DRN-4421395

The complaint

Miss R, represented by Miss E, has complained about her car insurer, Advantage Insurance Company Limited, because two years after an accident, which it was not covering her for, it sought to recover costs from her for its outlay to third-party insurers.

What happened

In early March 2020, Miss R was driving her car whilst under the influence of alcohol and crashed, damaging four cars and some property. Miss E notified Advantage. She was told that it wouldn't cover the damage to Miss R's car, but the policy would pay for the losses of the third-party car owners. When Miss R spoke to Advantage a few days later she was also told her damages wouldn't be covered, but also that Advantage "may" invoice her for "some" of its outlay.

In July 2020 Advantage cancelled Miss R's policy. The letter confirmed it was not covering Miss R for the accident.

Up until late 2021 Advantage focused on responding to the third-party insurers regarding claims made by their policyholders as owners of the damaged cars. In June 2022 Advantage wrote to Miss R and asked her to pay around £8,000, which was the total vehicle damage costs it had paid for two of the three third party cars it had been made aware of claims for. In July 2022 Advantage sent an update letter to Miss R setting out its total outlay in respect of all the three damaged cars, plus hire costs. It said it expected Miss R to pay it back its total outlay of £19,175.55.

Miss R was shocked and upset. She had been to court regarding a criminal charge related to the incident in August 2020 and since had been endeavouring to put matters behind her. Having not heard from Advantage since 2020, along with what Miss E recalled being told (that the policy would cover the third-party losses), as well as the uncertain nature of what she had been told "may" happen, she'd thought the matter was closed. Miss R felt she could have done more in the years since the accident if she'd known it was most likely that Advantage would ask her to reimburse its total outlay. Advantage acknowledged providing some "mis-advice" in the early stages of the claim. But said that wouldn't change what it was now asking Miss R to repay – although it would be happy to arrange a payment plan. Miss R complained to the Financial Ombudsman Service.

Our Investigator didn't think Advantage had unfairly or unreasonably expected Miss R to repay its costs. But she felt it could and should have communicated better with Miss R about it. She said Advantage should pay £250 compensation.

Miss E responded to the Investigator and said Advantage's recovery action, coming when and how it did, had a severe impact on Miss R. Advantage said it disagreed with the Investigator's suggested outcome because it felt it had handled things adequately. And that there was nothing wrong in it having focused on the claims in the intervening years rather than trying to contact Miss R when, reasonably, it could give no meaningful update until all of its costs were in and accounted for. The complaint was referred to me for an Ombudsman's decision.

I issued a provisional decision in which I set out the following things. I felt Advantage hadn't adequately advised or communicated with Miss R about what her liability may be. I noted that Advantage had chosen to act here as though it would have had liability under the Road Traffic Act to settle the other parties' claims – but felt that it should have chosen to act as if it were an Article 75 insurer instead. The latter meaning that it wouldn't have had to settle for the damage caused to the third-parties' vehicles. That being the case I felt it couldn't reasonably seek to recover its outlay for vehicle damage from Miss R, some £12,000. I also felt it had not fairly handled the credit hire claims from the third-parties. Meaning there was a further sum of around £1,600 I felt Advantage could not fairly seek to recover from Miss R. I thought Advantage then could only look to Miss R to return around £5,000 to it, rather than the circa £19,000 it had asked for. I also thought it should pay her £500 compensation.

Miss R was satisfied by my provisional findings. She said she'd be happy to off-set any compensation award against the amount owed to Advantage.

Advantage disagreed with my findings. It said it felt it had done enough on the call in March 2020 to put Miss R on notice that she might be liable for costs and it couldn't reasonably update her until all of its costs were known. It didn't think she'd have been better prepared if it had told her more. So it didn't agree with the compensation award. Regarding hire costs, Advantage said that it has an agreement with the hire provider to pay all costs unless its driver is not at fault.

Advantage, having sought legal advice, felt it hadn't been free to choose to act as an Article 75 insurer. It said if matters had proceeded to court, it would have been liable under the Road Traffic Act. So it was right, it said, for it to have dealt proactively with the claims as if it were the Road Traffic Act insurer.

I found Advantage's objection regarding the Road Traffic Act and Article 75 to be persuasive. So I felt my initial view and provisional outcome for the complaint had to be revised. This caused me, on 11 October 2023 to issue a second provisional decision. The change in outcome was significant for Miss R – I'd initially felt Advantage couldn't fairly seek from her reimbursement of its circa £12,000 of outlay for vehicle damage claims, but my new view was that it could reasonably do so. That new finding also impacted my compensation award – I'd said Advantage should pay £500 compensation, which my further findings reduced to £250. My findings and outcome regarding vehicle hire costs remained largely the same – although I did correct a minor typing error.

