

complaint

Ms S doesn't think it's fair that The Royal Bank of Scotland Plc (RBS) has used the compensation it offered her for the mis-sale of payment protection insurance (PPI) on six loans to reduce the debt which it says remained unpaid by her. Ms S doesn't think she had unpaid debt of the amount RBS says.

background

I issued my provisional decision on 15 November 2019. A copy of my provisional decision is attached and forms part of my final decision.

My provisional decision sets out the background to this complaint. It explains why I thought it was fair for RBS to use Ms S's PPI compensation to reduce the amount she owed and didn't repay when her trust deed came to an end.

RBS said it had nothing further to add to my provisional decision and Ms S didn't respond to it.

my findings

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

In 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 appealed by RBS – and that outcome might 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 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 in 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 that consumer's favour. RBS losing the appeal confirms the legal position within Scots law about what happens when a consumer is discharged from their trust deed (although I'm mindful that, as I've said above, RBS may be appealing this case further to the Supreme Court). But, as I also explained in 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 Ms S's complaint, as required of me through FSMA Section 228 and the FCA's DISP rules.

Having done so, and in the absence of any further comments on my provisional decision by either Ms S or RBS, I remain of the opinion that it would be unfair for me to require RBS to pay PPI compensation directly to Ms S when - because of her discharge from the trust deed – she now won't ever have to repay the monies borrowed from RBS and not already repaid by her.

my final decision

For the reasons I've explained above and in my provisional decision, I think It's fair for The Royal Bank of Scotland Plc to use Ms S's compensation for the mis-sold PPI to reduce the amount she owed and didn't repay when her trust deed came to an end.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms S to accept or reject my decision before 19 January 2020.

Simon Furse
ombudsman

copy of my provisional decision

complaint

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background

Ms S was sold PPI policies on six successive and linked loans she took out with RBS. Ms S complained to RBS that she'd been mis-sold these PPI policies. RBS upheld her complaint. It offered to pay her total compensation of £6,271.88 in relation to these mis-sales.

In 2012, Ms S had granted a trust deed for her creditors. This is an alternative in Scotland to bankruptcy (called sequestration here). It is a legally binding agreement between a consumer and their creditors, which is administered by a trustee. RBS says that Ms S was discharged from the trust deed in April 2018, but the trust deed remained an active one until the trustee was also discharged in May 2019. So RBS obtained acceptances from the trustee to the PPI compensation offers it had made on the above loans.

RBS says that, in these circumstances, it was entitled to use the PPI compensation offers it made to Ms S in May 2018 to offset the larger amount of debt which remained unpaid at that time of £10,027.87.

Our adjudicator didn't think Ms S' complaint should be upheld. Ms S disagreed with the adjudicator's view, so the case 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.

As Ms S doesn't think she had outstanding debt of £10,027.87 in May 2018 which had never been repaid to RBS, I've first looked at the evidence which RBS has provided to show this was the case.

RBS has provided a copy of a statement for Ms S' loan account ended 9223. This was the last loan in the chain mentioned above. The loan was taken out in November 2002 with a term of sixty months and a loan amount (including a PPI single premium) of £7,949. The statement shows that this account went into default and that there remained an outstanding balance on it as at 22 February 2008 of £10,027.87. I can see from the records that RBS has provided that, on 27 February 2008, this outstanding balance was written off in RBS' books. And I haven't seen any evidence to show that this outstanding debt was subsequently repaid to RBS.

So from the information I've seen, I'm currently satisfied that Ms S did have a debt of £10,027.87 which she has never repaid to RBS. However, if Ms S has any further evidence to show that this debt was repaid (in full or in part) after it was written off by RBS in February 2008, I will take this into consideration in making my final decision on her complaint.

I've next looked at whether I consider that it was fair and reasonable for RBS to offset the PPI compensation offers it had made against debt which Ms S hadn't ever repaid.

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.'

Where the evidence is incomplete, inconclusive or contradictory, I've made my decision on the balance of probabilities – that is, what I think is most likely to have happened given the available evidence and the wider circumstances.

As RBS has upheld Ms 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. So what I need to decide is whether it's fair and reasonable for RBS to use Ms S' PPI compensation offers to reduce the much higher amount of debt which she wasn't required to repay to it after she was discharged from her protected trust deed.

And in this case the relevant law I need to take account of is Scots law. In recent years there've been a number of cases looking at what happens to PPI compensation after a trust deed has come to an end.

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.

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 here, then RBS could not, in court, successfully argue for set-off in this case. I say this on the basis that it appears Ms S had been discharged from the trust deed before the offers of PPI compensation were made by RBS.

But I must apply an over-arching test of what's fair and reasonable in the particular circumstances of Ms S' complaint. And I simply don't think it would be fair to tell RBS to pay Ms S PPI compensation directly to her when she borrowed a great deal more money from RBS which won't ever now be repaid. The fact that Ms S' had been discharged from her protected trust deed before these offers of PPI compensation were 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 Ms S when she doesn't now need to pay back to RBS a much bigger amount which she borrowed. And as the PPI policies in question were paid for by single premiums added to her loans, for RBS to do so would, in effect, mean that it was refunding her some money that it had never actually received from her in the first place.

So it follows from what I've said that I think it's fair that RBS used the PPI compensation it offered to Ms S to reduce the debt, which won't now ever be repaid to RBS following Ms S' discharge from her protected trust deed.

Finally, I've thought about what Ms S has said in responding to the adjudicator's view on her complaint. But having done so, this hasn't changed my mind. I still don't currently think that her complaint should be upheld.

my provisional decision

For the reasons I've given, I'm not presently intending to uphold Ms S' complaint. I'm minded to decide that it was fair for The Royal Bank of Scotland Plc to use Ms S' compensation for the PPI policies it mis-sold to her to reduce the amount of debt she hadn't repaid when she was discharged from her protected trust deed. So, based on what I've seen so far, I don't plan to make a further award.

Simon Furse
ombudsman