

The complaint

Ms P complains about Aviva Insurance Limited's decision to turn down a claim made under her property owners policy.

What happened

Ms P holds a property owners policy with Aviva. She made a claim after discovering that her tenant had been using her rental property for the cultivation of cannabis and damage had been caused to the property.

Aviva turned down the claim as it said Ms P hadn't complied with all the policy requirements for cover to be provided. Unhappy with this, Ms P brought a complaint to this Service.

Our investigator didn't recommend the complaint be upheld. She thought Aviva's claims decision had been reasonable.

I issued a provisional decision on 13 September 2023. Here's what I said:

'The policy says:

'Illegal Cultivation of Drugs

We will indemnify You in respect of Damage arising from Your tenants use of The Premises for the manufacture, cultivation, harvest or processing by any other method of drugs classed as a controlled substance under the Misuse of Drugs Act (1971).

You will lose Your right to indemnity in respect of a Residential Unit if You, or anyone acting on Your behalf, do not

- (1) carry out internal and external inspections of the buildings at least every three months or as permitted under the tenancy agreement*
- (a) maintain a log of such inspections and retain that log for at least 24 months*
- (b) carry out a six monthly management check of the inspections log*
- (2) obtain and record written formal identification of any prospective tenant*
- (3) obtain and retain a written employers reference for any new tenant*
- (4) obtain and record details of Your tenant's bank account and verify those details by receiving at least one payment from such account*
- (5) advise Your tenant, where sub-letting is allowed by the tenancy agreement, that they must follow the measures laid out in items (2) (3) and (4) above for all lettings that they arrange.'*

These requirements were set out on page 27 of a policy document that was over 100 pages long. They were not included in the policy schedule. Given that a claim could be turned down if Ms P didn't comply with the requirements, I think they were onerous and ought to have been brought to her attention.

Though even if Aviva had brought the requirements to Ms P's attention, I'm not persuaded that it would be appropriate for Aviva to turn down the claim anyway. I'll explain why.

Aviva says that Ms P didn't carry out regular inspections of the property, and didn't obtain and record details of her tenant's bank account and verify those details.

The first requirement was that Ms P (or anyone acting on her behalf) needed to carry out inspections of the property at least every three months, or as permitted under the tenancy agreement.

The tenancy agreement only says that the landlord/agent may enter the property to inspect its condition by giving 24-hour notice, and doesn't specify how often the property would be inspected. Though in any event, Ms P says she accessed the property on two occasions (which was at least every three months of the period in which the property was rented) because a neighbour had reported a damaged tree, and that she kept a note of her visits in her diary (though I haven't seen this).

The other requirement is that Ms P (or anyone acting on her behalf) should obtain and record details of her tenant's bank account, and verify those details by receiving at least one payment from the account.

The letting agency apparently took its commission up front from the first two rental payments. It then informed Ms P that the tenant had issues adding her bank details, and that it would send her the rental payments after it had received them from the tenant. It then did so.

We now know that Ms P was a victim of deception, and that someone was merely posing as a letting agency. I accept there were some irregularities - for instance, the rental payments made to Ms P were not made by the name of the letting agency, but by an individual not known to Ms P. However, that letting agency was a registered company on Companies House, and they did arrange for a reputable referencing company to carry out the reference checks on the tenant. So, on balance, I think it was reasonable for Ms P to consider they were a genuine company acting on her behalf.

Ms P understood that the letting agency had received money from the tenant. Ms P says she called the letting agency to question whether the payment she had received from the individual was from the agency - and that the agency confirmed it was and that they had received the money from the tenant's bank account. I appreciate this can't be confirmed.

However, given that the letting agency was not genuine, I think it's likely they would have stated the tenant had made payments from their bank account if questioned about this. So at that point, there wouldn't have been anything further for Ms P to do to verify things to ensure she met the cover requirements (even if she had been aware of them). Although I accept the requirement wasn't strictly complied with, I think it would have been reasonable for Ms P to have relied on what the letting agency told her, and therefore it wouldn't have made a difference to the claim anyway.

I therefore find that it wasn't fair for Aviva to say that Ms P had lost her right to indemnity under the cover for illegal cultivation of drugs, and so I intend to require it to pay the claim in line with the remaining policy terms.'

I asked both parties for any further comments they wished to make before I made a final decision.

Ms P responded to say she accepted my provisional findings.

