

complaint

Mr J complains that Zenith voided his motorcycle insurance and refused to pay his claim when his bike was stolen. It's refunded the premiums he paid since the most recent policy renewal, but not the premiums paid in previous years.

background

Mr J insured his motorcycle through Zenith. He first insured it in 2015 through a broker, and the broker placed the insurance with a separate underwriter. At the 2016 renewal, the broker placed the insurance with Zenith, and that continued at the 2017 renewal.

About a month after the 2017 renewal, Mr J's bike was stolen. He kept it chained up in the front yard of his house – behind a boundary wall, but visible from the street. He also had it covered by CCTV cameras. The CCTV showed the bike being stolen.

Mr J claimed on his insurance. He told Zenith what had happened. Zenith said the policy required the bike to be kept overnight in a locked garage – and Mr J had said it would be when the predecessor policy was first taken out in 2015. He'd not corrected the renewal documents which said the same thing. But it wasn't in fact kept in a garage.

Zenith said that Mr J lived in a high risk area for motorbike theft. It said that in his area, it wouldn't accept motorbike policies unless the bike was kept in a locked garage. So if it had known the true position, it wouldn't have offered insurance. It voided Mr J's policy back to the most recent renewal and refunded the premium to the broker to pass on to Mr J.

Mr J complained. He initially said he'd never told the broker that the bike would be kept in a garage. But our investigator listened to the call with the broker where the initial policy was taken out, and found that he did – and the importance of it was made clear to him. Mr J then accepted that he'd not been accurate in the information he gave when taking out the first insurance policy.

At the later renewals in 2016 and 2017, Mr J didn't speak to Zenith or the broker. He was sent renewal invitations setting out the scope of his cover and the broker's understanding of the facts. The renewal documents invited Mr J to correct any errors, and stated both that his bike was kept in a garage – and the importance of doing so. The bike was also insured for social domestic and pleasure use as well – but Mr J used it in the course of his work.

As a result Zenith said he'd made a misrepresentation. It said that, because of where Mr J lived, it would never have offered insurance if it had known the true position. It voided the policy. Our investigator thought that was a fair decision. But she said Zenith should refund the premiums for the previous policy year as well, since the policy had been unacceptable from the start of Zenith taking it on. Zenith disagreed. It said it had only voided the current year's policy. Each policy year was a separate contract of insurance. So it only needed to refund the current year. It asked for an ombudsman to decide the issue.

I issued a provisional decision, in which I said:

In deciding what's fair and reasonable in this case I've taken into account the relevant law – which includes the Consumer Insurance (Disclosure and Representations) Act. This says, in summary, that a consumer has a duty not to make a misrepresentation when taking out a contract of insurance. If the insurer can

show a qualifying misrepresentation was made, it can take certain action. If the misrepresentation was careless, and it can show had it known the truth it would never have offered the policy it can void the policy but the premiums should be refunded. And if the misrepresentation was deliberate or reckless it can void the policy and need not refund the premiums unless it would be unfair to retain them.

I think there was a misrepresentation in this case.

When he took the policy out via the broker, with the previous insurer, Mr J said, when asked where it was kept at night, "it's garaged and locked up off the street". The broker then confirmed that the bike was kept overnight in a garage and said there would be no cover for theft if it wasn't. Mr J again confirmed the bike was kept in a locked garage. She said "when you're at home, please make sure you lock the vehicle in your garage, not keep it at the side of the road". Mr J agreed he would.

That wasn't correct. Mr J's property doesn't have a garage and the bike has never been kept in one.

It's been said on his behalf that keeping it locked up in front of the house under CCTV is equivalent security to keeping it in a locked garage. I'm not persuaded of that – and even if it was, the fact is it's not a garage and I don't think it's possible to describe it as such. The broker explained the importance of this question at the time and repeatedly confirmed that the bike would be kept in a locked garage, and wouldn't be covered if it wasn't. Having listened to the call, I don't think it's plausible that Mr J didn't understand the importance of that requirement, didn't understand what a garage was, or thought that keeping the bike outside the front of his house was equivalent to, and could be described as, keeping it in a locked garage.

All that was said to the broker, who then placed the insurance with the previous underwriter.

