complaint

M is unhappy with Bluefin Insurance Services Limited and says it fraudulently benefited from the insurance arrangements it made for M.

background

I have issued two provisional decisions on this matter. Both parties have provided further information and arguments in response to those provisional decisions and having considered those, I am now in a position to issue my final decision on this matter.

I will summarise the background to the complaint and my provisional findings below:

M, a business, arranged its insurance through Bluefin for a number of years. M had four different policies running each year. From 1997 to 2008 the premiums for two of these policies (provided by the same insurer) were paid by monthly instalments, direct to the insurer under a finance arrangement. Bluefin was paid commission by all the insurers.

On renewal in 2009, Bluefin arranged finance for the premiums of all four policies, with an unrelated premium finance provider. M says that it was not given enough information to enable it to compare the options and work out the true cost of the new arrangement. M says that it was told the new arrangement would be at a lower interest rate and so would be cheaper overall; and it would be more convenient because it would only have to make one payment each month. However, this arrangement turned out to be more expensive for M.

Bluefin did not earn income from the original finance arrangement with the insurer, but it earned £185.23 from the new finance arrangement – i.e. £185.23 more than it would have done if M had continued with the previous arrangement. M says that the additional income which Bluefin received from the new finance arrangement created a conflict of interest for Bluefin, which Bluefin failed to disclose; and that Bluefin breached its fiduciary duties to M.

M said that Bluefin only offered the new finance arrangement in order to raise revenue. M wants to be reimbursed the additional cost it paid for this arrangement in 2009 but also wants Bluefin to pay M the commission received from all the insurers and the income received from the premium finance provider (i.e. any and all income Bluefin derived from the insurance transactions with M). M has provided several legal references, which it says are relevant and which provide that this is the appropriate outcome.

Bluefin said, among other things, that the move to the new arrangement was a ‘joint decision’ between M and Bluefin; that it made the arrangement in order to ‘streamline’ M’s insurance payments; and M knew the interest rate and what the instalments it was to pay were. M was also told that it could ask for details of commission received by Bluefin.

I issued a provisional decision in 2016 and another in August 2017. I considered that Bluefin had provided misleading information about the new finance arrangement to M and that M would not have chosen the new arrangement if both options had been presented to it. I considered that Bluefin had not acted fairly or reasonably and that Bluefin’s failure to disclose the conflict of interest in relation to the finance arrangement was a breach of its fiduciary duty.

In addition, Bluefin's Terms of Business with M stated that Bluefin would notify M of any conflicts of interest. As a result, I also thought that Bluefin's failure to disclose its conflict of interest in relation to the finance arrangement to M was a breach of contract.

To put this right, I provisionally decided in August 2017, that Bluefin should:

- pay M £185.23 (being the amount Bluefin received from the premium finance provider for setting up this arrangement) together with interest at 8% simple per annum from the date the premium finance arrangement was put in place to the date of reimbursement; and
- pay the sum of £200 for the inconvenience caused by its conduct in relation to the premium finance arrangement.

M's response to my provisional decision

M has not accepted my provisional decision. It says the award I proposed to make is not the correct redress. Essentially, it still maintains that the legal position is that Bluefin should not be permitted to keep any income derived from the transactions with M; I should make that award or at least a recommendation as such, otherwise my decision will not be complete and M will publicly challenge it.

M also wants me to remind Bluefin of its fiduciary obligations and all the legal consequences that flow from breach of those duties; and demand an apology and acknowledgement from Bluefin "that their ignorance exceeded their considerable greed in 2009".

I've summarised M's submissions below:

- where another potential fiduciary duty (say to an underwriter) exists, the duty to the client is paramount.
- The terms of business confirm that Bluefin was engaged as M's agent. This legal document clearly sets out the 'no-conflict rule', and alludes to other fiduciary duties. It is therefore beyond any doubt that this case is based first upon the law of agency and the remedies demanded by this branch of equity.
- Therefore, the courts would not be 'likely' to conclude Bluefin owed fiduciary duties (as I said in my provisional decision) they would be compelled to do so.
- The Insurance: Conduct of Business sourcebook ("ICOBS") sets out the rules that brokers such as Bluefin are required to adhere to when selling insurance. These are in addition to their fiduciary obligations.
- The ICOBS extracts I set out in my provisional decision (and which are also set out below) came into force in January 2008.
- Not only was there a conflict of interest, but Bluefin deliberately created that conflict with a direct counter-party to M, which makes this an even more serious breach of its various duties to M. Bluefin introduced the counter-party to the transaction and induced M to enter into a contract by clear misrepresentation and deceit. If M had discovered this at the time, M would have been entitled to rescind the contracts. That it was not discovered is of no matter here.
- In doing so, the % over-rider charged to M at the discretion of Bluefin was in fact 'self-dealing' with all the legal consequences that entails. M refers to a legal textbook. "Bowstead and Reynolds on Agency" and provided this quote:

