complaint

Mr R is unhappy that Tesco Underwriting Limited voided his car insurance policy following a claim.

background

Mr R had a car insurance policy with Tesco which he renewed in March 2018. He added his daughter, Miss R, onto the policy as a named driver in May 2018. He did this using his online account but spoke to a representative of Tesco on the phone at the same time.

Miss R had a car accident in November 2018, so Mr R notified a claim to Tesco.

Tesco determined – in December 2018 – that Mr R had made a misrepresentation when adding Miss R to the policy. He'd completed the information online to show that she'd been driving for just over a year. But Miss R had in fact only been driving for a matter of days. Tesco deemed this to be a careless misrepresentation. As a result, it voided Mr R's policy from 10 May 2018 – the date she'd been added, meaning that the policy was treated as non-existent from that date, so the loss or damage claimed for wouldn't be covered.

Our investigator considered this complaint. He agreed with Tesco that Mr R had made a 'qualifying misrepresentation', and also that this was 'careless' – a term used in the Consumer Insurance (Disclosure and Misrepresentations) Act 2012 ('CIDRA'). But he didn't think that Tesco had acted fairly in voiding the policy. He thought the fair outcome would be to reinstate the policy in Mr R's name only and to remove any markers or records of voidance, but that the claim shouldn't be paid. Mr R agreed but Tesco didn't – so the case was escalated for an ombudsman's review and, therefore, passed to me.

I contacted Tesco informally to explain how I was minded to proceed – and to provide my interpretation of the relevant legal and equitable principles – in an effort to resolve this complaint at the earliest possible stage through mediation (as our rules encourage). In short, I'd asked Tesco to consider reinstating the policy and then to consider the claim in line with the terms and conditions. The key factor here was that Mr R had told Tesco over the telephone that Miss R had only been driving for a few days.

Tesco provided its thoughts on my proposals and why it disagreed with them. These can be summarised as follows:

- It was Mr R's responsibility to provide accurate information and to check the documents it sent him to make sure all the information he'd provided was right;
- It did not mislead Mr R, nor influence what he entered online. He didn't take reasonable care when entering this information;
- It shouldn't be asked to consider the claim as it wouldn't have provided Miss R with cover for that vehicle;
- The 'careless' provision in CIDRA exists for situations like this;
- The issue is around the 'representation' made by Mr R in terms of the written versus oral disclosure. Mr R avoided the administration fee by amending the policy online so accepted the accompanying risk and responsibility of doing so; and
- Accepting risk, pricing, and terms and conditions are all systems-driven. It's not reasonable to expect any member of staff to memorise the level of information required to know whether Tesco would be willing to insure someone. And Tesco doesn't have a rule that all new drivers would be declined.

my provisional decision

For completeness, and to give Mr R a fair opportunity to respond too, I issued a provisional decision in May 2020. In it I said:

"Consumer Insurance (Disclosure and Misrepresentations) Act 2012

CIDRA provides, in effect, that an insurer only has a remedy against a policyholder for nondisclosure or misrepresentation if he has breached his duty to take reasonable care not to misrepresent facts that are relevant to the insurer's fair assessment of the risk under proposal.

If there is a misrepresentation made in breach of this duty and the insurer can prove that it adversely affected its underwriting of the policy, that is deemed a 'qualifying misrepresentation'. This means the insurer may have a remedy up to and including voidance depending on the nature and quality of the misrepresentation, i.e. whether it is regarded as careless or reckless/deliberate.

In the case of a careless misrepresentation, CIDRA says the insurer ought to do what it would've done but for the misrepresentation, which might entail a proportionate settlement. In other words, if its contemporaneous underwriting evidence indicates that it would never have accepted the proposal on the true facts, it may still void cover but should return premiums. By contrast, a deliberate or reckless misrepresentation entitles the insurer to the remedy of voidance without a premium refund.

The above is just my informal summary of the relevant law to help put my reasoning in context; it's not a definitive guide. The parties should refer directly to CIDRA and/or seek independent legal advice if they require further information on such matters.

Was there a breach of duty?

