

## The complaint

Mrs H is complaining about the way Marshmallow Insurance Limited has handled a claim she made on her car insurance policy. She's unhappy as she thinks Marshmallow is holding her at fault for an accident she says was caused by a third party. She's also unhappy about the general customer service she's received.

## What happened

In February 2023 Mrs H was involved in an accident with a third party's vehicle where her car suffered damaged. She reported the incident to Marshmallow to claim for the damage to her car. She set out that she held the third party fully responsible for the accident as she says he pulled in her lane – causing the two vehicles to collide.

As Marshmallow considered the third party to be at fault, it referred her claim to a solicitor firm – who I shall refer to as W – to pursue the third party's insurer directly. W arranged for an engineer to inspect Mrs H's car who deemed it to be a total loss. W explained it would pursue the third party for the car's market value. Mrs H was also provided with a hire car. However, W were unable to get an admission of liability from the third party's insurer, so Marshmallow dealt with the claim and paid Mrs H the car's market value, but it deducted the amount Mrs H still owed for the annual premium and the salvage value of the car. It also said it would normally deduct the excess as well, but it agreed to waive it in this instance. W later paid the salvage value to Mrs H.

Mrs H continued to contact Marshmallow to understand why it was recording the claim as "fault". But she says she had difficulties getting a response from Marshmallow and W. So she complained about the service she was receiving. She also set out that her renewal premium had increased significantly because Marshmallow had recorded on the database that she was at fault for the accident. Marshmallow didn't initially respond to her complaint so she referred it to this Service.

Since this Service got involved, Marshmallow agreed to pay Mrs H £500 in compensation. But it maintained that it had recorded the claim correctly as it said the third party's insurer still hadn't refunded its outlay.

I issued a provisional decision saying I thought £500 in compensation was fair and I said the following:

*"I should first set out that I acknowledge I've summarised Mrs H's complaint in a lot less detail than she has presented it. Mrs H has raised a number of reasons about why she's unhappy with the way Marshmallow has handled this matter. I've not commented on each and every point she's raised but, instead I've focussed on what I consider to be the key points I need to think about. I don't mean any discourtesy about this, but it simply reflects the informal nature of this service. I assure Mrs H, however, that I have read and considered everything she's provided."*

*Mrs H has raised a number of concerns about what's happened, but, in summary, I think they are as follows:*

1. The initial delay in having her claim paid and the fact that her hire car was withdrawn;
2. Marshmallow has reported the claim as a “fault” claim, which has meant she’s unable to afford insurance, so can’t get her children to school or herself to work; and
3. The general customer service.

*I shall consider each point separately*

#### *The initial handling of the claim*

*When Mrs H first contacted Marshmallow to make the claim, it seems Marshmallow immediately referred her to W to handle the claim. I can see from the correspondence W sent to Mrs H that it’s clear W wasn’t acting on Marshmallow’s behalf and it specifically set out that she wasn’t claiming on her insurance policy. But it seems that Mrs H wasn’t given a choice whether to do this or not and I don’t think that’s fair.*

*Marshmallow refers customers to a solicitor firm when it considers the consumer to not be at fault for an accident. There are advantages for it doing so – the consumer won’t have to pay their excess, their no claims discount isn’t affected and sometimes they can get a hire car that they’re not entitled to under the insurance policy. However, there’s also disadvantages as well. The consumer doesn’t have their losses settled until the third party’s insurer agrees to do so – this can sometimes take time – and they can’t refer their complaint about the actions of the solicitor to this Service. In certain circumstances, they may also be liable for the cost of the hire car they’re given. I would expect this information to be presented to the consumer before they’re passed to the solicitors and they’re given a clear and informed choice. I haven’t seen anything to show Marshmallow did so in this case and I think that’s unfair.*

*In this case, the third party’s insurer didn’t admit liability and settle Mrs H’s claim. As a result, Mrs H didn’t receive settlement of her claim until May 2023 which was after the claim was referred back to Marshmallow and it settled the claim under the terms of her insurance policy. She also had issues that the hire car she was initially given was threatened to be taken away. Ultimately, it seems to me that Mrs H’s claim was delayed by two months as a result of being unfairly referred to W without being given an informed choice.*

*I’ve also thought about the way Marshmallow settled the claim – in particular whether it was fair for it to deduct the amount Mrs H still owed for the annual premium and the salvage value.*

*When Mrs H took out the insurance policy, Marshmallow required her to pay an annual premium which Mrs H needed to pay at the start of the policy. Mrs H wanted to pay for the policy in monthly instalments. To enable her to do so, she took out a finance agreement. The finance agreement paid the annual premium on Mrs H’s behalf and Mrs H agreed in return to repay this in line with the terms of the finance agreement. When Marshmallow settled the claim there was still a balance on the finance which Mrs H needed to pay and this is what Marshmallow took off the settlement.*

