FINAL DECISION	
Complaint by:	Mrs C
Complaint about:	The firm
Complaint reference:	
Date of final decision:	November 2008

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 Mrs C and the firm. Under the rules of the Financial Ombudsman Service I am required to ask Mrs C either to accept or to reject my conclusions, in writing.

The dispute is about the sale of a single-premium payment protection insurance (PPI) policy by the firm in connection with an unsecured personal loan. The sale was made in May 2004 at a meeting at a branch of the bank – *before* the introduction of regulation of such sales by the Financial Services Authority but *during* the period of self-regulation by the General Insurance Standards Council.

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. In addition to considering the parties' representations, I have also had regard to the law and regulations, regulators' rules, guidance and standards, codes of practice, and what I consider to have been good industry practice at the time. For the reasons I set out below, I have determined the complaint in favour of Mrs C and have made an award against the firm.

background to complaint

a) events leading up to the complaint

Following a face-to-face discussion at her local branch of the firm, Mrs C agreed to borrow £20,000. Some £5,400 of this loan was to settle previous credit-card and other loans with the firm. The loan was to be re-paid over seven years. The firm (acting as an insurance intermediary for this purpose) recommended that Mrs C should purchase its branded "loan protection insurance" (PPI) policy. This PPI policy was provided with a single premium of £4,661.17 which was added to the loan and upon which interest was payable.

b) Mrs C's complaint and the firm's response

Mrs C considered that the firm had acted unfairly in selling her a policy which she now considers she did not want or need and was therefore unsuitable. She says she was told by the firm's representative that the loan-protection policy was essential, if she were to receive her loan. She was asked no questions about her circumstances (for example, about whether she had any relevant medical conditions). In any event, she had no particular need for the policy, as she worked in local government and her employer provided a comprehensive package of health, and death in service benefits.

She says that when she queried the need for the policy, she was told: "*I had no choice. If I wanted the loan then it was compulsory that I took the payment protection out.*" She says: "*I trusted what my account manager was telling me and I was surprised and shocked to find out this was not the case at all. I trusted her and the bank and I cannot believe this sort of thing goes on.*" She says the firm "*did not advise me on my best interests – only on what would make them the most money.*" She believes the policy was mis-sold and wants the firm to compensate her.

The firm, in its response to Mrs C's complaint, says that Mrs C signed *"two documents that highlighted the costs of your loan agreement and also the details of your protection cover."* It says that *"when a customer enquires about Loan protection Insurance they are provided with all the information with regards to any policies that are suitable at the time of taking the loan out. If our customer decides that our products are not suitable for their needs it is the customer's responsibility to find a product that is suitable to them".* The firm notes that Mrs C was also provided with a copy of the policy booklet and had a chance to cancel the policy without penalty within 30 days. The firm rejected Mrs C's complaint. It says that it does *"not agree that you were misadvised about the optional loan protection insurance as the correct procedure was followed and the correct paperwork was signed by yourself."*

Following further correspondence with the firm (in which it said that Mrs C could cancel the insurance policy), Mrs C considered the firm's response inadequate and she referred the matter to the Financial Ombudsman 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 Mrs C by returning her to the position she would have been in, had she proceeded with the loan but *without* the PPI policy. Mrs C accepted this assessment but the firm did not. In summary, the firm said that:

- There was no attempt to conceal matters from Mrs C, and it is reasonable to assume she read the documentation which set out the salient points of the insurance;

- There was no suggestion that the question of early termination of the loan was raised by Mrs C; and although part of the loan related to previous debt consolidation, the evidence does not suggest she was in financial hardship;

- Given that she would have been aware that the policy was optional, and its cost, the evidence suggests that she required the cover provided.

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 *before* the introduction of FSA regulation of insurance mediation, but *during* the period of self-regulation under the General Insurance Standards Council (GISC). The firm was a member of GISC at the relevant time. But in any event, I consider the provisions of the GISC code to provide a helpful guide to good industry practice at the time. 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 and the GISC, it is important to note the relevant regulatory regime that applied at the time. Of particular relevance to this dispute are:

The GISC Code promised 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."*

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

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 Mrs C information that was clear, fair and not misleading – in order to put her in a position where she could make an informed choice about the transaction that she was entering into and the insurance that she 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 Mrs C's needs?

Overall, taking account of these factors, I must determine this dispute between Mrs C 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?

In this case, it is not in dispute that it was the firm that introduced the idea of purchasing the PPI policy. Indeed, I note Mrs C says that the firm suggested both the loan and the PPI policy to her. I cannot, of course, now be certain what precisely transpired between Mrs C and the firm's representative on that day in May 2004. I must evaluate the evidence available to me, and decide – on the balance of probabilities – what is most likely to have happened. At the time, the firm in its paperwork does not say it gave any advice or recommendation. It refers to the customer having "received information" and the customer making the decision whether or not to purchase the policy. But there is no dispute that there was a discussion about the policy. And it is clear that Mrs C considered that the policy was (at the very least) recommended to her.

