

## **The complaint**

A limited company that I will refer to as S complains about the decision of Zurich Insurance PLC to decline its commercial insurance claim for theft.

## **What happened**

The following is intended only as a brief summary of events. Additionally, for the sake of simplicity, I have largely just referred to S and Zurich when discussing their or their agents' actions.

S operated as a lighting and camera hire equipment company. And held a commercial insurance policy underwritten by Zurich. In September 2020, S suffered a theft of its equipment from one of its vehicles that was being used to collect this equipment from a third party. S claimed for this loss under the policy, but Zurich declined the claim. It was not satisfied that S's employee had locked the vehicle at the time of the theft, and relied on the following within S's policy:

"It is a condition precedent to our liability in respect of Property Insured while contained in an unattended road vehicle that:

- a) all doors windows and other openings are fully closed and locked whenever the vehicle is left unattended and any property concealed from view wherever possible..."

In doing so, Zurich referred to CCTV footage of the event and said that the driver was not seen locking the vehicle. Reference was also made to issues with the locking of the side door. And with alleged inconsistencies in the driver's statement. Various expert opinions were sought by each side, but Zurich did not alter its position.

S brought its complaint to the Ombudsman Service. And our Investigator recommended it be upheld. He said that the CCTV footage showed the driver pausing before moving away from the vehicle, which may have been when it was locked. Then the thief, with an item in his hand, is shown stopping at the rear of the vehicle for a period, before opening the door. The Investigator was persuaded that the vehicle was most likely locked, and that the activity of the thief was a process of unlocking it. So, he recommended Zurich reassess the claim on the remaining terms of the policy.

Zurich did not agree, and the complaint has been passed to me for a decision.

There are some additional circumstances involved in the complaint that are worth commenting on. The parties are aware of these, so again I will be brief. S has entered a process of voluntary liquidation. It had by this point also entered an agreement with a third party company, that I'll refer to as R, relating to the sale of S's business and assets. As a result, R was initially joined to this complaint. However, I have explained to all parties that R does not meet the financial limits required to be an eligible complainant. And so, this company has now been removed from the complaint and I am unable to consider any impact on R itself.

S however is an eligible complainant, and it did bring a complaint within six months of Zurich's final response letter. This has been considered by my colleague and a jurisdiction decision has been issued previously.

### **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 consider that S is an eligible complainant according to the requirements set out in the Financial Conduct Authority Handbook, and that its complaint was referred to the Ombudsman Service within the appropriate timeframes. As such, I consider I am able to consider its complaint about the decline of its insurance claim.

Having done so, I am upholding this complaint. I'll explain why.

At its heart, the issue is reasonably straightforward. There is seemingly no dispute that insured property was stolen, or that this theft happened from an unattended vehicle. The issue is whether the vehicle more likely than not locked.

It should be pointed out that whilst S is obliged to comply with this condition, and failure to do so means Zurich would not be liable for the claim, it is for Zurich to demonstrate the condition has been breached.

The driver of the vehicle was interviewed by Zurich. Comments have been made over whether the responses provided were consistent. But I am not persuaded that there are any significant inconsistencies.

I don't think comments over the nature of the key are significant. The key potentially had the ability to lock the vehicle remotely, by pushing a button, and for a key-blade to be extended from the fob to allow for manual locking or ignition. The driver said that he locks the vehicle by pushing the button. The existence of a key-blade does not appear relevant.

The driver said that the key was kept in his right-hand jumper pocket. In terms of whether he locked the vehicle on this particular occasion, the driver said he was "pretty sure" he did. And that he was "happy that [he] locked it, but ... not sure that [he] checked." Overall, I consider he is consistent in what he said on this issue.

There are some points around the side door to the vehicle. This was not the door that was used to access the vehicle by the thief. However, this door apparently had issues with closing. It was seemingly necessary for straps to be used to hold the door in place, so that the vehicle locking mechanism engaged. It seems that these straps were being used at the time though, which would mean the vehicle would be capable of being locked. So, I am not persuaded that any issues with this side door are directly relevant to the claim.

There is CCTV footage of the incident. All parties acknowledge that this is not the best footage. It was recorded from a third-party CCTV system using a handheld device, rather than being a copy of the recording itself. The quality of the footage is not the best, and it does not cover an extensive period of time. Neither is the entire the vehicle shown in the images.

The footage begins after the driver had finished unloading equipment into the vehicle and was about to make a further trip to collect more. He is seen closing the rear door, and

moving to the roll container, with what appears to be his phone in his right hand. He then puts this away, and pauses for a brief period. His right side is turned away from the camera and he is partially obscured by the time stamp on the footage. He then sets off with the container.

Several seconds later, the thief exits a car which is parked behind S's vehicle and walks in the same direction as S's driver. From the comments of the driver about his actions, and from looking at images of the location, it seems likely to me the thief followed the driver until he had entered the building where he was making collections from. It is likely a number of collections had been made by this point. And my guess would be that these had been monitored by the thief who would have had a reasonable idea of how long the vehicle would be unattended. Whether or not this accurate isn't directly relevant to the complaint though.