When the policy moved to Zenith, there was no further conversation. All that happened was that Mr J was sent renewal documentation setting out that the bike was kept in a garage and would not be insured for theft from at or near the home if it wasn't. Mr J didn't correct the information in the renewal documentation despite being asked to check it and amend if anything was wrong.

A failure to correct information when asked to do so can amount to a misrepresentation. So I think Mr J made a further misrepresentation when the policy moved to Zenith and when it was renewed. And I think that he misled the broker when the policy was first taken out – which directly led to the wrong information being given to Zenith by the broker, information which Mr J failed to correct despite knowing it was wrong.

Zenith has shown us its underwriting criteria which show that, in Mr J's area, any proposal where a bike is not kept in a garage would be declined. Mr J doesn't own a garage, and if it had known that Zenith would never have insured him.

I think that this was a qualifying misrepresentation, and I think Zenith was entitled to void the policy because it would never have offered it had it known the truth.

In such cases, the insurer is entitled to decline the claim because, in effect, the policy never existed. It's refunded the premiums for the policy year in which the claim happened. What's at issue in this case is whether it should do so for previous years as well.

Between 2015 and 2016, the policy was with a different underwriter. It appears it was part of the same business group as Zenith but it was nonetheless a different firm. So Zenith wasn't party to that insurance contract – and isn't in a position to refund the premiums for it.

That leaves the policy year 2016-17, the first year the broker placed it with Zenith. Zenith says each year is a separate contract of insurance, and it's only voided the one for the year in which the claim arose. But Mr J's partner, who's representing him, says that if the policy was never acceptable from the start all the premiums should be refunded – if Zenith keeps them, that shows it was prepared to accept the risk and so it wasn't fair to reject this claim.

As I've said, I've taken into account what the Act says here. It says that where there's a careless misrepresentation without which the contract would never have been entered into, the insurer can void the contract but must refund all premiums. But if the misrepresentation was deliberate or reckless, it need not refund the premiums.

Zenith has voided only the contract for the policy year in which the claim occurred, and refunded the premiums – as if this were a careless misrepresentation. I agree with it that each policy year is a separate contract, to be considered separately.

Having considered what Mr J told the broker when he took the policy out, I think it would have been possible for Zenith to have concluded the misrepresentation was deliberate or reckless, and not refunded the premiums at all. So in returning the premiums for the current year – which, I agree, is a separate contract of insurance to previous years, and the only one that was voided – I think Zenith has acted fairly in all the circumstances and I don't ask it to do anything further. I therefore don't intend to uphold this complaint.

Mr J didn't accept my provisional decision. On his behalf, his partner said that the Act required the insurer to take into account any characteristics or circumstances of the consumer it was, or ought to have been, aware of. She said that it should have used an internet satellite photography service to look at Mr J's house – and if it had done so it could have seen he didn't have a garage. She said it was the insurer's responsibility to carry out due diligence before entering into a contract – not Mr J's responsibility.

my findings

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

I'm aware of the provision in the Act Mr J's partner has referred to. The Act does say that an insurer's required to take into account the consumer's characteristics and circumstances in deciding whether a misrepresentation's been made.

But this provision is about the standard of care to be expected of a consumer. If there's anything about the consumer that means, for example, they might have had difficulty

understanding the question that was asked, that is to be taken into account. I'm not aware of any relevant characteristics or circumstances Mr J has – his partner has said he's not taken out insurance before, but I don't think that's relevant to whether he understood what a garage was. Having listened to the initial call I'm satisfied he understood the question he was being asked; he just didn't answer it accurately. And for the same reason I'm satisfied he understood what was being said when Zenith invited him to correct any errors in the renewal proposal – and didn't do so.

I don't think this provision means that an insurer's required to independently investigate everything a consumer says and that if it doesn't do so it can't find there's been a misrepresentation. That would be to undermine the overall purpose of the Act, which is to put a duty on the consumer to take reasonable care not to mislead the insurer when taking out insurance.

So I don't think it would be fair to say that the broker, or Zenith, should have checked Mr J's address using online mapping services – and that its failure to do so overrides his duty not to make a misrepresentation. I still think, for the reasons I gave, that Mr J made a qualifying misrepresentation, and that as a result Zenith was entitled to void his policy. And I don't think it would be fair, therefore, to uphold this complaint or require it to pay the claim.

my final decision

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 4 April 2019.

Simon Pugh
ombudsman