An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2018-0126
Sector:	Insurance
Product / Service:	Car
Conduct(s) complained of:	Rejection of claim - non-disclosure Rejection of claim - non-disclosure & voiding
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns the Respondent's cancellation of the Complainant's commercial vehicle insurance cover and its refusal to meet a claim made by the Complainant in **September 2016**. The Complainant was involved in a road traffic accident on 13 August 2016 The reason for the cancellation of the policy and rejection of the claim is the suggested non-disclosure by the Complainant of the use being made of the van; namely mobile catering and towing a catering trailer. The Complainant contends that the Provider was aware that he used the van to tow trailers as part of his occupation as builder, that his policy covered unspecified use of a third party trailer, and that any ambiguity should be resolved in his favour.

The Complainant's Case

In a letter of complaint dated 15 September 2016, the Complainant explains that he was driving his van on 13 August 2016 and towing a 12 foot long trailer with a "chipper", which overturned due to a gust of wind. When the Provider investigated the matter, it issued him with a letter dated 13 September 2016 cancelling his policy and advising of his non-disclosure of all facts. He asserts that when he attended at the branch where he had effected the policy in question, the Respondent confirmed to him that he was "*covered to drive a trailer but not one of that size*". He states that this was never made clear or specified to him. He notes that when he applied for the insurance, he gave the Respondent a copy of his driver's licence. He further asserts that he told the Respondent that the reason he needed the trailer cover was because he did work drawing lawnmowers. He notes that he worked with a particular Construction Company and drew trailers up to 16 foot long.

The Complainant asserts that he believed he was covered and that his policy schedule indicates that he was covered for "*unspecified Third Party Trailer Cover*". He further states that during his meeting in the Respondent's branch, the Respondent's representatives said "*something about my driver's licence not covering me*" but he doesn't understand this as the Respondent had already been given a copy of his licence "*when they framed the terms and conditions of my policy and they did give me cover*". He accepts that the trailer in question had four wheels and a drawing bar and consisted of essentially a mobile "*chipper*"/catering unit. The Complainant believed that because it was a trailer drawn behind his van, that he was covered. He asserts that the definition of trailer cover has not been defined in any of the documents that he received, in a way which excludes the drawing of that particular trailer.

The Complainant states that he will be severely disadvantaged if the policy of insurance is cancelled. He fails to understand why the Respondent will not pay the value of his vehicle which was comprehensively insured. He requested a review of the Respondent's decision but in spite of communications with the Respondent, he does not believe that it will reverse its decision. He notes that he is an EU citizen and came to Ireland 16 years ago and has worked in the building industry for a long period since he arrived. He is seeking the reinstatement of his insurance.

By letter to this Office dated 18 October 2016, and in response to a letter received from the Respondent, the Complainant stated his belief that he gave full and open disclosure to the Respondent and if it had had an issue with the type of trailer or the purpose of use of the trailer, that it was not specified in the policy. He notes that the words used in the policy in his view and as referred to in his letter, provide him with full cover. He notes that the decision of the Respondent is affecting his ability to get continuing insurance cover.

The Complainant also wrote to the Respondent on 18 October 2016 noting that the policy covered "*unspecified Third Party Trailer Cover*" and that any ambiguity in interpretation should, in his view, be interpreted against the Respondent. The Complainant argues that he fully disclosed that he was drawing a trailer and that he would use it with regard to lawnmowers and that he had further indicated that he had worked with a builder and towed a trailer up to 16 foot long.

By letter dated 25 January 2017, Complainant reiterated his belief that his fully comprehensive and trailer cover insurance included unspecified trailer cover and that, in his understanding, this meant any size or any trailer as non-specified was stated on his insurance policy which meant he was covered to drive any trailer of any size. Because this was stated on his policy, he argues that he thought he was covered on the day in question, for the trailer that he was towing.

