complaint

Mrs J says Lloyds Bank PLC, trading as TSB ("Lloyds") mis-sold her a payment protection insurance ("PPI") policy.

background and summary to complaint

Mrs J's complaint is about the sale of a PPI policy, which ran alongside a credit card she took out in 1999. Due to the time that has passed, it's not clear how or when the PPI was added to Mrs J's credit card account, but Lloyds has told us it's likely it was sold to Mrs J somewhere between 1999 and 2000.

During this time, Mrs J was employed as a sales assistant. She has told us she was entitled to at least three months' full sick pay, redundancy pay and death in service cover. Mrs J has said she had a medical condition at the time of the sale, but she did not provide any further information it.

The policy provided cover for accident, sickness, and unemployment – subject to its exclusions and limitations. It offered to repay 10% of Mrs J's credit card balance in the event of a successful claim. At the time, it cost 72p 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 to show that the credit card account closed in 2004.

Mrs J's representative has made lengthy and substantial representations on her behalf.

I will not restate them all here, but I have read and considered them all carefully. In summary, Mrs J'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 Mrs J wouldn't have taken out the policy and the complaint should be upheld. Mrs J'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 Mrs J 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 Mrs J and the impact they would have had on her chances of making a claim; and

- The information Mrs J 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 did not uphold the complaint. Mrs J 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 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 Mrs J's. I don't intend to set that out in much detail here but I've taken this into account in deciding Mrs J's complaint.

This sale took place between April 1999 and January 2000 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 2004. 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 Mrs J'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 Mrs J'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 Mrs J with reasonable care and skill – in particular, whether the policy was appropriate or 'suitable' for her, given her needs and circumstances.

- Whether Lloyds gave Mrs J sufficient, appropriate and timely information to enable her to make an informed choice about whether to take out the policy, including drawing to her 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 Mrs J, I must then go on to consider whether and to what extent Mrs J 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 Mrs J and Lloyds, I've decided not to uphold Mrs J's complaint. I've set out my reasoning below.

did Mrs J know she had a choice?

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

The sale took place a long time ago, so neither party has been able to provide much information. Because of this, I need to decide what I think is most likely to have happened when the PPI was sold.

Over the years, we've seen a number of Lloyds cases involving various methods of sales. Using what I know generally of Lloyds' sales practices around the time Mrs J was sold PPI, I think it's more likely than not Mrs J would have been given an option to take out the PPI.

Taking everything into account, I think it's more likely that Mrs J knew the policy was optional and she agreed to take it out without undue pressure.

did Lloyds provide advice?

Mrs J says she didn't receive any advice. But Lloyds doesn't know how the policy was sold, so it's reviewed the sale as though advice was given. This puts more responsibility on Lloyds, so in fairness to Mrs J, I've considered the case on the basis that advice was given.

This means Lloyds had to advise Mrs J with reasonable care and skill, in particular whether the policy was appropriate or 'suitable' given her needs and circumstances.

the advice

I don't know what steps Lloyds took to establish whether the policy was a suitable recommendation for Mrs J. It seems Mrs J can't remember clearly what happened and there is no record of what the adviser discussed in relation to the policy. This is unsurprising given the length of time that's passed since the sale took place. The adviser likely had some limited information about Mrs J's financial circumstances, but there is no specific evidence to show the adviser took steps to establish whether Mrs J would have been caught by the significant exclusions and limitations which might have meant the policy did not fully meet her needs. For example, there is nothing to suggest Lloyds considered whether Mrs J 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 Mrs J given her 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 Mrs J, I do think it's more likely than not that the policy was ultimately suitable for her. In reaching that conclusion I've taken into consideration:

- Mrs J met the eligibility criteria for the policy.

- Mrs J had a need for the policy – it seems likely that Mrs J's ability to continue to meet her credit card repayments would have been put under strain if she was not working for an extended period of time – even allowing for the employee benefits she says she would have been entitled to.

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

- The exclusions and limitations didn't make the policy unsuitable for Mrs J. There was nothing about Mrs J's employment or occupation which would have made it difficult for her to claim. And she hasn't given us any specific details about any pre-existing medical conditions that could affect her ability to claim, despite our request for further information.

- While the policy would only pay benefits for a maximum of 12 months for each claim for disability or unemployment, it still provided useful cover given Mrs J's circumstances and the fact the policy could have cleared her outstanding card balance.

