

Example Claim Assessment Report

Overview

This is a recent example of one of our Claim Reports that we prepared for a customer. In this case the policyholder had their policy cancelled from the day it started. The policyholder purchased a one year old Land Rover from a main dealer. When the original owner ordered the vehicle from the manufacturer they added a winch and A-bars during the order process with the manufacturer.

The policyholder did not realise that these additions might be viewed as a “modification” by their insurer and so they did not tell the insurer that the winch and A-Bars had been fitted when they purchased their insurance. The policyholder badly damaged their car in an accident and, when they reported their claim, the insurer avoided the policy for non-disclosure saying that the policyholder had failed to tell them about the modifications.

Claim Report – Name

Background

The purpose of this report is to explain why it would not be fair or reasonable for the insurer to refuse the policyholder's claim on the basis that the policyholder did not tell the insurer that his vehicle had been modified.

Details

Date: 3rd March 2017

Policyholder: Name

Insurer: ABC Insurance Limited

Financial Ombudsman case reference:

Policy number:

Insurer claim reference number:

Insurer case reference number:

Insurance type:

Claim type: Accident – first party damage to insured vehicle

Date of Claim: 2nd August 2016

Claim details: The policyholder's vehicle was involved in an accident when it was driven off the road and was damaged. The insurer has avoided the policy for failing to disclose modifications to the vehicle.

Insurer refusal

The insurer has raised a number of potential arguments which they say entitles them to avoid the policy and refuse the policyholder's claim. These are outlined below together with our analysis of their validity.

The policyholder failed to disclose vehicle modifications

Insurer's complaints department

In their final response the insurer's complaints department says that the insurer should be entitled to cancel the policyholder's cover from the day it started and refuse to pay the policyholder's claim because the policyholder failed to tell the insurer that the insured vehicle:

"...Includes items not to the standard specification of your car. This includes a winch and an A-bar."

The insurer continues:

"...We don't provide cover for vehicles which include a winch or an A bar. Also we haven't been made aware previously that these items were on your vehicle.

While these items are cosmetic and don't improve the overall power of your car, they are classified as cosmetic modifications.

Your policy booklet at page 6 defines modifications as any changes to your car's standard specification including optional extras. These include but are not restricted to changes to the cars appearance and/or the performance of your car (including wheels, suspension, bodywork and engine) and include changes made to your car by previous owners.

While we appreciate your comments that these items were on the car when it was built by Land Rover, we still wouldn't insure a vehicle with these items on it as they aren't standard."

Policyholder response

Allowing the insurer to rely on this as a reason to refuse the policyholder's claim would not be fair and reasonable. We believe that the Insurer's decision in this case has failed to properly consider several important principles that go directly against the Financial Ombudsman's settled and published approach. These principles are explained below.

It is not clear whether the insurer is refusing the policyholder's claim on the basis of a breach of a policy condition or the failure to disclose pre-contractual information, so we have reviewed both.

Contractual term issues

Assuming that the insurer is refusing the policyholder's claim because they say there has been a breach of a policy condition, the following rules apply:

The policyholder has not breached the policy requirement

Rule

In accordance with common legal principles and the Ombudsman's settled approach, the words used in a consumer insurance policy must be given their ordinary meaning. Any doubt about the meaning of those words must be interpreted in the way that "is most favourable for the consumer".

Application to facts

Although the definition of "modifications" under the policy is broad, it has been misapplied in relation to the relevant conditions under the policy. The requirement in Clause 8 on page 29 of the policy is limited to the policyholder telling the insurer about:

"... modifications you intend to make and obtain our agreement prior to making them".

This requirement is clear in that the policyholder is only obliged to disclose modifications that he intends to make. The clause does not therefore require disclosure of any modifications made by someone else who is not the policyholder. The policyholder's car was acquired second hand from a dealer and the changes made to the vehicle were carried out as part of the factory build of the car when they were specified by the original owner. This interpretation of the policy is also appropriate because the clause also requires the policyholder to get the insurers approval prior to making the changes. It is physically impossible for a policyholder to give prior notice in a situation where they purchase a vehicle second hand and the changes were made when the vehicle was originally manufactured.

We believe that the words used by the insurer in this policy condition are clear and that they do not require the policyholder to disclose any modifications made to a vehicle that were made by a previous owner as part of the vehicle's factory build.