By email dated 28 August 2017, the Complainant further notes that, as far as he was concerned, he was covered for any size trailer by the insurer, and also notes that the insurer took an instalment payment on the insurance after the accident and did not say anything at that point about the trailer size. He states that he is extremely upset over the situation, that

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he is not sleeping and that he is snappy with his family and totally distressed. He states his continued opinion that he was covered on the policy and that he did nothing wrong.

In response to a query raised by this Office in October 2017, in relation to the mobile takeaway business, the Complainant stated that "[Named] *Take Away*" was not his business and it was a sole trader business run by his wife. He said that *"It was only starting up and only had a turn over of a few hundred euro on the weekends. No financial statements as it was a start up chipper catering van".*

The Respondent's Case

By letter dated 13 October 2016 to the Complainant, the Respondent stated that the policy had been cancelled and it regretted to inform him that the loss was not covered under the policy. The Respondent stated that during the course of its investigation, it came to light that the Complainant was using the vehicle in conjunction with a catering business, namely towing a catering trailer. The Respondent asserts that the insurance on the vehicle was taken out on the basis that it was used in conjunction with the building trade. The Respondent also stated that it came to light that the Complainant did not have the appropriate licence to tow a trailer of the size/weight. The letter states that due to this non-disclosure, the Respondent is not in a position to deal with the Complainant's claim. It further informs him that another party has made a claim against his policy and as the Complainant has been deemed liable for the accident, the Respondent is obliged under the Road Traffic Acts to deal with the third party. The letter draws the Complainant's attention to the policy section on "***our right of recovery***" where it states that:-

> *"If by law we have to make a payment that would not be covered under this policy, you will have to refund the amount to us."*

The Respondent issued a further letter to the Complainant dated 14 November 2016. It noted that it had carefully considered all the points that he had made and revisited the circumstances of the claim but it did not agree that the decision to deem the policy void was wrong, for the following reasons:

I. The Respondent accepted the proposal for motor insurance on the basis of the Complainant's occupation being in the building trade and the goods that he would carry, were to be those associated with the said trade;

II. The use of the vehicle when the incident occurred was solely in connection with the catering fast food trade; a catering trailer fitted out for dispensing fast food was being towed. Cover for this use was never agreed by the Respondent;

III. Had the Respondent been made aware at inception of the full extent of the van's use and of all the Complainant's occupational activities, the Respondent would have declined the risk.

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The letter asserts that it is not correct to conclude that the policy was void merely because the Complaint was towing a trailer, but rather for the listed reasons.

In response to information sought by this Office, the Respondent responded by letter dated 21 June 2017. The Respondent alleges that the policy was incepted with effect from **12 January 2015** and that it was arranged on the basis that the vehicle in question was to carry own goods used in connection with the Complainant's occupation as a builder. The Respondent says that the policy covered towing a small trailer for third-party cover as allowed by the Complainant's driving licence, in connection with his occupation as a builder.

The Respondent suggests that the policy was renewed on 11 January 2016 by the Complainant's wife who confirmed to two different staff members that the van was used in connection with the Complainant's occupation of building and was used to carry tools and chainsaws.

The Respondent argues that on 13 August 2016, the Complainant accompanied by his wife was returning from a market where they had operated a mobile take away catering unit. The Respondent states that while travelling and towing the large catering trailer, the Complainant lost control and collided with the centre meridian causing the van on the catering trailer to flip over.

The Respondent states that its investigator met with the Complainant on 3 September 2016 and took a statement from him. The Respondent asserts that in this statement, the Complainant accepted that he had operated a catering stall at the market and was towing the van trailer which is a mobile catering unit. The Respondent notes that it wrote to the Complainant on 12 September 2016 cancelling the policy with effect from 12 January 2016 due to non-disclosure of all facts and further wrote to him on 13 October 2016 declining his claim and advising him of the Respondent's write to recovery. The Respondent says that it discharged a third party claim for €2,140.06, together with solicitor's fees of €430.50, for damages to the motorway. By letter dated 6 July 2018 the Respondent also confirmed that it has not exercised its right of recovery against the Complainant, following a recent settlement with the Complainant's wife in relation to her claim. It confirmed in that context that the total payments on this claim at that point, amounted to €32,545.71.

