

The complaint

Mr and Mrs K complain that AXA Insurance Designated Activity Company (“AXA”) unfairly declined their claim for accidental damage.

What happened

In February 2023, Mr and Mrs K found that there was sewage overflowing from their septic tank. They got in touch with their contractor to resolve the issue, and the contractor emptied the tank to find that the baffle – which was meant to act as a filter to keep solid waste from leaving the tank, whilst allowing wastewater through – had become dislodged.

The contractor surveyed some of the drains and sludge was noted on the internal walls of the pipes. The contractor concluded that because the baffle had become dislodged, solids were entering the drainage field pipework and this in turn was causing the system to overflow.

Mr and Mrs K reported the matter to their insurer, AXA, which sent its loss adjuster to carry out an inspection. During the inspection, a large piece of timber was found in the tank, which seemed to be pushing the baffle down. When the timber was removed, it was noted that the baffle was dislodged and out of shape, and that it had turned several inches from its original position.

A large amount of solid sludge was also found at the base of the tank. AXA’s contractor concluded that the tank hadn’t been maintained, so evidence of maintenance was requested. Receipts were provided showing the dates on which the tank had been emptied. As the cause of the problem couldn’t be determined, and AXA felt that the receipts didn’t show that the system had been maintained annually, AXA declined the claim on the basis that there was no evidence a sudden and unforeseen event had taken place.

Mr and Mrs K didn’t agree with AXA’s position, so they made a complaint. In its response, AXA said it was Mr and Mrs K’s responsibility to prove their loss – and that they’d not shown that the event was an insured peril. So it maintained its position. Mr and Mrs K remained unhappy, so they referred their complaint to this service.

Our Investigator considered the matter, but didn’t think the complaint should be upheld, because AXA’s expert opinions suggested that the damage happened gradually over time. And our Investigator thought the loss adjuster’s report was more persuasive than that provided by Mr and Mrs K’s contractor.

As Mr and Mrs K didn’t accept our Investigator’s assessment, the complaint was passed to me to decide. I issued my provisional decision on 24 September 2024, giving both parties an opportunity to make further representations. In summary, I said I intended to uphold the complaint, because AXA hadn’t demonstrated that the loss wasn’t accidental.

I’ve included an extract from my provisional decision below:

“Building insurance policies aren’t designed to cover every eventuality, and when a claim is

made, it's for the insured to show that the event that gave rise to that claim was an insured peril under the policy – that is, something that the policy covers. In this case, that peril is “accidental damage”.

Once it's been shown that the event giving rise to the claim was an insured peril, it's then for the insurer to show that a valid exclusion applies, or that a condition of the policy has been breached, if it intends to decline the claim.

Mr and Mrs K's policy covers “accidental damage to... underground pipes... septic tanks and drain inspection covers”. Under “accidental damage to your buildings” the policy specifies that it won't cover “wear or tear or damage that occurs gradually over time”.

The term “accidental damage” isn't defined in the policy, so I've applied the normal, everyday meaning which is damage that is unforeseen and unexpected. Mr and Mrs K say the damage was both unforeseen and unexpected, because they maintained the system regularly and weren't aware of the damage until they noticed the effluent overflowing. But AXA's suggestion is that the system wasn't maintained as required, which led to a build up of waste and that this likely caused the problem.

So AXA says Mr and Mrs K haven't shown evidence of an insured peril. It believes the damage occurred gradually and as a result of wear and tear. But it's not provided any persuasive evidence that wear and tear led to the failure of the baffle. And whilst I understand that failing to empty the tank regularly can lead to the baffle becoming dislodged, the evidence I've seen of maintenance persuades me that the tank was regularly emptied. Mr and Mrs K were asked to provide receipts demonstrating their maintenance of the septic tank, and the evidence that's been produced shows that the tank was emptied in July 2019, January 2020, February 2021, May 2022 and January 2023. So I don't currently think AXA can fairly point to the lack of maintenance as a possible cause of the damage. And as the damage was first noticed on 17 February 2023, I think it's unlikely that there was a longstanding problem which was getting worse over time, as this would've been noted when the tank was emptied just a few weeks earlier, on 11 January 2023.

I also find it unlikely, given the nature of the system, that Mr and Mrs K could've been aware of the problem sooner or known there was damage to the baffle before they saw the waste overflowing. And it seems they acted as soon as they did become aware of the damage. So I'm satisfied that the damage was unforeseen and unexpected – and therefore accidental.

