

complaint

Miss L has complained about the decision made by AXA Insurance UK Plc in relation to a claim made under her home insurance policy. Miss L is represented in this complaint by a firm of solicitors, "K".

background

This *background* section is only a summary of the relevant points in the timeline of this claim overall, but the many events in the life of this claim are well known to both parties.

Miss L had an insurance policy with AXA for a flat she owned within a building of five flats. Miss L was partly responsible for that building (including the garden and garden wall) along with the other flat owners. In late 2012 the garden retaining wall collapsed and the local authority issued a dangerous building notice. Miss L appointed an engineer to inspect the damage and, based on his advice, she reported the damage to AXA as a possible subsidence claim. AXA appointed a loss adjuster, but in February 2013 it was determined that the damage had not been caused by subsidence.

Other flat owners in the building had also reported the damage to their respective insurers (hereafter "B" and "C"), both of which accepted the claims. B and C concluded that the damage had been caused by storm or flood. In April 2013, AXA appointed a second firm of loss adjusters and in June 2013, the claim was transferred to be reviewed as a possible flood claim. However, ultimately, the loss adjusters concluded that the cause of the damage was wear and tear, not any insured peril under the policy.

In July the local authority advised that the wall was now in such a dangerous state that it had damaged the building and the flats. It ordered that all residents should leave the building. Moreover, despite the residents attempting to source repair estimates, the building had not been and was not being made safe, so the local authority issued a demolition order.

AXA maintained that there was no cover available under Miss L's policy because the damage had been caused by a deterioration in the condition of the wall over time, not by any one-off incident covered under the policy. It did note that there had been unusually high levels of rainfall in the area of the building in recent years and previous incidents of flooding and that, in part, this may have contributed to the damage to the wall.

It also stated that it would have been able to backfill the void to the wall with concrete but only as a temporary measure, not a permanent repair. The estimated cost of that temporary repair was nearly £45,000. There followed discussion around the fact that there was no policy cover available and some discussion of issues around underinsurance. However, in the end, as a goodwill gesture AXA agreed to pay the equivalent of 50% of Miss L's 20% share (as one of five flat owners), which was approximately £5,000. It also acknowledged that its handling of the claim could have been better and offered her £300 compensation.

Miss L complained that her neighbours' insurers had accepted and settled their claims. Therefore, she could not understand how she could not have any cover under her policy.

The complaint was referred to this service and one of our adjudicators recommended that it should be upheld. She felt that AXA should have accepted that the damage was caused by flood and accepted the claim. AXA did not accept this recommendation and maintained that

the damage had not been caused by any incident of storm or flood. As a result, the complaint was passed to me for my consideration and I issued a provisional decision.

my provisional findings

claims decision

In relation to the claims decision, I noted that Miss L's policy, like most insurance policies, offered cover for a defined set of insured events, subject to certain exclusions and limitations. I also explained that it needs to be proven that the loss or damage for which a policyholder is claiming was caused by one of these events.

I noted that in this case, despite the attempts of more than one loss adjuster and other experts, there seemed to be no agreement as to the cause of the damage to the wall. In fact, there were significant variations in the possible causes that were put forward by the various experts.

Miss L's original expert suggested that the damage could be subsidence related, but also commented that the wet weather experienced in the vicinity of Miss L's home was likely the ultimate contributing factor which caused the wall to be damaged. A second engineer appointed by Miss L did not think that the wet weather (in particular, flooding) had caused the damage, but that the wall had been damaged by a one-off incident causing the wall to be "blown-out"; he suggested either a lightning strike or an incident with an underground cable. Whilst neither opinion is definitive as to the cause of the damage, I noted that neither suggested that the damage had been caused simply by wear and tear and a general deterioration in the condition of the wall.

The loss adjusters appointed by AXA said that no insured event had happened and that the damage was more likely caused by a deterioration in the wall's condition over time. They said that such a gradual deterioration was not covered by the policy. I acknowledged that as well as an insured event having occurred, that insured event must be proven to have been the dominant cause of the damage to the property. However, I was mindful that Miss L had provided two reports that contradicted the findings of AXA's loss adjusters and I found those two reports to be persuasive.