The Respondent says that it is satisfied that a thorough investigation was carried out prior to a decision being made on indemnity and that the documentation enclosed with its submission shows that the Complainant did not correctly disclose the use of the vehicle. The Respondent argues that there was no cover under the policy in connection with mobile catering and that, if this use had been disclosed, the Respondent would never have opened the policy. The Respondent has enclosed an extract of "Unacceptable Risks" from its underwriting and risk acceptance rules for goods carrying vehicles. This extract suggests that the following amongst others, are deemed to be unacceptable risks to the Respondent:

> **Occupation** – fast food sales/delivery of takeaway foods; outdoor caterers; street and market traders, hawkers or casual traders.
>
> **Use of Vehicle** – mobile fast-food vehicles e.g. chip van, pizza deliveries etc.

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Type of Vehicle – mobile shops or vehicles used to tow trailers used for the purposes of selling food or confectioneries.

The Respondent says that it carried out a thorough and detailed investigation to establish the use of the vehicle and that it is satisfied that the vehicle did not fulfil the criteria to be deemed building use under the terms of the policy. It is therefore satisfied that the conduct complained of in voiding the policy and declining the claim, was not unjust or unreasonable.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties 3 August 2018, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, the final determination of this office is set out below.

This complaint arises out of the Respondent's refusal to pay the Complainant's claim for cover arising from a road traffic accident made under a motor insurance policy, and to cancel his cover. The Respondent relies on a suggested non-disclosure of material facts in reaching its decision. The Complainant refutes the suggestion that he failed to disclose relevant information and he says that any ambiguity in the policy documentation should be interpreted in his favour.

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POLICY SCHEDULE

The policy schedule associated with the Complainant's policy applying from 12 January 2016 onwards, states at the top that:-

> "*The* [Provider] *motor insurance policy which you have chosen is based on your confirmation with our staff and the information you have provided to us…..."*

The schedule goes on to note the Complainant's occupation as *"builder*". In section 3 entitled "*Towing and Trailer Cover*", the schedule notes that "*unspecified Third Party Trailer Cover*" applies.

The Certificate of Insurance notes the Limitations as to Use as "*Use in connection with the Insured's business and for social, domestic and pleasure purposes and use necessitated by the overhaul, upkeep and repair of the Vehicle for the Insured."*

CANCELLATION

After the incident on 13 August 2016 the Respondent's letter to the Complainant dated 13 September 2016 notified the Complainant that any cover that may have been provided under the policy would cease at midnight on 23 September 2016 and the reason for the cancellation of the policy was the Complainant's failure to provide it with correct details relating to the following: "*non-disclosure of all facts*".

To determine the question of whether the Respondent was entitled to conclude that there had been non-disclosure by the Complainant, it is important to consider what information was sought by and provided to the Respondent when the policy of insurance was taken out and when the policy was renewed.

The policy was taken out from 12 January 2015. In the schedule to the policy of insurance in 2015, the Complainant's occupation is noted as builder. In a section entitled "*Proposal and Declaration Details*", a "***Disclosure Warning***" is set out. This states as follows:

> ***"We asked you a number of questions the answers to which are important to [the Respondent]. Please take time to read through the details which reflect the answers you have given us. In the event that any detail that you have supplied to us and appearing on this Statement of Fact is incorrect then you need to advise us immediately. If you have made a misrepresentation [the Respondent] has certain legal rights which may include a voidance of the contract of insurance and refusal of all claims. As a result, you may also find it difficult to arrange this type of insurance in the future."***

Immediately below the Complainant's occupation is described as "*builder*". In relation to vehicle use, the proposal details reference the insurance certificate for the precise use covered. The use set out in the certificate of insurance dating from renewal in January 2016

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is in connection with the insured's business; I have not been furnished with the insurance certificate for 2015.

