

complaint

This complaint is about a payment protection insurance (PPI) policy taken out with a joint Mastercard and Visa credit card account. We now know the original sale was in 1995. Mr M says Lloyds Bank PLC, trading as TSB, mis-sold him the PPI.

To keep things simple, I'll refer mainly to "Lloyds" throughout this decision.

background

The background and circumstances leading up to this complaint (which includes Mr M's circumstances at the time as well as the PPI policy benefits, limitations and exclusions) aren't disputed. So I haven't repeated all of this information here.

Our adjudicator didn't think we should uphold the mis-sale complaint. However, they thought Lloyds's subsequent offer to pay back *some* of the cost of the PPI, because of the non-disclosure of high commission and profit share, was fair in the circumstances.

Mr M's representative disagreed with the adjudicator's opinion – they didn't raise any new or additional points but repeated the same complaint points and arguments they'd previously made. As the complaint couldn't be resolved informally, it has been passed to me for a final decision.

my findings

Although I have only included a summary of the complaint, I have read and considered all the evidence and arguments available to me from the outset, in order to decide what is, in my opinion, fair and reasonable in all the circumstances of this complaint.

When considering what is fair and reasonable, I am required to take into account relevant: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

We've set out our general approach to PPI mis-sale complaints on our website and published some example final decisions that set out in detail how these relevant considerations may apply to PPI sales like Mr M's. I haven't set out that detailed information here but I've taken into account all relevant considerations in deciding Mr M's complaint.

Having done so, I've decided not to uphold the mis-sale complaint. I've also considered the issue of non-disclosure of commission. And I've too decided Lloyds should have disclosed the commission it received - but that it's subsequent offer to refund some of the cost of PPI to compensate for the unfairness caused is fair in the circumstances.

I can see Mr M doesn't remember ever giving his consent to the PPI being added. I don't doubt this is his genuine recollection now, but the sale was in 1995. I was shown a copy of the credit agreement he signed. Due to its age, this wasn't entirely legible, but to assist me I was also sent an 'example' of the form typically used at the time which seems to match the one Mr M signed.

There was a section on the agreement which allowed applicants to tick a box to add PPI cover to their new card account. It does look to me as if Mr M ticked that box on his form, but the fact there was an obvious choice also demonstrates, in my view, that the applicant could either select PPI, or leave this part blank. In short, I think it was easy enough to see there was a choice.

I also note his monthly card statements described the PPI as “*PAYMENT INSURANCE - PREMIUM*” with the relevant charges directly alongside. So I think if Mr M hadn't wanted PPI or had somehow made a mistake on the form, he'd have wanted to ask what the charges were for. There's no evidence he did this. So, I think it's more like he asked for the cover to be added when he was taking out his new card account.

It looks like Lloyds recommended the PPI to Mr M as part of an 'advised' sale, so it had to check that the PPI was right for him. In my view, the evidence about Mr M's circumstances at the time, shows that the policy wasn't fundamentally wrong or unsuitable for him. For example, he was eligible for the cover and he had only limited other means to fall back on in the event of something unexpected happening, such as losing his job or being unable to work. I note he had some limited sickness protection already with his job. But the PPI could have paid 10% of his existing credit card balance for up to a year if he'd needed to claim. This would have been in addition to any other means he had.

I also note what's been said about him having 'death in service' protection and redundancy pay available with his job. I wasn't shown evidence of these things, however, they cover different eventualities to the PPI policy and I don't think being sold PPI conflicts with the types of other protections mentioned.

There was nothing about Mr M's employment or occupation which would have made it difficult for him to claim. He hasn't told us about any pre-existing medical conditions that would have affected his ability to successfully claim. I agree that there were probably some conditions on the policy regarding for claiming for certain back and mental health issues, typically requiring a degree of evidence from a specialist in those fields. Nevertheless, I've seen nothing that suggests these would have been relevant to Mr M's situation.

The evidence I have shown Mr M wanted this cover and he chose to take it out. And I think the policy was suitable for him.

It's obviously possible the information Lloyds gave to Mr M about the PPI wasn't as clear as it should have been, but as I've said, it looks like he chose to take it out and wanted this type of cover. It wasn't wrong for him, or too dissimilar to what he reasonably thought he was buying from the information he was likely given at the point of sale. It also looks like it was affordable for him so it seems it would have been useful if something went wrong. I therefore don't think Mr M would have declined the policy even if Lloyds could have done a better job at explaining some things.

Mr M's representative raised a number of what I consider to be general points, which it says apply to all PPI complaints. These include: a claim that the Financial Ombudsman Service is not correctly applying the regulator's rules and guidance for handling PPI complaints; these policies represented poor value because of the number of significant exclusions and limitations of cover coupled with a low claims ratio; and the duty of utmost good faith meant Lloyds should have disclosed the poor value and explained the significance of the limitations and exclusions and the impact on the chances of making a claim.

