DRN-4257770

The complaint

S complains AXA Insurance UK Plc's didn't deal with its subsidence claim effectively.

S is a partnership. It's been represented for the claim and complaint. For simplicity I've referred to the representatives' actions as being its own. Similarly I've referred to the actions of AXA's representatives and agents as being its own.

What happened

In 2004 S made a claim for subsidence damage to its property. AXA accepted the claim and completed repairs the following year. In 2016 S noticed further cracking. It made a further claim to AXA. In 2017 AXA rejected the claim by referencing made-up ground, defective design and pre-inception damage exclusions in S' policy.

Between 2017 and 2021 S' property underwent subsidence monitoring and assessment funded by its insurance broker. After receiving the final report S complained to AXA about its refusal to deal with the subsidence.

S feels the 2004 claim was never properly concluded. It says AXA accepted the claim and undertook rectification work which didn't resolve the underlying cause of the subsidence. So S feels the damaged reported in 2016 is a continuation of the 2004 claim - rather than a fresh and separate claim.

AXA responded in August 2022. It stated the cause of subsidence was either made-up ground or a defective design of the property. It maintained that the relevant policy exclusions would apply. AXA didn't accept the ongoing movement should be considered as part of the 2005 claim. It said the limited information it still retained about the claim, showed that it was a low value claim for minor damage (with costs of less than £2,000). It said that claim didn't appear to have involved any ground investigations that might have brought its attention to the cause of the current movement.

In November 2022 S came to this service. It said its complaint is the investigations and remedial works for the initial claim (2004) weren't sufficient, so the loss claimed for now (in 2016) is a continuation and so should be accepted by AXA. S made a few additional points. It said AXA didn't raise defective design issues in 2005. And, had it done so, there may have been an opportunity for recourse against the original property designer. Finally it says AXA has waived its rights to, or can't fairly rely on, any policy exclusion by virtue of its handling of the initial claim.

Our Investigator wasn't persuaded the 2005 repairs were inadequate and the cause of the current damage. She felt the repairs carried out under that initial claim were effective and lasting. She also felt it was fair for AXA to rely on the made-up ground exclusion. So she didn't recommend it do anything differently. S didn't accept that, so the complaint was passed to me to decide.

I issued a provisional jurisdiction decision. It explained I intended to find the complaint had been made outside of time limits this service operates under. I explained that meant this

service wouldn't have the power to consider it unless AXA gave its consent. AXA responded by providing permission for the complaint to be considered out of time. So I issued a further decision confirming this service would be looking at the merits of S' complaint.

I then issued a provisional decision outlining my thoughts on the merits of S' complaint. As its reasoning forms part of this provisional decision I've copied it in below. In it I explain why I didn't intend to uphold the complaint. I invited S and AXA to provide any comments or evidence they would like me to consider before issuing this final decision. However, neither submitted anything.

What I've provisionally 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 don't intend to uphold it.

As this is an informal service I'm not going to respond here to every point or piece of evidence S and AXA have provided. Instead I've focused on those I consider to be key or central to the issue. But I would like to reassure both that I have considered everything provided.

The policy excludes damage caused by or consisting of the settlement or movement of made up ground or defective design or workmanship or the use of defective materials. As set out above S feels it's unfair for AXA to rely on defective design and made-up ground exclusions. So I've first considered the application of the exclusions to the current claim for damage.

I've considered the key evidence for the cause of subsidence. It seems to be accepted the property is built on around four to six metres of made ground - over an old railway cutting with infill materials used to fill the void.

A 2016 structural engineer's report found ongoing ground movements are almost certainly taking place. In addition it says the buildings raft foundations are unable to accommodate differential ground movement between parts of the building.

A 2019 report, also from a structural engineer, says movement to date is almost certainly the result of consolidation to soft clay used to backfill the cutting. It found movements recorded in level monitoring to be consistent with progressive consolidation of a layer of soft soil and variable thickness under the property. It does note movement may have been exacerbated by external influences such as a large tree or drain leakage.

A 2021 structural report refers to an earlier site investigation. That found six and a half metres of deep fill material to be mostly clay. It's quoted as finding the upper layers to be well compacted, but deeper layers being softer and more variable. The report concludes differential settlement of the foundation is inevitable with such a variable depth of fill.

