

The complaint

Mr R complains that MS Amlin Insurance SE, in respect of his claim for damage to his commercial/tenanted property, has applied a policy limit of £5,000 to the claim.

What happened

Mr R owns a property which is a building which consists of two commercial premises and four residential flats. He had a policy with Amlin, which expired in early August 2021. In late August 2021, he received notification from the police that the property had been raided under a search warrant. The police found that all four flats had been used for the cultivation of cannabis.

Substantial damage was found, owing to the installation of equipment, such as holes in the walls and the chimney breast for ducting and wirings, nail and screw holes in ceilings. Also the electrics had been tampered with.

Mr R initially made a claim to his insurer at the time of the discovery of the damage. However that insurer said that the damage likely occurred before he had taken out the policy with it.

Amlin subsequently agreed to consider the claim. It found that the damage was malicious, but not accidental. As the policy limit for malicious damage caused by a tenant is £5,000 it paid Mr R that amount.

Mr R disputed this, as it will cost substantially more than £5,000 to repair the damage. On his behalf his brokers set out to Amlin that firstly he should have been advised about the relevant policy limit when buying the policy – it doesn't appear on the policy schedule but is contained in the middle of a 100 page policy booklet. They further said that the damage wasn't malicious, in that the tenants didn't cause the damage deliberately with an intention to do harm. So they said it should be classed as accidental damage for which there is only the limit for the whole policy. Lastly they said that the actions could have taken place at different intervals over a period of time so queried whether more than one £5,000 limit should apply to different claims over a period of time.

Amlin rejected those arguments and said there was one claim for malicious damage and it was not accidental damage.

On referral, to the Financial Ombudsman Service, our Investigator ultimately found that Amlin's decision concerning the claim was reasonable. However he said that Amlin's delay in accepting liability for the claim caused distress and inconvenience, for which it should pay £150 compensation.

Amlin agreed to this outcome. Mr R did not, and pointed out that the damage was to all four flats and that if it had taken a week (as the Investigator suggested) then this was damage on several different days. He said that there is no definition within the wording of the policy so as to restrict the damage conducted in one single event over a period of time to limit it to the one policy limit.

The matter has been passed to me for further consideration.

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.

awareness of the £5,000 limit

Mr R says he wasn't made aware of the policy limit for claims for malicious damage by tenants. This wasn't drawn his attention and only appears within the lengthy policy booklet.

From Amlin's point of view, I think it's entitled to apply such policy limits as it thinks fit, and which it is prepared to cover the risk for. The policy was sold to Mr R by a broker. So if there were any important terms in the policy that Mr R should have been made aware of, it was up to the broker, rather than Amlin, to draw his attention to them. So if Mr R has a complaint about the way the policy was sold, he should direct that complaint to his broker. I believe he has already done that.

single claim

Firstly I understand that we don't know precisely what happened, over what period of time and who was responsible. In deciding what's fair and reasonable the standard of proof is the balance of probabilities i.e. what, in my view is most likely to have happened. On the question of Amlin treating this as one single claim of malicious damage, the terms of the policy state Amlin will not cover "*any amount exceeding £5,000 for any one loss by malicious damage caused by the tenant.*"

Mr R argues that the damage didn't all take place at once, he points out that all four flats were damaged. He believes it is likely that the damage took place over a period of time, so several claims can be made, each with a policy limit of £5,000.

I would observe that the policy covers the whole building and isn't broken down into the different flats/ commercial premises. I think that damage caused by the setting up of a cannabis farm was likely to have been pre-planned. I understand that two of the tenants were arrested though it isn't known whether they have been charged. Nevertheless I believe it is most likely that it was the tenants who set up the equipment and caused all the damage to enable the equipment to be used to cultivate cannabis.

I think that the setting up of the cannabis farm even if it took several days was part of an overall intention to cause damage to the property in order to carry out a criminal activity. The policy doesn't have specific wording for this, but it can't cover every contingency. Generally our approach is that if a tenant causes malicious damage in several rooms unless it can clearly be separated as having occurred at different times for different reasons we would still regard that as one claim. So I think that Amlin did act reasonably in treating this as one loss under the terms of the policy, and paying the policy limit for that claim.

accidental damage

Mr R's broker has suggested that the claim could be accidental damage, on the basis that the tenant was arguably adapting the premises for their own purposes. So the damage wasn't deliberate.

There's no definition of "accidental" in the policy. In the absence of such a definition we usually say it is damage which is unforeseen and unintentional. I've considered this in the

context of this claim, but I have seen no evidence to suggest that any other damage took place that wasn't the direct result of the property being altered to carry out a criminal activity so was intentional rather than accidental.

loss of rent

Mr R has also asked if he could make a claim for loss of rent. As I understand it, the rent was paid up until at least the end of the policy period. As far as I can see there is no separate cover under the property damage section for loss of rent under the policy. There is cover under the "Business Interruption" part of the policy but in the schedule this cover is noted as "not insured".

Mr R enquired where this was claimable from his new insurer. As I don't know the terms of that policy he will have to take it up with them.

compensation

Initially Amlin disputed liability as the policy had expired before the damage was discovered. I believe it left it to the new insurer to investigate before it would consider liability. As a result it was in December 2021, some four months after the claim, before it started its investigation.

I don't think Amin was responsible for the delay in it starting its investigation, as it was reasonable in my view for it to wait until the other insurer established when the damage likely took place. But Mr R was left in a situation where both insurers denied liability and referred him to the other insurer. This caused Mr R a fair degree of inconvenience for which I think it should pay £150. I believe it has paid this but if it hasn't it should do so if Mr R accepts this decision.

Putting things right

Amlin should pay £150 compensation (if it hasn't already done so).

My final decision

I uphold the complaint and require MS Amlin Insurance SE to provide the redress set out above under "Putting things right".

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 26 May 2023.

Ray Lawley
Ombudsman