

## **complaint**

Mrs F complains that AXA Insurance UK Plc (AXA) is liable for various costs under a storm claim she made in 2011. This includes legal costs she incurred in connection with the works carried out after the storm and items in storage. She also complains about other issues and argues that AXA should pay for the loss assessor she instructed to assist her with the claim.

Any reference to AXA includes its agents.

## **background**

Mrs F had specialist holiday cottages insurance with AXA for her home, known as the main house, and three holiday cottages she rented out. She made a claim when her properties were damaged during a storm that occurred at the start of 2011. AXA accepted the claim.

Mrs F had a connection with a builder's firm, B. She was friends with the owner and they were already doing building works for her at the property. While AXA agreed to pay for the repairs, a JCT contract (JCT) was agreed between Mrs F and B for the works in December 2011 after a tendering process.

In April 2013, a 'final certificate of payment' was issued which signified the works under the JCT were complete. But Mrs F was unhappy as she thought the work was incomplete and defective so the final invoice from B wasn't paid. A site meeting with Mrs F, B and the JCT administrator took place and a 'final amended certificate of payment' was issued in May 2013. Mrs F didn't pay the amended certificate either.

In September 2013, B started court proceedings against Mrs F for just over £23,600 due on the final account under the JCT, £5,640 for additional works and less than £500 for interest. Mrs F counter claimed for damages for defective and incomplete works and £149,600 for liquidated damages arising from the delay in completing the works which she said was continuing. The proceedings came to an end in May 2015 when the judgment was issued. Ultimately, during the court proceedings, Mrs F accepted the builder was entitled to payment of £23,130.34 and it was held that she was able to offset the sum of £11,733 in respect of necessary remedial works. Her claim for liquidated damages was refused based on the shared understanding that the provision for liquidated damages no longer applied.

As B's claim was mostly successful and Mrs F's was mostly unsuccessful, she was ultimately responsible for B's costs.

Although AXA wasn't involved in the proceedings, it made a payment to the builders in March 2016 of nearly £80,000 to cover the amount awarded at court, including interest and costs. It says this was a gesture of goodwill to prevent Mrs F's property being taken away from her.

Mrs F complained to this service in 2015 and the complaint was upheld by one of our ombudsmen. The ombudsman concluded AXA was expected to deal with the claim and its actions gave the impression it was in charge of the arrangements with B. He required AXA to pay for rectification works that needed to be done to Mrs F's property. Within the decision the ombudsman also required AXA to pay for storage costs, alternative accommodation for a further three months and consider electricity costs and other costs Mrs F wanted to recover. The ombudsman also directed AXA to pay compensation to Mrs F for the distress and inconvenience she'd suffered.

Mrs F further complained to AXA about a number of outstanding issues which she felt still needed to be resolved by AXA. AXA issued a final response letter in June 2017. It upheld some of the complaint points. In relation to some of Mrs F's key points, it said the following.

- It'd consider the legal costs relating to the litigation against B if it was sent the solicitor's files to assess whether the costs were reasonable.
- It wouldn't pay for any ongoing storage or legal costs incurred in connection with the storage company, R. This is because it'd made payments for storage direct to Mrs F and her loss assessor. So, if she'd been unable to get her things back, it was because those payments hadn't been passed to R.
- It was unwilling to pay any more towards invoices issued in 2011 or pay backdated interest on the payment of £15,000 from 2011 as it was a gesture and Mrs F hadn't given them sufficient evidence to support that the works to which these costs relate were justified.
- The loss assessor's fees weren't covered under the policy and there was no evidence the loss assessor had altered the course of the claim or added any benefit.

Mrs F wasn't satisfied with AXA's response and she made a further complaint to this service. She made several points including the following.

- There's work from 2011 that was carried out following verbal instructions from a loss adjuster that doesn't meet building regulations and further areas of defective work have been identified by Mrs F's surveyor. AXA should put this right.
- Her central heating system should be fixed by AXA and it should also cover the increased electricity bills caused by the delay.
- Underground drainage pipes were removed during excavation works and replaced in a new location close to the existing oil tank. She's said the original drains need to be moved back to their original 2011 location by AXA to prevent potential contamination if a leak should occur.
- AXA should pay for the:
  - legal costs of the litigation with B and liquidated damages under the JCT.
  - legal costs of the litigation with R as well as any items lost or damaged by R.
  - carpet to be sorted out and loss of the fitted bedroom furniture.

Our investigator recommended the complaint should be upheld in part. However, Mrs F asked for her complaint to be reviewed by an ombudsman.

The matter was passed to an ombudsman who issued a provisional decision in March 2019 upholding part of Mrs F's complaint. Both Mrs F and AXA didn't accept the provisional outcome and a summary of their key reasons are set out below.

Mrs F's comments include the following points.

- AXA should pay interest on the legal costs associated with the proceedings against B, backdated to September 2013 for ease of a reference point.
- She needs to be compensated for the impact AXA's failures have had on her. She re-mortgaged her home and took out a loan to pay the legal costs and defective works.
- The £15,000 from AXA was an interim payment not a gesture of goodwill, therefore she's owed interest on it.

- In relation to R, the invoices were addressed and sent to AXA, so it shouldn't have made the payment to her loss assessor and expected it to be paid without clear instruction. Even so, there was no instruction or evidence the payment was for R's costs. And she only incurred legal costs as R took action against her because AXA hadn't paid them. She only sought an injunction to recover her goods from R.
- Interest is due on the amount of £6,419 which AXA offered to pay for items that were lost or damaged in storage as she feels it is on all cash payments.
- AXA didn't appoint a surveyor until October 2011 and so there were circumstances which meant she'd needed to instruct a loss assessor.
- She wants AXA to finalise the defective work as per the court order, and for the works to be managed by her surveyor and their fees paid by AXA.
- Defective work carried out in 2011 in the back flat resulted in mould and it must be closed to avoid potential litigation from guests. She wants AXA to pay her lost revenue for the time the flat is closed for these works.

She also felt the provisional decision didn't deal with the following points.

- Liquidated damages should be paid by AXA from June 2012 until all the work is complete as it was their actions that compromised her claim in court for this.
- The money she's owed when she paid for defective work in phase 1 and 2 to be put right which AXA refuses to pay or will only cover a percentage of.
- She's due the balance of the contents payment of £4,000 and a further £4,500 if our service thinks this amount was for R's costs rather than contents.
- AXA has failed to pay the full loss of revenue for further closures.

