

## **The complaint**

C, a limited company, complains that HSB Engineering Insurance Limited (HSB) has declined a theft claim made under their commercial plant insurance policy.

## **What happened**

C has a commercial contractor's plant insurance policy underwritten by HSB. This covers, amongst other things, damage to, and theft of, owned and hired plant.

In March 2020 a claim was made to HSB for the theft of an asphalt recycler. HSB ultimately declined the claim as they said a policy endorsement relating to security requirements of the asphalt recycler hadn't been complied with.

C approached this service as it was unhappy with HSB's decision as it felt it had met the intention of the endorsement in other ways.

Our investigator looked into matters, but he didn't uphold the complaint. He didn't think HSB's decision was unreasonable based on the information he had at that time. However, C provided some additional information (an additional photo), which hadn't been provided to HSB previously.

Therefore, our investigator said that HSB should consider this new information and if C remained unhappy with whatever decision was reached by HSB after taking this into account, we would consider it as a new complaint. HSB considered the photo and maintained the claim declinature. So, C brought a new complaint to this service.

Our investigator considered things taking into account all the information and upheld the complaint in part. Whilst he noted all parties accepted the endorsement hadn't been complied with, taking into account the photos, he was of the view that C had gone above what the endorsement required in securing the recycler. Therefore, he said it wasn't fair for HSB to decline the claim on this basis alone. He also addressed a number of points made by HSB in support of their overall claim decision. The investigator said HSB should reconsider the claim in line with the remaining policy terms.

However, the investigator also noted HSB had some other concerns about the claim, such as insurable interest of the recycler, which they'd put C on notice of previously. But HSB hadn't relied on these concerns to decline the claim at this stage as they hadn't fully investigated or reached a conclusion on those.

So, whilst the investigator said it wasn't fair for HSB to rely on the breach of endorsement, he also said HSB may now wish to investigate those concerns further – so he wasn't directing them to deal with the claim at this stage, and instead to reconsider it.

As an agreement couldn't be reached, the case was passed to me to decide.

## 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.

As mentioned above, HSB has relied on non-compliance of a security endorsement when declining the claim. So, this is point I'll be considering here in my final decision. HSB has other concerns, such as insurable interest, but it's not fully explored these or relied on these concerns to decline the claim (although it has put C on notice of its intentions to investigate these concerns further if needed). So, I won't be reaching a decision on those provisional concerns of HSB – I'll solely be considering the actual reasons HSB has declined the claim at this stage.

I should also clarify, there were numerous concerns and arguments presented by HSB to our investigator, which they addressed individually. However, I don't intend to comment on every point or argument which has been raised. Instead, I'll focus on what I consider to be the key issues relevant to reaching a final decision on what is fair and reasonable in all the circumstances of the case. I don't mean this as a discourtesy to either party, instead it reflects the informal nature of this service and my role within it. Having said that though, I'd like to reassure both parties that I've considered all the points and information they have provided when reaching my final decision, even if I haven't commented on them specifically.

### The policy endorsement

HSB says C hasn't complied with the following endorsement in its policy:

#### *"Endorsement wording*

*The following is a condition. If you do not keep to this condition, and that condition is relevant to your claim, we may refuse to pay part or all of the claim.*

*In respect of the following contractors' plant:*

*You must comply with the following security practice whilst contractors' plant is under your control and is left unattended overnight or at weekends:*

- *Compressors, decontamination units, pressure washers, trailers and other towed items of contractors' plant are to be immobilised by the application of a suitable wheel clamp;"*

So, this says a wheel clamp must be applied to immobilise the recycler (which is a towed item). It isn't disputed there wasn't a wheel clamp in operation and the endorsement hasn't been complied with by C. However, C argues that it removed all the wheels, so it says in effect the item was more secure and it says it has fulfilled the intention of the endorsement - to immobilise the recycler.

I accept, as does C, that it hasn't complied with the specific endorsement here. It's clear the intention of this endorsement is to immobilise the recycler and therefore reduce the risk of theft of towable equipment to C and HSB.

However, in the absence of a wheel clamp, if it is accepted that the wheels were removed, in my view that non-compliance doesn't increase the risk to HSB, or make the recycler more mobile than it would've been with a singular wheel clamp. I say this because one wheel clamp on a four wheel vehicle would mean only the one clamp would need to be removed in order to tow it. However, if it has no wheels at all in the first place, to tow it in a similar way as you would by removing the singular clamp, a thief would need to bring four wheels to

mobilise it, or to remove it by craning or dragging it from its location (which they could also do if there was a wheel clamp). So, whilst I acknowledge the endorsement wasn't strictly complied with, if all wheels were removed, I don't think this would have increased the risk as a result of the non-compliance.

