

The complaint

Mr W has complained that Aviva Insurance Limited avoided (treated it as if it never existed) his motor insurance policy and refused to pay his claim following the theft of his car.

What happened

Mr W took out a motor insurance policy with Aviva through a broker. When his car was stolen from outside his house a few days later, he tried to claim on his policy. Aviva declined his claim, avoided his policy and kept the premiums he'd already paid. When Mr W complained, it said he'd answered the question he'd been asked about modifications to his car incorrectly. And that it considered this to be a deliberate or reckless qualifying misrepresentation, which entitled it to avoid his policy, refuse his claim and retain his premiums. But Mr W said he hadn't been asked about any modifications.

Mr W brought his complaint to us and our Investigator thought it should be upheld in part. He agreed there had been a qualifying misrepresentation. But he didn't think this was deliberate or reckless. He believed it was careless. He said Aviva should refund Mr W's premiums and pay him £150 compensation for the delay in making its decision about the claim.

Aviva agreed with the Investigator's view. But Mr W replied that he hadn't been asked questions about the modifications when he bought the policy. He also said he didn't receive the Statement of Fact. He said he thought his broker had called Aviva when he bought his policy, but he wasn't privy to their discussion.

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.

I was sorry to hear about the effect this matter has had on Mr W and his family. I can understand that this has had a severe financial impact for them.

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.

Aviva thinks Mr W failed to take reasonable care not to make a misrepresentation when he stated in his application via a broker that his car had no modifications. Unfortunately, the sales call hasn't been retained and so I'm unable to verify the question that he was asked or the answer that he then gave.

But the broker has confirmed that Mr W was asked about any modifications to the car. And Mr W told Aviva that he gave the broker the car's details. I also think this is a standard question that is asked at point of sale. And so I think it's most likely that Mr W was asked about any modifications to his car.

Our approach where there isn't a recording of the sales call is that if the insurer can provide a Statement of Fact based on the information it says the consumer provided, we might accept this as a good indication of the questions the consumer was asked and the answers they provided. Aviva has provided us with the Statement of Fact that it said was provided to Mr W after the sale of the policy. This confirms the question asked about modifications:

"Have any changes been made to the maker's specifications other than being adapted solely to cater for any physical disability?"

The Statement of Fact records Mr W's answer as "No". Mr W said he didn't receive this document, and I have no reason to doubt him. But Mr W also said he wasn't aware that the car had any modifications. So I think if he had received the document then he wouldn't have corrected the wrong answer.

Mr W thought there had been a call from the broker to Aviva at the point of sale. But, as the Investigator has explained, the policy was set up online and no calls were made.

During the claim validation process, Mr W directed Aviva to the dealer to obtain a full specification of his car when it was advertised for sale. This specification describes a list of recent significant changes to the car. So I think Mr W must have been reasonably aware that the car had been changed from the maker's specification. And so I agree Mr W failed to take reasonable care when he didn't disclose that the car had been modified.

Aviva has provided evidence from its underwriters which shows that if Mr W had not made this misrepresentation it wouldn't have offered cover at all. This means I am satisfied Mr W's misrepresentation was a qualifying one under CIDRA.

I also think Mr W's misrepresentation was a careless one. This is because I haven't seen evidence that he made a reckless or deliberate misrepresentation.

Therefore, I'm satisfied Aviva was entitled to avoid Mr W's policy in accordance with CIDRA. And, as this means that – in effect – his policy never existed, Aviva does not have to deal with his claim following the theft of his car. And – as CIDRA reflects our long-established approach to misrepresentation cases, I think allowing Aviva to rely on it to avoid Mr W's policy produces the fair and reasonable outcome in this complaint.

However, Aviva retained Mr W's premiums as it thought the misrepresentation had been reckless or deliberate. So I think Aviva should now refund these, with interest, as it has already agreed to do. Aviva also delayed the claim for some months by not telling Mr W its decision when it had all the evidence it needed. The Investigator recommended that Aviva should pay Mr W £150 compensation for this. I think that's fair and reasonable as its in keeping with our published guidance for the level of impact this delay had.

Putting things right

I require Aviva Insurance Limited to do the following:

1. Refund Mr W his premiums in full, adding interest at 8% per annum from the date of payment to the date of settlement†.
2. Pay Mr W £150 compensation for the distress and inconvenience caused by its delay in deciding his claim.

†If Aviva considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr W how much it's taken off. It should also give Mr W a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

For the reasons given above my final decision is that I uphold this complaint in part. I require Aviva Insurance Limited to carry out the redress set out above, as it's already agreed to do.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 15 September 2022.

Phillip Berechree
Ombudsman