complaint

Mr B says Lloyds Bank PLC, trading as TSB, mis-sold him a payment protection insurance ("PPI") policy.

background

Mr B took out a credit card with Lloyds in 1994. Lloyds says it can't be sure when Mr B took out the PPI policy attached to his card account, but has assumed that this was when the account was opened. Lloyds also says that in discussing Mr B's complaint with him, Mr B now thinks the credit card and PPI were taken out in a meeting at a local branch.

At the time, Mr B was self-employed as a builder. He has told us he didn't have any means of making his card repayments if he wasn't able to work. He has also said he had a medical condition at the time of the sale.

The policy provided cover for accident, sickness, and unemployment, together with life insurance – subject to its exclusions and limitations. It offered to repay 10% of Mr B's credit card balance in the event of a successful claim. At the time, it cost up to 79p per £100 of the monthly outstanding balance. The premium would continue to have to be paid during a successful claim and it did attract interest.

Lloyds has sent us screenshots and account statements to show that the credit card account closed in 2000.

Mr B'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 B's representative says:

- Lloyds 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 B wouldn't have taken out the policy and the complaint should be upheld. Mr B'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 Lloyds should have told Mr B about the poor value;

- The common law duty of utmost good faith also means Lloyds should have explained the significance of the exclusions and limitations of cover to Mr B and the impact they would have had on his chances of making a claim; and

- The information Mr B 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 B disagreed with the adjudicator's opinion.

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.

<u>relevant considerations</u>

When considering what is fair and reasonable, I am 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 B's. I don't intend to set that out in much detail here, but I've taken this into account in deciding Mr B's complaint.

I consider it most likely that this sale took place in 1994, before the General Insurance Standards Council (GISC) published its code of practice in June 2000 and before the sale of general insurance products like this became regulated in January 2005. So, the GISC Code, the FSA's (and FCA's) overarching Principles for Businesses and insurance conduct rules (ICOB and ICOBs) aren't applicable to this complaint, nor is the FCA's Perimeter Guidance (PERG).

The credit agreement itself concluded in 2000. That means the unfair relationship provisions set out in s.140A of the Consumer Credit Act, the Supreme Court judgment in *Plevin* about s.140 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.

There were a number of industry codes in existence at that time, which I am satisfied are applicable to my consideration of what is fair and reasonable in the circumstances of this complaint. In particular, *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

I consider these publications to be indicative of the standards of good practice expected of intermediaries like Lloyds at the time. So I'm satisfied I should take the ABI Code and these

other publications into account when deciding, what is in my opinion, fair and reasonable in the circumstances of Mr B's case.

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.

Under the transitional provisions which continue to apply to complaints like this about acts or omissions before 1 December 2001, I'm also required to take into account what determination the relevant former scheme – in this case the Office of the Banking Ombudsman – might have been expected to reach in relation to an equivalent complaint. I note that under the Banking Ombudsman's terms of reference the Ombudsman was required to decide complaints by reference to what was, in his opinion, fair and reasonable in all the circumstances – and that the Ombudsman was required to observe any applicable rule of law or relevant judicial authority.

I am 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. This sale took place before insurance mediation became a regulated activity, so Lloyds was required to take into account the provisions in DISP App 3 as if they were guidance when considering Mr B'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 Lloyds gave advice, whether it advised Mr B with reasonable care and skill – in particular, whether the policy was appropriate or 'suitable' for him, given his needs and circumstances.

- Whether Lloyds gave Mr B 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 B, I must then go on to consider whether and to what extent Mr B 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 B and Lloyds, I've decided not to uphold Mr B's complaint. I've set out my reasoning below.

Did Mr B know he had a choice?

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

In the absence of any evidence to suggest otherwise, I think it's likely that the PPI would have been sold at the same time as Mr B took out the credit card in 1994. Given the length

of time since the sale, I don't think it's that surprising that Lloyds no longer has a copy of Mr B's credit card agreement. This means I can't see how PPI was presented during the sale. Equally, it's understandable that Mr B doesn't seem to have a strong recollection of what happened during the sale.

In these circumstances, I don't think I have sufficient evidence to be able to conclude that it's more likely that Lloyds didn't make it clear to Mr B that the policy was optional and that Mr B didn't agree to take it out. I say this having seen credit card agreements in use at around the time of the sale where the optional nature was set out clearly and the consumer was required to actively select PPI for it to be added to their account.

So, taking everything into account, I think it's more likely than not that Mr B knew the policy was optional and he agreed to take it out without undue pressure.

Did Lloyds provide advice?

Lloyds can't confirm how the policy was sold. But on the basis that Mr B has told it the sale was in a local branch and that he was given advice, it's assumed that this was the case. And I think this is fair to Mr B because this means Lloyds had to advise Mr B with reasonable care and skill. In particular, Lloyds needed to determine whether the policy was appropriate or 'suitable' given Mr B's needs and circumstances.

the advice

I don't know what steps Lloyds took to establish whether the policy was a suitable recommendation for Mr B. There is no record of what the adviser discussed in relation to the policy. And although Mr B thinks the policy was recommended to him, he doesn't seem to have any recollection of what was discussed either. This is unsurprising in respect of a sale during a meeting. The adviser had some limited information about Mr B's financial circumstances, but there is no specific evidence to show the adviser took steps to establish whether Mr B would have been caught by the significant exclusions and limitations which might have meant the policy did not fully meet his needs. For example, there is nothing to suggest Lloyds considered whether Mr B had any pre-existing medical conditions.

