DRN-4175418

The complaint

Mr S has complained that Aviva Insurance Limited unfairly avoided his motor insurance policy and declined his claim.

What happened

Mr S owned a van which he said he used exclusively for making deliveries as a self-employed courier. In March 2022, Mr S had the interior of his van carpeted and lined and added an electrical point for a heater, an awning rail and some lights.

Mr S took out a motor insurance policy with Aviva for his van on 17 September 2022, through an aggregator website, via a broker I'll refer to as S. He said he clicked on the list of modifications which were set out in a dropdown menu. And, because there wasn't the option to declare the changes he had made to his van and all of the options seemed to relate to changing the function of the vehicle mechanically, he answered 'no' to the question asking whether his van had been modified.

On 25 October 2022, Mr S made a mid-term adjustment to his policy. He changed his occupation from a delivery driver, reduced the mileage and also changed the use of the vehicle.

On 31 October 2022, Mr S had an accident in his van and claimed on his policy. Aviva looked into the claim and said that Mr S had made modifications to his van to turn it into a campervan and he hadn't declared these when he bought the policy. Aviva said that if he had said his van had been modified and declared these modifications when he bought the policy it would not have provided cover. Therefore, it avoided (cancelled from the start as though it never existed) Mr S's policy and declined his claim.

Mr S did not think that this was fair and complained to Aviva. As Aviva maintained that it had made the correct decision, Mr S brought his complaint to our service. He told us about the considerable impact the issue was having on him. Mr S said that he had outstanding finance on the van and it had added to his already escalating debt. He said this has added to the stress of losing his business due to the impact of Covid-19.

Our Investigator asked Aviva for evidence to show what it would have done if Mr S had disclosed the modifications. Aviva did not provide a response by the required date so our Investigator issued her view on Mr S's complaint and recommended it be upheld. She said that she did not think that Mr S had converted his van into a campervan and as Aviva had not demonstrated that it would have done anything differently if Mr S had declared the modifications when he bought his policy, she did not think it was entitled to avoid it. And that – in view of this - Aviva should reinstate Mr S's policy and consider his claim. She also said Aviva should remove any record of the avoidance from any databases and pay Mr S £500 compensation for his distress and inconvenience.

Mr S accepted our Investigator's view. But Aviva did not agree with it. Aviva provided evidence to indicate that it would not have offered Mr S the policy if he had declared the modifications when he bought the policy, even if the modifications were not to convert his

van to a campervan. Aviva also asked for an Ombudsman's decision.

I issued provisional decision on this complaint on 24 May 2023 explaining why I did not intend to uphold Mr S's complaint. I said:

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

Aviva told us that it had avoided Mr S's policy in line with the Consumer Insurance Disclosure and Representations Act 2012 (CIDRA). CIDRA says that a consumer is "an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession". However, Mr S has told us that he exclusively used the van for deliveries as a self-employed delivery driver. Therefore, I think the relevant law when considering the sale of the policy in September 2022 is the Insurance Act 2015 (the Act). I appreciate that when amending his policy in October 2022 Mr S changed his occupation and use of the vehicle and at that point likely would be considered a consumer as he was not using his vehicle wholly or mainly for purposes related to his trade, business or profession by this time. However, I do not think that makes a different to the outcome of this complaint, as I have not seen anything to indicate that Mr S declared any modifications when amending his policy and it is the sale of the policy in September 2022 which is being considered here, as that is the date from which Aviva avoided Mr S's policy.

Under the Act, Mr S had a duty to make a fair presentation of the risk when buying his policy. If he didn't do that, for it to take any action at all, Aviva needs to show that it would not have offered Mr S the policy, or would have done so on different terms.

The Act says a fair presentation of the risk is one in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith. This means the insured has to disclose either:

> "(a) … every material circumstance which the insured knows or ought to know, or
>
> (b) failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances."

While The Act doesn't make reference to a consideration of the questions asked the Insurance Conduct of Business Sourcebook (ICOBS) says that a way of ensuring a commercial customer knows what they need to disclose is for the insurer to have "asked clear questions about any matter material to the insurance undertaking." So I have started by considering the questions Mr S was asked when he bought his policy.

