DRN-5309473

The complaint

Mr M complains that Marshmallow Insurance Limited ("Marshmallow") unfairly declined his claim and cancelled his motor insurance policy following an accident he was involved in.

What happened

In January 2024 Mr M was involved in a car accident. He contacted Marshmallow to make a claim. He was then asked what he uses his car for. Mr M says he uses his car for social purposes and for commuting to work. He explains the accident happened when he was buying food, not in relation to his work.

Mr M says he works from a fixed place. However, his employer has several locations and where he works from can vary. But he says he doesn't drive around when at work. Mr M doesn't think it's fair that Marshmallow cancelled his policy based on this information. He says he didn't misrepresent the information he gave when taking out his policy.

In its final complaint response Marshmallow says it cancelled Mr M's policy and declined his claim because he'd used his car for driving to multiple places of work. It says his policy excludes this type of use. Marshmallow says had Mr M confirmed his intended use of his car when taking out his policy, it wouldn't have offered cover.

Mr M didn't think Marshmallow had treated him fairly and referred the matter to our service. Our investigator upheld his complaint. He says the law that applies in these circumstances is the Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA). He didn't think Marshmallow's underwriting rules specifically excluded Mr M's occupation. This means the CIDRA rules don't allow Marshmallow to take the action it did. Our investigator says it should now reconsider Mr M's claim. He says if Marshmallow would've charged a higher premium it can settle the claim proportionately. But it must also pay £150 compensation for the distress and inconvenience it caused.

Mr M agreed with our investigator's findings. Marshmallow didn't agree. It says it's able to cancel under its policy terms and conditions. It also says that the incorrect information Mr M provided justifies declining his claim. As an agreement wasn't reached the matter has been passed to me to decide.

I issued a provisional decision in January 2025 explaining that I was intending to uphold Mr M'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 M's complaint. Let me explain.
As our investigator says the relevant law in this case is CIDRA. Under CIDRA Mr M must take reasonable care not to make a misrepresentation when taking out insurance. If Mr M doesn't do this, CIDRA allows an insurer to take certain actions, assuming the

misrepresentation is a qualifying one. A qualifying misrepresentation is where the insurer wouldn't have provided cover at all, it would only provide cover under different terms, or it would only provide cover for a higher premium.

Marshmallow provided a screenshot of the question Mr M was asked about the use of his car. This is taken from the comparison website he used when taking out his insurance policy. This asked, "How do you use the [Mr M's make and model of car]". The options are, "Social only; Social and commuting; and Social, commuting and business uses". There's a drop-down menu that sets out the different types of business use.

Mr M chose the option for social and commuting. He confirmed this in his submissions to our service and his choice is clearly stated within his policy documentation.

In the screenshot provided an information box is included next to the question to help Mr M decide which option to select. This says social and commuting should be selected if, "you or a named driver drives to and from a single place of work or where you study, but do no other business travel". Information is also provided about business uses. It says, "Business use by the policyholder – choose this if you use the car on business away from your single place of work".

Mr M drives to different locations with his work. So the response he provided was incorrect as he wasn't commuting to one single place of work.

We asked Marshmallow to show that if correct information was provided by Mr M this would either have resulted in it not providing cover, providing cover under different terms, or at a higher premium. The information it provided in a document headed "Underwriting Guidelines" says:

"We offer two types of usage:

SDPC (social, domestic, pleasure & commuting) ○ This allows the policyholder to drive for social, domestic and pleasure purposes as well as commute to one fixed place of work"

And:

"Business Class 1 ○ This allows the policyholder and their spouse (if an additional driver) to do all included with SDPC as well as drive to multiple work locations. ○ An obvious example of this would be an estate agent… Some occupations, such as delivery drivers, [Mr M's occupation] and students, are excluded from Business Class 1. See pricing exclusions for the full list"

Marshmallow provided its "pricing exclusions list". This doesn't mention Mr M's occupation again. But it's clearly mentioned in the underwriting guidelines as an excluded occupation for a "business class one" policy. This is the policy Mr M required for driving to multiple work locations. But I'm satisfied Marshmallow's established approach is not to provide cover for someone in his occupation.

Based on this information, I think Mr M did make a misrepresentation. The question he was asked about his usage was clear. He made a qualifying misrepresentation under CIDRA as Marshmallow's underwriting guidelines confirm no business cover would've been offered given Mr M's occupation.

