complaint

Miss C bought a car from Chapelhouse Trading Ltd, a car dealership. She says when she tried to cancel some extras including a warranty she couldn't, and she was misled about how big her monthly payments would be.

background

I set out my provisional view on whether Miss C's complaint was inside this service's jurisdiction and whether her complaint should be upheld or not in October 2017 as follows;

In January 2016 Miss C went to Chapelhouse to trade in her old car and buy a new one. She also agreed to some extras - a service/MOT pack and warranty. She paid a £100 deposit and Chapelhouse arranged for about £5,500 in finance for Miss C through a third party finance company (R).

Miss C contacted Chapelhouse shortly afterward. She said she didn't need the extras and wanted to cancel them, with a full refund. And when she got the finance agreement through the post she contacted Chapelhouse to say the monthly payments were bigger than she'd been told they'd be.

Chapelhouse didn't uphold Miss C's complaint. It said it wasn't able to cancel the extras without Miss C incurring a fee. And it said the monthly payment amount was correct because she'd put down only a small deposit.

Miss C remained unhappy so she brought her complaint to us.

Our adjudicator looked into things for her. He partly upheld the complaint. He explained to Chapelhouse that he thought that the warranty should have been refunded as Miss C requested cancellation within 14 days of the policy starting. But he thought that her monthly payment was reasonable. The payments had increased as Miss C had put down a smaller deposit than had already been agreed.

But Chapelhouse said that the product Miss C held was a warranty and wasn't a contract of insurance and was therefore outside this service's jurisdiction. One of our adjudicators wrote to Chapelhouse and set out his opinion that this complaint is one we could consider. In summary he said:

- *Miss C's Chapelhouse Protect Gold Warranty was a contract of insurance;*
- *By arranging and carrying out a contract of insurance, Chapelhouse was undertaking a regulated activity;*
- *Miss C's complaint relates to an alleged act or omission by Chapelhouse carrying out a contract of insurance.*

Chapelhouse's representative didn't agree with the adjudicator. In summary it said that Miss C's warranty agreement was a dealer backed warranty which in effect crystallised its existing responsibilities. It ensured the car was handed over defect free. It highlighted that that this service's interpretation of PERG was too narrow.

In relation to the sale of the warranty Chapelhouse said that it had done all it could to get Miss C the best deal it could for the car and finance. And that it couldn't change the finance agreement once it was in place. It did try and mediate things with Miss C and find some middle ground but couldn't. But it still didn't think the warranty should be removed.

As Chapelhouse didn't agree that this service can look into this complaint or that it should be upheld the matter has been passed to me to decide.

my provisional findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. It is my intention to partly uphold Miss C's complaint and I'm satisfied that this service can look into this complaint. Let me explain why.

jurisdiction

a. relevant considerations

Our powers to consider complaints are set out in the Financial Services and Markets Act 2000 (FSMA) and in rules, known as the Dispute Resolution Rules (DISP) written by the Financial Conduct Authority (FCA) in accordance with the powers it derives from FSMA. These form part of the FCA Handbook.

DISP 2.3.1R says:

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:

> *(1) regulated activities…*
>
> *or any ancillary activities, such as advice, carried on by a firm in connection with them.*

Both at the time the warranty was sold in January 2016 and at the time of the complaint Chapelhouse was an authorised person and therefore a firm for the purposes of our Compulsory Jurisdiction.

It is not necessary for a firm to have permission to undertake the specific regulated activity that is the subject of a complaint. The only requirements are that the firm is an authorised person and that it has, in fact, carried on the activity complained about.

'Effecting' and 'Carrying Out' contracts of insurance are defined as regulated activities as specified in part II of the Financial Services and Markets Act (Regulated Activities) Order 2001 Statutory Instrument 2001/544 (RAO).

According to article 3(1) RAO, "contract of insurance" includes any long-term insurance or general insurance contract falling in Schedule 1 of the RAO.

