

The complaint

Mrs D complains about the way AXA XL Insurance Company UK Limited handled a claim and the settlement it paid under her conveyancing insurance policy.

Where I refer to AXA, this includes the actions of its agents and claims handlers for which it takes responsibility.

What happened

The detailed background to this complaint is well known to both parties, so I'll only summarise the key events here.

When Mrs D purchased the insured property in 2016, she took out a conveyancing insurance policy which covered her for adverse possession. This was because her property was accessed via land of which she wasn't the freeholder, and her title deeds were unclear on the extent of her rights.

In early 2021, Mrs D submitted a planning application to demolish the existing property and rebuilt it.

After being notified of the application, Mrs D's neighbour – who is the freeholder of the access land – served a notice requiring Mrs D to remove all belongings from the land and to provide a key to the entrance gates. Mrs D contacted AXA for support under her policy.

AXA declined the claim on the basis Mrs D's actions had prejudiced its position as it had given rise to the dispute of Mrs D's ownership and use of the area. It said the planning application included the adversely possessed area within the boundary plan and listed the neighbour as the owner of it. It said the acknowledgement of the neighbour as the true owner of the land is contrary to the claim to title.

Mrs D sought legal advice. And based on this, she challenged AXA's decision to decline her claim.

AXA took its own legal advice on policy coverage, which advised that its position wasn't sustainable. As such, four months after the claim was submitted, AXA accepted it.

AXA put forward three options on how to resolve the claim, which were:

1. Apply for title on the basis of adverse possession of the disputed land.
2. Negotiate with the neighbour for a transfer of title to the disputed land in order to reflect the occupation on the ground.
3. A payment of compensation to Mrs D for loss of title to the disputed land.

By this time, Mrs D's solicitors had written to the neighbour's solicitors claiming possessory title over the land. They attached a statement from the former owner of the property claiming adverse possession since the mid-1980s.

It was agreed between Mrs D and AXA that a surveyor should be instructed to value the property with and without the benefit from full title over the land. The advice received was that the property would be worth £50,000 less if it only had right of access in line with the title deeds.

AXA said that to settle the claim it would be prepared to pay the neighbour up to £50,000 for the transfer of the title. It suggested making an opening offer of £10,000, but if the neighbour wasn't prepared to negotiate or if they wanted more than that amount, it would settle the claim by paying Mrs D the sum of £50,000. It would then be for her to decide whether she continued her claim privately or accepted the position that she only had right of access over the land.

The offer was made to the neighbour, but they didn't engage with it. Instead, the neighbour's solicitor contested Mrs D's claim that she had possessory title and challenged the statements made by the previous owner. In light of this, AXA said it would pay Mrs D £50,000 to settle her claim.

Mrs D didn't think this was fair. She said her claim wasn't for a theoretical loss of the market value of her property. Rather, that she was in an ongoing legal dispute with her neighbour which she couldn't walk away from. She said by conceding the adverse possession claim, she'd be left relying on a poorly written title deed, the property would be cut off from the street and services, and it could have a significant impact on the saleability and value of the house. It could also lead to the neighbour removing the entrance gates.

AXA maintained its position. It said Mrs D wasn't tied into the dispute with the neighbour as it could be resolved by acknowledging them as the true owner and reverting to the title deeds for right of access. Alternatively, she could continue negotiations with the neighbour by making an increased offer for the title. AXA did offer a further £10,000 if the neighbour went on to dispute the entrance gates after the adverse possession claim was dropped.

Mrs D still didn't agree and raised concerns about some outstanding upgrades to services which could be affected if she dropped the claim for adverse possession. In light of this, AXA agreed Mrs D could obtain a comparative valuation of the property for consideration.

The second surveyor was of the opinion that the diminution in value of the property without the full title of the access land was £50,000. But they said there could be further losses in the region of 25% in light of the limited prospects of carrying out utility works and loss of amenity.

AXA said there was no evidence the neighbour would restrict access for carrying out utility works and upgrading services. It suggested Mrs D raise these issues with the neighbour to see what their position would be given that she had some outstanding works. But Mrs D decided to sell the property instead, and it was put on the market.

Mrs D was then served with legal proceedings by the neighbour, claiming damages for trespass.

AXA advised Mrs D not to defend the claim. But it said any costs arising from the proceedings wouldn't be covered by the policy. This was on the basis Mrs D hadn't followed AXA's advice by informing the neighbour that she wasn't proceeding with the works outlined in the planning application and that she accepted them as the owner of the land which AXA believed would've avoided legal proceedings entirely.

Mrs D subsequently followed AXA's advice. And the neighbour agreed to drop their claim for damages subject to Mrs D paying their legal costs in full. Mrs D agreed to this, but AXA maintained its decision that the costs would not be met by the policy.

