

## **complaint**

The trustees of a trust, W, complain that DAS Legal Expenses Insurance Company Limited ("DAS") have unfairly declined its insurance claim for legal expenses.

## **background**

I issued my provisional decision on this complaint in June 2019, which forms part of this final decision. I said I was minded to uphold W's complaint, as I considered that its claim met the requirements for cover under the policy. As a result, I said I intended asking DAS to pay W's reasonable legal costs in line with the remaining policy terms and conditions, but at the full rate charged by W's solicitor, given that it had lost the chance to negotiate any other rate when DAS wrongly declined the claim.

W responded and accepted the proposals set out in my provisional decision. DAS also accepted the outcome, but argued that W's legal costs should be reimbursed at the applicable country court rate as this is the most they would have paid under the policy terms and conditions.

## **my findings**

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so – and given that both parties have accepted the outcome set out in my provisional decision – I see no reason to depart from the conclusions set out in my provisional decision. However, I will respond to DAS's argument in relation to the rate at which they should cover W's costs, and expand upon my reasoning as to why they should pay the full rate charges by the solicitor.

In my provisional decision, I said I intended asking DAS to pay W's reasonable legal costs in line with the remaining policy terms and conditions. However, I qualified this by saying that DAS ought to pay the full rate charged by W's solicitor.

DAS say they're only obliged to pay W's costs at the applicable county court rate given that this is the maximum they would have paid under the policy. I agree this would have most likely been the case if DAS had agreed to cover W's claim from the outset as they should have. But given that they did not, I consider this to amount to a breach of the insurance contract, meaning the fair and reasonable remedy in these circumstances is compensation. So it follows that I consider DAS to be liable for W's reasonably foreseeable losses that were proximately caused as a result of the breach, and which aren't too remote.

In these circumstances, I think it's reasonably foreseeable that W would continue to instruct its solicitors at the full rate once DAS failed to indemnify the claim. So I don't think it would be fair for DAS to now insist on paying the contract rate in line with the policy terms and conditions when it was DAS that breached the contract. And given that this breach led to W incurring legal costs at the solicitor's full rate, this is what I will be directing DAS to pay.

## **my final decision**

For the reasons given above – as well as those set out in my provisional decision – I uphold this complaint and direct DAS Legal Expenses Insurance Company Limited to:

- Reimburse W's reasonable legal costs in line with the remaining policy terms and conditions at the full rate charged by W's solicitor – plus 8% simple interest per year on those costs from the date(s) they became payable to the date of indemnity (less any tax properly deductible).

Under the rules of the Financial Ombudsman Service, I'm required to ask W to accept or reject my decision before 4 August 2019.

Jack Ferris  
**ombudsman**

## **COPY OF PROVISIONAL DECISION**

### **complaint**

The trustees of a trust, W, complain that DAS Legal Expenses Insurance Company Limited ("DAS") have unfairly declined its insurance claim for legal expenses.

### **background**

W has held a commercial legal protection policy with DAS since 2004. It made a claim on 25 April 2018 in relation to a dispute concerning trespass onto communal land, which it asserts is owned by W. In essence, the third-party owner of the property which was alleged to be encroaching onto W's land had recently changed hands, and the new owners initiated proceedings in the Land Registration Tribunal claiming adverse possession.

DAS refused indemnity on the basis that there was no cover under the policy for the defence of adverse possession claims. They acknowledged that a claim in trespass would be covered in theory, but that it would be excluded under the policy terms and conditions on the basis that the initial encroachment of the land was the originating cause of the trespass dispute, which occurred around 30 years prior to the policy's inception.

Our investigator didn't uphold the complaint as she felt there was a dispute over who owned the land. She also didn't consider that the defence of an adverse possession claim was an insured peril covered under the policy. W disagreed. It submits that there was no dispute over who owned the land, and that it was clear that the trust had ownership of it given that the third party was now attempting to adversely possess the parcel of land from W going forwards. It also submits that the defence of an adverse possession claim is covered under the policy by virtue of the wording relating to trespass claims.

The adverse possession claim was subsequently withdrawn following a formal mediation between the parties, where W says the third party acknowledged that they had no legal claim to the property. But W argues that the legal costs it incurred in securing this outcome ought to be reimbursed by DAS given that the dispute falls within the legal action covered by the insurance.

As no agreement could be met, the matter has been passed to me.

### **my provisional findings**

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I'm currently intending to uphold it.

The policy terms and conditions state that cover will be provided for:

2. *"Nuisance or trespass:*

*A civil dispute relating to physical property which is:*

*(a) Owned by you or is your responsibility following a legal nuisance or a trespass.*

*Please note you must have, or there must be reasonable prospects of establishing you have, the legal ownership or right to the physical property that is the subject of the dispute.*

*(b) Owned by, or the responsibility of, another party, and to which you are alleged to have committed legal nuisance or trespass."*

W's dispute related to the ownership of three areas of land which formed part of the freehold registered title of its trustees and under the management control of its committee. It submits that DAS

ought to indemnify the costs expended towards defending the adverse possession claim as it was a civil dispute following a trespass relating to physical property owned by the trust – which it says fulfils the requirements of cover under section 2(a) of the policy.

