

## **complaint**

Mr A is unhappy that AXA Insurance UK Plc won't pay his claim for loss of rent and damages under his commercial property owners policy.

## **background**

Mr A let out a shop. In April 2015 he regained possession of the premises from an illegal sub-tenant. The property had major dilapidations. Mr A first made a claim for loss of rent and business rates under his legal expenses policy but then in 2018 he was referred to AXA to make a claim. He showed AXA a schedule of dilapidations drawn up after the eviction. He had carried out the repairs but asserted that he had made a considerable loss of rent as he was unable to re-let the premises for three years.

AXA reviewed the schedule of dilapidations. It pointed out that the loss of rent cover was contingent upon the damage being due to an insured cause. It said none of the damage could be shown to be malicious. The schedule referred to areas being of grime, shabby, dirty, beyond repair, incorrect installation and deterioration. It said this type of damage had either occurred over a period of time or because the property was not maintained by the tenant, all of which is excluded under the policy. It pointed out also that, in 2016, it had dealt with a claim for escape of water and loss of rent was added as part of that claim.

On referral to this service our investigator found that although some of the items in the report could be said to be covered under the policy, Mr A's claim was for loss of rent. He didn't think that any such loss was payable as Mr A had evicted the tenant meaning no rent was payable at the time of the claim.

Mr A disagreed and said that he believed the policy was there to cover the sort of damage he found after repossessing the property. He also said that if AXA was liable for some of the damage that was part of his loss.

I issued a provisional decision. In it I said that I thought that AXA should settle the claim for damage to Mr A's property in so far as it came within the policy terms. I didn't think it was liable for loss of rent or business rates.

AXA and Mr A didn't accept my decision. I've set out my provisional findings, their comments and my responses below.

## **my findings**

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

These were my provisional findings:

### ***"damage***

*I don't think it's fair to say that as Mr A had only made a claim for loss of rent, he should be held to this and not be able to make a claim for insured damage. AXA has clearly considered evidence of such loss. As the repairs had been completed long before a claim was made, I think it's fair just to refer to the schedule of dilapidations for the damaged items, as this was drawn up shortly after Mr A regained possession.*

*Under the policy there is cover under various "perils" including (damage by) malicious persons. I don't think from looking at the schedule, any damage can be shown to have been caused maliciously. But there is cover for:*

*"Any other cause which is not excluded"*

*So, as long as the damage (which is defined as "loss, destruction or damage") isn't excluded under the policy it is covered. I think that applies to the following:*

- Toilet – door drilled holes - replace – cost £200
- Preparation Room - Shelving damaged - cost £50
- Shop - Missing sections of grid in suspended ceiling, some damage, and generally in mediocre condition. The missing section and damage should be covered. The cost for replacing the whole ceiling £2,650, it would be fair to pay half - £1,325.
- Shop - Counter – missing and replaced with an inferior one - cost £1,000
- Front elevation - Canopy – missing - cost £500

*I think AXA should pay the cost of the repair/replacement of the items set out above totalling £3,075. It should pay simple interest on this at the rate of 8% per year though only from 21 August 2018, that being the date of Mr A's claim, until it is paid.*

*As for the rest of the schedule this refers to grime, items being shabby, mediocre, incorrectly fitted, with weed growth etc. These items are all in my view related to the maintenance of the property or things that happened gradually. Wear and tear and any other gradually operating causes of damage and the cost of maintenance or routine decoration are excluded.*

*loss of rent*

*I don't accept that loss of rent isn't payable just because Mr A had to evict the sub-tenant. The policy says, "the Insurer will indemnify the insured in respect of Reduction in Rent Receivable...following damage caused by an Insured Contingency to property insured." If the tenant has caused insured damage and as a result the property is unable to be let for a period, there is a loss of rent.*

*But in this case the damage covered by the policy is a very small proportion of the overall damage to the property. I don't think the items I've said are covered led to a loss of rent. I've noted also that there were other factors in Mr A not being able to let the property such as the market being quiet and a claim for escape of water in 2016.*

*So I don't think loss of rent is payable. The same applies to any loss of business rates."*

The following are AXA's comments (bulleted) and my responses:

- The insured had never intimated a claim for the property damage and at the time the claim was registered, the legal expenses claim in respect of dilapidations was still ongoing. It does not know the outcome of this and whether the insured has been successful and has not repudiated the property damage per se. It feels it would be unfair to penalise AXA in relation to interest for a claim that has never been presented and validated.

