

## **complaint**

Mr L is unhappy with how MCE Insurance Company Limited has handled a claim made for his stolen motorbike.

## **background**

Mr L came home from work and parked his bike as usual in the residential, gated, car parking facility. He chained his motorbike but didn't engage the steering lock. He woke on 5 July 2017 to find the bike had been stolen. He reported the matter to the police who explained a number of vehicles had been stolen from, in the same area that night.

Mr L submitted a claim under his insurance policy. The matter was investigated but ultimately, Mr L withdrew his claim. This is because the insurer said Mr L had misrepresented that the motorbike was kept in a concrete garage when it had in fact been a car park situated under the flats. This meant additional excesses were applied and an additional cost for handling the claim. It also said Mr L had indicated he had an alarm or other security device for the bike which turned out to not be true. So it added a 15% premium. This all meant that because of the value of Mr L's bike, the claim was actually in negative equity.

Mr L asked for the claim to be looked at again but was told if the claim was re-opened it would exclude the claim as Mr L hadn't engaged the steering lock. Mr L complained but didn't hear an outcome and so the matter was referred to our office. Our investigator upheld the complaint because:

- She wasn't persuaded Mr L had misrepresented where his bike was kept overnight as there was no option on the application for underground residential car park and concrete garage was the nearest fit.
- Mr L didn't say he had an alarm but did say he had another security device which he did – and so there was no misrepresentation.
- She didn't think it was fair to apply the additional excesses or premium so asked MCE to reconsider the claim accordingly. She also asked MCE to refund the remaining premium for the policy, pay £300 for loss of use and £100 for the inconvenience caused by how it handled this matter.

MCE didn't agree and has asked for the matter to be referred to an ombudsman. After the matter was referred to me I asked for further information. I asked for a breakdown of the excess and additional premium that had been applied – although MCE have provided a total it hasn't provided the breakdown I asked for - it hasn't shown how an excess of £550 has been reached. I also noted that reference to the steering lock not being engaged had been referred to and I asked for evidence from MCE to show that this had had a material impact on the motorbike being stolen. In response, it has provided an explanation for the inclusion of the term only.

I issued my provisional decision upholding this complaint on 5 March 2019. Mr L said he accepted my findings. MCE disagreed. In summary it said:

- The investigator said the motorbike was parked in an underground car park. Mr L could have selected car park from the list of areas where the motorbike was to be kept.
- The steering lock not being engaged was material to the bike being stolen. Thieves are often equipped with bolt cutters used to break chains and disc locks with ease

which is why it places importance on the steering lock being engaged. It says it's a first step defence and instant deterrent to a thief as it can be seen when the lock is engaged. And if a thief does break a steering lock it damages the bike and so it could be worth less to a thief.

- It has provided a copy of the schedule and excesses (this is the same as information previously provided).
- It is regulated by the Financial Conduct Authority.

## my findings

I've considered all the available evidence and arguments, including the response to my provisional decision, to decide what's fair and reasonable in the circumstances of this complaint. Having done so, my findings remain the same.

MCE has said it's regulated by the Financial Conduct Authority. But that's not quite right. MCE is allowed to conduct business in the UK because it is regulated in its home state (Gibraltar) and has passported into the UK – meaning it can conduct financial services business here. And it joined our voluntary jurisdiction giving us power to consider complaints against it. That said MCE's response clearly indicates it applies the principles of ICOBS.

Mr L's schedule policy shows the motor bike is valued at £700. But the schedule doesn't set out what the excess is for theft, despite this being specifically referred to in the policy document. The only excess mentioned on the schedule is that applying to the helmet and leather cover. And despite asking for an explanation of how MCE had reached an excess of £550 this hasn't been provided.

MCE has applied additional excess and premiums as it said Mr L misrepresented where his bike was kept when taking out the insurance and that he had an additional security device. As the law of the country in which the policyholder resides applies, it's the law of England and Wales that I need to take into account. The relevant law for me to consider is the Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA).