Advantage said it accepted my provisional decision dated 11 October 2023.

Miss E responded on behalf of Miss R. Miss E said they did not agree with my provisional decision dated 11 October 2023. Miss E said I had done exactly what Advantage had – said one thing and then changed it. She indicated that changing my view because Advantage could afford legal representation was unfair. And asked what compelling evidence had been provided at such a late stage.

She said she felt I had also changed my mind about Miss R having been mistreated by Advantage, thereby reducing the compensation award.

Miss E said Miss R can't appoint a solicitor and she has no way to pay Advantage – so, she asked, what do I expect Miss R to do now. She said she thought some middle ground could be reached – that I could tell Advantage it should only reclaim £11,000 from Miss R. She said if Advantage would agree to take just £7,000, this would be paid in a lump sum. Otherwise, with Miss R's income, it would take her years to repay Advantage.

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 said provisionally:
"with regret for the upset I know this will cause Miss R, on this occasion I've found Advantage's challenge, regarding Article 75 and the Road Traffic Act, to be compelling. As such I've reconsidered my provisional findings and I no longer intend to require Advantage to cease its recovery activity regarding its outlay for vehicle damage. My compensation award is affected too, although I still intend to award £250. My view on the credit hire issue has not changed and I intend to maintain my direction in that respect.

Communicating about recovery
I've considered what Advantage has said about communicating with Miss R. But I think it could and should have been clearer with her. Both in the early stages after the incident and whilst it handled the third-party claims. Some timely updates from it would have meant Miss R would have known that this had not gone away. Instead, Advantage vaguely referenced a possibility of some liability, said nothing more for two years and then presented Miss R with a demand to pay it over £19,000. It still had a duty to treat Miss R fairly and my view remains that was not a fair and reasonable approach. I said provisionally that this was particularly the case where "Miss R's representative, Miss E, had been told – quite clearly and several times during her call with Advantage – that the policy would pay. I think Advantage should have written to Miss R, or at least put more of an explanation in the cancellation letter, to explain what was then happening with her cover and liability for the losses sustained. It may not have been able to give her exact costs, but it could have put her on notice that its outlay would likely include, intending as it did to settle things as the Road Traffic Act insurer, repair costs for each car, assuming they could be repaired, and hire costs to keep the drivers mobile whilst the damage to their cars was resolved – which are often substantial." I still think that context, in the form of a reasonable, frank discussion, and additional detail would have helped Miss R.

As it was Miss R was left not knowing what Advantage really intended or what the ultimate outcome for her actions would be. And I can understand that two years after the criminal issue was settled, Advantage's sudden and out of the blue request for £8,000, quite quickly followed by an updated total of over £19,000, was distressing for her. I do think that is something which could have been mitigated if a discussion, as I've described above, had taken place earlier. I think £250 compensation is fair and reasonable to account for the shock and worry Miss R experienced when receiving those demands, out of the blue, for payment.

Road Traffic Act (RTA) and Article 75 (A75)
Both pieces of legislation, in part, seek to protect drivers who suffer damage or injury by another driver who is insured, but whose policy won't offer cover for some reason. Strictly speaking an insurer would only become either an RTA insurer or an A75 insurer if there was a court judgment. But most insurers will act proactively to keep matters out of court, because going to court is costly and time consuming. So an insurer will often be wise to situations that might, if left to a court decision, result in it having to act as the RTA or A75 insurer, then acting as its felt a court would expect it to in that role to settle the relevant third-party losses. I explained provisionally that the scope of losses for an RTA insurer to settle is wider than that of an A75 insurer.

The legislation is quite prescriptive in respect of when RTA or A75 applies. Essentially an insurer is an RTA insurer unless it can rely on a defence to avoid liability under the RTA. If there are circumstances where it is likely a defence could apply, the insurer could

reasonably avoid acting as the RTA insurer and they'd usually have to act as an A75 insurer instead. An example of a defence which an insurer could rely upon to avoid liability under the RTA (but not A75) is where the use of the relevant vehicle was other than permitted under the policy.

I have considered then whether there was a defence which likely would have been available to the insurer to avoid liability under the RTA. I think that the non-permitted use defence is the only likely example of a defence which might have applied in the circumstances of this matter, i.e. if Miss R's car was being used not as permitted by the policy, A75 would likely apply. In that instance the insurer would not have had to settle for vehicle damage with the third-parties. So, I've considered whether Miss R's use of the vehicle in this matter would be seen as non-permitted for the purposes of RTA/A75 liability.

