DRN-4801222

The complaint

Mr M has complained about the fact that Advantage Insurance Company Limited cancelled his van insurance policy and failed to notify him it had done so until several days after his cover had ended.

Where I've referred to Advantage, this also includes any actions or communication by agents acting on its behalf.

What happened

Mr M arranged cover for his van under his existing policy in May 2023. When he did so he was asked if it had been modified and he said it hadn't. His van was damaged in an accident in July 2023 and he made a claim under his policy. Advantage inspected his van and decided it was a write-off. And it made an interim payment on Mr M's claim by paying him the market value of the van less the policy excess. It then decided to avoid (treat it as if it never existed) Mr M's van insurance policy from the date he added his van to it. It did this on the basis he had failed to take reasonable care not to make a misrepresentation when he added his van by saying it hadn't been modified, when it had been converted to a campervan.

Advantage wrote to Mr M to explain its decision by letter on 17 August 2023 and it has said it emailed him the same day to say his policy had been cancelled. In the letter it said that because Mr M's policy had been avoided the damage to his van wasn't covered and that he may have to pay claim costs for anyone else involved in the accident if he was found to be responsible for it.

Mr M complained to Advantage. He complained that he had only found out his policy had been cancelled when he called to chase up on his claim for the recovery costs on 21 August 2023 and was 'rudely' told to refer to the email saying his policy had been cancelled, which he had not received. He then only fully understood what had happened when he received Advantage's letter of 17 August 2023 on 22 August. He also complained about receiving another letter dated 17 August on 24 August saying that he had to pay £214 following the cancellation of his policy. Only to be told when he called to query this that there was nothing to pay.

Mr M also asked in his email complaining what would happen about his no claim discount (NCD), the personal injury claim he was making against the other driver and the reimbursement of the recovery and storage charges he'd incurred for his van.

Mr M also explained to Advantage that, as far as he was concerned, his van had not been converted to a campervan, as it did not have water, gas or electricity. And he complained generally about poor communication from Advantage on his claim.

Advantage issued its final response letter to Mr M on 1 September 2023. In this it said his policy had been cancelled in accordance with its terms and conditions and that the amount it had said was outstanding had been written-off. And it apologised for poor communication around this and said it was going to pay Mr M £20 in compensation. It provided proof to

Mr M of his NCD as at the point his policy was cancelled. And it said any fees payable due to the cancellation would be charged regardless of who cancelled the policy. Although I assume it waived these when it wrote off the £214 it said Mr M owed. Advantage also said the claim would remain open for six months in case third parties involved in the accident wanted to make a claim. It added that due to what it described as 'non-disclosure' it was unable to cover Mr M's part of the claim.

Advantage made no reference to the recovery and storage charges, Mr M's excess or his personal injury claim in its final response letter, despite him querying these things when he complained. Although, it did tell Mr M separately that he'd need to claim directly from the third party insurer for these things. However, it then suggested its solicitor would assist him. And it seems the solicitor did manage to recover the recovery and storage charges and Mr M's excess for him. It also seems at some point Advantage suggested Mr M would have to repay what it had paid out on his claim. Although it does not seem it has pursued him for this amount because it recovered it from the third party insurer.

Mr M then asked us to consider his complaint. He maintained that his van had not been converted to a campervan.

One of our investigators considered Mr M's complaint. She said that she thought Mr M should have told Advantage his van had been modified when he added it to his policy. But she didn't think Advantage should have avoided Mr M's policy, as by making an interim payment for his van after knowing it had been modified, it had effectively affirmed the contract he had with them. She originally said Advantage should meet Mr M's claim for the recovery and storage charge. She also said Advantage should remove any record of the avoidance and pay Mr M £500 for distress and inconvenience. But when Advantage told her Mr M had already been reimbursed for the recovery and storage charges and his excess, she said Advantage should just remove any record of the avoidance/cancellation of his policy and pay him £500 in compensation for distress and inconvenience.

Our investigator also suggested that Advantage should progress Mr M's legal expenses claim. But when Advantage told her Mr M did not have legal expenses cover she said Advantage didn't need to progress his legal expenses claim.