Mrs D was able to resolve the trespass claim by way of a consent order in which she agreed; the neighbour was the true owner of the land; she would not use the land other than for the rights provided by the deeds, and she'd pay the neighbour's legal costs of £32,000.

AXA made a final settlement offer of £70,000 to resolve the claim.

Mrs D went on to secure a buyer for her property. But on the day of completion, the neighbour removed the entrance gates putting her in breach of contract with the buyer. To avoid the sale collapsing, she reduced the sale price by a further £20,000. The total sale price was £500,000 less than the surveyor's valuation.

Mrs D raised a complaint to AXA, the main reasons being:

- AXA initially declined the claim incorrectly causing delays of four months.
- AXA had refused to cover her costs and expenses in full under the policy.

To put things right, Mrs D wants AXA to pay an additional £70,000 to cover the costs she's incurred to settle the trespass claim, her outstanding legal fees, and the further reduction in value of the property after the entrance gates were removed.

AXA maintained its offer of £70,000 to settle the claim. It confirmed it had paid just over £43,400 in legal costs which included costs incurred prior to its acceptance of the claim. And it offered £350 compensation in recognition of its incorrect decision to decline cover.

Mrs D remained dissatisfied, so she brought her complaint to our service. But our Investigator didn't uphold it. He was persuaded AXA had offered a fair settlement in line with the policy terms and conditions.

As Mrs D didn't agree, the complaint was passed to me to decide. And I issued the following provisional decision.

My provisional decision

We've received very detailed submissions from both parties. I've summarised some of the key points, but I haven't set everything out in full. We provide an alternative dispute resolution service and our role is to provide an impartial review, quickly and informally. I use my judgement to decide what's fair, based on the main crux of a case. So, while I've considered everything, I won't comment in detail on every single point. Instead, I'll focus on the key points that are relevant to the outcome I've reached.

The policy terms

The terms and conditions of Mrs D's policy say:

"We will indemnity you for loss or damage above the excess (if applicable) caused by any of the insured events contained in your certificate of insurance. We will also pay your authorised expenses above the excess (if applicable), which will not reduce the policy amount."

The applicable insured event is described as:

“Adverse possession

Your property includes land that is not registered in your name at the land registry but which is claimed by possession only, and the owner of that land challenges your possession.”

The policy provides the following definitions:

“Authorised expenses

Legal fees and expenses that we are obliged to pay, which your Legal Representative incurs in defending you or pursuing your Claim because of an Insured Event. These fees and expenses must always be reasonably and properly incurred. We must approve them in writing before they are incurred.”

“Loss or Damage

Money or some other remedy that you must pay to someone else as a result of an Insured Event. This includes an award that a Court orders to be paid to settle your Claim, or expenses that you incur complying with an order of a Court, including an injunction.

The difference in the value of your Property immediately before and immediately after a Claim resulting from an Insured Event.

Demolition and/or reinstatement costs resulting from an Insured Event.”

The policy has the following exclusion:

“We will not indemnify you for Loss or Damage or pay Authorised Expenses, for the following Uninsured Matters... Legal fees and other expenses which we did not authorise in writing before they were incurred.”

And finally, the policy provides the following stipulation:

“Dealing with Claims under this Policy

You must co-operate with us at all times and we have the right to reduce your Claim to the extent that a material non-co-operation if you do not co-operate with us and that failure to co-operate affects our ability to assist you.

In dealing with any Claim under the terms of this Policy we will choose whether to defend you or pay you a cash amount equal to the cost of the Loss or Damage of your Claim. At any time, we can pay you an amount equal to the Policy Amount or any lower amount for which the Claim can be settled, after deduction of any money already paid. We may then give up control of and have no further liability in connection with the Claim.”

AXA's initial decision to decline the claim

It's not in dispute that AXA incorrectly declined Mrs D's claim in the first instance. It took legal advice on its decision which confirmed the stance it had taken wasn't sustainable. So I don't need to make a finding on whether or not it did something wrong here – it did. I only need to determine whether it's done enough to put things right.

Where a business has done something wrong, we'd expect it to put the customer back in the position they would've been in had everything been done correctly from the outset.

In this case, AXA accepted Mrs D's claim four months later than it should've done. However, throughout the time Mrs D's claim was declined, I can see that she continued to engage with AXA, and it provided her with advice and guidance on how to handle the claim whilst cover was in dispute. Mrs D was also represented by a solicitor who had written to the neighbour, so I'm satisfied her legal position wasn't prejudiced by this delay.

Once the claim was accepted, AXA agreed to pay the legal costs and disbursements Mrs D had incurred during the first four months of her claim, whereby putting her back in the position she would've been in.

