

## **complaint**

Mr and Mrs W don't think it's fair for The Royal Bank of Scotland Plc (RBS) to use their payment protection insurance (PPI) compensation to reduce the debt from which they were discharged when their protected trust deeds came to an end in 2011.

## **background**

Mr and Mrs W took out a series of eight loans with RBS between 1997 and 2003 each loan refinanced the previous loan. The first two loans were taken out in Mr W's name only while the last six were in joint names. They took out PPI alongside these loans to protect their repayments.

In 2007 Mr and Mrs W entered into protected trust deeds. This is an alternative in Scotland to bankruptcy (called sequestration in Scotland). It is a legally binding agreement between a consumer and their creditors, which is administered by a trustee.

When Mr and Mrs W entered into the trust deeds, RBS made a claim for several thousand pounds. RBS didn't chase for these outstanding sums but it confirmed it wrote off the accounts as a result of the trust deed. While RBS didn't chase for the outstanding sums the debt still existed. So a substantial amount of debt was left unrecovered from Mr and Mrs W.

Mr and Mrs W complained to RBS about the mis-sale of these policies. RBS upheld the complaint about all the PPI policies and offered to refund the PPI premiums and the extra interest that Mr and Mrs W had paid to date together with simple interest to compensate them for the time they'd been out of pocket. Mr W signed the acceptance forms for the six joint loans. RBS then used his half of the compensation to reduce the balance of the outstanding debt. RBS has said that when it receives acceptance by Mrs W for the joint loans and Mr W for the first two loans in his name only it will use the compensation due to further reduce the amount outstanding.

But Mr and Mrs W don't think the PPI compensation they were offered should be used by RBS in this way. They say that as the protected trust deeds long since ended, they don't owe the money to RBS. They have asked that the compensation be paid directly to them.

Our adjudicator said that she didn't think this complaint should be upheld. She thought that it was fair to set off the compensation against the sums owed to RBS. She said that RBS had acted in line with our expectations. Unhappy with the adjudicator's view, Mr and Mrs W asked that the matter be referred to an ombudsman for a final decision so the matter was passed to me.

In October 2019 I issued my provisional findings on this complaint and invited both parties to comment and send me any additional evidence they wanted me to think about. A copy of my provisional decision is attached and forms part of this final decision.

My provisional findings were that I was not intending to uphold this complaint.

In my provisional decision I explained that I was aware of and had taken into account the relevant law. But I must apply an over-arching test of what's fair and reasonable in the particular circumstances of Mr and Mrs W's complaint. Having done this, I thought it was fair for RBS to use the PPI compensation to reduce the money Mr and Mrs W borrowed and didn't repay.

I did however note that RBS had not responded to Mr W's correspondence in a timely way and I awarded £200 for the trouble and upset this had caused.

Both parties have now responded to my provisional findings.

Mr and Mrs W disagree with my initial findings. They've pointed out that RBS mis-sold the PPI in the first place and would have received commission on the sales, so they still think it unfair for RBS to use the compensation the way it has. Mr and Mrs W have said that other businesses have acted differently in similar situations and paid the consumer the PPI compensation directly. They have also pointed out that RBS wrote off the debt many years ago and have asked if legally RBS can take action to recover the debt now,

RBS has clarified some figures I quoted in my provisional decision but otherwise has agreed with my initial findings.

### **my findings**

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

I know this decision will disappoint Mr and Mrs W but having done so it remains my decision that it is fair for RBS to use the PPI compensation to reduce the outstanding debt. I'll explain why.

Firstly RBS has clarified that its claim in the trust deed was actually £12,875.61 and it has used the compensation total of £12,738.37 to reduce the debt to £137.24.

Mr and Mrs W have asked whether RBS are legally able to recover the debt due to legislation that limits the time it can chase the outstanding amount. But in this case RBS did not actively chase Mr and Mrs W to settle the debt. Mr and Mrs W approached RBS to complain about the PPI and RBS used the compensation to reduce the debt. So I don't think the Limitations Act applied in this case.

And while some other businesses may have taken a different approach, RBS has chosen to use the compensation to reduce the outstanding debt, and in this decision I am only looking at whether what RBS has done is fair.

Whilst it is true that RBS mis-sold the PPI, the compensation it calculated includes the entire cost of the PPI plus compensatory interest. So by reducing the outstanding debt by this amount it effectively returns Mr and Mrs W to the position they'd be in if the PPI had not been sold.

Within my provisional decision I mentioned that there were some court cases about to whom PPI compensation should be paid when a consumer has been 'discharged' from a 'protected trust deed. One of the court cases, Royal Bank of Scotland Plc v Donnelly [2019] CSIH 56. The court said RBS couldn't use the consumer's PPI compensation to reduce a debt from which they were 'discharged' when the trust deed came to an end. But I explained that this was being appealed by RBS – and that the outcome may change.

