This final decision is issued by me, Carole Clark, an Ombudsman with the Financial Ombudsman Service.

My provisional decision from April 2019 explained that I was minded not to uphold Mr S's complaint, subject to any further evidence and representations submitted by the parties. Neither Lloyds Bank Plc nor Mr S responded with any further submissions.

summary

1. This dispute is about the sale in 1999 of a payment protection insurance (PPI) policy to support a Lloyds Bank Plc (trading as Cheltenham & Gloucester Plc) mortgage.

2. Mr S complains that Lloyds 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 S was given a choice about whether or not to take out the policy, the policy was suitable for him and it is more likely than not that the policy's features and limitations were verbally explained to him in good time before the sale was concluded.

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 determine the complaint in favour of Lloyds, to the extent that I do not make an award in favour of Mr S.

6. This is a final decision. In summary, based on the evidence and arguments submitted so far, my conclusions are as follows:

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

   - Taking into account the law, industry codes of practice and what I consider to have been good practice in 1999 (there were no applicable regulations at the time), Lloyds should fairly and reasonably have advised Mr S 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 S with sufficient clear, fair and not misleading information about the policy it was recommending to him, to enable Mr S 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 S. It did not advise Mr S with reasonable care and skill – it did not take sufficient steps to establish whether the policy was suitable for Mr S (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 S made his decision to take out the policy based on the recommendation and incomplete information. But if things had happened as they should, on the evidence available in this case, it is more likely than not Mr S would still have taken out the policy.

- It would not be fair in those circumstances to make an award to compensate Mr S 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 S to accept or reject my decision before 21 July 2019.

background to the complaint

a) events leading up to the complaint

8. In April 1999, Mr S applied for a Lloyds mortgage. He met with a member of Lloyds staff who completed a loan assessment form, a mortgage application form and a Payment Protection Plus proposal form.

9. The mortgage application form, which Mr S signed included a section headed 'insurance'. Mr S ticked a box to indicate that he wished to apply for 'Payment Protection Plus' and had completed the relevant proposal form. Mr S also signed the proposal form and a direct debit mandate for the policy.

10. Due to a delay in completing on the mortgage, meaning that his signature was more than six months old, Mr S was sent a new Payment Protection Plus proposal form and direct debit mandate to sign and return. He did so on 3 December 1999.

11. Mr S was taking out a mortgage on his existing property. He was borrowing £24,250 over a term of 12 years.

12. The loans and the policy started on 22 November 1999. Mr G paid the £12.13 monthly premium by direct debit.

13. The policy ended when the mortgage came to an end in October 2009.

b) Mr S's circumstances in 1999

14. Mr S was taking out a mortgage on the property he was already living in. He was 52 years old at the time.

15. According to the mortgage application form, Mr S had a salary of £15,894 working as an HGV driver. He had worked for his employer for just one year.

16. Separately, Mr S has told us that:

    - He would have received between six and twelve months' pay if he was off work due to sickness or accident. I understand that he told Lloyds that this was six months at full pay, followed by six months at half pay.

- He had savings or insurance equivalent to between six and twelve months pay. Although I understand that he told Lloyds that he probably didn't have any significant savings at the time and that he had no other insurance policies.

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

17. I note for the sake of completeness that Mr S indicated on the payment protection insurance questionnaire he completed during the course of the complaint that he had been with his employer for six years.

18. I am, however, satisfied it is more likely than not that Mr S is mistaken in his recollection of events and that the mortgage application form provides an accurate record of his length of employment at the time.

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

19. Lloyds has provided a copy of the 'C&G Payment Protection Plus Statement of Cover' which sets out the full policy terms and conditions which applied to policies like Mr S's sold in April 1999.

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

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

    - The policy provided disability cover. Broadly, if Mr S was unable to carry out the duties of his work (or any other work which in the insurer's view he might reasonably become qualified for in view of his training, education and ability) due to injury, sickness or disease, it would pay, direct to Mr S's mortgage, his normal mortgage payment each month. The policy would also pay an additional cash payment to Mr S of £3 per month for every £1,000 of the opening mortgage balance. The monthly benefit would continue until the disability came to an end or 12 payments had been made, whichever came first.