I've also considered whether, when providing advice, Lloyds gave Mrs J sufficient information about the cover provided by the policy to enable her to understand what Lloyds was recommending to her 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 Mrs J was given a very broad description of what the policy was intended to cover (that is, that the policy would protect her card payments in the event she was unable to work through disability or unemployment). I have reached this conclusion because I think Mrs J would have been told this – at the very least – during the discussion with the adviser. I think it's unlikely Mrs J would have taken out the policy without any sense of what the policy was.

I am also satisfied Mrs J would have realised the policy wasn't free and it's likely she 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 Mrs J agreed to take out the policy.

Overall, having considered the parties' representations about what happened, while I'm satisfied that the policy was a suitable recommendation for Mrs J, 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 Mrs J. I'm not persuaded that Lloyds gave Mrs J all of the information she 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, Mrs J'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 Mrs J'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 Mrs J'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 Mrs J about the limitations and exclusions, it should have gone further and explained the significance of them to her.

I'm not persuaded by Mrs J'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 Mrs J 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 Mrs J? To what extent did Mrs J 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 Mrs J. So I have gone on to consider whether it would be fair and reasonable to conclude Mrs J suffered loss and damage as a result. To answer this, I must decide whether or not Mrs J 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 Mrs J, I've found that the policy *was* ultimately suitable for her.

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

Mrs J says she 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 Mrs J had some interest in taking out payment protection insurance. By this I mean when Lloyds advised her that there was a suitable product she could buy that would protect her credit card payments in the event she was unable to work because of accident, sickness and unemployment, she concluded she wanted that product. But she made that decision based on incomplete information, meaning what she thought she was getting is not exactly what she got.

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

In relation to the costs, I'm satisfied Mrs J ought reasonably to have known she would have to pay something for the PPI and that it would cover a portion of her outstanding balance – this was likely set out on the application form or discussed if a meeting took place. But I accept that Lloyds didn't make clear the on-going cost information. So while Mrs J didn't know some things, the ultimate position in the event of a successful claim was not dissimilar to what she would reasonably have thought from the information she based her decision to take out the policy on and found acceptable.

Possibly the most significant differences between what Mrs J thought she had bought and what she actually bought were the following:

- The policy excluded claims relating to medical conditions that Mrs J consulted or received medical treatment from a doctor for in the 12 months before the start date of the policy;

- The policy contained limitations on claims relating to back and mental health conditions placing more onerous evidential requirements to support a claim on those grounds;
- The policy limited, and in some situations, excluded unemployment cover if Mrs J wasn't a permanent employee.

I do accept that there is a possibility that the limitations and exclusions above might well have caused Mrs J pause for thought – and may well have caused her to conclude that the policy wasn't as good as she thought and she 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 Mrs J from taking out the policy.

But, the evidence about Mrs J's circumstances at the time of sale shows that the policy wasn't fundamentally wrong or unsuitable for her. she was eligible for its benefits and it provided cover that, despite its limitations and exclusions, could've proved valuable to her should the insured risks have become a reality. I also haven't seen any evidence to suggest she would've been caught by any of the significant exclusions – Mrs J didn't provide the details of any pre-existing medical conditions and was in permanent employment. So, I still think she had some good reasons to take the policy out.

I accept back pain and mental health conditions are common problems and the steps required to make a disability claim for these conditions were more onerous than Mrs J might reasonably have expected. But it's unlikely she would have expected to be able to make a disability claim without having to provide some evidence to support that claim. And while this limitation might have dissuaded some consumers in slightly different circumstances to Mrs J from taking out the policy, Mrs J, in her circumstances, still had some good reasons to take it out.

Having considered all of the evidence and arguments in this case, I consider it more likely than not that Mrs J would still have taken out the PPI. The policy was sufficiently close to what she thought she was getting and I think the policy could provide a useful benefit in a difficult time, notwithstanding her employment benefits. And in those circumstances I consider it more likely than not that she would have taken out the policy in any event.

Mrs J'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 Mrs J would not have bought the PPI she 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 Mrs J's circumstances as detailed above, I consider it reasonable to conclude the position Mrs J found herself in as a result of the sale was the same position she would have been in had the 'breach' or 'significant' failings not occurred.

Mrs J 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 her own comments that she 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 Mrs J in the position she would have been in if she had not bought the policy.

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

I'm also aware that Mrs J thinks Lloyds 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 Mrs J, in the way it did, was insufficient to meet the standards I consider it fair and reasonable to expect it to have met around April 1999 to January 2000 when providing information about an insurance policy.

I've also thought about the approach Mrs J's representative says a court might take if it were to find Lloyds negligently misrepresented the contract to Mrs J 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 Mrs J 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 Mrs J to accept or reject my decision before 13 June 2021.

Hanna Johnson
ombudsman