

## **The complaint**

A – a company – has complained that AXA Insurance UK Plc has unfairly declined a claim it made under its Commercial Property Insurance Policy.

## **What happened**

The details of this complaint are well known to both parties, so I won't repeat them again in full detail here. This isn't meant as a discourtesy, rather it reflects the informal nature of our service, and my role within it. However, I assure the parties that I've carefully considered all of the available evidence.

To briefly summarise the key background to this complaint, A made a claim for subsidence damage to a service road behind a row of commercial property units it owns. Following investigations undertaken by its loss adjuster, AXA declined the claim. It said the damage had happened gradually as a result of works undertaken to the road by A's neighbour in 2015 and 2018. It said this wasn't something covered under the terms of A's policy.

A brought its complaint to our service but our investigator didn't think it should be upheld. She said the policy excluded damage as a result of faulty design or construction and/or inherent defects, gradual deterioration or wear and tear. So, she felt AXA's decision was fair.

A didn't accept our investigator's opinion. So, because no agreement had been reached, the complaint was passed to me to decide.

I was minded to reach a different outcome to that reached by our investigator. So, I issued a provisional decision to give everyone a chance to reply before I reached a final decision.

Here's what I said in my provisional decision:

### ***"What I've provisionally 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 done so, I'm currently minded to reach a different outcome to that reached by our investigator, and to uphold A's complaint. I'll explain why in more detail below.*

*It's not in dispute that the dominant cause of damage in this case is the works undertaken by A's neighbour to rebuild their premises, remove underground drainage beneath the surface road and attaching their new drainage system to A's – without A's consent. Nor is it in dispute that A was aware of the works undertaken by its neighbour.*

*A's policy includes some elements of legal expenses cover. But having reviewed the policy document, it seems the majority of this cover is for the defence of legal action, rather than the pursuit of legal action. And the one element that seems to cover the pursuit of legal action focuses solely on the eviction of unauthorised occupants. So, it doesn't appear that this element of cover under the policy would respond to the loss A has suffered as a result of the neighbour's actions in this case.*

*I can see that AXA's loss adjuster considered that A had failed to disclose information about the works undertaken by its neighbour. But I can't see that AXA has sought to apply any of the remedies available, under the relevant legislation, for non-disclosure. Rather, it declined the claim based on some exclusions within the policy wording. So, I've not considered any alleged non-disclosure, and have instead focused on AXA's decision to decline the claim based on the exclusions it relied on.*

*AXA's position is that the issue is a civil matter between A and its neighbour. It says there is no insured peril for it to cover. In addition, AXA says the following exclusions apply:*

*"All other DAMAGE*

- 1. To any PROPERTY caused by
  - a. Its own defective design or materials*
  - b. Inherent vice latent defect gradual deterioration wear and tear*
  - c. Faulty or defective workmanship on the part of the Insured or any of their employees but this shall not exclude subsequent DAMAGE which itself results from a cause not otherwise excluded"**

*AXA has conceded that A's neighbour cannot be considered an employee and so 1c does not apply. But it says that both 1a and 1b apply to the circumstances of A's loss.*

*Firstly, it's important to note that A's policy is an 'All Risks' policy rather than a 'Perils' based policy. This means it covers damage by any cause, which isn't specifically excluded, rather than damage caused only by specified insured perils. So, I don't think AXA is correct to say there is no peril, as damage by any cause could potentially be covered, subject to the policy exclusions.*

*I've thought carefully about AXA's application of exclusions 1a and 1b above. But I don't think applying those exclusions to A's loss, in this case, is fair or reasonable. I say this because, to me, the intention of those exclusions is to protect AXA from being liable for poorly constructed property (as defined). But in this case, there is no evidence to suggest that the service road was poorly constructed or defective at the point it was constructed, or prior to the unauthorised works undertaken by A's neighbour.*

*In order for exclusions 1a (and the inherent defect part of 1b) to apply, I'd need to be persuaded that the defective design/materials or inherent defect were present at the point of construction. But AXA hasn't shown that's the case here. And it's for AXA, as the insurer, to demonstrate that a policy exclusion applies. So, I don't think exclusion 1a can be reasonably relied on to decline A's claim.*

*In terms of the gradual deterioration/wear and tear element of exclusion 1b, the evidence does suggest the damage has happened gradually. But only since the works undertaken by the neighbour. So, there is a clear proximate cause of the damage here, which has resulted in the gradual damage, rather than the road suffering normal gradual damage/wear and tear based on its age and usage – which is my view of the purpose of this exclusion. In these circumstances, I don't think it would be fair to conclude that exclusion 1b can reasonably be applied either.*

*Taking everything I've seen into account, I don't agree that AXA's decision to decline the claim, based on the exclusions it relied on, was fair or reasonable. So, I'm intending to direct AXA to reconsider A's claim in line with the remaining terms and conditions of the policy. Should this result in AXA deciding to cover the claim, it may wish to consider pursuing a recovery from A's neighbour using its rights of subrogation – but that's something for AXA to decide itself once it reaches a decision on the claim.*

*As a commercial entity, A cannot experience distress, only inconvenience. But as I think the decision AXA reached on the claim was incorrect, and the matter remains unresolved, I think it's reasonable to conclude that A has been inconvenienced by AXA's decision. So, in addition to reconsidering the claim, I think AXA should pay A £200 for the impact it has suffered as a result of the incorrect claim decision."*

AXA responded to confirm that it accepted my provisional decision.

A didn't respond, and the deadline to do so has now passed, so I'm moving forward with my 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.

In the absence of any new evidence or arguments, in response to my provisional decision, I've reached the same conclusions I reached in that decision, and for the same reasons.

### **My final decision**

For the reasons above, I uphold A's complaint.

AXA Insurance UK Plc must:

- Reconsider A's claim in line with the remaining terms and conditions of the policy.
- Pay A £200 for the inconvenience it has suffered as a result of the incorrect repudiation of the claim.

Under the rules of the Financial Ombudsman Service, I'm required to ask A to accept or reject my decision before 18 January 2023.

Adam Golding  
**Ombudsman**