summary

1. This dispute is about the sale in 2002 of a payment protection insurance (PPI) policy to support a Santander UK Plc (trading as Alliance & Leicester) mortgage.

2. Mr and Mrs M complain that Santander included the policy as part of a package with their mortgage without making it clear they had a choice about buying it. They also say Santander did not properly explain the policy's features, exclusions and limitations. If it had, they say they would not have taken the policy out.

3. Santander says Mr and Mrs M were given a choice about whether or not to take out the policy, the policy was suitable for them and if it had given Mr and Mrs M more information about the policy, it would not have affected their decision to take it out.

4. I have carefully considered all of the evidence and arguments submitted by both sides, in order to decide what is, in my opinion, fair and reasonable in all the circumstances of this complaint.

5. This is not a straightforward complaint, with both parties making credible arguments in support of their positions. But for the reasons I explain in detail below, I have decided to determine the complaint in favour of Santander, to the extent that I do not make an award in favour of Mr and Mrs M.

6. This is a final decision. In summary, having considered all of the evidence and arguments submitted by the parties during the course of the complaint, my final conclusions are as follows:

   - Mr and Mrs M made their decision to take out the policy based on advice and information Santander gave them about the policy.

   - Taking into account the law, industry codes of practice and what I consider to have been good practice in 2002 (there were no applicable regulations at the time), Santander should fairly and reasonably have advised Mr and Mrs M with reasonable care and skill. In particular, it should have considered whether the policy was appropriate or 'suitable' for them, given their needs and circumstances. It should also fairly and reasonably have provided Mr and Mrs M with sufficient clear, fair and not misleading information about the policy it was recommending to them, to enable Mr and Mrs M to make an informed decision about whether to follow the recommendation and take out the policy.

   - Santander did not act fairly and reasonably in its dealings with Mr and Mrs M. It did not advise Mr and Mrs M with reasonable care and skill – it did not take sufficient steps to establish whether the policy was suitable for Mr and Mrs M (although the policy it recommended was ultimately suitable for them). And it did not provide them with all the information they needed to make an informed decision about whether to take out the policy.

   - Mr and Mrs M made their decision to take out the policy based on the recommendation and incomplete information. But if things had happened as they should, on the evidence available in this case, it is more likely than not Mr and Mrs M would still have taken out the policy.

- It would not be fair in those circumstances to make an award to compensate Mr and Mrs M for the money they spent in connection with the policy.

7. Under the rules of the Financial Ombudsman Service, I am required to ask Mr and Mrs M either to accept or reject my decision before 9 September 2018.

background to the complaint

a) events leading up to the complaint

8. Mr and Mrs M already had an existing mortgage with Santander. But in June 2002 they applied for an additional home loan. They met with a member of Santander staff who completed a secured loan application form, a mortgage interview record form and a Mortgage Related Insurance Sales Record (MRISR).

9. The secured loan application form, which Mr and Mrs M signed, included a section headed 'Insurance'. Within this section a box has been ticked to indicate that Mr and Mrs M would like details of how to arrange 'Mortgage Payment Cover'. The mortgage interview record form indicates that Mr and Mrs M had said 'yes' to PPI and the MRISR details that they wanted cover for Mr M only with a benefit of £500 per month at a cost of £26.25.

10. Mr and Mrs M borrowed an additional £10,000 for home improvements to be repaid over the same term as their existing mortgage. The benefit of £500 covered their total monthly mortgage repayments.

11. The policy began on 3 July 2002. Mr M paid the £26.25 monthly premium by direct debit.

12. The policy was cancelled on 30 April 2003 and the mortgage was redeemed in the same month. In total, Mr and Mrs M made 10 PPI payments – £262.50.

b) Mr and Mrs M's circumstances in 2002

13. Mr and Mrs M had held their mortgage with Santander since 1998. This was not protected by a PPI policy. Mr M was 33 years old at the time.

14. According to the loan application form, Mr M earned £26,000 and Mrs M earned £4,368 per year. Mr M has told us that he was working as a fitter and that he had been with his employer for 14 years. Mrs M worked as a clerical officer and had been with her employer for three years.

15. Mr M has also told us that:

    - He would have received between three and six months' pay if he was off work due to sickness or accident and that at least three months of that would have been at full pay.

    - He would have received at least one month's redundancy pay.

    - He had a separate life insurance policy.

    - He did not have any health problems at the time.

16. Based on the statutory redundancy provisions at the time, it seems likely Mr M would have been entitled to statutory redundancy of around three months' pay.

17. Mrs M has also told us that:

    - she can't remember if she would have received any benefits from her employer if she was off work due to sickness or accident.

    - she had a separate life insurance policy.

    - she was pregnant at the time that the loan was being arranged.

c) the policy – what was Santander selling and what did Mr and Mrs M buy?

18. Santander has provided a copy of the 'Mortgage PaymentCover' policy which sets out the full policy terms and conditions which applied to policies like Mr and Mrs M's sold in June 2002.

19. The policy conditions were set out in an 11 page booklet. Among other things, these show that:

    - There were eligibility criteria which Mr M met – for example he had to be 18 or over, but under 65 and working for the past three months at the start date. The cover would end when he reached 65.

    - The policy provided disability cover. Broadly, if Mr M was unable to carry out the duties of his work (or any other work which in the insurer's view he might reasonably become qualified for in view of his training, education and ability) due to injury, sickness or disease, it would pay Mr and Mrs M £500 each month. The monthly benefit would continue until the disability came to an end or 12 payments had been made, whichever came first.

    - The policy would provide unemployment benefits. Broadly, the policy would pay £500 each month. The monthly benefit would continue until Mr M ceased to be unemployed or 12 payments had been made, whichever came first.

    - The policy would have paid out after 30 consecutive days of disability or unemployment.

    - The insurer was Pinnacle Insurance plc.

20. To put the benefits into context, if Mr M had made a successful claim for 12 months he would have received £6,000. And he could have claimed more than once during the life of the policy.

21. Returning to the policy terms and conditions, there were also exclusions – for example, claims resulting from pre-existing medical conditions which Mr M knew, or should have known about at the start date, were not covered unless he had been free of symptoms and had not consulted a doctor or received treatment in the 24 months prior to a claim.

22. There were also limitations restricting the circumstances in which a successful claim could be made, for example:

    - The policy would cover Mr M if he was unable to work because of a mental health condition, provided it had been diagnosed by a consultant psychiatrist and he was under the continuing care of a consultant psychiatrist

    - The policy would cover Mr M if he could not work because of backache and related conditions, but only if there was evidence such as a report from a specialist and with the probable requirement of an MRI or CT scan.

d) the complaint and Santander's response

23. Mr and Mrs M's representative We Fight Any Claim Ltd (WFAC) has made lengthy and substantial representations on their behalf.

24. I will not restate them all here and I will refer to some of the specific representations they have made at relevant times in this decision. But I have read and considered them all carefully. In essence, Mr and Mrs M say:

    - Santander included the policy as a package with their mortgage.

    - Santander did not give them the information it should have given them about the costs and benefits associated with the policy.

