

The complaint

Mr A is unhappy Amtrust Europe Limited turned down a claim he made on his residential property owners insurance policy.

What happened

Mr A has an insurance policy with Amtrust which includes legal expenses cover for a property he rents out. In September 2020 he contacted Amtrust because the tenant was in arrears and he wanted to pursue legal action for rent recovery and eviction. Amtrust turned down the claim because Mr A hadn't obtained a deposit from the tenant (and registered this with the relevant scheme) which was a requirement of the policy.

In response to the complaint Mr A made, Amtrust said it also needed to consider whether its position had been prejudiced by non-compliance with this term. It noted Mr A had been able to issue the relevant notices seeking possession. It also didn't feel it could rely on a term relating to credit checks to decline the claim. But it said the tenant had been in arrears for some considerable time and the policy provided cover where "*all your normal credit control procedures have been exhausted*". It didn't feel Mr A had taken proper steps to ensure the rent was paid and that had prejudiced both his and its position.

Our investigator accepted Mr A hadn't met the requirements of the policy terms as they relate to the deposit. But he didn't think Amtrust had shown how that had prejudiced its position in this case. Even if a deposit had been obtained the arrears were in excess of that amount and a claim would still have arisen. And although the tenant had previously fallen into arrears that issue was resolved some time ago and this claim related solely to problems that had arisen more recently. He thought Amtrust should reconsider the claim in line with the remaining terms and conditions.

Amtrust didn't agree. It said Mr A hadn't acted in line with the terms of the policy and highlighted comments it had previously made about how its position had been prejudiced by this. Mr A said he was disappointed Amtrust hadn't agreed but didn't have any further comments. So I need to reach a 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.

The relevant rules and industry guidelines say Amtrust has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably.

I've looked first at the terms and conditions of Mr A's policy. The relevant section says, subject to other terms being met, it will cover legal expenses relating to "*the recovery of an undisputed debt for rent unpaid by your tenant*". The policy also covers "*legal expenses to assist you with gaining possession of the building when the tenant refuses you access to the building at the end of the tenancy agreement or if the tenant has failed to pay the rent*".

However, it doesn't cover:

“Disputes and/or legal proceedings between you and a tenant where you or your letting or managing agent are unable to:

- a) Produce one satisfactory financial or credit reference and one other satisfactory written reference for each tenant or guarantor;*
- b) Prove that a minimum of one month’s rent as deposit was obtained before letting the building to the tenant;*
- c) Prove, by evidence of a certificate, that the rent deposit was placed in a Tenancy Deposit Scheme...”*

Amtrust accepted in its response to the complaint that it couldn’t rely on the credit referencing section of this term. So I haven’t considered that further. But I don’t think it’s in dispute Mr A hasn’t met the requirements of the policy as they relate to a deposit because his tenant didn’t provide a deposit (and so nothing has been registered with the Tenancy Deposit Scheme).

However, I also need to consider whether it’s fair and reasonable to apply that term in this case. In response to our investigator Amtrust said it thought its position had been adversely affected by Mr A not obtaining a deposit because:

- The insured does not have recourse to utilise the loan to mitigate the loss claimed
- The tenant is less likely to comply with tenancy obligations if a deposit is not retained (thus making a claim more likely)
- Not following a suitable procedure in respect of arrears can complicate claims as the arrears become large and it reduces the prospect of being able to recover losses
- It prevents the tenant from being put under pressure to make payment

However, all of those are general points and Amtrust hasn’t explained how they apply in this case. And under the terms of Mr A’s policy Amtrust doesn’t cover the actual loss and so he isn’t claiming that from it. Having said that I accept in principle the absence of a deposit could increase the risk to Amtrust; any arrears that arise wouldn’t be covered by a deposit meaning legal action to recover the outstanding amount might be more likely. But in this case the arrears that prompted Mr A’s claim are substantially more than a month’s deposit would have been (and continued to accrue after the claim had been made). So even if that had been obtained (and placed with the relevant scheme) the claim would still have arisen.

I’m also mindful of what Amtrust said in its final response to the complaint. In that it acknowledged Mr A was in breach of this term but accepted it needed to consider what prejudice had been caused as a result. And it hasn’t suggested the absence of a deposit impacted the legal action Mr A wants to take (and which he wants Amtrust to fund). In fact it acknowledged not obtaining a deposit hadn’t prevented Mr A from issuing the required notice seeking possession.

The policy in any case requires any claim must have reasonable prospects of success and only provides for the payment of reasonable legal costs. So, if the absence of a deposit does impact on either the likelihood of the claim succeeding or the ability to recover the arrears from the tenant, then Amtrust will be able to take this into account. However, I’m not persuaded its position in this case has been prejudiced in and of itself because the tenant didn’t provide a deposit. And I don’t think it’s fair of it to rely on that to turn the claim down.

Amtrust also argues Mr A should have acted in a way that minimised the risk of a claim being made and has referenced policy wording which says “*all your normal credit control procedures have been exhausted*”. However, I’m not clear what, if any, checks it has done into what credit control procedures Mr A had in place and whether they have been exhausted. So, as it stands, I don’t see it can use this clause to turn down the claim.

But I accept the policy separately says the insured must “*try to prevent any event or circumstances that may give rise to a claim*”. So Amtrust is right to say Mr A should try and minimise the risk of a claim being made. Amtrust has produced a spreadsheet which it believes shows the tenant got into arrears in July 2018 and while payments were subsequently made the account remained in arrears from then until Mr A made his claim in September 2020. Amtrust doesn’t believe Mr A took appropriate action to remedy the problem at the point it arose.

However, as our investigator pointed out, that doesn’t appear to be correct. When the tenancy was taken out the tenant paid £1,125 of rent in advance which was applied as a credit to his rent account. That isn’t something Amtrust has taken into account when calculating the arrears. Doing so means although the tenant still got into arrears in late 2018, the regular payments they then made in excess of the monthly rent cleared those arrears by early 2019. That remained the position until the events which gave rise to Mr A’s September 2020 claim to Amtrust.

Amtrust has argued Mr A increased the risk to it by not acting as a prudent landlord in obtaining a deposit. I accept he didn’t do that but I think he nevertheless took steps to mitigate that risk by ensuring, as I’ve explained, the tenant paid more than a months rent in advance. So I don’t think Amtrust can fairly say Mr A hasn’t sought to prevent an event or circumstance that might give rise to a claim.

Putting things right

I don’t think Amtrust can rely on the reasons it’s used to turn down this claim. So it will need to reconsider the claim against the remaining terms and conditions of the policy.

My final decision

I’ve decided to uphold this complaint. Amtrust Europe Limited will need to put things right by doing what I’ve said in this decision. Under the rules of the Financial Ombudsman Service, I’m required to ask Mr A to accept or reject my decision before 18 February 2022.

James Park
Ombudsman