Determination

Case number: 530676 18 December 2018

1 Determination overview

1.1 Complaint

The complainant held a Comprehensive Motor Vehicle Policy with the financial firm (insurer) and lodged a claim following an accident on 26 April 2018.

The insurer denied the claim and says the complainant has provided false statements, has failed their utmost good faith obligation and that the claim is fraudulent.

The complainant disputes the insurer's decision.

1.2 Issues and key findings

Has the complainant established a valid claim within the terms of the policy?

The policy provides cover for accidental damage including a collision. Accidental damage is damage that is unexpected and unintended. There is no dispute that the complainant's vehicle was involved in a collision with a third-party vehicle (TP) on 26 April 2018 and that the collision was unexpected and unintended.

Is the insurer entitled to refuse payment of the complainant's claim?

The insurer is not entitled to refuse payment of the complainant's claim. I am not satisfied the insurer has established that the complainant has breached their duty of utmost good faith or that the claim was fraudulent or that they have been prejudiced in anyway by the complainant's conduct.

1.3 Determination

This determination is in favour of the complainant.

The insurer is liable to settle the complainant's claim by repairing the vehicle in accordance with the terms and conditions of the policy.

The insurer is also required to remove any allegation of fraud or breach of utmost good faith from its records and the records of any organisation with whom it has communicated.

2 Reasons for determination

There has been a full exchange of material between the parties and each party has had the opportunity of addressing the issues that arise from the information exchanged.

In addition, I was able to conduct an interview with the parties on 12 December 2018 and provided both parties with a further opportunity of clarifying issues arising in this complaint.

This determination follows consideration of all of the information and is based on what is fair in all the circumstances, having regard to the relevant legal principles, terms of the policy, good industry practice including codes of practice and prior determinations where applicable.

2.1 Has the complainant established a claim within the terms of the policy?

The complainant has established a valid claim

There is no dispute that on 26 April 2018, the complainant's vehicle when being driven by the complainant's husband (MV) was involved in a collision with the third-party vehicle. There is no dispute that the collision was the fault of the third-party driver or that at the time of the collision, the third-party driver was unlicensed.

The complainant's policy is a Comprehensive Motor Vehicle Insurance Policy insuring the complainant's vehicle, a 2008 Honda Jazz hatchback for market value.

Cover is provided for accidental loss or damage including damage arising from a collision. The policy does not define accidental damage but this is generally accepted to mean damage which is unexpected and unintended. I am satisfied the collision was accidental as it was unintended and unexpected.

2.2 Is the insurer entitled to refuse payment of the complainant's claim?

The insurer has the onus to establish an exclusion applies

The insurer denied the complainant's claim on the grounds the complainant had made false statements, breached her duty of utmost good faith and the claim is fraudulent.

The allegations made are serious allegations that can have a significant impact on the complainant in terms of her ability to obtain insurance and in some circumstances finance. The allegations should be made lightly and where made should be supported by clear and cogent information. Normally such allegations would need to be supported by information as to motive, opportunity, character and credibility and, where appropriate, forensic information.

MV admits making a false statement

MV admits that he initially provided false information regarding the third-party driver to the insurer.

MV says that he was trying to assist the third-party as the driver informed him immediately after the accident that he did not have a licence. He thought he would do the driver and third-party a favour at the request of the third-party driver. MV says at no time did he mean to mislead the insurer into making payment of his claim.

MV lodged the claim on behalf of the complainant. This is confirmed in the transcript of the claim lodgement call dated 26 April 2018. The complainant has provided authority to MV to lodge the claim. It is during that call that he provided the incorrect third-party driver details. His description of the accident is otherwise correct.

In a statement taken on 3 May 2018 MV was asked to clarify the circumstances of the accident. He has provided full details as to how the accident occurred and confirmed the circumstances. He admitted that he had previously said the third-party driver's mother was driving the car. He explained that the third-party driver didn't have a licence and had nothing on him to identify him. He confirmed he felt that he was helping the driver.

The complainant did not make a false statement to deceive the insurer into paying the claim

I am not satisfied based on the available information that the insurer has established that the complainant has made a false statement to deceive the insurer into making payment of her claim.

MV was authorised to provide information on behalf of the complainant. No actual statement was provided from the complainant.

The insurer relied upon legal decisions that provide a claim is fraudulent if a person knowingly provides false statements to deceive an insurer into making payment of a claim which they believed or knew they had no right to receive.

