

## **The complaint**

N, a limited company, is unhappy with what QBE UK Limited did after it made a claim on its Contractors Combined insurance policy.

All references to QBE include its agents and claims handlers.

## **What happened**

In 2015 N carried out local authority funded renovation works for a customer. Solicitors acting for the customer contacted it in late 2018 and alleged poor workmanship which had resulted in damage to the consumer's property.

N contacted QBE through its broker in January 2019. QBE says it advised the policy wouldn't cover defective work but could cover damage. N didn't believe there were any issues with the work it carried out and liability was denied to the claimant's solicitors by QBE. In July 2019 those solicitors provided a surveyor's report which identified issues with the work. QBE sent this to N. It provided comments in September. Having considered those QBE continued to deny liability.

In April 2020 legal action was commenced by the claimant's solicitors. QBE and N instructed solicitors who maintained the denial of liability and entered a defence. In October proceedings were stayed so those solicitors could get a surveyor's report. That was obtained by November 2021 (I understand there were delays as a result of the Covid-19 pandemic). The report wasn't supportive of N's position. Solicitors suggested N should be liable for 90% of the costs with QBE responsible for the remaining 10% based on the split in the report between issues with workmanship and damage.

QBE agreed liability would need to be conceded and the claim settled on the best possible terms. N accepted that but didn't agree with the apportionment of costs. The claim was subsequently settled at £35,000 plus reasonable costs. And those were split at 80% for N with QBE responsible for the remaining 20%.

N didn't accept it should be responsible for 80% of the costs. And it said it was never told it would potentially be liable for the other side's costs. It thought there were missed opportunities to settle the claim at an earlier stage and, if it had been given clear information about its potential liabilities, it would likely have done so. It argued it was QBE's decision to defend the claim and it should be responsible for paying the claimant's solicitors costs in full.

Our investigator didn't think QBE needed to make any further payment in relation to the claim costs. It was reasonable of it to act in line with the findings of the expert report and the conclusions it reached on the split between costs relating to damage and defective workmanship.

And he accepted the policy didn't provide cover for third party legal costs incurred in defending a claim. But he didn't think it would be fair for N to pay the costs of a decision QBE had made (acting under the provisions of the policy which allowed it to take over and conduct a claim). Nor did he think that QBE had made it clear to N that it could be liable for

claimant solicitor's costs if the claim was defended.

He thought if that had been made clear then it was likely N would have sought to settle the claim around July 2019 (when the expert report from the claimant was provided). And QBE should be responsible for the claimant costs incurred from that date until the claim was settled.

N didn't provide any comments. QBE did respond. In summary it said:

- Following receipt of the report from the claimant liability was denied on the basis of comments made by N who disputed its factual accuracy. And those comments weren't provided until September 2019.
- N was aware its policy with QBE would only cover a proportion of the claim made against it. And in October 2019 it was told only some of the claim would be met by the policy meaning N was aware of its financial liability when deciding to continue to defend the claim. And it gave separate instructions to the solicitors in relation to this. So QBE didn't think N would have reached a different decision in July 2019 even if it had been given more information about this earlier.

Our investigator asked QBE to provide the instructions to solicitors it referred to in its response. QBE said it would do so but hasn't. Our investigator therefore advised we'd progress the complaint based on the information we did have.

I issued a provisional decision on the complaint earlier this month. In summary I said:

*The relevant rules and industry guidelines say QBE has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably.*

*I've looked first at the terms and conditions of N's policy. I understand the relevant section is 'Contract Works' which says "the Insurers will at their option indemnify the Insured reinstate or replace the property insured or any part thereof in respect of All Risks of Physical Loss or Damage of whatsoever nature to: The Works..."*

*However, the policy excludes damage due to "wear and tear, gradual deterioration, mechanical or electrical breakdown or derangement or to defective workmanship, material, design, plan or specification. (This exclusion shall be limited to that part of the machine structure or work immediately effected and shall not extend to other work or property accidentally lost or accidentally damaged in consequence thereof.)"*

*So the policy wouldn't cover the claim made against N as it relates to defective workmanship or specification but would potentially cover damage caused to other parts of the property in consequence of that. But there's nothing in this section of the policy that covers N's legal expenses (or third party costs) in pursuing or defending a claim; this section of the policy doesn't provide legal expenses cover. So I think QBE acted correctly in saying the legal costs that N is liable for aren't covered by its policy.*

*Having said that I appreciate the policy does contain a general condition which allows QBE "to take over and conduct in the name of the Insured the defence or settlement of any claim or to prosecute in the name of the Insured for their own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings and in the settlement of any claim and the Insured shall give all such information and assistance as the Insurers may reasonably require."*

*I don't think it would be fair in principle of QBE to utilise that clause to defend a claim and then expect the insured to pay the costs of a decision it had taken. Nor I don't think it would*

*be fair to expect the insured to pay third party costs if QBE gave it reason to believe it would be covering these and that led the insured to take a decision (to defend) it wouldn't otherwise have made. And I don't I think it would be fair to expect an insured to pay costs that were only incurred because of something QBE got wrong. I've thought about how that applies here.*

*Was it QBE's decision to defend the claim?*

*I think it's clear N didn't believe it had carried out defective work. And, as a result, it didn't want to accept liability for this. After the claim was made to QBE it disputed its work had been poor and it was on that basis a denial of liability was issued. And that denial was maintained following the response N provided to the building surveyor's report that was produced in July 2019. It was only after a further report was obtained in November 2021 that N accepted liability should be conceded because of the unsupportive nature of that report. So I can't conclude it was QBE's decision to defend the claim; it appears to have agreed to this based on representations N made.*

