prospects of success. DAS said it wouldn't provide further funding but if Mr B obtained a positive opinion on prospects from a KC of his own it would reimburse his costs in doing so (up to the policy indemnity limit). In a subsequent final response it said its claims decisions were correct but identified some issues with handling for which it offered to pay Mr B a total of £300.

Our investigator thought DAS had correctly declined the claim against Mr D as Ms C hadn't entered into a contractual relationship with him for the buying of services. And she thought it was reasonable of DAS to rely on the legal advice provided as to whether the claim against Mr C had prospects of success. She thought it had correctly advised it would reconsider the position if Mr B provided a positive legal opinion of his own from a suitably qualified barrister. And she thought the £300 DAS had agreed to pay in relation to delays and communication issues was fair.

Mr B didn't agree. In summary he said

- In relation to the claim against Mr D the decisions on policy coverage should have been made by a legal firm who could have advised on whether a contract existed. He argued in this case Ms C was effectively paying Mr D as his fees would be taken from her as the residuary beneficiary of the estate. And he referenced legal advice he'd received in support of his position and queried how that had been taken into account.
- For the claim against Mr C he thought the standard of the barrister's opinion should have caused DAS to fund a new barrister. He thought it was responsible for providing a competent barrister and a panel solicitor who would provide appropriate instructions. He didn't accept that had taken place. in this case or that the barrister involved had the capacity to provide advice.
- He said DAS should have made clear to the barrister that the issues to be considered were only those that fell within the period for which insurance cover was in place. He said this was a complex case and referenced guidance which said that where that applied he should have the freedom to choose his own solicitor. And he thought it should be for DAS to provide an alternative opinion.

So I need to reach a final decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

The relevant rules and industry guidelines say DAS has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably.

Claim against Mr D

For cover to be available for Mr B's claim it needs to fall within one of the insured incidents set out in his policy. I've reviewed the incidents his policy covers and I think the only one this claim could fall within is 'Contract Disputes'. The policy says "*we will cover the costs and expenses for...your legal rights in a contractual dispute arising from an agreement or alleged agreement which you have entered into for the buying or hiring in of any goods or services or the selling of any goods*". And the onus is on a policyholder to show an insured event as set out in their policy has taken place.

In this case it's clear Mr D was appointed as executor by the High Court. I recognise Ms C consented to that but I haven't seen evidence to show she was a party to any contractual arrangements with Mr D. DAS does nevertheless appear to have accepted there might be a relationship between them. But it says Ms C didn't make direct payment to Mr D for his services which would be required for the claim to be covered by the policy.

I understand as a residuary beneficiary of the estate monies that might otherwise have been provided to Ms C could have been used in payment for Mr D's services. But it would nevertheless be the estate which made those payments. I've not seen evidence that there was a direct payment relationship between Ms C and Mr D in his role as executor.

Mr B feels DAS should have obtained legal advice on the contractual position prior to turning down the claim. I don't agree it needed to do that. As I've already explained the onus is on a policyholder to evidence an insured event covered by their policy has taken place. Based on the information Mr B provided (which didn't include legal advice in support of his position) I think it was reasonable of DAS to conclude he hadn't done that.

Mr B has referenced a legal opinion he did obtain but that's dated 7 December 2023 which is after the final response DAS issued on his complaint. I'm not clear if he's provided that to DAS or not. However, I don't think it would make a difference in any case. That advice appears to have been provided by an online service and it's unclear what qualifications and experience the provider has.

In any case the advice doesn't say Ms C did have a contractual relationship with Mr D. It sets out in general terms what would be required for that but concludes in relation to this case *"the question of whether there is a contract between the High Court appointed executor and the residuary who has suffered a financial loss because of the executor's behaviour is a complex and uncertain one...there may be a contract based on implied terms by fact, but this is not a clear or definite answer"*. And it advises seeking professional legal help to resolve the matter. If Mr B provides DAS with a legal opinion which confirms the existing of a contractual relationship between Ms C and Mr D I'd expect it to review matters. But I think it acted fairly in saying that hadn't been evidenced to date and turning down the claim.

Claim against Mr C

It's not in dispute there was a contractual relationship between Mr C and Mr B so the claim against Mr C for professional negligence is one the policy could potentially cover. However, in common with other legal expenses insurance policies Mr B's requires that for cover to be provided reasonable prospects must exist for the duration of the claim. And the policy defines reasonable prospects as *"the prospects that you will recover losses or damages...must be at least 51%"*.

As an insurer isn't a legal expert, we think that assessment should be carried out by a suitably qualified legal professional. So I think it was right DAS referred the matter to panel solicitors so that could be done. I appreciate Mr B is unhappy with the actions of the panel firm and in particular doesn't feel they drafted clear instructions to counsel. But DAS isn't responsible for the actions (or inactions) of that firm when carrying out their legal role. The panel firm are a separate set of professionals to DAS with their own set of rules and a different regulator. If Mr B is unhappy with the actions of the panel firm that's something he might be able to raise with the Legal Ombudsman.