Advantage didn't agree with the investigator's view. It said Mr M told it when he added his van that it hadn't been modified and it entered into the contract with him on this basis. And that Mr M 'voided his contract on 17 July 2023 by adding the modifications without taking the necessary steps to inform us'. It has gone on to say that at this point Mr M breached the terms of his policy and it would no longer have provided cover if it had known about the modifications. On this basis it didn't agree that it had affirmed the contract by paying Mr M's claim, as by this point he had already breached his contract with it.

Advantage also said it considered it was reasonable for it to 'void the policy based on CIDRA under misrepresentation'. And that it settled the claim as quickly as it could to mitigate the impact of the damage to Mr M's van. But, once its underwriters were shown the images of his van, a couple of days after it had made the interim payment, the decision to 'void' the policy was made.

I issued a provisional decision on 2 May 2024 in which I set out what I'd provisionally decided and why as follows:

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

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) or when there is a variation to the contract (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. One of these considerations is how clear, and how specific, the insurer's questions were when the policy was taken out or varied.

And the remedy available to the insurer under CIDRA depends on whether the qualifying misrepresentation was deliberate or reckless, or careless.

When Mr M called to change the vehicle under his policy to the van that was damaged he varied the policy. And when he did this he needed to take reasonable care not to make a misrepresentation. But I don't think he did take reasonable care not to make a misrepresentation. I say this because Advantage has provided evidence to show that he was asked whether his van had been modified and he answered this question 'no'. Bearing in mind seating, which it looks like could also be converted to a bed, and boxing had been added to the rear of the van I think a reasonable consumer would have answered this question as 'yes'. And this is why I don't think Mr M can be said to have taken reasonable care when he answered it 'no'.

Advantage has also provided evidence to show if Mr M had answered this question 'yes' it wouldn't have insured his van. And this means Mr M's misrepresentation was a qualifying one. And this also means that Advantage would have been entitled to avoid Mr M's policy. However, I agree with our investigator that by making a payment in settlement of Mr M's claim for his van at a point when it already knew it had been modified it effectively affirmed the contract Mr M had with them. And it waived its right to avoid Mr M's policy. I appreciate Advantage's underwriters may not have viewed the images of Mr M's van at this point, but it seems its claims team did have a report which said alterations had been made to the interior of the van prior to it making its offer to Mr M. And at this point Advantage knew that Mr M had said the van hadn't been modified when he added it to his policy. Therefore, I think legally Advantage did affirm the contract with Mr M with knowledge of the fact he had failed to take reasonable care not to make a misrepresentation.

Even if this is not the legal position, I think the fair and reasonable outcome to Mr M's complaint would be for Advantage's actions in making an offer and payment in settlement of his claim to be treated in the same way as a legal affirmation of the contract he had with it.

This means, even if Advantage did not legally affirm the contract, I do not consider it would produce a fair and reasonable outcome to Mr M's complaint if I allowed Advantage's avoidance of his policy to stand.

I've noted Advantage's reference to the policy terms, but these are not relevant other than giving it the right to cancel Mr M's policy after it found out his van had been modified. This is because the appropriate approach was for it to consider the position under CIDRA, which is what it actually did.

In view of what I've said, I think the fair and reasonable outcome to this complaint is for Advantage to remove any record of the avoidance or cancellation of Mr M's policy from its records and from any external databases it has placed a record of it on.

I also think Advantage should provide Mr M with proof of the no claim bonus (NCB) he would have had if it hadn't avoided his policy and his policy had got to renewal. This is because I consider it most likely to be what would have happened if Advantage hadn't inappropriately avoided Mr M's policy.

Advantage should also compensate Mr M for any extra premium he has paid as a result of him having a lower NCB when he took out a policy to cover his replacement van and as a result of having to declare that he'd had a policy avoided. This is subject to Mr M providing details of his new policy showing that he did declare he'd had a policy avoided or cancelled and that he received a lower NCB than he would have done if his policy with Advantage had got to renewal.

To work out what the difference in premium would have been Advantage should calculate what premium it would have charged if Mr M's policy had renewed and pay him the difference between this and what he paid for his new policy, subject to him providing the details I've set out. If Mr M paid the premium for the new policy as a lump sum then Advantage should also pay interest on the extra amount he paid (calculated as I've set out above) at 8% per annum simple from the date he paid it to the date of settlement. If Mr M is paying the premium in instalments then I do not think it is necessary for Advantage to pay interest on the difference.

