

complaint

Mr N complains that The Funding Corporation Limited ("TFC") mis-sold him payment protection insurance with a loan.

Mr N also complains that TFC has been adding interest to a judgment debt in relation to that loan.

background

I set out the full background to this complaint in my provisional decision which I issued in October 2019. That decision is attached here and forms part of my final decision. I invited both parties to comment on my provisional decision, and to provide any further comments or evidence they wished me to consider before making my final decision.

Mr N's representative accepted my findings in full. She confirmed that Mr N hadn't received any notices about interest charges from TFC and that Mr N continued to make payments to TFC from July 2009.

Mr N's representative also explained that TFC obtained a charge against Mr N's property. When Mr N came to sell his property the entire outstanding debt was paid off, including the interest charges.

TFC did not object to the principle of my decision, although it disputed the redress I provisionally directed.

my findings

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

While TFC did not make any representations on the substance of my provisional decision it did object to the award of 8% statutory interest on the compensation award. It said this service had taken too long to make a final decision which increased their costs. TFC also pointed out that the original court judgement included costs of £153 which I did not include in the sum owed by Mr N. I accept TFC's point in relation to the costs.

While I note that it has taken longer than I would like resolve this case, I do not accept that TFC should avoid paying statutory interest to Mr N on the sum owing to him. The object of the redress is to put Mr N back in the position he would have been if TFC had dealt with him fairly and reasonably in the first place. I am satisfied that the inclusion of statutory interest is fair and reasonable in this case.

As Mr N has accepted my provisional findings and TFC has provided no comment on the substance of my findings I am satisfied there is no reason to depart from my provisional decision to uphold Mr N's complaint about the interest charged and not to uphold Mr N's complaint about the sale of the PPI.

I have considered how the sale of Mr N's property affects the redress that should be paid to him. I do not think it makes a difference that the debt has now been paid in full, but for clarity I have set out below how the redress should be paid to Mr N in light of this information.

putting things right

- Rework Mr N's account to 1 July 2009 (the date of the CCJ), removing all additional interest charges from that point onwards and applying any payments made by Mr N to the £2,432.29;
- Remove any legal or other fees applied to the account from 1 July 2009;
- If - when TFC works out what Mr N paid since 1 July 2009 – Mr N paid more than £2,432.29, then TFC must refund the excess and pay Mr N 8% simple interest per year[†] on the amount Mr N paid in excess of the CCJ sum, from the point at which he paid it until the point at which he gets it back.

[†] HM Revenue & Customs requires TFC to take off tax from this interest. TFC must give Mr N a certificate showing how much tax it's taken off if he asks for one.

my final decision

I am not upholding Mr N's complaint about how the PPI policy was sold, but I am upholding Mr N's complaint about the post-judgement interest that was charged on the debt related to the loan taken in 2005.

The Funding Corporation Limited must pay compensation as I have detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 12 January 2020.

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Provisional decision

complaint

Mr N complains that The Funding Corporation Limited (“TFC”) mis-sold him payment protection insurance with a loan.

Mr N also complains that TFC has been adding interest to a judgment debt in relation to that loan.

background

Mr N took out a loan with TFC in 2005. At the same time he was sold a PPI policy which would’ve covered his repayments for up to a year at a time if he couldn’t work due to an accident, sickness or involuntary unemployment.

Mr N says that the cost, benefits and terms weren’t fully explained to him.

Mr N defaulted on the loan repayments and TFC obtained a county court judgement (“CCJ”) against Mr N. It later applied for, and was granted, a charging order for the debt.

Mr N says that TFC has been incorrectly continuing to add interest to the charging order debt.

The adjudicator didn’t think that Mr N’s complaint about the sale of the PPI should be upheld. And they thought that this service couldn’t look into the issue of the charging of post-judgment interest.

Mr N disagreed, so his complaint has been passed to me to decide.

my provisional findings

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

First of all, I shall look at the complaint about the potential mis-sale of the PPI policy. We’ve set out our general approach to complaints about PPI on our website and I’ve taken this into account when deciding this element of the complaint. Having done so, I’m not upholding this part. I’ll explain why I’ve reached this decision.

