

Determination

Case number: 532080

21 December 2018

1 Determination overview

1.1 Complaint

The complainant holds an insurance policy with the financial firm (insurer) covering his jet ski. The complainant lodged a claim against his policy when he noticed his jet ski was missing from its place in the parking area beneath the apartment block where he resides.

The insurer denied the claim because it did not accept there had been any proof the jet ski had been stolen by violent and forcible means.

The case manager provided the parties with a recommendation on the issues in dispute. The recommendation was in favour of the complainant. A copy of the recommendation is attached to this determination.

The recommendation was issued by the Financial Ombudsman Service (FOS) Australia. The Australian Financial Complaints Authority (AFCA) has replaced FOS. AFCA is responsible for managing FOS complaints lodged prior to 1 November 2018. While this determination is issued by AFCA we have applied the FOS Terms of Reference.

1.2 Issues and key findings

Were the findings of the recommendation correct?

The findings contained in the recommendation were correct and are adopted in this determination. Further submissions provided after the recommendation have been considered, but do not warrant a change in the outcome.

Was the insurer entitled to deny the claim?

The insurer was not entitled to deny the claim and is required to settle the claim because it is fair in all the circumstances for it to do so.

1.3 Determination

This determination is in favour of the complainant.

I agree with the case manager's reasons for the recommendation and the recommended outcome.

The insurer is required to settle the claim in accordance with the terms of the policy and to pay interest on that amount from 9 April 2018 until the date of payment.

2 Reasons for determination

2.1 Were the findings in the recommendation correct?

I have decided this case on its merits, having regard to the relevant law, good industry practice, codes of practice and previous AFCA decisions. I have taken into account all the material submitted by the parties, both before and after the recommendation. I am satisfied the documentation I have relied on has been provided to both parties.

I am satisfied the case manager's recommendation contains an accurate summary of the complaint, the issues to be determined, any applicable paragraphs of the Rules and any relevant law.

2.2 Was the insurer entitled to deny the claim?

The policy covers accidental loss or damage including theft the applicant's policy provides cover for 'accidental loss or damage' to the jet ski including 'theft'. The policy defines 'theft' to mean:

a claim resulting from someone taking Your Boat or Insured Components without Your knowledge, consent or agreement with the intention of depriving You of them

Insurer relied on policy condition to deny claim

The complainant lodged a claim against his pleasurecraft insurance policy when he noticed his jet ski was missing from the car park beneath the apartment complex where he lives. His policy covers loss or damage to his jet ski and, as such, he has a valid or *prima facie* claim to which his policy responds. The applicant reported the theft to the police and a copy of the report was provided to this Service. The FSP does not dispute the jet ski was stolen and says:

[FSP] has no doubt the PWC was stolen at the time but we do not believe the security and storage of the property at the time allows the claim to be paid

The applicant has established a claimable loss for the theft of his jet ski. The onus is therefore on the FSP to establish the claim is excluded from cover or otherwise not covered. This involves establishing the application of a policy exclusion or condition where it does not accept liability for the claim.

The insurer relied on a condition contained in the complainant's policy schedule that requires an unattended jet ski to be housed in a locked garage or yard or is immobilised. The condition also requires visible evidence of violent and forcible removal from the place of storage.

Cover for theft is subject to terms and conditions

The policy schedule states that cover provided for accidental loss or damage, does not apply to:

loss or damage caused by theft while your Boat is stored or left unattended unless the Boat is contained in a locked garage or locked yard or is immobilised by an anti-theft device, and there is visible evidence of violent and forcible removal from or entry into your Boat or place of storage.

The FSP argues that policy does not cover the theft if the jet ski was stored or left unattended. However, there is an exception to the exclusion. That being, if the jet ski was:

1. in a locked garage or a locked yard or immobilised by an anti-theft device; and
2. there is visible evidence of violent and forcible removal from or entry into the jet ski or place of storage.

Both need to be present for the exception to apply.

The jet ski was not left unattended in a locked garage

The first exception to the above exclusion requires that the jet ski must be:

- contained in a locked garage, or
- contained in a locked yard, or
- immobilized by an anti-theft device.

The policy does not define 'locked garage' or 'locked yard' however it is evident a locked yard broadens the cover to something more than a garage. I am satisfied that the first exception to the exclusion has been established and the FSP has conceded this.

Insurer said there was no violent or forcible removal

The insurer also did not accept there was enough evidence there had been a violent and forcible removal of the jet ski and denied liability for the claim.

There was no cctv camera, nor any evidence on how the jet ski and its trailer were removed from the car park under the apartment complex. The garage is locked behind a large gate with grills, which requires access through the scanning of a security card.

