| FINAL DECISION | |
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| **Complaint by:** | Mr A |
| **Complaint about:** | the firm |
| **Complaint reference:** | |
| **Date of final decision:** | November 2008 |

**summary of complaint**

This final decision is issued by me, Tony Boorman, an ombudsman with the Financial Ombudsman Service. It sets out my conclusions on the dispute between Mr A and the firm. Under the rules of the Financial Ombudsman Service, I am required to ask Mr A either to accept or to reject my conclusions, in writing, before 11 December 2008.

The dispute is about the sale of a single-premium payment protection insurance (PPI) policy recommended by the firm in connection with an unsecured personal loan. The recommendation was made in May 2005 (after the introduction of regulation of such sales by the Financial Services Authority) at a meeting at a branch of the firm.

I have considered all the available evidence and arguments from the outset, in order to decide what is fair and reasonable in the circumstances of this complaint. For the reasons I set out below, I have determined the complaint in favour of Mr A and have made an award against the firm.

**background to complaint**

*a) events leading up to the complaint*

Mr A wished to borrow £6,000. He considered a number of firms before discussing at his local branch the possibility of a loan from this firm. In May 2005 the firm agreed to offer Mr A an unsecured loan of £6,000 that was to be repaid over four years. The firm (acting as an authorised insurance intermediary for this purpose) recommended that Mr A should purchase its branded "loan protection insurance" (PPI) policy (the greater part of which was underwritten by a general insurer within the same group of companies as the firm). This PPI policy was provided with a single premium of £972.86 that was added to the loan – and upon which interest was payable.

Two years later Mr A was able to settle the loan early. He did so. But was unhappy that – when the associated PPI policy was cancelled at the same time as the loan – he received a refund of premium of £171.45 (some 18% of the total premiums he had paid, although only around a half of the policy term had expired).

*b) Mr A's complaint and the firm's response*

Mr A considered that the firm had acted unfairly. He had been persuaded to take out the loan because he had been told that it was more flexible than a cheaper loan offered by a

competitor of the firm. He says he told the firm's representative that he expected to be able to settle the loan early. Had he been aware of the true facts, he says he would not have entered into the arrangement with the firm. He says he has been a customer of the firm for ten years and that they had gained his trust. He considers that his *"trust has been taken advantage of"* by the firm and that he has been *"conned"*. He believes the policy was mis-sold and wants the firm to compensate him.

After some delays, the firm responded to Mr A's complaint. It says that Mr A had wanted a PPI policy and that he had signed an agreement to that effect which, according to the firm, showed "*the loan amount you are borrowing, how much this costs per month, the cost of insurance, how much the insurance costs per month and finally, the total monthly instalment (which includes the loan monthly instalment and the insurance monthly instalment).*" The firm notes that Mr A was also provided with a copy of the policy booklet and had a chance to cancel the policy without penalty within 30 days.

Mr A felt this response was inadequate and he referred the matter to this Service. My adjudicator considered the matter. In her written assessment of the case she concluded that the policy had indeed been mis-sold and that the firm should compensate Mr A by returning him to the position he would have been in had he proceeded with the loan but without the PPI policy (in effect to return to Mr A the payments he had made in respect of the PPI policy plus interest). Mr A accepted this assessment but the firm did not, so as agreement cannot be reached the matter falls to me to determine.

**my findings**

I have considered all the evidence and arguments very carefully from the outset – including the firm's response to the adjudicator's conclusions – in order to decide what is fair and reasonable in the circumstances. Having done so, I have come to the same overall conclusions as the adjudicator, and for broadly the same reasons.

*a) relevant considerations*

This sale was made after the introduction of FSA regulation of insurance mediation. Whilst the general principles that I need to consider in assessing cases such as this are, in large part, similar both before and after regulation by the FSA, it is important to note the relevant regulatory regime that applied at the time.