    - Santander did not tell them about the poor value of the policy, which is illustrated by the low claims ratio – for example the average claims ratio for this type of policy was 35%, meaning that around 35p in every pound was used to pay claims, the rest paid for costs, profits and commission. Additionally Mr and Mrs M have also said that research has shown that claims ratios were typically rooted below 20%. Santander's failure to explain this to them was a breach of the common law duty of utmost good faith and of the FCA's principles, which require firms to treat customers fairly.

    - Santander did not tell them about the limitations affecting the policy, in particular: that the policy would only pay out if Mr M was unable to do both his own job and other work which the insurer thought he was reasonably qualified to do; and that claims arising from back injury and mental health were subject to restrictions and evidential requirements which significantly reduced the cover provided by the policy and the prospects of making a successful claim. This reduced further the policy's value, particularly as those conditions are the cause of the most common reasons for long term absence.

    - The common law duty of utmost good faith meant Santander should have done more than simply draw the limitations to their attention, it should also have explained the significance of them and the impact they would have on Mr M's chances of making a claim.

- The policy was not suitable because it only protected payments for the short-term, whereas a mortgage is generally someone's biggest ever long-term transaction. Evidence from the National Institute of Clinical Evidence (NICE) in 2009 confirmed that four out of five people who are off work for six months actually end up being off work for five years. Most people could cope with a relatively short-term absence such as the absence this policy protected – using a combination of residual earnings, savings, family support and a helpful approach from the lender. But cover under the policy would cease at just the time it would be most needed.

- These policies were promoted as providing peace of mind, but the number of exclusions, limitations and restrictions on the scope of the cover meant that this was untrue. The adviser knew how the insurance worked and they trusted the adviser and were entitled to rely on what was said.

- These were substantial flaws in the sale process. Had they known the true cost of the policy, the limits on the cover and its poor value, they would not have taken it out – that would have been the logical outcome, given the seriousness of the failings.

- In any event, the FCA's guidance at DISP App 3.6.2E makes it clear that it should be presumed they would not have taken out the policy unless there is evidence to outweigh the presumption. I am required to take that regulatory guidance into account when deciding what is fair and reasonable and should not depart from it, other than in exceptional circumstances when there is sufficiently good reason to take a different approach.

- Santander should pay compensation to put them in the position they would have been in if they had not taken out the policy.

25. Prior to the provisional decision Santander said:

- The sale took place in branch so it is likely that it would have provided Mr and Mrs M with advice about the policy based on the information they provided.

- Mr M was eligible for the policy and the paperwork suggests that Mr and Mrs M were given a choice about whether or not to apply for it.

- The policy was suitable for them. Mr and Mrs M had a need for the insurance to protect their payments should Mr M not have been able to work, they were not affected by the significant exclusions and limitations and the policy was affordable.

- It is more likely than not that the adviser explained the policy features and limitations to Mr and Mrs M and that the appropriate documentation was sent to them following the sale.

- Mr and Mrs M's decision to take out the policy would not have changed if it had done more.

e) the parties' representations in response to the provisional decision

26. Santander had nothing further to add following the provisional decision.

27. Mr and Mrs M's representative made further submissions in response to the provisional decision, all of which I have read and considered carefully. In large part, they have restated the substance of their prior representations.

28. I will refer to some of the specific representations made at relevant times in this decision, but briefly and in summary, Mr and Mrs M say:

    - The provisional decision fails to properly deal with matters raised in earlier correspondence.

    - The provisional decision does not properly take into account the FCA's guidance at DISP App 3.6.2, misconstrues the tests the guidance sets out and fails to properly assess and weigh up the evidence in the complaint.

    - There's no reason to believe that, if open and fair questions had been asked to properly identify the clients' sick pay arrangements and to ask what income they wanted to replace and at what time, they would have ended up with this policy.

    - The provisional decision concludes that the sale was made on an 'advised' basis, and that the sale was flawed, but that the policy was suitable anyway without considering how proper advice ought to have been given and what the process should have entailed. The policy was unsuitable for them given their requirements and the limitations on cover.

    - Mr and Mrs M had risks they might well have wished to cover, but there is no evidence this policy covered them.

    - In particular, the policy only covered the first year of sickness or unemployment. Whilst that in itself was not inappropriate, it was inappropriate to not address the post 12 month period.

    - The evidential requirements for mental health and back conditions are usually impossible to provide, particularly in the short term.

    - Mr M's profession as an agricultural mechanic meant that he was at greater risk of developing back problems.

    - If Mr M could not do another occupation that he was reasonably qualified for, he could not claim, which is unfair. Mr M was in a high risk occupation and so there was more chance a claim would be excluded because he was qualified to do something else (such as a job in a lower risk category).

    - The policy was poor value, which is an important consideration when considering fairness.

my findings

29. I have included only a summary of the complaint, but 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 the case.

a) relevant considerations

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

31. This sale took place in 2002 before the sale of general insurance products like this became regulated by the Financial Services Authority in January 2005 and before mortgage lending became regulated in October 2004. So the FSA's and FCA's overarching Principles for Businesses and insurance conduct rules (ICOB and ICOBS) are not applicable to this complaint.

32. The original mortgage and additional home loan were redeemed in 2003. That means the unfair relationship provisions set out at s140A of the Consumer Credit Act, the Supreme Court judgment in *Plevin*[1] about s140A of that Act and the rules and guidance made by the FCA recently about the handling of complaints about the non-disclosure of commission in the light of the *Plevin* judgment, are not applicable.

33. But there were a number of industry codes in existence at the time, which I am satisfied are applicable to my consideration of what is fair and reasonable in the circumstances of this complaint. In particular:

The General Insurance Standards Council's General Insurance Code for private customers – 'the GISC Code'

34. Mr and Mrs M's policy was sold during the period of 'self-regulation' by the General Insurance Standards Council (GISC). It published the GISC code which set out minimum standards of good practice for its members to follow when selling insurance, including PPI. Santander was a member of GISC when it sold Mr and Mrs M's policy.