AXA's key comments include the following points.

- The direction it should pay Mrs F's legal costs of the litigation with B is both perverse and irrational and it fails to consider the full facts of the case.
  - The litigation was brought about by the breakdown in the personal relationship between Mrs F and the builder, rather than concerns with the quality of the works carried out.
  - Mrs F was a shareholder of B and had a financial interest in their appointment to do the work. This may have also meant she'd benefit from both sides of the proceedings.
  - The most significant part of the claim was the counter claim for liquidated damages and it'd be wholly unreasonable to make it pay the costs incurred by this aspect of the claim as, not only is there no cover for this under the policy, but AXA had no responsibility for bringing the claim, no control over its outcome, and wouldn't have benefitted financially from the outcome.
- The finding that AXA appointed the contractors to carry out the work and controlled it through its loss adjuster isn't fair or accurate. It says it maintained a close involvement as Mrs F kept deviating from the schedule of works and instructed the contractors to carry out additional work which it wasn't responsible for under the insurance contract. Its loss adjuster needed to be involved to sign off on which work would be paid for under the insurance policy but this didn't make it the employer - Mrs F was in control of the work and it wasn't present at the site meeting in May 2013 or many others.
- It didn't previously say it'd pay Mrs F's legal costs, instead it had said it'd consider her request upon receipt of the solicitors' files but, to date, Mrs F has refused to share the files of those proceedings with AXA.

- The claim to which this complaint relates has already significantly exceeded our award limit, in this case of £150,000. This is because more than £400,000 has already been paid at the direction of this service and by making a further award connected with the same claim we would be acting outside of our jurisdiction. It argues this service can't make an award which, when taken into consideration with the earlier complaint with which it's inextricably linked, results in AXA paying out sums far in excess of the award limit. Therefore, any award made by our service can only be a recommendation and AXA cannot be compelled to comply with the same.

The matter was then passed to me for a decision. I issued a provisional decision on 14 July 2021, an extract from which appears below and forms part of this final decision.

### ***'my provisional findings***

*A previous ombudsman issued a provisional decision in this matter. It has now been passed to me for a decision. I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.*

*Where there's a dispute about what happened, I've based my decision on what I think is more likely to have happened in light of the evidence.*

*Although many issues have been raised, this decision only addresses those issues I consider to be materially relevant to this complaint. However, I've given careful consideration to all of the submissions made before arriving at my decision.*

### *our award limit*

*As AXA has commented, where we uphold a complaint, an ombudsman can award fair compensation to be paid by a financial business up to the relevant award limit. That limit is determined by the date of the act or omission by the business as well as the date it's referred to our service. In this case, the limit is £150,000. If we think fair compensation is more than our award limit, we can recommend that the business pays the balance but the business wouldn't be obliged to do this, even if the consumer accepted our decision. However, the following are excluded from the award limit:*

- *any interest on the amount payable under a money award; and*
- *any costs awarded (and any interest awarded on those costs). For the avoidance of doubt, the reference to "costs" here concerns the costs of a complainant bringing a complaint to the Ombudsman Service. As such, it would not include, for example, the legal costs Mrs F has incurred in the litigation with B and R.*

*This matter involves complaint points we've looked at before and dealt with in previous decisions issued by our service and AXA has explained it has already paid over our limit as a direct result of those prior decisions – in excess of £400,000 it alleges. It also involves other issues which stem from the same originating event and original claim but either:*

- *haven't been dealt with by us previously in a decision; or*
- *were specifically excluded in a decision as something that needed to reach a conclusion before we could consider it. For example, the legal costs against R as they were still in storage with R at the time of the 2015 decision.*

*As the complaint points in this case are the same as those dealt with in previous decisions or*

*stem from the same originating event or claim (subject to the factors in the bullet points above) these complaint points are linked to the previous complaints and therefore the single award limit of £150,000 applicable to those previous complaints. I do not consider these complaint points would benefit from a new award limit. The award limit of £150,000 has already been exceeded by the amount AXA has paid to Mrs F as a direct result of the previous decisions this service has issued on those previous complaints. Therefore, any amount recommended to be paid by AXA in this decision which doesn't relate to interest awarded on the amount payable under a money award or costs or interest on those costs is a recommendation. It isn't part of a determination or award. AXA doesn't have to do what I recommend even if Mrs F accepts the decision.*

#### *complaint points*

*I have grouped the complaint points raised by Mrs F under fourteen broad headings. For ease, I've set these out below and then covered each one in turn.*

- 1. Legal costs of the proceedings against B*
- 2. Legal costs of the proceedings against R and contents shortfall*
- 3. Items damaged/not returned from storage*
- 4. Defective works*
- 5. Loss of rental income whilst repairs are being done to correct the defective works*
- 6. Loss of rental income*
- 7. Damaged carpets*
- 8. Fitted furniture damaged by the works*
- 9. Location of underground pipes*
- 10. Central stove/central heating system*
- 11. Additional heating costs incurred while without a central heating system*
- 12. Payments to the builder*
- 13. Loss assessor's fee*
- 14. Compensation for distress and inconvenience*

*Turning now to each issue mentioned above.*

- 1. legal costs of the proceedings against B*

*Mrs F didn't pay the builder's final invoice because she was unhappy with the standard of the repairs, arguing the work was incomplete and defective. This resulted in the builder commencing court proceedings against Mrs F for unpaid invoices, interest and costs. Whilst AXA paid the judgment sum to B, Mrs F's believes AXA is responsible for her legal costs.*

*In property insurance claims it's not uncommon for issues to arise concerning the work undertaken by contractors and, generally, the insurer is responsible for the standard of the work.*

*Even though AXA had accepted the claim and undertaken to pay for the repairs, Mrs F signed a JCT with B. This meant, when B pursued payment of the unpaid invoices, they claimed against Mrs F, not AXA. The main question here is whether, even though the JCT is between Mrs F and the builders, AXA was responsible for the quality of the repairs, and for paying for them. I'm satisfied our service has already decided in 2015 it was - the existence of the JCT didn't mean AXA no longer had these obligations under the insurance contract. Whilst I understand AXA is now saying the 2015 decision was incorrect in some of its findings, that decision is final and still stands. As a result, the findings made therein aren't*

