DRN-4591268

The complaint

Mr L, trading as W, complains about the settlement and handling of his commercial insurance claim by AXA Insurance UK Plc.

What happened

The following is intended only as a brief summary of events. Additionally, whilst other parties have been involved in the process, I have largely just referred to W and AXA for the sake of simplicity.

W operates as a waste transfer site and held a commercial insurance policy underwritten by AXA. The policy largely just provided cover in relation to W's plant and equipment. In late September 2022, W experienced a fire that damaged a crusher. W contacted AXA, who assessed the claim and confirmed the machine was damaged beyond economical repair.

AXA offered W £95,000 in settlement of the claim. AXA would then arrange for the damaged machine to be recovered. W was unhappy with this and said that the settlement offer was not enough for it to purchase a replacement. W also said that recovering the salvage would not be possible outside of working hours due to council restrictions, and so this would have to take place during working hours – which would cause W to suffer losses. W was also unhappy with the time taken to resolve the claim. AXA did not change the settlement offer, but did say that it could leave the salvage with W and deduct £7,500 from the settlement amount to reflect this.

W remained unhappy, and brought the complaint to the Financial Ombudsman Service. However, our Investigator did not recommend the complaint be upheld. He thought the settlement offer was reasonable, and that AXA hadn't acted unreasonably in relation to attempts to recover the salvage.

As W was not satisfied with this, the complaint was passed to me for a decision. I issued my provisional decision on 11 January 2024. The following is an extract from that decision:

> "The settlement figure
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> The first of [the key issues for me to determine] is the £95,000 offer AXA has made for the loss of W's crusher. As has been pointed out previously, under the policy AXA has the right to settle a claim in a number of ways. It can choose to repair or replace the damaged property. Or it can pay a claimant the value of the property at the time of the damage. In this case, AXA has decided to pay W the value of the crusher at the time of the fire. In making this decision, AXA is appropriately exercising its rights. However, it does need to make a fair and reasonable offer of settlement.
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> This means AXA will need to determine the value of the crusher at the time of loss. AXA has reached the settlement figure by reference to a number of alternatives that were available for sale. Finding an exact match for W's machine appears to have been difficult. AXA initially relied upon adverts for a slightly different crusher, that was valued at £89,500. And a model that was similar to W's, that was cheaper, but older

and was located abroad. AXA has also provided details of a machine that was the same model and age of W's, with similar hours of use, that was available for around £87,000. Again though, this was located abroad.

W on the other hand has provided examples of more expensive machines that are different models and makes, and that were a number of years younger than its own. I do note the hours of use were comparable, but the other differences mean that I more persuaded by the examples AXA has provided.

I note W's comments about the condition, of the examples AXA has relied upon, being unknown. But AXA identified a number of options, at a similar price, and then offered a settlement amount in excess of the advertised price for these machines. Taking all of this into account, I consider AXA's offer here to be reasonable.

W has referred to the cost of transporting machines from abroad to the UK. But AXA's obligation is not to cover the cost of actually obtaining an exact replacement. It is to pay W the value of the machine it lost – i.e. the sum W could have obtained had it sold the machine just prior to the fire. In some circumstances, it might be reasonable for AXA to think about difficulties a claimant might have in sourcing a suitable replacement. But there were, and are, options of other machines available that W could obtain.

Ultimately, I am satisfied that AXA's offer for the value of the crusher was fair and reasonable.

The salvage and its recovery

AXA offered to either remove the salvage or to deduct £7,500 for W to retain this.

In terms of the latter, if W wanted to retain the salvage, I consider that £7,500 is a reasonable amount to be deducted.

In providing a cash settlement, AXA would essentially be purchasing the damaged machine from W. And so would be entitled to take possession of the crusher. And AXA has said that it could expect to have sold the machine for at least £20,000 in its damaged condition – and that the pure scrap value of such a large piece of machinery would be £15,000. Given its weight of around 43 tonnes, this does not appear unreasonable. So, AXA offering to deduct less than this from the settlement also does not seem unfair or unreasonable – and actually puts W in a potentially better position than it might otherwise be.

If W does not want to retain the salvage though, then it needs to allow AXA to recover this.

I understand that restrictions imposed by W's local council mean this might not be allowed outside of normal operating hours. W's policy requires it to make or allow others to take reasonable steps to mitigate loss. And I consider that W making suitable enquiries with the council is something that can reasonably be expected of it.

However, I also understand that W has attempted to contact its local council on a number of occasions to determine whether or not an exception can be made to the working restrictions imposed upon its site. W has said that it has not received a response to these attempts. If that is the case, it cannot be held responsible for this. So, I am satisfied W has done all that it reasonably could to allow for the salvage to be recovered. Although, if AXA considers it would like to contact the council directly,

then it would be reasonable for W to consent to this if required.

Given, as things stand, any recovery of the damaged machine would need to occur within working hours, I consider AXA will need to cover the loss of income caused to W this.

