

The complaint

D, a company, complains about Starr International (Europe) Limited's ('Starr') decision to decline a claim it made under a contractor's liability insurance policy as well as delays in dealing with it.

What happened

D made a claim on its Starr contractor's liability insurance policy for help to defend a claim made against it by a customer for defective workmanship. The customer applied for an Adjudication against D, so D asked Starr for assistance to defend this as well as recover the outstanding sums it had invoiced the customer for, which had yet to be paid.

D says it received no meaningful reply from Starr, despite chasing and that it took them over four months to assess the claim. When the claim was assessed, Starr turned it down on the basis that it had been notified late, that the policy didn't cover claims for defective workmanship and that rectifying original contract works was also not covered.

D says it had no option to appoint its own Solicitor to act for it in the Adjudication and that if it had waited for help from Starr, it wouldn't have got any in time, which would have prejudiced its position. D feels Starr's conduct represents a lack of care that left them without advice or cover when it needed it.

Our investigator considered D's complaint and concluded it shouldn't be upheld. She said that Starr had accepted the service they'd provided fell below what was expected of them and that they'd adequately compensated D for this by offering to pay £500 in compensation. The investigator also said the claim wasn't in any event one that would be covered because claims for defective workmanship were specifically excluded by the policy.

D doesn't agree. It says the amount Starr awarded doesn't properly compensate it for the loss it suffered. It says it incurred over £45,000 because the dispute had to be escalated to the High Court, giving rise to defamation and harassment issues that have impacted its business operations. It also feels it would have incurred costs of more than £50,000 representing its customer's costs, had it not obtained representation and defended the matter without Starr's assistance.

I issued a provisional decision upholding D's complaint in August 2023 in which I said:

"The starting point are the policy terms. Under the PUBLIC LIABILITY, DEFINITIONS section,

they say:

"Costs and Expenses

In addition the Underwriter will pay costs and expenses incurred by the Insured or with its written consent:-

a. in connection with defence of any claim.

.....

which may be the subject of indemnity under this Section."

Starr says this element of cover doesn't extend to defective work. I've set out the exclusion it relies on below.

"EXCLUSIONS

8. Damage to Goods Supplied

Liability in respect of: -

a. Damage to any goods or other property sold, supplied, delivered, installed or erected by or on behalf of the Insured.

b. all costs of or arising from the need for making good, removal, repair, rectification, replacement or recall of

i. any such goods or property;

ii. any defective work executed by or on behalf of the Insured;

except that 8 a. and 8 b i. above shall not apply to liability in respect of loss or damage to the said goods or property if such loss or damage is caused by or arises from: -

1. any alteration, repair or servicing work executed;

2. any other goods or property sold, supplied, delivered, installed or erected; by the Insured under a separate contract."

It's true that the claim alleged by D's customer against D was for defective roofing work, but D says the cause of the damage to the customer's roof was as a result of a design defect which it was not responsible for. Starr appointed a loss adjuster to consider the matter, but that was some considerable time after the claim was made, at which point the Adjudication between D and its customer had concluded. The loss adjuster's report refers to evidence obtained by D which confirmed the cause of the damage was due to a design defect rather than defective workmanship by it. This was then supported by the Adjudicator's decision which found that on the balance of probabilities, defective design was the cause of the problems complained of by C's customer.

In this case it took Starr a considerable period of time to investigate the claim, by which point D had taken steps to defend its position to conclusion of the Adjudication. If things had gone as they should, Starr should have appointed a loss adjuster to determine the cause of the problems complained of by D's customer in order to determine whether this was a claim it could provide cover for. The fact that D's customer was alleging defective workmanship when D disputed this was the reason for the claim, doesn't mean Starr was entitled to decline the claim without first investigating D's position. I can't say with any certainty what the loss adjuster would have said if they'd investigated the position before the Adjudication concluded but given the evidence obtained by D supported that defective design was the cause of the problems, I think it's also likely the loss adjuster would have come to this conclusion. If it had done so, then I think the claim would have been covered by the policy terms. I say so because the terms I've set out above extend to covering costs and expenses incurred in connection with the defence of any claim unless excluded- and there are no other exclusions that I think apply here. I've explained why below.

When reaching this conclusion, I've thought about the other reasons Starr gave for declining D's claim. The loss adjuster referred to the claim against D being for costs related to rectifying the roof which formed part of D's original contract works and that these costs might well have fallen into the exclusion I've quoted above at clause 8(b)(ii). My view is that this exclusion would not be applicable if Starr had satisfied itself that the cause of the problems complained of was as a result of defective design, irrespective of what D's customer was claiming for. And as I've already said, I think it's more likely than not that if things had gone as they should, Starr would have obtained a loss adjuster's report that supported that position.

