

## The complaint

Mr G complains on behalf of his son that AXA Insurance UK Plc has unfairly reduced his claim for damage from an escape of water under his landlord's insurance policy. I have just referred to Mr G throughout.

## What happened

Mr G took out a policy with AXA in June 2020. Following a leak in November 2020 he claimed to AXA for the water damage. He said the floors and kitchen of his property had to be removed and redecoration was required.

AXA appointed loss adjusters to progress the claim. It said the loss adjusters assessed what it would cost to rebuild the property if the right amount of cover was taken for the policy. AXA said for these policies it is informed by the policyholder or representative of an amount that it would cost to rebuild the property and it had recorded an amount of £100,000 for this.

AXA said if at the time of loss the cost to rebuild has increased the policy allows for an uplift as long as the 'Declared Value' was sufficient when given. But it said the Declared Value wasn't sufficient and it applied the 'Average' to settle the claim. Average is the term used to assess the difference between the cost of damage, and what will be paid due to the under-insurance. AXA said if this was disregarded it would be acting outside of the policy and Mr G would receive more than his entitlement. The claim was settled according to the assessed under-insurance at 31%. AXA paid Mr G £25 for the time taken to deal with his complaint.

Mr G said he hadn't provided his broker with a rebuild sum as they said AXA would provide this from building information. He said AXA had put the sum as £150,000 and reinstatement value of £100,000. He said the repairs weren't a complete reinstatement only remedial works and shouldn't fall under this part of the cover. Mr G said the property has been empty since 5 November 2021 and is un-rentable due to the claim not being settled. He said there's loss of rent at £800 per month and council tax payable as the council charges for vacant properties. He wants AXA to pay the £16,450 quote to refurbish the damage, less any excess, and pay for loss of rent for the period until refurbished. Mr G brought the complaint to AXA.

In response to Mr G's complaint AXA said the claim was notified after Mr G had discovered damage to the property following the tenant vacating the premises. It confirmed that Mr G's property is under-insured for rebuild purposes and it refused to pay the cost of the cheapest quote for the refurbishment. AXA shared the calculations of the under-insurance.

Mr G brought his complaint to us. Our investigator recommended the complaint be upheld. She said AXA provided Mr G with adequate information to work out the correct Declared Value of the property and the amounts were provided to AXA rather than set by AXA. She said the property was under-insured and AXA calculated the proportionate settlement. But she didn't think the average clause should be applied as the Insurance Act precedes the contract terms and AXA should consider whether there was a qualifying misrepresentation and take the appropriate action under the Act. The investigator said she was satisfied there's been a qualifying misrepresentation because the wrong information was given by Mr G. She thought that as AXA hadn't applied the remedy in the Act it hadn't treated Mr G fairly.

The investigator thought that AXA had fairly reimbursed £2,000 of rent for the period from December 2020 to September 2021. She said AXA should reimburse council tax whilst it was vacant as the repairs weren't carried out in time for the property to be rented out.

Mr G agreed with the investigator, but AXA thought the application of the average clause to the claim was fair. AXA said the purpose of the Insurance Act concerning proportionate remedy is for this to be applied where a material fact has not been disclosed. It said it applied the average clause as this is a contract term that is specific for sums insured and shows policyholders the importance of obtaining adequate cover.

AXA said it isn't seeking to apply a proportionate remedy on grounds of misrepresentation of the sum insured, but to use the average clause as its satisfied the policyholder acted to the best of their knowledge and belief. It said our service's guidance indicates that insurers can rely upon average clauses in these cases and it's irrelevant whether they took reasonable steps to avoid misrepresenting the rebuild costs of the property as it was under-insured and it was their responsibility to ensure this was not the case. AXA said it would reconsider reimbursement of the council tax for the period of December 2020 to September 2021.

AXA requested the complaint be referred to 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.

Mr G has a landlord insurance policy covering a single property for which he is the landlord. Although this is a commercial policy, I don't view Mr G as an experienced business policyholder, and I've seen nothing to suggest he was experienced in calculating rebuilding costs. I can see from the policy that the building reinstatement value of the property has been set at £100,000 and the building sum insured at £150,000. These figures were shown on the quotation AXA sent to Mr G before the policy started.

