DRN-5110682

The complaint

Mr and Mrs J complain that Legal and General Assurance Society Limited (L&G) declined a claim on their critical illness insurance policy.

What happened

Mr and Mrs J applied for a critical illness policy with L&G in January 2022 with the policy starting in mid-March 2022. In early September 2022, Mrs J was diagnosed with breast cancer. I'm sorry to hear about Mrs J's diagnosis.

Mr and Mrs J raised a claim with L&G. L&G investigated the claim buy ultimately declined it in November 2023. L&G said that Mrs J had misrepresented on her application. L&G considered the misrepresentation to be careless and added a breast cancer exclusion to the policy. Mr and Mrs J raised a complaint, but L&G didn't change their decision. As a result, Mr and Mrs J brought the complaint to our service.

Our investigator didn't think L&G had done anything wrong and so didn't uphold the complaint. They agreed there had been a misrepresentation and thought adding the exclusion was fair. Mr and Mrs J didn't agree. They said Mrs J was a layman and answered the questions accurately. They also sent evidence to show they'd taken out a policy with another insurer around the same time and had answered the questions the same way and that insurer had paid out. As no agreement could be reached, the complaint has been passed to me to consider.

I note that Mr and Mrs J had other complaints with L&G. These were around delays and communication with the claim. Mr and Mrs J haven't raised these complaints with our service and so I won't be considering them in this decision.

What I provisionally decided – and why

In my provisional decision, I said:

"*I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.*

Based on what I've seen so far, I intend to uphold Mr and Mrs J's complaint. I've explained my reasons why below.

At the outset I acknowledge that I've summarised their complaint in far less detail than Mr and Mrs J have, and in my own words. I'm not going to respond to every single point made. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here. The rules that govern the Financial Ombudsman Service allow me to do this as it's an informal dispute resolution service. If there's something I've not mentioned, it isn't because I've overlooked it. I haven't. I'm satisfied I don't need to comment on every individual point to be able to reach an outcome in line with my statutory remit.

When considering complaints such as this, I need to consider the relevant law, rules and

industry guidelines. The relevant rules, set up by the Financial Conduct Authority, say that an insurer must deal with a claim promptly and fairly, and not unreasonably decline it. So, I've thought about whether L&G acted in line with these requirements when it declined to settle Mr and Mrs J's claim.

The relevant law in this case is The Consumer Insurance (Disclosure and Representations) 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. And the remedy available to the insurer under CIDRA depends on whether the qualifying misrepresentation was deliberate or reckless, or careless.

L&G thinks Mrs J failed to take reasonable care not to make a misrepresentation when answering the following questions:

> *"Apart from anything you've already told us about in this application, during the last 5 years have you contacted a doctor, nurse or other health professional for:*
>
> - *A growth, lump, polyp or tumour of any kind? – **Yes***
>   - *Please select from this list. Only select other when you cannot find a match. – **Cyst***
>   - *Have you still got the cyst(s)? – **No**"*

I've looked at Mrs J's medical history, this shows the following:

- *October 2018 – a sonograph revealed small benign looking cystic changes in Mrs J's breast. An attempt to aspirate a lump was attempted to see if it was a cyst but it failed.*
- *October 2018 – core biopsy was performed. Result showed tiny fragment of breast parenchyma with fibrosis and no obvious atypia to suggest cancer in situ or invasive malignancy present.*
- *March 2019 – further biopsy performed. Result showed benign fibrofatty tissue with no evidence of malignancy or proper breast tissue included.*
- *March 2020 – ultrasound detected lesion in breast which were unchanged. Agreed to leave and review in one year.*
- *March 2021 – lump wasn't palpable but ultrasound confirmed well defined lesion. Mrs J was discharged with no further reviews to take place.*

L&G believe that Mrs J should have selected "Lump" from the list instead of "Cyst". They also think that Mrs J should have told them that she still had the cyst as it was present on her latest scan prior to the application. I'll look at both questions separately.

Starting with the difference between a lump and a cyst, I think Mrs J has taken reasonable care in how she's answered this question. Whilst I appreciate that the word lump is mentioned in Mrs J's medical history, so is cyst. A cyst is a type of lump. Under CIDRA, the standard of care is that of a reasonable consumer. Mrs J doesn't have any medical expertise and I wouldn't expect her to be able to necessarily differentiate between the two terms, especially when they are both used in her medical notes. Looking at the medical history, two

staff members at L&G also agree with this. One of the misrepresentation panel states "The life assured did make a reasonable attempt to tell us about this history".

L&G has said they think Mrs J was aware that it wasn't a cyst as the initial question doesn't include the word cyst. Mrs J's policy was taken out through an independent financial adviser (IFA). I would expect an IFA to understand that a cyst would fall under this question which is why it was answered this way. L&G has also said that the aspiration attempt confirmed that the lump wasn't a cyst. I haven't seen that Mrs J's medical records specify this is the case. They simply state the aspiration failed.

Based on what I've seen and for the reasons above, I don't think Mrs J answered this question without reasonable care and so there wasn't a misrepresentation.

I do agree that Mrs J should have told L&G that the cyst was still present. This is because it was present on her most recent scan and there was no reason to believe this had changed. Mrs J has said that she thought the question was asking about there being active symptoms or issues. This isn't what the question asks, and so I do think Mrs J didn't take reasonable care when answering this question.