Mr S told us he bought his policy through an aggregator website. Aviva has not provided a copy of the questions that Mr S would have seen at that time but our Investigator has checked the questions which were on the aggregator site in March 2023 and I have not seen anything to indicate that these questions weren't the same in September 2022.

The relevant question says, "Has the van been modified in any way?". There is further information accessed by an information button next to the question. This says:

> "A vehicle is considered modified if it has been changed in any way since it was first supplied by the vehicle manufacturer.
>
> This would include: Changes to the bodywork, suspension or brakes, cosmetic changes and changes to the engine management system or exhaust system. If

> you are unsure whether changes to the vehicle are classed as a modification, please check with your chosen provider before purchasing".

Mr S said he checked the list of modifications but as none of them seemed to relate to the changes he had made, he did not think Aviva wanted to know about them.

It is not in dispute that Mr S had carried out modifications to his vehicle. It is also not in dispute that Mr S answered "No" to the question about modifications. So, the question I need to consider is whether Mr S should have disclosed the modifications to make a fair presentation of the risk.

Having considered this, I do not believe that Mr S made a fair presentation of the risk when buying his policy. I appreciate that Mr S said that in considering the dropdown list of modifications he could not find ones which fitted the changes he had made. However, I think it was clear from the question that Aviva wanted to know about modifications as it said a vehicle was considered to have been modified if it had been changed "in any way". It also said that the buyer of the policy should call to check if they were unsure if something was a modification.

Mr S knew he had made modifications to his van to the extent that he checked the dropdown menu. However, when he did not find what he thought were suitable options he did not call to check as advised to on the aggregator site. So, in not answering "yes" when asked about modifications and not checking if he was unsure, I think Mr S failed to make a fair presentation of the risk.

I have also reviewed the Statement of Fact which Aviva sent to Mr S after the sale of the policy. This says, "Have any changes been made to the maker's specifications for any of the vehicles mentioned above, other than being adapted solely to cater for any physical disability?" This question is answered as "No" and Mr S did not let Aviva know that this was not correct.

As I don't believe that Mr S made a fair presentation of the risk when buying his policy I have considered what Aviva would have done if he had made a fair presentation of the risk.

Mr S has explained why he had the modifications carried out to the van and I'm persuaded by what he has said that he had not converted the van into a campervan. However, that does not make a difference to the outcome of this decision. That is because, Aviva has provided evidence to show that it would not have offered Mr S his policy if he had correctly declared the modifications to his van. It is disappointing that Aviva did not provide this information when requested by our Investigator, but I have to consider the information now provided by both parties.

As Aviva would have done something differently if Mr S had made a fair presentation of the risk, that means that Mr S made what's known as a qualifying breach. A qualifying breach is considered either deliberate or reckless or neither deliberate nor reckless. Aviva has treated the breach as neither deliberate nor reckless and has refunded Mr S's premium. I think that is fair and reasonable in the circumstances as I don't think Aviva has shown that Mr S deliberately or recklessly did not provide the correct information.

Where a qualifying breach is neither deliberate nor reckless, but where the insurer would not have a offered the policy if there had been a fair presentation of the risk, the Act says that an insurer can avoid the policy but must refund the premium. So, I am satisfied that Aviva has acted in accordance with the Act and fairly avoided Mr S's policy. As Aviva fairly avoided Mr S's policy it does not need to pay his claim.

I recognise that this isn't the outcome Mr S was hoping for, given the considerable impact that this has had on him. However, as I think Aviva has acted reasonably in avoiding Mr S's policy and not paying his claim I do not intend to require it to do anything further."

Aviva did not provide any further comments for consideration. However, Mr S is unhappy with the outcome I reached. In summary, Mr S has said or asked the following:

- He was a self-employed delivery driver. This became his second job which he completed on weekends. He used the van to drive to his fixed workplace and to carry out deliveries.

- When he renewed his policy over the phone in September 2022. He was not asked if he had modified his vehicle in any way. As the last time he had bought insurance was a year previously he did not think he needed to mention any modifications unless he was asked.

