

The complaint

E complains that AXA Insurance UK Plc (“AXA”) unfairly declined a legal expenses insurance (“LEI”) claim under its management liability policy.

Any reference to E or AXA includes respective agents and representatives.

What happened

The background of this complaint is well known by all parties, so I’ve summarised events.

- E held an AXA management liability policy that includes various cover.
- In January 2020, E was investigated by the police. Around this time, E’s director (Mr F) was arrested and interviewed.
- In October 2020 the management liability policy renewed.
- On 11 November 2020, Mr F was asked to attend a voluntary police interview, which he did. And on 20 November 2020, a summons was issued against E.
- In January 2021, a summons was issued against Mr F directly.
- E contacted AXA around February 2021 to make a claim on the company legal liability and directors’ & officers’ sections of its management liability policy.
- AXA considered these and declined the claims. It said E was aware of circumstances that would lead to a claim prior to the policy period (that renewed in October 2020), and these events were excluded in line with its policy terms. AXA said there is no power of arrest for a company, and if only E had been under investigation (not the director too), the first interview would’ve been conducted by invitation to a representative and not under caution as was the director’s arrest.
- E disagreed, saying the allegations against E were not likely to give rise to a claim due to limited disclosure and evidential weaknesses. So, it said it had acted reasonably by first notifying AXA of the action when it did. And until November 2020 Mr F had only been interviewed in the capacity of a representative of E.
- Our Investigator looked into what happened and initially didn’t uphold the complaint. She was satisfied the circumstances of both claims fell outside of the 2021 policy period, and so considered AXA’s declination to be fair.
- E disagreed, and made the following points:
 - *Company legal liability claim:* It would not be fair for AXA to decline E’s claim as it has not been prejudiced by the late notification of the claim.
 - *Directors’ & officers’ claim:* It said there were no rule to prevent a representative of a company being arrested to answer questions on behalf of that company. And here, Mr F was the only person who could’ve been required to attend an interview to answer questions about company offences.
 - E quoted rules around arrests and said Mr F would’ve needed to be

interviewed separately as an individual to his interview representing E.

- It provided a copy of the police invitation from November 2020 and transcript notes that it said showed this was the first knowledge Mr F would've had that he was being investigated as an individual.
- Following some back and forth, our Investigator looked at it again. She explained she was satisfied E was bringing the complaint on behalf of both claims and seeking its own losses, not those of Mr F as it was E that had incurred the losses related to the director's claim. And she upheld the complaint, saying:
 - The prior claims exclusion related to the 2021 policy year. And so given the circumstance had occurred in the previous year, AXA needed to consider the claim under the 2020 policy.
 - In doing so, she directed AXA to outline any impact of the late notification in relation to a claim being made under the 2020 policy.
 - AXA hadn't provided evidence or reasoning as to how the late notification would've had any material bearing on the claims. So, she directed it to reconsider the claims under the 2020 policy.
- AXA responded to say:
 - Mr F's claim was not able to be considered by this Service as he was a director and not a "*consumer*".
 - For the Company legal liability claim it said while the "*circumstance*" in question existed in the 2020 policy period, this did not trigger a claim during this time until it received a charge sheet in November 2020 – under the following policy year. And it argued the question of prejudice was therefore not relevant as it was a "*claims made*" policy. And it said prejudice is not a consideration when a matter is excluded under a policy – and its clauses set out specific risks which will be covered – and in this instance prior circumstances are not covered.
- The Investigator reiterated her earlier comments about E bringing the complaint on behalf of both claims and seeking its own losses, not those of Mr F.
- AXA provided nothing further. E reached out to say all charges against Mr F had since been dropped.

So, the complaint has been passed to me for an Ombudsman's 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.

Having done so, I'm upholding this complaint. I'll explain why.

- E has brought this complaint about both the and company legal liability claim and the directors and officers claim. E has demonstrated it has paid the associated legal costs related to both claims. So, I'm satisfied E is seeking its own losses and not any losses on behalf of Mr F himself.
- AXA has put forward its reasons for declining these claims under the 2021 policy. These relate to an exclusion that says "*We will not cover any claim, or circumstance which you were aware of before the start of the period of insurance.*" The word "*circumstance*" is defined in the policy as "*Any verbal or written complaint made*

against you or an insured person that could give rise to a claim. This does not include any routine employee disciplinary action or employee dismissal.”

- AXA argues the events that took place prior to the renewal of the policy – namely, the police interviews related to E and Mr F – means E was aware of the respective circumstances before the start of the period of insurance.
- If I agree that the circumstance did take place prior to period of insurance (the 2021 policy year) – then it appears to me that E would be unable to make a claim under the 2021 policy. So, I’ve thought about the 2020 policy that preceded it. To my knowledge, from what AXA has presented, E held cover with AXA continuously across these two years with no gap in cover.
- So, it seems to me – under the FCA principle of treating customers fairly – AXA should be considering the impact of this claim falling “between two stools”. That is to say, AXA argues E cannot make a claim under the 2020 policy due to the circumstances of the time, but also cannot make a claim under the 2021 policy due to the date the claim was made. Doing so leaves E in a position where it seemingly cannot claim under either policy.
- Our Investigator has put to AXA that it would therefore need to demonstrate why the claim under the 2020 policy would not succeed – and put forward any reason as to why any such late notification of the claim would’ve had an impact.
- AXA has been clear it believes it does not need to present such a reason. But I disagree. Here it appears to me E has demonstrated an insured peril has taken place and has suffered a loss in relation to that peril. And as AXA is seeking to rely on an exclusion, it is for AXA to demonstrate that relying on the exclusion would be fair. Here – this means AXA needed to demonstrate that a late notification of a claim under the 2020 prejudiced its position. And given it has had the opportunity to do so and decided not to provide a response to this point – I’m satisfied it hasn’t demonstrated it can fairly rely on any exclusions related to late notification.

My final decision

For the above reasons I’m upholding this complaint. I direct AXA Insurance UK Plc to:

- Reconsider both of claims - including consideration of all costs E has incurred related to the claims (the company legal liability and director’s and officer’s claims) under the remaining terms of the 2020 policy.

Under the rules of the Financial Ombudsman Service, I’m required to ask E to accept or reject my decision before 31 August 2023.

Jack Baldry
Ombudsman