This final decision is issued by me, Nimish Patel, an Ombudsman with the Financial Ombudsman Service.

I issued a Provisional Decision on 19 February 2018 ("the Provisional Decision") explaining that I was not minded to uphold the complaint and setting out my reasons for reaching those provisional conclusions. I explained that I would consider the parties' further representations (together with the evidence and arguments submitted before the Provisional Decision) before reaching my final decision.

Mr V made further submissions, all of which I have considered carefully. Lloyds Bank PLC made no further submissions. This is my final decision on Mr V's complaint.

summary

1. This dispute is about the sale in 2000 of a payment protection insurance (PPI) policy to support a Lloyds Bank PLC credit card.

2. Mr V complains that Lloyds did not establish whether the policy was suitable for his needs and circumstances and did not properly explain the policy's features, exclusions and limitations. If it had, he says he would not have taken the policy out.

3. Lloyds says Mr V was given a choice about whether or not to take out the policy, that the policy was suitable for him and that there were no failings in the sale of the policy that affected his decision to buy it.

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 Lloyds, to the extent that I have not made an award in favour of Mr V.

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

   - Mr V made his decision to take out the policy based on advice and information Lloyds gave him about the policy.

   - Taking into account the law, industry codes of practice and what I consider to have been good practice in 2000 (there were no applicable regulations at the time), Lloyds should fairly and reasonably have advised Mr V with reasonable care and skill. In particular, it should have considered whether the policy was appropriate or 'suitable' for him, given his needs and circumstances. It should also fairly and reasonably have provided Mr V with sufficient clear, fair and not misleading information about the policy it was recommending to enable him to make an informed decision about whether to follow the recommendation and take out the policy.

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

- Mr V made his decision to take out the policy based on this 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 V would still have taken out the policy.

- It would not be fair in those circumstances to make an award to compensate Mr V for the money he spent in connection with the policy.

7. Under the rules of the Financial Ombudsman Service, I am required to ask Mr V either to accept or reject my decision before 29 November 2018.

background to the complaint

a) events leading up to the complaint

8. In July 2000, Mr V applied for a Lloyds 'Asset' credit card and 'Asset Payment Protection' cover. Most recently Mr V says he took out the credit card at a meeting in a Lloyds branch and that Lloyds did not recommend the policy to him. Lloyds also says he made his application in a branch meeting but says it did recommend the policy to him. We have a copy of a completed 'Asset Application Form and Agreement' which Mr V signed.

9. The Application Form and Agreement included a section headed 'Optional features'. The relevant box to indicate that PPI was to be added was ticked.

10. Lloyds' records show the credit card account started on 31 July 2000 with a £1,000 credit limit. It has also provided a credit card statement from June 2001 which it says shows the first PPI premium he was charged – £0.31 – and one from February 2004 which it says shows the last PPI premium he was charged. This means Mr V paid for PPI for 32 months.

11. I have not been provided with a list of all the transactions on the account. But Lloyds has provided information which shows that the credit card was closed on 31 May 2005.

b) Mr V's circumstances in 2000

12. The Application Form and Agreement contains some information about Mr V's circumstances at the time. He was 36 years old and earned £10,500 a year as an assistant in a supermarket. He had been working there for a year and three months.

13. Separately, in a payment protection insurance questionnaire sent to Lloyds in June 2016 (PPIQ 1) Mr V has said:

    - He took out the PPI cover in June 2001. At the time, he had been working as a shop assistant in a supermarket for four years, was earning £12,000 a year and would have received at least one month's redundancy pay from his employer. He did not say if he was entitled to any enhanced sick pay from his employer.

- He had no other way of making his card repayments if he was not able to work due to disability or redundancy.

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

14. In a second PPIQ dated January 2017 (PPIQ 2), Mr V repeated much of the same information provided in PPIQ 1, other than to say he was sold the policy in July 2000 and had been working for his employer for five years.

15. In February 2017, Lloyds said it contacted Mr V while investigating his complaint. Mr V said he was entitled to six months' sick pay at half pay and some redundancy pay, although he could not recall the details. Mr V also said he had around £400 in savings that were not earmarked for any particular purpose.

16. In September 2017, Mr V told us he could not remember what his sick pay entitlement was and that he could not provide any evidence of what it might have been.

17. I am satisfied it is more likely than not that Mr V is mistaken in his recollections and that the Application Form and Agreement provides an accurate, contemporaneous, record of the date of sale and his income and employment details at the time. Given his employment situation, I am satisfied any enhanced sick pay he was entitled to would have been limited to no more than six months' half pay.

c) the policy – what was Lloyds selling and what did Mr V buy?