I have been furnished with a document which appears to record the questions asked of and answers given by the Complainant at the time that the insurance was first taken out in January 2015. No recording of the relevant conversation has been made available, though I note the insurance may of course have been arranged in person. The relevant section of this conversation is recorded as follows:

> *"Occupation BBD BUILDER*
> *State the primary use of the vehicle 02 Own Goods*
> *State the secondary use of the vehicle ___*
>
> *Do you carry any goods that are not associated with the vehicle use and occupation declared N"*

The record of this conversation is significant as it appears to record the Complainant's confirmation that he has no occupation other than building and that the only goods that he carries are in relation to his occupation as a builder.

Although it is unclear from the information provided to me exactly when the Complainant commenced use of the vehicle and trailer for the drawing of a mobile chip van, it appears from this record that he was asked to and did confirm that the vehicle had no use other than in connection with the building trade and this information was not amended by him at any time prior to the accident in question. The relevant policy notes further confirm as of 12 January 2015:

> "Goods carried Building (Tools/Bricks)
> Vehicle use Drive to/from own workplace"

The Respondent wrote to the Complainant in December 2015 offering him a renewal of his commercial policy from 12 January 2016. The renewal letter noted a number of reasons why the policy was right for the customer, including that it included "third party trailer cover (should your trailer cause loss or injury to other people)". The renewal letter asked the Complainant to check that his details on the renewal notice were correct and noted as follows:

> *"It is important that you read any other information that accompanies this document, in particular the "Non-Disclosure Warning" on page 4."*

Page 4 of the renewal letter contains the following warning:

> ***"Accuracy and Honestly Warning***
>
> ***You have applied for a contract of insurance between you and [the Respondent]. The information you have given us is the basis of this contract. Please read this information carefully and make sure it is correct. If the information is incorrect, [the Respondent] may declare the contract void, cancel your policy or refuse to pay any***

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claim in addition to any other rights [the Respondent] may have under the policy. As a result you may also find it difficult to arrange this type of insurance in the future. If you are in doubt whether certain facts are important and should be notified to [the Respondent], please ask us…."

An important component of the evidence furnished is a recording of two telephone calls that occurred on the morning of 11 January 2016 between representatives of the Respondent and the Complainant's wife during which the motor insurance policy was renewed. In the first phone call, the parties discussed the renewal of the policy, the addition of rescue cover on the policy, the premium quoted and any available discount. The Respondent's representative asked the Complainant's wife to confirm the business use associated with the vehicle in question and asked for confirmation of the occupation, as it needed to be kept updated. The Complainant's wife responded that "*I think he just has builder on it*". There was no follow-up from the Respondent's representative in response to this answer asking whether there was more than one occupation as might have been appropriate in light of the slight ambiguity in her answer, though no other occupation was identified by the Complainant's wife.

In the second call that occurred on 11 January 2016 between a representative of the Respondent and the Complainant's wife, the Complainant's wife confirmed that she was seeking to renew the policy for her husband and was anxious that the renewal quote be brought down. The Respondent's representative asked what the Complainant was carrying in the vehicle; "*what does he carry*?" The Complainant's wife responded "*just tools, chainsaw*" and further stated "*tools and stuff like that*". In my view, it was clear from the context of the conversation that the Respondent's representative was seeking information on the goods that were carried in the vehicle in order to determine whether or not it was possible to reduce the renewal premium quoted. No goods other than those associated with the Complainant's occupation as builder were identified in response to the direct questions from the Respondent and no mention was made by the Complainant's wife of the use of the van in connection with the mobile catering business.

In the policy summary document, it is stated that the policy applies while the customer's vehicle is towing a trailer but that there are some exceptions for which trailer cover does not apply and to please see the policy document. In the policy document, towing and trailer cover is further explained. In relation to unspecified third party trailer cover, the policy document states that this cover applies where the vehicle is towing a caravan or trailer where allowed by law. The relevant page has a section setting out three circumstances in which claims in relation to the trailer cover will not be paid, including where the insured is being paid to tow a caravan vehicle.