*something we're now able to revisit.*

*Following on from the findings in the 2015 decision, if AXA had done what it was required to do under the terms of the insurance contract, Mrs F wouldn't have been a party to the JCT. However, it doesn't automatically follow from this that AXA is responsible for all the legal costs Mrs F incurred as a result of those proceedings. I'll explain why.*

*AXA says – supported by schedules and records – that it paid more than £19,000 to Mrs F's loss assessor for the balance of the works done by B that it was responsible for under the insurance contract. It says this was in accordance with what Mrs F had asked it to do and the payment was going to be withheld until the works had been completed satisfactorily.*

*When she first complained to our service in 2014, Mrs F said after the proposed 'final' certificate had been sent to her, this is what she did:*

*'I took legal advice.*

*I arranged a site meeting 13 May 2013 to try to resolve matters.*

*I instructed AXA to cancel the mandate with [B]...'*

*Taking this into account, Mrs F had decided not to pay B and she told AXA not to either. She might not have expected B to issue court proceedings. But, even at that stage, she could've mitigated her loss. Mrs F could have, for example, instructed her loss assessor to pay the final invoice payment received from AXA onto B or to their solicitors to hold in escrow pending resolution of the works Mrs F was unhappy with. Mrs F didn't do this and instead issued a substantial counterclaim against B, mostly comprising liquidated damages.*

*I agree most of the counterclaim – nearly £150,000 - wasn't for something that AXA would have benefitted from and it shouldn't fairly be expected to pay the costs relating to it. Further, this part of the counterclaim was dismissed by the judge.*

*I accept Mrs F was probably entitled to get some legal advice on her position here when the proceedings were issued as the party to the JCT and AXA would be responsible for those costs. But I have no doubt her determination to claim liquidated damages and her actions in the proceedings increased the costs significantly.*

*In a situation like this, I don't think it'd be fair or reasonable for me to ask AXA to pay all her legal costs in this matter as she's asked. Nor would it be possible for me to say what might be an appropriate amount for AXA to pay, if any. I say this taking into account all of the circumstances above as well as noting the solicitors acting in the litigation against B were the subject of an intervention by the Solicitors Regulation Authority. This was due to improper accounting and failing to comply with the solicitors accounting rules and their legal obligations. I note Mrs F has mentioned payments she made to her solicitor weren't passed on and she had to pay them twice so I'm satisfied the misconduct of the firm may have had an impact in this matter.*

*It follows that I don't uphold the part of Mrs F's complaint that AXA should pay the legal costs of the proceedings against B.*

## *2. legal costs of the proceedings against R and contents shortfall*

*In October 2015, our ombudsman concluded AXA should pay R's invoice to allow the release of Mrs F's belongings. But R started proceedings against Mrs F as a result of unpaid*

*invoices for storage and repair. In response, Mrs F sought an injunction against R on the basis it was withholding her goods and threatening to sell them at auction. She used a solicitor to help her to secure her things and incurred significant legal costs – more than £24,000. She's since argued AXA didn't pay the storage costs it'd been required to pay as a result of the 2015 decision and, therefore, it should reimburse her legal costs of the proceedings against R.*

*AXA's said it's not prepared to pay the legal costs because it paid the money direct to Mrs F and her loss assessor. It said that because the payment wasn't forwarded to the storage company it shouldn't be responsible for any legal costs Mrs F incurred in her efforts to recover her possessions.*

*I've thought carefully about Mrs F's complaint that there was no payment by AXA of R's costs, and consequently further loss arising from the non-payment. Having done so, I don't uphold her complaint point about this. This is because I've seen the following evidence from the file.*

- payment of £4,500  
*A screenshot to support that a BACS payment was made to the loss assessor in the amount of £4,500.*

*In correspondence with AXA's agent in late 2013 and early 2014, Mrs F's loss assessor says 'upon [Mrs F's] direction we can either part settle the accounts from [R] or pass the monies to her or her Solicitor.' AXA's agent confirms the money will be sent over 'in settlement of the contribution towards [R's] costs' and the loss assessor confirms 'we have received £4,500 on account and I have passed this to [Mrs F's] Solicitor to deal with [R] accordingly'.*

- payment of £3,217.22  
*A screenshot to show a cheque was sent to Mrs F in the amount of £3,217.22 in December 2015 for which Mrs F confirmed receipt and referred to as a 'payment for [R's] invoice'.*

*Having considered the evidence of the payments, I accept AXA paid the storage costs of R to Mrs F and her loss assessor. The fact the money wasn't passed to R isn't AXA's responsibility. So, any money Mrs F spent trying to recover her things and defending the proceedings started by R for these costs to be paid wouldn't be something AXA is responsible for. I therefore don't uphold her complaint on this issue.*

*I've also considered Mrs F's comments the contract was with AXA, and the invoice was addressed to AXA, so it shouldn't have expected her loss assessor to make the payment. Whilst I agree this is usually the position, the correspondence is clear about what the money was for when it was sent to her loss adjuster. In these circumstances, it wouldn't be fair or reasonable to suggest that AXA is responsible where this money wasn't passed on to R.*

*contents shortfall*

*Following the previous provisional decision, Mrs F says she's due the balance of the contents payment of £4,000 and a further £4,500 if our service thinks this amount was for R's costs rather than contents.*

*In so far as this relates to a shortfall in the contents payment, it has already been dealt with*

*in a previous decision of this service when the complaint wasn't upheld. So this isn't something I can consider here.*

*In relation to the point Mrs F makes that she's due a further £4,500 if our service considers the £4,500 paid was for R's costs rather than contents, I don't uphold Mrs F's complaint. The correspondence outlined above and on the file between the parties and their representatives is clear - the payment is for R's costs and so I see no reason to suggest there would be a further amount due under contents.*

*3. items damaged or not returned from storage*

*AXA's offered to pay Mrs F £6,419 for items that were lost or damaged in storage and she said she would accept that, provided it included interest from 13 January 2011. AXA didn't agree interest was due.*

*I agree with AXA - interest isn't due on the payment as Mrs F hasn't lost out financially and interest generally is discussed in some further detail later in this provisional decision.*