Given the conflicting evidence, I did not think that I could conclude that any one report had provided the definitive answer to what had caused the damage. I noted that a report from the local authority only served to demonstrate how difficult it was in this case to determine the cause of the damage and risk of collapse.

One of the loss adjusters appointed by AXA was also appointed by B, to assess the claim on its behalf. B accepted and settled the claim, as has C. Although I acknowledged Miss L's frustration that her neighbours' respective claims had been paid, I underlined that one insurer choosing to cover damage did not necessarily mean that another insurer deciding not to was unfair. Different insurers offer insurance cover on differing terms and subject to differing limitations and exclusions. The approach as to how to interpret the evidence offered by experts may also vary.

However, Miss L's claim does not relate to one incident that has caused damage to two neighbouring properties that may be built and, therefore, affected differently. In this case, the damage is to the same building.

I also considered expert reports sent to this service (and shared with AXA) since this service has been reviewing this complaint. I said in my provisional decision that I thought that evidence was compelling and that the expert comments within those reports merited consideration. In particular, it said that conclusions about wear and tear – for example to the mortar of the wall – were speculative. I noted that wear and tear was a significant factor in AXA's decision to decline the claim. That expert report argues that mortar damage would have been extensive after the damage was caused and, therefore, making a decision about wear and tear based on evidence from after the damage was reported to AXA was unfair.

AXA said that the views expressed in that report were speculative. It said that its experts reviewed the state of the wall at the time and were qualified to make an assessment. It was not persuaded that the additional reports submitted by Miss L altered the overall evidence under consideration. It said that it had taken account of the range of expert opinion and that there was consensus that the wall was in a poor state of repair and that its construction was poor. It said it did not consider that an insured peril, in particular a storm or flood, had occurred.

I underlined that the overriding question was what, on balance, had most likely caused the damage to the wall. I thought that the new reports provided persuasive evidence that a cause other than the deterioration of the wall, as determined by AXA, could be the dominant factor.

AXA said that Miss L's most recent expert report was selective in its use of quotes from other experts. Given the opposing evidence and expert evidence, I acknowledged that it was not easy to state definitively that the evidence is conclusive in either direction. Our adjudicator concluded that the balance of evidence fell in favour of Miss L's experts and was particularly persuaded by the fact that Miss L's neighbours' insurers had decided that an insured peril had occurred.

However, the evidence was very finely balanced and both sides had at times said that they considered the evidence presented by the other to have been selective in its emphasis. Therefore, it was my provisional finding that the fair way forward was for an independent expert to examine the evidence and for the parties to agree to be bound by the conclusions of that expert.

Given the unusual circumstances of a claim involving one building but several insurers, I said that AXA should take the step (although it is an unusual one) of liaising with B to satisfy itself that the information received from the loss adjusting firm they both used was the same. This is not something Miss L can do, but it would reassure all parties that the review to be carried out is impartial and thorough.

my provisional decision

Therefore, I issued a provisional decision in which I explained that I was minded to uphold Miss L's complaint in part. My recommendation was that AXA should recommend three experts, from which Miss L would select one, to review the evidence and re-consider her claim.

I also provisionally awarded Miss L £2,000 compensation (in addition to the £300 already offered by AXA) in recognition of the poor handling of her original claim, in particular the failure to take action to make the property stable and the resulting emergency evacuation of

Miss L from her home. The effect on Miss L, given her personal circumstances and health, was acute.

I thought that during the time it was investigating Miss L's claim, AXA could have taken steps to attempt to secure the wall and prevent the structure from further deterioration. It is not clear that this would have prevented what ultimately happened, but it is also certainly not clear that the wall was damaged beyond repair from the outset.

I noted the difficulties that arose in trying to coordinate the different parties that were involved – B and C and at least one flat owner who was uninsured. However, AXA's responsibility was to Miss L and it should have taken steps to mitigate its and her potential losses and to provide some reassurance to Miss L.

responses to my provisional decision

AXA's response

AXA did not accept my provisional decision. It wanted to underline as particularly important that it had previously highlighted key parts of the previous reports from experts and engineers, which failed to conclude that an insured peril caused the damage. In addition to that, it said no report could cite an episode of flooding on or around the date of the damage. It noted that there was no evidence to suggest that the flood recorded a year earlier had affected the property and that more than one party had recorded the condition of the wall as being poor.

