

## The complaint

Mr H complains that AXIS Specialty Europe SE refused to cover his claim for an escape of water and avoided his commercial property insurance policy.

## What happened

There have been several businesses or individuals involved in this complaint acting as agents or representatives of either Mr H or AXIS. For simplicity, I'll only refer to Mr H and AXIS by name, even when referring to evidence or arguments put forward by their representatives.

Mr H reported a claim to AXIS for an escape of water in July 2022. AXIS investigated the claim and decided to avoid the policy because it said Mr H had failed to disclose all material facts when the policy renewed in March 2022.

AXIS says issues with the bathroom of the flat in question were first noticed in November or December 2021, and that Mr H attended the property with a structural engineer and contractor in early March 2022 where damp, rot and numerous external issues were identified. Subsequent repairs were completed by the contractor, but these were less extensive than recommended by the engineer's report and were insufficient to prevent continued damage. AXIS says Mr H ought to have disclosed the condition of the property when the policy renewed in late March 2022 and because he didn't, it avoided the policy back to that renewal.

In terms of the claim for damage caused by the escape of water, AXIS says it was most likely the result of faulty sealant around the shower tray. It also says the policy only covers escapes of water due to freezing, and that there is an exclusion for wear and tear or damage which has happened gradually.

Mr H says although the engineer's inspection took place in early March 2022, he didn't receive the report until April 2022, after the renewal. He also says most of the issues highlighted were not significant enough to be considered material facts the insurer needed to be notified about. And he says it's incorrect for AXIS to suggest he didn't regularly maintain the property as he could evidence numerous surveys or inspections of the guttering and drainage systems.

Mr H also pointed out that the escape of water was reported prior to the renewal, and so should be covered by the policy during that policy year, even if the avoidance back to March 2022 were to stand.

Mr H has argued that the policy wording around what's covered under the escape of water peril is ambiguous and that he should be covered for an escape of water whether from freezing or not. He also says there are no policy exclusions applicable to the escape of water peril and so his claim for damage arising from the leaking shower should be covered. And that this damage includes all the damage caused by the dry rot, which he says has arisen solely due to the escape of water from the shower.

Mr H brought his complaint to our service where it was looked into by one of our investigators. He didn't think it should be upheld. He said he was persuaded the property was in a poor condition and that the gradual deterioration exclusion would reasonably apply. He also thought the avoidance was fair, as he said Mr H would have been aware of the condition of the property following the inspection and yet didn't disclose it. He said AXIS had shown that had it been told, it wouldn't have offered cover, and the actions AXIS had taken were in line with the remedies set out in the appropriate legislation. So, he felt the actions it took were fair and reasonable in the circumstances.

Mr H didn't agree with our investigator's opinion. So, as no agreement could be reached, the complaint was passed to me to decide.

I was minded to reach the same overall outcome as our investigator, but for slightly different reasons. So, I issued a provisional decision to give the parties the opportunity to respond, before I reached my final decision. Here's what I said:

***“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, and while I appreciate it will come as a disappointment to Mr H, I agree with the outcome our investigator reached.*

*However, I've gone into quite a bit more detail about AXIS's decision to decline the claim for damage caused by the escape of water. So, I'm issuing a provisional decision, to give the parties the opportunity to respond before I reach my final decision.*

*I'll explain my reasons, addressing the avoidance and claim decisions separately.*

**Policy avoidance**

*The relevant law in this case is the Insurance Act 2015. This says that as a commercial customer, Mr H had a duty to make a fair presentation of risk to the insurer. And this means disclosing every material circumstance which the insured knows, or ought to know. Or failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice to make further enquiries for the purpose of revealing those material circumstances.*

*I'm aware that Mr H didn't receive his engineer's report until after the renewal date. But it hasn't been disputed that he attended the inspection along with the engineer and his contractor, although he does dispute that he witnessed the same damage and deterioration in the basement seen and photographed by the engineer.*

