

The complaint

A limited company, that I will refer to as S Ltd in this decision, has complained about Accelerant Insurance Europe SA/NV UK Branch's refusal to accept its insurance claim.

S Ltd is represented in this complaint but, for ease, I will refer to S Ltd throughout.

What happened

In March 2020, S Ltd entered into a contract with another entity (which I will call M) to take over construction of a new build development. The building was completed in February 2021. S Ltd says it became apparent that the construction was defective, as a result of faulty design and workmanship, for which it held M responsible.

S Ltd claimed the cost of the necessary rectification work and losses, in relation to the roof, and the plumbing and electrical systems, from M. This was dealt with in arbitration and in September 2022, S Ltd was awarded approximately £250,000, together with costs. However, M had started liquidation proceedings and there were no assets from which this award could be paid.

S Ltd therefore made a claim under M's professional indemnity policy with Accelerant. As it is entitled to benefit under the policy and M is in liquidation, S Ltd has rights as a third party to make a claim under the policy and bring this complaint.

Accelerant refused the claim. It has relied on seven different reasons for this refusal. I will summarise these as follows:

1. The policy only covers claims made within the policy period (*i.e.* August 2020 to August 2021). And no claim was notified during that period.
2. S Ltd wrote to Accelerant in July 2021 about leaks but this did not amount to a claim notification, as it had no right to register a claim under the policy at that time and it did not set out details of a potential claim.
3. In any event, M waived entitlement to be indemnified in relation to this, as it also wrote to Accelerant in July 2021 confirming there was no claim to be made under the policy and the complaint made by S Ltd was about leaks to the roof which were not linked to the professional indemnity policy.
4. S Ltd contacted it again end 2021 referred to new issues regarding plumbing, heating, electricity and cladding. These were notified outside the policy term and therefore not covered.
5. M breached a condition precedent regarding the notification of the adjudication (which had to be done within two days of receiving notice of adjudication). This is particularly relevant, as M did not respond to the adjudicator and the application was unopposed; and S Ltd is seeking settlement in line with the outcome of the adjudication. M was not dissolved that point. In addition, S Ltd did not notify Accelerant either.
6. The claim concerns issues caused by faulty workmanship and materials, which is excluded from cover, in any event.
7. There is other insurance, as S Ltd received a payment from the roof guarantee

provider. And the policy will not provide indemnity for issues covered by another insurance policy.

S Ltd does not accept this and complained. Accelerant maintained its position, so S Ltd referred the complaint to us. S Ltd says it did notify the claim in the policy period and was entitled to do so pursuant to The Third Parties (Rights Against Insurers) Act 2010 (“the Act”).

It asks that Accelerant be required to settle the amount awarded by the adjudicator, with interest, and also wants compensation for the delay in processing the claim in good time and incorrect refusal of the claim, as well as for its reputational damage.

One of our Investigators looked into the matter. She explained that Accelerant only needed one valid reason to refuse the claim, although it had set out that there were several reasons why it did not consider the claim should be met. The Investigator therefore only considered what she thought was the most critical reason relied on, which is that the policy is a “*claims made*” policy, which means that the claim would need to be made while Accelerant was on risk.

The Investigator said that although S Ltd contacted Accelerant in July 2021 about leaks, it only acquired third party rights under the Act in 2022, after the policy ended, so could not have raised a claim during its period of cover. And in July 2021, M told Accelerant there were issues with the roof but it had insurance backed warranty for the roof and was not notifying it of a claim.

S Ltd does not accept the Investigator’s assessment. It says that the matter is complex and Accelerant cannot use M’s failure to comply with policy terms arising from its insolvency as a defence. Accelerant was notified of the potential claim during the policy cover and should have carried out further investigations as a result. The decision not to do so and the responsibility not to investigate the claim rests with the insurer. Any reasonable party would want to know why there was conflicting requests made of the insurers.

