

The complaint

Mr N complains AXA Insurance UK Plc unfairly removed his subsidence cover and declined his claim.

What happened

In 2000 Mr N purchased a property. A pre-purchase report noted some distortion and cracking – including historic cracking between a bay window and main wall. But it found no evidence of obvious recent or progressive movement.

Around 2014 Mr N let out the property and moved abroad. In March 2020, whilst still living abroad, Mr N took out an AXA commercial and residential landlords property insurance policy. This didn't include subsidence cover. But Mr N added it when the policy renewed in March 2021.

Mr N says around Easter 2021 his tenant informed that gaps had formed in the bay window area. In July 2021 Mr N arranged a survey to assess the property. It found subsidence to be the likely cause. Later that year Mr N made a subsidence claim against his AXA policy. But the insurer declined it and avoided (treating it as though had never existed) the subsidence part of his cover.

AXA felt Mr N had failed to disclose the property had ongoing subsidence issues when adding that cover. AXA said if he had declared that information it would still have offered him insurance – but it wouldn't have included subsidence cover.

AXA responded to Mr N's complaint in May 2022. It said the damage pre-existed the renewal when subsidence cover was added to his policy. So it continued to decline the claim. AXA paid Mr N £250 compensation to apologise for avoidable delays. He wasn't satisfied so came to this service. He wants AXA to accept his claim and reimburse the costs of his survey.

Our investigator said AXA hadn't acted fairly by avoiding the subsidence cover. She wasn't persuaded Mr N had failed to make a fair presentation of the risk when taking out the cover in March 2021. She didn't agree he should have been aware the property was suffering with subsidence. So she recommended AXA accept the subsidence claim. AXA didn't accept that outcome. It said the timeline suggested Mr N was aware of worsening damage when he added the subsidence cover. So the complaint was passed to me to decide.

I issued a provisional decision. Its reasoning forms part of this final decision, so I've copied it in below. In it I explained why I didn't intend to require AXA to reinstate the subsidence cover, consider the claim or to do anything differently. I also invited Mr N and AXA to provide anything they would like me to consider before issuing this final decision.

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.

As this is an informal service I'm not going to respond here to every point or piece of evidence Mr N 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 taken into account everything provided.

I've considered if AXA's decision to avoid the policy and refuse any claims was fair and reasonable – and in line with the relevant legislation. In particular I've considered the Insurance Act 2015 (the Act). Having done so, I think it was. So I don't intend to require AXA to reinstate the subsidence cover, consider the claim or to do anything differently.

When Mr N took out the policy (adding subsidence cover) in 2021 he had a duty – under the Act – to make a fair presentation of the risk. This means it was his responsibility to disclose everything he knows, or ought to know, that would influence the judgement of an insurer in deciding whether to insure the risk and on what terms.

A broker was acting as an agent for Mr N. It provided information to AXA, on Mr N's behalf, when arranging the cover. AXA feels the duty was breached when existing subsidence damage wasn't disclosed.

AXA says the renewal was arranged, by the broker, through its online portal. It's shown questions the broker answered. The first relevant one is 'Do you require cover for subsidence, landslip and heave?'. AXA says as 'Yes' was chosen a further question will have been asked – 'Has the property or any adjacent property ever suffered from, or does it show any visible signs of damage from subsidence, landslip or heave?'. I'm satisfied AXA wanted to know about subsidence – or signs of it.

AXA's also shown that a guidance box was presented. This includes the text – 'Common signs of these conditions are cracks appearing in interior walls, ceilings or external masonry.'

It seems most likely that at that point the property was suffering from and showing visible signs of damage from subsidence. Mr N's July 2021 survey report notes concern at the appearance of significant cracking to the bay window. It concludes this is likely the result of ongoing structural movement. The report suspects the cause to be subsidence resulting from drainage issues. It goes on to note the property's tenant describing the external cracking as having very noticeably worsened during the previous 12 months.

So considering the timescale I'm satisfied an answer of 'No' to the above question was incorrect. But I need to decide if AXA's conclusion that the fair presentation duty was breached. To do that I need to consider if there was a failure by Mr N to disclose everything he knew or ought to have known.

