DRN-4177079

The complaint

Mr W has complained about his motor insurer, Advantage Insurance Company Limited ("Advantage"), and about the way it dealt with a third party claim against his policy.

Advantage is the underwriter of this policy i.e. the insurer. Throughout the claim Mr W was dealing with a different company who acts as Advantage's agent. As Advantage has accepted it is accountable for the actions of the agent, in my decision, any reference to Advantage includes the actions of the agent.

What happened

I issued a provisional decision regarding this complaint in May 2023. In that decision I provisionally decided that if Advantage does pursue Mr W for its outlay it must only seek to recover £9,717.00 and not £16,856.00 from him. An extract from that decision follows:

"Mr W took out a motor insurance policy for his motorbike which started on 1 September 2020. He was involved in an accident in October 2020 with a third party, for which Advantage deemed him to be at fault. Advantage settled the third party claim but said that it wouldn't indemnify Mr W (meaning it would request reimbursement of its outlay from him). It said this was because he breached his policy terms by being under the influence of alcohol at the time of the accident. Overall, Advantage paid £16,856.00 in compensation and fees to the third party, which it now wants back from Mr W. Advantage also cancelled the policy.

Mr W wasn't happy about this and complained. He said he contacted the police and they said they had no record of his case. He added that he had not breached his policy terms and that he had not been found to be over the prescribed limit for alcohol. Mr W's criminal solicitors also wrote to Advantage and said that they believed that the breathalyser test at the police station was inconclusive and that this would explain why Mr W wasn't charged. They asked for Mr W's policy to be reinstated.

Advantage didn't change its decision. It said that Mr W was above the legal drink drive limit at the time of the accident. In its final response it said that when Mr W reported the incident, he said his readings at the roadside and at the police station were both 43 micrograms per 100 millilitres of breath and that he had consumed several pints of beer. It said the legal limit is 35 micrograms per 100 millilitres. It added that the policy expired on 31 August 2021 and could not be reinstated and also that it was intending to issue court proceedings against Mr W.

To us Advantage said that it didn't require a conviction in order to determine that Mr W had breached his policy terms. It said it settled the third party claim in line with its obligation under the Road Traffic Act (RTA).

Mr W didn't agree and asked us to consider his complaint. He said when he was tested at the roadside he was just over the limit. He was then taken to a police station, retested and released under investigation. He added that he is of limited means and did not understand

how the damage he caused to the third party car amounted to a life changing amount of money. He said he believed Advantage's reaction to be excessive.

One of our Investigators reviewed Mr W's complaint, but he didn't think it should be upheld. He felt that Mr W had breached the terms of his policy. He also didn't think he could comment on the amount Advantage settled the third party claim for.

Mr W didn't agree and asked for an Ombudsman's decision. He disputed that he was over the limit and repeated that he was never charged by the police. He said the readings taken by the police may have been flawed which would explain why he wasn't ever prosecuted.

Before I issued my decision, I requested that Advantage provide me with copies of the Ministry of Justice (MOJ) portal pack, which contains details of the negotiations between it and the third party solicitors when it came to the amount of general damages (damages for injuries) and special damages (any other damages such as expenses, credit hire, treatment costs etc) the claim settled for. I also asked how it arrived at the offers it made to the third party. For example I saw that it had settled on a £10,000.00 offer for the credit hire claim and £1,400.00 for the recovery and storage claim, but it wasn't clear how those offers had been calculated. Advantage has now provided this information, which I have considered below.

What I've provisionally 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.

The policy

In the "General exceptions" section the policy says that Advantage will not provide cover if its insured is "found to be over the prescribed limit for alcohol…" or "is riding while unfit through alcohol, drugs or other substances whether prescribed or not…". This is also found in its insurance product information document and the policy certificate. So, I think it was sufficiently highlighted and Advantage did enough to bring it to Mr W's attention.

At the end of the "General conditions" and "General exceptions" sections the policy states that in the circumstances listed under those two sections Advantage will not provide cover under the policy and instead its liability will be restricted to meeting the obligations as required by the RTA or other laws that apply in the country where the loss occurs. And in such circumstances Advantage may seek to recover from the insured any sums it pays out to discharge its insured's liability whether that is made in settlement or under a court judgment.

