

The complaint

Mr L complains about how AXA Insurance UK Plc settled his claim on his commercial insurance policy.

What happened

Mr L had a smallholders and landowners insurance policy with AXA to cover his farm and outbuildings. In November 2020 there was a fire in an outbuilding that destroyed the entire structure. He made a claim on the insurance.

AXA sent out a loss adjuster to the site shortly after the fire. However it discovered a potential problem with the sum insured for the outbuilding. This required two further visits in the months that followed.

By June 2021 Mr L still hadn't had confirmation of how his claim would progress and he made a complaint to AXA. It didn't respond in the required time so he asked this service to investigate.

Our investigator contacted AXA to ask it to confirm its decision on the claim. After a few months it confirmed that while the outbuilding was underinsured, it didn't think a qualifying misrepresentation had occurred under the Insurance Act 2015. However it said the policy contained an 'average condition' and so it would reduce the claim value proportionately based on the amount it was underinsured by.

Our investigator considered this but didn't think AXA had acted fairly. He said that the Insurance Act 2015 allows a proportionate settlement if there has been a qualifying misrepresentation. However as AXA had confirmed there hadn't been a misrepresentation under the act, these supersede any policy conditions, so he didn't think it fair for AXA to settle the claim proportionately. He therefore recommended AXA pay the claim in full, in line with the remaining(?) policy terms and conditions.

Our investigator said the settlement should be based on the cheapest of two quotes for the work to rebuild the structure that Mr L was to obtain. He said AXA should pay 8% interest on this from January 2021 until the date the settlement was paid. Further, he identified eight months of delays caused by AXA that could have been avoided and recommended it pay £750 compensation to make up for these.

Mr L accepted our investigator's opinion. However AXA didn't. It said as there was a policy condition that allowed it to apply an average, it wasn't fair or reasonable for our investigator to find that this could not be applied. It also didn't agree with the interest it had been asked to pay. However it accepted our investigator's recommendation of £750 compensation. It asked for the complaint to be reviewed by an ombudsman.

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.

AXA says that Mr L was underinsured, as the value of the outbuildings covered in the policy was significantly less than the true re-build cost. Because of this, it's said it will apply the average clause in the policy and offer a proportionate settlement.

When considering a complaint where the under insurance is alleged, I must first consider whether there has been a qualifying misrepresentation under the relevant law. Mr L's policy is a commercial one so the law that applies here is the Insurance Act 2015.

Under the act a commercial customer has a duty to make a fair presentation of the risk to the insurer. In order to fulfil a fair presentation of risk, the act says a commercial policyholder must disclose everything they know, or ought to know, that would influence the judgment of an insurer in deciding whether to insure the risk and on what terms. If it is found that they didn't fulfil this duty then in order to say there has been a qualifying misrepresentation, the insurer needs to show that it would have either not offered the policy at all, or offered it on different terms.

Often when it comes to underinsurance, the insurer will show that if the full value had been declared then the policy would have been more expensive. In these instances the Insurance Act allows the insurer to settle a claim proportionately, based on the proportion of premiums paid, against what the policy should have cost.

In this case AXA has said that it doesn't think a qualifying misrepresentation has occurred. While it hasn't offered any further detail as to why, this means that it either thinks Mr L presented the risk fairly, or that it would have made no difference to the policy cost or terms. So even if it considers Mr L didn't make a fair presentation of the risk when he took out and renewed the policy, the evidence I've seen suggests that it wouldn't have made a difference to the policy it offered, and therefore its subsequent obligations in the result of a claim. For this reason, I don't think it's fair that Mr L's settlement has been reduced.

Further, the remedies laid out in the Insurance Act supersede policy clauses. And AXA would've been aware of these remedies when it wrote the terms of its contract with Mr L. And under the act where there hasn't been a qualifying misrepresentation, I don't think it's fair or reasonable for AXA to reduce the claim settlement, when the relevant law doesn't offer this as a remedy. Even though there is a policy clause.

I have also considered Mr L's comments about the significant increase in the cost of building materials in the months before the incident due to a number of factors, including Brexit. And in AXA's Loss adjuster's report of May 2021 it states as follows:

"We are aware due to the nature of the current market and significant factors such as Brexit and the COVID pandemic lockdown that the cost of materials has increased substantially over the last year especially insulation materials. Lead-in times for contractors to commence works have been extended due to the unprecedented demand for construction works at this present time. Therefore, we suggest that any rates and costs are very fluid due to fluctuations in the market conditions and costs."

This suggests that the difference in the true rebuild cost and the sum insured is at least in part due to the large increases in costs of building materials. And because of this I don't think it's fair to penalise Mr L for these sharp increases. As I can't see that he could have done anything more when taking out and renewing the policy to ensure he got a full settlement.

I understand AXA strongly disagrees with this position. It says the decision means insurers

would never be able to rely on an average clause in the policy. However when making a decision I have to consider the merits of the individual case. This includes taking consideration of policy conditions, the relevant law and what's fair and reasonable. And when considering everything here, I don't think AXA has acted fairly by applying the average clause in this instance.

Putting things right

For these reasons, I agree with our investigator that AXA should settle Mr L's claim based on the cheaper of two quotes he is to obtain for the rebuild, in line with the relevant policy terms and conditions but without applying the average clause.

Our investigator said that 8% interest should be added to the settlement amount. Since the decision came to me, I've explained to both sides why I don't think this would apply here. As this would only apply if Mr L had already paid for the repairs, to make up for the time he had been without the money. I therefore won't ask AXA to pay interest on the settlement amount.

Finally our investigator recommended AXA pay Mr L £750 compensation to make up for the delays and poor service. Both sides have accepted this amount so I see no reason to depart from our investigator's recommendation.

My final decision

For the reasons I've given, I uphold Mr L's complaint and require AXA Insurance UK Plc to:

- Settle Mr L's claim based on the cheaper of two quotes he is to obtain for the rebuild, in line with the remaining policy terms and conditions (such as an excess) but without applying the average clause.
- Pay Mr L £750 compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 14 January 2022.

Sophie Goodyear
Ombudsman