After a period, the thief returns and is seen leaning into his car, before walking to S's vehicle. As he turns toward the carriageway, an object is visible in his hand, which he then seems to conceal by folding his arms. He then approaches the driver's side rear of the vehicle and lifts his hands to the vehicle. He is offset from the lock and handle to the rear door, but his actual actions are hidden from view. He remains in this position for five or so seconds, before moving to the handle and opening the rear doors. Items are then loaded from S's vehicle into the thief's car, which is ultimately driven away. No further footage is provided.

It is unfortunate that we don't have a longer period of footage. If we had, we might have a better idea about whether the driver's actions during previous collections were consistent with those in the footage. This might give more of an indication of whether the vehicle was likely locked.

But, ultimately, what we do have shows the driver pausing and his right side is obscured. Based on his testimony, this is where the key fob would have been. And he has said he most likely locked the vehicle. I find this combination of evidence persuasive.

The thief is then shown standing at the rear of the vehicle, with something in his hand and carrying out some action for several seconds before opening the door. The thief is located to the right-hand side of the vehicle's rear and is not in line with the lock or handle.

In terms of what action might have been carried out by the thief, the expert reports that have been provided refer to both electronic and manual actions.

Zurich has provided what it has referred to as informal evidence from an expert in vehicle security. Having seen the footage, the expert has said, "I don't know of any electronic attack method which correlates with the actions in the video." And that, "to the best of [his] knowledge", there are no devices available for S's vehicle that would be able to generate the code required to remotely unlock the vehicle.

I don't consider this to be a wholly definitive statement. The report is not formal, and "to the best of the expert's knowledge" is not confirmation that an electronic method was actually unavailable.

The Investigator has pointed to publicly available evidence that suggests there are electronic means of unlocking a vehicle. And the role of the Ombudsman Service is to consider complaints based on all the circumstances – not just the evidence submitted directly by the parties, provided the parties are made aware of this and have the right to challenge it. The Investigator provided a copy of the relevant weblink to Zurich though.

Zurich has commented that S's expert has not relied on any electronic means that could have been used. And has suggested that this indicates the expert does not consider these

would have been used. I am not persuaded that the lack of a comment here is as conclusive as Zurich thinks though.

S's expert has referred to a number of potential methods by which entry could have been achieved. The fact that these appear to rely, at least initially, on manual methods does not in itself mean the expert did not consider electronic means to be a possibility. Arguably, the expert may have considered that by providing a number of methods of entry this was sufficient to resolve the query of whether entry without a key was possible. It isn't clear that he was asked to provide details of each and every possible method of entry.

It seems that entry could have been achieved manually via the driver's-side rear door. This potentially would have involved making a small hole in the door skin. Zurich has not provided any evidence that persuades me this would not have been possible in the circumstances.

Zurich has said that no hole is shown on the footage or was reported by either S or the leasing company it ultimately returned the vehicle to. However, I do not consider the footage to be of sufficient quality to confirm this one way or the other. I am aware that some methods of entry require only a small hole. And I don't think this would be visible in the footage.

Additionally, S has said that it is not an expert, and it is not clear that a detailed inspection of the vehicle was carried out after the event. S also said that no report was provided from the leasing company. S has said this was potentially due to the timing of the events and pandemic related restrictions in force. The relevant employees are also not available for further comment on this. It is unfortunate that S is unable to provide details of the physical condition of the van, but it was also not asked for these by Zurich.

It is, frankly, surprising that the vehicle was not inspected by Zurich. Its own loss adjuster commented to S that issues over whether the vehicle was locked were likely to be a key factor only a few weeks after the theft. And the vehicle was not returned to the lease company for another month. S was not advised to retain the vehicle or provide any evidence of its physical condition. So, it would appear that any failing in evidencing the physical condition of the vehicle rests with Zurich. It was, after all, for Zurich to evidence that there was a breach in the condition requiring the vehicle to be locked.

Zurich has said that the evidence from the CCTV that the driver locked the vehicle is inconclusive. However, I need to weigh this alongside the driver's statement that he did most likely lock the vehicle. It is for Zurich to demonstrate that this statement is most likely incorrect. It seems to me that the driver took some action when paused before leaving the vehicle. And that, on balance, this was most likely locking the vehicle.

Zurich has also said that the actions of the thief are not conclusive that he had to unlock the vehicle. And that whilst the thief may have believed further action was required to unlock it, the evidence is inconclusive that the vehicle was in fact locked. But this in itself suggests that the thief was prepared to unlock a locked vehicle and that action was taken that would have produced this result. The thief did not try to open the door until he had carried out some activity at the rear of the vehicle. Either way, I do not consider this demonstrates the vehicle was most likely not locked.

Ultimately, I need to consider the circumstances as a whole and to consider whether Zurich has acted fairly and reasonably by relying on there having been a breach of the condition precedent set out above. Taking everything into account, I am not persuaded that Zurich has demonstrated there was most likely such a breach, and it follows that I do not consider Zurich is able to rely on this to decline S's claim.

**Putting things right**

Zurich Insurance PLC should reassess S's claim on the basis that there has been no breach of the above condition.

**My final decision**

My final decision is that I uphold this complaint. Zurich Insurance PLC should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask S to accept or reject my decision before 15 March 2024.

Sam Thomas  
**Ombudsman**