Both parties have offered suggestions as to how the jet ski was removed, but these are only conjectures. The complainant provided a photograph of a wheel clamp to the trailer. However, it is uncertain whether it was in place on the day of the theft. The

insurer said there was no sign of any debris that would be expected had the clamp been forcibly removed. But, this does not mean it did not occur.

The complainant suggested the thief attempted to prise the gate open, pointing to some damage to the gate. The insurer, when rejecting the recommendation that was in the complainant's favour, provided a photograph (dated July 2017) depicting the scrape marks on that part of the gate. This predates the loss which occurred on 22 February 2018.

The policy does not define violent and forcible removal from or entry into

The policy does not define what it intends "visible evidence of violent and forcible removal from or entry into your boat or place of storage" to mean.

The courts have however considered the meaning of "forcible and violent entry". It was determined that the terms "forcible" and "violent" are not interchangeable and mean different things. It is "forcible" if entry is without permission, but "violent" requires an act beyond "mere force" yet the extent required need only be minimal.

I agree with the finding in the recommendation that the visible evidence of violent and forcible removal from or entry into the jet ski or place of storage meets the broad exception to the exclusion.

The applicant has provided information to show damage to the garage gate, being a point of entry and/or exit from where the jet ski was stored at the time of loss. Given the damage was found after the theft of the jet ski, I accept on balance it was likely caused by the person who stole the jet ski, when either entering or exiting the complex.

The FSP is not entitled to decline the claim

The policy clearly intends to provide cover for loss caused by someone taking the jet ski without the applicant's knowledge, consent or agreement while it was being stored in a locked garage or yard, even when it is shared parking. Is it not in dispute this has occurred.

As recorded in the recommendation the applicant has provided information to show damage to the garage gate, being a point of entry and/or exit from where the jet ski was stored at the time of loss. Given the damage was found after the theft of the jet ski, I accept on balance it was likely caused by the person who stole the jet ski, when either entering or exiting the complex.

It is evident the entry to the locked garage was without permission. In accordance with the court's interpretation of "forcible" I am satisfied there has been forcible entry into the place of storage.

The recommendation made the point that the courts have found that "violent" requires an act beyond "mere force" yet it need only be minimal. AA's report of 13 April 2018

acknowledges the damage could have occurred during the claimed loss as a result of forcing the gate open. AA says:

An alternative interpretation of the insured's photographs could suggest that they show damage to the security gate as a consequence of forcing it open.

The act of forcing a motorised security gate open is beyond “mere force”. I consider this enough to establish there was an element of violence involved and therefore on balance, violent and forcible removal from or entry into the place of storage.

In the circumstances and considering the intention of the policy, I consider the FSP liable for the claim. I agree with the recommendation that there is no need to address the operation of section 54 of the Act.

Insurer also referred to previous decisions in support

The insurer referred to two previous AFCA decisions in support of its position (although previous decisions are not binding).

Decision 390120 differs from this current complaint because the complainant admitted the gates were not locked and the jet ski was not secured. Under decision 451498, there was CCTV footage showing a car hauling the jet ski on its trailer. The information indicated the thieves had been able to hook the trailer up in the normal manner and drive away. Therefore, there was no violent and forcible removal.

These decisions are of no assistance in determining this present case because those decisions differ in material instances. There is no evidence as to how the thieves managed to remove the jet ski and trailer from the enclosed parking area, whereas there was evidence available in the two decisions that established how the jet skis were stolen.

Unfair in all the circumstances for insurer to deny claim

The policy covers theft of an insured's boat; in this case the complainant's jet ski. The policy schedule provides for additional security provisions that account for the greater risk that jet skis present. The policy schedule outlined the requirements and the complainant has met at least one of these, namely, a locked enclosure.

The enclosure requires a security card to access the locked enclosure. While this will not completely ensure total security of the property parked inside, the measures mean only those who are sufficiently determined will succeed in stealing from the enclosure.

The complainant has undertaken security measures to guard against theft of the jet ski. There is no evidence that establishes exactly how the thief removed it from the locked enclosure, but I am satisfied there is some evidence of forcible entry.

Therefore, it is fair in all the circumstances for the insurer to settle the claim in accordance with the terms of the policy. The insurer is also required to pay interest on

that amount in accordance with section 57 of the Insurance Contracts Act 1984, from 9 April 2018 (date of denial letter) until date of payment.

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 'Complainant' includes his representative

The complainant has been represented by his insurance broker during this complainant. For the purposes of this determination, the broker is also referred to as the 'complainant'.

Case number: 532080

23 October 2018

1 Overview

1.1 Dispute

The applicant insured his jet ski under a pleasure craft policy with the financial services provider (FSP). The applicant lodged a claim with the FSP after he noticed his jet ski missing from his shared car park.

The FSP declined the claim because it says there was no physical evidence of violent and forcible removal of the jet ski, and no anti-theft device fitted at the time of the loss.

