

# Determination

<b>Case number</b>	694379
<b>Financial firm</b>	Auto & General Services Pty Ltd

# 1 Determination overview

## 1.1 Complaint

The complaint relates to two separate Comprehensive Car Insurance policies held with the financial firm (insurer), regarding two separate insured vehicles, Vehicle 1 and Vehicle 2.

The complainant has lodged two claims with the insurer. The first claim is in relation to the theft of Vehicle 1 on 22 October 2019 and the second claim is in relation to damage caused by a collision on 26 October 2019, between Vehicle 1 and Vehicle 2.

The insurer has denied the complainant's claims on the basis it says that the damage to both Vehicle 1 and Vehicle 2, was the direct result of the complainant driving Vehicle 2 into Vehicle 1, to stop the theft of Vehicle 1 and as such, is not covered under the policy.

The policy excludes any loss, damage or liability deliberately caused by an insured person or resulting from the driver of the vehicle acting in a wilful or reckless manner.

## 1.2 Issues and key findings

### Is the insurer entitled to deny the complainant's claims?

The insurer is not entitled to deny the complainant's first claim.

The insurer is entitled to deny the complainant's second claim as the complainant has not established he suffered a loss that is covered by the terms of the policy.

## 1.3 Determination

This determination is substantially in favour of the insurer.

The insurer is required to meet the complainant's first claim under the terms and conditions of the insurance policy relevant to the first claim.

The complainant is to provide evidence of the loss and damage he suffered arising from the first claim.

The insurer is entitled to deny the complainant's second claim.

## 2 Reasons for determination

I have carefully considered all the material provided in the preparation of this determination.

This complaint has been determined based on what is fair in all the circumstances, having regard to the relevant law, good industry practice, codes of practice and previous decisions where applicable.

There has been a full exchange of all material information relied on for the purposes of this determination and each party has had the opportunity to address any issues raised by the other. All the material provided by the parties has been reviewed and considered.

While the parties have raised numerous issues in their submissions, for the purposes of this determination, commentary has been restricted to those issues considered directly relevant to the outcome only.

### 2.1 Is the insurer entitled to deny the complainant's claims?

#### Coverage of the policies

The complainant held two separate Comprehensive Car Insurance policies for Vehicle 1 and Vehicle 2.

Both policies provided coverage in the event of accidental damage which includes damage caused by attempted theft.

'Accident' is defined as an event that is sudden, unforeseen, unexpected and unintended by the complainant.

The coverage provided by the policies is subject to conditions and exclusions.

Loss, damage or liability is specifically excluded where deliberately caused by the complainant.

It is accepted insurance law that the complainant carries the initial onus to establish a loss which is covered by the terms and conditions of the policy.

The complainant's obligation to establish that the claim is covered by the policy, extends to establishing that the loss and damage occurred in circumstances which are consistent with the other known and confirmed evidence and that the complainant's version of the loss is credible.

I am satisfied that the complainant is required to show that the loss and damage to Vehicle 1 and Vehicle 2 was the result of events that were sudden, unforeseen, unexpected and unintended by the complainant.

Having reviewed all the exchange material, I am satisfied that the insurer relies largely upon statements made by the complainant and the conclusions of its forensic expert (MS), to say that the loss and damage to the vehicles was deliberately caused by the complainant.

### Transcripts and recordings of telephone conversations and interviews

The exchanged material includes several recordings of telephone conversations and interviews.

The transcripts and recordings include:

- Recording of a telephone call between the complainant and the insurer, 24 October 2019 – prior to the collision incident.
- Recording of a second telephone call between the complainant and the insurer on 24 October 2019 – prior to the collision incident.
- Recording of a telephone call from the complainant to the police on 26 October 2019, at 2.31am
- Recording of a telephone call from the complainant to the police on 26 October 2019, at 2.41am
- Recording of a telephone call between the complainant and a representative of the insurer (Ja) on 28 October 2019 (Part 1)
- Recording of a telephone call between the complainant and a representative of the insurer (E) on 28 October 2019 (Part 2)
- Recording of a telephone call from the complainant to a representative of the insurer (Mar) on 29 October 2019.
- Recording of a telephone call from the complainant to a representative of the insurer (P) on 29 October 2019 (Part 1)
- Recording of a telephone call from the complainant to a representative of the insurer (Mac) on 29 October 2019 (Part 2)
- Recording of a telephone call between the complainant and a representative of the insurer (A) on 30 October 2019
- Recording of a telephone call from the complainant to a representative of the insurer (Mar) on 31 October 2019.
- Recording of a telephone call from the complainant to a representative of the insurer (D) on 28 November 2019

- Recording of a telephone interview with the complainant by a representative of the insurer (Je) on 4 December 2019.

The complainant says that the insurer has not provided copies of all calls and the recording of a call with Ja that took place on 4 December 2019.

The insurer says that the list above includes recordings of all calls it holds.

