

The complaint

Mr and Mrs X have complained about their let property insurer Aviva Insurance Limited because it had refused their claim for damage found at their property after the tenant had been evicted. As Mr X has mainly dealt with things, my decision will mostly refer to him only.

What happened

In January 2021 Mr X told Aviva he may have to make a claim for damage caused at his property by his tenant. But he said he would first have to evict him. The tenant was evicted and in June 2021 Mr X made a claim. He told Aviva about threatening emails the tenant had sent him.

Aviva sent its field surveyor to the property. He spoke to the managing agent and took photos. It was decided that the condition at the property had resulted from a tenant breaching their tenancy agreement, not malicious damage as covered for by the policy. It said it didn't meet the definition of malicious persons and intent under the policy. Aviva also said it felt that if there had been malicious damage, that would have been caused over several incidents and a policy excess would apply to each.

Mr X was unhappy. He complained to us.

Our Investigator felt Aviva should be covering most of the damage, reimbursing Mr X's costs for completed repairs and lost rent plus 8% simple per year interest and paying £200 compensation.

Mr X didn't think the remedy went far enough. Aviva disagreed with the findings. The complaint was passed to me for an Ombudsman's consideration.

I felt the complaint should be upheld. But for reasons and to an extent different from those set out by our Investigator. Therefore, I issued a provisional decision to explain my views to both parties. My findings from that provisional decision were:

"Aviva has often during this claim referred to whether or not the problems at Mr X's property amount to malicious damage. But the policy Mr X has with Aviva offers cover for damage caused by malicious persons. In the policy damage is described as loss, destruction or damage. No definition is given for malicious persons (other than to say this does not mean thieves). There is clearly some 'loss, destruction or damage' at Mr X's property – although the specifics of that need some consideration. So the only other thing Mr X has to show is that the damage was caused by a malicious person.

I've seen an email and heard a voicemail Mr X received from the tenant. I know Mr X has shared some of the content of those with Aviva previously. I won't quote them here. But I think it's fair to say they are threatening and do show the tenant to be malicious in nature. So it seems to me that there is damage at the property which was caused by a malicious person. As such, I think Aviva acted unfairly and unreasonably when it declined the claim.

However, as I said, the problems at the property though do need some closer consideration. In short, I don't think Aviva fairly and reasonably has to settle for everything noted. Aviva has already set out some thoughts it has on the different areas of repair as part of its replies to Mr X. So I'll look at each of the areas/items reported as in need of repair and decide whether or not Aviva has to cover them. For the avoidance of doubt I don't intend to allow Aviva to apply an excess for each area of damage I find it is liable for. The policy allows Aviva to charge an excess per claim, not per instance of damage. And Mr X has only made one claim. Furthermore, this service often doesn't find it fair for an insurer to charge multiple excesses for damage caused in the same way. But we will often allow one excess per type of damage. So I'll likely only allow Aviva to apply one policy excess per type/cause of damage on any settlement I award.

I think there is a difference between damage and something having been changed. A policy like the one offered by Aviva isn't offered to cover instances where tenant's make changes to the home. And I don't think it is fair to stretch the definition of 'damage' to something which is merely different from what it was before but still performs similarly. Here I am specifically referring to the grass being changed to astro-turf, the laminate flooring being changed to vinyl and carpet and the tile by the front door being replaced with cement. I don't intend to require Aviva to reinstate these areas to how they were before.

There are a number of items though which I think, from the photos, it is clear the malicious tenant damaged or destroyed. For example; the shed, which is clearly no longer in tact in the back garden, has been destroyed. And, in another example, the kitchen wall units, which can't be used in their dismantled state on the kitchen floor, are damaged. I think Aviva will need to reinstate all the following areas in respect of each item I've listed here:

- The kitchen – wall and extractor units removed and dismantled.*
- The sitting room – boxing in removed, writing on the wall, hole in plasterboard, smoke alarm hanging from ceiling.*
- The back garden – the gate has been barred and nailed in place, the shed has been destroyed.*

Aviva doesn't seem to have considered the cover on the policy for theft. Where items are missing and have not been returned by the tenant, I think Aviva is reasonably liable for them under the theft section of cover. After all, Mr X has been deprived of them. So Aviva I think is liable for the missing pavers, window keys, patio door locks and bedroom carpet. I note the garden is full of debris – it is possible the carpet in particular is amongst all that. But I think it's fair to say that in putting a carpet outside there is an intention for it to not be used again. So I still think that the bedroom carpet, even if it is found within the property boundaries, can still reasonably be considered under the theft cover.

Aviva noted damage internally to the front door which has been patch repaired with expanding foam filler. I think Aviva has a point when it says this looks like a poor repair. But what Aviva did not note, but Mr X has provided photos of, is the damage to the door handle, potentially the locking mechanism and certainly the door frame. Mr X says this was done by the police, Aviva said even if the door was damaged by the police gaining entry to evict the tenant, that wouldn't fall for cover under the policy because it wasn't an emergency. I think Aviva is wrong in this respect. The policy gives cover for damage caused by the "emergency services". It does not specify that this has to be done in the course of the services attending to an emergency situation. So if Mr X can show that the police forced entry, I think Aviva

should cover the resultant damage to the door – the handle, lock mechanism if this was affected and the frame. For the avoidance of doubt, I don't think the areas of door filled with expanding foam seem like damage which would occur when a door is forced, to me it looks more like an attempt to repair.

