

## **The complaint**

G, a limited company, complains that AXA Insurance UK Plc unfairly declined a claim under their business protection insurance policy, and it caused delays in coming to this decision.

Where I refer to AXA, this includes its agents and claims handlers.

## **What happened**

As the detailed background of this complaint is well known to both parties, I'll only provide a summary of the key events here.

G has held business protection insurance for several years, which was arranged through a broker, who I'll refer to as "B". In 2019 and 2020, G was in dispute with one of their shareholders and legal threats had been made against them. They notified B who, in turn, notified the insurers.

In September 2020, B renewed G's insurance with AXA. B told G it had notified AXA of the ongoing dispute with the shareholder and assured G there was cover under the policy should a claim arise.

In February 2021, G made a claim to defend the legal action being brought against them by the shareholder.

AXA considered the claim, but in August 2021 it was declined. AXA said it hadn't been notified of the ongoing threats and, if it had, it would've added a specific matter exclusion to the policy for any claims caused by or arising from this shareholder. As G hadn't made a fair presentation of the risk at inception of the policy, AXA said it would treat the policy as if it had included the exclusion and decline the claim.

G were unhappy with this decision, as they disclosed everything to B who'd said it had been passed on to AXA. So there wasn't anything more G could've done. They were also unhappy with the length of time AXA took to make this decision. They want it to reimburse the legal costs they incurred during this time as, had they known the claim was going to be declined, they would've looked for a cheaper alternative to defend themselves rather than appointing the company solicitor.

G raised a complaint, which AXA partially upheld. It said the claim could've been handled more promptly and it offered an apology for that. But its decision to add the exclusion and decline the claim was maintained.

As G remained unhappy, they brought the complaint to our service. But our investigator didn't uphold it. He didn't think AXA had been provided with a fair presentation of the risk it was insuring, and so it was fair for AXA to decline the claim. He also found that, whilst the claim had taken longer than he'd expected it to, he didn't think G had been inconvenienced in a way that would result in a reward of compensation.

As G didn't agree, the complaint was passed to me and in November 2022, I issued the following provisional decision.

## **My provisional decision**

### *Claims decision*

The relevant law in this case is the Insurance Act 2015 which requires a commercial policyholder to make a "fair presentation" of the risk to the insurer when taking out a policy.

This means they have to disclose either:

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

G were aware of the shareholder's threats, and I think it's fair to say this is something that would be material to AXA's decision whether to take on the risk, and on what terms. But although G did disclose it to B, this doesn't appear to have been passed onto AXA. I can see in AXA's internal report it says:

*"We have seen a copy of an email from the broker to the Insured dated 29 October 2021 in which they confirm the cover and state "I have also informed AXA, that there may be a potential threat from one of the [shareholder]. AXA have noted this on their system and confirmed if it does develop to inform them". We have contacted underwriters who have a recording of a call from brokers in which the broker has raised other matters referred to in the email of 29 October 2021 but does not mention the threat of a claim from the [shareholder]."*

From the information I've seen, I'm not persuaded that AXA received a fair presentation of the risk. The Insurance Act 2015 says:

*"The insurer has a remedy against the insured for a breach of the duty of fair presentation only if the insurer shows that, but for the breach, the insurer –*

*a) would not have entered into the contract of insurance at all, or*

*b) would have done so only on different terms."*

AXA has confirmed that if it had known about the ongoing issues, it would've added a specific matter exclusion to the policy which would've said "we will not cover any claim, loss, or investigation caused by or arising from any dispute or disagreement with [this shareholder]".

Where the breach of the duty of fair presentation is not considered to be deliberate or reckless, which is the case here, the Insurance Act 2015 says:

*"If the insurer would have entered into the contract, but on different terms (other than terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms if the insurer so requires."*

On that basis, AXA is able to apply the exclusion and decline this claim.

I do appreciate G will feel that they didn't do anything wrong. But my role is to decide whether AXA has done anything wrong or unfair, and I can't fairly say it has. I say this because I'm not persuaded it was told about the ongoing dispute with the shareholder and so it didn't have a fair presentation of the risk when it offered the policy.

For these reasons, I'm not upholding this part of the complaint.

### *Delays*

G first notified AXA of their claim in February 2021. But AXA didn't decline it until August 2021 – six months later. AXA acknowledge that it didn't deal with the claim promptly and offered an apology. But G doesn't think this goes far enough to put things right given that it was incurring legal costs during this time. And I'm inclined to agree.

