An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2018-0037
Sector:	Insurance
Product / Service:	Car
Conduct(s) complained of:	Rejection of claim - reasonable care/security of vehicle
Outcome:	Upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant's claim under his comprehensive motor insurance policy for the loss of his motor car was declined by the Insurer. The Complainant claimed that his vehicle was stolen and destroyed. The Insurer declined the claim on the basis that policy conditions had not been complied with.

The Complainant's Case

The Complainant purchased a motor vehicle in or around January 2010 for €4,500.00. The Complainant states that he subsequently purchased a comprehensive motor insurance policy in respect of this vehicle from the Insurer in May 2010. The Complainant states that, on the night of the 14th of November or on the 15th of November 2010, the vehicle was stolen from outside his home.

The Complainant claims that he last saw the car on the evening of the 14th of November 2010, when he parked it near to his home. He asserts that the vehicle was locked, that there was only one key to the vehicle and that he had this key in his possession at all times. He claims that he left the house on the morning of the 15th of November 2010 via a door that did not bring him within sight of the parking location. Upon his return home on the evening of the 15th of November 2010, the Complainant states that he noticed that the car was missing and he notified this to the Gardaí that evening. The matter was reported to the Insurer on the 16th of November 2010. The vehicle was discovered by the Gardaí, in January 2011, abandoned and irreparably damaged having been set on fire.

The complaint is that the Complainant made a claim on his insurance policy which, he maintains, was improperly declined by the Insurer.

The Provider's Case

The Insurer wrote to the Complainant by way of letter of the 6th of July 2011 stating the following:

> *Having reviewed the circumstances of the incident we are not satisfied that you have taken all reasonable steps to protect the insured vehicle from loss or damage as the assessor advises there was no evidence of forced entry to the vehicle.*
>
> *The assessor has advised me that there was a standard immobiliser on the car and a key would have been needed to steal the vehicle.*
>
> *Therefore, we are not providing indemnity for this loss and we refer you to Page 18 of your policy booklet Condition 4 that applies to the whole policy:*
>
> > *You must take all reasonable steps to protect the Insured Vehicle from loss or damage, and keep it in an efficient and roadworthy condition. The vehicle keys should be removed from the ignition and the vehicle kept locked when not being driven.*

On the basis of the foregoing, the Insurer declined the claim by reference to "*Condition 4*" on page 18 of the policy.

In response to a request for a Final Response Letter, the Insurer wrote to the Complainant on the 21st of September 2016, reiterating the rationale set out in the letter of the 6th of July 2011 and relying on "*page 18, section 4 and 9, and page 24*" without reproducing same. This reference to 'sections' on page 18, rather than 'Conditions', is unhelpful as, in the first part, separate parts of the policy booklet are described as 'Sections'. Secondly, the majority of correspondence from the Insurer cites 'Conditions' when referring to the provisions contained on page 18 of the policy booklet. Accordingly, I will advert to 'Conditions' in this decision when referring to the provisions contained on page 18 of the policy booklet.

The quotation set out in the previous paragraph is doubly confusing as there is no Condition 9 (nor section 9) on page 18 of the policy booklet. The reference here to 'section 9' may be a typographical error insofar as it may have been intended to refer to Condition 5 which is relied upon by the Insurer in subsequent correspondence.

The Insurer, in the letter of the 21st of September 2016, further indicated that there had not been, and would not be any, Final Response Letter in circumstances where the Complainant had not made a formal complaint or appeal.

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Following correspondence with this office, a formal Final Response Letter issued dated the 19th of October 2016. This letter again reiterated the rationale set out in the letter of the 6th of July 2011 and went further to the extent that it noted the following:

> *The vehicle did not have current Road Tax or NCT at the time of the theft, and your Client advised the Engineer that they had the vehicle keys in their possession at all times.*

The letter went on to set out and rely upon Conditions 4 and 5 from page 18 of the policy. (There is no reference in this correspondence to page 24 of the policy.)

In addition to the foregoing, the Final Response Letter provided as follows:

> *Having reviewed the file we are satisfied that* [the Insurer's] *liability is limited in relation to 'Loss of or Damage to the Insured Vehicle caused by Fire or Larceny' to;*
>
> > *'Where the Insured Vehicle keys are stolen and the theft was accompanied by violent and forcible entry, we will pay up to a limit of €1000 per incident for replacing vehicle door lock(s), the ignition steering transmitter and central locking interface.'*

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 1 May 2018, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

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In the absence of additional submissions from the parties, the final determination of this office is set out below.