*I recognise that the terms of the insurance policy entitled Marshmallow to do this, but it doesn’t mean it was fair to do so. It needs to be remembered that the purpose of the insurance policy is to enable a consumer to replace the car with the same age, mileage and specification. If the balance of the finance is taken off of this amount, then a consumer can’t do this with the settlement. So I would generally consider it unfair to deduct the balance on the finance agreement as this is a separate contract to the insurance policy. It’s also generally a 12 month contract – i.e. all parties agreed at the start that the consumer would have 12 months to repay this. If an insurer wishes to end the finance early and deduct any*

*amount still owed, I think it should seek consent from the consumer to do so in the first instance. Marshmallow didn't do so in this case.*

*However, while I think Marshmallow treated Mrs H unfair in this respect, I'm not persuaded she's lost out as a result. Mrs H would have still had to pay the balance on the finance agreement if Marshmallow hadn't deducted the balance and I haven't seen anything to show that she wasn't able to replace the car.*

*I do, however, think in the specific circumstances of this complaint that it was fair for Marshmallow to deduct the salvage value as it was aware the car's salvage had already been sold and the proceeds were going to be paid to Mrs H – which I understand they subsequently were. Had it not deducted the salvage amount, it was possible Mrs H would have ended up being double compensated for this.*

#### *Categorisation of the claim*

*I recognise Mrs H is unhappy that the claim is recorded as a "fault" claim. However, generally, the claims database considers a claim to be either "no claims discount (NCD) allowed" or "NCD disallowed". Essentially a claim will be considered "NCD disallowed" – more commonly known as "non-fault" where the policyholder has made a claim and the insurer gets a full recovery of what it paid out from a third party. Crucially the terminology isn't related to whether the insured party was at fault for the accident or not, but it's whether the insurer is out of pocket from the claim.*

*I can understand why Mrs H is unhappy that an incident she considers wasn't her fault is impacting her premium so much. But the reason for this is that the third party's insurer hasn't agreed its insured wasn't responsible for the accident. So it hasn't repaid Marshmallow's outlay. And it's this reason why the claim is considered a "fault claim" and Mrs H is out of pocket.*

*I've thought about whether Marshmallow has acted fairly in pursuing the third party's insurer. I can see that it instructed solicitors to act on its behalf shortly after settling the claim to recover its outlay. It's also informed this Service that it was looking to commence legal proceedings against the third party's insurer – although it's now told us the third party has admitted liability. But I'm satisfied that it is acting fairly and reasonably in this regard.*

*However, Mrs H has also complained Marshmallow didn't make any attempt to recover CCTV footage. she provided emails she sent to W regarding this. Marshmallow has acknowledged that it didn't pro-actively pursue the CCTV footage. However it's said Mrs H hasn't lost out as the third party's insurer has now admitted liability. I can't say with any certainty about whether the CCTV would have made a difference to the claim journey as it may not have been possible to get the footage or it may not have recorded the incident. But Mrs H did provide photographs of the camera and it was within the area of the incident.*

*Ultimately liability has been resolved in Mrs H's favour. But Mrs H emailed numerous times about the CCTV and the failure to pro-actively chase and obtain the footage has clearly added to Mrs H's distress.*

*I also note, Mrs H has complained that Marshmallow initially treated a claim she made in November 2022 as a fault claim, which she says was unfair as the claim was never finalised because her car was written off before it could be repaired. I should set out that, strictly speaking, Marshmallow was entitled to treat this as a separate claim. The car was damaged in that incident – which I understand was a vandalism claim after a dispute with another driver. And the damage occurred in that incident would be treated as separate to the February 2022 incident. Had Marshmallow continued to treat the claim as a "fault claim" I*

*wouldn't be able to say that was unfair – Mrs H did make a claim. So I think it acted more than fairly in removing that claim as a "fault claim".*

*I naturally sympathise with the situation Mrs H has found herself in, but I can't hold Marshmallow responsible for the fact her annual premium has increased so significantly.*

#### **Customer service**

*Mrs H is unhappy that she's contacted Marshmallow and W numerous times and been given a lot of conflicting information and, at times, not been responded to. I should first set out that I can't hold Marshmallow responsible for the actions of W. W wasn't acting on behalf of Marshmallow – it was acting on behalf of Mrs H in pursuing the third party's insurer directly.*

*I can see that there were times Mrs H contacted Marshmallow through its online chat facility and she didn't get a reply. But I also recognise that some of these occasions were late and out of hours. And I do think a lot of Mrs H's upset from this was that Marshmallow was explaining why it had recorded the two claims as "fault claims". But, as I set out above, I don't think this was unfair."*

Mrs H didn't agree with my provisional decision for the following reasons:

- Marshmallow recorded more than one incident as a fault claim, but she said she had proof she wasn't at fault for either of them.
- She said the claim remained open because Marshmallow didn't get the CCTV footage. She said this made her uninsurable. She said she'd lost her job as a result of this and had to sign onto universal credit. She also said she couldn't get her son to school because she couldn't get insurance.
- She's had to pay for taxis to get about.
- She had to buy a day's insurance because Marshmallow didn't respond to her live chat when she tried to insure her new car.
- She said this matter had had a profound impact on her mental health and didn't think I'd taken this into consideration.

