

The complaint

Miss D complains about what The Royal Bank of Scotland Plc has done to put things right following her complaint that it mis-sold a payment protection insurance (PPI) policy.

What happened

Miss D complains that she was mis-sold PPI alongside three loans she had with RBS between 2003 and 2010:

- a loan of £17,000 that began in January 2003 and ended in August 2003,
- a loan of £12,000 that began in October 2003 and ended in March 2004, and
- a loan of £10,000 that began in October 2004 and remained open until August 2010.

RBS investigated Miss D's complaints, and said they should be upheld. It made offers to settle the complaints. After deducting tax, it said the redress would be:

- £1,760.20 in respect of the first loan
- £1,585.61 in respect of the second loan, and
- £484.33 in respect of the final loan.

Miss D says she was advised by a third party claims advisor to accept these offers. She signed and returned settlement forms agreeing to them in full and final settlement of her complaints.

But Miss D had previously been in a protected trust deed. This is a less formal alternative to bankruptcy under Scots law – and meant Miss D didn't need to repay everything she owed RBS. RBS says that Miss D hasn't repaid £13,701.58. It proposes to use its offer to reduce the amount Miss D hadn't repaid.

Miss D didn't agree with this, and referred the complaint to this service.

An adjudicator looked the complaint, but thought what RBS had done was fair.

Miss D doesn't agree for the following reasons:

- She doesn't understand the basis on which the adjudicator reached his view of her complaint; she doesn't think this outcome reflects the law or the individual circumstances of her complaint.
- She thinks her circumstances are similar to those of the debtor in the judgment of the Inner House of the Court of Session in *Donnelly v. Royal Bank of Scotland Plc* [2019] CSIH 56, which was upheld following the involvement of the Financial Ombudsman Service.
- She doesn't think it's fair for RBS to offset the PPI compensation, as the PPI wasn't part of her trust deed. Moreover, she says that her debt should have been written off on the discharge of the trust deed – and given the time that has passed the debt is "statute-barred" and the debt no longer exists.

- She refers me to section 145 of the Bankruptcy (Scotland) Act 2016, which provides for the debts and obligations of the debtor to be discharged at the date of sequestration.
- She also refers me to a paper by the Scottish Government explaining that on completion of the trust deed the remaining unpaid debt is written off.
- She complains that this is a violation of her right to property under Article 1 of Protocol No. 1 to the European Convention on Human Rights.
- She doesn't think the approach the adjudicator has taken is consistent with the ombudsman service's role as an informal alternative to the courts.
- She feels the approach the adjudicator has taken is heavily weighted in favour of financial institutions.

As the adjudicator was unable to resolve matters informally, the complaint has been passed to me to review.

What I've decided – and why

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

My power to consider this complaint comes from Part XVI of the Financial Services and Markets Act 2000. Section 225 of that Act provides for "a scheme under which certain disputes may be resolved quickly and within minimum formality by an independent person." Section 228(2) provides that "a complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case". And where I uphold a complaint, section 229 says I may include, among other things, an award against the respondent "of such amount as the ombudsman considers fair compensation for loss or damage [...] suffered by the complainant".

The basis on which I make decisions is set out in Chapter 3 of the Dispute Resolution rules, which can be found online in the Financial Conduct Authority's handbook. DISP 3.6.4 states that, in considering what is fair and reasonable, "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."

RBS has already agreed that the complaint that it mis-sold PPI should be upheld. And Miss D hasn't raised any objections to the amounts RBS worked out. So I don't need to look at this further in this decision. In this decision, I'm looking at whether it's fair for RBS to pay Miss D's compensation towards the amount Miss D didn't need to repay following her trust deed.

In this case, the relevant law is Scots law. There have been a number of recent court judgments looking at what happens to PPI compensation following a trust deed.

In *Dooneen Ltd (t/a McGinness Associates) v Mond* [2018] UKSC 54, the Supreme Court held that following the completion of that trust deed, the debtor was discharged from his debts. In that case, PPI compensation was paid to the consumer rather than to the discharged former trustee of the estate for the benefit of the other creditors.

And following this judgment, the Inner House of the Court of Session concluded – in *Donnelly v Royal Bank of Scotland Plc* [2019] CSIH 56 – that a business couldn't use the consumer's PPI compensation to reduce a debt from which she was discharged when the trust deed came to an end: there was no debt to set-off.