*4. defective works*

*The issue of outstanding or defective work is related to the standard of the repairs. This is an issue that was previously considered and Mrs F's complaint was upheld by our ombudsman in 2015. Mrs F has since submitted a surveyor's report dated August 2018 detailing outstanding items which she says are related to the claim and haven't previously been considered by this service. AXA says some of the defective work fell outside the insurance contract. I've also seen evidence that:*

- there were three phases to the rectification work and final certificates were issued by Mrs F's surveyors in Summer 2018 in relation to phases one and two; and*
- from the three phases of works and the scope of works Mrs F's surveyors were instructed on, this has all been dealt with.*

*It's clear there has been, for a significant period of time, a continuing dispute about the works AXA was required to undertake to discharge its obligation under the insurance contract and whether it has adequately done so. Recently, Mrs F has told our service there are still defective works which are outstanding which she says are close to £10,000 in value. However, in light of the evidence provided and the time since it was compiled, it is difficult to tell from the evidence which items still need to be remedied and who is responsible for them.*

*It's also become apparent, through the 10 years this claim has been ongoing and the various issues raised, the relationship between both parties has broken down. Mrs F doesn't trust AXA to carry out the works without further supervision, various events which have occurred have frustrated AXA's ability to complete the repairs and the costs have spiralled. So, to bring it to a close for both parties, it's my recommendation the parties follow the following steps to get to a point where the costs of any remaining insurance claim related work is quantified. Once this has been done, I recommend that AXA should then pay Mrs F a cash settlement in lieu of any further repairs. This would bring AXA and Mrs F's involvement in this matter to a close and I've outlined below the steps they should follow to do this.*

- 1. AXA must find three suitably qualified independent surveyors and give a list to Mrs F within 14 days of her accepting this decision and AXA agreeing to this recommendation (whichever is later). All three surveyors must have confirmed*

- they're independent and would be willing to comply with the timetable outlined below.*
- 2. Mrs F must confirm to AXA which one from this list she would agree to being appointed. This must be communicated to AXA within 7 days of the list being sent to her. If she doesn't respond in time, AXA may appoint its own choice from the list.*
  - 3. The surveyor is to be appointed as a single joint expert to assess:
    - a. Whether there's any remaining insurance claim related work to be done.*
    - b. If so, the costs of those works at commercial/publicly available rates.**
  - 4. When instructing the expert, AXA must send them the following:
    - a. original loss reports evidencing the damage caused by the storm in 2011 with photographs;*
    - b. copy policy schedule;*
    - c. a copy of Mrs F's report from August 2018;*
    - d. AXA's representations in the matter (limited to no more than 6 sides of A4 in font 11 arial); and*
    - e. any report(s) AXA has obtained which would assist the expert.**
  - 5. A copy of the instructions must also be sent to Mrs F at the same time. She will have 7 days from the date of the instructions being sent to her to:
    - a. send the expert and AXA a copy of her representations in the matter (limited to no more than 6 sides of A4 in font 11 arial); and*
    - b. any further report(s) since August 2018 that Mrs F has obtained which would assist the expert.**
  - 6. If either party sends the expert additional material not set out above, the expert may disregard this.*
  - 7. The expert must inspect the properties as they are now within 21 days of appointment.*
  - 8. Within 14 days of inspecting the properties, the expert will report to the both parties with a copy of the draft report.*
  - 9. Within 7 days of the report being sent to them, the parties may put written questions to the expert.*
  - 10. Within 21 days of the report being sent to them, the expert will answer any questions raised and issue their final report.*
  - 11. Both parties will be bound by the findings of the expert's report.*
  - 12. The expert must send copies of all correspondence to each party, ensure that both parties or their advisers are present for any discussions and that all communications are recorded.*
  - 13. The costs of the jointly appointed surveyor are to be covered by AXA.*
  - 14. Within 21 working days of the expert's final report being sent to the parties, AXA should pay the cash settlement sum recommended therein. No interest is due on this sum unless AXA doesn't pay it by the deadline after which simple interest will accrue at 8% from the day after the deadline for AXA to pay until the date payment is made.*
  - 15. Noting the current restrictions caused by the pandemic, either party can request a reasonable extension to the above deadlines where they – or the expert – is unable to comply with them. A request for an extension of time should be sought in advance, with reasons and a proposed deadline. Any consent sought is not to be unreasonably withheld.*

#### *The costs of defective work in phase 1 and 2*

*Mrs F also says she's owed money from when she paid for defective work in phase 1 and 2 to be put right which AXA refuses to pay or will only cover a percentage of. However, Mrs F hasn't been able to send our service sufficient evidence which would allow me to be satisfied as to what was paid and that it more likely than not related to defective works carried out as*

*part of the claim which AXA is liable for. It's my view this matter has been ongoing for such a long time that, if such evidence were available, it would've been provided to us by now.*

*It follows I don't uphold Mrs F's complaint point that AXA should pay Mrs F the cost of putting defective work in phase 1 and 2 right.*

5. *Loss of rental income*

*Mrs F believes AXA is responsible for lost rental income on the holiday cottages from 2012 onwards.*

*In 2011, AXA paid Mrs F up to the policy limit of £25,000 for lost rent. The previous decision in 2015 considered whether AXA was liable to pay more than the policy limit. However, the ombudsman found that AXA had acted reasonably in applying the policy limit. In so far as Mrs F's request for further loss of rent payments relates to the time it took to complete the works, this matter has already been covered in the previous decision and isn't something I could now consider.*

*However, generally speaking, where works have been defective and further works are needed to put things right, the insurance company would be responsible for any lost revenue during this further period of works, even if the policy limit has been exhausted. This is because it's responsible for the actions of the firm it appoints to do the work.*

*Between 2016 and 2017, AXA made several payments for lost rent of more than £33,000 in total. Mrs F believes she is owed more than this and has provided information relating to the income she received from each of her rental properties from 1994 to 2012. However, she's failed to quantify her claim for lost rental income, and the figures she's provided don't show any significant loss over and above that which AXA has already paid. Even if she was able to provide this, she'd also need to provide sufficient evidence that the loss was caused by the further works which were AXA's responsibility. I say this bearing in mind the impact of any loss of business due to other factors, such as seasonal irregularities and the current pandemic and any relief, payments or support Mrs F has received as well as the works she carried out. Further, I haven't seen any evidence that Mrs F has made reasonable efforts to mitigate the impact on her of these works.*