Since my provisional decision, the appeal has been heard at the Inner House of the Court of Session. In short, RBS lost the appeal and the court reaffirmed the legal position that RBS

couldn't use the compensation to pay down the amount that wasn't repaid after the trust deed ended. The court said when the trust deed ended the debtor was discharged from her debts, so there was no longer any debt owing from her to the bank which could be subject to set-off.

At this moment it isn't known whether RBS intend to appeal the decision further to the Supreme Court – so there is a possibility the outcome may change.

However, as explained within my provisional decision – I have considered the relevant law. And when initially providing my provisional decision, I did so when the law had already found in the consumers favour. RBS losing the appeal confirms the legal position within Scots law about what happens when consumer is discharged from their trust deed (although I'm mindful as I've said above, RBS maybe appealing this further to the Supreme Court). But as I also explained with my provisional decision, whilst I take into account the relevant law – I'm not bound to follow it. I must also apply an over-arching test of what's 'fair and reasonable' in the particular circumstances of Mr and Mrs W's complaint – as required of me through FSMA Section.228 and the FCA's DISP rules.

Having done so, I remain of the opinion it would be unfair for RBS to pay compensation directly to Mr and Mrs W – when Mr and Mrs W, thanks to the trust deed, now won't ever have to repay the monies borrowed and left unpaid.

I note RBS has agreed to my suggestion to award Mr and Mrs W £200 compensation directly for the trouble and upset caused by not answering their correspondence in a timely manner.

### **my final decision**

For the reasons set out above and in my provisional decision I find that it's fair for The Royal Bank of Scotland Plc to use Mr and Mrs W's compensation for the mis-sold PPI to reduce the amount they owed and didn't repay when their trust deeds came to an end.

I also direct The Royal Bank of Scotland Plc to pay Mr and Mrs W directly £200 for the inconvenience and upset they experienced due to the bank's service failings.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs W to accept or reject my decision before 23 January 2020.

Steve Thomas  
**Ombudsman**

### **copy of my provisional decision**

#### **complaint**

Mr and Mrs W don't think it's fair for The Royal Bank of Scotland Plc (RBS) to use their payment protection insurance (PPI) compensation to reduce the debt from which they were discharged when their protected trust deeds came to an end in 2011.

## background

Mr and Mrs W took out a series of eight loans with RBS between 1997 and 2003 each loan refinanced the previous loan. The first two loans were taken out in Mr W's name only while the last six were in joint names. They took out PPI alongside these loans to protect their repayments.

In 2007 Mr and Mrs W entered into protected trust deeds. This is an alternative in Scotland to bankruptcy (called sequestration in Scotland). It is a legally binding agreement between a consumer and their creditors, which is administered by a trustee.

When Mr and Mrs W entered into the trust deeds, RBS's total claim was £16,782.94. RBS didn't chase for these outstanding sums but it confirmed it wrote off the accounts as a result of the trust deed. While RBS didn't chase for the outstanding sums the debt still existed. So a substantial amount of debt was left unrecovered from Mr and Mrs W.

Mr and Mrs W complained to RBS about the mis-sale of these policies. RBS upheld the complaint about all the PPI policies and offered to refund the PPI premiums and the extra interest that Mr and Mrs W had paid to date together with simple interest to compensate them for the time they'd been out of pocket. Mr W signed the acceptance forms for the six joint loans. RBS then used his half of the compensation totalling £6,423.34 to reduce the balance of the outstanding debt to £10,359.60. RBS has said that when it receives acceptance by Mrs W for the joint loans and Mr W for the first two loans in his name only it will use the compensation due to further reduce the amount outstanding.

But Mr and Mrs W don't think the PPI compensation they were offered should be used by RBS in this way. They say that as the protected trust deeds long since ended, they don't owe the money to RBS. They have asked that the compensation be paid directly to them.

Our adjudicator said that she didn't think this complaint should be upheld. She thought that it was fair to set off the compensation against the sums owed to RBS. She said that RBS had acted in line with our expectations. Unhappy with the adjudicator's view, Mr and Mrs W asked that the matter be referred to an ombudsman for a final decision so the matter has been passed to me.

## 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. When considering what is, in my opinion, fair and reasonable, I'm required by DISP 3.6.4 R of the Financial Conduct Authority ("FCA") Handbook to take into account:

(1) *relevant:*

- (a) *law and regulations;*
- (b) *regulators' rules, guidance and standards;*
- (c) *codes of practice; and*

(2) *(where appropriate) what [the ombudsman] considers to have been good industry practice at the relevant time.'*

As RBS has upheld Mr and Mrs W's PPI mis-sale complaints, in this provisional decision I've just looked at whether what it's done to put things right is fair and reasonable. I haven't looked at how the PPI policies came to be mis-sold. Mr and Mrs W's complaint is that RBS has set-off the amount of compensation to reduce the loan amount that hasn't been fully repaid rather than paying the compensation directly to them.

