complaint

Mr G says Barclays Bank UK PLC ('Barclays') mis-sold him a payment protection insurance ("PPI") policy. Barclays were trading at the time as 'Egg' but for simplicity I will refer to the business as 'Barclays' throughout the rest of the decision.

background and summary to complaint

AXA told us Mr G bought the policy in October 2008 at the same time as taking out a credit card and that he applied for the credit card and PPI policy over the internet.

Mr G told us that at the time of the sale he was employed and working as a gas meter reader for a company for two years. Mr G told us he was entitled to some sick pay, but he couldn't recall what the size and duration of his sick pay would have been. Mr G told us he had no other means of repaying his credit card should he be unable to work. Mr G has said he was in good health at the time of the sale.

The policy provided cover for life, accident, sickness, and unemployment – subject to its exclusions and limitations. It offered to repay 10% of Mr G's credit card balance in the event of a successful claim. At the time, it cost 79p per £100 of the monthly outstanding balance. The premium would continue to have to be paid during a successful claim and it did attract interest.

Barclays has sent us screenshots to show that the credit card account closed on 30 October 2014.

Mr G's representative has made lengthy and substantial representations on his behalf. However, for ease of reference, I will refer to its representations as being Mr G's from now on.

I will not restate them all here, but I have read and considered them all carefully. In summary, Mr G says:

- Barclays failed to meet the sales standards which applied at the time. In those circumstances, applying the regulator's rules and guidance for businesses on handling PPI complaints under DISP App 3, it should be presumed Mr G wouldn't have taken out the policy and the complaint should be upheld. Mr G believes there to be no evidence to rebut that presumption;

- The policy excluded or limited claims for back pain and stress, which are some of the most common reasons people are off work. This significantly reduced the value of cover;

- The true costs including interest and the fact it was unlikely you could make a successful claim meant the policy was of inherently poor value as shown by the low claims ratio. The common law duty of utmost good faith means Barclays should have told Mr G about the poor value;

- The common law duty of utmost good faith also means Barclays should have explained the significance of the exclusions and limitations of cover to Mr G and the impact they would have had on his chances of making a claim; and

- The information Mr G received was misleading. These policies were promoted as providing peace of mind, but the number of exclusions and limitations on the scope of the cover meant this was untrue.

Our adjudicator didn't uphold the mis-sale complaint – both parties have seen and provided their responses to the adjudicator's opinion. Mr G disagreed with the adjudicator's opinion for several reasons.

As the complaint couldn't be resolved informally, it has been passed to me for a decision.

my findings

Although I have only included a summary of the complaint, I have read and considered all the evidence and arguments available to me from the outset, in order to decide what is, in my opinion, fair and reasonable in all the circumstances of this complaint.

relevant considerations

When considering what is fair and reasonable, I'm required to take into account: relevant law and regulations; relevant regulators' rules, guidance and standards; relevant codes of practice; and, where appropriate, what I consider to have been good industry practice at the time. The Financial Ombudsman Service has set out its general approach to PPI mis-sale complaints on our website and published some example final decisions that set out in detail how these relevant considerations may apply to PPI sales like Mr G's. I don't intend to set that out in much detail here, but I've taken this into account in deciding Mr G's complaint.

This sale took place in October 2008 after the sale of general insurance products like this became regulated by the Financial Services Authority (FSA) in January 2005 and after the FSA renewed its insurance conduct rules in January 2008. So, the FSA's and the FCA's overarching principles for businesses and insurance conduct rules (ICOBS) are applicable to this complaint.

The credit agreement continued to run until 2014. That means the unfair relationship provisions set out at s140A and B of the Consumer Credit Act, the Supreme Court judgment in Plevin1 about s140A of that Act and the rules and guidance made by the FCA about the handling of complaints about the non-disclosure of commission in the light of the Plevin judgment, also apply. I will come back to this later on.

It is also relevant to note that there have for some time been codes governing the sale of insurance products such as PPI. There is much in common between the present statutory regulatory regime and the non-statutory provisions that preceded it (and, indeed, the position at law).

Although the non-statutory provisions no longer apply as specific requirements on those selling insurance, I consider they still represent a helpful guide to good industry practice. As a result it is appropriate for me to take them into account along with the relevant ICOBS rules and the other relevant considerations.

In the period immediately before statutory regulation in 2005, there was a period of industry 'self-regulation' by the General Insurance Standards Council (GISC). It published *The*

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

General Insurance Standards Council's General Insurance Code for private customers – the 'GISC Code'. This set out minimum standards of good practice for its members to follow when selling insurance, including PPI.

The Association of British Insurers (ABI) also published a number of codes, which I consider to be indicative of the standards of good industry practice expected from intermediaries, like Barclays, selling insurance at this time:

- The Association of British Insurers' General Insurance Business Code of Practice for all intermediaries (Including Employees of Insurance Companies) other than Registered Insurance Brokers – 'The ABI Code'.

