

## **The complaint**

Mr C has complained that AXIS Specialty Europe SE has declined a claim he made for malicious damage under his commercial property owners insurance policy.

## **What happened**

The background to this complaint is well known to the parties so I won't repeat it in detail here. In summary Mr C rented out a property he owned. The tenant caused damage to that property, and one above. AXIS declined the claim Mr C made for malicious damage as it considered Mr C had issues with the tenant for approximately 12 months before the tenant was evicted in October 2022. As these issues were before the policy commenced in June 2022, AXIS voided Mr C's policy and agreed to refund the premiums he had paid.

Our investigator didn't recommend that the complaint be upheld. She found that Mr C had breached his duty to make a fair presentation of the risk when he took the policy out. And if he had done so she found that AXIS wouldn't have offered Mr C a policy.

Mr C appealed. He said that there had been no issues with the tenant for three years. He said that it took six months to evict the tenant and that the property was then listed for sale which was the reason for the eviction. Mr C requested a copy of the loss assessor's report and a redacted copy was sent to him.

Mr C further said that:

- He acted in good faith answering all questions on the application form to the best of his understanding and ability.
- The initial application didn't contain specific questions relating to outstanding eviction notices. He would have willingly disclosed any relevant information had he been specifically asked about eviction notices.
- The insurer made no attempt to seek clarification or additional details regarding his rental situation during the application process.
- There were inaccuracies in the loss adjuster's report. These included the reference to '12 months of issues with the tenant' – Mr C stressed that his reason for the no-fault eviction was his decision to sell the property and relocate. The upper floor tenants were also served with a no-fault eviction notice and moved out promptly without court involvement.
- Finally he said that the reference to a high street bank on the ground floor was also incorrect – it had been several different businesses, latterly a cake shop.

Mr C provided a tenancy agreement, but no longer had court documents relating to the tenant's eviction.

As no agreement has been reached the matter has been passed 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.

I've summarised the background to this complaint - no discourtesy is intended by this. Instead, I've focused on what I find are the key issues here. Our rules allow me to take this approach. It simply reflects the informal nature of our service as a free alternative to the courts. If there's something I haven't mentioned, it isn't because I've ignored it. I've fully reviewed the file and considered the representations Mr C has made with care. I recognise that Mr C will be disappointed by my decision, but I agree with the conclusion reached by our investigator. I will explain why.

The relevant regulations provide that insurers should not unreasonably reject claim. So, as well as the law and other regulations I've considered all the evidence to see if AXIS has treated Mr C fairly in all the circumstances.

The relevant law here is the Insurance Act 2015. By this legislation, the insured has a duty to make a fair presentation of risk to an insurer when taking out a policy. AXIS says that Mr C breached this duty and if he had made a fair presentation of the risk it wouldn't have offered him a policy.

A fair presentation of risk includes disclosing every material circumstance which the insured knows, or ought to know. Or failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice to make further enquiries for the purpose of revealing those material circumstances. And the circumstance or facts are material if it would influence the judgement of a prudent insurer in determining whether to take on the risk.

At the inception of this policy in June 2022 Mr C was asked:

*Is the Insured aware of any information or facts that would be relevant to Insurers in assessing this proposal for insurance?*

He answered negatively to this question. I have considered Mr C's arguments that the question didn't ask specifically about eviction notices, and the insurer didn't ask any further questions regarding the rental situation. But on balance I'm not satisfied that Mr C did fairly present the risk. I say this because he advised the claims assessor that he had been having problems with the tenant for about 12 months before the tenant was evicted in October 2022. He also advised that he had been receiving complaints from other tenants about the ground floor tenant and had needed to call the police on occasion. Mr C provided crime reference numbers but subsequently said that these were unrelated to the tenant.

I haven't disregarded Mr C's submission that he had no issue with the tenant until the last few months prior to the eviction, that is, after the policy commenced. But I find this is inconsistent with the initial account he gave to the loss assessor. I recognise that Mr C feels that there are inaccuracies in the report – for example that the shop premises is not occupied by a bank but now a bakery, but I'm not persuaded that this means the whole report is inaccurate. I find it was fair for AXIS to rely on the report.

I accept that Mr C is not a professional landlord, but as he was purchasing a commercial policy I don't find that AXIS did anything wrong by not asking further questions. It was entitled to rely on the duty of fair presentation of risk. Overall, I'm satisfied that there were material circumstances known to Mr C that were material to the risk proposed. It follows I'm not persuaded that the duty to fairly present the risk was met.

The Insurance Act 2015 then goes on to consider whether there has been a qualifying breach. This means if the insured had made a fair presentation of risk, would the insurer have acted differently by not offering a policy, or offering it on different terms. I can't share sensitive underwriting guidance, but I'm satisfied AXIS has shown that if it had been made aware of the ongoing issues that Mr C was having with the tenant, including the pending eviction, it wouldn't have offered him a policy.

Accordingly I find that there was a qualifying breach. Under the Insurance Act 2015 when there has been a breach which isn't deliberate or reckless, the insurer may avoid the policy and not deal with any claims. But it must return any premium paid. That's what AXIS offered here, so I'm satisfied that AXIS' actions are fair and in line with the Act.

I'm very sorry that this decision brings Mr C unwelcome news, but in all the circumstances I don't find that AXIS has treated him unfairly.

### **My final decision**

For the reasons given above I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 28 May 2024.

Lindsey Woloski  
**Ombudsman**