"Sale to Principal. Similarly, an agent may not sell his own property to his principal without full and fair disclosure and obtaining the principal's informed consent, nor may he lease his own property to the principal without full disclosure. He must also prove that the transaction was fair. But however fair the transaction may be, it can still be set aside by the principal if there has not been full disclosure". There was no disclosure and there was no consent. Being a disloyal agent does not only mean concealing relevant information (which Bluefin did) but also not making full disclosure.

- M says the premium finance provider would also have known of this and may have therefore incurred a "*secondary liability as dishonest assistants in this affair."*
- The insurer's premium instalment plan renewal is sent direct to customers and Bluefin would only normally receive a copy. So M should have received this direct from the insurer in 2009. So to replace the existing arrangement with the premium finance facility, Bluefin had to suppress that renewal offer, otherwise M would never have agreed to the arrangement Bluefin wanted to set up for its own gain. M was prevented from making a comparison of the two options.
- M wants to know why the finance renewal with the insurer was not only withheld, but cancelled without any lawful authority or consent? It insists I state that I believe this was encouraged or endorsed by senior staff.
- Bluefin believed arranging finance not to be a regulated activity. But there was a conflict of interest anyway, which it was aware of.
- Even in its response to my provisional decision, Bluefin clings to the notion that this arrangement had value to M. But it matters not whether there was any harm to M (but there was – due to the increased finance rate from 8.9% annual percentage rate ("APR") to 23.4% APR). And we have only one missing piece of evidence (but that is not required) that Bluefin ordered this at a senior level solely to raise revenue.
- Bluefin has said that the advisers responsible no longer work there but this isn't true and the practice has continued.
- M has referred me to numerous court cases, which it says means the redress I proposed in my provisional decision is incorrect. I have summarised some of the relevant court cases below.
- Equity adopts a strongly prophylactic stance, it precludes any enquiry by the court about whether there has been any harm done to the consumer.
- There is also no requirement of any intention on the part of the agent in order to find that there has been a breach of fiduciary duty (although it is present in this case). But the "obvious and serial dishonesty of Bluefin throughout" does mean that the appropriate remedy is to remove from Bluefin all earnings made as a result of work done for M. Bluefin's breaches are so serious that these go to the root of the agency contract, becoming a repudiatory breach. This is superior to any Financial Conduct Authority ("FCA") regulation or requirement to deal openly or candidly with us or M.
- When the new finance was provided, it is clear that M was only told this would be at a 'reduced rate' (which was entirely misleading), so Bluefin was not providing full information on the new loan.
- It's irrelevant that this might be a common practice (as FCA's research suggests it is) as the "question of whether any usage or custom is unreasonable or unlawful is a question of law."
- Equity demands that no agent should profit in a situation such as this and that it is better for the enrichment of the principal. But allowances can occasionally be made for the time, expertise, and financial resources used by the agent, and if entirely appropriate, some profit element. Such allowances are, however, given sparingly.

- Bluefin must have realised by 2014 that this was a regulated activity; its terms of business evolved slowly to permit premium finance earnings. It would be expected that an honest agent realising its mistakes would deal openly and honestly with them. Given the ambulatory nature of the fiduciary relationship it should have contacted those affected clients. This is a most serious aggravating factor and only adds to the case against it.
- I've not grasped the "reverse burden of proof" that applies in agency situations, which means it is for Bluefin to show that the monies it received from the premium finance provider were "entirely proper" (not for M to show they weren't). This is illustrated in the cases of Murad v Al Saraj [2005] and Manley v Sartori [1927] and others.
- Bluefin has recently been fined over £4,000,000 (reduced for early payment) by the FCA for failing to properly inform its customers that it wasn't truly independent (as it was at the relevant time owned by an insurer which created a conflict of interest it should have disclosed) and in focusing on increasing its sole shareholder's (ie the insurer owner) business, rather than on offering the best arrangements for its customers. This illustrates the "malignant culture of greed" at Bluefin but also makes clear that, as an agent, Bluefin owes strict fiduciary duties to its customers.