So in this decision I need to decide whether it's fair and reasonable for RBS to use Mr and Mrs W's PPI compensation offer to reduce the much higher amount of debt which they were not required to repay back to it (and was written off by RBS) after their protected trust deeds were closed in 2011.

And in this case the relevant law I need to take account of is Scottish law. In recent years there have been a number of cases looking at what happens to PPI compensation after a trust deed has been discharged.

In *Dooneen Ltd v Mond* [2018] UKSC 54, the Supreme Court considered the effect of a discharge following a final distribution by the trustee. In that case, the discharge was held to terminate the trust which meant that any unrealised assets were returned to the debtor – including the PPI compensation that no one had known about at the time.

So in this case the Supreme Court said that the PPI compensation should not be paid to the trustees for the benefit of the creditors. It said it should be paid to the consumer.

In *Donnelly v The Royal Bank of Scotland PLC* [2017] SAC (Civ) 1, the Sheriff Appeal Court considered whether RBS could offset PPI compensation against the amount that hadn't been repaid when the trust deed came to an end. The terms of the trust deed in this case meant RBS had, in effect, agreed that the debt would be extinguished – and it couldn't later revive the debt to offset the PPI compensation (I understand RBS has appealed this decision, so the outcome may change).

So I accept that, unless and until the Inner House reverses the decision of the Sheriff Appeal Court, and on the assumption that the relevant terms of the trust deed in *Donnelly* are essentially the same as those in this case, then RBS could not, in court, successfully argue for set-off in this case.

In this case I am aware of and have taken into account the relevant law. But I must apply an over-arching test of what's fair and reasonable in the particular circumstances of Mr and Mrs W's complaint. Having done this, I think it's fair for RBS to use the PPI compensation to reduce the money Mr and Mrs W borrowed and didn't repay.

Just because Mr and Mrs W entered into protected trust deeds and they were discharged from the debt when the trust deeds ended, doesn't make a difference to what is fair. I think it would be unfair to tell RBS to pay Mr and Mrs W compensation when they don't now have to repay the borrowing which is still outstanding.

At the start of the protected trust deed, the outstanding amount Mr and Mrs W owed RBS was a little over £16,782.94. It is important to note that when a consumer grants a trust deed, the creditor simply pools together any debts the consumer owes it – so it effectively becomes one amount that is owed. And a business will look to see if it owes the consumer anything, and then adjusts the amount that is owed. This would then be the final amount that it puts forward as what is owed to it as a creditor in the trust deed.

While it is the case that RBS agreed to the protected trust deeds, had Mr and Mrs W – or their trustees – realised they'd been mis-sold the PPI while the trust deeds were active, then RBS would clearly have been entitled to use the PPI compensation to reduce what they owed it. Or, alternatively, it could have been paid to the trustees for the benefit of all their creditors. Importantly Mr and Mrs W wouldn't have got this money directly.

The fact that Mr and Mrs W's protected trust deed had come to an end before this offer of PPI compensation was made doesn't, in my opinion, make a difference to what is fair and reasonable in the circumstances here. I don't think anyone would think it fair to require RBS to repay the PPI compensation directly to Mr and Mrs W when they don't now need to pay back to RBS a bigger amount which they borrowed from RBS.

So it follows from what I've said that I think it's fair for RBS to use the PPI compensation it's offered to reduce the outstanding debt which was written off by RBS following the closure of Mr and Mrs W's protected trust deed.

I note that Mr and Mrs W have said that the sale of the PPI itself caused them an additional financial burden which may have contributed to their financial difficulties and ultimately having to enter the

protected trust deeds. I've thought about this, but Mr and Mrs W took out a chain of eight loans over six years and the PPI formed a relatively small part of the loan amounts. So I think that if Mr and Mrs W hadn't been sold the PPI to begin with, it's likely – given the amounts involved – that they'd still have entered the trust deeds, but owed less. And this is the position RBS's offer puts them in.

Finally I note that Mr and Mrs W have said that RBS handled their complaint poorly. RBS has offered £75 for service failings. Mr and Mrs W have declined this offer. This was a complicated case involving eight different loans over six years, some in joint names and others in Mr W's name only. So it would have been important that Mr and Mrs W received clear answers to their complaints. I can see that in particular Mr W didn't receive a response to his complaints about the two loans in his name and that when he called RBS for copies his requests were not actioned. I think this would have caused Mr and Mrs W some inconvenience and upset and I think a fair amount of compensation would be £200.

### **my provisional decision**

For the reasons set out above, my provisional decision is that I am currently minded to decide that it's fair for The Royal Bank of Scotland Plc to use Mr and Mrs W's compensation for the mis-sold PPI to reduce the amount they owed and didn't repay when their trust deeds came to an end.

I am also minded to direct The Royal Bank of Scotland Plc to pay Mr and Mrs W directly £200 for the inconvenience and upset they experienced due to the bank's service failings.

Steve Thomas  
**ombudsman**