    - The policy would provide unemployment benefits. Broadly, the policy would pay the normal mortgage payment each month, plus an additional cash benefit of £3 per month for every £1,000 of the opening mortgage balance. The monthly benefit would continue until Mr S ceased to be unemployed or he had received 12 payments, whichever came first.

    - The policy would have paid out after 60 consecutive days of disability or unemployment.

    - The insurer was Lloyds TSB General Insurance Limited.

21. To put the benefits into context, if Mr S had made a successful claim for 12 months he would have received £3,829.20 – made up of £246.35 per month paid directly to the mortgage account (totalling £2,956.20) and an additional cash benefit of £72.75 per month (totalling £873).

22. Returning to the policy terms and conditions, there were also exclusions – for example, claims resulting from pre-existing medical conditions which Mr S knew, or should have known about, were not covered for the first 24 months of the policy being in place.

23. Part of Mr S's complaint is that the policy was poor value because it excluded or limited claims arising from back injury and mental health issues. Whilst the policy required Mr S to provide satisfactory proof of disability to make a claim, including providing a certificate from his doctor, it did not exclude back or mental health conditions, or place any additional restrictions or more onerous evidential requirements on claims relating to back and mental health issues than would have applied to any other disability.

24. It is also of note that the 'Important Notes' section contains information about C&G's status when selling the policy:

> *C&G Payment Protection Plus has been negotiated by Cheltenham & Gloucester plc, an agent of the insurer, TSB General Insurance Limited. As an agent, Cheltenham & Gloucester plc has agreed to comply with the Association of British Insurers Code of Practice for the Selling of General Insurance. The insurer accepts liability for C&G's activities in this connection.*

d) the complaint and Lloyds's response

25. Mr S's representative Claims Advice Bureau (CAB) has made lengthy and substantial representations on his behalf.

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

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

    - Lloyds did not tell him about the poor value of the policy, which is illustrated by the low claims ratio – for example the Competition Commission reported that the average claims ratio for mortgage payment protection insurance was 28%, meaning that around 28p in every pound was used to pay claims, the rest paid for costs, profits and commission. Lloyds' claims ratio is below 10%. Lloyds' failure to explain this to him was a breach of the common law duty of utmost good faith and of the FCA's principles, which require firms to treat customers fairly.

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

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

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

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

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

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

27. Lloyds says:

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

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

- The policy was suitable for him. Mr S had a need for the insurance to protect his payments should he not have been able to work, he was not affected by the significant exclusions and limitations and the policy was affordable.

- It is more likely than not that the adviser explained the policy features and limitations to Mr S and gave him appropriate documentation before the sale concluded.

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

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

the parties' representations in response to the provisional decision

28. Lloyds had nothing further to add following the provisional decision..

29. Mr S's representative also had nothing further to add following the provisional decision.

my findings

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

31. Mr S's representative has made some comments about this service having a standardised approach to PPI cases. I can confirm that I have considered this complaint on the particular evidence of this case, including Mr S's individual circumstances and what he has said about the sale of the policy.

a) relevant considerations

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

33. This sale took place in 1999 before the sale of general insurance products like this became regulated by the Financial Services Authority in January 2005 and before mortgage lending became regulated in October 2004. So the GISC code, the FSA's and FCA's overarching Principles for Businesses and insurance conduct rules (ICOB and ICOBS) are not applicable to this complaint.

34. Mr S arranged additional borrowing in 2006 which I am satisfied meant the entire mortgage became regulated at that time. That means the unfair relationship provisions set out at s140A of the Consumer Credit Act, the Supreme Court judgment in *Plevin*[1] about s140A of that Act and the rules and guidance made by the FCA recently about the handling of complaints about the non-disclosure of commission in the light of the *Plevin* judgment, are not applicable.

