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

I issued a Provisional Decision on 23 January 2018 ("the Provisional Decision") explaining that I was not minded to uphold the complaint and setting out my reasons for reaching those provisional conclusions. I explained that I would consider the parties' further representations (together with the evidence and arguments submitted before the Provisional Decision) before reaching my final decision.

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

summary

1. This dispute is about the sale in September 2005 of a payment protection insurance (PPI) policy to support a Bank of Scotland plc, trading as Halifax, credit card.

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

3. Halifax says Mr H was given a choice about whether or not to take out the policy, that the policy was suitable for him and even if there were any failings in the sale of the policy they would not have affected his decision to buy it.

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

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

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

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

   - Taking into account the law, regulations, industry codes of practice and what I consider to have been good practice in 2005, Halifax should fairly and reasonably have advised Mr H 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 H with sufficient clear, fair and not misleading information about the policy it was recommending to enable him to make an informed decision about whether to follow the recommendation and take out the policy.

   - Halifax did not act fairly and reasonably in its dealings with Mr H. It did not advise Mr H with reasonable care and skill – it did not take sufficient steps to establish whether the policy was suitable for him (although the policy it

recommended was ultimately suitable for him). And it did not provide him with all the information he needed to make an informed decision about whether to take out the policy.

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

- It would not be fair in those circumstances to make an award to compensate Mr H 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 H either to accept or reject my decision before 13 January

background to the complaint

a) events leading up to the complaint

8. In September 2005, Mr H applied for a Halifax credit card and 'Credit Card Repayment Cover'. He says he cannot recall why he took out the credit card, how he applied for it or whether Halifax recommended the policy to him. Halifax says he made his application in a branch meeting and that it did recommend the policy to him. We have copies of a completed 'Credit Card Application' and 'Credit Card Agreement' which Mr H signed.

9. The Credit Card Application included a section headed 'Product Details'. A cross was printed in the relevant box to indicate that PPI was to be added. Mr H signed a Credit Card Agreement, and this document also included a box marked with a tick to indicate PPI was to be added.

10. Halifax's records show the credit card account started on 28 September 2005 with a £1,250 credit limit. It has also provided a credit card statement from November 2005 which shows the first PPI premium he was charged on 1 November 2005 – £9.22 – and one from September 2006 which shows the last PPI premium he was charged. This means Mr H only paid for PPI for 11 months.

11. I have not been provided with a list of all the transactions on the account. But Halifax has provided information which shows that the credit card was closed on 6 December 2007.

b) Mr H's circumstances in 2005

12. The Credit Card Application contains some information about Mr H's circumstances at the time. He was 43 years old and earned £15,000 a year as a bus driver.

13. Separately, Mr H has told us that:

- He would have received redundancy pay from his employer who he had been working with for four years. Although he has not provided any further detail on how much this pay would have been.

- He would have received death in service benefit equal to a year's salary.

- He had mortgage protection in place but no other savings or insurance policies.

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

14. I note for the sake of completeness that Mr H indicated on the payment protection insurance questionnaire he completed in bringing his complaint that he earned £13,500 a year as opposed to £15,000.

15. I think Mr H is mistaken in his recollection and that the Credit Card Application provides an accurate record of his income at the date of the sale.

c) the policy – what was Halifax selling and what did Mr H buy?

16. Halifax has provided a copy of the 'Credit Card Repayments Cover Conditions' document which sets out the full policy terms and conditions which it says – and I accept on the balance of probabilities – applied to policies like the one it sold to Mr H in 2005.

17. The policy conditions were set out in a 24-page booklet Among other things, these show that:

    - There were eligibility criteria, which Mr H met. For example, he had to be at least 18 years old but under 65, living in the UK and in paid work.

    - The policy provided for payment of the outstanding credit card balance, up to a maximum of £25,000, in the event that Mr H either died, was diagnosed with a specified critical illness or became a carer.

    - The policy provided hospitalisation cover. Benefits were payable if Mr H was confined to hospital for at least seven consecutive days. The monthly benefit was a fixed amount of 10% of the outstanding balance at the date of notification of hospitalisation. This was payable until the PPI ended, he was no longer confined to hospital or until 12 consecutive monthly benefits had been paid for any one claim, whichever came first.

