

The complaint

Mr W has complained that AXA Insurance UK Plc ('AXA') declined a claim under his previous home insurance policy following a wall collapse which damaged his home.

What happened

In January 2021, Mr W experienced a traumatic event when a large section of wall to the rear of his home collapsed, resulting in a large accumulation of stone and earth to the rear of the property. The debris broke through the back door and into the utility room, causing damage.

Mr W reported the matter to his current home insurers. The insurance company advised Mr W to register the claim with AXA under the Association of British Insurers Domestic Subsidence Agreement ('DSA'), as a potential landslip occurrence. Mr W's AXA policy had covered the period 1 January 2020 to 31 December 2020.

Mr W then contacted AXA who advised that if this was a sudden collapse then it was likely the claim should be pursued through his current home insurers, but asked Mr W to send photographs of the damage. Mr W then instructed experts to try to determine the cause of the wall collapse and propose solutions for the repair.

Mr W contacted both insurers at the end of March 2021, asking them to '*sort it out*' as both had declined the claim. AXA appointed loss adjusters to determine if a landslip had occurred and to determine if the claim was covered under the DSA guidelines. Having reviewed the photographs produced by Mr W's experts AXA concluded that the damage was due to the sudden failure of a retaining wall and that the DSA didn't apply in this instance. Mr W disagreed with this conclusion and considered that AXA should complete a further investigation. AXA's loss adjusters declined a site inspection but agreed to consider any further evidence.

In July 2021, Mr W submitted two expert reports to AXA for consideration. AXA took the view that the reports confirmed that the cause of damage was due to collapse of the wall, not a landslip or subsidence. It didn't think that the event was covered under the DSA and Mr W's AXA policy. Mr W complained to AXA, however it declined to uphold the complaint.

Mr W was dissatisfied as he considered that AXA should refund the cost of debris clearance and the expert reports and he complained to this service. Our investigator didn't uphold the complaint. It was the investigator's view that, having considered Mr W's expert reports, the damage wasn't caused by a landslip. He said he couldn't say AXA was wrong to decline the claim or that the DSA guidance should be invoked.

Mr W remained unhappy with the outcome of his complaint and he believed the prime responsibility remained with AXA. The matter was therefore referred to me to make a final decision in my role as Ombudsman. In March 2022, I issued my provisional decision for this complaint and explained why I was minded to uphold Mr W's complaint as follows; -

'The two issues for me to determine are firstly, whether AXA acted in a fair and reasonable

manner in concluding that the collapse of the wall wasn't caused by heave, landslip or subsidence. Secondly, whether it was fair and reasonable for AXA to rely upon the DSA to decline to deal with Mr W's claim. I consider that it didn't act fairly and reasonably in both respects for the following reasons.

Mr W's home insurance policy with AXA was no longer in force when the incident occurred at Mr W's property in January 2021. The DSA sets out which insurer should deal with heave, landslip and subsidence-related claims which straddle two periods of insurance and two policies. Where a relevant claim is made eight weeks or less after the start date of a new policy, the previous insurer is expected to deal with that claim when it's more likely than not that the movement that caused the damage started before the incident. The guidelines suggest that the DSA applies even if there's no evidence of damage caused by subsidence, heave or landslip occurring over the course of both policies. The exception to this is where 'the damage is due to a sudden subterranean event.'

The first issue for me to consider is the wording of the AXA home insurance policy in the light of the findings of the expert reports obtained by Mr W. The policy terms and conditions include the following relevant definitions; -

'Heave' The upward or sideways movement of the site on which your buildings are situated caused by swelling of the ground.

Landslip - Sudden movement of soil on a slope or gradual creep of a slope over a period of time.

Subsidence - Downward movement of the site on which the buildings are situated by a cause other than the weight of the buildings themselves.'

As to what is covered under the policy, this includes 'loss or damage including accidental damage to the buildings.' What is not covered includes 'loss or damage...to...garden walls...by subsidence heave or landslip unless the home has been damaged at the same time by the same cause'.

The definition of **'Buildings'** includes 'the structure of the home including fixtures and fittings and the following if they form part of the property... walls....',

Cover also includes 'the reasonable additional costs and expenses incurred as a result of a valid claim for damage to the buildings on this policy for:

1 architects, surveyors, consulting engineers and legal fees

2 the cost of clearing debris from the site or demolishing or shoring up the buildings...'

I now refer to the relevant reports. The report which Mr W obtained in June 2021 was from a firm specialising in ground conditions. It noted that a 2m section of the wall in question had partially collapsed and that it was in front of a steep 3m to 3.5m high slope. It stated that the cause of the wall collapse was unknown, 'however, it appears that the over steepened, cut face has been supported by a stone 'facing' rather than a true retaining structure... Walls and slopes often fail during the wetter, winter, months, when water pressures inevitably increase. No formal through drainage was noted. The inclusion of the concrete buttress and sloping concrete steps/terracing appear to have been constructed to provide additional, post construction, support.' The report went on to state that 'Such water pressures can have a destabilising effect' and also; 'The 'surcharge' from the tree, plus root action may well have had a destabilising influence.'