So, the first step in deciding this complaint is to determine whether there has actually been a misrepresentation in breach of the duty of reasonable care. When deciding this, there are numerous factors to consider, including "how clearly the insurer communicated the importance of answering those questions (or the possible consequences of failing to do so)"; and "if the insurer was, or ought to have been, aware of any particular characteristics or circumstances of the actual consumer".

In this case, Tesco was aware of the particular circumstances of the additional person that Mr R sought to add as a named driver – i.e. the length of time Miss R had been driving for. Mr R was on the phone to Tesco at the same time as trying to amend his policy. It was clear that he was unsure about what he had to do so he was being helped through the process, which resulted in a lengthy phone conversation. Mr R told the representative that his daughter had only been driving for a few days. And there was also a conversation about how the amendment would result in his premiums increasing from about £40 per month to about £90 per month, with him indicating this was higher than he expected. The representative, who was accessing his account information throughout the call, said in response, "if she only passed her test the other day, it could be because she's a brand new driver as well. That'll be influencing the price." So, there's no doubt here that the representative – acting for and on behalf of Tesco – knew that Miss R had only been driving for a few days.

I've also thought about how clearly the importance of answering the questions correctly was communicated to Mr R. It's clear from the call that Mr R was having trouble with completing the amendment. So the representative was making suggestions around what he could do to try to resolve the issue. And that became the focus of the call – trying to process the change. But it does mean that there wasn't any emphasis given orally to the importance of checking the information being entered was correct. I think it's fair to say that Mr R was likely to have been focusing more on the conversation with the representative than on any wording that was showing online. And I don't think Tesco's representative pressed upon Mr R the importance of answering the questions accurately online.

It's common ground that Mr R made an error when completing the online form. But there's a material difference between making an error in good faith and making a misrepresentation in breach of the duty of reasonable care. From listening to the call, I think it's very clear that Mr R was open and honest about Miss R's circumstances – and was trying to answer to the best of his knowledge and belief. As mentioned above, when deciding if there's been a breach of duty, the factors to consider under CIDRA include "if the insurer was, or ought to have been, aware of any particular characteristics or circumstances of the actual consumer". Given this, I'm minded to conclude that, despite the factual error online, Mr R didn't breach his duty of reasonable care not to make a misrepresentation because Tesco had actual – or, at the very least, constructive – knowledge of Miss R's limited driving experience.

<u>What are the remedies under CIDRA where there hasn't been a breach of the duty of reasonable care?</u>

CIDRA states (my emphasis):

*"An insurer has a remedy against a consumer for a misrepresentation made by the consumer before a consumer insurance contract was entered into or varied **only if** –*

> *(a) the consumer made the representation in the breach of the duty set out in section 2(2)…"*

But as I've said above, I don't think Mr R did breach his duty. So, we don't need to go on to decide whether the misrepresentation was 'qualifying' (i.e. adversely affected the risk assessment) or whether it was deliberate/reckless or just a careless mistake. It follows that Tesco doesn't have a remedy in law for the error that was made in the final stages of the application process. It only has a remedy if there was a breach of duty. When insurance is proposed via multiple channels or processes – such as phone and online – I think it is only fair and reasonable, and in line with CIDRA principles, to take a holistic view of what actually happened. We have to try to work out with the benefit of hindsight whether or not a consumer was in breach of his statutory duty to take reasonable care over material facts. It is artificial and unfair to look at just one part of the process rather than the overall context.

<u>Other considerations</u>

Tesco has said that it wouldn't be reasonable to expect any member of staff to memorise the level of underwriting information required to know whether it would be willing to insure someone. It pointed out that it doesn't have a rule that all new drivers would be declined. Seemingly, it depends on a number of factors such as the type of vehicle being insured.