In any event, the wording of the policy says that HSB *may* decline the claim. In my view this implies that in some cases they may decline the claim, but in others they may not. So, on strict non-compliance with the endorsement, there may be occasions where the claim is still accepted by HSB. Based on this wording, it doesn't appear that compliance with the endorsement is necessarily conditional for a successful claim to be made.

However, regardless of this, whilst I do consider whether the terms of a policy have been strictly complied with, and/or applied by strict application by an insurer, my remit also extends to what I consider is fair and reasonable in all the circumstances of the case.

In these circumstances, C recognises it hasn't complied with this endorsement as it didn't have a wheel clamp in operation. However, C says the asphalt recycler was more secure as it had removed all four wheels. In support of its position, C has provided photos of the asphalt recycler without wheels and a separate photo of the wheels.

In response to this photo evidence, HSB has raised a number of points, this includes:

- They are unsure if the photo of the recycler without wheels is the one which was stolen
- The photo of the recycler is several years old and taken at a different location and prior to when C said it bought it. And it was only provided after HSB had declined the claim for non-compliance of the endorsement
- Whilst the photo of the recycler from several years before shows it without wheels, there is nothing to say this would be how C would've stored it after it took ownership
- The wheels photo was taken more recently and was at a different location and site
- C didn't mention the wheels had been removed when being interviewed by the loss adjuster - despite being asked about security
- C said he thought the recycler may have been towed during the call with the loss adjuster, which HSB says implies it had wheels on at the time
- The burden is on C to demonstrate the wheels were removed, rather than HSB to show they weren't

I'll consider some of the key points above in deciding whether, on balance, I'm persuaded the wheels were removed, and whether HSB has acted fairly and reasonably in all the circumstances of the case when declining the claim.

### The asphalt recycler

HSB has said they are unsure whether the recycler without wheels in the image provided by C is the one which has been stolen.

C has said that this is the recycler that was stolen, and the image is of the same make and model of recycler being claimed for, and I haven't been provided with anything from HSB which demonstrates that isn't the case. In fact, I would question how feasible it would be to find a photo of another recycler, the same make and model of the recycler being claimed for, which had its wheels removed – which HSB say is an unusual thing to do.

HSB also say the photo metadata shows the image was taken several years prior to the loss, at a different location, and when the item was owned by another company.

I recognise the metadata shows several years prior to the loss and a different location. However, I can't see that C has disputed this, or implied the photo was taken on site at the time or location of loss.

In addition, the previous owner of the recycler was a company which one of C's directors is also a director of. And C has explained that the recycler was sold from one company to the other. I don't find C's explanation unreasonable here and I'm satisfied this clarifies why the images were taken before the loss, and whilst the item was owned by another company – which C is also the director of. This also reasonably explains why it would have been in a different location at the time the image was taken.

### Evidence of wheel removal

HSB has said the metadata from the image of the wheels is from a different location to the site the recycler was stolen from. They have questioned this, along with why the wheels wouldn't be stored at the same site as the recycler was being used.

I don't think the fact the wheels were pictured in a different location is unusual. I say this because they were pictured at the site of one of the directors of C's other companies, and that is also the site of the company which sold the recycler to C. Whilst HSB has said this site used to be a scrap yard, I don't think that demonstrates the wheels pictured aren't those from the stolen recycler, or that they belonged to the scrap yard rather than C/the recycler.

In addition, HSB's own internal notes reflect they think the wheels are the ones from the recycler. And I haven't been provided anything which shows on balance that they aren't. I also don't think it's unreasonable that the wheels would be stored at another location (which is also C's directors, albeit for a different company), given the purpose of the removal was to reduce the risk of theft of the recycler overall.

HSB asked C for any images to support its position, and C provided this following HSB's request. And the metadata shows this was taken only a few days before being provided, which in my view, accepting they are the wheels for the recycler in question, that they weren't on the recycler at the time of theft - hence why they are able to be photo'd after the recycler had been stolen.