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

While I'm not persuaded Lloyds did all it should have done to make sure the policy was suitable for Mr C, 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 B met the eligibility criteria for the policy.

- Mr B had a need for the policy – it seems likely that Mr B's ability to continue to meet his credit card repayments would have been put under strain if he was not working for an extended period of time.

- Although Mr B says he was financially stretched at the time, I've seen nothing else to suggest the monthly cost of the PPI wasn't affordable.

- While the policy would only pay benefits for a maximum of 12 months for each claim, it still provided useful cover given Mr B's circumstances and the fact the policy could have cleared his outstanding card balance.

The exclusions and limitations didn't make the policy unsuitable for Mr B. There was nothing about Mr B's self-employment or occupation which would have made it significantly more difficult for him to claim. Regarding pre-existing medical conditions, Mr B has told us about a medical condition he had before the sale. But from what he's said about this condition, I don't think it would have meant the policy was unsuitable for him. He appears to have had his condition well under control and it hadn't caused him to take any significant amount of time off work before the date of the sale. So I don't think Mr B would have thought the condition was particularly likely to cause him to take time off work in the future. There also don't appear to have been any additional restrictions on cover for mental health or back problems.

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

<u>the information</u>

I'm satisfied it's more likely than not Mr B was given a very broad description of what the policy was intended to cover (that is, that the policy would protect his card payments in the event he was unable to work through disability or unemployment). I have reached this conclusion because I think Mr B would have been told this – at the very least – during the discussion with the adviser. I think it's unlikely Mr B would have taken out the policy without any sense of what the policy was. The sample I've seen of the credit agreement Mr B is likely to have signed also described the policy as '*Credit Card payments Insurance'*, which would have given him some idea of what the policy was for.

I am also satisfied Mr B would have realised the policy wasn't free and it's likely he would have had some understanding of how much the policy cost before agreeing to take it out.

But the evidence from the time of the sale doesn't tell us whether Lloyds gave sufficient information about the actual monthly benefit, the actual cost (the fact that the premiums would be added to the account balance, attracting interest if unpaid at the end of the month, and were payable during a claim) or about the exclusions and limitations, before Mr B agreed to take out the policy. Even if that information were in a leaflet or policy summary Mr B might have been given, I think it's more likely than not that he based his decision on the things he was told, rather than on anything he was given.

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

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'm persuaded that there were significant failings in this case.

In addition to the failings I've highlighted above, Mr B'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 B'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 B'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 B about the limitations and exclusions, it should have gone further and explained the significance of them to him.

I'm not persuaded by Mr B'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 cannot 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 B 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 Lloyds ought to have done either.

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

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

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

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

Mr B says he would not have taken it out and believes that I should presume this to be the case given the significant failings identified above. I have 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 don't have insurance, should the risks come to fruition.

The evidence in this case suggests that Mr B had some interest in taking out payment protection insurance. By this I mean when Lloyds advised him that there was a suitable product he could buy that would protect his credit card 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 B's circumstances at the time of the sale that the policy was not fundamentally wrong or unsuitable for him.

In relation to the costs, I'm satisfied Mr B ought reasonably to have known he would have to pay something for the PPI and that it would cover a portion of his outstanding balance. But I accept that Lloyds didn't make clear the on-going cost information. So, while Mr B didn't know some things, the ultimate position in the event of a successful claim was not dissimilar to what he would reasonably have thought from the information he based his decision to take out the policy on and found acceptable.

Possibly the most significant difference between what Mr B thought he had bought and what he actually bought was that the policy excluded claims relating to medical conditions that Mr B knew about or ought to have known about before the start date of the policy.

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

But, the evidence about Mr B'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 could have proved valuable to him should the insured risks have become a reality. I also haven't seen convincing evidence to suggest he would have been particularly likely to have been caught by the policy's main exclusions or limitations.

The policy doesn't appear to have excluded 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 its unlikely Mr B would have expected to make a disability claim on the policy without first providing some evidence to support that claim.

Having considered all of the evidence and arguments in this case, I consider it more likely than not that Mr B would still have taken out the PPI. The policy was sufficiently close to what he thought he was getting and he didn't have any means of meeting his credit card repayments if he was unable to work due to accident, sickness or unemployment. And in those circumstances I consider it more likely than not that he would have taken out the policy in any event.

Mr B'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 have thought about what outcome applying the FCA's guidance to this complaint might lead to. In the language of DISP App 3, I have 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 B would not have bought the PPI he bought *unless*, in the particular circumstances of the complaint, there is evidence to rebut the presumption.

I am satisfied, applying DISP App 3, it is reasonable to conclude the presumption is rebutted in the particular facts and circumstances of this complaint. Taking into account Mr B's circumstances as detailed above, I consider it reasonable to conclude the position Mr B 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 B 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 would not 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 don't consider, in this case, that it would represent fair compensation to put Mr B in the position he would have been in if he had not bought the policy.

That is because, while I accept it's possible he wouldn't 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 Lloyds should pay Mr B 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 B thinks 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 Lloyds's statements misrepresented the contract, in my opinion the reason why Lloyds 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 Lloyds gave Mr B, in the way it did, was insufficient to meet the standards I consider it fair and reasonable to expect it to have met in 1994 when providing information about an insurance policy.

I've also thought about the approach Mr B's representative says a court might take if it were to find Lloyds negligently misrepresented the contract to Mr B and about the remedy a court might award if it were to find that Lloyds 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 B in a better position than if everything had happened as it should have done.

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 this complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr B to accept or reject my decision before 26 September 2020.

Simon Furse
ombudsman