I do appreciate what Tesco is saying, and I accept that it is harder to fix a large corporate body with constructive knowledge than a natural person. But there is caselaw that indicates

a firm can have constructive knowledge of information so long as it is conveyed to the right sort of person. For example, if Mr R had disclosed the correct information to the wrong sort of employee (e.g. the security team or finance department), that would probably not fix Tesco's underwriters with constructive knowledge of facts relevant to the proposed risk. But disclosing that information to staff expressly charged with selling and advising on insurance applications is completely different. They ought reasonably to have relevant information in order to be able to advise properly; or at least have access to the information or to someone who knows (cf. Evans v Employers Mutual Insurance Association Ltd [1936] 1 K.B. 505; and Mahli v Abbey Life Assurance Co Ltd [1994] C.L.C. 615). In the Mahli case, the Court of Appeal rejected the policyholder's appeal that the insurer had constructive knowledge of information from previous events (including a failed application). But the majority of judgments cited and approved important principles on when underwriters might reasonably be fixed with constructive knowledge which, if ignored, might give rise to a waiver of any right to void for misrepresentation. Lord Justice Rose said (my emphasis):

> *I agree with [counsel for the appellant] that Evans v Employers Mutual is the most closely relevant of her authorities. I am unable to accept, however, that that case is authority for the proposition that the defendants in the present case should have imputed to them knowledge of the contents of all the documents in their records in relation to insurance business proposed by the deceased regardless of when, to whom and in what circumstances those documents were supplied.*
>
> *In my judgment the provision of information to an insurance company does not necessarily afford to that company knowledge sufficient to found waiver by election: whether it does afford such knowledge depends on the circumstances of its receipt. In particular, information will not give rise to such knowledge* ***unless it is received by a person authorised and able to appreciate its significance.*** *In the present case that necessarily involves the collation by the defendants' underwriting department of information received by the defendants at three different times for three different purposes.*

When deciding what's fair and reasonable in all the circumstances, I must take account of the law even though I am not bound by it under our statutory rules. It seems to me the 'ratio' of these Court of Appeal authorities – which are still binding precedents for lower and later courts – is that insurance underwriters should have constructive knowledge of matters that are disclosed to their authorised servants or agents in relation to delegated transactions. In Evans, the relevant information was known to the underwriters' subordinate and therefore to them; whereas in Mahli, the information was clearly separated in time and space from the disputed application. Even taking account of significant changes in the way insurance is now mediated and sold, the case here is still more akin to Evans insofar as Mr R was dealing with an employee acting on behalf of Tesco's underwriters – and for purposes directly related to the very application and contract they now wish to void.

The law reinforces my opinion of what's the fair and reasonable outcome. But even leaving it to one side, the simple fact here is that Tesco, as the regulated insurer, had all the information about who it would and wouldn't insure, whereas Mr R didn't. So, I think there was an onus on Tesco's underwriters and their direct representatives to do more here. For example, they could've explained that they don't always offer insurance to new drivers; or emphasised the importance of completing online information carefully and double-checking the documentation when he received it.

From the evidence I've been given, it appears that amendments made over the phone by Tesco would incur a £25 administration fee, and amendments made by the policyholder using the online portal wouldn't. Tesco said that, by avoiding the administration fee and making the amendment online, Mr R accepted the risk and responsibility of amending the policy himself. And that there's an issue around the representation made by Mr R in terms of his written disclosure versus his oral disclosure. But I don't think it was made clear to Mr R that he was taking on additional risk by avoiding this fee. To me, it came across that the representative was helping him to make the amendment online as he wasn't sure what to do and wanted to help him to avoid the fee. But Mr R doesn't appear to have been trying to avoid it himself; he seemingly wasn't given the option. And Tesco didn't try to 'sell' him the option of it making the amendment on his behalf for a fee. I think it likely that, had Mr R been presented with the option of Tesco making the amendment for a fee, or completing it himself for free, he would've elected to complete it by himself. But, had this happened, I'd expect there to have been some more focus on the transfer of risk and responsibility.

Although Tesco has said that it wouldn't have insured Miss R, the fact here is that it did. It entered into a contract that didn't take into account all the information. It had the information constructively or actually in the phone call – and missed the chance to highlight the difficulties of adding brand-new young drivers. Without evidence of a breach of the duty of reasonable care, Tesco does not have a remedy and must honour the terms and conditions of the contract entered into.

