

complaint

Mr O complains AXA Insurance UK Plc unfairly declined a claim he made for subsidence on his commercial property insurance policy.

background

Mr O has held a commercial property insurance policy since 2013. In May 2018, Mr O noted some damage to the property, which he thought had been caused by subsidence, so he contacted AXA to make a claim.

When AXA investigated the claim, it reviewed a report from 2009. Mr O had this report carried out when he'd inherited the property from a family member. AXA said this report showed the property had previously suffered from movement, and Mr O hadn't disclosed this when the policy was taken out in 2013. In late 2016 Mr O's policy lapsed and was then reinstated. AXA said it had again asked if the property had suffered damage caused by subsidence and Mr O still hadn't disclosed the previous movement.

AXA voided Mr O's policy from 2016 as it said Mr O hadn't made a fair presentation of the risk when it was taken out. It said had Mr O disclosed the previous movement, it wouldn't have offered him cover.

Mr O disagreed he'd given the wrong information. He said there hadn't been any subsidence prior to the damage he reported in the claim. He was only aware of settlement damage which he didn't think he needed to disclose.

Our investigator thought AXA had acted unfairly in voiding the policy. She thought even though the relevant law was the Insurance Act 2015, it would be fair in the circumstances to consider the principles of the Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA).

She reviewed the report AXA had relied on and didn't agree it said the property had suffered damage from subsidence. So she didn't think Mr O had misrepresented the condition of the property when he took out the insurance in 2016. She said the policy should be reinstated and AXA should reconsider the claim in line with the remaining policy terms.

AXA didn't agree. It strongly disputed that the principles of CIDRA should apply. And it said its interpretation of the engineers comments are that the property had suffered from subsidence, even though the report doesn't specifically mention subsidence.

Mr O agreed with the findings of our investigator. But he thought AXA should compensate him for loss of rent. Our investigator said this needed to be considered when AXA were considering the claim, so she didn't consider this further.

As AXA didn't agree, the matter has come to me to decide.

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 agree with the outcome reached by our investigator.

Given AXA is relying on the 2016 sale as the point where Mr O didn't give a fair presentation is risk, the Insurance Act 2015 is the relevant law that applies. This is because the policy is a commercial one. I agree with our investigator that it's fair and reasonable to also consider the principles of CIDRA. I say this because Mr O isn't a professional landlord, but someone who is caught by this law by being in a position to rent out a property he has inherited. However it's worth noting that whatever legal principles apply, I consider the outcome would be the same in that AXA cannot fairly void the policy for misrepresentation. So I've only considered the principles of the Insurance Act 2015.

The Insurance Act 2015 says Mr O has a duty to give a fair presentation of the risk. Having considered what was known to Mr O in 2016 and the 2009 report, I think he did.

AXA says Mr O knew about movement and the report from 2009 says future movement is likely to occur. So he should have disclosed this when asked if the property had suffered damage from subsidence. Having read the report, I don't agree with AXA's interpretation that the report concluded subsidence damage had occurred that was likely to occur in the future.

The conclusion made by the structural engineer was:

'we strongly suspect that the movement that has occurred is associated with the presence of generally weak ground conditions beneath the foundations that has led to long term settlement'.

It also says:

'the total degree of movement that has occurred to date is in our opinion with structurally acceptable limits and considering the age of the property...the indications are that the future rate of movement will be very slow.'

The report says only minor repairs of any cracks are needed. So there isn't anything in the conclusions of that report that I think should have put Mr O on notice that this would be material to disclose to the insurer. Mr O says on receiving this report he wasn't aware there was any cause for concern. I don't think that was an unreasonable assumption for him to make given no substantial repairs were recommended and the engineer concluded the movement was within acceptable limits.

The questions AXA asked at the point of sale give an indication of the type of things it thinks are important to know about. None of the questions I've seen ask about settlement or general movement. AXA has said it considers the foundation movement referred to in the report to be the same as subsidence. But I don't agree it does consider them to be the same. I say this because AXA's policy doesn't cover damage caused by *'normal settlement'*. So if it doesn't consider there is a difference between the two, then I can't see a reason for excluding one and covering the other under the policy.

When Mr O took out the policy, he was only asked if the property has experienced signs of damage due to *'subsidence, heave or landslide'*. Based on everything I've seen I don't think he could have reasonably been aware that he'd have to mention the previous evidence of settlement. In concluding this I've also considered that by the time the policy was taken out in 2016, it had been around seven years since the report had been carried out. Mr O hadn't experienced any further issues in those seven years.

So because I consider Mr O did give a fair presentation of the risk, it follows that he has complied with his duty under the Act. So AXA cannot void the policy for misrepresentation. To put things right, AXA needs to reinstate the policy from 2016. It also needs to settle the claim in line with the remaining policy terms.

I note Mr O has mentioned he's suffered a loss of rent as a result in AXA progressing the claim. This is something for AXA to consider as part of the claim settlement.

my final decision

My final decision is that I uphold this complaint. I direct AXA Insurance UK Plc to reinstate Mr O's policy from 2016. It also needs to settle the claim in line with the remaining policy terms.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 18 October 2019.

Michelle Henderson
ombudsman