Decision Ref:	2020-0016
Sector:	Insurance
Product / Service:	Car
Conduct(s) complained of:	Claim handling delays or issues Disagreement regarding Pre-accident value provided Rejection of claim
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant held a motor insurance policy with the Provider. This complaint concerns the Provider's decision to reject a claim made on the Complainant's motor insurance policy in **September 2017**.

The Complainant's Case

On **5 September 2017**, the Complainant reported to the Provider that his 2004 Audi A4 would not start due to damage to the vehicle. The Complainant submits that the 'initial notification form' (which was sent to the Provider on 5 September 2017), contains the opinion of the mechanic who first examined the vehicle after the incident. The 'initial notification form' states that "*damage to the vehicle was caused: "By fire damage to the ECU"*. On **7 September 2017**, the Complainant submitted a 'Motor Incident Report Form' to the Provider, which states that the damage was in respect of "*fire damage to ECU"*.

The Provider appointed a motor assessor ("the Provider's assessor") to prepare a report in respect of the damage to the vehicle. The Provider's assessor concluded that the cause of the damage to the vehicle was due to an electrical fault and that there was "*no fire present"*. The Provider rejected the claim on the basis that the damage to the vehicle was caused by an electrical fault, which was an exception (i.e. not covered) under the Complainant's policy.

The Complainant commissioned his own expert automotive engineer ("the Complainant's engineer") to assess and investigate the cause of the damage to his car, at his own expense.

On **1 November 2017**, the Complainant's engineer reported that upon examination of the vehicle, there was "*extensive damage to the vehicle's engine compartment wiring harness consistent with inclandestine heat / fire*" and that "*the damage is consistent with a direct short in a non-fused circuit which supplies power to the vehicle's electronic control unit (ECU)*". The report of the Complainant's engineer stated that "*from our inspection of the vehicle and investigation into the cause of damage we are satisfied that the loss is not consistent with normal wear and tear or a component failure within the vehicle and the consequential fire damage to the electrical control unit and wiring harness is consistent with fire*".

The Complainant submits that the Provider wrongfully failed to indemnify him for damage caused to his vehicle as he asserts that the damage was caused as a "*direct result of fire*". The Complainant submits that the damage was not due to an electrical fault and states that the Provider's "*reasons for refusing to indemnify herein are wrongly grounded on incorrect findings of fact contained in the [Provider's] Motor Assessor's Report*". The Complainant contends that the Provider has "*chosen to ignore the factual reasons for the damage caused to the vehicle in issue which are particularised in [the engineer's] Report, to whit 'fire' and has thereby failed in the fiduciary duty of care owed to the Complainant and has directly caused same to suffer loss and damage*".

The Complainant submits that he "*takes issue with what he regards as an attempt by the servants or agents of [the Provider] in correspondence to depict him as being un-cooperative*". The Complainant submits that he has fully engaged with the Provider by providing a detailed description of his case in relation to this matter, but that the Provider is acting unjustly and will not accept his reasons or the findings of the Complainant engineer in relation to the claim in dispute. He further states that as the Complainant's engineer was not going to change his opinion in respect of what caused the damage, "*no reasons existed that required any discussion with the Assessor employed by [the Provider]*".

In respect of the Provider's proposal for the Complainant's engineer and the Provider's assessor to discuss the matter, the Complainant states that "*the suggested standard practice is inequitable and those who would seek to employ it negligent, particularly in the absence of an independent Arbitrator*".

The Provider offered to refer both assessors' reports to a further independent assessor for a third opinion. The Complainant submits that it questions the Provider's procedures in this regard and that "*the Complainant respectively contends that any independent Assessor / Umpire should be chosen by Agreement and that each Party to the matter in issue should independently furnish the documentation on which they seek to rely*". The Complainant submits that "*it is for the reasons expressed and the perceived lack of independence in the adjudication process that is proposed by [the Provider] that the Complainant believes it necessary as stated to refer this Complaint to [FSPO]*". The Complainant submits that this option from the Provider will not resolve the matter, as he claims that any party

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commissioned by the Provider to investigate his vehicle is likely to be biased towards the Provider.

The Complainant also submits that the Provider delayed in sending him the final report of the Provider's assessor. He states that he requested the report on or about **11 September 2017** and that the report was furnished on **17 November 2017**. The Complainant further submits that when he supplied the Provider with the report of the Complainant engineer on **10 December 2017** that the Provider unnecessarily delayed in providing its response. He states that a response was not provided until **23 January 2018**. The Complainant states that this "*caused the Complainant to sustain further unnecessary loss and damage and exacerbated his costs in relation to car hire, payments on a jeep and storage costs*".

The Complainant disputes the pre-accident valuation of the vehicle referred to in the report of the Provider assessor. The Complainant submits that the pre-accident value of his vehicle was circa €4,500 and not €1,500 as outlined in the report of the Provider's assessor. He states that this is due to extensive work that he carried out on the vehicle. The Complainant asserts that the Provider's assessor cites three alternative valuations for a similar vehicle in his report and that "*the valuations do not take into account the respective condition of each vehicle in question*". He also states that "*the vehicle in issue had a higher grade spec than those the [Provider's] Assessor compared it to*".

The Provider has ceased to insure the damaged car, pertaining to this dispute, as the damage done to the car out-values the repairs which need to be carried out on the car. The Complainant asserts that under his insurance policy, car hire is limited to only ten days by the Provider, which the Complainant contends is not a sufficient level of cover for car hiring, taking into account the damage to his car and that he requires a car for work purposes. He states that "*no possibility arose herein whereby the vehicle could be repaired before the alleged termination period contained in the hire car condition in the Contract*".