*As I've explained previously in relation to other claims by Mrs F, it's my view this matter has been ongoing for such a long time that, if such evidence were available, it would've been provided to us by now.*

*As there's no evidence of a loss here, it follows I don't uphold this part of Mrs F's complaint.*

*In the legal proceedings against B, Mrs F counter-claimed for liquidated damages of nearly £150,000. But the claim was rejected on the basis that there had been a shared assumption between the parties that the liquidated damages clause would no longer apply. She says this is something our service should now require AXA to pay.*

*The issue of liquidated damages was resolved during the previous court proceedings in so far as this related to the JCT between Mrs F and the builder. So, whilst I can consider whether AXA is liable for this amount, it wasn't a party to the JCT and Mrs F's claim for it was denied in court. Any penalty clause in the JCT for late completion by B which was held to no longer apply isn't something AXA should be liable for in these circumstances.*

6. *Loss of rental income whilst repairs are being done to correct the defective works under point 4*

*Mrs F's also said she wants AXA to reimburse her for lost revenue whilst repairs are being done to correct the defective works under point 4. But this isn't something that's happened yet nor has AXA had an opportunity to consider a claim for it. This would need to form the basis of a separate claim to AXA should there be further works and then a complaint if she was unhappy with how this was handled. However, any such claim would likely need to overcome the same issues outlined above at point 5. I'd also take the opportunity to remind Mrs F of her duty to mitigate any losses in advance of any further works.*

7. *Damaged carpets*

*AXA has already paid Mrs F more than £1,110 for the cost of replacing the damaged carpets in 2018. As there's no evidence of a loss here, I don't agree it needs to add any interest to that payment. It follows I don't uphold this part of Mrs F's complaint.*

8. *Fitted furniture damaged by the works*

*It's not clear from the file in this matter if the works for decoration (the correspondence refers to 'sanding and staining the salvaged fitted wardrobe units, and gloss to doors' and a date of 26 November 2016) were in lieu of AXA paying for the fitted wardrobes.*

*As there's no evidence of a loss here due to the limited information on our files, I don't uphold this part of Mrs F's complaint.*

9. *Location of underground pipes*

*I understand Mrs F is concerned about the location of the underground drainage pipes. But I can't reasonably ask AXA to undo work it has done based on the potential for contamination should a leak occur from the oil tank. Mrs F hasn't given us any expert evidence that it poses a health or other risk or was in breach of relevant regulations at the time. It follows I don't uphold this part of Mrs F's complaint.*

10. *Central stove and heating system*

*Mrs F had also explained that AXA had been due to reinstate her central heating stove. However, she acknowledged a payment of £9,794.95 towards this but says the estimate amounted to £12,445.20 (including VAT) although we don't have any invoices to support this amount.*

*AXA sent us a report from the loss adjuster which states the relevant OFTEC expert had been paid directly. The same report confirmed the amount of £8,683.20 including VAT should conclude this issue. I've also been sent email communication Mrs F had with AXA in October 2018 where this amount was accepted by her for the oil stove and flue along with £1,111.75 for carpet bringing the total amount paid to £9,794.95. I've also seen emails in late October 2018 which confirm the payment was made by BACS to Mrs F.*

*So, based on the evidence, I don't uphold Mrs F's complaint there is a further sum due to her in relation to the central stove and heating.*

11. *The offer made for the heating (electricity) cost as a result of 10 above needs to be*

*increased*

*Mrs F had also said her heating bills increased as a result of AXA's failure to pay for the central heating stove to be reinstated. AXA previously agreed a settlement of £2,000 for electricity costs and says it paid this to Mrs F in April 2016.*

*As there's no evidence of a loss here above and beyond the payment AXA paid to Mrs F in April 2016, I don't uphold this part of Mrs F's complaint.*

## *12. Interest on payments to B*

### *Payments made to B in 2011*

*Mrs F says AXA owes her money that she'd paid to the builders in 2011. AXA disputes this. As has previously been explained, because B had been doing work for Mrs F, there would need to be evidence - not only that money was paid, but also that the money paid related to work done as part of the claim.*

*I've considered the further arguments Mrs F has made in respect of money she paid to B before the work was put out to tender in 2011. However, Mrs F hasn't been able to send our service sufficient or persuasive evidence which would allow me to say what was paid and that it more likely than not related to the claim which AXA is liable for.*

*In particular, I've considered some invoices from 2011 which suggest work was invoiced outside the JCT. I've also seen Mrs F's bank statement which shows a payment of £31,985.05 leaving her account on 17 February 2011. Mrs F says this was payment to B in advance for works carried out from 13 January 2011. But I can't make AXA pay anything without evidence that the money was paid to the builders and what it was for. Significantly, the invoices I've seen for the relevant period don't amount to £31,985.05 and there are no receipts.*

*It's my view this matter has been running for such a long time, if such evidence were available, it would've been provided to us by now. It follows I don't uphold Mrs F's complaint point that AXA should pay her for the 2011 invoices or interest on the same.*

### *Interest on the £15,000 interim payment AXA made in 2011 to Mrs F*

*I've considered Mrs F's comments concerning interest on the £15,000 AXA paid to her for interim payments she says she made in 2011 and before she entered into the JCT with B.*

*I'm satisfied the interim payment was that, an interim payment, rather than a gesture by AXA. As such, it should include interest, but this would only be in so far as it related to amounts Mrs F had already paid and which AXA were liable for in connection with the claim. However, I don't consider Mrs F has sent sufficient or persuasive evidence to show the following:*

- the expenditure;*
- that it related to the claim which AXA is liable for; and*
- the date payment was made by her.*

*I also note Mrs F has explained to our service that, in 2011, she paid the contractor up front all the time. Whilst she recognised, in hindsight, this was a mistake there wouldn't be any*

*interest due if Mrs F paid amounts in advance of them being due. This is because this isn't required and isn't something we'd expect AXA to do if Mrs F hadn't paid them. And I haven't seen any evidence to support a claim that interest would be due on those invoices from the time they would've been properly due up to the point AXA actually paid them (or would have paid them in the normal course of an insurance claim but for the contractor being paid up front).*

*In these circumstances, and taking everything I've mentioned into account, I don't uphold Mrs F's complaint that the £15,000 payment should attract interest nor any payments made by her in advance in 2011. As I've explained previously in relation to other claims by Mrs F, it's my view this matter has been ongoing for such a long time that, if such evidence were available, it would've been provided to us by now.*