*Did QBE lead N to think its legal costs would be covered?*

*I've gone on to consider whether, in deciding to defend the claim, N was aware (or should have been aware) that legal expenses, including third party legal costs, wouldn't be covered. I think the starting point here is the policy terms. And, as I've already found, the relevant section doesn't include legal expenses and there's nothing in that part of the policy which suggests these costs would be covered. So in the absence of information to the contrary I don't think N (which was represented by a broker) could reasonably have thought these costs would be covered.*

*I don't think QBE gave any different indication to N during the progression of the claim. I can see at various points QBE made clear to N that its policy wouldn't cover defective workmanship but would potentially cover damage. I appreciate N didn't agree with the proposed apportionment of those claim elements but I think it was nevertheless clear it would potentially be responsible for any parts of the claim that related to defective workmanship.*

*I accept N doesn't appear to have specifically been told by QBE that it wouldn't cover legal costs that related to defective works. But equally it didn't give any indication it would. And as there's no cover under the policy for this I don't think that's something N could reasonably have thought QBE would do.*

*I'm also not persuaded N would have acted differently even if this had been made explicitly clear to it. It didn't believe it had carried out defective work and took the decision to defend the claim in the knowledge that, if a court found differently, it would be responsible for this element of it. I've not seen evidence which satisfies me it would have taken a different decision if it had been told it would also be responsible for the legal costs associated with this.*

*Did QBE make errors in its handling of the claim?*

*I understand in July 2019 the solicitors for the other side provided reports which alleged failings in the work N had carried out. I don't think it was unreasonable of QBE to initially provide that information to N for its comments. And it doesn't appear to have provided a response until September 2019.*

*On the basis of the information N provided QBE agreed to continue to deny liability for the claim. However, I haven't seen there was any significant additional evidence available in*

*relation to this when the solicitors who were by then acting for QBE and N decided they needed to commission their own report (which was ultimately unsupportive of N's position).*

*I can see in their subsequent comments on the claim those solicitors said that, in their professional judgement, it wasn't unreasonable of QBE to initially deny liability on the basis of the points made by N. But once the claimant provided expert evidence "it then came down to the claimant's expert vs the insured's lay witness and the court would almost certainly favour the expert witness".*

*Given that I think once the claimant's expert report had been disclosed (and N had commented on it) QBE should have sought its own surveyor's report (as it later did) prior to denying liability for the claim. And it was on the basis of that later report liability was conceded. I think if it had been obtained earlier liability would have been conceded significantly sooner than was in fact the case.*

*Looking at the timelines for how long that report took to be provided once it was requested, and taking into account it would then need to have been considered, I think it's reasonable to say that would have been by January 2020. As a result I don't think legal costs incurred after that date are ones that N should be responsible for because they were only incurred because QBE didn't obtain an expert report when it should have done.*

*I'm also not satisfied QBE has evidenced how the apportionment of costs in this case (the 80:20 split) has been calculated. It's relied on the expert report (which led to the decision to concede liability). On the basis of that report QBE thought costs should be apportioned on the basis of 90% for the insured and 10% for the insurer (later revised to an 80:20 split).*

*But while that report does contain some handwritten calculations which reflect that initial split it's not clear how these have been arrived at, how they relate to the line items in the report, what the joint costs referenced are and how these have been calculated. We asked for further information on this from QBE but it hasn't been able to provide this to date. Most recently it's told us that it needs to retrieve relevant records and appoint a suitable handler. However, it reached a claim decision on the basis of that report (and issued a final response to the complaint). So I think this is information that should already have been available to it.*

*Putting things right*

*For the reasons I've explained I'm not satisfied N should be liable for legal costs incurred after January 2020. So I don't think QBE is entitled to pursue it for these.*

*I'm also not satisfied that for other outstanding costs QBE has evidenced that an 80:20 split is appropriate. I'm therefore intending to direct that it appoints a claims handler to assess this in line with the findings of the expert report (as I understand it's currently doing) and provide a revised outcome on this to N (explaining the rationale for this).*

*If the outcome of this process is the apportionment should operate in a way more favourable to N then QBE will need to act in line with that.*

*I also think that N will have been caused inconvenience by QBE's inability to evidence its conclusions in relation to the apportionment split and I think it should pay N £300 in recognition of this.*

**Responses to my provisional decision**

QBE didn't respond to my provisional decision. N made a number of points which relate to how the expert report (on which the apportionment of costs was based) should be considered.

### **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.

I appreciate N doesn't feel the expert report has been correctly considered. And I agreed in my provisional decision QBE hadn't evidenced how that report led to the apportionment of costs to be calculated as it had.

But I think the further comments N has made are ones QBE should take into account as part of the revised assessment I've said it should carry out. So if N does have further points to make in relation to this it should provide these to QBE.

In the absence of any other comments from N or QBE I don't have any reason to change the findings I set out in my provisional decision.

### **Putting things right**

I'm not satisfied N should be liable for legal costs incurred after January 2020. So QBE isn't entitled to pursue it for these.

I'm also not satisfied that, for other outstanding costs, QBE has evidenced that an 80:20 split is appropriate. It will therefore need to appoint a claims handler to assess this in line with the findings of the expert report (taking into account any additional evidence N wants to provide).

It will then need to provide a revised outcome on this to N explaining the rationale for its decision. If the outcome of this process is the apportionment should operate in a way more favourable to N then QBE will need to act in line with that.

I also think that N will have been caused inconvenience by QBE's inability to evidence its conclusions in relation to the apportionment split. It will need to pay N £300 in recognition of this.

### **My final decision**

I've decided to uphold this complaint. QBE UK Limited will need to put things right by doing what I've said in this decision

Under the rules of the Financial Ombudsman Service, I'm required to ask N to accept or reject my decision before 26 September 2023.

James Park  
**Ombudsman**