The Complainant submits that he has two jobs. The Complainant submits that he has had to purchase another vehicle for work purposes which the Provider has refused to insure. As a result, the Complainant had to hire a separate vehicle to get to work at a considerable personal expense, due to the delay in resolving this matter with the Provider. The Complainant also asserts that he has been unable to secure any insurance cover on his new vehicle as a result of the Provider refusing to indemnify him in the matter of this dispute and that he has had to repay a loan on a vehicle he is unable to insure.

The Complainant asserts that the wrongful refusal of his motor insurance claim by the Provider has caused him significant economic loss and the payment of his claim for the damaged car is now not sufficient to resolve this matter for him.

The Complainant wants the Provider to agree to indemnify the vehicle pertaining to this dispute and "*place him back in a position he would have been in if his valid claim under the Policy had been indemnified*". He also requests compensation relating to the other costs incurred as a result of the failure to indemnify. The Complainant has provided the "*relevant calculations of losses incurred by the Complainant as a result of the [Provider's] refusal to indemnify*", which comes to a sum of €44,018.09".

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The Provider's Case

The Provider submits that it would not indemnify the Complainant in respect of his claim, as it did not fall under the remit of his insurance policy as per Exception (a) applicable to Section 2 and Section 3 of the Policy, which states "*we shall not be liable for: a) loss of use, wear and tear, depreciation, betterment, mechanical, electrical, electronic or computer failures or breakdown or breakages*".

The Provider submits that on the basis of the report of the Provider's assessor, there was "*no evidence of fire/fire damage but the loss was a result of electrical failure*". The Provider submits that the photographs in the report of the Provider assessor show no fire damage. The Provider contends that it therefore declined the claim, as the nature of the claim does not fall under the remit of the Complainant's Insurance policy (electronic failures are an exception under the policy).

The Provider submits that "*the motor assessor engaged by the Complainant was asked for some evidence to confirm there was a fire / fire damage, however, none was forthcoming and then the Motor Assessor engaged by the Complainant refused to engage with the Motor Assessor engaged by the Provider*".

The Provider also submits that it offered for both motor assessor reports to be provided to a further independent assessor for a third opinion, but that this was not taken up by the Complainant. The Provider submits that it remains open to both expert reports being referred to a third independent motor assessor for adjudication (at the Provider's expense) as to whether or not a fire occurred and that if the independent motor assessor "*says a fire did occur we would be very much open to a settlement based on the conclusion and will agree to settlement in respect of the vehicle value on the basis of what the Third Independent Assessor declares on his report*".

In respect of the complaint about the Provider's practice and procedures in relation to the dispute, the Provider submits that independent motor assessors are used by the Provider in order to be fair to the Policyholders. It states that "*where expert opinions differ, normally, both experts would consult with each other in a professional manner and explain as to how the findings were established to ensure any concerns are addressed, unfortunately this was refused by the Complainant as was the request to engage a Third Independent Motor Assessor to review both reports*".

In respect of the pre-accident value of the vehicle, the Provider states that the Complainant's engineer did not provide a value for the Complainant's vehicle in his report. The Provider also states that the invoices provided by the Complainant for repairs to the vehicle prior to the incident occurring would "*have been required to keep the vehicle in a roadworthy condition and had no reflection on the Pre-Accident Value of the Complainant's vehicle*".

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The Provider submits that all aspects of this matter were dealt with within a timely manner and the declinature to the Complainant was communicated to him on **18 September 2017**. In respect of the complaint about the car hire, the Provider submits that the maximum cover allowed under the policy is 10 days and that this is provided for in the policy at Section 9, Endorsement 8, which states "*the cost of hiring a Group A, 1.0 litre vehicle for a single period of* ***up to 10 days*** *or until you can drive the insured vehicle again, if this is sooner*".

The Complaints for Adjudication

The complaint for adjudication is that the Provider wrongfully failed to indemnify the Complainant under his insurance policy for damage caused to his vehicle in September 2017.

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 26 September 2019, 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.

Following the issue of my Preliminary Decision, the parties made the following submissions:

1. Letter from the Complainant to this Office (received 8 October 2019).

2. Letter from the Provider to this Office (received by e-mail on 15 October 2019).

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3. Letters received by this Office from a third party on behalf of the Complainant dated 11 and 15 October 2019 respectively.

4. Letter from the Provider to this Office dated 21 October 2019.

5. Letter from the Complainant to this Office dated 12 January 2020 (in response to my letter to him dated 7 January 2020).

Copies of the above additional submissions were exchanged between the parties.

Having considered these additional submissions and all of the submissions and evidence furnished to this Office, I set out below my final determination.

In support of his argument that the Provider wrongfully failed to accept his insurance claim, the Complainant has also argued that:

The valuation placed on the motor vehicle in issue by the Provider is incorrect.

There was an administrative delay on the Provider's part in processing the Complainant's claim;

The Provider incorrectly *"contended"* that the Complainant has been uncooperative;

The proposed practice and procedure employed by the Provider to resolve the matters in issue in this matter are incorrect;

The Provider has wrongfully "*contended"* that in all the circumstances of the dispute that it is permitted to rely on unreasonable and unconscionable limitation periods contained in the terms and conditions of the policy with respect to car hire.

I will set out the relevant provisions from the Policy Terms and Conditions, then set out a sequence of events relevant to this complaint, before arriving at my Decision.

Policy Terms and Conditions

The terms and conditions include the following:

"***EXCEPTIONS APPLICABLE TO SECTION 2 & 3***

We shall not be liable for:

a) loss of use, wear and tear, depreciation, betterment, mechanical, electrical, electronic or computer failures or breakdown or breakages…"

*"**SECTION 7 – GENERAL POLICY CONDITIONS***

…

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3. Claims Procedure

…

We are entitled to take sole control of all negotiations and proceedings and shall be entitled to settle any claim or part thereof without reference to you. We are also entitled to use your name to settle and/or prosecute and/or defend any claim and we reserve the right to abandon same at any time.

