

## **The complaint**

Mr M is unhappy AXA Insurance UK Plc (AXA) has declined a claim he made under his commercial property insurance policy.

## **What happened**

Mr M has a commercial property insurance policy with AXA, the policy covers five properties Mr M owns and rents out.

When the tenant vacated one of the properties covered by the policy, Mr M discovered extensive damage had been caused. Mr M subsequently made a claim to AXA, as his policy covered malicious damage caused by tenants.

AXA declined the claim. They said Mr M hadn't complied with the conditions outlined in the policy terms for the malicious damage caused by tenants cover to apply.

Mr M was unhappy with AXA's position, so he approached this service.

One of our investigators looked into things but she didn't uphold the complaint. She said that Mr M hadn't complied with the policy terms, so she said AXA's decision to decline the claim was reasonable.

Mr M didn't agree and asked for a final decision from an ombudsman.

I was minded to reach a different outcome to our investigator, so I issued a provisional decision to give both parties an opportunity to comment on my initial findings before I reached my final decision.

## **What I provisionally decided – and why**

In my provisional decision, I said:

*"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.*

*As I've reached a different outcome to our investigator, I'm issuing a provisional decision to give both parties an opportunity to comment on my initial findings before I reach my final decision.*

*I'll also outline here that whilst I take into account the policy terms and conditions, my remit also extends to what I think is fair and reasonable in all the circumstances of this case. What that means is I can also direct AXA to deal with a claim outside the strict application of the policy terms, if I decide it's fair and reasonable in all the circumstances of the case to do so.*

*Mr M's policy covers a number of different insured events. In relation to malicious damage by tenants, the policy terms outline:*

*“Malicious damage and theft by tenants cover*

*We will cover you for malicious damage and loss by theft caused by your tenants provided that you*

*1 carry out internal and external inspections of the building(s) at least every 3 months or as frequently as is permitted under the tenancy agreement and*

*a maintain a log of those inspections and retain that log for at least 24 months*

*b carry out a 6 monthly management check of the inspections log*

*2 obtain satisfactory credit references from a licenced Credit Referencing Agency prior to granting the tenancy with the tenant having given permission for this information to be released in the event of a claim*

*3 obtain and record details of your tenant’s bank account and verify those details by receiving rental payments from that account*

*4 obtain and retain a written formal identification of any prospective tenant*

*5 do not permit any sub-letting of your property*

*If you do not comply with the above conditions you will not be covered and we will not pay your claim.”*

*The terms also outline the maximum cover limit under malicious damage by tenants in any one period of insurance is £5,000.*

*After the tenant vacated Mr M’s property, he discovered extensive damage so made a malicious damage by tenants claim.*

*AXA declined the claim as they say Mr M hasn’t complied with the above term. AXA hasn’t pointed specifically to which requirements individually they think Mr M has or hasn’t satisfied. Instead, they’ve focussed on all the points not being met, which is a requirement for the cover to be provided. I’ll consider each of the requirements separately.*

#### *Internal and external inspections*

*As outlined above, inspections need to be carried out at three-month intervals (or as frequently as is permitted under the tenancy agreement).*

*Mr M has provided AXA with a log of the inspections dating back five years. Having seen this, it appears that the inspections were carried out on a six-monthly basis. From what I've seen, the tenancy agreement doesn't outline a specific timescale for inspections, and instead outlines with notice, but not how frequently they are permitted.*

*Mr M has said:*

*"Internal and external inspections were completed every 3 months initially for the first approx. 3 years, I then extended these to every 6 months due to no issues being identified"*

*So, it does appear that Mr M, after having the tenant in situ for three years, decided that due to no damage or issues during inspections, to revert the inspections to every six months.*

*Whilst it appears Mr M could have carried these out every three months, I don't think that Mr M not strictly complying with the inspection requirement means it would be fair or reasonable in all the circumstances for AXA to rely on non-compliance to decline the claim.*

*I say this because the tenant was in place for ten years. So, they were a long-standing tenant. At all the inspections over the ten-year period, no damage or concerns were identified. So, whilst Mr M may have been able to inspect more frequently, I'm not persuaded not doing so is material to the loss that ultimately occurred.*

*If it was a new tenant, then I might have reached a different view on this point, but given they were in situ for ten years, I don't think by only inspecting every six months rather than three, given there was no previous damage or cause for concern, increased any risk to Mr M or AXA.*