Bluefin's response to my provisional decision

Bluefin accepts that the complaint should be upheld and that additional information should have been provided to M in order that it was in a position to make an informed decision about the relative benefits of the two payment options on offer. It therefore now accepts that it should reimburse any additional costs M paid as a result (plus interest at 8%). However, Bluefin doesn't accept the amount I said should be reimbursed in my provisional decision for the reasons set out below. It also accepts that a sum of £200 should be paid to reflect the inconvenience resulting from its conduct.

I've summarised Bluefin's submissions below:

- I said that it could have offered M the new premium finance arrangement without taking an income from the arrangement itself. Whilst it is correct that this would have been possible, putting such an arrangement in place does incur a cost to a broker and it is not unreasonable therefore that it earnt a proportionate income for undertaking that work.
- There are a number of benefits of a premium finance facility compared to paying by instalments direct with the insurer, including: having a single finance agreement and direct debit for a number of policies (which is more efficient and can result in lower banking costs); policy administration fees can be included in the arrangement (further improving cash flow); the broker has increased visibility of the loan (which can result in any issues being more promptly resolved) and a change of insurer does not require a new agreement nor a new direct debit mandate (so the facility is more flexible and offers greater consistency).There is therefore a value to its clients in it offering such a facility and it is standard within the industry that remuneration is received by brokers for this.
- I said that this introduces a potential conflict of interest which it accepts is correct. However, it says that the regulations require it to take "*reasonable steps*" to identify such conflicts. The Senior Management Arrangements, Systems and Controls ("SYSC") section of the FCA Handbook states it is required to "maintain and operate effective organisational and administrative arrangements" with a view to preventing the conflicts "giving rise to a material risk of damage".

- I suggested that it should have disclosed this conflict of interest, whereas SYSC 10.1.8 states that disclosure of a conflict is only required where it cannot ensure "with reasonable confidence" that the risk of damage to the interests of a client cannot be prevented.
- In order to address the possible conflict of interest in relation to M, it should have tried to match the lower (APR) interest rate that was available to M from the insurer. This would have meant that M could have enjoyed the benefits of the finance arrangement mentioned above, without incurring any additional cost - thus preventing the "risk of damage" (meaning that there is no requirement to disclose).
- If it had done this, and therefore M would have known the true cost and been given the opportunity to benefit from the premium finance arrangement at no extra cost to it, Bluefin says it’s likely M would have accepted the arrangement. This means that the detriment suffered is not therefore the full £185.23 received from the finance provider, but rather the difference between the finance charge that was actually applied and the lower cost, price-matched option.

Bluefin therefore asks that I reconsider the award I proposed to make, taking this into account.

our rules: determination of a complaint

The ombudsman service was set up under section 225 of the Financial Services and Markets Act 2000 to resolve disputes quickly and with minimum formality. In this decision I can look only at M’s individual case.

Complaints are to be determined by reference to what is, in my opinion as the ombudsman, fair and reasonable in all the circumstances of the case (section 228(2)). I am required to consider this complaint in accordance with our rules, which include:

DISP 3.6.4 R: In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account:
(1) relevant:
(a) law and regulations;
(b) regulators’ rules, guidance and standards;
(c) codes of practice; and
(2) (where appropriate) what he considers to have been good industry practice at the relevant time.

The law is one factor which I have to take into account, but I am not required to make a decision which is in accordance with the law. If I don’t think that it would be fair and reasonable to follow the law, I am free to reach a different decision, but I will explain my reasons.

relevant considerations

I have carefully considered the applicable law, including the law of agency, contract and misrepresentation.

In particular, M has made submissions about the relevant law which applies to this complaint, referring in particular to the cases of <u>Imageview v Jack</u> [2009] EWCA Civ 63, <u>Andrews v Ramsey & Co</u> [1903] 2 KB 635, and the recent case of <u>Ivey v Genting</u> [2017] UKSC 67, among others.

In Andrews v Ramsey & Co, an agent acting for a seller of a house had accepted a payment from the buyer. The judge held that the agent was not entitled to recover his commission from the seller and noted that it was impossible to say what the seller had lost through the agent's misconduct. He stated that: "*A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission. In my opinion, if an agent directly or indirectly colludes with the other side, and so acts in opposition to the interest of his principal, he is not entitled to any commission. That is, I think, supported both by authority and on principle; but if, as is suggested, there is no authority directly bearing on the question, I think that the sooner such an authority is made the better.*" M says Bluefin deliberately and repeatedly betrayed M in connection with the sole subject matter of the agency and at the one point in the relationship where Bluefin would be remunerated, namely the renewal (placing). However, I note that the case involves the provision of a single service (assistance with the sale of the house).