An example of a non-permitted use of the vehicle which would have provided the insurer a defence to RTA liability would be where Miss R had permission under the policy to use her car socially, but not for business, and was driving to a business meeting when an incident occurred, then she would be driving her car outside of the permitted use of the policy.

But certain provisions of the RTA provide certain exclusions/exceptions under which insurance policies will be ineffective for the purposes of RTA liability. One of those provisions makes it clear that exceptions or exclusions in insurance policies with regard to the physical or mental conditions of persons driving will be ineffective when determining whether or not an insurer is liable under the RTA. In the circumstances I am satisfied that an exclusion against losses arising from damage caused where the driver of a vehicle is intoxicated is likely to fall in the scope of the type of exclusion which is ineffective for the purposes of avoiding an insurer's liability under the RTA. Which, unfortunately for Miss R, were exactly the circumstances under which she was driving when she had the accident.

So, when the incident subject of the claim and complaint occurred, Miss R was using her car as permitted by her policy given the provision of the RTA explained above. Because cover was available but liability was excluded due to the policy exception for drink driving (which would be ineffective for RTA liability purposes). Meaning that if the matter progressed to court, Advantage would have had no viable defence to not being the RTA insurer. The court, I think, would then likely have found Advantage to be the responsible insurer under the RTA, not under A75. Of course, Advantage did not let matters progress to court. Instead, it acted as though it would be the RTA insurer. I think that was fair and reasonable of it in the particular circumstances of this complaint.

<u>Vehicle damage</u>
Advantage, even acting as though it were the RTA insurer, should still look to settle things fairly. It might not be reasonable for it to just pay sums put to it. So I've looked at the damage claims which came through from the third-parties and the settlements it made. It paid £3,653.87 to the first third-party (TP1), £4,483 plus a £60 engineer's fee to TP2 and £4,474.42 to TP3.

I note Advantage received an engineer's report for TP2's claim. I think that was likely to support that insurer's settlement for that car on a total loss basis – this is something usually (but not always) determined by an engineer. I think Advantage settling for those sums given an engineer's report had been received, was fair and reasonable.

It seems that Advantage did not assess any evidence of the loss claimed for TP1 and TP3. Rather Advantage took an overview that due to the overall claim position, it couldn't reasonably challenge any amounts claimed. I'm not persuaded that is a generally reasonable position for Advantage to have taken. In short Advantage should have been thinking about what a court might find it liable for if things went that far. And a court would

likely assess the damage and repair costs presented. For example, was the damage claimed for consistent with the accident which occurred and, if so, was the cost for repair of that damage reasonable. Having undertaken such an exercise, I'd then expect Advantage to have put to the other parties any concerns it had about their claims. Just because Miss R was at fault wouldn't mean another insurer couldn't be persuaded that the costs they were looking to recover from Advantage were unfair or unreasonable. To treat Miss R fairly and reasonably Advantage should have been completing this type of assessment and, potentially, negotiating any settlement proposal. I don't think it did that here.

However, whilst I think Advantage failed Miss R in this respect, I could only reasonably prevent it from recovering sums from her if I could be satisfied it was most likely it could have successfully negotiated down the claim costs. I'm not satisfied that is most likely the case here. The repair sums for TP1 and TP3 are relatively low. I think if damage was included which was clearly not claim related, such that the other insurer could have been persuaded to reduce the sum it was asking Advantage to pay, the overall repair sum would likely have been much higher. So despite Advantage not following what I'd expect to be a reasonable assessment process for those claims, I think it most likely fairly settled with TP1 and TP3 for the sums requested. And whilst I've noted this failure in its process, that wasn't something Miss R was aware of, so she wasn't caused distress and inconvenience.

I think Advantage fairly settled the above claims. Its policy allows it to recover costs from Miss R in a situation like this; where any general exception to cover applies, reasonably requiring it to settle the claim as if the RTA applied. Which means, with regret for the upset I know this will cause Miss R, I think Advantage can fairly and reasonably expect her to repay it £12,671.29.

<u>Credit Hire Costs</u>
I said provisionally:
"If a car owner is not a fault for an accident it might be reasonable to think they should not suffer any inconvenience as a result, such as being without a car. So, quite often, drivers who are not a fault for an accident are placed in credit hire cars to avoid them suffering inconvenience. But when/if matters progress to court, the courts do not necessarily view that all non-fault drivers should automatically be placed into credit hire. Generally the courts will expect that this is done fairly – that those who could afford and are able to arrange their own replacement transport, or have access to another car, are not placed into expensive credit hire arrangements. I can't see that here Advantage made any enquiries in this respect before settling the hire costs presented to it by the other parties.

