

The complaint

Mr W's complaint is about a claim he made on his DAS Legal Expenses Insurance Company Limited ('DAS') legal expenses insurance policy in respect of a right to light claim.

DAS have taken the decision to withdraw funding on this claim. Mr W doesn't agree that this is fair and wants DAS to reinstate cover.

What happened

Mr W made a claim on his DAS legal expenses insurance policy for funding to pursue a right to light claim in respect of his property. I won't repeat the history of the claim following this because it's well known to both parties save to say that there came a point where DAS appointed a panel firm to act for Mr W, who took Counsel's opinion on the merits of the claim, after proceedings had been issued.

In January 2023 the Barrister provided a detailed advice about Mr W's claim. In doing so he referenced a previous Barrister's opinion that had been obtained and set out his own conclusions. The Barrister said there was little point in pursuing the claim as issued against the developer of the neighbouring property (A) because A had gone into liquidation with no apparent assets.

The Barrister then explored the possibility of claims against the company who had acquired the freehold of the properties previously owned by A, who I shall refer to as B. The Barrister said that if a claim for an injunction was pursued, the lessees of B's property would need to be joined into those proceedings. He then went on to conclude however that it would be highly unlikely that an injunction would be granted in this case. Further advice was then given in respect of a claim for damages against B.

Based on the advice given, DAS concluded that Mr W's claim didn't have reasonable prospects of success and withdrew funding accordingly. Mr W says that DAS have misinterpreted the Barrister's advice. In his recent communications with the Financial Ombudsman Service, he has asked if DAS would go back to the Barrister for confirmation of the merits of his claims, but DAS has refused to do this because they consider the advice to be sufficiently clear in respect of this.

Our investigator considered Mr W's complaint. She thought that the Barrister's advice didn't support the merits of Mr B's claim and set out that it was disproportionate to pursue. As such she thought DAS were entitled to withdraw funding in the way that they had. Mr W didn't agree so the matter was passed to me to determine.

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.

Having done so, I won't be upholding Mr W's complaint. I'll explain why below. Before doing so I want to recognise that Mr W has made a number of submissions in this complaint.

Although I haven't addressed each and every one, I can assure him that I've considered everything he's said. This approach is representative of the informal nature of the Financial Ombudsman Service.

The starting point is the policy terms. It's a requirement of virtually all legal expenses insurance policies that any intended claim has a reasonable prospect of succeeding and is proportionate to pursue. Mr W's policy is no exception. That means his claims needed to have over 51% prospects of succeeding in order for DAS to cover them.

We don't think this is unfair. Litigation can be expensive. A privately paying customer wouldn't want to bear the cost if advised it is unlikely to succeed or that the costs it will incur will outweigh anything they're likely to recover. We wouldn't expect a legal expenses insurer to fund claims in these circumstances either.

Where an insurer has declined funding in such a case, it isn't for us to evaluate the merits of the underlying claim. Instead, and as the investigator explained, we look at whether the insurer has acted fairly. So long as they have got advice from suitably qualified lawyers, we won't generally question their reliance on that advice, unless we think it was obviously wrong or based on factual mistakes. DAS did this, however the issue in dispute between the parties is whether the Barrister determined that Mr W's claims had no reasonable prospect of succeeding.

I've considered the advice given in detail. I think it's clear that the Barrister thought the claim against A had no reasonable prospect of success as A was in liquidation. As for the claim against B, the Barrister said it was highly unlikely injunctive relief would be granted in this case. He went on to explain why in detail. Finally, the Barrister went on to consider a claim for damages against B assuming there was a basis for Mr W to claim against B for this. The advice was that a realistic award would be in the region of £30,000.

The dispute here between Mr W and DAS is about the Barrister's comment that the merits of establishing liability are around 60%. I think it's clear from the advice that there were no reasonable prospects of Mr W obtaining an injunction against B or the leasehold owners of the neighbouring properties. DAS says the sets out that a claim for damages is not legally possible against B. I'm not sure how clear that is. What is clear is that the reference to 60% relates to liability. But that doesn't necessarily mean the claim itself has 60% prospects of success. What is clearer is that even if a claim for damages could be established a realistic award would be around £30,000. I think this is key.

The costs as quoted by the Barrister as at January 2023 amount to around £40,000 of the £50,000 indemnity offered by the DAS policy. So even if I accept that the Barrister said a claim for damages does have merits, the realistic figure Mr W could expect to receive is already £10,000 less than the costs he's already incurred. I appreciate that the costs he's incurred are something he's sought to challenge separately but I'm not considering that here. As things stand, Mr W's claim is currently disproportionate to pursue. So, I don't think it matters whether his claim has reasonable prospects of success or not. Given Counsel's advice about the likely award, I think DAS were entitled to withdraw cover because the claim had become disproportionate.

For the avoidance of doubt, I'm satisfied that the Barrister instructed for Mr W was experienced in the area of law Mr W was asking for help with and I've seen nothing that suggests his advice was based on factual mistakes. I appreciate Mr W has taken the Barrister's advice to mean that his claim has more than 51% prospects of success, but for the reasons I've set out above, I don't think that makes any difference here. If Mr W is able to provide an alternative reasoned opinion from a comparable Barrister setting out that his claim has prospects of success and is proportionate to pursue based on the costs he's

already incurred, then I would expect DAS to consider that. Equally, if he provides DAS with any new evidence or information that has now come to light that might change the outcome of the merits of his claim or proportionality, I would expect DAS to refer that back to their panel firm. But as matters stand, I can't say DAS did something wrong by relying on the legal opinion they received.

In this case funding was withdrawn whilst the matter was being litigated. As a result, I would expect DAS to provide Mr W with some limited funding to help extract himself from it, if that's what he wants. However, if Mr W wishes and has continued to pursue his claim himself then that's up to him to do so without the benefit of further funding from DAS.

My final decision

For the reasons set out above, I don't uphold Mr W's complaint against DAS Legal Expenses Insurance Company Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 23 February 2024.

Lale Hussein-Venn
Ombudsman