Turning now to the compensation suggested by our investigator for distress and inconvenience. While I appreciate that Advantage decision to avoid Mr M's policy caused him distress and inconvenience, unlike our investigator, I do not consider it would be appropriate for him to be compensated for this. This is because Mr M would not have experienced this distress and inconvenience if he had taken reasonable care not to make a misrepresentation. And, as I've explained, I think he should have realised he needed to answer 'yes' when he was asked whether his van had been modified. In view of this, I do not intend to award any compensation to Mr M.

I do also appreciate Mr M doesn't appear to have received Advantage's email saying his policy had been cancelled. And, although Advantage has provided some evidence to show it sent this, I am not entirely convinced it did. However, bearing in mind Mr M's policy was only cancelled because he failed to take reasonable care not to make a misrepresentation, I do not consider it would be appropriate for Advantage to pay him compensation for any distress and inconvenience he experienced as a result of only finding out his policy had been cancelled five days after it had actually happened.

I should also say that the fact Mr M doesn't have legal expenses cover means he will need to pursue his claim for loss of income due to his accident with the third party insurer himself, unless Advantage is willing to instruct its solicitor to help him and cover any costs. What Advantage has said previously does suggest it will do this and it should let Mr M know whether it is willing to do so.

Obviously, as Mr M has already got back the recovery fee and storage charges Advantage will not need to pay him for these.

I gave both parties until 16 May 2024 to provide further comments and evidence in response to my provisional decision.

Mr M has responded to say that he is happy to accept my provisional decision, although he is disappointed that, unlike our investigator, I do not consider he should receive compensation for distress and inconvenience.

Advantage has responded to say it does not agree with my provisional decision. It has

explained that it was not aware that Mr M's van had been modified until after it had paid the settlement amount. And that it paid this amount when it did to make sure Mr M had the funds needed to buy a replacement van, as he used his van for work. In view of this, it doesn't think its decision to pay an amount in settlement of Mr M's claim before checking whether his van had been modified should mean its decision to avoid his policy shouldn't stand.

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 noted what Mr M has said, but I have already explained why I don't consider it is appropriate for him to receive compensation for distress and inconvenience. And my view on this hasn't changed.

I've also noted what Advantage has said. And I can see from the evidence its provided its claims team didn't actually have evidence of the modifications to Mr M's van until after it had paid the settlement amount. However, it did have an engineer's report that suggested it needed to check whether the van had been modified. So, I consider it was on notice that it was a possibility at this point. And, I consider it would have been reasonable for it to wait a couple of days to get the images to check this before paying the settlement amount. It didn't and I consider this does mean Advantage affirmed the contract it had with Mr M and waived its right to avoid it. And – even if this is not the position legally, I do not consider it would produce a fair and reasonable outcome to let the avoidance of Mr M's policy stand when Advantage paid an amount to settle his claim at the point it was on notice that his van could have been modified.

In summary, it remains my view that it would not produce a fair and reasonable outcome to let Advantage's avoidance of Mr M's policy stand. This means the policy will need to be reinstated retrospectively, so that Advantage can deal with any third party claims against Mr M. And it will not be entitled to recover what it paid Mr M in settlement of the claim from him.

Putting things right

For the reasons set out in my provisional decision and above, I've decided to uphold Mr M's complaint and make Advantage do the following:

- Reinstate Mr M's policy and deal with any claims against Mr M by third parties.
- Not recover anything it paid on the claim for his vehicle from Mr M.
- Remove any record of the avoidance or cancellation of Mr M's policy from its records and any external databases.
- Provide Mr M with proof of the no claim bonus (NCB) he would have had if it hadn't avoided his policy and his policy had got to renewal.
- Compensate Mr M for any extra premium he paid as a result of him having a lower NCB when he took out a policy to cover his replacement van and as a result of having to declare that he'd had a policy avoided. The amount due will need to be calculated as I set out in my provisional decision. Advantage must also pay interest on this amount at 8% per annum simple if Mr M paid the premium for the new policy he took out in full.*

* If it does pay interest Advantage must tell Mr M if it has made a deduction for income tax. And, if it has, how much it's taken off. It must also provide a tax deduction certificate for Mr M if asked to do so. This will allow Mr M to reclaim the tax from His Majesty's Revenue & Customs (HMRC) if appropriate.

My final decision

I uphold Mr M's complaint and order Advantage Insurance Company Limited 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 Mr M to accept or reject my decision before 19 June 2024.

Robert Short
Ombudsman