We shall be entitled to exercise the same rights in respect of claims, which we would not be liable to pay, but for the provision of the law of any territory in which this policy operates relating to the insurance of liability to Third Parties, without prejudice to our right of reimbursement from you under this Policy".

Sequence of Events

- On **9 May 2017**, the Complainant incepted a motor insurance policy with the Provider.

- On **5 September 2017**, the incident in respect of the damaged vehicle was reported to the Provider. The 'First Notification' form was sent to the Provider which stated as follows:

  "CIRCS: Fire at ECU unit
  Water from the windscreen leaked into ECU unit and caused burning

  Unsafe to drive
  Car could be a write off
  …

  Comments: Car would not start when he came out of house this morning. Mechanic brought it away and told him water from the windscreen leaked into the ECU unit and caused burning – Car is not safe to drive.
  Issue ARF + arrange car hire + notify broker

  Told him we can't confirm anything until MA report read."

- On **6 September 2017**, the Provider appointed a motor assessor to inspect the vehicle in order to provide a report. The Provider informed the motor assessor by way of letter that the circumstances in respect of the damage to the vehicle were as follows: "*water from the windscreen leaked into ECU Unit causing fire*".

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- On **6 September 2017**, the Provider wrote to the Complainant to advise that the Provider's assessor had been appointed. The Provider also informed the Complainant that "*although an independent advisor, this firm will act on our behalf.*

  However, you may, at your own expense, appoint a Motor Assessor to act in your own interests…"

- On **7 September 2017**, the Complainant submitted the 'Motor Incident Report Form' to the Provider. The relevant extracts of this form are as follows:

  "….***SECTION D DAMAGE TO THE INSURED VEHICLE...***

  Details of damage to your car *Fire Damage to ECU*
  …

  SECTION F CIRCUMSTANCES OF INCIDENT…

  Car wouldn't start, battery had discharged. Mechanic charged battery + started car, brake lights remained on + battery wasn't charging properly. Mechanic brought car to garage for further tests & discovered water had got into ECU and relays, wires from ECU had melted together

  Mechanic says car is a write off as could go on fire at any time…"

- On **15 September 2017**, the Provider's assessor submitted his report to the Provider (which included two pages of photographs of the vehicle).

  The relevant extracts of the report are as follows:

  "CIRCUMSTANCES

  It is reported that the ECU was damaged as a result of water.

  INSPECTION

  The Electronic Control Unit – ECU is located in the engine bay area/wiper panel area. The battery is also located in this area. This area is prone to filling with water due to drain holes becoming blocked due to leaves and general debris.

  I can confirm that the ECU housing had water present and the drain holes were blocked, which caused the wiring loom to the ECU to short circuit. This damaged the loom and the ECU. When an electrical system comes in contact with water the fuses should blow to cut any power to prevent a short circuit.

  The fuses in this vehicle are not blown.

  There was no fire present.

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This is electrical failure the ECU [sic]. The fact that the fuses did not blow prior to the system shorting leads me to the opinion that there was an electrical fault prior to the water becoming in contact with the ECU.

Electrical Fault/Short Circuit due to water. No Fire present…"

- On **18 September 2017**, the Provider wrote to the Complainant to advise that it would not indemnify him in respect of the claim. The report of the Provider's assessor was not enclosed with this letter. The letter stated as follows:

> *"As advised we are now in receipt of the Final Report from the Independent Motor Assessor with regard to the damage sustained to your vehicle and we have reviewed the report together with the file in its entirety.*
>
> *The Assessor has rendered your vehicle as beyond economical to repair (Category C) following his inspection of same.*
>
> *The Assessor has confirmed in his report that the ECU (Electronic Control Unit) housing had water present and the drain holes were blocked which has caused the wiring loom to the ECU to short circuit which subsequently caused damage to the loom and to the ECU. The Assessor confirmed that there was no evidence of a fire/fire damage and in his expert opinion the damage is a result of electrical failure and the fact the fuses did not blow prior to the system shorting, leads him to believe that there was an electrical fault prior to the water becoming in contact with the ECU.*
>
> *We therefore regret to advise that we will not be indemnifying you in respect of this claim as unfortunately this does not fall under the remit of your insurance policy as* ***<u>per Exception a) applicable to Section 2 & 3</u>****: "We shall not be liable for: a) loss of use, wear and tear, depreciation, betterment, mechanical, electrical, electronic or computer failures or breakdown or breakages."*
>
> *We also are reserving our rights to introduce other reasons for repudiating this claim in the future.*
>
> *In view of the fact that the vehicle has been deemed beyond economic to repair and that we are not in a position to indemnify you for this loss the option remains open for you to repair the vehicle yourself and should you wish to repair the vehicle, a Motor Assessor's Report would be required confirming that the vehicle has been restored to a roadworthy condition to enable our Underwriting Department to reinstate cover on the said vehicle…"*

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- On **18 September 2017**, the Complainant wrote to the Provider by email and outlined that he disputed the report of the Provider's assessor.

- On **19 September 2017**, the Provider wrote to the Complainant by email in respect of the options available to the Complainant further to the declination of his claim.