Prior to considering the substance of the complaint, it will be useful to set out the relevant terms and conditions of the policy.

Policy Terms and Conditions

The Insurer has identified the following Conditions from page 18 of the policy in support of its decision to decline the Complainant's claim:

> ***4. Care of Your Motor Vehicle***
>
> *The Insured Vehicle must be covered by a valid Department of Transport NCT Test Certificate, if you need one by law. You must take all reasonable steps to protect the Insured Vehicle from loss or damage, and keep it in an efficient and roadworthy condition. The vehicle keys should be removed from the ignition and the vehicle kept locked when not being driven.*
>
> *If we ask, you must allow us free access to examine the Insured Vehicle at any reasonable time. Alarms, immobilisers and tracking devices should be turned on when fitted.*
>
> *Endorsements may apply to your cover setting out other requirements relating to immobilisers, alarm and tracking devises.*
>
> *These devices must always be on and working whenever the Insured Vehicle is left. If you do not take reasonable care of the Insured Vehicle and meet any security requirements, this Policy may no longer be valid and we may not pay any claim.*
>
> ***5. Policy Holder's Duty***
>
> *The following are conditions precedent to the liability of* [the Insurer]
>
> *a) The truth of any information in connection with this insurance supplied by or on behalf of you which shall be the basis of and incorporated in this contract*
>
> *b) Observance of the terms of the Policy relating to anything to be done or complied with by you or so far as they can apply by any other person entitled to indemnity under this Policy.*

The Insurer's letter of the 21st of September 2016 made reference to a "*page 18, section 4 and 9, and page 24*" of the policy. There is no Condition 9 or section 9 on page 18. Page 19 contains a Condition 9 but this relates to arbitration and is not relevant to this complaint. In light of the later reference to it, it may be that it was intended to refer here to 'Condition 5' on page 18 rather than to 'section 9' and indeed Condition 5 is the provision (along with Condition 4) which is reproduced in full in the Insurer's Final Response Letter.

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In any event, the 'section 9' referred to does not provide any additional grounds for declining the claim.

The letter of the 21st of September 2016, as noted, also made reference to page 24 of the policy. Again, this is a reference which is not repeated elsewhere and which is not adverted to in the Final Response Letter.

There is nothing on page 24 of the policy which bears on the matter under consideration here save that it may relate to the reason why there was a delay in the provision of a Final Response Letter - a matter which I am satisfied is of no consequence for the purposes of this decision.

In addition to the foregoing, the Final Response Letter also refers to the 'Section' of the policy (in this case, '*Section*' is the correct description) dealing with "*Loss of or Damage to the Insured Vehicle caused by Fire or Larceny*" and quotes one provision thereof (as reproduced in the 'Provider's Case' part of this decision above and as appearing at page 7 of the policy).

It will be useful to set out this Section in fuller detail:

> ***Section 4***
> ***Loss of or Damage to the Insured Vehicle caused by Fire or Larceny***
>
> *We will pay for loss or damage to the Insured Vehicle and its accessories and spare parts while they are in or on the Insured Vehicle or in your private domestic garage, it caused by:*
>
> - *Fire*
> - *Larceny or attempted larceny*
>
> ***Provisos to Sections 3 and 4***
>
> ***A Payment of Claims***
>
> *….*
>
> ***B Limits of Payment***
>
> *…*
>
> *Our liability will be limited for the following:*
>
> *(i)* *…*
> *(ii)* *…*
> *(iii)* *…*
> *(iv)* *Where the Insured Vehicle keys are stolen and the theft was accompanied by violent and forcible entry, we will pay up to a limit of €1000 per incident*

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for replacing vehicle door lock(s), the ignition steering transmitter and central locking interface

Exceptions to Section 3 and 4

…

10. Any excess as shown in the Schedule.

11. Theft or larceny of the Insured Vehicle or damage cause by attempted theft or larceny where the Insured Vehicle was not locked and/or the vehicle keys were in the ignition or stored in the vehicle.

Finally, the schedule to the Complainant's Certificate of Motor Insurance notes that an excess of €300 applies in respect of the policy.

