

complaint

Mr N says HSBC UK Bank Plc mis-sold him a payment protection insurance (“PPI”) policy.

background and summary to complaint

Mr N bought the policy in 2007 to protect the repayments on a mortgage he took out with HSBC. He applied for the mortgage and PPI policy in branch.

The policy provided cover for Mr N for accident, sickness, and unemployment – subject to its exclusions and limitations. It offered to repay £400 a month towards Mr N’s mortgage balance in the event of a successful claim. At the time, it cost £23.76 a month.

At the time, Mr N was employed in property work. He has told us he wasn’t entitled to any sick pay and didn’t have any other means of repaying his mortgage should he be unable to work. Mr N has said he had a medical condition at the time of the sale.

Mr N’s representative has made lengthy and substantial representations on his behalf.

I will not restate them all here, but I have read and considered them all carefully. In summary, Mr N’s representative says:

- HSBC failed to meet the sales standards which applied at the time. In those circumstances, applying the regulator’s rules and guidance for businesses on handling PPI complaints under DISP App 3, it should be presumed Mr N wouldn’t have taken out the policy and the complaint should be upheld. Mr N’s representatives believe there to be no evidence to rebut that presumption;
- The policy excluded or limited claims for back pain and stress, which are some of the most common reasons people are off work. This significantly reduced the value of cover;
- The true costs including interest and the fact it was unlikely you could make a successful claim meant the policy was of inherently poor value as shown by the low claims ratio. The common law duty of utmost good faith means HSBC should have told Mr N about the poor value;
- The common law duty of utmost good faith also means HSBC should have explained the significance of the exclusions and limitations of cover to Mr N and the impact they would have had on his chances of making a claim;
- The policy only protected payments for the short-term, whereas a mortgage is generally someone’s biggest ever long- term transaction – cover would stop at the time it would be most needed; and
- The information Mr N received was misleading. These policies were promoted as providing peace of mind, but the number of exclusions and limitations on the scope of the cover meant this was untrue.

Our adjudicator didn’t uphold the complaint – both parties have seen and provided their responses to the adjudicator’s opinion. Mr N disagreed with the adjudicator’s opinion for several reasons.

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.

relevant considerations

When considering what is fair and reasonable, I'm required to take into account: relevant law and regulations; relevant regulators' rules, guidance and standards; relevant codes of practice; and, where appropriate, what I consider to have been good industry practice at the time. The Financial Ombudsman Service has set out its general approach to PPI 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 N's. I don't intend to set that out in much detail here, but I've taken this into account in deciding Mr N's complaint.

The mortgage was arranged after mortgage lending became regulated in October 2004 – as such this was a 'regulated mortgage contract'. That means the unfair relationship provisions set out in s.140A of the Consumer Credit Act, the Supreme Court judgment in *Plevin* about s.140A of that Act and the rules and guidance made by the FCA about the handling of complaints about the non-disclosure of commission in light of the *Plevin* judgment, aren't applicable.

This sale took place in 2007 after the sale of general insurance products like this became regulated by the Financial Services Authority (FSA) in January 2005. So the FSA's and the FCA's overarching principles for businesses and insurance conduct rules (ICOB) are applicable to this complaint.

It's also relevant to note that there have for some time been codes governing the sale of insurance products such as PPI. There is much in common between the present statutory regulatory regime and the non-statutory provisions that preceded it (and, indeed, the position at law).

Although the non-statutory provisions no longer apply as specific requirements on those selling insurance, I consider they still represent a helpful guide to good industry practice. As a result, it is appropriate for me to take them into account along with the relevant ICOB rules and the other relevant considerations.

In the period immediately before statutory regulation in 2005, there was a period of industry 'self-regulation' by the General Insurance Standards Council (GISC). It published *The General Insurance Standards Council's General Insurance Code for private customers – the 'GISC Code'*. This set out minimum standards of good practice for its members to follow when selling insurance, including PPI.

The Association of British Insurers (ABI) also published a number of codes, which I consider to be indicative of the standards of good industry practice expected from intermediaries, like HSBC, selling insurance at this time:

- The Association of British Insurers' General Insurance Business Code of Practice for all intermediaries (Including Employees of Insurance Companies) other than Registered Insurance Brokers – 'The ABI Code'.

The ABI Code was supplemented by:

- Guidance on the application of the ABI Code
- The ABI Statement of Practice for Payment Protection Insurance
- The ABI General Business Code of Practice for Telephone Sales, Direct Marketing/Direct Mail and the Internet
- The Resume for Intermediaries

The sale took place after the sale of mortgage products became regulated by the FSA. So the mortgage conduct of business rules (MCOB) are applicable to this complaint. Prior to regulation subscribing lenders and mortgage intermediaries followed a voluntary mortgage code. While predominantly about mortgage related matters, it also included some insurance-related commitments.