The cancellations section of the policy also says that Advantage may give its insured seven days' notice of cancellation if it is prevented from providing cover under the policy by law or other reason.

The decision to refuse indemnity and seek reimbursement from Mr W

Mr W has not denied that he told Advantage that, according to the breathalyser test, he was over the limit when he was tested at the scene of the accident. In his initial call to Advantage he also said that he was over the limit when he was tested at the police station. Mr W's main argument in favour of Advantage indemnifying him is that he was not convicted of an offence and was therefore not in breach of his policy terms.

The policy exceptions I referred to above and which Advantage has relied on don't say that Mr W has to be convicted of the offence of drink driving in order for Advantage to be able to

rely on those exceptions. They say that it is enough for him to be found to be over the limit or to be riding while unfit through alcohol. Mr W accepts that the breathalyser tests showed him to be over the limit so I think Advantage was acting within the terms of its policy when it refused to indemnify Mr W. And Advantage only has to show, on the balance of probabilities, that Mr W was over the limit and I think it has. I note that Mr W's solicitors have said that the tests may have been inconclusive, but I am not aware of any evidence in support of this allegation. I also note that Mr W was never charged by the police but there may be a number of other reasons for that. And as far as I am aware the police never specified why it did not proceed to charge Mr W. So in the circumstances, I don't think the way Advantage acted was unfair or unreasonable.

The policy also allows Advantage to seek reimbursement from Mr W. I don't think this term is necessarily unfair and this may also be something that Advantage is entitled to in law. In the circumstances where I think that Advantage should be able to rely on an exception to decline the cover, I don't think it would be fair or reasonable for me to interfere with Advantage's decision to seek to make a recovery from Mr W. But in deciding whether it is fair and reasonable in the specific circumstances for Advantage to recover its outlay in part or in full from Mr W, I need look at its actions, including its efforts to defend or settle the third party claim in a reasonable way.

The decision to settle the third party claim under the Road Traffic Act

Mr W collided with the back of a stationary vehicle. So the circumstances of the accident would suggest that Mr W was at fault. So, I think Advantage was acting fairly and reasonably when it agreed to deal with/settle the third party claim.

Advantage said it dealt with the third party claim in line of its obligations under the RTA - where insurers are in some circumstances required to settle third party/innocent party claims despite having indemnity issues with their own insured.

In this case Mr W was riding his motorbike whilst over the limit, something that is excluded under the policy. In the circumstances, I think this is a case where Advantage could have asserted Article 75 status (without the need of a court declaration) rather than deal with the third party claim as RTA insurer. And under Article 75 it would have been required to meet the claim on behalf of the Motor Insurer's Bureau, which would have meant that it wouldn't have been responsible for losses covered by another policy. What this means in this case is that if the third party had fully comprehensive cover, Advantage could have arguably successfully refused to pay for its vehicle damage. This came to £1,600.00.

Bearing this in mind, I think Advantage's decision to deal as RTA Insurer rather than assert Article 75 status has impacted Mr W. So in seeking reimbursement I don't think Advantage should be able to recover the amount it paid towards the third party's insured losses from Mr W. If Advantage can show that the third party didn't have comprehensive cover it must provide me with evidence in support at the earliest opportunity and in any event before the deadline for responding to this provisional decision.

I note that under Article 75 there is no automatic right of recovery from Mr W. Advantage could have compelled the third party to complete a consent and assignment form ahead of it settling the claim. As far as I am aware it has not done this. But as I have said above, it is entitled to make a recovery under the terms of its policy. So in the circumstances, I will not interfere with its decision to seek recovery of the balance beyond the insured losses from Mr W in principle. But I do need to consider whether the amount it paid to do this was reasonable in the circumstances.

The amount the third party was settled for

The third party's claim included a claim for the provision of a replacement car under a credit hire agreement. Credit hire is, as the name suggests, a contract whereby a party is provided with a hire car "on credit" and without having to pay for it in advance. Credit hire is normally provided to the party who isn't at fault for the accident and who hopes to recover the cost of the hire from the at fault party, in this case Mr W. As the hire is provided on credit it is more expensive than normal hire.

The Association of British Insurers (ABI) introduced the General Terms of Agreement (GTA), which set agreed service standards and charges for the credit hire industry on an opt-in basis, including maximum daily rates for different vehicle groups. The costs depend on the type, specification, and value of the hire car.