- Whether consumers are told about the Act and offered alternative policies that are more relevant.

- That the Insurance Conduct of Business Sourcebook does not sound legally binding and he didn't see how this could be used to back up an argument.

- There was a failure on Aviva's part to ask the right questions when he bought his policy. Mr S said he bought the policy over the phone and has asked for a copy of the call.

- He does not recall purchasing insurance in March 2023. He was not with Aviva at that time.

- What 'risk' was I referring to when stating that he had a duty to make a fair presentation of the risk. Mr S said the only risk was to him paying to make his driving experience easier and more efficient.

- The impact this had on him financially and mentally has been severe.

- He did not consider the changes to his van to have been modifications, so he did not know that he had made modifications that needed to be declared. He did not think there was anything relevant to choose from in the options. He did not make any mechanical changes to the van and the driving performance wasn't enhanced. There was not an option to pick to declare that he had made the driving experience more comfortable.

- The Statement of Fact is small print for insurers to use to get out of paying. He did declare that he has a heart condition. Mr S also said he made changes to the van for a more comfortable driving experience.

- The policy he bought in 2022 was via the aggregator site, but in September 2023 he bought a policy on the phone. Whether the policy was bought on the phone or through a website he does not believe that he was asked the correct questions. Mr S said the questions could have changed since he bought the policy.

- The repair network is to blame for him alerting Aviva to the modifications as it suggested Aviva might pay for everything. Mr S had not been interested in claiming for the additional work which had been carried out.

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 have considered Mr S's response carefully. And while I'm mindful of the considerable impact my decision will have on him, I am not persuaded to change from the outcome I reached in my provisional decision.

In response to my provisional decision, Mr S told us he carried out his delivery job on weekends and also used the van to drive to his regular place of work. However, he had previously told us that he only used his van for making deliveries. I don't think this makes a difference to the outcome of my decision. That is because, even if Mr S did not use his van wholly or mainly for the purpose of his trade, craft or profession, and the correct law is CIDRA, this would not change I consider to be the fair and reasonable outcome to his complaint.

Under CIDRA a consumer has to take reasonable care not to make a misrepresentation. And for an insurer to take any action the insurer needs to show that it would have either not provided the policy, or would have done so on different terms. One of the considerations under CIDRA is the question that a consumer was asked when buying the policy. The test of whether reasonable care has been taken is that of a reasonable consumer.

Mr S said he bought his policy in 2022 via the aggregator website and renewed it on the phone in September 2023. I assume that there is an error with the dates he has provided as the relevant policy period is September 2022 to September 2023.

Mr S has said he does not recall purchasing insurance in March 2023. However, I do not believe Mr S purchased insurance in March 2023. The reference to March 2023 in my provisional decision was in relation to the date our Investigator sourced the questions from the aggregator website.

I have asked Aviva if it has any record of a call from Mr S. It said it has searched for a call but cannot find one. I have considered the fact that Aviva can't find a record of a call, along with the information Mr S has provided to our service to decide what I think more likely than not happened, i.e. whether Mr S called Aviva or S to take out his policy in September 2022 or did so online via an aggregator site.

In his complaint form to us Mr S said that he made some changes to his van and then "renewed my policy in September on [aggregator website]. I clicked on the option to notify the insurers of any modifications, on the list of options to pick, there wasn't anything referring to noise reduction or carpeting the interior. Everything referred to changing the function of the vehicle mechanically."

In further correspondence to us, Mr S said:

> "The insurance was initially booked through [aggregator website]. When I went through all of the options, the closest option was upholstery..."

As Mr S made the changes to his vehicle in March 2022 the next renewal would have been September 2022. From what he's told us, I think it's more likely than not that Mr S bought his policy through an aggregator website via S, as he has referred to checking the list of modifications. I do not think it is likely he would have done this – and noted that none of them applied to the changes he had made – if he had not yet made any changes to his van.