Aviva didn't accept my provisional decision and made the following main points:

- It thinks Ms P should be regarded as a commercial customer subject to the Insurance Act 2015.
- It thinks the policy did put Ms P on notice to check its contents. It says Ms P was also an experienced landlord who arranged her policy through a broker.
- It has referred to section 11 of the Insurance Act 2015, and says it was entitled to rely upon Ms P's failure to comply with the policy requirements, unless Ms P can show that these failures could not have increased the risk of the loss which occurred.
- It thinks it is irrelevant that Ms P's letting agent would have falsified information if she had pursued validation for the tenant's bank account, as this would still be a failure to comply with policy requirements.
- It says it is doubtful that Ms P did carry out any inspections, and thinks it highly likely that by the date of the second inspection, the cannabis farm had been installed.
- As there was no periodic inspection regime in the tenancy agreement, it thinks the policy requirement was that the property should be inspected every three months.

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.

Aviva says the policy did put Ms P on notice to check its contents. It has referred to page one of the policy terms which say the policy and schedule should be read carefully to ensure the cover meets requirements. Aviva says it would be impractical and unreasonable to give prominence to a particular condition or exclusion over others.

However, I note that Aviva brought other onerous terms to Ms P's attention in the policy schedule. The schedule said that loss of rent/and or alternative accommodation was limited to 20% of the building sum insured. It also said that Ms P would lose indemnity for flat roof cover if she didn't arrange for any flat roofs to be inspected annually and by a competent roofing contractor every three years. Finally, it said that subsidence cover was excluded for a single storey rear extension.

Given that indemnity would only be provided by Aviva under the illegal cultivation of drugs section of the policy if Ms P took certain actions, I remain of the opinion that this should have been made clear by Aviva (as it did for the other onerous terms I've mentioned above). I think this alone means that Aviva can't rely on the requirements. Though for completeness, I've considered Aviva's other arguments.

The Insurance Act 2015 applies to commercial policies. Section 11 essentially says that an insurer can't rely on a breach of a policy term if the breach didn't increase the risk of the loss which actually occurred.

The requirement was to *'obtain and record details of Your tenant's bank account and verify those details by receiving at least one payment from such account'*.

The letting agent had arranged for a genuine referencing agent to carry out background checks on the tenant (Mr S). They carried out an employment check, passport number verification, a check with Mr S's previous landlord, and a credit search where they matched the tenant. So the main background checks (that I think any prudent landlord would have arranged), were successfully carried out.

I don't know if Mr S was involved in the deception, though if he was, then I think it's likely he would have sent a payment from his bank account if needed. But if he wasn't, then I accept that non-compliance with the term likely did increase the risk of the loss.

Therefore, strictly speaking, Aviva was entitled to rely on the non-compliance in order to turn down the claim (if I were to ignore that Aviva hadn't brought the requirement to Ms P's attention). However, I remain of the opinion that in these particular circumstances, that wouldn't be fair or reasonable. I think that if Ms P had known of the requirements and asked the letting agent if it had received a payment from Mr S's bank account, they would have told her they had. And so this wouldn't have made a difference to the claim, even if Ms P had done all she reasonably could.

I've read the decisions issued by my ombudsman colleagues that Aviva has referred to. Though as Aviva is aware, each case is considered on its own merits, and I'm not bound by the findings of previous cases.

Aviva also says it's doubtful that Ms P did carry out any inspections, and thinks it's highly likely the cannabis farm had been installed by the date of the alleged second inspection. It also says that as the tenancy agreement didn't have an inspection regime, then the property should have been inspected every three months.

I don't know for certain that Ms P carried out the inspections, though she says she did and that she kept a record of this in her diary. I note that Aviva's loss adjuster was planning to request this, but I haven't been provided with a copy.

I appreciate Ms P had no formal arrangement with the letting agency for inspections to be carried out, but the property was only let for seven months before the cannabis farm was discovered. Ms P apparently only visited the property due to an issue raised by a neighbour, but based on what she's said, the property was visited at least every three months in that seven-month period. So it seems that Ms P inadvertently complied with this requirement (even though it wasn't brought to her attention by Aviva).

Aviva thinks the cannabis farm was likely already in place when Ms P says she visited the property. It says the installation would have taken a considerable time, and that images of the cannabis plants show that cultivation had been taking place for some time.

Ms P says she visited the property for the second time on 14 August, which was two months before the cannabis farm was discovered by her. Aviva hasn't provided persuasive evidence that the cannabis farm took longer than this to be installed in the property. Also, it seems to me that there's no way of knowing if the plants were grown from seed or moved into the property after they'd started developing.

Overall, I don't think Aviva has shown that Ms P hasn't been truthful about the dates she says she visited the property.

My final decision

My final decision is that I uphold this complaint. I require Aviva Insurance Limited to pay the claim in line with the remaining policy terms. Interest* at 8% simple per annum should be added to any cash settlement due from a month after the date of loss to the date of settlement.

If Aviva considers that it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Ms P how much it's taken off. It should also give Ms P a certificate showing this if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms P to accept or reject my decision before 8 November 2023.

Chantelle Hurn-Ryan
Ombudsman