

The complaint

G, a limited company, complains HCC International Insurance Company Plc (HCC), turned down a claim it made on its public liability insurance policy. G is represented in bringing the complaint by its director, Mr D.

What happened

G contracted with a company (M) to provide labour services. In January 2020 an accident took place on a construction site where it was providing services. Sadly that resulted in the death of a worker and serious injury to another. Mr D says at a meeting with M later that month he was told it would cover legal costs relating to this. A solicitor was instructed to represent G at the start of March.

In June 2021 HCC were notified of the accident by solicitors acting for M. It reviewed matters and told G in November it wouldn't be providing any cover. That was because G's policy said it should be notified of any incident that may give rise to a claim under the policy as soon as reasonably practicable. But in this case it hadn't been told about the accident until around 17 months after it had taken place.

In August 2022 (around six weeks prior to an inquest hearing) G was told M would no longer be covering its legal costs. Around the same time it received correspondence from solicitors acting for the deceased worker saying they were instructed to claim damages and asking whether liability was conceded or denied. G paid for its own representation at the inquest and asked HCC to reconsider its position on funding for the claim that had been brought against it. HCC said its position was unchanged.

Our investigator said it was reasonable for G to think its legal fees relating to the incident would be covered by M as that's what it had been told. Once it became aware funding had been withdrawn it told HCC about the claim. So he thought G had met the requirement in the policy to notify HCC as soon as reasonably practicable of any incident that may give rise to a claim; G didn't know the incident would give rise to a claim on its policy with HCC until the funding provided by M was withdrawn. He thought the claim should be accepted by HCC and set out what else he thought it needed to do to put things right.

G agreed with his outcome. HCC didn't. In summary it said:

- When considering late notification the question was whether a reasonable person would have considered that a claim against them was possible. In this case one person had died and another had been seriously hurt and it was clear Mr D needed legal representation. And the claim hadn't in fact been notified to it by G; it only became aware of it following a notification from the solicitors acting for M.
- M might have agreed to cover the cost of 'legal investigations' but there was no commitment made to indemnify G against a civil claim (which hadn't been made at that time). Even if such a promise had been made there was no guarantee M would have been able to deliver on it and its insurers hadn't made any undertaking to it.

- It didn't think the distinction between cover for legal fees to do with the inquest and related matters and cover for a civil liability claim was one a layman would have difficulty understanding. And G must have been aware of the risk of incurring such a liability in order to decide it needed public liability insurance.
- It also thought it had been prejudiced by the late notification. While evidence had been gathered as part of the inquest this wasn't the same as an insurer having the ability to undertake its own investigations at the time of the incident. And the purpose of the inquest was to establish the cause of death and not whether there might be a civil liability for that death.

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

The relevant rules and industry guidelines say HCC 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 G's policy. That does provide cover against the insured's "liability to pay Damages (including claimants' costs fees and expenses) and Defence Costs in respect of...accidental Bodily Injury to any person". But that's subject to the other terms and conditions of the policy and the one HCC has relied on to turn down the claim is that relating to notification.

On that the policy says "The Insured shall give written notice to [policy administrator] as soon as reasonably practicable of any incident that may give rise to a claim under this Policy and shall give all such additional information as [policy administrator] or the Insurer may require..."

In this case the accident took place in January 2020. It doesn't appear G contacted HCC directly about this until 18 November 2022. Prior to that G received a claim from solicitors acting for the deceased on 9 August 2022. They said "please note that your Insurers will need to see this letter as soon as possible". I understand it was around that time G was told the funding that had been provided via M would be withdrawn. So there was then a three month period from when G was aware a claim had been made against it, and funding had been withdrawn by M, before it contacted HCC. On those facts alone I'm not persuaded G has met the notification requirements set out in its policy.

However, the matter is complicated by the fact HCC was clearly already aware of the accident because solicitors acting for M contacted it about this in June 2021 (and its representatives contacted G following that). I accept notification wasn't given by G but as HCC was nevertheless told about what had happened I think it would be fair to treat that as the date HCC was given notice of the incident. I don't think there's anything it would have done differently at that point if the notification had come from G direct.

But that's still 17 months after the accident took place. And the requirement in the policy is for HCC to be notified as soon as reasonably practicable of any incident that may give rise to a claim. Taking into account relevant case law, I think it's reasonable to say there should be a real rather than a fanciful risk of a claim being made on the policy. And that a reasonable insured would have understood there was a real risk of such a claim being made taking into account their knowledge of what happened.

G says it didn't think the accident would give rise to a claim on its policy with HCC because its legal costs were being covered through its agreement with M. And there was clearly contact between those parties after the accident and that resulted in solicitors being appointed to act for G. It does appear M (possibly through its own insurer) agreed to cover those costs.

But the evidence as to exactly what was said at the time, what costs were to be covered and for how long is limited. I understand those discussions took place during a meeting which I haven't been provided with any further information about. Correspondence following that meeting confirms solicitors will be appointed to represent G but doesn't go into further detail about what that's in relation to and what, if any, other commitments were made in relation to this.

However, even if I accept M agreed to cover G's legal costs in relation to the inquest and other health and safety investigations on an ongoing basis I haven't seen anything to show it was told this cover would extend to cover any future civil liability claims that were made against it. And I don't think that's something G could reasonably have thought would be the case; it had after all taken out insurance covering public liability with HCC to provide cover for claims of this nature

I appreciate that, as G says, it wasn't advised to contact HCC at the time. But I don't think a reasonable insured should need to have been told that. An accident had taken place which resulted in the death of one worker and serious injury to another. I accept G didn't think it was responsible for this and I understand no blame was apportioned to it by the subsequent inquest. But I think the circumstances of the accident and its consequences would in and of itself give a reasonable insured grounds to think there was a real (rather than fanciful) chance of it needing to make a claim under its public liability policy.

So I think HCC is right to say the incident wasn't notified to it in line with the policy terms after it took place in January 2020. And the policy says the notification requirement is a condition precedent to the insurer's liability to provide cover under the policy. That means the legal position is HCC doesn't need to show how non-compliance with the condition has adversely affected (prejudiced) its position to turn down the claim.

But that isn't the only issue I need to consider. I understand the legal position as it applies to a condition precedent. However, our remit is wider than that and requires me to also take into account what's fair and reasonable in all the circumstances. I think the question of whether HCC has been caused prejudice by late notification is relevant when considering what's fair and reasonable.

HCC has explained what the impact of the late notification has been. And I think it's fair to say it has lost out on the opportunity to undertake its own investigation of what happened at the time the incident occurred. I appreciate evidence was gathered as part of the inquiry process for the inquest but that was for a specific purpose which is different to the inquiries HCC might have undertaken in preparation for the defence of a civil claim.

So while I accept that formal action in relation to that claim wasn't taken against G until after HCC was aware of the incident I do think it's shown that the 17 month delay in it becoming aware of this prejudiced its position. Taking into account that the notification clause is a condition precedent I think HCC has acted correctly and fairly in turning down the claim G made on the basis that condition hadn't been complied with.

Responses to my provisional decision

HCC didn't respond. Mr D (on behalf of G) confirmed he'd received the provisional decision and was very disappointed by the outcome but didn't have any further evidence to provide.

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.

As neither party has provided any further information for me to consider I don't have any reason to change the findings I set out in my provisional decision.

My final decision

I've decided not to uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask G to accept or reject my decision before 10 January 2024.

James Park
Ombudsman