The policy was a Comprehensive Motor Vehicle Policy. There is no suggestion in the information provided that the complainant or MV believed they did not have a valid claim. There is no suggestion that their policy would not have covered them or that they believed the policy would not have covered them in the circumstances in which they were involved in a collision with an uninsured driver.

The insurer has not provided any information to suggest that it has been prejudiced in anyway as a result of the statement made by MV. It has not provided any information to suggest it has been unable to investigate the claim or any information to suggest that the circumstances leading to the collision have in anyway been fabricated other than the name of the third-party driver.

Insurer has not established claim is fraudulent

I accept that MV provided a false statement and that in doing so, breached the terms and conditions of the policy.

The insurer has argued that it was not until the third-party's details and evidence was put to the complainant that they admitted the information was false. That is not the case.

MV in clarifying the circumstances, admitted that he provided false information about the driver details. This was before any information about the third parties claim was put to MV. The complainant was not asked about this.

Section 56(1) of the *Insurance Contracts Act 1984* (the Act) refers to a claim being made fraudulently. It does not simply mean that some fraudulent circumstance attends to the claim. This view is supported by section 54(2) of the Act.

If the misleading information were provided to deceive the insurer into making payment of the complainant's claim, it would be fraudulent and a breach of duty of utmost good. However, the fact that MV initially provided false details as to the driver whilst tainting the claim does not mean it is fraudulent or a breach of utmost good faith. He did not mislead the insurer about the circumstances of the claim to gain any financial benefit.

In my view, the information as provided is not sufficient to establish that the complainant has provided false information to deceive the insurer into making payment of the claim or that the claim is fraudulent.

The insurer has not been prejudiced

The insurer has not provided any information suggesting it has been prejudiced by the breach.

In the course of the interview on 12 December 2018, the complainant confirmed that they are still driving the vehicle with the collision damage. The insurer provided a copy of the assessment report which identified the cost to repair the vehicle at $5,700.

I accept that the insurer has been able to assess the damage to the vehicle and has not been prejudiced in anyway in this assessment.

In the circumstances, the insurer is liable to meet the complainant's claim in accordance with the terms and conditions of the policy. The insurer should attend to the repairs of the vehicle under the terms and conditions of the policy.

As the insurer has not established its allegations with respect to breach of duty of utmost good faith or fraud, then the insurer should remove any reference to any such allegations from its records and the records of any organisation with whom it has communicated.

3 Supporting information

3.1 The determination is made under FOS Terms of Reference

The Australian Financial Complaints Authority (AFCA) has commenced managing disputes previously lodged with Financial Ombudsman Service (FOS).

This determination is made under FOS Terms of Reference but has adopted the following terminology for consistency with AFCA. In this determination the AFCA terms have the same meaning as the FOS terms defined in paragraph 20.1 and Schedule 1, 2 & 3 of the FOS Terms of Reference.

FOS definitions	AFCA term
applicant	complainant
financial services provider	financial firm
dispute	complaint
claim	claim

3.2 Relevant law

Insurance Contracts Act 1984

Section 56(1) of the Act - Fraudulent claims

(1) Where a claim under a contract of insurance, or a claim made under this Act against an insurer by a person who is not the insured under a contract of insurance, is made fraudulently, the insurer may not avoid the contract but may refuse payment of the claim.

(2) In any proceedings in relation to such a claim, the court may, if only a minimal or insignificant part of the claim is made fraudulently and non-payment of the remainder of the claim would be harsh and unfair, order the insurer to pay, in relation to the claim, such amount (if any) as is just and equitable in the circumstances.

(3) In exercising the power conferred by subsection (2), the court shall have regard to the need to deter fraudulent conduct in relation to insurance but may also have regard to any other relevant matter.

Section 13 - The duty of the utmost good faith

(1) A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act

towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

(2) A failure by a party to a contract of insurance to comply with the provision implied in the contract by subsection (1) is a breach of the requirements of this Act.

(3) A reference in this section to a party to a contract of insurance includes a reference to a third-party beneficiary under the contract.

(4) This section applies in relation to a third-party beneficiary under a contract of insurance only after the contract is entered into.

3.3 Relevant case law

Briginshaw v Briginshaw [1938] HCA 34 (1938) 60 CLR 336

Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.