18. Lloyds has provided a copy of the 'asset payment protection policy booklet' which sets out the full policy terms and conditions which it says – and I accept on the balance of probabilities – applied to policies like the one it sold to Mr V in 2000.

19. Among other things, the policy conditions show that:

- There were eligibility criteria, which Mr V met. For example, he had to be at least 18 years old but under 75.

- The policy provided for payment of the outstanding credit card balance, up to a maximum equal to the credit limit, in the event that Mr V died as a result of an accident.

- The policy provided hospitalisation cover. If Mr V was in hospital for five or more consecutive days, it provided an amount equal to the monthly benefit up to a total of £500 a month. The policy continued to provide a monthly benefit for each complete and consecutive 30 days of hospitalisation. Benefits would continue to be paid until the hospitalisation ended or 11 such payments had been made. If, following the 11th monthly payment, hospitalisation continued for a further 30 days the policy provided an amount equal to the remainder of the outstanding balance and any interest due as the12th payment. The monthly benefit was a fixed amount of 5% of the outstanding balance at the date of knowledge of hospitalisation.

- The policy provided disability cover. Benefits were payable if any injury, sickness or disease left Mr V totally unable to do his normal work or any other work he was, or might reasonably have become, qualified for in view of his training, education or

ability. The monthly benefit was a fixed amount of 5% of the outstanding balance at the time of disability up to a total of £500 each month. If, following the 11th monthly payment, the disability continued for a further 30 days the policy provided an amount equal to the remainder of the outstanding balance and any interest as the 12th payment. The benefit was payable until the PPI ended, the disability ended, or until 12 consecutive monthly benefits had been paid for any one claim, whichever came first.

- The policy provided unemployment benefits. Again, the monthly benefit was a fixed amount of 5% of the outstanding balance at the date of knowledge of unemployment up to a total of £500 each month, payable until the PPI ended, the unemployment ended or until a 12th and final consecutive payment equal to the remainder of the outstanding balance and any interest had been paid for any one claim, whichever came first.

- The policy would have started to pay out after 15 consecutive days of time off for disability or unemployment.

- There were two insurers – London and Edinburgh Insurance Company Limited (a business since transferred to Aviva Insurance Limited) provided disability, unemployment and hospitalisation cover and Norwich Union Life & Pensions Limited (now known as Aviva Life & Pensions UK Limited) provided life cover.

20. To put the benefits into context, I have calculated roughly what would happen to Mr V's account, assuming he made a successful claim for 12 months after spending £1,000 on his card on purchases.

21. The calculation assumes a 1.456% per month interest rate (the rate Lloyds charged on purchases). It also assumes the payment protection policy cost 79p per £100 of the outstanding balance and that the minimum contractual payment was 2% of the monthly balance.

22. It shows that, during the 12-month period of the claim, the policy would more than cover the contractual monthly minimum payment and would clear the outstanding balance in full.

Month	Opening balance	Spend	PPI premium	Interest	Insurance payment	Closing balance	Minimum payment
1	£0	£1,000.00	£0	£0	£0	£1,000.00	£0
2	£1,000.00	£0	£7.62	£14.56	£50.00	£972.18	£20.00
3	£972.18	£0	£7.40	£14.15	£50.00	£943.78	£19.44
4	£943.73	£0	£7.17	£13.74	£50.00	£914.64	£18.87
5	£914.64	£0	£6.94	£13.32	£50.00	£884.89	£18.29
6	£884.89	£0	£6.70	£12.88	£50.00	£854.48	£17.70
7	£854.48	£0	£6.45	£12.44	£50.00	£823.37	£17.09
8	£823.37	£0	£6.20	£11.99	£50.00	£791.56	£16.47
9	£791.56	£0	£5.95	£11.53	£50.00	£759.04	£15.83
10	£759.04	£0	£5.69	£11.05	£50.00	£725.78	£15.18
11	£725.78	£0	£5.42	£10.57	£50.00	£691.77	£14.52
12	£691.77	£0	£5.15	£10.07	£50.00	£656.99	£13.84
13	£656.99	£0	£0	£9.57	£666.56	£0	£13.14

23. Returning to the policy terms and conditions, there were also exclusions. For example, claims resulting from pre-existing medical conditions which Mr V knew, or should have known, about at the start of the policy were not covered. But there was an exception to this, meaning a claim for a pre-existing medical condition could be considered if disability or hospitalisation occurred more than 12 months after the start of the policy.

