

The complaint

Mr and Mrs J have complained that AXA Insurance UK Plc declined a claim they made on their buildings insurance policy.

Mrs J has primarily dealt with things so, for ease of reading, I'll refer to her only.

What happened

The circumstances of this complaint aren't in dispute, so I'll summarise the main points:

- Mrs J owns a property that she rented out to tenants. A neighbour had work carried out in 2019. Mrs J noticed damage to her property around that time and particularly in 2020, following which her tenant moved out. I understand the neighbour accepted responsibility for damage to the upper floor, but not the lower floor.
- Mrs J got in touch with AXA in September 2020 to claim for the building damage to the lower floor and loss of rent. AXA investigated the claim.
- Expert engineering advice said the damage had been caused by subsidence, primarily due to poor construction practice carried out by the neighbour's contractors. AXA said this wasn't covered by the policy and declined the claim.
- Mrs J didn't think this was a fair outcome and AXA logged a complaint. It responded in January 2022 and agreed to consider the claim further. Further engineering advice was provided by Mrs J as part of her legal dispute with the neighbour.
- AXA went on to decline the claim for two main reasons. In summary:
 - The policy covers subsidence, excluding: *"damage resulting from demolition, construction, structural alteration or repair of any property or groundwork or excavation at the property"*.
 - The policy also covers accidental damage, excluding: *"the collapse or cracking of buildings"*.
 - The word 'property' is defined to mean Mrs J's property and 'buildings' to mean the building at her property.
 - AXA thought the nature and cause of the damage meant these two exclusions applied to the claim.
- Mrs J complained and AXA responded in January 2023. It said it partially upheld the complaint, although it's unclear why, because it maintained the claim was declined, said it had handled the claim fairly, and didn't offer to do anything further.
- Unhappy with this response, Mrs J referred her complaint to this Service. Our investigator said we could only consider what happened after the first complaint response in January 2022 as that hadn't been referred to us in time. He thought it was unfair to decline the claim as Mrs J hadn't employed the builders. He asked AXA to accept the claim for building damage and loss of rent and pay £800 compensation.

- Mrs J agreed but AXA didn't. Whilst discussions about the complaint continued, the Court made a judgement about a dispute between Mrs J and her neighbour in relation to the damage. In summary, this found:
 - As a result of the neighbour's work, the rear wall of Mrs J's property dropped. That caused the internal walls and floor slabs to drop, and caused damage internally to the lower floor.
 - The neighbour is liable to pay the cost of repairing this damage, including filling the voids beneath the floor slabs.
 - In practice, no contractor will be willing to carry out this work without also underpinning the rear wall.
 - However, the need for underpinning the rear wall arises from a longstanding problem with a lack of support to the rear wall. This problem predated the work, possibly going as far back at the 1970s, and therefore wasn't caused by the work. As a result, the neighbour isn't liable to pay for putting this problem right, so they're not liable for the cost of underpinning the rear wall.
 - There was no other cause of damage, for example, due to nearby trees.
- AXA said the Court's judgement had the following impact on Mrs J's claim:
 - Even if there were cover under the policy for the internal damage, the Court has ordered the neighbour to pay for it to be repaired. So this damage doesn't fall for consideration under the policy.
 - The Court hasn't ordered the neighbour to pay to underpin the rear wall, so that does fall for consideration under the policy.
 - AXA had previously declined the entire claim by relying on the two exclusions noted above.
 - The Court has since found the need to underpin the rear wall wasn't caused by the neighbour's work because it was a longstanding problem. The Court found the problem had been present for around 50 years – so it predated AXA's policy by many years.
 - The rear wall hasn't been damaged during AXA's policy – or by any event which occurred during AXA's policy. The need to underpin it has arisen during that time, but that's a consequence of rectifying the longstanding problem and facilitating the work the neighbour is responsible for.
 - Overall, this means the policy doesn't cover the buildings claim. As a result, it would be unfair to expect AXA to pay for a loss of rent.
- An agreement wasn't reached, so the complaint has been passed to me.

My provisional decision

I issued a provisional decision in which I said:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

- As our investigator has explained, we can only consider matters since the complaint response in January 2022. That's because it wasn't referred to us in time. That means I can't consider how the claim was handled up to that point.
- Ordinarily, I would consider matters up to the latest complaint response. Which, in this case, would be January 2023. However, I don't think that would be practical or

helpful in the circumstances of this case. That's because the Court subsequently made a judgement on Mrs J's dispute with her neighbour, and that's important to this complaint. So I'll consider matters up to the current time.

