DRN-3857495

The complaint

S complains that BCR Legal Group Limited's ("BCR") appointed representative took money for a warranty that it didn't provide.

Mr C has brought the complaint on S' behalf.

What happened

Mr C is the director of S. On 23 August 2019 Mr C approached BCR's appointed representative, who I'll refer to as "C", to get a quote for a ten-year structural defect building warranty for a property S was building. C provided a quote for a warranty with an insurer, I'll refer to as "G".

On 29 August 2019 S made payment of £8277.09 to C for the warranty. However around this date C's bank account was frozen by the bank due to financial difficulties and it later entered a Creditors Voluntary Agreement ("CVA"). This meant the money was never passed on to G and the warranty was never set up.

When Mr C learnt of C's position, he contacted G directly to find out what would happen to his warranty and found out that it hadn't been set up as the money hadn't been received. He made a complaint to C and later BCR, as he wanted a refund of the money he'd paid. C responded to say that the money paid wasn't refundable and was now with its administrators, so Mr C should contact them. BCR said it wasn't responsible for C's actions as it wasn't acting on its behalf when arranging warranties for G.

Unhappy with these responses, Mr C brought the complaint to this service.

Our investigator considered all the issues and recommended a complaint against BCR should be upheld. He said he was satisfied that C were acting as an appointed representative of BCR when arranging the warranty, so would be responsible for this complaint. He also thought that BCR or C should have informed S about C's financial position before selling the warranty, so it could make an informed decision before buying it. And he thought if it had, S wouldn't have chosen to take a warranty out with C. Therefore he thought C had mis-sold the warranty. So he recommended that BCR reimburse S the amount it paid for the warranty and pay 8% interest on this amount from when it was paid until the date of settlement.

Mr C accepted our investigator's recommendations. However BCR didn't, it responded with the following objections, which I have summarised:

- It didn't agree that it was responsible for C when it carried out the sale because it said that C was acting for G and not for BCR, as BCR didn't have a specific agreement in place for selling G's policies. So the complaint should be against G not BCR.

- It also said that even if it were responsible for C, it was carrying out an 'ancillary' activity and not one that is regulated by the Financial Conduct Authority (FCA). And this service only has the authority to consider regulated activities carried out by an appointed representative against the principal. It said that BCR could therefore only be responsible for the regulated fees paid to C such as the premium, but not the full amount.

- C couldn't have known that its bank account would have been frozen as it was done suddenly and unexpectedly. Until the bank account was frozen C had every expectation that it would continue trading and fulfilling its commitments, as it had full shareholder support up until that point.

- BCR fulfilled its obligations as principal by checking on C's financial position, most recently by writing to them shortly before it provided S with the quote.

- BCR isn't responsible for C's insolvency debts and it feels this service is suggesting it is.

- S could seek to recover its money from C's administrators and it should do that rather than pursuing it through BCR.

It offered S a payment of £5,000 to resolve the complaint, however Mr C rejected this as he said he was due the full amount that he paid for the warranty back. BCR therefore asked for the case to be reviewed by an ombudsman.

On 22 November 2022 I issued a provisional decision that stated as follows:

'As BCR has raised concerns about whether this complaint falls into this service's jurisdiction, I have started by considering whether we have the power to look into the merits of the complaint.

Jurisdiction

BCRs relationship with C

When considering this service's jurisdiction to decide on this complaint, it's first important to explain the relationship between C and BCR and the agreement in place between them.

C itself is not authorised by the Financial Conduct Authority (FCA) to carry out regulated activities. However between June 2013 and September 2019, it was appointed by BCR as its 'appointed representative'. This appointment was made through a written agreement with BCR, who acted as 'the principal'. This agreement was in accordance with the regime set up in s. 39 of the Financial Services and Markets Act 2000 (FSMA 2000). Essentially, it allowed C to perform regulated activities through BCR's own authorisation, that it wouldn't have the authority to carry out otherwise.

In entering into this agreement, FSMA lays out that the principal – BCR in this case – is responsible for any acts or omissions that are carried out as part of the agreement. It states:

"The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility."

So when C was carrying out any activities for which BCR had accepted responsibility under

the agreement, then BCR was responsible for any acts or omissions it made.

An addendum to the appointed representative agreement was added on 19 May 2015 and this laid out the permissions BCR gave more explicitly. Clause 1 of the addendum stated that BCR gave C permission to:

"carry on the business consisting of one or more of the following activities in relation to non-investment insurance contracts:

- Advising
- Arranging
- Assisting in the administration and performance of a contract of insurance
- Dealing as agent
- Making arrangements with a view to transactions."

It went on to state:

"The Principal accepts responsibility for the activities of [C] in carrying on the whole or part of such business."

So under the agreement, any activities listed that C carried out would be the responsibility of BCR.

Does this service have the jurisdiction to look at this complaint against BCR?

BCR has said that it doesn't consider itself responsible for C's actions in this complaint under the agreement. It says it didn't have an agreement in place specifically for C selling warranties for G and therefore C was acting as an agent of G rather than BCR when selling its warranties. It's also said that not all the money paid was for regulated activities and therefore BCR wouldn't be responsible for all of the funds, even if C was acting for BCR.

In order to satisfy myself that we have the power to consider this complaint, I need to be persuaded that C was operating as BCR's appointed representative when it carried out the actions in this complaint and that the activities it carried out where regulated by the FCA. I've therefore considered each of these points in turn.

Sale of G's policies are not part of the appointed representative agreement

BCR has said that C wasn't acting for it when arranging policies for G. And that the complaint should be set up against G itself as C was acting as its agent. However BCR hasn't provided any evidence to show that there was an agreement between G and C that would override the appointed representative agreement. And as the agreement between BCR and C covers it carrying out any regulated activity that BCR is authorised to carry out, I'm satisfied that C was acting for BCR for matters within this complaint.

Further, Article 21 of the Regulated Activities Order 2001 states:

"Buying, selling, subscribing for or underwriting … relevant investments … as agent is a specified kind of activity".

BCR has said C was acting as an agent of G when selling policies for it and not as its appointed representative. And the RAO states that the activity is still a regulated one when it is being carried out as an agent for an insurer. As C only had the authority to carry out regulated activities through the appointed representative agreement with BCR, I conclude that this service does have the jurisdiction to look into this complaint against BCR.

Regulated activity

BCR has said that even if C were acting for it under the appointed representative agreement, then it would only be responsible for the costs associated with regulated activities, as this is what the agreement allows C to carry out on its behalf. It therefore says the fees for C's services wouldn't be covered by the agreement and BCR would have no responsibility for this amount.

S paid a total of £8277.09 to C for the warranty. This was made up of £3,520 for the insurance premium, £422.40 for the insurance premium tax and the rest for C's services such as underwriting, risk management, completing surveys and a membership fee. BCR says that only the sale of the insurance policy itself amounts to a regulated activity, so as C wasn't carrying out a regulated activity when selling its services, this didn't form part of its representative agreement and therefore this service wouldn't have the power to look at this part of the sale against BCR.

The FCA sets out the rules for the complaints that this service can and can't look into in the DISP sourcebook of the FCA's Handbook. DISP 2.3.1R states as follows:

"The Ombudsman can consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on one or more of the following activities:
regulated activities…
… or any ancillary activities, including advice, carried on by the firm in connection with them."

I've already explained that under the appointed representative agreement BCR is responsible for acts and omissions made by C when carrying out regulated activities, so to be satisfied this service has the jurisdiction to decide on this complaint I need to satisfy myself that C was carrying out a regulated activity when selling S the warranty.

Before looking at this, it's useful to define the purpose of the warranty that C sold to S. S is a developer that builds properties to eventually sell. And it bought latent defect warranties, as when the property is ready to sell, having a warranty in place likely makes it a more appealing prospect to potential buyers. The warranty itself is therefore intended to benefit a person who might purchase a property in future, rather than S itself, other than from potentially making the property more saleable.

With this in mind, I need to consider whether the sale of such a warranty would amount to a regulated activity. The FCA says that a regulated activity is one that falls under the Regulated Activities Order 2001 (RAO). Article 25 (1) describes the regulated activity 'arranging (bringing about) deals in investments' and how this relates to contracts of insurance. It states:

"making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is…(b) a relevant investment … is a specified kind of activity".

BCR is authorised by the FCA to undertake insurance mediation; including arranging (bringing about deals) in investments. The investment type to which this permission relates is non-investment insurance contracts for retail and commercial customers. Based on the nature of the policy sold by C, it qualifies as such a contract. So, I'm satisfied our service can consider a complaint about BCR in relation to the arranging of this policy, as it meets the definition of a regulated activity as outlined in the RAO.

I note BCR has said that as some of the money S paid for the warranty was for C's fees, and these aren't regulated activities so wouldn't form part of the appointed representative agreement. The costs it is referring to is the money paid on top of just the insurance premium and premium tax. This is made up of various fees for services that C provides such as site inspections, underwiring fees, risk management and a membership fee.

The sale of the warranty is dependent on these services being included. For example, the warranty cannot be activated, and therefore have value, without the necessary site inspections being carried out. So the insurance premium paid cannot reasonably be separated from the charges for C's services. The warranty is sold either as a package with C's services or not at all. C sold S the warranty along with a package of services that would enable the warranty to be activated. And they are therefore part and parcel of the warranty itself.

Further, in FCA's perimeter guidance PERG, section 5.6.2 states:

"In the FCA's view, a person would bring about a contract of insurance if his involvement in the chain of events leading to the contract of insurance were important enough that, without it, there would be no policy..."

As I've explained, the additional costs, on top of the policy premium, form an intrinsic part of arranging the warranty and without them the policy would not be able to be activated. I therefore think it's reasonable that these too would reasonably amount to a regulated activity. As without C's services, the warranty couldn't be activated on completion of the development, which is equivalent to there being no warranty at all for the potential home buyer.

And even if I were to conclude that C's services were separate and not regulated in themselves. As quoted above, the FCA lays out in the DISP rules that this service has the power to consider a complaint that relates to regulated activities 'or any ancillary activities, including advice, carried on by the firm in connection with them' And the additional services sold as part of the warranty are, at the very least, ancillary if not regulated activities in themselves. So I'm satisfied this service has the power to consider the full amount paid as part of the sale.

So based on these reasons, I'm satisfied BCR was responsible for C's actions in taking the money for the total cost of the warranty in this case. I therefore need to consider whether C treated S fairly when doing so.

The merits of S' complaint

The Insurance Conduct of Business Sourcebook (ICOBS) says that when selling a policy, a firm needs to ensure it is providing information that is clear, fair and not misleading, so that the customer can make an informed decision as to whether they wish to go ahead with the purchase. So I've considered whether C met these obligations here, in order to decide if it treated S fairly or if it mis-sold the policy.

When C sold the warranty to S, it gave S the reasonable expectation that in exchange for the money paid it would receive a warranty in return. Therefore, were there to have been any doubt that it would be able to arrange the warranty, then I think it ought to have either not sold the warranty at all, or made S aware of its circumstances so that S could have made an informed decision based on clear and not mis-leading information. It's accepted that C proceeded to sell the warranty to S without giving any such information. So, when determining if the warranty was mis-sold, what I need to decide is whether C was aware, or ought reasonably to have been aware, that it may not have been able to fulfil the warranty

when it sold it.

C originally sent a quote for the warranty on 23 August. And BCR has confirmed that C's bank account was frozen on either 28 or 29 August – the day, or day before, S paid for the warranty.

BCR has said this happened unexpectedly, with no notice. So C wouldn't have known this was about to happen when it quoted for the warranty, regardless of the close proximity in date.

While neither BCR or C have made it clear exactly why the bank account was frozen, BCR has commented as follows:

'We understand from [C] that as a consequence of certain County Court judgments, [C]'s bank froze their bank account without reference to [C] as a precautionary measure.'

So it seems it was due to County Court Judgements (CCJ) that were registered against C. But regardless of the specific reason, while the freezing of the account on that day may have been unexpected, I don't agree that C wouldn't have been reasonably aware that this was a possibility or that it may otherwise have been unable to fulfil the sale of the warranty given the problems it was facing at the time.

BCR has said that C was dealing with a large amount of litigation from various developers due to its dealing with a warranty provider that collapsed in 2018. And due to the volume of threats, this meant it missed the CCJ which led to the account being frozen. But because it hadn't been aware of the threat of a CCJ, it wouldn't have known that this would happen.

I've considered this but I think C ought to have known they were at risk of not being able to fulfil the sale of the warranty. The fact that C was subject to a large number of threats of litigation, would be a clear indication that it wasn't in a financially stable position and may enter into financial difficulty in the near future. Further if C was under such intense pressure from possible litigation that it overlooked something as important as a possible CCJ, it's hard to conclude that it would have been in a stable enough position to accept significant sums of money as it did from S. So based on this alone, I think C ought to have known it may not have been able to fulfil the sale of the warranty. Even if the bank account being frozen on that date was unexpected.

Based on this I think C ought to have been reasonably aware that it may not be able to fulfil the warranty it sold to S. So in order to fulfil its obligation under ICOBS to provide clear, fair and not misleading information it follows that it either shouldn't have provided, or accepted payment, for the warranty at all or made the customer aware of its circumstances at the time of the sale. As it sold the warranty and didn't provide this information, I'm persuaded that it didn't fulfil its obligations and therefore mis-sold the warranty. And it isn't just a matter of whether it met its obligations under ICOBS but also whether it acted fairly and reasonably in the circumstances. And because of what BCR has said about the level of litigation levelled against it at the time, I don't think it did.

BCR has said that as a principal, it only has the responsibility of doing reasonable checks to ensure C is financially stable and therefore suitable to continue as its appointed representative. It's shown that it wrote to C shortly before it sold the warranty to S to ask for clarity around its financial position. And C confirmed that it had full support of all its shareholders so this shows BCR carried out due diligence and had no reason to discontinue the agreement at this stage.

While I agree that as principal BCR does hold this responsibility, I don't agree that its

responsibilities end at that. In this case C were acting as an appointed representative of BCR, which means BCR is responsible for C's actions. I've explained why I think C didn't meet its obligations under ICOBs or treat S fairly and reasonably when selling the policy, so I'm persuaded it's got something wrong. And as C was acting as an appointed representative of BCR, BCRs responsible for this action. So as I'm persuaded C ought to have been aware of its financial situation and the risks of not being able to fulfil the sale of warranties, then BCR was responsible for that.

In addition, from the letter BCR has provided that it sent to C in July 2019, it seems BCR had reason to be concerned about C's financial position. In the letter it states:

'You have indicated to me that you might consider in the near future insolvency procedure for [C] such as a CVA…'

So regardless of C's reassurances in response to the letter, it shows that BCR had reason for concern about C's financial position in July 2019. And if it held these concerns, I think C would likely also have been aware of its delicate financial position itself, particularly as it appears to have discussed a potential CVA with BCR.

Further it isn't clear exactly what support C's shareholders showed during this time other than by not withdrawing. I've asked BCR for more information about what support was being offered by shareholders that convinced it that C was not at risk of collapse, but it has provided no specific detail other than that they withdrew support once C's account was frozen. So I've not seen enough to persuade me that BCR carried out robust checks to ensure C's stability or that it took action based on its concerns.

For the reasons I've outlined, I'm persuaded that C ought to have been reasonably aware that it may not have been able to fulfil the warranty it sold to S at the time it sent the quote in August 2019. And for the reasons above, I'm not satisfied it acted fairly when it continued with the sale and took payment from S for a warranty it wasn't able to setup. Further I think there was more BCR could, and should, have done to satisfy itself of C's financial stability and its ability to continue to fulfil the warranties it was selling on BCR's account. I've therefore considered what BCR should do to put things right.

To do so, I've considered what would have happened if C had acted fairly and in line with its obligations under ICOBS. And in order to do this, it would have either not sold the warranty at all, or made S aware of its situation when it did. In both of these circumstances, I think the outcome would have been the same – S wouldn't have paid C the £8277.09. As I consider it most likely wouldn't have bought the policy if it had known there was a significant risk C wouldn't be able to fulfil it, because this would only cause potential problems when it came to sell the properties. And I've seen nothing to suggest S wouldn't have been able to purchase a different warranty from a different provider in this instance, which I think it likely would have done in order to avoid this problem.

Therefore in order to put things right I agree with our investigator that BCR should reimburse S the amount it paid for the warranty. And due to the fact S has been without the money for a number of years, it should pay 8% interest on the amount from the date it paid C until the date the settlement is paid by BCR.

I've also considered BCR's comments about S claiming the money back through C's administrators and I agree this is an option open to S. But it doesn't change my position on what BCR should do to resolve this complaint fairly. However, I agree it wouldn't be fair for S to receive the money back twice, so should S receive any refund from C's administrators it should pay this money to BCR on receipt.'

Response to my provisional decision

While BCR confirmed it received my provisional decision, it didn't provide any further comment in response.

Mr C also provided no further comment.

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.

As neither side has provided anything further in response to my provisional findings, I see no reason to depart from the outcome I laid out in my provisional decision.

My final decision

For the reasons I've given, I uphold S' complaint and direct BCR Legal Group Limited to:

- Reimburse S £8277.09 it paid for the warranty.
- Pay 8% simple interest on this amount from the date it paid C until the settlement is paid by BCR.

Under the rules of the Financial Ombudsman Service, I'm required to ask S to accept or reject my decision before 9 February 2023.

Sophie Goodyear
Ombudsman