AXA says the July 2021 survey shows Mr N was aware of the cracking getting worse over the prior 12 months prior. It suggests it may have been this that prompted him to add subsidence cover in March 2021. However, it was the tenant that reported the cracking having worsened during that period – not Mr N. So this doesn't confirm he knew about subsidence or signs of it.

Mr N says he wasn't aware of the gaps forming around the bay window until the tenant informed him by telephone around Easter 2021 (early April). Considering the relatively short time between the subsidence cover being added, Mr N commissioning a survey and the claim I can understand AXA's concern.

But overall I'm not currently persuaded there's enough for AXA to fairly say Mr N did know of visible signs of subsidence – including cracking etc – when adding the subsidence cover. But Mr N was required to disclose not only material circumstances that he did know – but also those that he ought to know. The Act says Mr N ought to know what should reasonably have been revealed by a reasonable search of information available to him.

As far as I'm aware Mr N took out the cover whilst abroad. He lives many thousands of miles away from the property. So it seems unlikely he inspected the condition of the property frequently. He hasn't said that someone else was doing this for him or providing regular condition reports. Neither has he reported the property being inspected, by himself or others, in the period before taking out the cover in March 2021.

So as far as I'm aware Mr N responded to the question about subsidence without any recent knowledge, personal or otherwise, of its condition. In those circumstances it would have been reasonable for him to ask the tenant about the condition of the property. And as set out above the tenant was aware of the developing cracks and other more recent visible signs of subsidence. As the tenant was the one to have notified him of the problem, a short while after the policy renewal, it seems likely he would have told Mr N about the developing problem.

So it seems fair to say Mr N ought to have known about the external cracks and other visible signs of subsidence damage – and therefore for the broker to have passed that information on to AXA. I accept the tenant may not have been able to diagnose subsidence as the cause. But Mr N would have been aware of the cracks and so the possibility of subsidence.

Mr N was provided with a statement of fact. This explains he needs to make a fair presentation of the risk. It warns of the possible consequences of not doing so. It asks him to check the information included in the document is correct. It includes a statement, based on the broker's submission, that the property has not suffered from or is showing visible signs of, subsidence. As I've set out above, I feel it's fair to say he ought to have known that information wasn't, or was potentially, incorrect. So it's reasonable to say when the broker, and Mr N, failed to correct it that he breached his duty to provide a fair presentation of the risk.

But for AXA to take any action, like avoiding the subsidence cover, the Act requires it to show the breach was a 'qualifying one'. Essentially it needs to show that if the correct information was provided it would have done something differently - for example not offered cover at all or only done so on different terms.

AXA's provided part of its underwriting criteria. Having seen that I'm satisfied it would have offered insurance, but without subsidence cover, if it had been told the property has suffered from or showed visible signs of damage from subsidence. So I intend to find AXA acted fairly, and in line with the Act, when it avoided the subsidence cover and declined Mr N's claim.

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.

AXA didn't respond to my provisional decision. Mr N was understandably disappointed with it. His response focused on my finding that it would have been reasonable for him to have asked his tenant about the condition of the property.

Mr N says that there had been no subsidence issues or concerns (apart from references in the 2000 pre-purchase survey) in 21 years of ownership. So he doesn't accept he, as a matter of law, ought to have asked his tenant about subsidence.

However I said, in the circumstances (including a lack of recent personal or professional inspections of the condition of the property), it would have been reasonable for Mr N to have asked his tenant about the condition of the property.

By that I meant the general or overall condition of his property he was intending to insure – and that he was answering related questions about. I didn't say he should have asked about subsidence specifically.

I'm still persuaded it would have been reasonable for Mr N have enquired about the condition of his property before taking out insurance for it. After all he was required to present a fair presentation of the risk the insurer was considering taking on. And I still think it's likely, if he had, that his tenant would have explained about the developing cracks.

Ultimately, I'm still satisfied Mr N failed to provide a fair presentation of the risk. So my decision is AXA acted fairly, and in line with the Act, when it avoided the subsidence cover and declined his claim.

My final decision

For the reasons given above, I don't require AXA Insurance UK Plc to reinstate Mr N's subsidence cover, consider his claim or to do anything differently.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 7 September 2023.

Daniel Martin
Ombudsman