

Before the Arbiter for Financial Services

Case No. 012/2019

SL ('the complainant')

vs

TravelJigsaw Insurance Ltd. (C 82173)

('the service provider/insurer')

Hearing of the 22 June 2020

The Arbiter,

Having seen the complaint, whereby the complainant submits that Rentalcars.com do not want to cover the amount needed to repair the car that sustained severe damage following an accident.

The complainant stated that he rented an SUV car from 14 to 28 July 2018, through the web *Rentalcars.com* in Iceland whilst also purchasing the *Full Protection Insurance* in the same web at the same time. The rental company providing the car was *Thrifty*.

He had an accident on the 23 July 2018 whilst driving on an unpaved road, the F225, which was crossed by a river.

He declared that he was allowed to drive on this road and stated that this has been confirmed by a representative of *Thrifty* whilst it was also common that SUV vehicles cross the river on such road as was also declared by the Team leader of the Department of Nature in Iceland.

The complainant argued that he was crossing on first gear, found a hole, the car bounced, and some water entered in the engine thus causing severe damage to

the car. As a result, the rental company is claiming from him the sum of €14,757.99.

He further states that he was driving with his wife and his five-year-old daughter. He states that he is a responsible driver with more than 25 years' experience, he has never had any incident with the six rentals in the last few years with *Rentalcars* and never claimed the *Full Protection Insurance*.

The complainant claimed the amount from *Rentalcars*, but his request was denied as, initially, it was considered that he had breached the contract with *Thrifty*. However, after demonstrating to them that it was not a breach of contract as he was in fact allowed to drive on this road as many other cars like his crossed the river on the same day, he stated that it had subsequently been accepted that he did not breach such contract with *Thrifty*, but still his claim has been denied. The reason given was that he failed to comply with the terms of the *Full Protection Insurance Policy* by crossing the river with the rental vehicle and causing severe damage to the same.

He admitted the incident but claimed that it's for this reason that he had purchased the insurance.

The complainant pointed out that there were different kinds of insurance cover that *Thrifty* offered, even a specific one for river crossing for SUV cars like the one that he rented; but he admitted that he decided not to contract with *Thrifty* as he had opted to buy the *Full Insurance Protection* with *Rentalcars* that covered him in case of an accident.

He expects that *Rentalcars* should cover the full amount that *Thrifty* is claiming from him which amounts to €14,757.99 as the *Full Protection Insurance* provides that it covers:

"... (a) the amount of any damage Excess You have paid or to pay if Your Rental Vehicle is involved in an Incident; (b) charges arising from the incident for damage to the Rental Vehicle's exterior or mechanical components that are not covered by the insurance/cover included with your Car Rental Agreement, including ... (iii) wheels, tyres, hubcaps, engine, clutch, battery; ..."

Having seen the reply by the service provider which states:

1. That preliminarily and without prejudice to the below, the Complainant is not an 'eligible customer' of the Company as defined under Article 2 of Chapter 555 of the Laws of Malta (the 'Act') in relation to the incident referred to in the Complaint as the said incident was not covered by the insurance policy the Complainant took out with the Company and therefore the Company did not provide or offer to provide a financial service in terms of the Act. By the Complainant's own admission, in an email dated 16 August 2018, annexed to the Complaint, the Complainant states 'I simple (sic) was not covered by the insurance'. It therefore follows that the Complaint ought to be rejected with costs against the Complainant;
2. That subsequently and without prejudice to the above, the Complaint is unfounded and ought to be rejected with costs as the Complainant failed to exercise reasonable care of an ordinary diligent driver when in possession of the rental vehicle by driving on an unpaved road marked 'F' and proceeding further to cross a river without exercising reasonable due diligence in order to determine whether it was at all safe to proceed, thereby breaching Clause 5 (a) of the Policy Document annexed to the Complaint. The Courts of Malta have on various occasions cited Gibb's 'Trial of Motor Car Accident Cases' (para 77-78) that a driver is to exercise reasonable care and 'should wait for a suitable opportunity before attempting passage and he should not attempt to pass unless he can do so with reasonable safety ... If he finds that the surroundings are such that he cannot pass with safety, it is incumbent upon him either to stop his car or drop back ...'¹
3. That moreover and without prejudice to the above, the Complaint is unfounded at law and in fact and ought to be rejected with costs in view of the fact that the incident occurred solely and purely due to the fault and gross negligence of the Complainant *qua* driver/policy holder for not having followed the signposts on site thereby breaking the rules and regulations;

¹ Rik Nru: 817/08 JA, Elmo Insurance Limited kif surrogat fid-drittijiet tal-assikurat taghha Martin Xuereb, u l-istess *Martin Xuereb vs Wagdi Ben Hamed et.*

4. That in accordance with the fundamental principle of '*uberrimae fides*' in insurance contracts, which principle has been consistently applied by the Maltese Courts, specifically application number: 1182/2007 JPG in the names Patricia Agius vs GasanMamo Insurance Limited citing Lord Mansfield in the case Carter vs Boehm, '*insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation and proceeds upon the confidence that he does not keep back any circumstances to his knowledge ...*'.