#### *Payments made to B by AXA as a result of the 2013 proceedings*

*Mrs F wants AXA to pay her interest on the payment it made to the builder following the judgment against her. I don't uphold this point. If interest was due on the payment, this would've been a matter for the judge in the related proceedings. Even so, it wouldn't be payable to Mrs F as the money was due to the builders.*

#### *13. The loss assessor's fees*

*Mrs F's argued she wouldn't have had to appoint loss assessors if AXA had conducted the claim properly and paid for the work at the appropriate time. So she feels AXA is responsible for these costs. But I don't see things in the same way. It was Mrs F's decision to appoint the loss assessor, and this wasn't something that was prompted by AXA or covered under the policy. I haven't seen any evidence of any special circumstances which meant she'd needed a loss assessor. Whilst I accept AXA didn't appoint anyone to manage the claim until 2011, I'm still not persuaded there were special circumstances which meant she needed this additional representation.*

#### *14. Compensation*

*Mrs F was awarded £1,500 compensation by our ombudsman in 2015, so I've only considered what she can fairly be awarded after that point.*

*Mrs F says she experienced extreme stress and anxiety because of AXA's handling of the claim and had to see a counsellor. She also spent significant periods without central heating and had to use electric heaters as well as time dealing with correspondence, attending meetings, court hearings and mediation. There's also further works which need to be assessed.*

*I have to distinguish between the distress and upset that Mrs F suffered because of the storm in 2011 and its consequences, which AXA isn't responsible for, with what AXA did or failed to do that might've added to that distress.*

*I've also balanced this with Mrs F's conduct throughout this claim and the impact this had on increasing the distress and inconvenience she experienced. This includes, for example, her failure to pass on the balance of the fee for B which ultimately led to the issue of proceedings against her. I have also considered that AXA has paid more than it should've needed to. It paid more than £78,000 against an original final invoice of £23,600. This discharged a significant liability that Mrs F was responsible for as a result of the judgment*

*issued in the proceedings between her and B and isn't something I feel should be disregarded here.*

*I've taken into account the significant correspondence in this matter and where the evidence is limited, the evidence has not been provided or the explanation given has altered over time. I've also thought about the litigation with B as well as the advice Mrs F received that the costs of proceeding with her litigation against R was likely to outweigh the value of any goods recovered and damages.*

*I've thought about this very carefully and I just don't think it'd be fair or reasonable for me to make a recommendation of a compensatory payment to Mrs F when taking into account the circumstances of this case, in particular those outlined above.*

#### *General matters*

*Since the 2015 decision, I note much of what Mrs F has corresponded with AXA about is interest. I thought it'd be helpful to explain the general purpose of interest and when this is due. If we uphold a complaint, we'd usually look to put the consumer in the position they would be in if things had happened as they should. In some cases, we decide the consumer has been out of pocket because of a business's error. So, to compensate the consumer for not having the money available to use themselves – we can tell the business to pay interest on top of the money award, for the period the consumer was out of pocket. It's for this reason some of the awards given to Mrs F by our service have had interest awards made on them. However, it wouldn't be appropriate to say that this gives Mrs F a right to interest on all payments made to her by AXA, particularly any made outside of an award or recommendation of this service.*

*Further, I note Mrs F says AXA has set a number of 'precedents' by making payments for certain things. However, I don't agree that future liability for something automatically follows a payment for that thing or something connected to it. The Ombudsman Service looks at each situation on its individual facts.*

#### *Money paid by AXA which is unaccounted for*

*AXA says it paid more than £19,000 direct to Mrs F for the final payment due to B in January 2015 and I've seen evidence of this in the schedules sent to us. This is also covered under complaint point 1 above. AXA says this amount hasn't been accounted for. It has asked this to be considered in this decision. As it paid B the judgment debt due under the proceedings it has, in effect, paid money towards B's final invoice twice – once in 2015 and once when it paid the judgment sum of just under £80,000 in 2016.*

*Mrs F needs to explain to AXA's reasonable satisfaction:*

- what the January 2015 payment was used for with evidence; and*
- that it appropriately fell within Mrs F's claim.*

*If she's unable to do this within a reasonable time – which I'd suggest is no more than two weeks from the date the final decision is accepted – I think it'd be fair and reasonable for this to be deducted from any further payments AXA are due to make to Mrs F, whether under this decision or at all.'*

*I invited all parties to let me have any further submissions before I reached a final decision.*

AXA has responded to say it considers the provisional decision to be fair on the whole. However, it takes issue with the reasonableness of appointing a new surveyor at this late stage and isn't willing to accept my recommendation under section 4 - Defective works. AXA says this is for three key reasons:

- (a) AXA has already paid out significantly in excess of the financial cap and there are elements of the monies that have been paid out which, with the benefit of hindsight, need not have been paid. Therefore, AXA considers Mrs F has been adequately compensated;
- (b) It is extremely unlikely that any surveyor will be able to determine whether there are any insurance related repairs still outstanding from a storm event that occurred some 10 years ago; and
- (c) Mrs F's own appointed surveyors have stated they're unaware of any outstanding snagging issues from the original event and there has been no indication from Mrs F as to what repairs are alleged to remain outstanding.

Mrs F has replied to my provisional decision and, in summary, she says she's hopeful my provisional decision will move her complaint to an amicable conclusion. She makes a number of further comments which I have broadly summarised below in my findings and taken into account, in full, in my further consideration of this matter.

### **my findings**

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

Having done so, I've reached the same conclusions as set out in my provisional decision and for the same reasons.

I acknowledge AXA's comments. But I also consider it's difficult to tell from the evidence which items still need to be remedied - if indeed there are any - and who is responsible for them. The surveyor for Mrs F - understandably - limits his confirmation of this to the works they were instructed to deal with. Further, the surveyor's final certificates referred to in my provisional decision were from September 2018 and yet, since then, the parties have been in correspondence with each other and our service about the works. This suggests it isn't the case that the 2018 certificates are evidence that all the issues have been resolved.

I acknowledge AXA say a surveyor wouldn't be able to determine whether there are any insurance related repairs 10 years after the insured event. However, if a surveyor was unable to determine this, it's my view this would suggest there wouldn't be any cash settlement to pay.

