

The complaint

Mr S complains about how Amtrust Europe Limited dealt with a claim he made under a property owners' legal expenses policy. Reference to Amtrust includes its agents.

What happened

The details of this complaint are well known to both parties, so I won't repeat them again here in full. In summary, Mr S is a landlord and in August 2019, he took out a policy with Amtrust which covers legal costs in certain proceedings with a tenant. Mr S also took out optional rent guarantee cover, which provides a monthly rental benefit where the tenant fails to pay the rent, subject to the policy terms and conditions.

In August 2019, Mr S entered into a tenancy agreement. The rent was £1,200 a month. Mr S didn't take the deposit of £1,661.52 from the tenant but instead, was the beneficiary of a zero deposit guarantee scheme taken out by the tenant with another insurer. The cost of that policy to the tenant was £276.92. That scheme protects Mr S in relation to financial loss, such as rent arrears, up to the guarantee value of £1,661.52.

In November 2019, Mr S contacted Amtrust about a claim against his rent guarantee cover, as the tenant was in default in relation to rent payments. He later made a claim against the policy in relation to possession proceedings. Amtrust accepted and settled Mr S' claim in relation to possession proceedings. In January 2021, Mr S obtained an order for possession of the property.

I understand that in February 2021, Mr S received £1,661.52 as the beneficiary of the zero deposit rent guarantee scheme, which is the equivalent of the deposit the tenant would have paid.

Amtrust declined Mr S' claim against the rent guarantee cover part of his policy. It relied on a condition in the policy which says that an eligible claim is one where he'd collected the first month's rent and dilapidation deposit before allowing the tenant to occupy the property. It also relied on an exclusion for cases where Mr S or his letting agent can't prove that they took a minimum of one month's rent as deposit before letting the property.

Mr S didn't accept Amtrust's position and pursued his complaint. He wants Amtrust to settle his claim and pay him the equivalent of six months' rent payments.

In response to an enquiry from the investigator, Amtrust said that it's clearly a greater risk where the landlord lets the property to a tenant who doesn't have money to pay a deposit, as there's a greater risk of default by the tenant and therefore a claim on the policy.

The investigator looked at what had happened. She said that it wasn't fair and reasonable for Amtrust to rely on the exclusion to which it referred. That was because she didn't think that Amtrust's position had been prejudiced by Mr S agreeing to a zero deposit rent guarantee scheme, rather than taking a deposit.

The investigator said that there's no evidence that Mr S' tenant didn't have money for a deposit and that it's a requirement of Mr S' policy with Amtrust that he obtain a satisfactory credit reference. She said that if Amtrust was aware that Mr S had entered into a zero deposit rent guarantee scheme, rather than taking a deposit, it would be unreasonable for it to decline the claim.

Mr S agreed with the investigator. He said that it wasn't right for Amtrust to assume that the zero deposit guarantee scheme was in place because the tenant couldn't pay the deposit. Mr S said that at the time of setting up the tenancy, his estate agent said that the tenant was happy to pay the deposit but if he accepted the zero deposit guarantee scheme she would use the money she didn't pay for the deposit on decorating the property, which she did.

Amtrust didn't agree with the investigator. It said:

- The underwriter considers that a tenant not supplying a deposit is an unacceptable risk.
- It was unaware that Mr S hadn't collected a deposit until it was notified of the claim.
- The term requiring a full month's rent or deposit before the tenant moves in is a standard condition in a rent guarantee policy and as a professional landlord, it was for Mr S to ensure that the policy met his needs.
- There is evidence that the tenant was unable to pay a deposit, as she didn't pay the first rent payment of £1,200 and paid only £1,500 of the £4,800 owed for the first four months of the tenancy.
- If Mr S had collected a deposit it could have been used to offset rent arrears.
- Mr S' recovery under the zero deposit guarantee scheme is irrelevant. If a deposit had been collected the tenant has an incentive to pay rent on time and maintain the condition of the property. In this case, the only loss to the tenant was the premium of £276.92 she paid for the zero deposit guarantee scheme whereas the deposit would have been £1,661.52. As the tenant has less financial interest in the property, the risk of a claim on the policy increases.

As there was no agreement between the parties, the complaint was passed to me to decide.

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 policy terms and conditions

The starting point is the terms and conditions of the policy, the relevant parts of which say as follows:

“OPTIONAL RENT GUARANTEE

[...]

COVER

*This policy provides a monthly rental benefit where **Your Tenant** fails to pay or defaults on their **Rent** payment.*

1. ELIGIBILITY

For a Landlord to be eligible for cover:

[...]

*(sic) d. not allow any **Tenant** into occupation until the first month's **Rent** and dilapidation's deposit payment has been paid in cash or payment has been cleared in the **Landlord's** or managing agent's bank account.”*

“3. MONTHLY BENEFIT

*a. **Monthly Benefit** will be paid in respect of arrears of **Rent** owed on an **Insured Property** by the Tenant to the Insured for up to six months or until vacant possession has been gained, whichever happens soonest, subject to the following:*

[...]”

“SPECIFIC RENT GUARANTEE POLICY EXCLUSIONS

[...]