35. Of particular relevance to this dispute:

- Among other things, members promised that they would:

  - *'act fairly and reasonably when we deal with you;*
  - *make sure that all our general insurance services satisfy the requirements of this Private Customer Code;*
  - *make sure all the information we give you is clear, fair and not misleading;*
  - *avoid conflicts of interest or, if we cannot avoid this, explain the position fully to you;*
  - *give you enough information and help so you can make an informed decision before you make a final commitment to buy your insurance policy...'*

[1] *Plevin v Paragon Personal Finance Limited [2014] UKSC 61*

- Under the heading ‘helping you find insurance to meet your needs’:

‘We will give you enough information and help so you can make an informed decision before you make a final commitment to buy your insurance policy.
…

Matching your requirements

3.2 We will make sure, as far as possible, that the products and services we offer you will match your requirements.

- *If it is practical, we will identify your needs by getting relevant information from you.*
- *We will offer you products and services to meet your needs, and match any requirements you have.*
- *If we cannot match your requirements, we will explain the differences in the product or service that we can offer you.*
- *If it is not practical to match all your requirements, we will give you enough information so you can make an informed decision about your insurance.*

Information about products and services

3.3 We will explain all the main features of the products and services that we offer, including:
…
- *all the important details of cover and benefits*
- *any significant or unusual restrictions or exclusions;*
- *any significant conditions or obligations which you must meet; and*

…

Information on costs

3.4 We will give you full details of the costs of your insurance including…
…
- *if we are acting on your behalf in arranging your insurance and you ask us to, we will tell you what our commission is and any other amounts we receive for arranging your insurance or providing you with any other services.*

…

Advice and recommendations

3.5 If we give you any advice or recommendations, we will:
- *only discuss or advise on matters that we have knowledge of;*
- *make sure that any advice we give you or recommendations we make are aimed at meeting your interests; and*
- *not make any misleading claims for the products or services we offer or make any unfair criticisms about products and services that are offered by anyone else.’*

The Mortgage Code

36. The Mortgage Code was a voluntary code followed by subscribing lenders and mortgage intermediaries. Whilst predominantly about mortgage related matters, it also included some insurance related commitments.

37. Among other things, the Mortgage Code said that when providing information to help customers choose a mortgage, subscribers would give customers:

    - *'…a description of any insurance services which we can arrange (for example, buildings, contents, mortgage payment protection and life insurance);*
    - *whether it is a condition of the mortgage that such insurance be taken out and whose responsibility it is to ensure that it is taken out*;
    - *whether it is a condition of the mortgage that such insurance must be arranged by us;*
    - a *general description of any costs, fees or other charges in connection with the mortgage which may be payable by you (for example, mortgage valuation fees, arrangement fees, early repayment charges, legal fees and insurance premiums)'*.

38. Subscribing lenders (but not mortgage intermediaries) also agreed to comply with relevant codes including the ABI Code (below).

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'

39. First introduced in 1989 and updated in March 1996, the ABI Code set out a framework of general principles within which ABI members and intermediaries were expected to sell general insurance, including payment protection policies like this. Among other things it said, that:

    - *'It shall be an overriding obligation of an intermediary at all times to conduct business with utmost good faith and integrity.'*

    - The intermediary should:

        - *'ensure as far as possible that the policy proposed is suitable to the needs and resources of the prospective policyholder.'*

        - *'explain all the essential provisions of the cover afforded by the policy, or policies, which he is recommending, so as to ensure as far as possible that the prospective policyholder understands what he is buying.'*

        - *'draw attention to any restrictions and exclusions applying to the policy.'*

Guidance on the application of the ABI Code

40. The ABI also issued guidance to member companies on the application of the ABI code and a note summarising the main points of that guidance.

41. The ‘Guidance Notes for Intermediaries’ issued in December 1994 included:

When selling insurance intermediaries must

...2.5 Explain the essential provisions of the insurance cover, draw attention to any restrictions and exclusions under it, as well as the consequences of non-disclosure…

…2.13 If an independent intermediary, disclose commission on request…

42. The ‘Resume for Intermediaries’ published in July 1999 explained how insurers should interpret some of the key requirements of the code including:

“Explain all the essential provisions”
It is necessary for the intermediary (insurer, if dealing direct) to provide an overview of the policy. The detail will vary depending on the particular class of insurance. However, the proposer should have a reasonable understanding of what he is buying, whether this is explained orally or whether he is given a summary and his attention drawn to the main points. In this respect, it is important to recognise the responsibility under the ABI Statement of General Insurance Practice that insurers will work towards clearer policy wordings

The intermediary is not expected to go through all the provisions and exclusions in detail. The important feature is to identify the level of cover being provided (for example, in the case of household contents whether it is “indemnity” or “new for old”), that the type of policy being sold suits the circumstances of the proposer and the level of protection they are seeking as far as possible. It is not good enough simply to offer, for example, an indemnity basis of cover without explaining the limitations and, indeed, that other options are available, unless, of course, the proposer wittingly asks for that type of cover.

“Draw attention to any restrictions and exclusions”
The same general principles outlined above apply equally here. Certain exclusions, conditions, restrictions etc under a particular policy will be common to all policyholders, for example, a condition about fraud. In those circumstances, it would not be necessary to identify these other than by reference to general exclusions applying to all policyholders of a particular type of insurance, either orally or in policyholder documentation.

However, some will be more relevant and, indeed, significant to certain but not other policyholders. An example would be where benefit to self-employed people is either excluded or severely restricted for redundancy cover under a creditor insurance policy. Clearly, self-employed people should be made aware of this so they can decide whether the other benefits under the policy and the premium to be paid justifies taking out such a policy.

43. The ‘Resume for Intermediaries’ also highlighted the importance of the ABI Code. It noted:

The Code is mandatory for business sold by ABI members in the UK. The DTI are Responsible for ensuring that companies which are not members of ABI comply with the Code and, in addition, bringing the Code to the attention of foreign insurance companies covering UK risks on a services basis as part of the UK’s general good rules.

The ABI Statement of Practice for Payment Protection Insurance

44. The ABI also published a statement in December 1996 about PPI. Among other things, it said:

> *Providers will give sufficient detail of the essential provisions of the cover afforded by the policy so as to ensure, as far as is possible, that the prospective insured person understands what he/she is buying.*
>
> *In particular:*
>
> *the suitability of a contract will be explained to those who are self-employed, those on contract or part time work, and those with pre-existing medical conditions;*
>
> *details of the main features of the cover as well as important and relevant restrictions will be made available and highlighted at the time the insurance is taken out with full details being sent afterwards;*
>
> *all written material will be clear and not misleading;*
>
> *full details of the cover will be provided as soon as possible after completion of the contract.*

The ABI and CML Statement of Practice for Sales of Mortgage Payment Protection Insurance

45. The ABI jointly published a statement with the Council of Mortgage Lenders in July 1999. Among other things, it said:

> *Is the policy suitable for the consumer?*
>
> *The ABI Code requires sellers of MPPI to ensure as far as possible that the insurance policy being proposed is suitable for the prospective insured person's needs and resources.*
>
> *This means the customer should be encouraged to assess the levels of risks they face as a homeowner, and particularly how they would keep up mortgage repayments if they lost their income via unemployment or ill health. Issues that need to be addressed during the sales process include:*
>
> - *security of the customer's employment, bearing in mind the duration of financial commitment they are about to undertake,*
> - *what level of sick pay they could expect from their employer if they fell ill, and*
> - *whether they have savings or alternative sources of income*
>
> *This type of information will help customers to decide whether they need MPPI, and which kind of policy would be best for them.*

Does the customer understand what he/she is buying?

Sellers of MPPI must explain all the essential provisions of the policy, including restrictions and exclusion, at the point of sale.

The key aims at the point of sale should be to identify:

- *The level and type of cover being provided. This includes benefit levels and whether they cover disability and/or unemployment, length of time for which payments will be made and the duration of the policy in relation to the mortgage.*
- *All the main restrictions and exclusions. These include any eligibility criteria, conditions relating to pre-existing health conditions, time limits relating to claim payments and age restrictions.*

The needs of individual customers may vary. For example, self-employed or contract workers will need to understand clearly any restrictions that apply to them and affect their cover. Wherever possible, sellers should take account of individual circumstances and adjust the information they provide accordingly.