24. So in some circumstances Mr V might have been able to make a successful claim under the policy for a condition that had previously occurred.

25. While the policy required Mr V to provide satisfactory proof of disability to make a claim it did not exclude claims for back or mental health conditions, or place any additional restrictions or more onerous evidential requirements on claims relating to those conditions than would have applied to any other disability.

d) the complaint and Lloyds' response

26. Mr V's representative, We Fight Any Claim Ltd (WFAC), made lengthy and substantial representations on his behalf prior to the Provisional Decision.

27. I will not restate them all here and I will refer to some of the specific representations he has made at relevant times in this decision. But I have read and considered them all carefully. In essence, Mr V said:

- Lloyds did not give him the information it should have given him about the costs and benefits associated with the policy. The only information it gave him was incomplete and misleading.

- It was not enough to say what the premium was per £100 of outstanding balance. The true costs were much higher as the premiums were added to the account attracting interest (which compounded over time) and the premiums would continue to be charged during the period of a successful claim, reducing the benefit. This meant the policy was both expensive and represented exceptionally poor value.

- Lloyds did not tell him about the poor value of the policy, which is illustrated by the low claims ratio. Typically around 20p in every pound was used to pay claims, the rest paid for costs, profits and commission. Lloyds' failure to explain this to him was a breach of the common law duty of utmost good faith.

- Lloyds did not tell him about the limitations affecting the policy, in particular: that the policy would only pay out if he was unable to do both his own job and other work which the insurer thought he was reasonably qualified to do. This reduced further the policy's value.

- The common law duty of utmost good faith meant Lloyds should have done more than simply draw the limitations to his attention, it should also have explained the significance of them and the effect they would have on his chances of making a claim.

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

- In any event, FCA's guidance at DISP App 3.6.2 E makes it clear that it should be presumed he would not have taken out the policy unless there is evidence to outweigh the presumption. I am required to take that provision 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.

- Lloyds should pay compensation to put him in the position he would have been in if he had not taken out the policy.

28. Prior to the Provisional Decision Lloyds said:

- Mr V was eligible for the policy and the optional nature of the policy was explained to him in good time before the sale was concluded.

- The PPI was sold on an 'advised' basis and there was nothing in Mr V's circumstances to show the policy was unsuitable or unaffordable for him.

- It was not required to disclose the commission it received.

- There is no evidence of any failings on its part in the sale that affected his decision to buy the policy which means that no compensation is due. And because of the dates Mr V's policy and credit card were both in force, it does not have to re-examine his complaint to establish whether there was an unfair relationship caused by the non-disclosure of commission.

e) the parties' representations in response to the Provisional Decision

29. Mr V made further representations in response to the Provisional Decision, all of which I have read and considered carefully. Mr V, in large part, restated the substance of his prior representations. Lloyds did not make any further submissions.

30. I will refer to some of the specific representations made at relevant times in this decision but briefly, and in summary, Mr V says:

- The Provisional Decision fails to properly deal with matters raised in earlier correspondence.

- The Provisional Decision does not properly consider utmost good faith, and misrepresents the position on this.

- There were significant flaws in the sale and non-disclosures of certain policy features by Lloyds that made the policy unsuitable for him. For example, to claim for disability Mr V would need to show he could not carry out his own occupation or an entirely different occupation for which he was qualified by way of training, education or ability. He also says the policy excludes cover for voluntary unemployment or unemployment resulting from resignation. He says this only leaves cover for redundancy, but that this would not result in a successful claim either because those made redundant almost always sign a voluntary 'compromise' agreement with their employer.

- The Provisional Decision does not properly take into account DISP App 3, misconstrues the tests the provisions set out and fails to properly assess and weigh up the evidence in the complaint.

- The sale was made on an 'advised' basis, and there was a failure by Lloyds in its advice which the Provisional Decision does not address in a way that is consistent with our approach or with relevant case law.

my findings

31. 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

32. 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.

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

34. The credit agreement itself ended in 2005. So 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.

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

35. 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'

36. Mr V's policy was sold during the period of industry '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. I am satisfied it represented good practice for non-members too.

37. Of particular interest 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...'*

- 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 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'

38. 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

39. 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.

40. 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…*

41. The 'Resume for Intermediaries' published in July 1999 explained how insurers should interpret some of the key requirements of the ABI 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.*

42. 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

43. 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 law

44. 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.