    - The policy provided disability cover. Broadly, benefits were payable if sickness, disease, condition or injury stopped Mr H from doing his job, a similar job or job that his experience, education or training reasonably qualified him to do. Again, the monthly benefit was a fixed amount of 10% of the outstanding balance at the date of notification of disability. This was payable until the PPI ended, the disability ended, or until 12 consecutive monthly benefits had been paid for any one claim, whichever came first.

    - The policy provided unemployment benefits. The monthly benefit was again a fixed amount of 10% of the outstanding balance at the date of notification of unemployment, payable until the PPI ended, the unemployment ended or until 12 consecutive monthly benefits had been paid for any one claim, whichever came first.

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

- There were two insurers – Halifax Insurance Ireland Limited provided disability, unemployment, carer, hospitalisation and critical illness cover and Halifax Assurance Ireland Limited provided life cover.

18. To put the benefits into context, I have calculated roughly what would happen to Mr H's account, assuming he made a successful claim for 12 months after spending £1,250 on his card on purchases.

19. The calculation assumes: a 1.016% per month interest rate (the rate Halifax charged on purchases). It also assumes the payment protection policy cost 78p per £100 of the outstanding balance and that the minimum payment was 2% of the monthly balance (or £5, whichever was more), as the card conditions suggest was the case.

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

Month	Opening balance	Spend	PPI premium	Interest	Insurance payment	Closing balance	Minimum payment
1	£0	£1,250.00	£0	£0	£0	£1,250.00	£0
2	£1,250.00	£0	£8.87	£12.70	£125.00	£1,146.57	£25.00
3	£1,146.57	£0	£8.06	£11.65	£125.00	£1,041.28	£22.93
4	£1,041.28	£0	£7.23	£10.58	£125.00	£934.09	£20.83
5	£934.09	£0	£6.38	£9.49	£125.00	£824.97	£18.68
6	£824.97	£0	£5.53	£8.38	£125.00	£713.87	£16.50
7	£713.87	£0	£4.65	£7.25	£125.00	£600.78	£14.28
8	£600.78	£0	£3.76	£6.10	£125.00	£485.64	£12.02
9	£485.64	£0	£2.85	£4.93	£125.00	£368.42	£9.71
10	£368.42	£0	£1.93	£3.74	£125.00	£249.10	£7.37
11	£249.10	£0	£0.99	£2.53	£125.00	£127.61	£5.00
12	£127.61	£0	£0.03	£1.30	£125.00	£3.94	£3.94
13	£3.94	£0	£0	£0.04	£3.98	£0	£3.98

21. Returning to the policy terms and conditions, there were also exclusions – for example, claims resulting from pre-existing medical conditions which Mr H knew, or should have known, about were not covered. But there was an exception to this, meaning a claim for a pre-existing condition could be considered if Mr H had been symptom-free and not consulted a doctor or received treatment for the condition in the 24-month period prior to the claim.

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

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

- The policy would cover Mr H if he was unable to work because of any psychotic or psychoneurotic illness, mental or nervous disorder or stress or stress-related condition, but only if it was diagnosed by a consultant and he was under continued supervision and receiving treatment from a consultant.

- The policy would cover Mr H if he was unable to work because of backache or a related condition, but only if he could supply radiological evidence of medical abnormality resulting in disability.

d) the complaint and Halifax's response

24. Mr H's representative, We Fight Any Claim Ltd (WFAC), made lengthy and substantial representations on his behalf before I issued the Provisional Decision.

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

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

- It was not enough to say the premium was 78p per £100 of outstanding balance as Halifax did. The true costs were much higher as the premiums were added to the account attracting interest (which compounded over time) and the premiums would continue to be charged during the period of a successful claim, reducing the benefit. This meant the policy was both expensive and represented exceptionally poor value.

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

- Halifax did not tell him about the limitations affecting the policy, in particular: that the policy would only pay out if he was unable to do both his own job and other work which the insurer thought he was reasonably qualified to do; and that claims arising from back injury and mental health were subject to exclusions and/or restrictions 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 Halifax should have done more than simply draw the limitations to his attention, it should also have explained the significance of them and the aeffect they would have on his chances of making a claim.

- There 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 3.6.2 E makes it clear that it should be presumed he would not have taken out the policy unless there is evidence to outweigh the presumption. I am required to take that provision into

account when deciding what is fair and reasonable and should not depart from it, other than in exceptional circumstances when there is sufficiently good reason to take a different approach.