I've seen the loss adjuster's report provided by AXA, which says Mrs K was unable to advise when the tank was last emptied. But I don't consider this relevant as it's likely Mrs K was simply unaware of or had forgotten the schedule of maintenance for the preceding years. I say this because, as the evidence shows, the tank was emptied annually at least five times before the claim was made. The report also mentions solidified waste at the bottom of the tank, and says this potentially suggests that the tank hadn't been emptied prior to February 2021 for some time. But we now know this not to be the case as evidence of maintenance in 2020 and 2019 has been provided. I don't consider it reasonable to expect Mr and Mrs K to have kept records dating back further than this, and the evidence produced indicates that Mr and Mrs K kept the system in a good state of repair generally and maintained it regularly.

It's also important to note that the policy doesn't cover damage that occurs gradually over time. This means that for a claim not to be covered, it's the damage that has to be gradual, and not the cause of the damage. In this case, both parties seem to agree that the baffle sustained damage, but there's a difference of opinion about the cause of the damage. I'm not persuaded that the policy doesn't cover gradually occurring causes of damage. So even if a longstanding problem had caused the baffle to become dislodged all of a sudden, I think the policy should cover this because the damage to the baffle itself wouldn't have been

gradual, it would've been a one-off, unexpected and unforeseen event.

The loss adjuster's report includes photos, but I'm not persuaded that the photos show what AXA says they show. For example, there's a photo of a piece of timber in the tank, which Mr and Mrs K say was placed there to hold down the baffle by their contractor. And AXA suggests that the photo following this shows that the damage to the baffle is consistent with the size and shape of the timber placed in the tank. But I don't think the second photo does show this – and in any event the timber is said to have been placed by the contractor who attended after the damage was already noted. So I don't consider it was the placement of the timber which caused the initial damage to the baffle and caused the system to overflow. It's useful to note that the baffle can become dislodged due to the movement of the suction hose used to routinely empty the tank. And Mr and Mrs K's policy doesn't exclude damage caused by routine cleaning.

It follows therefore, that as AXA hasn't shown that the event giving rise to the claim was not an insured peril, nor has it been able to demonstrate that any of the valid policy exclusions apply or that conditions have been breached, I'm currently minded to uphold this complaint. Unless I receive anything that changes my mind, I'll require AXA to settle the claim in line with the remaining policy terms.

I can also see there have been some unexplained delays in AXA's handling of the claim. It took some time for the claim to progress and I can see that once receipts were provided, further information was requested by AXA, causing prolonged distress and inconvenience to Mr and Mrs K, for which I think they should be compensated.

So I'm minded to require AXA to pay Mr and Mrs K £200 for the distress and inconvenience they've experienced as a result of it unfairly declining the claim and the delays caused."

Mr and Mrs K didn't make any further points in response to my provisional decision, but AXA said the following, in summary:

- The placement of the timber had clearly damaged the baffle. It's unlikely to have been damaged prior to the contractor's attendance. If it was already damaged, the contractor wouldn't have needed to weigh down the baffle with the timber.
- The baffle was constructed of robust fibreglass or reinforced plastic so it wouldn't have become damaged due to routine tank emptying.
- Emptying the tank regularly by different contractors doesn't constitute routine maintenance. And in May 2022 there was a higher volume of waste removed than expected, but as other contractors haven't detailed the volumes removed it's not possible to tell whether the tank was functioning as it should've been prior to the loss.
- The large quantity of sludge found had rendered the tank beyond repair and suggests a longstanding problem.
- AXA had the tank inspected by a qualified engineer with many years of experience in contrast to the contractor acting on behalf of Mr and Mrs K, who had no such experience or qualifications.
- That I hadn't taken into account that the system was 20 years old.
- A high number of design failures were identified and these hadn't been taken into account.

- A ruling that any damage covered under “accidental damage” whether caused gradually or not equates the insurance policy to a maintenance contract which it is not. And this means insurers would need to cover claims to replace installations which have merely reached the end of their natural life.
- The repudiation was not based on an exclusion but based on the loss not being proven by way of accidental damage occurring.
- And that there were no unexplained delays caused by AXA or its agents.

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 carefully reconsidered everything including the additional comments provided by AXA, I see no reason to depart from my initial conclusion; that AXA has not acted fairly and reasonably in declining Mr and Mrs K’s claim.

I’ll explain why AXA’s response hasn’t changed my mind.

