complaint

The background facts and circumstances of this complaint about Carole Nash Insurance Consultants Ltd are set out in my provisional decision of 21 December 2015, the relevant parts of which I repeat here:

> Mr K complains that his insurance broker—Carole Nash Insurance Consultants Ltd (trading as *Just Motorcycle Insurance*)—failed to issue a renewal notice for his scooter insurance. As a result, he's been prosecuted for driving without insurance – and holds Carole Nash responsible for this.
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> **background**
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> Our adjudicator didn't uphold the complaint. He accepted Carole Nash's evidence that it had emailed Mr K on 3 July 2015 with a renewal notice; and that it had also tried to contact him by phone in the week prior to the policy lapsing on 23 July. In the circumstances, the adjudicator felt that Carole Nash had discharged its duty of care towards Mr K so far as reasonably possible. Ultimately, the adjudicator pointed out that responsibility for holding motor insurance lies with the driver, as it's a criminal offence to drive without insurance. So he didn't think Carole Nash was liable for Mr K being stopped by the police and/or prosecuted.
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> Mr K has appealed. He says (amongst other things) that:
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> - He *never* received the alleged email of 3 July – and Carole Nash has failed to prove it ever left its servers;
> - Carole Nash should have emailed him again;
> - It only rang his office number and ought to have contacted him personally;
> - It should also have sent a hard copy by post;
> - Carole Nash didn't ring back as per the message left with a colleague;
> - He thought the policy would auto-renew like all his other insurance policies; and
> - Carole Nash is in breach of statutory duty, namely, the Financial Conduct Authority's *Insurance: Conduct of Business Sourcebook* ('ICOBS').
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> **my provisional findings**
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> I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.
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> This is a very unfortunate case – and I've a great deal of sympathy for Mr K's predicament. However, he's trying to prove a negative—ie, that the email *wasn't* sent or *didn't* arrive—which is almost impossible to do. Whereas Carole Nash simply needs to prove on the balance of probabilities that it did attempt to notify Mr K that his renewal was due. And Carole Nash has provided enough evidence to persuade me that it's more likely than not that it did use reasonable endeavours to contact Mr K. For example, it's produced the following:
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> - A screenshot showing a database entry for 3 July 2015 indicating that the email renewal notice probably was despatched;
> - A copy of the renewal letter that was attached to the email;
> - An explanation from Carole Nash's IT department explaining that a document only enters the case history/archive once released from the print or email queue *without error* – and confirming that, despite searching, there's no record of any error for that date; plus
> - I've listened to four call recordings from Carole Nash to Mr K's workplace leaving messages for him with colleagues – and two of those expressly stated that it was about his motorcycle insurance renewal.

In the circumstances, I'm satisfied that Carole Nash tried to contact Mr K before his policy lapsed; and I'm not persuaded that it breached its obligations under ICOBS and/or its common-law duty of care. Carole Nash didn't need to send anything by post as Mr K had opted to communicate by email. And it has also produced evidence clearly showing that this policy did not in fact auto-renew; and that Mr K was never led to believe that it would, either in the original application call or the terms of business (which stated that, 'Further details of whether or not your policy will be automatically renewed will be confirmed on your renewal invite').

In his email of 10 December 2015, Mr K asked us for an extension of time, saying:

> I would need more time to get more opinions with regard to copy of sent email. I would like to get few more IT professional opinions and forward it to you. I am going on holiday this weekend for 10 days, then we will have Christmas and new year holiday.

I'm happy to reconsider this matter if Mr K does provide new expert evidence. But I'm also keen that he doesn't waste his time or money on what I think is likely to be a fruitless exercise. Even if he could prove that the email wasn't sent (which I doubt), that wouldn't alter the fact that (a) there's irrefutable evidence that Carole Nash tried to contact him about his renewal by phone *four times* before the deadline; and (b) even if Carole Nash had breached its duties (which it didn't), driving without insurance is an 'offence of strict liability', ie, just doing the act is enough to be convicted without the prosecution having to prove a 'guilty mind', eg, negligence, carelessness, recklessness, wilfulness, etc. So the alleged failures of an insurance broker wouldn't save him from a conviction. It's still ultimately the *driver's* responsibility to make sure he has at least third-party insurance in place. That obligation overrides any duty on a broker to issue reminders.

my provisional decision

For the reasons set out by the adjudicator and above, I don't intend to uphold this complaint against Carole Nash. I'm sorry to disappoint Mr K.

