

complaint

Mr and Mrs R are unhappy about the sale of Mortgage Payment Protection Insurance ('MPPI') by Norfolk & Suffolk Financial Services Limited. They think it was mis-sold because Mr R was self-employed at the point of sale – and say they were wrongly led to believe the insurance was compulsory if they wanted the loan.

Norfolk & Suffolk denied Mr and Mrs R's allegations. It also queried whether the Financial Ombudsman Service had jurisdiction over this case given that the disputed sale occurred in 1999, many years before the statutory regulation of insurance intermediation.

background

Our adjudicator concluded that this case was within jurisdiction despite the age of the sale. This was because Norfolk & Suffolk had been a voluntary member of a relevant former scheme at the point of sale: the Mortgage Code Arbitration Scheme ('MCAS'). And Mr and Mrs R's complaint included an alleged breach of the Mortgage Code, ie, failure to explain that the MPPI wasn't a condition of the loan. However, the adjudicator concluded that the complaint couldn't be upheld on its merits because the Mortgage Code was far more limited in scope than later statutory regulations. So, Norfolk & Suffolk had no obligation to check whether the MPPI was suitable for Mr and Mrs R – and it complied with the Code so long as it didn't actually misrepresent the policy as compulsory. Given that the application form signed by Mr and Mrs R did indicate that MPPI was optional, the adjudicator found no evidence of a breach of the Code.

Mr and Mrs R have appealed. They're dismayed by the outcome and feel that the paperwork, though signed by them, only proves that they in fact had no choice. They neither wanted nor needed MPPI, which they don't think would have covered their mortgage liabilities due to being self-employed. Mr and Mrs R think the adjudicator's view is unfair and bewildering, as they've been paying for something of no value for 16 years and 'were coerced into taking out this agreement'.

my findings

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

If this sale had occurred when Norfolk & Suffolk was later authorised by the Financial Services Authority or its successor, a mis-sale complaint *might* have been upheld. That's because the statutory regime brought in by the Financial Services and Markets Act 2000 provides a greater degree of consumer protection than that afforded by some of the predecessor schemes (such as MCAS). But it's a key principle of justice that people aren't retrospectively judged by later standards rather than those that applied at the material time. Indeed, the statutory rules that we're obliged to follow expressly provide that we must take account of what a former scheme would have done had a complaint been referred to that scheme before its functions were transferred to the Financial Ombudsman Service.

Under our rules (*cf.* the DISP section of the *Financial Conduct Authority Handbook*), this complaint is classed as a 'relevant transitional complaint'. In other words, the events date from the time of MCAS but the complaint was only referred after the Financial Ombudsman Service took over MCAS's functions on 31 October 2004. So, it's covered by the transitional

provisions laid down in a statutory instrument called the *Mortgages and General Insurance Complaints Transitional Order*.¹ These are summarised in the rulebook as follows:

DISP 2.3.2 G

The Ombudsman can also consider under the Compulsory Jurisdiction:

...

(2) as a result of the *Mortgages and General Insurance Complaints Transitional Order*, a *relevant transitional complaint* that relates to an act or omission by a firm (or an unauthorised person that ceased to be a firm after the relevant commencement date) which was subject to a former scheme at the time of the act or omission;

provided that:

(3) the act or omission occurred in the carrying on by that firm or unauthorised person of an activity to which that former scheme applied; and

(4) the complainant is eligible and wishes to have the complaint dealt with by the Ombudsman.

DISP 2.7.10 G

In the Compulsory Jurisdiction, in relation to...*relevant transitional complaints* under the *Mortgages and General Insurance Complaints Transitional Order*:

...

(3) where the former scheme in question is the MCAS scheme, a complainant is not to be treated as an eligible complainant if...(a) the *relevant transitional complaint* does not relate to a breach of the Mortgage Code published by the Council of Mortgage Lenders...

DISP 3.6.5 G

Where the Ombudsman is determining what is fair and reasonable in all the circumstances of a...*relevant transitional complaint*, ...the *Mortgage and General Insurance Complaints Transitional Order* require[s] him to take into account what determination the former Ombudsman might have been expected to reach in relation to an equivalent complaint dealt with under the former scheme in question immediately before the relevant transitional order came into effect.

I appreciate that all these legalistic rules are complex and bewildering to the uninitiated. But what they essentially boil down to is this: we can only consider complaints about older unregulated events to the same extent that MCAS could have. And that means our jurisdiction is more restricted – in the case of MCAS cases, to allegations that relate to a breach of the Mortgage Code.

The Mortgage Code was a voluntary scheme. And it was primarily concerned with lending rather than ancillary activities such as general insurance sales (an activity which wasn't actually regulated in its own right until 14 January 2005). But the Code did provide *some* protection for consumers. Lenders who subscribed to it—such as Norfolk & Suffolk—had to do the following (amongst other things):

- Describe any insurance services they could arrange;
- Say whether such insurance was a condition of the mortgage; and
- Give a general description of costs, fees or other charges associated with the mortgage, eg, insurance premiums.

We can only consider this complaint at all because Mr and Mrs R's allegations include one that relates to a breach of the Mortgage Code (*cf.* DISP 2.7.10 G, above). Namely, the one

¹ Full title: *The Financial Services and Markets Act 2000 (Transitional Provisions) (Complaints Relating to General Insurance and Mortgages) Order 2004* (SI 2004/454)

about being misled over the optional nature of cover: 'It was made clear that unless the PPI insurance [*sic*] was taken that we would not receive a mortgage offer' (*PPI Questionnaire*).

But the documentary evidence from the point of sale doesn't support this allegation. The signed application form dated 12 July 1999 is still available – and it clearly indicated that the MPPI wasn't in fact compulsory or a condition of the mortgage. For example, the form requires the applicants to tick a box requesting single cover or joint cover – or *no* cover:

I do not require Payment Protection (please initial the appropriate reason)

- Mortgage Loanguard has been strongly recommended to me. However, I would be able to meet my repayments in the event of unemployment, accident or sickness.
- I already have cover for my payments in the event of unemployment, accident or sickness.

Under the Mortgage Code, this was enough to satisfy the seller's obligation to say whether the insurance was a condition of the mortgage. There's no independent evidence that Norfolk & Suffolk misrepresented that it was compulsory – and there was no statutory duty (as nowadays) to highlight optionality more clearly or prominently. Accordingly, I agree with the adjudicator that there's no persuasive evidence the Mortgage Code was breached. It's therefore highly unlikely that MCAS would have upheld this complaint – and that's something I have to take into account for a 'relevant transitional complaint' when deciding what's fair and reasonable in all the circumstances (*cf.* DISP 3.6.5 G, above).

my final decision

For the reasons set out above, I'm unable to uphold this complaint against Norfolk & Suffolk Financial Services Limited. I am sorry to disappoint Mr and Mrs R.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs R to accept or reject my decision before **5 February 2016**.

Mark Sceeny
ombudsman