Mr N says that he thinks he was sold the PPI in a telephone call after the loan was taken out. But TFC has provided a copy of his credit agreement and separate PPI application and they are both signed on the same day, so I think it’s likely the two sales occurred together.

Mr N was offered a single premium PPI policy with his loan, but he declined this. Instead, he opted for a regular premium policy and he filled out a separate application form for it. TFC has provided a copy of this, as well as the credit agreement where Mr N doesn’t accept the single premium policy. I’m satisfied that these show that the policy was optional and that Mr N made an active decision to buy it.

It’s not clear whether TFC made a personal recommendation to Mr N about the PPI. If it did, then TFC also had responsibility to take reasonable steps to make sure it was right for him. Because there’s some doubt about whether TFC recommended the policy I’ve worked on the basis that it did – as this holds TFC to a higher standard.

Looking at Mr N’s circumstances at the time I think any recommendation would’ve been suitable for him. I say this because:

- Mr N was eligible for the policy and wouldn't have been affected by any of the terms which might've made it more difficult for him to make a successful claim, such as those related to existing medical conditions or self-employment;
- Mr N had some sick pay from his employer. But if Mr N was off work sick for an extended period the policy would've paid out in addition to this and potentially for longer – for up to 12 months at a time;
- Similarly, if Mr N had been made redundant the policy would've paid out in addition to any redundancy pay he received, leaving any redundancy pay to cover other uninsured expenses;
- The cost of the policy was comparable to other similar policies on the market offering the same benefits. It was a regular premium policy, paid monthly, which could have been cancelled at any time without a financial penalty.

TFC also had to make sure it gave Mr N all the information he needed about the policy. Mr N says that the information he was given wasn't good enough. It's possible that this was the case – although I can't know for certain. But even if Mr N had all the information he needed I don't think he'd have changed his mind and not bought the policy, because it was suitable for him in the way I've already described.

So, on balance, I don't think Mr N lost out as a result of anything TFC did wrong in relation to the sale of the PPI. That means I don't think TFC needs to pay Mr N any compensation for this.

I'll turn now to Mr N's second complaint, regarding the adding of interest after the charging order was made in court.

Can I consider this complaint?

I am satisfied that this complaint falls within the jurisdiction of this service as outlined in the relevant rules in the DISP section of the Financial Conduct Authority Handbook. It's a complaint about a regulated business, carrying out a regulated activity which has been brought to this service within the relevant timescales.

This service is not reconsidering the amount of Mr N's original debt, which was decided by the court. I am considering matters which have arisen since the charging order was made, namely the way TFC has managed Mr N's debt since the charging order was made, and whether it was entitled to add post-judgment interest to Mr N's debt.

Background

Mr N defaulted on the loan repayments. TFC sent a default notice to Mr N in April 2009 and obtained a County Court Judgment ("CCJ") for the outstanding sum in July 2009. TFC obtained a charging order – a charge over Mr N's property – for the sum owed in September 2009.

Mr N continued to make erratic payments towards the debt over the years. Mr N says that he didn't receive any statements from TFC telling him how much he owed. Mr N made no payments towards the outstanding debt between October 2010 and January 2014.

In early 2014 Mr N made a complaint to TFC about the sale of the PPI. TFC rejected his complaint in June 2014 and in Mr N's response to TFC he again asked for details about the outstanding debt. Mr N explained that he had, at that point, paid off more than the original loan plus interest and didn't believe that he owed any more. I have seen a copy of this letter.

TFC did not respond substantively to Mr N about the interest and charges. It says it required proof of identity and authority for a third party to act on Mr N's behalf. This was provided on 11 April 2014. Instead of providing the information requested TFC merely spoke to their litigation department who stated that the debt had been passed on to another third party for collection and that the litigation department would 'inform them of Mr N's concerns.'