So, whilst I appreciate AXA's indication it doesn't accept the recommendation under point 4 of my provisional decision - to pay a cash settlement in lieu of further repairs (if any exist), as calculated under that section - it nonetheless remains my recommendation. As explained in my provisional decision, this recommendation is not part of my determination or award. AXA doesn't have to do what I recommend and it's unlikely that Mrs F can accept my decision and go to court to ask for the balance.

I've thought carefully about the additional comments from Mrs F. In summary, Mrs F says she agrees for a surveyor and quantity surveyor to be appointed under point 4 or just a quantity surveyor and also sets out the terms of an offer she would consider from AXA.

Responding to the first point, the redress proposed in point 4 of my provisional decision is a recommendation and AXA don't have to do what I say. But, even if they did, it'd be up to AXA which three surveyors to pick initially, as set out in the recommendation. As regards Mrs F's suggestion that a surveyor and quantity surveyor be appointed, my recommendation under complaint point 4 proposes the appointment of only one surveyor, not two. I do not consider it would be fair and reasonable to amend my recommendation at complaint point 4 to recommend that AXA appoint more than one surveyor.

As regards the second point, whilst I understand Mrs F would consider an offer from AXA, the terms of the offer she'd consider don't reflect the redress proposed in my provisional decision. As previously mentioned, I have reached the same conclusions in my final decision as in my provisional decision and for the same reasons. Although this doesn't prevent AXA from making an offer to Mrs F, it's not something I'm making a recommendation for AXA to do.

A number of the further points from Mrs F are set out below, broadly under the headings used in my provisional decision from July 2021.

When reviewing my provisional decision, I note that in the summary of complaint points, number 12 referred to 'Payments to the builder'. This should've been the heading used at point 12 of my findings when I came to consider this complaint point. I shall refer to complaint point 12 as '12. Payments to the builder' in this final decision. I also noted when I listed the complaint points under the heading 'complaint points' in the provisional decision the headings for point 5 and point 6 were not in the correct order such that point 5 should have read '5. Loss of rental income' and point 6 should have read '6. Loss of rental income whilst repairs are being done to correct the defective works'. Finally, under the section titled 'our award limit' I say: '*As the complaint points in this case are the same as those dealt with in previous decisions or stem from the same originating event or claim (subject to the factors in the bullet points above)*'. The words '*same originating event or claim*' should read as '*same originating event and original claim*' as set out earlier in that section of the provisional decision. I also once refer to Mrs F's loss assessor as a loss adjuster and, at point 8 of the directions relating to the appointment of a surveyor, I say: '*...the expert will report to the both parties..*'. The word '*the*' should be deleted from these words so it reads '*...the expert will report to both parties..*'. For the avoidance of doubt, these are minor typographical errors and don't impact on the findings of my provisional decision or final decision. I simply set this clarification out here for the sake of completeness.

#### *our award limit*

Mrs F says this complaint came about because the points raised were not a known issue when the initial complaint was made to our service. Even so, she feels she should've been told at the outset this was an extension of the final decision she received in 2015. And she mentions the length of time it has taken, with no timeline or explanation.

I feel this should've been made clear to both parties sooner than it was. For this, I offer my apologies to both parties. Nonetheless, the fact remains that the award limit of £150,000 has already been exceeded by the amount AXA has paid to Mrs F as a direct result of the previous decisions this service has issued on those previous complaints.

Mrs F says that the compliant points raised in this complaint were not a known issue when the initial complaint was made to the Ombudsman Service. However, per my provisional

decision, the complaint points in this case are the same as those dealt with in previous decisions or stem from the same originating event and original claim but either:

- haven't been dealt with by us previously in a decision; or
- were specifically excluded in a decision as something that needed to reach a conclusion before we could consider it.

As such, these complaint points are linked to the previous complaints and therefore the single award limit of £150,000 applicable to those previous complaints. Whether the complaint points were a known issue or not they are all either the same complaint points raised in previous decisions or stem from the same originating event and original claim (subject to the two bullet points above). All the complaint points raised in this complaint are therefore subject to the original award limit which has now been exceeded.

Therefore, any amount recommended to be paid by AXA in this decision which doesn't relate to interest awarded on the amount payable under a money award or costs or interest on those costs is a recommendation.

1. Legal costs of the proceedings against B

Mrs F talks about the loss of trust she felt in B and the JCT administrator and says she mitigated AXA's losses throughout by allowing it to do less than they were required to do e.g. not putting back the dado rails and heritage wallpaper.

Mrs F explains she had a number of traumatic personal things occur between 2006 and 2010 and this led to her making some '*serious and foolish*' decisions including giving £130,000 to B to support the business and ensure B continued working on her property. But she says she never benefited from her connection with B.

I note these comments and understand this – I'm sure we have all made decisions we regret or would change when considered with the benefit of hindsight, particularly during periods of great stress. But what I'm considering here is to what extent AXA got things wrong and needs to put things right.

Having done so, my view on the outcome of this complaint point about the recovery of her legal costs is unchanged and this is for the reasons set out in my provisional decision. In terms of the solicitors' files related to the proceedings with B, Mrs F asks that these documents are returned. She says for AXA to review these documents, it needs to apply to the SRA and seek approval and she won't object to this. She suggests AXA can then appoint a costs draftsman to review the cost schedule and conclude the issue of payment of legal costs.

Whilst AXA may choose to do this, to be clear, I don't uphold the part of Mrs F's complaint that AXA should pay the legal costs of the proceedings against B and so this isn't something I would make a recommendation for it to do.

2. Legal costs of the proceedings against R and contents shortfall
3. Items damaged/not returned from storage

Mrs F says she doesn't know what she was expected to do to recover her goods and refers to the confusion over the £4,500 and asks me to expand on R's refusal to accept payment from the solicitor in 2015. But, as I've said previously, I consider the correspondence is clear

about what the £4,500 was for when it was sent to her loss assessor. And R's refusal of money in 2015 doesn't affect my decision on this point as it relates to proceedings when R was seeking to recover money due to it, which I don't hold AXA responsible for. To have the belongings released, R needed to be paid. And Mrs F – directly or through her agents – had the money from AXA to pay them.

