

The complaint

B has complained that Marshmallow Insurance Limited has avoided the van insurance policy covering a van belonging to it.

B is represented by Mr Z, who is a director.

What happened

Mr Z took out a policy in May 2023 in his own name covering a van which belonged to B. The van was stolen in August 2023 and Mr Z made a claim for it under the policy. Marshmallow then wrote to him to say it was avoiding the policy and not paying the claim because he'd provided incorrect information when taking out the policy. This was on the basis that the van belonged to B and it was the registered keeper, whereas Mr Z had said it belonged to him and he was the registered keeper when he took out the policy. Marshmallow also thought Mr Z had also failed to declare two licence endorsements (fixed penalty offences) when he took out the policy.

Mr Z complained to Marshmallow about its decision. But Marshmallow didn't alter its position. So Mr Z asked us to consider a complaint about Marshmallow's decision. He did this in his own name. One of our investigators considered the complaint. He issued four views on it in all. Two saying Marshmallow were wrong to avoid the policy and two saying it was entitled to do so. The last view he issued of the four said Marshmallow was entitled to avoid the policy.

Mr Z asked for an ombudsman's decision. It was at this point that we realised that because the van belonged to B, Mr Z wasn't eligible to complain about Marshmallow's decision to avoid the policy. So we asked for the permission of both Mr Z (as a director of B) and Marshmallow to change the complainant to B. Mr Z agreed to this. But Marshmallow didn't respond at all. So we said to Marshmallow if it didn't respond by 3 December 2024 we'd assume it agreed to this change. It still hasn't responded, so we have assumed it agrees to the change of complainant to B.

We also asked Marshmallow to provide screenshots of the actual questions Mr Z was asked when he took out the policy and for a full copy of its van insurance underwriting guide from this time. It hasn't provided either.

Having reviewed the complaint, I wrote to Marshmallow to explain that I thought it should be upheld because it hadn't shown it was entitled to avoid the policy. Marshmallow has not responded to this email.

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.

The relevant legislation in this case is the Insurance Act 2015 (the Act). This is because the policy Mr Z took out to cover B's van is a commercial contract. This required Mr Z, on behalf

of B, to make a fair presentation of the risk B wanted Marshmallow to insure when Mr Z took out the policy to cover the van. I appreciate Mr Z took out the policy in his own name, but I am satisfied he did so on B's behalf and that B was an undisclosed principal.

If Mr Z failed to make a fair presentation on behalf of B and Marshmallow can show this was what the Act describes as a qualifying breach; and that it would have offered the policy on different terms but for this breach or not at all, it may then have the right to avoid it (treat it as if it never existed) and refuse any claims under it. Whether Marshmallow is entitled to avoid the policy will depend on whether Mr Z's breach on behalf of B was deliberate or reckless. If it was, Marshmallow would be entitled to avoid the policy, even if it would have offered it on different terms. If it was neither deliberate nor reckless Marshmallow would only be entitled to avoid the policy if it wouldn't have offered it all but for the breach.

I'm satisfied from the evidence Marshmallow has provided that when he took out the policy Mr Z was asked who the owner and registered keeper of B's van was. This is because the schedule shows him as the owner and registered keeper and Mr Z hasn't disputed Marshmallow's assertion that he was asked questions about these things and said he was the legal owner and registered keeper, when it was actually B.

I'm also satisfied that when he took out the policy Mr Z was asked whether he had any motoring convictions or licence endorsements. This is because, while I haven't seen the actual question set Mr Z answered when he took out the policy via a comparison site and his answers, I have seen an extract from the normal question set that someone is presented with when obtaining quotations. This includes a question about convictions and licence endorsements for people that are to be insured to drive under the policy. And there is nothing in the documentation provided to Mr Z after he went ahead with the policy to suggest he disclosed the licence endorsement he was aware of at this time. And he's admitted he forgot to disclose this. I'm satisfied he only had one at this point he needed to disclose, as he wasn't aware of the offence which led to his second endorsement.