Imageview v Jack [2009] EWCA Civ 63. In this case, the Court of Appeal decided that a football agent breached its fiduciary duties to its footballer client (the principal) by making a secret deal on the side which benefited the agent. This secret deal created a real conflict of interest between the agent and its client. The Court of Appeal noted that it did not matter whether the agent thought its behaviour was wrong – what mattered was the breach of duty. The agent therefore forfeited the commission which the client had paid (and its right to future commission) and was ordered to pay the money made from the secret deal to the client, without being given any finance for the work done.

The decision in Imageview has been followed and considered in other cases. In the Supreme Court case of FHR European Ventures LLP and others v Cedar Capital Partners LLC [2014] UKSC 45, the Supreme Court said that "*The principal's right to seek an account undoubtedly gives him a right to equitable compensation in respect of the bribe or secret commission, which is the quantum of that bribe or commission (subject to any permissible deduction in favour of the agent—eg for expenses incurred).*"

In the Court of Appeal case of Crocs Europe BV v Craig Lee Anderson & Anor trading as Spectrum Agencies (a partnership) [2012] EWCA Civ 1400, which considered whether a breach of fiduciary duty entitled a principal to terminate the contract of agency, the Court of Appeal held that termination was not justified, stating that "*The remedial consequences of the breaches of duty depend not only on the nature of the duty owed but also on the factual circumstances in which the particular breach occurred and the intentions of the parties, as expressed or inferred, in relation to the contract. It would be an odd principle that separated the consequences of and available remedies for the breach from the surrounding circumstances of the particular case.*"

M has also referred to a number of other cases that it says support the remedy it has asked for, including:

Winter v Irish Life Assurance Plc. [1995] 2 Lloyd's Rep. 274: this was a case where insurers sought to avoid a life insurance policy for material non-disclosure of the insured's medical condition. There was a dispute over whether the brokers were acting as agents for the insured or the insurers. I don't think this case is relevant here because there is no dispute that Bluefin was M's agent.

<u>Lazarus Estate v Beazley [1956] 1 QB 702</u>: this decision related to a dispute between a landlord and tenant about repairs. The tenant alleged that the landlord had not carried out all the repairs claimed. The issue for the court was whether the tenant could claim fraud, even though a statutory deadline had expired. The court stated that: *"No court in this land will allow a person to keep an advantage which he had obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand it if has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever..."*

In <u>Keech v Sandford [1726] EWHC (Ch)</u>: the court was asked to consider the law of trust and fiduciary duties of a trustee. The court determined that a trustee owes a strict duty of loyalty and should not benefit from his role as trustee (even in a case where the particular asset was not available to the beneficiary of the trust).

The case of <u>Bray v Ford</u> [1896] A.C. 44 was a defamation case but also looked at conflicts of interest: "*It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services.*"

In <u>Fullwood v Hurley</u> [1928] 1 KB 498 an estate agent acting on behalf of a vendor, claimed commissions from the vendor and the purchaser, without their knowledge or consent. The court held that agents must not accept commission from both parties unless it was done with the full knowledge and agreement of both parties.

In <u>O'Sullivan v Management Agency and Music Ltd</u> [1985] QB 428, Mr O'Sullivan had entered into agreements as a young artist but claimed he had been under undue influence when doing so, as he had trusted his manager and was inexperienced in such matters. The court held that there was a fiduciary duty owed to Mr O'Sullivan and the agreements had been obtained by undue influence. As a result, the defendant companies had to account for profits, but were allowed to retain a reasonable payment for services actually rendered. M says this case turned on *"the most unusual circumstances [and] provides the exception that indicates the likely rule, (if there be one). Allowances when (sparingly) given are more likely where the agent has acted in good faith or some compartmentalisation of transactions."*

In <u>Brickenden v London Loans and Savings Company of Canada</u> [1934] 3 DLR 465 the court said that where a party with a fiduciary duty fails to disclose a material fact in connection with the transaction, it cannot maintain that disclosure would not have altered the decision to proceed with the transaction. "*Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken, is not relevant."*

In Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134, the directors of a company had breached their fiduciary duties by buying and selling shares in a subsidiary of the company. They were ordered to repay their profits. It was stated that *"The rule of equity which insists upon those, who by use of fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or act as he did for the benefit for the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest or well-intentioned, cannot escape the risk of being called to account."* M says the position is the same in this case.