46. The other codes produced by the ABI supplemented the ABI Code and I consider them to be indicative of the standards of good practice expected of intermediaries like Santander at the time.

47. So I am satisfied it is right that I should take them into account, together with the codes Santander subscribed to when deciding what is, in my opinion, fair and reasonable in the circumstances of Mr and Mrs M's case.

The law

48. I have also taken account of the law, 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.

49. I have also considered carefully WFAC's representations about the law set out in a number of documents including WFAC's letters to this office about complaints generally of 2 March and 5 June 2017.

The FCA's guidance for firms Handling PPI complaints – DISP App 3

50. I am 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 payment protection contracts like Mr and Mrs M's.

51. The sale took place before insurance mediation became a regulated activity in January 2005, so Santander was required to take into account the evidential provisions in DISP App 3 as if they were guidance when considering Mr and Mrs M's complaint.

52. I note DISP App 3 includes guidance for firms about assessing a complaint in order to establish whether the firm's conduct of the sale fell short of the regulatory and legal standards expected at the time of sale – referred to as 'breaches or failings'. It did not impose new, retrospective, expectations about selling standards.

53. DISP App 3 also contains guidance for firms about determining the way the complainant would have acted if a breach or failing by the firm had not occurred. In relation to that it says:

> *DISP App 3.1.3G*
> *Where the* firm *determines that there was a breach or failing, the* firm *should consider whether the complainant would have bought the* payment protection contract *in the absence of that breach or failing. This appendix establishes presumptions for the* firm *to apply about how the complainant would have acted if there had instead been no breach or failing by the* firm*. The presumptions are:*
>
> > *(1) for some breaches or failings (see* DISP App 3.6.2 E*), the firm should presume that the complainant would not have bought the* payment protection contract *he bought; and*
> >
> > *(2) for certain of those breaches or failings (see* DISP App 3.7.7 E*), where the complainant bought a single premium* payment protection contract*, the* firm *may presume that the complainant would have bought a regular premium* payment protection contract *instead of the* payment protection contract *he bought.*
>
> *DISP 3.1.4G*
> *There may also be instances where a* firm *concludes after investigation that, notwithstanding breaches or failings by the* firm*, the complainant would nevertheless still have proceeded to buy the* payment protection contract *he bought.*
>
> *DISP App 3.6.1E*
> *Where the* firm *determines that there was a breach or failing, the* firm *should consider whether the complainant would have bought the* payment protection contract *in the absence of that breach or failing.*
>
> *DISP App 3.6.2E*
> *In the absence of evidence to the contrary, the* firm *should presume that the complainant would not have bought the* payment protection contract *he bought if the sale was substantially flawed, for example where the* firm*:*
>
> *…(4) did not disclose to the complainant, in good time before the sale was concluded, and in a way that was fair, clear and not misleading, the significant exclusions and limitations, i.e. those that would tend to affect the decisions of* customers *generally to buy the* policy*;*
>
> *…(8) did not disclose to the complainant, in good time before the sale was concluded and in a way that was fair, clear and not misleading, the total (not just monthly) cost of the* policy *separately from any other prices (or the basis for calculating it so that the complainant could verify it);*

…(10) provided misleading or inaccurate information about the policy *to the complainant;*

DISP App 3.6.3E

Relevant evidence might include the complainant's demands, needs and intentions at the time of the sale and any other relevant evidence, including any testimony by the complainant about his reasons at the time of the sale for purchasing the payment protection contract.

Overall

54. Taking the relevant considerations into account, it seems to me that the overarching questions I need to consider in deciding what is in my opinion fair and reasonable in all the circumstances of this complaint, are:

    - If Santander gave advice, whether it advised Mr and Mrs M with reasonable care and skill – in particular, whether the policy was appropriate or 'suitable' for Mr and Mrs M, given their needs and circumstances.

    - Whether Santander gave Mr and Mrs M sufficient, appropriate and timely information to enable them 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.

    - If, having considered these questions, I determine the complaint in favour of Mr and Mrs M, I must then go on to consider whether and to what extent Mr and Mrs M suffered loss or damage and what I consider would amount to fair compensation for that loss or damage.

55. Mr and Mrs M say Santander ought fairly and reasonably to have gone further than I have suggested. I shall address Mr and Mrs M's representations about this later on.

b) the sale - what actually happened?

56. Mr and Mrs M attended a meeting in a branch of Santander. They were looking to borrow extra money in addition to their existing mortgage.

57. Mr and Mrs M say the policy was sold in that meeting. They say they discussed the mortgage terms but can't remember if the firm gave them advice or recommended they take out the policy and they did not receive any documentation about the policy during the sale. They say it was included in a package with the mortgage.

58. Santander says that as the sale took place in a branch, an adviser would have given advice and made recommendations based on information provided by Mr and Mrs M.

59. Santander has provided copies of a number of documents that were completed during the meeting:

    - The Secured Loan Application Form, which Mr and Mrs M have signed, included a section headed *'Insurance'.* This included a series of options relating to PPI which suggests that Mr and Mrs M expressed an interest in PPI even though they hadn't previously had it, and were requesting details about it.

    - The Mortgage Interview Record, which Mr and Mrs M have signed, indicates that they already had home insurance, but wanted mortgage payment cover.

    - The Mortgage Related Insurance Sales Record (which appears to be an internal document that was possibly not seen by Mr and Mrs M during the meeting). This form deals with how the benefit of the cover should be split. It states that Mr M was to be insured for 100% of the mortgage costs. It also notes the monthly benefit required as £500 and the monthly premium as £26.25.

    - A letter headed 'Your Further Loan' dated the same day as the meeting (it is unclear whether this was given to Mr and Mrs M during the meeting or sent out afterwards). This states that Mr and Mrs M have agreed to a policy with a £500 monthly benefit for a cost of £26.25 per month. It confirms the benefit split as £500 (100%) for the first applicant (Mr M).

60. Having considered the representation of both sides and keeping in mind the limitations on the evidence available about what happened during a meeting 15 years ago, I find:

    - Whilst it is possible that Santander may not have provided any advice in this case, it is more likely than not that it did, given Santander's own representations that it recommended the policy to Mr and Mrs M.

    - It is more likely than not that there were some discussions about the policy Santander was recommending at the meeting between Mr and Mrs M and the adviser. Mr and Mrs M may not have known all there was to know about the policy, but it is unlikely they took out the policy without knowing anything about it at all.

    - It is more likely than not that the full policy conditions were sent to Mr and Mrs M after the meeting. Santander has provided a copy of a 'welcome letter' sent to Mr and Mrs M on 16 July 2002 which says that the policy documents were enclosed.

c) did things happen as they should in 2002?