While Mr A didn't make a claim for property damage until August 2018, I have set out why in my provisional findings. AXA rejected the claim for loss of rent (and by implication the claim for damage to the building). Mr A presented photos, the said report and the invoices for repair. So it can't say the claim hasn't been presented. Rather it chose not to validate it as it rejected the whole claim. The award of interest isn't a penalty but flows from the insurance contract. I have taken it that Mr A was unsuccessful in pursuing the former tenant which was the reason for him making the claim to AXA.

- Whilst I have referred to "*any other damage not excluded*", the items listed are clearly dilapidations which the insurer is not responsible for – the tenant is and the insured has/is pursuing a claim against them.

I have set out in my provisional findings those items which I believe are damage which should be covered under the policy. Whilst part of the dilapidations report it doesn't mean that the items of damage which aren't in my view excluded under the policy shouldn't be covered.

- The items have not all needed replacing or become damaged at the same time and the late notification has prejudiced its ability to individually validate them. There would also be a separate excess applicable to each item of damage. It would be happy to review the damage should claims be submitted for damage over and above the excess amount of £300, that has been caused by an insured event.

Since AXA rejected all the damage so made no attempt to validate it I think it's rather late in the day to say it would now be happy to review the damage, or to raise the question of separate excesses. Our approach is that where there's extensive damage to a property and no clear evidence to indicate when the damage occurred, it's reasonable to treat this as one claim and apply one excess.

- Having looked at the invoice for the repairs the company is clearly related to the insured and appears to have increased the dilapidations by 20% being a VAT amount but the company does not display a VAT registration number.

This is irrelevant in my view. I have based the costs on those set out in the dilapidations report, drawn up by an independent chartered surveyor, rather than any invoices Mr A has produced. That report says: "*All the works set out in the schedule are reasonably required to put the Premises into the physical state required by the terms of the lease. Where quoted the costs are reasonable.*"

These are Mr A's comments (bulleted) and my responses:

- The content of the dilapidations report is the extent of all the damage done maliciously by the illegal sub tenant, and the cost should be paid according to that report.

The dilapidations report wasn't drawn up for the insurance claim. Rather it was a list of all the items that needed repair before the property could be re-let. Some of the items, as I've found in my provisional findings are covered by the policy, but a number of them I've determined aren't, as they are excluded.

- When the repair started and the ceiling was removed for the repair, he found above the suspended ceiling the extractor duct had overheated or an escape of smoke and heat

had damaged the ceiling between the shop and the flat above. He had to fit a new fire rated ceiling under the flat above before he could fit the new suspended shop ceiling.

- The sub tenant covered the entire floor with a commercial vinyl floor stuck over the floor tiles using a commercial glue. He had to remove the entire vinyl and the glue and the entire existing floor tiles had to be polished and broken tiles repaired as well as re-grouted. He has produced a number of “before and after” photos.
- He believes he is entitled to two years payments of business rates and loss of rent.

Mr A's main problem in this case is that he didn't report the damage to the property until over three years after it had occurred. I'm satisfied that, due to the dilapidations report, delay shouldn't prevent Mr A from claiming for the damage within that report which reasonably appears to be covered by the policy. But I bear in mind that as AXA wasn't made aware at this time it didn't have the opportunity to assess and review more damage as it arose – that would be the usual course for a claim and repairs. So I'm not going to award anything beyond that covered by the policy as reflected in the dilapidations report. I don't think it's fair to make AXA settle for further damage as it wasn't given chance to assess that as it normally would have done. Whilst I've seen Mr A's photos they don't add anything to my findings.

I'm not persuaded that there is any rent or rates due under the terms of the policy, for the reasons set out in my provisional findings.

My role is to try to informally resolve the dispute between the parties and I've done that taking into account all the evidence and the difficulties in this case. I appreciate that this may not be what Mr A wanted, but he's free to reject my decision and take other action.

My provisional findings as set out above are now final and form part of this final decision.

### **my final decision**

I uphold the complaint and require AXA Insurance UK Plc to pay to Mr A £3,075 in settlement of his claim. It should add simple interest\* at 8% per year from 21 August 2018 until it repays this.

\*AXA Insurance UK Plc is required by HM Revenue and Customs to deduct tax from any interest paid. Should Mr A request it, AXA Insurance Plc should provide him with a certificate showing how much tax has been taken off so that, if appropriate, he can reclaim it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 10 October 2020.

Ray Lawley  
**Ombudsman**