

The complaint

Mr and Mrs F are unhappy with what AXA XL Insurance Company UK Limited did after they claimed on the liability section of their self-build insurance policy.

Although the policy is in joint names as this complaint has been brought by Mr F, I'll mainly refer to him in this decision.

What happened

Mr and Mrs F took out a self-build insurance policy with AXA in May 2019 to cover farm conversion work they were carrying out. In May 2020 their son (who was working on the project) injured himself on site when he fell off a ladder. Mr F didn't initially think that would give rise to a claim but, when the position changed, he notified AXA in February 2022.

AXA declined the claim. It said the policy required notice should be given of any occurrence which might give rise to a claim as soon as possible. And as far as practicable no alterations or repairs should be made until it had an opportunity to carry out an inspection. In this case the claim hadn't been made until nearly two years after the incident took place and the ladder had been disposed of without proper investigation into the cause of the accident.

Our investigator agreed Mr F hadn't notified AXA of the incident in line with the policy terms. And he thought that delay had prejudiced its position because it meant AXA didn't have the opportunity to inspect the ladder as it had already been disposed of by the time the claim was logged. So he thought it was fair of AXA to decline the claim.

Mr F didn't agree. He made detailed submissions and in summary said:

- AXA (through its loss adjuster) had previously accepted late notification of the claim was no longer an issue and not a reason for the decline. And it was solely relying on the disposal of the ladder as grounds for doing so.
- In relation to that the ladder was disposed of after his son had indicated he wouldn't be making a claim. He accepted AXA hadn't had the opportunity to inspect the ladder but it could have interviewed witnesses (including those who had used the ladder on the day of the accident) and hadn't done so. And he said the ladder had been in regular use for at least five years prior to the accident which demonstrated there was no manufacturer's defect with it. He thought the most likely cause of the accident was the locking mechanism hadn't been properly operated.
- He drew attention to the policy wording which referred to not carrying out alteration or repairs as far as practicable. In this case that term had been met; the ladder had been retained for over a year after the accident (until July 2021) at which point he thought it would no longer be required as evidence. And he thought retaining damaged equipment on site could have put him in breach of a different condition of the policy.

So I need to reach a final 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.

The relevant rules and industry guidelines say AXA has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably.

First, I appreciate this has been a difficult experience for Mr F and his son. The accident was serious and must have been extremely worrying for all concerned. And I'm sorry to learn of the ongoing health problems that are affecting his son. However, the question I need to consider is whether AXA acted fairly in turning down the claim Mr F made on his policy.

I've looked first at the terms and conditions of that policy. This does include liability cover in relation to which it says *"The Insurer agrees, subject to the terms, Limitation, Exclusions and Conditions, to indemnify the Insured up to the Limit of Indemnity for all sums the Insured shall become legally liable to pay as Compensation including Claimants Costs recoverable from the Insured and Costs and Expenses in respect of an Occurrence to which this Section applies as stated in the Specification occurring within the Territorial Limits during the Period of Insurance and happening in the course of the Contract."*

For employer's liability it defines 'Occurrence' as *"Injury caused during the Period of Insurance to any person under a Contract of Service or Apprenticeship with the Insured if such Injury arises out of and in the course of their employment by the Insured in connection with the Contract"*. And 'Occurrence' within public liability cover includes *"Injury to any person except that arising out of and in the course of their employment by the Insured under a Contract of Service or Apprenticeship"*.

I think any claim made by Mr F's son would fall within the definition of 'Occurrence' as it relates to either employer's or public liability (depending on what capacity he was operating in at the point the accident took place). And if this claim was one Mr F was legally liable to pay then in principle it's one his policy could cover.

However, that's subject to the other terms and conditions of the policy which include the notification requirement AXA has referenced. That says *"In the event of any occurrence which may give rise to a claim under this Policy, the Insured shall as soon as possible give notice thereof by telephone or email to [claims handler] and provide full details and as far as practicable there shall not be any alteration or repair until the Insurer shall have had an opportunity of inspecting"*.

Mr F has highlighted comments from the loss adjuster in which he said *"the reason for the decision is not the delay in reporting the incident"*. But AXA has referenced that in its final response to the complaint. So I think it is relying on this as a ground for turning down the claim. I've therefore thought about whether Mr F did meet the policy requirement to notify AXA as soon as possible of any occurrence that might give rise to a claim.

I appreciate he does appear to have told AXA about the claim as soon as his son indicated he was intending to pursue that. I also understand prior to that date his son had indicated he wouldn't be doing so. It was only when it became clear his recovery wasn't progressing as well as anticipated that he decided to do so.

