

## The complaint

Mr and Mrs T are unhappy with how AXA Insurance UK Plc have dealt with a claim they made under their home insurance policy.

## What happened

Mr and Mrs T's house was flooded, and they contacted AXA to make a claim on their insurance policy.

AXA accepted the claim and sent out a loss adjuster to provide a report on the damage.

Concerns were raised that the property was underinsured, the property was insured at a cost to rebuild it of £700,000, but the loss adjuster felt the amount should be more in the region of £852,000. On this basis, AXA said the 'average clause' in the policy applied to Mr and Mrs T's claim. It said as they had only insured for approximately 82% of the property's rebuild value, it would only pay that proportion of the claim. AXA made a cash payment to Mr and Mrs T towards the repairs needed.

Mr and Mrs T complained to AXA but as it didn't change its position, they brought the complaint to this service. Our Investigator looked at the complaint and said he thought it should be upheld. The investigator referred to the Consumer Insurance (Disclosure and Representations) Act 2012 ("CIDRA") which sets out remedies an insurer can take should a misrepresentation take place at the point of sale. In this case, the rebuild value of the property. He said that as he thought Mr and Mrs T had taken reasonable care to answer the question asked about the rebuild value of the property, under CIDRA, AXA wouldn't be entitled to take any action to reduce the value of the settlement. It therefore wouldn't be fair and reasonable for it to apply the average clause in the policy which effectively goes against this.

AXA disagreed and asked for an ombudsman's decision. It pointed to long established case law which it said supports its position to apply the average clause to the settlement. It pointed out this clause is clear in the policy and isn't unusual. It said that it wasn't applying an average as a remedy for misrepresentation under CIDRA, but due to the fact the policy terms had been breached as the sum insured was not adequate.

## My provisional findings

I issued a provisional decision on 10 March 2022. In it I said I intended to uphold the complaint for the following reasons:

*"The issue I need to decide here, is whether AXA has acted fairly and reasonably in applying the 'average' clause of the policy to the settlement of Mr and Mrs T's claim.*

*I've taken into account the case law AXA has referred to; however, I note this takes into account the laws in place in the early 1900's and 1997. And I think it is fair to say the legal landscape has changed somewhat since then. My role allows me to make a decision based on what I believe to be fair and reasonable taking into account all the*

circumstances of the complaint. And, having done so, I think the complaint should be upheld.

I've looked at the question that Mr and Mrs T were asked –

“What is the cost of rebuilding the property?”.

Below that question is a further explanatory note which can be expanded out when clicked on which is titled “Quick guide to rebuild costs”. And, further information about “Things to consider” when reaching a figure. It goes on to say that if the individual doesn't know the rebuild cost of the property, they could use a calculation tool on a recognised website which would help to provide a figure to insure the property for.

Having considered the question asked, I think Mr and Mrs T are being asked to give their opinion or an estimate on what they think it might cost to rebuild their property. After all, until such action actually needs to happen the precise cost would be unknown. So, given an opinion is being requested, any incorrect or different answer given may not amount to a misrepresentation, so CIDRA, as cited by the investigator may not be appropriate to consider here.

In this case, Mr and Mrs T were unsure of the rebuild value of their property and therefore followed the directions given and used the recognised tool as directed by AXA in its explanatory note. They took measurements from the literature which advertised the house for sale and input those into the calculator. Mr T said he double checked a couple of the measurements to ensure accuracy and as they were correct, he felt comfortable using the rest of the measurements given.

The tool gives different values depending on the condition of the property, Mr T said he considered the property was in a reasonable condition so chose a value in the middle of the range. I think this was a reasonable approach to take, as Mr and Mrs T have acknowledged some parts of the property are older than others and naturally therefore had different levels of finish. A middle value therefore would seem a reasonable one to choose. It's important to note here also that the tool doesn't allow different ages for a property to be put in i.e. to recognise aspects of a property built at different times. This is relevant as AXA's calculation broke down the rebuild cost for different aspects of the property – something that wasn't available for Mr and Mrs T to do.

AXA has said Mr and Mrs T used the incorrect measurements for the property which is what caused the rebuild cost of the property to be incorrect. It says its surveyor measured the property differently and Mr and Mrs T had failed to include a feature which would be relevant to the calculation. This is what ultimately caused them to use a different value and be underinsured.

However, having considered the reasons given by Mr T for using the measurements he did, I think he acted reasonably in doing so and taking the further step of double checking them. He wouldn't have been an expert on all of the features AXA required in its calculation, so he could have only followed the advice he was given.

Having considered the question Mr and Mrs T were asked. And given the fact they followed the guidance given to use a recommended calculation tool and relied on the values that provided. I think they took reasonable steps to give an accurate estimate of the rebuild cost of the property. After all, that is all builders and or surveyors would also do - give an opinion on what they think the likely cost would be based on material costs at that time (which can vary), albeit they may also have more resources and knowledge available to them.