Section 2 (2) of CIDRA says:

*It is the duty of the consumer to take reasonable care not to make a misrepresentation to the insurer*

Section 3 sets out what reasonable care is. It says:

- (1) *Whether or not a consumer has taken reasonable care not to make a misrepresentation is to be determined in light of all the relevant circumstances.*
- (2) *The following are examples of things which may need to be taken into account in making a determination under subsection (1) –*
  - (a) the type of consumer insurance contract in question, and its target market,*
  - (b) any relevant explanatory material or publicity produced or authorised by the insurer,*
  - (c) how clear, and how specific, the insurer's questions were,*
  - (d) in the case of failure to respond to the insurer's questions in connection with the renewal or variation of a consumer insurance contract, how clearly the insurer communicated the importance of answering those questions (or the possible consequences of failing to do so),*

- (e) *whether or not an agent was acting for the consumer*
- (3) *The standard of care required is that of a reasonable consumer; but this is subject to subsections (4) and (5).*
  - (4) *If the insurer was, or ought to have been, aware of any particularly characteristics or circumstances of the actual consumer, those are to be taken into account.*
  - (5) *A misrepresentation made dishonestly is always to be taken as showing a lack of reasonable care*

Under CIDRA remedies are available to an insurer if it can show misrepresentations have been made. So my first consideration is whether Mr L misrepresented where he kept the motorbike and what security devices were in place.

MCE has provided screen shots of the questions asked and the answers given by Mr L when taking out the insurance. These aren't the clearest of screen shots but I have nevertheless considered them.

MCE asked Mr L where the motorbike was kept. The options were:

- Car Park
- Carport
- Garaged
- Kept on 3<sup>rd</sup> party
- Locked building
- Locked compound
- Parked on Drive
- Private Property
- Public road
- Unlocked building
- Unlocked compound

The screen shot doesn't show that definitions of these parking areas are given. Mr L selected 'Garaged' and when asked to select from a drop down box, that the garage was made of concrete.

I have considered pictures provided by Mr L of where the bike was kept. Firstly I'm satisfied the area is made of concrete. So Mr L didn't mispresent that. The area is a large area underneath flats that several residents are able to use to park their vehicles. I'm given to understand from Mr L's testimony that the area is only accessible to residents that have the necessary fob to enter – and that police believe the entry system was hacked.

As MCE hasn't provided definitions of what the parked areas mean, it's left to prospective policy holders to work out which matches their circumstances. And the ordinary definition of 'garage' includes 'a building or indoor space in which to park or keep a motor vehicle'. This matches the area where Mr L kept his motorbike.

I accept MCE defined garage within the policy as '*A garage is a lockable brick, concrete, steel, stone or wooden building with a roof constructed of slate, tile, steel or wood in which to park or keep a motor vehicle, for your sole purpose*'. But this definition wasn't given during the application process. And like the investigator I don't think it's fair to rely on an ungiven definition when determining whether Mr L misrepresented where he kept his bike when applying for the policy.

MCE has said the investigator indicated Mr L kept his motor bike in an underground car park and car park was an option that could have been selected. I accept it is possible the parking area could be described as an underground car park, although I didn't make that finding in my provisional decision. But again that isn't defined. And so it would appear there are two possible options Mr L could have selected that could accurately represent where the bike was kept – Garaged and Car Park. Given there are two options, and given MCE didn't define what either of them were, I still find that Mr L took reasonable care when he provided information to MCE such that I find he didn't misrepresent where his motorbike was kept.

MCE said endorsement MCE5 had been breached because of Mr L's misrepresentation about the garage. In the policy it's explained that:

*If a theft or attempted theft of your motorcycle happens within the proximity of your home address or the garaging address when your motorcycle is not in a locked garage or building, we will double the theft excess. There will also be a claims handling charge of £100.00 (subject to insurance premium tax, where applicable) imposed to cover the additional administrative costs.*

As I don't find Mr L misrepresented where his motorbike was kept, I'm not persuaded it's fair for MCE to double the theft excess applicable to Mr L or for it charge an additional £100 for administering the claim.

MCE also said that Mr L misrepresented having a security device. The statement of fact sent to Mr L set out the security device was 'unspecified'. So I agree with the investigator's findings that Mr L did not misrepresent that he had an alarm. Mr L had a steering lock and a security chain that he used for the motorbike. So I'm not persuaded he has misrepresented having an 'unspecified' security device. If MCE had a particular type of security device in mind when asking that question, then it should have made that clear.

