

The complaint

X's complaint is about a claim he made on his DAS Legal Expenses Insurance Company Limited ('DAS') legal expenses insurance policy.

X feels that DAS treated him unfairly.

What happened

In July 2021 X made a claim on his DAS legal expenses insurance policy for cover to bring a claim against a third party.

X initially asked to use his own Solicitors. DAS sent that firm a claims management report to allow them to decide whether they could agree to this, but the firm said they didn't have capacity to take the claim.

DAS then sent a claims management report to a direct access barrister to allow them to decide whether to appoint him. The barrister returned the report but asked DAS to increase the hourly rate they were prepared to pay.

On return of the claims management report, DAS decided cover wasn't available and withdrew funding. This was because the information they were given suggested the claim hadn't been reported within a reasonable period of time and this had prejudiced their position. X said the information contained in the claims management report was wrong. The following month another law firm appointed by X emailed DAS to provide further information together with a copy of a barrister's opinion of the claim. The advice was dated November 2021, but this was sent to DAS in April 2022.

In May 2022 X agreed for DAS to appoint their own panel firm to assess the merits of his claim. Four months later X asked to appoint another firm of his choosing instead. At this point DAS asked their own panel firm for an update. DAS say their panel firm advised them they'd not received authority back from X, so they weren't able to consider his claim. As a consequence, DAS agreed to appoint the firm of X's choosing and sent them a claims management report to complete.

By January 2023 X asked DAS to appoint his direct access barrister. The barrister completed a claims management report in March 2023 and signed DAS' terms of appointment however he advised he wasn't authorised to conduct litigation.

In April 2023 X provided DAS with authority for the claim to be returned to DAS' panel firm for assessment. But by August 2023 X terminated their retainer. He said he'd been provided with poor service and that he disagreed with their advice on the merits of his claim. DAS investigated this issue and found that the panel firm hadn't provided any solid advice in respect of the merits of X's claim. Rather they advised that a conference with a barrister would be necessary to explore the claim in full. The panel firm have said that they're not prepared to be re engaged by X unless he confirms he has trust and confidence in them. X has said he's not prepared to work with the panel firm.

X wants his direct barrister to be engaged by DAS. He says he asked for this some considerable months before his complaint was brought to the Financial Ombudsman Service, but DAS didn't reply to this. DAS have accepted this failing and that they've not responded to other items of correspondence. They've offered X £300 in compensation in respect of this.

X is unhappy that DAS haven't agreed to instruct his direct access barrister to act for him against the third party. He wants DAS to provide him with the funding he feels he's entitled to under his policy, for the Financial Ombudsman Service to impose punitive sanctions on DAS and award him punitive damages, for us to publish the results of any adverse finding against DAS, plus any other suitable action. He's also said might pursue the matter through the Courts if this Service doesn't uphold his complaint.

DAS have said that the claim has not yet been issued and there's no conflict of interest here, so they're not prepared to consider the appointment of X's own choice of representative. They've also expressed their concerns about the proportionality of using X's direct access barrister and they don't think his instruction is appropriate because he's not authorised to conduct litigation. DAS have also said that in normal circumstances they would offer the use of an alternative panel firm of Solicitors to X but on this occasion that alternative is unable to accept instructions. As a result, they've asked that panel firm to assess the value of X's claim with a view to paying him the value of it.

X is unhappy because he feels the valuation his direct access barrister provided in respect of his claim in November 2021 is sufficient. DAS don't agree because the advice refers to the barrister only having dealt with quantum briefly and that it was difficult for him to assess this issue. They're also concerned the advice is now two years old so a fair assessment should be sought now. DAS feel their panel firm can adequately provide this assessment.

Our investigator considered X's complaint and upheld it. She said that DAS' offer of compensation for the service X received was fair as was their offer to assess the value of a claim with a view to paying him that amount. However, the investigator said the assessment should be conducted by X' own barrister as he is familiar with X' claim and avoids further delays if X is unwilling or does not accept the assessment of another legal professional.

X didn't accept the investigator's view for a variety of reasons including but not limited to the fact that he didn't want DAS to be involved in instructing his barrister to do anything and he didn't want to be paid the value of his claim. He also wanted DAS to pay more than the £300 offered in the form of a financial penalty. In addition, he wanted DAS to fund his barrister's costs in corresponding with the third party he's in dispute with.