S Ltd says that the Third Parties (Rights Against Insurers) Act 2010 is designed to make life easier for third parties and transfers the insured’s rights automatically on insolvency, and removes the need to establish the insured’s liability first through separate proceedings (although it says it has done this in any case through the adjudication).

As the Investigator was unable to resolve the complaint, it has been passed to me.

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 am mindful of the impact this matter has had on S Ltd. However, having considered the matter very carefully, I do not intend to uphold the complaint. I will explain why.

The policy in question ran from 28 August 2020 to 28 August 2021. The policy provided M with indemnity against liability for damages and costs arising out of “*the conduct and execution of the Professional Activities and Duties first made against you and notified to us during the Period of Insurance for... negligence ...*”. It also stated that:

“The foregoing indemnity extends to include liability which you may incur in respect of any Claim or Claims first made against you during the Period of Insurance as a result of any:

1. decision by an adjudicator appointed to resolve a dispute in accordance with the Scheme for Construction Contracts as contained in the Housing Grants Construction and Regeneration Act 1996 or an adjudication clause or rules contained in a contract”.

S Ltd says that because it has obtained an adjudication in its favour, this amount should be paid by Accelerant. However, Accelerant is entitled to rely on the policy terms, save for any that M could not comply with because of its insolvency.

The cover under the policy is, like all insurance, subject to various terms and conditions. This policy is also a “*claims made*” policy. As stated above, it covers claims made against M and notified to Accelerant during the period of insurance. The policy also states:

“This is a “Claims made” insurance Policy This insurance covers only Claims or losses made and notified to us during the stated period of insurance (please refer to The Schedule)...

If during the Period of Insurance you become aware of any circumstance which might reasonably be expected to lead to a Claim against you you must give written notice of such circumstance to us as soon as reasonably possible irrespective of either your views as to whether such Claim will succeed or as to whether the amount of the Claim will exceed your Contribution. All circumstances must be notified to us prior to the expiry of the Period of Insurance. Any Claim that materialises from any circumstance notified to us in accordance with this Condition shall be deemed to have been made in the Period of Insurance”.

It is therefore clear that any claim had to be notified to Accelerant during the policy period (*i.e.* August 2020 to August 2021), otherwise it will not be covered.

Accelerant says the policy provides (and contract law would support) that the policyholder only can notify a claim and the contract specifies that no other party can enforce the contract and S Ltd’s rights under the Third Parties (Rights Against Insurers) Act 2010 only accrued after M was wound up, which was after the policy had already ended. It says that only M could notify a claim before the end of the policy, and M specifically stated there was no claim to be made.

I think that is correct. However, I also have to consider what is fair and reasonable in all the circumstances and therefore have also considered whether S Ltd’s correspondence in July 2021 could reasonably amount to notification of a claim.

S Ltd’s representative wrote to Accelerant in July 2021 and said there had been successive leaks that had damaged the building and “*the cause is unknown and we have asked ... [M] to notify you of a potential claim and we are not certain if they have done so.*

We ask that you contact them asap to ensure that all steps are being undertaken to identify the cause of the problem and to take effective steps to remedy the leaks”.

Accelerant says that S Ltd’s email only referred to a potential claim and made no allegation against M that it would be responsible and there was nothing in that email to mean it should reasonably expect a claim to arise. It therefore does not accept this was a valid notification of a claim or circumstances that might reasonably be expected to lead to a claim against M.

I think it is implicit in S Ltd.’s email that it thought that M was liable for the leaks. However, I agree there was no mention of the roof, the plumbing or the electrics.

Accelerant did contact M following this and M stated on 8 July 2021 *"I have been instructed by the directors (cc'd into this email) of [M] ... to acknowledge your email and to confirm that this is not a matter we require our Professional Indemnity insurers to investigate ..."*.