It's important to be clear that I don't think that Mr R is blameless here – he, without a doubt, made an error. And this error contributed to Tesco entering into a contract that we know it wouldn't ordinarily have. So, I think it would be fair for Mr R to cover the consequential costs of expenses he's incurred in relation to having to purchase another policy elsewhere. Had things gone as they should, it seems likely that Mr R would have had to insure him and/or his daughter elsewhere at greater cost – so this doesn't look like a loss necessarily caused by any wrongful act or omission of Tesco.

But I'm minded to conclude that Tesco, under CIDRA, doesn't have a remedy against Mr R for the error here. So it should:

- *Reinstate the policy for the originally agreed period of cover;*
- *Remove any references to the voidance of the policy from internal and external databases; and*
- *Consider the claim in line with the policy terms and conditions."*

responses to my provisional decision

Mr R accepted my provisional decision. But Tesco responded with some further points:

- It says it can't reinstate the policy and presumes that Mr R has insured the car elsewhere by now anyway. It questioned whether it's being asked to reinstate the policy with the error, or provide a new policy based on the correct details which are unacceptable. It expressed surprise that it's being instructed to continue cover for a risk it deems unacceptable, even when it's been told to cover a claim.
- It also asked for me to reconsider the suggestion that the importance of customers providing accurate information wasn't made clear. It referenced a recording that it says all customers hear prior to speaking to an adviser. Within this, it asks customers to answer all questions to the best of their knowledge, as any incorrect information could invalidate their insurance.

my findings

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

For the reasons given in my provisional decision, I'll be upholding this complaint. But I'll respond to the points raised by Tesco below.

In the evidence provided by Tesco initially, I wasn't given the transcript of the recorded message, or an actual recording of it. But, now that I've been given this, I don't think it makes a difference in this case. I say this because my intention wasn't to imply that Tesco didn't make *any* reference to the importance of answering the questions accurately. Instead, I felt that there hadn't been enough *emphasis* on this point, particularly given the context and individual circumstances of this case. So, while I note the script I've been provided with does warn consumers that incorrect information could invalidate their insurance, I don't think this is enough when I factor in the conversation that followed. It remains the case that the adviser focused on trying to resolve the issues with processing the change.

In my provisional decision I said, "*it does mean that there wasn't any emphasis given orally to the importance of checking the information being entered was correct".* I note that the scripted message would've been delivered orally. But I do think there's a substantial difference between information delivered through a recorded message and through the human being that you're speaking with directly, specifically about the policy you hold. While I acknowledge it was mostly likely that Tesco did give warnings around the importance of providing correct information in this recorded message and online, I don't think the importance of this was sufficiently highlighted during the conversation with the adviser. I don't think there was enough to make Mr R aware that he'd need to take reasonable care in answering the questions accurately online, regardless of how carefully and honestly he answered the questions with the telephone adviser.

In relation to reinstating the policy, I think this may have been misunderstood. I'm not asking Tesco to insure Mr and Miss R now. Instead, I don't think it's fair that this shows as a voided policy. As I've said previously, I'm satisfied Tesco entered into a contract with Mr and Miss R, whether or nor it intended to do so given the facts that have now been highlighted. So, I think Tesco should ensure its records show that Mr and Miss R were insured for the originally intended period of cover, which will have now ended – and, if necessary, provide written confirmation of that should Mr R encounter future difficulties with obtaining insurance at a fair premium or at all. (Mr R is of course also free to show this decision to insurers and brokers.) There's no requirement for Tesco to enter into a new policy with them. It's just a question of righting the wrong and returning Mr R to the position he would have been in but for the voidance: *equity regards as done that which ought to have been done.*

my final decision

For the reasons given above and before, I uphold this complaint against Tesco Underwriting Limited. I ask it to:

- Reinstate the policy for the originally-agreed period of cover within 28 days of receiving notice of Mr R's acceptance of this decision;
- Within that same period, remove any references to the voidance of the policy from internal and external databases – and consider the claim in line with the policy terms and conditions; and
- If requested within the next five years, provide Mr R with a written, factual confirmation explaining that its voidance was quashed by the Financial Ombudsman Service as being contrary to the parties' respective rights and responsibilities under CIDRA.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 16 July 2020.