I also haven't seen whether Advantage gave any thought to the daily rates behind the periods and sums requested. That's important because 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. Nor have I seen that Advantage gave any thought to whether the costs charged included things which I think Advantage would usually not wish to be liable for such as collision damage waiver.

I've also looked at the specific hire periods in question. The first third-party owner (TP1) was paid £2,501.84 for credit hire for a period 9 March 2020 until 5 May 2020. TP2, £3,496.28, for the period 7 March 2020 until 7 April 2020. TP3, £506.14 for the period 9 March 2020 to 13 March 2020. I see no issue with the periods for TP2 and TP3. In fact the period for TP3 was really quite short given the car needed some £4,500 worth of repairs. For TP2 IT was a little longer – but that car was deemed a total loss. Advantage received the engineer's report for that on 18 March 2020, issuing a settlement cheque shortly thereafter. I understand it

then allowed a period of ten working days for the cheque to clear and a week for the hire car to be returned. I think that period was reasonable overall.

I do however have concerns about the period of hire for TP1. I don't see any reasoning from Advantage why it felt paying hire through to 5 May 2020 (58 days in total) was reasonable. That is a long time after the accident. And I note that the third-party insurer in that case took an unreasonably long time to tell Advantage what the vehicle damage costs were. Whilst Advantage didn't know in the early months of the claim what the vehicle damage cost for TP1 was, I think it could have looked to make a goodwill payment regarding TP1 to encourage the hire agreement to end because it must have realised that expenses in this respect were adding up. Any payment made could then have been off-set against the total costs for hire once they were known. And Advantage could have done more to chase and try to ensure repairs for TP1 were progressing reasonably such as to limit the necessary hire period. I don't see it did that either. I bear in mind that the repair costs for TP1 were less than those for TP3, whereas TP3's hire period was considerably shorter. I don't think Advantage should have just accepted this period, with its related costs, without challenge. I'm going to say that the period over which Advantage can reasonably look to claim back hire costs for TP1 from Miss R is reduced from two months to the period from 9 March to 9 April (32 days in total). That gives a reduced rate of £1,389.33 for hire costs for TP1.

But, as I said above, I think there are other enquiries Advantage could and should have made before agreeing to meet the costs that it did. I think it's likely that if some challenge had been made, some of the costs would have been reduced. I can't say that for sure. Or know by how much, or in respect of what. But I think it's reasonable to think that a saving of around 10% could have been achieved. The hire sums of £1,389.33, £3,496.28 and £506.14 present a total of £5,391.75, ten percent of which is £539.17."

I note Advantage has replied explaining that it paid the sums in line with a service agreement it has with the hire company. I can understand an insurer entering an agreement like this – it likely comes with preferential rates keeping the cost of hire low. Which can only be to the advantage of policyholders. But I come back to what I've explained in my findings so far – Advantage can reasonably act as though it were the RTA insurer, which happens when a court judgment is handed down. So, to treat Miss R fairly, Advantage should've only been settling in line with what a court might be expected to award. I'd expect it to take a fair and reasonable approach when thinking about the quantum of any such award. I explained provisionally what I thought reasonable costs would likely be. I remain of that view.

Upon review though, I have noted a typing error in my provisional findings which has caused an error in the final figures I applied. Above the figure £1,389.33 should have read £1,380.33. The corrected reduced rate of hire is £1,380.33, meaning Advantage can't reasonably ask Miss R to repay it £1,121.51 of the £2,501.84 it had asked for. Applying that corrected figure to the further 10% calculation I set out, gives an initial total of £5,382.75, 10% of which is £538.28. Which means of the total credit hire cost of £6,504.26 which Advantage paid, it can only reasonably seek recovery from Miss R of £4,844.47 (the above total less £1,121.51 and £538.28).

<u>Summary of recovery</u>
Miss R has said that she would like any compensation award to be deducted from the sum she is found to owe Advantage. I'm currently intending to award £250. And I've said that the maximum credit hire costs Advantage can recover from Miss R is £4,844.47. Deducting £250 from that sum is £4,594.47. But I then, as explained, need to add on the vehicle damage costs of £12,671.29. Which gives a final total Advantage can reasonably ask Miss R to repay it of £17,265.76.