Cases and materials

The following cases and materials include the relevant statutes, case law, FCA regulations and the settled and published approach of the Financial Ombudsman, which underpin the points made above.

The words in insurance documents must be given their ordinary meaning.

Ombudsman

Issue 4: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/4/calling-a-spade-a-shovel.htm>

Case 04/15: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/4/lack-of-clarity-case-studies.htm>

Case 10/11: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/10/oct-case-roundup.htm>

Case 18/13: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/18/july-misleading.htm>

Case 24/03: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/24/24-assessing-evidence.htm>

Case 77/05: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/77/77-medical-insurance.html>

...any doubt about the meaning must be interpreted in the way that is most beneficial for the policyholder.

Ombudsman

Case 13/10: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/13/jan-round-up.htm>

Case 18/15: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/18/july-misleading.htm>

Case 64/07: http://www.financial-ombudsman.org.uk/publications/ombudsman-news/64/64-travel-insurance_cases.html

Case 69/04: http://www.financial-ombudsman.org.uk/publications/ombudsman-news/69/69-extended_warranties.html

Case 87/06: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/87/87-insurance-connected-to-travel.htm>

Law

The Consumer Rights Act 2015 (Section 69): <http://www.legislation.gov.uk/ukpga/2015/15/section/69/enacted>

Lancashire CC v Municipal Mutual [1996] 3 All ER 545 (Per Simon Brown LJ):

<http://www.bailii.org/ew/cases/EWCA/Civ/1996/1345.html>

Dobson v Peter H Dobson Insurance Brokers. [2000] EWCA Civ 320 (See paragraphs 41 and 42):

<http://www.bailii.org/ew/cases/EWCA/Civ/2000/320.html>

The policy requirement should have been drawn to the policyholder's attention

Rule

An insurer must take reasonable steps to draw the main policy conditions in a policy to a policyholder's attention when they buy and later renew their policy. A condition will be a main policy condition if it: (i) affects a main policy benefit; or (ii) is onerous (in that it requires burdensome or repetitive action to maintain cover); or (iii) is unusual (because it is not normally found in comparable policies).

A change in circumstances clause is also an onerous condition.

To draw it to a policyholder's attention the clause must be expressly mentioned to the policyholder when they purchased their policy or it must be prominently highlighted in the explanatory literature given to the policyholder when they purchased their policy.

Application to facts

The modifications clause that the insurer is relying on is an onerous condition. This is because it requires the policyholder to inform the insurer about a very wide range of modifications including but not limited to:

"..changes to the appearance and/or the performance of your car (including wheels, suspension, bodywork and engine) and includes changes made to your car by the previous owner(s).

This obligation is clearly both burdensome and repetitive in that it requires a policyholder to tell the insurer every time any changes in appearance are made to the insured vehicle (however trivial), and requires the policyholder to locate and contact all previous owners to make an enquiry about whether they have ever altered the vehicle.

The clause is also a change in circumstances clause in that it requires a policyholder to notify any changes during the policy period before such changes are made.

The requirement to notify modifications during the policy period was not drawn to the policyholder's attention when he purchased or renewed his policy, either expressly or by including it in any explanatory material given to the policyholder when he purchased/renewed the policy. The insurer should therefore be precluded from relying on this requirement as a reason to refuse the policyholder's claim (or avoid his policy).

Cases and materials

The following cases and materials include the relevant case law, FCA regulations and the settled and published approach of the Financial Ombudsman, which underpin the points made above.

A policyholder must be given appropriate information about their policy including its main policy conditions before they buy or renew it. If a policy summary is provided this must include a description about the significant features of the policy without overloading the customer with detail.

FCA

ICOB 6.1.5 R to 6.1.7 G: <http://fshandbook.info/FS/html/FCA/ICOB/6/1>

ICOB 6.1.10 G: <http://fshandbook.info/FS/html/FCA/ICOB/6/1>

ICOB 6 Annex 2 (Sections 2.1 and 2.2): <http://fshandbook.info/FS/html/FCA/ICOB/6/Annex2>

A policy clause requiring a policyholder to inform their insurer about any change in circumstances after a policy has been purchased is a main condition, so it must be drawn to a policyholder's attention.