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:

<u>*The Mortgage Code*</u>

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

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

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

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

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

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

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

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

    - The intermediary should:

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

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

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

Guidance on the application of the ABI Code

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

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

When selling insurance intermediaries must

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

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

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

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

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

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

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

<u>The ABI Statement of Practice for Payment Protection Insurance</u>

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

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

Is the policy suitable for the consumer?

The ABI Code requires sellers of MPPI to ensure as far as possible that the insurance policy being proposed is suitable for the prospective insured person's needs and resources.

This means the customer should be encouraged to assess the levels of risks they face as a homeowner, and particularly how they would keep up mortgage repayments if they lost their income via unemployment or ill health. Issues that need to be addressed during the sales process include:

- *security of the customer's employment, bearing in mind the duration of financial commitment they are about to undertake,*
- *what level of sick pay they could expect from their employer if they fell ill, and*
- *whether they have savings or alternative sources of income*

This type of information will help customers to decide whether they need MPPI, and which kind of policy would be best for them.

Does the customer understand what he/she is buying?

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

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

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

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

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

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

<u>*The law*</u>

47. 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.

48. I have also considered carefully CAB's representations about the law, and complaints generally, as particularly set out in its letter dated 22 June 2018.

<u>*The FCA's guidance for firms Handling PPI complaints – DISP App 3*</u>

49. 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 S's.

50. 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 S's complaint.

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

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

DISP App 3.1.3G

Where the firm *determines that there was a breach or failing, the* firm *should consider whether the complainant would have bought the* payment protection contract *in the absence of that breach or failing. This appendix establishes presumptions for the* firm *to apply about how the complainant would have acted if there had instead been no breach or failing by the* firm*. The presumptions are:*

> *(1) for some breaches or failings (see* DISP App 3.6.2 E*), the firm should presume that the complainant would not have bought the* payment protection contract *he bought; and*
>
> *(2) for certain of those breaches or failings (see* DISP App 3.7.7 E*), where the complainant bought a single premium* payment protection contract*, the* firm *may presume that the complainant would have bought a regular premium* payment protection contract *instead of the* payment protection contract *he bought.*

DISP 3.1.4G
There may also be instances where a firm *concludes after investigation that, notwithstanding breaches or failings by the* firm*, the complainant would nevertheless still have proceeded to buy the* payment protection contract *he bought.*

DISP App 3.6.1E
Where the firm *determines that there was a breach or failing, the* firm *should consider whether the complainant would have bought the* payment protection contract *in the absence of that breach or failing.*

DISP App 3.6.2E
In the absence of evidence to the contrary, the firm *should presume that the complainant would not have bought the* payment protection contract *he bought if the sale was substantially flawed, for example where the* firm*:*

…(4) did not disclose to the complainant, in good time before the sale was concluded, and in a way that was fair, clear and not misleading, the significant exclusions and limitations, i.e. those that would tend to affect the decisions of customers *generally to buy the* policy*;*

…(8) did not disclose to the complainant, in good time before the sale was concluded and in a way that was fair, clear and not misleading, the total (not just monthly) cost of the policy *separately from any other prices (or the basis for calculating it so that the complainant could verify it);*

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

DISP App 3.6.3E

Relevant evidence might include the complainant's demands, needs and intentions at the time of the sale and any other relevant evidence, including any

testimony by the complainant about his reasons at the time of the sale for purchasing the payment protection contract.

Overall

53. 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 S with reasonable care and skill – in particular, whether the policy was appropriate or 'suitable' for Mr S, given his needs and circumstances.

    – Whether Lloyds gave Mr S 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 S, I must then go on to consider whether and to what extent Mr S suffered loss or damage and what I consider would amount to fair compensation for that loss or damage.

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

b) the sale - what actually happened?

55. Mr S attended a meeting in a branch of Lloyds in April 1999. He was looking to take out a mortgage on the property he owned.

56. Mr S says the policy was sold in that meeting. He says that Lloyds advised him to take out the policy although it did not ask him about any existing cover he might have. He says there was no discussion about what the policy's cover and limitations.

57. Lloyds says that as the sale took place in a branch, an adviser would have given advice and made recommendations based on information provided by Mr S.