However, afterwards the business sought instead to set aside the discharge of the debtor's trust deed. In *Royal Bank of Scotland Plc v Donnelly* [2020] CSOH 106, the Outer House of the Court of Session said that if the trustee made a mistake (a "material" or "substantial" error), then the court could set aside the consumer's discharge. And the failure by the trustee to pursue the PPI claims for the benefit of the consumer's creditors was clearly a mistake: if the trustee had known about the PPI claims, it was "inconceivable" that the trustee would have granted the debtor's discharge until that claim was realised as an asset for the benefit of the debtor's creditors. And as such, the remedy sought by the business would normally be granted by the court as a matter of course.

That said, reduction is a discretionary remedy. The court may withhold the remedy in exceptional circumstances, when there is some "very cogent reason" for doing so which would make it "inconvenient and unjust" to grant reduction. In that particular case, the court concluded it would be unduly harsh on the consumer to set aside the discharge. This took into account a number of factors – including the time since the discharge, the impact the litigation had had on the debtor, and the size of the compensation compared to the legal fees likely to have been incurred.

Miss D has also referred me to the Bankruptcy (Scotland) Act 2016, and a note prepared by the Scottish Government during the preparation of the Protected Trust Deed (Scotland) Amendment Regulations 2010. Miss D's trust deed in fact began in 2005 and, I understand, ended in 2010. So the relevant statute would have been the Bankruptcy (Scotland) Act 1985.

I've thought about all this when looking at Miss D's complaint.

Assuming the relevant terms of the trust deed in *Donnelly* are the same as in this case, a court wouldn't allow RBS to set the PPI compensation against the amount left unpaid following the trust deed unless the court first set aside Miss D's discharge from her trust deed. The court might decide not to grant this.

But while I have taken into account the law, I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of this complaint.

Based on what I've seen, Miss D owed RBS £13,708.58 following the completion of her trust deed. This is money that Miss D will never now need to pay RBS, and RBS cannot chase Miss D for this money.

But RBS has worked out the compensation for mis-selling PPI would be £3,887.21. This amount is a lot less than the amount Miss D didn't need to repay following the trust deed.

Simply put, Miss D owed RBS money, and RBS now owes Miss D money. The trust deed was intended to draw a line under matters and allow Miss D to go forward debt free. I don't think it would be fair to tell RBS to pay Miss D this money directly when, following the trust deed, Miss D didn't need to repay a much greater amount of money.

Where I decide, or a business agrees, that a complaint that a PPI policy was mis-sold should be upheld, the compensation I award is intended to put the consumer in the position they'd be in if they hadn't bought the policy. If Miss D hadn't bought the PPI, I think it's likely she'd still have entered the trust deed. But she'd have owed less. And that's the position RBS's offer puts her in. Similarly, if her trustee had pursued these complaints while Miss D was in

her trust deed, RBS would have been entitled to use the compensation to reduce the amount it claimed as part of the arrangement. Either way, Miss D would not have received this money directly. I'm also mindful that at least some of the cost of the PPI was borrowed as part of the one of the loans that Miss D didn't have to repay following her trust deed.

I've considered Miss D's comments in response to the adjudicator. I note her comments about *Donnelly* and what she says about the similarities to her own complaint. I decide every complaint based on the individual circumstances of that complaint, and no two complaints are entirely alike. I can't comment on other complaints brought by other consumers. That said, I highlight paragraph 34 of the judgment in *Donnelly*, where the debtor told the court that the bank hadn't told the ombudsman it intended to set off the unpaid balance against the PPI compensation – that didn't happen until afterwards. In Miss D's case, by contrast, that's the very thing I've been asked to decide.

I've taken into account Miss D's comments that she was discharged from all her debts when she was discharged from the trust deed – and that the debts in any case will be "statute barred" and so will no longer exist. But given that these PPI policies were all taken out before Miss D entered the trust deed I'm satisfied that, regardless of whether this debt technically still exists, it's fair for RBS to take it into account when deciding what it needs to do to put things right – particularly given that RBS cannot now chase Miss D for this debt.

Similarly, I note what Miss D has said about Article 1 of Protocol No. 1 to the European Convention on Human Rights (the right to property), as incorporated into domestic law by the Human Rights Act 1998. Miss D is concerned in particular that, if we treat the debt as still live, that this also implies that RBS might now take action to recover the debt. I confirm that in this decision I'm solely looking at what's fair and reasonable in the circumstances of her complaint about the sale of PPI. I make no broader findings about the discharge of her trust deed – that would be a matter for the court.

For all these reasons, I think it would be fair for RBS to use the compensation for mis-selling PPI to pay down the amount Miss D didn't repay following her trust deed.

My final decision

My final decision is that The Royal Bank of Scotland Plc may use the compensation for mis-selling PPI to repay the amount Miss D didn't repay following her trust deed. I make no further award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss D to accept or reject my decision before 21 May 2021.

Rebecca Hardman
Ombudsman