

The complaint

Mr Z complains that Marshmallow Insurance Limited mishandled a claim on his motor insurance policy.

What happened

The subject matter of the claim and the complaint is a car made by a premium-brand car-maker and first registered in November 2016.

In November 2021, the car passed an MOT test with a recorded mileage of about 41,000.

For the year from 6 September 2022, Mr Z had the car insured on a comprehensive policy with Marshmallow. He agreed to pay by instalments totalling about £3,000.00 for the year. Any claim (except a windscreen claim) was subject to an excess of £450.00.

According to the September 2022 statement of fact document, Mr Z had passed a driving test ten years ago in a member state of the EU. He had recently moved to the UK and acquired the car.

Unfortunately, in late November 2022, Mr Z had an accident in a member state of the EU. He reported that at about 00:40 on 28 November 2022 local time (23:40 on 27 November 2022 GMT), his car had hit a highway barrier belonging to a third party highway authority.

The MOT certificate ran out on 27 November 2022.

Marshmallow wrote a letter dated about 1 December 2022 (but Mr Z says he didn't receive it until mid-March 2023). Marshmallow said Mr Z hadn't had vehicle tax for the car. So it said it wouldn't pay his claim for damage to the car, it would seek to recover from him any payment it made to a third party, and it had cancelled the policy.

Marshmallow also asked Mr Z to pay the balance of the yearly premium - about £2,000.00.

In mid-March 2023, Mr Z got evidence that the car had vehicle tax on 27 and 28 November 2022. Marshmallow said it had repudiated the claim because the car had no MOT certificate. Marshmallow said that Mr Z had been driving the car without an MOT certificate on 27 November 2022. Mr Z got evidence that the certificate expired at about 23.59 GMT on 27 November 2022.

Mr Z complained through us to Marshmallow.

By an email dated 21 March 2023, Marshmallow said Mr Z had stated his intention to drive through the night on which the MOT certificate expired. Mr Z asked when he had said that. Marshmallow didn't give details.

By a letter dated late April 2023, Mr Z complained directly to Marshmallow. He set out a list of demands. He included a copy of a policy summary headed "*Marshmallow Plus Private Vehicle Insurance policy*". It included cover for driving in Europe - which would be the

minimum legal requirement (that is third party cover) or, if he had purchased the “*Europe Roaming Pass Upgrade*”, comprehensive cover.

By a final response dated mid-May 2023, Marshmallow said that it had incorrectly cancelled the policy on the grounds that the car had no MOT. Marshmallow said that it had changed its record from an insurer cancellation to a customer cancellation, and it had credited the cancellation fee of £75.00. The final response said that Mr Z only had third party – not comprehensive - cover for driving in Europe.

our investigator's' opinion

Our first investigator recommended that the complaint should be upheld in part. He thought that Marshmallow was entitled to cancel the policy and it was fair that Marshmallow recorded a cancellation by Mr Z.

However, the investigator thought that the MOT certificate was valid at the time of the incident and there was an absence of evidence to suggest the car was unroadworthy. He thought that Marshmallow declined the claim unfairly and caused considerable trouble and upset.

The investigator recommended that Marshmallow should:

1. cover the claim as per the remaining policy terms; and
2. pay Mr Z £500.00 compensation.

Marshmallow reiterated that Mr Z only had third party - not comprehensive - cover for driving in Europe.

Our second investigator confirmed the first investigator's recommendation.

By an email dated 22 September 2023, Marshmallow accepted the investigators' opinion. The email included the following:

*“...it appears that Mr [Z] is under our old Policy Wording, which did incorrectly show that he had the upgrade auto applied...
Following my own, and underwritings' viewpoints, we do believe that in this instance, the claim is right to be reinstated and reviewed in line with the applicable policy terms. I will also accept the FOS's decision to award £500.00.”*

In October 2023, Marshmallow told us it had settled the third party claims.

An email from Marshmallow to Mr Z dated 6 November 2023, included the following:

*“What happens now?
As you have the European Roaming Upgrade we will be able to deal with the damage to your vehicle and the Third Party involved.”*

Our second investigator asked for an update from Marshmallow. In the absence of a response from Marshmallow, our second investigator asked for an ombudsman to review the complaint.

my provisional decision

After considering all the evidence, I issued a provisional decision on this complaint to Mr Z and to Marshmallow on 6 December 2023. I summarise my findings:

As the car had road tax and an MOT certificate and there was no evidence it was unroadworthy before the accident, I consider that Marshmallow declined cover unfairly.

That caused an adverse impact on Mr Z. That included worry about having to pay an unknown amount of compensation for the damage caused to the barrier and associated costs, potentially including legal costs.

Subject to any further information either from Mr Z or from Marshmallow, my provisional decision was to uphold this complaint in part. I intended to direct Marshmallow Insurance Limited to:

1. meet Mr Z's claim for his damaged car in line with the policy terms other than the general exception quoted above; and
2. pay simple interest at a yearly rate of 8% on any sum it pays Mr Z in settlement of his claim from 28 December 2022 to the date of payment. If Marshmallow considers that it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Mr Z how much it's taken off. It should also give him a certificate showing this if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate; and
3. pay Mr Z £500.00 for distress and inconvenience.

