

The complaint

P's complaint is that Aviva Insurance Limited didn't consider a claim it made correctly under its business protection insurance policy.

P says Aviva treated it unfairly.

In this decision all references to P include its claims handlers.

Although P is helped by Mr C, I shall refer to all submissions as being its own for ease of reference, unless there is necessity for me to specifically reference Mr C.

What happened

P made a claim on its Aviva business protection insurance policy for disruption to its business following a flood. The claim was dealt with between July 2021 and March 2022. P is unhappy with Aviva's handling of that claim. The complaint that was brought to the Financial Ombudsman Service by P was that:

1. It was unhappy the settlement for the material damage element of its claim was limited because Aviva said it was underinsured for this.
2. The settlement proposed by Aviva for business interruption didn't take account of the entire period it was closed for.
3. Aviva treated it unfairly by failing to coordinate its claim with its landlord who was responsible for rectifying the damage to the building it was occupying and ensuring he fulfilled his obligations under the lease in relation to the suspension of rent.
4. Aviva did not include the salary of Mr C in the business interruption claim.
5. The amount offered by Aviva for business interruption does not go far enough to cover its losses.
6. Aviva did not offer P a new policy at renewal, and this has prejudiced P's ability to obtain insurance elsewhere.

Our investigator considered P's complaint and concluded it could not consider my numbered points 1, 2 and 4 because P had not raised these points with Aviva and Aviva had not had the opportunity to consider them. He also acknowledged that although this was the case, Mr C's salary appeared to have now been included in the revised settlement proposed by Aviva.

In respect of point 3, the investigator said Aviva weren't obliged to coordinate its claim with its landlord and that they did in any event take steps to help P by writing to its landlord to stress the importance and urgency of drying out the building P was occupying.

In response to complaint point 5, the investigator said that Aviva had made a deduction for savings it thought P had made in respect of a reduction in rent payable to its landlord, but Aviva was not allowed to make this unless a saving had actually been made by P. So, he didn't think it was fair for Aviva to reduce the settlement value for this if the evidence it reviewed didn't support this saving had actually been made by P.

Finally, in respect of point 6, the investigator said that Aviva's underwriting criteria supported

that due to the nature of P's business, providing further insurance wasn't a risk they were prepared to take. As such he was satisfied that Aviva didn't treat P any differently to any other prospective customer in the same circumstances and that they were entitled to decline to renew P's policy when they did.

P accepted the investigator's view, but Aviva didn't. Aviva said that the evidence they had reviewed supported that P had not paid full rent during the claim period and that the deduction it made for savings was in respect of this. Alternatively Aviva said that they were entitled to make deductions for savings P should have been entitled to make. Aviva gave a fuller explanation of the documents they reviewed to support this. The investigator considered this and felt that all of the evidence he had seen didn't support that P made a saving on rent during the claim period and that it was still being charged full rent by its landlord. As such the investigator remained of the view that P's complaint should be upheld in the same way he'd previously suggested.

In response to the investigator's second view, P spoke to the investigator and said one of the documents its landlord had produced called 'Enquiry for Arrears' was fake and was made by its landlord to look like P owed the landlord money when it didn't. P was asked to provide further information to explain why this was but didn't do so.

In response to the investigator's second view, Aviva said that the evidence they had been provided with showed that P was only charged 50% of rent and no arrears were accrued during July-November 2021 and they had no evidence to support that P's landlord later charged P the other 50% of rent that was due. And if this did occur Aviva said that P needed to ask its landlord to correct this and not seek payment from Aviva because P was entitled to a reduction in rent on reliance of its lease agreement during this time.

In August 2024 I considered P's complaint and issued my provisional findings by email to the parties. I said I'd reviewed P's complaint and noted that the only issue in dispute between the parties left for me to determine is whether Aviva was entitled to deduct any savings P made in rent during the period of loss claimed and if so, what that amounts to. That was because P had accepted the investigator's findings in respect of all of the issues he'd determined and Aviva was only disputing this particular matter.

I agreed broadly with the findings of the investigator that Aviva was entitled to offset any savings P made in respect of a reduction of rent against P's claim on the policy, but they were not entitled to deduct those savings if they had not actually been made. I said that what was less clear in this case was whether savings had been made by P in respect of the rent claim during the claim period as a result of the condition of the building P was occupying.

I set out that P claimed it had paid its rent at the full rate for the claim period whilst Aviva say the evidence P had supplied didn't support this. I said that Aviva said that if there was additional evidence that P had paid full rent for the claim period, this should be recovered by P from its landlord.

I set out that I did not agree that P needed to recover any payments of rent from its landlord if it have paid the full amount for the claim period. And I said that Aviva were not entitled to offset any savings from the claim if these had not actually been made. I relied on the policy wording that was quoted by the investigator in his view in this regard. I also said that whether P should have sought to make savings from its landlord wasn't a matter for the Financial Ombudsman Service to determine but rather was a matter of law between P and its landlord. I said that the Financial Ombudsman Service was able to determine the correct interpretation of the policy terms however which didn't support that Aviva could deduct savings if the policyholder has not actually made them.

I also noted that P said it had paid rent at the full amount for the entire claim period but that the amount payable for that specific period was paid at a later date. I pointed out that Mr C on behalf of P told the investigator that he could supply evidence to show what P paid its landlord by way of bank statements. He also said that P didn't owe any arrears of rent to its landlord before the date of loss and that it had never missed a payment. I cited that when the investigator pointed out a document called 'Enquiry for Arrears' showing around £42k of arrears before the loss period by P, Mr C said this was a fake document made by the landlord to make it look like P owed money, though he couldn't explain why this was. I said to date Mr C had not provided any documents to support what he said P had paid in rent either side of the claim period and for the entire year straddling it.