58. Lloyds has provided copies of a number of documents relating to the sale of the mortgage and the PPI:

    – The loan assessment form, completed on the interview date of 8 April 1999, which included a section headed *'sales'.* This included a series of tick boxes which suggest that Mr S was sold Payment Protection Plus, but was using his own nominated company for buildings and contents insurance. There are some notes about the loan, but no references to the policy or what Mr S was told about it.

    – The mortgage application form, which Mr S signed on 8 April 1999. This included an 'insurance' section that indicates that Mr S did not want Lloyds to arrange his home insurance, but he wanted payment protection cover. The form

also suggests that Mr S had chosen his mortgage based on information provided by Lloyds, but had not been given advice.

- The Payment Protection Plus proposal form which Mr S signed on 8 April 1999. This says the total amount of the loans to be covered by the policy was £24,250. The third section of the form deals with how the benefit of the cover should be split. It states that the first customer (Mr S) was to be insured for 100% of the mortgage costs. It included the statement: *'Full details of the terms and conditions of this insurance are contained in the statement of cover booklet which will be sent to you once your proposal for insurance has been accepted'.* The end section of the form, headed 'office use only' notes the cost as £12.13 per month. Mr S signed a direct debit mandate for the policy at the same time.

- The loan agreement (although this makes no mention of the policy).

- A second Payment Protection Plus proposal form which Mr S signed on 3 December 1999. The insurer sent this to Mr S to sign and return because, as the mortgage didn't complete until November 1999, the signature on the original form (from April 1999) was over six months old. This says the total amount of the loans to be covered by the policy was £24,000 (I'm satisfied the policy was set up to cover the actual mortgage amount of £24,250) Otherwise it contains the same details as the earlier proposal form. Mr S signed a new direct debit mandate for the policy at the same time.

59. Having considered the representations of both sides and keeping in mind the limitations on the evidence available about what happened during a meeting nearly 20 years ago, I find:

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

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

    - It is more likely than not that the full policy conditions were sent to Mr S after the meeting.

c) did things happen as they should in 1999?

60. 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 S, is in my view important to my consideration of the question which ultimately lies at the heart of this complaint: would Mr S have acted differently if Lloyds had advised and explained things properly?

61. 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 S agreed to the policy Lloyds recommended knowing that he did not have to take it out and that it was separate to the mortgage.

62. In reaching that conclusion, I note the mortgage application form had a separate section entitled '*Payment Protection Insurance'* with '*Yes*' and '*No*' boxes next to the statement:

    I have received information about C&G Payment Protection Plus. I wish to apply for cover and have completed the relevant proposal form.

    Whilst it appears the adviser completed the application form for Mr S to sign (and it seems likely he/she ticked the '*Yes*' box), I am also mindful that: there were two options to choose from, there was a separate insurance proposal form and direct debit form, and Mr S retained his own home insurance arrangements - it would appear those arrangements were also discussed.

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 mortgage, albeit insurance the adviser recommended Mr S take out. I am not persuaded it is more likely than not that the Lloyds' adviser incorrectly (or inadvertently) told Mr S he had to agree to the payment protection policy for the mortgage to be approved or that the insurance was an inseparable feature of the mortgage.

64. I have concluded Lloyds recommended the policy to Mr S, so I consider it appropriate to consider whether it advised Mr S 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 S. Mr S says that his circumstances were not discussed. The adviser had information about some of Mr S's financial circumstances, but there is not any specific evidence to show that the adviser took steps to establish whether Mr S 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 S 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 S 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 S, I am satisfied it is more likely than not that the policy was ultimately suitable for him given what I am satisfied were Mr S's needs and circumstances at the time. In reaching that conclusion I have taken into consideration:

    - Mr S met the eligibility criteria for the policy.

    - Mr S had a need for the policy – Mr S's finances would have been put under strain if he were not working – even allowing for the sickness and redundancy benefits he was entitled to. The policy would have helped Mr S manage the consequences if he were unable to work.

