

Heading:

Insurance claim for stolen item declined. Complaint not upheld.

A v M [2014] FDRS Aug 2014

1. Issue

Whether the Scheme Member was correct in declining an insurance claim for a stolen [item].

2. Background

As I understand matters, the Customer purchased [the item] from [Scheme Member parent company], and elected to take an additional insurance policy via the Scheme Member, [Scheme Member name].

In the early hours of 8 June 2014, [the item] was stolen.

The Applicant made a complaint to Police regarding the theft on 9 June 2014.

A claim was also lodged with the Scheme Member that same day by phone. A call recording has been provided to FDR, in which the Customer described the circumstances of the theft as follows:

"[the item] what stolen on Saturday night...

...at approximately 3, 3:30

...

I had put it down, this was outside a nightclub, and I put it down and someone had taken my whole bag [where had you put it down?] I put it down on the back of a car...I put it down because some of my friends were arguing with some people, and I put it down to try and stop the situation and that, and when I went back it was gone...

The call centre representative made the following note:

"[Customer name]; 8/6 @ 3:30am; Outside a nightclub, had put [item] on back of a car went to help friends came back and the [item] was gone. Declined for leaving unattended..."

Ultimately the claim was declined on the basis that the [item] had been left in a public place, contrary to the terms of the insurance policy.

The Customer brought a complaint to FDRS on the basis of the insurance claim being declined.

The Customer provided a statement dated 30 June 2014, in which she states in part:

“...

3. *The morning of Sunday 8th June 2014 my bag was stolen.*
4. *In my bag was [the Item], my wallet with my driver’s license and back card and other personal belongings.*
5. *The following Monday 9th June 2014 I phoned [Scheme Member parent company] to make an insurance claim and on the same day I lodged a complaint with the [location] Police, accompanied by my lawyer.*

6. ...

Incident

7. *The night in question I was standing with others on a well lit street footpath in the city.*
8. *I was fully aware of my faculties and the surroundings.*
9. *A nearby incident involving my friends who were arguing distracted my attention and I put my bag down onto the back of a car mindful of where my bag was.*
10. *It was only a brief moment later that I returned to my bag only to find it was gone.*
11. *I searched for my bag and asked as many people as possible if they had seen it, but nobody could help me.*
12. ...”

3. Position of the Parties

Customer’s position

The Customer is represented by her father who is a Barrister. The representative has filed written submissions dated 30 June 2014, as well as providing other comments in the course of the complaint and dispute. I summarise the Customer’s position as follows:

- There is no definition of “unattended in a public place”, and that exclusion is too broad.
- The Customer had not been warned when the policy was taken out, that such an exclusion may apply.
- The Customer’s bag was put down only momentarily while assisting others in need.

Scheme Member’s position

The Scheme Member’s position is as follows:

- The Customer had been advised of exclusions to cover in the policy document sent to the applicant's last known address.
- The call recording suggests the bag had been put down more than momentarily. If the bag had been stolen from 'under the Customer's nose' as proposed, then she would have seen the thief.
- The exclusion to cover applies.

4. Jurisdiction

I am satisfied this complaint does fall within FDR's jurisdiction to consider. That is not disputed by the parties.

5. Discussion

The Customer entered into an insurance contract with the Scheme Member, at the time of purchasing [the Item].

There is no dispute between the parties that the [Item] was stolen, the sole area of contention is whether the claim would be excluded from cover, given the circumstances of the theft.

The starting point must be to consider what the policy holds. That is for the simple reason that it is the policy document which forms the basis of the legal obligations which arise between the Customer and Insurer (Scheme Member).

FDR has been provided with a copy of the policy document, which is in brochure format. That document includes a range of exclusions to the policy, under the heading of "What is not covered". 18 Exclusions are listed, but the first exclusion is relevant in this case and holds that:

"We will not pay anything under this Policy if:

- 1. Your [Item] is left unattended in the open air or in any public place."*

For brevity I will refer to this exclusionary clause as "the exclusion".

I record that I found the policy document easy to follow, and written in plain language. Compared with some insurance policies, this document is succinct and easy to follow.

The question becomes whether the circumstances of the theft of the phone would fall within the exclusion set out above.