The applicant disputes the FSP's decision because he says:

- there is damage to the garage gate which indicates violent and forcible removal from or entry into the garage
- an anti-theft device was fitted despite it not being needed as the jet ski was in a locked garage, and
- section 54 of the *Insurance Contracts Act 1984* (the Act) prevents the FSP from declining the claim.

1.2 Issues and key findings

Is the FSP entitled to decline the claim?

The FSP is not entitled to decline the claim.

The jet ski was in a locked garage. The applicant has provided information to show the garage gate has been damaged. I accept the damaged gate shows visible evidence of violent and forcible removal from or entry into the place of storage. This was found after the theft and on balance, I accept it likely occurred during the claimed event.

On balance, the exclusion for leaving the jet ski unattended does not apply and the FSP is liable for the claim.

1.3 Recommendation

This recommendation is in favour of the applicant.

Within 14 days of the parties' acceptance of this recommendation the FSP is to settle the claim in accordance with the terms of the policy.

2 Reasons for recommendation

2.1 Is the FSP entitled to decline the claim?

The policy covers accidental loss or damage including theft

The applicant's policy provides cover for 'accidental loss or damage' to the jet ski including 'theft'. The policy defines 'theft' to mean:

a claim resulting from someone taking Your Boat or Insured Components without Your knowledge, consent or agreement with the intention of depriving You of them.

The applicant has established a claimable loss

There is a common law onus on the applicant to show, on the balance of probabilities, he has suffered a loss caused by a risk insured against under the policy.

If the applicant can establish a claimable loss, the onus shifts to the FSP to show, on the balance of probabilities, it is entitled to rely on an exclusion under the policy or is otherwise entitled to deny the claim.

The applicant reported the theft to the police and a copy of the report was provided to this Service. The FSP does not dispute the jet ski was stolen and says:

[FSP] has no doubt the PWC was stolen at the time but we do not believe the security and storage of the property at the time allows the claim to be paid.

The applicant has established a claimable loss for the theft of his jet ski. The onus is therefore on the FSP to establish the claim is excluded from cover or otherwise not covered.

Cover for theft is subject to terms and conditions

The policy cover for accidental loss or damage is subject to certain terms and conditions, as outlined in the relevant policy schedule. The schedule states that cover provided for accidental loss or damage, does not apply to:

loss or damage caused by theft while your Boat is stored or left unattended unless the Boat is contained in a locked garage or locked yard or is immobilised by an anti-theft device, and there is visible evidence of violent and forcible removal from or entry into your Boat or place of storage.

This states the FSP will not cover the theft if the jet ski was stored or left unattended. However, there is an exception to the exclusion. That being, if the jet ski was:

1. in a locked garage or a locked yard or immobilised by an anti-theft device; and

2. there is visible evidence of violent and forcible removal from or entry into the jet ski or place of storage.

Both need to be present for the exception to apply.

The jet ski was left unattended in a locked garage

The first exception to the above exclusion requires that the jet ski must be:

- contained in a locked garage, or
- contained in a locked yard, or
- immobilised by an anti-theft device.

The policy does not define 'locked garage' or 'locked yard' however it is evident a locked yard broadens the cover to something more than a garage.

The applicant lives in an apartment building and the garage is shared with other residents. The applicant says the garage can only be accessed by using a swipe card at the garage gates or on foot at the front door of the building before entering the garage internally.

The FSP accepts the jet ski was in a locked garage at the time of the loss.

Applicant says paint chipping shows violent and forcible removal or entry

The second exception to the exclusion is "visible evidence of violent and forcible removal from or entry into your boat or place of storage".

The applicant has provided photographs of paint chipped from sections of the motorised garage gate.

The applicant says there is no CCTV footage to confirm how the thief entered the garage and in the absence of this, the paint chipping on the garage gate suggests the thief "forcibly entered through the gate". The applicant also says:

It is possible that the thief gained entry without causing any scratches/damage beyond what is presently on the gate. While these scratches could have been caused by wear and tear, we submit it is more likely that it was not.

The FSP says no evidence of violent and forcible removal or entry

On the other hand, the FSP says there is no evidence of violent and forcible removal from or entry into the jet ski or garage and it is therefore entitled to decline the claim.

The FSP's assessor (AA) says the chipped paint is "far removed from a 'violent and forcible removal or entry into your boat or place of storage'".

The FSP also says it does not consider the loss of paint to be excessive and there was no reported damage to the gate. The FSP says if there was a record of repairs to the gate then it could be considered.

The FSP also suggests there needed to be an anti-theft device fitted even when stored in a locked garage. This is because it would require forcible removal, which would in turn leave physical evidence of such.

