

## DETERMINATION

Case number: 206194

*Insurance Broking – fleet policy  
– whether applicant clearly informed of special conditions*

### SUMMARY OF FACTS

1. The applicant is a company who engaged the services of the Financial Services Provider (FSP) to arrange an insurance policy covering a fleet of vehicles.
2. On or around 1 April 2009, the FSP's authorised representative received a request from the applicant to obtain a mid-term endorsement for a HSV Holden vehicle ("the vehicle") recently purchased. The vehicle was going to be used by a director of the applicant and parked at the director's premises.
3. The FSP's authorised representative arranged the vehicle to be covered whereby the insurer imposed a number of special conditions, one being that the vehicle be securely garaged whilst at the director's residence. This cover operated from 6 April 2009 to 30 June 2009.
4. The fleet policy was due for renewal on 30 June 2009. The FSP's authorised representative arranged for the vehicle to be covered under this policy with the same special conditions being imposed by the insurer. As a result, the fleet policy was renewed and the vehicle was covered from 30 June 2009 to 30 June 2010.
5. On or about 24 September 2009, the vehicle was stolen from the director's premises. A claim was lodged with the insurer who denied the claim on the basis the vehicle was not securely garaged as required under a special condition. The applicant disputed this decision and requested that it be reviewed pursuant to the insurer's Internal Dispute Resolution (IDR) process. The insurer reviewed it and upheld the decision.
6. The applicant has subsequently brought a dispute against the FSP on the basis it breached its duty of care in failing to notify it of this special condition and/or ensure appropriate cover was taken. As a result, it is seeking payment of its loss.

### ISSUES IN DISPUTE

7. Whether the FSP has breached its duty of care when arranging the insurance cover for the vehicle;
8. If the FSP has breached its duty, whether its breach directly resulted in the applicant suffering a loss for which he would otherwise have been entitled to indemnity under a policy of insurance; and
9. Whether the applicant has failed to mitigate its loss.

### RELEVANT POLICY PROVISIONS

"Placing Schedule

...

## Endorsements

This Policy is amended by the following Endorsements ...

...

2008 HSV R8 Tourer Reg No.: [number] Policy Conditions:

- Vehicle to be securely garaged whilst at residence
- No Driver under 35 years of age &/or Inexperienced (less than 2 years)
- Nominated 2 Drivers only

...”

## REASONS FOR DECISION

10. The FSP has stated in its submission that it does not consent to the Service dealing with this matter on the basis that it (the Service) does not have jurisdiction. However this aspect has previously been reviewed by the Service and it has confirmed with the FSP that it does have jurisdiction and therefore will proceed to deal with the matter.
11. The Panel is satisfied that a full exchange of information has taken place between each party and each party has had the opportunity to address any issues raised.

### *The Applicant's Submission*

12. It notes that the special condition relied upon by the insurer was not included in the fleet policy it had prior to the inclusion of the vehicle.
13. Upon the FSP's authorised agent (hereinafter referred to as authorised representative, or AR) arranging a mid-term endorsement for the vehicle between 6 April 2009 and 30 June 2009, the insurer clearly informed the AR of three special conditions that were to be imposed for this vehicle. One of these special conditions was the basis for the subsequent claim denial.
14. However, neither the FSP nor its AR brought these special conditions to its attention. This is acknowledged by the FSP and the fact the Certificate of Currency provided to the applicant did not allude to this in any manner. In fact, the Endorsement in this document stated:  
“IN ALL OTHER RESPECTS THE POLICY REMAINS UNALTERED”
15. With respect to the renewal that was arranged for the fleet and included the vehicle, this special condition was again not alluded to in their verbal communications. Although the FSP's AR did telephone the director to discuss whether he had a garage prior to arranging the renewal, he was never informed of the basis for this enquiry.
16. It acknowledged that the special conditions were included in the Placing Schedule provided to it by the FSP. This Placing Schedule contained a Schedule and a number of endorsements that was to be read together with the standard policy as forming the insurance contract. However, the relevant condition was placed on page 7 of the Placing Schedule with no heading or index to specifically draw attention to it.
17. It submits this is insufficient notification in the circumstances given its impact, and the fact it was a new condition imposed on an otherwise existing policy it had for 7 years. Instead, the FSP ought to have clearly informed it of the new

conditions as well as any alternative options available prior to arranging the cover to ensure it was suitable for its needs.

