

complaint

This complaint is about a mortgage payment protection insurance (PPI) policy taken out in 2008. Mr B says Santander UK Plc mis-sold him this PPI.

background

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

One of our adjudicators previously looked into the mis-sale element of the complaint and said they didn't think we should uphold it. However, they thought Santander's offer to pay back some of the cost of the PPI, because of the non-disclosure of high commission and profit share Mr B paid, was fair in the circumstances.

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 B's. I haven't set out that detailed information here but I've taken into account all relevant considerations in deciding Mr B'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 decided Santander should have disclosed the commission it received - but that Santander's offer to refund some of the cost of PPI to compensate for the unfairness caused is fair in the circumstances.

On balance, I think Santander probably made it clear enough that Mr B didn't have to take out the PPI and that he himself chose to take it out.

I say this because I note that his mortgage had already been running for around 5 years *without* any PPI attached. We know the PPI was added when Mr B was rearranging his financial affairs in 2008. By definition therefore, it's logical to say that Mr B would have probably known that having PPI was optional, rather than compulsory.

The PPI was sold over the 'phone and due to the passage of time there's no recording left, but this isn't unreasonable given when it was. However, I've seen a few sales like this one and we have a copy of the telephone 'script' that Santander's agents were told to follow when dealing with consumers like Mr B at the time. I think the likelihood is that Mr B was asked about PPI and he agreed to it during that call.

A central theme of the complaint is that Mr B says he didn't agree, and he didn't receive any confirmation of a sale. But I don't think this is right because I've been sent a copy of a 'welcome' letter about the PPI, from August 2008, which outlined the costs involved and what Mr B could do if he wanted to change his mind. I also think he'd have needed to set up a direct debit to transfer the monthly PPI premiums from his bank account.

I accept that Mr B may genuinely not remember this now, but in my view, it represents reliable evidence that he would have known he had a choice and that he took out the policy because the cover was something he wanted to have. I think at the time Mr B wanted to protect his mortgage repayments against losing his job or becoming too ill to work. In my view, he probably provided his consent and could see the policy had been set up for him. I note he went on to cancel it after year or so.

This wasn't an 'advised' sale and so it was for Mr B to decide for himself what he wanted to do. Santander had a responsibility to provide clear information to allow him to make that decision.

It's certainly possible Santander could have explained the policy in more detail than it did, although I can see there was some information about the price and other key features of the PPI. So I think Mr B probably had enough information to decide what he wanted to do. Even if I accept more could have been done by Santander to explain things, I don't think this makes any difference to my overall decision.

This is because I think Mr B was eligible for the cover and not 'caught' by any of the main exclusions we tend to see in these types of policy. The cost of the cover, at £20.96 per month, seems affordable for him and the PPI would have paid £347 each month for up to a year if he'd needed to claim. Looking at Mr B's job and general circumstances, I think this would have been useful. The evidence about Mr B's circumstances at the time, shows that the policy wasn't fundamentally wrong or unsuitable for him. There was nothing about his employment or occupation which would have made it difficult for him to claim.

Overall, I consider that Mr B would have still taken out PPI. I think the policy could have provided a useful benefit in a difficult time, given his circumstances at the time. I also think the policy was sufficiently close to what it's likely he thought he was getting. And in those circumstances, I think that he would have taken out the policy in any event.

Mr B's representative has raised a number of what I consider to be general complaint points, which it says apply to all PPI complaints. These general points 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 the low claims ratio; and the duty of utmost good faith meant Santander should have disclosed the poor value and explained the significance of the limitations and exclusions and the impact it had on the chances of making a claim.

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

I have thought about these things and how they might apply in Mr B's particular case. But these 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 Santander doesn't have to pay back all of the cost of the PPI to Mr B.

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 Santander should have disclosed the commission it received and that Santander'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?

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

I don't think Santander acted fairly and reasonably in its dealings with Mr B 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 B'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 B should get back all the money he paid for the policy because: Santander failed to tell Mr B 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 B wouldn't have taken out the

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

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:

- 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 B in order to remedy the unfairness caused by Santander 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 B's representative suggests, driven to conclude that he wouldn't have purchased the policy but for Santander's failure to disclose the level of commission for the reasons I've given above.

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

So I consider that Santander'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.

my decision

Overall, having considered all the evidence and arguments to decide what is, in my opinion, fair and reasonable in all the circumstances of this complaint and for the reasons I have set out above, I don't uphold the mis-sale element of Mr B'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 Santander UK Plc should pay Mr B 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 B to accept or reject my decision before 10 October 2021.

Michael Campbell
ombudsman