DRN-3151974

The rules about complaining to the ombudsman set out when we can – and can't – look into complaints. In my decision, I've explained what this means for Mr N's complaint.

Summary and background to complaint

Mr N said Bank of Scotland plc trading as Lloyds TSB ("BoS") mis-sold him payment protection insurance ("PPI") with a loan in 2008.

BoS didn't agree we could look at a complaint about how the PPI was sold - because it said Mr N had referred the complaint to us too late.

But BoS did pay back the amount of commission and profit share that was above 50% of Mr N's PPI premium. It did this because it didn't tell Mr N about the high level of commission and profit share he'd pay – which was unfair.

Our adjudicator looked at all of this – but didn't think we could help with Mr N's complaint about how this policy was sold. And they thought BoS' payment was a fair way to resolve the complaint

Mr N'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.

The complaint has been passed to me for a decision.

My findings

I can't look at all the complaints referred to me. The rules applying to this service say that, where a business doesn't agree, I can't look at a complaint made more than six years after the event being complained about – or (if later) more than three years after the complainant was aware, or ought reasonably to have been aware, of cause for complaint. This is Dispute Resolution rule 2.8.2R(2) – which can be found online in the Financial Conduct Authority's handbook. And in this case BoS hasn't agreed.

Mr N's mis-sale complaint was made in April 2018 (received by the business on 1 May 2018.) This is more than six years after BoS sold the policy to him – in February 2008 – which is the event he's complaining about here. So I need to think about whether the complaint was made within three years of when Mr N should reasonably have been aware he had cause to complain.

BoS says it sent Mr N a letter on 25 March 2013, which alerted him to the possibility something might have gone wrong with his policy sale. This was followed up by three more letters in June, November and December 2013, which said broadly the same thing.

Given what Mr N is complaining about, I think he should reasonably have been aware he had reason to complain when he got this letter. I say this because the letter said that something might have gone wrong with the sales of PPI around the time Mr N took out his policy and it gave some examples of the kind of problems it had identified – some of the

things Mr N is now complaining about. It also invited Mr N to raise any concerns he had about his own policy sale in light of its general findings that PPI might have been mis-sold.

I can see that the letter was sent to the right address and I haven't been told about any reason why Mr N might not have received it (like problems with his post). So I'm satisfied it was most likely delivered correctly.

Three years from the letter is 25 March 2016, which in this case *does* extend the six-year deadline mentioned above. This means Mr N needed to make his complaint about the policy sale by 25 March 2016. As he didn't complain until 2018 his complaint is out of time under the rules I have to apply.

I *can* still look into complaints made outside the time limits if I'm satisfied the failure to comply with them was due to exceptional circumstances.

But, other than what I've looked at above, Mr N hasn't given any real reasons for the delay.

So I'm sorry that we're unable to help Mr N with his complaint about how this policy was sold.

Non-disclosure of commission

But I have 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 BoS should have disclosed the commission it received and that BoS' 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?

BoS didn't tell Mr N 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 BoS and Mr N was unfair under section 140A of the Consumer Credit Act because BoS didn't tell him about the high levels of commission and profit share in this case

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

Redress to remedy that unfair relationship

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[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*

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

Mr N'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 N should get back all the money he paid for the policy because: BoS failed to tell Mr N 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 N wouldn't have taken out the policy had he 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:

- 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 in this case is to determine what redress, if any, would represent fair compensation for Mr N in order to remedy the unfairness caused by BoS 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 N's representative suggests, driven to conclude that he wouldn't have purchased the policy but for BoS' failure to disclose the level of commission for the reasons I've given above.

I think it was fair for BoS to calculate compensation in line with the FCA's guidance and return *some* of the money Mr N paid for his PPI policy - I consider this fairly removes the source of the unfairness.

So I consider that BoS' 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.

As BoS has already paid Mr N compensation on this basis (in 2018), I don't consider it should do anything further.

My decision

I'm unable to consider Mr N's complaint about how his policy was sold, because it was referred to us too late – and I'm not persuaded the failure to comply with the time limits was because of exceptional circumstances.

But because of the non-disclosure of commission and profit share, I've decided that Bank of Scotland plc trading as Lloyds TSB should pay Mr N an amount equivalent to the commission and profit share paid in excess of 50% of the policy cost (plus associated interest where applicable.) As Bank of Scotland plc trading as Lloyds TSB has already paid compensation on this basis, I do not consider that it should do anything more.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr N to accept or reject my decision about the commission aspect of the complaint before 18 January 2022.

Paul Featherstone
Ombudsman