

## **complaint**

Mr and Mrs C don't think it's fair for The Royal Bank of Scotland Plc (RBS) to use their payment protection insurance (PPI) compensation to reduce the debts from which they were discharged when their protected trust deed came to an end in April 2014.

Mr and Mrs C felt strongly that the joint loans weren't part of the trust deed which was discharged in 2011. Only the loan in Mrs C's name was included in the trust deed and that RBS shouldn't use the money due to Mr C to clear a debt in Mrs C's sole name.

## **background**

In November 2019, I issued my provisional decision. In it I explained why I wasn't intending to uphold Mr and Mrs C's complaint. A copy of my provisional decision is attached and forms part of my final decision.

Following receipt of my provisional decision, RBS said it didn't wish to add anything further in relation to this complaint. But it did clarify that my provisional decision incorrectly stated the outstanding balance for Mr C as £7,642.42 when it should in fact have read £7,462.42. And further it stated that a total of £11,764.10 in redress was paid to clear the balances, not £11,649.85 as stated in my provisional decision. This figure altered because of additional interest.

Mr and Mrs C didn't respond to my provisional decision.

## **my findings**

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

I've decided not to uphold this complaint.

In my provisional decision (attached) I mentioned that some court cases had been heard which considered who PPI compensation should be paid to when a consumer has been 'discharged' from a 'protected trust deed'.

In 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 being appealed by RBS – and that the outcome may 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 deed 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.

Mr and Mrs C have not responded to my provisional decision, so I see no reason to depart from the findings set out in it.

RBS lost the appeal. However, as explained in my provisional decision – I have considered the relevant law. And when I initially gave my provisional decision, I did so when the law had already found in the consumer's favour. RBS losing the appeal confirms the legal position within Scots law about what happens when consumer is discharged from their trust deed (although I'm mindful as I've said above, RBS maybe appealing this 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 Mr and Mrs C's complaint – as required of me through FSMA Section.228 and the FCA's DISP rules.

Having done so, I remain of the opinion it would be unfair for RBS to pay compensation directly to Mr and Mrs C – when Mr and Mrs C, because of the trust deed, now won't ever have to repay the monies borrowed and left unpaid.

So, I'm sorry to disappoint Mr and Mrs C but I don't uphold this complaint.

### **my final decision**

For the reasons I've given above, I don't uphold this complaint

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs C to accept or reject my decision before 16 February 2020.

Nicola Woolf  
**ombudsman**

## Copy of provisional decision

### complaint

Mr and Mrs C don't think it's fair for The Royal Bank of Scotland Plc (RBS) to use their payment protection insurance (PPI) compensation to reduce the debts from which they were discharged when their protected trust deed came to an end in April 2014.

Mr and Mrs C felt strongly that the joint loans weren't part of the trust deed which was discharged in 2011. Only the loan in Mrs C's name was included in the trust deed and that RBS shouldn't use the money due to Mr C to clear a debt in Mrs C's sole name.

### background

Mr and Mrs C took out a number of loans between November 1994 and February 2002. Some were in joint names and some were in the name of Mrs C only. At the same time they took out PPI policies to protect their repayments.

In March 2008 Mr and Mrs C entered into a trust deed as they were unable to pay all their debts when they fell due. This became a protected trust deed for their creditors. This is an alternative in Scotland to bankruptcy (called sequestration in Scotland). It is a legally binding agreement between a consumer and their creditors, which is administered by a trustee.

RBS records show that following the completion of the trust deed in 2014, Mr C's outstanding balance was £7642.42 (including a joint current account with Mrs C) and Mrs C's outstanding balance was over £34,000 which included the £7642.42 for the joint account and a further £26,651.20 for the loan account in her sole name. While RBS didn't chase for the outstanding sums the debt still existed. So a substantial amount of debt was left unrecovered from Mr and Mrs C.

Mr and Mrs C complained to RBS about the mis-sale of these policies in January 2018. RBS upheld the complaint about the sale of the PPI policies and offered to refund the PPI premiums and the extra interest that Mr and Mrs C had paid to date together with simple interest to compensate them for the time they'd been out of pocket.

RBS offered to pay back around £11,649.85. RBS said it would set off Mr C's 50% of the redress (£5824.92) against the balance outstanding on his accounts when his trust deed came to an end which was £7,642.42. RBS said it would set off Mrs C's 50% of the redress against the remaining £1,613.20 owed on the joint account and RBS said the rest would be set off against the sum of £26,651.20 owed on Mrs C's sole loan account. To summarise the PPI redress paid to Mr and Mrs C reduced the joint loan balance to £0.00 and Mrs C still has an outstanding balance of around £22,349.52.