To confirm if the misrepresentation is qualifying under CIDRA, L&G needs to show us that it would have changed their underwriting outcome. L&G has said they would have added an exclusion to Mrs J's policy had they been aware the cyst was still present. However, having reviewed L&G's underwriting evidence, I can't see this is the case. L&G has provided their automatic underwriting flowchart. This confirms that with a cyst that hasn't been removed, which has been seen by a specialist and isn't under further review, that the policy would have been accepted on ordinary rates.

As the policy would still have been accepted on ordinary rates, the misrepresentation wouldn't have changed the underwriting outcome. This means that the misrepresentation isn't qualifying. Under CIDRA, when a misrepresentation isn't qualifying, the insurer isn't allowed to take any action.

Based on what I've seen, I don't think L&G should have added the exclusion or declined the claim. The claim notes state that Mrs J met the policy terms for cancer. So, I think the claim should have been paid.

The claim being incorrectly declined has had a significant mental and financial effect on Mr and Mrs J. It made them feel dishonest and haven't had access to funds that would have provided a financial cushion and lessen the burden of money worries following Mrs J's diagnosis. Mr and Mrs J should receive compensation for the distress and inconvenience caused to them."

I set out what I intended to direct L&G to do to put things right. And gave both parties the opportunity to send me any further information or comments they wanted me to consider before I issued my final decision.

Responses to my provisional decision

L&G confirmed they didn't agree with my provisional decision. They maintained that Mrs J didn't take reasonable care when declaring she had a cyst and not a lump. They didn't provide any further medical information but reiterated and provided further comments around the existing medical information.

Mr and Mrs J didn't respond to the provisional decision by the deadline.

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've thought carefully about the responses to my provisional decision. Having done so, while I appreciate it will come as a disappointment to L&G, my conclusions remain the same. I'll explain why.

L&G accept that Mrs J is a lay person and she may not have understood what a fibrotic lump or fibrofatty tissue is. However, L&G don't agree that Mrs J wasn't made aware that the lump in her breast was not a cyst. They added that they don't believe there is any evidence to support why Mrs J would potentially think it was a cyst as the only time it was referred to as a cyst was the first appointment in 2018. L&G say that during this appointment it was determined that it wasn't a cyst.

Neither myself or the case handler for L&G are medically trained. So, we have to rely on the medical evidence provided to decide the outcome of this case.

A sonographic assessment of both breasts in October 2018 revealed multiple small benign looking cystic changes. It was reported that an attempt to aspirate the lump was made to see if it was a cyst but this failed. There is no information from the doctor at this time to say that the lump wasn't a cyst, only that the aspiration attempt failed. L&G has provided a link to a website about breast masses and medical evaluation. I wouldn't have expected Mrs J to have the knowledge of this website at her point of application.

L&G say that they don't think there was any reason to leave the meeting thinking she had a cyst but I don't agree. We don't know what was discussed between the doctor and Mrs J. From the medical records, it's not clear that a cyst has been ruled out.

L&G has based their response on what they think it's likely Mrs J would have been told by doctors at different times. For example, when a biopsy was needed, L&G say that it's not conceivable that the specialist would not have been very clear that this was not a cyst. Whilst I agree that the specialist would have been clear with Mrs J about the situation, I don't think the specialist would necessarily have specifically told Mrs J that it wasn't a cyst. I also don't think that Mrs J can be expected to know the histology differences of cysts and other types of breast lumps.

There is a lot of technical medical terms used by the specialist which Mrs J likely wouldn't have understood what they meant. It's likely that the specialist used the generic term of lump when speaking to Mrs J. A cyst is a type of lump but not all lumps are cysts. It was initially suggested to Mrs J that her lump might be a cyst and I've no evidence to support that Mrs J was specifically informed that the lump wasn't a cyst.

Overall, based on what I've seen, I still don't think it's unreasonable that Mrs J answered that it was a cyst. I also note that Mrs J didn't have the option to select breast as the location of her cyst on her application. However, L&G have since changed this and it is now an option.

Based on the above, and given L&G hasn't shown Mrs J didn't take reasonable care when disclosing a cyst, or that the presence of the "cyst" was a qualifying misrepresentation, I still agree with the outcome I came to in my provisional decision and L&G need to put things right as set out below.

Putting things right

To put things right, L&G should do the following:

- Pay Mr and Mrs J's claim in line with the sum assured of the policy
- Pay Mr and Mrs J 8% simple interest* on the above payment, from the date of declining the claim, to the date of making payment
- Refund Mr and Mrs J any overpaid premiums because of the claim being incorrectly declined
- Pay Mr and Mrs J 8% simple interest* on the above payment from the date of declining the claim, to the date of making payment
- Pay Mr and Mrs J £750 for the trouble and upset caused by incorrectly declining their claim

* If L&G considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr and Mrs J how much it has taken off. It should also give Mr and Mrs J a tax deduction certificate if they ask for one, so they can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

For the reasons I've explained above, I uphold this complaint and direct Legal and General Assurance Society Limited to put things right by doing as I've said above, if they haven't already done so.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs J and Mr J to accept or reject my decision before 11 December 2024.

Anthony Mullins
Ombudsman