The distinction at the time between advice (or recommendation) and simply the provision of information can be difficult to assess. In my view, the distinction was not drawn clearly by the firm. I need to consider the matter in a practical common-sense way. The evidence does not suggest to me a process where the firm simply said words to the effect: "*Some customers find loan protection insurance of assistance. We offer the following product and I can explain its key features if you would find that helpful*". Rather, the balance of the evidence is that the firm actively promoted and recommended the policy to Mrs C as a good fit for her circumstances. (I note she says the firm did more than this – a point I discuss in the next section. But for the present purpose, I need not decide that point.) So I think it reasonable to conclude that the firm went beyond simple introduction, or even mild encouragement, but rather it actively recommended the product to Mrs C.

On balance, therefore, I conclude that the firm did, on this occasion, make a recommendation that Mrs C should purchase the policy. It was therefore under a duty to make sure that the recommendation was aimed at meeting Mrs C's interests.

But in any event, a cursory consideration of Mrs C's needs would (or should) have suggested to the firm that Mrs C's needs and the policy in question were not well matched. The firm needed (in the words of the ABI code) to *"ensure as far as possible that the policy proposed is suitable to the needs of the prospective policyholder".* Mrs C was a local-government worker with a well-protected job with significant sickness- and other benefits. Given her circumstances, her need for the policy was questionable. Certainly the availability to her benefits from her employer would have significantly altered the evaluation of the product.

Furthermore, Mrs C had entered into the loan having "consolidated" previous loans. But the policy she was recommended was inflexible. It was paid for by a single premium upon which interest was payable. If the loan was terminated early for any reason, there would be only a limited return of premium.

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 Mrs C – other than to note that she did not seem to be in any financial hardship. But it is not just customers in financial hardship who will be interested in the flexibility of the product they are being asked to purchase. Indeed, in my view, the balance of evidence suggests that this would have been a relevant consideration for Mrs C, regardless of the fact that, to date, she has retained the loan and kept to its repayment terms.

I conclude that the firm did not take adequate steps to assess Mrs C's needs when it recommended the policy – and that it did not consider whether or not Mrs C required flexibility in her PPI policy. It should have done so. Had the necessary assessment been made, an insurance intermediary would not have recommended the policy at all – or would have done so subject to clear *caveats* about its shortcomings in Mrs C's case, enabling Mrs C to make an informed choice about the issue.

It is not sufficient for the firm to say that the customer did not emphasise the issue (and/or that the information was available to the customer in the policy and the responsibility therefore rested solely on the customer to assess the position). The firm was the professional insurance adviser which had (or should have had) a knowledge not only 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 in this context the requirement of GISC Code (3.2): *"If it is practical, we will identify your needs by getting relevant information from you".* I have seen no evidence to suggest that the firm asked questions about this matter – or otherwise sought to clarify Mrs C's needs on this point, or consider the information readily available to it from its other sources.

The firm suggests that Mrs C had the opportunity to become aware of the relevant facts surrounding the cancellation and other terms, and that accordingly I should not uphold her complaint. But this ignores the fact that the firm recommended the product – and had an obligation itself to consider the suitability of what it was selling. Mrs C was entitled to place trust in the professional advice of the firm that this was a suitable product for her. I have concluded that the firm did not take reasonable care to ensure the suitability of its advice to Mrs C.

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

The firm says that in addition to the 33-page policy document "*Your Loan Protection Policy Document"*, it also provided a credit agreement and an "*Optional Loan Protection acknowledgement of purchase*" form – both signed by Mrs C.

The credit agreement sets out the total amount of credit and monthly repayments broken down by the "*cash loan*", the "*optional loan protection insurance loan Premium (cash price)*" and the "*loan for repayment of existing debts*". This shows a cash price for the PPI policy of £4,661.17 – with monthly payments of £78.43. The amount of interest to be paid in each case is not specified, nor is the total payment over the period of the loan. There are tick boxes for "optional loan protection?" and "premium advanced as part of loan?" Both have been completed by the firm with "X" in the "yes" boxes.

The "acknowledgment of purchase" document refers to confirmation that the customer has received information "*relating to the following … the cost, terms and conditions and exclusions of the optional loan protection policy, the loan agreement and loan protection policy document contained within the policy document wallet*."

The wallet-cover includes a "summary of cover" which summarises the benefits in tick-box form, sets out some eligibility issues, and points policyholders to the enclosed policy document. There is no reference to the single-premium arrangement or to the refund terms (if the policy is terminated) on either the wallet-cover or in the acknowledgment document.

