

## **The complaint**

Mr A complains about AXA Insurance UK Plc trading as Swiftcover ("AXA") and their decision to withdraw indemnity from a claim that was made initially in 2015.

## **What happened**

Both parties are well versed with the events that have happened during the lifetime of the claim. The claim itself had been ongoing since 2015 and because of this, I don't intend to list the timeline of events in detail.

But in summary, Mr A held a motor insurance underwritten by AXA when he and his partner, Miss S, were involved in a road traffic accident in 2015. Liability was agreed between AXA and the third-party insurer, who I'll refer to as "E", on a 50/50 basis, and Mr A's claim for personal injury, and repairs to his car, were settled. But Miss S' personal injury claim was more complex. And she raised a claim against both E and AXA through her own solicitors. AXA took the decision to defend this claim and appointed a solicitor, who I'll refer to as "D" to defend them. And as part of this defence, as Mr A was the policyholder, Mr A was listed as a defendant.

But Mr A says he was unaware of this until November 2022, when he and Miss S chose to change Miss S' solicitor representing her. During this transition, he became aware of AXA's defence, and that he'd been listed as a defendant. So, he emailed D directly disputing the defence. D felt Mr A's position presented a conflict of interest and applied to the courts to be removed from the case, which the court agreed and approved. Because of this, AXA felt Mr A had impacted their defence, and so his claims chances of success. And due to this, they wrote to Mr A explaining they were withdrawing indemnity from the claim altogether. Mr A was unhappy about this, so he raised a complaint.

Mr A was unhappy AXA had withdrawn indemnity. And he felt this could've been avoided had D, or AXA, spoken to him to explain AXA's rights within the policy he held, which included them being able to defend a claim on his behalf. So, he wanted AXA to reinstate indemnity, and instruct another solicitor to continue with the claim and its defence.

AXA responded to the complaint and didn't uphold it. They felt that, despite Mr A's change in position, the conflict of interest remained. So, they felt the withdrawal of indemnity was fair, and in line with the terms of the policy he held and because of this, they explained they wouldn't be overturning their decision. Mr A remained unhappy and so, he referred his complaint to us.

Our investigator looked into the complaint and didn't uphold it. They thought AXA had acted in line with the terms of the policy when withdrawing indemnity, considering D had successfully applied to be removed from the case through the courts citing a conflict of interest. So, they didn't think AXA needed to do anything more.

Mr A didn't agree, and he provided extensive comments explaining why. These included, and are not limited to, his continued belief that had AXA, or D, contacted him to explain the litigation process and AXA's rights within this, then he wouldn't have sent the email he did

which D felt presented a conflict of interest. So, he didn't think it was fair or reasonable for him to be placed in a situation where he may be liable for the costs paid to Miss S, should her claim ultimately be successful. As Mr A didn't agree, the complaint has been passed to me for a decision.

### **What I've decided – and why**

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

Having done so, I'm not upholding the complaint for broadly the same reasons as the investigator. I've focused my comments on what I think is relevant. If I haven't commented on any specific point, it's because I don't believe it's affected what I think is the right outcome.

First, I want to recognise the impact this complaint has had on Mr A. I appreciate the claim itself is complex in nature, due to the fact AXA and the third-party insurer agreed to settle the claim on a 50/50 basis. So, it's created a situation where Mr A's partner, Miss S, is pursuing a claim which Mr A's own insurer is liable for a portion of the costs should it be successful. I note that because of this, and for other reasons, the claim has been ongoing for a significant period of time.

But this decision will focus solely on Mr A's complaint raised to AXA, which centres around their decision to withdraw indemnity. And because of this, I think it would be useful for me to set out exactly what I'm able to consider here. I must make clear that our service is an alternative to the courts. And because of this, we don't have the powers to overturn, or change, a ruling made by the courts themselves. I note in this situation the courts have ruled that there was a conflict of interest present that meant D should be able to remove themselves from representing AXA in the claim. As the courts have already made this decision, I won't be commenting on whether there was a conflict of interest, as it's already been decided there was. So, as D were instructed by AXA to defend their position, my decision is based on their being a conflict of interest that prejudiced D, and so, AXA's defence of the claim.

And while D were instructed by AXA to represent them, it's important to note D are a separate business altogether, regulated by a separate regulator to that of AXA. So, any actions D took during the defence of the claim, including the way they prepared for the claim and their decision not to contact Mr A to make him aware he was listed as a defendant, would be an issue Mr A would need to raise with D directly.

