DRN-3601314

The complaint

Mr and Ms I complain that First Complete Ltd trading as PRIMIS Mortgage Network ('First Complete') made mistakes when completing a critical illness policy application on their behalf.

What happened

Mr I and his wife Ms I had an established relationship with First Complete which they used to set up protection policies.

In 2015 they took out a 22 year level term joint life and critical illness policy with a sum assured of £200,000. This was provided by an insurer who I'll call 'Insurer A'.

In 2018 there was a review of the policies they held. The broker recommended Mr and Ms I replace the joint policy they held with Insurer A, as it found the same level of cover at a lower monthly premium with another insurer, who I'll call Insurer B.

This recommendation was accepted and First Complete applied for a 22 year level term joint life and critical illness policy with a sum assured of £200,000 with Insurer B. Cover was accepted but after the policy went live, Mr and Ms I decided not to cancel their existing cover with Insurer A and retained both policies as this was affordable for them.

As part of the same review in 2018, Mr and Ms I also took out individual level term life assurance policies with sums assured of between £400,000 and £450,000.

In 2020 First Complete contacted Mr and Ms I again for another review of their cover. The broker recommended Mr and Ms I replace the joint policy they held with Insurer B as it found the same level of cover at a lower monthly premium with another insurer, who I'll call 'Insurer C'.

Mr and Ms I accepted the recommendation and First Complete applied for two level term life and critical illness policies over a 20 year term with a sum assured of £200,000 - one had Mr I as the life assured and the other Ms I; Mr and Ms I jointly owned both policies. These applications were accepted and the policies went live shortly afterwards. Mr and Ms I then cancelled the joint policy they held with Insurer B.

As part of the same review in 2020, First Complete also recommended Mr I replace his sole level term life assurance policy as it believed this could be obtained at a lower monthly premium. This recommendation was accepted and a new level term life assurance policy was set up for Mr I with a sum assured of £450,000. This was with a different insurer again, who I'll call 'Insurer D'.

Unfortunately, in 2021 Mr I had cause to claim on the policies he held with critical illness cover following a heart attack – one with Insurer A and one with Insurer C.

Insurer A paid the claim in full but Insurer C did not. When investigating the claim, Insurer C received medical information about Mr I's smoking history. After reviewing this, Insurer C

was of the view it had been given incorrect information about Mr I's smoking status when he applied for the policy. Insurer C decided Mr I had carelessly misrepresented his circumstances and said it would have charged Mr I more for the cover had the question been answered correctly. So, in line with The Consumer Insurance (Disclosure and Misrepresentation) Act 2012 (CIDRA), it proportionately settled the claim. Which means Mr and Ms I received £88,003.60 less than the full sum assured.

Mr and Ms I then complained to First Complete. Mr I said when he spoke with the advisor in 2020, he told them his circumstances had not changed. The policies he'd taken out in 2018 had his smoking status recorded correctly, so he felt this question ought to have been answered differently by the adviser in the 2020 application.

First Complete looked into things and upheld the complaint – it agreed its adviser had made a mistake when inputting Mr I's smoking status for both of the policies applied for in 2020. It said it had asked Mr I about his smoking in 2020 and he'd said he was a current e-cigarette smoker, but human error meant the advisor recorded this incorrectly.

In the application to Insurer C the adviser said Mr I hadn't smoked any tobacco or nicotine replacement products in the last five years.

In the application to Insurer D the adviser said Mr I was an ex-smoker and that he'd last smoked or used nicotine products 1-5 years ago.

First Complete contacted Insurer D about the incorrect information given. Insurer D then gave Mr I the option of either paying the difference in premiums to bring his cover up to date or reducing his sum assured.

First Complete then offered Mr I £750 compensation to apologise for the error. It felt this was sufficient as it said Mr I ought to have checked the answers on his application forms and so felt he had made further errors in addition to its own. In particular it said:

- First Complete had emailed details of both of his applications, including his answers, to him directly.
- Insurer C also sent him an email asking him to log into his portal to check his documentation. Had Mr I done this he would have been able to check his answers.
- Insurer D had posted him a copy of his application for him to check.