HSB has also said that just because the recycler was stored without wheels several years before, doesn't mean it would be stored in that way once in the ownership of C. However, given C had the same director as the previous owner of the equipment, as I mentioned above, on the contrary, I don't think it would be unusual to continue to store the item in the same way. In addition, C has also explained it always secures trailers and other towable plant in this manner to reduce the risk of theft, and I don't find its explanation of why it removes wheels unreasonable or illogical.

#### The call with the loss adjuster

HSB has raised several concerns about the call between C and the loss adjuster. They say they fail to understand why C didn't mention the wheels had been removed during this call when being asked about the security of the recycler. They also say that C said it thought the recycler may have been towed away, which indicates it most likely had the wheels on at the time.

Whilst I note HSB's concerns, having listened to the call, I'm not in agreement. During the call the loss adjuster asked C about any security devices *installed* on the recycler. C said there was a tow lock, but that was the only security *installed*. Given C was asked about *installed* security devices, I don't think the answer C gave was unreasonable. It's clear the loss adjuster was asking about built in security, rather than how C secured it beyond that. Therefore, whilst C didn't mention the removal of the wheels of its own accord without prompt, in the context of the call and the question asked, I don't think this was unreasonable.

I've also considered HSB's point about C mentioning the recycler may have been towed, and their assertion that means it must therefore have still had the wheels on. Having done so, I don't agree.

In the full context of the call, the loss adjuster asks C if it has any thoughts on how the recycler *may* have been stolen. They also verbally recognised that this would be 'impossible' to answer. C said either it could have been towed, or put on to a vehicle, possibly lifted or winched onto something like a recovery vehicle. I don't think C's answers were unreasonable here. It is clear C was speculating about possibilities as that was what was asked by the loss adjuster.

Towing it could've been by dragging it without wheels onto a low loader, or the thieves could've equally come with a set of wheels. Either way it was speculation on possibilities by C, as it couldn't have known for certain either way.

In any event, beyond towing or lifting onto another vehicle, I'm not entirely sure there would be any other way in which it could have been stolen more generally, so I don't think the speculative answers C gave are unreasonable, or go any way to support HSB's arguments that the recycler mostly likely had the wheels on.

#### The evidence provided

HSB says it is for C to demonstrate the wheels were removed, rather than for them to demonstrate they weren't, in line with the relevant legislation, including the Insurance Act 2015. I've considered above the impact of C's non-compliance with the endorsement, which as I say, doesn't appear conditional for a claim to be successful in any event. And as I also outlined, whilst I take into account the relevant policy terms, rules and legislation, my remit also extends to what is fair and reasonable in all the circumstances of the case.

I can't know with certainty either way whether the wheels were removed or not. And where I can't know with certainty, I need to decide on balance what I think is most likely to have occurred when reaching a decision on what is fair and reasonable in all the circumstances of the case.

Having taken everything into account, I'm persuaded that on balance, based on the evidence, it is most likely the wheels were removed at the time of loss for the reasons I've outlined above. And whilst I accept the endorsement wasn't strictly complied with, as I'm satisfied on balance it is most likely the wheels were removed, I'm also of the view that not complying with the endorsement wasn't material to the loss and didn't increase the risk as a result of the non-compliance. I think C went above and beyond the endorsement when it immobilised the recycler by removing all its wheels.

Therefore, I don't think HSB has acted fairly or reasonably when declining the claim based on the failure to comply with the endorsement, and I don't think failure to comply with the endorsement increased the risk of loss. And I'm persuaded that C has done enough to show on balance the wheels were removed at the time of loss too.

With this in mind, I think it would be fair and reasonable in all the circumstances of the case for HSB to reconsider the claim in line with the remaining terms.

However, I should outline here that I'm not directing HSB to deal with the claim at this stage. That's because they have a number of other concerns which they've put C on notice of, such as insurable interest of the recycler, which they've not fully explored or reached a position on and may need to investigate further. My decision here is solely in relation to the failure to comply with the endorsement, and whether on balance the wheels were removed.

Once HSB has considered matters further, and if C is unhappy with the position ultimately reached, it may be able to refer a new complaint about that new decision to this service.

### **My final decision**

It's my final decision that I uphold this complaint and direct HSB Engineering Insurance Limited to:

- Reconsider the claim in line with the remaining policy terms

Under the rules of the Financial Ombudsman Service, I'm required to ask C to accept or reject my decision before 2 December 2022.

Callum Milne  
**Ombudsman**