

The complaint

Ms D and Mr L have complained that esure Insurance Limited avoided (treated it as if it never existed) their motor insurance policy and refused to pay their claim following the theft of their car.

What happened

Ms D took out a motor insurance policy with esure through an online price comparison site and renewed it a year later. Mr L is a named driver on the policy. When their car was stolen from outside their home, they tried to claim on their policy.

esure declined the claim, avoided the policy and returned the premiums they'd already paid, less an administration fee. When Ms D complained, esure said she'd answered the question she'd been asked about previous motoring convictions incorrectly. And that it considered this to be a qualifying misrepresentation, which entitled it to avoid the policy and refuse the claim.

Ms D brought her complaint to us and our Investigator thought it should be upheld in part. She agreed there had been a qualifying misrepresentation. She didn't think esure had treated this as deliberate or reckless, but as careless. She thought esure was entitled to avoid the policy and decline the claim. It had returned the premiums but retained an administration fee. The Investigator thought it wasn't entitled to do this as the policy should be treated as if it had never existed. And so she thought esure should reimburse this fee with interest.

esure doesn't agree with the Investigator and has asked for an Ombudsman's decision. It said it had cancelled the policy before deciding to avoid it and so was entitled to charge a cancellation fee. It said Ms D hadn't complained about this. Ms D has also said she doesn't agree on the basis she wasn't asked about previous convictions at renewal.

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 can understand that Ms D and Mr L feel frustrated and disappointed by esure's decision to avoid their policy and decline the claim. They've explained that this leaves them with a considerable debt as the car was on finance. I was sorry to hear about their financial difficulties.

I'm satisfied that the relevant law in this case is The Consumer Insurance (Disclosure and Misrepresentation) Act 2012 (CIDRA). As our Investigator has explained, 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 Ms D failed to take reasonable care not to make a misrepresentation when she stated in her application via a comparison site that neither she nor her partner had previous driving convictions within the previous five years. And I've looked at the question she was asked when she completed the application and agree she failed to take reasonable care.

This is because she was asked:

"In the last five years have you received any motoring convictions, drivers licence endorsements or fixed penalties, and/or have been disqualified from driving (including any pending prosecutions)?"

Ms D was then provided with further information about motoring convictions. And I think this was a clear question asked by esure through the comparison site Ms D used. Ms D didn't disclose any convictions. At renewal, I can see that Ms D was told:

"...It's important that you check your documents and call us if any of the information is inaccurate, has changed over the past year or changes in the future. Not telling us could lead to you being uninsured, your policy being cancelled or voided, a claim rejected or reduced, or additional terms being applied to your policy..."

Under details of the convictions and fixed penalty offences in the last five years for all drivers it again states *"none disclosed"*.

But when Ms D took out the policy she and Mr L had three convictions within the previous five years. And when they renewed the policy, they had four motoring convictions that should have been disclosed.

As the convictions were relatively recent and would have been preceded with warning letters, I think Ms D and Mr L should reasonably have known of them. Mr L said he disclosed the convictions in a phone call to esure. But I haven't seen any evidence to support this. And I think Ms D should have reasonably checked her renewal invitation to ensure that the information disclosed was correct. And so I think this means Ms D failed to take reasonable care not to make a misrepresentation when she said they had no previous motoring convictions.

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

esure returned Ms D's premiums, which I think shows that it regarded the misrepresentation as careless. And I haven't seen any evidence from esure to show that the misrepresentation was reckless or deliberate.

Therefore, I'm satisfied esure was entitled to avoid Ms D's policy in accordance with CIDRA. And, as this means that – in effect – her policy never existed, esure does not have to deal with her claim following the theft of her car. And – as CIDRA reflects our long-established

approach to misrepresentation cases, I think allowing esure to rely on it to avoid Ms D's policy produces the fair and reasonable outcome in this complaint.

esure retained a fee which it has said was for cancellation of the policy. But the policy was avoided due to careless misrepresentation and this supersedes the cancellation. I'm satisfied that esure is required by CIDRA to refund the premiums in full and, as the policy is treated as if it never existed, any cancellation fees cannot be applied. And so I think esure should refund this fee to Ms D with interest as she has been without her money for some time.

Putting things right

I require esure Insurance Limited to refund the cancellation fee charged to Ms D, adding interest to this amount at the rate of 8% simple per annum from the date the premium was refunded until the date of settlement.

If esure considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Ms D how much it's taken off. It should also give Ms D a tax deduction certificate if she asks for one, so she 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 esure Insurance Limited to carry out the redress set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms D and Mr L to accept or reject my decision before 3 November 2022.

Phillip Berechree
Ombudsman