First Complete further said Mr and Ms I hadn't lost out because of its error as the policy with Insurer A (which it had recommended Mr I cancel) had paid out. First Complete also noted that by taking out two separate policies with Insurer C, Ms I now had ongoing critical illness cover despite Mr I's claim – something she would not have had otherwise.

Mr and Ms I remained unhappy and brought their complaint to our Service. They raised a number of points in support of their complaint, including:

- The email from Insurer C had gone to Mr I's business account which receives many emails, he simply missed it and so never opened it.
- Mr I relied on the specialist to complete the application on his behalf and didn't expect to have to check their work.
- The broker didn't ask him to check the answers at any point.
- Mr I would have paid a higher premium if this was needed in order to obtain cover.

Our Investigator looked into things and was of the view Mr and Ms I had lost out because of First Complete's mistake. They thought First Complete should pay Mr and Ms I the

outstanding benefit amount of £88,003.60 and 8% simple interest on this amount from the date Insurer C made the proportionate payment, until the date this further payment was made. They were of the view the £750 compensation already offered by First Complete was fair.

First Complete disagreed and so the complaint was passed to me to consider.

After reviewing the evidence, I was thinking about reaching a different outcome to the Investigator. So, I issued a provisional decision so that First Complete and Mr and Ms I could have the opportunity to comment before a final decision was given. In brief, I agreed that First Complete had made mistakes but felt Mr I had had opportunities to check his answers as instructed to by the insurer. So, I didn't think I could fairly say First Complete was directly responsible for the misrepresentations that occurred.

First Complete accepted my provisional findings. Mr and Ms I did not. In response, they raised a number of points including:

- The email Mr I was sent from Insurer C looked like an advert, an invitation to register for other services or a form of receipt. They noted it was only in small print that Mr I was told to review the answers he'd given.
- Mr I felt he could rely on the advisor and so didn't think he needed to check their work.
- It cannot be fair there are no consequences for First Complete's mistake.
- The outcome doesn't reflect First Complete's role in the chain of events that led to the shortfall in payment.

They also said that my provisional decision didn't consider contributory negligence.
Mr and Ms I then highlighted case law which illustrated consideration by the courts of the extent of responsibility for the damage caused in cases where a broker made an error. They argued that the extent of their contribution to the error was around 20% given the facts of the complaint.

After reviewing all of the evidence again, I was thinking about changing my findings. So, I issued a second provisional decision so that First Complete and Mr and Ms I could have the opportunity to comment before a final decision was given. In brief, I said that a fair resolution in these particular circumstances was that First Complete pay 50% of the shortfall in the sum assured. I felt this reflected my view that both parties have responsibility for the loss incurred.

Mr and Ms I accepted my findings. First Complete did not. It provided responses to the further points Mr and Ms I made following my first provisional decision. These included:

- The email that was sent from Insurer C told Mr I to check his documentation. He had a duty to comply and it was reasonable that he did so.
- CIDRA S.2(3) states "*A failure by a consumer to comply with the insurer's request to confirm or amend particulars previously given is capable of being a misrepresentation for the purposes of the Act*".
- There is no evidence First Complete advised Mr I to ignore the request from the insurers.
- The role of the advisor ended when the application was submitted. The failure to check the answers was Mr I's and nothing to do with the advisor.
- Insurers ask consumers to check answers to safeguard against administrative mistakes by advisors.
- It did not agree contributory negligence applied and the case law examples Mr and Ms I provided predated CIDRA.

I am now in a position to issue a final decision on this complaint.

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.

Although a number of issues have been raised, this decision only addresses those I consider to be materially relevant to this complaint. However, I've given careful consideration to all of the submissions made before arriving at my decision.

First Complete has agreed it made an error when completing the application to Insurers C and D. So, in this decision I intend to focus on the impact of this mistake and whether the action taken by First Complete to resolve things is fair.