I appreciate these costs weren't paid in full and Mrs D has been left with a shortfall. Mrs D's appointed solicitor had charged £840 per hour which AXA didn't think was reasonable. The policy is clear that legal costs should be "*reasonably and properly incurred*" and Mrs D had an obligation to mitigate her losses.

I'm satisfied AXA's contribution of £380 per hour is fair. I say this because it's in line with the county court rates for a grade B fee earner in the location of the insured property – which I'm persuaded is sufficient for a claim of this nature. AXA paid just over £35,299 of these costs as well as the cost of counsel's advice and the surveyor's fees in full – minus the policy excess.

AXA has further offered compensation of £350 to recognise the distress and inconvenience caused to Mrs D when her claim was incorrectly declined. And I'm satisfied this is fair given the impact suffered as a result.

AXA's offer to cash settle the claim

As quoted above, the policy gives AXA the discretion to settle a claim by the method it chooses, including by cash settlement.

When AXA accepted Mrs D's claim, it set out three options on how to resolve the claim, one of which was to pay the cash amount equal to the loss of the title. As Mrs D had already written to the neighbour's solicitors setting out her claim for possessory title, I think it was appropriate for AXA to explore options one and two to see if things could be resolved on the basis of Mrs D retaining the land. But when that seemed unlikely, AXA chose to settle the claim by option three.

I appreciate Mrs D had concerns about settling the claim in this way. She says the legal dispute had already started which she couldn't walk away from. But I don't agree. Having reviewed the correspondence from the neighbour's solicitors at the time AXA proposed a cash settlement, it was clear the neighbour only sought Mrs D to drop her claim for possessory title, acknowledge the neighbour has the true owner of the land, and limit her use of it to the rights given in the deed. They said if Mrs D didn't agree, it would start legal proceedings.

As such, I'm satisfied Mrs D was in a position to resolve the legal dispute at the time and take a cash settlement under the policy.

Mrs D also raised concerns about the amount offered for the cash settlement. In light of the points raised, AXA agreed to a second valuation of the property. And when the second surveyor said there might be a reduction in value due to the limited prospect of carrying out

utility works and loss of amenity, AXA agreed for Mrs D to explore this with the neighbour to see whether that was the case.

AXA also agreed to increase its settlement offer if the neighbour disputed the entrance gates in response to Mrs D's concerns that they would.

It seems to me that AXA has made a reasonable attempt to accommodate and resolve the concerns raised by Mrs D regarding the claim settlement and has increased its offer to recognise the additional impact to Mrs D of losing the rights over this land. I don't think it reasonably could've done any more without Mrs D following the advice it gave her about exploring the theoretical additional losses with the neighbour to see whether they materialised.

As it stands, Mrs D's established losses are the £50,000 reduction in value to the property estimated by two surveyors and the £20,000 price reduction following the removal of the entrance gates.

I appreciate Mrs D's house sold for much less than predicted by the surveyors. But I don't have any evidence to show me this was solely as a result of not having title over the access land. From what I've seen, many buyers had concerns over the poorly written title deed and the ongoing neighbour dispute.

It's for these reasons that I'm satisfied AXA's offer of £70,000 as a cash settlement is fair in the circumstances.

AXA's refusal to pay the costs associated with the trespass claim

Mrs D complains that AXA has refused to cover the costs associated with the neighbour's claim for trespass. She says this is a loss arising from the claim for adverse possession so it falls under the policy.

I agree that the circumstances of the neighbour's claim could arguably fall under the policy's description of an insured event. Ultimately, the neighbour's allegations of trespass arise from Mrs D's use of land that isn't registered in her name but which is claimed by possession only, and the neighbour is essentially challenging her possession.

However, the definition of loss or damage is money or some other remedy that Mrs D "must pay" to someone as a result of an insured event. The policy also gives AXA the right to reduce the claim settlement if Mrs D fails to co-operate.

Having reviewed the correspondence between Mrs D and AXA in full, I can see Mrs D was advised on multiple occasions of her options to drop her claim and acknowledge the neighbour as the true owner of the land. AXA had made it clear it wasn't prepared to pursue or defend any claims under the policy; rather, that it would cash settle. As such, it was for Mrs D to act as a prudent uninsured and take steps to mitigate her losses and avoid legal action.

Mrs D argues that even if she'd followed AXA's advice, there's nothing to suggest that the neighbour wouldn't have pursued a trespass claim against her regardless. But I don't agree. The fact the neighbour agreed to withdraw the trespass claim after Mrs D confirmed she wouldn't be pursuing an adverse possession claim and acknowledged the neighbour as the true owner, asking only that Mrs D cover their legal costs incurred as a result, persuades me that the neighbour only pursued the trespass claim in retaliation of Mrs D's claim for title.