*Mr H says the engineer didn't specifically highlight the presence of mould or rot during the inspection. And I do accept that Mr H isn't a qualified engineer and so may not have had the same appreciation for the level of damage present as the engineer did. But the requirement wasn't just for Mr H to notify AXIS about what he knew, it was to notify it about what he ought to have known. And as a professional landlord I think it's reasonable to suggest that Mr H ought to have been carrying out regular inspections of the property, including the basement, which would have, on balance, highlighted this issue.*

*In addition, as explained, Mr H was present for the investigation, so I find it difficult to accept that he wouldn't have accompanied the engineer into the basement, or at least that the engineer wouldn't have shared key findings with him, and/or his contractor who was also present, on site at the time. And in my view, even as a layman, the photos taken during the inspection clearly show evidence of water ingress, mould and/or fungus growth within the cellar and on timbers. So, I consider that as the property owner, and a professional landlord, who was on site during the inspection, Mr H ought reasonably to have known that the condition the property was in was poor. I also think it ought to have been clear that the condition the property was in amounted to a material fact that he ought to have made AXIS aware of at renewal.*

*Taking all the above into account, I'm satisfied that Mr H breached the duty of fair presentation by failing to disclose the condition of the property at the March 2022 renewal.*

*Under the Insurance Act 2015, there are certain remedies available to insurers in the event of a breach of the duty of fair presentation. But only where the insurer can demonstrate that, but for the breach, it:*

- would not have entered into the contract of insurance at all, or*
- would have done so only on different terms.*

*A breach for which the insurer has a remedy against the insured is referred to as a qualifying breach.*

*AXIS has provided evidence, in the form of a statement from one of its underwriters, which persuades me that had AXIS been made aware of the condition of the property, it would not have offered cover.*

*The Insurance Act 2015 explains that a qualifying breach of the duty of fair presentation is either:*

- deliberate or reckless, or*
- neither deliberate nor reckless.*

*A qualifying breach is deliberate or reckless if the insured –*

- knew that it was a breach of the duty of fair presentation, or*
- did not care whether or not it was in breach of that duty.*

*The remedies available to AXIS under the Insurance Act 2015 depend on whether it considers the breach of the duty was deliberate or reckless, or neither. And it is for AXIS (as the insurer) to show that the breach was deliberate or reckless.*

*The remedies available for a breach that is deliberate or reckless state the insurer –*

- may avoid the contract and refuse all claims, and*
- need not return any premiums.*

*AXIS hasn't sought to apply either of the above remedies. Instead, it avoided the policy but refunded the premiums relating to the relevant property – which is a remedy available for breaches which are neither deliberate nor reckless. So, based on the actions AXIS took, I think it's reasonable to conclude that it considers the breach to be neither deliberate nor reckless. And as the remedy for a breach that is neither deliberate nor reckless is clearly more favourable for Mr H, I don't think AXIS treated him unfairly in considering the breach as such.*

*Taking everything into account, I'm satisfied that the actions taken by AXIS, in avoiding Mr H's policy back to the 2022 renewal, and returning the relevant premium, is in line with the remedies under the Insurance Act 2015 for a qualifying breach of the duty which was neither deliberate nor reckless. I also consider that adherence to the Insurance Act 2015 delivers a fair and reasonable outcome in the circumstances of this claim and complaint.*

### *The escape of water claim*

*Mr H has highlighted that the initial escape of water took place in the policy year prior to the renewal, and so should be covered irrespective of the policy avoidance decision. And he argues that the mould and rot is damage which has been caused by that escape of water, and so should be covered by the policy.*

*Mr H's policy provides the following cover for damage to the buildings caused by an escape of water:*

*“Escape of water from and resultant damage arising from freezing of fixed water tanks, apparatus or pipes”*

*AXIS says there is no evidence that any escape of water was caused by freezing and so the claim shouldn't succeed. It also says the policy contains the following exclusion, which is applicable to all sections of cover, which it says also applies to the damage being claimed for:*