Based upon all the exchanged information, I am not satisfied that the complainant has been able to establish that there were additional calls that would impact upon this determination.

I have listened to the recordings of all the calls.

I am satisfied that the details contained in this determination accurately reflect the information provided by the complainant to the insurer during the above-mentioned telephone calls.

### Circumstances of the loss and damage

The first claim relates to the theft of Vehicle 1. The complainant says that Vehicle 1 was stolen on 22 October 2019. The insurer records the following loss description:

THE CAR WAS PARKED AT MY DRIVEWAY, LAST SAW MY CAR AT AROUND 23:00 – 23:15. WHEN I WOKE UP THIS MORNING THE CAR WAS NOT THERE, ASKED MY WIFE AND SHE DID NOT TAKE IT, SHE IS USING THE OTHER CAR. I WAS AT HOME ALL NIGHT. MADE SURE WAS CAR WAS LOCKED, I HAD MY WIFES PURSE AND MY LAPTOP INSIDE THE CAR. AND A BAG OF CLOTHS RETURNED FROM MY FRIEND (H)

The complainant made a second claim. He says that Vehicle 1 (which was being driven by an unknown person) and Vehicle 2 (which was being driven by the complainant, with his wife in the front passenger seat) were damaged on 26 October 2019, when they collided with each other.

The insurer has recorded a loss description as:

*"I HAD FINISHED DINNER AT MY SISTERS PLACE WE LEFT MY SISTERS ON THE TRIP HOME WE SAW OUR FORTUNA WHICH HAD BEEN STOLEN EARLIER IN THE WEEK WE CALLED THE POLICE TO ADVISE THEM WE HAD SEEN OUR STOLEN CAR THE POLICE ADVISED US NOT TO FOLLOW THE STOLEN CAR AND TO RETURN HOME WHICH WE DID AS WE WERE MAKING A RIGHT TURN OUR STOLEN CAR HAS COME FROM THE AS WE TURNED RIGHT WE HIT OUR STOLEN CAR WITH THE THIEF WHO WAS DRIVING HEAD ON MY CAMRY - CENTRE OF THE FRONT OF MY CAR IS COMPLETELY SMASHED IN, ALL AIR BAGS WENT OFF - HALF OF THE ENGINE CAVED IN"*

### The claim in relation to the stolen Vehicle 1

Having reviewed all the exchanged material, I am satisfied that there is little or no evidence to challenge the complainant's claim that Vehicle 1 was stolen on 22 October 2019.

The insurer says that the complainant was advised that the claim for Vehicle 1 would be withdrawn as the only damage to Vehicle 1 was the result of the collision with Vehicle 2.

The complainant says that he did not withdraw the claim for the stolen Vehicle 1.

Whilst I accept the evidence that it is possible that the only damage to Vehicle 1 was caused by the collision with Vehicle 2, on 26 October 2019, I am also satisfied that the complainant's statement that Vehicle 1 was stolen on 22 October 2019, is genuine and if there is any loss or damage arising from the theft of Vehicle 1, then the policy held by the complainant for Vehicle 1 would respond.

### **The claim for the damage caused by the collision between Vehicle 1 and Vehicle 2**

In addition to the insurer's claim lodgement record in relation to the collision referred to above, I note that the insurer's claim notes record:

- HE CONFIRMED HE WAS COMING HOME FROM FAMILY CELEBRATION WHEN HE SAW HIS CAR, HE FOLLOWED IT FOR 1-2 MINS AND CALLED POLICE
- POLICE ASKED HIM TO STOP FOLLOWING SO HE TURNED AROUND TO GO HOME
- HE DROVE ABOUT 2-3KMS. WHEN HE TURNED ONTO LUXFORD ST WHEN IV CAME ACROSS ROAD AND HIT HIM

Within the submission to the authority on 30 April 2020, the complainant detailed:

We finish a get together party at our family friends place and were heading back home. It was around 2:30 or 3:00 am not sure exact about the time but it was late night and early morning of 26<sup>th</sup> October 2019. My friends car was just behind us on the way back home and while we were on L road, near S at one of the traffic lights we saw our car (Vehicle 1) and notice that some else was driving it. We then followed the vehicle for around 2 to 3 km in the same area. My wife had also called 000 at that time. My wife started to cry when the consultant answered the call and my wife then mentioned the consultant about the situation and informed the consultant that the driver was driving the car recklessly and was also over speeding. On hearing this the consultant advised not to chase the vehicle e as it could be occupied my multiple persons who could also harm us. On hearing this we provide the consultant the last location of the car and then headed back home. After moving around 2 km ahead we had to take a right toward our home and then suddenly out of the blue the same car (Vehicle 1) came in front of me and collided with Vehicle 2 head on. As far as I remember, the accident occurred on L road.

The complainant says that he was not at fault for the collision.

As stated, the insurer relies upon statements from the complainant and the report from MS to establish its denial of the claim.

MS had the opportunity to inspect both vehicles and use crash data retrieval (CDR) to determine the circumstances of the collision.