Mrs F feels that if she'd had continuing legal cover and AXA had accepted it got things wrong with the JCT contract and the appointment of R, matters with B and R would've been easier to sort out and this would've reduced her claim and impact of it as matters would've been resolved sooner than they were and without escalation. These issues have previously been considered and/or commented on by our service and so it's not something I shall comment on any more than what has already been said in my provisional decision.

4. Defective works
5. Loss of rental income
6. Loss of rental income whilst repairs are being done to correct the defective works

Mrs F says her contributions to the rectification of defective work is shown in the surveyors schedules sent to AXA and our service. I've read all the documents relevant to this complaint point. However, as explained, Mrs F hasn't been able to send our service sufficient evidence which would allow me to be satisfied as to what was paid *and* that it more likely than not related to defective works carried out as part of the claim which AXA is liable for.

I note Mrs F's comments about the rental income and evidence she has supplied previously. However, my opinion remains as set out at point 5 and 6 of my provisional decision.

8. Fitted furniture damaged by the works

Mrs F says another company should've been appointed. She also says she can get a quote for the cost of replacement wardrobes. However, there's still no evidence of a loss here and neither a quote to install wardrobes nor her argument that another company should've been appointed are evidence of the loss itself.

9. Location of underground pipes
10. Central stove/central heating system
11. Additional heating costs incurred while without a central heating system

Mrs F says works couldn't be carried out because of the shortfall in payment and the only way forward now is to change from an oil boiler and oil tank to a heat pump. Also, she wants the cost of extra electric until the system is in place. She feels it's hard to quantify how much extra has had to be paid but she'd accept a further £2,000 for this.

As I explained in my provision decision, the evidence on file shows Mrs F accepted £8,683.20 for the oil stove in accordance with the estimate from a report about the same. There's also still no evidence of a loss for the electricity cost above and beyond the payment AXA paid to Mrs F in April 2016.

I note Mrs F's comments about the location of the underground pipes being in breach of buildings regulations. However, in the face of no evidence in support of this, my opinion remains as set out at point 9 of my provisional decision. As mentioned in relation to other points, it's my view this matter has been running for such a long time, if such evidence were available, it would've been provided to us by now.

12. Payments to the builder

*Interest on the £15,000 interim payment AXA made in 2011 to Mrs F.*

As explained in my provisional decision, I don't consider Mrs F has proven her claim under this point. And it's not for our service or AXA to obtain the evidence to do this for her.

13. The loss assessor's fees

I note Mrs F's comments about the appointment of the loss assessor being necessary and that AXA agreed to pay the fees of the loss assessor and then changed its mind but I haven't seen evidence of this. Even so, the current position is AXA doesn't agree to pay anything further to Mrs F and my opinion remains as set out at point 13 of my provisional decision.

14. Compensation

Mrs F comments that compensation of £5,000 was removed from the previous decision and made further comments to support her suggestion that she should receive compensation. She's told us about some very difficult personal matters which she experienced, and which must have undoubtedly had a significant impact on her over the time of this claim and beyond.

I thought about this very carefully and, whilst I appreciate this will be disappointing news to Mrs F, those comments don't change my opinion on this issue. As explained in my provisional decision, I don't think it'd be fair or reasonable for me to make a recommendation of a compensatory payment to Mrs F when taking into account the circumstances of this case, in particular those outlined in my provisional decision. And my provisional decision replaces any which came before it.

*Money paid by AXA which is unaccounted for*

Mrs F has commented on what the 2015 payment was used for. She's explained, due to a discrepancy in AXA's accounting, when it refers to more than £19,000 being unaccounted for, it's referring to two payments which amount to £20,000. She explains these payments were to compensate her for work she had paid with her own money and weren't connected to work done by B.

It's not in dispute the payment was made to Mrs F by AXA. Instead, what has been questioned by AXA is how she'd spent the money to which that payment related. This is due to concerns this is an amount which hasn't been accounted for and possibly one which AXA has paid twice. I'm not ignoring the evidence Mrs F has sent to us recently on this point but it doesn't go to the issue raised.

Taking everything into account, it's my opinion that Mrs F still hasn't explained (i) what the January 2015 payment was used for with evidence; and (ii) that it appropriately fell within Mrs F's claim. I note she directs AXA to other parties for clarification/information but it's for her to prove this and I don't find that she has.

*Evidence*

I note Mrs F says in recent emails to this service that she can send further documents if

required. I consider enough information has been provided for me to determine the complaint and don't require any further documentation in order to reach my decision.

Also, I don't think it's fair or reasonable to delay the issue of the final decision further. I consider that the gaps in evidence to support her case have been clearly set out for Mrs F to consider and respond to. Our service has also asked Mrs F on a number of occasions to send to us anything else she wanted our service to consider before the issue of a final decision. This was done formally in the provisional decision of March 2019 and also in my provisional decision of July 2021. Our investigator also explained to Mrs F that she should send in any more evidence that she wanted considered before the deadline in my provisional decision of 4 August 2021.

Even so, as set out previously in relation to many of the complaint points, it's my view this matter has been running for such a long time, if such evidence were available, it would've been provided to us by now.

### **Putting things right**

For the reasons set out above, I uphold this complaint in part and fair compensation should be calculated in accordance with what I've said below.

I recommend AXA Insurance UK Plc, in order to put things right, pays Mrs F a cash settlement in lieu of any further repairs. The method of calculating that amount is set out above in the extract from my provisional decision under point 4\*. As explained above, the award limit in this matter has already been reached and so this is a recommendation for AXA to pay these amounts or take this action.

For completeness, AXA Insurance UK Plc may deduct the unaccounted sum from any monies due to be paid to Mrs F if no reasonable explanation is provided within 2 weeks of acceptance of the final decision.

To be clear, and as explained in the further provisional decision, this recommendation is not part of my determination or award. AXA Insurance UK Plc doesn't have to do what I recommend and it's unlikely that Mrs F can accept my decision and go to court to ask for the balance. So, Mrs F may want to get independent legal advice before deciding whether to accept this decision.

\*If AXA Insurance UK Plc considers that it's required by HM Revenue & Customs to withhold income tax from any interest, it should tell Mrs F how much it's taken off. It should also give Mrs F a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

**my final decision**

My final decision is that I partly uphold this complaint. It is my recommendation that AXA Insurance UK Plc should take the steps set out above to put things right.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs F to accept or reject my decision before 3 October 2021.

Rebecca Ellis  
**ombudsman**