*“We will not pay for:*

- Damage caused by wear and tear, gradual deterioration, rusting, corrosion, wet rot, dry rot, rising damp or mould”*

*Mr H argues that most policies available provide broader escape of water cover, not limited to freezing, and that there is some ambiguous wording in the policy booklet which suggests AXIS does too. Mr H also argues that the policy wording has no exclusion specifically applicable to the escape of water peril. Due to this, he says the policy should respond to the damage to his property caused by the escape of water. AXIS argues that there is conflicting evidence about the escape of water and the works which were required to put things right. It says Mr H's contractor's invoice says they completed the following works:*

*“Remove existing shower tray. Strengthen floor joists, replace floorboards, install new shower tray and screen, panel walls that are currently tiled.”*

*But AXIS says a later email from the contractor referred to them having repaired a leak from the controller unit of the shower and that this was replaced along with some pipework. AXIS says these works do not appear on the contractor's invoice, and that the works shown on the invoice suggest it's more likely the escape of water was due to poor or deteriorated sealant around the shower tray – which would be excluded under the gradual damage exclusion.*

*It's important to note that despite the escape of water occurring in either November or December 2021, and some investigation and remedial works being undertaken in March 2022, no claim was made to AXIS until July 2022. This means AXIS wasn't involved in diagnosing or remedying the fault or scoping out any required remedial works as a result of the damage.*

*Given the available expert evidence, I accept there has been either an escape of water or a leak. But I'm not persuaded Mr H has sufficiently evidenced that it was one which should be covered under the policy terms. Nor am I persuaded that any leak or escape of water can be considered the primary cause of the damage being claimed for.*

*I say this because it's clear from the evidence I've seen that there was water entering the property in numerous other locations, such as through the external walls. And that a lack of ventilation in the cellar also contributed to the worsening of the damage. I'm also mindful that there was around three months between the initial identification of an issue (November/December 2021) and any attempt at remediation on Mr H's part – which would likewise have contributed to the level of damage. It's also apparent that the localised remedial works which were undertaken in March 2022 appear less extensive than required by Mr H's engineer's report (received in April 2022), meaning damage continued to worsen between March and July 2022. Mr H's policy sets out the requirements on the policyholder to keep the property in a good state of repair and to prevent damage:*

*“A. Your duties*

*I. You must take all reasonable steps to prevent damage or an accident and keep the buildings in a good state of repair”*

*Taking the above into account, I think it's reasonable for AXIS to consider that Mr H failed to maintain the property and failed to take reasonable steps to prevent the damage caused by the escape of water from getting worse. I think the delay in Mr H acting would have contributed toward the level of damage present at the time the claim was made, and so would have prejudiced AXIS's position. And I'm not persuaded that the contradictory evidence Mr H has provided from his contractor is sufficient to demonstrate that there was more likely an escape of water from the shower control unit or pipes, rather than a leak due to gradual deterioration of the sealant, as suggested by AXIS.*

*So, even if I were to agree with Mr H that the policy should respond to an escape of water even if it wasn't caused by freezing – which I'm not necessarily saying I do – I don't think it would be fair or reasonable for me to direct AXIS to deal with this particular claim, in these particular circumstances, in any event.*

*Based on everything I've said above, I don't think AXIS's decision to decline Mr H's claim for damage caused by an escape of water is unfair or unreasonable in the circumstances of this claim and complaint.”*

I asked both sides to send any further comments or evidence they wanted me to consider before I reached my final decision.