Marshmallow responded to accept my provisional 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.

I'm aware of the significant impact this matter has had on Mrs H and I naturally sympathise with the situation she's found herself in. This claim has undoubtedly had a significant impact on her life. But I can only require Marshmallow to compensate Mrs H for any distress and inconvenience it's unreasonably caused in the way that it's handled the claim – i.e. I can't require it to compensate her for anything that would inevitably have occurred from her having to make a claim where liability was in dispute.

I recognise Mrs H said, had Marshmallow looked to get the CCTV footage at the start, liability would have been resolved quickly. But, as I said in my provisional decision, I don't think I can reasonably say that. CCTV footage is only available for a short period of time and it's not unusual that CCTV isn't able to be obtained. I also can't safely conclude it would have recorded the incident.

But, even if it had obtained the footage, it doesn't mean that liability would have been resolved straight away. It would have always taken a number of weeks to obtain it.

Marshmallow would then have to review the footage, then send it to the third party's insurer to review. The third party insurer would then have to review this and make a decision accordingly. I think it's likely that this still would have taken a number of months to resolve. I recognise Mrs H said she was unable to work or get her son to school because of this, but I think this was down to the fact she had to make a claim and the third party disputed liability – not because of anything Marshmallow did wrong.

Ultimately Mrs H has largely suffered the distress and inconvenience she did because the third party's insurer didn't agree they were at fault for the accident and liability was disputed. I can't hold Marshmallow responsible for that. As I said, I fully appreciate that this had a significant impact on Mrs H – both mentally and in regards to her daily life. I assure her I have taken this into consideration when thinking about what's an appropriate award. But I can't reasonably require Marshmallow to compensate her for any impact the claim itself has caused her.

Mrs H has highlighted that Marshmallow said there were two "fault" claims. But, as I said in my provisional decision, this wasn't unreasonable. Mrs H says she showed she wasn't at fault for either incident, so says Marshmallow shouldn't have recorded the claims as "fault". But, while a claim may generally be referred to as "fault" or "non-fault", what they're actually categorised as is "NCD allowed" or "NCD disallowed". Whether a consumer is at fault for the loss or not, is not what the category is based upon. A claim will be recorded as "NCD disallowed" if a claim is made and it will stay as such until such time as the insurer gets its money back.

Ultimately, for the reasons I set out in my provisional decision, Marshmallow was entitled to treat both incidents as "NCD disallowed" as Mrs H had made a claim on both incidents. While I recognise Marshmallow later stopped treating the first incident as "NCD disallowed", it doesn't mean it was wrong to treat it as such initially. While I recognise Mrs H's strength of feeling in this regard, I can't say it treat her unfairly here.

I've thought about Mrs H's comments that she struggled to change car on the policy through Marshmallow's app. I can see from Marshmallow's comments there were issues for a couple of hours, but it does look like it responded to her within a few hours asking for details of her replacement car. Mrs H provided these the following day and the change was processed, producing an additional fee to facilitate the change. Mrs H responded to say she didn't agree she should have to pay a fee. But I can't say Marshmallow acted unfairly in charging this as it's not unusual an amount is payable after a policyholder asks to change a vehicle on the policy. I recognise Mrs H was unhappy with the way Marshmallow handled this, but I think it took reasonable steps to put things right here, so I can't reasonably require it to compensate her for any delays that may have occurred here.

### **Putting things right**

As I said in my provisional decision, I do think Marshmallow could have done things to make the claim journey smoother. Although I think the majority of the what's happened is down to the fact the third party disputed liability and Mrs H didn't agree with the fact the claims should be treated as "fault" claims, which was out of Marshmallow's reasonably control. But I do think it needed to compensate her for this. However, for the reasons I've set out above, I still think £500 in compensation was fair. I don't think Marshmallow needs to pay anything more than this.

### **My final decision**

For the reasons I've set out above, it's my final decision that I think Marshmallow Insurance Limited's compensation offer of £500 is fair. It should pay this to Mrs H directly if it hasn't

already done so. I make no further award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 21 February 2024.

Guy Mitchell  
**Ombudsman**