

The complaint

A trust that I will call H has complained about the refusal of a claim and the service provided under the legal expenses insurance part of their commercial property insurance policy with Amtrust Europe Limited.

What happened

H's policy with Amtrust, provides cover for legal expenses arising from certain events that might occur in relation to the insured property. The trust owns a freehold property and wanted cover to take action against a leaseholder for unpaid service charges. I understand H also then wanted to claim against the tenant for causing damage to the property. In response the leaseholder made a counterclaim for unfinished building works.

H says that in October 2022, when it received the counterclaim, it contacted Amtrust to notify it of a claim under the policy. It says it got a response with general information on how to make a claim on 18 October 2022. H says it wrote to Amtrust again on 5 December 2022 and 8 February 2023 but got no response. H says it then contacted its broker who made enquiries and found out the representative H had been emailing had left Amtrust and their emails were not accessible. The broker was given a different email address, which H used on 22 February 2023. H says it still didn't hear anything from Amtrust, so chased by phone on 17 March 2023 and was told to resubmit the claim, which it did in April 2023. H says it had to chase a response from Amtrust again by phone on 1 June 2023 and also by email. H also submitted a complaint about the handling of the matter and the call not being answered at the same time.

On 20 June 2023, Amtrust informed H it would not cover the claim as disputes about service charges are excluded from cover. It said that while the counterclaim was raised about the state of repair of the building, this still arose from the initial dispute about the service charge. Amtrust said it could not trace a call made on 1 June 2023. Amtrust did however, accept that it was not satisfactory that H's emails in 2022 had not been responded to. It accepted that there was no indication provided to H that emails to that address were not being looked at. Amtrust said that in future it will make sure there is an automatic message to inform any sender that a staff member has left Amtrust. It offered H £250 compensation for this.

H remained unhappy with Amtrust's response and referred the complaint to us. In the meantime, the proceedings continued and H has incurred significant legal costs.

One of our Investigators looked into the matter. He did not recommend the complaint be upheld, as he was satisfied that Amtrust was entitled to rely on the exclusions it had to refuse the claim. The Investigator acknowledged the serious error in H's emails going unanswered but did not think this had impacted the outcome of the claim, so was satisfied the £250 compensation Amtrust already offered was reasonable.

H did not accept the Investigator's assessment. It says the policy clearly provides cover for legal defence and while this started as a dispute about the service charge, it has become a disrepair claim, which is covered under the policy.

H also said it actually made a claim for disrepair issues, not service charges initially, despite what was said in the claim form. H says it is also now claiming for notice of major works, disrepair and remedial work, and the evidence suggests the tenant brought the counterclaim for disrepair, when he realised H was trying to get forfeiture for not only his debt but also having failed to report disrepair, and also knocking down internal walls without permission.

The Investigator asked Amtrust to consider this further. Amtrust said it could only assess the insurance claim based on the information provided to it and the claim form submitted by H said it had made the initial claim for recovery of outstanding service charges and this was confirmed in an email in June 2023. It still considered that the defence of the counterclaim arose from the initial claim relating to service charges and was not covered. In addition, Amtrust says that even if the claim was for the disrepair issues, the claim would be excluded as the costs were incurred without Amtrust's involvement and it has been prejudiced by late notification of the claim.

The Investigator therefore did not change his opinion on the case. H says the Investigator has failed to take account of the fact that it did bring the matter to Amtrust's attention in a timely manner but the staff member it was emailing had left Amtrust and not updated their email.

As the Investigator was unable to resolve the complaint, it was passed to me.

I issued a provisional decision on the matter in July 2024. I provisionally determined that Amtrust should reconsider the claim for defending the counterclaim and related claim for damage to the property and pay H some compensation. I have set out my provisional findings below:

"H's policy with Amtrust provides cover for legal costs of various disputes that might arise in relation to the insured property. This includes claims for property damage, nuisance and trespass, repossession, lease disputes and recovery of rent arrears.

The policy says it covers:

"pursuit or defence of your legal rights arising from a dispute with your business tenant under the terms of a written lease agreement in relation to your insured property..."

As this states the policy covers the defence of H's rights as well as pursuit of legal rights, it would be a reasonable expectation that this would also cover defence of a counterclaim in my opinion.

The cover set out above does however specifically exclude:

"Any disputes that arises from or relates to a disagreement with your tenant over payment or non-payment of service charges."

So in relation to H's claim for payment of outstanding service charges, it is correct Amtrust would not be liable to pay those costs. Amtrust says this is also enough for it to mean the defence of the counterclaim, and any other claim for damage H has, is not covered either, as it was made in response to the claim for service charges.

I note the claim form H submitted to Amtrust said: “on claiming via solicitors for unpaid legally submitted services charges, the leaseholder submitted a counterclaim regarding structural issues”.

I also note that H said in an email to Amtrust in June 2023:

“The claim relates to legal costs incurred. The legal case started in order to recover unpaid service charges from the leaseholder... On progression of pursuing the Leaseholder for these charges, the Leaseholder has submitted a spurious and vexatious counter claim against us for unfinished building works. Without permission (or our knowledge) he removed all internal walls of his leasehold flat and part way through our main building works refused entry to his leasehold flat inhibiting the completion of the works we were required to do.”