I've also taken account of relevant law in reaching my decision, including: the law relating to negligence, misrepresentation and contract (including the express and implied duty on professional advisers to give advice with reasonable skill, care and diligence); the law relating to the duty of utmost good faith; and the law relating to causation and remoteness.

I'm also mindful of the evidential provisions and guidance set out at DISP App 3, first issued by the FSA in 2010, which sets out how firms should handle complaints relating to the sale of PPI. The sale took place after insurance mediation became a regulated activity in January 2005, so HSBC was required to take into account the provisions in DISP App 3 when considering Mr N's complaint.

key questions

Taking the relevant considerations into account, it seems to me that the key questions I need to consider in deciding what is in my opinion fair and reasonable in all the circumstances of this complaint, are:

- If HSBC gave advice, whether it advised Mr N with reasonable care and skill – in particular, whether the policy was appropriate or 'suitable' for him, given his needs and circumstances.
- Whether HSBC gave Mr N sufficient, appropriate and timely information to enable him to make an informed choice about whether to take out the policy, including drawing to his attention and highlighting – in a clear, fair and not misleading way – the main provisions of the policy and significant limitations and exclusions.
- If, having considered these questions, I determine the complaint in favour of Mr N, I must then go on to consider whether and to what extent Mr N suffered loss or damage and what I consider would amount to fair compensation for that loss or damage.

Having carefully considered the above and the information provided by both Mr N and HSBC, I've decided not to uphold Mr N's complaint. I've set out my reasoning below.

did Mr N know he had a choice?

HSBC had to make it clear that the PPI policy was optional.

HSBC has provided a copy of Mr N's mortgage offer. I can see that the PPI policy is shown under the heading "Optional Insurance". It's also provided a copy of a "Mortgage Protection Advice" form. And I think this also makes clear that the PPI was an optional product – separate from the mortgage – which Mr N didn't need to take if he didn't want to.

Taking everything into account, I think it's more likely Mr N knew the policy was optional and he agreed to take it out without undue pressure.

did HSBC provide advice?

HSBC says this was an advised sale. And from the copy of the advice form I've seen, I think this was the case.

This means HSBC had to advise Mr N with reasonable care and skill, in particular whether the policy was appropriate or 'suitable' given his needs and circumstances.

the advice

While I don't know all that was discussed in the meeting, the documentary evidence suggests that HSBC took some steps to establish whether the policy was a suitable recommendation for Mr N. The adviser had information about some of Mr N's financial circumstances as part of the mortgage application. But although a Mortgage Protection Advice form was completed to try and establish whether Mr N had a need for the policy, I don't think I've seen enough to make me think HSBC did all it needed to do to ensure the PPI was suitable.

Overall, on the balance of probabilities I'm not persuaded HSBC did all it should have done to determine whether the policy was suitable for Mr N given his circumstances. So I'm not persuaded HSBC advised with reasonable care and skill.

While I'm not persuaded HSBC did all it should have done to make sure the policy was suitable for Mr N, I do think it's more likely than not that the policy was ultimately suitable for him. In reaching that conclusion I've taken into consideration:

- Mr N met the eligibility criteria for the policy.
- Mr N had a need for the policy – he wouldn't have received any sick pay if he was unable to work due to illness, his redundancy benefits are likely to have been limited and he didn't have any savings he could fall back on. The policy would have helped Mr N manage the consequences if he was unable to work.
- The monthly cost of the policy appears to have been affordable for Mr N.

- The exclusions and limitations didn't make the policy unsuitable for Mr N. There was nothing about Mr N's employment or occupation which would have made it difficult for him to claim. Regarding pre-existing medical conditions, Mr N has told us about backache he suffered from some ten years before taking out the policy which caused him to take the odd day off work. But from what he's told us, I don't think he would have thought this condition would be likely to cause him to take an extended time off work, so I don't think it made the policy unsuitable for him. There were also no additional restrictions on cover for mental health or back problems.
- While the policy would only pay benefits for a maximum of 12 months for each claim for accident, sickness or unemployment, it still provided useful cover given Mr N's circumstances, the fact the policy protected the mortgage repayments relating to his home and the potential consequences should he be unable to make the repayments on loans secured against his home.

I've also considered whether, when providing advice, HSBC gave Mr N sufficient information about the cover provided by the policy to enable him to understand what HSBC was recommending to him and make an informed decision about whether to follow that advice and take out the policy.

the information

I'm satisfied it's more likely than not that Mr N was given a broad description of what the policy was intended to cover (that is that the policy would protect his payments if he was unable to work through accident, sickness or unemployment) and of the costs. I have reached this conclusion because I think it's unlikely Mr N would have taken out the policy without any sense of what the policy was for and of how much the premium might be.