The case of Ivey v Genting has changed the test for dishonesty in criminal proceedings, so that it is now the same as the civil test (which requires the court to determine the individual's actual knowledge or belief as to the facts and then decide whether the individual was honest, by the standard of ordinary decent people (an objective standard)). M says that Bluefin has been deliberately dishonest throughout and that the Ivey *case "closes off any previously possible avenues for not clearly stating that Bluefin's actions have been and are still dishonest"*. M also says it means that I am obliged to follow the *'full forfeiture'* rule (i.e. require Bluefin to forfeit all income derived from the tainted transaction) even if only as a recommendation.

I've also considered some other cases. In some cases, agents have been allowed to retain fees or commission even though they have breached their fiduciary duties. For example:

- in the case of Accidia Foundation v Simon C Dickinson Limited [2010] EWHC 3058 (Ch) an art dealer was required to account for a secret commission which it had received, but was allowed to retain part of the commission, to reflect what the principal would have been prepared to pay. In that case, the art dealer did not have direct contact with the principal, so it did not know that the principal was unaware of the secret commission. M says this case is inconsistent *"with equity's prophylactic objective"* but there was no dishonesty by the agent and the allowance allowed was less than originally contemplated.
- In the case of Stupples v Stupples & Co (High Wycombe) Ltd [2012] EWHC 1226 (Ch) an estate agent who was acting as a consultant to his former firm breached his fiduciary duty when acting on certain projects. However, the agent was allowed to retain fees and commission paid to him for other projects where there had been no breach of duty. M says that the dishonesty shown by Bluefin is greater than in this case and in Stupples the agent wasn't able to keep the remuneration linked with the dishonesty.
- In the case of Bank of Ireland v Jaffery [2012] EWHC 1377 (Ch) a senior employee who had acted in breach of fiduciary duty was allowed to retain his salary and bonuses, which were paid for his work generally (the employer principal instead received equitable compensation). M says there was a distinction between the investigated transactions and Mr Jaffery's general service to his employer and, given this, it was considered disproportionate to divest him of all salary and bonuses. But this is different from the law of agency.

Snell's Equity states that:

> *"If a fiduciary acts dishonestly he will forfeit his right to fees paid or payable by the principal (as distinct from sums paid by a third party, such as a briber). He will also forfeit his right to such fees if he takes a secret profit from a third party which is directly related to performance of the duties in respect of which the fees were payable by the principal, even if the principal has benefited from the fiduciary's performance of those duties. However, a fiduciary's fees may not be forfeit if the betrayal of trust has not been in respect of the entire subject matter of the fiduciary relationship and where forfeiture would be disproportionate and inequitable.*
>
> *A fiduciary will also lose his or her right to fees payable by the principal if the fiduciary's breach of duty is so grave that there has effectively been no performance at all, on the basis of total failure of consideration."* (33rd edition, paragraph 7-062)
>
> (M is the principal in this case.)

The rules and regulations which applied to Bluefin are also relevant and I have considered them. The FCA Handbook sets out the Principles which apply to regulated businesses, including Bluefin. The Principles apply to regulated activities and, in relation to insurance mediation activity, also apply to ancillary activities. Among other things, the Principles require a business to: conduct its business with integrity; pay due regard to the interests of its customers and treat them fairly; communicate information to customers in a way which is clear, fair and not misleading; and manage conflicts of interest between itself and its customers fairly.

There are specific rules which apply to the sale of insurance products; these rules are set out in the Insurance: Conduct of Business sourcebook ("ICOBS"). The rules in force in 2009 (which came into force in 2008, and which I have referred to because they were in force at the time of the events complained of) include:

ICOBS 4.4.1R: An insurance intermediary must, on a commercial customer's request, promptly disclose the commission that it and any associate receives in connection with a policy.

ICOBS 4.4.2G: An insurance intermediary should include all forms of remuneration from any arrangements it may have. This includes arrangements for sharing profits, for payments relating to the volume of sales, and for payments from premium finance companies in connection with arranging finance.

ICOBS 6.1.5R: A firm must take reasonable steps to ensure a customer is given appropriate information about a policy in good time and in a comprehensible form so that the customer can make an informed decision about the arrangements proposed.

I have also reviewed the FCA thematic reviews and factsheet provided by M, but I note that these documents were published from March 2013 onwards, but the events M is complaining about took place in 2009. I have also reviewed industry guidance which was supplied to me by M, and two "Dear CEO" letters written by the Financial Services Authority ("FSA") in November 2005 and December 2006 which were referred to in the industry guidance. The November 2005 "Dear CEO" letter related to the need to identify and manage conflicts of interest effectively and noted the risk of conflicts of interest in respect of premium finance arrangements.

