complaint

Miss P has brought this complaint on behalf of herself and the Estate of Mr F. I was sorry to see Mr F died in 2002.

Miss P says Lloyds Bank PLC mis-sold her and Mr F a payment protection insurance ("PPI") policy.

It hasn't always been clear which business sold this cover. I can see that at the point of sale, Lloyds was trading as TSB. For the avoidance of any further confusion, I'll refer to Lloyds for the rest of this decision – Lloyds is the business responsible for answering this complaint.

background and summary to complaint

Miss P and Mr F bought the policy in 1997 at the same time as taking out a mortgage. They applied for the mortgage and PPI policy in a branch.

Although they took out a joint mortgage, the PPI was set up for Mr F only. He was covered for accident, sickness, and unemployment, subject to the policy's exclusions and limitations. It offered to repay £139.13 a month towards Miss P and Mr F's mortgage balance in the event of a successful claim. At the point of sale, it cost £8.13 a month.

At the time, Mr F worked for the NHS. It looks as though he would have had around six months full pay if he was off sick from work. Mr F had been working in his job for around 6 years when the cover was sold. With that in mind, I think he'd have been entitled to some redundancy pay. Miss P told us that they didn't have any other means with which to make their mortgage repayments if Mr F were out of work.

I asked our adjudicator to make some further enquiries about whether Mr F had any medical conditions at the time of sale. Miss P clarified that Mr F was in good health when the cover was sold.

Lloyds has sent us screenshots to show that the mortgage account was closed in September 2001.

Those representing Miss P and Mr F's estate 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, the 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 Miss P and Mr F wouldn't have taken out the policy and the complaint should be upheld. The representative argues there is 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 Miss P and Mr F 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 them 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 Miss P and Mr F 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 Miss P and Mr F 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 uphold the complaint – both parties have seen and provided their responses to the adjudicator's opinion. The adjudicator's opinion was not accepted 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 this. I don't intend to set that out in much detail here but I've taken this into account in deciding the complaint.

This sale took place in 1997 before the General Insurance Standards Council (GISC) published its code of practice in June 2000 and before the sale of general insurance products like this became regulated in January 2005. So, the GISC Code, the FSA's (and FCA's) overarching Principles for Businesses and insurance conduct rules (ICOB and ICOBs) aren't applicable to this complaint, nor is the FCA's Perimeter Guidance (PERG).

The credit agreement itself concluded in 2001. 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'm satisfied are applicable to my consideration of what is fair and reasonable in the circumstances of this

complaint. In particular, *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

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 the ABI Code and these other publications into account when deciding, what is in my opinion, fair and reasonable in the circumstances of this case.

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 this 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 with reasonable care and skill – in particular, whether the policy was appropriate or 'suitable' given Miss P and Mr F's needs and circumstances.

- Whether Lloyds gave sufficient,appropriate and timely information to enable Miss P and Mr F 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.

- I must also consider whether and to what extent Miss P and Mr F 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 Miss P and Lloyds, I've decided not to uphold the complaint. I've set out my reasoning below.

did Miss P and Mr F know they had a choice?

Lloyds had to make it clear that the PPI policy was optional.

I've had the benefit of seeing the mortgage application form that was completed by Miss P and Mr F. Looking at that document, I can see there was a separate section dealing with the PPI. There were two equally prominent boxes – one to tick to indicate they wanted a policy and another to say they did not. The box agreeing to PPI has been selected.

I can also see that Miss P and Mr F also had to decide how to set the cover up. They've decided on Mr F only and answered some fairly basic questions about his employment circumstances. Taking these things into account, I think it's most likely they had a discussion with the Lloyds representative about the cover, which reflected what was written on the application form.

Taking everything into account, I think it's more likely that Miss P and Mr F knew the policy was optional and they agreed to take it out without undue pressure.

did Lloyds provide advice?

I've treated this as an advised sale. That's because when the PPI was sold, Miss P and Mr F could have reasonably thought Lloyds was recommending the cover after taking a detailed account of their financial circumstances. This means Lloyds had to advise them with reasonable care and skill, in particular whether the policy was appropriate or 'suitable' given their needs and circumstances.

the advice

While I don't know what was discussed in the meeting, the documentary evidence suggests that Lloyds took some steps to establish whether the policy was a suitable recommendation The adviser had information about some of Miss P and Mr F's financial circumstances as part of the mortgage application. And I can see that some questions were asked about Mr F's employment circumstances. But I don't think Lloyds did enough to ensure the PPI was suitable. For example, it didn't enquire about their existing means.

Overall, on the balance of probabilities I'm not persuaded Lloyds did all it should have done to determine whether the policy was suitable. 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 policy was suitable for Miss P and Mr F. I do think it's more likely than not that the policy was ultimately suitable. In reaching that conclusion I've taken into consideration:

- Mr F met the eligibility criteria for the policy.

- Miss P and Mr F had a need for the policy – Mr F was the main wage earner and it seems likely their finances would be put under strain if he was not working – even allowing for the sickness and redundancy benefits he was entitled to and Miss P's income. The policy would have helped them manage the consequences were Mr F unable to work;

- The monthly cost of the policy appears to have been affordable;

- The exclusions and limitations didn't make the policy unsuitable. There was nothing about Mr F's employment or occupation which would have made it difficult for him to claim. And I haven't been told about any medical conditions that Mr F had at the time the cover was sold.