As Mr Z provided the wrong owner and registered keeper for the van he was insuring and failed to disclose a licence endorsement I think he did fail to make a fair presentation of the risk he wanted Marshmallow to insure on behalf of B. I appreciate Mr Z has suggested Marshmallow should have checked his licence, as it mentioned later it had carried out checks. But, as far as I can see, Marshmallow didn't actually tell Mr Z at the time he took out the policy that it was going to do this and that he didn't need to let them know about motoring convictions or other licence endorsements. And I think Mr Z needed to answer the question he was asked about motoring convictions and licence endorsements correctly.

I've considered Mr Z's reasons for answering the abovementioned questions about the owner and registered keeper and motoring convictions and licence endorsements incorrectly. And I think in doing so he acted neither deliberately nor recklessly. I think it was simply carelessness, i.e. he didn't really give enough thought to the answers he provided. This is because Mr Z has explained how he had always taken policies to cover B's van in his own name and not realised this was wrong. And that he simply forgot about the fixed penalty offence. And Marshmallow seems to accept the breaches were neither reckless nor deliberate, as it referred to careless misrepresentation in its final response letter to Mr Z.

This means for me to support Marshmallow's decision to avoid the policy Mr Z took out I need to be satisfied it wouldn't have offered the policy at all if he had made a fair presentation, i.e. answered the questions correctly. Unfortunately, despite us asking for it on several occasions, Marshmallow has not provided a full copy of its van insurance underwriting guide from the time Mr Z took out the policy or any other clear evidence to show it wouldn't have offered the policy to B on the same terms, instead of Mr Z, if he had declared that B was the owner and registered keeper of the van. So, I do not consider

Marshmallow has shown Mr Z saying he was the owner and registered keeper of B's van was a qualifying breach of Mr Z's duty on behalf of B to make a fair presentation.

Marshmallow has provided an extract from its van underwriting guide, which it has said was in use at the time Mr Z took out the policy. This shows it wouldn't have provided cover for a van that was to be used to carry materials and tools for work purposes if the driver had any motoring convictions. However, Mr Z didn't have any motoring convictions when he took out the policy. He had a licence endorsement, i.e. a fixed penalty offence. In view of this, I do not consider Marshmallow has provided sufficient evidence to show that it wouldn't have provided a policy to cover B's van with Mr Z as a driver under it. And I should make the point that we have asked Marshmallow to provide its full underwriting guide for van insurance on several occasions. So I think it has had ample opportunity to provide the evidence I would need to decide that it has shown Mr Z's failure to disclose his licence endorsement was a qualifying breach. This means so far as I am concerned Marshmallow has not demonstrated that Mr Z's failure on behalf of B to make a fair presentation with regards to his licence endorsement was a qualifying breach under the Act.

In summary, it should be clear from what I've said, that I don't consider Marshmallow has demonstrated Mr Z on behalf of B made a qualifying breach or breaches under the Act when he took out the policy to cover B's van. So it follows that I do not consider Marshmallow has shown it was entitled to avoid the policy and refuse B's claim because of this. So I consider the fair and reasonable outcome to B's complaint is for Marshmallow to reinstate the policy Mr Z took out and consider B's claim under it. I also think this incorrect decision caused B inconvenience and that Marshmallow should compensate B for this. And I'm satisfied that £100 in compensation is appropriate, as it is in line with what I'd expect for the level of inconvenience B experienced and reflects the fact that Mr Z did provide Marshmallow with incorrect information.

Putting things right

For the reasons set out above, I've decided to uphold B's complaint and I consider the fair and reasonable outcome to it is for Marshmallow to reinstate the policy Mr Z took out to cover B's van and consider B's claim under it for the theft of the van.

It doesn't look like Marshmallow has ever refunded the premium for the policy Mr Z took out. But, if it has, Mr Z must pay this back before the policy is reinstated.

Marshmallow also needs to remove any record of the avoidance of the policy from its records and any central databases it has placed it on.

Marshmallow also needs to pay B £100 in compensation for the inconvenience its incorrect decision to avoid the policy Mr Z took out caused B.

My final decision

I uphold B's complaint about Marshmallow Insurance Limited and require it to do what I've set out above in the 'Putting things right' section.

Under the rules of the Financial Ombudsman Service, I'm required to ask B to accept or reject my decision before 18 January 2025.

Robert Short
Ombudsman