AXA did not agree that Miss L's experts' reports were persuasive and noted that neither suggested that flooding was the cause of the damage. AXA noted that the reports offered different suggestions as to the cause of the damage: one suggested that the damage was related to subsidence and another that it was caused by a one-off incident – but not storm or flood. AXA also noted that B and C did not pay the claim on the basis of either of those causes.

AXA accepted that appointing a loss adjuster from the same company as B and C and the outcome being different must have been disconcerting for Miss L. AXA explained that it appointed a loss adjuster from the "ground movement" division to assess that particular cause, not to handle or validate claims for general damage or speculate on what they might otherwise have thought.

AXA also noted that the neighbours' claims had been dealt with by the same loss adjuster it used, albeit B and C instructed someone from a different part of that firm. Given the same person looked at the claims for B and C, AXA said it was unsurprising that the claims had the same outcome. It said that it had tried to engage with the loss adjuster to understand its rationale, but that it was not prepared to discuss its reasoning, which AXA said was somewhat unusual. As AXA's loss adjuster was from a separate division, and the loss adjuster acting for B and C was not employed by AXA, it further noted that it could not compel the loss adjuster to provide any information to it.

AXA also commented on the provisional compensation award, which it did not consider to be reasonable. It said that my award suggested that it should have given "ex-gratia consideration" to the claim and should have paid costs amounting to thousands of pounds to resolve an uninsured issue. AXA said it appreciated the impact that this claim – and the

outcome – had on its customer, but that it considered the compensation recommended to be compensation for a choice it made in exercising its discretion.

Finally, AXA asked that if the decision remains unchanged, more detail is specified as to the type of expert that should be appointed: they expressed a preference for an engineer, given the “complex mechanism of the damage”.

Miss L's response

K responded on behalf of Miss L, to confirm that she did not accept my provisional decision. Overall, Miss L asked me to “depart from [my] provisional findings and find in [her] favour”. K said that Miss L's position remained the same: that “but for” a rain storm, which was extreme on the night the damage was caused, the wall would have stood. Miss L describes the night in late December as *“the heaviest rain storm for the most prolonged period I have experienced in 60 years”*. She then describes the retaining wall partially collapsing with *“a sudden “phsst”, then rumbling and banging of bins... There may have been a bang first to attract my attention as I first thought that a vehicle had hit a wall...”*. K and Miss L state that this supports the idea that there may have been a lightning strike.

K and Miss L point out that one of her expert reports suggested that a build-up of water in the subsoil around the wall would have caused extra pressure on it, which could have been a cause of the damage.

K points out that it only needed to be proved on a balance of probabilities that an insured event had occurred and that two other insurers have accepted this to be the case (that either a storm or flood occurred). K also underlined that one of those insurers accepted that on the basis of a report from the same loss adjusters used by AXA and, although different policies have different contractual terms, the loss adjusters' findings must at least be persuasive to indicate that an insured event existed in relation to the same property.

K went on to say that if my provisional findings remained unchanged, it did not think that my suggestion that AXA present a panel of three experts for Miss L to choose from represented an independent instruction. Instead, K presented a recommended expert and a quote of their likely costs and said that those costs should be met either by AXA or this service. K also asked for clarification of the expert's remit and instructions.

In relation to the recommended compensation, K asked that I explain how this was quantified and also express clearly whether this is in addition to funds already received. K said, on behalf of Miss L, that she feels the original award of our adjudicator of £5,000 (or a greater sum) is more appropriate in this case, which she considers to be extreme. She noted that Miss L has lost her home of 27 years, which had been bought using funds left to her by her late mother for whom she cared for some time. Although Miss L owns a share of the land that the building was on, that is of little value currently and the owners will need to spend an estimated £2,500 each to be able to market it with outline planning permission.

K also noted that Miss L's health had suffered dramatically due to the stress caused by having to deal with AXA over such a long period and also from the stress of having to leave her property which was then demolished.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

The parties have sent detailed responses to my provisional decision and I have reviewed these carefully, along with the evidence already available to me. As in my provisional decision, I will address the claims decision and the issue of compensation separately.

claims decision

I concluded in my provisional decision that the evidence was so finely balanced – and both sides felt that the other had been selective in its emphasis and interpretation – that the fair way forward was for an independent expert to examine the evidence.

