## complaint

Miss T says Canada Square Operations Limited, who were trading at the time as "Egg" mis-sold her a payment protection insurance ("PPI") policy.

## background and summary to complaint

Miss T bought the policy in 2004 at the same time as taking out a credit card. She applied for the credit card and PPI policy over the internet.

At the time, Miss T was employed in customer service. Egg said the information from the time of the sale suggests Miss T had been working for her employer for over three years. Miss T told us she was entitled to some company sick pay, but she couldn't recall how long it would have paid out. Miss T told us she didn't have any other means of repaying her credit card should she be unable to work. Miss T has said she had two medical conditions in the years before the sale. I'll say more about this later in the decision.

The policy provided cover for accident, sickness, and unemployment – subject to its exclusions and limitations. It offered to repay 10% of Miss T's credit card balance in the event of a successful claim. At the time, it cost 74p 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.

Egg has sent us screenshots to show that the credit card account closed in November 2005.

Miss T'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, Miss T's representative says:

- Egg 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 Miss T wouldn't have taken out the policy and the complaint should be upheld. Miss T'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 Egg should have told Miss T about the poor value;

- The common law duty of utmost good faith also means Egg should have explained the significance of the exclusions and limitations of cover to Miss T and the impact they would have had on her chances of making a claim; and

- The information Miss T 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. Miss T 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 Miss T's. I don't intend to set that out in much detail here, but I've taken this into account in deciding Miss T's complaint.

This sale took place in 2004 before the sale of general insurance products like this became regulated by the FSA in January 2005. So, the FSA's and the FCA's overarching principles for businesses and insurance conduct rules (ICOB and ICOBS) are not applicable to this complaint; nor is the FCA's Perimeter Guidance (PERG).

The credit agreement itself concluded in 2005. That means the unfair relationship provisions set out in s.140A of the Consumer Credit Act, the Supreme Court judgement 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 judgement, 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 General Insurance Standards Council's General Insurance Code for private customers – the 'GISC Code'.*

This sale was made during a period of industry 'self-regulation' by the General Insurance Standards Council (GISC). It published the GISC Code, which 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 Egg, 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

While not all intermediaries who sold PPI at the time were a member of the ABI or GISC, I consider these publications to be indicative of the standards of good practice expected of intermediaries like Egg at the time. So, I'm satisfied I should take these codes into account when deciding, what is in my opinion fair and reasonable in the circumstances of Miss T's case.

I have 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 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 Egg was required to take into account the provisions in DISP App 3 as if they were guidance when considering Miss T'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 circumstances of this complaint, are:

- If Egg gave advice, whether it advised Miss T with reasonable care and skill – in particular, whether the policy was appropriate or 'suitable' for her, given her needs and circumstances.

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

***did Miss T know she had a choice?***

Egg had to make it clear that the PPI policy was optional and it had to gain Miss T's agreement to the cover. Miss T can't remember agreeing to the cover.

I think Egg made it clear that Miss T didn't have to take out the PPI and she chose to take it out. I say this because I've considered what we know about how Egg sold PPI over the internet around this time and I've seen internet screenshots that Egg say are representative of what Miss T would have seen at the time of applying for PPI. To get the cover Miss T would have had to select it and she would have had a choice about doing that or not. Egg has said Miss T wouldn't have been able to proceed with her application unless she chose one of these options. Egg says that neither answer was preselected for Miss T so she should have understood this was something she could say 'No' to.

I've also noted the credit card statements show that Miss T was paying for 'Credit Card Repayment Protector' from the beginning of her credit facility. So, if Miss T hadn't applied for the PPI, as she says now, then I think she'd have noticed these entries and would, most likely, have raised a formal complaint about this matter with the business many years before she eventually chose to do.

So, having considered all the submissions made in this case, I think it's more likely that Miss T knew the policy was optional and she agreed to take it out without undue pressure, although I can understand why she can't remember this now, many years later.

***did Egg provide advice?***

Egg says that advice wasn't provided during this sale. Miss T couldn't remember if the sale was made with advice or not.

I have seen no evidence of a formal recommendation having been made to Miss T in this case. So, looking at what happened when Egg sold Miss T the PPI, I'm not persuaded that it provided advice.

This means Egg didn't have to check if the PPI was suitable for Miss T. Instead, it had to give her sufficient, appropriate and timely information to enable Miss T 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.

***the information***

Egg has provided us a copy of the paperwork it says Miss T would've received, including the policy summary of cover – which I accept on a balance of probabilities – applied to policies like Miss T's.

Looking at the information provided to Miss T at the time, I don't think Egg gave Miss T the information she fairly and reasonably needed to make an informed decision about whether or not to take out the policy.

This sale took place over the internet. I can see the application screens described the PPI policy as providing cover against unemployment, accident and sickness. It also informed Miss T that the policy cost 74p per £100 of her monthly statement balance.

The information provided would have given Miss T a broad sense of what the policy covered. But it was Egg's responsibility to draw to Miss T's attention the important information – i.e.

the key information about the nature of the cover and any significant exclusions and limitations which might be relevant to her decision.

