

The complaint

Mr N has complained that AWP P&C SA (AWP) have unfairly declined the claim for repairs to his car under his mechanical breakdown insurance policy.

What happened

Mr N took out a mechanical breakdown insurance policy with AWP in August 2021. In November 2021, he noticed a slight juddering from his car when he applied the brakes, so he took his car to a repair garage to have the issue investigated.

The investigation found mud compacted around the drive shaft and suggested it might have caused the drive shaft to fail. The technician also concluded that the drive shaft had heated up and caused the front nearside brake disc to warp. As a result, the drive shaft, brakes and discs needed to be replaced.

Mr N was informed by the dealer that AWP declined the claim on the basis that the damage was caused by mud. Mr N asked the dealer to explain how such damage could have occurred. He recalled the dealer saying it wasn't something they'd seen before and they'd agreed to significantly reduce the repair costs as a result.

After receiving a complaint from Mr N about their decision to decline his claim, AWP issued their final response letter not upholding his complaint on 31 December 2021. In summary, they said that they'd received a video from the repair garage which confirmed the drive shaft hadn't been damaged by a defect, but rather, it had been damaged by a build-up of mud. They also said the garage concluded the vehicle was likely used-off road, which caused the build-up of mud. In addition, AWP advised that third party software had been installed onto the vehicle which had been modified outside of BMW recommendations. They also concluded that, as the alloy wheels weren't approved by BMW UK, the replacement of the alloy wheel also wouldn't be covered by the warranty.

In responding to the final response letter, Mr N told AWP that the car had not been driven off-road. He suggested that if it had, he would expect there to be damage to the underside of the car, such as scratches to the under tray. Mr N also asked AWP to assess his claim for the alloy wheel from when it had originally cracked and he requested they provide him with their evidence to support their conclusion that his car had been driven off-road. AWP didn't reply to those requests made by Mr N.

Unhappy with their final response, Mr N brought his complaint to our service. He told us that his normal driving does involve a lot of country lanes, but those are public roads and are not off-road. Mr N also explained that he had an off-road car, which he could use if he wanted to drive off-road.

Our investigator looked into Mr N's complaint and, on 21 April 2022, issued her view upholding the complaint. In summary, she explained that AWP had unfairly declined Mr N's claim in relation to the drive shaft because they hadn't provided sufficient evidence to persuade her that the off-road exclusion had been fairly applied. Our investigator also explained why she didn't think the exclusion regarding the installation of software was

relevant, and she concluded that the alloy wheel wouldn't be covered by the warranty.

With regard to the impact of AWP's actions on Mr N, our investigator explained that he was moving to a new house at the time the car was being repaired, and having to spend his money, at that time, on repairs that should have been covered by the warranty, rather than on moving house, caused him stress.

AWP didn't accept our investigator's view and requested an ombudsman's decision on the complaint. Their response to the view was: *"we do believe the video from the [repair garage] supports the reason why the claim was declined"*.

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.

Mr N's policy covers him for *"the costs of repairing or replacing the covered components below that have suffered electrical or mechanical failure during the period of insurance"*.

As Mr N had comprehensive cover, the policy provided cover for *"all factory fitted mechanical and electrical components of the vehicle"*, with some exceptions listed alongside. These included *"brake and clutch facings, discs and drums"*, and *"wheels and tyres"*, among other things. The components that Mr N has claimed for under the warranty include the drive shaft and the brake components that were damaged as a result of the fault with the drive shaft. Although *"brake and clutch facings, discs and drums"* are excluded from the list, in these circumstances, where they've been damaged as a result of a faulty component, I think it's fair that the costs of repairing or replacing those, should also be covered. However, as our investigator mentioned in her view, replacement of the alloy wheel wouldn't be covered by the warranty.

Electrical or mechanical failure is defined in the policy as: *"...the sudden and unexpected failure of a component which is covered by the warranty section of this insurance and which needs immediate repair or replacement"*. Mr N took his car to the garage because it was juddering when he applied the brakes. Upon investigating the issue, the repair garage was of the view that the drive shaft and brakes needed immediate repair and / or replacement for the vehicle to be able to be driven properly again. So, I'm satisfied the parts are covered by the warranty and meet the requirement of the policy for a sudden and unexpected mechanical failure to have occurred.

However, AWP have sought to apply the "off-road" exclusion to decline Mr N's claim. This exclusion is detailed on page 20 of the policy terms and conditions. Under the heading, *"What must I do to keep the warranty valid?"* it says, under paragraph 6, *"This warranty will not cover the following.....an insured vehicle used for courier or private hire services, track days, off road use, competitions or racing of any kind"*.

