DRN-4818356

## The complaint

Mr and Mrs G are complaining that AXA Insurance UK Plc avoided their buildings insurance policy and subsequently declined a claim they'd made.

In parts, Mr and Mrs G have used a solicitor firm to pursue this complaint on their behalf. But for ease of reference, I shall refer to anything the solicitor firm said or did as being said or done by Mr and Mrs G.

## What happened

The facts of this complaint are well known to all parties, so I won't set them out in detail. But, in summary, in March 2019 Mr and Mrs G took out a buildings insurance policy through a broker – who I shall refer to as F – and the policy was branded and underwritten by AXA. In September 2019 Mr and Mrs G's property suffered damage arising from water exiting a drain. The claim was settled around January 2020. The policy then renewed in March 2020.

In February 2021, AXA wrote to F to say it wasn't willing to renew Mr and Mrs G's insurance policy. So F looked to source another policy. In doing so, it used an underwriting agency – who I shall refer to as C. It ended up arranging a non-AXA branded insurance policy, which was also underwritten by AXA, but was managed by another company – who I shall refer to as M.

In July 2021 a significant flood occurred in Mr and Mrs G's area which caused significant water damage to their property. Mr and Mrs G then looked to claim for the damage against their insurance policy.

AXA investigated the claim but, in doing so, discovered that they'd not disclosed the previous claim. It said it wouldn't have provided the insurance policy had Mr and Mrs G disclosed the claim so it avoided the insurance policy back to the start. It looked to refund the premium they'd paid, but Mr and Mrs G refused receipt of this.

Mr and Mrs G have raised a complaint with both AXA and F. F acknowledged it didn't disclose the claim when arranging the policy, but it said AXA should have realised the claim hadn't been disclosed given it was the one to settle the claim. Mr and Mrs G thought AXA was being unfair for the following reasons:

- They highlighted that AXA's right to avoid the insurance policy comes from the Consumer Insurance (Disclosure and Representations) Act 2012 ('CIDRA'). But they also highlighted that S3(4) of CIDRA says the failure to take reasonable care doesn't apply *"If the insurer was, or ought to have been, aware of any particular characteristics or circumstances of the actual consumer."* As AXA was the insurer that settled the claim, Mr and Mrs G believe it ought to have known the information provided wasn't correct.
- Even if the above didn't apply, they dispute AXA had grounds to avoid the policy as they think it's unlikely it would have refused to provide insurance because of one escape of water claim. AXA renewed the policy in March 2020 after the claim for all the same perils and without restriction for flood or any other peril, but at a substantially higher premium. So they didn't understand why AXA wouldn't renew the policy a year later.

- They recognised AXA said it was a flood claim, but they disputed that's the case. They said it was initially dealt with as a storm claim, but it was later discovered that the cause of the problem was actually a blockage in the drains of the rear patio which backed up during heavy rain causing the problem. So they said the cause was escape of water from a drainpipe. They don't think it's right it was treated as a flood claim.
- Finally they highlighted that the declined claim was actually as a result of a storm which caused a torrential downpour.

AXA didn't uphold Mr and Mrs G's complaint for the following reasons:

- It said F had incorrectly answered two questions when applying for the policy – firstly "*Has the applicant or anyone else to be insured had any claims, losses or damages in the last five years"* and said *"no",* then, secondly, in response to the "assumption": *"Neither the property nor grounds has suffered from "flooding*", F responded to say "*agree*". AXA said both of these answers were wrong.
- They said C wasn't affiliated with AXA and neither C nor M had access to AXA's systems. It said C arranged policies with a number of different insurers – not just AXA – so it wouldn't have known about the claim. It said the online application process is automatic and is a common way for insurance policies to be taken out. It said its underwriters are reliant upon customers (and their agents) taking reasonable care to give accurate answers to questions asked. It said there's no opportunity in the process for an underwriter to "sense-check" or "validate" the answers given.

