

The complaint

Mr S complains on behalf of a company, W, about W's commercial motor insurer, Arch Insurance (UK) Limited. Arch has declined W's claim for a stolen car.

What happened

Mr S found one of W's cars had been stolen. He called the police and made a claim to Arch.

Arch investigated. It had a specialist assess the key for the vehicle which Mr S had said he still had in his possession. The key was for a different car which had been scrapped and crushed several years ago. Mr S said a prospective buyer for the car must have swapped the keys over.

Initially Arch said it was declining the claim due to a lack of reasonable care. In a final response letter of 4 July 2024 Arch said that was not its reason for declining the claim. It was declining it on the basis of a policy condition regarding unattended cars, which required them to be locked.

Mr S was unhappy. He said the car had not been unattended, he had been observing it and it was definitely locked when checked after the prospective buyers left. Mr S complained to the Financial Ombudsman Service.

Our Investigator felt Arch had acted fairly and reasonably.

Mr S said he did not think his argument – that he had been observing the car – had been taken into consideration. He said he had not broken any terms of the policy. Mr S said that the possibility of the key being swapped was only an idea he had put forward when Arch asked how he could possibly have had 'the wrong' key in his possession – it was by no means clear that was actually how the theft occurred. He said the stress of dealing with all of this and the worry over losing such an asset was affecting his health.

Our Investigator said he remained of the view that the decline was fair and reasonable. The complaint was referred for an Ombudsman's decision.

Having reviewed matters, I was also of a mind to not uphold the complaint. But my reasons for doing so were different to those set out by our Investigator. So I issued a provisional decision to explain my views to both parties. My provisional findings were:

"The term

Arch relied upon the following term as its final reason for decline:

"5. during Business Hours all unattended Vehicles being any Vehicle with no person in charge or keeping the Vehicle under observation and able to observe or prevent any attempt by any person to interfere with the Vehicle (including Insured Vehicles displayed for retail sale purposes and Customer Vehicles) must be securely locked and all windows and similar openings tightly closed with the ignition key removed therefrom and kept in a place of safety

out of sight from the public”.

The policy explains that if this term is not complied with, then the policyholder will lose the right to be indemnified for any related claim.

The theft

I acknowledge Mr S’s point that no-one knows for sure how the theft took place – there is no CCTV and the police haven’t caught any suspects. But it is not unusual for an insurer to consider claims on the basis of what is most likely to have occurred.

Here Mr S has been adamant from the outset that he had the vehicle’s only key in his possession, somewhere away from the car on the night the car was stolen. He voluntarily and with no equivocation gave that key to Arch to inspect. Mr S was surprised to learn, following that key’s assessment, that it was not for W’s vehicle. In the circumstances, I can see why Arch is satisfied its most likely the car’s key was swapped, without Mr S’s knowledge, at some point before the night on which the theft occurred. I think that is a reasonable conclusion for it to base its claim assessment on.

The swapped key and the policy term

The key, as I noted above, must have been swapped at some point before the night on which the car was stolen – that’s because Mr S left W’s premises earlier in the day than normal, taking what he believed to be the car’s key with him. There was only one key for the car, and the correct key for the car has not been found since – such that one could not reasonably think that maybe Mr S picked up ‘the wrong’ key when he left for the day. And, as far as I’m aware, the key Mr S left with was for a car that neither he, nor W, had ever owned.

Mr S, in his formal statement to Arch said he had last moved the car a couple of days before the incident. He did not suggest or recall any other interaction with the car before the night it was stolen.

When Arch told Mr S the findings of the key assessment, he said he would investigate how the key might have been swapped.

A week later he said he’d made enquiries with all W’s staff and he did not know how the key might have been swapped. He said though there had been a lot of people around and a lot of people looking at the car.

Arch told Mr S that it would need to know more about how the key might have been swapped. Mr S replied a week later stating he recalled that on the day before the theft (the day before he left early), two men had viewed the vehicle, which they did whilst he was also outside on the phone. He said they’d handed the key back afterwards and later that evening he’d checked the car was securely locked (by trying the handles).

Mr S has since said he was on the call for only about 30 seconds – that he never said he had been on the call for the whole duration of the viewing. He said that even during the call he was attentively focussed on listening to the buyers and he was “in attendance”.

I appreciate the detail Mr S has given about the days leading up to the theft. I can also understand that when someone focusses on a matter, certain details and specifics can be recalled which, when they are mundane, might initially slip one’s mind. However, I can also

appreciate, from Arch's point of view, why, having considered what Mr S has said, it thinks it's most likely he breached the relevant policy term.

It's generally accepted by this Service that to be in "attendance" you and your mind have to be focussed on the subject of the "attendance". So you might turn away from the focus for a moment – but you won't be far away from it, either physically or mentally. And you'll be able to act to try and prevent something untoward happening. Indeed the policy term in question here is reflective of that – the car is considered unattended if no person is observing it such they are able to "observe or prevent...any attempt...to interfere with the vehicle". For the avoidance of doubt, I'd consider someone swapping the vehicle key to be interfering with the vehicle but Mr S did not observe or prevent the swap.

Setting what was or wasn't observed aside, when I think about our general position on attendance in the context of this complaint – knowing that this car was of particular importance to Mr S and taking into account his evolving recollection about the viewing – I'm not persuaded it's fair to say he was most likely "in attendance". In short, had he been truly focussed on these prospective buyers, I think he'd have recalled that interaction when he was made aware, shortly after the theft, that the key in his possession – the key these prospective buyers had returned after they had viewed and locked the car – was not the key for the car.