  The letter stated as follows:

  > *"I note from the content of our telephone call that you are unhappy with the declinature of your claim and outline herewith the options available to you:*
  >
  > *The option remains open for you to appoint your own Motor Assessor, at your own expense to act in your interests (as outlined in ours of the 06/09/2017).*
  >
  > - *You may submit a formal complaint either verbally to me or in writing directly to [the Provider] marking the letter for his personal attention and "Private & Confidential".*
  > - *You may seek legal advice in the matter and we will deal directly with your Legal Representative.*
  > - *You may refer the matter to [FSPO] if we are not in a position to resolve your complaint. We will issue the required signing-off letter to you so that you may proceed with your case to [FSPO].*
  > - *You may invoke the Arbitration Condition contained in the policy…"*

- On **13 November 2017**, the Complainant wrote to the Provider by letter to request a copy of the report of the Provider's assessor and to advise that he had obtained an expert engineering opinion. The letter stated as follows:

  > *"The Insured therefore rejects any and all of the reasons put forward by your Employer for refusing to indemnify in this matter and in particular denies that the damage caused to the vehicle comes within the exception applicable to; S.2 and S.3 of the Policy Insurance and in particular denies that the damage caused to the vehicle was due to wear and tear.*
  >
  > *…*
  >
  > *Further to the above the Insured does not have an objection to a servant or agent of the Insurer contact [the engineer] at the stated address and/or phone number on notice, provided the Insured is furnished with the Motor Assessor's Report on which the Company seeks to rely prior to doing so.*
  >
  > *In all the circumstances the Insured strongly requests that the Insurer reconsiders its decision not to indemnify in relation to the matter in issue".*

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- On **23 November 2017**, the Provider wrote to the Complainant by letter and enclosed a copy of the report of the Provider's assessor. The Provider requested a copy of the report of the Complainant's engineer.
  The letter stated the following:

  > *"Please note that we provided you with the option of instructing your own Assessor from the outset in accordance with our obligations under the Consumer Protection Code and in the event of our decision being overturned for any reason on the back of your Assessor's Report we assure you that we will reimburse the Assessor's fee incurred by you….we would appreciate if you would provide us with a copy of your Report so that we may refer same to the Assessor used by us for his review and we will also request him to liaise with [the Complainant's engineer] regarding his findings once we have sight of the Report in question as we appreciate the fact the [engineer's] firm is an independent company also.*
  >
  > *We wish to assure you that upon receipt of the Report commissioned by you we will most certainly ask [the motor assessor] to review [the engineer's] findings in line with his findings and we shall revert to you as soon as the matter has been reviewed..."*

- On **30 November 2017**, the Provider received a letter from the Complainant in response to its letter dated 23 November 2017. The Complainant's letter is dated 13 November 2017, however I understand that this is a typographical error. The Complainant stated that he disputes all of the allegations contained in the report of the Provider's assessor and that he relies on the findings of fact in the report of the Complainant's engineer.

- On **12 December 2017**, the Provider wrote to the Complainant to request the report of the Complainant's engineer. The letter stated as follows:

  > *"As previously mentioned we would appreciate if you would provide us with a copy of your Report so that we may refer same to the Assessor used by us for his review and we will also request him to liaise with [the Complainant's engineer] regarding his findings once we have sight of the Report in question as we appreciate the fact that [the Complainant engineer's] firm is an independent company also.*
  >
  > *We wish to assure you that upon receipt of the Report commissioned by you we will most certainly ask [the motor assessor] to review [the Complainant's engineer's] findings in line with his findings and we shall revert to you as soon as the matter has been reviewed..."*

- On **12 December 2017**, the Complainant furnished a copy of the report of the Complainant's engineer to the Provider. The report of the Complainant's engineer dated 1 November 2017 stated as follows:

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"Your local garage…diagnosed the cause of the non starting was damage to the vehicle's wiring harnesses and electrical components in the engine compartment.

Upon dismantling it became apparent that the damage to the wiring harness and the electrical components was the consequence of fire. Under the terms and conditions of your motor insurance policy you decided to proceed with a claim for consequential fire damage to your motor vehicle. [The Provider], instructed a Motor Assessor in accordance with Sections 3.43 and 3.44 of the Consumer Protection Code 2012 to act on their behalf to view and assess damage to your vehicle.

Due to the extent of the damage caused by the fire the Assessor acting on behalf of your Insurers considered the vehicle Beyond Economical Repair and subsequently categorised the salvage as Category C which is defined as "a financial written-off vehicle (not being a statutory written-off vehicle) that has been extensively damaged but can be repaired."

His Report outlined the extent of damage in that the ECU (Electronic Control Unit) housing had water present and the drain holes were blocked which had caused the wiring loom to the ECU to short circuit which subsequently caused damage to the loom and the ECU. The Assessor advised that he did not record any evidence of a fire/fire damage and in his opinion the damage was a result of electrical failure and the fact that the fuses did not blow prior to the system shorting leads him to believe that there was an electrical fault prior to the water becoming in contact with the ECU.

…

The inspection recorded extensive damage to the vehicle's engine compartment wiring harness consistent with inclandestine heat/fire. The damage is consistent with a direct short in a no-fused circuit which supplies power to the vehicle's electronic control unit (ECU). The short within a non fused circuit explains the absence of blown fuses within the vehicle's electrical protection systems. It is suspected that a short occurred in the electronic control unit resulting from the presence of water within the control unit housing compartment. The presence of water in this compartment is consistent with a latent defect in which the drain holes of the compartment were blocked.

From our inspection of this vehicle and investigation into the cause of damage we are satisfied that the loss is not consistent with normal wear and tear or a component failure within the vehicle and the consequential fire damage to the electronic control unit and wiring harness is consistent with fire and should be dealt with under the terms and conditions of your motor policy. We are satisfied that due to the extent of the damage sustained

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repairs are not recommended and the loss should be treated as an uneconomical repair with salvage categorised as Category C…"

- On **21 December 2017**, the Provider's assessor emailed the Complainant's engineer which stated, "*your report states that there was fire damage. [The Provider] have asked us to contact you to discuss same. We are still of the same opinion that this was electrical failure, however could you forward some evidence to confirm there was fire, some photos of the fire damage would be of great assistance"*.

- On **2 January 2018**, the Provider's assessor emailed the Complainant's engineer which stated, *"I'm just following up on the email below"*.

- On **16 January 2018**, the Complainant's engineer emailed the Provider's assessor, which stated, "*We have now taken instructions from our client. Our client is of the opinion that we should not engage in correspondence with yourselves at this stage as the matter has been escalated to litigation on his behalf*".