I've issued this provisional decision to give Mr K a clear steer on the likely outcome before he incurs costs trying to obtain expert evidence that I think is unlikely to make a difference. But I will of course carefully consider any further evidence that he sends before the deadline I set out at the start of this decision. And if it were to change my mind, I'd issue a further provisional decision so both parties could comment before the matter was finalised.

further developments

In response to my provisional decision, Mr K has sent us four IT opinions about whether or not the email of 3 July 2015 was in fact sent to him by Carole Nash. I considered those but, as I explained to Mr K by email, they didn't appear to make a difference to the outcome, not least because Carole Nash had in the meantime also produced further and better evidence from its software provider. This consisted of a huge data log of all the emails sent to customers and other recipients on or around the date in question. Whilst I wasn't able to send this list to Mr K—because of data protection laws—I assured him that there was an entry for him on the correct day to the correct email address timed at 11:22. I explained that I had no doubts about the authenticity of this real-time documentary evidence because the entry that applied to him was sandwiched between thousands of other entries in a log that totalled 487 pages. And it came from a third party (albeit one employed by Carole Nash). In the circumstances, I was satisfied that the renewal notice was emailed to Mr K in time for him to ensure cover was in place. Besides, it didn't alter the fact that we had recordings of four phone calls to his workplace about the renewal.

Mr K still wishes to pursue this matter though. In correspondence he sent to our chief ombudsman (not realising there was no right of appeal to another ombudsman), he says, amongst other things, that:

- If I finalise his complaint now, that won't be in line with the Financial Ombudsman Service's aims and values (eg, listening, thinking, explaining, doing the right thing, making decisions that *feel* right as well as being technically right, etc);
- There is persuasive new evidence that my decision is factually incorrect, namely, the judge at his recent court hearing said that 'he believed me when I said that I have not received the reminder email from [Carole Nash]' – so, this implies as fact that the email wasn't sent;
- Carole Nash should provide a copy of the email to prove it was sent;
- It should have sent a further email after the four phone calls; and
- It should have posted a hard copy to his home address as well.

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've allowed Mr K plenty of time to consider the evidence and make further points. I've listened to his points of view and carefully looked at all his evidence and arguments. I don't think I'm making an unfair, purely technical decision that's at odds with our aims and values. As for moving towards final resolution, we're required by law to deal with complaints quickly and informally, which is why the rules we have to follow allow an ombudsman to set deadlines, direct how evidence should be presented, and move to the next stage. Without such rules, we risk endless arguments that don't actually resolve the case or move things forward. At some stage we have to make a final decision.

The IT information that Mr K relies on can only show at best that an email wasn't received by him (though at least one of the experts searched the wrong domain, ie, Carole Nash rather than Just Motorcycles). By contrast, the evidence from Carole Nash's software provider satisfies me that an email was sent to the correct address for Mr K on 3 July 2015 at 11:22. In his correspondence of 21 January 2016, Mr K asks for the software engineer's comments. But they simply forwarded a copy of the log with the relevant part highlighted. And I've already explained to Mr K that I can't disclose the entire log to him because of other people's confidential data. I also emailed him a PDF 'snapshot' of his own entry (which I can't insert in this decision because it will be published on our website).

The judge's comments, as reported by Mr K, don't make a difference because I'm not suggesting he *received* the email. Like the judge, I can accept that he didn't receive it. But non-receipt doesn't automatically mean Carole Nash didn't *send* it. That logic is flawed. It's common knowledge that emails can accidentally end up in junk inboxes or be treated as spam or deleted. But if that were the case, it wouldn't be Carole Nash's fault.

The key reason for finalising this case now rather than allowing Mr K more time or even more expert evidence (which I think would be disproportionate) is that the receipt or non-receipt of the email is actually a bit of a red herring – so I didn't want Mr K to waste further time or money trying to prove something that made no difference. As I explained in the provisional decision (and subsequent emails to Mr K), there's indisputable evidence (call recordings) that Carole Nash phoned the number it had for him on four occasions, twice leaving a message for him about his imminent renewal. In the circumstances, I still feel that it

used reasonable endeavours to warn him that his motor cover was about to expire – and I don't think it's liable for his prosecution just because it didn't send a further email or post a letter. We live in an age when many people prefer to communicate by email and/or phone.

It's really unfortunate that Mr K is in trouble with the law for driving without insurance. But a broker can only do so much to remind customers that it's time to renew – the ultimate responsibility lies with the driver. I think most people do know they have to hold at least third-party insurance in order to drive lawfully. Mr K's certificate of insurance would have stated when his cover ended. I'm not persuaded that Carole Nash breached its regulatory duties or duty of care towards Mr K, or that it treated him unfairly or unreasonably. Brokers have to tread a fine line between giving customers adequate notice and information without appearing to apply undue pressure or hard sales tactics. Consumers often shop around for cheaper cover at renewal, so a broker can't automatically assume that silence from an existing customer means he's unwittingly about to become uninsured.

my final decision

For the reasons set out above and before, I'm unable to uphold this complaint against Carole Nash Insurance Consultants Ltd. I am sorry to disappoint Mr K.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 25 February 2016.

Mark Sceeny
ombudsman