The back garden is full of debris. In its current state it cannot function as a garden. So I think it is suffering damage. And the policy offers cover for debris removal associated with damage. So Aviva I think is liable for removing the debris.

A hole has also been dug in the back garden. The garden didn't have a hole before so I think it is fair to say the garden, as was, is suffering damage. Similarly, in the front garden, there are ruts which weren't there before. The policy offers cover for damage to landscaped gardens. I'm satisfied that Aviva needs to reinstate these areas. But, to be clear, as I said above, I don't view the installed astro-turf as equating to damage. My comments here about reinstating the gardens on account of the hole and ruts don't change that.

For any of the work I have found Aviva is liable for, and which Mr X has completed, Aviva will have to reimburse his outlay, plus interest. Interest will have to be applied on each cost incurred from the date it was incurred until settlement is made. If any of the work I have found Aviva is liable for is outstanding, Aviva can either undertake the repairs or settle in cash.*

The policy covers Mr X for rent lost whilst the property can't be lived in or accessed. I think it seems to have been generally accessible as the front door was in use. However, I think some of the damage did mean the property couldn't be lived in as there was no safe rear entrance/exit, and the missing locks meant the property wasn't secure. But I think the house could otherwise be lived in – whether or not it would have been possible to let it in its damaged state is another issue. But the policy doesn't offer cover for lost rent when the property can't be let, only when it can't be lived in. So I think Aviva will have to pay Mr X for lost rent in line with the policy cover. As Mr X has been without the benefit of rental income, and Aviva hasn't reimbursed this loss, Aviva will have to add interest to any settlement it makes to Mr X for lost rent from the date Mr X would have received rental payments until settlement is made.*

I think this has been a difficult situation for Mr X. And I think Aviva did fail him by denying liability and cover for the majority of the damage he reported. Whilst Aviva made its decision and communicated this to Mr X quite quickly, he has felt the worry caused by that over the many months since. He doesn't live at the property so he isn't suffering upset caused by living in a damaged home. But he does derive an income from it, so he has had financial stress. I think £500 compensation is fair and reasonable in the circumstances here."

Aviva said it disagreed with my findings. So did Mr X.

Aviva said it thinks my provisional findings don't view things "in the context the policy wording meant it to do". It thinks it should be able to charge more than one excess as the issues in question have clearly arisen over a period of time. It argued that whilst I had said this should be seen as one event, I was also stating different events, such as theft, should be included in the malicious damage claim.

Mr X said the items which I'd said the tenant had merely changed, had not been changed like-for-like. He said the carpet, lino and astro-turf now in place don't perform as the original flooring and grass did. They'd also not been fitted or looked after properly and didn't cover the same areas as those which had been in place before.

Aviva said items in the kitchen, sitting room and back garden which I had detailed as falling under the claim for damage caused by malicious persons, didn't seem to it like damage a malicious person would cause. It said there seemed to be no malicious intent behind the condition the property had been left in. And the policy requires the police to be notified – which Mr X hadn't shown he had done.

Regarding the items I'd said had been stolen, Mr X said he didn't think that was really the case. He, as did Aviva, said the carpet and pavers were still at the property. He said the keys and lock mechanisms would be useless to a thief. Aviva also said the policy wording excludes theft caused by residents.

Regarding the front door, reportedly damaged by the police, Aviva said evicting a tenant is not a criminal matter. It said it would, therefore, question why the police were involved.

In respect of the hole and wheel ruts in the garden, Aviva said it hadn't suffered malicious damage. It said whilst it agrees that while the garden is covered in debris it is not "functionable", this only amounts to a "Loss of Enjoyment, not a coverable peril under the policy".

Mr X said there was other damage at the property too – a hole in the worktop and a buckled exterior door. He'd like all these issues to be recognised as damage caused by malicious persons. Mr X said he'd worked to reinstate the property and would like to be paid as a contractor would have been – along with receiving compensation for lost wages and time spent. In total he'd like me to require Aviva to pay him £24,447.01.

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 did not say that Aviva could only charge one excess overall. I specifically explained that an excess per claimable event on the policy could be charged. And whilst it is likely that the instances of damage caused by the tenant did not occur all at the same time, this service's approach in claims like this is to say that applying an excess for every instance of damage is usually unfair and unreasonable. Even where a policy allows for that to be done, which this one does not. So I don't intend to change my view on this aspect of the complaint.

I'm not sure why Aviva thinks Mr X did not involve the police. From what I have seen he certainly did. I'm not persuaded that Aviva's now stated concern in this respect means I should change my provisional view on this complaint.

There are certain risks in being a landlord of a property. One of those is that the tenant will change things at the property. And those changes may not leave the property like it was before. But I remain of the view that something being different doesn't necessarily mean damage has been caused. The floors are still covered, the back garden (under the debris) is still green and the finish at the front of the property is still watertight. None of those things are exactly as they were before – different materials have been used and likely not as much ground/floor space has been covered. But I'm satisfied that changes have been affected rather than damage having been caused.

