

complaint

This complaint is about a credit card payment protection insurance (PPI) policy taken out in 1999. Mr S says MBNA Limited mis-sold him PPI.

background

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

Our adjudicator did not uphold the mis-sale complaint, but he thought MBNA's offer to pay back some of the cost of the PPI, because of the non-disclosure of high commission and profit share Mr S paid, was fair in the circumstances.

Mr S's representative disagreed with the adjudicator's opinion – it didn't raise any new or additional points but repeated the same complaint points and arguments it had 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 S's. I haven't set out that detailed information here, but I've taken into account all relevant considerations in deciding Mr S'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 MBNA should have disclosed the commission it received - but that MBNA's offer to refund some of the cost of PPI to compensate for the unfairness caused is fair in the circumstances. I've summarised my reasons for each of these conclusions below.

In summary, my reasons for not upholding the mis-sale part of this complaint are:

- I think MBNA made it clear that Mr S didn't have to take out the PPI and he chose to take it out. I say this because MBNA sent in a copy of Mr S's credit card application form, and I can see that he didn't complete the PPI section on the form and cover wasn't applied to the account initially – so I think he would have understood that he didn't have to have PPI to get the card. The sale then took place when Mr S called MBNA to activate his credit card. I do not have a copy of MBNA's call script from the time of the sale, but

MBNA said that its representative would've been required to make it clear the PPI was optional. I've no reason to doubt that in this case.

- MBNA didn't recommend the PPI to Mr S - so it didn't have to check that the PPI was right or suitable for him. But it did have to give Mr S enough clear and timely information so he could decide for himself if it was right for him.
- It's possible the information MBNA gave Mr S about the PPI wasn't as clear as it should've been. But I've found that he chose to take it out - so it looks like he wanted this type of cover. The cover wasn't fundamentally wrong for Mr S – for example he wasn't affected by the significant exclusions on or limits to the cover. And it wasn't too dissimilar to what he reasonably thought he was buying from the information he was given. It also looks like it was affordable – so it seems like it would have been useful for him if something went wrong. Because of this I don't think Mr S would have declined the cover had MBNA done anything more.
- While the policy contained limitations on claims relating to back and mental health conditions, in light of Mr S's circumstances at the time of sale and despite its limitations and exclusions, the policy wasn't fundamentally wrong or unsuitable for him. So I think he would have still thought he had some good reasons to take the policy out.

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

Mr S'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 MBNA should have disclosed the poor value and explained the significance of the limitations and exclusions and the impact they had on the chances of making a claim.

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

I have thought about these things and how they might apply in Mr S'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 MBNA doesn't have to pay back all of the cost of the PPI to Mr S.

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

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

I don't think MBNA acted fairly and reasonably in its dealings with Mr S 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 S'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 it has said Mr S should get back all the money he paid for the policy because MBNA failed to tell Mr S about the high commission and profit-share rates paid, the low claims ratio and the restrictions and exclusions on cover. Because, it says, that meant the policy was poor value, I should find that Mr S 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 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

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

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

I think it was fair for MBNA to calculate compensation in line with the FCA's guidance and return *some* of the money Mr S paid for his PPI policy.

I consider this fairly removes the source of the unfairness. This is because it leaves Mr S with the policy I've concluded above he would still have taken out if MBNA had done everything it should have done – but with lower commission and profit share levels.

So I consider that MBNA'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 final 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 S's complaint or make any award in his favour for this part of the complaint.

But because of the non-disclosure of commission and profit share, I've decided that MBNA Limited should pay Mr S 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 S to accept or reject my decision before 24 September 2021.

Jan Ferrari
ombudsman