Financial Ombudsman Service

summary

This complaint concerns three single premium payment protection insurance (PPI) policies taken out by Mr and Mrs A alongside three unsecured loans in March 2003, June 2003 and May 2004. Mr and Mrs A say Welcome Financial Services Limited ('Welcome') mis-sold the policies.

background

The circumstances leading to this complaint, and my initial conclusions, were set out in my provisional decision of August 2012. In that decision, I explained I was minded to uphold Mr and Mrs A's complaint for the following reasons:

– I was not persuaded Mr and Mrs A's personal loan liabilities had been incorporated into the hire purchase agreement ending 8876 or that their personal loan liabilities had ended when the hire purchase agreement had been written off.

– There was not enough of a link between the redress for the PPI policies associated with Mr and Mrs A's first two loans and the arrears on Mr and Mrs A's third loan for the compensation for the first two PPI policies to be used to reduce the arrears on the third loan.

– Welcome had sold the debt associated with Mr and Mrs A's third loan to a third party in 2007. As such, Welcome was no longer the legal owner of the debt and could not use the redress for the mis-sale of the PPI policy associated with Mr and Mrs A's third loan to reduce the outstanding arrears on that loan.

I invited both parties to let me have any further representations. I received responses from both parties. Mr and Mrs A said:

– In relation to the car loan (hire purchase agreement), the car plus 14 payments were in full and final settlement of the loan and they heard nothing more between 2005 and 2010, when they were contacted by the new owner of the debt. Welcome confirmed they needed to deal with the new owner.

– It is only in relation to the PPI policies that Welcome has demanded it keep the money and requested that they sign this money over to Welcome. Mr and Mrs A told Welcome the PPI money was rightfully theirs.

– They require the PPI redress to be paid direct to them as Welcome does not own the alleged debt and it is for them to settle the matter directly with the third party owner of the alleged debt.

Welcome said it does not agree with my provisional decision. I will not repeat all of Welcome's submissions here but, in its initial response to my provisional decision, it says:

– It believes the three personal loans are linked in such a way that it is fair and reasonable to apply the redress for the PPI on the first two loans to reduce the arrears on the third loan.

– It also believes it is fair and reasonable to use the redress for the PPI on the first two loans to reduce the arrears on the third loan in accordance with Welcome's right of set off. There is a substantial balance outstanding for the third loan and Mr and Mrs A have not shown any intention of repaying it. They last made a payment to the loan in July 2005 and had been late in making payments or missed payments on a number of prior occasions. It made substantial efforts to contact Mr and Mrs A to procure payment from them but they have failed and / or refused to make any repayment proposals.

– It feels the ombudsman's position regarding set off is inherently unfair and Mr and Mrs A have already benefitted from Welcome's decision to write off the balance for the hire purchase agreement.

– Welcome is contractually entitled to repurchase the debt it sold to the third party; this is a necessary feature of debt assignments. Although it has not yet repurchased the debt, it is contractually entitled to do so and will exercise that right as required. It is illogical for customers whose debts have been assigned to be placed in a better position than those whose debts have not been reassigned merely because those customers have failed to discharge their debt in line with their contractual requirements.

In response, I wrote to Welcome. In summary, I said:

– I did not consider the link between the PPI redress for the first two loans and the arrears on the third loan to be sufficiently close for me to be persuaded it would be fair for the PPI redress on the first two loans to be used to reduce the arrears on the third loan.

– The banker's right of set off applies when a financial business can transfer money from an account that is in credit to make payments on another account. I considered it did not apply here as the PPI compensation was not an account in credit, so could not be used to offset outstanding debt.

– Welcome had previously indicated that it intended to pay the redress directly to the third party owner of Mr and Mrs A's debt and there was no indication it intended to repurchase the debt. I asked Welcome to provide confirmation and evidence of the contractual entitlement to repurchase the debt and / or confirmation that it had actually repurchased the debt. I also asked Welcome to provide confirmation of the point at which it became the legal owner of the debt once more. Finally, I asked Welcome to explain what it intended to do with the debt once it had been repurchased and redress applied.