In the "General Exceptions" section of the policy document, it is clearly stated that:

> *"1. This policy does not apply when your vehicle:*
> *is being used for purposes that are not shown in your certificate of insurance"*

In a section entitled "general conditions", the policy document states that the customer must keep to the following conditions and if those conditions are not kept to, the

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Respondent may cancel the policy or refuse to deal with the claim. In section 4 of the general conditions entitled "*changes to your policy*", customers are directed to immediately tell the Respondent about any change in use or in the main user.

If a customer is in any doubt about whether certain factors are important, they are encouraged to ask the Respondent.

In a further section entitled "Fraud", the Respondent states that it will take certain action if the insured or anyone acting on their behalf fails to reveal or hides a fact likely to influence whether the Respondent would accept the proposal, renewal or adjustments; fails to reveal or hides a fact likely to influence the cover provided; or makes a statement to the Respondent or anyone acting on its behalf knowing the statement is false in any way. The consequences of those actions are set out and include that: the Respondent will not pay a claim; the Respondent may declare the policy void: and that the Respondent will be entitled to recover from the insured in the amount of any claim they have already paid under the policy.

The Respondent's terms of business statement provides a further accuracy and honesty warning in comparable terms to that set out above on the renewal letter:

> *"It is important to [the Respondent] that the information which you have given us is correct. You have a legal obligation to take reasonable care not to make a misrepresentation to us with regard to the information. If there have been any changes to your information whether about your vehicle yourself, any driver named on the policy you must inform us immediately. Failure by you to amend information previously given may in legal terms amount to a misrepresentation. If a misrepresentation is made [the Respondent] has certain legal rights which may include avoidance of the contract of insurance and refusal of all claims. As a result you might find difficult to arrange this type of insurance in the future. You are also required to update us with any future changes to your information immediately to ensure continuity of cover under your policy."*

I note that the Complainant has asserted that he informed the Respondent that he regularly towed long trailers in connection with his work as a builder and that he also moved lawnmowers. There is no record in the documentation furnished to me of this conversation. While the lack of record may have been significant if the road traffic accident had involved the towing of lawnmowers, such an issue does not arise in this instance. Nowhere is it suggested by the Complainant that he or his wife at any point informed the Respondent of the use of the vehicle to tow a mobile catering unit. The Complainant accepts that he was towing a chip van at the time the accident occurred. The issue in contention is whether or not this was covered by the terms of policy and whether the policy documentation was ambiguous in this regard.

Motor insurance policies, like all insurance policies, do not provide cover for every eventuality; rather the cover will be subject to the terms, conditions, endorsements and exclusions set out in the policy documentation. Insurance contracts are contracts of utmost

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good faith, wherein the failure to disclose information which is relevant to the assessment of the risk, allows the insurer to void the policy from the outset and refuse or cancel cover.

The Complainant asserts that, when read in isolation, the unspecified trailer cover provided for in his policy of insurance does not suggest that cover applies only in the case of certain uses or the towing of certain trailers. However, when read in the context of the policy documentation as a whole, including the use provided for in the certificate of insurance itself, and the terms of the policy document, it is clear that the vehicle is insured only for use in connection with the insured's business as disclosed, and for social use. It is further clear that the only business use that was ever disclosed to the Respondent by the Complainant or his wife was that of builder and any trailer cover was therefore limited to use in that context.

I note that I have been furnished with two engineering reports in connection with the road traffic accident, one dated 26 August 2016 in connection with the vehicle itself and a further report dated 30 October 2016 in relation to the trailer. As there is no real dispute between the parties in relation to the condition or value of either the vehicle or trailer, or the relevant circumstances of the accident, I do not propose to address the findings made therein.

I have also been furnished with the report of a claims handler dated 5 September 2016 who interviewed the Complainant in the aftermath of the accident. This report states that the Complainant sells food, burgers, chips, and sausages from a mobile catering trailer at the identified market which is held on Saturdays and that he tows this catering trailer with his insured van. The report further notes that the Complainant does not have classes D and E on his driver's licence which would cover him to tow the trailer that he was towing when involved in the accident. Although this question of whether or not the Complainant was covered by his driving licence to draw the trailer at issue has been mentioned, and that this may at first have been given as one of the reasons for the cancellation of the policy, I am satisfied that this is not the primary reason which the Respondent relies upon, in justifying its decision in the present case to void the policy.