DAS say that a claim for *trespass* would be covered under section 2 of the policy, but that the defence of an adverse possession claim would not as it isn't an insured peril in itself; and neither would it fall within the scope of a claim in trespass. But I don't consider this to be a fair and reasonable interpretation of the policy terms and conditions.

Considering first the matter of ownership, W says that the land area in question is owned by the trust, which is demonstrated by Land Registry entries. And based on DAS's final response it doesn't appear that they are disputing W's claim to the land. And I note that the third-party developers who were claiming adverse possession have since withdrawn their attempted claim following formal mediation, where W say they acknowledged that they've never had a legal claim to the property. So I don't intend on exploring the matter of ownership any further, as this complaint is fundamentally concerned with whether the defence of an adverse possession claim is covered under the policy.

I appreciate that adverse possession is not expressly listed as a separate and distinct insured peril within the policy terms and conditions. But neither is it expressly excluded, and I consider that the policy wording of section 2(a) is broad enough to encompass such a claim as the policy contracts to cover civil disputes that result from trespass. Adverse possession is a natural corollary of the tort of trespass and I believe that such claims and counterclaims/defences are often interlinked. So I think it would be an excessively narrow and unreasonable interpretation of the policy terms to conclude that adverse possession *cannot* be regarded as a civil dispute resulting from a trespass. Indeed, DAS have even argued themselves (in relation to a separate point regarding an exclusion) that, but for the initial trespass, there would be no basis for the recent legal action. So I don't think it would be fair for DAS to assert this on the one hand, but then deny cover under the trespass element of the policy on the other. I'm persuaded that the circumstances of W's claim satisfy the requirements of section 2(a) of the policy.

DAS further argue that cover would be excluded in any event as the date of occurrence of the insured incident (i.e. the initial trespass) pre-dated the policy's inception. The relevant policy exclusion states:

*"We agree to provide the insurance described in this policy for you...in respect of any insured incident arising in connection with the business shown in the schedule...provided that:*

*2. the date of occurrence of the insured incident is during the period of insurance".*

The date of occurrence is further defined as:

*(a) "For civil cases...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. (This is the date the event happened, which may be before the date you or an insured person first became aware of it)".*

DAS submit that the date of occurrence would be the date the encroachment or trespass first occurred, which was in the 1970s. As such, they say the originating cause of the insured incident occurred before the policy began in 2004 because, but for the initial trespass, there would be no basis for the recent legal action.

However, W disputes this. It says it was aware that the previous neighbours had encroached onto its land, but that it had always had an agreement in place. The previous neighbours had agreed to eventually remove the encroaching structure, but they unfortunately passed away before being able to do so. The land was then sold to the new third-party developers in or around 2017, and it was at this point that the dispute between the two parties began, as they tried claiming that they'd successfully trespassed onto the relevant parcel of land for a sufficient period in order to claim adverse possession.

Having considered both arguments carefully, I do not consider the originating cause of the dispute to have been the initial encroachment onto W's land by the previous neighbour. DAS claim that, but for this initial trespass, there would be no dispute or claim of adverse possession. But the tort of trespass requires an *unauthorised* intrusion onto another person's property. And the nature of the agreement W had in place with the previous neighbours was such that they effectively had authorisation to encroach onto the land until such time that W revoke it and insisted that the structure be removed. As such, the initial encroachment cannot reasonably be regarded as a trespass.

The new third-party developers took over the neighbouring property in 2017, and they had no corresponding agreement in place with W. So the trespass could've only started when the new neighbours took ownership, as they did not have the same authorisation to encroach onto the relevant land that the previous neighbours enjoyed. And it was this trespass in 2017 that instigated the claim for adverse possession that W had to defend, so I consider this recent trespass to be the originating cause of the legal dispute as there was no trespass committed by the previous neighbours. And given that the recent trespass occurred after the policy was taken out in 2004, the exclusion does not apply.

In summary, I consider that W's claim meets the requirements of section 2(a) of the policy and, given that the date of the insured incident occurred in 2017, the policy term excluding incidents that occur before the policy's inception does not apply. So I intend asking DAS to meet the claim and pay W's reasonable legal costs in line with the remaining policy terms and conditions. And I intend asking them to pay these costs at the full rate charged by W's solicitor, given that they've lost the chance to negotiate any other rate.

#### **my provisional decision**

For the reasons set out above, I intend to uphold this complaint and direct DAS Legal Expenses Insurance Company Limited to:

- Reimburse W's legal costs in line with the remaining policy terms and conditions at the full rate charged by W's solicitor – plus 8% simple interest per year on those costs from the date(s) they became payable to the date of indemnity (less any tax properly deductible).

I'll consider any further arguments either party may have before issuing my final decision, so long as these are received before 28 June 2019.

Jack Ferris  
**ombudsman**