But the evidence from the time of sale doesn't tell us whether HSBC gave sufficient information about the actual monthly benefit or about the exclusions or limitations before Mr N agreed to take out the policy.

Overall, having considered the parties' representations about what happened, while I'm satisfied the policy was a suitable recommendation for Mr N I'm not persuaded HSBC did enough to present information about the policy it was recommending in a way that was fair and reasonable to him. I'm not persuaded HSBC gave Mr N all of the information he needed about the policy to make an informed decision about whether to follow the recommendation and take it out.

I've considered how my findings interact with the FCA's list of significant failings in its guidance for firms handling PPI complaints set out at DISP App 3. And for the reasons set out above, I am persuaded there were significant failings in this case.

In addition to the failings I've highlighted above, Mr N's representative has raised a number of general points in regards to the requirements on a business when providing information in PPI sales. It suggests these points apply to all PPI complaints, like Mr N's. I've considered these carefully and summarised them as:

- The common law duty of utmost good faith means the business should have explained the low claims ratio – what Mr N's representative considers to be 'poor value' – and the fact that much of the premium went to the business rather than the insurer.

- The common law duty of utmost good faith means the business shouldn't have just told Mr N about the limitations and exclusions, it should have gone further and explained the significance of them to him.

I'm not persuaded by Mr N's representative's views on this. The duty of utmost good faith in insurance law imposed a duty on both parties to the contract to disclose material facts and not to make material misrepresentations. While I can't be certain what a court would say – I think it's unlikely a court would find that this extended to the insurer having to disclose the claims ratio information or explaining the significance of the limitations and exclusions in the way Mr N has suggested. And taking into account the law, industry codes and standards of good industry practice applicable to this complaint, I don't think it's fair and reasonable to conclude that HSBC ought to have done either.

what effect did HSBC's shortcomings have on Mr N? To what extent did Mr N suffer loss or damage as a result?

I've found that HSBC didn't do all it should have done when it sold this policy to Mr N. So I have gone on to consider whether it would be fair and reasonable to conclude Mr N suffered loss and damage as a result. To answer this, I must decide whether or not Mr N would have still taken out the policy, had HSBC done things properly.

While I'm not persuaded HSBC took the steps it should have done to establish whether the policy it recommended was suitable for Mr N, I have found that the policy was ultimately suitable for him.

In those circumstances it seems to me that, whether or not Mr N has suffered loss or damage in this case primarily depends on whether, if HSBC had explained things properly, Mr N would have acted differently, or whether he would have taken out the policy in any event.

Mr N says he wouldn't have taken it out and believes I should presume this to be the case given the significant failings identified above. I've considered the representations of both sides and the evidence relating to this carefully.

Deciding whether to follow advice to take out insurance requires the consumer to weigh up a number of factors before deciding whether to proceed. Effectively the consumer has to weigh up the advice to take out the policy, the cost of doing so given the benefits offered in return and the potential consequences they will suffer if they do not have insurance, should the risks come to fruition.

The evidence in this case suggests that Mr N had some interest in taking out payment protection insurance. By this I mean when HSBC advised him that there was a suitable product he could buy that would protect his mortgage payments in the event he was unable to work because of accident, sickness and unemployment, he concluded he wanted that product. But he made that decision based on incomplete information, meaning what he thought he was getting is not exactly what he got.

As I explained earlier, I'm satisfied from the evidence about Mr N's circumstances at the time of the sale that the policy was not fundamentally wrong or unsuitable for him.

I consider it more likely than not that Mr N knew he would have to pay for the policy. And it seems that Mr N was told the cost before the policy started, as this is shown on both the mortgage offer and the advice form.

But I'm not persuaded HSBC made clear exactly what Mr N would get back in return in the event he made a successful claim. But I think it's unlikely Mr N's expectations about what the policy would pay in the event of a claim (an amount sufficient to meet his mortgage payment) were significantly different to what the policy actually did.

Possibly the most significant differences between what Mr N thought he had bought and what he actually bought were the following:

- The policy excluded claims relating to medical conditions that Mr N knew about or ought to have known about before the start date of the policy and which recurred within the first 12 months of its start, or which were chronic conditions;
- The policy limited, and in some situations, excluded unemployment cover if Mr N wasn't a permanent employee;
- The policy protected payments for up to 12 months, rather than the remaining term of the mortgage.

I do accept there is a possibility the limitations and exclusions above might well have caused Mr N pause for thought – and may well have caused him to conclude the policy wasn't as good as he thought and he might have decided not to proceed. The limitations on the cover, when coupled with the other shortcomings in this sale, might have dissuaded some consumers in slightly different circumstances from Mr N from taking out the policy.