18. It submits that if it was aware of this condition, it would have sought alternative cover given the carport clearly did not satisfy the special condition. This is corroborated by the insurer's claim denial.
19. As such, the FSP ought to have provided it with alternatives to remove the special condition, whether by paying a higher premium or having the vehicle insured with another insurer. None of these options were provided or communicated.
20. In these circumstances, it submits the FSP has failed in its duty of care and is responsible for its loss.

#### *The FSP's Submission*

21. The AR would have informed the applicant's director regarding this special condition when seeking information about the garage where the vehicle would have been kept.
22. The AR did clarify with the insurer what securely garaged meant upon being informed by the director that he had a carport which was open at the back, closed at the sides and had a roller door at the front. The insurer responded by stating:

"Securely garaged means a locked garage i.e. no driveway or street parking whilst at the driver's usual place of residence"
23. In light of this, the AR arranged the cover for both the vehicle and the rest of the fleet when the renewal was due as it appeared appropriate. Subsequent to this, the FSP provided a covering letter to the applicant dated 3 July 2009 which included the policy and the Placing Schedule.
24. It submits that its covering letter specifically informed the applicant that it should carefully read all the enclosures. Further, the letter informed the applicant about the endorsements that may affect the coverage provided. As the relevant condition was contained in the Placing Schedule that was included with the covering letter, this should have been apparent to the applicant if it read it as instructed.
25. It also notes that the applicant is under an obligation to mitigate its loss. In these circumstances, it submits the applicant has a meritorious basis to challenge the insurer's claim denial with the Service. This view is based on the fact that the circumstances leading to the theft would have resulted in the vehicle being stolen irrespective if it was secured locked in a garage.
26. The FSP therefore submits it has not been negligent in arranging the cover for the vehicle. Further and in the alternative, the applicant has failed to mitigate its loss.

#### **Consideration of each party's submission**

27. A broker's duty to its customers is determined principally by the law of contract and the law relating to negligence. In the absence of any specific written agreement, a broker has a general duty to take reasonable care in procuring

suitable policies of insurance to protect his or her client against relevant risks and advising on suitable options.

28. The standard of care in exercising this duty is that of an ordinary broker exercising the special skill of that profession. Further, under Section 917F of the *Corporations Act 2001*, the FSP may be held responsible for the conduct of its authorised representative.

#### *Arranging Insurance for the Vehicle*

29. It is agreed between the parties that when the FSP's AR first arranged the mid-term endorsement for the vehicle, he failed to inform the applicant either verbally or in writing regarding the special conditions.
30. In arranging the renewal of the fleet policy, the FSP's AR did discuss what type of garage the vehicle would be secured in. It appears that the applicant informed him it was a carport, not a garage, and the carport was open at the back, closed at the sides and had a roller door at front. The Panel does not accept that this leads to an inference that the AR would have informed the applicant of the special condition as being the basis of this inquiry. There is no contemporaneous note or statement from the AR to corroborate this whilst in contrast, the applicant has refuted this was ever communicated.
31. The Panel therefore accepts the applicant was not informed of the special condition in this conversation.
32. Although the AR did attempt to clarify with the insurer what "securely garaged" means, it is unclear why he did not simply convey to the insured how the vehicle was to be garaged and whether this would satisfy the special condition. This would have led to greater certainty regarding the practical effect the clause would have had to the applicant's situation.
33. Instead, the response by the insurer to the general question was "securely garaged means in a locked garage". Although this explanation lacks absolute clarity, it should have been apparent to an experienced AR that either the applicant's home parking arrangements were inconsistent with this requirement or at the very least further clarification was required, especially given the insurer has now relied on this condition to deny the applicant's claim.
34. In the Panel's opinion, an ordinary broker, exercising the special skill of that profession, should have made reasonable attempts to clarify with the insurer whether the applicant's carport would have satisfied this special condition.
35. The Panel accepts that the FSP set out the special conditions in the "Placing Schedule", which also contained a number of other endorsements regarding the fleet policy, and forwarded this to the applicant. However, the Panel does not accept this discharged its duty of care towards the applicant in clearly informing him of this condition and/or whether this cover was appropriate for its needs.
36. The nature of the special condition was such that the FSP's AR should have been reasonably aware that the applicant's carport, which was accessible from the rear, would be likely to breach this condition. This was apparent to the applicant's director and should have been reasonably apparent to an ordinary broker exercising the special skill of that profession.