I issued a provisional decision upholding this complaint and I said the following:

*"I intend to uphold this complaint and I'll now explain why.*

*I should first set out that I acknowledge I've summarised Mr and Mrs G's complaint in a lot less detail than they've presented it. Mr and Mrs G have raised a number of reasons about why they're unhappy with the way AXA has handled this matter. Similarly, AXA have provided detailed responses to both Mr and Mrs G as well as to this Service. I've not commented on each and every point all parties have raised. Instead I've focussed on what I consider to be the key points I need to think about. I don't mean any discourtesy about this, but it simply reflects the informal nature of this Service. I assure all parties, however, that I have read and considered everything they've provided.*

*Further to this, I need to set out that I'm only considering Mr and Mrs G's complaint about AXA in this decision. Mr and Mrs G have also raised a complaint about F, but this Service is considering that complaint separately.*

*The relevant law in this case is CIDRA. This requires consumers to take reasonable care not to make a misrepresentation when taking out a consumer insurance contract. 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. One of these is how clear and specific the insurer's questions were. And the remedy available to the insurer under CIDRA depends on whether the qualifying misrepresentation was deliberate or reckless or careless.*

*If the misrepresentation was reckless or deliberate and an insurer can show it would have at*

*least offered the policy on different terms, it's entitled to avoid the consumer's policy. If the misrepresentation was careless, then to avoid the policy, the insurer must show it would not have offered the policy at all if it wasn't for the misrepresentation.*

*If the insurer is entitled to avoid the policy, it means it will not have to deal with any claims against it. If the qualifying misrepresentation was careless and the insurer would have charged a higher premium if the consumer hadn't made the misrepresentation, it will have to consider the claim and settle it proportionately if it accepts it.*

*I've thought about what happened in this case and I shall address the various facets of CIDRA separately.*

*Did Mr and Mrs G fail to take reasonable care not to misrepresent?*

*AXA has set out that F, on Mr and Mrs G's behalf, didn't answer the following question correctly:*

*"Has the applicant or anyone else to be insured had any claims, losses or damages in the last five years"; and*

*AXA also says F incorrectly confirmed the following statement to be true:*

*"Neither the property or grounds have suffered from flooding".*

*I think it's first critical to stress that the test under CIDRA isn't whether Mr and Mrs G gave incorrect information, but whether they failed to take reasonable care. And the test for reasonable care is that of a reasonable consumer. So it's not a question of whether AXA considers the information Mr and Mrs G provided was incorrect, but whether a reasonable person in the same set of circumstances would have acted in a similar way.*

*All parties accept that Mr and Mrs G should have disclosed the 2019 claim. And F accepts it's at fault for this. So there is no dispute that F, on Mr and Mrs G's behalf, didn't answer the question about Mr and Mrs G's claims history reasonably. So I think they did fail to take reasonable care. However, it doesn't automatically follow that AXA can follow the process it did. I need to think about what Mr and Mrs G (and F) would have done had they taken reasonable care.*

*Mr and Mrs G have given detailed testimony around the fact that they considered the claim to be an escape of water. And I can also see that F carried out a number of insurance applications in August 2020 in which it disclosed in all applications that Mr and Mrs G had made an escape of water claim in 2019.*

*AXA has set out that F, as a broker, had a more advanced set of knowledge and should have recognised that AXA had treated the claim as a flood. I agree F is held to a higher knowledge standard to Mr and Mrs G and I've read and considered AXA's comments in this regard. F was required to take into consideration the facts and circumstances to assess how AXA was likely to have treated the claim. But, having done so, I can't agree that it should have known AXA dealt with the claim as a flood claim.*

*The circumstances of the claim were that a blockage in the drainpipe caused water to build up and come out of the pipe and damage the property. I recognise that the terms of AXA's policy may have meant that it may have had to have dealt with the claim under "flood damage", but I think it arguably could have been dealt with under other sections too – such as escape of water, storm or accidental damage. But I haven't seen anything to show AXA set out to either Mr and Mrs G or to F how it had treated the claim. And, as AXA has set out*

*repeatedly, no other parties would have had access to its systems to sense-check its records.*