But the requirement under the policy isn't to notify as soon as the policyholder becomes aware of a claim but to do so in the event of any occurrence which may give rise to a claim. Mr F says "*it cannot be the case that an insurer will require any accident to be reported as a potential claim*". However, my view (taking into account relevant case law) is that for a claim to be notified there should be a real rather than a fanciful risk of a claim being made on the policy. And that a reasonable insured would have understood there was a real risk of such a claim being made taking into account their knowledge of what happened.

I've thought about how that applies in this case. Mr F was aware in May 2020 that his son had been involved in a fall from a ladder at height on to a concrete floor and was in considerable pain. That caused him to be taken to hospital by emergency ambulance. And following that I understand he was unable to work or drive for approximately three months.

I appreciate Mr F's son may not have intended to bring a claim at that point (and I've seen an email from him in which he confirms that). But I think the seriousness of the accident is in itself something which Mr F could reasonably have thought might give rise to one. And Mr F himself said "*The ladder was kept for a few months just in case [son] made a claim*". I think that indicates a recognition on his part of the potential for a claim to be made and so is something AXA should have been informed of.

I appreciate his initial focus in the immediate aftermath of the accident would understandably have been on checking his son was ok. I don't think he'd have been in a position to contact AXA until the position on that was clearer. But I do think it would have been reasonable of him to have told it significantly sooner than he did. And I think there has been a breach of the policy terms here.

The policy says compliance with all of its terms and conditions is a condition precedent to AXA's liability to make any payment under the policy. I'm not persuaded it's fair to characterise all of the conditions of the policy in that way but I think it would reasonably apply to the notification requirements given those are often defined as a condition precedent. And the legal position is that AXA doesn't need to show how non-compliance with a condition precedent has adversely affected (prejudiced) its position to turn down a claim. But under our rules I still need to take into account what's fair and reasonable in all the circumstances. And I think the question of whether AXA has been caused prejudice by late notification is relevant when considering what's fair and reasonable.

AXA appears to have accepted that witnesses were still available to interview so it would be able to obtain an understanding of what happened. So the late notification hasn't prejudiced the position in relation to that. And as no formal legal action was progressed prior to the claim being notified there have been no costs incurred or steps taken that AXA didn't authorise. The issue is at the point the claim was notified the ladder which Mr F's son fell off had been disposed of.

I appreciate Mr F retained the ladder for over a year after the accident. I understand why he then disposed of it when he did. I'm not persuaded he is in breach of the policy terms as they relate to not carrying out alteration or repair "*as far as practicable*" until after the insurer has had an opportunity to inspect. But I think the issue here is with the late notification. If Mr F had told AXA about the claim within a reasonable time of the accident taking place then the ladder would still have been his possession. I think the question is whether AXA's position has been prejudiced because when notification did take place he no longer had it. Mr F suggests that would only be the case if that meant AXA wasn't able to bring a claim against the manufacturer of the ladder. I don't agree with him on that. I think AXA's position would be prejudiced if its ability to properly investigate and establish liability for the claim (and defend it if appropriate) was adversely affected by not being able to inspect the ladder.

I think that's the case. Because the ladder isn't available AXA has lost out on the opportunity to undertake its own investigation of its condition and whether there was any issue with it which either caused or contributed to the accident. That appears a key consideration in establishing whether Mr F would be held legally liable for what happened. And that would have informed AXA's view on whether the claim should be defended or not.

I've taken into account there could nevertheless be other evidence available in relation to that from witnesses. I also understand the ladder had been used for some years without any problem prior to the accident taking place. That could suggest there was no manufacturing defect. And it may be the issue was with the locking mechanism not being engaged as Mr F has suggested (his son has acknowledged in recent correspondence that may have been due to an oversight on his part).

Mr F has also said "*clearly it is a matter of conjecture as to what actually happened - that is the nature of an accident*". But I think the absence of the ladder has made it more difficult for AXA to establish what did happen and so where any liability for the incident should rest. As a result I think its position has been prejudiced because the ladder is no longer available. And that wouldn't have been the case if the policy terms as they relate to notification had been met. Taking into account that the clause is a condition precedent I think AXA acted correctly and fairly in turning down the claim Mr F made on the basis of non-compliance with the notification condition.

My final decision

I've decided not to uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F and Mrs F to accept or reject my decision before 20 November 2024.

James Park
Ombudsman