

The complaint

Mr A and Mr K are unhappy with what DAS Legal Expenses Insurance Company Limited did after they made a claim on their legal expenses insurance policy.

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

What happened

A party wall award was agreed between Mr A and a neighbour following damage caused to his property by work the neighbour carried out. As the neighbour didn't pay the agreed amount Mr A sought assistance from his legal expenses policy in February 2024. DAS accepted the claim could fall within the 'Property Protection' section of the policy.

But it said the policy didn't cover a claim that would be covered by another policy. It also said a policyholder should take reasonable steps to prevent and avoid claims and avoid incurring unnecessary costs. It asked Mr A to establish whether his home insurer would provide cover for the damage caused to his property. Mr A was unwilling to do that as he'd already reached the final stage of the Party Wall Act process and only required assistance with enforcement action. I understand he pursued that action himself and was successful in recovering the debt from his neighbour.

Having reviewed the policy terms our investigator thought it was fair of DAS to say Mr A should engage with his home insurer before agreeing to provide cover for his legal expenses claim. Mr A didn't agree. In summary he said:

- His legal expenses policy did cover a civil dispute following physical damage to "your *principal home*" which had taken place here. His home insurance wouldn't have covered legal action over a dispute to recover a debt. So he didn't accept the claim was covered by another policy.
- And while he accepted legal action should be a last resort he thought that was the case here. He'd followed the process laid down by Parliament in the Party Wall Act and a legally binding award had been made. As his neighbour hadn't paid the most expedient means of dealing with this was legal action to enforce it. Pursuing a home insurance claim for the outstanding amount would likely have taken months.
- He also raised concerns about what happened when the legal expenses policy was sold to him and queried whether a proper assessment of his demands and needs had been made. And he questioned if its exclusions had been made clear to him at that time.

I issued a provisional decision on the complaint last month. In summary I said:

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

Mr A's policy under 'Property Protection' provides cover for "costs and expenses for your legal rights in a civil dispute relating to your principal home...following an event which

causes physical damage to such material property provided that the amount in dispute is more than £100". In this case an event has caused physical damage to Mr A's property (the work his neighbour carried out) and he's seeking cover for a civil dispute following that which relates to his home. So I'm satisfied (and I understand DAS accepts) the claim he's making would fall within that section of cover.

However, in correspondence with Mr A, DAS has referenced a term of the policy which says "if any claim covered under this policy is also covered by another policy, or would have been covered if this section of cover did not exist, we will only pay our share of the claim even if the other insurer refuses the claim". And it's suggested Mr A should establish whether his claim would be covered by his home insurance before it provides cover for it.

I don't think that term applies to the claim Mr A made. His claim to DAS is for the costs and expenses relating to a legal claim against his neighbour. That isn't something his home insurance would cover. It's possible it might cover the damage caused to his property but that isn't what his claim to DAS is for. So I don't think DAS are right to say this term could apply to the claim he made.

I appreciate the policy separately says the policyholder must "take reasonable steps to avoid and prevent claims" and "take reasonable steps to avoid incurring unnecessary costs". And I think any policyholder would also have a general duty to mitigate their losses. Pursuing a court claim without doing so could lead to an award for adverse costs against them if the judge found they had an alternative way of resolving the claim they were seeking to bring which it would have been reasonable for them to use.

So in some circumstances I don't think it would be unreasonable for DAS to ask a policyholder to check whether any other insurance cover they held might cover the underlying legal claim they were seeking to bring. However, I think the position is different here. Mr A has already established through the procedures laid down by Parliament in the Party Wall Act that his neighbour is liable for the damage to his property, An award has been quantified and agreed which covers the amount required for remedial work and alternative accommodation while that's being carried out.

That means the only issue before the court would be the enforcement of that award. Given that I don't think it was reasonable of DAS to say Mr A would need to approach his home insurer prior to it providing cover for this claim. I think it should have referred the matter for a legal assessment of whether it had reasonable prospects of success (which is a requirement of the policy).

If the lawyer who carried out that assessment thought further information was required on any other policies Mr A might hold to establish whether the claim had prospects of success (and was appropriate to pursue in court) that's something which could have been explored as part of that process. I don't think it was reasonable in the circumstances of this case for DAS to prevent the claim moving to that stage until Mr A had claimed on his home insurance.

