

The complaint

Mr S complains that Aviva Insurance Limited mishandled his claim on his motor insurance policy.

Where I refer to Aviva, I include claims-handlers, engineers and others insofar as I hold Aviva responsible for their acts or omissions.

What happened

From April 2021, Mr S, through a broker, took out a “mini fleet” insurance policy. The insured vehicles were a hatchback car and a van. Cover was third party, fire and theft (“TPFT”). The policy didn’t cover damage to either of Mr S’s vehicles – unless the damage was caused by fire or theft (including attempted theft).

On the evening of 25 May 2021, someone damaged Mr S’s car outside his partner’s home. The damage included damage to door handles, windows, glove box and interior. There was also damage to the panels, roof and rear of the car.

Through the broker, Mr S made a claim to Aviva. Mr S said that criminals had caused the damage while trying to steal the car.

Aviva declined the claim, saying that the damage was vandalism. Aviva said the car was a total loss in category B (so that it should never again appear on the road).

Mr S complained to Aviva. By a final response dated 20 July 2021, Aviva turned down the complaint. Mr S brought his complaint to us in August 2021.

our investigator’s opinion

Our investigator recommended that the complaint should be upheld in part. He thought that some of the damage was theft-related. He recommended that Aviva should pay Mr S what it would cost to repair the damage to the interior, glove box, front windows and door handles.

my provisional decision

After considering all the evidence, I issued a provisional decision on this complaint to Mr S and to Aviva on 11 January 2022. I summarise my findings:

Aviva’s notes suggest that the first notification of loss was in relation to the damage on 25 May. It says that the broker reported this as vandalism. But whatever Mr S had told the broker, the broker may have misreported to Aviva. So I didn’t place much weight on the file note as evidence that Mr S initially reported vandalism and then changed this to attempted theft.

As the damage was sustained, I found it likely that all the damage was caused directly by the unsuccessful attempt to drive the car away, including the criminals’

violent frustration. For that reason, I was minded to find that Aviva treated Mr S unfairly by declining his claim.

If I was wrong that all the damage was caused directly by the attempt to drive the car away, then there was an alternative reason why I was minded to find that Aviva treated Mr S unfairly by declining his claim. That reason was that, on the balance of probabilities, the criminals' actions met all the ingredients of the offence of theft. By breaking into his car, they dishonestly assumed some of the owner's rights and "appropriated" it. By deliberately damaging it beyond repair, the criminals showed an intention permanently to deprive the owner of his car.

As far as I knew Mr S still had the use of his van. But he has some issues with anxiety. And I found it likely that Aviva's decision made him feel disbelieved and more worried than usual about the future. He had to get his partner to help him pursue his complaint.

Subject to any further information either from Mr S or from Aviva, my provisional decision was to uphold this complaint. I intended to direct Aviva Insurance Limited to pay Mr S:

1. the market value of the car as it was before the damage on 25 May 2021, less the policy excess; and
2. simple interest on that payment at a yearly rate of 8% from 25 May 2021 to the date of payment. If Aviva considers that it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Mr S how much it's taken off. It should also give him a certificate showing this if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate; and
3. £200.00 for distress and inconvenience.

Mr S accepted the provisional decision.

Aviva disagreed with the provisional decision. It says, in summary, that:

- It refers to the Criminal Damage Act 1971 Section 1 and the Theft Act 1968 Sections 1, 3, & 6.
- By deliberately causing the level of damage that they did, the criminal(s) could not have had any intention to appropriate the vehicle. Instead, their intention was to maliciously and wantonly cause criminal damage. It is not feasible that this level of damage was caused in the act of attempting to steal the vehicle.
- The vehicle clearly had not been driven and there was no evidence it had been moved, or the criminal(s) attempted to move it. If it were the criminal(s)' intent to steal the vehicle and drive it away, smashing the windscreen would be counterproductive to this. It seems pure conjecture to speculate that the criminal(s) were so frustrated by their inability to steal the vehicle that they would risk arrest by creating additional disturbance and damaging the vehicle beyond repair.
- The vehicle was not "appropriated" as for the entire duration the damage was caused to it, it was still situated on Mr S's partner's driveway. The vehicle effectively remained in his custody, but was criminally damaged whilst it remained so.

- Damaging something beyond repair while it remains in someone's custody is not the same as appropriating the vehicle and removing it from their custody with the intention of permanently depriving them of it. Aviva as a motor insurer deals with a high number of theft and attempted theft claims, and the circumstances and physical evidence from this incident do not fit the usual way of theft/attempted theft.
- Brokers report claims to Aviva on behalf of our mutual clients. It is their duty to ensure that they are reporting incidents correctly and accurately. Aviva takes such information from brokers on trust, unless any evidence emerges to the contrary. As such, if there has been a genuine error or omission on the part of the broker, Aviva contends that this would be a complaint for the policyholder to raise with the broker. The claim was presented to Aviva as vandalism, and it has seen no compelling evidence to suggest this was anything but as first reported. As such, the TPFT cover will not respond in respect of this incident.
- The police say the incident was reported as criminal damage and not attempted theft.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've taken into account the law, regulation and good practice. Above all I've considered what's fair and reasonable.