- Whilst the Court's judgement is important and relevant, it's about a substantially different matter because it didn't involve AXA or AXA's policy. So there remains a dispute between Mrs J and AXA under the policy for me to resolve.
- I don't have the power to reconsider or challenge any of the Court's findings. So I will treat them effectively as if they are a matter of fact.
- There are a number of points to consider, so I'll take each in turn.

Internal damage

- Following the Court's judgement, the neighbour will be responsible for the cost of the internal repairs. As a result, I agree with AXA that this damage no longer falls for consideration under the buildings insurance policy. I'll explain why.
- If I were to require AXA to accept a claim for the internal damage, I would effectively be making a second party responsible for the same damage and corresponding cost. I don't think that would produce a fair and reasonable outcome as it could mean AXA becomes legally bound to pay for the same repairs as the neighbour.
- Even if I were to put aside the neighbour's responsibility for the internal damage, I would still have to consider the two exclusions AXA raised. And I may agree it would be fair for AXA to rely on them to decline the claim, given the findings of the Court about the cause of the damage.
- As a result, I don't intend to require AXA to accept the claim for the internal damage.

Rear wall underpinning

- The neighbour isn't responsible for the rear wall underpinning, so I agree with AXA that the cost of this work does fall for consideration under the policy.
- The Court found that the rear wall needed to be underpinned due to a lack of support, and this had been the case for a long time, perhaps as much as 50 years. As such, this problem predated AXA's policy by decades.
- AXA says there hasn't been any damage to the rear wall during its policy. From the evidence I've seen, I agree that's the case. The policy covers damage caused in certain ways. So, without any damage during the policy, there's nothing for AXA to consider and it's entitled to decline this part of the claim.
- Overall, this means the need for underpinning has arisen during the policy – but not the underlying problem itself, or any damage. Put simply, that's not what AXA's policy covers or is designed to cover. So whilst I can appreciate that from Mrs J's perspective, the need for underpinning is an unexpected event that's arisen recently, I don't think it's something AXA is responsible for under the policy.
- As a result, I don't intend to require AXA to accept the claim for the rear wall underpinning. And that means it acted fairly when it declined the buildings claim.

Loss of rent

- The policy covers loss of rental income provided, amongst other things, AXA has accepted a claim under the buildings section of the policy. That means AXA won't cover loss of rent in isolation – it will only do so alongside an accepted claim for building damage.
- As AXA hasn't accepted a buildings claim, and I've found that to be fair, it follows that it isn't required to accept a claim for loss of rent.

Claim handling

- After January 2022, AXA says it reasonably took some time to consider the matter further, including taking legal advice and gathering further evidence to determine the cause of damage and liability for it. By November 2022, around ten months later, it had provided its answer to Mrs J.
- AXA has conceded it took several months longer than it should have done to reach this stage. I agree. Whilst it was entitled to take the steps it did, that took too long, especially bearing in mind this was a claim with significant implications for Mrs J.
- Had AXA provided its answer sooner, the outcome of the claim wouldn't have changed. And Mrs J would have had to wait on the outcome of the Court action regardless, as AXA had no influence on that process.
- So whilst I think it would have been preferable for AXA to act more promptly in 2022, I don't think it would have made a significant difference to the distress and inconvenience Mrs J suffered. In these circumstances, I consider it would be fair and reasonable for AXA to pay £250 compensation.

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.

- AXA accepted my provisional decision and said it had nothing further to add.
- Mrs J said she disagreed with my provisional decision, made a number of points, and asked me to reconsider my findings. Whilst I've read and considered everything in her response, I won't comment on each and every point separately. I'll focus on the points which I think are most relevant when reaching and explaining my decision.
- Many of Mrs J's points are about what happened prior to the January 2022 complaint response. However, I simply can't consider what happened during that time, as the complaint was referred to this Service too late. As a result, my consideration must be limited to what happened after the January 2022 complaint response.
- Mrs J has also mentioned the way the policy was sold, including a change of insurer to AXA. I understand the policy was sold by an independent intermediary, so that's not something I can consider under this complaint against AXA. Mrs J is entitled to complain to the intermediary if she considers it hasn't treated her fairly.
- Mrs J has pointed to certain phrases used by AXA in its marketing literature. For example, it said things like "we've got you covered", "protect yourself", "cover you can

rely on” and similar. I don’t dispute that’s what the literature said, but nor do I think it has an impact on this complaint. They’re all broad phrases which speak to the general purpose of the policy. But none of them offer a guarantee that all claims will be accepted. And nor are they the policy documents, which will set out in more detail exactly what the insurance policy does and doesn’t cover. So I don’t think the marketing literature makes a difference in this case.