Mr M's representative has not said how these points apply to the specific facts and circumstances of his individual complaint – just that they apply to all PPI complaints. I have

thought about them and how they might apply in Mr M's particular case. But the points don't persuade me to alter my conclusions about what is fair and reasonable in all the circumstances of the complaint.

For the reasons I've set out above I don't uphold the mis-sale element of this complaint. This means Lloyds doesn't have to pay back all of the cost of the PPI to Mr M.

non-disclosure of commission

As I said above, I've also considered the issue of non-disclosure of commission, including whether the non-disclosure resulted in an unfair relationship under section 140A of the Consumer Credit Act – and if so, what fair compensation would be to remedy that unfairness.

Having done so I've decided Lloyds should have disclosed the commission it received and that Lloyds's offer to refund some of the cost of PPI to compensate for the unfairness caused is fair. My reasons are set out below.

was there an unfair relationship?

Lloyds didn't tell Mr M about the high levels of commission and profit share paid in this case. So taking into account:

- The Supreme Court judgment in *Plevin*¹ and the conclusion in that case that the non-disclosure of commission could lead to an unfair relationship;
- The FCA's rules and guidance for handling complaints about the non-disclosure of commission and profit share - introduced in light of the Supreme Court judgment in *Plevin* - which requires a business to presume that the failure to disclose commission gave rise to an unfair relationship where the business expected commission and profit share to be more than 50% of the cost of the policy; and
- the likelihood, in my view, that a court would determine that the relationship between Lloyds and Mr M was unfair under section 140A of the Consumer Credit Act because Lloyds didn't tell him about the high levels of commission and profit share in this case

I don't think Lloyds acted fairly and reasonably in its dealings with Mr M because it failed to disclose the high commission and profit share.

redress to remedy that unfair relationship

I'm now required to consider what is fair compensation in all the circumstances to remedy the unfairness I have identified.

Mr M's representative has made a number of representations about this part of the complaint including the impact of the *Plevin* judgment and sections 140A and 140B of the Consumer Credit Act on his complaint. In summary they have said Mr M should get back all the money he paid for the policy because: Lloyds failed to tell Mr M about the high commission and profit-share rates paid, the low claims ratio and the restrictions and exclusions on cover. Because they say that meant the policy was poor value, I should find that Mr M wouldn't have taken out the policy had they known about the level of commission and he should receive a refund of all the premiums he paid. But I don't agree. I'm mindful of the following:

¹ *Plevin v Paragon Personal Finance Limited* [2014] UKSC 61 in which the Supreme Court concluded that the non-disclosure of commission could lead to an unfair relationship

- The Supreme Court judgment in *Plevin* made no specific finding about whether the consumer in that case would or would not have bought the PPI policy had the commission been disclosed;
- A court would have a range of powers available under section 140 B to remedy the unfairness caused by the non-disclosure of commission – it does not follow that a court would automatically order a return of all the premiums paid or conclude that a consumer would not have purchased the policy had the commission been disclosed; and
- The FCA considered the matter and decided that it wouldn't be appropriate to merge the considerations about undisclosed commission in the existing rules and guidance about mis-selling (hence the two-step approach for firms handling PPI complaints) and that the impact of any undisclosed commission and any remedy caused by it should be considered at step 2.

Taking into account relevant law and the FCA's rules and guidance, my role as an ombudsman is to determine what redress, if any, would represent fair compensation for Mr M in order to remedy the unfairness caused by Lloyds not disclosing the high level of commission to him before he purchased the policy.

So, taking into account:

- The FCA's guidance usually requires a business to refund the amounts paid by the consumer in commission and profit share *above* 50% of the policy's cost, plus interest in order to remedy the unfairness caused by the failure to disclose the level of commission;
- refunding some of the money paid for the PPI policy in this way is an order which, in my view a court could, in the exercise of its discretion, make under section 140B of the Consumer Credit Act in order to remedy any unfairness; and
- I am not, as Mr M's representative suggests, driven to conclude that he wouldn't have purchased the policy but for Lloyds's failure to disclose the level of commission for the reasons I've given above.

I think it was fair for Lloyds to calculate compensation in line with the FCA's guidance and return *some* of the money Mr M paid for his PPI policy. I consider this fairly removes the source of the unfairness because it leaves Mr M with the policy I've concluded above he would still have taken out if Lloyds had done everything it should have done – but with lower commission and profit share levels.

So I consider that Lloyds's subsequent offer of payment of an amount equivalent to the commission and profit share paid in excess of 50% of the policy costs (plus associated interest where applicable) in line with the FCA's guidance to firms is fair in all the circumstances.

my decision

Overall, having considered all the evidence and arguments to decide what is, in my opinion, fair and reasonable in all the circumstances, I do not uphold the mis-sale element of Mr M's complaint or make any award in favour of him for this part of the complaint.

However, because of the non-disclosure of commission and profit share, I've decided that Lloyds Bank PLC should pay Mr M an amount equivalent to the commission and profit share

paid in excess of 50% of the policy cost (plus associated interest where applicable) if it hasn't already done so.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr M to accept or reject my decision before 12 October 2021.

Michael Campbell
Ombudsman