61. For reasons I shall explain, I consider it is more likely than not that Santander fell short of what was reasonably expected of it. Exactly how, and the extent to which, Santander fell short and its relevance to Mr and Mrs M, is in my view important to my consideration of the question which ultimately lies at the heart of this complaint: would Mr and Mrs M have acted differently if Santander had advised and explained things properly?

62. Having considered the evidence from the time of sale and the parties' representations about what happened, I am satisfied it is more likely than not that Mr and Mrs M agreed to the policy Santander recommended knowing that they did not have to take it out and that it was separate to the mortgage.

63. In reaching that conclusion, I note the secured loan application form included three options:

> *If you do not want to protect your Secured Loan payments against accident, sickness or unemployment tick the box (remember you will still be expected to meet your full mortgage payments if you are unable to work). Please note that if you are unable to work changes to State Benefits mean you could have to wait up to 9 months before you receive any State assistance with your mortgage payments.*
>
> *If you already have Mortgage PaymentCover you are advised to increase your cover to ensure new monthly payments are included. Please tick the box and an amendment form will be provided.*
>
> *If you do not have Mortgage PaymentCover and would like details of how to arrange this valuable accident, sickness and unemployment protection, please tick the box and details will be provided.*

Whilst it appears the adviser completed the application form for Mr and Mrs M to sign (and it seems likely ticked the third of these boxes), I am also mindful that: there were three options, there was a separate mortgage related insurance record and mortgage interview record which also indicate that Mr and Mrs M wanted the PPI and Mr and Mrs M retained their own home insurance arrangements and it would appear those arrangements were also discussed.

64. On the balance of probabilities, I consider it more likely than not that the adviser presented the policy as an optional extra to the mortgage, albeit insurance the adviser recommended Mr and Mrs M take out. I am not persuaded it is more likely than not that Santander's adviser incorrectly (or inadvertently) told Mr and Mrs M they had to agree to the payment protection policy for the mortgage to be approved or that the insurance was an inseparable feature of the mortgage.

65. I have concluded Santander recommended the policy to Mr and Mrs M, so I consider it appropriate to consider whether it advised Mr and Mrs M with reasonable care and skill, in particular whether the policy was appropriate or 'suitable' given their needs and circumstances.

66. I cannot say for certain what steps Santander took to establish whether the policy was a suitable recommendation for Mr and Mrs M. Mr and Mrs M can't remember being given advice and the adviser did not make any notes about what was discussed in relation to the policy. The adviser had information about some of Mr and Mrs M's financial circumstances, but there is not any specific evidence to show that the adviser took steps to establish whether Mr M would have been caught by the significant exclusions and limitations which might have meant the policy did not fully meet Mr and Mrs M's needs. For example, there is nothing to suggest Santander considered whether Mr M had any pre-existing medical conditions.

67. Overall, I am not persuaded on the balance of probabilities that Santander did all it should have done to determine whether the policy was suitable for Mr and Mrs M given their circumstances. So in that sense, I am not persuaded Santander advised with reasonable care and skill.

68. Whilst I am not persuaded Santander did all it should have done to determine whether the policy was suitable for Mr and Mrs M, I am satisfied it is more likely than not that the policy was ultimately suitable for them given what I am satisfied were Mr and Mrs M's needs and circumstances at the time. In reaching that conclusion I have taken into consideration:

- Mr M met the eligibility criteria for the policy.

- Although the benefit split meant the policy only provided cover for Mr M, he was by far the main wage earner. So I do not think it unreasonable to recommend the policy be set up on the basis it was.

- As the main wage earner it seems likely that Mr and Mrs M's finances would be put under strain if Mr M were not working – even allowing for the sickness and redundancy benefits he was entitled to and Mrs M's income. The policy would have helped Mr and Mrs M manage the consequences were Mr M unable to work.

- Mr M would have received a maximum of six months' sick pay from his employer, and not all of that necessarily at full pay, so a policy providing cover for the mortgage for the first twelve months of any period of sickness or unemployment would have been a useful benefit.

- Mr M has told us that he had a life insurance policy. But he did not have existing insurance to protect the mortgage repayments in the event he was unable to work due to accident, sickness or unemployment.

- The monthly premium of £26.25 was not a large part of Mr and Mrs M's monthly income and seems to have been affordable to them.

- The exclusions and limitations did not make the policy unsuitable for Mr M. There was nothing about Mr M's employment or occupation which would have made it difficult for him to claim. Mr M did not have any pre-existing medical conditions and was not suffering from any mental health or back problems.

- Whilst - as Mr and Mrs M have reiterated in their response to the provisional decision – there were limits to the cover provided by the policy (which I will expand on later on in this decision), the policy still provided valuable cover given:

    - Mr and Mrs M's circumstances, including his employer's sickness and redundancy provisions and the limits to those provisions, which meant the policy could play an important role after those provisions were exhausted; and

    - The fact the policy protected the mortgage repayments relating to their house and the potential consequences if Mr and Mrs M were unable to make the repayments on loans secured against their house.

69. I have also considered whether when providing advice Santander gave Mr and Mrs M sufficient information about the cover provided by the policy to enable Mr and Mrs M to understand what Santander was recommending to them and make an informed decision about whether to follow that advice and take out the policy.

70. I am satisfied it is more likely than not that Mr and Mrs M were given a broad description of what the policy was intended to cover (that is that the policy would protect their payments if Mr M was unable to work through accident, sickness and unemployment) and of the approximate costs. I have reached this conclusion because I think it is unlikely that Mr and Mrs M would have taken out the policy without any sense of what the policy was for and of how much the premium might be.

71. But the evidence from the time of sale does not tell us whether Santander gave sufficient information about the actual monthly benefit, the actual cost or about the exclusions and limitations before Mr and Mrs M agreed to take out the policy. The limited evidence there is suggests that Santander relied on the terms and conditions set out in the statement of cover booklet sent to Mr and Mrs M once the proposal for insurance had been accepted to deliver that information.

72. Whilst I am satisfied Santander sent Mr and Mrs M the full policy conditions which gave information about the benefits, limitations and exclusions after they applied for it, I do not consider that means Santander gave Mr and Mrs M the information they fairly and reasonably needed to make an informed decision about whether to follow the recommendation and take out the policy. I am mindful:

    - Mr and Mrs M did not base the decision they made at the meeting to take out the policy on the full policy conditions.

    - There is nothing to suggest Mr and Mrs M were forewarned that they should delay making a final decision about the policy until they had received and considered the contents of that document.

    - It was incumbent on Santander to provide them with the most important information they required to make their decision before they took out the policy (see the good practice I set out earlier).

73. Overall, having considered the parties' representations about what happened, whilst I am satisfied that the policy was a suitable recommendation for Mr and Mrs M, I am not persuaded Santander did enough to present information about the policy it was recommending in a way that was fair and reasonable to Mr and Mrs M. I am not persuaded Santander gave Mr and Mrs M all of the information they needed about the policy to make an informed decision about whether to follow the recommendation and take out the policy.