I have considered Bluefin's Terms of Business. The relevant terms include:

"*As an intermediary and your agent we owe various duties to you. However, in certain circumstances we may act for and owe duties of care to other parties such as insurers… We will advise you if these circumstances occur so you will be aware of any possible conflict of interest and to obtain your advices as to how you would wish us to proceed...*"

Bluefin undertakes to explain all the main features of the products and services offered as well as the basis on which it has provided information and advice. It may recommend preferred suppliers "*in situations where it is appropriate for our customers*" (but will confirm if this applies).

"*Prior to the conclusion of each insurance contract or upon renewal we will remind you of your right to be advised of the level of commission which we receive from insurers. You are entitled at any time to request information regarding any commission which we may have received as a result of placing your insurance business.*" (This term was in bold.)

"*We are usually remunerated by commission from your insurer. You may be offered the opportunity to pay a fee partly or wholly in lieu of commission… We may also receive account-based remuneration from some providers… However, it is our policy to place business with an insurer solely on the principle of putting the customer's interests first. You are entitled at any time to request information regarding any commission which we may have received as a result of placing your insurance business*".

The terms do not refer to Bluefin receiving commission or income from a finance arrangement.

M says that I should also consider section 17 of the Theft Act 1968 and sections 3 and 4 of the Fraud Act 2006. However, I don't think these Acts are relevant to my consideration of the complaint because they create criminal offences – which are a matter for law enforcement. In my opinion, I don't need to decide whether Bluefin might have committed any criminal offences in order to fairly resolve this complaint.

Bluefin was recently fined £4,023,800 by the FCA for having inadequate systems and controls relating to conflicts of interest and failing to provide information to its customers about Bluefin's independence in a way that was clear, fair and not misleading. M considers that the fine is circumstantial evidence of the culture at Bluefin and its practices and wants me to comment on Bluefin's behaviour generally. The fine relates to the period from 9 March 2011 to 31 December 2014 and does not relate to conflicts relating to premium finance. The events in M's case took place in January and February 2009, two years before the events covered by the FCA's final decision. I have reviewed the decision fining Bluefin, but it is not my role to make findings on what Bluefin was (or was not doing) in general: my decision only relates to the individual complaint which I am considering.

my findings

I've considered all the available evidence and arguments again to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I have decided to uphold the complaint for the same reasons as set out in my provisional decisions. I will set these out again.

what happened when the policies were renewed in 2009?

Bluefin received the renewal terms from the original insurer and says this said: "*Premium payment. The premium may be paid via our instalment scheme with a service charge added at a rate of 8%."*

Bluefin has commented that the insurer has "*not clarified if this is the interest rate or the APR rate. You will note that in the customer's communication with you (FOS) he suggests that [the insurer] …had an APR of 8.9 – but this is not clear from the correspondence received".*

This demonstrates to me that Bluefin didn't carry out a proper comparison of the cost to M of the two alternative arrangements and if it wasn't clear about the APR offered by the insurer, it couldn't have provided clear information about the two options to M.

The insurer has provided a letter confirming it would have offered renewal in 2009 on the same basis as it had for the previous years, i.e at 8.9% over 11 monthly instalments. The letter also confirms that the instruction to cancel the agreement came verbally from Bluefin.

The arrangement offered through the separate premium finance company had an APR of 23.2% and a service charge of 6.35% for using direct debit.

The renewal instruction taken by Bluefin says *"it is assumed standard commission unless stated otherwise"* and finance charge is 6.35%. It doesn't mention the APR.

M paid 10 monthly instalments of £505.10 to the premium finance company. As stated, the APR was 23.2% and total charge for finance was £301.50.

There's a file note that M called Bluefin to query the arrangement on 16 March 2009 (not long after renewal) as the £505.10 per month instalment was *"a lot more than the … agreement last year. I advised that as all the policies are on the one agreement and over 10 months it may seem more, but I did check the DD agreement for last year with … [the insurer] to compare, and the APR was 8.9% over 11 months – instalments were 1 of £746.20 and then 10 x £373.10 [ie a total of £4,477.20] and that was just for the motor trade policy, so [this]… is better for the client this year…said that was fine and thanked me for looking into this".*

However, the agreement for the last year (2008) quoted in the call above, was for two policies, not just the motor trade policy. The total cost to M of £4,477.20 for that year was made up of premium of £4,305 (for the two policies with the same insurer) and interest/finance facility charges of £172.20. So it was incorrect to say the amount of £4,477.20 paid to the insurer in 2008 was for just one policy.