Mr H responded setting out the reasons why he disagreed with my provisional decision, and providing some additional evidence, including photographs taken during inspections and during his contractor's repairs in April 2022. To summarise, he said:

- The evidence clearly shows the escape of water took place in the previous policy year to when the policy was avoided. He can't understand why this important point keeps being overlooked.
- The reason there is a discrepancy around whether the escape of water was from the pipework or not is because AXIS has referred to an estimate as an invoice. The initial estimate was just that, an estimate. It was only during works that the actual cause became apparent. The contractor has clarified this in their subsequent email.
- The surveyor's report confirmed the property was generally in a good condition and pressing issues were addressed by Mr H's contractor in April 2022.
- Photos from an inspection report in July 2021 shows there was no rot in the basement at that time.
- There was an inspection after the contractors' repairs in April 2022 and there was no rot remaining in the basement at that time.
- The condition of the property has been grossly exaggerated based on the loss adjuster's misunderstanding of how quickly rot can develop and spread.

AXIS responded to acknowledge receipt of my provisional decision, and to confirm it intended to provide a response. But no response has since been received, and the deadline to provide it has passed, so I'm moving forward with my final 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.

I've also thought carefully about the responses to my provisional decision. Having done so, my conclusions remain the same. I'll explain why.

Firstly, I should point out that I fully appreciate Mr H's argument about the escape of water having happened in the earlier policy year, and I commented specifically on this in my provisional decision. That's why despite agreeing that AXIS could fairly and reasonably avoid the policy back to the 2022 renewal, I still went on to consider the claim decision separately.

I explained in my provisional decision why I thought it was reasonable for AXIS to conclude Mr H had made a qualifying breach of the duty of fair presentation. None of the points he's made in response to my provisional decision have changed my conclusions here. I say this because I remain of the view that the photos taken during the engineer's inspection clearly show evidence of water ingress, mould and/or fungus growth within the cellar and on timbers. So, as the property owner, and a professional landlord who was on site during the inspection, I think Mr H ought reasonably to have known that the condition the property was in was poor. I also think it ought to have been clear that the condition the property was in amounted to a material fact that he ought to have made AXIS aware of when the policy renewed.

In terms of the claim decision, Mr H has evidenced that his contractor's original estimate was only that. So, that likely explains the absence of information about the shower control unit being the cause, if that wasn't discovered until during the works. But even taking that into account, I'm still of the view that AXIS can fairly and reasonably decline to cover the claim in the particular circumstances of this complaint.

I say this because the point remains that there appears to have been multiple causes of water ingress to the basement, beyond any escape of water from the shower, as well as a lack of ventilation which would all have contributed to the damage and rot. There was also a significant delay between the escape of water being reported and any inspection or remedial works being arranged by Mr H. And when works were carried out in March/April 2022, they were less extensive than required, based on the engineer's report. All of this would have significantly contributed to the level of damage present, and so prejudiced AXIS's position.

So, even if I were persuaded that the escape of water from the shower should be covered under the policy terms, which I'm still not necessarily saying I do as the policy requires it to be caused by freezing, I still don't think I can fairly conclude that this claim ought to be covered because delays and a lack of mitigation have prejudiced AXIS's position.

I've thought carefully about the photos and report Mr H has provided in response to my provisional decision, which he says shows that there was no mould present in the basement in 2021 or after the 2022 repairs. But these photos and report are very limited in scope or detail. The photos only show very isolated areas and so aren't persuasive evidence that the basement as a whole was in substantially better condition or that there was no rot present. And there is nothing in the page of the report which speaks to the overall condition of the basement. So, this additional evidence hasn't changed my overall conclusions.

Ultimately, I remain of the view that Mr H failed to appropriately maintain the property (in particular the basement and the water ingress through external walls), and that he failed to take reasonable steps to prevent the damage caused by the escape of water from getting worse. I think the delay in Mr H acting contributed toward the level of damage present at the time the claim was made, and so prejudiced AXIS's position. So, taking everything into account, I still think AXIS's decision to decline the claim for damage caused by the escape of water was fair and reasonable in the particular circumstances of this claim and complaint.

### **My final decision**

For the reasons set out above, and in my provisional decision, I don't uphold Mr H's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 15 May 2024.

Adam Golding  
**Ombudsman**