*Crucially, the 2020 statement of facts, which was created by AXA in February 2021, make no reference to the claim at all. AXA says this was because the renewal process was started so soon after the claim was finalised. I don't dispute that this is a fair explanation of why the claim wasn't included – although it could and should have recorded the claim as an open claim – but it means that AXA didn't set out it had treated the claim as a flood claim. And I cannot say there was anything from what AXA told all parties that would notify them that the claim was a flood claim.*

*AXA has also referred to the fact it told F it wasn't willing to renew the insurance policy because of the flood claim. So it said this alone should have alerted F to the fact it had treated the claim as a flood claim. But I don't agree. In fact, the letter AXA sent to F said the following:*

*"Unfortunately we are not able to offer a renewal for this policy. This is because:*

- *The property is no longer acceptable due to its postcode rating area and is considered at risk of flooding and/or;*

- *We have changed our underwriting acceptance criteria with regards to properties that have suffered from previous flooding.*

*The ABI flood insurance 'Statement of principles' agreement with the insurance industry expired in April 2016 and the Flood Re reinsurance scheme has been launched to provide options for eligible customers who are at risk of flooding to insure their homes."*

*It seems to me that a reasonable interpretation of the letter is that AXA wasn't willing to insure the area itself. And I understand that it wasn't just Mr and Mrs G's property that was subject to AXA's decision to not renew the policy. I don't think I can reasonably say this should have alerted F that it had treated the previous claim as a flood claim.*

*Ultimately, taking everything into consideration, I think a reasonable consumer would have thought that Mr and Mrs G had made an escape of water claim. And I haven't seen anything for me to say either they or F should have known otherwise. So it follows, therefore, that had Mr and Mrs G (through F) taken reasonable care not to misrepresent, I think they would have disclosed an escape of water claim. And I don't think I can reasonably say they failed to take reasonable care when saying the property had not been subject to a flood claim previously, for the same reasons.*

*Mr and Mrs G have set out that it's not a qualifying misrepresentation because AXA knew of the claim and they've said failure to take reasonable doesn't apply if AXA was already aware of this information. However, while I understand Mr and Mrs G's comments here, CIDRA doesn't extend to requiring an insurer to check all systems and databases when a policy is taken out. AXA has referred to previous case law – Mahli v Abbey Life – but I'm conscious that this case was considered many years before CIDRA came into law. So I don't think it's entirely relevant in this case.*

*However, I've thought about how S3(4) of CIDRA would fairly apply in this case. I think it's first important to recognise that this was an entirely new policy application – i.e. I would look at this differently had it been a policy renewal. In this case F applied for a new policy through C and a policy was arranged through a third party underwriting agency. I'm persuaded by AXA's testimony and evidence provided that it had minimal involvement in the underwriting process and crucially the underwriting criteria was created by M – not AXA. So I don't think I*

*can reasonably say that the fact AXA dealt with the claim is reasonable grounds for me to say that there wasn't a failure by Mr and Mrs G to take reasonable care.*

*Can AXA avoid the policy and decline the claim?*

*As I said above, AXA only has a remedy in law if it can show that the misrepresentation is a qualifying misrepresentation. So, for it to have a remedy under CIDRA it has to show it would have offered the policy on different terms or not at all if Mr and Mrs G had taken reasonable care to not misrepresent.*

*Firstly, AXA has said it considers the qualifying misrepresentation to be careless and I agree with that. And this is not in dispute, so I shan't comment on this further.*

*To be allowed to avoid the insurance policy, CIDRA says AXA can only do so if it would not have entered into the contract on any terms had Mr and Mrs G taken reasonable care.*

*Critically, the question is not whether Mr and Mrs G would have taken out the insurance policy, but whether AXA would have entered into the policy on any terms or not. I should first set out that, even if I thought Mr and Mrs G should have disclosed a flood claim (which as I said I don't think they failed to take reasonable care in not doing so), I don't think CIDRA allowed AXA to avoid the policy. As I said, I need to be satisfied it would not have offered the policy on any terms. But I don't think it's shown this. I've found AXA and M's testimony inconsistent on this point.*