74. I have 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.

75. It seems to me that it would be reasonable to conclude that there were significant failings in this case. Santander did not for example disclose to Mr and Mrs M before the sale was concluded and in a way that was clear, fair and not misleading the significant limitations and exclusions that would tend to affect the decision of customers generally to take out the policy [DISP App 3.6.2E(4)]. Santander may also have failed to disclose the cost information envisaged at DISP App 3.6.2E(8).

76. I have considered carefully Mr and Mrs M's arguments that Santander should have done more than I have found it should have done and provided additional information. I have given particular thought to Mr and Mrs M's view that the common law duty of utmost good faith meant that:

    - Santander should have explained the low claims ratio (and what they consider to be the inherent poor value) and the fact much of the premium went to Santander rather than the insurer.

    - Santander should have told them not just about the limitations and exclusions, but also about the significance of them.

    Santander did have to consider the features of the policy and weigh up the significance of the exclusions and limitations to ensure the policy it was recommending was suitable for Mr and Mrs M's needs and resource and it also had to explain the features of the cover. But I am not persuaded by Mr and Mrs M's views about what the duty of utmost good faith required.

77. Under the law which existed at the time, both parties to an insurance contract owed a duty of utmost good faith to the other. By way of summary only, both parties had duties to disclose material facts and to refrain from making material misrepresentations to the other.

78. Usually, the focus of any dispute tends to be on the extent of the obligations the duty of utmost good faith places on the person seeking insurance to disclose to the insurer the information it needs to determine and calculate the risk it will be taking if it agrees to provide the insurance.

79. But an insurer also has a duty to disclose:

    ..all facts known to him which are material either to the nature of the risk sought to be covered or the recoverability of a claim under the policy which a prudent insured would take into account in deciding whether or not to place the risk for which he seeks cover with that insurer.[2]

80. MacGillivray on Insurance Law[3] explains that the duty does not extend to giving the insured the benefit of the insurer's market experience, such as for instance, that the same risk could be covered for a lower premium either by another insurer or, presumably, by the same insurer under a different type of insurance contract; and the insurer is not required to perform the role of the insured's broker in this regard.

81. I cannot be certain, but I think it is unlikely a court would conclude an insurer should have disclosed the claims ratio and 'value' information, or contextualised the information about the limitations on disability cover in the way Mr and Mrs M say Santander should have done by virtue of the duty of utmost good faith. In any event, I do not think it would be fair or reasonable in the circumstances of this case to impose such requirements on Santander.

[2] *Banque Keyser Ullmann SA v Skandia (U.K.) Insurance Co. Ltd [1990] 1Q.B. 665, 772*
[3] MacGillivray on Insurance Law 13th edition 17-094

82. Santander was not the insurer in this transaction. Regardless, the ABI Code also referred to an overriding duty on the intermediary to act with utmost good faith and integrity.

83. The Guidance Notes for Intermediaries and the Resume for Intermediaries about the application of the ABI Code which I have referred to in this provisional decision do not refer to that duty or elaborate on what it was intended to mean. But I think it is unlikely that it was intended to place a greater or substantially different obligation on the intermediary to that owed by the insurer.

84. I consider it more likely than not that the reference to an overriding duty on the intermediary was a reminder of the importance of disclosing material information to both the insurer and the insured (depending on whom the intermediary was acting for), reflecting the legal duty those parties were under. And it seems likely the provisions of the ABI Code were in effect intended to be practical examples of how the intermediary might meet the overarching principles of utmost good faith and integrity as well as expected standards of good practice.

85. I also note there was no expectation at the time under the provisions of the ABI Code or the GISC Code that insurers or intermediaries should proactively disclose commission. For example, the guidance to the ABI Code published in December 1994 said only that independent intermediaries should disclose commission on request and the GISC Code said that members would disclose information about commission and other amounts received if asked.

86. Nor do I consider it can reasonably be inferred from the ABI Statement of Practice for Payment Protection Insurance (which gave further information about the expectations in PPI sales) that insurers or intermediaries were expected to disclose the kind of information Mr and Mrs M say Santander should have done.

87. So it seems very unlikely that it was ever the intention of the ABI Code that intermediaries should provide the kind of additional information Mr and Mrs M suggest it should. In any event, I am not of the view that it would be fair and reasonable in the circumstances of the case to impose a greater or substantially different obligation on the intermediary to that owed by the insurer.

88. Overall, taking into account the law, industry codes and standards of good practice applicable to this complaint, I am not persuaded that Santander ought fairly and reasonably to have provided the additional information Mr and Mrs M says it should have done.

89. But for the reasons and in the ways I have set out, I find the information Santander gave Mr and Mrs M was insufficient. Santander failed to explain in a clear way all the features of the policy it was recommending, so the information Mr and Mrs M based their decision on was incomplete. I am not persuaded that was fair and reasonable in all the circumstances.

e) what effect did Santander's shortcomings have on Mr and Mrs M? to what extent did Mr and Mrs M suffer loss or damage as a result?

90. I have found Santander did not do all it should fairly and reasonably have done when it sold this policy to Mr and Mrs M, so I have considered whether it would be fair and reasonable to conclude Mr and Mrs M suffered loss and damage as a result.

91. Whilst I am not persuaded that Santander took the steps it should have done to establish whether the policy it recommended was suitable for Mr and Mrs M, I have found that the policy was ultimately suitable for them.

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

93. Mr and Mrs M say they would not have taken out the policy and I should, in any event, presume that they would not have taken it out given the substantial failings in the sales process I have identified (unless Santander can produce evidence to show they would have taken out the policy, which Mr and Mrs M says it cannot because its failings were so fundamental).

94. I have considered the representations of both sides and the evidence relating to this carefully.

95. Deciding whether to follow advice to take out insurance requires the consumer to weigh up a number of factors before deciding whether to proceed.

96. 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 don't have insurance should the risks come to fruition. That is why it was incumbent on the intermediary to provide the information about the policy's features when recommending the policy, so the consumer could make that assessment.

97. The evidence in this case suggests that Mr and Mrs M clearly had some interest in taking out payment protection insurance. In saying that, I do not mean they actively sought insurance or that it was their intention to take out insurance before they applied for the mortgage – I have seen nothing to suggest they did.

98. Rather, I mean when Santander advised them that there was a suitable product they could buy that would protect their mortgage payments in the event they were unable to work because of accident, sickness or unemployment, that resonated with them in some way and they concluded that they wanted that product to provide cover for Mr M.

99. The issue here is that the decision they made about whether to accept Santander's recommendation was based on incomplete information, meaning what they thought they were getting is not exactly what they got. And they would have had different things to weigh up when deciding to take out the policy if Santander had told them everything it should have done about the policy it was recommending.

100. I consider that in deciding what is fair and reasonable in this case and whether Mr and Mrs M suffered loss or damage as a result, the evidence about the extent to which the product differed from what Mr and Mrs M might reasonably have expected from what they were told, is relevant to the consideration of what would have happened.

101. In this case, as I explained earlier, I am satisfied from the evidence about Mr and Mrs M's circumstances at the time of the sale that the policy was not fundamentally wrong or unsuitable for them.

102. Whilst Mr and Mrs M were interested in the policy, were eligible and had good reason for wanting the cover provided by a suitable policy, the policy did not work entirely as they might have thought.