I've looked at the questions AXA asked of Mr G and the information it provided in order for him to advise AXA of the rebuild or Declared Value of his property. I think this information was clear and sufficient for the purpose. Mr G was asked what the cost of reinstating his building would be. He said he didn't provide the figure of £100,000 recorded by AXA and it may have been provided by his broker. But I've seen nothing to show that AXA completed the Declared Value on to the policy as opposed to recording the values with which it was provided. AXA provided an explanation of what was required here as the cost of rebuilding the property together with all professional fees. This values on the policy were available for Mr G to check and correct if he had wished.

AXA has applied the average clause in settling Mr G's claim, explaining that this is the policy term used to calculate the difference between the cost of the damage, and what will actually be paid out due to the under-insurance. The policy term states:

*'if at the time of damage the declared value of the property you are claiming for is less than the cost of reinstatement at the start of the period of insurance, our liability for any damage will be proportionately reduced and will be limited to the proportion that the declared value bears to the cost of reinstatement.'*

I note what AXA says about the policy, but I think the applicable rules in this case come from the Insurance Act 2015. This places a duty on the insured to make a *'fair presentation'* of the

risk to the insurer when taking out an insurance contract (a policy). This means Mr G had to disclose either:

- everything he knew, or ought to know, that would influence the judgment of an insurer in deciding whether to insure the risk and on what terms;
- enough information to put an insurer on notice that it needs to make further enquiries about potentially material circumstances.

The Act has brought about changes in the way in which misdeclarations of the risk of commercial insurance are to be treated, and that includes the value of the risk to be covered. The Act states that if the insurer would have entered into the contract but at a higher premium it may reduce proportionately the amount to be paid on a claim and sets out the calculation for this.

AXA has reflected this approach within its policy terms, stating:

*'if the failure to make a fair presentation of the risk is not deliberate or reckless and we would have issued cover on different terms had you made a fair presentation of the risk then we can:*

*a) reduce proportionately any amount paid or payable in respect of a claim under your policy using the following formula. We will divide the premium actually charged by the premium which we would have charged had you made a fair presentation and calculate this as a percentage. The same percentage figure will be applied to the full amount of the claim to arrive at the proportion of the claim to be paid or payable.'*

I think this term applies where AXA can show that but for Mr G's failure to present the value of the risk correctly it would have offered cover at a different cost. AXA can then apply the remedy within the Act in respect of a *'qualifying breach'*. I don't think there's any doubt that the rebuild costs were misrepresented to AXA and AXA would have charged more premium had it been aware of the correct rebuild cost. I'm satisfied there has been a qualifying breach of the duty on Mr G to make a fair presentation of the risk.

The remedy available to the insurer under the Act depends on whether the qualifying breach was deliberate or reckless, or careless. AXA hasn't suggested that Mr G acted deliberately or recklessly. It's clear Mr G should have ensured that accurate information was provided to AXA on the rebuild costs, but I think this failure was careless rather than deliberate.

I've looked at the remedies available to AXA under the Insurance Act. The Act says that the insurer would need to consider what it would have done differently if not for the breach. It says that, *'if the insurer would have entered into the contract on different terms, the contract is to be treated as if it had been entered into on those different terms if the insurer so requires'*. The Act also says, *'if the insurer would have entered into the contract but charged a higher premium'*, the insurer should pay the claim – but it, *'may reduce proportionately the amount to be paid'*. The Act sets out that this proportion should be based on what premium the insurer would have charged if not for the breach.

And so, in conclusion I agree with the investigator that AXA should deal with Mr G's claim under the Insurance Act. And – as the Act reflects our long-established approach to misrepresentation cases - I think requiring AXA to follow the requirements of the Act in assessing the proportion of Mr G's claim to be paid, produces the fair and reasonable outcome in this complaint. I have reached this decision on the particular circumstances of Mr G's complaint and not with a view to extending this approach to all complaints concerning commercial insurance policies.

AXA has agreed to reimburse Mr G for the rent and council tax he incurred from December 2020 to September 2021, and I think that is fair. I also think it was fair for AXA to pay Mr G £25 for the small delay in its response to his complaint.

It is open to Mr G to bring a separate complaint against his broker should he wish to do so.

### **My final decision**

For the reasons I have given it's my final decision that the complaint is upheld in part. I require AXA Insurance UK Plc to settle Mr G's claim in accordance with the remedy set out within the Insurance Act 2015 dealing with breaches of the duty to make a fair presentation of the risk. As this is more than any payment in settlement for the claim that it has already made or calculated by use of the average clause then it can deduct this sum from the new settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 19 April 2022.

Andrew Fraser  
**Ombudsman**