

## The complaint

Company K complains that Zurich Insurance PLC (“Zurich”) have unfairly declined its Contractors All Risks claim.

## What happened

The details of this complaint are well known to both parties, so I will not repeat everything again here. In brief summary, Company K submitted a claim after flooding caused damage to a site road it was constructing in November 2019.

Zurich declined the claim, however, as the insurer had consulted an independent engineer (“Hawkins”) who considered the damage to the tarmac was due to pre-existing deficiencies in the sub-base of the road. Zurich cited an exclusion for the cost of property insured which is in a defective condition as a result of defect in design or workmanship.

Our investigator didn’t uphold Company K’s complaint. He considered that Zurich had declined the claim fairly as it had relied on an expert report with regards to the likely cause of the damage. Company K disagreed and provided a copy of its own engineer’s report, but the investigator didn’t think this would outweigh the findings of the independent engineer. As it disagreed with this, the matter was escalated to me to determine.

I issued my provisional decision on this complaint in July 2022. I said I was minded to uphold it, and set out the following reasoning:

*The All Risks policy terms and conditions state that Zurich will cover*

*“Damage to the Property Insured occurring within the territorial limits in the course of the business during the period of Insurance”.*

*Company K submit that both the sub-base and the part of the tarmac base layer of the road both form part of the “Property Insured”. Zurich have also accepted that the insuring clause operates in these circumstances, so this is not in dispute. However, Zurich have declined the claim in reliance upon an exclusion clause which sets out that they will not cover:*

*“10, the cost of repairing, replacing or rectifying that part of any*

- a) Property Insured which is in a defective condition due to a defect in design plan specification materials or workmanship of such Property Insured*
- b) other Property Insured lost or damaged to enable the repair replacement or rectification of Property Insured excluded by 10(a) above.*

*This exception will not apply to other Property Insured which is free of the defective condition but is damaged as a consequence thereof...”*

*So, I’ve considered whether Zurich has demonstrated, with enough evidence, that*

*the exclusion clause applies in the circumstances of Company K's claim, and that they have therefore declined the claim fairly.*

*Following a visit to the site by Zurich's loss adjuster, an independent report was carried out by forensic investigators (Hawkins), which states that the defects identified in the tarmac were:*

*"most likely to have been caused by the base course being laid on a wet and unstable sub-base"*

*"...when the tarmac was laid, no measures were in place to ensure that surface water would not simply drain off of the public highway and onto either the sub-base or the base course itself".*

*The independent engineer ultimately concluded:*

*"I consider the failure of the tarmac base course...was as a result of pre-existing and pre-identified deficiencies in the sub-base. In particular, I anticipate that the failure to remove saturated sub-base material identified in the comments associated with the first photograph in the 'Tarmac Issues' document.*

*I consider it highly unlikely that an escape of water of sufficient severity to cause deficiencies in the sub-base occurred from OCC's highway drainage system as a result of the low rainfall that occurred".*

*So, he was of the opinion that a defective sub-base was the cause of the problems with the tarmac.*

*I appreciate that Company K strenuously refutes this and has submitted its own thoughts and opinions on what the cause of the tarmac problems were, which it has put down to drain blockage. However, it is not the role of this service to determine the likely cause of the damage, as this would be a matter for qualified experts and or the courts to decide. What I can consider is whether Zurich have declined the claim fairly by relying on the Hawkins report rather than Company K's own opinion/report.*

*The independent expert found it highly unlikely that an escape of water from the drainage system caused the deficiencies in the sub-base. Since bringing its complaint to this service, Company K has submitted its own engineer's report, which states the cause of the damage as being due to "water escaping from a surcharged highway drain" rather than defective workmanship. However, Zurich have said this has not changed its decision to decline the claim.*

*So, there are now two contrary conclusions reached by different engineers. But I note that the report submitted by Company K's engineer, while detailed, has been compiled by an employee of theirs who was involved in the design of the drainage of the estate roads. And while I appreciate this will give him a good understanding of the site in general, the engineer cannot be said to be independent or impartial in this matter, particularly as he was an employee of Company K. So, I don't consider his report can reasonably carry more weight than that of the independent engineer at Hawkins who had no interest and/or involvement in the project. So, there's currently no basis on which to conclude that Zurich were incorrect to rely on the findings of the Hawkins' engineer.*

*I also appreciate the Hawkins report was a "desktop" investigation and that they did not physically inspect the road. However, it was still a comprehensive 40-page report*

*based on the evidence provided by the loss adjusters, who had physically inspected the site. This included video clips, photographs, site diaries, plans, maps and other reports. It had been issued by an appropriately qualified expert who, if they were not able to reach a conclusion based on the evidence provided, would have most likely said so. But that was not the case in this instance.*

*I note that Zurich also passed Company K's submissions on to Hawkins for further consideration following the report being issued, but the independent engineer issued a follow up report on 5 October 2020 stating that the submissions had not altered his preliminary conclusions on the likely cause of the failure of the tarmac. So I don't consider it can be said that Zurich have unreasonably and blindly relied on the Hawkins report either, without taking into account any of Company K's opinions or giving it a right to comment on the findings.*

*The insurer is not a construction expert, and generally this service would consider it fair for the insurer to rely on the findings of appropriately qualified experts, unless there is anything to suggest that the findings were patently wrong. But, there is nothing in this case to suggest that the engineer's conclusions were obviously wrong.*

