

The complaint

Miss W complains that esure Insurance Limited declined her claim following the theft of her car and avoided (treated it as if it never existed) her motor insurance policy.

What happened

In October 2021 Miss W's car was stolen. She says in September she added her partner, Mr J, onto her policy as a named driver. When she made a claim to esure it declined her claim and said it was avoiding the policy. It told her this was because she hadn't told it about a MS90 motoring conviction Mr J had received in 2017.

Miss W says Mr J wasn't aware of the conviction. She says this would no longer be on his licence at the time he was added as a named driver to her policy. She also says he had never driven her car by the time it was stolen. Miss W says she doesn't think a letter informing of the MS90 conviction was sent. But if it was it may have been sent to Mr J's father's house, after Mr J had moved to a different address.

Miss W says she is in £7,000 worth of debt because of the decline decision. This has caused her a great deal of distress and anxiety resulting in time off work. She asks that esure at least contributes towards her loss.

esure says that had it been aware of Mr J's motoring conviction it wouldn't have been able to offer Miss W renewal terms. It says the policy has been avoided back to the date Mr J was added as a named driver in September 2021. And Miss W will need to declare this avoidance to future insurers.

Miss W thought this was unfair and referred her complaint to our service. Our investigator didn't uphold her complaint. He says Miss W was asked whether Mr J had any motoring convictions, and she had confirmed he didn't. He says this was a careless qualifying misrepresentation and esure had acted fairly by declining the claim, avoiding the policy, and refunding premiums back to Miss W.

Miss W didn't agree with our investigator and asked for an ombudsman to review her complaint.

It has been passed to me to decide.

I issued a provisional decision in June 2022 explaining that I was intending to uphold Miss W's complaint. Here's what I said:

provisional findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

The relevant law in this case is The Consumer Insurance (Disclosure and Misrepresentation) Act 2012 (CIDRA). This requires consumers to take reasonable care not to make a

misrepresentation when taking out a consumer insurance contract (a policy). The standard of care is that of a reasonable consumer.

And if a consumer fails to do this, the insurer has certain remedies provided the misrepresentation is - what CIDRA describes - as a qualifying misrepresentation. For it to be a qualifying misrepresentation the insurer has to show it would have offered the policy on different terms or not at all if the consumer hadn't made the misrepresentation.

CIDRA sets out a number of considerations for deciding whether the consumer failed to take reasonable care. One of these is how clear and specific the insurer's questions were. And the remedy available to the insurer under CIDRA depends on whether the qualifying misrepresentation was deliberate or reckless or careless.

If the misrepresentation was reckless or deliberate and an insurer can show it would have at least offered the policy on different terms, it is entitled to avoid the consumer's policy. If the misrepresentation was careless, then to avoid the policy, the insurer must show it would not have offered the policy at all if it wasn't for the misrepresentation.

If the insurer is entitled to avoid the policy, it means it will not have to deal with any claims under it. If the qualifying misrepresentation was careless and the insurer would have charged a higher premium if the consumer hadn't made the misrepresentation, it will have to consider the claim and settle it proportionately if it accepts it.

esure thinks Miss W made a qualifying misrepresentation when she failed to disclose Mr J's MS90 motoring conviction. I've listened the call when Miss W added Mr J to her policy. esure's agent very clearly asks if Mr J had any motoring convictions from the past five years. Miss W says, "no".

It's not in dispute that Mr J had a MS90 motoring conviction recorded against him in 2017. This should've been declared when Miss W was asked if Mr J had any motoring convictions in the past five years.

I acknowledge Miss W's comments that neither she nor Mr J were aware of this conviction – and the reasons given for why they were unaware. But I don't think this is esure's fault. Ultimately it was for Miss W to take reasonable care not to make a misrepresentation, which in this case, I don't think she did.

esure has provided evidence from its underwriters which shows that if Miss W hadn't made this misrepresentation it wouldn't have provided cover at all. This means that I am satisfied Miss W's misrepresentation was a qualifying one.

I think esure's decision that this was a careless misrepresentation is reasonable. I think this is fair because of the circumstances described by Miss W as to why she and Mr J were unaware of the conviction.

But I'm not satisfied esure was entitled to avoid Miss W's policy in accordance with CIDRA.

CIDRA says that for a careless misrepresentation an insurer can only avoid the policy if it wouldn't have provided insurance on any terms. But esure hasn't shown that it wouldn't have offered cover to Miss W without Mr J on the policy. It was Mr J who had the motoring conviction that meant esure wouldn't provide cover. I think esure would have offered cover to Miss W without Mr J as a named driver. She was considered an acceptable risk prior to Mr J being added. I haven't seen any information that shows this position changed.

