

Determination

Case number: 619894

6 September 2019

1 Determination overview

1.1 Complaint

The complainant held a pleasure craft insurance policy with the financial firm (insurer). He made a claim after two jetskis on a double trailer were stolen.

The insurer accepted there was a genuine theft, but declined the claim on the basis there was no visible evidence of the insured items being taken by 'violent and forcible' means, as required under the personal watercraft conditions of cover.

The complainant did not accept this. He believes the claim should be accepted and paid.

1.2 Issues and key findings

Is the insurer entitled to decline the claim?

The complainant established a valid claim for theft, and the available evidence shows:

- it is more likely than not the trailer carrying the jetskis had been immobilised with an anti-theft device (including a padlock), locking it to the complainant's car when the theft occurred
- the trailer and jetskis had been taken forcibly (that is, without permission)
- the fact of the locked padlock being missing meant, on balance, violence had been used to break and remove it.

That means the insurer is not entitled to decline the claim.

1.3 Determination

This determination is in favour of the complainant.

The insurer is required to accept and settle the claim in accordance with the policy terms and conditions, and pay statutory interest on any cash settlement, calculated from the date it declined the claim until the date of payment.

2 Reasons for determination

I have decided this case on the basis of what I consider fair in all the circumstances, 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. I am satisfied that the documentation I have relied on has been provided to both parties. For the purposes of this determination, I will deal with only those points considered relevant.

2.1 Is the insurer entitled to decline the claim?

No dispute complainant has a valid claim

The policy covers 'theft', which it defines as:

'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'.

In the course of the claim, the complainant said the trailer carrying the jetskis had been locked on to a motor vehicle parked outside his house overnight, before it was discovered missing the next morning. He reported the incident to the police.

Neither the insurer nor the police have suggested the claim is not genuine. I am satisfied the complainant has established a valid claim.

So the onus now shifts to the insurer to show an exclusion applies, or that it is otherwise entitled to decline the claim.

Policy condition applies to theft of personal watercraft

The policy cover for theft does not apply in the following circumstances:

'...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 insurer is relying on what it believes was the complainant's failure to comply with this condition to decline the claim.

Insurer says no lock was fitted

The complainant has explained that the trailer carrying the jetskis had been attached to the towbar of the car by a padlock which prevented the hitch of the trailer being lifted from the towball.

When the loss was discovered, I understand the hitch lock device was found, but the padlock was missing.

The insurer submits that as there was no physical evidence of a broken padlock at the scene, that means there was no lock fitted to the trailer at the time of the theft.

However, the complainant has provided a photo of the rear of his car, which he says was from the day before the incident, taken to show his new personalised number plates. In that photo, what appears to be a hitch lock device – including a substantial locked padlock – can be seen attached to the trailer.

It is also worth noting that the vehicle in the photo is parked in the position described by the complainant when speaking with the insurer's investigator – namely, partially on the road and partially on the nature strip outside his home, with his wife's car parked nearby in the driveway directly in front of the garage.

As well, the complainant showed the insurer's investigator a similar hitch lock arrangement on his work trailer in his garage. A photograph of that has been provided with the investigator's report, along with a separate photo of the trailer hitch lock itself, without the missing padlock, although the complainant was able to provide the padlock key, which was on his keyring. Finally, the complainant was also able to show the investigator the anti-theft device which he said was fitted when the trailer was not attached to the vehicle.

I consider the evidence supports the conclusion that the complainant took appropriate and reasonable care to safeguard the jetskis. His account of what happened and what his usual practice was is consistent throughout the course of the claim and complaint. Specifically, I am satisfied on the available evidence, that it is more likely than not that the hitch lock device and locked padlock were in place at the time of the theft.

I am also satisfied – in the absence of any policy definition to require otherwise – that the locking arrangement which has been described meets the requirement for the trailer and jet-skis to be 'immobilised by an anti-theft device'.

The fact that the thieves were able to break that device does not mean the insured items had not been 'immobilised' for the purposes of the policy condition.

Insurer says there was no evidence of 'violent and forcible' removal

The insurer maintains it is entitled to decline the claim because the lack of a broken padlock means there was no 'visible evidence of violent and forcible' removal or entry as required under the policy.

The policy itself does not define 'violent and forcible'.

In support of its position, the insurer has referred to the Concise Oxford Dictionary definition of 'violent', which it says involves 'great physical force' – but, as set out

below, it is not appropriate to apply that general definition in the context of this policy or this claim.

That is because the courts have specifically considered the meaning of the words 'violent' and 'forcible' in the insurance context. It was held that the terms are not interchangeable, but that they mean different things: 'forcible' means 'without permission'; while 'violent' requires an act beyond 'mere force', even though that extra act need only be minimal.

The policy clearly intends to provide cover for loss caused by someone taking the jetskis without the complainant's knowledge, consent or agreement while it is immobilised by an anti-theft device. I am satisfied that is what occurred here.

In accordance with the judicial interpretation of 'forcible', I am also satisfied there has been a forcible removal of the jetskis.

With regard to the requirement that the removal also be 'violent', while there needs to be more than 'mere force', that additional act need only be minimal. As already noted, I am satisfied the anti-theft device was attached and secured with a padlock at the relevant time. That means that in order for the substantial padlock to have been removed it must have been broken or fundamentally compromised (since the complainant still had the key), which in turn will have required the application of more than 'mere force'.

I consider this is sufficient to establish there was an element of violence involved in the removal.

I also consider, in the particular circumstances, that the absence of the padlock reasonably represents 'visible evidence' of that use of force and violence.

Unfair in the circumstances for the insurer to decline the claim

Given the intention of the policy, the available evidence and the specific circumstances in this case, I am not satisfied it is fair for the insurer to decline the claim on the basis of a lack of visible evidence of 'violent and forcible' removal.

3 Supporting information

3.1 Judicial interpretation of 'forcible and violent'

Homeowners Insurance Pty Ltd v Job (1983) 2 ANZ Insurance Cases 60-535

'Forcible' – without permission

'Violent' – requires an act beyond mere force (as in the opening of an unlocked window), however the extra act need only be minimal.