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

26. Prior to the Provisional Decision Halifax said:

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

- The PPI was sold on an 'advised' basis and that its adviser completed a full assessment of his circumstances at the time. There was nothing in Mr H's circumstances to show the policy was unsuitable or unaffordable for him.

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

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

- There is no evidence of any failings on its part in the sale of the policy and no compensation is due.

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

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

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

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

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

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

- The ICOB requirements have not been dealt with in sufficient detail in the Provisional Decision.

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

- My view of utmost good faith fails to address the basic non-disclosure of the policy's exclusions and limitations that dramatically reduce the range of cover.

my findings

29. I have read and considered all the evidence and arguments available to me from the outset, in order to decide what is, in my opinion, fair and reasonable in all the circumstances of the case.

a) relevant considerations

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

31. The credit agreement itself ended in 2007. So the unfair relationship provisions set out at s140A of the Consumer Credit Act, the Supreme Court judgment in *Plevin*[1] about s140A of that Act and the rules and guidance made by the FCA recently about the handling of complaints about the non-disclosure of commission in the light of the *Plevin* judgment are not applicable.

32. The sale took place after the sale of general insurance products like this became regulated by the Financial Services Authority in January 2005. So the FSA's and FCA's overarching Principles for Businesses and insurance conduct rules (ICOB) are applicable to this complaint. And for clarity I have set out in detail below how I have taken them into account when considering this complaint.

33. 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).

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

Principles for Businesses – 'the Principles'

35. The Principles apply to all authorised firms including Halifax (acting as an insurance intermediary). Of particular relevance to this dispute are:

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

Principle 1 (integrity):
"*A firm must conduct its business with integrity.*"

Principle 6 (customers' interests):
"*A firm must pay due regard to the interests of its customers and treat them fairly.*"

Principle 7 (communications with clients):
"*A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*"

Principle 8 (conflicts of interest):
"*A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.*"

Principle 9 (customers: relationships of trust):
"*A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.*"

Insurance Conduct of Business rules (ICOB)

36. Whereas the codes on the sale of insurance were voluntary prior to 14 January 2005, the FSA – who became responsible for the regulation of the sale of general insurance (including PPI) by intermediaries from that date – introduced the more detailed rules set out in ICOB. Among them were the requirement that intermediaries were a) more specific about the information that should be provided before and after a sale and b) when making personal recommendations, ensure the suitability of those recommendations in view of the customer's demands and needs. Intermediaries had to provide a statement setting out the demands and needs identified, confirming whether they have personally recommended a contract of insurance and any reasons for personally recommending the contract.

Of particular note are the following:

ICOB 4.3.1 R, which includes that:

"*(1) An insurance intermediary must take reasonable steps to ensure that, if in the course of insurance mediation activities it makes any personal recommendation to a customer to buy or sell a non-investment insurance contract, the personal recommendation is suitable for the customer's demands and needs at the time the personal recommendation is made.*"

ICOB 5.3 'Provision of information to retail customers' says, at 5.3.1 R, an insurance intermediary must provide the following to a retail customer before the conclusion of a relevant contract:

- a policy summary
- a statement of price; and

- draw the attention of the customer orally to the importance of reading the policy summary, and in particular the section of the policy summary on significant and unusual exclusions or limitations.

ICOB 5.3.24 R includes that:

"*For the duration of a non-investment contract, an insurance intermediary must notify a retail customer of:*

(1) changes to the premium, unless the change conforms to a previously disclosed formula;
(2) changes to any term or condition of the contract, together with an explanation of any implications of the change where necessary…"

ICOB 5.5.14 R says:

"*A statement of price must include the following information:*

(1) the total amount of the premium for the non-investment insurance contract or, if the premium cannot be indicated, the basis for the calculation of the premium enabling the retail customer to verify it;
(2) for non-investment insurance contracts of more than one year, details of the period for which the premium is valid, whether it will be reviewed at a certain time or at set periods and, if so, when it will be reviewed;
(3) fees, administrative charges and taxes payable by the retail customer via the insurance intermediary in addition to the premium. Fees and administrative charges include any interest payable on the premium, including where the premium is paid by way of a credit agreement taken out either for payment of the premium only or for the purpose of purchasing goods or services as well;
(4) a statement identifying separately the possibility of any taxes not payable via the insurance intermediary;
(5) where the non-investment insurance contract is purchased in connection with other goods or services:
(a) the premium for the non-investment insurance contract, separately from all other prices in relation to the other goods or services, if an additional price is charged; and
(b) whether purchase of the non-investment insurance contract is a requirement of purchasing the other goods or services or not; and
(6) the total price to be paid by the retail customer for the non-investment insurance contract."