Although the Complainant may not have been aware of the significant increase in risk for the Respondent where his vehicle was being used to tow a mobile food catering van, it is clear that neither the Complainant nor his wife at renewal stage disclosed this use to the Respondent. In my view, the documentation provided to the Complainant in relation to his policy made it clear that the insurance being provided to him contained a limitation of use. This use was confined to commercial use in connection with his occupation as builder and to social and domestic use. There is no evidence that there was deliberate concealment on behalf of the Complainant or his wife in this regard but it is clear to me that the Respondent met its obligations in documenting the limitation on use. As previously mentioned, the record of the phone calls which took place between the Complainant's wife and the Respondent's representatives on 11 January 2016 are very significant in that in those phone calls, the Complainant's wife was asked to confirm the Complainant's occupation and the goods he moved using his vehicle. She confirmed that his occupation was a builder and that the goods he moved were in connection with that use, such as tools. There is no obvious connection in my view between the use of a vehicle in connection with drawing a mobile catering van and use in connection with trade as a builder. The use to which the vehicle was

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put on the date of the accident in question was therefore a different use from the use which was insured with the Respondent. It is further relevant, in my view, that the Respondent concerned, deems use in connection with a takeaway or mobile catering service to be an unacceptable risk which it would refuse to cover. There is no suggestion that this information was disclosed specifically to the Complainant but because of the Complainant's failure to alert the Respondent to the use of his vehicle, in connection with mobile catering, there was never any discussion concerning this.

In light of the above and the fact that the Complainant did not inform the Respondent of the use of his vehicle in connection with a mobile catering service and/or did not inform the Respondent of the change of use of the vehicle from that in connection with the building trade, I am satisfied that the Respondent was entitled to void the policy and to decline the claim. I am further satisfied that several warnings were provided to the Complainant which ought to have alerted him to the fact that a failure to inform the Respondent of relevant use or relevant change in use could lead to refusal of his claim and the cancellation of this policy.

In my opinion, the use of the vehicle in connection with a mobile catering truck was not insignificant or immaterial. The fact that the mobile catering unit was being towed on a trailer attached to the vehicle, and the policy covers the towing of a trailer (subject to certain exceptions) does not affect the material change of use at issue.

The Complainant indicated to this office in October 2017, that the catering business belongs solely to the Complainant's wife. This does not align however, with the statement which the Complainant made and signed shortly after the accident, on 3 September 2016 which recorded that:-

> *"I am the owner and registered owner of a* [brand/model] *van registration number ********. On Saturday 13 August 2016 I attended at* [name] *market from 6.00 a.m. until 2.20 p.m. approximately, it was a fine day and I had a catering stall in the market. I packed up around 1.30 p.m. and set off for home at 2.20 p.m. I was towing an enclosed van trailer which is a mobile catering unit. I was accompanied by my wife* [name] *who was seated in the front passenger seat of the van, we were the only 2 occupants, we were wearing our seatbelts…."*

The Respondent Provider furnished a copy of the handwritten signed statement dated 3 September 2016, following a further query raised by this office in circumstances where the contents of the statement had been relied upon, but only a recreated typed and unsigned version of the statement had at that point, been furnished in evidence.

It is clear that at the renewal of the policy in January 2016, the mobile catering use for the vehicle was not made known to the Respondent. I note that it is unclear when this use commenced, but the Complainant has not sought to argue that he had not been using the vehicle in connection with the takeaway business as of January 2016. In any event, the Complainant was under a continuing obligation to inform the Respondent of any change of use in accordance with the terms and conditions of policy and he failed to do so. I am satisfied by not making the relevant disclosure in relation to the secondary use of the

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Complainant's vehicle, the Complainant did not meet his disclosure obligation to the Respondent and left it open to the Respondent to exercise it cancellation rights.

