Financial Ombudsman Service

complaint

Ms I's complaint is about DAS Legal Expenses Insurance Company Limited's decision to decline her claims for funding under her legal expenses insurance policy.

background

I issued a provisional decision on this matter in January 2016, part of which is copied below:

"Ms I has been in dispute with her landlord for some time. The dispute is about various issues, including service charges and repairs. But one of Ms I's main concerns is about the extended lease she entered into in 2004. She believes it has unfair terms and would like it to be amended to rectify the position.

In April 2012 Ms I notified DAS that she wished to bring a claim about the terms of her lease. DAS considered the claim under the terms of her existing legal expenses insurance policy. But it said it couldn't offer funding as the drafting of the lease happened before Ms I's cover with it began in February 2012. It offered to refer her potential claim to its panel solicitors with a view to their suggesting alternative funding arrangements. It appears that Ms I agreed to this but the panel firm told DAS they had been unable to get instructions from her, so they closed their file.

In March 2015 Ms I informed DAS she wanted to make a claim for retrospective cover under the legal expenses insurance policy she held with them between 2002 and 2005. She said she wanted funding to rectify the problems which had arisen as a result of the terms of her lease. DAS said its policy covered disputes with a professional adviser over terms of a lease and appointed another firm of panel solicitors to assess the claim. At this stage DAS appeared to overlook the issues complained about by Ms I in 2012.

In May 2015 the panel solicitors told Ms I they didn't think her claim was likely to succeed. They said there weren't reasonable prospects for her to obtain a significant reduction on the amount claimed from her by her landlord. But they thought there was a chance that the lease terms would be found to be unfair - although they advised it was unlikely she would receive any compensation as a result of this. Based on the panel firm's advice, the landlord wouldn't be able to enforce the terms of the lease against Mrs I, if they were found to be unfair. If the landlord sought to do this, the panel firm advised Ms I she should approach her legal expenses insurer again in future. As a result of this DAS declined to cover Ms I's claim further.

Ms I was unhappy with this and complained about the rejection of her claim and about DAS's delay in dealing with it. The panel firm had also advised that it would be disproportionate to pursue the claim about the alleged defects with the lease. But Ms I said that this advice hadn't taken account of other issues in dispute when considering proportionality. She also thought that DAS had already confirmed she should have cover in 2012, provided its panel solicitors thought there were reasonable prospects of success.

Ms I complained directly to the panel firm about their assessment but they didn't accept they had been at fault or acted against her interests. They informed her she could contact the Legal Ombudsman if she remained dissatisfied. Ms I has told us that the Legal Ombudsman said it couldn't assist. She said this was because the panel firm had been appointed by DAS.

Our adjudicator assessed Ms I's complaint and concluded that it shouldn't be upheld. She said that DAS was entitled to reject her claim based on the panel firm's advice.

Ms I didn't accept our adjudicator's assessment. She referred to the panel firm's advice that the terms of the lease could be seen as unfair. She felt she was entitled to legal representation for the issue of the lease and the problems arising from this. She also said the matter was having a significant impact on her health and finances.

DAS has since confirmed it has discovered that it wasn't Ms I's legal expenses insurer between November 2002 and January 2005 - despite previously indicating that it was. So it says it couldn't assist at all with Ms I's dispute with her landlord or with her new request for funding to bring a claim against the lawyers who had acted for her in connection with the lease in 2004. DAS has apologised for any confusion and offered £200 as compensation for the inconvenience it has caused.

Ms I remains unhappy and questions whether DAS is correct in saying it wasn't her legal expenses insurer in 2004.

my provisional findings

The background I have set out above is a brief summary, but I confirm I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I understand that Ms I appears to have had legal expenses insurance cover with various different insurers over recent years. I understand she has brought complaints to this service about some of those insurers, which have been considered by us separately. This decision deals only with Ms I's complaint about DAS.

It's a requirement of virtually all legal expenses policies that any intended claim arises out of an event which occurs during the period of insurance. Ms I's policy is no exception

As a general rule, you take out insurance cover for something which may or may not happen in the future. So, in my judgment, it isn't unfair in principle for a legal expenses insurer to exclude claims for things which started to happen before cover began. There are special policies available which are designed to cover such disputes, but this isn't one of them.

We don't always think it's fair for a legal expenses insurer to reject a claim on strict reliance on an exclusion like this - for example, if no-one could've realised in advance about the dispute. But I don't think that's the case here.

I appreciate that Ms I isn't sure whether DAS is right when it says it wasn't on cover as her insurer between 2002 and 2005. Because DAS says it wasn't and I haven't seen anything to suggest that it was her insurer at the time, I can't say that it needs to consider her claim.