The report which Mr W obtained in July 2021 was from a firm of structural engineers. It noted that the wall collapse occurred between a buttress and an adjacent extension. It noted also that the wall was of dry-stone type construction and 'some form of binder had been used

between some of the stones but not all.’ The report stated that each terrace of stone wall was constructed on the soil behind the stonework of the wall below, meaning the wall was a ‘facing’ rather than a retaining wall. ‘In simple terms, the wall is not able to resist horizontal forces meaning it is not a retaining structure.’

The report goes on to say ‘The soil behind the wall is cut very steeply and above the natural angle of repose of the soil. This simply means that if material of this type is excavated to this steep slope and is left to weather naturally, it would after an undefined period collapse to an angle close to the natural slope angle. This angle is difficult to define without testing of the soil but broadly would be near 30 degrees. With the application of the facing stones and concrete protection on the surface these protect the soils from weathering but do not completely halt fully the risk that the soils will collapse.’

As to the reasons for the failure of the wall, the report states that ‘Many factors can affect the stability of a steeply cut slope including the natural faults in the soil, water penetration and trees. From the inspections it is not possible to determine if water (from the air or ground) has contributed to the collapse of the wall, but the tree roots located in the upper soil may have destabilised the wall stones by direct contact.’ It also states that ‘The facing wall has been provided to protect steeply cut natural soil which has moved due to some unknown mechanism. The construction of the facing wall is such that it was not able to support the horizontal forces caused by the soil and so failed.’ The report concludes that it’s not been possible to define what caused the soil behind the wall to move. It stated that, to determine what safe repair solution might work, intrusive geotechnical work was required.

Turning to what AXA says about the matter, it based its initial view that no landslide had occurred on a review of the photographs supplied by Mr W’s experts and considered that, in view of the DSA, it was a matter for the current insurers. As Mr W disagreed, AXA then appointed a firm of loss adjusters to validate the claim on its behalf. The firm didn’t visit Mr W’s property to inspect the damage, however it also reviewed this same information. It considered this sufficient to support the decision to decline the claim.

In conclusion, AXA considered that both reports supported its decision to decline the claim. I also note from its claim notes that AXA had taken the view that the photographs didn’t appear to show a landslide but instead, the collapse of the retaining wall. It said that it’s very likely that the collapse of the wall was due to increased hydrostatic pressure rather than landslide and it said that even if a landslide occurred, it considered it to be a sudden occurrence which occurred outside the policy period.

Looking at what Mr W says about the incident, he thinks that it’s clear from both expert reports that the soil moved suddenly, destroying a facing wall, causing damage to the back of his house. He said it was also worth noting that the experts had carried out detailed inspections on site, whereas AXA’s representatives had declined the opportunity to inspect. He said that it was important to note that the rear of the house was damaged at the same time as the collapse.

Mr W thought that the key finding in the June report was that the cause of the collapse was the failure of a facing wall, not the failure of a retaining wall and not a landslide. He also conceded that his structural engineers stated that the vertical nature of the slope means that it’s not a landslide cause. He says ‘The professionals are clear that landslide is not the cause. But they do not know what the cause is. The fact that no person we have spoken with knows what is the cause, is central to our argument, that the fall of soil and rock definitely happened, but cannot be definitely categorised nor dismissed. It is defined as one or another description, but without certainty.’ Mr W then provides definitions of ‘landslide’ from various sources and he said that there is no clear definition in practice.

He concluded that 'The question is whether the definition is met, not whether by using extrinsic evidence, the terminology is or is not apt'... We believe that AXA cannot point to any convincing evidence that the definition is or is not satisfied.' He says that there has firstly been a movement of soil, which was sudden and, at the same time, caused damage to his home. He considered it unnecessary for him to establish the underlying cause, because he said that AXA's policy wording didn't require this.

I've considered all of the evidence and submissions in this matter very carefully and I've had particular regard to the reports of the experts appointed by Mr W and the views of the loss adjusters appointed by AXA. My provisional conclusions in this matter are as follows.

The AXA policy booklet which contains the terms and conditions of cover is my starting point. In principle, the damage to the rear of Mr W's property and the garden wall would normally be covered by the policy (putting aside for a moment the issue that AXA is not Mr W's current insurer). This is because the cover includes loss or damage to Mr W's property including garden walls. The structural engineer's report confirms that the wall which collapsed was a facing wall as opposed to a retaining wall. It was nevertheless a garden wall within the curtilage of the home.