Welcome replied with the following response, which I have summarised:

– It maintains it is fair and reasonable to set off the PPI redress for the first two loans against the outstanding balance of the third loan. It believes the loans are inextricably linked, given that a proportion of the third loan funded the acquisition of the PPI sold with the first two loans.

– It is not seeking to assert a banker's right of set off. It believes it has a right of equitable set off and that it is entitled to exercise that right in these circumstances. The equitable right of set off means it is entitled to set off against sums owed to another party any cross-claim that it has against that other party where the cross claim arises from the same or a closely related transaction as the sum owed and where it would be manifestly unjust to allow the other party to enforce payment without taking into account the cross-claim.

  In this situation, Welcome's claim for repayment of the outstanding balance of the third loan arises from the same or closely related transaction that gave rise to the obligation to pay PPI redress. It is also unjust to allow Mr and Mrs A to retain the benefit of such redress where the amount outstanding for the third loan substantially exceeds the redress amount, the debt has been outstanding for a considerable time and where Mr and Mrs A have shown no intention of repaying the debt.

It believes it is legally entitled to exercise its equitable right of set off by applying the total redress amount to the outstanding balance of Mr and Mrs A's loan.

– Its sale agreements with the third party owner of Mr and Mrs A's debt allow it to recall and repurchase debts under certain circumstances and where it provides the owner with notification to repurchase. It is also free to negotiate the purchase of any debt from the owner as it sees fit.

  Welcome intends to repurchase Mr and Mrs A's debt by notifying the owner of its intention. The debt will then be reassigned to Welcome. It intends to offset the PPI redress against the outstanding balance of the loan and maintain ongoing ownership of the debt.

– It believes its offer of redress is fair and appropriate and accords with the Dispute Resolution Rules (DISP) Appendix 3.8.1E.

I wrote a further letter to Welcome in February 2013, stating it should provide me with confirmation it had repurchased Mr and Mrs A's debt by mid March 2013, after which I would issue my findings based on the position of the debt at that point. I sent a copy of the letter to Mr and Mrs A. I have received no response from Welcome to my letter.

my findings

I thank both parties for their submissions and I have considered them alongside all the evidence and arguments already submitted by them in order to decide what is fair and reasonable.

First, I have considered the arrangements concerning Mr and Mrs A's debt. Whilst I understand the point Mr and Mrs A seek to make, I am not persuaded all of their personal loan liabilities were incorporated into the hire purchase agreement. It seems to me there is still some outstanding liability for their third personal loan.
Next, Welcome says it has an equitable right of set off, which it says means it can use the PPI compensation otherwise payable to Mr and Mrs A to reduce their outstanding debt.

I have carefully considered what Welcome says about its rights to set off the PPI compensation against Mr and Mrs A's debt.

When I decide what is fair and reasonable in each case, I must take into account (though I am not necessarily bound by), amongst other things, the relevant law as well as any relevant regulatory rules.

The Financial Services Authority has issued guidance for financial businesses handling PPI complaints. That guidance states:

"*where the complainant's loan or credit card is in arrears the firm may, if it has the contractual right to do so, make a payment to reduce the associated loan or credit card balance, if the complainant accepts the firm's offer of redress. The firm should act fairly and reasonably in deciding whether to make such a payment*" (DISP Appendix 3.9.1 G).

A strict reading of the relevant guidance suggests Welcome can only use PPI compensation to reduce arrears on the *associated* loan or credit card balance and only where *it has the contractual right to do so*. Here, Mr and Mrs A's first two loans (the associated loans) have both been repaid in full, so there are no arrears on those loans. Setting aside whether or not Welcome has a *contractual right*, applying the relevant guidance suggests Welcome is *not* entitled to use the compensation for the mis-sale of PPI alongside Mr and Mrs A's first two loans to reduce the outstanding balance on their third loan as it is not the *associated loan or credit card* in this case.

Next, Welcome says it can rely on an equitable right of set off in law. The equitable right of set off in law allows a person to 'set off' closely connected debts. This means that one person (X) can deduct from a debt that they owe another person (Y), money which that person (Y) owes to them.