The remedies available to Marshmallow under CIDRA depend on whether the qualifying misrepresentation is thought to be careless, reckless, or deliberate. In its submissions to our service Marshmallow says Mr M's actions were deliberate and reckless. Had it sought to use

the CIDRA remedies it would've avoided the policy, declined the claim, and retained the premiums. It points out that this is the most extreme measure it can take. And in this case it deemed it more reasonable to cancel the policy and decline the claim in line with its policy terms. It says this acknowledges that cover was in place. And it can cancel the policy because Mr M was driving for a purpose not permitted by his certificate of insurance.

In its decline letter to Mr M, Marshmallow says section three of its policy terms allow it to cancel a policy. This is if a policyholder fails to comply with any of the general conditions or general exceptions set out in the policy terms. The policy terms under section 14, "General Conditions: Part Two: Your Obligations" say:

"If you have given us inaccurate information this can affect your policy in one or more of the following ways:

1. If we would not have provided you with any cover we will have the option to:

a. void the policy, which means we will treat it as if it had never existed and repay the premium paid minus a void fee of £130, unless there is any claim in which case the full premium may be retained; and

b. decline your claim, and/or seek to recover any money from you for any claims we have already paid, including the amount of any costs or expenses we have incurred.

c. in the alternative, we may cancel the policy in accordance with Section 3: Cancellations, charge a cancellation fee of up to £130 & refund any remaining premium owed on a pro rata basis."

The CIDRA rules and remedies apply in these circumstances due to the qualifying misrepresentation Mr M made. But we don't think it's unfair for an insurer to cancel a policy rather than go down the avoidance route – as an avoidance record will have more of a negative impact and make it more difficult to obtain future insurance.

Marshmallow decided to cancel the policy after Mr M's claim. It hasn't applied the CIDRA remedy to avoid the policy, which would otherwise mean there was no cover in place at the time of the accident. It hasn't applied the void option from its policy terms and conditions (1(a) above), which would then allow it to cancel the policy under 1(b). The only alternative under point 1(c) above, if Marshmallow doesn't void the policy, is for it to cancel it. This is what the business has done here. But this was after Mr M's claim and means he had cover in place at the time of his accident. This means Marshmallow is able to cancel the policy as it confirmed to Mr M. But this doesn't allow it to decline his claim. Because of this it should now consider his claim as though cover was in place at the time of the accident. It should do this in-line with its remaining policy terms.

I've thought about the impact this has had on Mr M. The incorrect decline of his claim has clearly caused him distress and inconvenience. But he's benefited from a more favourable outcome as Marshmallow chose not to avoid his policy. As discussed, it was able to exercise this remedy under the CIDRA rules. In these circumstances I don't believe it's fair to require the business to pay compensation.

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 M responded to say he had nothing further to add.

Marshmallow responded to say that my provisional decision suggests it is entitled to avoid the policy but cannot decline the associated claim. It says this seems contradictory. Marshmallow says it has taken a more lenient approach in Mr M's case. But it is not prepared to compromise on its right to refuse the claim.

Marshmallow says it has now decided to change the policy to "*a void*". This means the policy will never have been in place. It believes Mr M's misrepresentation was deliberate so it will be retaining the premium.

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.

Having done so I'm not persuaded that a change to my provisional decision is warranted.

I agree that Mr M did make a qualifying misrepresentation for the reasons I've already explained. This would allow Marshmallow to apply the remedies allowed under the CIDRA rules. But the key point here is that it didn't avoid Mr M's policy. It cancelled relying on its policy terms. This means cover was in place at the time of Mr M's loss.

Marshmallow has said it's now changing how it deals with Mr M's claim. I accept the CIDRA remedies were available to Marshmallow. But as it didn't exercise its right to avoid the policy, it can't now decide to retrospectively avoid it after telling Mr M it was dealing with this as a cancellation. To do so wouldn't be fair and reasonable. So, the claim must be considered under the remaining terms and conditions of the policy. This assumes cover was in place at the time of Mr M's loss.

My final decision

My final decision is that I uphold Mr M's complaint. Marshmallow Insurance Limited should:

- consider Mr M's claim as though cover was in place at the time of his loss, subject to the relevant policy terms, limits, and excesses.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 15 April 2025.

Mike Waldron
Ombudsman