The policy wording was written to apply whether the cover was comprehensive or TPFT. Section 1 of the policy covered damage. A policy index provided that where cover was TPFT, Section 1 operated only in respect of loss of or damage "*caused directly by Fire or by Theft*".

The policy contained the following definition of "*Theft*":

"Theft, attempted theft or taking your vehicle without your consent."

So the definition of theft included attempted theft.

Mr S has told us that on 24 May, an object broke the rear windscreen of his car while he was driving it. Aviva's notes make no reference to this.

Mr S has told us that the next day, criminals first tried to break into his partner's home, probably to look for car keys. Mr S has told us that the incident included the criminals entering the car and emptying the glove box, probably to look for a spare key.

Aviva's notes suggest that the first notification of loss was in relation to the damage on 25 May. It says that the broker reported this as vandalism. But whatever Mr S had told the broker, the broker may have misreported to Aviva. So I don't place much weight on the file note as evidence that Mr S initially reported vandalism and then changed this to attempted theft.

In any event, I don't doubt that the criminals had done criminal damage. It would be reasonable for Mr S, the broker, the police and Aviva to say so. But neither the legislation or the policy wording say that criminal damage and theft are mutually exclusive. So there remained the issue of whether the damage was – in the words of the policy - "*caused directly ... by Theft*". And "*Theft*" includes attempted theft.

The damage to the car was very extensive. It went way beyond what a thief or joyrider would usually do in the course of trying to enter and start a car.

One of the engineers expressed the following opinion:

“I would suggest that the vehicle has been subject to vandalism damage and not theft. I cannot see how the vehicle would have been subject to attempted theft, surely if this was attempted theft the thieves would not have hung around to cause this amount of damage in case of disturbing someone in the process”

But the photographs show that the criminals got into the vehicle. And that engineer’s opinion doesn’t analyse the damage by reference to how they got inside. So I don’t place much weight on that opinion.

And I find that the damage to usual points of entry such as doors and windows was consistent with breaking into the car in an attempt to take it away.

On balance, I accept Mr S’s evidence that criminals had tried and failed to take his car, before doing further damage to it. The damage included malicious damage to glass and body panels. And the damage was sustained for some time. So I find it likely that the criminals started the damage in an attempt to drive the car away, and – when they were unsuccessful - they continued to cause damage out of violent frustration.

So I find it likely that all the damage was caused directly by the unsuccessful attempt to drive the car away. For that reason, I find that Aviva treated Mr S unfairly by declining his claim.

If I’m wrong that all the damage was caused directly by the attempt to drive the car away, then there is an alternative reason why I find that Aviva treated Mr S unfairly by declining his claim. That reason is that, on the balance of probabilities, the criminals’ actions met all the ingredients of the offence of theft – they dishonestly appropriated Mr S’s car with an intention permanently to deprive him of it.

As I understand it, the Theft Act meaning of the verb “appropriate” requires an assumption of some of the rights of the owner. And that doesn’t necessarily involve moving the property.

The criminals broke into the car. Some of the damage was consistent with an attempt to take the car away. Overall the criminals destroyed all the usefulness and value of the car. So I consider that they dishonestly assumed some of the owner’s rights and “appropriated” it.

In thinking about “intention” I find it likely that the criminals intended the consequences of their actions. By deliberately damaging the car beyond repair, the criminals showed an intention permanently to deprive the owner of it.

I’ve found that all the damage was caused directly by the unsuccessful attempt to drive the car away. So Aviva treated Mr S unfairly by declining his claim.

if I’m wrong about that, I’ve found that the criminals’ actions met all the ingredients of the offence of theft – they dishonestly appropriated Mr S’s car with an intention permanently to deprive him of it. That’s an alternative reason why Aviva treated Mr S unfairly by declining his claim.

Putting things right

In an attempt to put things right, I find it fair and reasonable to direct Aviva to pay Mr S the market value of the car as it was before the damage on 25 May 2021, less the policy excess.

As he's been out of pocket since that date, I find it fair to direct Aviva to add interest at our usual rate.

I've also thought about the non-financial impact on Mr S of Aviva's decision to decline his claim. As far as I know he still had the use of his van. But he has some issues with anxiety. And I find it likely that Aviva's decision made him feel disbelieved and more worried than usual about the future. He has had to get his partner to help him pursue his complaint.

So I find it fair and reasonable to direct Aviva to pay Mr S £200.00 for distress and inconvenience.

My final decision

For the reasons I've explained, my final decision is that I uphold this complaint. I direct Aviva Insurance Limited to pay Mr S:

1. the market value of the car as it was before the damage on 25 May 2021, less the policy excess; and
2. simple interest on that payment at a yearly rate of 8% from 25 May 2021 to the date of payment. If Aviva considers that it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Mr S how much it's taken off. It should also give him a certificate showing this if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate; and
3. £200.00 for distress and inconvenience.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 4 March 2022.

Christopher Gilbert

Ombudsman