- On **23 January 2018**, the Provider wrote to the Complainant as follows:

  "*We are somewhat confused that [the Complainant's engineer] will not enter into any discussion with the Independent Motor Assessor instructed by us, as we requested that said firm to contact [the Complainant's engineer] so that they may discuss their findings in detail with a view to treating [the Complainant] fairly and to finalise our investigations. This will enable us to review our position but in view of the fact [the Complainant's engineer] co-operation is not forthcoming, we ourselves feel this is acting to the detriment of [the Complainant].*

  We therefore are not in a position to progress matters until such time [the Complainant] is willing to discuss the matter with our Assessor and should it be a case that his stance remains, please let us know and we will arrange to issue the relevant signing –off letter so that the Insured may refer his case to [FSPO]..."

- On **31 January 2018**, the Complainant wrote to the Provider as follows:

  "*[the Complainant's engineer] has expressed the view that this is an open and shut case; you previously have been furnished with a copy of his Report dated the 1st of November 2017 wherein he states as a finding of fact that the damage done to the vehicle in issue was caused 'BY FIRE'. That is not an inconclusive statement but one states with literal certainty. It is [the Complainant engineer's] opinion therefore that any reasonably competent Assess or in carrying out an inspection on the said vehicle would and should have come to the same conclusion. The latter is also of the view that to*

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request that he enter into a discussion with another individual about the findings contained in his Report incorrectly raises issues as to his professional competency and the findings therein.

[The Complainant engineer's] opinion is contained in his Report his findings and conclusions are contained therein and he is not going to enter into a discussion with anyone regarding the findings of fact therein…"

- On **20 February 2018**, the Provider wrote to the Complainant as follows:

  "As previously indicated, we are not in a position to progress matters, until such time [the Complainant's engineer] is willing to discuss the matter with the Independent Assessor instructed by us, in view of the fact his findings differ to that of [the Complainant's engineer].

  This is standard practice whereby if there is a difference of an expert opinion that both experts would discuss the matter in detail in a professional manner and explain as to how the findings were established, to enable us to review the matter in line with the concerns raised by you.

  If you/ [the Complainant's engineer] are not open to this procedure the only further suggestion I can make at this juncture is to refer both Reports to a further Independent Assessor and should you wish for us to proceed down this route we will require written confirmation from you that you consent to us sharing [the Complainant engineer's] report with an external party ie an alternative Independent Assessor…"

- On **9 March 2018,** the Complainant wrote to the Provider as follows:

  "It is my view and I have been so advised that what you refer to as standard practice is not in fact appropriate and is the equivalent of your Office conducting an internal inquiry into the matters in dispute herein which in all the circumstances amounts to your employer being a judge in its own cause and thereby intentionally employing what is in fact bad practice. Further to same there is inequality in bargaining power in what you suggest is; 'standard practice' as your employer has a constant business relationship with the Motor Assessor Profession and it is self evident that it is of business advantage to the latter to ensure a satisfactory outcome for an Insurer. I therefore herewith reject your proposal on grounds that any finding by you would be open to allegations of bias and could lead to further delay in any resolution. In relation to the appointment of an independent Assessor and/or Umpire I for the reasons already stated would not have confidence in proceeding at this juncture in such a manner".

- On **12 March 2018**, the Provider received a letter from the Complainant. The letter is dated 31 January 2018, however I understand that this is a typographical error.

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The contents of this letter are similar to his letter dated 31 January 2018. The letter also stated that "*in regard to your statement that you as the insurer 'feel this is acting to the detriment of [the Complainant]'.*

With respect what is acting to the detriment of the insured herein is your failure to identify same; as stated [the Complainant engineer's] opinion and findings are not going to change and again I would respectively suggest that you read his Report as the damage caused by your failure to indemnify continues and it is your Employer who is at risk".

- On **17 April 2018**, the Provider wrote to the Complainant as follows: "*Please note that we did ask our motor assessor for a more thorough report to ensure that our decision to decline your claim was right and fair. Unfortunately, the reason for the decline still stands. However, we are still open to have the reports reviewed by an independent assessor and bear that cost if this is acceptable to you…"*

- On **5 June 2018**, the Complainant wrote to the Provider as follows: "*I have decided to refer the Insurer's refusal to indemnify under the said Claim to [FSPO]. In this regard please issue the relevant signing-off letter by return to enable me to refer the said Claim"*.

- On **7 June 2018**, the Provider issued a final response letter to the Complainant as follows:

> *"We have previously offered you the option of availing of our internal complaints procedure to try and resolve this matter in an amicable way.*
>
> *We again ask that you please engage with our independent Complaints Department in an effort to try and find a way to resolve this matter in a way that is acceptable to you.*
>
> *Our refusal with regard to indemnifying you under the policy is based on the Independent Motor Assessor's Report obtained by us following his examination of your vehicle. The Assessor, namely [Assessors Name] confirmed in his report that the ECU (Electronic Control Unit) housing had water present and the drain holes were blocked which caused the wiring loom to the ECU to short circuit which subsequently caused damage to the loom and to the ECU. The Assessor confirmed that there was no evidence of a fire/fire damage and is his expert opinion the damage is a result of electrical failure and the fact the fuses did not blow prior to the system shorting, led him to believe that there was an electrical fault prior to the water becoming in contact with the ECU.*
>
> *Unfortunately in view of the fact this does not fall under the remit of your Insurance Policy as* ***<u>per Exception a) applicable to Section 2 & 3:</u>*** *"We shall not be liable for: a) loss of use, wear and tear, depreciation, betterment, mechanical, electrical, electronic or computer failures or breakdown or*

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breakages" we were not in a position to proceed with settlement of the matter.