Analysis

The Insurer has relied upon three provisions of the policy as grounds for declining the Complainant's claim. The original letter of the 6th of July relied upon one ground only, namely Condition 4 (on page 18) of the policy. The letter of the 21st of September 2016 (which post-dates the date of the Complainant's submission of his complaint form to this office) sought to supplement the grounds relied upon by referring additionally to page 18, "section" 9 and to page 24. As already noted however, these additional references advanced no further valid grounds for declining the claim given the content of the said provisions and/or in light of the probable typographical error. Finally, the Final Response Letter, cited two additional parts of the policy over and above the original grounds relied upon, namely Condition 5 on page 18 of the policy and Section 4B, sub-clause (iv) on page 7 of the policy. Each of these grounds cited in support of the decision to decline the claim will be considered in turn.

Condition 4 (Page 18)

This provision of the policy, in the first instance, requires the policy holder to have a valid NCT certificate and further requires that the car be maintained in an efficient and roadworthy condition. It has not been maintained here that there was a failure to keep the vehicle in an efficient and roadworthy condition. The Final Response Letter includes a single sentence noting that the vehicle did not have current road tax or NCT at the time of the theft. The provisions of the policy relied upon make no reference to road tax and this sentence would seem to have been transposed from the assessor's report. This single reference to the absence of a NCT cert is the only reference in correspondence to the Complainant about the matter.

I am not satisfied that it would be just or reasonable to stand over the Insurer's declining of the claim on the basis that the vehicle had no valid NCT cert. In the first instance, this is not a matter that has been set out in correspondence to the Complainant in any detail at

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all and, indeed, the single passing reference to same appeared only belatedly in the letter of the 19th of October 2016, sometime after the Complainant's claim had been declined and after he had submitted his complaint form to this office. It is noteworthy that the letter of the 6th of July 2011 which reproduces part of a paragraph of Condition 4 of page 18 omits the first sentence only of the said paragraph which is the sentence dealing with the NCT requirement. This would tend to suggest that this reasoning did not form part of the grounds for declining the claim at the time the claim was declined.

Furthermore, the reference to the absence of a NCT certificate in the Final Response Letter does not make it clear that this reason was a formal ground for declining the claim (Indeed, insofar as road tax is also mentioned, the contrary could be argued). In fact, the Final Response Letter simply sets out a number of statements before reproducing entire Conditions of the policy and then stating generally that the Complainant had not fulfilled its obligations without specifying precisely which obligations were not fulfilled.

I am of the view that it is incumbent on an insurer to set out with much greater clarity the precise provision allegedly breached.

The greater thrust of the Final Response Letter and indeed the sole reasoning as set out in the original response letter of the 6th of July 2011 and in the subsequent letter of the 21st of September 2016 is that the Complainant failed to comply with Condition 4 (of page 18) insofar as he failed to take all reasonable steps to protect the insured vehicle from loss or damage. This is supported by a file note dated the 6th of July 2011 taken at 12:49 which records as follows:

> *Decline*
> *No forced entry / failure to safeguard the vehicle*

The conclusion that the Complainant failed to take all reasonable steps to protect the insured vehicle from loss or damage is reached on the basis that the Insurer's assessor had advised the Insurer that there was no evidence of forced entry to the vehicle and that a key would have been needed to steal the vehicle. The assessor's report, dated the 24th of January 2011, contained the following (wording in bold is as contained in the original report):

> *It is our opinion that the cause was clearly arson / malicious in nature, however there was no evidence of forced entry, and the Ignition Lock and Barrel were fully intact.*
>
> *If this vehicle had been **driven** from your client's home, a coded ignition key would have to have been used.*

The clear implication of the Insurer's letters to the Complainant is that the Complainant did not, in fact, have the sole key in his possession at all times and that the individual who removed the car must have had possession of a/the key, possibly by virtue of the key having been left in the car and/or by virtue of the car having been left unlocked.

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I am not satisfied that this implication is warranted nor am I satisfied that the Insurer has established that the Complainant failed to take all reasonable steps to protect the insured vehicle from loss or damage. Notably, there is no reliance placed on Exception 11 as reproduced above.

In response to the implication adverted to above, the Complainant, on the 4th of January 2018, made the following submission to this office:

> *There is no evidence in the papers as submitted of any enquiry being made as to whether the key for the vehicle could have been cloned without the insured's knowledge thereby obviating the necessity of any electrical short circuit in the engine compartment.*
>
> *There is no evidence of fraud or implication of the insured and no complaint has been made to An Garda Síochána. A standard immobiliser can easily be cloned without the knowledge of the insured.*

Whilst I do not believe that I need to give any detailed analysis to this proposition, I do not think that the submission is without merit. The fact that the Insurer's assessor was unable to find any evidence of forced entry to the vehicle is not determinative of whether there was in fact forced entry and equally it is not determinative of whether the Complainant failed to safeguard or protect the vehicle from loss or damage.