The ABI Code was supplemented by:

- Guidance on the application of the ABI Code
- The ABI Statement of Practice for Payment Protection Insurance
- The ABI General Business Code of Practice for Telephone Sales, Direct Marketing/Direct Mail and the Internet
- The Resume for Intermediaries

I've also taken account of relevant law in reaching my decision, including: the law relating to negligence, misrepresentation and contract (including the express and implied duty on professional advisers to give advice with reasonable skill, care and diligence); the law relating to the duty of utmost good faith; and the law relating to causation and remoteness.

I'm also mindful of the evidential provisions and guidance set out at DISP App 3, first issued by the FSA in 2010, which sets out how firms should handle complaints relating to the sale of PPI. The sale took place after insurance mediation became a regulated activity in January 2005, so Barclays was required to take into account the provisions in DISP App 3 when considering Mr G's complaint.

key questions

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

- If Barclays gave advice, whether it advised Mr G with reasonable care and skill – in particular, whether the policy was appropriate or 'suitable' for him, given his needs and circumstances.

- Whether Barclays gave Mr G 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 about the alleged mis-sale in favour of Mr G, I must then go on to consider whether and to what extent Mr G suffered loss or damage and what I consider would amount to fair compensation for that loss or damage.

- If I conclude Mr G has not suffered loss or damage and I propose no award for the alleged mis-sale, I must then go on to consider whether, in all the circumstances (and taking into account sections 140A and 140B of the Consumer Credit Act, the Supreme Court's decision in Plevin, and the FCA's guidance at DISP App 3), Barclays should have disclosed the commission it received - and if it didn't, what would be fair compensation in all the circumstances.

Having carefully considered the above and the information provided by both Mr G and Barclays, I've decided not to uphold Mr G's alleged mis-sale complaint. I have also considered the issue of non-disclosure of commission and I've decided that Barclays should have disclosed the commission it received. My findings are set out below.

did Mr G know he had a choice?

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

I've considered the sample internet screens Egg has provided. From those sample screens it seems most likely that Mr G had to select either "Yes" to add PPI to his card, or "No" not to. So, Mr G should have understood this was something he could say 'No' to. So, overall, I think it's likely Mr G selected "Yes" and did so knowing this was something he could have said 'No' to, even if he doesn't remember that now, many years later.

Taking everything into account, I think it's more likely that Mr G knew the policy was optional and, considering the application was completed on the internet away from any direct involvement with a Barclays representative, he agreed to take it out without undue pressure.

did Barclays provide advice?

Both Barclays and Mr G agree that advice wasn't provided during this sale.

This means Barclays didn't have to check if the PPI was suitable for Mr G. Instead, it had to give him sufficient, appropriate and timely information to enable Mr G 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.

the information

Barclays has provided us with a sample of the screens that Mr G was likely to have seen whilst completing the application for the credit card. It has also provided a copy of the paperwork it says he would've received, including the policy summary of cover document – which I accept on a balance of probabilities – applied to policies like Mr G's.

Looking at the information provided to Mr G at the time, I don't think Barclays gave Mr G the information he fairly and reasonably needed to make an informed decision about whether or not to take out the policy.

This sale took place over the internet. I can see the sample application screens described the PPI policy as providing cover against 'unemployment, accident, sickness or death'. It also informed Mr G that the policy would cost '79p per £100 of your monthly statement balance'. I don't know if these were the actual screenshots Mr G would have seen. But it seems likely that Mr G knew he would have to pay something for the cover.

The information provided would have given Mr G a broad sense of what the policy covered. But it was Barclays's responsibility to draw to Mr G's attention the important information – i.e. the key information about the nature of the cover and any significant exclusions and limitations which might be relevant to his decision.

I'm not persuaded Barclays did enough to do this. For example, I don't think the true cost of the policy was made clear to Mr G, including the need to maintain premiums during a claim or that the payments would attract interest. In addition, I can't see that Barclays adequately drew to his attention the main provisions of the policy and significant limitations and exclusions.

So, I don't think Barclays gave Mr G sufficient, appropriate and timely information to enable him to make an informed choice about whether to take out the policy, including drawing his attention and highlighting – in a clear, fair and not misleading way – the main provisions of the policy and significant limitations and exclusions.

I've considered how my findings interact with the FCA's list of significant failings in its guidance for firms handling PPI complaints set out at DISP App 3. And for the reasons set out above, I'm persuaded there were significant failings in this case.

In addition to the failings I've highlighted above, Mr G has raised a number of general points with regard to the requirements on a business when providing information in PPI sales. It suggests these points apply to all PPI complaints, like [his/hers]. I've considered these carefully and summarised them as:

- The common law duty of utmost good faith means the business should have explained the low claims ratio – what Mr G considers to be 'poor value' – and the fact that much of the premium went to the business rather than the insurer.