45. I have considered carefully WFAC's representations about the law set out in a number of documents including most recently its letter of 10 March 2017 and email of 15 March 2018 in relation to Mr V's complaint and its letters to this office about complaints generally of 2 March and 5 June 2017.

The approach taken by former schemes

46. Under the transitional provisions[2] which continue to apply to complaints like this about acts or omissions before 1 December 2001, I am also required to take into

[2] The Financial Services and Markets Act 2000 (Transitional Provisions) (Ombudsman

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.

47. In that respect I note that, among other things, under the Banking Ombudsman's terms of reference:

- The Ombudsman was required to decide complaints by reference to what was, in his opinion fair in all the circumstances.
- The Ombudsman was required to observe any applicable rule of law or relevant judicial authority.
- The Ombudsman was required to have regard to the general principles of good banking practice and any *'relevant code of practice applicable to the subject matter of the complaint'*.
- The Ombudsman could make money awards, but *'no award shall be of a greater amount than in the opinion of the Ombudsman is appropriate to compensate the complainant for loss or damage or inconvenience suffered by him by reason of the acts or omissions of the Bank against which the award is made'*.

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

48. 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 V's.

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

50. I note DISP App 3 includes provisions 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.

51. 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 3.1.3 G*
>
> *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 3.1.4 G

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 3.6.1 E

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 3.6.2 E

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 3.6.3 E

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

52. 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 Lloyds gave advice, whether it advised Mr V with reasonable care and skill – in particular, whether the policy was appropriate or 'suitable' for Mr V, given his needs and circumstances.

    - Whether Lloyds gave Mr V sufficient, appropriate and timely information to enable him to make an informed choice about whether to take out the policy, including drawing to his 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 V, I must then go on to consider whether and to what extent Mr V suffered loss or damage and what I consider would amount to fair compensation for that loss or damage.

53. Mr V says Lloyds ought fairly and reasonably to have gone further than I have suggested. I shall address Mr V's representations about this later on.

b) the sale – what actually happened?

54. Not surprisingly given the passage of time since Mr V took out the policy, his account of how he was sold the policy has not been consistent. In PPIQ 1, he said he could not recall how Lloyds sold him the policy. In PPIQ 2, Mr V said the policy was sold to him in a meeting. Mr V said in both PPIQs that Lloyds did not advise him to buy the policy.

55. Lloyds says the policy was taken out during a meeting at one of its branches. It says it advised him to buy the policy.

56. Lloyds has provided some of the documents relating to the sale including a copy of the 'Asset Application Form and Agreement' Mr V signed.

57. The Application Form and Agreement includes a tick in a box to indicate that the policy was to be added.

58. Having considered the representations of both sides and keeping in mind the limitations on the evidence available about what happened more than 18 years ago, I find:

    - Whilst it is possible that Lloyds sold the policy in some other way in this case, it is more likely than not that it did so in a branch meeting based on the documentation and from what the parties have said.

    - Whilst it is possible that Lloyds might not have provided any advice about the policy, it is more likely than not that it did in the circumstances of this case. In reaching that conclusion I have taken into account the representations of both sides on this point. I am mindful that Mr V's recollections of what happened in 2000 appear, understandably, to be limited – for example, as I have already

mentioned, I am satisfied he is mistaken about how much he earned at the time. And, whilst I cannot be certain about what happened, I think Lloyds' representations – that it recommended the policy to Mr V – are more likely than not to reflect what actually happened, given its knowledge of how it expected sales to be conducted in branches at the time.

- It is more likely than not that there were some discussions about the policy Lloyds was recommending at the meeting between Mr V and the adviser.

- It is more likely than not that the policy booklet was sent to Mr V after the meeting.

c) did things happen as they should in 2000?

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

60. 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 V agreed to the policy Lloyds recommended, knowing that he did not have to take it out and that it was separate to the credit card.

61. In reaching that conclusion, I note the Application Form and Agreement included an 'Optional features' section. That section included a box to tick – and which was ticked – next to the following instruction:

    Tick Yes, to take out Asset Payment Protection and protect your payments

    The box next to it – which was left unticked – said the following:

    If you do not wish to protect your payments, tick No

62. The Application Form and Agreement does not say the insurance is compulsory – it referred to 'Optional features' as I said above – and by having to tick to take out the insurance, I am not persuaded Mr V would have been given the impression that he did not have a choice about whether to take it out or not.