Ms I entered into the extended lease in 2004. DAS says it didn't become Ms I's legal expenses insurer until November 2007. Because I think it is more likely there was no insurance in place with DAS during this time I can't say that a claim in relation to any alleged defects with the lease were covered by the policy, nor any actions against the lawyers who had acted for her in connection with it. I appreciate this matter is complicated by the fact that DAS had previously said there was cover and has since discovered there wasn't. DAS accepts it was wrong to do this. The consequences of it accepting the claim in the first *instance was that a panel firm was instructed to consider the claim for Mrs I. Ms I engaged with the panel firm by providing the information they requested from her, whilst dealing with the dispute with her landlord at the same time. Ms I says this caused her a lot of stress and had an impact on her health as well as her financial circumstances. So whilst I agree that DAS should offer Ms I something in recognition of the trouble and upset it has caused her, I don't think the offer it has made goes far enough. I think a payment of £500 is more appropriate and adequately compensates Ms I for the stress and inconvenience DAS has caused in this regard.*

I know that Ms I wants DAS to provide her with significantly more compensation but I haven't suggested that DAS should pay any more than £500. I say so because I think that even if DAS was the insurer for Ms I between November 2002 and January 2005, I don't think her claim would've attracted cover under the policy in any event. I say so because the terms of her policy require there to be reasonable prospects of success. Based on the panel firm's assessment, Ms I's claims didn't have reasonable prospects of success which are defined as 51% and over. And even though the panel firm said there was a chance that the terms of the lease would be found to be unfair, they assessed that claim at 50%, which wasn't enough to reach the threshold set out by the policy.

I understand that Ms I doesn't agree with the panel firm's assessment of her claims but where an insurer has turned down a claim in a case like this, it isn't for us to look at the merits of the underlying claim. Instead, we look at whether the insurer has acted fairly. So long as it has got advice from suitably qualified lawyers, we won't generally think it's unfair to rely on that advice, unless we think it was obviously wrong or based on factual mistakes. DAS did this. And for the reasons I have set out above I don't think Ms I's claims fell within the period of cover in any event.

fair compensation

DAS should pay Ms I £500 in recognition of the trouble and upset it has caused her as set out above."

developments

I asked both parties to provide any other comments or information they wanted considered in response to my provisional decision. DAS has confirmed it's happy to increase the level of compensation offered to Ms I, in line with the amount I have suggested.

Ms I has also responded. She says she doesn't accept the findings contained in my provisional decision. In particular Ms I says that the first panel firm instructed by DAS agreed to cover her claims and that she was put under pressure to supply many documents which caused her tremendous stress and inconvenience and had an impact on her health.

She also says the panel firm have now said they are covering her claim from 2006-2010 instead of from November 2004 until November 2005.

Ms I believes that another underwriter accepted her claim and that the panel firm were involved in this process. Ms I has a number of complaints against the panel firm about the way in which they handled her matter, including a nine month delay, before being told she wasn't covered by her legal expenses insurance policy. She says this caused her severe financial hardship and that she's now facing having to pay £81,000 in legal fees in respect of the litigation surrounding the lease.

Ms I has questioned the relationship between the various insurers who have considered her claim and the panel firm. She has queried who will be responsible for the payment of compensation to her.

my 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 remain of the view that Ms I's complaint should be upheld to the extent set out within my provisional decision.

I appreciate that Ms I is dissatisfied with the solution I have suggested. She is looking for reimbursement of the legal costs she has incurred and a higher level of compensation. But for the reasons I have set out within my provisional decision, I can't say that DAS is responsible to pay her legal costs. This is because DAS wasn't her legal expenses insurer between 2002 and 2005. And as I have said, I appreciate that Ms I seems to have had legal expenses insurance cover with various different insurers over recent years. But I can't determine who should cover her claims, if at all within this decision. I can only comment on what DAS has done.

Ms I says that DAS agreed to cover her claims from 2006-2010. But I'm not sure that's right. I accept that DAS did accept her claim in the first instance in 2015, but later declined it on advice from its panel firm that Ms I's claims didn't have reasonable prospects of success, as required by the policy. DAS has since said that it shouldn't have considered this claim at all because it wasn't Ms I's legal expenses insurer between November 2002 and January 2005 - despite previously indicating that it was.

For clarity, any cover provided by DAS at a later date would've been subject to the insured event happening within the period of cover. In this case, that would be the issues surrounding the extended lease which was entered into in 2004. So Ms I would need to have had cover in place with DAS at this time in order for it to consider her claim. I haven't seen anything further in response to my provisional decision to suggest that Ms I was covered by DAS in 2004.

I understand that Ms I isn't happy with the actions of the panel firm but for the reasons set out within my provisional decision, I can't comment on those. And I appreciate what she says about compensation but I haven't seen anything to suggest that the amount I have proposed within my provisional decision is too low. I reached that figure by taking into account DAS's initial acceptance of the claim in 2015, then subsequent confirmation that it wasn't on cover. But I also took into account that even if DAS was on cover, it's unlikely it would've funded Ms I's claims because the panel firm said they didn't have reasonable prospects of success, as required by the policy. Because of this, I remain of the view that the amount I've suggested adequately addresses the trouble and upset caused by DAS in this matter.

Finally, Ms I has questioned the relationship between the various insurers who have considered her claim and the panel firm. I don't have full knowledge of which legal expenses insurers provided cover for her in the past. This is something that Ms I should be able to determine with reference to her historic policy documents. If not, she should contact the insurers she thinks provided cover to her to query whether they might have been on risk in 2004.

fair compensation

DAS should pay Mrs I £500 in recognition of the trouble and upset it has caused her as set out above.

my final decision

For the reasons set out above, I uphold Ms I's complaint in part against DAS Legal Expenses Insurance Company Limited and direct it to comply with the award of compensation I have made.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms I to accept or reject my decision before 18 February 2016.

Lâle Hussein-Doru
ombudsman