- The common law duty of utmost good faith means the business shouldn't have just told Mr G about the limitations and exclusions, it should have gone further and explained the significance of them to him.

I'm not persuaded by Mr G's views on this. The duty of utmost good faith in insurance law imposed a duty on both parties to the contract to disclose material facts and not to make material misrepresentations. While I can't be certain what a court would say – I think it's unlikely a court would find that this extended to the insurer having to disclose the claims ratio information or explaining the significance of the limitations and exclusions in the way Mr G has suggested. And taking into account the law, industry codes and standards of good industry practice applicable to this complaint, I don't think it's fair and reasonable to conclude that Barclays ought to have done either.

what effect did Barclays's shortcomings have on Mr G? To what extent did Mr G suffer loss or damage as a result?

I've found Barclays didn't do all it should have done when it sold this policy to Mr G. So, I've gone on to consider whether it would be fair and reasonable to conclude Mr G suffered loss and damage as a result. To answer this, I must decide whether or not Mr G would have still taken out the policy, had Barclays done things properly.

Mr G says he would not have taken it out and believes I should presume this to be the case given the significant failings identified above.

As this was a non-advised sale, Mr G had to weigh up in his own mind the cost of the policy against the benefits offered and the potential consequences if he didn't insure against the risk of being unable to work.

As I've found above, Mr G chose to take this policy out. So, I consider that it's reasonable to conclude he had some interest in the benefits offered by this type of insurance. But he made this decision based on incomplete information. So, what Mr G thought he was getting is not exactly what he got. The extent to which this differed is a relevant consideration when determining if Mr G has suffered any loss or detriment.

In relation to the costs, I'm satisfied Mr G ought reasonably to have known he would have to pay something for the PPI and that it would cover a portion of his outstanding balance – this was set out on the sample screen shots which explained that the policy covered the monthly repayments. But I accept Barclays didn't make clear the on-going cost information. So, while Mr G didn't know some things, the ultimate position in the event of a successful claim was not dissimilar to what he would reasonably have thought from the information he based his decision to take out the policy on and found acceptable.

Possibly the most significant differences between what Mr G thought he had bought and what he actually bought were the following:

- The policy excluded claims relating to medical conditions and/or symptoms that Mr G knew about or ought to have known about before the start date of the policy;
- The policy contained limitations on claims relating to back and mental health conditions placing more onerous evidential requirements to support a claim on those grounds;
- The policy limited, and in some situations, excluded unemployment cover if Mr G wasn't a permanent employee; and
- The requirement that in order to be eligible for a disability claim – Mr G be unable to do his own job, a similar job or any paid work which his experience, education or training reasonably qualified him to do.

I do accept there is a possibility the limitations and/or exclusions above might well have caused Mr G pause for thought – and may well have caused him to conclude the policy was not as good as he thought and he might have decided not to proceed. The limitations on the cover, when coupled with the other shortcomings in this sale, might have dissuaded some consumers in slightly different circumstances from Mr G from taking out the policy.

But, the evidence about Mr G's circumstances at the time of sale shows that the policy wasn't fundamentally wrong or unsuitable for him. He was eligible for its benefits and it provided cover that, despite its limitations and exclusions, could've proved valuable to him should the insured risks have become a reality. The policy would have paid out in addition to any sick pay that Mr G had and, most likely, for longer than his employer would have paid him at his full rate of pay. And Mr G told us he had no other means he could have relied on if he couldn't work. I also haven't seen any evidence to suggest he would've been caught by any of the significant exclusions – Mr G didn't have any pre-existing medical conditions and was in permanent employment. So, I still think he had some good reasons to take the policy out.

I accept back pain and mental health conditions are common problems and the steps required to make a disability claim for these conditions were more onerous than Mr G might reasonably have expected. But it's unlikely he would have expected to be able to make a disability claim without having to provide some evidence to support that claim. And while this limitation might have dissuaded some consumers in slightly different circumstances to Mr G from taking out the policy, Mr G, in his circumstances, still had some good reasons to take it out.

If Mr G had known he could only claim for disability if he was not only unable to do his job or any similar job but also unable to do any job which in the insurer's view he might reasonably be qualified for, it might have played into his thinking about what he would do. And I accept it may have given him pause for thought – although given Mr G's circumstances and the limited other means he had to make his repayments if he wasn't working, on balance, I still think he would have been interested in taking out the cover.

Having considered all of the evidence and arguments in this case, I consider it more likely than not that Mr G would still have taken out the PPI. The policy was sufficiently close to what he thought he was getting and I think the policy could provide a useful benefit in a difficult time, notwithstanding his employment benefits. And in those circumstances, I consider it more likely than not that he would have taken out the policy in any event.