I've taken into account the relevant legislation here which is The Consumer Insurance (Disclosure and Misrepresentation) Act 2012 (CIDRA). I've also considered the industry guidance that was in place at the time, called the "Misrepresentation and Treating Customers Fairly – ABI Code of Practice Managing Claims For Individual and Group Life, Critical Illness and Income Protection Insurance Products September 2019". I will refer to this as 'the code'.

CIDRA requires consumers to take reasonable care not to make a misrepresentation when taking out an insurance policy. If the consumer doesn't take reasonable care, it sets out the remedies available to the insurer. These depend on whether there has been a claim and the standard of care is that of a reasonable consumer.

CIDRA sets out a number of considerations for deciding whether the consumer took reasonable care, including if the questions asked at application by the insurer were clear and specific.

The remedy available to the insurer under CIDRA depends on whether there was what the Act describes as a qualifying misrepresentation and whether this was deliberate or reckless, or careless. For any misrepresentation to be a qualifying one, as well as showing the consumer failed to take reasonable care, the insurer needs to be able to show it made a difference to the terms on which it would have offered the policy or that it wouldn't have offered the policy at all. Where a misrepresentation was careless, if the insurer would have offered the policy at a higher premium and there has been a valid claim under the policy in question, the insurer should settle the claim proportionately.

The code talks specifically about misrepresentation where policies have been taken out through a broker. It states:
'If the intermediary was clearly acting on behalf of the customer, for example, an independent financial adviser, the intermediary (as opposed to the insurer) should be accountable for any misrepresentation resulting directly from the intermediary's action or omission.'

Here I'm satisfied First Complete was working on Mr and Ms I's behalf and the incorrect answer was submitted because of the intermediary's action. Yet the argument First Complete is raising is that the misrepresentation is not a direct result of its mistake. It is of the view that Mr I had the opportunity and responsibility to check his answers, but he didn't. So, it doesn't feel it should be held responsible for the shortfall in the claim pay out from Insurer C.

I've seen evidence which shows that on 9 April 2020, First Complete sent Mr I an email

explaining he would shortly receive a copy of the answers he'd given – I've also seen evidence these documents were then sent in a follow up email by First Complete. However, this initial email didn't tell Mr I that he needed to check his answers and I can't see that the follow up email did either. Whilst I appreciate First Complete's point that there were disclaimers within the documents themselves, I don't think Mr I would necessarily have had cause to open these attachments unless he was advised to do so. I say this noting these documents were simply copies of the information already given and signed as part of the advice meeting. So, I'm not persuaded that Mr I ought to have checked his answers based on this communication.

However, I've also seen evidence to show that after the application to Insurer C was submitted, Mr I was sent an email from Insurer C asking him to log into his portal to check the answers the advisor gave when applying for his policy. Yet Mr I didn't ever log in or check his answers.

I've also seen an email from Insurer D which says it emailed Mr I a copy of his application answers. I don't know what this email said as I haven't been provided with a copy, but on balance, I think it's likely it did tell Mr I to check his answers as this is a standard process for all major insurers. And it's clear that Mr I didn't do so as he made no amendments to either policy at that time. I mention the application to Insurer D here as it too contained incorrect information. And had Mr I realised there were errors on this application, I think it's likely this would have given him cause to check the application details submitted to Insurer C.

So, it's clear Mr I had opportunities to check the information First Complete had given his insurers and he didn't do so. I also think it's relevant the steps Mr I needed to take in order to check this information weren't particularly onerous.

Mr I has told us he missed Insurer C's and Insurer D's emails in his work inbox due to the volume of material he received. Mr I has also said he wasn't told to expect any emails from the insurers and that he was under particular strain at the time with his business and the impact of lockdown. I was sorry to hear this. That being said, Mr I chose to use this inbox to communicate with First Complete and his insurers, and if the emails were sent, I think it's fair to say it was Mr I's responsibility to ensure they were read. Whilst Mr I says he wasn't warned by First Complete that he needed to check his answers, I'm satisfied he was warned by the insurers. I think that's relevant here as Mr I is saying First Complete is responsible for the proportionate settlement Insurer C paid out. However, had Mr I followed the advice to check his answers, I think it's reasonable to say the error would have been found and rectified much earlier.

