

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 Mrs T's complaint.

summary and background to complaint

Mrs T has said Canada Square Operations Limited, trading as "Egg", mis-sold her payment protection insurance ("PPI") with a credit card.

Canada Square didn't agree we could look at a complaint about how the PPI was sold - because it said Mrs T had referred the complaint to us too late.

But Canada Square did offer to pay back the amount of commission and profit share that was above 50% of Mrs T's PPI premium. It did this because it didn't tell Mrs T about the high level of commission and profit share she'd pay – which was unfair.

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

Mrs T's representatives disagreed with the adjudicator's opinion but didn't raise any new points. Mrs T requested that we continue with her complaint and make a final decision. So, as the complaint couldn't be resolved informally, it 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 Canada Square hasn't agreed.

The sale is the event Mrs T is complaining about here - and Canada Square sold the policy to her more than six years before she complained in 2019. I say this as although Mrs T has said the sale was in 1998, Canada Square says Mrs T applied for the card and PPI in 2005 – which is still well over six years before she complained.

So I need to think about whether Mrs T complained within three years of when she should reasonably have been aware that she had cause to complain.

Canada Square says it sent Mrs T a letter in 2012 which alerted her to the possibility something might have gone wrong with her policy sale. Given what Mrs T is complaining about, I think she should reasonably have been aware she had reason to complain if she got this letter.

I say this because Canada Square's letter, amongst other things, made clear the PPI was optional and not something she had to take to get her credit card – and Mrs T has said she's

unhappy with the PPI because, amongst other things, she had no interest in PPI and it was just included on her card.

Mrs T's representatives say they can't verify Canada Square's letter was sent – and I've thought about this. Canada Square has provided records showing the date the letter was sent and that it was sent to Mrs T's address. And I haven't been told of any reason why Mrs T might not have received it (like problems with her post). With all this in mind, I'm satisfied it's most likely the letter was delivered correctly.

This means Mrs T needed to make her complaint about the policy sale before the time to do so expired in 2015. As she didn't complain until 2019, her 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, Mrs T hasn't given any reasons for the delay.

So I'm sorry that we're unable to help Mrs T with her complaint about how this policy was sold – I appreciate this may disappoint her.

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 Canada Square should have disclosed the commission it received and that Canada Square'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?

Canada Square didn't tell Mrs T 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 Canada Square and Mrs T was unfair under section 140A of the Consumer Credit Act, because Canada Square didn't tell her about the high levels of commission and profit share in this case;

I don't think Canada Square acted fairly and reasonably in its dealings with Mrs T, because it failed to disclose the high commission and profit share.

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

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.

Mrs T'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 her complaint.

In summary they have said Mrs T should get back all the money she paid for the policy because: Canada Square failed to tell Mrs T 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, they say I should find that Mrs T wouldn't have taken the policy had she known about the level of commission and she should receive a refund of all the premiums she 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 140B 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 Mrs T in order to remedy the unfairness caused by Canada Square not disclosing the high level of commission to her before she 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 Mrs T's representative suggests, driven to conclude that she wouldn't have purchased the policy but for Canada Square's failure to disclose the level of commission for the reasons I've given above;

I think it was fair for Canada Square to calculate compensation in line with the FCA's guidance and return *some* of the money Mrs T paid for her PPI policy - I consider this fairly removes the source of the unfairness.

So I consider that Canada Square's 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. Canada Square offered Mrs T this payment towards the end of 2019 - so it may be that this has already been paid to her now, although I don't have confirmation of that.

I'm grateful to Mrs T for her attention and courtesy throughout our consideration of her complaint.

my final decision

I'm unable to consider Mrs T's complaint about how her 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 Canada Square Operations Limited should pay Mrs T 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 Mrs T to accept or reject my decision before 18 February 2022.

Richard Sheridan

Ombudsman