Mr G says the rules about how to handle PPI complaints (DISP App 3) make it clear that, where a significant failing is identified, it should be presumed the consumer wouldn't have taken out PPI, unless there is evidence to outweigh the presumption. They say we should follow this other than in exceptional circumstances.

That guidance is for firms, but it is a relevant consideration, so I take it into account along with many other things when I decide what is in my opinion fair and reasonable. Considering the purpose of the guidance, I don't think it was ever intended to be at odds with the approach I have taken.

I've thought about what outcome applying the FCA's guidance to this complaint might lead to. In the language of DISP App 3, I've found it would be reasonable to conclude there were substantial flaws in the sales process. In those circumstances, DISP App 3 says it should be presumed Mr G wouldn't have bought the PPI he bought unless, in the particular circumstances of the complaint, there is evidence to rebut the presumption.

I'm satisfied, applying DISP App 3, it's reasonable to conclude the presumption is rebutted in the particular facts and circumstances of this complaint. Taking into account Mr G's circumstances as detailed above, I consider it reasonable to conclude the position Mr G 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.

Mr G believes the presumption may only be rebutted when the flaws in the sales process were immaterial, that the flaws in this case were highly material and we have failed to give proper weight to the evidence – including his own comments that he would not have taken out the policy. I'm not persuaded by these arguments.

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

That is because, while I accept it's possible he wouldn't have taken out the policy, I'm satisfied that of the two possibilities, it's more likely than not that he would still have taken out the PPI had he been given clear, fair and not misleading information about the policy he was buying. So, I'm not persuaded it would be fair and reasonable in those circumstances, to conclude Barclays should pay Mr G compensation, as that would put him in a better position than he would have been in if everything had happened as it should have done.

I'm also aware that Mr G thinks Barclays misrepresented the terms of the policy in how it described the PPI. Whilst I accept there is a possibility a court might conclude some of Barclays's statements misrepresented the contract, in my opinion the reason why Barclays failed to act fairly and reasonably was not because of what it did or didn't say in the information it provided – but because the overall information Barclays gave Mr G, in the way it did, was insufficient to meet the standards I consider it fair and reasonable to expect it to have met in 2008 when providing information about an insurance policy.

I've also thought about the approach Mr G says a court might take if it were to find Barclays negligently misrepresented the contract to him and about the remedy a court might award if it were to find that Barclays had been in breach of its duty of utmost good faith. But this doesn't persuade me to alter my conclusions about what is fair and reasonable in all the circumstances of the complaint – including what I think is fair compensation in the circumstances of this case. For the reasons I've already set out I don't think it would be fair and reasonable to put Mr G in a better position than if everything had happened as it should have done.

So, I don't uphold the mis-sale element of Mr G's complaint.

However, having considered the overall mis-sale, I must now go on to consider whether the non-disclosure of commission resulted in an unfair relationship under section 140A of the Consumer Credit Act – and if so, what compensation it would be fair to award to Mr G to remedy that unfairness.

non-disclosure of commission

I've considered the effect of section 140A and B of the Consumer Credit Act, the Supreme Court decision in *Plevin v Paragon* and the FCA's rules and guidance for businesses about handling PPI complaints set out at DISP App 3 (as I referred to earlier) in the light of that case.

Section 140A (1) and (2) of the Consumer Credit Act states:

"(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following:

(a) any of the terms of the agreement or of any related agreement;

(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;

(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)."

Mr G has made a number of representations about the impact of the Plevin judgment and sections 140A and 140B of the Consumer Credit Act on his complaint. In summary, Mr G said that:

- Barclays failed to tell him about the high commission and profit-share rates paid, the low claims ratio (the proportion of the premiums paid by policyholders used to pay claims), and the restrictions and exclusions on cover; and

- If Barclays had told him about those things, he would not have taken out the policy, so he should get back all the money he paid by way of premium for the policy.

I've considered those representations carefully. In doing so, I'm mindful of the following:

- When selling insurance, the relevant insurance codes and the FCA's ICOB rules did not specifically require Barclays to tell Mr G about commission or about the claims ratio (nor, for reasons I've already explained, did the duty of utmost good faith require that). As the FCA said when introducing its rules and guidance to businesses for the handling of PPI complaints in the light of the Plevin judgment, the failure to disclose commission was not in breach of ICOB/ICOBS (or the industry codes which preceded them) and would not – in and of itself – have been a breach of FCA's Principles for Businesses. Those Principles include a requirement on businesses to 'pay due regard to the interests of its customers and treat them fairly'.

- Where a court determines under section 140A that the relationship between the creditor and the debtor arising out of a credit agreement (or the agreement taken with any related agreement) is unfair to the debtor because of (among other things) anything done, or not done, by or on behalf of the creditor, the court has a range of powers available to it under section 140B. Those powers include altering the terms of the credit agreement or any related agreement, requiring the creditor to repay sums paid by the debtor, and to reduce or discharge any sums payable.