Mr S told us that he made the October 2022 amendment to his policy over the phone but Aviva has not been able to find a call. Given that Mr S bought his policy through a broker, it might be that he called the broker rather than Aviva directly. However, the broker is not an agent of Aviva's and so the broker would have been acting on Mr S's behalf rather than Aviva's when selling the policy. This means I can't hold Aviva responsible for the actions of the broker when selling the policy.

As I think it's likely Mr S bought his policy in September 2022 through an aggregator website, I have considered the points Mr S has made about whether the question could have changed since he bought his policy. While it is possible the question changed, I have to make my decision based on what I think is more likely than not to have happened. In this case, the information Mr S has provided about checking the drop-down options for modifications is consistent with the question that our Investigator identified on the aggregator website. And this suggests to me the questions Mr S was asked were the same in September 2022 as they were in March 2023. In any event, Mr S bought his policy through a broker who is responsible for providing the information to Aviva on Mr S's behalf. The Statement of Fact from Aviva asks about any changes and Mr S did not let Aviva know about the changes.

Mr S has asked about ICOBS. ICOBS are industry guidelines and I need to take them into consideration when reaching a decision. However, even if I had disregarded the provision in ICOBS which I referred to in my provisional decision, I would still have reached the same outcome, because I do not believe that Mr S provided the correct information when he bought his policy.

Mr S has clarified that he did not know he had made modifications to his van. Mr S has also told us that he has a heart condition and that the changes he made to his van were to improve the comfort. I accept what he has said, but I think that he did know he had made changes to his van, even if he didn't consider them to be 'modifications', because he said he checked the list to see if the changes he had made needed declaring.

I appreciate that the changes Mr S made were not mechanical changes but, given that when he bought his policy he was told that a modification was a change in any way from when his van was first supplied, I think a reasonable consumer should understand that they needed to answer yes to this question. It was not helpful that Mr S didn't think there was an option for him to choose from the drop-down list of modifications but, as the website told him to check if he was unsure, I do not think this is sufficient reason to hold Aviva responsible for Mr S not providing the correct information.

Therefore, if CIDRA is the correct legislation then I do not think Mr S took reasonable care not to make a misrepresentation. If the Act is the correct legislation then I still do not think he made a fair presentation of the risk, as he did not tell Aviva about the changes that he had made to his van.

Mr S has asked whether customers are told about the Act when buying a policy. It's usual for aggregator websites and other firms who sell insurance to include information about what might happen if an insured does not answer questions. In this case, I can see that the aggregator website currently provides this information on the first page a customer would need to access to obtain a quote. While I appreciate this might have changed since Mr S bought his policy, I think this information was most likely visible to Mr S when he bought his policy as it is common for it to be included. It doesn't mention either the Act or CIDRA specifically, but I think it is clear enough on the customer's obligations.

Mr S also asked whether alternative policies are offered by insurers. When buying a policy, the onus is on the buyer of the policy to make a fair presentation of the risk if they are a

commercial customer or to take reasonable care not to make a misrepresentation if they are a consumer. Insurers might want to cover different risks and they offer a policy based on the risks they want to cover, using the information given by the buyer of the policy. As Aviva was not willing to offer the policy Mr S took out, this means that it can rely on the Act or CIDRA to avoid his policy.

Mr S has asked what the risk is, as he believes the only risk was to him. The 'risk' referred to in the Act is the risk that the insured is asking the insurer to cover. In this case, the risk was Mr S's van with its modifications. Aviva is entitled to know about the risk it is being asked to cover so it can decide whether it wants to cover it. I appreciate Mr S is frustrated, as he believes the repair network is responsible for him highlighting the changes to Aviva. But it remains that Mr S did not provide the information he should have done when buying his policy and Aviva has sufficiently shown that it would not have sold Mr S the policy if he had given the correct information. Under either the Act or CIDRA, Aviva is entitled to avoid his policy and not pay his claim. And I do not consider it would be fair and reasonable to make Aviva pay a claim it would never have been presented with if Mr S had made a fair presentation of the risk to it or if he'd taken reasonable care not to make a misrepresentation.

I appreciate how disappointed Mr S will be with my decision but I do not consider it would be fair and reasonable for me to require Aviva to do anything differently.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 7 August 2023.

Sarann Taylor
Ombudsman