

complaint

Mrs C complains about DAS Legal Expenses Insurance Company Limited's decision to withdraw funding for her claim for legal assistance.

All references to DAS Legal Expenses Insurance Company include its claims-handling agents.

background

In 2008 Mrs C instructed solicitors (*the conveyancing solicitors*) to act on her behalf in the purchase of a leasehold flat. She later discovered that the lease documents for her flat incorrectly referred to a different flat number.

Mrs C made a claim for legal expenses to pursue legal action for professional negligence against the conveyancing solicitors. DAS sought a legal opinion from its panel solicitors about the prospects of success of the claim, as it is a policy requirement that a claim must always have reasonable prospects of success (ie that it is more likely than not that it will proceed).

The legal opinion was that, although the conveyancing solicitors may have been wrong not to advise Mrs C on the discrepancy in the lease between the written description (which referred to a different flat number) and the plan, there was no legal claim against them for the moment. Mrs C had intended to buy her flat and she was the registered legal owner. She did not have any legal interest or entitlement to the other flat. The conveyancing solicitors had agreed to solve the issue by amending the lease free of charge, and if they could resolve the issue, Mrs C would not have suffered a loss and therefore did not have a legal claim. The prospects of success of a claim against the conveyancing solicitors were therefore assessed as being less than 50%.

The opinion also pointed out that Mrs C had a duty to mitigate her losses which would be done by accepting the conveyancing solicitors' offer to draw up a deed to amend the lease.

Mrs C did not agree with the legal opinion which had been obtained and said that the Home Information Pack (HIP) for her purchase held the door number plans and the type and floor space of each apartment and correctly matched the description in her lease. The HIP did not contain the name of the seller of her flat. She also said that a local search had not been carried out before completion of the purchase and such a search would have shown the direction of the pipes to each flat to the mains drainage and would have identified each flat and its owner. The panel solicitors did not consider that this changed their assessment of the prospects of success of her claim.

Mrs C then informed DAS that she had been advised by a barrister at the Leasehold Advisory Service that she would need to apply for a High Court order to rectify the lease and she should not enter into a deed of rectification (as offered). DAS sought advice on this issue from a barrister who concluded that the evidence suggested that a court order would not be required to register the deed of rectification, and it could be done without the court's involvement on the basis that the parties had agreed and because the Land Registry records were correct. The barrister said that Mrs C should revert back to the conveyancing solicitors and ask them to amend the lease. He did not consider that her claim had prospects of success, as it only amounted to the registration fee and it fell below the threshold for legal

expenses cover. DAS withdrew cover for Mrs C's claim in reliance on the barrister's legal opinion.

Mrs C disagreed with the barrister's opinion and said that the conveyancing solicitors should be liable for the additional costs in respect of legal work including a court order to enable resolution of the correct plots. She did not feel that the solution offered by the conveyancing solicitors was a suitable solution for her. She also had concerns about the purchase price which had been paid on the first registration of the lease and that a mortgage fraud had occurred. She referred her complaint to this service.

the adjudicator's conclusion

Our adjudicator considered Mrs C's complaint and concluded that DAS had shown that it relied on the advice of its appointed solicitors and counsel in withdrawing cover for her claim. He was unable to find that DAS had acted unreasonably in relying on the legal advice it had received. He said that the advice which Mrs C received from the Leasehold Advisory Service had apparently been provided had not been put in writing so he could not consider it. Mrs C's allegation of mortgage fraud was not an insured event under the policy and it would not therefore be covered.

Mrs C disagreed with the adjudicator's conclusion and requested a review by an ombudsman. She made the following points:

- She feels that by withdrawing cover for her claim, DAS and its solicitors tried to bully her into signing a deed of rectification in order to alter the address on her lease. If she signed the deed of rectification, she would perjure herself by condoning what the conveyancing solicitors did in covering up the past mortgage fraud by switching the plots and leases to hide the fact that the former owner bought the flat from one company but the Land Registry records show that a different company was the vendor and the purchase price was recorded as a higher amount.
- She understands that on the first registration of a lease, the colour references of the plan should match the text of the lease and this is checked by the Land Registry. The mismatch in her lease should have prevented registration of her purchase by the Land Registry. There was also no solicitor's certified copy of her lease apart from an official endorsement from the Land Registry. She was advised by the Leasehold Advisory Service that the wording of the lease takes precedence over the land.
- She has obtained the first registration documents for her flat from the Land Registry and they show a slightly different address. The Royal Mail also has no record of the address with that post code. The FR1 also shows that the documents lodged with the form included a certified copy of the lease. A firm of solicitors certified that the lease was a true and certified copy but it contained the wrong flat details. She obtained a copy of her file from the Land Registry with a copy of her original lease but it did not have the 'certified copy' stamp from solicitors on the front.
- A letter was delivered to her flat which was addressed to a third party but she opened it by accident. She rang the sender of the letter who would not give her any details of why they were trying to contact the person but they did say that three credit reference agencies had all given them the same information about the person's address. In her view the fact that the third party is registered at her address shows that she cannot be the owner of her flat because she did not buy it from that person. Leasehold law