37. Further, upon the initial endorsement being applied, a reasonable person in the applicant's circumstances would have assumed that the insurance cover applicable for the vehicle was no different to the rest of the fleet. This is corroborated by the fact that the initial endorsement did not contain the special condition and instead, stated that the policy in all other respects remained unaltered.
38. As such, the FSP was under a duty to clearly convey the special condition to the applicant upon the renewal being arranged given its previous omission. Instead, the only manner in which this was conveyed was by having the special condition contained on the fifth page of seven pages document of Endorsements thereby leaving it up to the applicant to discover it and inquire into its effects.
39. The seven-page document did not contain an index, neither was the relevant condition introduced under any heading. The condition was contained, without reference, between a condition headed "Towed Vehicles" and "Replacement Vehicle Endorsement".
40. This, in the Panel's opinion, is not conduct consistent with an ordinary broker exercising the special skill of its profession.
41. The Panel accepts the applicant's evidence that had the FSP or its AR brought this special condition to its attention, it would have instructed it to arrange cover with an alternative insurer or paid a higher premium to adjust the condition to its circumstances.
42. Given all of the above, the Panel therefore accepts the FSP has failed to meet its standard of care to the applicant in arranging insurance cover appropriate to its needs. Further, this failure had led to the applicant suffering a loss given this special condition is now being relied upon by the insurer to deny the claim.

#### *Failure to Mitigate*

43. In determining this issue, the appropriate standard to consider is whether the entity who suffered the loss has taken reasonable steps to mitigate their loss. What is reasonable will depend on the circumstances of the case.
44. In this case, the FSP submits that the applicant has an obligation to mitigate its loss by seeking to have the insurer's denial reviewed by the Service. It has based this on an assumption that the insurer's denial may be incorrect given the circumstances that led to the loss.
45. However, the Panel does not accept this submission. The applicant has attempted to overturn the insurer's decision by having it reviewed through the insurer's IDR process, but was unsuccessful. Further, the Panel is not satisfied that there is any certainty the applicant would be successful in overturning the insurer's denial, especially on the basis of the limited information available.
46. Further, if the applicant did pursue this course and was unsuccessful, it may instead be increasing its loss and costs. This would therefore be contrary to someone attempting mitigate their loss.
47. However, the applicant has pursued a dispute against the FSP and has satisfied the Panel it was appropriate to do so.

48. On the basis of this analysis, the Panel does not accept the applicant has failed to take reasonable steps to mitigate its loss.

#### *Damages*

49. The Panel notes the vehicle was insured for \$69,000. According to the endorsements, the policy appeared to insure the vehicle for either the sum insured or the market value, whichever was lesser.
50. Neither party has provided any evidence regarding the vehicle's market value. However, given the vehicle was insured in April 2009 and the loss occurred approximately 5 months later, it is reasonable to accept this is the approximate amount of the applicant's loss less the applicable excess of \$300.
51. The Panel also considers the awarding of interest as being appropriate in the circumstances. The applicant has had to continue making repayments on a vehicle it no longer has access to, which would no doubt include an interest component.
52. As the applicant would be entitled to interest under Section 57 of the *Insurance Contracts Act 1984* from the date an insurer denied the claim to the date of payment, it would be appropriate to apply a similar principle in these circumstances.

#### **CONCLUSION**

53. The Panel determines the FSP is liable to compensate the applicant for its loss.
54. The Panel determines the FSP should pay to the applicant the sum of \$68,700. This is calculated from the sum insured (\$69,000) minus the excess (\$300).
55. The Panel further determines the FSP should pay interest on the above sum from the date the insurer denied the claim (18 November 2009) to the date when this Determination is satisfied.
56. In the event the applicant accepts this Determination, these amounts should be paid no later than 21 days after the FSP is notified of the acceptance.