As such, I agree with AXA that these costs could've been avoided. By going against AXA's advice, Mrs D took on the risk of the consequences. So I can't fairly conclude that AXA should pay these costs.

Outstanding legal fees

Mrs D says she has £10,000 of legal fees "on the clock" for work carried out by her solicitors. But from the information provided, I can see AXA has settled the legal costs up until the point a second surveyor was appointed and inclusive of the second surveyor's fees.

As I've explained above, I'm satisfied AXA has acted fairly in limiting the amount it pays to £380 per hour, so any shortfall arising from the reduced hourly rate isn't covered by the policy.

Furthermore, I can't fairly conclude that any legal fees incurred since the second surveyor's report are covered by the policy. I say this because AXA was clear at this point that it was offering a cash settlement to resolve the claim. It offered for Mrs D to do some further investigatory work by exploring any additional losses with the neighbour, which AXA would've covered the costs of, but Mrs D declined. AXA was clear at that point that no further legal fees would be met by the policy as a settlement under the policy had been offered and it didn't agree to any further work by the solicitors.

The policy is clear that legal costs incurred without AXA's written authorisation are excluded. So I'm satisfied AXA isn't liable to pay any further costs.

Responses to my provisional decision

Mrs D says the main point she's disputing is AXA's refusal to cover the costs she's incurred in settling the legal proceedings with the neighbour, amounting to £32,000. I've summarised her key reasons below:

- She believed the loss in value was more than just the use of the land for parking and storage which is why she wanted a second valuation. Until this was received, it wasn't prudent to concede the adverse possession claim as it was a key bargaining point for any negotiations for a new, clearer title deed.
- Whilst she wasn't served with the legal proceedings until after the second valuation had been received, they were prepared and issued much earlier.
- There were delays in getting the second valuation report due to difficulties finding a valuer prepared to provide advice and then when she did find one, they had personal circumstances which caused delays. Mrs D chased regularly as she was keen to get matters concluded as quickly as possible.
- It was clear from the neighbour's conduct throughout that they would make it very difficult – and likely restrict access – with regard to any request to do things relating to the disputed land including carrying out utility works and upgrading services. So it wasn't necessary to obtain evidence of this by contacting the neighbour about upgrading services.
- AXA never came to view the property and understand the practical situation on the ground.

AXA didn't respond.

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 don't intend to address the complaint in full again or respond to Mrs D's further submissions in detail. Instead, I'll focus on the key points that are relevant to the outcome I've reached.

I can see from the file that AXA confirmed to Mrs D by email dated 19 October 2021 that, as the neighbour hadn't engaged with negotiations to sell the title, it would be settling the claim by way of a cash settlement.

So from that point, Mrs D was aware AXA wouldn't be paying anything under the policy other than a payment of compensation for the loss of title to the disputed land. Whilst Mrs D was entitled to dispute how much that compensation payment was for and obtain a second valuation to support a higher value, she should've taken all reasonable steps to mitigate her losses.

Mrs D says she acted as a prudent uninsured by not conceding her adverse possession claim with the neighbour as this was her key bargaining point for a new, clearer title. But the policy doesn't cover negotiating a new title and Mrs D was aware that the policy wasn't covering negotiations or legal proceedings in respect to an adverse possession claim. So any actions she took in this respect, she took on the risk of the consequences.

Mrs D tells us that the neighbour signed a statement in February 2022 and issued the trespass claim in March 2022. As such, it's clear that this action could've been avoided had Mrs D conceded her claim in October 2021.

As I've said, this wouldn't have prevented her from getting a second valuation of her property to explore the extent of the loss of value. And she could've continued to negotiate with AXA over what she considered a reasonable compensation payment. She didn't need an active dispute with the neighbour to do this.

Finally, I see no reason why AXA needed to attend the property in order to deal with the claim. It's normal practice that if an insurer requires sight of the property or something specific within it (for example, if there is a claim for damage), it will arrange for an appropriate professional to attend such as a loss adjuster. In this case, AXA arranged for a valuer to attend to understand the loss. I'm satisfied this was sufficient in the circumstances.

I haven't seen anything to dissuade me from the findings set out in my provisional decision, so my outcome remains the same for the reasons I've previously given.

My final decision

AXA XL Insurance Company UK Limited has already made an offer to settle the claim for £70,000 and pay compensation of £350 to resolve the complaint and I think this offer is fair in all the circumstances for the reasons I've explained above.

So my decision is that AXA should pay £70,350, if it hasn't already.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 22 August 2024.

Sheryl Sibley
Ombudsman