In March 2018, Mr and Mrs C signed the acceptance forms for all the loans. The forms also stated:

*'If I am, or have been, subject to an Individual Voluntary Arrangement (IVA), Protected Trust Deed, Bankruptcy or Sequestration, any payment will be made to the relevant account I hold with you. Any disbursements due under the terms of the arrangement will then be managed by the Groups insolvency team.'*

*I understand that the offer will take into account consideration of any arrears on my account....'*

RBS confirmed it had used the redress to offset against its total claim in the trust deed. But Mr and Mrs C don't think the PPI compensation they were offered should be used by RBS in this way.

They say that the joint loans weren't part of the trust deed which was discharged. Only the loan in Mrs C's name was included in the trust deed and that RBS shouldn't use the money due to Mr C to clear a debt in Mrs C's sole name.

Our adjudicator said that she didn't think this complaint should be upheld. She thought that the way RBS had offered to settle the complaint was fair. Unhappy with the adjudicator's view, Mr and Mrs C asked that the matter be referred to an ombudsman for a final decision. So the matter 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. 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.'*

I'm sorry to disappoint Mr and Mrs C but I'm not intending to uphold this complaint.

I will explain why.

As RBS has upheld Mr and Mrs C's PPI mis-sale complaint, I've just looked at whether what it's done to put things right is fair and reasonable. I haven't looked at how the PPI policies came to be mis-sold. And Mr and Mrs C haven't raised any issues about the amount of compensation offered so I also won't consider this. Mr and Mrs C's complaint is that RBS has set-off the amount of compensation to reduce the total loan amounts that haven't been fully repaid rather than paying the compensation directly to Mr C. RBS shouldn't use the money due to Mr C to clear a debt in Mrs C's sole name.

So in this decision I need to decide whether it's fair and reasonable for RBS to use Mr and Mrs C's PPI compensation offer to reduce the much higher amount of debt which they weren't required to repay back to it (and was written off by RBS) after their protected trust deed was closed in 2014.

I've thought carefully about what the law says about protected trust deeds. In recent years there have been a number of cases looking at what happens to PPI compensation after a trust deed has been discharged.

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.

So in this case the Supreme Court said that the PPI compensation should not be paid to the trustees for the benefit of the creditors. It said it should be paid to the consumer.

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 those in this case, then RBS could not, in court, successfully argue for set-off in this case.

In this case I am aware of and have taken into account the relevant law. But I must apply an overarching test of what's fair and reasonable to both parties, not just the relevant case law, in the particular circumstances of Mr and Mrs C's complaint. Having done this, I think it's fair for RBS to use the PPI compensation to reduce the money Mr and Mrs C borrowed and didn't repay.

I appreciate that RBS can't now chase Mr and Mrs C in court for the money that they owed when they entered into a protected trust deed. But I can see from the evidence RBS has provided that Mr and Mrs C still owed a substantial amount more than they repaid off their loans. It's likely that won't now ever be repaid.

Just because Mr and Mrs C entered into a protected trust deed – Mr C owing over £7000 and Mrs C owing over £26,000 plus her part of the joint account - and Mr and Mrs C were discharged from the debt when the trust deed ended, doesn't make a difference to what is fair. I think it would be unfair to tell RBS to pay Mr and Mrs C compensation when they don't now have to repay the borrowing which was still outstanding.

The fact that Mr and Mrs C's protected trust deed had come to an end before this offer of PPI compensation was made and after Mr and Mrs C were discharged from it 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 Mr and Mrs C when they don't now need to pay back to RBS a much bigger amount which they borrowed to take out their loans. In reality Mr and Mrs C have borrowed considerably more from RBS than they have paid back.

So it follows from what I've said that I think it's fair for RBS to use the PPI compensation it's offered to reduce the outstanding debt which was written off by RBS following the closure of Mr and Mrs C's protected trust deed.

### **my provisional decision**

For the reasons set out above, my provisional decision is I'm not intending to uphold this complaint.

I'm currently minded to decide that it's fair for The Royal Bank of Scotland Plc to use Mr and Mrs C's compensation for the mis-sold PPI to reduce the amount they owed and didn't repay when their trust deed came to an end.

So unless comments or information I get by 5 December 2019 change my mind, based on what I've seen so far I don't plan to ask The Royal Bank of Scotland Plc to do anything more to put things right.

Nicola Woolf  
**ombudsman**