The relevant section of W's policy sets out what is covered in the event of a claim. It also sets out a number of exclusions to this cover. One of these exclusion clauses is titled "Communicable disease exclusion" and the first part of this explains that claims from such diseases are not covered. However, the second part of this clause reads:

> "Subject to the other terms, conditions and exclusions contained in this policy, this section will cover physical damage to property insured and any time element loss directly resulting therefrom where such physical damage is covered by the policy and is directly caused by or arising from any of the following perils: fire, lightning, explosion, aircraft or other aerial devices or articles dropped from them or impact by any road vehicle or animal, storm, earthquake, flood, subsidence, landslip, landslide, riot, riot attending a strike, civil commotion, vandalism and malicious persons, theft, escape of water from any tank apparatus or pipe, leakage of oil from any fixed heating installation."

Time element loss is defined within this section as, "Business interruption, contingent business interruption or any other consequential losses".

In terms of this passage, AXA has said:

> "…whilst not explicit, Insurers explained that this clause relates entirely to the disease exclusion and the clause has to be read in it's [sic] entirety and such does not provide general Business Interruption cover."

I do not consider this wording can be interpreted as an exclusion though. It is clearly drafted as providing cover for business interruption/consequential loss as a result of physical damage caused by a number of perils that have nothing to do with disease. And, as AXA will be aware, it is rare that disease could be said to have caused physical damage. So, it does not seem to me that this wording is connected to the disease exclusion itself.

I note AXA's comments about the location of this wording. But, whilst I appreciate the need to consider the whole policy and its context, I do not consider that this means this wording does not provide cover. It is also notable that the term 'time element loss' is only used within this paragraph.

It seems that the communicable disease exclusion was recently inserted into the policy wording. And it is possible that when this was done, this additional paragraph was included or incorrectly located in error. However, even if this is the case, AXA is responsible for this error and is required to provide the cover as set out in the policy. And I consider that this cover is for business interruption or consequential loss resulting from physical damage caused by a fire.

So, given it seems the only times when AXA can arrange for the recovery of the salvage are during working hours, it will need to cover losses this will cause to W as a result of this interruption to its business.

<u>Delays and claim handling</u>

Having assessed the claim, it took AXA over two months to provide W with a settlement figure. There does not appear to be any reason for this that has been provided. Whilst I note there was the outstanding decision the salvage to be considered, it is also not clear why an interim settlement was not made.

There has then been a delay whilst the recovery of the salvage has been discussed. As above, I think it was reasonable that AXA could expect W to attempt to contact the local council. And this may have taken some time. But, given I consider AXA should then have arranged the recovery of the salvage at its expense – compensating W for any consequential loss as a result of this, I consider this should have happened some time ago.

AXA has said that W itself has not provided certain information to its agents when attempts to arrange recovery of the salvage were made. W disputes this though, and AXA has not provided any evidence to support its position here. And whilst W may not have been willing to agree to certain suggestions made, W will have needed to consider the council's restrictions for which it is responsible for adhering to.

Summary

I am satisfied that the settlement figure AXA arrived at was fair and reasonable. This was higher than comparable alternatives.

However, I consider AXA ought reasonably to have made an interim settlement of £87,500 (the settlement less salvage). The exact date this should have been made is open to some debate, but I consider that a reasonable date for the purposes of the following is 1 January 2023. And I consider that AXA should pay Mr L this amount, plus interest at 8% simple per annum on this sum, from 1 January 2023 to the date of settlement.

AXA should also pay Mr L the remaining £7,500, plus any losses caused to W as a result of interrupting its business to recover the salvage.

I also consider that the handling of this claim has caused Mr L avoidable distress and inconvenience. So, AXA should pay Mr L £300 in respect of this. This, in part, also reflect the delay in arranging recovery of the salvage."

I invited both parties to respond with any further comments or evidence. W accepted the provisional decision. But AXA disagreed and I have summarised its points as follows.

AXA said W had refused any payments until the issue of salvage had been resolved, so an interim offer was not made – and so interest should not be added to the settlement. AXA also provided two witness statements from salvage agents, and said that these confirmed W had not provided information they needed to arrange the removal.

AXA disputed that any loss of W's earnings should be covered. AXA said the removal could take place on Sunday subject to the relevant permits, but that W would need to provide the 'relevant information'. And AXA said that the time element loss wording above did not apply.

AXA also said that it had actually made an offer on 14 November 2022, rather than this being more than two months after the claim was made. And that it was not appropriate to award compensation where the delay in removing the salvage was due to a lack of cooperation from W.

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 have come to the same outcome as set out in my provisional decision, largely for the same reasons.

W has accepted the issue around valuation, so I am not commenting further on this here and the reasoning in my provisional decision, and set out above, remains unchanged.

In terms of AXA's response, whilst W may have refused to accept a full and final settlement of the claim, I remain of the view that AXA ought reasonably to have confirmed that £87,500 of its offer could be accepted as an interim payment whilst the remaining issues were resolved. I have not been provided with anything to persuade me that it would not have been fair and reasonable for this to have been done, effectively, on 1 January 2023. And I consider that W has been without these funds since this date.

I do note that an excess may have been payable on this settlement. If so, AXA would be entitled to deduct this prior to calculating the necessary interest payment.