We genuinely feel that we have made every endeavour possible to progress this matter and review same but were unable to do so as the Assessor commissioned by you would not enter into any discussion or engage with the Independent Motor Assessor instructed by us, as we requested the said firm to contact [the Complainant's engineer] so that they could discuss their findings in detail with a view to treating you fairly and to finalise our investigations. This would have enabled us to review our position, but in view of that fact [the Complainant engineer's] co-operation was not forthcoming, we ourselves felt this detrimentally affected the progression of the matter.

This is standard practice whereby if there is a difference of an expert opinion that both experts would discuss the matter in detail in a professional manner and explain as to how the findings were established, to enable us to review the matter in line with concerns raised by you.

We also offered to refer both Reports to a further Independent Assessor for a third opinion at our own cost but note that you did not avail of same…"

<u>Analysis</u>

The issue to be determined is whether the Provider wrongfully rejected the Complainant's claim, which involves a decision as to whether the damage to the Complainant's vehicle was as a result of fire or as a result of an electrical failure. The reason for this is that damage arising from an electrical failure is not covered under the policy, whereas damage as a result of fire is covered under the policy.

As there are two expert reports with differing opinions as to the cause of the damage to the vehicle, it is not for FSPO to determine whether the damage was caused as a result of fire or whether it was caused as a result of an electrical failure. At the outset, I must note that I am of the view that in circumstances where the Provider had commissioned a report from a motor assessor it was reasonable for the Provider to rely on that report in rejecting the claim. In the following paragraphs, I have also considered the manner in which the Provider has dealt with the Complainant's claim.

I note that the 'First Notification' form and the 'Motor Incident Report Form' make reference to the mechanic who brought the vehicle to the garage on the day of the incident (**5 September 2017**). The forms outline that the mechanic was of the view that there was fire damage to the vehicle. The Complainant also submits in his letter to FSPO dated **13 March 2019** that "*the vehicle the subject matter of this Complaint was first inspected by a mechanic with over twenty years' experience who found as a matter of fact that the damage caused to the vehicle was as a result of 'fire'. That opinion is contained in the formal Complaint made. The terms and conditions of the insurance contract entered into by the Complainant require that he be indemnified for damage caused as a result of fire.*

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The Provider refused to so do and the Complainant alleges that the Provider wrongfully disregarded the opinion of the said mechanic and did not take the latter's findings into consideration when arbitrarily refusing to indemnify the Complainant". I note that whilst the Complainant has referred to the findings of this first mechanic in support of his claim, the Complainant has not submitted any documentary evidence to support the purported findings of this mechanic.

The Provider advised the Complainant of his entitlement to have the vehicle inspected by his own independent assessor at his own expense. The Complainant took this course of action. I note that this is in accordance with ***Section 7.10*** of the ***Consumer Protection Code 2012***.

This Office has been furnished with two expert reports in respect of the cause of the damage to the vehicle. The report from the Provider's assessor concludes that the damage was caused as a result of an electrical failure. The report from the Complainant's engineer concludes that the damage was caused as a result of a fire. The Complainant disputes that the damage was caused as a result of an electrical failure.

The Provider has proposed that both experts enter into discussions in relation to their findings. I accept that this was a reasonable proposal from the Provider and it is disappointing that the Complainant did not avail of this offer. I note that the Provider's assessor emailed the Complainant's engineer on two occasions, to which the Complainant's engineer responded that he was instructed not to engage in correspondence.

I also note that in the email from the Provider's assessor to the Complainant's engineer dated **21 December 2017**, that the Provider's assessor requested evidence (such as photographs) which showed fire damage. In this regard the last paragraph of the report of the Complainant's engineer stated that "*should you require further information including images of damage or loss value calculations please do not hesitate to contact us further"*. However I note that no such evidence was provided by the Complainant's engineer to the Provider's assessor, nor has the Complainant submitted the images of damage referenced by the Complainant's engineer to FSPO.

I note that following the submission of a complaint by the Complainant to FSPO, the Complainant's engineer stated in a letter to the Complainant's representative dated **14 February 2019** that "*we confirm that no formal request was received from the Insurance Company to enter in to discussions / negotiations in relation to our findings. We confirm the findings of our report are a matter of fact and no amount of discussion will change same. However, if a formal request is received from the Insurance Company to consult with their Motor Engineer then we will be happy to do so upon authorisation from [the Complainant] / his legal representative…"* I am of the view that this statement is incorrect as there is evidence to support the Provider's position that contact was made by the Provider's assessor with the Complainant's engineer in December 2017 and January 2018. The

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Complainant's engineer responded in January 2018, detailing that his instructions from the Complainant were not to engage.

I further note that when it became clear that the Complainant did not wish to avail of the proposal that both experts enter into discussions, the Provider proposed to refer both reports to a further independent assessor on 20 February 2018. On 17 April 2018, the Provider wrote to the Complainant to state that "*we are still open to have the reports reviewed by an independent assessor and bear that cost if this is acceptable to you*". It appears to me that this was a reasonable proposal from the Provider to determine the cause of the damage to the vehicle and to advance matters with respect to the Complainant's claim.

It is disappointing that the Complainant did not avail of this proposal or make any enquiries in his correspondence to the Provider as to how the proposal would work (as he has done in his complaint to FSPO). The Complainant states in his complaint to FSPO that "*The Complainant respectively contends that any independent Assessor / Umpire should be chosen by Agreement and that each Party to the matter in issue should independently furnish the documentation on which they seek to rely. It is for the reasons expressed and the perceived lack of independence in the adjudication process that is proposed by the Insurer and that the Complainant believes it necessary as stated to refer this Complaint to [FSPO]*".