In coming to this conclusion, I am mindful of the decision in *Chariot Inns Ltd v Assicuraziono Generali spa* [1981] IR 199. The Supreme Court stated that the test for materiality is:

> *". . . a matter or circumstance which would reasonably influence the judgment of a prudent insurer in deciding whether he would take the risk, and if so, in determining the premium which he would demand. The standard by which materiality is to be determined is objective and not subjective."*

It is not therefore determinative that the Complainant and/or his wife failed to appreciate the significance of the secondary use of the vehicle in connection with the mobile catering unit; it is enough that it is a matter or circumstance that would reasonably influence the judgment of a prudent insurer in relation to accepting the risk or determining the premium. It ought to have been clear to the Complainant's wife in her second conversation with the Respondent on 11 January 2016 that the types of goods that the vehicle was carrying would at the very least impact on the level of the premium. I draw this conclusion because the representative of the Respondent dealing with the Complainant's wife asked her to confirm the goods being carried, while he was attempting to answer her query on whether there was any possibility that the Respondent could reduce the premium. Furthermore, the Respondent has asserted that it would not have provided insurance to the Complainant if it had known the use to which the vehicle was being put and has further provided an extract of unacceptable risks which includes use of a vehicle in connection with mobile catering. In light of these facts, and all of the circumstances, I conclude that the secondary use of the vehicle in connection with mobile catering was a material fact or circumstance and one which was not disclosed to the Respondent in advance of the accident.

I have also had regard to the High Court decision of *Earls v The Financial Services Ombudsman and Anon* [2015] IEHC 536, where the Court carried out a detailed analysis of previous case law on non-disclosure and the principles to be applied. From this decision it is clear that this Office should not proceed on the basis that if the material fact was not disclosed then, *ipso facto*, there has been a breach of the duty of disclosure. Rather, in the Court's opinion, this may not always be the case, as the duty arising for an insured in this regard is to exercise a genuine effort to achieve accuracy using reasonably available sources, so that, e.g. if the form of questions asked in a proposal form might limit the duty of disclosure rising, such an issue would require consideration.

Furthermore, this High Court decision points to the fact that materiality falls to be gauged by reference to the hypothetical prudent proposer for insurance. The Court held that the arbiter must also give consideration to what a reasonable insured would think relevant and relevance in this particular context is not determined by reference to an insurer alone.

Whilst it is of course unusual that the Respondent Provider elected to renew the policy on the basis of instructions taken directly from the Complainant's wife, rather than speaking directly to the Complainant himself, the Provider has confirmed that this came about in circumstances where the Complainant's wife was present with the Complainant when the

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policy was arranged in 2015, she was a named driver, and she responded directly to the Provider after the renewal notice addressed to the Complainant was sent to the address on file. The Provider has also confirmed that it was the Complainant's wife who responded to 2 voicemails which the Provider left for the Complainant on 11 January 2016, requesting contact to be made.

While there has been no suggestion in the present case that the Complainant sought in any way to deliberately conceal or misrepresent any material facts, unfortunately once nondisclosure takes place – whether innocently or otherwise – the legal effect of that can operate harshly, and entitle an insurer to amongst other things refuse cover and to cancel the policy, as the Respondent has done in this instance.

The Respondent was entitled to full disclosure from the outset, at the time of renewal, and after a change in use, so that it could make a fully informed decision on cover at each relevant time. This information was, in my view, not provided to it in this instance, with the result that the Respondent entered into a contract for motor insurance under terms that it would not otherwise have. Therefore, in the circumstances of the matter, and pursuant to the relevant policy terms and conditions, I am satisfied that the Respondent was entitled to decline the Complainant's claim, and to cancel his policy of insurance.

Therefore, while I have great sympathy for the Complainant, and the position he now finds himself in, in relation to seeking further insurance, nevertheless, in my opinion, the evidence discloses no wrongdoing on the part of the Respondent and therefore I am not in a position to uphold this complaint.

For the reasons as outlined above, this complaint is not upheld.

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Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is rejected

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION
AND LEGAL SERVICES

27 August 2018

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,

(ii) a provider shall not be identified by name or address,

and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.