Starr has also referred to the claim being turned down on the basis that D reported it four months after it became aware of the issues complained of and that this breaches the policy

requirement for D to notify Starr “immediately upon being advised of any prosecution, inquest or enquiry connected with any Injury, Damage or consequential loss which may form the subject of a claim under this Policy”.

I agree that Starr is entitled to rely on this term, but it wouldn't be fair to do so if it's not able to show its position was prejudiced by the delay in the claim being brought. Starr hasn't made any submissions to support this contention, so I'm not persuaded that it was prejudiced by the claim being brought when it was. And given it took Starr over 4 months to consider the claim at all, I don't think I can say they would have done anything meaningful sooner, had the claim been brought earlier by D. Because of this I don't accept that it's fair for Starr to turn down cover on the basis that the claim was notified late.

Finally, I agree that Starr's handling of the claim was poor. It took too long to consider things despite the need for cover to be assessed being urgent given the impending Adjudication. And I can see that D chased Starr various times in this regard. Given the urgency, I understand why D considered it had no option but to instruct Solicitors to help defend the claim against it. And given what I've said above, I think this would have been a claim that D should have been covered to defend. Because of this, I think Starr should put things right in the way I've set out below.

For clarity, I haven't awarded anything in respect of compensation to D because I think the sum of £500 Starr has offered D is enough to compensate it for the inconvenience of chasing for cover and the four month delay in Starr doing anything meaningful. If D hasn't yet received this and wants to accept the offer, it should contact Starr directly.

Putting things right

- Starr should now reimburse D's for the legal costs it incurred in defending the claim against its former customer from four weeks after D's claim was made until the conclusion of the Adjudication.*
- I have allowed a period of four weeks because I consider this represents a reasonable period for Starr to have properly investigated D's claim, including the appointment of a loss adjuster.*
- Starr should pay D interest of 8% per year simple on the legal costs D has paid in respect of defending the claim in the Adjudication to date, from the time they were paid, until Starr reimburses D for these.*
- D will need to provide Starr with evidence of the costs it's paid in this respect as well as when they were paid to allow Starr to comply with the award I have made.*
- D has said that proceedings have been pursued in the High Court following this matter. I don't have enough information about those proceedings to determine whether Starr should consider that claim. And given Starr hasn't had the opportunity to consider these costs, D will need to provide Starr with details of these proceedings to allow it to decide whether the claim is covered at all. If Starr would have always covered that claim following the conclusion of the Adjudication, then it should reimburse D for its costs incurred in the matter. But if Starr doesn't agree that the claim would have been covered under the policy terms and D doesn't accept Starr's position, D will be entitled to pursue a complaint through this Service accordingly- though this will form the basis of a fresh complaint.”*

I asked both parties to provide any further comments and evidence in response to my provisional decision. Both parties responded. D provided the evidence it relies on to support the costs its claiming. Starr made a number of submissions in response. I've summarised those as follows:

- The claim against D was for rectification of works for damage to goods or property sold, supplied, delivered, installed or erected and this is excluded by the policy;*

- The claim was for rectification of the contract works and damage to property which forms part of the contract works and this is excluded separately by the policy;
- Even if the cause of the claim was for defective design, this would not have been covered by the policy due to the exclusions quoted and the cause of the claim is irrelevant;
- A claim for defective design by D would not have been covered as there is an exclusion that relates to this too in the policy;
- The policy covers costs and expenses incurred in connection with the defence of any claim which may be the subject of indemnity under the Public Liability Section. There is no indemnity for this type of claim under that section so it cannot be capable of cover.
- The claim was not declined on the basis of late notification because there was never any cover for it but if it was covered, Starr have been prejudiced by the late notice given because they weren't able to appoint panel lawyers with pre agreed preferential rates.
- They accept the delay in handling the claim and have adequately compensated D for this with the offer of £500.
- They take the view that my provisional decision seeks to depart from the policy terms and conditions and broadens coverage.

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 remain of the view that D's complaint should be upheld in the same way I have set out within my provisional decision. I'll explain why below, but before doing so, I want clarify that I won't be considering the evidence D has supplied to support its claim for costs. That's something that it will need to pass on to Starr directly to consider so that they can assess the level of payment and interest due to D.