- The Supreme Court considered whether the non-disclosure of high commission levels might produce an unfair relationship in the case of Plevin. In that case, the Supreme Court concluded that that the non-disclosure of commission could lead to an unfair relationship.

- Following the *Plevin* judgment (and the uncertainty that it created), the FCA issued rules and guidance to businesses for the handling of PPI complaints that included a complaint about undisclosed commission. That guidance (which is contained in DISP App 3) came into force in August 2017 and was preceded by a policy statement (PS17/03, issued in March 2017) and two consultation papers (CP15/39 and CP16/20). The respondents to those consultations included consumer groups, businesses, claims management companies and trade associations, and the final rules and guidance took account of their views.

- In PS 17/03, the FCA said that in publishing this guidance for firms, it had *"used [its] regulatory judgement to create a framework that [it] believe[s] will reduce uncertainty and enable firms to take a fair and consistent approach to handling PPI complaints. This will help ensure the best outcomes for consumers at the earliest stage in the complaints process…'* [Page 6 para 1.8]

- In broad terms, the FCA's guidance and rules for businesses handling PPI complaints require businesses to consider complaints about PPI using a two-step approach as set out in DISP App 3. Broadly speaking, at step 1, the firm should first consider whether the business's 'conduct of the sale' failed to comply with FCA's rules or legal requirements. Where failings are identified, the business should determine the way the consumer would have acted if the breach or failing had not occurred (i.e. whether or not the consumer would have bought the policy) and then determine appropriate redress - if any. It is at this step, for instance, where the presumption in DISP App 3.6.2E – which I have already addressed above – may apply.

- Where the business concludes – as Barclays did in this complaint – that the consumer would have bought PPI, it must then go on to assess, at step 2, whether any failure to disclose commission and profit share gave rise to an unfair relationship under section 140A, in which case the business should go on to determine the appropriate remedy - if any.

- As a starting point, the FCA's rules and guidance require businesses to presume that the failure to disclose commission gave rise to an unfair relationship where the business expected commission and profit share to be more than 50% of the cost of the policy (the FCA referred to this as the "tipping point" in its consultations and policy statement). Usually, in those circumstances, the FCA's rules and guidance require businesses to refund the amounts paid by the consumer in commission and profit share above 50% of the policy's cost, plus interest. While this presumption of an unfair relationship is rebuttable, I note that Barclays has not sought to rebut it in Mr G's case. In fact, Barclays made an offer or payment to Mr G in 2017, calculated in line with the FCA's guidance.

Was there an unfair relationship?

Given that Barclays didn't tell Mr G about the high levels of commission and profit share paid in this case, I think it's likely a court would determine that the relationship between Barclays and Mr G was unfair under section 140A. As I've mentioned above, the FCA's rules require Barclays to determine appropriate redress in those circumstances, and I have had regard to those rules below in deciding what compensation it would be fair to award Mr G in order to remedy that unfairness.

With respect to the claims ratio, I can't say with any degree of certainty whether a court would conclude that Barclays's failure to disclose information about the claims ratio also meant there was an unfair relationship. But in some respects, commission and the claims ratio are two sides of the same coin – the fact that a relatively small amount of the premiums is required to pay claims is what permits the high commission and profit share payments.

And I accept – although I can't be sure – there's a possibility that a court might take a similar view about the claims ratio when considering a claim under section 140A. But since I've already found that it's likely a court would say that Barclays should have told Mr G about commission, and the claims ratio involves a similar concept, I don't think the failure to disclose the claims ratio as a separate matter affects my overall conclusion about what's fair in this case.

So, taking into account:

- the likelihood (in my view) that a court would determine the relationship between Barclays and Mr G was unfair under section 140A because it didn't tell him about the high levels of commission and profit share paid in this case; and

- the regulator's complaint handling guidance for businesses,

I don't think Barclays acted fairly and reasonably in its dealings with Mr G insofar as it failed to disclose the high commission and profit share paid out of the premiums in this case.

Redress to remedy that unfair relationship

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

I've thought carefully about whether fair compensation means Mr G should get a full refund of the premiums he paid to put him in the position he would have been in if he hadn't taken the policy out, or a full refund of the commission and profit share Barclays received, or a refund of the commission paid above a certain point – for example by taking the approach set out in the FCA's rules and guidance (as has already been offered by Barclays).

As I've mentioned above, Mr G says that he should get a full refund of all the PPI premiums he has paid. In summary, Mr G says that the high level of commission (and/or the low claims ratio) – together with the policy's limitations and exclusions – meant that the PPI policy generally represented poor value for money for him. I should therefore find that Mr G would not have purchased the policy had he known of the level of commission – and accordingly, he should receive a refund of all the PPI premiums he paid.