In November 2014 TFC provided Mr N with a statement of the sums he owed. Mr N queried this balance as it was much lower than the sums that had previously been demanded of him. Even though the sum was lower, Mr N still disputed the amount owed.

TFC did not respond to address the concerns Mr N raised in his letters of April and November 2014.

Nearly two years later, in July 2016 Mr N received a letter from a further *different* third party debt collector explaining that it was instructed to recover the debt – the amount was much larger than that provided to Mr N by TFC in their statement of November 2014 and the amount Mr N thought he owed. The letter advised that if Mr N was able to agree to a payment plan that interest would be frozen from the point of the first payment.

Mr N's representative wrote back to the third party again disputing the amount owed and asking for an updated statement taking into account all payments made and removing the disputed interest charges.

As Mr N didn't receive a response, this service wrote to TFC about Mr N's concerns. TFC responded that it would provide a final response within eight weeks of Mr N's letter to them. This should have been provided by 5 October 2016. I have not seen a copy of this final response, although Mr N's representative reports that he received some kind of response from TFC *'insisting that he still owes over £3000.'* I have requested a copy of this response – if it exists – from Mr N's representative but I have not received it, and it hasn't been provided by TFC as part of their evidence. So I can't be sure that Mr N received any formal final response.

Was TFC entitled to charge interest on the judgment debt?

My starting point has been to consider whether TFC was entitled to charge ongoing interest after the court orders. Looking at the orders, the CCJ stated *"interest to date of judgment"* in the body of the order – which implies that ongoing interest wasn't permitted. But then the final charging order a few months later referred to *"any further interest."* So the wording of the court orders is confusing.

At the bottom of the CCJ there are notes to say that interest can only be charged if:

- i) The judgment debt is for more than £5,000; or,
- ii) The debt attracts contractual or statutory interest.

Mr N's judgment debt was below £5,000, so (i) doesn't apply. And I don't think (ii) applies either.

The County Courts (Interest on Judgment Debts) Order 1991 ("the 1991 order") states that interest can't be charged on a judgment debt in relation to an agreement regulated by the Consumer Credit Act 1974 (as amended) ("CCA"). Mr N's judgment debt was related to an outstanding personal loan debt, so it falls into this category.

But the House of Lords in *Director General of Fair Trading v First National Bank PLC* [2001]UKHL 52 said that charging interest on a CCA judgment debt was nevertheless possible if there's a term in the credit agreement stating that interest can be charged post-judgment.

I have reviewed Mr N's original credit agreement. I note that in section 5 (*Key Information*) it states:

"We may charge interest at the rate of the APR on all sums overdue under this Agreement – see clause 7 of the Terms"

The numbering on the agreement only goes up to section 6 – the signature box. There may be a further page to the agreement but I have not been provided with it. So I can't be satisfied that there was any further explanation to Mr N of whether interest would be charged post-judgment, and I can't be satisfied that TFC met the requirements laid out in the House of Lords' judgment.

However, even if I was wrong about this (and I only have to *take into account* the relevant law when deciding if TFC has acted fairly and reasonably in the circumstances of this complaint), I still don't think TFC has acted properly under the Consumer Credit Act 1974, as amended. There are other conditions which also have to be satisfied to allow post-judgment interest to be charged. These are:

- i) The creditor must send a default notice to the consumer before court action is taken. If there is a term in the credit agreement allowing interest after judgment then the creditor must include a special statement in the default notice saying:

"You should be aware that if we take you to court and get a judgment against you requiring you to pay us the money you owe us under the agreement, you may have to pay us both the amount of the judgment and the interest under the agreement on all the sums owed by you at the date of judgment until you have paid these in full. This means that even if you pay off the whole amount of the judgment, you may still have a further sum to pay."
- ii) The creditor must send the consumer a notice to say they intend to charge interest on the judgment. They are not allowed to add interest until they have sent the first notice. The notice must tell the consumer the outstanding balance on which interest will be charged. It must also say what the rate of interest is and what date the interest will run from.
- iii) All the notices must tell the consumer that they can ask the court to change the interest rate and the instalments the consumer should pay.
- iv) The creditor has to send a new notice every six months if they want to keep charging interest. The notice must tell the consumer how much interest has been added and the interest rate.
- v) If the creditor does not send a notice within six month, they are not allowed to charge interest until a new notice is sent. They are not allowed to backdate and charge interest for the time they have missed.