63. On the balance of probabilities, I consider it more likely than not that the adviser presented the policy as an optional extra to the credit card, albeit insurance the adviser recommended Mr V take out. I am not persuaded it is more likely than not that the Lloyds's adviser incorrectly (or inadvertently) told Mr V he had to agree to the payment protection policy for the credit card application to be approved or that the insurance was an inseparable feature of the credit card.

64. I have concluded Lloyds recommended the policy to Mr V, so I consider it appropriate to consider whether it advised Mr V with reasonable care and skill, in particular whether the policy was appropriate or 'suitable' given his needs and circumstances.

65. I cannot say for certain what steps Lloyds took to establish whether the policy was a suitable recommendation for Mr V. There is no record of what the adviser discussed in relation to the policy. The adviser had information about some of Mr V's financial circumstances, but there is not any specific evidence to show that the adviser took steps to establish whether Mr V would have been caught by the significant exclusions and limitations which might have meant the policy did not fully meet his needs. For example, there is nothing to suggest Lloyds considered whether Mr V had any pre-existing medical conditions.

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

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

- Mr V met the eligibility criteria for the policy.

- Mr V had a need for the policy – Mr V says he was financially stretched and it seems likely that his finances would be put under even greater strain if he were not working – even allowing for the limited redundancy payment and sick pay he was more likely than not entitled to. He did not have access to significant savings. The policy would have helped Mr V manage the consequences were he unable to work.

- The monthly premium appears to have been affordable for Mr V.

- The exclusions and limitations did not make the policy unsuitable for Mr V. There was nothing about Mr V's employment or occupation which would have made it difficult for him to claim. Mr V did not have any pre-existing medical conditions. There were also no additional restrictions on the cover for mental health or back problems.

- There were limits to the cover provided by the policy. For example it was a requirement that Mr V needed to be disabled to the extent he was unable to do both his normal occupation and a suitable alternative before he could claim. But the policy still provided valuable cover given Mr V's limited provisions, which meant the policy could play an important role after those provisions were exhausted.

- Whilst the policy would only pay benefits for a maximum of 12 months for each disability or unemployment claim, in my view it still provided useful cover given Mr V's circumstances, and the fact the policy could have cleared his outstanding card balance.

68. I have also considered whether, when providing advice, Lloyds gave Mr V sufficient information about the cover provided by the policy to enable Mr V to understand what Lloyds was recommending to him and make an informed decision about whether to follow that advice and take out the policy.

69. I am satisfied it is more likely than not that Mr V was given a broad description of what the policy was intended to cover (that is, that the policy would protect his card payments in the event he was unable to work through disability or unemployment). I have reached this conclusion because I think Mr V would have been told this – at the very least – during the discussion with the adviser. I think it is unlikely Mr V would have taken out the policy without any sense of what the policy was. The Application Form and Agreement he signed also described the policy as 'Payment Protection', which would have given him some idea of what the policy was for.

70. But the evidence from the time of the sale does not tell us whether Lloyds gave sufficient information about Mr V having to make payments during a claim or – as Mr V says – that the payments would be added to the account balance attracting interest if unpaid at the end of the month. The policy would meet his 'payments' (rather than pay off his 'balance' like, for example, the life cover) if he was unable to work because of disability or unemployment. But he would not have understood from this that it would pay out a fixed monthly amount of 5% of the outstanding balance at the start of the claim, that the disability and unemployment cover was limited to 12 payments, nor would he have known what exclusions and limitations on cover there were.

71. On the other hand, it was also not made clear that the outstanding balance would be paid in full after 12 months. The limited evidence there is does not suggest that Lloyds can rely, for example, on a policy summary set out in an accompanying leaflet with the Application Form and Agreement to deliver that information. Lloyds has confirmed it does not hold a copy of any policy summaries from the time. As Mr V spoke to an adviser, I think it is more likely than not that he based his decision on the things he was told, rather than on anything he was given – particularly as it does not seem likely that Mr V would have had an obvious opportunity during the meeting to take the time to read and digest the information in a summary before deciding to take out the policy.

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

    - Mr V did not base the decision he made during the meeting and discussion to take out the policy on the full policy conditions.

    - There is nothing to suggest Mr V was told that he should delay making a final decision about the policy until he had received and considered the contents of the policy booklet.

    - It was for Lloyds to provide Mr V with the most important information he required to make his decision before he 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 V, I am not persuaded Lloyds did enough to present information about the policy it was recommending in a way that was fair and reasonable to Mr V. I am not persuaded Lloyds gave Mr V all of the information he 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 rules for firms handling PPI complaints set out at DISP App 3.