The investigator asked DAS if they were prepared to appoint X's direct access barrister in the alternative to continue with his claim. DAS said they weren't prepared to do so. They pointed out that X was in breach of his policy terms by failing to co-operate with their panel firm but rather than withdraw funding, they had tried to reach a reasonable outcome by providing X with the option to pay him the value of it. In addition, they pointed out that X didn't have the freedom to choose his own representative as his claim was pre litigation. They also expressed their concerns about X being unlikely to cooperate with alternative legal representatives.

Because of this the investigator passed the matter to me to determine.

I issued a provisional decision in February 2024 in which I said:

"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 X's complaint. Before explaining why, I want to assure X that whilst I've considered all of the detailed submissions he's made in this case, I won't be addressing them all. That's not intended to be disrespectful. Rather it represents the informal nature of the Financial Ombudsman Service. In this decision I've concentrated on the crux of X's complaint.

I also want to point out that our role is not to punish businesses if they've done something wrong. Rather it's to direct them to put things right, taking into account the impact this has had on a customer in accordance with our common approaches to their specific circumstances. In this case I can see that DAS did fail to respond to correspondence from X on a number of occasions when they should have. This left X to chase DAS for a reply and meant that his claim wasn't progressed at times. DAS have acknowledged this failing and offered X £300 in compensation for the trouble and upset they caused him. That broadly accords with the compensation we'd direct them to pay in similar circumstances. So, I think their offer is reasonable. In reaching this conclusion I've also taken account of the fact that X's claim wasn't in any event at a stage where the claim was one that DAS had accepted with a proper assessment on merits from a firm of their choosing. I've discussed this further below. If X wants to accept this offer and the sum hasn't already been paid to him by DAS, he should contact them directly.

Turning now to X's freedom to choose his own representative; DAS have pointed out that although they did offer to let X appoint his own firm of Solicitors by sending a case management form to them initially, this isn't something they should have done (they refer to it being done in error) and they don't feel it's appropriate now. X has said he should have been entitled to choose his own legal representative to act for him. The policy says:

"Your legal representation

- On receiving a claim, if legal representation is necessary, we will appoint a preferred law firm as your appointed representative to deal with your claim. They will try to settle your claim by negotiation without having to go to court.*
- If the appointed preferred law firm cannot negotiate settlement of your claim and it is necessary to go to court and legal proceedings are issued or there is a conflict of interest, then you may choose a law firm to act as the appointed representative."*

It's common for legal expenses insurance policies to contain such a term and it's consistent with the relevant laws applicable to freedom of choice. Regulation 6 of the Insurance Companies (Legal Expenses Insurance) Regulations 1990 says:

"where under a legal expenses insurance contract recourse is had to a lawyer (or other person having such qualifications as may be necessary) to defend, represent or serve the interests of the insured in any inquiry or proceedings, the insured shall be free to choose that lawyer (or other person)"

The phrase "any inquiry or proceedings" means when it becomes necessary to issue court proceedings, or proceedings in another formal place of inquiry, such as a tribunal. X's claim has never been litigated. That means proceedings have never been issued. I haven't seen anything that supports there was a conflict of interest in appointing the panel firm. Rather it seems that X was unhappy with the advice and service he received from them. That's not the same as a conflict of interest arising. So, in the absence of anything to suggest that there was a conflict of interest in appointing the panel firm, I can't see that X had freedom to choose his own solicitor at any point during his claim with DAS at all. And given DAS haven't been able to establish that X's claim that meets the policy requirement on the question of prospects of success with the benefit of a legal opinion from their own preferred firm, I don't think it's unfair for them to decline to fund X's own choice of

representative at this point to conduct his claim.

