Financial Ombudsman Service

complaint

Mr and Mrs B say Lloyds Bank PLC, trading at the time C&G, mis-sold them payment protection insurance ("PPI").

To keep things simple, I'll refer mainly to "Lloyds" in this decision. And although there were two PPI policies sold – if I occasionally mention "policy" I'm referring to both sales, as they were sold very close together.

background and summary to complaint

We now know Mr and Mrs B bought the PPI in two blocks, in February and August 2003, at the same times as taking out further borrowing on their (already existing) joint-mortgage. They applied for the additional borrowing and PPI policies in a branch.

The PPI policies provided cover for Mr B only - for accident, sickness, and unemployment – subject to certain exclusions and limitations. The cover offered to repay them a monthly amount towards Mr and Mrs B's mortgage balance in the event of a successful claim. At the time, the PPI cost £2.75 per month for the first policy (February 2003) and £6.00 further (August 2003) for the second policy.

At those times, Mr B was employed as a fabricator. He told us he was entitled to employee benefits such as a death in service award and what he refers to as '6 months sick pay'. My understanding is that he was in good health at the time and had some savings available. I don't have evidence of the benefits or savings Mr B says he had, but I've considered what he's said, and indeed Mr and Mrs B's wider circumstances, with care in assessing their complaint. Mrs B wasn't protected by the PPI.

Lloyds has sent us screenshots to show that the mortgage account opened in 2002 and closed in 2005. Mr and Mrs B's representative has made lengthy and substantial representations on their behalf. I will not restate them all here, but I have read and considered them all carefully. In summary, Mr and Mrs 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 and Mrs B wouldn't have taken out the policy and the complaint should be upheld. Mr and Mrs 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 and Mrs 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 and Mrs B and the impact they would have had on their chances of making a claim;

- The policy only protected payments for the short-term, whereas a mortgage is generally someone's biggest ever long- term transaction – cover would stop at the time it would be most needed; and

- The information Mr and Mrs 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 think we should uphold the complaint – both parties have seen and provided their responses to the adjudicator's opinion. Mr and Mrs B 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'm 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 and Mrs B's. I don't intend to set that out in much detail here but I've taken this into account in deciding Mr and Mrs B's complaint.

This sales took place close together, in 2003, 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 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 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 Lloyds, 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 Lloyds 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 Mr and Mrs B's case. There was also the Mortgage Code which was a voluntary code followed by subscribing lenders and mortgage intermediaries. While predominantly about mortgage related matters, it also included some insurance related commitments.

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'm 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 and Mrs 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 and Mrs B with reasonable care and skill – in particular, whether the policy was appropriate or 'suitable' for them, given their needs and circumstances.

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

did Mr and Mrs B know they had a choice?

Lloyds had to make it clear that the PPI policy was optional and I think there's strong evidence of this.

The first element is that Mr and Mrs B are adamant they refused to have PPI, despite discussing it with an adviser, and would never have agreed to this type of cover. By definition then, they are accepting there was indeed a choice, which they maintain they chose to turn down.

But as far as refusing the PPI cover is concerned, I'm afraid the evidence points strongly the other way. I see, for example, that they both signed a *"Payment Protection Plus Proposal Form"* on 27 February 2003. I think this would have been obvious enough what this application was for, particularly as they'd previously operated a mortgage *without* any PPI at that point. They also authorised the monthly PPI premium of £2.75 to leave their bank account each month. This shows, in my view, they did apply for PPI.

I've thought about whether this might have been done somewhat in haste. However, they followed the same procedure again in August 2003, just a few months later, when they were borrowing more money again. They filled out a specific PPI application asking for the insurance to be set up, signed the form and once again they completed a direct debit instruction to allow the additional £6.00 to leave their bank account. On both occasions I note they chose PPI cover only for Mr B, rather than both of them. To me this suggests they'd given the PPI a lot of consideration and decided, twice, what they wanted to do.

Finally, I note they wrote to Lloyds in 2005 asking to cancel the PPI. The letter set out certain details of the cover, such as the policy numbers, and it contained no element of complaint or surprise. Taking everything into account therefore, I am completely satisfied that Mr and Mrs B knew the policies were optional and they agreed to take them both out without undue pressure. I do accept however, they genuinely may not remember this after such a long time.

did Lloyds provide advice?

Lloyds concedes that advice was provided during the sales. This means Lloyds had to advise Mr and Mrs B with reasonable care and skill, in particular whether the policy cover was appropriate or 'suitable' given their needs and circumstances.

the advice

I don't know what steps Lloyds took to establish whether the cover was a suitable recommendation for Mr and Mrs B. It seems Mr and Mrs B can't remember clearly what happened and there is no record of what the adviser discussed in relation to the policy. This is unsurprising in respect of a sale during a meeting. The adviser had some limited information about Mr and Mrs B's financial circumstances, but there is no specific information 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 policies did not fully meet his and Mrs B's 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'm not persuaded Lloyds did all it should have done to determine whether the cover was suitable for Mr and Mrs B given their 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 PPI was suitable for Mr and Mrs B, I do think it's more likely than not that the it was ultimately suitable for them. In reaching that conclusion I've taken into consideration:

- Mr B met the eligibility criteria.

- Mr and Mrs B had a need for the cover – it seems likely that their ability to continue to meet their mortgage repayments would have been put under strain if Mr B was not working for an extended period of time – even allowing for benefits or savings they say they would have been entitled to.

- The monthly cost of the cover appears to have been affordable for Mr and Mrs B.