75. I consider it reasonable to conclude that there were significant failings in this case. Lloyds did not for example disclose to Mr V before the sale was concluded and in a way that was clear, fair and not misleading some of the significant limitations and exclusions that would tend to affect the decision of customers generally to take out the policy [DISP App 3.6.2 E (4)].

76. It is also arguable that Lloyds failed to disclose the costs information envisaged at DISP App 3.6.2 E (8). I cannot see where Lloyds referred Mr V to how the premium was calculated. The Application Form and Agreement itself does not mention that there was a cost at all – although I find it unlikely the adviser would have said nothing about the cost. But I have not seen enough evidence to say Mr V was told he would continue to be charged premiums during a claim and that the premiums would attract interest. Mr V would not necessarily have known what the policy was likely to cost on a monthly basis given its dependency on a potentially changing outstanding balance.

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

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

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

    Lloyds 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 V's needs and resources and it also had to explain the features of the cover. But I am not persuaded by Mr V's views about what the duty of utmost good faith required.

78. 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.

79. 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.

80. 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.[3]

81. MacGillivray on Insurance Law[4] 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.

82. 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 V says Lloyds 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 Lloyds. I note that in response to the Provisional Decision, Mr V considers this to misstate the legal position. I do not agree with this representation.

83. Lloyds 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.

84. The Guidance Notes for Intermediaries and the Resume for Intermediaries about the application of the ABI Code which I have referred to in this 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.

85. 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.

86. With regard to the limitations of the policy, I note Mr V's representations that the unemployment terms dramatically reduced the scope of cover, in that voluntary redundancy is not covered, and that 'almost without exception' anyone being made redundant is obliged to sign a compromise agreement, rendering the redundancy – in practical terms – voluntary. I consider this a generalisation. Whether or not a redundancy is voluntary (and indeed whether or not a compromise agreement is entered into by the parties) will depend on the individual circumstances, and our expectation would be that an insurer would take reasonable steps to establish the consumer's circumstances before paying or declining a claim.

87. 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.

88. 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

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[3] *Banque Keyser Ullmann SA v Skandia (U.K.) Insurance Co. Ltd [1990] 1Q.B. 665, 772*
[4] MacGillivray on Insurance Law 14th edition 17-094

in PPI sales) that insurers or intermediaries were expected to disclose the kind of information Mr V says Lloyds should have done.

89. 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 V suggests 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.

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

91. But for the reasons and in the ways I have set out, I find the information Lloyds gave Mr V was insufficient. Lloyds failed to explain in a clear way all the features of the policy, so the information Mr V based his decision on was incomplete. I am not persuaded that was fair and reasonable in all the circumstances.

e) what effect did Lloyds' shortcomings have on Mr V?
to what extent did Mr V suffer loss or damage as a result?

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

93. Whilst I am not persuaded that Lloyds took the steps it should have done to establish whether the policy it recommended was suitable for Mr V, I have found that the policy was ultimately suitable for him.

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

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

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

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

98. 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. That is why it was for the intermediary to provide the information about the policy's features when recommending the policy, so the consumer could make that assessment.

99. The evidence in this case suggests that Mr V clearly had some interest in taking out payment protection insurance. In saying that, I do not mean he actively sought insurance or that it was his intention to take out insurance before he applied for the credit card – I have seen nothing to suggest he did.

100. Rather, I mean when Lloyds advised Mr V that there was a suitable product he could buy that would protect his credit card payments in the event he was unable to work because of disability or unemployment, that resonated with him in some way and he concluded that he wanted that product.

101. The issue here is that the decision Mr V made to accept Lloyds' recommendation was based on incomplete information, meaning what he thought he was getting is not exactly what he got. And he would have had different things to weigh up when deciding to take out the policy if Lloyds had told him everything it should have done about the policy it was recommending.

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

103. In this case, as I explained earlier, I am satisfied from the evidence about Mr V's circumstances at the time of the sale that the policy was not fundamentally wrong or inappropriate for him. He was eligible for its benefits and it provided cover that could prove valuable to him should the insured risks come to fruition – even allowing for the limitations on the disability cover it provided.

104. Whilst Mr V was interested in the policy, was eligible and had good reason for wanting the cover provided by a suitable policy, the policy did not work entirely as he might have thought.

105. Mr V's own evidence or 'testimony' is that, if he could not work through unemployment, he would have been entitled to redundancy pay from his employer. But that was equivalent to only one month's pay. It seems his sick pay was limited to no more than six months' pay at half pay. It also appears he told Lloyds, after making his complaint, that he had £400 in savings. Mr V told us he would have had no other means of making his credit card payments if he was not working.