Ombudsman

Case 25/17: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/25/25-insurance-casestudies-non-disclosure.htm>

Case 56/05: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/56/56-travel-insurance.htm>

Case 64/07: http://www.financial-ombudsman.org.uk/publications/ombudsman-news/64/64-travel-insurance_cases.html

... it is also an onerous term.

Ombudsman

Case 01/17: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/1/travel-insurance-case-studies.htm>

Case 56/05: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/56/56-travel-insurance.htm>

Cases 64/06: http://www.financial-ombudsman.org.uk/publications/ombudsman-news/64/64-travel-insurance_cases.html

Law

Interfoto v Stiletto [1989] QB 433 (Per Dillon LJ): <http://www.bailii.org/ew/cases/EWCA/Civ/1987/6.html>

The information must be clear in any explanatory literature AND must be expressly drawn to the policyholder's attention.

ICOB 2.2.2 R: <http://fshandbook.info/FS/html/FCA/ICOB/2/2>

... especially if a requirement in the policy to do something is onerous (in that it requires burdensome or repetitive action to maintain cover) or is unusual (because it is not normally found in comparable policies).

Case 7/03: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/7/july-travel.htm>

Case 7/05: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/7/july-travel.htm>

Case 13/10: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/13/jan-round-up.htm>

Case 24/03: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/24/24-assessing-evidence.htm>

Case 56/05: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/56/56-travel-insurance.htm>

Cases 64/06: http://www.financial-ombudsman.org.uk/publications/ombudsman-news/64/64-travel-insurance_cases.html

Case 69/01: http://www.financial-ombudsman.org.uk/publications/ombudsman-news/69/69-extended_warranties.html

Interfoto v Stiletto [1989] QB 433 (Per Dillon LJ): <http://www.bailii.org/ew/cases/EWCA/Civ/1987/6.html>

... to be expressly draw the clause to your attention it must at least be prominently highlighted in the explanatory literature.

ICOB 6.1.10 G: <http://fshandbook.info/FS/html/FCA/ICOB/6/1>

ICOB 6 Annex 2: <http://fshandbook.info/FS/html/FCA/ICOB/6/Annex2>

Case 18/16: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/18/july-misleading.htm>

Case 24/03: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/24/24-assessing-evidence.htm>

Case 62/09: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/62/62-insurance-complaints.htm>

.... just referencing it in the middle of a set of papers will not be enough.

Case 18/17: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/18/july-misleading.htm>

Case 23/11: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/23/iss23-ins-renewals.htm>

.... nor will it be enough to say the policyholder could have read the policy or cancelled it.

ICOBS 6.1.9 G: <http://fsahandbook.info/FSA/html/handbook/ICOBS/6/1>

Case 7/03: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/7/july-travel.htm>

Case 23/12: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/23/iss23-ins-renewals.htm>

Case 76/09: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/76/76-travel-insurance.html>

Non-disclosure issues

Assuming that the insurer is refusing the policyholder's claim because they say there has been a failure to disclose pre-contractual information, the following rules apply:

The misrepresentation did not relate to a material fact

Rule

An insurer will only have a remedy against a policyholder for pre-contractual misrepresentation if the insurer can show that, had they known the accurate position, they would not have entered into the contract at all or would only have done so on different terms. The insurer will have to substantiate what they would have done if they had known the accurate position, for example by showing what their underwriting manual would have required.

Application to facts

We submit that any failure by the policyholder to tell the insurer that his car had a winch and an A-Bar fitted is not important enough to make the insurer act differently when underwriting the risk. If the insurer wishes to dispute this we would expect them to have to substantiate what they would have done by providing the relevant extract from their underwriting manual. To be effective this should clearly show that, had they known the accurate position, they would either not have entered into the contract at all or would only have done so on different terms. We would treat with great scepticism the comments made by the insurer in their final response to the effect that they "*don't provide cover for vehicles which include a winch or an A-Bar*".

Cases and materials

The following cases and materials include the relevant statutes, case law, FCA regulations and the settled and published approach of the Financial Ombudsman, which underpin the points made above.

An insurer can only refuse to pay a claim or avoid a policy because of a misrepresentation if they can show that had they known the accurate position they either would not have offered the policy at all or would have offered it on different terms

Law

Consumer Insurance (Disclosure and Representations) Act 2012 (section 4(1):

<http://www.legislation.gov.uk/ukpga/2012/6/enacted>

The insurer must show that the misstatement was a real and substantial reason that they sold the policy on the terms or price that they did.