The FSA Principles apply to all authorised firms including the firm (acting as an insurance intermediary). Of particular relevance to this dispute are:

- Principle 1 (integrity):
  *"A firm must conduct its business with integrity"*

- Principle 6 (Customers' interests):
  *"A firm must pay due regard to the interests of its customers and treat them fairly"*

- Principle 7 (Communications with clients):
  *"A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading"*

- Principle 8 (Conflicts of interest):
  *"A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client"*

- Principle 9 (Customers: relationships of trust):
  *"A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment"*

In addition, it is relevant to take into account the more detailed rules set out in "ICOB" (the insurance conduct of business rules) – especially the provisions of ICOB 4.3 (suitability), ICOB 4.4 (statements of demands and needs) and ICOB 5.3 (provision of Information to retail customers). In particular, ICOB 4.3.1R requires that:

> *"An insurance intermediary must take reasonable steps to ensure that, if in the course of insurance mediation activities it makes any personal recommendation to a customer to buy or sell a non-investment insurance contract, the personal recommendation is suitable for the customer's demands and needs at the time the personal recommendation is made."*

I also need to take into account the law (and especially the provisions of insurance law), industry codes and good industry practice.

In this respect, it is relevant to note that there has for some time been regulation or codes governing the sale of insurance products such as PPI. There is much in common between the present statutory regulatory regime and the non-statutory provisions that preceded it (and, indeed, the position at law). The non-statutory provisions no longer apply as specific requirements on those selling insurance, but I consider they still represent a helpful guide to good industry practice.

For example, in the period immediately before statutory regulation in 2005, the General Insurance Standards Council (GISC) promised in its Code that its members would:

- "*act fairly and reasonably when we deal with you [the customer];*
- *make sure that all our general insurance services satisfy the requirements of this Private Customer Code;*
- *make sure all the information we give you is clear, fair and not misleading;*
- *avoid conflicts of interest or, if we cannot avoid this, explain the position fully to you;*
- *give you enough information and help so you can make an informed decision before you make a final commitment to buy your insurance policy."*

The GISC Code provisions included:

*"3. We will give you enough information and help so you can make an informed decision before you make a final commitment to buy your insurance policy."*

*"3.2 We will make sure, as far as possible, that the products and services we offer you will match your requirements …*

- *If it is practical, we will identify your needs by getting relevant information from you.*
- *We will offer you products and services to meet your needs, and match any requirements you have.*
- *If we cannot match your requirements, we will explain the differences in the product or service that we can offer you.*
- *If it is not practical to match all your requirements, we will give you enough information so you can make an informed decision about your insurance."*

*"3.3 We will explain all the main features of the products and services that we offer, including …*

- *any significant or unusual restrictions or exclusions;*
- *any significant conditions or obligations which you must meet."*

*"3.4 We will give you full details of the costs of your insurance" "*

*"3.5 If we give you any advice or recommendations, we will:*

- *only discuss or advise on matters that we have knowledge of;*
- *make sure that any advice we give you or recommendations we make are aimed at meeting your interests; and*
- *not make any misleading claims for the products or services we offer or make any unfair criticisms about products and services that are offered by anyone else".*

The Association of British Insurers (ABI) codes (which pre-dated GISC) also set out relevant requirements. For example, the ABI General Insurance Business Code of Practice for all Intermediaries (1989) (the ABI Code) said that it *"shall be an overriding obligation of an intermediary at all times to conduct business with utmost good faith and integrity."*

The ABI Code stated as one of its general sales principles that the intermediary shall "*ensure as far as possible that the policy proposed is suitable to the needs of the prospective policyholder.*" It also included requirements about *"Explanation of the Contract".* It said the intermediary shall *"explain all the essential provisions of the cover afforded by the policy or policies he is recommending so as to ensure as far as is possible that the prospective policyholder understands what he is buying; [and] draw attention to any restrictions and exclusions applying to the policy."*

Taking the relevant considerations here into account, I conclude that the overarching question I need to consider in this case is whether the firm gave Mr A information that was clear, fair and not misleading – in order to put him in a position where he could make an informed choice about the transaction that he was entering into and the insurance that he was buying; and whether, in giving any advice or recommendation, the firm took adequate steps to ensure that the product it recommended was suitable for Mr A's needs.

Overall, taking account of these factors, I must determine this dispute between Mr A and the firm by reference to what is in my opinion fair and reasonable in all the circumstances of the case.

*b) did the firm take adequate steps to ensure that its recommendation was suitable?*

It is clear that the firm gave Mr A "a recommendation". It was therefore under a duty to take all reasonable steps to ensure that recommendation was suitable.