And while it's accepted this was a complex case (that's referenced in the responses to DAS from the panel solicitor and elsewhere) I don't agree Mr B should have had the right to choose his own solicitor. The guidance he's provided is some years old but does reference the relevant legislation on this. However, our normal approach (which takes into account the relevant law) is that a policyholder is entitled to do that from the point at which proceedings become necessary (so from when negotiations have failed and formal legal action is required). I'm not clear that was the case in relation to the claim Mr B wanted to bring.

But in any event I don't think that's something which would fairly apply unless cover was available under Mr B's policy in the first place. And that wouldn't be the case unless it had been shown to have reasonable prospects of success. So I think it was reasonable in this case DAS agreed to the panel firm's request for a barrister to carry out that assessment. And an insurer is generally entitled to rely on a properly written and reasoned assessment from a suitably qualified lawyer when deciding if a claim has prospects of success or not.

In this case I've seen a copy of the barrister's opinion which is lengthy and detailed. And it gives a clear rationale for concluding that Mr B's professional negligence claim didn't have reasonable prospects of success. The barrister who provided it is extremely experienced and specialises in professional negligence claims. He did raise some queries with the panel firm about the information he'd been provided with but I don't think that would reasonably have caused DAS concern about his ability to advise on this matter. Overall, I don't think

DAS did anything wrong in relying on his opinion when concluding the claim didn't meet the policy terms as they relate to having reasonable prospects of success.

Mr B says DAS should have explained to the barrister that his advice should be limited to those issues which fell within his period of insurance cover. The policy does require that a claim's 'Date of occurrence' is within the period of insurance. It defines that as *"the date of the event that leads to a claim. If there is more than one event arising at different times from the same originating cause, the date of occurrence is the date of the first of these events..."*

In this case the date of occurrence was within the period which Mr B had insurance with DAS. But it doesn't appear the policy limits cover to events occurring within that period. So I don't think DAS should have limited the time period the barrister considered as Mr B has suggested. In any event I don't consider not doing so has impacted the outcome. It's clear from the barrister's opinion he doesn't consider the claim to have reasonable prospects of success. I've seen nothing to show a more limited time period would have made a different to that view.

I've considered whether DAS should have done more in response to the points Mr B made about the opinion. DAS did initially authorise additional funding for this but that was on the basis it was required to confirm whether the claim had prospects of success or not. The panel firm doesn't appear to have advised it until the barrister revised his time estimate that a negative opinion had already been provided.

When that was made clear to DAS I think it reasonably reviewed whether further funding should be provided. But while it's highlighted the impact on the policy indemnity limit of doing so, I don't think it's appropriate for costs relating to a prospects assessment to count against that. The policy says *"the most we will cover for any one dispute is £50,000"*. But the cover offered by the policy is for costs and expenses for *"your legal rights in a contractual dispute..."*. Costs incurred in providing a prospects assessment don't relate to Mr B's legal rights in a contractual dispute but to whether a claim is covered by his policy or not. I don't think that's something to which the indemnity limit should reasonably apply.

However, that's not the only issue here. In general terms we'd expect an insurer to look at a claim again if a customer provides more evidence. But I think that should reasonably be balanced against the fact that, where a negative prospects assessment has been produced which an insurer is entitled to rely on, the claim isn't one for which funding is available at all.

In this case the review of the further points Mr B made would clearly have incurred significant additional cost on a claim for which funding wasn't available under the terms of his policy. And there's no suggestion in the evidence I've seen that the barrister was intending to reach a different outcome on prospects having reviewed the evidence provided to date.

Given the significant cost the barrister quoted to set out his response to the points Mr B raised I don't think it was unreasonable of DAS to decline to fund that. I think it correctly advised Mr B it would review matters further if he was able provide a positive legal opinion from a KC of his own (and would reimburse the costs of that).

Customer service

I agree there were some customer service issues in the handling of both of Mr B's claims. It's clear from the timeline of events that, on occasion, DAS took too long to respond to him. That caused Mr B some unnecessary inconvenience in chasing responses and will no doubt have caused uncertainty about the progress of his claims. However, taking into account the nature and extent of those delays I think the £300 DAS has already offered to pay is a reasonable way of recognising the impact on him of what it got wrong.

My final decision

DAS Legal Expenses Insurance Company Limited has already made an offer to pay £300 to settle this complaint and I think this offer is fair in all of the circumstances. So my decision is that DAS should pay Mr B and Ms C £300.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Ms C to accept or reject my decision before 20 November 2024.

James Park
Ombudsman