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

37. 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 GISC Code which set out minimum standards of good practice for its members to follow when selling insurance, including PPI.

38. Of particular interest:

- Among other things, members promised that they would:

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

– Under the heading 'helping you find insurance to meet your needs':

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

Matching your requirements

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

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

Information about products and services

3.3 We will explain all the main features of the products and services that we offer, including:

…

- *all the important details of cover and benefits*
- *any significant or unusual restrictions or exclusions;*
- *any significant conditions or obligations which you must meet; and*

…

Information on costs

3.4 We will give you full details of the costs of your insurance including…

…

- *if we are acting on your behalf in arranging your insurance and you ask us to, we will tell you what our commission is and any*

other amounts we receive for arranging your insurance or providing you with any other services.

…

Advice and recommendations

3.5 If we give you any advice or recommendations, we will:

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

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

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 ABI Code including:

> *"Explain all the essential provisions"*
> *It is necessary for the intermediary (insurer, if dealing direct) to provide an overview of the policy. The detail will vary depending on the particular class of insurance. However, the proposer should have a reasonable understanding of what he is buying, whether this is explained orally or whether he is given a summary and his attention drawn to the main points. In this respect, it is important to recognise the responsibility under the ABI Statement of General Insurance Practice that insurers will work towards clearer policy wordings.*
>
> *The intermediary is not expected to go through all the provisions and exclusions in detail. The important feature is to identify the level of cover being provided (for example, in the case of household contents whether it is "indemnity" or "new for old"), that the type of policy being sold suits the circumstances of the proposer and the level of protection they are seeking as far as possible. It is not good enough simply to offer, for example, an indemnity basis of cover without explaining the limitations and, indeed, that other options are available, unless, of course, the proposer wittingly asks for that type of cover.*
>
> *"Draw attention to any restrictions and exclusions"*
> *The same general principles outlined above apply equally here. Certain exclusions, conditions, restrictions etc under a particular policy will be common to all policyholders, for example, a condition about fraud. In those circumstances, it would not be necessary to identify these other than by reference to general exclusions applying to all policyholders of a particular type of insurance, either orally or in policyholder documentation.*
>
> *However, some will be more relevant and, indeed, significant to certain but not other policyholders. An example would be where benefit to self-employed people is either excluded or severely restricted for redundancy cover under a creditor insurance policy. Clearly, self-employed people should be made aware of this so they can decide whether the other benefits under the policy and the premium to be paid justifies taking out such a policy.*

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

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

The ABI Statement of Practice for Payment Protection Insurance

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

Providers will give sufficient detail of the essential provisions of the cover afforded by the policy so as to ensure, as far as is possible, that the prospective insured person understands what he/she is buying.

In particular:

the suitability of a contract will be explained to those who are self-employed, those on contract or part time work, and those with pre-existing medical conditions;

details of the main features of the cover as well as important and relevant restrictions will be made available and highlighted at the time the insurance is taken out with full details being sent afterwards;

all written material will be clear and not misleading;

full details of the cover will be provided as soon as possible after completion of the contract.

The law

45. 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.

46. I have also considered carefully WFAC's representations about the law set out in a number of documents including most recently its letters of 22 June 2017 and 14 February 2018 in relation to Mr H's complaint and its letters to this office about complaints generally of 2 March and 5 June 2017.

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

47. I am also mindful of the evidential provisions and rules 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 H's.

48. The sale took place after insurance mediation became a regulated activity in January 2005, so Halifax was required to take into account the evidential provisions in DISP App 3 when considering Mr H's complaint.

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

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

DISP App 3.1.3 G

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

(1) for some breaches or failings (see DISP App 3.6.2 E), the firm should presume that the complainant would not have bought the payment protection contract he bought; and

(2) for certain of those breaches or failings (see DISP App 3.7.7 E), where the complainant bought a single premium payment protection contract, the firm may presume that the complainant would have bought a regular premium payment protection contract instead of the payment protection contract he bought.

DISP 3.1.4 G

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

DISP App 3.6.1 E

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

DISP App 3.6.2 E

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

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

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

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

DISP App 3.6.3 E

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

Overall

51. And so 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 Halifax gave advice, whether it advised Mr H with reasonable care and skill – in particular, whether the policy was appropriate or 'suitable' for Mr H, given his needs and circumstances.