I asked TFC several times for copies of *all* the default notices they sent to Mr N. TFC only provided one, which was sent to Mr N on 14 April 2009.

This notice includes the relevant wording in (i) above. But there isn't a further notice sent after the judgment saying that TFC *did* intend to charge interest, as explained in (ii) or that Mr N could apply to the court to change the interest rate or instalment amounts as in (iii). And from what has been provided it seems like TFC didn't ever send another default notice to Mr N from April 2009 onwards. So even if TFC was entitled to add post-judgement interest in the first place, I think that entitlement fell away when it didn't meet its obligations to Mr N under the Consumer Credit Act in this regard.

Failure to send statements

I have already described in the background section that Mr N says he did not receive annual statements about his account from TFC, and I haven't received copies of these from TFC as part of their evidence either. Mr N was given a confusing picture of his outstanding debts from different parties at different times. He could not have relied on the information to fully understand what he owed and why.

Section 78 of the Consumer Credit Act 1974 places a legal obligation on creditors to send – as a minimum – annual statements in relation to running-account credit. That includes loan debts like Mr N's.

The Office of Fair Trading ("OFT") has issued guidance on whether s.78 continues to apply when post-judgment debt interest is being charged by a creditor ("Guidance on sections 77, 78 and 79 of the Consumer Credit Act 1974 – the duty to give information to debtors and the consequences of non-compliance on the enforceability of the agreement" 2010).

Paragraph 4.1 of that guidance states that s.78 doesn't apply where a judgment has been obtained *"unless there is an interest-after-judgment clause in the agreement."* So, even if I was wrong about whether Mr N's credit agreement allowed post-judgment interest to be applied, if TFC thought that it *could* be applied it should have been sending Mr N statements each year, which it appears it didn't do.

I've thought about the impact on Mr N of TFC's failure to send annual statements to him. I think if he'd understood straight away that TFC were applying post-judgment interest he'd have been able to deal with the issue more quickly – preventing further interest accruing. Or he could have returned to court to clarify the position or to seek an amendment to the charging order – an option which is no longer realistic given the passage of time.

I think that TFC has failed in its overarching duty to treat Mr N fairly (PRIN 2.1.1(6) R and CONC 7.3 of the FCA handbook). But I also have to think about what is fair to TFC in the circumstances. It is reasonable that TFC should be able to collect the amount that the judgment ordered Mr N to pay - £2,279.29.

my provisional decision

For the reasons I've explained I do not intend to uphold Mr N's complaint in respect of the sale of the PPI. But I do provisionally intend to uphold Mr N's complaint about the interest charged post-judgement on his outstanding debt to TFC.

If my decision becomes final, I intend to direct The Funding Corporation Limited to:

- Rework Mr N's account to 1 July 2009 (the date of the CCJ), removing all additional interest charges from that point onwards and applying any payments made by Mr N to the £2,279.29;
- Remove any legal or other fees applied to the account from 1 July 2009;
- Ensure that no interest is applied going forward;
- Notify Mr N of the new balance of his debt and continue to notify him of his account activity and outstanding balance annually (as a minimum).
- If - when TFC works out what Mr N has paid since 1 July 2009 – Mr N paid more than £2,279.29, then TFC must refund the excess and pay Mr N 8% simple interest per year[†] on the amount Mr N paid in excess of the CCJ sum, from the point at which he paid it until the point at which he gets it back.

[†] HM Revenue & Customs requires TFC to take off tax from this interest. TFC must give Mr N a certificate showing how much tax it's taken off if he asks for one.

I will consider any further comments or representations that either party wishes to make, and any evidence either party wishes to supply, which I receive before 18 November 2019. I will make my final decision after this.