

The complaint

The rules about complaining to the ombudsman set out when we can – and can't – look into complaints. In my decision, I've explained what this means for Mr A's complaint.

Mr A has complained that Lloyds Bank PLC mis-sold him a credit card payment protection insurance (PPI) policy in 1998.

Mr A has recently said that he is complaining about PPI on his credit card and mortgage accounts. To be clear, this complaint reference only relates to PPI on his credit card.

What happened

Lloyds didn't agree we could look at the complaint about how the PPI was sold – because it said Mr A had referred the complaint to us too late.

But Lloyds did pay back the amount of commission and profit share that was above 50% of Mr A's PPI premium. It did this because it didn't tell Mr A about the high level of commission and profit share he'd pay – which was unfair. I understand that a payment of £89.82 was paid directly to Mr A's account on 21 May 2018.

Our adjudicator looked at all of this – but didn't think we could help with Mr A's complaint about how this policy was sold. And they thought Lloyds' payment was a fair way to resolve the complaint.

Mr A disagrees with the adjudicator's opinion and so the complaint has been passed to me for a decision.

What I've decided – and why

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

The rules say that, when a business doesn't consent, I can't consider a complaint which is referred to me more than six months after the date it sends the customer its final response letter advising them they may refer the complaint to this office. Dispute Resolution (DISP) rule 2.8.2R (1) can be found in the regulator's handbook of rules and guidance.

In this case Lloyds wrote to Mr A a couple of times in response to his mis-sale complaint, its ultimate final response letter being dated 4 March 2015. So Mr A had until 4 September 2015 to refer the matter to this service. But he didn't do so until June 2018. So, the complaint was referred out of time under the rules I have to apply.

I can look into complaints referred outside the usual time limits where I'm satisfied the failure to comply with the time limits was because of exceptional circumstances.

Mr A was represented by a claims management company (CMC) in 2018. It said that it hadn't been party to the earlier complaint made by Mr A and so didn't know if it covered off

all of the reasons why the PPI might have been mis-sold. As such, it should be allowed to make the complaint again but this time including all of its additional points.

Mr A hasn't explained why he didn't refer the mis-sale complaint to us by September 2015. I'm satisfied that Lloyds letter of 4 March 2015 made it clear that he had six months in which to escalate his complaint to this service. He didn't need to know all the reasons why the policy might have been mis-sold. If he had referred the complaint to us in time we could have looked broadly at the sale to decide whether the PPI had been mis-sold or not. Therefore, I'm not persuaded that what the CMC has said about his initial complaint not covering every issue is an exceptional circumstance that would allow us to consider the mis-sale complaint now.

Lloyds did send another final response letter to Mr A in May 2018 in relation to unfair commission and profit share. Although it mentions the mis-sale aspect of the complaint, the outcome of the mis-sale element hadn't changed and so didn't revoke the original deadline for referral in 2015.

So I'm sorry we've unable to help Mr A with his complaint about how this policy was sold.

non-disclosure of commission

But I have 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 Lloyds should have disclosed the commission it received and that Lloyds' 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?

Lloyds didn't tell Mr A about the high levels of commission and profit share paid in this case.

So taking into account:

- The Supreme Court judgment in Plevin 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 Lloyds and Mr A was unfair under section 140A of the Consumer Credit Act because Lloyds didn't tell him about the high levels of commission and profit share in this case.

I don't think Lloyds acted fairly and reasonably in its dealings with Mr A because it failed to disclose the high commission and profit share.

redress to remedy that unfair relationship

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

Mr A's CMC had 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 his complaint.

In summary they had said Mr A should get back all the money he paid for the policy because: Lloyds failed to tell Mr A about 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 Mr A wouldn't have taken out the policy had he known about the level of commission and he should receive a refund of all the premiums he 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 in this case is to determine what redress, if any, would represent fair compensation for Mr A in order to remedy the unfairness caused by Lloyds not disclosing the high level of commission to him before he purchased the policy.

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 A's CMC suggested, driven to conclude that he wouldn't have purchased the policy but for Lloyds' failure to disclose the level of commission for the reasons I've given above.

I think it was fair for Lloyds to calculate compensation in line with the FCA's guidance and return some of the money Mr A paid for his PPI policy - I consider this fairly removes the source of the unfairness.

My final decision

I'm unable to consider Mr A's complaint about how his policy was sold, because it was referred to us too late – and I'm not persuaded the failure to comply with the time limits was because of exceptional circumstances.

But because of the non-disclosure of commission and profit share, I've decided that Lloyds Bank PLC should pay Mr A an amount equivalent to the commission and profit share paid in excess of 50% of the policy cost (plus associated interest where applicable). As Lloyds Bank PLC has already paid compensation on this basis, I do not consider that it should do anything more.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 21 February 2024.

Carole Clark
Ombudsman