*7. For disputes and or **Legal Proceedings** between **You** and a **Tenant** where **You** or **Your** letting or managing agent are unable to prove that a minimum of one months **Rent** as deposit was obtained before letting the **Property** to the **Tenant**.”*

has the claim been declined unfairly?

The relevant rules and industry guidance say that Amtrust has a responsibility to handle claims promptly and fairly and it shouldn't reject a claim unreasonably. I uphold Mr S' complaint for the following reasons:

- Insurance policies aren't designed to cover every eventuality or situation. An insurer will decide what risks it's willing to cover and set these out in the terms and conditions of the policy document. The onus is on the consumer to show that the claim falls under one of the agreed areas of cover within the policy. If the event is covered in principle but is declined on the basis of an exclusion set out in the policy, the onus shifts to the insurer to show how that exclusion applies.
- Amtrust seeks to rely on the exclusion in the policy which I've set out above. Mr S didn't collect a deposit from the tenant, as required by the policy. So, on the face of it, Amtrust is entitled to rely on the exclusion to which it's referred. But in deciding whether Amtrust has acted fairly in turning down Mr S' claim, I need to consider whether Amtrust's position has been prejudiced by Mr S' actions in this case. And I don't think it has for reasons I'll explain.
- Amtrust said that it's clearly a greater risk where the landlord lets the property to a tenant who doesn't have money to pay a deposit, as there's a greater risk of default by the tenant and therefore a claim on the policy. It refers to the tenant's

subsequent non-payment of rent as evidence of her inability to pay a deposit at the outset.

- I don't think it's necessarily the case that a tenant who enters a zero deposit guarantee scheme doesn't have the money required for a deposit. I've seen no evidence that was the case here. Mr S says the estate agent told him that the tenant could pay the deposit in the usual way or enter into the zero deposit guarantee scheme and use the saving on decorating the property, which Mr S says she did. I don't think that subsequent non-payment of rent necessarily shows that the tenant couldn't afford to pay the deposit at the time the tenancy was granted. In reaching that view, I've taken into account that the policy requires Mr S to obtain a satisfactory credit reference for the tenant before granting the tenancy, so there would have been some check on the tenant's ability to pay the rent.
- Amtrust has provided an e-mail in response to a broker's enquiry which it says is from its underwriters and shows that it wouldn't accept the risk of a zero deposit guarantee scheme in place of a deposit. The enquiry wasn't from Mr S' broker. There's no suggestion that Amtrust told Mr S or his broker at the outset that it didn't cover claims where there was a zero deposit guarantee scheme in place. Similarly, I accept that Amtrust was unaware that Mr S hadn't collected a deposit until it was notified of the claim, but I don't think that alters the outcome here.
- Amtrust says that its underwriters consider that a tenant not supplying a deposit is an unacceptable risk. Essentially, Amtrust says that a tenant who doesn't pay a deposit is inherently a greater risk than a tenant who pays a deposit. But it hasn't provided any evidence to support that assertion.
- In this case, Mr S didn't simply fail to collect a deposit at the outset. He agreed to be the beneficiary of a zero deposit guarantee scheme instead of collecting the deposit. So, there was a guarantee that he'd receive the deposit if certain events occurred, such as the tenant defaulting on the rent. So, I think that Mr S protected his position in relation to the deposit and, based on what I've seen, he didn't increase Amtrust's risk or liability in doing so. And Amtrust can take into account the money Mr S received from the zero deposit guarantee scheme when dealing with his claim.
- Amtrust says that as the tenant paid only £276.92 at the outset - which was the premium for the zero deposit guarantee scheme – rather than the deposit of £1,661.52, she had a reduced incentive to pay rent on time, which increased the risk of a claim on the policy. I don't think that's the case. There are other incentives for a tenant to pay the rent on time, such as retaining a home and maintaining a good credit rating. I don't think that the initial saving of the difference between the cost of the premium and the deposit makes it more likely a tenant will default and therefore increases the risk to Amtrust of a claim by Mr S. And the provider of the zero deposit guarantee scheme is entitled to recover from the tenant any payment it makes to the beneficiary. So, whilst the tenant only paid the premium at the outset, she remained liable for the amount of the deposit.
- For the reasons I've explained, I don't think that Amtrust acted fairly and reasonably in declining Mr S' claim and in relying on the exclusion to which it referred.

Putting things right

In order to put things right, Amtrust should deal with the claim, in line with the remaining terms and conditions of the policy. In doing so, it's entitled to take into account the money Mr S recovered as part of the zero deposit guarantee scheme.

As Mr S has been kept out of the use of the money due under the policy, Amtrust should also pay interest on the amount of any settlement, at the simple rate of 8% per year from the date of Mr S' claim to the date it makes any payment.

HM Revenue & Customs requires Amtrust to take off tax from this interest. Amtrust must give Mr S a certificate showing how much tax it's taken off if he asks for one.

My final decision

My final decision is that I uphold Mr S' complaint. Amtrust Europe Limited should now take the steps I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 22 July 2022.

Louise Povey
Ombudsman