Law

Avon v Swire [2000] 1 All ER 573 (per Rix J at paragraph 18): <http://www.bailii.org/ew/cases/EWHC/Comm/2000/230.html>

Generali v Arab Insurance [2003] 1 All ER 140 (See Clarke LJ at paragraph 62(iv):

<http://www.bailii.org/ew/cases/EWCA/Civ/2002/1642.html>

It's up to an insurer to prove that they would have acted differently.

Law

Laker Vent Engineering v Templeton Insurance [2009] 2 All ER 755 (Per Aikens LJ. See paragraph 68-70):

<http://www.bailii.org/ew/cases/EWCA/Civ/2009/62.html>

Lewis v Norwich Union Healthcare (per West -Knight QC. See paragraph 90 - 98):

<http://www.bailii.org/ew/cases/Misc/2009/2.html>

Drake Insurance v Provident Insurance [2004] QB 601: <http://www.bailii.org/ew/cases/EWCA/Civ/2003/1834.html>

Consumer Insurance (Disclosure and Representations) Act 2012 (Section 4 (1) (b)):

<http://www.legislation.gov.uk/ukpga/2012/6/enacted>

Acceptable forms of proof showing an insurer would have acted differently include providing a statement from the person who accepted who sold the policy or producing a copy of their relevant underwriting manual.

... on underwriting guidelines and statements.

Ombudsman

Case 01/25: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/1/non-disclosure-case-studies.htm>

Case 79/11: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/79/79-motor-insurance.htm>

Issue 46: http://www.financial-ombudsman.org.uk/publications/ombudsman-news/46/46_non_disclosure_insurance.htm

... on computer program/rigid points system.

Law

Whitlam v Hazel [2004] EWCA 1600 (See paragraphs 15 -19 and 34):

<http://www.bailii.org/ew/cases/EWCA/Civ/2004/1600.html>

Drake Insurance v Provident Insurance [2004] QB 601: <http://www.bailii.org/ew/cases/EWCA/Civ/2003/1834.html>

Trivial or relatively minor issues need not be disclosed.

Ombudsman

Case 13/05: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/13/jan-critical-illness.htm>

Case 25/14: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/25/25-insurance-casestudies-non-disclosure.htm>

Case 90/05: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/90/90-vehicle-related-complaints.htm>

The insurer did not ask the policyholder a question about it

Rule

A policyholder's duty to disclose information to an insurer before a consumer insurance contract is entered into is limited to taking reasonable care not to make a misrepresentation. If an insurer wants a policyholder to provide pre-contractual information they must ask the policyholder a clear question about it. It is for an insurer to show that they asked the relevant question and any doubt about the meaning of a question must be construed against the insurer.

At renewal firms are also expected to ask clear questions. If a firm wants a policyholder to check and re-confirm information they provided originally, then it is good practice for the firm to send them a copy of that information, or to ask all the questions afresh.

Application to facts

The insurer did not ask the policyholder a clear question about whether his vehicle had been modified.

The policy that is being claimed under is a renewal and the insurer also failed to provide either a copy of the most recent proposal questions and answers provided by the policyholder, or a Statement of Facts containing such information. This meant that the policyholder was unable to check the answers he had given previously.

The only document the policyholder received at renewal was a document called a Motor Proposal Confirmation. This contained the following statement under a section called Car Details:

“Modifications: None”

We submit that this is not a clear question. It gives no insight to a policyholder what type of modification the insurer is referring to and the document does not cross reference to anything in the policy documents that would allow a policyholder to find out what the insurer means by the term “modification”.

The policyholder is therefore not under any duty to disclose the information that the insurer says they failed to provide.

Cases and materials

The following cases and materials include the relevant statutes, FCA regulations and the settled and published approach of the Financial Ombudsman, which underpin the points made above.