However, I note that the Provider states in its letter to FSPO dated 25 February 2019 that "*we then suggested that the parties appoint a third motor assessor to examine [the Complainant's] vehicle. [The Provider] agreed to discharge the cost of that assessment. [The Provider] also agreed to be bound by the opinion of such a third assessor. [The Complainant] consistently refused to allow this to happen*". Whist I do accept that the Provider made this proposal and informed the Complainant that it would discharge the cost of the third report, I do not accept that the Provider informed the Complainant that it would be bound by the opinion of a third assessor. I have not been provided with any correspondence from the Provider to the Complainant prior to a complaint being made to FSPO where this information was provided to the Complainant. The correspondence only refers to the third assessor reviewing the two reports. Whilst one would expect that any third assessor who is appointed to examine the two reports would also examine the vehicle to come to a conclusion, this is not clearly set out by the Provider to the Complainant. It is disappointing that these parts of the Provider's proposal were not made clear to the Complainant before he made his complaint to FSPO. However, I do also note that the Complainant indicated that he did not wish to avail of the proposal and he did not seek any further information about the proposal, nor ventilate any concerns with respect to the independence of an assessor and how the proposal would work in practice at the time. These concerns were only ventilated in his complaint to FSPO.

The Complainant submits that the Provider incorrectly "*contended*" that the Complainant has been uncooperative and that the proposed practice and procedure employed by the Provider to resolve the matters in issue in this matter are incorrect. I am of the view that the proposed practice and procedure to resolve the issues in respect of this dispute were reasonable. In this respect I have had regard to the interactions between the Complainant

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and the Provider and it appears to me that the Provider offered a reasonable proposal to progress with the claim in the first instance, in that, the Provider's assessor and the Complainant's engineer would meet in order to discuss their respective opinions.

When that proposal was rejected by the Complainant, the Provider then proposed an alternative solution, that an independent assessor could be appointed. This is of course subject to my views, as already set out that the proposal should have been set out in more detail to the Complainant. It is disappointing to note that neither of these proposals were availed of by the Complainant to seek a resolution of this matter.

The Provider has confirmed that its offer of referring both motor assessor reports to a third independent motor assessor, at their own expense, with them being bound by the opinion of the third assessor, remains open. I agree with the Complainant's submission that the identity of the third independent motor assessor should be agreed between the parties. In the circumstances I am of the view that the Provider's proposal, which remains open, is the most sensible and reasonable solution to resolve this complaint. It is a matter for the Complainant as to whether he wishes to pursue this course of action.

With respect to the ground of complaint that the valuation placed on the motor vehicle in issue by the Provider (outlined at (2) above), I note the Complainant disputes the pre-accident valuation on his vehicle which is referred to as €1,500 in the report of the Provider's assessor. The Complainant submits that the pre-accident value is €4,500. The Complainant takes issue with the valuations referred to in the report of the Provider's assessor as "*the valuations do not take into account the respective condition of each vehicle in question*". The Complainant submits that his vehicle was properly maintained at all times and he has furnished receipts for work carried out on his vehicle to the Provider.

Prior to setting out my preliminary decision in respect of this aspect of the complaint, it would be useful to set out the relevant extracts of the report of the Provider's assessor and the subsequent correspondence between the Complainant and the Provider in this respect.

- The report of the Provider's assessor states as follows:

  "…

  PRE ACCIDENT VALUE

  1 VMS Value €1596.00

  2 2004 Audi A4, 150000 miles, NCT, OCT 2017, in [County], €1250.00
  …

  3 2004 Audi A4, NCT, March 2018, €1900.00
  …

  PAV €1500.00..."

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- On **23 November 2017**, the Provider furnished a copy of the report of the Provider's assessor to the Complainant.

- On **30 November 2017**, the Provider received a letter from the Complainant in response to its letter dated 23 November 2017. The Complainant enclosed receipts in relation to the works carried out on the vehicle. The letter stated as follows:

  > *"I also take issue with and dispute the pre-accident value of €1,500 placed on the vehicle by [the inspector]. I do so as I recently had extensive works carried out on the said vehicle and had a new; clutch, fly wheel, water pump, brake callipers and timing belt installed none of which is referred to in the latter's Report and as a result of the said works and comparative replacement car valuations contained herein I place a pre-accident value on the vehicle of in or around €4,500…"*

- On **5 December 2017**, the Provider's assessor emailed the Provider as follows: *"I would also request that the policy holder justify a PAV of €4500.00. The PH provided invoices for the vehicles repair which are for general maintenance and would have to be done anyway to keep the vehicle in a roadworthy condition and should have no reflection on the PAV…"*

- On **12 December 2017**, the Provider wrote to the Complainant as follows:

  > *"…We further request that you please forward documentation supporting the Pre-Accident value of €4,500 that you have placed on your vehicle. While we can confirm receipt of the Invoices for the vehicles repair this would be for the general maintenance of the vehicle to keep the vehicle in a roadworthy condition and would not be a reflection of the market value of the vehicle..."*

I note that the Complainant did not submit further documentation to the Provider following its letter dated 12 December 2017. I also note that the Complainant's engineer's report does not include any pre-accident value for the Complainant's vehicle. In addition, the letter of the Complainant's engineer furnished to the Complainant's representative dated 14 February 2019 and following the complaint to FSPO, does not include any pre-accident value for the Complainant's vehicle.

I note that the Provider's assessor has provided a pre-accident value of the vehicle in his report. I have been provided with copies of invoices furnished by the Complainant in respect of works carried out to his vehicle. This is simply not persuasive in the face of the expert evidence available to me from the Provider's assessor (both in his report and in the email to the Provider dated 5 December 2017). As such I am of the view that it was reasonable for the Provider to make this valuation on the basis of the evidence that was available to it.

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I also note that the last paragraph of the report of the Complainant's engineer stated that "*should you require further information including images of damage or loss value calculations please do not hesitate to contact us further*". However, the Complainant has not furnished any loss value calculations from the Complainant's engineer.

I do not accept that the Complainant has offered any evidence to justify the valuation of €4,500.

With respect to the Complainant's complaint that there was an administrative delay in processing the Complainant's claim, the Complainant submits that he requested a copy of the report of the Provider's assessor on or about 11 September 2017 and that the Provider's assessor agreed to furnish the report on 17 November 2017.