AXA’s comments suggest the placement of the timber was the proximate cause of the damage to the baffle. But I don’t consider it likely that the timber was placed in the tank before the baffle became damaged, and that the timber caused the damage to occur. It’s clear to me that there was no reported damage to the baffle when the tank was emptied in January 2023 – as this wasn’t noted at the time by the company emptying the tank. And the overflow was first noticed in February 2023, just a few weeks later. So I think it’s reasonable to conclude that the baffle became damaged during the emptying process in January, which caused the sewage to overflow.

AXA has referred to the materials used to construct the baffle and the age of the system, but I understand from my own research that even fibreglass or reinforced plastic baffles can become dislodged during the cleaning process. And whilst I don’t doubt the age of the tank had an impact on its function, neither Mr and Mrs K’s engineer nor AXA’s loss adjuster identified this as the main cause of the problem. AXA’s loss adjuster said the damage was caused by the timber and a lack of maintenance, but Mr and Mrs K’s contractor confirmed that the baffle was weighed down by the timber after it had already become loose. So I still don’t consider that AXA has been able to demonstrate that the damage was gradual or that it wasn’t accidental.

AXA has suggested that having the tank emptied regularly by different contractors didn’t constitute regular maintenance. But it hasn’t provided further detail in relation to what Mr and Mrs K ought to have done, in addition to having their tank frequently cleaned, or whether such additional action was in line with manufacturer’s guidelines. And initially, AXA’s reasoning included that the tank hadn’t been emptied regularly. So I don’t consider it fair for AXA to now place additional retrospective requirements on Mr and Mrs K.

Whilst I accept the point made by AXA in relation to the expert analysis it’s provided compared to the report by Mr and Mrs K’s contractor, the contents of AXA’s expert report don’t persuade me that the cause of the damage was the large piece of timber. The commentary provided isn’t consistent with what can be seen in the photos, and AXA’s recent comments about how the baffle became damaged by the timber aren’t in the report itself. So I find it more likely, based on all the evidence provided, that the baffle was already damaged which caused the effluent to overflow. And that this was why the contractor was called out in

the first place. And I think the baffle folding inward under the pressure of the timber could have happened after it had already become loose or dislodged.

None of the design failures identified by the drainage surveyor are mentioned in its report as a possible cause of damage – in fact they are noted more as an afterthought at the end of the report and not as a possible reason for the failure of the system.

AXA has raised concerns that to cover this sort of damage would set a precedent for insurers to have to consider all claims of this nature on the basis that the policyholders weren't aware of an impending mechanical breakdown. But this isn't what I've concluded here, and each case is decided on its own merits. In this case, I've found that Mr and Mrs K have evidenced that the maintenance of their system was carried out regularly, which is in direct contrast to what has been suggested by AXA. It was suggested that their lack of maintenance had led to the issues occurring gradually and that the damage to the baffle wasn't accidental because it was weighed down by a piece of timber. I've found this not to be the case for the reasons I've explained, and so I don't agree that my decision implies that all claims would be covered in which the policyholder is unaware of a problem, but the damage is acted upon following discovery.

The comment in my decision about exclusions was made merely to point out that I consider there to be no valid basis to decline this claim, as AXA hasn't demonstrated that the loss isn't covered, nor has it shown an exclusion applies.

I've reconsidered my findings in relation to the delays and compensation attributable to those. Having done so, I've reached the same conclusions as I reached in my provisional decision. Looking at the timeline provided by AXA, I think it should've accepted the claim and come to a decision sooner – particularly as the emails from May 2023 show that Mr and Mrs K were still awaiting a decision following submission of their contractor's report in March. And the claim wasn't declined in full until July, despite, in my view, there being enough evidence of an insured peril some months earlier.

Whilst I accept AXA's point that some delays may have been caused by Mr and Mrs K's representative, I still think it acted unfairly in relation to the declination of the claim, which caused Mr and Mrs K disappointment and more inconvenience than one might expect from making an insurance claim, so my decision about compensation remains unchanged.

It therefore follows that I uphold this complaint and now require AXA to put things right as follows.

Putting things right

AXA Insurance Designated Activity Company must now:

- Settle Mr and Mrs K's claim for accidental damage to the septic tank in line with the terms and conditions of their policy.
- Pay Mr and Mrs K £200 compensation for distress and inconvenience.

My final decision

My final decision is that I uphold this complaint and I direct AXA Insurance Designated Activity Company to put things right as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K and Mrs K to accept or reject my decision before 9 November 2024.

Ifrah Malik
Ombudsman