I'm glad to note Aviva has accepted that the back garden was not functioning as such, due to the debris left in it. When an item no longer functions it is damaged.

Aviva clearly thinks its policy wording offers cover for 'malicious damage' and the intent of the person doing that damage at the time needs to be taken into consideration. For most complaints about claims for malicious damage, Aviva would have a point. But its policy in question here, offers cover for damage caused by malicious persons. That is a subtle but significant difference. In considering the complaint I can't go behind that wording or add to it to create an interpretation that supports Aviva's position of what it thinks the policy should say. All I can do is apply the policy wording in place. And that is what I've done.

Similarly regarding theft – often policy's like this will exclude thefts which were either perpetrated, or allowed, by the resident of the property. But this policy does not. I'm not persuaded to change my mind about the policy wording in question and what that means for Mr X's claims.

I'm still satisfied it is reasonable to consider that some items were stolen. As I said the items listed are no longer available for Mr X to use, they are either missing or damaged because they were taken from where they should have been. So the tenant removed them without Mr X's authorisation and he has been permanently deprived of their benefit. Fairly and reasonably that is theft.

As I understand it, when a tenant is evicted, the police do sometimes have to be involved. But, in any event, I said provisionally that if Mr X can show that the police attended and forced entry into his property, he can claim for the damage which resulted.

The policy – separately to stating there is cover for damage caused by certain events, such as theft, says there is cover for damage to landscaped gardens. The wording does not require that the damage was caused by something else covered by the policy, or specify what sort of damage to the garden needs to have occurred for the cover to apply. Here there is a hole in the back garden and wheel ruts in the front. So there is damage to the landscaped gardens at the property which Mr X can claim for, and for which Aviva can charge an excess.

I note Mr X's reference to other damage, namely that the worktop had a hole cut in it and the door was buckled. But this damage wasn't featured on the list compiled by Aviva's claim handler when he met the property's managing agent at the start of the claim in June 2021. Aviva considered its liability for the listed items and set out its view in respect of each in its final response of 26 July 2021. As such Aviva hasn't considered its liability for the worktop or buckled door. If Mr X wants it to do so, he should contact it.

I note neither party has objected to anything I said about lost rent. And I note Mr X has completed work at the property and re-let it. Aviva can then, if Mr X wants it to and bearing in mind both my comments about this and the policy wording, progress the claim for lost rent.

I see Mr X wants me to award him the cost a contractor would have charged to complete the work. That is not something I can fairly and reasonably do as he did not pay a contractor to do the works. Mr X will have to submit his cost details and any receipts to Aviva so it can progress the claims for the different aspects of damage subject of this complaint and decision. If Mr X thinks it should pay him for his time spent doing the work, he can ask it to do so and it can consider that.

I note Mr X would, in addition to the £500 I have awarded him for distress and inconvenience, like me to award him £700 a days for the time he has spent pursuing this claim and complaint. But an award like that would be out of line with this service's approach and, therefore, unfair and unreasonable. I'm satisfied that £500 compensation for the distress and inconvenience I've found Aviva caused Mr X, is fair and reasonable in the circumstances here.

Putting things right

I require Aviva to;

- Settle Mr X's claim for damage caused by malicious persons, in respect of the following areas/items, subject to one policy excess amount being paid/applied;
 - the kitchen – wall and extractor units removed and dismantled;
 - the sitting room – boxing in removed, writing on the wall, hole in plasterboard, smoke alarm hanging from ceiling;
 - the back garden – the gate has been barred and nailed in place, the shed has been destroyed, debris needs removing.
- Settle Mr X's claim for damage/loss caused by theft, in respect of the following areas/items, subject to one policy excess amount being paid/applied;
 - missing pavers;
 - window keys;
 - patio door locks;
 - bedroom carpet.
- Settle Mr X's claim for damage caused to the front door handle, lock mechanism and frame, by emergency services, subject to Mr X providing proof of entry and one policy excess amount being paid/applied.
- Settle Mr X's claim for damage to landscaped gardens, in respect of the following areas/items, subject to one policy excess amount being paid/applied;
 - hole in the back garden;
 - ruts in the front garden.
- Settle Mr X's claim for lost rent in line with the policy terms and conditions, bearing in mind my findings that some, but not all, of the damage at the property meant it could not be lived in.
- Pay Mr X £500 compensation for upset.
- Where any amount is settled in cash with Mr X, either for damage or lost rent, apply interest* on the amount being paid to Mr X from the date he either incurred that cost, or in the case of rent, the date he should have received the payment but didn't. Interest will have to be applied until Aviva makes the settlement to Mr X.

*Interest is at a rate of 8% simple per year and paid on the amounts specified and from/to the dates stated. HM Revenue & Customs requires Aviva to take off tax from this interest. If asked, it must give Mr X a certificate showing how much tax it's taken off.

My final decision

I uphold this complaint. I require Aviva Insurance Limited to provide the redress set out above at "Putting things right".

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

Fiona Robinson
Ombudsman