Turning now to Starr's submissions; it's disappointing that they're now seeking to introduce a new policy exclusion so late into D's complaint journey, which they've quoted from clause 10 of the exclusions set out in the policy. I've thought carefully about what they've said about this and the exclusions at clause 8, but I don't think it makes any difference to the outcome of this complaint.

My provisional findings in this complaint are based on the fact that although liability for claims for defective workmanship and rectification of works to D's customer's property were excluded by the policy, Starr wasn't entitled to decline the claim without first investigating D's position. And if it wanted to rely on a policy exclusion, it had to do so by evidencing this was applicable. In this case, I've said that if things had gone as they should have and Starr had appointed a loss adjuster at the right time, it's likely that the adjuster would have concluded the cause of the claim against D was due to the poor design of another and not as a result of defective workmanship that required rectification work.

The causation issue is relevant because the policy wording in relation to the exclusions quoted by Starr require there to be "*Liability*" in respect of those exclusions. As "*Liability*" is not defined by the policy, I've applied the ordinary dictionary meaning which is "*the state of being legally responsible for something*". I think that given the evidence D had obtained to support its position and from what I can see, the lack of evidence to dispute that from its customer, Starr would be hard pressed to show that liability for defective workmanship and rectification works to D's customer's property could be established in this case. And for the same reasons, I apply the same approach to the new clause Starr have quoted which excludes:

"10. Contract Works and J.C.T. Clause 21.2.1

Liability in respect of Damage to any property:-

- a. Comprising or to be incorporated into the contract works in respect of any contract undertaken by the Insured."*

Starr have said that the policy wording sets out that the policy only affords cover for costs and expenses incurred in connection with the defence of any claim which *may* be the subject of indemnity under the Public Liability Section. They've said that as there's no indemnity for the type of claim being made, then it can't be capable of cover. I don't agree. The operative words in the follow clauses are in my view "*any*" and "*may*":

"Costs and Expenses

In addition the Underwriter will pay costs and expenses incurred by the Insured or with its written consent:-

- a. in connection with the defence of any claim.
..... which may be the subject of indemnity under this Section."*

So the policy covers costs and expenses in connection with the defence of "*any*" claim which "*may*" be the subject of indemnity under the Public Liability section. It's not a requirement that the claim has to be the subject of specified cover or that the defence needs to fit into any specific category, defined by the policy. As such I think that D's claim for cover would have fallen within the construction of this term, which I've not interpreted any more widely than the way it is phrased.

Starr have referred to claims for defective design being excluded by the policy too, but that's not applicable to the claim that D made. The cause of the claim was the defective design of another but that's not what was being advanced by D's customer against D and as such not the claim D needed cover to defend. Because of this, I don't think the exclusion they've referred to here has any bearing on D's claim for cover.

Turning now to the point Starr have made in relation to late notification and prejudice; I'm not persuaded that not being given the opportunity to appoint a panel firm at preferred rates in circumstances where Starr themselves caused a delay of 4 months to the claim, amounts to their being prejudiced. Even if D had notified the claim in time, they would still have likely sought their own representation due to the considerable delay in Starr dealing with it. So, I'm not satisfied that Starr has established it's fair to rely on the late notification term.

Putting things right

For the same reasons set out in my provisional decision and this decision, I direct Starr International (Europe) Limited to put things right as follows:

- Starr should now reimburse D's for the legal costs it incurred in defending the claim against its former customer from four weeks after D's claim was made until the conclusion of the Adjudication.
- I have allowed a period of four weeks because I consider this represents a reasonable period for Starr to have properly investigated D's claim, including the appointment of a loss adjuster.
- Starr should pay D interest of 8% per year simple on the legal costs D has paid in respect of defending the claim in the Adjudication to date, from the time they were paid, until Starr reimburses D for these.
- D will need to provide Starr with evidence of the costs it's paid in this respect as well as when they were paid to allow Starr to comply with the award I have made.
- D has said that proceedings have been pursued in the High Court following this matter. I don't have enough information about those proceedings to determine whether Starr

should consider that claim. And given Starr hasn't had the opportunity to consider these costs, D will need to provide Starr with details of these proceedings to allow it to decide whether the claim is covered at all. If Starr would have always covered that claim following the conclusion of the Adjudication, then it should reimburse D for its costs incurred in the matter. But if Starr doesn't agree that the claim would have been covered under the policy terms and D doesn't accept Starr's position, D will be entitled to pursue a complaint through this Service accordingly- though this will form the basis of a fresh complaint.

My final decision

I uphold D's complaint against Starr International (Europe) Limited and direct it to put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask D to accept or reject my decision before 21 September 2023.

Lale Hussein-Venn
Ombudsman