I also note H’s email of 5 December 2022 says the only dispute remaining between the parties seems to be the counterclaim. H also has a claim for unauthorised works against the tenant.

Given the above, it seems clear that H told Amtrust that the claim started regarding service charges but later evolved. I don’t however think it makes any difference whether the legal claim started about service charges or not. I will explain why below.

The wording “*arises from or relates to*” can be interpreted quite widely. So I can see the argument Amtrust makes that the counterclaim arises from and relates to the original claim for service charges and is therefore excluded, as it has been served in response to the claim for service charges.

However, it seems to me that the counterclaim could have been made as a standalone claim and as such could have been brought against H irrespective of the service charges claim. In addition, H has said that the leaseholder has caused damage to the property in breach of the lease and again it seems to me that a claim could have been made regarding that irrespective of any service charge issues. Given this and in line with our approach on such matters, it seems unfair to me to exclude cover for defence of a counterclaim simply because of the timing when it would have been covered if it had been brought first.

Late notification

Amtrust also says it would be entitled to refuse cover for costs of defending the counterclaim on the basis that it was ... notified of the claim late and has therefore been prejudiced, as it was unable to approve any legal action or costs. Amtrust says the first claim form it received was in June 2023. It relies on the policy exclusion which says that:

“the insured is not covered for any claim arising from or relating to:

- 1. Costs or compensation awards incurred without our consent”.*

H says it contacted Amtrust immediately after receiving the counterclaim, in October 2022.

The claim form says H became aware of the counterclaim in October 2022 and there is a hand completed claim form dated 8 October 2022, which is the same date that H says it emailed the representative at Amtrust.

I have not seen a copy of the October 2022 email but I think it is likely that it was sent. I have seen the email H sent Amtrust on 5 December 2022, which refers to the October 2022 email. The December 2022 email also gave details of the claim including the repair counterclaim and said it had a partially completed claim form and asked for guidance about completing it.

H then wrote again on 8 February 2023 as it had not had a response.

Amtrust accepts that the email address was not manned and there was no automatic response in place to notify H that the emails were not being looked at. There were then further delays after H was given the different email address in February 2023.

H's email of 22 February 2023 said "*Please investigate this as a matter of urgency now and respond with details of the action we need to take in order for the claim to be accepted.*" It appears this was not actioned.

It seems to me that H tried to make the claim in October 2022, and at least by December 2022. Amtrust has accepted the email address used by H was not manned and that this should not have been the case. There is no evidence that it was unreasonable for H to have sent the potential claim emails to that email address.

Amtrust has not commented on the fact H tried to make the claim in October 2022. I have not seen copies of the legal proceedings, so I cannot make any finding about when H should reasonably have made the claim to Amtrust, although it has said it was only aware of the counterclaim in October 2022 and unless and until any other evidence is provided to counter this, I think it is reasonable to take this on face value.

Given this, I do not think Amtrust has established that the claim was notified to it late and that it has been prejudiced as a result.

On the evidence currently available, I therefore think that Amtrust should reconsider the claim and if necessary backdate cover.

To avoid raising H's expectations, as stated I have not seen the legal proceedings so there may be other evidence that comes to light that impacts this decision. I also highlight that cover under the policy is only for reasonable costs, so that would be reasonable in terms of time and actions taken by H and its legal representatives, as well as the fees charged.

I also consider that some compensation is warranted for the incorrect refusal of the claim and the difficulties H faced in trying to register the claim. I consider the sum of £450 to be more appropriate."

Responses to my provisional decision

I invited both parties to respond with any further information or evidence they want considered.

Amtrust has confirmed it received my provisional decision and has not added anything further.

H has also confirmed receipt of my provisional decision. H has not added anything further either but it has provided copies of some documents related to the court case.

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.

As neither party has added any further information, I see no reason to change my provisional findings. I therefore remain of the opinion that the defence of the counterclaim and any action for damage to the property are not excluded because there is also a claim for service charges; and Amtrust cannot refuse the claim for late notification. Amtrust should therefore reconsider the claim and if necessary backdate cover.

As stated in my provisional decision, this does not mean all of H's legal costs will definitely be paid, as there may be other information that impacts the cover once Amtrust considers the claim properly; and any backdated cover under the policy is only for reasonable costs, so that would be reasonable in terms of time and actions taken by H and its legal representatives, as well as the fees charged.

I also remain of the opinion that some compensation is warranted for the incorrect refusal of the claim and the difficulties H faced in trying to register the claim. I consider the sum of £450 to be appropriate.

My final decision

I uphold this complaint and require Amtrust Europe Limited to do the following:

1. Reconsider H's claim for costs in defending the counterclaim from its tenant and any related claim for damage to the property, subject to any remaining terms of the policy, and bearing in mind my comments above about the date of notification of the claim.
2. Pay H the sum of £450 compensation for the inconvenience caused by its handling of the claim.

Under the rules of the Financial Ombudsman Service, I'm required to ask H to accept or reject my decision before 10 October 2024.

Harriet McCarthy

Ombudsman