DAS haven't however turned down the claim entirely. Rather they've said they're prepared to obtain an opinion from their own panel firm (who aren't able to accept instructions from X at the present time) on the value of his claim to determine what it's worth and pay him that amount with a view to bringing their involvement with him to conclusion on this particular claim. I don't think this is unreasonable, especially given X doesn't want DAS to be involved in instructing his own barrister to consider the value of it. If X wants his own barrister to set out his legal advice in respect of what he thinks the value of X's claim is worth at the present date, they he can do that, but it will be at his own cost. DAS can then put that to their panel firm to consider when reaching their conclusions. Otherwise, X is entitled to make his own submissions to that panel firm through. The panel firm's determination is something DAS will be entitled to rely on when determining what sum to pay X. If X doesn't want to accept that, then that's up to him. DAS aren't obliged to pay him the value of his claim. It's simply an offer they've made in the circumstances which I think is reasonable given the point at which X's claim is and the fact that DAS haven't so far been able to obtain their own legal opinion on the merits of his claim.

I appreciate that X doesn't want DAS to pay off his claim because he feels there will be cost consequences to him in their doing so. If there are- that isn't something DAS are responsible for. As matters stand, DAS hasn't provided funding for his claim. They haven't even obtained their own advice on the merits of it from their own choice of Solicitors, which we would ordinarily say they are entitled to do given they would be responsible for the costs of the claim. So, DAS has no liability currently for any cost consequences to X at all. If there are any cost implications to X, this would have no doubt have occurred as a result of his dispute with the third party. And given there's no cover currently in place to deal with that, I can't say that DAS are responsible for this.

X has referred several times to the fact that he doesn't want DAS to "buy" his claim. By this I think he means pay him the amount he's likely to recover then pursue the third party for it on his behalf. That's not the offer that DAS are making in this case. They are simply offering to settle his claim. They have not said they're seeking to recover the value of it from the other party in this case, so I don't think X's concern is one which applies in this case."

I asked both parties to provide me with any further comments or evidence they wanted me to consider. Both parties have now responded. DAS have said they have no further points to make. X hasn't accepted my provisional findings. He's made several detailed submissions which I won't repeat here. Again, that's representative of our being an informal service. As such I will concentrate on addressing the main points of his submissions below.

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 don't uphold X's complaint for the same reasons set out within my provisional decision.

X doesn't agree with my findings. He believes DAS have broken the rules set out in the Insurance Conduct of Business Sourcebook (ICOBS) and wants me to refer to that.

Insurers do have an obligation to deal with claims both promptly and fairly. The only failing I identified in my provisional decision was DAS' failure to respond to correspondence. But I also said that DAS's offer to remedy this failing by offering X compensation in the sum of £300 was sufficient. In addition, I pointed out that our role is not to punish businesses for

their conduct, so we don't make punitive awards in this way. What we do is seek to put things right, taking into account the impact a business' failing might have had on them. In this case I think DAS did that with their offer of compensation, so I didn't think they needed to do anything further. Beyond this, I haven't identified any further failings by DAS. And whilst X has made further submissions, there's nothing that he's said that persuades me that the provisional outcome I reached should be any different. What he's provided is essentially a repetition of the chronology of his claim with DAS together with the documents that evidence that. I'm aware of the history of the claim but that makes no difference to my findings in respect of it.

X has said that DAS prejudiced his claim. I don't agree. His claim isn't one that DAS have been able to confirm is covered under the policy- and it's not one they've agreed to cover. So, they're not responsible for the progress of his legal claim at all or for funding it.

X has suggested that I've applied a legal interpretation of his complaint and that I'm acting on behalf of DAS. I can assure X that my role is independent of either party and that I've considered all the evidence in his complaint and taken account of this when reaching my findings. In doing so I've applied our longstanding approach to the issues X has raised. This takes into account of the law, the policy terms and what's fair and reasonable in the circumstances. I appreciate that my outcome will be disappointing for X, but it doesn't mean that I'm acting for or on behalf of either of the parties.

X feels that DAS haven't discharged their responsibilities to him because they haven't provided what he calls a 'purchase price' for it. As I explained in my provisional findings, DAS didn't need to offer to settle X's claim. That's something they've decided to do in this case. In my provisional decision I set out how a settlement value could fairly be worked out. It's up to X whether he wants to agree to that process. If not, DAS aren't in my view obliged to do anything further beyond this.

My final decision

For the reasons set out above and in my provisional decision of February 2024, I don't uphold X's complaint against DAS Legal Expenses Insurance Company Limited

Under the rules of the Financial Ombudsman Service, I'm required to ask X to accept or reject my decision before 3 April 2024.

Lale Hussein-Venn
Ombudsman