103. Although I consider it more likely than not that Mr and Mrs M knew they would have to pay something for the policy, it is not clear if Santander told them the exact premium at the point Mr and Mrs M applied for the policy. Having said that, it seems likely Mr and Mrs M would have been told the cost before the policy started and they paid for the policy for a number of months, so if the costs were significantly at odds with their expectations at the point of sale, it is possible they might have raised that with Santander at the time, or reconsidered their decision.

104. Overall, I am not persuaded Mr and Mrs M would have found the cost unacceptable if they had been given the exact figure during the meeting in which they agreed to the policy.

105. In addition, I am not persuaded Santander made clear exactly what Mr and Mrs M would get back in return in the event they made a successful claim. But I think it is unlikely Mr and Mrs M's likely expectations about what the policy would pay in the event of a claim (an amount sufficient to meet their monthly mortgage payment) were significantly different to what the policy actually did.

106. I am not persuaded Santander explained the limitations and exclusions to Mr and Mrs M either. But I do not think it is more likely than not that the limitations and exclusions there were would have dissuaded Mr and Mrs M from taking out the policy.

107. Mr M did not for example have any pre-existing medical conditions. And I think it is unlikely Mr and Mrs M would have expected to make a disability claim on the policy without having to provide some evidence to support that claim.

108. Possibly the most significant differences between what Mr and Mrs M thought they had bought and what they had actually bought were the limitations on back and mental health claims.

109. I am not persuaded Santander told Mr and Mrs M that any claim they made would be limited to a 12-month period. This may have differed from what Mr and Mrs M expected. But 12 months was a longer period than Mr M would have received full sick pay for and his statutory redundancy entitlement was also significantly less than 12 months' income. The 12 month claim period would also allow them time to explore other income options, for example to find a new job, in the event of an unemployment claim.

110. In those circumstances, I consider it likely Mr and Mrs M would still have thought a policy that paid up to 12 monthly mortgage payments would have been of benefit to them and would help them manage the consequences should Mr M be unable to work in the circumstances covered by the policy. The policy would help reduce their outgoings at a difficult and uncertain time, ensure that their home was not placed at risk and might potentially help preserve Mr M's limited sick pay or redundancy money for other use.

111. So, whilst Mr and Mrs M did not know some things about the policy, I am satisfied the ultimate position in the event of a successful claim was not dissimilar to what they would reasonably have thought from the advice and information they based their decision to take out the policy on and found acceptable.

112. The terms of the policy also differed from what Mr and Mrs M might have expected because Mr M could only claim for disability if he was unable to do both his own job and a reasonable alternative. If Mr and Mrs M had known this, it may have played into their thinking about what they would have done, and how this restriction may have affected them. And I accept it may have given them pause for thought – although it was possible they may not have been overly concerned given that if Mr M was unable (through disability) to carry on his own occupation the chances that he would be able to take up a similar occupation would also, in all probability, be limited.

113. Mr and Mrs M provided information in the PPI questionnaire about what they would have done with more information, which I have considered carefully. In their most recent updated questionnaire, they say:

WFAC have further explained that a high proportion of reasons anyone is likely to miss work were often excluded – in particular pre-existing medical conditions and often chronic conditions and sometimes common conditions such as bad backs and mental health conditions such as stress, depression and anxiety. These statistically are among the most likely reasons for anyone being off work and I can say that these exclusions were not disclosed to us.

If (Santander) had said that they were excluding some of the most common reasons people miss work we can say that we would not have wanted this PPI for that reason alone.

This policy was meant to protect our mortgage from sickness. It is now obvious that it was never going to do what it was supposed to. It was supposed to protect payments if you couldn't work, but wouldn't have done that in a majority of cases.

Let us be clear – we would not have wanted this policy had we been told this. And it was particularly relevant to us because in my job both stress and bad backs are commonplace and in (Mr M's) job stress is commonplace and among the main reasons people miss work. This makes it even more obvious as these exclusions affected us personally.

If the exclusion for pre-existing conditions had been explained to us, it is clear we would not have wanted this policy. In addition, we believe pregnancy may be excluded too. (Mrs M) was pregnant at the time this was sold so another exclusion that was relevant to us was just not explained.

On top of this we now understand that on average, firms kept 65% + of each premium payment as profit and expenses. The policy was appalling value for money.

In addition to the above, there are more reasons as well why we now understand this PPI should not have been sold to us, and why if it had been explained properly, we would not have wanted it.

In my job as a fitter, I had sickness cover – see above. I also had redundancy and would have got at least less than (sic) 3 months redundancy pay if I had been made redundant.

So the PPI was expensive and really unlikely to pay out and on top of that we were covered anyway.

We don't think this PPI should have been sold to us and would not have wanted it if it had been properly explained. WFAC says that [Santander] *were supposed to treat us fairly and not take advantage of us, but it cannot be right to sell a product like this without explaining the exclusions, and that they were keeping so much money for something with so little value to us. We feel badly let down by* [Santander].

114. Mr and Mrs M are effectively saying that as a result of what their representative WFAC has told them, both about what it considers should have happened and what they should have decided at the time, they would not have taken out the policy.

115. In light of the findings I have already made, I do not think Mr and Mrs M's representations demonstrate what they claim because much of the information they say would have affected their decision would not have been known to them at the time of the sale if everything had happened as it should. And some of the things they have mentioned would not have been relevant to the decision they were making. For example:

- There was no legal, code, or good practice requirement on Santander to disclose the commission it received.

- I am satisfied the requirement on Santander in 2002 was to consider the features of the policy and weigh up the significance of the exclusions and limitations to ensure the policy it was recommending was suitable for Mr and Mrs M's needs and resources and it also had to explain the features of the cover as I have discussed.

- Mrs M's pregnancy was not relevant as the policy only covered Mr M.

- Mr M originally told us that he did not have any health problems. Then in a more recent questionnaire he said that he did have health problems (without providing any details). However it has since been clarified that Mr M did not have any pre-existing medical conditions.

116. I am also mindful that: Mr and Mrs M's recollections of the sale are, owing to the significant passage of time, likely to be limited; their representations about what they would have done are made in support of a claim for compensation; and the paragraphs I have quoted resemble quite closely the consumer representations made in other cases where WFAC represents the consumer.

117. I do accept the limitations on the policy might well have given Mr and Mrs M pause for thought – as Mr and Mrs M say, these are common conditions.

118. Whilst it is likely they would have expected to provide some medical evidence to support a claim arising from a back condition or mental health condition (as the policy required for other conditions), the steps required for these conditions were more onerous than they might reasonably have expected (which is ultimately why Santander should have brought them to their attention).

119. I accept Mr and Mrs M may have concluded that the policy was not as good as they thought and they might have decided not to proceed. This limitation on cover, when combined with the other shortcomings in the sale, might have dissuaded consumers in slightly different circumstances to Mr and Mrs M from taking out the policy.

120. But Mr and Mrs M, in their circumstances, still had some good reasons to take out the policy, notwithstanding the reduced value of the policy compared to what they might have expected from the information they were given.