From information provided to the Company, it transpired that:

- a. The route in question was through a road falling under the category of roads marked 'F';
- b. That despite other vehicles within the same party exercising due care and caution and choosing to use another route so as not to cross the river (as confirmed by the Complainant in his email dated 9 August 2018), the driver did not follow suit and unilaterally decided to proceed by crossing a river which, as confirmed by representatives of the Environmental Agency of Iceland, was medium high on the day of the incident (see correspondence annexed to the Complaint);
- c. The Complainant failed to inspect the intended route in order to ensure it was safe to proceed despite the foreseeable risk to damage to the vehicle from boulders, debris and water ingress;
- d. As a result of (c) above, the driver entered into a hole and hit a boulder resulting in substantial water ingress thereby causing extensive damage to the engine of the vehicle as well as the interior of the vehicle;
- e. Personnel at the Thrifty car rental desk at the time of pick up informed the Complainant that as per Car Rental Agreement, water damage was excluded from the cover as well as the Collision Damage Waiver, however, this may be covered by their optional

River Ford Crossing Protection (RFC) product but the Complainant declined to purchase the same.

That without prejudice to the above pleas, on the basis of the above circumstances, several terms and conditions of the Car Rental Agreement between the Complainant and the rental car company Thrifty were not adhered to, inter alia clauses 10, 32 (a), (h), (i) and (n). It therefore follows that in terms of 4.1 (a) of the Policy Document – *'This policy will not provide any cover for any incident occurring under circumstances where you have failed to abide by the terms of the Car Rental Agreement ...'*, the Complainant was not covered under the Policy Document for the damage that ensued.

Additionally, by proceeding through water of an inappropriate depth, substantial amounts of water also entered into the interior of the vehicle resulting in costs which are likewise not covered by the Policy Document in terms of clause 4.1(d).

5. That in addition, contrary to the principle of *Uberrimae Fides*, in view of the Complainant's gross negligence, the Complainant has unnecessarily exposed the Company to increase risk and financial burden and, therefore, the Complaint ought to be rejected with costs against the Complainant.
6. That in view of the above, it is submitted that there could be no remedy as the Complaint is unjustified in fact and at law and should be rejected with costs.

Having heard the parties

Having seen all the documents of the case

Considers:

The Complainant's Version

During the sitting of the 13 May 2019, the complainant gave his evidence. He stated that he was driving on an unpaved road in Iceland and that in these kinds of roads, there are rivers that need to be crossed and, for this reason, he rented a 4x4 car. He did not have a lot of experience in crossing the rivers but did some tutorials about how to cross it. He admitted that one must be very prudent regarding this because it is not like a road.

He narrates that he entered the river on the first gear, very slowly, but, whilst he was in the middle of the river, he found a hole, the car went down, some water entered into the engine and then the car stopped.

The complainant submitted that it was an accident because he could not see the depression. It resulted that there were two options how to arrive at the other end of the river and, although other cars had chosen another way, he followed the one indicated to him by the GPS.

On cross-examination, he stated that there was no difference between these two roads as the river was about 13 metres long, but the only difference was the road that one had to follow once the river is crossed. The complainant revealed that on the day, although there were other vehicles which chose the other route, there were also other cars, bigger than his, that also chose the same route that he did.

When asked with regards to the road signs that were on the route that he had chosen, he admitted that these indicated that one should not pass, or should pass very cautiously, and that one has to take care and should not cross if not with 4x4.

He was aware that driving on the F225 would be at one's risk and would not be covered by insurance and that some issues might be encountered on the road, but he was assured because he had a 4x4.

The complainant admitted further that he had read all the policies and thought that he was covered by the *Full Protection Insurance*. He stated that the man from the rental company told him to make a deposit on his rental car and he could lose the deposit, but, as long as he had full insurance, he would be refunded.

Despite accepting the fact that there was a specific type of insurance for river crossing that he could have taken out with *Thrifty*, he felt that with the *Full Protection Insurance*, he would have been covered.