The firm provided Mr A with a document at the point of sale titled "*Your Personal Summary & Our Recommendation(s)*". This described Mr A's demands and needs as "*to cover loan*". It set out "*details of our product recommendation: - loan protection insurance*" and explained the reasons for this recommendation as "*customer only gets ssp* [statutory sick pay] *and would like to be covered in the event of accident sickness and unemployment*."
Under the heading "*Personal circumstances including any demands and needs not met*", the firm says "*You have not advised me of any personal circumstances that may affect the cover you are currently eligible for*". This document is not signed by the parties, but it concludes with an "*Insurance Advisors Declaration: I have recommended the product(s) included in this document as being suitable for you on the basis of the information supplied by you in relation to your demands and needs, existing relevant insurances and personal circumstances*".

Mr A says that he entered into the arrangement with the firm because the firm's official he spoke to told him that, unlike a competitor product he had been considering, the loan had no early settlement fee. He says he mentioned that he hoped to settle the loan before the end of four years.

The firm has no record of this part of its discussion with Mr A. In its response to my adjudicator's conclusions, the firm says that it is clear some discussion took place between its representative and Mr A. It says it is reasonable to assume that the terms of the policy were properly explained – and to assume any questions Mr A had about the policy were answered accurately.

I cannot be certain now what was and was not discussed at the time. But I have no reason to doubt Mr A's recollection. And the firm has not directly challenged it.

In any event, it seems to me that, in thinking about any loan and connected insurance policy, a relevant consideration is how far that arrangement is flexible, should the customer's circumstances change. In this market it is not uncommon for customers to re-arrange their loans before the end of the planned term. The firm has provided no evidence to show that this was not, in fact, a relevant consideration for Mr A. Indeed, in my view the balance of evidence suggests that it *was*.

I conclude that the firm did *not* consider whether or not Mr A required flexibility in his PPI policy, when considering the product it should recommend. It should have done so. It is not sufficient for the firm to say that the customer did not emphasise the issue (and/or that the issue was not set out in a demands and needs statement by the customer). The firm was the professional insurance adviser which had (or should have had) a knowledge not just of the products available, but also of the way in which the substance of those products was likely to interact with the common demands and needs of its customers – particularly where the feature was significant and unusual. I note that ICOB (4.3.2R) requires an insurance intermediary in assessing its customer's demands and needs to:

> *"seek such information about the customer's circumstances and objectives as might reasonably be expected to be relevant in enabling the insurance intermediary to identify the customer's requirements. This must include any facts that would affect the type of insurance recommended, such as any relevant existing insurance"*

– and that the intermediary should "*have regard to any relevant details about the customer that are readily available and accessible to the insurance intermediary."*

I have seen no evidence to suggest that the firm asked questions about this matter – or otherwise sought to clarify Mr A's needs on this point or to consider the information readily available to it from its other sources.

The firm suggests that Mr A had the opportunity to become aware of the relevant facts surrounding the cancellation terms and that, accordingly, I should not uphold his complaint. But this ignores the fact that the firm recommended the product. Mr A was entitled to place trust in the professional advice of the firm that this was a suitable product for him. I have concluded that the firm did not take reasonable care to ensure the suitability of its advice to Mr A.

*c) did the firm provide information that was clear, fair and not misleading?*

The firm says that in addition to the "*Your Personal Summary & Our Recommendation(s)*" document, it provided an 8-page leaflet titled "*your quick guide to comprehensive loan protection insurance"* (the quick guide); a 3-page loan agreement document; and a 33-page policy document.

The quick guide, under the FSA's "keyfacts" logo, provides a policy summary. On the back page, under the heading "*important Information*", it says: "*The insurer will provide cover during the period of insurance according to the terms set out in your policy in return for payment of the premium. Premiums, fees and charges … In the event of you settling your loan agreement*

*early a standard administration fee of £45 will apply*." No explanation is made in that "keyfacts" document of the single-premium arrangement and the terms that apply to refunds.

The firm notes that there is a provision on refunds set out in the (separate) policy document on page 26: "*are you eligible for a premium refund?*" This explains: "*To help you with the purchase of your loan protection cover, the cost of the insurance premium has been added to the amount you have borrowed. The cost of your insurance is spread evenly over the duration of your loan.*" The policy booklet then explains how a premium refund would be calculated: "*using a formula that accounts for the way risk changes over the term of your loan.*" Examples are given to "*give you an idea of how the calculation works.*" For example, showing that after 24 payments of a 36-month loan, the refund would amount to 11% of the premium.

The separate loan-agreement document sets out the amount of credit and premium – in total and as a "monthly repayment". It also sets out the total premium (£972.86) and the interest on that premium (£159.07) – to give a "total price of the loan protection" (£1,131.93).

