

## **complaint**

Mr A doesn't think it's fair for The Royal Bank of Scotland Plc (RBS) to use the payment protection insurance (PPI) compensation offers it's made to him to reduce the debt which remained unpaid when his protected trust deed came to an end.

## **background**

I issued my provisional decision on 6 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 Mr A's PPI compensation to reduce the amount he owed and didn't repay when his trust deed came to an end.

RBS said it had nothing further to add to my provisional decision.

Mr A said that it had been brought to his attention that, since my provisional decision was issued, RBS had lost a recent court case it had appealed which was relevant to his complaint. And in the light of this legal decision he asked whether I would be changing the outcome of his complaint in my final 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.

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 Mr A’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 other comments on my provisional decision by either Mr A or RBS, I remain of the opinion that it would be unfair for me to require RBS to pay PPI compensation directly to Mr A when - because of his discharge from the trust deed – he now won’t ever have to repay the monies borrowed from RBS and not already repaid by him.

### **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 Mr A’s compensation for the mis-sold PPI to reduce the amount he owed and didn’t repay when his trust deed came to an end.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr A to accept or reject my decision before 12 January 2020.

Simon Furse  
**ombudsman**

## **copy of my provisional decision**

### **complaint**

Mr A doesn't think it's fair for The Royal Bank of Scotland Plc (RBS) to use the payment protection insurance (PPI) compensation offers it's made to him to reduce the debt which remained unpaid when his protected trust deed came to an end.

### **background**

RBS sold Mr A a PPI policy in 2004 to protect the repayments on a loan he was taking out with it. This loan was repaid early when Mr A took out a further loan later that year. Once again, Mr A was sold a PPI policy to protect the repayments on his new loan.

Mr A complained to RBS that he had been mis-sold these PPI policies. RBS upheld his complaint. It offered to refund the PPI premiums and the extra interest he'd been charged as a result of these mis-sales, together with simple interest to compensate him for the time he'd been out of pocket. The total amount offered was £10,456.65, which Mr A accepted.

In 2006, Mr A had granted a trust deed - which became a protected trust deed - for his creditors. This is an alternative in Scotland to bankruptcy (called sequestration there). It is a legally-binding agreement between a consumer and their creditors, which is administered by a trustee. RBS says that, when this protected trust deed came to an end in 2012, the total amount of debt which it had been unable to recover was £20,391.07.

Following acceptance by Mr A of the compensation offers made to him for the mis-sale of his PPI policies, RBS says it used these in partial payment of the outstanding amount it hadn't fully recovered when Mr A's protected trust deed ended in 2012. But Mr A doesn't think that the compensation he's been offered should be used in this way. He thinks that, as his protected trust deed had ended before RBS made these offers, he didn't still owe it any money. And so he thinks these PPI compensation offers should be paid directly to him.

Our adjudicator didn't think that Mr A's complaint should be upheld. She thought that it was fair in these circumstances for RBS to use the compensation offer partially to offset the debt to it which was still unpaid when the protected trust deed was ended. Mr A 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.

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 Mr A'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 Mr A's PPI compensation offers to reduce the much higher amount of debt which he wasn't required to repay to it after his protected trust deed ended.

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

But I must apply an over-arching test of what's fair and reasonable in the particular circumstances of Mr A's complaint. And I simply don't think it would be fair to tell RBS to pay Mr A's PPI compensation directly to him when he borrowed a great deal more money from RBS which won't ever now be repaid. The fact that Mr A's protected trust deed had come to an end before this offer of PPI compensation was 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 Mr A when he doesn't now need to pay back to RBS a much bigger amount which he borrowed. And as the PPI policies in question were paid for by single premiums added to his loans, for RBS to do so would, in effect, mean that it was refunding him some money that it had never actually received from him 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 Mr A to reduce the debt, which won't now ever be repaid to RBS following the closure of his protected trust deed.

I've also considered whether Mr A's complaint should be dismissed by this service without considering its merits. This is on the basis that the PPI compensation offers RBS made to him were in "*full and final settlement*". And it appears that Mr A signed to accept these offers in June 2016.

But I think that it's most likely that Mr A's acceptance of these offers would have been on the basis that he thought he was entitled to have this compensation paid directly to him, because his former debt had been extinguished when the trust deed was completed. Given the uncertainty about the legal position regarding pre-existing debts after a trust deed had ended, I don't think RBS's offers made its position sufficiently clear. And so I don't think it would be appropriate to dismiss the case on that basis.

Finally, I've thought carefully about the points which Mr A has made in explaining why he doesn't agree with the adjudicator's view. But having done so, these haven't changed my mind. I still don't currently think that his complaint should be upheld.

**my provisional decision**

For the reasons I've given, I'm not presently intending to uphold Mr A's complaint. I'm minded to decide that it was fair for The Royal Bank of Scotland Plc to use Mr A's compensation for the PPI policies it mis-sold to him to reduce the amount of debt he hadn't repaid when his trust deed came to an end. So, based on what I've seen so far, I don't plan to make a further award.

Simon Furse  
**ombudsman**