We consider GTA rates to be a good guide for what reasonable rates are in a specific case. Unlike courtesy cars, credit hire cars are provided on a like for like basis whereas courtesy cars are normally small cars. So if a party has a large car with a big engine their credit hire car will be something similar and so their credit hire "bill" will be higher compared to someone who owns a small car.

In this case the car Mr W collided with was a taxi. Taxis have different rates to private cars under the GTA and a car that is a taxi will be more expensive to hire compared to the same car that isn't a taxi.

The third party claimed for credit hire between 26 October 2020 and 5 January 2021 at a rate of £220.00 (excluding VAT) per day but the provider said it would reduce this to £110.39 plus VAT if the bill was settled within 14 days of its letter to Advantage. The GTA rate for the particular taxi, which the third party solicitors said was a category NT4 vehicle, is £110.39 per day.

There are additional charges such as collision damage waiver (CDW- a type of insurance in case the credit hire car is damaged or stolen) £710.00, delivery and collection £92.00, recovery and storage £1,575.00 and £3,599.40 VAT bringing it to a total of £21,596.40.

I would expect to see Advantage to have considered the length of hire and whether this was reasonable in the circumstances. In this case the hire started on 26 October, the car was inspected the following day and the engineer's report was provided two days after that so I can't see any delays there. It seems the hire provider sent the engineer's report to Advantage on 30 October (though Advantage says this was received on 2 November), but the vehicle damage claim wasn't settled until 17 December by Advantage. Hire ended on 5 January. There seems to have been a delay between the engineer's report being sent and the claim for the vehicle damage being settled by Advantage and it's not clear why that was the case. Particularly, as Advantage had decided that the claim was a fault claim from the start. There also seems to have been a delay in the third party coming out of hire, although I appreciate this was around the Christmas holiday. So I would have expected to see Advantage query this and consider the fact its delay in settling the claim for the third party vehicle led to a longer hire period.

Furthermore, my understanding is that the courts also don't consider that a third party should be automatically entitled to a credit hire vehicle if it is not at fault for the accident. They consider this should only be the case in certain circumstances. Some of these include not having access to another vehicle; but also on whether the third party is unable to afford a "normal" hire car because they are impecunious. And in cases where the third party relies on their car for work the court could consider awarding loss of profit instead of credit hire fees. In this case, as I said above, the third party was a taxi driver and in their mitigation questionnaire where they explain why there is a genuine need for hire, they said that they need a replacement vehicle to continue to work.

Advantage has provided a copy of its defence to the credit hire claim. Its arguments included the fact that the third party was not impecunious and did not have a genuine need for hire. It has also argued that a reasonable hire rate would have been £28.57 per day. This is based on "basic rates" i.e. normal hire rather than credit hire rates. And Advantage's argument in support was that the third party was not entitled to credit hire in the first place. It also challenged the length of hire and said it should have lasted for 55 days instead of 71. It said that the credit hire provider delayed sending its engineers report to it and also that there was a delay in the third party coming out of hire after receiving the settlement offer from Advantage. Despite its arguments and calculating that the third party should have only claimed around £1,500.00 for hire, it offered to settle the claim for £10,000.00. This offer was accepted.

It is difficult to know whether Advantage's arguments would have been accepted by a judge and the credit hire claim reduced to £1,500.00. Despite this, even if we were to assume that the third party would have been able to claim more than the £28.57 basic rate, I think Advantage's offer of £10,000.00 suggests that a reasonable rate would have been around £145 per day (and in calculating this I have deducted £2,000.00 for VAT and I haven't included the additional charges such as CDW which I think Advantage could have also argued against). I note that the third party said it was prepared to accept £110.39 (the GTA rate) so even if I were to say that £110.39 per day is reasonable, I don't think Mr W should be responsible for the £10,000.00 to Advantage and I will explain why.

