

DETERMINATION

Case number: 202941

Commercial Motor Vehicle Insurance – adequacy of claim settlement

SUMMARY OF FACTS

1. The applicant held a Commercial Motor Vehicle Insurance Policy with the FSP which was current at the date of loss.
2. On 23 July 2007, the applicant lodged a claim on the policy in relation to damage caused to his vehicle when it collided with another vehicle.
3. Despite the applicant's insistence that he was not responsible for the accident, the police charged him with failing to give way and negligent driving occasioning grievous bodily harm.
4. Based on the police charges, the Financial Services Provider (FSP) deemed the applicant to be at fault and informed him that his excess would apply. The FSP also settled the third party's insurer for its repair costs.
5. The applicant engaged a solicitor to defend the police charges and on 16 September 2009, the charges were dismissed by Order of the Local Court. The applicant is now seeking reimbursement from the FSP for the legal costs he incurred in defending the police charges. He is also claiming the cost of hiring a vehicle whilst his vehicle was repaired, and the policy excess which the FSP applied to the claim.
6. The FSP has paid the cost of repairs to the applicant's vehicle, but has declined to reimburse the applicant for legal fees, hire costs and the policy excess.

ISSUES IN DISPUTE

7. Whether the FSP's denial of the applicant's claim for legal expenses, refund of excess and reimbursement of hire vehicle costs is in accordance with the terms and conditions of the policy.

RELEVANT POLICY PROVISIONS

"Section 6 – Legal Costs

We will pay all legal costs incurred with our written consent."

...

General Conditions

...

11. Excesses

Excess is the amount you might have to pay if you make a claim. The standard amounts of excesses for your policy are shown on your certificate of insurance..."

RELEVANT LAW

Section 54 of the Insurance Contracts Act 1984 (insofar as it is relevant to this claim) provides that where but for this section an insurer may refuse to pay a claim, either in whole or in part by reason of some act of the insured or another person, being an act that occurred after the contract was entered into, the insurer may not refuse to pay that claim by reason

only of that act, but its liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced by that act.

REASONS FOR DECISION

8. I am satisfied that a full exchange of information has taken place between each party and that each party has had the opportunity to address any issues raised.

The Applicant's Submission

9. The applicant submits that the motor vehicle collision was not his fault and he has maintained this position since the time of the accident. He submits that the Court's dismissal of the police charges supports his position.
10. Given that the applicant was not found guilty of the charges, he submits that he should be reimbursed the \$1,200 policy excess he paid. He also believes he is entitled to reimbursement of the legal fees he incurred in defending the charges amounting to \$9,660, and vehicle hire costs in the amount of \$3,740.

The FSP's Submission

Legal costs

11. The FSP submits that the applicant is not entitled to reimbursement of his legal costs as he did not obtain written consent for legal costs to be paid, as required by the policy terms. If the applicant had sought consent for his legal costs to be paid, prior to incurring them, the FSP submits that it would have refused consent on the basis that criminal legal costs are not intended to be covered by the policy. In the FSP's view, the only legal costs claimable under the policy are civil court costs where liability is disputed between the parties.
12. The FSP argues that Section 54 of the *Insurance Contracts Act 1984* does not entitle the applicant to relief in these circumstances. Whilst there is an "act" ("omission") of not gaining the FSP's consent, the FSP submits that the cost of defending a local court matter is not covered by the policy and therefore no liability exists. In any event, the FSP would not have given consent to the incurrence of legal costs.
13. The FSP submits that if Section 54 does apply, then its interests have been prejudiced as a result of not being able to appoint its own solicitors to defend the charges at a discounted rate. Therefore, pursuant to Section 54, the FSP's liability should be reduced by the extent of its prejudice.

Policy excess

14. The FSP maintains that the applicant was at fault for the accident and therefore it is entitled to apply the policy excess to the claim. The FSP submits that the applicant failed to give way to oncoming traffic at an intersection with traffic lights, and therefore was in breach of the Australian and NSW Road Rules.
15. The FSP submits that if the third party was speeding, as alleged by the applicant, then the FSP would not consider the applicant to be 100% responsible for the accident. However, it would consider the applicant to be at fault to some degree, because he still had a responsibility to give way to the oncoming third party vehicle even if it was speeding. The FSP submits that it is entitled to apply the policy excess even if the applicant was only partly responsible for the accident.

16. The FSP accepts that the police charges against the applicant were dismissed; however it does not know the basis for the dismissal as the applicant has not provided court transcripts as requested. Therefore, in the FSP's view, there is no new evidence to consider in relation to the liability decision.

Vehicle hire costs

17. The FSP submits that the policy has no provision for reimbursement of the cost of a hire vehicle. It was the applicant's choice to hire a vehicle and therefore it is a cost that he should bear.

Consideration of each party's submission

Legal costs

18. I have reviewed the policy terms and conditions as set out in the Product Disclosure Statement (PDS). I note that the Section 6 of the policy states that the FSP will pay all legal costs incurred with its written consent.
19. The FSP submits that the policy only covers legal costs for civil liability. However, that limitation is not expressed in the policy wording either in Section 6 or in the general conditions or exclusions. I am not satisfied that a reasonable person would assume, on reading the PDS, that the policy covers "all legal costs incurred" in relation to a motor vehicle accident, which would include legal costs associated with criminal liability.
20. The PDS states that the FSP will pay legal costs incurred with its written consent. The applicant did not obtain the FSP's written consent prior to incurring the legal costs and as such, he is in breach of the policy terms and conditions. The FSP has denied his claim on this basis.
21. However, Section 54 of the *Insurance Contracts Act* 1984, may provide relief to the applicant in these circumstances. Section 54 provides that the FSP is not permitted to rely on a policy condition or exclusion to deny a claim by reason only of an act of the insured, unless it can demonstrate that it has been prejudiced by the insured's act.
22. As to the issue of prejudice, the FSP submits that the legal costs incurred by the applicant are higher than they would have been if the FSP had agreed to pay the costs and had engaged its own solicitors. In my opinion, the failure by the applicant to obtain the consent of the FSP prejudiced the FSP and Section 54 does not apply to assist the applicant.

Policy Excess

23. The PDS states that an excess is an amount the applicant might have to pay if he makes a claim. The PDS does not elaborate as to the circumstances in which an excess will, or will not, be payable. However, the FSP's submissions suggest that an excess would not be payable if the applicant was not responsible for the damage caused to his vehicle.
24. The applicant claims that he was not responsible for the damage to his vehicle and submits that his position is supported by the fact that the police charges against him were dismissed by the Court.
25. No evidence has been provided as to why the charges were dismissed. The FSP submits that it has requested a copy of the court transcript from the

applicant, but it has not been provided. Therefore, it is not clear whether the charges were dismissed due to the applicant being found not guilty or due to a legal technicality or for some other reason.

26. On the basis of the information which is available, including the police report and subsequent charges, I am satisfied that it is reasonable for the FSP to determine, on the balance of probabilities, that the applicant was at least partly to blame for the accident. Accordingly, in my opinion the FSP is not obliged to refund the policy excess to the applicant.

Vehicle hire costs

27. In relation to the hire vehicle costs incurred by the applicant, I accept the FSP's submission that there is no provision in the policy for reimbursement of the cost of a hire vehicle. Accordingly, in my opinion, the FSP is not liable to reimburse the applicant for the cost of hiring a vehicle.

CONCLUSION

28. I determine that the FSP is not liable to reimburse the applicant for the policy excess or hire car costs.
29. I further determine that the FSP is not liable to reimburse the applicant for the legal costs he incurred in defending the police charges.