Advantage paid out its costs over a two-year period. And only then asked Miss R to repay it. I think it's only fair that it gives Miss R at least that time in which to repay it. But I'd also expect Advantage to take into account Miss R's personal and financial situation to agree a fair payment arrangement for reimbursement of these funds."

I absolutely understand how devastating my amended findings set out in my provisional decision dated 11 October 2023 are for Miss R, and for Miss E as her representative and mother. I appreciate that my previous outcome from July 2023 had offered Miss R some solace in that had that view remained, and become final, she would only have owed Advantage a fraction of the costs it had been asking her for. That was based on reasoning I had given about the RTA and A75. This argument hadn't been raised or considered before.

When initial findings like that are issued – where a new point/reasoning is relied upon to reach the complaint outcome – our process allows both parties the chance to respond. On this occasion, as my 11 October 2023 decision explained, I found that Advantage's response, objecting to what I'd said about the RTA and A75, was persuasive. I couldn't ignore the legal argument it had raised – to do so and move to a final decision on the basis of my initial findings would have created an unsafe as well as unfair and unreasonable decision. So I needed to review the complaint afresh and issue a second provisional decision, which resulted in the findings and the change of outcome set out above.

That provisional decision dated 11 October 2023 did explain that I still felt Advantage had mistreated Miss R. My intended compensation award was reduced though because I no longer felt Advantage had failed Miss R by dealing with the claims on the policy as though the RTA, as opposed to A75, had applied. My view remained, and still does, that Advantage could and should have done more between March 2020 and June 2022, when it suddenly began asking Miss E to repay significant sums of money, to manage her expectations.

I can't offer advice about Miss R's financial situation, or what she should do now that her complaint about Advantage asking her to repay its outlay has been considered by the Financial Ombudsman Service, to the point of my issuing a final decision. Miss R felt Advantage couldn't fairly and reasonably ask her to repay to it its £19,175.55 of outlay. I've considered that and, as well as finding there was some poor service with £250 compensation being due, I've found that Advantage can fairly and reasonably seek repayment from Miss R of £17,265.76. I've also directed Advantage to seek to agree with Miss R a reasonable, suitable payment arrangement of not less than two years. And I know our Investigator has indicated to Miss E that there are public services available which will offer advice and assistance on debt matters.

I appreciate the difficulty of the situation Miss R is in, but that and Advantage's failure to manage her expectations, don't give me cause to require Advantage to waive £6,000 to £10,000 of its outlay (given Miss E's current proposals to pay it £11,000 or £7,000). Although if Advantage becomes satisfied that Miss R has no likely prospect for being able to repay it the whole sum due, it might think it would make better sense to negotiate with her for settlement of a lower sum. But that would be a negotiation for Miss R /Miss E and Advantage to have now that I've found it can fairly and reasonably ask her to repay its outlay of £17,265.76 (net of my £250 compensation award).

Having considered Miss E's reply to my provisional decision dated 11 October 2023, my views on the fair and reasonable outcome for this complaint have not changed. My provisional findings of that 11 October 2023 decision, along with my responses to concerns raised in reply by Miss E, are now the findings of this, my final decision.

Miss R, and Miss E, should be aware that a final decision is binding on the respondent business only if it is accepted by the complainant within the deadline set. The deadline can

be seen at the end of this document, above my signature, and is included in the covering letter. If acceptance is communicated after the deadline, the business may choose to comply with the decision, but it won't have to. If Miss R should wish to challenge Advantage any further, perhaps by taking court action, she should be aware that this may not be possible if she has accepted my final decision. If Miss R is thinking about any further challenge, she might like to take advice before deciding whether or not to accept my final decision. I know Miss R may feel that she does not have any option available to her to challenge Advantage further – but, in any event, I need to let her know how things stand with my final decision being issued. To clarify, in respect of the Financial Ombudsman Service, this final decision marks the end of our complaint process.

Putting things right

I require Advantage to:

- Pay £250 in compensation to Miss R, by taking this amount off of the sum it is seeking her to repay – which I've accounted for in my award below.
- Amend its records to show that all it requires Miss R to pay it in reimbursement of its outlay, incurred in settling the third-party losses, including the deduction for the compensation mentioned above, is £17,265.76.
- Contact Miss R, which Miss R should cooperate with, to agree a reasonable, suitable payment arrangement with her of not less than two years, to allow her to repay this sum.

My final decision

I uphold this complaint. I require Advantage Insurance Company Limited to provide the redress set out above at "Putting things right".

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss R to accept or reject my decision before 23 November 2023.

Fiona Robinson
Ombudsman