I note Mr and Ms I's arguments about the content of the email from Insurer C being unclear. However, their explanation for not having opened the email was that it was missed. So I'm not persuaded the prominence, or lack thereof, is relevant to the reasons why Mr I didn't check this email or his application answers. The email subject said Insurer C had updated Mr I's account, and given Mr I had just taken out an insurance policy with it, I don't think it would be reasonable in these circumstances to consider this email an advert or marketing. I appreciate why in these circumstances Mr I may have thought this email could be a receipt, but I still don't think this removed his responsibility to open correspondence from his insurer to check this was the case.

That being said, First Complete was the professional in this situation, whom Mr and Ms I had engaged to provide advice and assist with applications. I don't dispute that First Complete had a responsibility to ensure the answers it submitted were correct and that it failed to do this. At the same time, I also don't think this expertise removes Mr I's responsibility to check the answers as instructed by the insurer.

First Complete has argued that the purpose of the insurer inviting customers to check their details is to safeguard against mistakes of this nature. And I'd agree that this process does serve as a safeguard against such errors. But I don't think this necessarily means it's is never appropriate to hold a broker responsible for errors it has made in the application process that have then led to a loss for the consumer. What I think is a fair outcome would depend on the individual circumstances of each complaint.

In this complaint, I think it's also key that Mr I changed his policy at First Complete's suggestion and it then made a significant error in his application. Which means he'd have had sufficient cover in place but for First Complete's actions.

It's also important to stress that my role isn't to punish businesses for mistakes. It's my role to look at the circumstances of this complaint and try to understand the impact of First Complete's error on Mr and Ms I.

Mr and Ms I are saying the shortfall in their insurance settlement is something First Complete is responsible for. They have said First Complete is at least partially responsible, even if it isn't wholly responsible.

Where a business has done something wrong but there has been an intervening event, it is only in very unusual or exceptional circumstances that I would still think it's fair for some of the liability for the error (and loss) to remain with the business. Yet, having carefully considered things, I do think a proportionate settlement is an appropriate resolution to this complaint. I have weighed up what both parties have done and how that's contributed to the situation Mr and Ms I now find themselves in. I agree with First Complete that it isn't wholly responsible for the loss as Mr and Ms I had an opportunity and responsibility to check their answers and they didn't do so - had this happened, no loss would have occurred. That being said, had First Complete not made the mistakes it did, no loss would have occurred - so there is a link between its error and the loss. Therefore, on reflection I think it can be fairly said both parties have responsibility for the loss incurred in these particular circumstances. Whilst Mr and Ms I have suggested their contribution to the loss amounts to 20% based on the facts of the complaint, I'm not persuaded by this. In my opinion both parties could have avoided this loss had they taken the action they ought to have, so in the circumstances, I think it's fair they take equal responsibility. Which means I think First Complete ought to take responsibility for half of the loss incurred here.

This means I am asking First Complete to pay Mr and Ms I £44,001.80 to account for its contribution to the shortfall in the settlement received. I also think First Complete should pay 8% simple interest per annum on this amount from the date the rest of the claim was paid by Insurer C until the date it makes this payment.

I am not awarding any more compensation to Mr and Ms I. I'd note they've already been awarded £750 by First Complete and I think this is sufficient to account for the distress caused by the submission of the incorrect information by First Complete. I say this noting that Mr and Ms I's actions also contributed to the situation they ultimately found themselves in.

My final decision

My final decision is that First Complete Ltd should pay Mr and Ms I £44,001.80 as well as 8% simple interest per annum on this amount from the date Insurer C paid the rest of the claim until the date it makes this payment.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms I and Mr I to

accept or reject my decision before 15 August 2022.

Jade Cunningham
Ombudsman