In order for the equitable right of set off to apply, I must be satisfied there is a close connection between the PPI compensation and the outstanding debt to which Welcome would like the compensation transferred. I must also consider whether it would be unjust not to allow Welcome to set off in this way. Both tests need to be satisfied in order for me to conclude Welcome has an equitable right to set off the PPI compensation against Mr and Mrs A's debt.

Before I consider whether or not there is a close connection between the PPI compensation and Mr and Mrs A's outstanding debt, however, I think it is important to remember that, as far as I am aware, Welcome is not a party to the debt which remains outstanding. Welcome is not the legal owner of the debt, having sold it to a third party in September 2007. And, although it said it has the opportunity to repurchase the debt, it appears it has not done so. The current third party owner of the debt has confirmed it still owns the debt. The parties to the debt are the current owner and Mr and Mrs A; Mr and Mrs A do not owe Welcome the outstanding balance of the loan. So, it is difficult to see how Welcome can argue Mr and Mrs A owe them a debt against which it can set off their PPI compensation.

I think that Welcome not owning the debt is reason enough for me to conclude it cannot set off Mr and Mrs A's PPI compensation against that debt. But, in addition, I am not persuaded there is a close connection between *redress* for the PPI policies taken out in connection with Mr and Mrs A's first two loans and the *arrears* on their third loan. I accept there is a connection between the loans themselves. But, as I said in my letter to Welcome, I am not currently persuaded there is a close connection between redress for the mis-sale of the PPI policies associated with the first two loans, which arose from failings in the way Welcome sold insurance, and the arrears on the third loan, which arise from entirely different circumstances.

So, Welcome's arguments have not persuaded me that the first part of the test – the close connection – has been satisfied and that the equitable right of set off applies. For completeness, I have considered Welcome's comments as to why it would be unjust for the redress not to be applied to Mr and Mrs A's outstanding debt. But I fail to see why it would be unjust for Welcome to pay the redress to Mr and Mrs A when it is no longer the owner of the debt. I note Welcome's comments that Mr and Mrs A have failed to repay the debt over some time and show no intention of repaying the debt. But, I cannot see why this is relevant to whether it would be unjust for Welcome to pay the redress directly to Mr and Mrs A, particularly when Welcome has taken the commercial decision to sell Mr and Mrs A's debt (and presumably obtained monies in return) and is no longer the owner of that debt.

So overall and on balance, I am not persuaded by Welcome's arguments that it has an equitable right of set off in this case.

Finally, I have also considered Welcome's comments about its intention to repurchase Mr and Mrs A's debt. Welcome says it retained the right to repurchase the debt in its contract with the new owner and that it was free to negotiate the repurchase of any debt at any time. It has provided a copy of a draft agreement between it and the new owner dated 4 July 2006 in evidence of this and says it intends to repurchase Mr and Mrs A's debt.

Having given Welcome ample time and opportunity to resolve the position of the debt, it appears it has not done so. In light of this and the resulting delay to resolving Mr and Mrs A's complaint, I am persuaded that I should now to proceed to resolving this dispute based on the current legal position between the parties. As such, I am not persuaded to alter my conclusions that redress should be paid directly to Mr and Mrs A.

In conclusion, I am not persuaded the equitable right of set off applies here for the reasons I have outlined above. Welcome has not taken steps to repurchase Mr and Mrs A's debt and has no current contractual relationship with Mr and Mrs A.

In light of this, I remain of the view that Welcome should pay the compensation in respect of PPI on all three loans directly to Mr and Mrs A. Mr and Mrs A may wish to use the compensation from Welcome to repay some of the outstanding loan balance held by the third party owner. I also direct Welcome to recalculate its offer to Mr and Mrs A in respect of all three PPI policies.

my decision

For the reasons stated above, I direct Welcome Financial Services Limited to recalculate redress to date for the PPI policies associated with Mr and Mrs A's three loans as set out above and to pay any redress direct to Mr and Mrs A. I make no further award against Welcome Financial Services Limited.

Chloe Wooles
ombudsman