*M has set out to AXA that, had F disclosed a flood claim, its underwriting criteria required it to refer the matter to its underwriter to see if it would provide cover. And, crucially, the underwriter has said it would have insured Mr and Mrs G, but it would essentially have added an endorsement to remove flood cover. I recognise M has said it wouldn't have gone through this process and also said that Mr and Mrs G wouldn't have taken out the policy on these terms. But, it matters not whether Mr and Mrs G would have taken out the policy on these terms, but what's relevant is that, if the full underwriting process was carried out, AXA would have offered cover with the flood endorsement. So, it seems to me that, if AXA was fair to say Mr and Mrs G needed to disclose a flood claim, then the remedy under CIDRA would have been to add the endorsement to the policy – i.e. it didn't have fair grounds to avoid the insurance policy.*

*However, as I said above, I think, had Mr and Mrs G taken reasonable care not to misrepresent, they would have said they made an escape of water claim. So I need to look at what AXA would have done differently had F told AXA this. I can see this Service did query with AXA about what it would have done in this scenario, but it didn't advise what it would have done. However, I have seen and reviewed M's full underwriting. Having done so, I'm satisfied it would have provided an insurance policy and I'm not persuaded it would have done so on different terms (other than in regard to the premium charged).*

*So, it follows that in all circumstances, I don't think AXA was fair to avoid the insurance policy. And I think Mr and Mrs G have lost out as a result.*

***Putting things right***

*As I said above, I don't think AXA acted fairly in avoiding the insurance policy. So AXA should remove any record of the policy's avoidance from all databases. Further to this, I'm not persuaded that it would have added an endorsement to the policy had Mr and Mrs G taken reasonable care not to misrepresent. So I think AXA should now reconsider the claim in line with the existing terms of the insurance policy.*

*However, while AXA hasn't specifically set out precisely what it would have done had Mr and Mrs G disclosed an escape of water claim, I think it's safe to conclude that it's most likely that it would have charged a higher premium. CIDRA covers this scenario in terms of the remedy available to AXA. And it sets out that, where it would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim. And I think that's fair in this case. So I think AXA should pay the percentage of the claim payable under the policy based on the proportion of premium Mr and Mrs G paid against what they would have paid had they disclosed the escape of water claim.*

*I should also set out that I'm aware AXA has suggested Mr and Mrs G are underinsured. And it's suggested that this may have an impact on any claim settlement. But for the avoidance of doubt, I've not considered this in this decision. And I make no comment about whether AXA is or isn't entitled to reduce the amount payable on the claim due to alleged underinsurance. If this leads to a further dispute, it will need to be the subject of a new complaint.*

*Mr and Mrs G have highlighted that they've suffered significantly increased premiums as they've had to disclose the policy avoidance. I think that's unfair and I'm persuaded they're out of pocket as a result of this. So I think AXA should refund the extra that Mr and Mrs G have paid for any policy where they've been affected by this. To do this, where Mr and Mrs G can show a policy they took out was impacted by them having to disclose the avoidance, I think AXA should compare the premium Mr and Mrs G were paying before AXA avoided this policy against the premium they paid for their new policies and refund the difference, assuming there weren't any other change in material facts that would have impacted the premium.*

*AXA should add 8% simple interest per year on any increased premium they've paid from when Mr and Mrs G paid it until they gets them back. If AXA thinks that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr and Mrs G how much it's taken off. It should also give them a tax deduction certificate if they ask for one, so they can reclaim the tax if appropriate.*

*Finally it's clear this matter has caused Mr and Mrs G a great deal of distress and inconvenience. They've had the major upset of seeing their property suffer significant damage, but then not be able to utilise the insurance policy they paid for to protect themselves from this scenario. As a result of this, they had to live in a property that's significantly smaller than the house they lived in. In addition to this, they've had the upset of having an insurance policy unfairly avoided and had to take significant steps to try and put this right.*

*AXA has set out that it's unfair it's being penalised for the errors F has admitted to while applying for the policy. And I agree it's not solely responsible for everything that's gone wrong. But I do think it could have put this right a long time ago and it's right that it compensates Mr and Mrs G for this. The investigator recommended that AXA pay £750, but I think £1,000 is fairer compensation in the circumstances."*