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

52. Mr H says Halifax ought fairly and reasonably to have gone further than I have suggested. I shall address Mr H's representations about this later on.

b) the sale - what actually happened?

53. Not surprisingly given the passage of time since Mr H took out the policy, Mr H says he does not remember how he was sold the policy or if Halifax advised him to take it out.

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

55. Halifax has provided: a copy of the actual Credit Card Application and Credit Card Agreement Mr H signed; a copy of a 'Credit Card Repayments Summary of Cover'; and a copy of a document headed 'Credit Card Repayments Cover – Demands And Needs Statement' which included some of Mr H's personal details.

56. The Credit Card Agreement, which was signed by Mr H, included a box to tick for Mr H to apply for the policy. The Credit Card Application included a printed 'X' to indicate the policy was to be added.

57. The Demands And Needs Statement, which is undated, related to Mr H and said the monthly premium was '*78p per £100 of your outstanding balance each month*'. It went on to say:

Need

[Mr H] *you have confirmed that you are working and have applied for a credit card. You therefore require the peace of mind that should your income stop suddenly this cover may help to pay the outstanding balance on your credit card.*

Our Recommendation And The Reason For Making It

We are advising and making a recommendation to you after we have assessed your needs based on the information provided to us.

We recommend that you consider our Credit Card Repayments Cover, and you have advised that you do not have existing cover that you wish to use. You have also taken into account the cost of the insurance which will be added to the outstanding balance on your credit card each month. Credit Card Repayments Cover provides protection in the event of accident, sickness, involuntary unemployment, critical illness, if you become a full time carer, or in the event of your death.

Please note that cover is subject to underwriting. Should your application be accepted you will also be sent detailed policy documentation. We advise you to read this documentation carefully.

We would like to draw your attention in particular to exclusions and conditions that may apply under this policy. You should read these carefully in line with your own circumstances to ensure that you fully understand any implications.

This policy is designed to cover your monthly credit card repayments in the event of your income stopping unexpectedly. If you have any further queries at this point please do not hesitate to contact us for further information. Contact details are included in the policy documentation.

58. The Summary of Cover, also undated, included the following information about the policy:

This summary outlines cover available under our Credit Card Repayments Cover policy, which is underwritten by Halifax Insurance Ireland Limited and Halifax Assurance Ireland Limited. The following summary does not contain the full terms and conditions and should be read in conjunction with the full policy wordings, a copy of which are available on request.

COVER

Credit Card Repayments Cover can protect you in the event of:

Life Cover

Disability Cover

Unemployment Cover

Carer Cover

Hospitalisation Cover

Critical Illness Cover

If you are under the age of 65 and still in work at the date of loss we agree to provide death, disability, unemployment, carer cover and critical illness cover subject to terms, conditions and exclusions. If you are over the age of 65 or permanently retired at the date of loss we agree to provide death and hospitalisation cover subject to terms, conditions and exclusions. This policy is a renewable policy. All cover under this policy will end and all monthly benefits will stop automatically, if you fail to pay two minimum payments on your credit card for two consecutive months, or if you are diagnosed with a named critical illness and a successful claim is made, or when you reach the age of 70. Please see Section 11 of your policy booklet for full details on how cover ends.

LIFE COVER

Benefits: If you die between the start date and the end date, we will pay the outstanding balance at the date of your death, on your credit card up to a maximum of £25,000.

Exclusions: We will not pay life benefits: If your death results from suicide or directly relates to any pre-existing condition or chronic condition. Please see policy booklet Section 3 (B) for full details on the exclusions.

DISABILITY COVER

Benefits: In the event of a valid claim, we will pay 10% of the outstanding balance, at the date your statement is printed, to a maximum of £2,500 a month.

Exclusions: We will not pay disability benefits resulting from: any pre-existing condition or chronic condition, backache and related conditions unless supported by radiological evidence, psychotic or psychoneurotic illness, mental or nervous disorder, stress or stress related conditions unless the condition is diagnosed by a consultant and you are under continued supervision and receiving treatment from a consultant. Please see policy booklet Section 4 (B) for full details on the exclusions.

UNEMPLOYMENT COVER

Benefits: In the event of a valid claim, we will pay 10% of the outstanding balance, at the date your statement is printed, to a maximum of £2,500 a month.