As I don't find Mr L misrepresented having an 'unspecified' security device, I find no basis on which MCE can fairly, and retrospectively, increase the premium by 15%. But even if I found Mr L had carelessly misrepresented his security device, which I make clear I don't, the remedy MCE has sought to apply isn't consistent with the remedies available under CIDRA. If there is a qualifying misrepresentation that means MCE would have charged Mr L a higher premium for insuring his motorbike, the remedy for that is to pay a proportionate claim (see Schedule 1 of CIDRA) not to increase the premium and reduce the claim by that sum accordingly. And if it was seeking to pay a proportionate claim, it would still need to satisfy us that Mr L would have been charged a higher premium. To date all MCE has been able to provide is confirmation that 15% extra is applied at the claim stage. What I would expect to see is underwriting criteria to show what premium would have been charged at the outset. But as I don't find a misrepresentation was made, I find there is no basis on which MCE can fairly make an additional charge for that.

MCE has told us that even if it reconsidered the claim it would be declined as the steering lock wasn't engaged when Mr L left his motorbike. The policy terms set out on page 6:

*11. Loss or damage arising from theft or attempted theft where your motorcycle is left unattended and the steering lock has not been activated.*

I accept all of the reasons that MCE has given me for including such an exclusion within the policy and that it is a deterrent for prospective thieves. And it is for an insurer to decide what

risks it is and isn't prepared to cover. But I still need to decide whether that exclusion has been applied fairly.

As MCE isn't regulated by the Financial Conduct Authority (FCA) it isn't required to comply with the regulations set out in ICOBS, although it appears from its response that it does so. I am, in any event, required to take account of good industry practice. And I consider those regulations to be representative of good industry practice.

ICOBS 8.1.1 says an insurer must

*(3) not unreasonably reject a claim (including by terminating or avoiding a policy)*

ICOBS 8.1.2 sets out case where rejection of a consumer's claim is unreasonable: contracts before 1 August 2017. Mr L's policy was taken out before then, so this section would apply. It says:

*For contracts entered into or variations agreed before 1 August 2017, a rejection of a consumer/policyholder's claim is unreasonable, except where there is evidence of fraud, it is:*

*(3) for a breach of warranty or condition unless the circumstances of the claim are connected to the breach and .....*

It is for this reason I asked if MCE could provide evidence to show whether or not the steering lock being engaged was material to the bike being stolen. In response to my provisional findings, it has said it was material but still has not provided any evidence; instead it has again referred to why the condition has been included in the policy. What I would expect to see is evidence to show it was the steering lock being left unengaged that enabled the theft to take place.

MCE investigator's report records the police had informed Mr L other thefts occurred in the same parking area that night. It also reported there was no debris. This would suggest either the thief cut through the security chain and took it with them, or the chain wasn't cut through at all.

I do accept it's possible the steering lock not being engaged is what led to the bike being stolen. But it's equally possible the bike was wheeled away on its back wheel, or was picked up and loaded onto another vehicle – in which case not engaging the steering lock wouldn't have been material to the bike being stolen. It is for MCE to show that an exclusion applies, not Mr L to show it doesn't. I'm not satisfied MCE has provided persuasive evidence to show the breach of condition – not engaging the steering lock – was material to the circumstances of Mr L's claim. I'm therefore not persuaded it would be fair for MCE to rely on that exclusion to decline Mr L's claim.

#### **how MCE need to put this right**

I have found MCE hasn't fairly applied the MCE3 (security device) and MCE5 (garage) endorsements to Mr L's claim. I also don't find it has fairly excluded Mr L's claim on the basis the steering lock wasn't engaged. To that end I require MCE to:

- Pay Mr L's claim subject to the usual policy excess for theft only.
- Add 8% simple interest per annum from the date of loss to the date of settlement of the claim.

- Pay Mr L an additional £100 for the inconvenience the way this claim has been handled has caused.
- Pay £300 for the loss of use of a vehicle.

The investigator also asked MCE to refund the outstanding balance of the premium. But I understand this is an annual policy, and a claim being declined wouldn't be a basis for asking for a refund of the premium. And as I'm requiring MCE to pay the claim, it's right the full premium for insurance cover for that year remains paid.

**my final decision**

For the reasons given above, I uphold this complaint and require MCE Insurance Company Limited to settle this claim as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 8 May 2019.

Claire Hopkins  
**ombudsman**