Schedule 1 includes contracts of insurance against loss or damage to vehicles and contracts of insurance against miscellaneous financial loss, including loss attributable to a person incurring unforeseen expense.

Clearly Chapelhouse entered into the warranty agreement with Miss C (and therefore 'effected' the contract). As her complaint relates to an alleged act or omission by Chapelhouse in respect of this contract, I am of the view this complaint relates to the 'effecting and/or carrying out' of the contract in question.

The key question I have to consider is whether the contract was a 'contract of insurance' or simply a 'service' or 'repair' contract.

The distinction is an important one because, in broad terms, we can often consider complaints under our compulsory jurisdiction made against FCA-regulated firms about contracts of insurance, but, in most cases, we cannot consider complaints about service contracts.

There have been a number of judicial decisions on whether specific contracts were contracts of insurance but none have provided a comprehensive definition that can be applied when considering our jurisdiction. I will refer to relevant case law when setting out my findings on particular points below.

In ***Card Protection Plan v Customs and Excise Commissioners (Case C-349/96) [1992] 2 AC 601****, the Court of Justice of the European Union held that the 'essentials' of an insurance transaction are:*

"that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded.

It is not essential that the service the insurer has undertaken to provide in the event of loss consists in the payment of a sum of money, as that service may also take the form of the provision of assistance in cash or in kind ...."

In ***Prudential v Commissioners of Inland Revenue [1904] 2 KB 658****, the High Court issued helpful criteria to determine whether a contract is a contract of insurance:*

1. "A contract of insurance must be a contract which for some consideration, usually but not necessarily in periodic payments called premiums, you secure … some benefit, usually but not necessarily the payment of some money, upon the happening of some event.

2. The event should be one which involves some amount of uncertainty ... either uncertainty whether the event will ever happen or not, or if the event is one which must happen at some time, there must be uncertainty as to the time at which it will happen.

3. The insurance must be against something ... that is to say, the uncertain event must be adverse to the interest of the assured."

The Perimeter Guidance Manual [PERG] contained within the FCA Handbook provides guidance to the businesses it regulates about the circumstances in which FCA considers authorisation is required, including guidance on the activities which are regulated under FSMA.

It advises:

PERG 6.3.3G

'The courts have not fully defined the common law meaning of 'insurance' and' insurance business', since they have, on the whole, confined their decisions to the facts before them. They have, however, given useful guidance in the form of descriptions of contracts of insurance.'

PERG 6.3.4G

'The best established of these descriptions appears in the case of Prudential v. Commissioners of Inland Revenue [1904] 2 KB 658. This case, read with a number of later cases, treats as insurance any enforceable contract under which a 'provider' undertakes:

(1) in consideration of one or more payments

(2) to pay money or provide a corresponding benefit (including in some cases services to be paid for by the provider) to a 'recipient';

(3) in response to a defined event the occurrence of which is uncertain (either as to when it will occur or as to whether it will occur at all) and adverse to the interests of the recipient.'

*PERG 6.5.1G advises: "any contracts that fall outside the description in 6.3.4G which is derived from the **Prudential** case are unlikely to be contracts of insurance".*

*I recognise that PERG is the regulator's view of the law and that is something I have kept in mind throughout. However, in my view PERG 6.3.4G helpfully summarises the description of insurance contracts in the **Prudential** case, and identifies characteristics common to contracts of insurance.*

So, applying these tests, I have considered whether the Chapelhouse Protect Gold warranty contract purchased by Miss C, alongside the purchase of her car, in January 2016 contains the features of a contract of insurance.

b. did Chapelhouse Trading Limited 'effect' or 'carry out' a contract of insurance?

I have been provided with a copy of the Chapelhouse Protect Gold Warranty terms and conditions that applied to the arrangement. Having reviewed the agreement, I agree with the adjudicator that Miss C's warranty has all of the features of a contract of insurance. So I will adopt here much of what the adjudicator has said in that regard.

…in consideration of one or more payments…

I have seen a copy of the Chapelhouse Protect Gold warranty certificate which sets out the details of the policy. This confirms that the warranty cost over £600 so it's clear that the warranty had a monetary value. So I'm satisfied that there was a consideration.