*I don't think as consumers, Mr and Mrs T would have been well equipped to provide a completely accurate estimate. This would have been a challenging task for them and therefore it would have been reasonable for them to follow any advice they were given.*

*Simply because a loss adjuster, who has more knowledge and expertise in the area later arrives at a different value, this doesn't automatically mean the answer that was initially provided by a consumer was an unreasonable estimate. Where a consumer has followed the advice they were given and, taken all reasonable steps to produce a reasonable estimate, they have fulfilled what the insurer has asked them to do. It therefore seems unfair they do not have their claim fully paid because an insurer considers another later estimate by someone arguably more experienced in being able to produce one, more accurate.*

*AXA has suggested that it provides a warning in its policy document that should it find a rebuild calculation has been quoted at less than what it believes it should be, then any settlement maybe reduced accordingly. While I accept the policy document does suggest this, it must be taken into account this literature is only provided after the sale has taken place. AXA by its own admission has confirmed it doesn't provide such a warning at the point of the sales process where the customer is asked to and guided to provide a rebuild valuation. In any event, based on what I have set out above, I'd question what a consumer would do differently at that point, if they'd already followed all the advice given.*

*AXA has argued that it has a contractual right to affect the average clause in the policy. Both parties entered into the contract willingly and therefore they are bound by the terms within the policy irrespective of whether they reviewed them beforehand. While this might be the strict legal position, and I will not make comment on this as it is not my place to do so. My role, as previously stated is to consider the matter and come to a decision that I think is fair and reasonable based on the circumstances of the complaint.*

*While I recognise the policy would allow AXA to take such action, and the case law it has pointed to supports that. For the reasons I have set out above, I don't think the application of average clause in the circumstances of this complaint provides an outcome that is fair and reasonable. And so, for the reasons stated above, I think AXA should meet Mr and Mrs T's claim in full. I understand it has already provided a cash settlement to Mr and Mrs T for part of the amount so it should pay the remaining amount to them plus interest at 8% simple per annum from the date it made the original payment, to the date it makes this settlement."*

## **Responses to my provisional decision**

Mr and Mrs T responded saying that accepted my provisional decision.

AXA said it disagreed with the decision and provided further points for me to consider. I have summarised them briefly below:

- The average term is clear in the policy documents and the insurance product information document that Mr and Mrs T would have received. It is also a well-established principle in English law, with case law supporting how the term has been applied in this instance.
- It reiterates it is only applying the average term as the sum insured was incorrect.
- The valuation was based on the square footage of the property and this was incorrectly given. As with all insurance policies, the onus is on the consumer to

provide the correct information.

- Mr T was clearly confused between the rebuild value and retail value of the property when he later spoke with a surveyor. And the surveyor recommended Mr T get his own survey done if he disagreed with the valuation AXA came to – however he did not do so.
- The valuation tool recommended provides a warning that says the value is provided based on minimal details about the property and that if the property has special or unusual features professional advice should be obtained. It further says it is the individual's responsibility to provide an accurate rebuilding sum for their property, but the estimated figure provided by the tool can be used to assist with that process.

### **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.

Having reviewed the further comments provided, I'm not minded to alter the outcome in my provisional decision.

As I acknowledged in my provisional decision, strictly speaking AXA is entitled to apply the average clause in the circumstances of this claim. However, I also pointed out that I make my decision on the basis of what I deem to be fair and reasonable having considered all of the circumstances of the case. And, as AXA is aware, this service treats each decision on a case by case basis.

It isn't in dispute the value Mr and Mrs T gave for the rebuild of the property was wrong, and that in part came from incorrect measurements being used. However, I still think, as I set out in my provisional findings that Mr and Mrs T took reasonable steps to give an accurate estimate based on the information they had and were provided with.

Following the recommended tool, a rebuild estimate was given and, Mr and Mrs T used that for insurance purposes. I acknowledge the tool also provides warning about giving accurate information, however I don't think this changes my decision here. Mr T would have still given the same estimate as he thought he was acting correctly, double checking the measurements and following the advice given so as not to make an error.

The fact Mr T later became confused about the difference between a rebuild valuation and retail valuation, or the fact he didn't instruct a surveyor of his own to challenge AXA's rebuild value later in the claims process, aren't factors that are relevant to my decision. As they both happened after the event in question – the point Mr T provided the rebuild estimate.

Having reviewed everything, I remain of the opinion that I don't think the application of average clause in the circumstances of this complaint provides an outcome that is fair and reasonable. And so, for the reasons stated above, and in my provisional decision, I think AXA should meet Mr and Mrs T's claim in full.

### **Putting things right**

As AXA has already provided a cash settlement to Mr and Mrs T for part of the claim amount, it should pay the remaining amount to them plus interest at 8% simple per annum from the date it made the original payment, to the date it makes this settlement.

**My final decision**

My final decision is that I uphold Mr and Mrs T's complaint against AXA Insurance UK Plc.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs T and Mr T to accept or reject my decision before 27 April 2022.

Alison Gore  
**Ombudsman**