AXA provided a detailed response setting why they disagreed with my provisional decision. In summary, they set out the following:

- Had Mr and Mrs G disclosed a previous escape of water claim, it would have increased the premium by 40%, and applied a £1,000 escape of water excess. But it says it's irrelevant what it would have done in such circumstances as it maintains Mr and Mrs G should have disclosed a flood claim.
- It said it isn't clear from my provisional decision whether I thought Mr and Mrs G had failed to take reasonable care in response to the question *"Neither the property nor*

*grounds has suffered from flooding".*

- It said the circumstances of the 2019 claim aren't disputed. But it maintained that this cleared amounted to "flooding". It referred to guidance this Service issued which corroborates its assessment of the claim as a flood claim. And it highlighted that this Service's approach closely mirrors the position at common law.
- It set out that, as I accept the first misrepresentation (claims history) was made without reasonable care, it must be because I think F must have overlooked the 2019 incident altogether. It said, if I think this, it must follow that they cannot have taken care when answering the question about flooding. It said I need to look at what actually happened, not some hypothetical version of events, to determine whether or not reasonable care was actually taken.
- Even if the event could also reasonably be regarded as an escape of water (which it doesn't accept), it was plainly a flood. So the property had flooded before, on any reasonable interpretation. And it said that this meant the broker incorrectly said the property hadn't flooded before.
- It maintained that the questions it asked couldn't have been clearer. It set out this Service has clear guidelines on flooding to help even individual consumers determine whether or not a flood has taken place. And it reiterated it had set out how basic application of that simple guidance leads to the conclusion that the 2019 event was a flood.
- It said the relevant test is what would AXA have done had the true facts been known. And it referred to case law and leading insurance law textbooks which it says corroborates that the question is about what would have happened had the answers been answered accurately and completely. So it says that remedies under CIDRA are determined by reference to what the insurers would have done with the benefit of accurate information; not on the basis of any other hypothetical version of events.
- AXA sets out that "reasonableness" ceases to be relevant once it's been ascertained that the policyholder (or their agent) failed to take reasonable care. It says, once it's ascertained, as a fact, that care was not taken, the approach under CIDRA – which it believes is summarised very clearly in the Service's own guidance – is that you must go on to determine what insurers would have done had they known the truth.
- It maintained it wouldn't have insured Mr and Mrs G had they disclosed a flood claim.

Mr and Mrs G 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.

I acknowledge I've summarised and paraphrased AXA's response to my provisional decision in a lot less detail than it's set out. But I assure AXA, and all parties, I have carefully read and considered everything AXA has said. That said, I'm not persuaded it's provided anything materially new to what it's provided before. So I'm satisfied my provisional decision largely addresses the points raised. I shall however, address what I consider to be AXA's core points.

As I set out in my provisional decision I agree there has been a qualifying misrepresentation, but the fundamental question is whether AXA has applied a fair remedy in line with its rights under CIDRA. I've carefully read and understood AXA comments in this regard. But I don't agree and I'll explain why.

To set this out again, AXA says F, on Mr and Mrs G's behalf, didn't answer the following question correctly:

*"Has the applicant or anyone else to be insured had any claims, losses or damages in the last five years"; and*

AXA also says F incorrectly confirmed the following statement to be true:

*"Neither the property or grounds have suffered from flooding".*

Ultimately, I need to reiterate what I set out in my provisional decision that, from what I've seen, at no point, prior to F arranging the policy in question, did AXA specifically set out to F or Mr and Mrs G how it had categorised the claim. The statement of fact it sent to F in 2020 made no reference to the claim. So in understanding what to disclose as part of the application, F had to use the information Mr and Mrs G told it about the claim in arranging insurance policies for them. Had AXA included the claim on this statement of fact – as it should have done – and explained it was a flood claim, I most likely would have come to a different conclusion on this complaint.