For consumer insurance policies the duty of utmost good faith is limited to misrepresentation only (and the principle of non - disclosure no longer applies)

... for policies purchased on or after 6th April 2013 see:

Law

Consumer Insurance (Disclosure and Representations) Act 2012 (section 2(4):
<http://www.legislation.gov.uk/ukpga/2012/6/enacted>

...for policies purchased before 6th April 2013 see:

Ombudsman

Case 07/08: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/7/july-travel.htm>

Case 106/11: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/106/106-pet-insurance.html>

Issue 7: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/7/july-innocent-non-disclosure.htm>

Issue 27: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/27/27-ins-nondisclosure.htm>

Issue 46: http://www.financial-ombudsman.org.uk/publications/ombudsman-news/46/46_non_disclosure_insurance.htm

It's up to an insurer to prove that a question was asked

Ombudsman

Case 13/07: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/13/jan-critical-illness.htm>

Case 13/15: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/13/jan-round-up.htm>

Case 18/01: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/18/july-said-that.htm>

Case 18/11: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/18/july-assessment-team.htm>

Case 25/15: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/25/25-insurance-casestudies-non-disclosure.htm>

Clear and specific questions are required and a policyholder must be told about importance of answering them

FCA

ICOBS 5.1.4 R: <http://fshandbook.info/FS/html/FCA/ICOBS/5/1>

ICOBS 8.1.1 R (3) and 8.1.2 R (1): <http://fshandbook.info/FS/html/FCA/ICOBS/8/1>

Law

Consumer Insurance (Disclosure and Representations) Act 2012 (section 3(2)(c):

<http://www.legislation.gov.uk/ukpga/2012/6/enacted>

Any doubt about what the question requires must be interpreted against the insurer.

Ombudsman

Case 07/21: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/7/july-innocent-non-disclosure.htm>

Case 18/21: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/18/july-misleading.htm>

Case 79/10: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/79/79-motor-insurance.htm>

Case 90/05: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/90/90-vehicle-related-complaints.htm#cs6>

Case 90/06: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/90/90-vehicle-related-complaints.htm#cs6>

Case 93/12: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/93/93-electrical-appliances.html>

Case 106/11: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/106/106-pet-insurance.html>

Issue 7: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/7/july-innocent-non-disclosure.htm>

Issue 27: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/27/27-ins-nondisclosure.htm>

Issue 46: http://www.financial-ombudsman.org.uk/publications/ombudsman-news/46/46_non_disclosure_insurance.htm

If the policy is a renewal, asking the policyholder to disclose any changes since the last time they bought the policy will be an unclear question unless the insurer provides either the policyholder or the intermediary with a copy of the specific questions and answers given previously by the policyholder so they can check what they had already told the insurer.

Ombudsman

Case 49/02: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/49/annual-travel-insurance.htm>

Issue 23: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/23/iss23-ins-renewals.htm>

The information need not have been disclosed because it diminishes the risk

Rule

A policyholder need not disclose a circumstance if it diminishes the risk.

Application to facts

We submit that the information that the policyholder did not disclose about to the insurer diminishes the risk. Both the winch and the A-bars can fairly be regarded as safety features that will either assist the driver if he runs into difficulty or protects their vehicle if they are involved in an accident. On this point, the insurer also confirms in their final response that *“these items are cosmetic and don’t improve the overall power of your car”*.

The policyholder is therefore not under any duty to disclose the information that the insurer says they failed to provide.

Cases and materials

The following cases and materials include the relevant statutes, and case law which underpin the points made above.

Issues that reduce the risk for the insurer need not be disclosed.

Law

Marine Insurance Act 1906(Section 18(3) (a): <http://www.legislation.gov.uk/ukpga/Edw7/6/41>

Decorum Investments v Atkin [2001] EWHC 496 (at para 24): <http://www.bailii.org/ew/cases/EWHC/Comm/2001/496.html>

Any misrepresentation was an innocent mistake

Rule

An insurer will only have a remedy against a policyholder for misrepresentation before a consumer insurance contract is entered into if the insurer can show that the policyholder failed to take reasonable care to avoid making the misrepresentation.

If a misrepresentation is “innocent” it will not have breached the duty to take reasonable care. It will be innocent if, at the time the policyholder made it, they genuinely believed what they said was true, they did not know what the true position was, or it was reasonable not to have mentioned it because it was a minor issue or happened a long time ago.

Application to facts

If the insurer’s case is that the policyholder misrepresented the answer to a pre-contractual question about vehicle modifications, it is clear that any misrepresentation was an innocent mistake.

As stated, when the policyholder purchased his car, it was second hand and he purchased it from a Land Rover main dealer. It was the previous owner who had the winch and A-bars fitted when they originally purchased the vehicle from Land Rover. The dealer who sold the policyholder the car did not tell the policyholder that it had any modifications. At the time the policyholder purchased the vehicle therefore he was unaware that the vehicle had been modified.