But the evidence about Mr N's circumstances at the time of sale shows that the policy wasn't fundamentally wrong or unsuitable for him. He was eligible for its benefits and it provided cover that, despite its limitations and exclusions, could have proved valuable to him should the insured risks have become a reality. Although Mr N says he had a medical condition when the PPI was taken out and the policy wouldn't have provided cover had he needed time off work because of this condition, I don't think better information about this exclusion would have put him off agreeing to it. I say this because I don't think he would have thought it likely that his condition would cause him to take an extended time off work.

And I haven't seen any evidence to suggest Mr N would have been caught by any of the other significant exclusions. So I still think he had some good reasons to take the policy out.

The policy didn't exclude back or mental health conditions or place any additional restrictions or more onerous evidential requirements in the event of a claim on those grounds than would have applied to any other disability claim. And I think it's unlikely Mr N would have expected to make a disability claim on the policy without first providing some evidence to support that claim.

HSBC may not have told Mr N that any claim he made would be limited to a 12-month period. This may have differed from what he expected and might have hoped for – but he didn't have any other means to fall back on.

In those circumstances, I consider it likely Mr N would still have thought a policy that paid up to 12 monthly mortgage payments would have been of benefit to him and would help him manage the consequences should Mr N be unable to work in the circumstances covered by the policy. The policy allowed for multiple claims to be made, it could help reduce his outgoings at a difficult and uncertain time and ensure his home was not placed at risk.

Having considered all of the evidence and arguments in this case, I consider it more likely than not Mr N would still have taken out the policy. The policy was suitable for him, was sufficiently close to what it's likely he thought he was getting and provided benefits that would help him manage the consequences if he was made redundant, or unable to work through accident or disability. In the circumstances I consider it more likely than not Mr N would have taken out the policy in any event notwithstanding the limitations on cover.

Mr N's representatives say the rules about how to handle PPI complaints (DISP App 3) make it clear that, where a significant failing is identified, it should be presumed the consumer wouldn't have taken out PPI, unless there is evidence to outweigh the presumption. They say we should follow this other than in exceptional circumstances.

That guidance is for firms, but it is a relevant consideration, so I take it into account along with many other things when I decide what is in my opinion fair and reasonable. Considering the purpose of the guidance, I don't think it was ever intended to be at odds with the approach I have taken.

I've thought about what outcome applying the FCA's guidance to this complaint might lead to. In the language of DISP App 3, I've found it would be reasonable to conclude there were substantial flaws in the sales process. In those circumstances, DISP App 3 says it should be presumed Mr N would not have bought the PPI he bought *unless*, in the particular circumstances of the complaint, there is evidence to rebut the presumption.

I'm satisfied, applying DISP App 3, it's reasonable to conclude the presumption is rebutted in the particular facts and circumstances of this complaint. Taking into account Mr N's circumstances as detailed above, I consider it reasonable to conclude the position Mr N found himself in as a result of the sale was the same position he would have been in had the 'breach' or 'significant' failings not occurred.

Mr N believes the presumption may only be rebutted when the flaws in the sales process were immaterial, that the flaws in this case were highly material and we have failed to give proper weight to the evidence – including his own comments that he wouldn't have taken out the policy. I am not persuaded by these arguments.

Even if I am ultimately departing from the guidance for firms set out at DISP App 3 (which I don't consider I am), I am only doing so because I do not consider, in this case, that it would represent fair compensation to put Mr N in the position he would have been in if he had not bought the policy.

That is because, while I accept it is possible that he would not have taken out the policy, I am satisfied that of the two possibilities, it's more likely than not that he would still have taken out the PPI had he been given clear, fair and not misleading information about the policy he was buying. So I'm not persuaded it would be fair and reasonable in those circumstances, to conclude HSBC should pay Mr N compensation, as that would put him in a better position than he would have been in if everything had happened as it should have done.

I'm also aware that Mr N thinks HSBC misrepresented the terms of the policy in how it described the PPI. While I accept there is a possibility a court might conclude some of HSBC's statements misrepresented the contract, in my opinion the reason why HSBC failed to act fairly and reasonably was not because of what it did or didn't say in the information it provided – but because the overall information HSBC gave Mr N, in the way it did, was insufficient to meet the standards I consider it fair and reasonable to expect it to have met in 2007 when providing information about an insurance policy.

I've also thought about the approach Mr N's representative says a court might take if it were to find HSBC negligently misrepresented the contract to Mr N and about the remedy a court might award if it were to find that HSBC had been in breach of its duty of utmost good faith. But this doesn't persuade me to alter my conclusions about what is fair and reasonable in all the circumstances of the complaint – including what I think is fair compensation in the circumstances of this case. For the reasons I've already set out I don't think it would be fair and reasonable to put Mr N in a better position than if everything had happened as it should have done.

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 this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 30 January 2021.

Simon Furse
ombudsman