…to pay money or provide a corresponding benefit to a recipient…

The warranty agreement provided cover 'against mechanical breakdown of certain parts (see attached listing) for a period of 36 Month'.

*The arrangement does so by providing for repairs to be made by a nominated repairer or, in some circumstances, to refund the customer for the costs of covered repairs. Logically, and following **DTI v St Christopher Motorists' Club [1973]**, these benefits seem to amount to 'money or a corresponding benefit'.*

*Further, in **Digital Satellite Warranty Cover Ltd and another v Financial Services Authority [2013] UKSC 7**, the Supreme Court approved the reasoning at first instance: "if the equipment does break down or malfunction, then it is inevitable that the insured will need to incur cost if he is to have a set of working equipment: he will either have to pay for its repair, or he will have to replace it". That seems to apply equally here.*

Overall, I am satisfied that for the consideration, some benefits were secured.

… in response to a defined event …

Cover is provided for a specified list of components damaged due to mechanical breakdown. The policy says it will 'cover parts and labour costs including VAT up to a maximum limit of £500 per claim with no limit on the number of claims made within the period of cover'. So I am satisfied that mechanical breakdown would seem to be a specific and defined event.

Further, the obligation to provide the benefits is binding. Although some of the benefits are conditional on certain circumstances being met, they are not discretionary.

As such the benefits are payable upon the happening of a defined event.

…the occurrence of which is uncertain…

The contract states that the warranty would reimburse Miss C for the cost of repair or replacement 'against mechanical breakdown of certain parts (see attached listing) for a period of 36 Months' and the attached listing outlines the cover provided. So clearly it provides for events the occurrence of which is uncertain and I am of the view that this means cover would not be available where a fault already existed and a breakdown (and therefore a claim) was certain.

…and adverse to the interests of the recipient.

A breakdown will mean that a vehicle is not functioning as it should and the customer would either have to accept that (which would be inconvenient given that the cover in question relates to a car), or repair or replace the failed components (incurring cost). It is self-evident in this case that Miss C has an 'insurable interest' in her own vehicle and, clearly, a breakdown would be adverse to her interests.

Taking all of the above into account, I agree with the adjudicator that Miss C's warranty agreement has all of the features of a contract of insurance. Indeed it is clear that was Chapelhouse's understanding of the contract as it applied insurance tax to the policy (and presumably paid this) and referred to the policy being underwritten in text communication with Miss C.

c. Chapelhouse Trading Limited further submissions regarding jurisdiction

In response to the adjudicator's opinion, Chapelhouse's representatives said that the warranty is a dealer warranty. It suggests that the warranty was simply to cover any unforeseen problems or defects with the vehicle that require rectification.

Chapelhouse highlighted PERG 6.7.17G in its representations and it is one of the few examples given by the FCA as regards motor warranty schemes administered by motor dealers.

However, when referring to these examples PERG 6.7.17G advises: "…Provided that, in each case, the FCA is satisfied that the obligations assumed by the dealer are not significantly more extensive in content, scope or duration that a dealer's usual obligations as to the quality of motor vehicles of that kind, the FCA would not usually classify the contracts embodying these transactions as contracts of insurance."

I should note here whilst PERG is a helpful guidance from the regulator, whether a contract is a contract of insurance is ultimately a question of law. PERG 6.4G also makes clear that in deciding whether authorisation is required "The FCA will consider each case on its facts and on its merits".

However, although PERG represents guidance to firms about the circumstances in which authorisation is required, I have taken into account FCA's comments when considering the proper application of our jurisdiction rules. I have considered the question of whether Miss C's warranty merely crystallises an existing responsibility on Chapelhouse or whether it is 'significantly more extensive in content, scope or duration'.

Chapelhouse, as the supplier of the car to which the warranty agreement applies, did have some responsibilities to its customer in relation to that supply.

