

The complaint

Ms B and Mr S's complaint is about the refusal of a claim under their legal expenses insurance policy with DAS Legal Expenses Insurance Company.

What happened

In December 2022, Ms B and Mr S contacted DAS to make a claim for cover in relation to a dispute they had with contractors, employed to work on their property, over payment for their services. Ms B and Mr S had been in dispute with the contractors since July 2022 and both parties had agreed to go to mediation. The mediation appointment was set for 12 January 2023. Ms B and Mr S say the contractors had charged for items not delivered and failed to fulfil the contract. They believed they had a straightforward case against the contractors and in defence of their claim for payment of their bill.

DAS instructed one of its panel solicitors to assess the claim. The solicitors said that without expert witness evidence it did not consider the claim would have more than 51% chance of success. As a result, DAS said it would not cover the claim.

Ms B and Mr S are very unhappy with this. They say the legal assessment was flawed and was provided by someone not suitably qualified. Ms B and Mr S also say that they had to continually chase progress on the assessment, which was only provided the day before the mediation, which put them in difficulties; the assessment should have been completed much sooner than it was. They arranged for the mediation to be postponed and instructed their own solicitors to act for them (paying them almost £12,000). Ms B and Mr S say they won the case following the mediation, as a "drop-hands" settlement was agreed, which meant they did not have to pay the contractors outstanding invoices. Ms B and Mr S are however, out of pocket their legal expenses and the mediation fee, which they want reimbursed by DAS.

DAS says it was notified of the claim on 19 December 2022 and it confirmed cover and instructed panel solicitors on 22 December 2022. There was a problem with the first instruction, so this was re-sent. The panel solicitors confirmed receipt of the instruction on 29 December 2022 and issued their assessment of the claim on 11 January 2023. DAS says its solicitors are usually allowed 28 days to assess a claim, so it is satisfied they did this in a reasonable time. DAS says it had also got updates from the solicitors and asked if they would attend the mediation.

DAS noted that Ms B and Mr S had known of the mediation appointment since July 2022 and says if they had reported the claim sooner, there would have been more time to assess the claim and seek alternative representation if needed. DAS also said that the fee earner was supervised by a suitably qualified lawyer, who works on contract disputes.

One of our Investigators looked into the matter. She said that while she appreciated that Ms B and Mr S wanted an urgent assessment of their claim, it was not done in an unreasonable time, given the claim had been notified on 19 December 2022 and they provided the legal assessment on 11 January 2023. The Investigator also considered that DAS had done all it reasonably could to get the matter expedited, as it had contacted the panel solicitors for updates and to follow up Ms B and Mrs S's concerns.

The Investigator also thought DAS's request that the panel solicitors attend the mediation was reasonable and outside its obligations. She did not think DAS had done anything wrong and it was entitled to rely on the solicitor's opinion.

Ms B and Mr S did not accept the Investigator's assessment. They have made a number of submissions in their initial complaint and in response to the Investigator. I have considered everything they have said and have summarised their main points below:

- They were not given a choice about the solicitors appointed to assess the claim.
- They mentioned getting an expert report when they first spoke to the panel solicitors but were told that they would identify any need for reports.
- DAS representative said on multiple occasions that they had been let down by the panel solicitors.
- The assessment was done by an unqualified paralegal who got lost in detail and did not consider the key evidence.
- They had prepared a spreadsheet showing all the issues with the contractors and different valuations of the work done, which was deemed to be the key evidence in the mediation. This was apparently not considered by the panel solicitors, as it was not mentioned in the assessment of the case, and they wanted confirmation this had been considered.
- Is it right for DAS to ignore their requests to check that the solicitors had received and read what they considered to be the key document. Surely this activity is part of their role?
- DAS should have taken better care to ensure a more appropriate person was allocated their case and offered an alternative solicitor.
- The fee earner that assessed their case was supervised by a specialist in non-injury car insurance. This is not in any way suitable.
- The legal opinion was obviously wrong and based on mistakes of fact. The defects were obvious.
- If the panel solicitors had been supervised properly by DAS, they would not be out of pocket.

As the Investigator has been unable to resolve the complaint, it has been passed to me.

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.

It is a condition of cover under the policy that "*reasonable prospects exist for the duration of the claim*".

Reasonable prospects of success is defined in the policy as:

"For civil cases, the prospects that the Insured person will recover losses or damages (or obtain any other legal remedy that we have agreed to, including an enforcement of judgment), make a successful defence or make a successful appeal or defence of an appeal, must be at least 51%. We, or a preferred law firm on our behalf, will assess whether there are reasonable prospects".

Almost all legal expenses insurance policies have similar terms and I do not regard this policy term as unfair or unreasonable. It is designed to prevent claims and legal costs involved in actions that have little merit.