I bear in mind that when Mr S was asked by Arch why the prospective buyers had been given the key, he said keys are given out to prospective buyers so the vehicles can be checked – so they make sure the electrics and the like are working properly. So I'm not persuaded that Mr S was introduced to these prospective buyers, and took them over to the car to show it to them, that he then gave them the key so the car could be turned on, before he then took a short call, whilst his focus remained on them/the car. It seems to me more likely that Mr S may have been coincidentally outside, when the prospective buyers were given the key and looked round the car, at which time he also took a call, before they finished their viewing locked the car (with the correct key) and returned the key (the now swapped key) to whomever had given it to them. That would explain why Mr S did not initially recall this activity when telling Arch of the events in the days leading up to the theft. That scenario would be of the type I think someone might not initially remember but which might come back to them upon reflection.

So, Arch believes the car was unattended, and I think that is a reasonable conclusion by it in the circumstances. The term requires that, during business hours, the keys for an unattended car are removed from the ignition and kept in a safe place, out of sight of the public. Here the keys were handed to the prospective buyers for them to check the car was working – which would include the car being unlocked and the keys being used in the ignition. I'm satisfied that, on this occasion, Arch's conclusion that Mr S breached the term was also fair and reasonable.

I'd add that whilst the term says that a breach will result in the policyholder not being indemnified, for Arch to rely on that, the breach would still need to be material to the loss. However, given the details I've set out above, I think it's clear here that it's most likely that the prospective buyers used the viewing as a way to gain access to the car's key, which they were then able to swap, whilst satisfying Mr S they had locked the car and returned the key they had been given to access the car. I think that but for the breach, the car wouldn't have been stolen because Mr S would have retained possession of the true key. However, I do think Mr S was deceived and I recognise that this has caused a significant loss. I realise Mr S would have thought a theft such as this would be covered by W's policy. However, in the circumstances, I think Arch's decline of the claim, on the basis of the above discussed policy term, was fair and reasonable."

Mr S said he emphatically disagreed with the decision. He said it wasn't supported by the available evidence, or lack thereof, and the contract terms. He maintained the term relied upon by Arch, and referenced in my decision, was irrelevant as it was specifically for unattended vehicles – which this car was not. He said he felt that I was bringing his integrity into question. He said he wanted the complaint to be reviewed and for justice to be done, without the need for W to take the matter to court.

Regarding attendance, Mr S said only he had given evidence and nothing he had said suggested he was not in attendance of the car. He said he was in charge and observing the car, which was not interfered with at all, the whole time it was being viewed. He said the policy does not prevent keys being provided to potential buyers for inspection.

In respect of the theft, Mr S said it wasn't fair to think about what might have happened – that isn't reflected in the policy terms. He said insurers can't just make up the policy rules as they go along. He explained the car in question locks automatically when the key leaves a certain radius – so there should be no further concern as to whether the vehicle was locked.

Mr S gave some consideration to the key being swapped – he said it was a scam, performed with a magician's sleight of hand that had likely been performed within seconds and had been impossible for him to spot even though he was watching at all times. He noted details about this type of scam can be seen on the internet and the perpetrators are well trained. Mr S said the fact he was deceived doesn't mean he wasn't in attendance. He said it was not the job of the Ombudsman to introduce new scenarios about what may have happened. Mr S said it had been he who had personally handed the key to the viewers and he was in attendance of the car.

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 appreciate Mr S feels strongly about this. I can assure him that I am not questioning his integrity. I can also assure Mr S that it is the practice of this Service to decide complaints on the basis of the balance of probabilities. In other words on the basis of what is most likely to have happened. Insurers will often do the same – their policies will not say so but that is because that is the general legal basis which would apply to this civil contract, so that basis becomes part and parcel of how an insurer fairly and reasonably considers a claim made under the policy.

I considered provisionally everything Mr S had said about his being in attendance of the car. And I explained why, having considered all of that, I thought it was most likely he had not been in attendance. I also explained how the term was relevant in this situation and that interfering with the key equated to interference with the car. So I don't think the term reasonably needed to include specific reference to keys not being passed to the buyers, for Arch to fairly rely on it in this instance.

As far as I have seen there has never been any doubt the car was locked either after the prospective buyers left or when the car was stolen. I accepted, provisionally, what Mr S had said about checking the car was locked before he left for the day.

I realise that Mr S thinks he was deceived by professional scammers, I acknowledged that in my provisional decision. But, just as Mr S is now aware of this scam, insurers are aware that thieves operate in this way and they build terms into their policies to require adequate steps are taken to, as far as possible, safeguard against such a loss. If the steps are taken and a loss occurs, then the insurer will be liable. But if a loss occurs when the safeguarding hasn't

been undertaken, then the insurer might decline liability for that loss. There is nothing wrong with that in principle, it's a matter of an insurer's commercial judgement what risks they are prepared to be liable for and which ones they wish to avoid.

As long that is, as the insurer fairly and reasonably relies on a relevant policy term to decline a claim. Having reviewed everything and taken into account Mr S's further comments, I'm still of the view that Arch did that here.

My final decision

I don't uphold this complaint. I don't make any award against Arch Insurance (UK) Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask W to accept or reject my decision before 2 July 2025.

Fiona Robinson
Ombudsman