states that what you own is set out in the lease and this evidences her ownership of another flat.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

The policy provided, amongst other things, that it would cover the insured incidents as long as: *“For civil claims it is always more likely than not that you or your family will recover damages (or obtain any other legal remedy which we have agreed to) or make a successful defence.”*

The policy also provided that: *“If you or your family does not accept a reasonable offer to settle a claim, we may refuse to pay any further costs and expenses.”*

It is, therefore, a requirement of the policy that a claim should be more likely than not to succeed (ie should have reasonable prospects of succeeding) to recover damages or make a successful defence. The usual way of ascertaining whether a claim has reasonable prospects of succeeding is to obtain a legal opinion from a suitably qualified lawyer who will have the legal expertise to assess whether a claim will succeed in court or not. As the adjudicator explained, this service does not consider such a clause to be inherently unfair or unreasonable because it would be a waste of the insurer’s resources to fund litigation which has no prospect of succeeding.

I agree with the adjudicator’s conclusion that because DAS had obtained two legal opinions; from its appointed solicitors and from a barrister, and had relied on the legal advice in withdrawing cover for Mrs C’s claim, he could not find that DAS had acted unreasonably. There is no persuasive expert evidence that the panel solicitors or DAS’ barrister’s are patently wrong or that DAS should have recognised them as such. We expect an insurer to have acted on expert legal advice and in the absence of a contrary legal opinion which stated that Mrs C’s claim had prospects of success of more than 51%, the complaint cannot be upheld.

The policy also states that if the policyholder does not accept a reasonable offer to settle a claim, DAS could refuse to pay any further costs and expenses. Both the legal opinions stated that the conveyancing solicitors’ offer to rectify the errors in the lease by preparing a deed of rectification at their expense, was reasonable. In the circumstances, DAS’ withdrawal of cover for Mrs C’s claim does not have appear to me to have been unreasonable. If Mrs C commenced legal action against the conveyancing solicitors through the courts, and the court became aware of the offer she had received, she would be likely to be penalised, for example, by costs being awarded against her. The clause in the policy exists to avoid this situation.

I do not agree with Mrs C’s submission that DAS and its solicitors were trying to bully her into signing a deed of rectification. The barrister was of the opinion that it represented a reasonable solution to her situation and DAS relied on the opinion.

I am aware of Mrs C’s strength of feeling about the matter, and have noted her other submissions relating to the merits of her legal claim. However, I am unable to comment on the legal case and it is not my role to decide whether the offer to rectify the deeds is

reasonably. I can only consider whether DAS insurer acted fairly and reasonably in its consideration of her claim for legal assistance.

The expert evidence, as it stands at the moment, is that her claim does not have reasonable prospects and a reasonable offer has been made. In the absence of any other independent expert legal opinion to the contrary, I cannot therefore conclude that DAS has acted unreasonably or that it has not dealt with the claim in line with the policy terms and conditions.

As to the allegation that a mortgage fraud had occurred, and that by signing the deed of rectification Mrs C would be condoning the fraud, I can understand Mrs C's concerns. However, even if I were satisfied that there was fraudulent activity concerning previous owners of the properties involved (which does not appear to be as certain as Mrs C considers) that would not mean that DAS should pay the legal costs of court action in relation to her lease which can be rectified by agreement without incurring such costs.

I also note that the panel solicitors had said in their advice that if the conveyancing solicitors were unable to rectify the lease, then it would reassess prospects. This seems entirely reasonable to me.

my final decision

For the reasons set out above, it is my decision that this complaint is not upheld.

I make no award against DAS Legal Expenses Insurance Company Limited.

Harriet McCarthy
ombudsman