My decision instead focuses solely on the actions of AXA, in their role as insurer. And for me to say they should overturn their decision to withdraw indemnity, I first need to be satisfied they've done something wrong. So, I'd need to be satisfied they failed to act in line with the policy terms and conditions when taking this decision. Or, if I think they did act within these, I'd need to be satisfied they acted unfairly in some other way. And in this situation, I don't think that's the case.

I've carefully read through the policy terms and conditions. And these explain that Mr A and any named driver, in this case Miss S, must *"not do anything which might damage the prospects of the claim succeeding"* before going onto explain that *"If you or the named driver do not keep to these conditions we may refuse any claim or withdraw from any current claim"*.

In this case, AXA were defending Mr A's position against the claim brought by Miss S against Mr A's insurance policy. So, when considering the terms above, I think the claim

succeeding would be for Miss S' claim, brought independently by a solicitor of her own choice, to be defended.

And I can see in an email sent by Mr A to D in November 2022, he made it clear his belief that Miss S' claim should be accepted. So, I do think this stance put forward by Mr A was in clear contradiction to AXA's position, and the position of D acting on AXA's behalf. I note D made an application to be removed following this email, which the courts approved. So, I do think the actions Mr A took here led to D, who were representing AXA, to be removed from the defence of the claim. And because of this, this left AXA without the representation of the solicitor they appointed, which I think it's reasonable to assume damaged the prospects of the claim succeeding from their point of view. So, I think AXA acted in line with the terms of the policy when withdrawing indemnity, as this is what they said they could do.

But as I've explained above, I've also thought about whether it was fair for AXA to rely on this term. And I've carefully considered Mr A's comments about why he sent the email he did, as he didn't fully understand the litigation process or AXA's rights in their role as his insurer.

I want to reiterate again that AXA aren't responsible for D's failure to make Mr A aware of their involvement, or that he was listed as a defendant. And within the terms of the policy Mr A held, which he would've had access to when the policy was inception, it explains within the *"General Conditions"* section of the policy that Mr A must *"comply with the following conditions to have the full protection of your policy...If you or any other named driver do not comply with them we may cancel the policy as detailed below, refuse to deal with any relevant claims or reduce the amount of any relevant claim payments."* The conditions then go on to explain that Mr A must *"give us full control of the claim...We may take over, defend or settle the claim and take up any claim in your name. You must not negotiate regarding any claim, settle any claim without our written permission or admit liability for any claim unless we ask you to do so"*.

I think these conditions make it clear that AXA had the ability to defend or settle the claim as they saw fit. And so, as Mr A's own claim had already been settled, I don't think AXA had a duty to involve Mr A in the defence of the claim made by Miss S, especially considering the personal relationship between Mr A and Miss S and the complications this created. In the email Mr A sent to D, I think the comments he made could be taken as an attempt to negotiate the claim, as he was putting forward his opinion that Miss S' claim, made against AXA, should be upheld. And this was in clear conflict to AXA's own position.

So, I think AXA acted fairly in how they processed the defence, and I think the policy documentation made it clear the actions they could take if Mr A broke the conditions, which I think he did here. While I appreciate why Mr A feels AXA should've made these conditions clearer, I think they were readily available and easy to decipher within the policy documentation. So, because of the above, I don't think AXA need to do anything more on this occasion.

I appreciate Mr A is unlikely to agree with this outcome. And I want to recognise Mr A's comments specifically about AXA having the opportunity to contact him after he raised his concerns with D by email. But crucially, Mr A contacted D directly, not AXA. And once that email had been received, I think a clear conflict had been presented. So, I don't think AXA explaining to Mr A their powers over the policy in more detail at this point would've ultimately changed what transpired in this situation. And I also want to reassure Mr A I have carefully thought about the potential financial implications on him, should Miss S' claim be successful, and AXA be required to pay a compensatory amount to her. But crucially, I don't think it's a mistake from AXA that has opened Mr A up to this potential financial risk. And it's also important to note that at the moment, it is only a potential risk and, as I can't see the claim

had been concluded by the point AXA responded to the complaint, our service isn't able to consider potential impacts that may or may not happen.

### **My final decision**

For the reasons outlined above, I don't uphold Mr A's complaint about AXA Insurance UK Plc trading as Swiftcover.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 28 December 2023.

Josh Haskey  
**Ombudsman**