121. In deciding with appropriate information whether to follow the recommendation to take out the policy, I consider it fair and reasonable to think Mr and Mrs M would have weighed up various other considerations, in particular their lack of savings and their financial circumstances and how they would be affected if Mr M was not working. It is likely they would also have thought about whether the cost to benefit proposition still worked for them.

122. Having considered all of the evidence and arguments in this case, I consider it more likely than not that Mr and Mrs M would still have taken out the policy. The policy was suitable for them, was sufficiently close to what they thought they were getting and provided benefits that would help them manage the consequences were Mr M made redundant, or unable to work through the accident or disability. In the circumstances I consider it more likely than not that Mr and Mrs M would have taken out the policy in any event notwithstanding the limitations on cover.

123. I have considered Mr and Mrs M's representations about causation and DISP App 3, including the general opinion of Stephen Knafler QC provided by WFAC on behalf of Mr and Mrs M. That guidance is for firms, but it is a relevant consideration I take into account along with many other things when I decide what is in my opinion fair and reasonable.

124. I am mindful of the purpose of the guidance. I don't think it was ever intended to be at odds with the approach I have taken. FSA explained its thinking in the policy statement[4] at the time:

> *…we have taken as a starting point the typical approach in law (which we understand also to be the FOS's general approach) that the customer should be put in the position they would have been in if there had been no failure to comply with its obligations on the part of the firm. Typically that involves considering what the customer would have done 'but for' the firm's breach or failing. Firms have also been making such 'but for' judgements for many years, it being the basic tenet of complaint handling. Complaints about PPI are not new or unusual in this respect. We are satisfied that the 'but for' test is a reasonable one in the circumstances.*

[4] Financial Services Authority Policy Statement 10/12 The assessment and redress of Payment Protection Insurance complaints – Feedback on the further consultation in CP 10/6 and final Handbook text – page 43 to 45

The presumptions represent a way of judging what a customer would generally have done, in our view. Having given due consideration to responses concerning presumptions we remain of the view that the presumptions we have set out are reasonable ones fully in the tradition of, and informed by, the kinds of judgements that courts and ombudsmen have long and often been making when assessing claims and complaints and the potential need to put the claimant, as far as practicable, back in the position 'they would have been in' had the breach not occurred.

We also recognise that it would not be possible to establish in every case what a customer would have done in every individual circumstance and that there has to be scope for a firm to depart from the presumptions. So, the presumptions are rebuttable – that is, it is open to the firm to evidence that the customer would have bought the policy notwithstanding the breach or failing, in which case no redress will then be required.

125. It also said:

A recording of the sale is not essential to rebut the presumptions. Where it is not available, firms must fairly assess the available evidence to make a decision about what they think would have been likely to have happened, but for the failing, given the circumstances and the evidence from the sale. For example, if the firm failed to disclose the existence of an exclusion relating to pre-existing medical conditions, then it may be reasonable for the firm to rebut the presumption that the customer would not have bought the policy if it can be shown that the customer did not have a pre-existing medical condition. It is unlikely that a recording of the sale would elicit this information. The PPIQ, if properly completed, will however provide this information.

We have carefully considered, in light of responses, the proposed list of 'substantial flaws' in the proposed Handbook text. We are satisfied that the rebuttable presumptions cover substantial flaws and that our proposals are appropriate because in each case the nature of the failing raises serious doubts over whether the customer would have proceeded with the purchase if there had not been such a failing.

It is true that the presumptions do not make allowance for the materiality of the failings. We consider that the failings amount to substantial flaws irrespective of their materiality to particular consumers, and that it is reasonable and simpler for our guidance not to differentiate the failings in terms of materiality. In practice, firms are likely to be able to factor in considerations of materiality when potentially rebutting the presumptions in the case of a particular complaint. For example if a firm failed to disclose an exclusion, and if that exclusion did not apply to that customer at the time of the sale (something which can be evidenced relatively straightforwardly with reference to the policy), it may be reasonable for the firm to conclude (assuming there are no other failings) that the exclusion was not material to that customer and that he would have bought the policy anyway, notwithstanding the firm's failure to disclose the exclusion…

126. I have thought about what outcome applying the FCA's guidance to this complaint might lead to. In the language of DISP App 3, I have 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 Mr and Mrs M would not have bought the payment protection insurance they bought unless, in the particular circumstances of the complaint, there is evidence to rebut the presumption.

127. I am satisfied, applying DISP App 3, it is reasonable to conclude the presumption is rebutted in the particular facts and circumstances of this complaint. Based on the evidence pertaining to Mr and Mrs M's circumstances I have considered above, I consider it reasonable to conclude the position Mr and Mrs M 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. In other words, I am satisfied that Mr and Mrs M would have bought the policy in the absence of the breach or failing.

128. I am mindful of Mr and Mrs M's representations that the presumption may only be rebutted when the flaws in the sale process were immaterial, that the flaws in this case were highly material and I have failed to give proper weight to the evidence – including their own representations – that they would not have taken out the policy. However, I am not persuaded by those representations.

129. 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 doing so because I do not consider, in this case, that it would represent fair compensation to put Mr and Mrs M in the position they would have been in if they had not bought the policy.

130. That is because, whilst I accept it is possible that they would not have taken out the policy, I am satisfied that of the two possibilities, it is more likely than not that they would still have taken out the policy if their needs had been assessed correctly and they had been given clear, fair and not misleading information about the policy they were buying.

131. I am satisfied it would not be fair and reasonable in those circumstances to conclude Santander should pay Mr and Mrs M redress, as that would put them in a better position than they would have been in if everything had happened as it should have done.

132. It follows from my findings that on the balance of probabilities it is more likely than not that Mr and Mrs M would have taken out the policy if things had happened as they should. I am not persuaded they have suffered loss or damage as a consequence of the way this policy was sold.

133. In its response to the provisional decision, WFAC has referred to the *Plevin* judgment and also to the case of *R (on the application of British Bankers Association) v The Financial Services Authority & Another* [2011] EWHC 999 (Admin), which commented on the FSA Principles. WFAC has quoted select passages from these cases and asked me to consider how the wider considerations about fairness are relevant to Mr and Mrs M's complaint. I have already explained why I don't consider the *Plevin* judgment and the Principles to be applicable to Mr and Mrs M's complaint. In any event, I've considered the submissions made by WFAC about these passages – and they have not changed my view about what is fair and reasonable in the circumstances of Mr and Mrs M's complaint.

134. I have thought about whether it would be appropriate to make an award of some kind because of the flaws I have identified in the sale process even though I have found Mr and Mrs M would still have taken out the policy. I have not seen anything in the evidence relating to this case which leads me to conclude that Mr and Mrs M suffered material distress or inconvenience because of the way the policy was sold or any other form of non-pecuniary financial loss. In those circumstances, I do not consider it would be fair to make an award.

my final decision

135. 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 in detail above, my final decision is that I do not make an award or direction in favour of Mr and Mrs M.

Carole Clark
ombudsman