

## **complaint**

This complaint is about mortgage payment protection insurance (PPI). Mr D complained that Royal Bank of Scotland Plc ("RBS") mis-sold this type of cover.

## **background**

I'll begin by noting that it doesn't look like Mr D is entirely sure of the dates and details of the PPI sale or the mortgage(s) covered. I do understand however, that due to the passage of time, remembering what happened isn't easy. I also see that Mr D's wife, Mrs D, has since passed away and I'm sorry to learn about that.

Nevertheless, I've looked at what paperwork and other records still seem to exist for this matter. Businesses aren't required to keep records indefinitely but we now know Mr D and the late Mrs D probably took out this type of cover with RBS to help protect joint mortgage borrowing, taken out in 1999. It seems they had already operated a joint mortgage since the 1980s, but in 1999 they appear to have been re-arranging their financial affairs by borrowing more money. This represented the first PPI sale from what I can see.

So, they appear to have taken out PPI in 1999 - at this point covering both Mr D and the late Mrs D equally. It cost around £7 per month and would have paid out up to £120 in the event of a successful claim. In 2007, the cover was re-arranged to cover only Mr D, but also for a higher amount, reflecting the higher borrowing. This time, for around £19 a month, it protected him against losing his job or being unable to work – for up to £350 per month.

One of our adjudicators looked into the case and said they didn't think we should uphold the mis-sale element of the complaint. However, they also said they thought RBS's subsequent offer to pay back some of the cost of the PPI because of the non-disclosure of high commission and profit share Mr D and the late Mrs D paid, was fair in the circumstances.

Mr D's representative disagreed with the adjudicator's opinion – they didn't raise any new or additional points but repeated the same complaint points and arguments they'd previously made. 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.

When considering what is fair and reasonable, I am required to take into account relevant: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

We've set out our general approach to PPI mis-sale 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 this. I haven't set out that detailed information here but I've taken into account all relevant considerations in deciding Mr D's complaint.

Having done so, I've decided not to uphold the mis-sale complaint. I've also considered the issue of non-disclosure of commission. And I've decided RBS should have disclosed the

commission it received - but that it's offer to refund some of the cost of PPI to compensate is fair in the circumstances and accordance with the rules we work to. I've summarised my reasons for each of these conclusions below.

In summary, my reasons for not upholding the mis-sale part of this complaint are as follows:

- Whilst we don't have all the records from the 1999 sale, I think RBS probably made it clear that Mr D and the late Mrs D didn't have to take out the PPI and they chose to take it out because they wanted to protect their mortgage. I say this because I've looked at their mortgage quotation. A key point of Mr D's complaint is that he doesn't recall ever agreeing to PPI and was unaware he / they even had it. But I'm afraid I don't think this is right because the mortgage quotation included the PPI costs and I think these were laid out clearly enough. Also, in re-arranging the PPI cover in 2007, Mr D would most likely have re-visited his financial affairs, which caused the existing dual PPI coverage to be changed to just covering himself. Finally, records show he made a successful claim on the PPI policy in 2009 and received £501. Clearly, Mr D would need to know the policy existed (and what it covered) to make such a claim. So, I think the evidence is strong enough here that he knew the cover was in place and that consent was correctly obtained.
- There's no evidence RBS recommended the PPI to Mr D and / or the late Mrs D as part of an 'advised sale' - so it didn't have to check that the PPI was suitable for them. But it did have to provide information that was clear, fair and not mis-leading, so they themselves could think about what right for them. As I've said, the costs were probably clear enough and known to them and there was an obvious awareness of what the insurance was for.
- Of course, it's certainly possible the information RBS provided wasn't as clear as it should've been. But I've found that they / he chose to take it out and it's clear to me that there was an engagement with subsequent policy management, changes, and indeed a successful claim. It therefore looks very much like they / he wanted this type of cover. It wasn't fundamentally wrong for them. I have considered with care what's been said about pre-existing medical conditions and it's possible certain limitations could have been applied to some illnesses previously experienced. However, for Mr D, these related back to the 1980s and therefore well before the PPI sale in 1999. I've seen nothing suggesting these medical conditions persisted into the late 1990s or that he would have considered the previous injuries to be ones – which by 1999 – for which a claim on the PPI would seem likely. A medical condition mentioned in respect of the late Mrs D *post-dated* the 1999 sale, so I'm afraid this isn't relevant in this context. In summary, it seems like the PPI would have been useful for them if something went wrong and I think this is probably why it was purchased. Because of this I don't think Mr D and / or the late Mrs D would have declined the cover, even if RBS could have done a better job at explaining certain things, such as the limitations or policy exclusions.

Overall, I consider that Mr D and the late Mrs D would have still taken out the PPI. The policies in 1999 and 2007 were probably sufficiently close to what it's likely they / he thought they were getting and I think the PPI provided a useful benefit.

Mr D's representative has raised a number of what I consider to be general complaint points, which it says apply to all PPI complaints. These general points include: a claim that the Financial Ombudsman Service is not correctly applying the regulator's rules and guidance for handling PPI complaints; these policies represented poor value because of the number of

significant exclusions and limitations of cover coupled with the low claims ratio; and the duty of utmost good faith meant RBS should have disclosed the poor value and explained the significance of the limitations and exclusions and the impact it had on the chances of making a claim.