    - The monthly premium of £12.13 was affordable for Mr S. While in relation to the mortgage itself but in my view supportive of my conclusion, I can see the

adviser also noted the following on the loan assessment form: *"Well within income multiplier at 1.51 + well within customer's affordability."*

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

- Whilst the policy included a requirement that Mr S be disabled for 60 days before he could make a disability claim and would only pay benefits for a maximum of 12 months for each claim, it still provided valuable cover given: Mr S's circumstances, the fact the policy protected the mortgage repayments relating to his house and the potential consequences should Mr S be unable to make the repayments on loans secured against his house.

68. I have also considered whether when providing advice Lloyds gave Mr S sufficient information about the cover provided by the policy to enable Mr S 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 S was given a broad description of what the policy was intended to cover (that is that the policy would protect his payments if Mr S was unable to work through accident, sickness and disability) and of the approximate costs. I have reached this conclusion because I think it is unlikely that Mr S would have taken out the policy without any sense of what the policy was for and of how much the premium might be.

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

71. Whilst I am satisfied Lloyds sent Mr S 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 S 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 S did not base the decision he made at the meeting to take out the policy on the full policy conditions.

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

   - It was incumbent on Lloyds to provide him 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).

72. Overall, having considered the parties' representations about what happened, whilst I am satisfied that the policy was a suitable recommendation for Mr S, 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 S. I am not persuaded Lloyds gave Mr S 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.

73. I have considered how my findings interact with the FCA's list of significant failings in its guidance for firms handling PPI complaints set out at DISP App 3.

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

75. I have considered carefully Mr S'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 S'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 S's needs and resource and it also had to explain the features of the cover. But I am not persuaded by Mr S's view about what the duty of utmost good faith required.

76. 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.

77. 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.

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

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

[2] *Banque Keyser Ullmann SA v Skandia (U.K.) Insurance Co. Ltd [1990] 1Q.B. 665, 772*

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

80. 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 S say 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.

81. 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.

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

83. 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.

84. I also note there was no expectation at the time under the provisions of the ABI 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.

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

86. 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 S 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.

87. 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 S says it should have done.

[3] MacGillivray on Insurance Law 14th edition 17-094

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

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

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

90. 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 S, I have found that the policy was ultimately suitable for him.

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

92. Mr S 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 S says it cannot because its failings were so fundamental).

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

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

95. Effectively the consumer has to weigh up the advice to take out the policy, the cost of doing so given the benefits offered in return and the potential consequences they will suffer if they don't have insurance should the risks come to fruition. That is why it was incumbent on the intermediary to provide the information about the policy's features when recommending the policy, so the consumer could make that assessment.

96. The evidence in this case suggests that Mr S 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 mortgage – I have seen nothing to suggest he did.

97. Rather, I mean when Lloyds advised him that there was a suitable product he could buy that would protect his mortgage payments in the event he was unable to work because of accident, sickness or unemployment, that resonated with him in some way and he concluded that he wanted that product.

98. The issue here is that the decision he made about whether 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.

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

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

101. Whilst Mr S 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.

102. Although I consider it more likely than not that Mr S knew he would have to pay something for the policy, it does not appear Lloyds told him the exact premium at the point Mr S applied for the policy. Having said that, it seems likely Mr S would have been told the cost before the policy started and he paid for the policy for a number of years, so if the costs were significantly at odds with his expectations at the point of sale, it is possible he might have raised that with Lloyds at the time, or reconsidered his decision.

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

104. In addition, I am not persuaded Lloyds made clear exactly what Mr S would get back in return in the event he made a successful claim. But I think it is unlikely Mr S's likely expectations about what the policy would pay in the event of a claim (an amount sufficient to meet his monthly mortgage payment) were significantly different to what the policy actually did – if anything, it is more likely than not that the policy actually paid more in the event of a claim than he would have expected as there was an additional cash payment.

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

106. Mr S did not for example have any pre-existing medical conditions and 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 S would have expected to make a disability claim on the policy without having to provide some evidence to support that claim.

107. More significantly I am not persuaded Lloyds told Mr S that any claim he made would be limited to a 12-month period. This may have differed from what Mr S expected. But 12 months was a longer period than Mr S would have received full sick pay for.