Damage to garden walls are covered in principle in cases of heave, subsidence and landslip under the policy wording. The policy doesn't however cover damage to garden walls 'unless the home has been damaged at the same time by the same cause'. I consider that if a landslip has occurred within the policy definition and that this damages the home, then damage to garden walls is included in principle under the terms of the policy.

As to the relevant definitions, regardless of other definitions, including industry definitions, the specific definitions of heave, subsidence, and landslip which I must consider are those contained in the AXA policy document.

AXA stated that it considered that the expert evidence showed that the collapse wasn't caused by a landslip. Unfortunately, however, this view was given without reference to the specific AXA policy definition of 'landslip'. Unless I'm persuaded otherwise by any further submissions or evidence, I'm satisfied that the specific definition of 'landslip' in AXA's policy terms and conditions describes the events which occurred in January 2021. It's necessary to give the definition wording its ordinary and straightforward meaning. The definition doesn't require a conclusive determination as to cause of any movement. Neither does it exclude circumstances where the cut face of the slope was 'over-steepened'.

'Landslip' is defined as 'Sudden movement of soil on a slope or gradual creep of a slope over a period of time.' Neither of the expert reports give a definitive view as to whether the cause of the wall collapse was sudden or gradual. What is clear however from the structural engineer's report, is that he considers the cause to have been due to the movement of soil; - 'steeply cut natural soil which has moved due to some unknown mechanism. The construction of the facing wall is such that it was not able to support the horizontal forces caused by the soil and so failed.'

AXA might, with some justification, argue that under the DSA if 'the damage is due to a sudden subterranean event', it wouldn't be expected to deal with the claim as it no longer insured Mr W at the time of the event. I've come to the provisional conclusion however that the damage is not due to a sudden subterranean event. On the balance of probabilities, I consider that the collapse of the facing wall occurred due to the gradual force of movement of soil or 'gradual creep' as per the policy definition.

The structural engineer noted that the existing slope had been cut steeper than is stable and I therefore consider it more likely than not that the 'horizontal forces' had built up over a

period of time. The June 2021 report on the ground conditions supports this conclusion; - 'slopes often fail during the wetter, winter, months, when water pressures inevitably increase.' The fact that movement of soil may be exacerbated by the presence of tree roots or water pressure over winter does not alter fulfilment of the ordinary and straightforward meaning of the definition of 'landslip' within AXA's policy, which includes 'gradual creep of a slope'. The fact that a gradual force can ultimately result in a sudden wall collapse, likewise doesn't alter this conclusion.

This provisional conclusion is also supported by the photographs provided in both reports. Given the original height of the wall and the amount of debris visible against the back of Mr W's house, the photographs show that the steeply cut soil slope moved and collapsed, so causing damage.

I appreciate that the structure was a facing wall rather than a retaining wall. In this specific case however, nothing in the expert reports indicate the collapse being primarily caused by the condition and construction of the facing wall itself.

I'm satisfied on a provisional basis therefore, that although the expert reports didn't come to a firm conclusion as to the reason for the failure, it was clear to the extent that the failure was due to movement of soil; 'natural soil which has moved due to some unknown mechanism'. In conclusion, unless I'm persuaded otherwise, the specific definition of 'landslip' in the policy is fulfilled in this instance on the facts and evidence.

I consider that it's more likely than not that the soil movement took place over a period of time, particularly over the winter months of 2020/2021 and that it was not caused by a sudden event nor indeed a 'sudden subterranean event'. This movement fulfils the definition of a 'landslip' in AXA's policy document. As the home was damaged at the same time by the same cause, then I consider the damage to be covered under policy.

I also consider that due to the expectations of the DSA document, it falls to AXA to handle this claim under the provisions of its policy. I therefore conclude on a provisional basis that it wasn't fair or reasonable for AXA to decline to provide cover to Mr W in the circumstances.'

In my provisional decision, I asked both AXA and Mr W if they had any further comments or evidence they would like me to consider before I came to a final decision.

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 provided further submissions in response to the preliminary decision. Firstly, it thought that it was inconsistent with decisions received from our service in similar cases. It also thought that the claim related to failure of a stone wall, which subsequently allowed supporting soils and rubble to collapse against the rear wall of the property. It thought that there had been no evidence of subsidence, heave, or landslip and that the DSA therefore didn't operate. It considered that the claim should have been diverted to the current insurers.

AXA referred to the report of Mr W's engineer and his comments that "*brief inspection of available online LIDAR information does not reveal additional evidence which is conclusive of extensive landslipping at this location*", and that, "*No landslipping is reported at or adjacent to the site,...*". AXA also considered that the slope stability analysis and site investigations had not identified landslip, even taking into account the steep nature of the cut slope.

