DRN-3786027

The complaint

Mr H and Mrs P complain that Axa Insurance UK Plc (Axa) have proportionally settled their claim under their home insurance policy following a fire at their property.

For ease of reference I've referred to Mr H throughout as he is authorised to deal with this complaint on behalf of Mrs P.

What happened

Mr H took out home insurance with Axa in 2016. The policy was taken out online and policy documents were emailed to him. Renewal documents were sent to Mr H each year.

In June 2021 a self-contained annex built in Mr H's garden suffered fire damage and Mr H made a claim on his policy. Axa appointed a loss adjuster who valued the annex at £115,000. The policy limit for outbuildings, including the annex, was £7,500.

Axa accepted the claim but said that Mr H's claim should be settled on the basis of the "average clause" that is contained in the policy. This states that if the sum insured is not sufficient, the policy holder will be underinsured, and any claim will be paid proportionately. Axa obtained a quote for the repairs of £11,775.48 and offered settlement of £767.97 less the £400 policy excess.

Mr H complained to Axa as he said he told Axa about the annex and thought that it should be fully covered. Axa said that Mr H purchased the policy on a non-advised basis and that he was responsible for ensuring that he understood the policy and that it was suitable. They said their policy was clear and that Mr H had included outbuildings in his cover, but he'd stated that £7,500 was sufficient. As this was below the true value, they would apply the average clause.

Mr H brought his complaint to this service. Our investigator thought the claim should have been dealt with under The Consumer Insurance (Disclosure and Misrepresentation) Act 2012 (CIDRA). He concluded that Mr H's outbuildings were underinsured and there had been a qualifying misrepresentation but thought this was careless rather than deliberate or reckless. He said that as Axa would have still offered the policy but at a higher premium, the claim should be settled on the basis of a proportion of the premium paid which would amount to £9,797.76 less the £400 excess.

Mr H accepted our investigator's view but Axa asked for an ombudsman's decision. They said they are entitled to apply the average clause as it's a term of the policy and that it was Mr H's responsibility to check that the sum insured was sufficient.

My provisional decision

On 4 October 2022 I issued a provisional decision. I said:

"*Whilst my decision is in line with our investigators, I've issued a provisional decision as I've added interest which I think is payable on the settlement sum.*

My starting point is to look at the policy terms and having done so I accept that the policy contains an average clause. It says that if property is underinsured any claim that is settled will be reduced proportionately depending on how underinsured the property is. Axa have applied this clause and offered Mr H a proportionate settlement. I need to consider whether this was a fair approach.

When looking at a complaint where there is underinsurance, I must first consider whether there has been a qualifying misrepresentation under the relevant law - it doesn't matter that Axa haven't dealt with it as a misrepresentation. The relevant law in this case, as our investigator said, is The Consumer Insurance (Disclosure and Misrepresentation) Act 2012 (CIDRA). This requires consumers to take reasonable care not to make a misrepresentation when taking out a consumer insurance contract (a policy). The standard of care is that of a reasonable consumer.

And if a consumer fails to do this, the insurer has certain remedies provided the misrepresentation is - what CIDRA describes as - a qualifying misrepresentation. For it to be a qualifying misrepresentation the insurer has to show it would have offered the policy on different terms or not at all if the consumer hadn't made the misrepresentation.

CIDRA sets out a number of considerations for deciding whether the consumer failed to take reasonable care. And the remedy available to the insurer under CIDRA depends on whether the qualifying misrepresentation was deliberate or reckless, or careless.

Axa have been unable to provide Mr H's original policy application but I've seen an example of the online journey Mr H would have encountered in 2016. The online application says "Your policy includes £7,500 cover for rebuilding or repairing all detached outbuildings. Is this sufficient?" Mr H could answer yes or no and there is a question mark to click on for more information about what an outbuilding is. It is understood that Mr H answered yes to this question.

I've also looked at Mr H's renewal documents from 2021 and can see that outbuildings cover is clearly included and that the sum insured is £7,500. Mr H is asked to check this information is correct. Outbuildings are described in the policy booklet as "Fixed structures or buildings detached from the Home located within the Boundary that You are legally responsible for. Outbuildings include but are not limited to: detached garages, sheds, boundary or garden walls, fences, tennis courts, swimming pools, external car ports, driveways, patios, artificial lawns, septic tanks, soakaways or sewage treatment centres." The booklet also provides a diagram showing an example of the home, outbuildings, and boundary. The home is defined as "the main building within the Boundary of the Insured Address. Home does not include Outbuildings, items kept in an Outbuilding or items left in the open". I think it's clear from this that Mr H's annex was an outbuilding.

Mr H says that he told Axa about the outbuilding when he took out the policy. However, I'm aware that the policy was taken out online and on a non-advised basis, so it's not clear how Mr H provided this information. Axa also say that having checked their records there is no evidence of any calls from Mr H or Mrs P at the time of the policy or since.

Axa have valued the annex at £115,000 and I accept this is reasonable as it's based on an industry standard calculation. I'm therefore satisfied Mr H undervalued his annex. Axa say Mr H didn't exercise reasonable care when calculating the sum insured, and I agree. I don't think Mr H took reasonable care to ensure the information he provided was accurate. I say this because I think Axa provided clear information about what an outbuilding was and asked a clear question about the value of the outbuildings.

Axa have told us that had they known the true value of the annex they would still have offered cover, but at a higher premium. This means I'm satisfied Mr H's misrepresentation was a qualifying one.

I don't think Mr H deliberately or recklessly misrepresented the value of the annex but I do think he was careless. I say this because I think that it was a simple mistake by him rather than a deliberate attempt to underinsure his property. As I'm satisfied Mr H's misrepresentation should be treated as careless, I've looked at the actions Axa can take in accordance with CIDRA.

Under CIDRA, where there has been a qualifying misrepresentation and Axa would've still offered cover but with a higher premium, Axa should settle the claim proportionately taking into account what premium would've been charged had the correct insured value of the property been declared. Axa have told us that they would have charged £953.96 a year rather than the £793.74 that Mr H paid. Mr H's loss from the fire was £11,775.48. Settlement would therefore be calculated as: (premium paid / correct premium) x loss. This results in Mr H receiving £9,797.76 less £400 excess – so £9,397.76. If Mr H has already paid for the repairs, then it's also fair that he be paid interest at 8% to take into account the time he has been without the money. I ask Mr H to provide evidence to us of the date he paid for the repairs.

I understand Axa disagrees with the approach taken. They say it means they would never be able to rely on an average clause in a policy. They also refer to previous decisions and views issued by this service. My role, however, is to look at the merits of an individual case and come to a decision based on what I think is fair and reasonable in the circumstances of that case. When making my decision I've considered the case law Axa have referred to, but I note that it pre-dates CIDRA which came into force on 6 April 2013. I've taken into account Axa's comments, the policy conditions, 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 and I intend to uphold the complaint.

Response to my provisional decision

Mr H accepted my provisional decision. Axa did not respond.

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 new information, I see no reason to change my provisional decision. My final decision and reasoning are the same as in my provisional decision.

My final decision

I uphold this complaint and require Axa Insurance UK Plc to:

- pay Mr H and Mrs P £9,797.76 in settlement of their claim less the £400 policy excess; and

- pay 8% simple interest on the settlement sum from the date Mr H and Mrs P made payment to the date of settlement, upon receipt of evidence of the date the repairs were paid for.

If Axa Insurance UK Plc considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr H and Mrs P how much it's taken off. It should also give Mr H and Mrs P a certificate showing this if they ask for one, so they can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H and Mrs P to accept or reject my decision before 30 November 2022.

Elizabeth Middleton
Ombudsman