It is for a policyholder to establish that they have a valid claim but in common with most other legal expenses insurers, DAS agrees to pay for a legal opinion at the outset to assess if the claim is one that should be met under the policy. It has arrangements with a panel of pre-approved solicitor firms, which is aimed to make this more cost effective.

DAS has a duty to exercise some care in selecting firms for its panel but it is up to the firm to decide which fee earner is allocated to a specific case. The solicitor firms, whether on DAS's panel or not, are independent professionals subject to their own professional rules of conduct and practice. DAS would have no right to dictate how that firm decides to carry out its work and DAS cannot be held liable for any act or omission made by them.

It is common for law firms to have employees with a variety of different levels of qualification and experience. Legal Executives, paralegals and legal clerks play an important role in the administration of justice and litigation. There are normally requirements for supervision of such staff but my understanding is that there does not necessarily need to be supervision of each and every task carried out in the conduct of a case.

I note DAS did make enquiries in response to Ms B and Mr S's concerns and confirmed that the fee earner that assessed Ms B and Mr S's claim was supervised. Ms B and Mr S say the supervision was not being carried out by a suitable expert but I have no jurisdiction over the panel solicitors. Any allegations about a failure to properly supervise unqualified staff, is a matter for the Law Society and/or the Legal Ombudsman.

I am not aware of any persuasive evidence that DAS was aware or should have been aware that the panel firm was not suitably experienced or qualified for the instructions in question. And I am not persuaded that knowing that the matter might be dealt with by a paralegal means that DAS did not handle Ms B and Mr S's insurance matter correctly.

The panel firm assessed that the claim did not have more than 51% chance of success. Ms B and Mr S say the assessment is obviously wrong because they were being charged for items not delivered, and they had photos to back up what they were claiming, so it makes sense they would win the case. They say the spreadsheet they prepared and submitted to the panel solicitors was a key piece of evidence (as confirmed by the mediator) and they wanted confirmation the panel solicitors had considered it as, if they had, they would have known that case had good prospects of success.

The spreadsheet sets out Ms B and Mr S's position about how much each disputed item was worth against the amount charged by the contractors for each item. This included payment for items Ms B and Mr S said were not delivered as well as some allegations of poor workmanship, such as the depth of gravel and issues with a paved area.

The panel solicitors provided a reasoned assessment of their opinion on the case. They would have considered how much weight to put on each piece of information and evidence provided to them. They said that whether work had been carried out to a reasonable standard, and the cost of rectifying any defects, would be a matter of expert evidence. And they could not say the claim had more than 51% chance of success without such expert evidence to support Ms B and Mr S's case.

Ms B and Mr S say expert evidence was not necessary but part of the counterclaim was for the cost of rectifying remedial work and completing work not done. The solicitors said "*if the amount owed ... [to the contractors] is more than the cost of remedial works then you will owe them money*". I do not think there is anything obviously wrong with this, as the spreadsheet Ms B and Mr S provided was not independent proof of the costs involved.

The panel solicitors did not state that there was no chance of Ms B and Mr S's case succeeding, or that there had not been any breach of contract by the contractors but that they could not say there was 51% or more chance of success and therefore did not meet the threshold required for cover under the policy with DAS.

The fact that Ms B and Mr S did get solicitors prepared to act (and even that they got what they consider a successful outcome) does not mean that the assessment by the panel firm was wrong.

In any event, my role is just to consider whether Ms B And Mr S's insurance matter was dealt with fairly, reasonably and in line with the policy terms and conditions. Having considered everything, I am satisfied that DAS met its obligations under the policy. It arranged for the matter to be assessed and was entitled to rely on the opinion of the panel solicitors on the claim.

Ms B and Mr S are also unhappy with how long the assessment took. In the submissions to us they said they first notified the claim on 13 December 2022 but DAS's file shows it was notified on 19 December 2022. DAS appointed panel solicitors and they contacted Ms B on 29 December 2022. It took just over three weeks in total for the assessment to be provided. I do not think this was unreasonable, as such matters do take some time. I also have to bear in mind that this was over the Christmas and New Year period, with three bank holidays.

I can see that Ms B called a number of times to chase the assessment before it was provided on 11 January 2023. And can understand that they wanted an urgent response but I do not consider that DAS did anything wrong here. DAS contacted the panel solicitors for updates and asked if they could assist at the mediation or to get it postponed for Ms B and Mr S. I do not consider that it needed to do anything more, or to offer any other solicitors.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms B and Mr S to accept or reject my decision before 26 January 2024.

For the avoidance of doubt, if Ms B and Mr S reject my decision it is not binding on them and their legal rights against DAS, if any, remain intact.

Harriet McCarthy
Ombudsman