

The complaint

Mrs P's complaint is about a claim she made on her DAS Legal Expenses Insurance Company Limited (DAS) commercial legal expenses insurance policy.

Mrs P, through her representative, says DAS has treated her unfairly

Although Mrs P is represented in this complaint, I shall refer to all submissions as being her own for ease of reference.

What happened

Mrs P's complaint follows on from a previous complaint she made to the Financial Ombudsman Service. Another Ombudsman issued a final decision in that complaint. The complaint concerned DAS' decision to turn down cover on a claim Mrs P made under the same commercial legal expenses insurance policy that is the subject of this present complaint. The Ombudsman who determined that complaint directed that DAS was wrong to turn down cover in the way that it had and directed that it *"Reconsider Mrs A's claim under the policy terms and conditions disregarding the terms they relied on when they declined it."*

Following that decision, DAS considered Mrs P's claim again and determined that it fell within cover. Some months later DAS reviewed its earlier decision and decided that it was wrong to have granted cover. It said that the claim wasn't one that fell within the policy terms because it was being pursued in the Scottish Land Court and the terms didn't provide for this situation. This reason differed from the earlier reasons DAS gave to decline cover, which were overturned by the Ombudsman who decided that complaint.

DAS accepted that in failing to decline cover after the Ombudsman's decision and doing so some months after it accepted the policy covered Mrs P, it caused her distress and inconvenience. In recognition of this, it agreed to fund Mrs P's reasonable legal costs up to the date it later declined cover and pay her £250 in compensation.

Mrs P disagrees with the position DAS has taken. She says that its actions have prevented it from declining the claim further because it accepted there was cover following the Ombudsman's decision. She also feels that DAS isn't entitled to decline cover at all given the previous Ombudsman's decision and to do so is unfair. Mrs P has also made submissions about the term DAS has relied on- she feels it's not relevant to her claim and that the timing of its decision has prejudiced her ability to request the claim be heard at another Court, which would be covered by the policy.

Our investigator considered Mrs P's complaint and concluded that it shouldn't be upheld. Mrs P doesn't agree so the matter has been 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 Mrs P's complaint for broadly the same reasons as the investigator. I'll explain why.

The starting point is the previous Ombudsman's decision and whether DAS was entitled to decline the claim at all. Mrs P says it wasn't and that the decision prevented this from happening. I don't agree. In her decision, the Ombudsman said DAS needed to "*Reconsider Mrs A's claim under the policy terms and conditions disregarding the terms they relied on when they declined it.*"

That doesn't mean that DAS wasn't entitled to decline the claim at all. Rather it was directed to reconsider the claim under the remaining policy terms. The only caveat to that was that it couldn't rely on the same terms it previously used to decline the claim. If the decision had directed DAS to simply accept the claim without further direction, I would have reached a different conclusion but the award itself is clear. DAS was entitled to decline the claim under different policy terms, if it thought these applied.

The difficulty in this case is that DAS didn't do that immediately. Rather it accepted the claim and began funding it. So, I appreciate why Mrs P is unhappy that it changed its position some months on. DAS has accepted it was wrong to do this and I agree that it should have acted diligently after the Ombudsman's decision by carrying out a proper assessment of the claim at that juncture. By failing to do so, it led Mrs P to conclude she'd have cover and could continue with the litigation she was involved in with the benefit of that, subject to her claim having reasonable prospects of success. But this doesn't mean that DAS wasn't entitled to change its mind or that it was estopped from doing so when it discovered its error. Whilst this would have been disappointing for Mrs P, DAS isn't obliged to cover a claim that its policy terms don't provide for. I've considered those further below.

The policy provides cover for:

"ARBITRATION & AGRICULTURAL SCOTTISH LAND COURT HEARINGS

(a) We will represent you at arbitration or at hearings of the Scottish Land Court relating to disputes arising out of a contract of tenancy or lease regulated by the 1991 Agricultural Holdings (Scotland) Act or 2003 Agricultural Holdings (Scotland) Act under the terms of the tenancy or lease or as directed by statute.

(l) Arbitration relating to any dispute arising out of a contract of tenancy or lease regulated by the 1991 Agricultural Holdings (Scotland) Act or the 2003 Agricultural Holdings (Scotland) Act includes determination by an independent expert or mediation where the contract of tenancy or lease states that determination by an independent expert or mediation is the sole means of resolving the dispute."

I take Mrs P's point that the type of claim she is engaged in isn't the type of claim described in these terms. Her claim does not involve arbitration and it's not a Scottish Land Claim. In addition, it's not an end of tenancy dispute. Rather it relates to whether a statutory notice to transfer the tenancy into her name, following the death of her Father, was valid. But I don't think that helps her case much. The fact that her claim isn't one that falls within the description set out in the policy further supports that it's not capable of cover.

That said, it seems to me that DAS was prepared to accept the claim was covered as representation at a hearing in the Scottish Land Court arising out of a lease, but when it realised (very late) that the claim was being pursued in the Court of Session, it determined that cover wasn't available.

I know that Mrs P feels that DAS has discretion to cover the claim because its policy terms

set out:

“We agree to provide the insurance described in this policy for the insured person in respect of any insured incident arising in connection with the business shown in the schedule, in return for payment of the premium and subject to the terms, conditions, exclusion and limitation set out in this policy, provided that:

...

5 *any legal proceedings will be dealt with by a court, or other body which we agree to, within the countries covered....”*

But I don't think this means there's cover under the policy for the type of claim Mrs P is engaged in. That's because the term noted above requires there to be an insured incident, and for the reasons set out by DAS - namely that the claim is being pursued in the Court of Session, this isn't an insured incident that's capable of cover.

Mrs P has said that DAS' conduct has prevented her from taking action to bring her claim within cover. As I understand it there came a point in proceedings where Mrs P could have applied to have the case moved to the Scottish Land Court. But because DAS accepted her claim, she didn't pursue this. She says that had she known this would mean she wasn't covered, she would have requested her claim be moved so she could have the benefit of funding. I've thought about this carefully, but the starting point was that this claim was always being litigated in the Court of Session. And whilst there was scope for applying for it to be moved, I haven't seen persuasive evidence to suggest that would definitely have happened, such that it would bring Mrs P's claim within cover. I do however agree that she lost the opportunity to pursue this application, but I don't think the potential to bring the claim within cover means that it would have been, with certainty.

And whilst I appreciate that Mrs P was led to believe she would have cover for her claim, then subsequently had this withdrawn, I think DAS has proposed adequate compensation for this by offering to cover her reasonable legal costs for the period after the Ombudsman's decision, until it withdrew cover, as well as £250 for the trouble and upset this caused her. I think this is fair because if things had gone as they should have, Mrs P wouldn't have been entitled to any cover at all so she has benefitted from some contribution to her legal costs that she wouldn't otherwise have been entitled to.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs A to accept or reject my decision before 12 October 2023.

Lale Hussein-Venn
Ombudsman