Furthermore, the complainant also acknowledged that with the *Thrifty* car rental agreement, he expressly declined river ford crossing protection, and reiterated that he refused that kind of insurance because he had the *Full Protection Insurance of Rentalcars* which covered every mechanical part of the car, from wheels, windows, to engine and, in fact, it was the engine that was damaged.

With reference to the terms and conditions of the *Thrifty* agreement, which he admitted to have read, when asked regarding the fact that shouldn't he have been aware that he had breached the same agreement and as a result, he would not be covered by the insurance policy, he replied in the affirmative, but claimed that he still followed the instructions given to him by *Thrifty*. Despite this, he still admitted that that he was aware of the clause in the policy document which stated that any incident occurring under the circumstances where the insured have failed to abide by the terms of the car rental agreement, will not be covered, but insisted that he “... followed the *Thrifty* policy and *Thrifty* things.”²

He further insists that he has an email from the Manager of *Thrifty* whereby he was told that he was allowed to drive on the road in question and was allowed to cross rivers with the car.

The Service Provider's Version³

Simon Paris works with *Willis Towers Watson*, the *Insurance Managers* for the service provider that represent them in Malta.

He stated that he was not involved with the claim, as the sales and handling are done in the UK and, thus, has asked the company to provide them with documentation in their records. Their input consisted in giving their advice on how they viewed the claim.

² A fol. 67

³ A fol. 68

Following review of the documentation related to the case in question, the witness argued that the *Thrifty* insurance policy had offered the complainant off-road cover, but he declined it.

He further stated that there were also the terms and conditions which the complainant was required to follow because the same terms and conditions are primarily based on the terms and conditions of the insurance contract.

He stated that:

“This is a back-to-back contract. The insurance policy of TravelJigsaw states, ‘Usual Terms and Conditions of your Contract’.”⁴

Simon Paris stated that at the time of renting the car, all the documents were given to the complainant, whereby he was also given the option to insure with *TravelJigsaw*, at which point he was also given the policy with all the terms and conditions with which he had to abide.

However, what happened in this case was that the agreement specifically states that if he did not purchase the insurance, then he specifically was not covered in going off-road. *Thrifty* had told him that if he bought the river ford crossing protection policy, he would have been covered, but he did not buy it and, therefore, he was not covered in crossing the river.

He made it clear that:

“If he is in breach of that policy, he is automatically in breach of mine because my policy abides by the terms and conditions of the original policy. You are also not allowed to drive off-road in our policy.”⁵

He noted further that since their policy is a mirror image of the other policy, they rely on the terms and conditions of the original policy and, thus, he was excluded from driving off-road.

Further Considers

⁴ A fol. 68

⁵ A fol. 69

The complaint mainly revolves around the fact that, whilst driving his hired car, the complainant was involved in an accident whilst crossing the F225, which road was crossed by a river. He lodged a claim under his *Full Protection Insurance*, but the insurer is refusing to honour such claim, mainly on the basis that the accident occurred due to him being negligent and the he was in breach of his car rental agreement, thus, leading to a breach of the insurance policy conditions.

The complainant is disputing such decision as he insisted that he had confirmation from the Manager of *Thrifty* that he was allowed to drive on the F225 whilst also having obtained verification from a representative of the Department of Nature in Iceland that it is common that SUV vehicles cross the river on such road.

The Arbiter shall determine and adjudge the complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.⁶

As it has been previously mentioned, the complainant hired a car from *Thrifty*, and as he has witnessed, he rented a 4x4 car specifically to cross a river on an unpaved road in Iceland. A rental contract⁷ with the relevant *Car Rental Agreement – Terms and Conditions*⁸ had been signed in this regard. For this purpose and through the same website, the complainant also purchased a *Full Protection Insurance*.

The complainant's hired car sustained damages whilst he was crossing the river because he found a hole which he could not see, and water seeped into the car. He admitted that he did not have experience in crossing a river and had taken a few tutorials by himself how he could do it.

The insurer argues that the complainant failed to exercise the reasonable care of an ordinary diligent driver and the incident occurred due to his fault through gross negligence for not having followed the signposts on site thereby breaking the rules and regulations. Amongst other reasons, the service provider pointed out that, without prejudice to such other reasons, the complainant had

⁶ Chapter 555 of the Laws of Malta, Art. 19(3)(b)

⁷ A fol. 22

⁸ A fol. 24

breached several terms and conditions of the *Car Rental Agreement* which, therefore, implies that as per the terms contained in the policy document, he was not covered for the damages he sustained in the hired car.

In his complaint, the complainant argued that:

“I made a claim to Rental Cars, but my request was denied as they initially considered from me a breach of contract with Thrifty.

I reclaimed again, demonstrating them it was not a breach of contract, as I was allowed to drive on this road, and many other cars like mine, crossed the river the same day.