From what I have seen, Advantage said it received the engineer's report on 2 November but it didn't settle the vehicle damage claim until 17 December; with payment being raised on 11 December. It is not clear why there was a delay and in the absence of any evidence to the contrary I don't think it was reasonable for Advantage to have delayed settling the vehicle damage claim. Particularly, in light of the fact that it was for a relatively low amount and also as this was a straightforward liability-admitted claim. As soon as the £1,600.00 was paid the third party would have come out of hire. I think a reasonable amount of time would have been around ten days after receipt of the payment. So I think even if Advantage didn't have the engineer's report until 2 November it could have raised the total loss payment of £1,600.00 (even on a without prejudice basis) within a few days. I see that it took the third party six days to receive payment. So, I think it would have been reasonable for Advantage to have raised the payment no later than a week later, so by 9 November. The third party would have received the payment by 16 November and allowing 10 days to come out of hire and purchase a new car this would have meant that hire would have stopped around 26 November. And even allowing two weeks to find a new car would have meant that hire would have stopped by 30 November. Instead it carried on more than one month longer than it should have in my opinion. I don't think this is something Mr W should be responsible for. So if I were to accept the £110.39 daily rate for 36 days this would mean that Mr W should be responsible for £3,974.04 (£4,769 inclusive of VAT) and not £10,000.00 in respect of credit hire.

Also, in the previous section I said that had Advantage asserted Article 75 status it would have not been responsible for the £1,600.00 vehicle damage payment. I stand by that statement and I think, as I said before, Advantage could have simply paid the third party £1,600.00 to get them out of hire on a without prejudice basis. And it could have deducted this amount from the overall settlement later on.

In terms of the additional charges of CDW I would have expected Advantage to question whether this was something it should be paying for as it is arguably not something Mr W is responsible for. If the third party wanted to take out insurance to protect it against the risk of a potential future accident, then that is arguably a matter for them, and an expense they should bear themselves. It's unclear whether Advantage agreed to pay the CDW or not because its offer of £10,000.00 wasn't broken down. But for the purposes of this decision

I have taken it that it didn't make an offer towards the CDW. And I say this because in its credit hire defence it said the £10,000.00 offer was for credit hire and it didn't mention any of the other charges.

In terms of the storage charges I see that the third party car was in storage for 53 days (between 26.10.2020 and 17.12.2020) at a cost of £25.00 per day. I would have expected Advantage to challenge the need for storage and to have checked whether the third party had access to free storage - in line with his duty to mitigate its losses. Advantage argued that the storage fees were high and offered £20.00 per day plus VAT for 47 days plus £150.00 plus VAT for recovery charges. Advantage relied on the Removal, Storage and Disposal of Vehicles (Prescribed Sums and Charges) Regulations 2008 to arrive at these offers. Even if I were to accept that Advantage did enquire about whether the third party had access to free storage and that the rates it offered were reasonable, for the reasons I gave above in relation to the credit hire I don't think Mr W should be responsible for the full amount paid towards storage. And this is because had the vehicle damage been paid earlier the third party vehicle would have come out of storage sooner- particularly bearing in mind the car was a total loss. With that in mind I think a reasonable offer would have been 23 days storage (between 26 October 2020 and 16 November 2020 when I think the vehicle damage payment should have been made) at £20.00 plus VAT which comes to £552.00. Plus the recovery fee of £180.00 (£150.00 plus VAT) which seems reasonable this comes to £732.00.

In terms of the third party general damages (compensating for injuries) I see that they were initially claiming £6,500.00 and that the claim ultimately settled for £3,040.00. I see that Advantage justified its lower offer by saying that the third party only took three days off work and only required painkillers and no other treatment. It also said he was able to exit the car unaided after the accident. The third party solicitors referred to the Judicial College Guidelines (The JC Guidelines) when making their offer. The JC Guidelines provide guidance and give an indication of likely damages awards for various types of injuries.

The medical expert diagnosed the third party with severe shock which lasted one day. He also diagnosed him with neck pain and stiffness, gave a ten month prognosis and recommended physiotherapy. There were also ten and 12 month diagnoses for pain and stiffness to the left shoulder and to the lower back respectively. And six month travel anxiety. I think the settlement of £3,400.00 seems reasonable and it seems to be in line with the JC Guidelines.

Advantage also paid £216.00 for the medical report and £180.00 for the engineers fee both of which seem reasonable. Plus solicitors costs which are fixed under the Ministry of Justice protocol.

Overall I think the amount Advantage is entitled to recover from Mr W is £3,400.00 for damages, £816.00 solicitors fees and disbursements, £4,769.00 for credit hire and £732.00 for storage and recovery. Total £9,717.00 instead of £16,856.00.