AXA didn't think that Mr W's engineer presented evidence to support the occurrence of landslip, being silent on precise causation. In addition, it didn't consider that the policy definition of this mechanism was supported by the engineer's findings. It concluded that the ground had moved solely as a result of the wall's failure, *'and not under its own design or influence'*.

Finally, AXA was concerned that classing such damage as landslip would have broader implications across the claims it receives for failure of retaining walls where there is an inevitable shift of earth that follows.

Mr B accepted the provisional conclusions in full but added some comments. He stated that he'd been careful to handle his case in accordance with *'the rules'* set down by the AXA policy. He stated that; *'after such a long time period since the January 2021 incident, during which time we have had to live with the trauma of the event, with dust, dirt, draughts and inconvenience, we had just asked a structural engineer and a builder to clear the site and make safe, so they can proceed with wall repair.'* He said that he would proceed with the lowest priced quotation of three unless advised by our service or AXA to delay the work

I will deal with each of AXA's submissions in turn. As to consistency of the service's decisions, every decision is made on the facts of each specific case. In this instance, the very specific facts and the experts' conclusions have led to this particular outcome. It's appreciated that if the expert evidence had shown that this wasn't a landslip event under the terms of AXA's policy, the outcome may have been different. This is clearly not the case however and AXA hasn't produced further evidence which persuades me otherwise.

As to the DSA, I've explained within the preliminary decision why it was considered that it would operate in this specific case. This is linked to the finding of a landslip event and I won't repeat the detailed analysis at this point.

As to diversion of this matter to Mr W's current insurers, unfortunately I cannot consider the relative merits of a complaint against alternative insurers under their policy as opposed to that of AXA. The complaint under consideration is against AXA and I can therefore only consider the facts under the terms and conditions of AXA's policy and in the light of the DSA. I'm satisfied however that the evidence supports the decision to uphold Mr W's complaint against AXA as follows.

Turning to the crux of the matter and the findings of Mr W's engineer, I note AXA's reference to the fact that 'LIDAR' information didn't show *'conclusive'* evidence of *'extensive'* land-slipping and that no land-slipping was *'reported'* at or adjacent to the site [*My emphasis*]. However, this doesn't undermine the engineer's recorded view of the most probable cause being movement of soil, following his specific on-site investigations. The lack of previously reported or extensive land-slipping doesn't alter this conclusion. As explained in the provisional decision, the specific wording and conclusions provided by the engineer as to what he considered to be the cause of the collapse entirely fulfilled the specific wording and meaning contained in AXA's definition of *'landslip'*. There was no evidence to the contrary from other sources such as LIDAR.

I also note that AXA accept that the collapsed wall hadn't been designed as a retaining structure and didn't include formal weep holes. It considered however that the ground had moved solely as a result of the wall's failure. As recorded in the provisional decision; *'although the expert reports didn't come to a firm conclusion as to the reason for the failure, it was clear to the extent that the failure was due to movement of soil; 'natural soil which has moved due to some unknown mechanism'.* In summary, whilst I agree that there was a collapse of the wall, this wall was described by experts as a facing wall rather than a retaining wall. Crucially, the expert conclusion was that the collapse was caused by

movement of soil against the facing wall and not due to the failure of the wall itself, whether by design failure, under its own influence or otherwise.

AXA states that Mr W's engineer hasn't presented evidence to support the occurrence of landslip, the engineer being silent on precise causation. It's the case however that the expert provided a detailed analysis in his report and clearly concluded that the collapse occurred '*due to movement of soil*'. This is entirely consistent with being a 'sudden movement of soil on a slope or gradual creep of a slope over a period of time.' This is AXA's policy's clear and specific definition of '*landslip*' and this description of the landslip mechanism is therefore supported by the engineer's findings.

In summary, I'm satisfied that a landslip event took place in accordance with the wording of AXA's policy definition. I'm also satisfied as stated in the provisional decision, that as the home was damaged at the same time by the same root cause as damage to the wall, the policy terms and conditions are fulfilled and the damage is covered under the policy.

I note AXA's concern about broader implications in cases relating to failure of retaining walls. AXA accepts however that in this case, the wall was not designed and did not act as a retaining wall. This decision therefore turns on the specific facts and evidence in this case.

In conclusion, AXA hasn't produced any fresh evidence to persuade me to overturn the provisional decision. I've carefully considered AXA's submissions however I don't consider that these alter the position. I appreciate that AXA will be disappointed by the outcome and that it's an unusual case. The facts and evidence lead me to the firm conclusion however that the damage was covered under AXA's policy.

In all the circumstances, I've concluded that the provisional decision provides a fair and reasonable outcome to the matter.

My final decision

For the reasons given above, I uphold Mr W's complaint and require AXA Insurance UK Plc to settle Mr W's claim under the terms of the home insurance policy he previously held with AXA

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 25 May 2022.

Claire Jones
Ombudsman