From a review of the correspondence furnished to FSPO, I note the following:

- On **15 September** 2017, the Provider wrote to the Complainant to advise that the Provider's assessor was finalising his report.
- On **15 September 2017**, the Provider's assessor provided a copy of his 'amended report' to the Provider.
- On **18 September 2017**, the Provider wrote to the Complainant to advise him that the claim was declined.
- On **13 November 2017**, the Complainant wrote to the Provider to request a copy of the report of the Provider assessor.
- On **17 November 2017**, the Provider sought the consent of the Provider's assessor for release of the report to the Complainant. The Provider's assessor provided his consent on this date.
- On **23 November 2017**, the Provider furnished a copy of the report of the Provider's assessor to the Complainant.

I have not been provided with any correspondence which demonstrates that the report was requested on 11 September 2017, however it is possible that this request may have been made during a telephone call with the Provider. On the basis of the timeline above, I do not consider that there is an unreasonable delay in the Provider furnishing the report to the Complainant.

The Complainant also submits that there was a delay between the report of the Complainant's engineer being sent to the Provider on 10 December 2017 and a response from the Provider, which was given on 23 January 2018. I note from a review of the correspondence furnished to FSPO that the report of the Complainant's engineer was furnished to the Provider on 12 December 2017. I also note that the Provider's assessor attempted to contact the Complainant's engineer on two occasions (21 December 2017 and 2 January 2018) to discuss the matter further. The Complainant's engineer responded to the Provider's assessor by email on 16 January 2018 to confirm that he was instructed not to engage in correspondence. The Provider then wrote to the Complainant on 23 January 2018 in respect of the options available to him.

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I do not accept that there was an excessive delay on the part of the Provider responding to the Complainant on foot of being provided with the report of the Complainant's engineer.

I take account of the fact that there was the intervening Christmas period and the Provider was making efforts to progress the claim by attempting to contact the Complainant's engineer.

The Complainant also submits that he received a letter from the Provider on 14 March 2018, which stated that "*spoken to the Claims Manager…. Who advised me she would be contacting you in relation to your claim very soon*". He also submits that "*to the best of his knowledge and belief no such further communication was received up to and including the time this Complaint is drafted*". However, copies of letters from the Provider to the Complainant dated 17 April 2018 and 7 June 2018 have been furnished to FSPO, which were in respect of the Complainant's claim. Therefore, I do not accept that the Provider did not provide any further communication to the Complainant further to 14 March 2018 in respect of his claim.

I will now deal with the element of the Complainant's complaint that the Provider has wrongfully "*contended*" that in all the circumstances of the dispute that it is permitted to rely on unreasonable and unconscionable limitation periods contained in the terms and conditions of the policy with respect to car hire.

As I have outlined above, the Complainant submits that the car hire should not have been limited to 10 days. He asserts that 10 days is not a sufficient level of cover for car hiring, taking into account that he requires a car for work purposes and due to the damage to his vehicle.

It would be useful to set out the relevant terms and conditions of the policy. Section 9 of the terms and conditions of the policy states as follows:

> ***"SECTION 9 – ENDORSEMENTS***
>
> …
>
> ***Vehicle hire costs***
>
> *The cost of hiring a Group A, 1.0 litre vehicle for a single period of up to 10 days or until you can drive the insured vehicle again, if this is sooner..."*

The Provider advised the Complainant by letters dated 6 September 2017 and 15 September 2017 that the car hire benefit under the policy was for a period of 10 days only.

I am of the view that the Complainant accepted this level of car hire when he incepted the policy with the Provider. Whilst I appreciate the Complainant's frustrations that 10 days is not a considerable amount of time for car hire in circumstances where his vehicle is now not roadworthy, this was the level of car hire that he provided for under the policy terms and conditions.

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The Complainant has stated, in his post Preliminary Decision submission that I have not considered what the Complainant contends is the *"specific issue in dispute"*, this dispute being, was the damage to his vehicle caused by an electrical failure or by a fire?

He takes issue with my statement in my Preliminary Decision that *"as there are two expert reports with differing opinions as to the cause of the damage to the vehicle, it is not for the FSPO to determine whether the damage was caused as a result of fire or whether it was caused as a result of electrical failure".*

This Office does not have the expertise or knowledge to make such a determination, as such this is a question that is more appropriately addressed by an independent party who has the required knowledge and skill to interpret the expert reports of both the Complainant and Provider's motor assessor.

The complaint that is being adjudicated by me is whether *"the Provider wrongfully failed to indemnify the Complainant under the terms* [sic] *of his insurance policy for damage caused to his vehicle in September 2017".*

In adjudicating on this complaint I have examined not only the terms and conditions of the policy, but also the levels of communication from the parties, the evidence submitted by both parties, and I have examined the Provider's level of compliance with the Consumer Protection Code.

The Complainant has stated in his post Preliminary Decision submission that in my Preliminary Decision I have "*refused to consider the specific issue in dispute".*

I have stated clearly the reasoning for this Office not making a determination on which expert opinion is correct.

The Complainant has stated that had I held an Oral Hearing, then this would have *"permitted the said Officer* [the Ombudsman] *to make a determination on the issue in dispute"*

"The Complainant submits that the said Officer [the Ombudsman] should have heard the best evidence available before coming to a decision and would have done so if an Oral Hearing was convened".

I do not accept these statements made by the Complainant. I would not be in a position to determine whether the damage was caused as a result of fire or whether it was caused as a result of electrical failure even had an Oral Hearing been held.

As the fact remains that there are two expert reports with differing opinions as to the cause of the damage, and it is not for me to determine which is correct.

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In all of the circumstances and on the basis that the Provider's offer remains open to the Complainant, I do not uphold this complaint.

Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is rejected.

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

22 January 2020

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) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.