- Mrs J’s main argument is that AXA ought to have accepted the claim in 2020. Whilst that’s outside the scope of this complaint, I think her underlying point also applies to how AXA acted in 2022, which is within the scope and open to me to consider.
- In summary, I understand her argument as follows: AXA should have accepted the claim for damage to her building prior to the Court’s judgement. Had it done so, she would have been fully covered for all the damage and the work required to put it right, such as underpinning – whereas she’s only going to receive funds to the extent of the Court’s judgement and the costs it goes on to award, which will be less than the full value of the work required. She would also have been covered for loss of rent. And the significant financial insecurity and worry she’s suffered, in part because of the uncertainty of the Court action, would have been considerably reduced with AXA’s support and protection.
- In 2022, AXA declined the claim for the reasons set out above. In summary, that subsidence damage resulting from construction, repair or excavation at the property isn’t covered by the policy – and nor is accidental damage which takes the form of cracking to the building.
- So the question for me is whether it was fair for AXA to decline the claim at that time. The key evidence AXA had available then was the expert engineering advice Mrs J provided for her legal dispute with the neighbour. In summary, the experts found all the crack damage had been caused by subsidence. Some of which as a result of the neighbour’s work and some of which was historic.
- Part of the neighbour’s work involved underpinning the rear wall – and that led to the damage. I’m satisfied that work amounted to construction, repair or excavation. Mrs J has questioned whether it can be said this work was *at* her property, as required by the policy term, when the work wasn’t carried out under her instruction – it was carried out on behalf of the neighbour in relation to the neighbour’s property.
- I think the term is only concerned with where the work was carried out – not by whom. And part of the involved underpinning Mrs J’s rear wall – and that’s the part that led to the damage. So I think the work was at her property and I’m satisfied that means the term applies.
- However, there may be some situations where I might find it unfair for AXA to apply that term literally. For example, if the work was carried out to Mrs J’s property without her knowledge or agreement, it might be fairer to treat that as more akin to malicious damage than work at her property. But in this case, Mrs J was aware of the work, had agreed to it, and had engaged with the Party Wall process for it. So I’m not persuaded it would be fair for me to require AXA to depart from its policy term in these circumstances.
- I don’t think there’s any doubt the damage took the form of cracking, so the term AXA raised under the accidental damage section applies.

- Mrs J has suggested the damage not caused by the neighbour's work – the historic subsidence damage – could be covered under a previous AXA policy thought to have been in place sometime after 2005. I agree that may be possible, but it depends on the timing of the damage and when, if at all, AXA provided a previous policy, as well as what it covered. None of this is certain.
- The experts said the rear wall had a crack as far back as the 1970s due to longstanding problems with the way it was supported. So that damage, and the need to underpin it to remedy the problems, existed long before 2005 – and can't be considered under an AXA policy.
- Mrs J has pointed to the experts' finding that between the 1970s and around 2012, a void developed beneath the ground floor slabs and walls. So it's possible some of that activity may have happened since 2005 – and during an AXA policy if one was in place between 2005 and 2012. But in order for me to find that AXA should have accepted a claim, I would need to be persuaded of a number of things. Firstly, that there was an AXA policy in place at the relevant time which covered subsidence damage. Secondly, that the void developed during that policy. And thirdly, that the development of the void amounted to damage caused by subsidence. I'm not persuaded there's clear evidence for any of these things. So I'm not persuaded AXA should have accepted a claim for this problem.
- Overall, I'm satisfied it was fair and reasonable for AXA to decline the entire building damage claim in 2022. It follows that it was also fair and reasonable for it to decline the loss of rent claim for the reason given before. And nor was it responsible for the distress and inconvenience Mrs J suffered as a result of the financial insecurity and worry brought about by the damage or the Court action.
- I know this will come as a disappointment to Mrs J but, for the reasons above, I remain satisfied it was fair and reasonable for AXA to decline her claim in 2022. And it's only responsible for her distress and inconvenience to the extent I outlined in my provisional decision. Neither party has challenged this latter point, so I don't see the need to comment on it further other than to confirm my opinion is unchanged.

My final decision

I uphold this complaint.

I require AXA Insurance UK Plc to pay £250 compensation.

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

James Neville
Ombudsman