I'm not persuaded Egg did enough to do this. For example, I don't think the true cost of the policy was made clear to Miss T, including the need to maintain premiums during a claim or that the payments would attract interest. In addition, I can't see that Egg adequately drew to her attention the main provisions of the policy and significant limitations and exclusions.

So, I don't think Egg gave Miss T sufficient, appropriate and timely information to enable her to make an informed choice about whether to take out the policy, including drawing her attention to and highlighting – in a clear, fair and not misleading way – the main provisions of the policy and significant limitations and exclusions.

I have 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, Miss T's representative has raised a number of general points in regard to the requirements on a business when providing information in PPI sales. It suggests these points apply to all PPI complaints, like Miss T'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 Miss T'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 Miss T about the limitations and exclusions, it should have gone further and explained the significance of them to her.

I'm not persuaded by Miss T'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 Miss T 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 Egg ought to have done either.

***what effect did Egg's shortcomings have on Miss T? To what extent did Miss T suffer loss or damage as a result?***

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

Miss T says she wouldn't have taken it out and believes that I should presume this to be the case given the significant failings identified above.

As this was a non-advised sale, Miss T had to weigh up in her own mind the cost of the policy against the benefits offered and the potential consequences if she didn't insure against the risk of being unable to work.

As I've found above, Miss T chose to take this policy out. So I consider that it's reasonable to conclude she had some interest in the benefits offered by this type of insurance. But she made this decision based on incomplete information. So what Miss T thought she was getting is not exactly what she got. The extent to which this differed is a relevant consideration when determining if Miss T has suffered any loss or detriment.

In relation to the costs, I'm satisfied Miss T may have known she would have to pay something for the PPI and that it would cover 10% of her outstanding balance – this was set out on the benefits screen Miss T could have accessed during her application. But I accept that Egg didn't make clear the on-going cost information. So, while Miss T 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 Miss T thought she had bought and what she actually bought were the following:

- The policy excluded claims relating to medical conditions and symptoms that Miss T knew about or ought to have known about in the 12 month period prior to the start date which re-occurs within 24 months after 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 Miss T wasn't a permanent employee; and
- The requirement that in order to be eligible for a disability claim – Miss T be unable to do her own job, a similar job or any paid work which her experience, education or training reasonably qualified her to do.

I do accept that there is a possibility the limitations and exclusions above might well have caused Miss T pause for thought – and may well have caused her to conclude that the policy was not 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 Miss T from taking out the policy.

But, the evidence about Miss T's circumstances at the time of sale shows that the policy wasn't fundamentally wrong 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. Miss T told us she thought she would have received some company sick pay she couldn't recall what it would have been and for how long it would have lasted. This policy would have paid out in addition to any sick pay and, most likely, for longer than her employer would have paid her at her full rate of pay. And Miss T told us she had no other means she could rely on in the event she was unable to work through ill health, or if she lost her job.

Miss T was employed at the time of the sale and so wouldn't have been caught by any significant exclusions that pertain to people with a different employment status. And whilst Miss T told us she had two medical conditions many years before the year of the sale and

the policy may not have provided cover had she needed time off work because of them, I don't think better information about this exclusion would have put her off agreeing to it. I'll explain why I say this.

Miss T told us that she experienced asthma in 1982 and hay fever in 1994. The sale happened in 2004. Miss T told us she saw a doctor about these conditions and took some medication for them. Miss T also told us that the combined effect of the conditions had caused her to take no more than the odd day off work. However, Miss T has provided us with no detailed testimony about these conditions and no testimony that the conditions caused her any on-going issues or caused her to take a single day off work because of them in the many years directly before the sale. So, I have seen insufficient evidence to think that Miss T would have thought these conditions would have been, most likely, the cause of significant future time off work at the time of the sale. And so, I do not think it most likely that Miss T would have avoided the policy had better or more information been given to her at the time of the sale.

I also haven't seen any evidence to suggest she would've been caught by any of the other significant exclusions. 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 Miss T 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 Miss T from taking out the policy, Miss T, in her circumstances, still had some good reasons to take it out.

If Miss T had known she could only claim for disability if she was not only unable to do her job or any similar job but also unable to do any work which in the insurer's view she might reasonably be qualified for, it might have played into her thinking about what she would do. And I accept it may have given her pause for thought – although given Miss T's circumstances, on balance, I still think she would have been interested in taking out the cover.

Having considered all of the evidence and arguments in this case, I consider it more likely than not that Miss T 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.

Miss T'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 Miss T 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 Miss T's circumstances as detailed above, I consider it reasonable to conclude the position Miss T 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.

Miss T 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 Miss T in the position she would have been in if she had not bought the policy.

That is because, while I accept it is possible that she would not 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 Egg should pay Miss T 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 Miss T thinks Egg 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 Egg's statements misrepresented the contract, in my opinion the reason why Egg 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 Egg gave Miss T, in the way it did, was insufficient to meet the standards I consider it fair and reasonable to expect it to have met in 2004 when providing information about an insurance policy.

I've also thought about the approach Miss T's representative says a court might take if it were to find Egg negligently misrepresented the contract to Miss T and about the remedy a court might award if it were to find that Egg 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 Miss T 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 Miss T to accept or reject my decision before 13 June 2021.

Douglas Sayers
**ombudsman**