

The complaint

Mr R has complained about Allianz Insurance Plc's decision to reject his claim under a Motor Trade Select insurance policy.

What happened

Mr R agreed to swap a vehicle he owned, which I'll refer to as 'vehicle M', plus an additional amount in cash, for a van. He'd found the van on a website which allows people to arrange this sort of transaction. Mr R handed over the vehicle with its keys, plus the cash, and took possession of the van, along with the keys. Later, when he was driving the van, he was stopped by the Police. They told him the vehicle he was driving was a cloned vehicle, which meant it was a stolen vehicle with a false number plate matching a genuine vehicle.

Mr R made a claim under his policy for the theft of vehicle M. Allianz investigated the claim and then turned it down. This was on the basis that vehicle M had not been stolen and there was no other section of the policy that covered its loss. Mr R complained to Allianz, but they said they were right to reject his claim.

Mr R asked us to consider his complaint about Allianz. One of our investigators did this and said Allianz were entitled to turn down Mr R's claim.

Mr R asked for an ombudsman's decision. He said he wasn't aware that his policy didn't cover the type of loss he'd claimed for and he thought that the policy might have been mis-sold.

I issued a Provisional Decision on 11 January 2023 in which I set out what I'd provisionally decided as follows:

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

Mr R's policy provides cover for the events set out in it. One of these is the theft of vehicles insured under the policy whilst away from the insured premises. This comes under Section 2 of the policy entitled 'Road Risks'. And the vehicle Mr R exchanged was insured under this section of the policy at the time he exchanged it. The policy defines theft as follows:

'The Term Theft used in Section 2 - Motor Vehicle Road Risks shall include the offence of 'taking a motor vehicle or other conveyance without authority' as defined in Section 12 of the Theft Act 1968.'

Section 12 of the Theft Act 1968 states the following:

12 Taking motor vehicle or other conveyance without authority.

(1)Subject to subsections (5) and (6) below, a person shall be guilty of an offence if, without having the consent of the owner or other lawful authority, he takes any conveyance for his own or another's use or, knowing that any conveyance has been taken without such

authority, drives it or allows himself to be carried in or on it.

The person who took vehicle M took it with Mr R's consent. But he gained this consent under false pretences. And it is clear he provided a stolen vehicle to cover what he was meant to pay in consideration for Mr R's vehicle. I think this means it is fair and reasonable to treat this as the theft of vehicle M that was, at the time, insured under Mr R's policy. I say this because it can be said that – in effect – Mr R didn't really give his proper consent to the person who took the vehicle. And the person had no other lawful authority to take it. I appreciate it is arguable whether it was a theft according to the Theft Act 1968, but I think for the purposes of his claim Allianz should have treated it as one.

There is an exclusion for theft by deception in Mr R's policy, but this only applies to claims under Section 1 of the policy entitled 'Material Damage'. And Section 1 only covers property belonging to Mr R whilst it is at the premises listed in the schedule. This means Mr R does not have a valid claim under this section anyway. But, as I've said, I think he does have a valid claim under Section 2.

This means I think the fair and reasonable outcome to Mr R's complaint is for Allianz to settle his claim in accordance with the claim settlement terms in his policy. As Mr R has been without the funds due to him, I also think it is fair and reasonable for Allianz to pay interest on the amount due at 8% per annum simple from one month after Mr R made his claim to the date of actual payment. The one month is to recognise the fact Allianz would always have needed a period to investigate the claim.

I gave both parties until 25 January 2023 to provide further comments and evidence.

Mr R responded and asked whether he had a valid claim under his policy for the cash he handed over for the van, along with vehicle M. He also asked whether he had a valid claim for the private registration number attached to vehicle M, as he'd been unable to get this back after he'd realised the van he'd bought was stolen.

I emailed Mr R and told him that I didn't think he had a valid claim for the cash he handed over, due to a theft by deception exclusion under Section 1 of his policy. I also told him that I didn't think the loss of his registration was covered by his policy. He has accepted my view on these issues.

Allianz asked for an extension to provide further comments, which I allowed. They've now provided further comments. They've said there is judicial guidance as to the legal interpretation of "consent" within Section 12 of the Theft Act 1968. In their view, there has not been a taking without consent to satisfy this section and they've cited a case considered in the Queen's Bench Division of the High Court – *Whittaker and Another v Campbell [1984] Q.B. 318*. The Court decided in this case that where goods were obtained from the owner by fraud, but with the owner's consent, that fraud did not vitiate (impair the legal validity) of the consent that had been given. Allianz thinks that applying this legal authority shows that where there is apparent consent to the taking, which was obtained by fraud, the position in law is that this will not necessarily constitute taking without consent as defined under Section 12.

In view of this Allianz feels that there has been no theft to satisfy the wording of Section 12. In which case – in their opinion - the policy does not respond to the event claimed for. As far as they are concerned legal consent was provided and no offence was committed. By 'no offence', I assume they mean the offence of 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 considered Allianz's comments and studied the case it has cited, but it does not change my view on what the fair and reasonable outcome to Mr R's complaint is.

I accept that in law the loss Mr R has claimed for may not constitute a theft. And, I did say in my provisional decision this was arguable. However, whilst I have to take the law into account, I must decide what – in my opinion - is fair and reasonable in all the circumstances. I have taken into account the relevant law to this complaint, including the case Allianz have cited. But it remains my view that – whilst the event Mr R claimed for may not be a theft according to Section 12 of The Theft Act 1968, the fair and reasonable outcome to his complaint is for it to be treated as if it were a theft and for his claim to be settled. This is because – whilst the legal position is that his car was obtained by consent and the fact he only provided it due to fraud does not vitiate it, Mr R still lost his vehicle due to circumstances outside his control. And to all intents and purposes, it was stolen from him, albeit as a result of a fraudulent act or acts. I appreciate that on a strict interpretation Mr R's policy only responds where there has been a theft as defined by the Theft Act 1968. But I think the position Mr R has found himself in is fairly unusual and something many people would view as a theft. I say this as he handed over a valuable asset expecting to get another in return, but ended up with nothing.

Putting things right

For the reasons set out above and in my provisional decision, I still consider the fair and reasonable outcome to Mr R's complaint is for Allianz to settle his claim in accordance with the claims settlement terms in his policy. I also consider they should pay interest on the amount due to Mr R at 8% per annum simple¹.

My final decision

For the reasons set out above and in my provisional decision my final decision is that I uphold Mr R's complaint and order Allianz Insurance Plc to do what I've set out above in the 'Putting Things Right' section.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 6 March 2023.

Robert Short
Ombudsman

¹ Allianz must tell Mr R if they have made a deduction for income tax. And, if they have, how much they've taken off. They must also provide a tax deduction certificate for Mr R if asked to do so. This will allow Mr R to reclaim the tax from His Majesty's Revenue & Customs (HMRC) if appropriate.