*Therefore, I'm satisfied that the circumstances of Company K's claim fall within the scope of the exclusion, as the engineer's report shows there is property insured (i.e. the sub-base) that was in a defective condition due to a defect in design, plan specification, materials or workmanship.*

*However, I'm not persuaded the exclusion entitles Zurich to decline the entirety of Company K's claim. There is a limitation that forms part of the exclusion, which states:*

*"This exception will not apply to other Property Insured which is free of the defective condition but is damaged as a consequence thereof..."*

*It's clear from the report that it was only the sub-base layer of the road that was defective, which caused issues with the tarmac base course once it was laid on top. So the question here is whether the tarmac layer can reasonably be considered as 'other property insured' to the sub-base.*

*Zurich have said that the correct analysis here is to consider the road as one entire entity, and that it would be artificial to be splitting it up into its constituent parts. But I do not consider this position takes account of the relevant case law on this point.*

*In the Court of Appeal case of CA Blackwell (Contractors) Ltd v Gerling Allgemeine Verischerungs – AG [2007] EWCA Civ 1450, Lord Justice Tuckey stated that the wording of such clauses draws a distinction between "property insured" and "other property insured", and that:*

*"This suggests and indeed requires divisibility".*

*This case concerned a similar scenario of a road being damaged during its construction. He went on to say:*

*"One might argue in this case that the property insured refers to the entirety of the earthworks. But that cannot be what was intended by this wording. I think it must be restricted to that part of the works which has suffered damage".*

*So, in light of this judgment, I do not consider Zurich can reasonably maintain their*

*position of seeing the insured property as the entirety of the road and all its constituent layers. Zurich gave the example (also used within the Blackwell judgment) of the steel framework of a building being separate “property insured” to the roof, cladding and brick walls. The insurer says Company K’s claim is different to the steel frame example, but it hasn’t explained how. In the same way that Zurich consider all the constituent parts and layers of a road to be one thing, it could just as easily be said that all the divisible components of a structure simply form ‘one building’ and therefore cannot be considered as ‘other property insured’. But that is not how the courts have allowed this exclusion to be applied.*

*In this instance, I’m not persuaded Zurich have reasonably demonstrated that the tarmac and sub-base are the same property. They are different components in the construction of a road. Different contractors can presumably be hired to carry out the works on each part of the road building process, and the tarmac was delivered separately to be laid on top of the sub-base which was already in situ. A distinction was also drawn in the Blackwell case between the sub-formation and the capping layer of the road, where it was considered whether either were defective. The court did not treat them as one and the same thing just because it would eventually end up as one road.*

*So, I’m not persuaded that it would be reasonable for Zurich to treat the defective sub-base and the tarmac base course as the same ‘property insured’ in these circumstances. According to the Hawkins engineer, it was only the sub-base that was defective, so this should be the only ‘property insured’ excluded under the policy. The tarmac that was damaged as a result of being laid on the defective sub-base would therefore fall within the exclusion limitation; that being ‘other property insured’ which is free of the defective condition but is damaged as a consequence thereof.*

*I therefore intend directing Zurich to reassess the claim in line with the remaining policy terms and conditions, as I do not think it has handled the claim fairly by excluding the entirety of Company K’s losses.*

I invited further comments and evidence in response to my findings. Company K responded accepting my provisional proposals. However, it added that its engineer who compiled its report was not an employee and was an independent consultant who had previously been engaged to help with the drainage of the project. It also provided a breakdown of its costs being claimed, and also explained the detrimental impact Zurich’s handling of the claim had had on its director’s health. Zurich did not provide any further comments or evidence for consideration.

### **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.

Given that Company K has accepted my provisional findings – and given Zurich failed to respond – I see no reason to depart from the conclusions set out in my provisional decision.

In response to Company K’s comments, I’m grateful for its clarification of its engineer’s employment status. I referred to him as an employee to reflect the terminology used in his report:

*“[Company K] employed me to design the drainage and estate roads for the subject development”.*

I accept that he wouldn't legally be considered an "employee" given the nature of the work he carried out as Company K has described. But this still doesn't change the fact that he was nevertheless involved in the design and drainage of the estate roads that formed the subject of Company K's claim. So I'm still not persuaded he can be considered as independent and impartial in this matter given the interest he had in it. This therefore does not change my conclusions.

I note that Company K has also submitted its costs to this service for consideration. However, the direction in my provisional decision was for Zurich to reconsider the claim in line with the remaining policy terms and conditions. Any such costs should therefore be submitted to the insurer to consider as part of the claim; I cannot pre-empt what costs should and should not be covered under the policy, as this will be dependent on the remaining policy terms and conditions. However, if Company K subsequently has any further concerns about Zurich's reconsideration of its claim and settlement, it will be entitled to raise a further complaint.

Finally, I'm sorry to hear about the impact this has had on the health of Company K's director. He has put forward reasons for an award in recognition of the stress, aggravation, and suffering he has experienced as a result of Zurich's handling of the claim. However, while I do not doubt the impact this has had on the director, he is not the complainant in this case; it is the limited company. This service does not make awards for pain, suffering or distress to limited companies, as it is not a physical person capable of experiencing or feeling such things. I therefore cannot make any award of compensation to Company K due to the suffering experienced by its director.

### **My final decision**

For the reasons given above, I uphold this complaint and direct Zurich Insurance PLC to reconsider Company K's claim in line with the remaining policy terms and conditions.

Under the rules of the Financial Ombudsman Service, I'm required to ask K to accept or reject my decision before 7 September 2022.

Jack Ferris  
**Ombudsman**