Having considered the available evidence it seems reasonable for AXA to say the damage being claimed for has been caused by, or consists of, settlement or movement of made-up ground. And this is excluded under the policy. The evidence for 'defective design' is less clear cut. I haven't made a finding on that aspect as the application of one exclusion is enough for AXA to decline claim.

However, S' complaint is that, even if the cause of damage is made-up ground, it's not fair for AXA to rely on the exclusion (nor the faulty design exclusion). It feels the 2005 repairs were inadequate and it ought to have been obvious to AXA at the time that further movement was inevitable without a substantial repair scheme being adopted.

S has said its engineers have noted the variable depth and constitution of poorly compacted fill material under the property – and the influence of nearby trees. It says they are of the opinion that this means differential settlement was inevitable, so a piled solution was the appropriate claim resolution in 2005. Based on this it says this current claim is really a continuation of one that wasn't adequately settled in 2005. In addition it says as AXA didn't rely on either exclusion in 2004 it can't fairly do so now.

In response AXA said there is, given the passage of time, only limited information available for the 2004 claim. The settlement for repairs was a little under £2,000, with investigation fees nominal. AXA says this indicates the claim involved only minor damage. It says as there were no ground investigations there was no way of it becoming aware of the now understood cause of movement. Finally it doesn't accept, not applying the exclusions in 2004, means it can't rely on them now.

The most informative evidence, I've seen, for the 2004 claim is a report from AXA's loss adjuster (I'll call them G) dated May 2004. This references a 1998 subsidence claim for the property. That was against a different insurer - although it featured the same loss adjuster (G) and engineering (I'll call them E) firms as the 2004 claim. The outcome of the 1998 claim was part underpinning of the building's porch. This was considered necessary because of differential settlement.

G's 2004 report explains monitoring took place following S contacting E in 2002. Following that E prepared a schedule of works for repairs. The report says a recommendation was then made to refer to the matter to AXA – as S' insurer at that point. It's not totally clear but it seems, from the report, that E and its investigation, including the monitoring and recommendations, were commissioned and arranged by S itself rather than AXA.

In any event only minor or moderate cracking was identified by E and G for the 2004 claim. G's report says E hadn't been able to be specific about the cause. G rules out a direct link between the porch area (1998 claim) of damage and later damage to the main building relevant to the current (2004) claim. But it does say the cause is likely to have been slight deflection on the floor slab, resulting from differential settlement of the foundations. G says some thought has been given to possible root or drainage problems, but none have been identified as relevant.

It seems AXA accepted, on G's recommendation, E's Schedule of repair works. It then seems to have cash settled the claim with works undertaken by S' own contractor.

Based on what I've seen of the circumstances of the 2004 claim I'm not persuaded by S' argument that the repairs were inadequate. Neither can I agree that it ought to have been obvious to AXA at the time that a substantial repair scheme was inevitable.

The limited information points to AXA accepting the recommendations of the structural engineers that had investigated the damage. The engineer may even have been appointed by S. Regardless of that point I haven't seen anything to indicate that

the engineers at the time considered further movement inevitable without a piled solution or other significant works. Neither have I seen enough to persuade me that AXA should have undertaken further investigations.

In additional there was a significant period between the 2004 claim and damage being reported for this latest claim – including a break in cover. Such an intervening period makes it difficult to find AXA responsible for damage that occurred after it settled the earlier claim. It doesn't support S' argument that the repairs weren't lasting and effective.

For the above reasons I don't intend to require AXA to consider the 2016 claim as a continuation of the 2004 one.

As I consider the two claims to be separate, I'm not going to find, that because AXA didn't apply a made-up ground or settlement exclusion to the earlier claim, that it can't fairly rely on it now.

S has said AXA failed to set out the faulty design of foundations in 2004. It says that if it had it might have been possible for it to act against the builders or designers of the property. I haven't seen anything to persuade me that AXA considered faulty design to be an issue during that earlier claim. So I can't say it acted unreasonably by not applying such an exclusion or raising the issue to S back then.

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.

I haven't been provided with any further evidence or arguments. So I've no reason to come to a different outcome to that set out above. That means I'm not going to uphold S' complaint.

My final decision

For the reasons given above, I don't uphold S' complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask S to accept or reject my decision before 25 January 2024.

Daniel Martin
Ombudsman