106. I think it is reasonable to conclude that, from Mr V's perspective, he saw some benefit in having insurance in his circumstances. If the risk the policy was concerned about came to fruition, the policy would help him manage the consequences – it would help him reduce his outgoings during what would likely be a difficult period.

107. In relation to the costs, Lloyds might have told him about an important part of the costs information – what the policy cost per £100 of outstanding balance each month.

108. But as Mr V says, Lloyds did not explain that he would continue to be charged for the policy in the event of a claim, or spell out that the premiums were added to the account balance (so would attract interest). On the other hand, there is nothing to suggest the premiums would have been paid in some other way and they appeared on his statements, so it is possible Mr V might have expected this.

109. The Application Form and Agreement shows that the policy was described as *payment* protection cover (my emphasis). Mr V could have interpreted that in a

number of ways, but it seems unlikely that he would have thought that meant the policy would pay off his balance in full immediately. Instead, I think it is more likely he would have thought from the limited information in the Application and Agreement Form that the policy would meet the regular repayments he was due to make.

110. As the example I set out earlier in this decision illustrates, for 11 months the policy would more than cover the contractual payment and the costs added to the account during the period of the claim and the interest associated with it. A 12th monthly payment would have cleared the remainder of the outstanding balance and interest. So it is possible that the 5% monthly benefit the policy offered would actually have been better than Mr V expected.

111. Overall, I am not persuaded Mr V would have found the cost unacceptable if he had been given the exact figure during the meeting in which he agreed to the policy.

112. I am not persuaded Lloyds explained the pre-existing medical exclusions to Mr V either. But I do not think it is more likely than not this would have dissuaded Mr V from taking out the policy. Mr V did not, for example, have any pre-existing medical conditions.

113. I am not persuaded Lloyds told Mr V that any claim he made would be limited to a 12-month period. But I believe 12 months was a longer period than Mr V would have received full sick pay or redundancy pay for. It would also have allowed him time to explore other income options, for example to find a new job in the event of an unemployment claim.

114. In those circumstances, I consider it likely Mr V would still have thought a policy that paid up to 12 monthly benefit payments would have been of benefit to him and would help him manage the consequences should he be unable to work in the circumstances covered by the policy. The policy would help reduce his outgoings at a difficult and uncertain time and might potentially help preserve Mr V's limited redundancy/sick pay and savings for other use.

115. The policy did not exclude back or mental health conditions, or place any additional restrictions or more onerous evidential requirements in the event of a claim on those grounds than would have applied to any other disability claim. And I think it is unlikely Mr V would have expected to make a disability claim on the policy without providing some evidence to support that claim.

116. So, whilst Mr V 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 he would reasonably have thought from the advice and information he based his decision to take out the policy on and found acceptable.

117. Where the terms of the policy differed from what Mr V might have expected was that he could only claim disability benefits if he was unable to follow both his own occupation and a suitable alternative. If Mr V had known this, it might have played into his thinking about what he would have done and how these restrictions might have affected him. And I accept they might have given him pause for thought – although it is possible he might not have been overly concerned given that, if Mr V 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. I have considered the further representations made by Mr V in response to my Provisional Decision on this point, but they have not changed my mind.

118. Mr V provided information in the PPIQs about what he would have done with more information, which I have considered carefully. In PPIQ 2 he says:

Lloyds TSB did not explain how much this PPI was really going to cost. They also did not explain how little of the amount I would have to pay would actually be used to provide any kind of insurance, and therefore how poor value of this product really was. I still do not know exactly how much this has cost me and WFAC have told me I have a right to know, now. However, WFAC have explained that with credit card PPI, the normal cost is at least 8.5% of the balance every year and that if this is added to your balance it 'compounds'. On top of this, interest is charged on your balance at credit card rates of interest and that this means that over 10 years this could even treble your initial balance. They say that the exact effect depends on your circumstances and how long you have the card for and so on, but the important point is that, although credit card PPI was presented as being cheap, it was really extremely expensive. Lloyds TSB never gave any indication at all of how expensive credit card PPI could be or of what it could really cost. WFAC have also explained that as much as 86% of the PPI premiums and all the interest was not even being used to pay for insurance. If I had known this I would not have wanted this PPI. It is plain from this that the PPI was really expensive – because it was being sold for a lot more than it was really worth. I was not even told about this and I do not think this was fair. This PPI was expensive and bad value and I would obviously not have wanted it if I had known this at the time.