As is common knowledge, the policyholder, like most people was aware that when you order a new vehicle from any modern vehicle manufacturer (including Land Rover), the purchase process requires that you start by selecting the basic chassis and engine type. This process then requires you to select various options to build you vehicle. For example, by selecting vehicle colour, trim, wheel type, body styling, sun roof etc. The fact is therefore that no two vehicles built by Land Rover (or any other manufacturer) are the same and there is no longer any such thing as a standard model. In essence every vehicle built by every manufacturer will include modifications (within the insurer’s definition of the word).

We do not think that it would be fair to interpret this understanding of the production process as meaning that the policyholder knew that the vehicle had been modified. To do so would mean that a policyholder would have to disclose to the insurer every feature selected by the first owner of a vehicle that they made during the original purchase process with the manufacturer, just in case the insurer decided it was a feature that might be of interest to their underwriting department.

Cases and materials

The following cases and materials include the relevant statutes, case law, FCA regulations and the settled and published approach of the Financial Ombudsman, which underpin the points made above.

An insurer cannot avoid a policy or refuse to pay a claim if a misrepresentation is an innocent mistake.

Law

Consumer Insurance (Disclosure and Representations) Act 2012 (sections 2, 4 and 5):

<http://www.legislation.gov.uk/ukpga/2012/6/enacted>

Economides v Commercial Union [1997] EWCA 1754: <http://www.bailii.org/ew/cases/EWCA/Civ/1997/1754.html>

FCA
ICOBS 8.1.2 R: <http://fshandbook.info/FS/html/FCA/ICOBS/8/1>

Ombudsman
Issue 7: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/7/july-innocent-non-disclosure.htm>
Issue 27: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/27/27-ins-nondisclosure.htm>
Issue 46: http://www.financial-ombudsman.org.uk/publications/ombudsman-news/46/46_non_disclosure_insurance.htm

This includes situations where the policyholder believed what they were saying was true at the time they bought the policy.

Ombudsman
Case 18/21: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/18/july-misleading.htm>
Case 76/10: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/76/76-travel-insurance.html>
Case 90/04: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/90/90-vehicle-related-complaints.htm>
Case 105/01: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/105/105-travel-insurance.html>

... or where the policyholder has made an understandable mistake.

Ombudsman
Case 01/23: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/1/non-disclosure-case-studies.htm>
Case 13/05: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/13/jan-critical-illness.htm>
Case 18/21: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/18/july-misleading.htm>
Case 25/15: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/25/25-insurance-casestudies-non-disclosure.htm>

... or where the matter in question happened a long time ago or was a minor issue.

Ombudsman
Case 13/05: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/13/jan-critical-illness.htm>
Case 25/14: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/25/25-insurance-casestudies-non-disclosure.htm>
Case 106/11: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/106/106-pet-insurance.html>

A policyholder may only need to show that a misrepresentation is more likely than not to have been innocent

Ombudsman
Case 01/23: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/1/non-disclosure-case-studies.htm>
Case 90/04: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/90/90-vehicle-related-complaints.htm>

Summary

Based on the comments in this report, we do not believe that the insurer can refuse the policyholder's claim. In summary this is because:

If the refusal is based on a policy term requiring disclosure

- The policyholder has not breached the requirement in the policy wording to disclose any modification because, as drafted, the clause only requires a policyholder to notify modifications made by the policyholder (and does not require notification if the modification was made by a previous owner or anyone other than the policyholder);

- The requirement in the policy wording to disclose modifications is an onerous condition which should have been drawn to the policyholder's attention when he purchased the policy, but it was not;

If the refusal is based on a the duty to disclose pre contractual information

- The failure to disclose the addition of the winch and the A-Bar were not material facts;
- The insurer did not ask the policyholder a clear question requiring him to tell the insurer about any modifications;
- The addition of the winch and the A-Bar were not disclosable because they diminish the risk;
- Any failure to disclose was an innocent mistake because the policyholder did not know that the vehicle had been modified.

Required Outcome

The insurer should pay the policyholders claim in full (subject only to the policy excess) and should not be permitted to rely on the reasons they have used to refuse the claim which are stated in this report.