- The exclusions and limitations didn't make the cover unsuitable for Mr and Mrs B. There was nothing about Mr and Mrs B's employment or occupation which would have made it difficult for him to claim. And he hasn't told us about any pre-existing medical conditions that could affect his ability to claim. There were also no additional restrictions on cover for mental health or back problems.

- While the policy included a requirement that Mr B be disabled or unemployed for 60 days before he could make a claim and would only pay benefits for a maximum of 12 months for each claim, it still provided valuable cover given: Mr and Mrs B's circumstances, the fact the policy protected the mortgage repayments relating to their home and the potential consequences should Mr and Mrs B be unable to make the repayments on loans secured against their house.

I've also considered whether, when providing advice, Lloyds gave Mr and Mrs B sufficient information about the cover provided by the policy to enable them to understand what Lloyds was recommending to them 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 that Mr and Mrs B were given a broad description of what the cover was intended to cover (that is that the policy would protect their payments if Mr B was unable to work through accident, sickness or unemployment) and of the costs, which were outlined on the paperwork they had at the time. I have reached this conclusion because I think it's unlikely Mr and Mrs B would have taken out the cover without any sense of what the policy was for and of how much the premium might be.

But I accept the evidence from the time of sale doesn't tell us whether Lloyds gave sufficient information about the actual monthly benefit, the actual cost or about the exclusions or limitations before Mr and Mrs B agreed to take out the cover.

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

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 am persuaded there were significant failings in this case.

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

I'm not persuaded by Mr and Mrs 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 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 Mr and Mrs B have 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 and Mrs B? To what extent did Mr and Mrs 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 and Mrs B. So I have gone on to consider whether it would be fair and reasonable to conclude Mr and Mrs B suffered loss and damage as a result. To answer this, I must decide whether or not Mr and Mrs B would have still taken out the policy, had Lloyds done things properly.

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

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

Mr and Mrs B say they wouldn't have taken it out and believe I should presume this to be the case given the significant failings identified above. I've 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 do not have insurance, should the risks come to fruition.

The evidence in this case suggests that Mr and Mrs B had some interest in taking out payment protection insurance. By this I mean when Lloyds advised them that there was a suitable product they could buy that would protect their mortgage payments in the event they were unable to work because of accident, sickness and unemployment, they concluded they wanted that product. But they made that decision based on incomplete information, meaning what they thought they were getting is not exactly what they got.

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

As I've also already explained, the information Mr and Mrs B were given about the cost was clear. But the information about other aspects of the policy, such as limitations and exclusions wasn't as clear as it should have been.

I consider it more likely than not that Mr and Mrs B knew they would have to pay something for the policy. But overall, I'm not persuaded Lloyds made clear exactly what Mr and Mrs B would get back in return in the event they made a successful claim. Nevertheless, I think it's unlikely Mr and Mrs B's expectations about what the policy would pay in the event of a claim (an amount sufficient to meet their respective further borrowings on their mortgage) were significantly different to what the policy actually did – if anything, it is more likely than not that the policy actually paid more in the event of a claim than they would have expected as there was an additional cash payment.

Possibly the most significant differences between what Mr and Mrs B thought they had bought and what they actually bought were the following:

- The policy excluded claims relating to medical conditions or symptoms that Mr B knew about or ought to have known about 24 months before the start date of the policy;
- The policy limited, and in some situations, excluded unemployment cover if Mr B wasn't a permanent employee;
- The policy protected payments for up to 12 months, rather than the remaining term of the mortgage.

I do accept there is a possibility the limitations or exclusions above might well have caused Mr and Mrs B pause for thought – and may well have caused them to conclude the policy wasn't as good as they thought and they 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 Mr and Mrs B from taking out the policy.

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

The policy didn't exclude 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 and Mrs B would have expected to make a disability claim on the policy without first providing some evidence to support that claim.

Lloyds may not have told Mr and Mrs B that any claim they made would be limited to a 12-month. This may have differed from what they expected and might have hoped for – but they had limited other means to fall back on and the critical illness cover and death in service benefit mentioned by Mr B covered different things to the PPI. The evidence also shows they wanted the cover.

In those circumstances, I consider it likely Mr and Mrs B would still have thought a policy that paid up to 12 monthly mortgage payments would have been of benefit to them and would help them manage the consequences should Mr B be unable to work in the circumstances covered by the policies. They allowed for multiple claims to be made which could help reduce their outgoings at a difficult and uncertain time and ensure their home was not placed at risk.

Having considered all of the evidence and arguments in this case, I consider it more likely than not Mr and Mrs B would still have taken out the policy. The policy was suitable for them, was sufficiently close to what it's likely they thought they were getting and provided benefits that would help them manage the consequences if Mr B was made redundant, or unable to work through accident or disability. In the circumstances I consider it more likely than not Mr and Mrs B would have taken out the policy in any event notwithstanding the limitations on cover.

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

I'm satisfied, applying DISP App 3, it's reasonable to conclude the presumption is rebutted in the particular facts and circumstances of this complaint. Taking into account Mr and Mrs B's circumstances as detailed above, I consider it reasonable to conclude the position Mr and Mrs B found themselves in as a result of the sale was the same position they would have been in had the 'breach' or 'significant' failings not occurred.

Mr and Mrs B believe 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 their own comments that they 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 do not consider, in this case, that it would represent fair compensation to put Mr and Mrs B in the position they would have been in if they had not bought the policy.

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

I'm also aware that Mr and Mrs B think 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 Mr and Mrs 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 2003 when providing information about an insurance policy.

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

Michael Campbell
ombudsman