The policy document deals with *"are you eligible for a premium refund?"* on page 27/33. 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 8% of the premium.

I note that Mrs C says she was told that the policy was not optional but essential, if she was to obtain the loan. The firm says that is not true. I cannot be certain now what was said. But clearly, the papers that Mrs C signed referred to the policy throughout as "optional". However, set against that, I note that the tick boxes on the credit agreement had been completed by the firm. I have also seen some information from the firm about its sales process, which is part of a document badged *"franchise growth - Important Changes to the Loan Protection Sales Process"*. This shows that if the customer did not purchase the policy with their loan, they were required to sign a declaration that they wished to proceed without a PPI policy – an *"acknowledgement of non-purchase"*.

Evidence from other sources about the market and its sales practices (including the Office of Fair Trading and Competition Commission enquiries and reports about recent practice by the FSA) also tend to add weight to Mrs C's account.

I think it is also relevant to note at this point that the policy represented questionable value for money for Mrs C. The sickness and unemployment benefits under the policy provide for the monthly repayments against the loan to be met during the period of incapacity or unemployment – subject to various policy restrictions. In Mrs C's case, the premium for the PPI policy she was sold added 23% to the loan she was taking out. Over the period of the loan, once interest is taken into account, it would cost about £6,580. Given Mrs C's circumstances In particular, it seems doubtful that a fully informed customer would have opted for such a product, had she been confident it would have no impact on whether or not the firm would advance the loan.

Mrs C says that the firm told her that the policy was, in effect, a requirement if she was to obtain the loan. It is difficult now to reach a conclusion on this point. I need to balance her credible account of events with the paperwork that was provided at the time, which noted clearly that the policy was "optional". There are, no doubt, some fine distinctions of language that would draw a line between a strict requirement and simply misleading sales practices. For example, "we consider this policy to be essential" is not quite the same as "we require you to take out this policy".

Overall it seems to me likely that the firm did *not* in fact say that the policy was a strict requirement, but rather it left a clear and strong impression with Mrs C that the sales were closely connected. The firm had a single product that it wished to sell, whatever the needs of its customers. So whilst Mrs C did not, in fact, need to agree to the PPI policy in order to obtain the loan, I can well see that she would have gained the impression that the purchase was, in practice, essential.

So whilst I do not find that the firm strictly *required* Mrs C to take out the policy as a condition of the loan, I do conclude that the sale was intended to leave Mrs C with the impression that it was "essential" to take out the PPI policy. Accordingly, I am not satisfied that the firm acted with utmost good faith in conducting this transaction – nor that it avoided the conflicts of interest inherent in the sale.

But in any event, I do not accept the firm's assertion that the information it gave Mrs C was adequate in the circumstances to alert her to the nature of the cancellation/refund terms – and more generally to put her in the position where she could make an informed choice. Only the most assiduous of readers would have been able to identify from the information provided by the firm the nature of the single-premium transaction that it encouraged Mrs C to enter. 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 Mrs C.

summary of conclusions and findings relevant to the determination

For the reasons set out above, I have concluded that in the case of Mrs C, 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, Mrs C and that it did not treat her fairly. Accordingly, I conclude that I should determine this complaint in favour of Mrs C.

fair compensation

Having concluded that I should determine the complaint in favour of Mrs C 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 or she would have been in, but for the failure on the part of the firm. Overall, it seems to me likely that, properly advised and informed, Mrs C would *not* have purchased this PPI policy from the firm (but Mrs C 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 Mrs C – by putting her (so far as is now practicable) in the position she would have been in, had she *not* taken out the PPI policy. This follows the general approach proposed by our adjudicator in her assessment of the case.

So, subject to Mrs C's agreement to the cancellation of the PPI policy and to the reconfiguration of the loan, the firm should:

A. re-arrange the loan to Mrs C by writing off all amounts that remain outstanding in relation to the borrowing for the PPI premium, including any interest and charges, so that, in future, the number and level of outstanding repayments against the loan (and any charges and fees) are the same as would now have applied had Mrs C taken the original loan sum (£19,999.99) *without* the PPI cover (with the firm waiving for this purpose any charges or fees that would normally apply to a change in the loan);

B. calculate the amount Mrs C has paid to the firm from time to time up to the time of settlement in relation to the additional borrowing for the PPI premium (including interest charged), *less* any premium refund actually paid to Mrs C on cancellation of the policy;

C. to the sums calculated at (B), the firm should add interest from the points Mrs C made the payments to the firm to the point the firm settles this award in full – with that interest calculated at a rate of 8% simple *per annum*.

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 Mrs C, the firm should set out clearly an account of how it has made the calculations set out above – and provide a statement of the new instalments to be paid on the loan and the amount outstanding. It should pay the duly calculated amount to Mrs C and make the required changes to the loan without delay.

decision

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

Tony Boorman
ombudsman