I have considered AXA's argument that Miss L's experts' reports are not persuasive, in particular because the two reports from her experts state different possible causes of the damage (one possibly subsidence, the other a one-off event, but not storm or flood). Pertinently, however, the most recent report provided by Miss L casts serious and persuasive doubt on whether or not AXA's expert's conclusions about wear and tear and the condition of the wall being the dominant factor here is reasonable.

It is important to note that one of the reasons for the damage that the most recent report suggests is a one-off event, albeit not a storm or a flood: AXA has repeatedly said it does not consider either of those events to have occurred. However, I think it is reasonable that an independent expert should assess the possibility that a different one-off event, which may be covered under the policy, may have occurred.

K and Miss L were disappointed that I was not willing to make a decision in Miss L's favour that the claim should be paid. K said that on the balance of probabilities, an insured event had likely occurred – and that another insurer paying a claim for the same damage to the same building only underlined this. I do understand Miss L's frustration, but my findings here have to be confined to the evidence presented about her claim in relation to her insurance policy. Another insurer paying the claim, without knowing why or on what basis, is not enough to say that on the balance of probabilities *this* claim should be paid.

AXA has said that it cannot compel the other loss adjuster to release information to it. This is true, given that information is the property of B. However, in my provisional decision I asked that AXA might get in touch with B (the insurer) and possibly C. AXA is correct, the loss adjusters cannot release the information, but it may be that AXA can obtain useful information from B and C about the advice they received about the cause of the damage.

AXA asked for further clarification of which type of expert should be appointed to give an independent opinion of the damage. Given the complex nature of the claim and the evidence, I agree that an engineer would be the most appropriate expert. I have noted K's argument that AXA suggesting three firms and Miss L choosing from amongst those three does not represent an independent choice. K says that any of the three will be biased towards AXA because it will have a relationship with it or because it has chosen that firm. However, Miss L will have the choice of those three experts. I must be fair to both parties and allow them both a contribution to the choice of expert: appointing an expert chosen by Miss L instead would not be an independent choice or fair to AXA.

As set out in my provisional decision, I do understand that for Miss L this prolongs a situation that is very difficult for her. However, I remain of the opinion that both parties should have the chance for an independent third party to review all of the evidence in this claim. I hope this can be done as soon as possible for all concerned.

compensation

AXA has argued that the award I provisionally made was not fair. In particular, it says that the award suggests that it should have given ex-gratia consideration to the claim and should have paid costs to resolve an uninsured issue. I do not agree that this is the case, or that this is the suggestion of the award. It is not unusual for an insurer, when investigating whether insurance claims are covered under a policy, to take actions to limit its liability in cases it does ultimately accept. For example, it would not be unusual for an insurer to begin drying a property following a claim for a flood or escape of water whilst it was still validating that claim.

AXA suggests that here the award is based on a choice it made in the exercise of its discretion. That is not the case. Compensation awards are for the impact that any shortcomings in the handling of a claim have had on the policyholder. In this case, AXA's choice was not to take action either to attempt to stabilise the wall or to move Miss L and her belongings. At a later date, Miss L had to leave her home – and all of her possessions – in urgent and distressing circumstances. That was clearly distressing and has had a significant impact on her health.

The subjective nature of measures of distress and its impact means that I cannot, as requested by K and Miss L, quantify how I have calculated my compensation award, which I consider to be reasonable in the circumstances. I do understand and appreciate the devastating effect losing her home must have had on Miss L. However, without definitively concluding that the claim for that should be covered by AXA, which I have not been able to do based on the evidence I have received, I cannot also conclude that this should be a determining factor in my compensation award.

my final decision

For the reasons given above, my provisional findings remain unaltered. I uphold this complaint in part and I require AXA Insurance UK Plc to recommend three experts (as set out in my findings above) from which Miss L will select one, to review all the evidence and re-consider this claim. Both parties will be bound by that expert's findings.

I also award Miss L £2,000 compensation (in addition to the £300 already offered and any other funds already paid to her by AXA Insurance UK Plc).

Under the rules of the Financial Ombudsman Service, I am required to ask Miss L to accept or reject my decision before 22 June 2015.

Helene Pantelli
ombudsman