In seeking to apply this exclusion to decline an otherwise valid claim, AWP need to provide evidence that supports the application of that exclusion to the claim. In this case, AWP have solely relied on the two-minute video provided by the repair garage, when the technician was carrying out a courtesy vehicle check for Mr N. Between approximately 30 seconds into the video to one minute and three seconds, the technician said:

"When raised the vehicle in the air I found that there was a lot of mud compact around your drive shaft here. I've cleared most of it out and removed your undertrays but as you can see from the floor there was a serious amount of mud, compact all around your sub-frame this has actually damaged the CV boot and mud has entered it I would advise replacing the

whole drive shaft as this will have worn away the gears inside of there."

Then approximately two minutes into the video, the technician said:

"I do not believe it was the brakes that were at fault, I believe it was the amount of mud that came out of the vehicle compressing on the drive shaft".

I've carefully considered the video to decide whether I think it provides persuasive evidence to show that Mr N drove his car off-road, which caused the damage to the car that he's claimed for. And having done so, I'm not persuaded. The technician speculated that the mud may have caused the damage and showed a large deposit of mud on the floor of the garage in support of that. However, Mr N offered a plausible explanation for this when he told AWP that because of where he lives, he frequently drives along (public) country lanes. He also challenged AWP's conclusion that the presence of that amount of mud indicated the car had been driven off road, as there appeared to be no corroborating evidence for that, such as scratches underneath the car.

Where the evidence is incomplete, inconsistent or contradictory, as it is here, I make my decision based on the balance of probabilities, that is, what I think more likely than not happened. While I accept one possible explanation for the quantity of mud found on the undercarriage of Mr N's car, could be that the car had been driven off-road, I'm not persuaded that that explanation is more likely than not, the cause of the damage. Mr N has provided an equally plausible explanation. For AWP to persuade me that the exclusion has been fairly applied, I need to be satisfied that their evidence shows it's more likely than not.

I note that in addition to the video there are a couple of other comments included in the handwritten notes added by the garage to their three-page report, and in the case history notes AWP have provided. However, even taking account of that evidence together with the video, I don't agree that AWP have provided sufficient evidence to show that the damage to the car had likely been caused by Mr N driving his car off-road. So, my decision is that I'm upholding Mr N's complaint.

As AWP unfairly declined Mr N's claim, they should pay him the amount he paid the repair garage for the repairs to the drive shaft and brakes subject to deducting any excess payable under the policy. Also, as Mr N has not had use of that money, AWP should pay 8% interest simple per year to the amount from the date Mr N paid it (17 November 2021) to the date the awards detailed below are paid to Mr N. (The total sum Mr N paid to the garage for repairs to his car was £2,750.35. After deducting the £730.63 attributable to the replacement of the wheel, that gives a balance of £2,019.72 that AWP must reimburse to Mr N).

I've next considered the impact AWP's actions have had on Mr N. Having done so, I'm of the view that the lack of care taken in considering Mr N's claim, and the poor customer service he's received from AWP have clearly caused him distress and inconvenience. When he purchased the vehicle, the apple play software had already been installed in the car and Mr N specifically clarified with the dealer that no non-BMW approved software had been put in the car. Without checking this, AWP alleged that Mr N had acted outside of the policy terms in modifying the car; and they put that forward as a reason in support of their decision to decline his claim. AWP also alleged that Mr N had used his vehicle in breach of the terms of the policy by driving it off-road, also without any persuasive evidence to support that allegation. Mr N also told us that he was moving to a new house around the time that his claim was declined, and he was unable to use the money spent on the repairs, to help with his move, which caused him additional stress.

Taking all of this into account, I'm satisfied that Mr N has been caused distress and inconvenience by AWP, as a result of the way they've handled his claim, which he should be

compensated for. So, I'm awarding Mr N £200 compensation for that distress and inconvenience.

Putting things right

My final decision is that I uphold this complaint and require AWP P&C SA to pay Mr N:

- the sum of £2,019.72 that Mr N paid the repair garage for the repairs (less any applicable excess);
- 8% interest simple per year on that sum, from the date Mr N paid for the repairs (17 November 2021) to the date these awards are paid to Mr Nⁱ; and
- £200 compensation for the distress and inconvenience he's suffered as a result of the way AWP P&C SA have handled his claim.

My final decision

My final decision is that I uphold this complaint and require AWP P&C SA to pay the awards detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 17 June 2022.

Carolyn Harwood
Ombudsman

ⁱ If AWP P&C SA considers that it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Mr N how much it's taken off. It should also give Mr N a certificate showing this if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate