DRN-5893668

The complaint

Mr M complains that Arnold Clark Automobiles Limited ("Arnold Clark") mis-sold him a Guaranteed Asset Protection ("GAP") insurance policy. In particular, he says the policy didn't offer fair value and they didn't disclose to him they would be earning commission.

Mr M's complaint has been brought by a representative on his behalf – who I'll refer to as company Y.

What happened

Arnold Clark sold Mr M a 'Return to Invoice' GAP policy. The policy was for a three-year term and started in July 2013. Mr M then learned about cases where financial businesses hadn't disclosed to their customers they would be receiving commission, so, Mr M approached company Y who made a complaint, on his behalf, to Arnold Clark. Company Y complained that the GAP policy sold to Mr M didn't represent fair value and that the Financial Conduct Authority ("FCA") had deemed GAP to be a product which didn't represent fair value, Mr M wasn't given a two-day period between receipt of policy information and taking out the policy, and that Arnold Clark hadn't disclosed to Mr M that they would be receiving commission and the amount.

Arnold Clark responded and said Mr M's complaint was out of time on the basis it had been raised more than six years after the GAP policy was sold. Arnold Clark explained, in any event, the FCA General insurance value measures data wasn't in place at the time the sale took place, and also there was no requirement for them to comply with the deferred opt-in provision or commission disclosure requirements given the sale took place in 2013.

Our investigator looked into things for Mr M. He thought Arnold Clark hadn't mis-sold the policy and didn't uphold the complaint. Mr M disagreed so the matter has come to me for a decision.

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.

Having done so, I've decided not to uphold the complaint. I understand Mr M will be disappointed by this but I'll explain why I have made this decision.

Jurisdiction

I think it's important for me to start off by addressing Arnold Clark's point about this complaint being out of time. The rules that govern the time limits for when a consumer can bring a complaint are set out in the FCA's Handbook. The relevant one, DISP 2.8.2 R, says:

"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

> *(2) more than:*
>
> *(a) six years after the event complained of; or (if later)*
> *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint.*

I agree the complaint was brought to our service more than six years after the event complained of – which in this case was the sale of the GAP policy. But I'm not persuaded it was more than three years from the date on which Mr M ought reasonably to have become aware that he had cause for complaint. That's because, over the last couple of years, there has been significant media coverage around commission arrangements. And while that has related to a different product area, I think, in respect of the date of awareness point, it's fair to take the view this should also apply to insurance products. So, I think it's fair to say Mr M has brought his complaint to our service within three years of becoming aware he had cause for complaint.

Fair value

Company Y has said the GAP insurance Mr M took out didn't meet the standards expected under the Consumer Duty principle. But it's important to clarify this principle has only applied to 'open' products and services from 31 July 2023 and to 'closed' products and services from 31 July 2024. The Consumer Duty doesn't apply retrospectively to complaints about events that happened before these dates. In this case, the GAP policy was sold in 2013 and finished in 2016, and so the requirements of the Consumer Duty don't apply. That said, I have considered, more broadly, whether Arnold Clark treated Mr M fairly.

I can see company Y has referred to the FCA General insurance value measures data from September 2023 and say this raised concerns about GAP insurance and that it was determined such policies didn't represent fair value. Company Y has said it too shares the FCA's concerns.

I've thought carefully about the data referred to and the contact the FCA had with GAP insurers in September 2023, and I've taken this into account. However, I've looked more specifically at Mr M's circumstances at the time the sale took place.

The information shows a 'Vehicle Replacement Insurance' application form ("VRI form") was completed. This set out the price of the policy as well as the duration, and contained a 'Demands and Needs Statement' which said, "*Arnold Clark Vehicle Replacement Insurance (VRI) has been specifically designed to supplement your comprehensive motor insurance policy and will pay the difference between the price you originally paid for your vehicle (the net selling invoice price) and the greater of the current market value or your insurance company settlement in the event of your Insured Vehicle being a Total Loss*…"

This form was signed and dated by Mr M, so it's clear Mr M expressed a need to have, and would benefit from, a policy which would provide cover in the event his vehicle was deemed a total loss, and he wanted to ensure he received the invoice price of his vehicle. Although Mr M doesn't appear to have claimed on his policy, the cover and benefits were there if he did make a claim. So, Mr M knew how much the policy was going to cost and was able to shop around the market if he wasn't happy with the price being offered. Taking everything into account, I haven't seen anything that makes me think Arnold Clark treated Mr M unfairly, so I haven't upheld this part of the complaint.

I can see, in response to our investigator's view, company Y say the GAP policy was for a period of three years, yet the term on the finance agreement was for a period of 42 months. Company Y say, on this basis, the recommendation was unsuitable. The information shows a 'Key Facts' document was issued to Mr M and this said, "*You will not receive advice or a recommendation from us for…Guaranteed Asset Protection Insurance*…" and the VRI form also set out a statement in the customer declaration section which said, "*I understand that in purchasing this product a personal recommendation has not been made*." So, I'm not persuaded this was an advised sale – and Arnold Clark didn't provide a recommendation. Arnold Clark were required though to provide sufficient information to Mr M to enable him to make an informed decision on whether the policy was suitable for him. And, given the information set out in the 'Key Facts' document and VRI form, which included details about the duration of the policy, I'm satisfied sufficient information was provided to Mr M.

Deferred opt-in

Company Y says Mr M wasn't given at least two clear days between receiving key information about the GAP policy and then taking out the policy. The rules company Y are referring to here are the Insurance Conduct of Business Sourcebook ("ICOBS"), specifically ICOBS 6A.1.4R and ICOBS 6A.1.6R. This says, before a GAP contract is concluded, a firm must draw to the customer's attention, information including the total premium of the GAP contract, the features and benefits and any unusual exclusions or limitations, the duration of the policy, and whether it's optional. And, following this, the GAP contract cannot be concluded by the firm until at least two clear days have passed since the relevant information was provided.

The relevant rules company Y has referred to here didn't come into effect until 2015 – which was after the sale of the GAP policy to Mr M. So, it wouldn't be fair for me to measure Arnold Clark's actions against a set of rules which weren't in place at the time. So, I can't uphold this part of the complaint. I have though looked, more broadly, at the information Mr M was given at the time of the sale. The VRI form, which as I've already mentioned was signed and dated by Mr M, contained a customer declaration which said, "*I have received and read the Initial Disclosure Document (About Our Insurance Services), the VRI Information Brochure and the Summary of Cover, where my attention has been drawn to the 'Significant And Unusual Exclusions Or Limitations' section. I am satisfied that the product meets my demands and needs.*" I've seen these documents, and they do contain information about the policy's features and benefits, and any exclusions and limitations. So, I'm satisfied Mr M was aware about the key information relating to the GAP policy, which included the price, benefits and limitations and exclusions, at the time he bought the policy.

Commission disclosure

Company Y say the payment of commission relating to the sale of the GAP policy wasn't disclosed to Mr M. Company Y say Arnold Clark didn't disclose the existence or amount of commission. Company Y say Mr M wasn't therefore in a position to make an informed decision about the GAP policy. Company Y refer to Principle 7 of the FCA Principles for Business and say Arnold Clark should've communicated with Mr M in a way that was clear, fair and not misleading, and ensuring that Mr M was provided with all information to enable him to make an informed decision.

The relevant rules which require disclosure of commission, ICOBS 4.3, didn't come into effect until 2018 – which was after the sale of Mr M's policy. So, it wouldn't be fair for me to measure Arnold Clark's actions against a set of rules which weren't in place at the time.

I have though looked, more broadly, at whether Mr M was treated fairly. While there's no evidence Arnold Clark informed Mr M they would be earning commission, I'm not persuaded

this would've made a difference. I say this for a number of reasons. Firstly, it's standard practice within the insurance industry for a broker to charge commission for their services. The expected source of income for insurance brokers generally is the commission earned when selling/arranging/administering the insurance policy. And I think it's a fair starting position to expect that the insurance broker is paid for their service.

Secondly, I've also considered what, if anything, would likely have been different if Arnold Clark had confirmed they would earn commission. I'm not persuaded this would likely have led to Mr M finding an alternative broker. As I've mentioned, it's standard practice for brokers to earn commission, so that likely would've applied to any alternative brokers. Finally, the 'Key Facts' document explained Arnold Clark weren't providing a recommendation but would ask questions to narrow down the selection of products which they would provide details on and, "*You will then need to make your own choice about how to proceed*." So, Mr M was made aware he needed to make his own decision on whether to buy the policy – and he chose to buy it. So, I haven't seen any information which persuades me that Mr M was treated unfairly. And, looking at the information more broadly in terms of what was contained in the VRI form and the Key Facts document, and the way it was explained, I'm persuaded Arnold Clark provided information which was clear, fair and not misleading.

I've seen that company Y has said that the requirements in ICOBS should be read in accordance with section 140A of the Consumer Credit Act 1974 ("s140A CCA"). It has referred to a number of cases which it says supports its position. I've considered its arguments. The law relating to unfair relationships is described in section 140A and it says a court may make an order under s140 should it determine that the relationship between the creditor and the debtor is unfair.

However, Mr M's complaint isn't against the creditor (the creditor here is a completely separate firm that hasn't been complained about). The complaint before me is against the insurance broker and seller of the policy, Arnold Clark. I'm therefore satisfied that s140A CCA is not a relevant consideration in this complaint.

I wish to reassure Mr M and company Y I've read and considered everything they've sent in, so if I haven't mentioned a particular point or piece of evidence, it isn't because I haven't seen it or thought about it. It's just that I don't feel I need to reference it to explain my decision. This isn't intended as a discourtesy and is a reflection of the informal nature of our service.

My final decision

For the reasons I have given, it is my final decision that the complaint is not upheld.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 13 January 2026.

Paviter Dhaddy
Ombudsman