108. In those circumstances, I consider it likely Mr S would still have thought a policy that paid up to 12 monthly mortgage 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, ensure that his home was not placed at risk and might potentially help preserve Mr S's limited sick pay or redundancy money for other use.

109. So, whilst Mr S 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.

110. The terms of the policy also differed from what Mr S might have expected because Mr S could only claim for disability if he was unable to do both his own job and a reasonable alternative. If Mr S had known this, it may have played into his thinking about what he would have done.

111. Mr S provided information in the PPI questionnaire about what he would have done with more information, which I have considered carefully. He says:

> *I am unhappy with the insurance for the following reasons: I was never asked whether I had any existing cover for my finances and I was never informed that I could purchase the same cover elsewhere. Also I do not feel I had the terms and conditions properly explained to me because I was not informed that there would be an additional interest charge for the insurance. What has disappointed me the most is the fact that an additional interest charge was in place on the insurance when I was covered by my employer through sick pay and did not need the bank's cover provided.*
>
> *I had sick pay provided by my employer at the rate of 6 months full pay, 6 months half pay. I had redundancy cover in place via my employer, providing cover for both voluntary and not voluntary redundancy. I had savings that could have been used alongside my existing cover.*
>
> *There was no discussion about what I would not be covered for and the limitations of the insurance, had I of known the poor value of the insurance and the fact that I would not be covered for some of the most common ailments that is the primary cause of time off work, like back ache and stress, I would not have gone ahead with the purchase. The fact is, this was not discussed. I was not informed that I could arrange my own cover, I am a Union member and part of my membership is that I can purchase cheaper insurance through my union than that available on the high street. As I was not informed of this, I was deprived of being able to shop around.*

112. Mr S is effectively saying that as a result of what he now knows, both about what he considers should have happened and what he should have decided at the time, he would not have taken out the policy.

113. In light of the findings I have already made, I do not think Mr S'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, regulatory, code, or good practice requirement on Lloyds to disclose the commission it received.

- I am satisfied the requirement on Lloyds in 1999 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 S'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.

- The policy was paid for by regular monthly premiums and therefore did not attract interest.

114. I am also mindful that: Mr S's recollections of the sale are, owing to the significant passage of time, likely to be limited and his representations about what he would have done are made in support of a claim for compensation.

115. In deciding with appropriate information whether to follow the recommendation to take out the policy, I consider it fair and reasonable to think Mr S would have weighed up various other considerations, in particular his financial circumstances and how they 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.

116. Having considered all of the evidence and arguments in this case, I consider it more likely than not that Mr S 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 be unable to work through accident or disability. In the circumstances I consider it more likely than not that Mr S would have taken out the policy in any event.

117. I have considered Mr S's representations about causation and DISP App 3, including the general opinion of Stephen Knafler QC referred to by CAB on behalf of Mr S. 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.

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

> *…we have taken as a starting point the typical approach in law (which we understand also to be the FOS's general approach) that the customer should be put in the position they would have been in if there had been no failure to comply with its obligations on the part of the firm. Typically that involves considering what the customer would have done 'but for' the firm's breach or failing. Firms have also been making such 'but for' judgements for many years, it being the basic tenet of*

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

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.

119. 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 likely 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 illicit 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…

120. 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 S 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.

121. 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 S's circumstances I have considered above, I consider it reasonable to conclude the position Mr S 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.

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

123. That is because, whilst 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.

124. I am satisfied it would not be fair and reasonable in those circumstances to conclude Lloyds should pay Mr S 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.

125. It follows from my findings that on the balance of probabilities it is more likely than not that Mr S 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.

126. Mr S's representative has referred to the *Plevin* judgment, quoting a select passage from it, and asked me to consider how the wider considerations about fairness are relevant to Mr S's complaint. I have already explained why I don't consider the *Plevin* judgment to be applicable to Mr S's complaint. In any event, I've considered the submissions made by CAB and they have not changed my view about what is fair and reasonable in the circumstances of Mr S's complaint.

127. 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 S 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 S 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

128. 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 S.

Carole Clark
ombudsman