Overall, my provisional finding was that it was for P to establish it had a claim capable of cover and support that with evidence. I agreed that the documents Aviva have reviewed didn't support that P paid a full rent for the entire period of loss and said that it was up to P to provide Aviva with evidence to support that it did. In order to do so I said I would expect P to be able to provide a credible explanation why the 'Enquiry for Arrears' document was fake and evidence in the form of bank statements showing what P had paid its landlord in rent either side of the claim period and for the entire year straddling it.

I also said that if P was able to do that then I would expect Aviva to reconsider the claim. I said that until that happened, I was not minded to direct Aviva to do anything further or pay P anything given the evidence didn't currently support that P paid a full rent for the loss period.

For those reasons I said I was currently upholding P's complaint against Aviva because I didn't agree with Aviva's stance that they were entitled to apply a deduction for savings that they thought P should have been made but had not necessarily actually made. I said that If P was able to provide the information I set out, I would direct that Aviva reconsider its claim. Otherwise, I said that Aviva need not do anything further.

In response to my provisional findings P said that Aviva had appointed a forensic accountant and now accepted it was charged 100% of its rent during the claim period. P said that Aviva were looking to settle its business interruption claim in full.

Aviva also replied to my provisional findings. They said that they had not offered to settle P's interruption claim as contended at all and remained of the view that the evidence they'd seen supported that P had received a reduction in rent during the claim period. They set out detailed reasons with reference to the evidence they'd reviewed to support this. They also went on to say their loss adjusters had agreed to agree a further indemnity period for consideration, but that rent has still been limited to 50% between July-November 2021 but no settlement proposals had been made.

Aviva also said that it had not made an offer to settle all of P's claim and that further matters remained outstanding which it had now provided a response to namely in relation points 1, 2 and 4 which I had cited at the beginning of this decision. Aviva said these did not form part of the matters being considered as part of this complaint.

Finally, Aviva also said that they have not maintained that P were responsible for 100% of the rent during the claim period and that this statement was incorrect and had been advised to persuade the Ombudsman's decision.

Because the parties did not accept my provisional findings, the matter has been referred to me to determine.

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.

Having done so, I remain of the view that P's complaint should be upheld for the same reasons and in the same way set out within my provisional decision which was sent by email to the parties in August 2024. I say so because the parties have not provided me with any information or evidence that makes me think these findings are wrong.

I'm grateful to Aviva for confirming that P's claim for business interruption hasn't been agreed and that this is still being considered, albeit with a further indemnity period. Given Mr C's assertion to the contrary, he should contact Aviva directly to clarify his understanding of what is currently being considered by them and why.

I also note what Aviva said about not offering to settle all of P's claims including the complaints the investigator said he could not consider at numbered points 1, 2 and 4 of my decision, which I had cited above. Again, I'm grateful to Aviva for confirming this but it doesn't make a difference to the outcome of this complaint. If P is unhappy about the response it has been given in response to those three points, then it will be entitled to raise a further complaint against Aviva if it has not already done so.

I note Aviva contend the evidence it has seen does not support that P was charged and paid full rent for the claim period. I don't disagree. My provisional findings weren't that this was not correct, but rather that Aviva was not entitled to deduct any savings P had made, unless P had actually made them from the business interruption insurance claim. Aviva's position in response to P's complaint was that they were entitled to make deductions P should have made. Whilst that might have changed now, P's complaint should still be upheld because Aviva had maintained in response to its complaint that it was entitled to deduct savings irrespective of whether they had been made by P. As Aviva are not disputing my finding in respect of this I have not referred to where my interpretation of this is derived from save to say that it is the same as the investigator's initial findings.

Finally, I note that Aviva have said they have not maintained that P were responsible for 100% of the rent during the claim period and that this statement is incorrect and has been advised to persuade the Ombudsman's decision. I'm not sure what reference this relates to, but it has no bearing on and makes no difference to the outcome of my findings.

Overall, my findings are:

- It was for P to establish it has a claim capable of cover and support that with evidence. The documents Aviva have reviewed don't support that P paid a full rent for the entire period of loss and it is up to P to provide Aviva with evidence to support that it did.
- In order to do so I would expect P to be able to provide a credible explanation why the 'Enquiry for Arrears' document is fake and evidence in the form of bank statements showing what P has paid its landlord in rent either side of the claim period and for the entire year straddling it.
- If P is able to do that then I would expect Aviva to reconsider the claim. Until that happens, I am not currently minded to direct Aviva to do anything further or pay P anything given the evidence doesn't currently support that P paid a full rent for the loss period.

For those reasons I am upholding P's complaint against Aviva because I don't agree with Aviva's original stance that they're entitled to apply a deduction for savings that should have been made but were not actually made.

Putting things right

If P is able to provide a credible explanation why the 'Enquiry for Arrears' document is fake and evidence in the form of bank statements showing what it has paid its landlord in rent either side of the claim period and for the entire year straddling it, I direct that Aviva reconsider its claim.

Otherwise, Aviva need not do anything further.

My final decision

I uphold P's complaint against Aviva Insurance Limited and put things right as I have set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask P to accept or reject my decision before 3 October 2024.

Lale Hussein-Venn
Ombudsman