But Mr D's representative has not said how these points apply to the specific facts and circumstances of *this* complaint – just that they apply to all PPI complaints. I have thought about these things and how they might apply in Mr D's particular case. But these points don't persuade me to alter my conclusions about what is fair and reasonable in all the circumstances of the complaint – for the reasons I've set out above I don't uphold the mis-sale element of this complaint.

This means RBS doesn't have to pay back all of the cost of the PPI to Mr D.

### ***non-disclosure of commission***

As I said above, I've also considered the issue of non-disclosure of commission, including whether the non-disclosure resulted in an unfair relationship under section 140A of the Consumer Credit Act – and if so, what fair compensation would be to remedy that unfairness.

Having done so I've decided RBS should have disclosed the commission it received and that RBS's offer to refund some of the cost of PPI to compensate for the unfairness caused is fair. My reasons are set out below.

### ***was there an unfair relationship?***

RBS didn't tell Mr D about the high levels of commission and profit share paid in this case. So taking into account:

- The Supreme Court judgment in *Plevin*<sup>1</sup> and the conclusion in that case that the non-disclosure of commission could lead to an unfair relationship;
- The FCA's rules and guidance for handling complaints about the non-disclosure of commission and profit share - introduced in light of the Supreme Court judgment in *Plevin* - which requires a business to presume that the failure to disclose commission gave rise to an unfair relationship where the business expected commission and profit share to be more than 50% of the cost of the policy; and
- the likelihood, in my view, that a court would determine that the relationship between RBS and Mr D and / or the late Mrs D was unfair under section 140A of the Consumer Credit Act because RBS didn't mention the high levels of commission and profit share in this case

I don't think RBS acted fairly and reasonably in its dealings with Mr D and / or the late Mrs D because it failed to disclose the high commission and profit share.

### ***redress to remedy that unfair relationship***

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<sup>1</sup> *Plevin v Paragon Personal Finance Limited* [2014] UKSC 61 in which the Supreme Court concluded that the non-disclosure of commission could lead to an unfair relationship

I'm now required to consider what is fair compensation in all the circumstances to remedy the unfairness I have identified.

Mr D's representative has made a number of representations about this part of the complaint including the impact of the *Plevin* judgment and sections 140A and 140B of the Consumer Credit Act on this complaint.

In summary they have said Mr D should get back all the money paid for the policy because: RBS failed to disclose the high commission and profit-share rates paid, the low claims ratio and the restrictions and exclusions on cover. Because they say that meant the policy was poor value, I should find that they / he wouldn't have taken out the policy had they known about the level of commission and Mr D should receive a refund of all the premiums paid.

But I don't agree. I'm mindful of the following:

- The Supreme Court judgment in *Plevin* made no specific finding about whether the consumer in that case would or would not have bought the PPI policy had the commission been disclosed;
- A court would have a range of powers available under section 140 B to remedy the unfairness caused by the non-disclosure of commission – it does not follow that a court would automatically order a return of all the premiums paid or conclude that a consumer would not have purchased the policy had the commission been disclosed; and
- The FCA considered the matter and decided that it wouldn't be appropriate to merge the considerations about undisclosed commission in the existing rules and guidance about mis-selling (hence the two-step approach for firms handling PPI complaints) and that the impact of any undisclosed commission and any remedy caused by it should be considered at step 2.

Taking into account relevant law and the FCA's rules and guidance, my role as an ombudsman is to determine what redress, if any, would represent fair compensation for Mr D in order to remedy the unfairness caused by RBS not disclosing the high level of commission to Mr D.

So, taking into account:

- The FCA's guidance usually requires a business to refund the amounts paid by the consumer in commission and profit share *above* 50% of the policy's cost, plus interest in order to remedy the unfairness caused by the failure to disclose the level of commission;
- refunding some of the money paid for the PPI policy in this way is an order which, in my view a court could, in the exercise of its discretion, make under section 140B of the Consumer Credit Act in order to remedy any unfairness; and
- I am not, as Mr D's representative suggests, driven to conclude that they / he wouldn't have purchased the policy but for RBS's failure to disclose the level of commission for the reasons I've given above.

I think it was fair for RBS to calculate compensation in line with the FCA's guidance and return *some* of the money Mr D paid for the PPI.

I consider this fairly removes the source of the unfairness. This is because it leaves Mr D with the cover I've concluded above they / he would still have taken out if RBS had done everything it should have done – but with lower commission and profit share levels.

So I consider that RBS's offer of payment of an amount equivalent to the commission and profit share paid in excess of 50% of the policy costs (plus associated interest where applicable) in line with the FCA's guidance to firms is fair in all the circumstances.

**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 the mis-sale element of Mr D's complaint or make any award in favour of him for this part of the complaint.

But because of the non-disclosure of commission and profit share, I've decided that Royal Bank of Scotland plc should pay Mr D an amount equivalent to the commission and profit share paid in excess of 50% of the policy cost (plus associated interest where applicable) if it hasn't already done so.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr D to accept or reject my decision before 25 September 2021.

Michael Campbell  
**ombudsman**