CDR records a series of events, such as front and rear crashes, for both vehicles.

Based on his inspection of the vehicles and the CDR, MS advised that he was firmly of the opinion that all physical evidence indicates that whilst being driven at 50km/h, Vehicle 2 impacted Vehicle 1 in a front-2-front corner manner whilst Vehicle 1 was moving at about 10kmph and was being turned sharply to its right.

MS advised:

- CDR indicated that Vehicle 1's steering was being applied in an advanced right turn and Vehicle 2's steering was being applied very slightly left, almost straight ahead, at the point of impact.
- MS was able to establish the precise positioning and direction of the vehicles at the point of impact, as he identified the imprint of the manufacturer's badge of vehicle 1, on the front of vehicle 2.
- Based upon the CDR, at the moment of impact, Vehicle 2 was moving at 50 km/h. It had reduced from 69 km/h, in the 5 seconds prior to impact. Vehicle 1, at the moment of impact, was moving at 10 km/h. At 0.5 seconds prior to impact, Vehicle 1 was moving at 8 km/h. It had been stationary in the 4.5 seconds prior.
- MS concluded that the driver of Vehicle 1 had brought the vehicle to a stop with its steering applied at very mild right-turn light angles until sometime between 1.5 seconds and 1 second before impact, when the driver of Vehicle 1 applied a rapid and considerable right-turn steering input about which time the vehicle accelerated to about 10 km/h.
- The rapid and extensive right-hand steering input may have been out of efforts by Vehicle 1's driver to remove themselves from the path of Vehicle 2, that was advancing at speeds of up to 69 km/h on the stationary Vehicle 1.

MS concluded that this description of the collision is not consistent with the circumstances asserted by the complainant and the subject collision event did not occur in the manner that the complainant has reported.

As detailed above, the insurer has provided recordings and transcripts of several conversations it had with the complainant.

During those conversations I note that the complainant variously says:

- *"...The (Vehicle 1), from the middle of the street came more than hundred and hundred kilometres an hour and hit us, ah, front half, bang on..."*
- *"...more than hundred kilometres in a suburb street, you can imagine how bad he was driving..."*
- *"...he was driving more than one hundred and ten..."*

- *“...I was turning right on (L) Road and the guy was you know, going more than hundred, or I don't know how much kilometre and he just bang in front of me...”*

The complainant's description of the speed of vehicle 1, is completely at odds with the conclusions of MS.

The report from MS is thorough, logical and its conclusions are compelling. Those conclusions seriously challenge the version of events as provided by the complainant and the credibility of his claim.

The complainant says that the insurer has missed out on simple things, like:

- A lack of motive behind the accident. The complainant's wife has been out of work since the accident, the complainant has lost his work contract and suffered financial losses.
- The police were unable to track the thief of the stolen vehicle.
- The police report states that the driver of the stolen vehicle was responsible for the crash.

Motive can be relevant when considering the reasons behind or the cause of a collision. However, sometimes the motive is not known. In any event motive is only one matter that needs to be examined considering all the other evidence.

The report from MS significantly challenges the version of events provided by the complainant and the credibility of his claim. The absence of an obvious motive does not overcome the challenge to the complainant's version of the loss.

As stated, I accept that Vehicle 1 was stolen as described by the complainant. However, the inability of the police to track the thief, does not assist the complainant in establishing that his version of the collision is accurate.

The police report was prepared prior to the report from MS and the police did not have access to the report from MS, or the details obtained from CDR.

In my view, this additional information may have altered the conclusion of the police report.

The complainant said that the police had in fact prepared a forensic report and he obtained that report via a Freedom of Information application.

Within the Schedule of Documents, the document obtained by the complainant is described as, "Forensic Report". The document itself is entitled "Event/Case Summary Report".

The document details enquiries made by the police, including forensic investigations of finger prints and DNA.



The document does not provide a forensic analysis of the circumstances of the collision.

Having reviewed all the exchanged material, I am not satisfied that the complainant has met his onus to establish that the damage caused by the collision between Vehicle 1 and Vehicle 2, is covered by the terms of the policy.

As detailed above, the version of the loss provided by the complainant is not consistent with the conclusions of MS.

The insurer is entitled to deny the second claim.

## **2.2 Is the insurer required to pay the complainant non-financial loss compensation?**

There is no doubt that the circumstances of the complainant's second loss are unique.

Accepted insurance law entitles an insurer to investigate a claim, particularly given the unique circumstances of the second claim and its relationship with the first.

AFCA may award non-financial loss compensation where an insurer's handling of the claim has been unreasonably delayed or leads to an unusual degree or extent of physical inconvenience, time taken to resolve the situation or interference with the complainant's expectation of enjoyment or peace of mind.

Having reviewed all the exchange material and accepting that the insurer was entitled to investigate the claims and obtain the reports which it did, I am not satisfied that non-financial loss compensation is appropriate for the circumstances of this complaint.