WFAC say Lloyds TSB had to explain the exclusions and limitations, in a way that an ordinary person like me would have understood. I can definitely say Lloyds TSB did not do this. If the exclusion for pre-existing conditions had been explained to me, it is clear I would not have wanted this policy. In addition to the above, there are more reasons as well why I now understand this PPI should not have been sold to me, and why if it had been explained properly, I would not have wanted it. I also had redundancy and would have got at least 1 month redundancy pay if I had been made redundant. So the PPI was expensive and really unlikely to pay out, and on top of that I was covered anyway. As well as everything else, I was financially stretched. I have often had to run an overdraft. In fact I have struggled to pay my debts and gone into arrears. WFAC say that for me, even more than anybody else, it was wrong for me to spend money on this PPI which was both really expensive, and unlikely to pay out.

I don't think this PPI should have been sold to me and I would not have wanted it if it had been properly explained. WFAC say that Lloyds TSB were supposed to treat me fairly and not take advantage of me, 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 me. I feel badly let down by Lloyds TSB. PPI was just included as part of my package with my credit card. I had no interest in PPI and would not have had it if Lloyds TSB had not included it with the package.

119. Mr V is effectively saying that as a result of what his representative WFAC has told him, both about what it considers should have happened and what he should have decided at the time, he would not have taken out the policy.

120. In light of the findings I have already made, I do not think Mr V's representations demonstrate what he claims because much of the information he says would have

affected his decision would not have been known to him at the time of the sale if everything had happened as it should. And some of the things he has mentioned would not have been relevant to the decision he was making. For example:

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

- I am satisfied the requirement on Lloyds in 2000 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 V's needs and resources and it also had to explain the features of the cover as I have discussed.

- The policy did not – as I have already explained – restrict claims based on back or mental health conditions, unless they were pre-existing conditions.

121. I am also mindful that: Mr V's recollections of the sale are, owing to the significant passage of time, likely to be limited; his representations about what he 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.

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

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

124. In reaching that conclusion, I have carefully considered Mr V's representations about the approach he considers a court would take when considering an 'advised sale'. In particular, Mr V has cited the case of *Saville v Central Capital (2014) EWCA Civ 337* (*Saville*). The suggestion is that Lloyds should have asked him 'open and fair' questions about his demands and needs at the time and if it had, he would not have taken out the policy. In addition that, if open and fair questions had been asked, this could not have resulted in the adviser recommending the PPI.

125. I note that the S*aville* case involved very different circumstances to those in Mr V's complaint. For instance, *Saville* involved a term mismatch between a 5-year single premium PPI policy and a 25-year loan and a consideration of the requirements of the Insurance Conduct of Business Rules that applied to sales between 2005 and 2008 – neither of which apply here. But in any event, even if Lloyds had asked the kinds of questions Mr V says it should have done and pointed out the limitations on cover associated with the policy recommended, I think it is more likely than not that

Mr V would have taken out the policy in any event given the benefits it still provided and his overall circumstances.

126. I have considered Mr V's representations about causation and DISP App 3, including the general opinion of Stephen Knafler QC provided by WFAC on behalf of Mr V and the further representations it has made about this issue in response to the Provisional Decision. 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.

127. I am mindful of the purpose of the guidance. I do not think it was ever intended to be at odds with the approach I have taken. The FSA explained its thinking in the policy statement[5] 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.

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.

[5] 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

128. 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…*

129. 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 V would not have bought the payment protection insurance he bought unless, in the particular circumstances of the complaint, there is evidence to rebut the presumption.

130. 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 V's circumstances I have considered above, I consider it reasonable to conclude the position Mr V found himself in as a result of the sale was the same position he would have been in had the 'breach' or 'significant failings' not occurred. In other words, I am satisfied that Mr V would have bought the policy in the absence of the breach or failing.

131. But even if I am ultimately departing from the guidance for firms set out at DISP App 3 (which I do not consider I am), I am doing so because I do not consider, in this case, that it would represent fair compensation to put Mr V in the position he would have been in if he had not bought the policy.

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

133. I am satisfied it would not be fair and reasonable in those circumstances to conclude Lloyds should pay Mr V redress, as that would put him in a better position than he would have been in if everything had happened as it should have done.

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

135. 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 V 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 V 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

136. 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 V.

137. I now ask Mr V to either accept or reject my decision by 29 November 2018.

Nimish Patel
ombudsman