I have thought carefully about these representations and am mindful of Lord Sumption's observation in Plevin (at paragraph 18 of his judgment) where he said:

"Any reasonable person in [Mrs Plevin's] position who was told that more than two thirds of the premium was going to intermediaries, would be bound to question whether the insurance represented value for money, and whether it was a sensible transaction to enter into. The fact that she was left in ignorance in my opinion made the relationship unfair."

However, I note that the Supreme Court made no specific finding about whether the consumer in that case (Mrs Susan Plevin) would (or would not) have purchased the PPI policy had the commission been disclosed to her at the time of her purchase. The Supreme Court simply did not address the question of causation. I do not therefore consider that the Plevin judgment necessarily drives me to the conclusion that Mr G suggests it does – i.e. that he necessarily would not have purchased the policy had the level of commission been disclosed to him at the time.

I have also borne in mind that the overarching question for the court would be what steps are required to remedy the unfairness, and that, under section 140B, the court would have a wide range of powers available to it in order to do so under the lending relationship in question. It does not, for instance, follow that because Barclays did not disclose the high level of commission to Mr G, the court would necessarily order Barclays to return all the premiums Mr G paid for the policy. Nor does it follow that the court would necessarily find that Mr G would not have purchased the policy but for Barclays's failure to disclose the high commission.

Taking into account relevant law and the FCA's rules and guidance, my role as an ombudsman is to determine what redress, if any, would represent fair compensation for Mr G in order to remedy the unfairness arising from the fact Barclays did not disclose the high level of commission to him before he purchased the policy.

The FCA's guidance to firms following the Plevin judgment

In considering what would represent fair compensation for Mr G, I have, as I stated earlier, had regard to the FCA's guidance to firms for handling PPI complaints involving a complaint about undisclosed commission. I think the FCA's guidance is an important consideration for me to take into account, and I will now explain how I think the FCA's guidance affects my decision on this issue.

As I explained above, the FCA consulted extensively between 2015 and 2017 on the question of how firms should handle PPI complaints involving a complaint about undisclosed commission in the light of the *Plevin* judgment. In the exercise of its regulatory judgment, the FCA established the two-step approach I summarised above. According to the FCA, the purpose of this approach was to allow firms to take a fair and consistent approach to handling PPI complaints involving undisclosed commission.

The FCA explained why it decided to exercise its regulatory judgment in the way it did in paragraphs 4.68 – 4.70 of PS17/3. These paragraphs state as follows:

"The two step approach

The approach to assessing merits

4.68 *Some responses from industry, and from CMCs and consumer bodies, maintained their broad support for our proposed structuring of the new rules and guidance concerning* Plevin *as a separate 'second step' within our existing PPI complaint handling rules and guidance, seeing it as a sensible and proportionate approach.*

4.69 *However, some industry respondents maintained and amplified their concerns about our view (at paragraph 5.69 of CP15/39) that, in some marginal cases, a firm may conclude at Step 2 that not disclosing commission over 50% was the 'straw that broke the back' of the sale as a whole, and that, overall, the customer would not have bought the PPI if given better information, including about the commission, at point of sale. These responses argue that our view:*

- *inappropriately blurs the lines between two very different sets of circumstances*
- *is confusing and contradictory from the consumer's perspective*
- *will result in uncertainty and disorderliness, as CMCs will use it to try to get any Step 2 uphold 'upgraded' to a Step 1 uphold, increasing the length and complexity of handling for firms and delaying redress to consumers*
- *imposes disproportionate costs on firms and the Financial Ombudsman Service who will need to operationalise such hybrid assessments as standard in their processes despite the small number, we say, whose outcomes will change in practice*

4.70 *Conversely, some responses from consumer bodies and CMCs maintained and amplified their previous concerns that we are artificially and wrongly separating the issues at Step 1 and Step 2, when these should be considered together. Specifically, they said that:*

- *We had mis-understood the relevant case law and disregarded relevant considerations from the Plevin judgment, and ignored the findings of the Competition Commission that the non-disclosure of commission was a central plank of the sales strategy employed by most lenders.*

- *The question of unfairness under s.140A is not a narrow test of commission. Instead, it is a wide one in the round, so any sales failings at Step 1, or other issues of unfairness or inequalities of knowledge such as poor value from a low claims ratio, should also be considered at Step 2, in particular by the Financial Ombudsman Service, which has to consider all the circumstances anyway, not just s.140A.*

- *Conversely, Plevin says failure to disclose commission is unfair – which presumably also makes it a breach of FCA principles 6 and 7 – and that the customer did need to be told about poor value, and it explicitly cites unfairness arising from undisclosed poor value. So it is wrong for our proposed structure to imply (and Financial Ombudsman Service decisions to assert) that the non-disclosure of high commission and poor value was not relevant for causation and potential mis-selling or assessment at Step 1. Our proposed approach paid lip service to this, allowing that undisclosed commission may be the 'straw that broke the back' of the sale as a whole, but said these are 'marginal' cases that will be 'few and far between' – whereas in reality, they are the norm.*

- *As proposed, Step 2 assumes Step 1 has been fairly carried out, but we cannot reasonably assume that, given the continued poor complaint handling by firms. And the approach itself incentivises lenders not to concede a mis-sale, and to instead redress more cheaply at Step 2.*

Our response

We have carefully considered this feedback. However, we see no reason to change our previous views or position.

