

The complaint

Mr O complains that Marshmallow Insurance Company (Marshmallow) wants him to sign documents that could mean he's liable for £9,000 in hire car charges if its costs can't be recovered, under his motor insurance policy.

What happened

Mr O was involved in an accident when driving his car in January 2023. He says the other driver admitted responsibility. He contacted Marshmallow to make a claim under his policy. He says it provided him with a courtesy car for 38 days. The car was then taken back as his vehicle was determined to be a total loss. Since this time, he's been asked to sign an agreement that says he's liable for £9,000 if these costs can't be recovered from the third party's insurer.

Mr O says he refuses to sign this agreement as he thinks there's no situation where he should be liable for these costs. He explains how this has been a very stressful experience for him.

In its final complaint response Marshmallow says when it was informed of the circumstances of Mr O's accident, it understood this to be a 'non-fault' claim. So, it passed the claim onto its non-fault claim partner. Marshmallow says its partner can only take on clear non-fault cases, where there is a "*high likelihood*" it will be able to fully recoup the cost of the claim from the third party's insurer. It says a hire car was provided to Mr O by its non-fault claims partner between 25 January and 3 March 2023. As there was no action needed on its part it closed the claim.

In its complaint response Marshmallow says it understands the concerns Mr O has regarding the documents he received. It then explains that Mr O entered into a hire agreement with a 320-day credit period. It says its non-fault partner expects to receive payment for the cost of the hire vehicle within this period. If it doesn't it can invoice Mr O for this amount. Marshmallow says this is to cover its partner in an emergency situation, but that it hasn't ever seen this happen.

Marshmallow says that if Mr O was unhappy with the terms of the agreement with its partner company, he could've rejected its services. It says it would then have explored other claims options for him.

Mr O didn't think Marshmallow had treated him fairly and he referred the matter to our service. Our investigator upheld his complaint. She says she'd expect to see a clear explanation provided by Marshmallow of the advantages and disadvantages of using its non-fault partner company. She didn't think this happened, which meant Mr O wasn't in an informed position when deciding how to proceed.

Our investigator says it's likely that Mr O wouldn't have used the non-fault partner, had he been fully informed of the risk involved. To put things right she says Marshmallow should pay any costs the partner company is requesting from Mr O. It should ensure there is no further contact with Mr O from this company. It should give the option for Mr O's claim to be

handled using his policy with Marshmallow. Alternatively, it should agree with its partner that Marshmallow is responsible for continuing to handle the claim rather than Mr O needing to sign an agreement. In addition, she says the business should pay Mr O £250 for the upset this matter caused him.

Mr O accepted our investigator's findings. Marshmallow didn't respond. Because of the delay Mr O asked for an ombudsman to consider his complaint.

Marshmallow has since responded. It says Mr O knew he was dealing with its partner company. It says he has no issues reading or speaking English and so was able to understand the documents he was sent. It says although Mr O hasn't signed an agreement he took possession of the hire car and used it. Marshmallow says that if Mr O cooperates with its partner company there will be nothing for him to pay. But if he doesn't it will struggle to recover the costs from the third party's insurer.

Our investigator didn't change her view and confirmed this to both parties. Marshmallow didn't respond. As an agreement wasn't reached the matter has been passed to me to decide.

I issued a provisional decision in January 2024 explaining that I was intending to uphold Mr O's complaint. Here's what I said:

provisional findings

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 my intention is to uphold Mr O's complaint. Let me explain.

When Mr O contacted Marshmallow to register his claim it decided to refer him on to an accident management company (AMC) it's affiliated with. This is a practice used by some insurers when a claim is thought not to be the fault of its insured. In this case based on the description of the incident Mr O gave, Marshmallow's agent thought the other driver was at fault for the accident, which is why he was referred to the AMC.

We don't think it's unreasonable for an insurer to refer a claim onto an AMC. But we do expect a choice to be given to its customer. This should include a clear explanation of the pros and cons of choosing to use the AMC's services.

Marshmallow should've explained that if Mr O is later deemed to be at fault for the accident, fully or partially, then he may be liable to pay the cost of the hire car and any repair costs under the agreement with the AMC.

In its submissions to our service Marshmallow says that when Mr O first made contact he should've been given the option of it handling the claim through his policy or using the AMC route. But it says it can't see that this option was provided.

Based on this evidence Marshmallow failed to provide any explanation to Mr O of the risks of using the AMC. Or even to explain that he had an option of whether to use this company or not. I don't think this was fair. Mr O wasn't provided with the information he needed to make an informed decision. Marshmallow effectively decided for him that the AMC should handle the claim.

I've read Mr O's policy documentation. His policy provides for a courtesy car for the duration of any insured repairs. It says the car provided will usually be a small hatchback of less than

1200cc. The car Mr O was driving at the time of the accident was a small hatchback. Based on this I can't see that there was much benefit to having a hire car, given this would be expected to be provided on a like-for-like basis.

I understand the car was eventually determined to be a total loss, which took over a month to decide. A courtesy car isn't provided where a total loss determination has been made. But it wasn't known that the car was a total loss when Mr O first contacted Marshmallow. Based on this information I don't think the provision of a hire car via the AMC route was necessarily going to be a benefit, given the cover Mr O already had in place.

I can't see any reference in Mr O's policy booklet to explain Marshmallow's approach to non-fault claims. It's clear Mr O was extremely worried when he became aware he could be liable for the AMC's costs. I don't think he would've agreed to using the AMC had he been informed of the risks of doing so.

I can see that Mr O has an excess fee to pay in the event of a claim. By using the AMC he didn't have to pay his policy excess upfront. This can be seen as a benefit of following the AMC route. However, Mr O always had the option of claiming his policy excess back from the third party's insurer, dependent on the liability outcome. I can't see that this was explained to him by Marshmallow.

Mr O has more recently received notification that he's likely to be considered jointly liable for the accident. He was told that the circumstances of his claim would mean it's one person's word against the other.

I asked Marshmallow to provide a call recording from when Mr O registered his claim. In addition to any notes from this conversation. It didn't provide a call recording. I've seen the claim records it provided, but these don't show that the role of an AMC was explained to Mr O or that he was given an option of whether to use its services.

Having considered all of this I don't think Marshmallow treated Mr O fairly when referring his claim onto the AMC. It didn't provide information that would allow him to make an informed decision. To put this right, it should deal with the claim under its insurance policy and assume responsibility for any costs the AMC would otherwise claim from Mr O. To acknowledge the distress and inconvenience this caused it should pay Mr O £250 compensation.

I said I was intending to uphold this complaint and Marshmallow should deal with the claim under Mr O's insurance policy. I said it should contact the AMC to assume responsibility for costs it would otherwise claim from Mr O. And pay him £250 compensation for the distress and inconvenience it caused.

I asked both parties to send me any further comments and information they might want me to consider before I reached a final decision.

Mr O responded to accept my provisional findings.

Marshmallow responded to query the next step in our process. It also provided comments on changes it has made to its processes.

We responded to clarify the process query. Marshmallow didn't provide any further comments or information.

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.

As neither party has made any further submissions or provided further evidence for me to consider, I see no reason to change my provisional findings.

So, my final decision is the same as my provisional decision and for the same reasons.

My final decision

My final decision is that I uphold this complaint. Marshmallow Insurance Limited should:

- deal with the claim under Mr O's insurance policy and contact the AMC to assume responsibility for any costs it would otherwise claim from Mr O; and
- pay Mr O £250 compensation for the distress and inconvenience it caused him.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 12 March 2024.

Mike Waldron
Ombudsman