

The complaint

Mr C and Mrs M have complained that Marshmallow Insurance Limited unfairly declined to deal with their claim about their stolen car under their motor policy and that it then cancelled the policy as if it never existed, retaining the premium paid.

As we have only been in correspondence with Mr C I shall just refer to him as much as possible throughout this decision for ease of reference.

What happened

The car was stolen on 21 March 2023. Mrs M was the main policyholder on the policy with Mr C and his partner Miss L as named drivers. A claim was made to Marshmallow. Marshmallow said as it was verifying the claim, it noticed that Miss L was the registered keeper and owner of the car, not Mrs M.

Marshmallow also said that if it had known this it wouldn't have offered the policy to Mrs M. It decided this was deliberate non-disclosure and therefore it refused to deal with the claim, cancelled the policy as if it never existed and retained the premium.

Mr C said there was no intention for Mrs M to do anything wrong. She had merely offered to pay for the insurance. He also said she had some significant mental health issues. As Marshmallow wouldn't change its stance Mr C brought his complaint to us. The investigator was of the view that Marshmallow hadn't done anything wrong. Mr C didn't agree so the matter was passed to me to decide.

I issued a provisional decision on 22 February 2023 and I said the following:

'Having done so I'm not upholding this complaint for payment of the claim, but I don't consider the non-disclosure has been adequately proved to be deliberate, so I am asking Marshmallow to return the premium it kept. I'll now explain why. First, I do need to apologise to Mr C for the delay in dealing with this decision. This was solely so that I could ascertain the full situation as far as possible. Sadly, this took longer than I anticipated.

Secondly, I understand and appreciate that Mr C and his other family members will be most disappointed with my decision.

As the investigator explained, the law concerning the circumstances in this complaint is called The Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA). This requires consumers to take care in answering the questions asked by an insurer on the application form so as to not make any misrepresentations or non-disclosure. If such a misrepresentation occurs as in a wrong or incorrect answer is given to any question, then it's classed as a 'qualifying misrepresentation' under CIDRA. More importantly the insurer also must show that the misrepresentation changed the type of cover the insurer would have offered, or indeed meant the insurer wouldn't have offered any type of cover at all. Then the insurer must decide

on the available evidence if the misrepresentation was simply careless or deliberate. As that affects what remedy the insurer might be able to avail of.

Here it's very clear Mrs M wasn't the owner or registered keeper of the car, Miss L was. In these circumstances had Marshmallow known Mrs M wasn't the owner or registered keeper of the car, it's clear from its underwriting guide it would not have offered to insure this car with Mrs M as the policyholder. That's because it's classed as 'fronting' as in trying to get a better premium price by making that person as the policyholder and that is illegal.

Having read all the information Mr C has given me, to include his understanding, the medical issues that Mrs M has faced, the fact she only wanted to help pay for the cost of insuring this car given both Mr C and Miss L were visiting her to help out given her health issues, I consider on balance that it's very unlikely Mrs M was deliberately misrepresenting the situation. I think she just simply didn't understand the enormity of what she was doing in taking out the policy. Instead, Miss L should have taken out the policy with whatever named drivers she wished to have on her car, and it seems clear to me that Mrs M would then help to pay the premium. Therefore, I consider this was careless misrepresentation instead.

Marshmallow said it couldn't show me the difference in the premium amount if Mrs M hadn't decided to be the policyholder. In my view that doesn't show me what advantage Mrs M might have had in having herself as the policyholder. Which in turn lessens the strength of any argument that this misrepresentation was deliberate. Careless misrepresentation however doesn't change the outcome significantly for Mr C as Marshmallow would not have ever provided an insurance policy to Mrs M, given she didn't own the car and wasn't the registered keeper. That means that Marshmallow were entitled to cancel the policy as if it never existed and therefore decline to deal with the theft claim. However, it also means it wasn't entitled to keep the premium. It can only retain the premium in circumstances where the misrepresentation was deliberate. So, I consider that Marshmallow should refund the premium with interest.

Mr C said he had to make a windscreen claim on this policy before the car was stolen. That windscreen claim was paid without any issue. Obviously for someone in Mr C's position at that time, this indicated there was nothing wrong with the cover for this car. Marshmallow said all windscreen claims are dealt with by a third-party provider who don't verify the cover for the claim in the same way as Marshmallow would for a claim asking for the market value of a car. Windscreens can be damaged for a variety of very minor reasons. And a windscreen claim rarely effects the policyholder's claims history at all, it simply an add on service of most policies given the important fact windscreens can be damaged so easily. So, although I appreciate Mr C's point, I don't consider Marshmallow did anything wrong with permitting this windscreen claim to be dealt with by its third-party provider without verifying the policy.

CIDRA does impose important legal duties on every consumer on taking out a policy. And insurers like Marshmallow are entitled to rely on the provisions of CIDRA. There is nothing wrong with questions being asked about who the owner and registered keeper of a car is, when applying for motor insurance either. Sadly, given the situation with Mrs M's health and her wish to help out with the premium costs as she was relying on visits from Mr C and Miss L she thought it was right that she bought the policy without knowing of the important duties under CIDRA. And sadly, when faced with trying to buy a policy online the application process can't proceed without

answering the questions in the way they need to be answered. Careless misrepresentation consequently happens quite frequently as it has here.'

Marshmallow agreed with my provisional decision. Mr C said this matter has greatly affected all three members of his family causing significant stress and ill health and he wished for that to be considered in the final decision

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 done so again, I remain of the view my provisional decision is the right outcome here.

I fully understand and appreciate how stressful this matter has been for Mr C, Mrs M and Miss L. However other than wrongly deciding Mrs M deliberately decided to misrepresent the situation so it retained the premium paid, Marshmallow hasn't done anything else wrong.

It's a fact that Mrs M wrongly said she was the owner and registered keeper of this car. It's also a fact given its underwriting guide that had Marshmallow known Mrs M wasn't the owner and registered keeper of this car, it wouldn't have offered Mrs M any policy at all.

So, if the correct information had been given by Mrs M, she wouldn't have been able to buy this policy. It's not Marshmallow's fault that Mrs M gave the incorrect information in the first place. Therefore, the consequences and subsequent issues that Mr C and his family faced wasn't caused by anything Marshmallow did. Consumers themselves have duties under the law not to misrepresent the risk they wish to insure which is why they must answer the questions asked on the application form correctly and truthfully. And that same law permits Marshmallow to refuse to deal with the claim and cancel the policy as if it never existed when a consumer such as Mrs M here didn't answer those questions truthfully.

Therefore, although the entire situation was enormously stressful that didn't occur because of anything Marshmallow did.

My final decision

So, for these reasons it's my final decision, that I uphold this complaint in part.

I now require Marshmallow Insurance Limited to refund the premium paid to Mrs M, adding interest from the date of its decision to cancel this policy as if it never existed to the date it provides the refund.

If income tax is to be deducted from the interest, appropriate documentation should be provided to Mrs M for HMRC purposes.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C and Mrs M to accept or reject my decision before 29 March 2024.

Rona Doyle
Ombudsman