In response to the adjudicator in January 2016, Bluefin said that the difference between the finance charges in 2008 (£172.20) and 2009 (£301.50) can be accounted for by the fact that more policies were paid by instalments in 2009 and the premiums had increased.

This isn't entirely correct either. From the information received from the insurer, I've been able to calculate exactly what the difference was between the finance arrangement with the insurer and the new finance arrangement: M paid £301.59 in finance charges under the new arrangement recommended by Bluefin; the insurer has confirmed that its finance charge would have been £176.44 for the same year; therefore M paid £125.15 more than it would have done if his arrangements had been kept the same as the previous years.

The increased finance charge is because the premium finance arrangement made was subject to a much higher rate of interest and all four premiums were added to the finance arrangement. Overall, the arrangement set up for M cost it more than the instalment arrangement available from the insurer. But it also resulted in Bluefin receiving an extra £185.23 in payment from the premium finance company, in addition to the commission received from the insurers for each of the four policies. The commission from the insurers was similar to the amounts it had earned in previous years.

I therefore think it was misleading to say the rate was 6.32% pa, as this wasn't the actual charge to M for the premium finance arrangement and it was certainly misleading to say that M would be paying less in interest than if it had continued with the finance arrangement available with his insurer.

Bluefin says that M knew all the details of the arrangement made, including the charge for finance. I can see that the finance company sent out full details of this after the agreement was set up but I can't see that these details were given to M before that. The only information given before that time was that interest of 6.32% pa would apply.

And shortly after M received the details from the finance company it phoned Bluefin to query the arrangement because it was more expensive than previously. It was then told it was better than the alternative but – as set out above - I think this wasn't correct.

So M wasn't given sufficiently clear information about the arrangement, either before it was made or afterwards. It relied on Bluefin's advice when renewing the policies and again in the phone call in March 2009 but I think it was given incorrect information. Therefore, although M signed the agreement, it did so based on the misleading information given to it by Bluefin.

Bluefin therefore failed in its duty to provide M with information that was clear, fair and not misleading, as it was required to do, so that M could make an informed choice about the insurance it was buying (and the finance arrangement set up ancillary to that); and it failed to take adequate steps to ensure that the arrangement it recommended was suitable for M's needs. I am pleased that it has now agreed that it did not provide M with all the information it should have done at that time.

There is also no convincing evidence to support Bluefin's initial suggestion that M was willing to pay more for the convenience of only making one premium payment each month. M queried the costs shortly after the arrangement started and there's no record of any discussion about it wanting to 'streamline' its payments.

Bluefin's Terms of Business state that Bluefin was M's agent and owed duties to it. The Terms of Business also stated that Bluefin would put M's interests first when placing insurance for it. In these particular circumstances, I think that a court is likely to conclude that Bluefin owed fiduciary duties to M, including an obligation of loyalty, an obligation not to put itself in a position where its interests and duty conflicted, and an obligation not to act during the agency for its own benefit without M's informed consent. I therefore agree with M that Bluefin's primary duty was to M.

In my opinion, Bluefin had a conflict of interest in relation to the finance arrangement because it was receiving income from the finance provider. This was not disclosed in the Terms of Business and there is no evidence that Bluefin told M about it. In my opinion, Bluefin should have disclosed the income which it was going to make from the finance arrangement. Bluefin has said that if it had 'managed' that conflict, by matching the APR available from the insurer then it wouldn't have needed to disclose the income it was receiving and the conflict of interest. But it didn't match it, instead it told M that this arrangement was cheaper for M, when it knew it wasn't.

I think Bluefin's failure to disclose the conflict of interest in relation to the finance arrangement was a breach of fiduciary duty.

But in any event, Bluefin's Terms of Business stated that Bluefin would notify M of any conflicts of interest. As a result, I think that Bluefin's failure to disclose its conflict of interest in relation to the finance arrangement to M was also a breach of contract. I also think that it was a breach of Bluefin's fiduciary duties. Therefore I still consider it should have disclosed this to M at the time.

As I have explained above, Bluefin was also required to treat its customers fairly. I think Bluefin should have explained the conflict of interest so that M could make an informed decision about its finance arrangements and that its failure to do so meant that it did not treat M fairly.

M wants me to find out why Bluefin had done this and whether it was a wide-spread practice. However, I don't think that's necessary in order to fairly determine M's individual complaint, which is all I have the power to look at.

If I determine that a business has acted unfairly or unreasonably, I can make an award in favour of the consumer of what we consider to be fair compensation for loss or damage suffered by the complainant.