Plevin deals with the specific question of whether an unfair relationship between lender and borrower was created by undisclosed high commission on the PPI. This question is different from, and narrower than, the principal question behind our existing rules and guidance for firms, which is: did the conduct of the firm that sold the PPI fall so short, at point of sale, of what we would expect under our Principles and ICOB(S) rules, that it made the sale substantially flawed?

We still believe the two-step approach reflects this difference appropriately and fairly for complainants and firms. An alternative approach which merged considerations about undisclosed commission into the existing rules and guidance about mis-selling to create a single test would not be appropriate because:

- *We do not consider the non-disclosure of commission in PPI sales to have been a breach of our ICOB(S) rules, and it is unlikely in and of itself to have been in breach* *of our Principles, whereas we do consider the various sales failings set out in the existing rules and guidance to be so.*

- *It would lead us, and firms, into difficult considerations of whether a consumer would still have bought the PPI if they had been told about the level of commission. This difficulty is compounded by the fact that complaints about PPI increasingly involve older, pre-2005 sales, of which some will be eligible to be considered at Step 2.*

- *Additionally, if we were to force firms to make these assessments it would result in complaint outcomes which would be both arbitrary and inappropriately 'all or nothing'. It could give too little – nothing – to many consumers who had suffered an unfair relationship, and too much – full return of premium and interest – to many consumers who had benefitted from the PPI cover. (See paragraphs 4.87-4.105 below for further discussion of our approach to redress.)*

- *We would, anyway, have to leave scope for a PPI complaint where undisclosed commission may be relevant to be assessed by a lender that did not sell the PPI and could not assess if it was mis-sold under our existing rules….."*

This extract makes it clear that the FCA specifically considered representations from consumer bodies and claims management companies which are very similar to the representations which Mr G is now making – i.e. that the existence of an undisclosed high level of commission means that I should find that Mr G would not have purchased the policy had he known about the level of commission at the time he bought the policy.

However, I note that, in the exercise of its regulatory judgment, the FCA decided that it would not be appropriate to "*merge considerations about undisclosed commission into the existing rules and guidance about mis-selling*". This is why it created the two-step approach for firms handling PPI complaints summarised above. And as part of that two-step approach, the FCA said that impact of the undisclosed commission – and the compensation required to remedy the unfairness caused by that undisclosed commission – should generally be considered at step 2.

Turning now to consider what the FCA's guidance says about how firms should calculate fair compensation to remedy the unfairness caused by undisclosed commission at step 2, I am mindful that the FCA's guidance on this issue was also the product of extensive consultation and deliberation. The following extract from para 4.104 of PS17/3 (omitting the footnotes) explains the FCA's position:

"*……Concerning the core logic of our proposed approach to redress, we note […] the courts might take a variety of approaches to redress on individual cases. However, we remain of the view that our approach, centred on the return of that portion of undisclosed commission plus profit share that exceeded the tipping point, is fair and appropriate. As we have explained (see our response under paragraph 3.27 above), we are exercising our regulatory judgement about appropriate assessment and, where appropriate, redress of relevant PPI complaints in light of s.140A-B, taking account of Plevin. In doing so, we are seeking to ensure fair and consistent complaint handling. We consider our approach to redress to be a reasonable starting presumption, which fits well with the central importance Lord Sumption gave to the notion of a tipping point.*

For these reasons, although it was the remedy in Plevin ordered by the Manchester County Court, we do not agree that our general approach to redress should be the *return of all the commission that was not disclosed. Also, the consumer, who, as would generally have been established at Step 1, was not mis-sold, had a need for the protection offered by the policy and enjoyed the benefit of that protection before complaining. So it is fair and reasonable for the lender to keep some of the commission from the policy's distribution (i.e. the portion under the tipping point).*

Nor do we agree that our approach to redress should be the return of all the premium(s) paid by the consumer. Adopting this approach would dissolve any meaningful distinction between a mis-sale and an unfair relationship under s.140A, and thus between our existing Step 1 and proposed Step 2. In our view, it would (even more than the return of all commission) give excessive redress to the consumer who had enjoyed the benefit of that protection before complaining. We consider it is fair and reasonable for the consumer to have still paid for the underwriting of the policy and for some of the commission from the policy's distribution (i.e. the portion under the tipping point).