They accepted I did not breach the contract with Thrifty, but they denied again my reclaim, as they said I failed to comply with the terms of the Full Protection Insurance Policy, by crossing the river with the rental vehicle and causing severe damage to the same.”⁹

The complainant insists that the damages sustained are covered under the *Full Protection Insurance*, as the policy specifies that damages to the engine are covered.

However, the complainant was selective and did not quote the policy in its entirety.

The complainant fails to note the exclusions and conditions. These are all reflected in the policy document provided to the complainant, a copy¹⁰ of which has also been submitted with the complaint.

A specific policy exclusion, which has also been quoted by the service provider is:

“This Policy will not provide any cover for:

- a) any Incident occurring under circumstances where You have failed to abide by the terms of the Car Rental Agreement, including (but not limited to) driving in breach of the law, misfuelling, or driving under the influence of drugs or alcohol in breach of the law; ...”¹¹*

⁹ A fol. 6

¹⁰ A fol. 27

¹¹ A fol. 28

When, during his cross-examination, the complainant was referred to such clause as contained in the policy, he admitted that:

*"... asked if I am aware of this clause, I reply, yes."*¹²

As submitted by the service provider the insurance policy and the car rental agreement were a back-to-back contract and the cover afforded by the insurance policy depended on the adherence to the terms and conditions of the car rental agreement.

The Car Rental Contract specifically states that:

*"The renter has read and accepts this car rental contract and the attached car rental agreement – terms and conditions with renter's signature and accepts a responsibility of the rented vehicle throughout the rental period ..."*¹³

The complainant continuously argued that he had confirmation from *Thrifty* that he was allowed to drive on the F225, and this by referring to an email, which he also submitted, dated 7 August 2018 whereby *Thrifty's* representative confirmed that:

*"According to points a and b of article 10 in the T&C sheet Mazda CX3 (Economy sized 4x4) is allowed on F-roads except F-88, F-894, F-249 and F-578 ..."*¹⁴

However, the incident in question occurred in July, whilst this email is dated August 2018, that is, dated after the accident had already taken place. This means that the complainant did not have the go-ahead to drive on F225 before the accident took place. Moreover, the other clauses of the *Car Rental Agreement* still apply.

As in the case of the insurance policy, the *Thrifty Car Rental Agreement* should also be considered in its entirety.

In this case, of utmost importance is Clause 9 of the said agreement:

"The vehicle shall be operated and driven with care. Only those registered as drivers according to the rental agreement between the parties are permitted to

¹² A fol. 67

¹³ A fol. 22

¹⁴ A fol. 19

drive the vehicle. The Renter is liable for any damage resulting from the use of the vehicle for which no compensation will be paid by the vehicle's insurance company, including damage to the vehicle and/or injury to passengers resulting from any of the following:

(a) Off-road driving, for example in paths and tracks, on beaches, in areas only accessible during low tide, or in other trackless areas.

*(b) Driving in water, across rivers or on any other type of water course ...*¹⁵

The car rental agreement clearly stated that the renter could not drive in water.

Admittedly the complainant stated that he had entered the river:

*"I was driving and I stopped the car because I saw the river. There were two different ways and you had to choose to cross the river. I stopped the car, watched the river and put the car in first gear and I entered into the river."*¹⁶

It is evident that the incident occurred whilst the complainant was driving in water and, as a result, he was in breach of the above-quoted condition.

The complainant also admits that:

*"... I state that I read all the terms and conditions of the Thrifty contract."*¹⁷

He has also continuously referred to the fact that he failed to opt for another type of insurance policy, including the one specifically designed for river crossing, as he had the *Full Protection Insurance* in force. However, at the same time, he repeatedly confirmed that he has read both the terms and conditions of *Thrifty* and also the insurance policy documents.

In order to cross the river and be protected, the complainant was offered the river ford crossing protection, but he declined it and chose the standard protection policy, obviously, to save on the premium. In that way, he was assuming the risk of crossing the river without being protected by an insurance cover.

When he admitted that he had read the car rental agreement, he was aware that non-adherence with the car rental agreement would result in non-cover by

¹⁵ A fol. 24

¹⁶ A fol. 65

¹⁷ A fol. 67

the insurance; the provision of insurance cover depended on the adherence to the car rental agreement.

Since the complainant breached the provisions of the *Thrifty* car rental agreement, he was not covered by the insurance policy.

Therefore, the Arbiter cannot uphold the complaint.

Due to the particular nature of this case, each party is to bear its own costs of these proceedings.

Dr Reno Borg
Arbiter for Financial Services