This is reinforced by the fact that the vehicle had sustained "*catastrophic damage*" by the time the assessor examined it and indeed it is noteworthy that the assessor could not, for instance, determine whether the car windows had been smashed prior to or subsequent to the fire.

Furthermore, whereas the Insurer paraphrased the assessor as saying that "*a key would have been needed to steal the vehicle",* this was in fact slightly misleading in that the assessor had actually stated that a key would have been needed to *drive* the vehicle from the scene. This qualification, which had been highlighted by the assessor via the use of bold typeface, was not communicated to the Complainant who was also denied a copy of the assessor's report and only had sight of same following the involvement of this office.

In addition to the foregoing, a file note dated the 6th of July 2011 taken at 9:57 appears to be less conclusive than the assessor in stating as follows:

> *He advised that no damage to the ignition barrel / lock – it would be very hard to bypass the immobiliser without the use of the key to drive the car*

This file note appears to conceive of the possibility of bypassing the immobiliser *without* a key albeit that same is described as being 'very hard' to execute.

In summary, I am not satisfied that the Insurer has established that the Complainant failed to take all reasonable steps to protect the insured vehicle from loss or damage or that he

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failed to remove the keys from the ignition or that he failed to lock the car, all of which matters the Complainant disputes. Accordingly, I am not satisfied that the Insurer has established that the Complainant failed to comply with the provisions of Condition 4 of page 18 insofar as same were relied upon as a reason for declining the claim.

Condition 5 (Page 18)

The provisions of Condition 5 of page 18 simply seek to make the observance of the other terms of the policy a 'condition precedent' to the liability of the Insurer. In circumstances where I have concluded that there was no pertinent breach of Condition 4 of page 18, the provisions of Condition 5 are not relevant.

Section 4B, sub-clause (iv) (Page 7)

Section 4 is the section under which the Complainant would stand to be compensated if his claim was deemed valid. The Insurer has asserted that its potential liability to the Complainant is limited by virtue of provision (iv) of part B of this section as reproduced above. This submission is clearly premised on the supposition that the Complainant's key was actually stolen.

I am not persuaded by the Insurer's argument. In the first instance, I am not satisfied that the Insurer has established in any way that the Complainant's key was stolen, nor has the Complainant proposed this possibility.

Secondly, the provision relied upon by the Insurer does not in my view serve as a basis for the limitation of the Insurer's liability as suggested. Rather, the provision provides for a limit on the value of works to the amount of €1,000.00 in the event that car keys are stolen and, arising from same, replacement locks etc. are required. The provision does not relate to a situation where the car itself has been stolen and thus, I am satisfied that the provision has no relevance to this complaint.

On the contrary, Section 4 of page 7 clearly provides for the liability of the Insurer in the event of larceny or fire, the latter of which certainly occurred in this case. This liability would only be limited in the event that the Insurer had demonstrated that the policy holder had failed to comply with specified provisions of the policy document or if the Insurer had demonstrated that stated exceptions applied. I am not satisfied that the Insurer has met the threshold to limit its liability on either of these grounds.

In light of the entirety of the foregoing, I am not satisfied that the Insurer has established any valid grounds for declining the claim and, accordingly, it is my intention to uphold the complaint. It is apparent that the Complainant and the Insurer have differing views as to the value of the vehicle however I do not intend to decide the value of the car but I will instead direct that the Insurer admit the claim for assessment in the usual manner.

In that regard, I note that an excess of €300 applies in respect of the policy which may be deducted from the value of the claim.

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Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is upheld on the grounds prescribed in **Section 60(2)(b), (g) and (f).**

Pursuant to ***Section 60(4)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct that the Respondent Provider admit the Complainant's claim for assessment within a period of **30 days from the date of this Decision**.

Pursuant to ***Section 60(8)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** the Respondent Provider is now required, not later than 14 days after the period specified above for the implementation of the direction pursuant to Section 60(4), to notify this office in writing of the action taken or proposed to be taken in consequence of the said direction outlined above.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

30 May 2018

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,
(ii) a provider shall not be identified by name or address,
and
(b) in accordance with the Data Protection Acts 1988 and 2003.