We do not agree that our approach to redress at Step 2 inconsistently evokes hypothetical scenarios or, in general or for historic interest specifically, implies any assumption that the customer would have searched for or bought an alternative PPI policy that was cheaper by the amount of the excess commission over the tipping point. So we do not need to take into account whether such alternative cheaper PPI policies existed or were available to the consumer.

Rather, as stated above, our approach simply seeks to redress the customer for that element of undisclosed excess commission and profit share which created the unfair relationship under s.140A. It is in that specific sense, of our approach not second guessing what the consumer would have done had they been told of the commission, that we meant that our approach was different from the 'but for' logic at Step 1. We did not mean that our overall approach to redress had no element of restoring the consumer's financial position to what it would have been without the undisclosed excess commission.

Lastly, we note that our approach to redress has to be viewed in the round, as a package. Responses from CMCs and consumer bodies have focused on aspects which they believe depart from Plevin and are ungenerous to complainants, such as the presumptive 50% tipping point and redress based on the excess over it. Responses from industry have focused on aspects which they believe depart from …. So we consider that, overall, our approach is balanced and will give redress, in aggregate and to individuals, that is fair and proportionate in light of the detriment identified and described by the Supreme Court's judgment. ….."

In essence, therefore, the FCA's guidance to firms for calculating fair compensation in a case like Mr G's (involving a regular premium policy) is that a firm should pay a sum equivalent to the commission and profit share that is in excess of 50% of the policy's cost, together with interest. According to the FCA, compensation calculated in this way would fairly remove the element of unfairness caused by the existence of the undisclosed high commission.

my conclusion

Taking all these considerations into account, and having carefully considered Mr G's representations, my conclusion is as follows:

- Where a court determines that the relationship between a creditor and debtor is unfair under section 140A, the court is empowered to make a variety of different types of orders under section 140B in order remedy that unfairness.

- Mr G has urged me to conclude that because Barclays's failure to disclose the high level of commission (and/or profit share) made his relationship with Barclays unfair, I must find that he wouldn't have purchased the policy had he known about these matters at the time he purchased the policy.

- However, I do not accept Mr G's suggestion. As I said above, I recognise it is possible that had the level of commission been disclosed to Mr G at the time of the sale, he might have decided not to purchase the policy. At the same time, however, I am mindful of:

    i. the FCA's observation in PS17/03 (which I have quoted above) that the existence of undisclosed commission question raises "difficult considerations of whether a consumer would still have bought the PPI if they had been told about the level of commission"; and

    ii. the fact that there are a variety of other ways to fairly remedy the unfairness caused to Mr G by the failure to disclose the high level of commission – I am not, as Mr G suggests, driven to conclude that he wouldn't have purchased the policy but for Barclays's failure to disclose the level of commission.

- I am also mindful that the FCA's guidance to firms for handling complaints about the non-disclosure of commission requires a firm to refund some of the money paid for the PPI policy in order to remedy the unfairness caused by the failure to disclose the level of commission. I also think that refunding some of the money paid for the PPI policy in this way is an order which the court could, in the exercise of its discretion, make under section 140B in order to remedy any unfairness.

- Overall, and on balance, I therefore think it was fair for Barclays to calculate compensation in line with the FCA's guidance for handling complaints about the non-disclosure of commission and profit share, and thus return some of the money Mr G paid for his PPI policy. This is because, in my view, this:

    i. fairly removed the source of the unfairness; while:

    ii. leaving Mr G with the policy I've concluded above he would have taken out if Barclays had met its obligations when acting as an insurance seller – but with lower commission and profit share levels.

- In other words, by compensating Mr G in line with the FCA's guidance at step 2, this effectively reduced the overall cost of the policy by an amount equal to the excess undisclosed high commission (and/or profit share) which is the very source of the unfairness for the purposes of section 140A.

- I think that compensating Mr G in this way was a fair and reasonable outcome because it left him with the policy I believe he would have still taken out (for the reasons I explained above) while fairly compensating him for the unfairness caused by the existence of undisclosed high commission.

Taking all of this into account, I therefore consider that Barclays's offer of payment of an amount equivalent to the commission and profit share paid in excess of 50% of the policy costs, in line with the FCA's guidance to firms is fair in all the circumstances.

If Barclays has paid Mr G compensation on this basis, I do not consider it should do anything further.

My decision

Overall, having considered all the evidence and arguments to decide what is, in my opinion, fair and reasonable in all the circumstances of this complaint and for the reasons I have set out above, I don't uphold the mis-sale element of Mr G's complaint or make any award in favour of him for this part of the complaint.

But because of the non-disclosure of commission and profit share, I've decided that Barclays Bank UK PLC should pay Mr G an amount equivalent to the commission and profit share paid in excess of 50% of the policy cost, if it hasn't already done so. If Barclays Bank UK PLC has already paid compensation on this basis, I do not consider that Barclays Bank UK PLC should do anything more.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 24 August 2021.

Douglas Sayers
ombudsman