I do not accept what appears to be the firm's assertion that this was adequate information in the circumstances to alert the customer to the nature of the cancellation/refund terms. It seems to me that the "keyfacts" presented by the firm here were likely to mislead all but the most assiduous of readers. The reference to the administration fee, and not to the impact of the refund arrangements, did not give a balanced account of the position – it failed to be "clear, fair and not misleading", notwithstanding the information in the policy document. This was information that the firm knew (or ought to have known) was material for customers in evaluating the product. I conclude that the firm did not pay due regard to the information needs of Mr A.

**summary of conclusions and findings relevant to the determination**

For the reasons set out above, I have concluded that in the case of Mr A, the firm:

- failed to take reasonable care to ensure the suitability of its advice;
- did not pay due regard to the information needs of its customer.

Overall, I conclude that the firm failed to pay sufficient regard to the interests of its customer, Mr A, and that it did not treat him fairly. Accordingly, I conclude that I should determine this complaint in favour of Mr A.

**fair compensation**

Having concluded that I should determine the complaint in favour of Mr A, I now need to consider what award to make.

In determining the award, the law can provide a useful tool with which to analyse the variety of ways in which claims to compensation can be made. But it is for the ombudsman to arrive at a view as to what he considers fair compensation.

Where a consumer buys an insurance policy from an intermediary or insurer on the insurer's standard terms, there are a number of avenues that might be pursued in law in the event that the consumer has suffered detriment as a result of the sales process. The various heads of claim that might be considered in such cases include negligent advice, breaches of obligation, misrepresentation, mistake, non-disclosure or a failure of contract formation.

The law provides slightly different remedies for a successful claimant in these different heads of claim. Some give rise to a right for the insurance to be regarded as cancelled from the start

(for instance where an insurer or its agent has failed to disclose significant features of the policy); others to a right to compensatory damages. If it is right to treat the insurance as cancelled from the start, the premium is refundable – but claims cannot be paid. Compensatory damages for unsuitable advice, or other heads of damage, may amount to the cost of taking out the policy – which arrives at the same general result but by a different route.

Taking account of these considerations, my normal approach is to try to put the customer back into the position he would have been in but for the failure on the part of the firm. Mr A suggests he would have arranged his loan with another provider without the benefit of a PPI policy. But it is not possible to say now with any confidence what would have happened had the firm given Mr A appropriate advice. Overall, however, it seems to me likely that properly advised and informed, Mr A would *not* have purchased this PPI policy from the firm (but Mr A would still have proceeded with the loan).

Accordingly, in the circumstances of this case, I consider that the appropriate approach to fair compensation is to require the firm to compensate Mr A by putting him (so far as is now practicable) in the position he would have been in had he *not* taken out the PPI policy. This follows the general approach proposed by our adjudicator in her assessment of the case.

The relevant considerations are:

A: The monthly payments Mr A made towards the loan (including the element to cover the PPI premium and interest);

B: The monthly repayments that would have been required, had a loan been taken out over the same duration but *without* the additional element to cover the PPI premium;

C: The amount that Mr A paid in settlement of the overall loan (including the PPI element) *net* of any PPI premium refund he received – but including all fees and charges;

D: The amount that Mr A would have been required to pay (including all fees and charges) to settle the loan (on the same date as in C), had he taken a loan with the same duration but *without* the additional borrowing to cover the PPI policy premiums – and assuming that he had previously made the monthly payments appropriate to such a loan as calculated at B.

So the firm should pay compensation of:

- A *minus* B (in effect, the net monthly overpayment towards the loan), multiplied by the number of monthly payments made;

  *plus*

- C *minus* D (in effect, the net overpayment of settlement costs).

To these sums the firm should add interest at a rate of 8% simple *per annum* in each case from the date Mr A made the relevant (net) payments until the date this award is paid in full.

The calculations of redress here are not straightforward. I would consider any necessary application from either party concerning the precise details of the calculations to be undertaken. So as to assist Mr A, the firm should set out clearly an account of how it has made the calculations set out above. The firm should then pay the duly calculated amount without delay.

**decision**

For the reasons set out above, I determine this complaint in favour of Mr A. I require the firm to pay Mr A fair compensation in accordance with the calculation of redress I set out above. I make no further award against the firm.

Tony Boorman
**ombudsman**