So, I think esure should treat Miss W's policy as if it had been provided without Mr J as a

named driver. Records of the avoidance will affect Miss W's future cover. So, I think it's fair that esure should remove all records of the avoidance and provide Miss W with a letter saying that the policy was avoided in error.

Miss W says the avoidance has caused her considerable distress and anxiety, resulting in time off work. And it took esure nearly two months from the loss being reported to confirm the avoidance decision. In the circumstances I think it's reasonable for esure to pay Miss W £200 compensation for the trouble and upset it caused her.

As CIDRA reflects our long-established approach to misrepresentation cases, I think not allowing esure to rely on it to avoid Miss W's policy represents a fair and reasonable outcome in this complaint.

I asked both parties to send me any further comments and information they might want me to consider before I reached a final decision.

esure responded to say it initially accepted Miss W's testimony that she hadn't been aware of her partner's motoring conviction and thought the non-disclosure of this information was careless. It says it now feels that the non-disclosure falls under the reckless category. It says Miss W benefitted by the careless categorisation when the policy was avoided by the refund of premiums. But it says the true definition of the misrepresentation should be within the reckless category.

esure refers to an email from Miss W where she says she works in insurance and knows the importance of answering questions correctly. It says she was also made aware of the need to disclose any motoring convictions from the past five years. Knowing this, esure says Miss W should have ensured the information she gave was correct. In not doing so she behaved recklessly.

esure says it doesn't think its responsible to make a risk acceptable in the event of a misrepresentation being discovered. It doesn't think that if a misrepresentation relates to a named driver, then it should simply remove that driver. It says this isn't fair and negates the need to ask questions for additional drivers, as they can simply be removed in the event of an avoidance. esure thinks this will lead to more insurers categorising misrepresentations as reckless, which will impact on the customer.

esure also queries what evidence Miss W has supplied to substantiate her claim that she didn't know about the motoring offence.

Miss W didn't provide any further comments or information for me to consider.

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.

When esure declined Miss W's claim for the theft of her car because she didn't disclose her partner's motoring conviction, it said this was a careless misrepresentation. Under CIDRA an insurer can only avoid the policy for a careless misrepresentation if it can show it wouldn't have provided cover on any terms. In my provisional decision I said I didn't think esure has shown this to be the case. This is because it was prepared to insure Miss W prior to her partner being added to the policy. So, it's clear she had presented an acceptable risk to its underwriters immediately prior to adding the named driver.

esure says it now wants to change the category of misrepresentation from careless to

reckless. I don't think it has provided clear information to support why this is justified. I understand this change is an attempt to allow the avoidance decision to be maintained under the CIDRA rules.

I have no reason to doubt Miss W's testimony that she wasn't aware of the motoring conviction at the time she added her partner to her policy. Miss W is very clear that neither she nor her partner were aware of this because no notification of the offence had been received. Miss W explains that she works in the insurance industry and is aware of the need to answer questions accurately. I think it's unlikely she will have provided inaccurate information if it was known her partner had a motoring conviction, given her understanding of the potential consequences.

I acknowledge esure's concern about my provisional decision. Specifically, that if a misrepresentation is for a named driver, it should simply remove that driver from cover. It says this negates the need to ask questions about additional drivers, as they can simply be removed in the event of an avoidance.

My provisional decision considered the circumstances of this specific complaint. I think esure's decision that Miss W had made a careless misrepresentation was fair. I haven't seen information that shows she knew the information she provided was untrue or misleading. Or that she didn't care whether it was accurate and acted recklessly. So, I don't think esure has shown that there is reason to change the categorisation from careless to reckless. The CIDRA rules determine how an insurer should categorise a misrepresentation. Although I acknowledge esure's comments I don't think it's shown that my decision should change.

Having considered all of this I'm not persuaded that I should change my decision. So, my provisional decision now becomes my final decision.

My final decision

For the reasons I've explained above and in my provisional decision I uphold Miss W's complaint. esure Insurance Limited should:

- treat Miss W's policy as if Mr J hadn't been added as a named driver;
- remove all records of Miss W's policy avoidance and provide her with a letter explaining the policy was avoided in error; and
- pay Miss W £200 compensation for the trouble and upset the declined claim and avoided policy has caused.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss W to accept or reject my decision before 9 August 2022.

Mike Waldron
Ombudsman