I do appreciate that the investigation into this claim wasn't straight forward. I say this because I'm aware that AXA needed to review its files in full to determine whether it had in fact been notified of this claim by B. This involved listening to recordings of calls it had with B. And it also needed to make enquiries with its underwriters to determine what it would've done had a fair presentation been made. So I do think this claim would've taken longer than the average case.

But I can see that AXA's claims handlers provided a report in April 2021 setting out its full investigation and these questions were answered. So I'm satisfied AXA was in a position to decline the claim at that point. It's not clear why it took a further four months to communicate its decision.

As G are a company, rather than a person, I can't award compensation for stress. But I can award compensation for inconvenience if I think there's been one which caused an impact. I think G would've experienced some inconvenience from not knowing if they were covered for their claim because they would've spent time chasing AXA for a decision. And for this, they should be compensated. Based on what I've seen, I'm inclined to award compensation of £150 to put things right.

I'm aware G wants AXA to reimburse the legal costs incurred during this time. They say AXA told them to continue with the company solicitor and had they known they weren't covered; they would've found a cheaper option.

I'm not persuaded that AXA can fairly be held accountable for the legal costs incurred. I say this because G would've always had to seek legal representation for the claim against them. And it's their responsibility to mitigate their losses, regardless of whether cover is available under their policy or not. So unless G can provide evidence that AXA told them to stay with their company solicitor, as well as proof that they wouldn't have done so otherwise and information of a cheaper alternative they could've used for this case, I'm not inclined to award any consequential losses.

### **Responses to my provisional decision**

G accepted my provisional decision in regard to the claims decision, but they've provided further information in respect to the delays, which I've summarised below:

- In an email dated 18 February 2021, from G to the shareholder's solicitors, it says

*"[AXA's agents] had received a copy of my email that I sent to B asking if we would be allowed to use our existing company solicitor. She was of the view that we should as there is clearly too much history for someone else to fully understand in the time*

*available. She will be making that recommendation to AXA.”*

- In a letter from AXA’s agents dated 21 February 2021, it says:

*“Once cover has been confirmed, any decisions about the handling of the claim, whether by solicitors instructed on your behalf or not, will require authority from us on AXA’s behalf. Any fees incurred by other solicitors, counsel, experts or other third parties (including any settlements) must be authorised by us on AXA’s behalf. As stipulated in your policy, you must not accept, negotiate, pay, settle, admit or reject any part of the claim. Such steps must only be taken with our authority on AXA’s behalf.”*

G says this letter gave them the impression that they shouldn’t do anything which might prejudice the position of the claim, such as changing the solicitor instructed. So they remained with the company solicitor.

- G says that if they’d been told in April that cover was declined, they could have taken a number of steps. It could have moved its instructions from the large City firm to a local one (where the fees would have been materially less). With no insurance cover, it would have been for G to deal with the matter as quickly and as cheaply as possible. It is more likely that G would have brought the matter “in house”.
- G consider that AXA should pay some contribution to the legal fees incurred.

AXA accepted my provisional 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.

Looking at the further information provided, I’m persuaded that it was G’s intention to instruct their company solicitor. I say this because the email of 18 February 2021 quoted above shows that G wanted to do so and asked AXA’s agents for AXA’s permission. This email doesn’t indicate that G wanted to use a local firm or a cheaper alternative. And as I’ve explained above, G have a responsibility to mitigate their loss, regardless of whether policy cover is available.

I’ve reviewed the content of AXA’s agent’s letter dated 21 February 2021 in full. This letter makes it clear that AXA has not accepted the claim and is still reviewing whether cover is available. It gives no advice as to which solicitor should be used. Furthermore, it says G, or their solicitors, should take “*practical steps to minimise the claim*”. As such, I believe AXA’s instruction was that G keep costs as low as possible, so if a cheaper alternative of legal representation was available, they should’ve taken it.

Whilst I’m satisfied AXA could’ve communicated its claims decision sooner – for which I’m awarding compensation – I’m not persuaded it should be responsible for legal costs incurred at a time when the claim hadn’t been accepted and that would’ve needed to be incurred in any event to defend the legal action being pursued.

### **My final decision**

For the reasons I’ve explained, I’m upholding the complaint and I direct AXA Insurance UK Plc to pay G compensation of £150 for the inconvenience caused by the delays in receiving a claims decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask G to accept or reject my decision before 30 December 2022.

Sheryl Sibley  
**Ombudsman**