Miss C bought the car in 2016. I accept Chapelhouse's point that it would be covered under the Consumer Rights Act 2015. It contains implied terms about the quality or fitness of the goods supplied. There is an implied term that the goods supplied under the contract are of satisfactory quality. And for the purposes of the Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

I am satisfied that Chapelhouse obligations were, broadly, to provide a car that was of satisfactory quality at the time it was supplied. And the warranty does, to some extent meet similar objectives – it ensures that a customer continues to have a car that is free of certain specified defects for a set period of time.

However, Miss C's agreement provided a certainty as to what she could expect from Chapelhouse. So long as the terms and conditions were satisfied, she did not have to show that the car did not conform to the contract at the time of sale. Further, the benefits under the warranty were available even if the fault clearly occurred after the sale.

I also note that Chapelhouse's agent has said that it requested insurance premium tax in error and has offered to refund this. Chapelhouse also made reference to the underwriters of the policy in communication with Miss C. So I think it is clear that it believed this was a contract of insurance at the time of sale. And I'm surprised it hasn't already refunded the insurance premium tax before now if it genuinely believes this isn't a contract of insurance and tax wasn't due.

Although Chapelhouse describes this product as a 'warranty', the contract must be characterised as a whole, and more weight attaches to the substance of the contract, than to the form; the substance of the provider's obligation determines the substance of the contract.

So, although Miss C's warranty is not described as a regulated, underwritten insurance policy, for the reasons given and having considered all the features and substance of the contract, I am satisfied the warranty was a contract of insurance. The warranty does more than crystallise its existing obligations. This is because it is more extensive in content, scope or duration than Chapelhouse usual obligations.

merits

Turning to the merits of Miss C's complaint as I've already suggested I think that her complaint should be partly upheld.

I say this as it is an established principle of insurance that consumer's are entitled to a 14 day cooling off period in which they are entitled to cancel the policy. In this instance it is clear that Miss C attempted to cancel the Chapelhouse Protect Gold Warranty within a very short period of time. So I think it is only fair that she receives a full refund plus interest at our usual rate for the time she has been without the money.

I know Chapelhouse said it had done all it could to get Miss C the best deal it could for her car and finance and that it couldn't change the finance agreement once it was in place. But even if this was the case, and I haven't been provided with firm evidence to support this, it wouldn't sit with the fairness of a cooling off period and wouldn't be treating Miss C fairly.

In relation to the level of Miss C's monthly payments I think that Chapelhouse acted reasonably which Miss C appears to accept. Miss C's monthly payments increased as she put down a smaller deposit than originally agreed. Miss C may have misunderstood this at the time, but I can't conclude that Chapelhouse has acted unreasonably.

So, as I'm satisfied that Miss C was entitled to a refund in premium for her warranty as she looked to cancel within the first few days of the cooling off period. It should add 8% simple interest from the date she took it out until the date of settlement.

replies

Miss C responded to say that she agreed with the outcome outlined and she wanted to get the provisional decision finalised. But Chapelhouse didn't respond.

my findings

I've again considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, and without any further representations from either party, I'm not changing my position.

So, as clearly outlined above, I think that this is a complaint that this service can consider. Although Miss C's warranty isn't described as a regulated, underwritten insurance policy I'm satisfied that all the features and substance of the warranty show that it is a contract of insurance. The warranty does more than crystallise Chapelhouse's existing obligations as it is more extensive in content, scope and duration than Chapelhouse's usual obligations.

Turning back to the merits of the complaint I'm satisfied that Miss C was entitled to a refund of her premium for her warranty. This is because she looked to cancel the policy within the first few days of the cooling off period. And it is an established principle of insurance that consumer's are entitled to a 14 day period cooling off period in which to consider their position and to cancel the policy.

my final decision

It follows that this complaint is one that this service can consider and that I partly uphold it. I require Chapelhouse Trading Limited to refund Miss C's premium in full adding 8% simple interest from the date she took out the policy until the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss C to accept or reject my decision before 18 January 2018.

Colin Keegan
ombudsman