*Furthermore, the last inspection was September 2022, and no damage was identified then. If an inspection was carried out three months later, this would have been December 2022. That month was the last time the tenant paid rent before vacating in February 2023.*

*The fact the tenant stopped paying rent in breach of their tenancy agreement, they also may not have allowed access to Mr M to inspect the property anyway. And to gain access, Mr M would have needed to go through lengthy legal processes, and he may not have been able gain access any sooner than when the tenant vacated in February 2023 anyway. So, on balance, I don't think what happened in terms of the frequency of the inspections is material to the damage caused and the subsequent claim being made.*

*Therefore, unless anything changes as a result of the responses to my provisional decision, I'm not minded to conclude it would be fair or reasonable for AXA to rely on a breach of this condition alone to deny the malicious damage by tenants claim.*

### Credit reference agency

The full policy term says the following is a requirement:

*“obtain satisfactory credit references from a licenced Credit Referencing Agency prior to granting the tenancy with the tenant having given permission for this information to be released in the event of a claim”*

Mr M hasn't had credit checks carried out on the tenant at any point.

However, I don't think it would be fair or reasonable for AXA to rely on non-compliance with this to decline the malicious damage by tenant's claim. I'll explain why.

The malicious damage by tenants' policy cover (and requirements) wasn't introduced until 2017, which was a year after Mr M took out the policy. At that point, Mr M had already had the tenant in situ for around four years. And he confirms that at the time of the tenancy starting, he obtained references from the previous landlord, and this included confirming the tenant had always paid rent on time.

Given the tenant was in situ, and had been paying rent for around four years, I don't think it would then have been reasonable to expect Mr M to carry out credit checks on the tenant some significant way into the tenancy, as this would normally be carried out prior to a tenancy being started.

And this is reflected in the requirement here, as it says prior to granting the tenancy. And it doesn't outline the policyholder needs to have (past tense) obtained this when granting the tenancy previously, and before cover started. Instead, it says obtain when granting a tenancy, which in my view is future tense, rather than past tense. So, I don't interpret this to mean it's a requirement if there is already a tenant currently in situ, and instead applies for any future tenant obtaining a tenancy during the period of cover.

Furthermore, the term outlines a satisfactory credit reference. But doesn't clarify what satisfactory actually means in real terms. So even if Mr M had later carried this out (which I don't think the terms require), it's unclear what AXA would be expecting it to show. And even if there were negatives shown, such as CCJ's, at this point the tenancy would already have been in place for several years. So even if there was clear information about what AXA was expecting here from a credit check, it is unclear what actions AXA would be expecting Mr M to take, several years into a tenancy agreement, if it showed anything negatively.

And finally, this term was introduced at renewal in 2017. It doesn't say a credit check needs to be completed each year either, just prior to tenancy. So, although Mr M didn't have this completed either pre-tenancy, or when this term was introduced in 2017 (which I don't think he would have been able to anyway), I don't think compliance with this at either of those points would have had any bearing on the same tenant causing malicious damage some seven years after the term was introduced.

In fact, Mr M has confirmed that whilst no credit checks were completed ten years prior, during the ten-year tenancy, there were no payment issues during that time. So, I fail to see what relevance to the loss this would have had here.

*Therefore, I'm not minded to conclude its fair or reasonable for AXA to rely on a breach of this requirement to reject the malicious damage by tenants claim.*

#### *Tenants bank account and receiving payments*

*I don't think there is any dispute whether this requirement has been satisfied, as the tenant was in situ for ten years, and paid rent to Mr M's bank account during this time – and he's provided evidence of receiving payment. From what I've seen, AXA accepts Mr M has complied with this requirement.*

#### *Identification of tenant*

*Mr M says when the tenant took on the tenancy, he didn't obtain any identification from them as this wasn't a requirement at the time.*

*In any event, the term says any prospective tenant. The tenant wasn't prospective either when the policy was taken out, or when the malicious damage term was introduced in 2017, or since then. Instead, they were already in situ for several years, so I don't think it can reasonably be said this term hasn't been complied with.*

*Furthermore, my understanding is that the general purpose of this type of requirement would be to help ensure a genuine person is taking up a tenancy, rather than under a false name, and for example, to use the property for illegal activities. But here, the tenant was in situ for ten years, with regular inspections being carried out, regular rent payments being made, without any issues until 2023.*

