DRN-5052430

The complaint

The estate of Mrs O is unhappy that Vitality Life Limited cancelled Mrs O's life insurance policy ('the policy') and declined a claim made for the life benefit.

What happened

The details of this complaint are well known to both parties, so I won't repeat them again here. I'll focus on giving the reasons for my 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.

Was the person who arranged the policy acting as agent for Vitality or Mrs O?

The estate of Mrs O says that the agent who arranged the policy – and took her through the application for the policy – was an agent of Vitality's. The estate says the agent was acting as principal for Vitality when selling the policy to Mrs O.

Vitality says the agent is independent and was acting for Mrs O, not Vitality.

I've looked at the agent's website and it provides details of the products it offers and it doesn't say it only provides products underwritten by Vitality. It says: "we partner with companies that offer life, critical and serious illness protection…" I've also not been provided with any other compelling evidence that the agent was acting on behalf of Vitality.

So based on what I've seen, on the balance of probabilities, I'm satisfied the agent was acting for Mrs O.

Vitality's decision to cancel the policy and decline the claim

When determining this issue, I've taken into account the relevant ABI Code of Practice for managing claims for individual and group life, critical illness and income protection insurance products.

I've also considered The Consumer Insurance (Disclosure and Representations) Act 2012 ('CIDRA') as I'm satisfied this is relevant law in this case. CIDRA requires consumers to take reasonable care not to make a misrepresentation when taking out a consumer insurance contract. 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 (in this case Vitality) 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. And the remedy available to the insurer under CIDRA depends on whether the qualifying misrepresentation was deliberate or reckless, or careless.

Vitality has cancelled the policy and declined the claim made on it. It says Mrs O acted deliberately or recklessly by not answering a medical question correctly on her application form. Had she done this, Vitality says it wouldn't have offered the policy at the time. So, it says it was entitled to cancel the policy, decline the claim and retain the premiums Mrs O paid for the policy.

I know the estate of Mrs O will be very disappointed, but I'm satisfied Vitality has acted fairly and reasonably by doing this. I'll explain why.

When first completing an application for the policy Mrs O was asked many questions by the agent about her health and medical history and that included:

> Your health in the last five years…
>
> A lump or growth of any kind…?

From what I've seen, I'm satisfied that she answered 'no' to this question at the time.

However, the answers she gave weren't submitted by the agent to Vitality straight away. And the date they were provided to Vitality and it received the application for the policy is disputed.

That's relevant because a few months after the application form was completed, the medical evidence reflects that Mrs O attended her GP surgery on 13 August 2018 and it's stated that Mrs O had a one-week history of a tender lump in one of her breasts.

The data capture form completed by the agent reflects that the completed application was submitted to Vitality on 4 August 2018 – so a couple of days before Mrs O noticed the breast lump. However, Vitality says the application wasn't submitted until early September 2018 – so after Mrs O noticed the breast lump and after the GP consultation on 13 August 2018.

On the balance of probabilities, I think it's more likely than not that the application was submitted to Vitality in early September 2018. Vitality has given us a copy of the electronic submission as well as an electronic screenshot which I'm satisfied supports that the application was most likely received by it in September 2018.

The application form Mrs O completed with the agent contains the following declaration:

> I will inform you immediately of any changes that occur and that would affect my answers before the application is accepted…

Further, Vitality's letter dated 6 September 2018 (which I think it's more likely than not was sent to Mrs O and she received it) says:

> Your plan has been set up using the details shown on the attached confirmation schedule in section 1. This reflects the information sent to us electronically by your financial adviser.
>
> This confirmation schedule forms part of the basis of the agreement between you and Vitality for the provision of the… plan, so you must check this document for accuracy and completeness…

> If you need to advise us of any changes or errors, please complete section 2 at the end of schedule and return to us…

The confirmation schedule says:

> These are your application details, please check them carefully.

It then goes on to reflect the answers she provided to the agent when applying for the policy and that includes:

> Apart from any condition you have already told us about, have you had any of the following in the last 5 years:
>
> Lump, cyst, growth or skin lesion of any kind…

And it reflects that the answer is 'no'.

As of the start of September when I'm satisfied Vitality received the answers to the questions from the agent, I'm find that answer was wrong.

Further, it's also worth noting that the confirmation schedule also contains a duty of disclosure declaration which includes:

> I will inform you immediately of any changes that occur and that would affect my answers before the application is accepted (an application is accepted when we have provided a final underwriting decision).

The policy started later in September 2018.

So, in any event, I think Mrs O should've contacted Vitality to have changed the answer to the lump question before the policy started and I've seen no evidence that she did that.

CIDRA says that it's the duty of the consumer to take reasonable case not to make a misrepresentation to the insurer. And that a failure by the consumer to comply with the insurer's request to confirm or amend particulars previously given is capable of being a misrepresentation.

Overall, I'm satisfied that Vitality has fairly concluded on the balance of probabilities that Mrs O hadn't accurately disclosed the lump that she'd noticed and seen her GP about and that she'd made a misrepresentation.

I'm persuaded the answer to this question mattered to Vitality. It's provided underwriting evidence that it wouldn't have been able to have accepted the application at the time had it been made aware of the recently discovered lump. So, I'm satisfied that it wouldn't have offered the policy to Mrs O and the misrepresentation was a 'qualifying' one.

Vitality has concluded that Mrs O's misrepresentation was deliberately or recklessly made. I'm satisfied that's a fair and reasonable conclusion for it to reach. I'm satisfied that Mrs O ought to have reasonably known about the recently discovered lump that she'd consulted her GP about and that she acted recklessly by not telling Vitality about it.

I've looked at the actions Vitality can take in line with CIDRA if a qualifying misrepresentation was deliberate or reckless. It can avoid the contract of insurance, refuse all claims and

doesn't need to return any premiums paid for the policy. That's what Vitality has done here and when doing so, I think it's acted fairly and reasonably by relying on CIDRA.

Other issues

Since bringing a complaint to the Financial Ombudsman Service, Vitality has offered to pay Mrs O's husband, Mr O (who is bringing the complaint on behalf of the estate as the executor of the estate), £500 compensation to reflect the impact of the delays it caused, assessing the claim.

I don't think Mr O is an eligible complainant as he isn't party to the contract of insurance between Mrs O and Vitality. So, I don't have any power to direct Vitality to pay him compensation for the distress and inconvenience he personally experienced because of the claim delays. However, Vitality has said the offer of £500 compensation remains open and he can contact Vitality directly if he wants to now accept this amount.

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mrs O to accept or reject my decision before 18 November 2024.

David Curtis-Johnson
Ombudsman