<u>The decision to cancel the policy</u>

Advantage told Mr W that the policy expired on 31 August 2021, but I don't think that's the case. From what I have seen in Advantage's file, the policy was cancelled on 11 March 2021 further to it giving Mr W seven days' notice of its intention to cancel.

Though Advantage didn't really specify why it cancelled the policy I see that this is something that it was entitled to do under the policy terms - as a result of it not being able to provide cover to Mr W. So I am not going to interfere with its decision to do this."

Both parties responded to my provisional decision. Mr W restated that he has not been charged with a driving offence and would not have been riding his motorbike had he been over the limit. He questioned why the third party vehicle damage wasn't settled sooner by Advantage. He also reiterated that he is of very limited means.

Advantage's response focused on the hire costs. It said the third party was a fully licenced taxi driver and required the use of a fully licenced taxi as this was his main source of income. It also said that under the GTA taxis have their own (higher) rates and as this was the third party's primary source of income he wouldn't be indemnified for his loss if he was only provided with a general hire vehicle. It added that the fact that the third party was aware early on that their vehicle was a total loss didn't absolve it from being liable for the full cost of hire. The third party required continuous use of the hire vehicle until his new car became a licenced taxi. It said this can take time and provided an internet link to the licencing authority. It added that it was pleased that the length of hire was called into question and reduced to 51 days. It said it wanted to keep costs to a minimum whilst bearing in mind what a judge would decide if the matter went to court.

Advantage also said it didn't feel that my arguments regarding impecuniosity applied in this case. It said the third party was not able to prove he had little money. But his livelihood was put on hold whilst waiting for all of the checks to be completed for his new vehicle (in order to obtain his taxi licence). It asked me to show how the third party could have mitigated his losses in this instance. It added that the third party accepting its £10,000 which was a £9,706.40 reduction indicated that its offer would have been viewed favourably in court.

I responded to Advantage and referred to case law where the courts confirmed that the general rule when it comes to credit hire for taxis is that damages will be limited to the amount the claimant lost in profit. So the third party would have had to show that his profit for the 71 days of hire was more than £19,706.40 in order to succeed in his credit hire claim. This was something Advantage briefly referred to in its defence to the court claim but I couldn't see that the third party had provided evidence to show what his earnings were over that period. The same case also mentioned three exceptions to this general rule: future trading being compromised, the vehicle being used for social and domestic purposes and impecuniosity. So, in answer to Advantage's question, my view was that impecuniosity also plays a part in cases involving taxis/private hire vehicles. It was unclear to me whether in this case the third party was asked to produce any information in relation to these points before the £10,000 offer was made.

Regarding the timescales involved in obtaining a taxi licence, I informed Advantage that I wasn't able to find any relevant information using the link it had provided. In any event I noted that the third party in this case received payment of their vehicle damage claim on 17 December and came out of hire on 5 January. Bearing in mind the holiday period I didn't think that there was a significant delay at that point. Where I had found significant delays was in the settlement of the vehicle damage claim by Advantage. And as I mentioned in my provisional decision Advantage had said that it received the engineer's report on 2 November but didn't settle the vehicle damage claim until 17 December. It was unclear to me why there was such a long delay and from what I had seen it was unjustified. And I didn't think this delay was in any way related to the length of time it took for the third party to get a new taxi licence – because this was before they had their vehicle damage settlement and so they didn't have their new car at that point to be able to start the process for making it a taxi.

Advantage responded to say it agreed with my proposed outcome.

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.

Having reviewed everything, Mr W's comments in reply have not changed my views on the complaint as set out provisionally. I have addressed his comments in my provisional decision, namely that I don't think he needed to be charged with an offence for Advantage to be able to fairly and reasonably reject his claim. And I also agreed that Advantage did delay settling the third party vehicle damage claim.

As Advantage has accepted my additional comments above and accepted the outcome I proposed in my provisional decision, there is no need for me to comment further.

My provisional findings, along with my comments here, are now the findings of this my final decision.

My final decision

For the reasons above, my final decision is that if Advantage Insurance Company Limited proceeds with seeking to make a recovery of its outlay from Mr W it must only seek to recover £9,717.00 and not £16,856.00.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 17 August 2023.

Anastasia Serdari
Ombudsman