The applicant has provided a receipt for an anti-theft device to show it would have been fitted. However, I accept there is no information to show it was actually fitted at the time of the loss.

The policy does not define violent and forcible removal from or entry into

The policy does not define what it intends “visible evidence of violent and forcible removal from or entry into your boat or place of storage” to mean.

It is therefore unclear at what point the FSP would consider damage excessive enough, or not too far removed.

The courts have however considered the meaning of “forcible and violent entry”. It was determined that the terms “forcible” and “violent” are not interchangeable and mean different things. It is “forcible” if entry is without permission, but “violent” requires an act beyond “mere force” yet the extent required need only be minimal.

I consider visible evidence of violent and forcible removal from or entry into the jet ski or place of storage to be a broad exception to the exclusion. This is because it could relate to any one of the following scenarios:

- removal from the place of storage
- entry into the place of storage
- removal of the jet ski, or
- entry into the jet ski.

It is also clear the policy intends to cover theft in circumstances when a boat or jet ski is left unattended in shared parking. The policy schedule states:

Theft Excess - \$1,000, other than when you store your boat within a complex that has shared parking in which case the theft excess is increased to \$2,000.

The increased excess reflects the higher risk of storing the jet ski in shared parking, which the FSP has accepted.

The FSP says extra security measures are required for boats and jet ski's because they are easily stolen. However, if the FSP intended there to be a requirement that an anti-theft device was fitted at all times, it is unclear why it extended the exception to the exclusion to allow the jet ski to be left unattended in a locked yard, such as shared parking, with evidence of violent and forcible removal from or entry into the place of storage as opposed to the boat itself.

The FSP is not entitled to decline the claim

The policy clearly intends to provide cover for loss caused by someone taking the jet ski without the applicant's knowledge, consent or agreement while it was being stored in a locked garage or yard, even when it is shared parking. Is it not in dispute this has occurred.

The applicant has provided information to show damage to the garage gate, being a point of entry and/or exit from where the jet ski was stored at the time of loss. Given the damage was found after the theft of the jet ski, I accept on balance it was likely caused by the person who stole the jet ski, when either entering or exiting the complex.

It is evident the entry to the locked garage was without permission. In accordance with the court's interpretation of "forcible" I am satisfied there has been forcible entry into the place of storage.

As noted above the courts have found that "violent" requires an act beyond "mere force" yet it need only be minimal. AA's report of 13 April 2018 acknowledges the damage could have occurred during the claimed loss as a result of forcing the gate open. AA says:

An alternative interpretation of the insured's photographs could suggest that they show damage to the security gate as a consequence of forcing it open.

The act of forcing a motorised security gate open constitutes more than simply opening the gate or following another vehicle in and is something I consider beyond "mere force". I consider this sufficient to establish there was an element of violence involved and therefore on balance, violent and forcible removal from or entry into the place of storage.

In the circumstances and considering the intention of the policy, I consider the FSP liable for the claim. There is therefore no need to address the operation of section 54 of the Act.

Within 14 days of the parties' acceptance of this recommendation the FSP is to settle the claim in accordance with the terms of the policy.

3 Supporting information

3.1 FOS approach to this dispute

There has been a full exchange of the relevant material between the parties and each party has had the opportunity to address the issues raised.

All material provided has been read and considered. For the purpose of this recommendation, commentary is restricted to only the materials considered relevant to the outcome.

3.2 Relevant policy wording

Product Disclosure Statement

Section 1 – Accidental Loss or Damage to Your Boat

What We cover

We will cover You for:

- *Accidental Loss of or Damage to Your Boat*
- *Repairer’s Negligence*
- *Theft of Your Boat*
- *Damage resulting from a Latent Defect which has caused loss or damage to Your Boat (but excluding the cost of rectifying the Latent Defect itself)*
- *Lawful Seizure, but not if it results from a lack of reasonable care in the safeguard, protection and/or security of Your Boat or illegal activities*
- *Recovery/Detention which occurs during the Period of Insurance within the*

Geographic Limits:

- *on water, on land, in storage;...*

Policy schedule effective 10 December 2017

18.1 Personal Watercraft Conditions

Theft Excess - \$1,000, other than when You store Your Boat within a complex that has shared parking in which case the theft excess is increased to \$2,000.

...

The cover provided by Section 1 of this Policy does not apply to loss or damage caused by theft while your Boat is stored or left unattended unless the Boat is contained in a locked garage or locked yard or is immobilised by an anti-theft device, and there is visible evidence of violent and forcible removal from or entry into your Boat or place of storage.

3.3 Additional information relied upon

- The parties' submissions
- The photos of the damaged gate
- The FSP's assessor's report of 13 April 2018
- *Homeowners Insurance Pty Ltd v Job (1983) 2 ANZ Insurance Cases 60 – 535.*