I've gone on to consider the impact of what DAS got wrong on Mr A. I understand he pursued the claim himself and hasn't referenced incurring any legal costs in doing so. And the debt has now been paid by his neighbour. DAS has already agreed to pay £100 to recognise the customer service failings it's already accepted which I think is fair. However, I think the issues I've identified in this decision have caused Mr A additional inconvenience which would potentially have been avoided if DAS had acted as it should. I think it should pay him a further £100 in recognition of that.

If Mr A did incur legal costs (for example a fee for issuing proceedings) DAS will need to consider those in line with the terms and conditions of the policy. That would normally involve referring the matter for an assessment of whether it had prospects of success and if that was positive paying the reasonable and necessary costs incurred in pursuing the claim. But if the costs Mr A incurred are relatively low then it would also be open to DAS to simply reimburse him for those without it incurring the costs of a prospects assessment.

Mr A has also raised concerns which relate to what happened when the policy was sold to him. However, that doesn't appear to be an issue he's raised with the seller of the policy to date. If Mr A does want to pursue a complaint about that he'd need to give the seller an opportunity to respond to those issues before we could consider them.

Responses to my provisional decision

Mr A confirmed he was happy to accept my decision in full. He also confirmed he hadn't incurred any legal costs in pursuing the claim himself. DAS didn't agree. In summary it said:

- It didn't accept its request for Mr A to approach his home insurer was onerous and thought the fact he hadn't done so had negatively impacted its position. And it had explained to him the claim wouldn't be covered under the Contract Disputes section of cover and it couldn't assist with the Party Wall process or negotiations.
- It said the property damage was caused from February 2021 but Mr A only contacted it for assistance in February 2024 after a letter before action had been sent. So it thought the claim had been reported late and it's position had been prejudiced by that.

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.

I'm not clear why DAS has felt the need to explain why the claim Mr A made would only fall within the 'Property Protection' section of cover. I've already explained that I was satisfied his claim fell within that section.

DAS continues to feel it was reasonable to ask Mr A to approach his home insurer but it hasn't made any further arguments in support of that position. And I set out in my provisional decision why I didn't think in the circumstances of this case it was reasonable to expect him to do so. But to reiterate Mr A had already established through the procedures laid down by Parliament in the Party Wall Act that his neighbour was liable for the damage to his property, An award had been quantified and agreed which covered the amount required for remedial work and alternative accommodation while that was being carried out. The only issue before the court would therefore be the enforcement of that award. Given that my view remains that it wasn't reasonable of DAS to say Mr A would need to approach his home insurer prior to it providing cover for his claim.

DAS has also made some further arguments about late notification. These don't appear to be points it has relied on to date. And if it thought these provided grounds to turn down the claim I'm unclear why they weren't raised with Mr A earlier. DAS hasn't referenced the specific term it's relying on here either.

However, I assume it means the exclusion which says it won't cover a claim "*where you have failed to notify us of an insured incident within a reasonable time of it happening and*

where this failure adversely affects the reasonable prospects of a claim or we consider our position has been prejudiced”.

I appreciate that the damage to Mr A's property took place some years ago but it doesn't appear a dispute arose with his neighbour until they didn't pay the award that had been made against them following the conclusion of the Party Wall Act process. And it was following that Mr A contacted DAS to seek assistance with enforcement action. So I'm not persuaded he is in breach of this term. Even if he is I don't think DAS has clearly evidenced how its position has been prejudiced by that.

In any event I don't think that's something I need to reach a finding on because Mr A has confirmed that he hasn't incurred any legal costs. So that's no longer something I need to make any directions in relation to. But I continue to feel (for the reasons I've already set out) that DAS was wrong to say he needed to approach his home insurer prior to it considering his claim further. And so it will need to pay £100 (in addition to the £100 it's already agreed) in recognition of the impact of that failing on him.

My final decision

I've decided to uphold this complaint. DAS Legal Expenses Insurance Company Limited will need to put things right by paying Mr A and Mr K £200 (inclusive of the £100 it's already agreed to pay).

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A and Mr K to accept or reject my decision before 8 November 2024.

James Park
Ombudsman