In terms of the witness statements, I note these have not been shared with W. In order to rely upon these, it would likely be appropriate for AXA to have shared them in some format. However, I do not consider it necessary for this to happen at this point, as I am not persuaded that these alter my decision.

AXA has said that these statements confirm that W had not provided information needed to arrange the removal of the crusher. But whilst both statements seem to be in agreement that W was allegedly not as cooperative as would be hoped for, it is not clear that information was not provided that caused progression of the claim to stop.

W apparently made it clear that it did not want to have a disruption to its business activities. Whilst in some disruption is often inevitable when an insurance claim is made, a desire to avoid this is not unexpected. W then seems to have confirmed that removal on a Sunday would apparently be in contravention of planning permissions, and that the local council would need to agree to this. Leaving aside for the moment who would be responsible for obtaining this agreement, this is seemingly accurate information. And W apparently expressed a desire for a crane to be used to recover the salvage rather than for a ramp to be created to allow the crusher to be dragged/winched out. It isn't entirely clear why this was preferred, but the statement express W's position as being based on 'asking' for the crane option and 'not liking' the ramp option. It does not appear that W was refusing to allow the alternative.

The only information that was apparently not provided was a firm commitment on what space the salvage companies would be able to operate in. W allegedly said that it could not promise anything as its wagons needed to operate and then park up at night. This seems to align with a desire to minimise disruption to W's business activities. And had AXA confirmed that it would cover the cost of this disruption, as I consider it is required to do, I consider it is most likely that W would not have had these concerns.

Ultimately, I am not persuaded that W was failing to meet its obligations under the policy or, if it was, I consider that this was a result of AXA not meeting its own obligations.

This is because I remain satisfied that AXA is required to cover the costs of any interruption to W's business as a result of the recovery of the salvage.

AXA has said that no such costs will be incurred if the recovery happens on a Sunday. But as AXA has also said, this is subject to the "relevant permits". W has demonstrated that it has attempted to obtain these permissions, but has not received them. So, at this point, an interruption to W's business is seemingly the only way to allow for the salvage to be recovered. Should AXA be able to obtain these permissions itself, something W should consent to, then I agree no (or minimal) costs would be incurred. This would also mean that issues relating to W agreeing the area of the site the salvage operators could work in would be redundant. AXA, or its agents, would have access to the majority of the site as no other work would be taking place at the same time.

If the permissions are not obtained, then an interruption to W business would seem necessary. AXA has said that the inclusion of the relevant wording above was not in error. It has said that this was added as many claims were being received for business interruption following physical damage as a result of COVID-19. However, not only has it been widely held that COVID-19 did not cause physical damage to property, this does not explain why the wording specifically lists the perils above. AXA's intention may not have been to provide business interruption cover in the circumstances of claims such as W's, but I consider that this is what the policy would reasonably be interpreted to do.

Ultimately, I consider that a reasonable person with all the relevant background knowledge would interpret the wording as providing cover where business interruption is caused by fire, as is the case here. So, I consider AXA should cover the cost of any business interruption caused to W as a result of recovering the salvage.

I should though stress that W remains obliged to assist AXA, and its agents, in the claims process and to minimise any losses. And would encourage the parties to cooperate to resolve matters.

Lastly, AXA disputed it had caused delays in the process. In my provisional decision, I said that AXA made its offer in early December 2022. AXA has said that an offer was first made to W on 14 November 2022. The file provided by AXA does not contain evidence of this, though I note its letter of 1 March 2023 refers to a final offer having been made on 30 November 2022. I apologise for my error in referring to the December date. However, this final offer was still more than two months after AXA was notified of the claim.

AXA considers that compensation for delays in recovering the salvage should not be awarded where W did not cooperate with the salvage agents. However, as above, I am not persuaded that W did act unreasonably. Whilst it may have been reluctant to agree to what the agents suggested, they have also said that W "did not say a definitive no". I agree that AXA is not responsible for all of the time that has elapsed; generally dealing with the situation will have taken some time and W could reasonably be expected to have contacted the local council. But once this had taken place, AXA ought to have progressed matters one way or the other. So, I consider AXA is responsible for causing some avoidable delay.

Putting things right

In settlement of the value of the crusher (less the salvage cost), AXA Insurance UK Plc should pay Mr L £87,500. AXA is entitled to deduct the relevant policy excess from this amount.

AXA should then pay Mr L interest at 8% simple per annum on this sum (£87,500 less any applicable excess), from 1 January 2023 to the date of settlement.

If AXA is unable to obtain permission, within 28 days of Mr L accepting this decision, from the relevant local council for the recovery to take place outside of the permissible hours,

AXA should arrange for the salvage to be recovered during the permissible hours. AXA should then pay Mr L the remaining £7,500 settlement, plus any losses caused to W as a result of interrupting its business to recover the salvage.

Finally, AXA should pay Mr L £300 in respect of the avoidable distress and inconvenience caused to him during the handling of this claim.

My final decision

My final decision is that I uphold this complaint. AXA Insurance UK Plc should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 1 March 2024.

Sam Thomas
Ombudsman