- While the policy would only pay benefits for a maximum of 12 months for each claim, it still provided useful cover given Miss P and Mr F]'s circumstances.

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

But 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 Miss P and Mr F agreed to take out the policy.

Overall, having considered the parties' representations about what happened, while I'm satisfied the policy was a suitable recommendation, I'm not persuaded Lloyds did enough to present information about the policy in a way that was fair and reasonable. I'm not persuaded Lloyds gave Miss P and Mr F all of the information they needed about the policy 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, the 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 this. 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 the 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 Miss P and Mr F about the limitations and exclusions, it should have gone further and explained the significance of them.

I'm not persuaded by the 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 that was 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 Miss P and Mr F? To what extent did they 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. So I have gone on to consider whether it would be fair and reasonable to conclude Miss P and Mr F suffered loss and damage as a result. To answer this, I must decide whether they 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, I have found that the policy *was* ultimately suitable for them.

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

It is argued that Miss P and Mr F wouldn't have taken it out and that 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 Miss P and Mr F had some interest in taking out payment protection insurance. By this I mean when Lloyds advised them that there was a suitable product that would protect their mortgage payments in the event Mr F was 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 Miss P and Mr F's circumstances at the time of the sale that the policy was not fundamentally wrong or unsuitable.

Although I consider it more likely than not that Miss P and Mr F knew they would have to pay something for the policy, I can't say Lloyds told them the exact premium at the point they applied for the policy. Having said that, it seems likely Miss P and Mr F would have been told the cost before the policy started and they paid for the policy for a number of years, so if the costs were significantly at odds with their expectations at the point of sale, it's possible they might have raised that with Lloyds at the time, or reconsidered their decision.

Overall, I'm not persuaded Miss P and Mr F would have found the cost unacceptable if they had been given the exact figure during the meeting in which PPI was sold.

In addition, I'm not persuaded Lloyds made clear exactly what Miss P and Mr F would get back in return in the event of a successful claim. But I think it's unlikely their expectations about what the policy would pay in the event of a claim (an amount sufficient to meet their mortgage payment) was significantly different to what the policy actually did.

Possibly the most significant differences between what Miss P and Mr F thought they had bought and what they actually bought were the following:

- The policy excluded claims relating to any disability which happened during the 12 months before the start date and for which Mr F had received treatment from a medical practitioner;
- The policy excluded claims relating to mental health conditions and it contained limitations on claims relating to back conditions placing more onerous evidential requirements to support a claim on those grounds;
- The policy limited, and in some situations, excluded unemployment cover if Mr F wasn't a permanent employee;
- The requirement that in order to be eligible for a disability claim, Mr F be totally unable to work because of sickness or injury as certified by a registered medical practitioner;
- 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 and exclusions above might well have caused Miss P and Mr F 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 taking out the policy.

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

I accept back pain and mental health conditions are common problems. In this case the policy excluded claims for mental health conditions and the steps required to make a disability claim for back related conditions were more onerous than Miss P and Mr F might reasonably have expected. But it's unlikely they would have expected to be able to make a disability claim without having to provide some evidence to support that claim. And while this exclusion and limitation might have dissuaded some consumers in slightly different

circumstances from taking out the policy, Miss P and Mr F, in their circumstances, still had some good reasons to take it out.

To make a disability claim, Mr F needed to be totally unable to do his normal job. But I don't think this is likely to be too different to what they would have expected to make a claim. So it seems unlikely they would have thought they would been able to make a successful claim if Mr F was still working.

Lloyds may not have pointed out that any claim would be limited to a 12-month period. This may have differed from what they expected and might have hoped for – but 12 months was a longer period than Mr F would have received full sick pay for and his statutory redundancy entitlement was also significantly less than 12 months' income.

In those circumstances, I consider it likely Miss P and Mr F would still have thought a policy that paid up to 12 monthly mortgage payments would have been of benefit and would help to manage the consequences should Mr F be unable to work in the circumstances covered by the policy. The policy allowed for multiple claims to be made, it could help reduce their outgoings at a difficult and uncertain time. It may have also ensured their home was not placed at risk and might potentially help preserve Mr F's sick pay or redundancy money for other use.

Having considered all of the evidence and arguments in this case, I consider it more likely than not Miss P and Mr F 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 F was made redundant, or unable to work through accident or disability. In the circumstances I consider it more likely than not Miss P and Mr F would have taken out the policy in any event notwithstanding the limitations on cover.

It is argued that 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 Miss P and Mr F 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 the circumstances as detailed above, I consider it reasonable to conclude the position Miss P and Mr F 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.

It is argued that 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 Miss P's comments that she and Mr F 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 Miss P and Mr F's estate in the position they would have been in if the policy had not been purchased.

That is because, while I accept it is possible that Miss P and Mr F 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. So I'm not persuaded it would be fair and reasonable in those circumstances, to conclude Lloyds should pay compensation, as that would put Miss P and Mr F's estate in a better position than they would have been in if everything had happened as it should have done.

It has been contended that 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 provided was insufficient to meet the standards I consider it fair and reasonable to expect it to have met in 1997 when providing information about an insurance policy.

I've also thought about the approach the representative says a court might take if it were to find Lloyds negligently misrepresented the contract 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 Miss P and Mr F's estate 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 Miss P to accept or reject my decision before 12 September 2021.

Nicola Bowes
ombudsman