

The complaint

Mrs D has complained that esure Insurance Limited avoided (treated it as if it never existed) her motor insurance policy, refused to pay her claim and retained her policy premiums.

What happened

Mrs D took out a motor insurance policy with esure through an online price comparison site and the policy renewed twice. When her car was stolen, she tried to claim on her policy. But esure declined her claim, avoided her policy from the start and kept the premiums she'd already paid.

When Mrs D complained, it said she'd answered the question she'd been asked about whether the car was imported incorrectly. And that it considered this to be a deliberate or reckless qualifying misrepresentation, which entitled it to avoid her policy and refuse her claim.

our investigator's view

Mrs D brought her 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 esure should refund Mrs D's premiums in full.

esure doesn't agree with the Investigator and has asked for an Ombudsman's decision. It said that as Mrs D had said she always bought imported cars then she should have been aware of the question about this on the comparison site. It thought she had acted recklessly.

my provisional decision

After considering all the evidence, I issued a provisional decision on this complaint to Mrs D and to esure on 27 October 2023. I summarise my findings:

I could understand that Mrs D felt frustrated and disappointed with esure's decision. She had explained that she lost her No Claims Bonus (NCB) and she now found the cost of new insurance extremely high. This was in addition to the loss of her car.

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 and retain the premiums. 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.

esure thought Mrs D failed to take reasonable care not to make a misrepresentation when she stated in her application via a comparison site that her car wasn't imported. And I looked at the question she was asked when she completed the application and I agreed she failed to take reasonable care.

This was because she was asked whether her car was imported and given the options of answering yes or no. She was then asked to confirm that the car wasn't imported. If Mrs D had answered "No", then she could have chosen that the car was imported. And I thought this was a clear question asked by esure through the comparison site Mrs D used.

Mrs D didn't recall being asked this question. But I was satisfied that it would have been included in her online application. Mrs D said all her cars were imported. So I thought she should have been aware that the correct answer was "No" and I thought she answered the question incorrectly. And I thought this meant Mrs D failed to take reasonable care not to make a misrepresentation when she said her car wasn't imported.

esure had provided evidence from its underwriting guide which showed that if Mrs D had not made this misrepresentation it would not have offered cover at all. This meant I was satisfied Mrs D's misrepresentation was a qualifying one under CIDRA.

esure thought Mrs D's misrepresentation was a reckless or deliberate misrepresentation. This was because it thought Mrs D knew her car was imported, and so it thought she had answered the question recklessly.

But I wasn't satisfied that esure had shown that the misrepresentation was deliberate or reckless. Mrs D later said she thought she'd answered the question correctly. And the policy documents esure then provided didn't include any reference to the car not being imported. And so Mrs D wasn't provided with an opportunity to check and correct this error. So I thought the misrepresentation was careless.

Therefore, I was satisfied esure was entitled to avoid Mrs D's 2021 policy in accordance with CIDRA. But, as the misrepresentation was careless, I thought it unfairly retained her premiums for this year and it should now refund them.

But Mrs D then renewed her policy twice and her car was stolen in the third policy year. Our approach is that when a consumer renews a policy they take out a new consumer insurance contract. And the duty for them to take reasonable care not to misrepresent applies again. And it's for the insurer to prove there was a qualifying misrepresentation at the renewal. esure wanted to avoid all three policies. So I checked whether it had proved there was a qualifying misrepresentation at the start of each policy.

Some insurers might argue that if they had the right to avoid the original policy then it didn't exist, and so no further contracts (policies) can exist either; meaning it can avoid all the subsequent contracts formed at each renewal. We do not think this is correct because, as I've said above, at each renewal the consumer takes out a new insurance contract.

I looked at Mrs D's policy renewal documents. And I couldn't see that the car being imported or not was on any of the documents issued for Mrs D to check during the further renewal periods. So I was not satisfied Mrs D was asked a clear question at the renewals about whether or not the car was imported. And so I couldn't say that Mrs D made a misrepresentation in the renewal years that would entitle esure to avoid her policies and decline her claim.

And, as this meant that I thought esure unfairly avoided Mrs D's policies taken in 2022 and 2023, then I thought it should reinstate them and remove any records of the avoidance for these years. And so I thought it should now deal with Mrs D's claim following the theft of her car.

And – as CIDRA reflects our long-established approach to misrepresentation cases, I thought not allowing esure to rely on it to avoid Mrs D's policy produced the fair and reasonable outcome in this complaint.

This matter caused Mrs D considerable upset. So I thought esure should compensate Mrs D for the trouble and upset caused by it unfairly avoiding her policies and declining her claim. I thought esure should pay Mrs D £250 compensation for this as this was in keeping with our published guidance.

Subject to any further representations from Mrs D and esure, my provisional decision was that I intended to uphold this complaint.

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.

Mrs D replied that she accepted my provisional decision. esure didn't provide any response. So, as I've not received any further representations to consider, I can see no reason to change my provisional decision.

Putting things right

I require esure Insurance Limited to do the following:

1. Refund the premiums for Mrs D's policy taken out in 2021.
2. Reinstate Mrs D's policies taken out in 2022 and 2023, remove any records of their avoidance from any databases where they are recorded, and deal with her claim for the theft of her car.
3. Pay Mrs D £250 compensation for the distress and inconvenience caused by its unfair avoidance of her policies and declining her claim.

My final decision

For the reasons given above, my final decision is that I uphold this complaint. 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 Mrs D to accept or reject my decision before 26 December 2023.

Phillip Berechree

Ombudsman