S Ltd says Accelerant should have investigated the matter then and sought answers to why it had received these conflicting communications. M had not started liquidation proceedings at the time and was the policyholder. Given that at the time S Ltd did not have any right to lodge a claim itself and that M explicitly said it did not want to lodge a claim, I do not think Accelerant acted unfairly here. And I do not think the communication from S Ltd was enough to say that Accelerant had been notified of the claim. I think the email said there were leaks and asked Accelerant to make sure M took steps to rectify the leaks. I do not think this is sufficient to be considered to be notification of circumstances that might reasonably be expected to lead to a claim against M.

In December 2021, S Ltd wrote to Accelerant again to formally submit a claim for design and workmanship and that it was seeking to hold M responsible. Accelerant says this letter was the first notification of a circumstances that might reasonably be expected to have led to a claim. And this was outside the policy period.

The Act provides that an insurer may not rely on the fact that the insured has failed to comply with a condition or warranty in the insurance contract, if the failure occurred because of the insured's insolvency. However, failure to notify the claim in the period of insurance was not due to the liquidation proceedings, as these did not commence until almost a year later. In addition, the Act says that while an insurer cannot rely on conditions that the insured could not comply with due to its insolvency this did not include *"a condition requiring the insured to notify the insurer of the existence of a claim under the contract of insurance."*

Having considered everything carefully, I do not therefore consider that Accelerant has acted unfairly in refusing cover for this reason.

In case, for the sake of argument, I am wrong about this, I have also considered Accelerant's point that the claim would also be excluded for breach of the condition requiring M to notify it promptly of any adjudication proceedings.

The relevant part of the policy states:

"Notification of Adjudications

You shall as a condition precedent to your right to indemnity in respect of any adjudication for which indemnity is available under 1.2 Scope of Cover (1. a, b and c) a) notify us within 2 working days of receipt of any notice of intention to adjudicate notice of adjudication referral notice or any adjudication notice pursuant to contract b) not serve any of the notices referred to in Claims Condition 2a) above without our prior written consent unless in your considered opinion service of those notices would not reasonably be expected to give rise to a Claim against you

We will have no liability under 1.2 Scope of Cover (1. a, b and c) in respect of any matter which you do not notify to us in accordance with the requirements of this Condition."

The notice of adjudication was served on M in August 2022 and it – or the liquidators on its behalf - had two days to notify Accelerant of that.

S Ltd says that this condition cannot be relied on as it was not complied with due to M's insolvency. Accelerant says it was not dissolved at this point (and still isn't formally dissolved).

The Act says that S Ltd's rights under the policy "*are not subject to a condition requiring the insured to provide information or assistance to the insurer if that condition cannot be fulfilled because the insured is—*

(a) an individual who has died...

(b) a body corporate that has been dissolved... or

(c) an unincorporated body, other than a partnership, that has been dissolved..."

M had started liquidation proceedings but it was not dissolved in August 2022 and so it was were in a position to notify Accelerant of the adjudication. I am also satisfied that breach of this condition will have caused prejudice to Accelerant because, as a result, it did not have the opportunity to provide representations to the adjudicator. The policy provides cover for defence costs and provides Accelerant with the right to take over and defend any claim against M. Because it was not notified until after the adjudicator had made their decision meant it was not able to do these things and therefore its position was prejudiced.

I therefore consider that Accelerant was entitled to rely on this condition to refuse the claim as well.

I do not think I need to make a finding about the other reasons that Accelerant has relied on in order to fairly determine the outcome of the claim. I say this because, in line with what the investigator has said, I have already determined that the claim is not covered for the reasons given.

Finally, S Ltd also complained that Accelerant did not provide its reasons for refusing the claim initially. As the investigator has already said, it should have provided its reasons sooner than it did. I agree with the investigator however that the reasons were provided and S Ltd has had the opportunity to consider and respond to them. As I think Accelerant was entitled to refuse the claim, I do not think this has not made any difference to its position and do not intend to ask Accelerant to do anything in this regard.

My final decision

I do not uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask S to accept or reject my decision before 5 March 2026.

Harriet McCarthy

Ombudsman