*So, I don't think this point would apply given it's for prospective tenants and isn't material to the loss here in any event.*

#### *Sub-letting*

*I don't think there is any dispute whether this requirement has been satisfied, as there hasn't been anything which shows the property has been sub-let. So, from what I've seen, AXA accepts Mr M has complied with this requirement.*

*So, in summary, I'm minded to conclude the only requirement which may have been breached is the inspections frequency point. But for the reasons outlined, I'm not minded to conclude it would be fair or reasonable for AXA to rely on that (or the other points), to conclude the requirements haven't been met, or to decline the claim on this basis.*

*Therefore, I'm minded to conclude it would be fair and reasonable for AXA to reconsider the malicious damage by tenants claim in line with the remaining terms of the policy.*

#### *Policy cover*

*AXA declined the claim made which was for malicious damage by tenants. And I'm not minded to conclude this was fair or reasonable for the reasons outlined. However, AXA only considered the claim against malicious damage by tenant's cover, and no other insured peril.*

*When Mr M raised the claim, this was for:*

- *Doors pulled off*
- *Doors pulled off kitchen units*
- *Kitchen floor ripped*
- *Windows smashed*
- *Front door has been kicked in*
- *Bath has been damaged*
- *Rear garden debris*
- *Carpets ripped and ruined*
- *Hole in the floor*
- *Holes in the walls*

*In cases where a tenant moves out, and damage is discovered, it will often be raised as a malicious damage by tenants claim by the landlord. But AXA should already be aware that under this peril, for the damage to be covered (putting aside any exclusions), the key point is that the damage needs to have been caused maliciously – i.e., deliberately intended to cause harm, and by the tenant.*

*However, whilst damage may be present, it's not always the case that there was malicious intent by the tenant. Instead, damage may have been caused accidentally by the tenant during the time they lived in the property, rather than maliciously. Or sometimes that the damage, such as smashed windows or doors, might be due to a third party, maliciously or as vandalism, rather than by the tenant.*

*Looking at the list of reported damage, some of this may well be accidentally rather than maliciously caused, and some (externally) might have been caused by third parties, not the tenant. Mr M's policy does cover accidental damage as an insured event, along with malicious damage and vandalism more generally. And both of these perils don't have the same £5,000 policy limit either.*

*But it seems AXA solely focussed on malicious damage by tenants and refused the claim (incorrectly in my view). But AXA didn't go on to consider accidental damage (or any other insured event). And I think they should have done, even if they intended on declining the malicious damage by tenants claim.*

*So, in addition to reconsidering the malicious damage by tenants claim in line with the remaining terms, I'm also minded to direct AXA to consider whether accidental damage, or any other insured event, applies here.*

### *Service*

*As outlined, I don't think AXA reasonably declined the claim outright, and they should have considered the claim against the malicious damage by tenants, alongside any other insured events which might apply.*

*Not doing so has resulted in Mr M having to pay a considerable amount towards putting damage right, when it's likely that at least some (if not all) the damage potentially should have been covered under the policy and across the various insured perils. And it's clear that this has caused Mr M distress and inconvenience at what was already a difficult time in discovering his property was extensively damaged and having to fund repairs.*

*So, in addition to reconsidering the claim, I'm also minded to direct AXA to pay Mr M £350 compensation for the impact of this, and the distress and inconvenience caused."*

Therefore, I was minded to uphold the complaint and to direct AXA to reconsider the malicious damage claim in line with the policy terms, consider whether any other insured event under the policy applied for the loss and damage caused, and to pay £350 compensation.

### **The responses to my provisional decision**

Mr M responded and said he agreed with the provisional decision.

AXA asked for an extension to the deadline to provide a response. Despite the deadline being extended, they didn't provide a response or any further comments. As the extended deadline has now passed, 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.

And I've thought carefully about the conclusions I reached in my provisional decision. Having done so, as neither party has provided anything which would lead me to depart from my provisional findings, my final decision remains the same as my provisional decision, and for the same reasons.

### **My final decision**

It's my final decision that I uphold this complaint and direct AXA Insurance UK Plc to:

- reconsider the malicious damage by tenants claim in line with the remaining terms of the policy
- consider whether any other insured event under the policy terms applies for the loss and damage caused
- pay Mr M £350 compensation

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 11 October 2023.

Callum Milne  
**Ombudsman**