I can't say exactly what would have happened if Bluefin had disclosed its conflict of interest. If Bluefin had done so, I think it's more likely than not that M would have rejected the new finance arrangement. While some consumers/businesses may pay a premium for convenience, I'm not convinced this would have been the case here. I consider it is more likely than not that M would have remained with the arrangements it'd previously had with its insurer, if it had been presented with all the information. As stated, it queried the increased costs and it didn't continue the premium finance arrangement after 2009.

Bluefin could have offered M the new premium finance arrangement without taking an income from the arrangement itself. This does appear to have been possible for Bluefin to do. Bluefin has said it isn't reasonable to expect a broker to offer such an arrangement without deriving an income from it but, if it were treating M fairly and in accordance with fiduciary duties to it, I consider that it should have done (unless it disclosed the arrangements and obtained M's informed consent). This doesn't mean that Bluefin is expected to place insurance for nothing because it still would have received commission from the insurers.

This would potentially mean the new arrangement would have been cheaper for M by £185.23. I don't consider it fair or reasonable for Bluefin to keep the income from the premium finance arrangement made in direct conflict with its primary fiduciary duty to M.

In my opinion, therefore I think that £185.23 would be fair compensation for M.

Bluefin also says that M is likely to have agreed to the new premium finance arrangement, if it had been at no extra cost to it. This may be the case, although I can also see reasons why a customer would not want a premium finance arrangement with a third party.

M has also asked that it be compensated for the fact it didn't have the usual instalment arrangement direct with the insurer in 2010. I can see that it paid the premiums for all its insurance in one go at renewal in 2010, rather than take the finance arrangement arranged in 2009, or the previous years. I'm satisfied that it probably would have continued with the finance arrangement with the insurer if it had known that it was still available, so I do think some compensation is warranted for any inconvenience this caused. There's no evidence of any financial loss this caused.

I also consider that some inconvenience was caused to M by the finance arrangement that would otherwise have been avoided. Overall, I think that the sum of £200 is a fair and reasonable amount to reflect the inconvenience caused by the finance arrangement.

M has now also said it wants compensation for the time spent on this matter but it has been represented and there's no evidence of any charge for that. M says it has been misled through the complaint process but there's no evidence of any other loss (in addition to that set out above). So I still think the sum of £200 is adequate to reflect the inconvenience caused to M by this matter, including having to make a one-off payment for all of its insurance in 2010.

M is still adamant that a '*dishonest'* agent shouldn't profit at all from any deception of his client and should repay *any* earnings received as a result of the transaction done on behalf of the client (even monies received from another party). M has said that this is the *"inevitable remedy"*. I have carefully considered whether this is a remedy which I should award. As I have explained above, there are circumstances where a court will allow an agent to retain some element of its remuneration, even if the agent has deliberately breached its duty to the principal. In any event, I don't have to award what a court would award and my opinion on what would be fair compensation to M is set out here.

M's complaint and Bluefin's breach of duty related to the finance arrangements, not to the renewal of the insurance. I therefore don't think that Bluefin's breach of duty related to the whole of its relationship with M. Bluefin would still have received the same amount of commission that it did from the insurers in 2009, regardless of which finance arrangement it had arranged for M. M was aware that Bluefin might receive this commission from the insurers and had agreed to Bluefin receiving it; by contrast, it was not aware of the income which Bluefin received from the finance arrangement and had not agreed to this. I therefore don't think it would be proportionate to order Bluefin to pay its commission for the renewal of the insurance policies to M.

The award I'm making is the amount that Bluefin received from the premium finance provider. And it would have received the commission from the insurers whatever finance arrangement was made. I therefore think that my award gives M fair compensation overall.

Finally, M says that our technical helpdesk had not ruled out the remedy that it seeks and so one of us must be wrong. The helpdesk gives information on our approach to consumers and businesses. It made clear that there would need to be proper consideration of the case but it wouldn't rule out the remedy M was seeking. I don't agree that this can reasonably be interpreted as meaning that M could expect a final decision giving that remedy.

my final decision

I uphold this complaint against Bluefin Insurance Services Limited and require it to:

- pay M £185.23, together with interest at 8% simple per annum from the date the premium finance arrangement was put in place to the date of reimbursement; and
- pay M the sum of £200 for the inconvenience caused by its conduct in relation to the premium finance arrangement.

Under the rules of the Financial Ombudsman Service, I'm required to ask M to accept or reject my decision before 5 February 2018.

Harriet McCarthy
ombudsman