Mr Z hasn't responded to the provisional decision.

Marshmallow responded to the provisional decision. It says, in summary, that:

- The vehicle is currently being repaired and because of this, if it is not deemed a total loss, it will be unable to act on point 2.
- However, it will be reaching out the customer about the compensation.

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.

Marshmallow sent us its policy terms. They included the following:

"Section 5: General Exceptions

Excluded uses and excluded drivers

Any liability, loss or damage arising while the insured vehicle is being:

...

- *being driven in an unroadworthy, unsafe or damaged condition or where the vehicle does not have a Department of Transport MOT if one is required by law or Vehicle Tax...*

The policy terms identify three levels of cover. Each of them included *"the Europe Roaming Pass"* (which provided third party cover). But the policy terms made a distinction between that and *"the Europe Roaming Pass Upgrade"* (which provided comprehensive cover). That was included with the highest level of cover (*"Marshmallow Plus"*).

Policy terms Section 13 dealt with third party cover. It included the following:

"In order to utilise your abroad driving allowance, the following action must be taken:

- *Contact us via the live chat option a minimum of 10 days in advance.*
- *Provide us with full details of your trip including countries to be visited and departure and arrival dates.”*

Section 14 dealt with the Europe Roaming Pass Upgrade. It included the following:

“Your Motor Insurance Schedule will confirm if you have purchased this policy extension.

Your policy entitles you to 90 days of the legal minimum cover for driving abroad, subject to the appropriate actions being taken as outlined in Section 13. However, if you have also purchased the Europe Roaming Pass Upgrade, this upgrades your 90 day allowance to fully comprehensive cover within any member country of the European Union...

Please note, in the event of a claim, you will be required to provide evidence of your travel including the departure date. Damage to the insured vehicle will not be covered if the actions outlined above have not been followed and the appropriate supporting travel documents are not provided upon request.”

On balance, my view is that this meant that both the third party cover and any upgrade to comprehensive cover were subject to the actions of contacting Marshmallow a minimum of 10 days in advance of with full details of the trip.

Mr Z hasn't said that he contacted Marshmallow before taking the car abroad.

However, from what Marshmallow has said recently, Mr Z already had the highest level of cover which included up to 90 days comprehensive cover. So I find it likely that Marshmallow would've agreed to the trip (provided it was less than 90 days) without asking for an additional premium. So I don't consider that Marshmallow was prejudiced by Mr Z's omission to make contact before the trip.

I don't condone Mr Z's actions of driving in Europe with less than an hour left on the car's MOT certificate. Nevertheless, the car had a certificate and vehicle tax at the time of the accident. There's no evidence it was unroadworthy before the accident.

Mr Z hasn't said that he wanted to get a replacement car and put it on the policy. So, since Marshmallow treated the cancellation as having been made by Mr Z, I don't consider that he has been disadvantaged by the cancellation.

One consequence of the third party claim is the application of the usual policy requirement for the policyholder to pay the unpaid balance of the yearly premium. I don't accept Mr Z's argument that this operates as an increase in the policy excess.

The Financial Ombudsman Service is bound by the Financial Conduct Authority's dispute resolution rules. One of those rules means that – before we can investigate a complaint – the consumer must first have made that complaint to the regulated firm and waited for up to eight weeks for a “final response”.

In this context, a final response is a final response to a complaint and must include wording about the right to bring the complaint to us within six months.

As the car had road tax and an MOT certificate, and there's no evidence it was unroadworthy before the accident, I consider that Marshmallow declined cover unfairly.

That caused an adverse impact on Mr Z. That included worry about having to pay an unknown amount of compensation for the damage caused to the barrier and associated costs, potentially including legal costs. That went on for almost a year, aggravated by poor internal and external communication by Marshmallow.

Putting things right

Keeping in mind that impact on Mr Z, I agree with our investigators that £500.00 is fair and reasonable compensation for distress and inconvenience.

As it has given us a breakdown – I accept Marshmallow’s statement that it has settled the third party claim. From what Marshmallow has said recently, I consider that it has withdrawn its suggestion that it would seek to recover its outlay from Mr Z.

I will direct Marshmallow to meet Mr Z’s claim for his damaged car in line with the policy terms other than the general exception quoted above.

I consider that Marshmallow should’ve met the claim by about 28 December 2022. So I find it fair and reasonable to direct Marshmallow – in the event that it makes a total loss payment to Mr Z - to add interest at our usual rate to any payment to Mr Z in settlement of his claim.

My final decision

For the reasons I’ve explained, my final decision is that I uphold this complaint in part. I direct Marshmallow Insurance Limited to:

1. meet Mr Z’s claim for his damaged car in line with the policy terms other than the general exception quoted above; and
2. pay simple interest at a yearly rate of 8% on any sum it pays to Mr Z in settlement of a total loss claim from 28 December 2022 to the date of payment. If Marshmallow considers that it’s required by HM Revenue & Customs to take off income tax from that interest, it should tell Mr Z how much it’s taken off. It should also give him a certificate showing this if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate; and
3. pay Mr Z £500.00 for distress and inconvenience.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr Z to accept or reject my decision before 25 January 2024.

Christopher Gilbert

Ombudsman