As I set out previously, the test for whether there's been a qualifying misrepresentation is not whether Mr and Mrs G provided accurate information, but whether they failed to take reasonable care. Ultimately, for all the reasons I set out in my provisional decision, I cannot say it was unreasonable for Mr and Mrs G to have thought they'd made an escape of water claim. I don't dispute that it may have been fair for AXA to treat the claim as a flood claim. But, similarly, I wouldn't expect Mr and Mrs G to be aware of the intricacies of how an insurance industry treats claims. Ultimately, as far as they're concerned, water came out of their drainpipe, so it wasn't unreasonable for them to think they've had an escape of water. And this is what F recorded on all insurance policy applications in 2021 prior to arranging the insurance policy in question.

Regarding the second question, it follows that, if I don't think Mr and Mrs G would have reasonably understood the incident to have been considered a flood to inform F accordingly, I similarly cannot reasonably say it was unreasonable for F to say the property hadn't been subject to a flood.

The simple and inescapable fact is I haven't seen anything to show that AXA ever told F or Mr and Mrs G that it had treated the claim as a flood claim. I note AXA has said the letter is sent declining to renew the policy should have notified F that it had treated the claim as a flood claim. But I don't agree. I remain of the opinion for all the reasons I set out previously that this was a generic letter and I cannot agree that this should have given F relevant notice. And I'm not persuaded AXA has given me anything new to conclude differently.

AXA says, it's ultimately irrelevant what Mr and Mrs G thought, because it says, once its agreed there is a qualifying misrepresentation, the question is not what's reasonable, but what's correct. While I note what it has said regarding this and its reference to legal textbooks, I have paid particularly close reference to what CIDRA *actually* says regarding this. And Schedule 1 para. 4 says:

*"The insurer's remedies are based on what it would have done if the consumer had complied with the duty set out in section 2(2),"*

Section 2(2) says "*It is the duty of the consumer to take reasonable care not to make a misrepresentation to the insurer."*

So I think the fair and reasonable interpretation of the remedies under CIDRA is to say AXA's remedies rest from what AXA would have done had Mr and Mrs G taken reasonable care not to make a misrepresentation. But, even if this isn't the strict application, I think this is the fair and reasonable thing to do.

For all the reasons I've set out previously, I remain of the opinion that, had F (as Mr and Mrs G's agent) taken reasonable care to not misrepresent, it would have disclosed an escape of water claim. So I think AXA's remedies under CIDRA are what it would have done had F had told AXA Mr and Mrs G had made an escape of water claim instead of saying they'd not made a claim.

AXA has set out it would have charged a 40% loading and added a £1,000 escape of water excess. As I said in my provisional decision AXA should pay the percentage of the claim payable under the policy based on the proportion of premium Mr and Mrs G paid against what they would have paid had they disclosed the escape of water claim. Further to this, CIDRA also sets out, if AXA would have entered into the policy but on different terms (such as including an additional excess) *"the contract is to be treated as if it had been entered into on those different terms if the insurer so requires."* So, if AXA would have added a £1,000 escape of water excess, the contract is to be treated as if this excess was part of the policy.

**My final decision**

For the reasons I've set out above, it's my final decision that I uphold this complaint and require AXA Insurance UK Plc to resolve this complaint by doing the following:

1. It should pay the percentage of the claim payable under the policy based on the proportion of premium Mr and Mrs G paid against what they would have paid had they disclosed the escape of water claim. If it would have added any additional terms, such as an additional excess, it can treat the contract as if this term was part of the policy.
2. It should refund the extra that Mr and Mrs G have paid for any policy where they've been affected by an increased premium as a result of them having to disclose the policy's avoidance. To do this, where Mr and Mrs G can show a policy they took out was impacted by them having to disclose the avoidance, I think AXA should compare the premium Mr and Mrs G were paying before AXA avoided this policy against the premium they paid for their new policies and refund the difference, assuming there weren't any other change in material facts that would have impacted the premium.*
3. Pay Mr and Mrs G £1,000 in compensation for the distress and inconvenience this matter has caused them.

* AXA should add 8% simple interest per year on any increased premium they've paid from when Mr and Mrs G paid it until they get them back. If AXA thinks that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr and Mrs G how much it's taken off. It should also give them a tax deduction certificate if they ask for one, so they can reclaim the tax if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs G to accept or reject my decision before 28 June 2024.
Guy Mitchell
**Ombudsman**