There is no dispute between the parties that the theft occurred when the Customer placed her bag on the back of a car, while she intervened in an argument with friends. There is a difference of opinion as to whether that was only for a "brief moment", or whether it was longer.

It can be accepted that the purpose of the exclusion is to excuse the Scheme Member from being responsible for replacement of any handset

lost when the person is careless or negligent with it. Insurance policies typically have a formal expectation on the insured, that they will treat the insured item(s) with reasonable care.

I do agree with [Customer representative] that the exclusion is broad. That of itself will not make the clause unenforceable. It would be impossible for a policy to expressly state in detail all situations where the policy would be avoided. What is required is a common sense interpretation of the exclusion, in light of the circumstances which arise in each case.

Over the years, the courts have considered a number of insurance claims relating to exclusions for 'unattended' items. In the New Zealand judgment of Bueno v Marac Fire and General Insurance Ltd [1983] NZHC 1101, the Court discussed the term "left unattended" as follows:

"The meaning of 'left unattended' was considered in Starfire Diamond Rings Ltd v Angel (1962) 2 Lloyds Rep 217. The policy covered jewellery against theft and contained a clause excluding theft from a vehicle 'which not be garaged is left unattended'. The driver went 37 yards away from it to relieve himself. It was held that the vehicle was 'left unattended'. Lord Denning M.R. considered that 'attended' means 'that someone is able to keep the vehicle under observation. That is, in a position to observe an attempt by anyone to interfere with it, and who is so placed as to have a reasonable prospect of preventing unauthorised interference with it'."

Applying that approach, I am satisfied that the handset was left unattended in a public place in this case. While involved with the argument with her friends, [Customer name] was not observing her bag, and she was accordingly not in a position to prevent it being stolen.

It was submitted that the Customer had not been made aware of the exclusion, and had she known she would probably not have taken the policy. While I have not received evidence from the Customer that she was not adequately informed, I am not in any event persuaded that is the case.

In Interfoto Picture Gallery Ltd v Stiletto Ltd [1989] QB 433 at 437 Lord Denning observed:

"Where a condition is particularly onerous or unusual the party seeking to enforce it must show that condition or an unusual condition of that particular nature, was fairly brought to the notice of the other party."

In Wynne v New Zealand Insurance Ltd - [2002] DCR 217, Judge Hubble confirmed that principle would apply also to insurance cases. In my view, the exclusion is ordinary. In fact, I would have been very surprised if there was not a clause in the agreement, requiring the Insured to take reasonable care in protecting the insured item from theft. I therefore do not consider there was a duty on the Scheme Member to draw this clause to the Customer's attention.

The Scheme member states that the Customer was sent a policy document, and I have been provided with a blank covering letter which would have been sent. The covering letter states that the Customer should "*carefully...make sure your policy provides the cover you*

expect". The letter also says that the policy could be cancelled within 30 days at no cost if not satisfied with the cover provided. In my view the Scheme Member could not reasonably have done any more to bring the terms of the policy to the Customer's attention.

I am also minded that there is an obligation on the Customer to be aware of what she is signing up for. If the Customer had not received the policy document (and there is no evidence supporting that situation), she equally could have contacted the Scheme Member to request the policy document again.

Finally, it was also submitted that the Scheme Member was wrong in basing its decision only on a phone conversation. I am not persuaded the Scheme Member's process was wanting in this regard. The claim was a concise claim, in that it related to one item, and the circumstances of the theft were not involved. It was reasonable for that information to be gained on the telephone. I also accept there is an element of good customer service in allowing claims by phone, rather than requiring the filling of forms.

For the above reasons I find the Scheme Member was able to decline cover on the basis that the exclusion applied, in the circumstances of the theft of the handset.

6. Proposed Decision

The proposed decision is to dismiss the complaint.

7. Parties Reply to Proposed Decision

The Scheme Member has advised that it accepts the proposed decision.

FDRS has not received any response to the proposed decision from the Customer or her representative, despite reminders being sent.

8. Final Decision

In the absence of any objection to the proposed decision, the final decision of FDRS is to dismiss this complaint, for the reasons set out above.

Mr R Woodhouse

FDR Scheme Adjudicator

August 2014