Exclusions: We will not pay unemployment benefits if you were not in 6 months continuous employment immediately before the date of your claim, you become voluntarily unemployed or you work on a fixed term contract which ends unless you were working continuously for the same employer for at least 24 months, you were on a contract for at least 12 months and had it renewed at least once or you were originally employed on a permanent basis by the same employer but were transferred to a fixed term contract without a break in employment. Please see policy booklet Section 5 (B) for full details on the exclusions.

CARER COVER

Benefits: If you become a carer between the start date and the end date, we will pay the outstanding balance, on your credit card up to a maximum benefit of £25,000.

Exclusions: We will not pay carer benefit if the sickness, disease, condition or injury of the person being cared for existed prior to the start date, or in our reasonable opinion the Community Care Assessment does not confirm that your relative requires a carer or if your work ceases for any other reason not associated with the need to become a carer. Please see policy booklet Section 6 (B) for full details on the exclusions.

HOSPITALISATION COVER

Benefits: In the event of a valid claim, we will pay 10% of the outstanding balance at the date your statement is printed, up to a maximum of £2,500 a month.

Exclusions:

We will not pay benefits if the disability is resulting from: any pre-existing condition or chronic condition, backache and related conditions unless supported by radiological evidence, psychotic or psychoneurotic illness, mental or nervous disorder, stress or stress related conditions unless the condition is diagnosed by a consultant and you are under continued supervision and receiving treatment from a consultant. Please see policy booklet Section 7 (B) for full details on the exclusions.

CRITICAL ILLNESS COVER

Benefits: In the event that you suffer from a Critical Illness, we will pay the outstanding balance, as at the date of diagnosis of the critical illness, from which you survive for a period of 30 days or more from the date of diagnosis (not including any payments you have missed or any interest on them) up to a maximum of £25,000.

Exclusions: We will not pay benefit if the critical illness results from any pre-existing condition or chronic condition, if the critical illness is suffered by you within 3 months of the start date or if the condition relates directly or indirectly from intentionally self-inflicted bodily injury. Please see policy booklet Section 8 (B) for full details on the exclusions.

59. I note the payment protection cover information in the Summary of Cover matches the terms of the policy set out in the Credit Card Repayments Cover Conditions.

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

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

- Whilst it is possible that Halifax might not have provided any advice about the policy, it is more likely than not that it did in the circumstances of this case. In reaching that conclusion I have taken into account the representations of both sides on this point. I am mindful that Mr H's recollections of what happened in 2005 appear, understandably, to be limited – for example, as I have already mentioned, I am satisfied he is mistaken about how much he earned in 2005. And, whilst I cannot be certain about what happened, I think it is more likely that Halifax's representations – that it recommended the policy to Mr H – are more likely to reflect what actually happened, given its knowledge of how sales of this nature should have been conducted by its branch staff at the time.

- It is more likely than not that there were some discussions about the policy Halifax was recommending at the meeting between Mr H and the representative.

- It is more likely than not that the Credit Card Repayments Cover Conditions were sent to Mr H after the meeting.

c) did things happen as they should in 2005?

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

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

63. In reaching that conclusion, I note the Credit Card Agreement included a box to tick – and which was ticked – next to the following statement:

    I wish to apply for Credit Card Repayment Cover

64. The Credit Card Application included a printed 'X' to show Mr H had opted to take out the policy. I am mindful that: the option to not tick the box on the Credit Card Agreement was given, and Mr H did not opt to go ahead with another insurance policy referred to as 'Credit Care' on the Credit Card Application.

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

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

67. I cannot say for certain what steps Halifax took to establish whether the policy was a suitable recommendation for Mr H. The adviser had information about some of Mr H's financial circumstances, but there is not any specific evidence to show that the adviser took steps to establish whether Mr H would have been affected 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 Halifax considered whether Mr H had any pre-existing medical conditions.

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

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

    - Mr H met the eligibility criteria for the policy.

    - Mr H had a need for the policy – Mr H says he was financially stretched and so it seems likely that his finances would be put under even greater strain if he were not working – even allowing for the unspecified redundancy payment he has told us he was entitled to. He has not elaborated on what this would have been, but as he had been with his then employer for around four years I think it is unlikely it was significant relative to his annual salary). And Mr H has not said he was entitled to enhanced sick pay from his employer. In the light of the employment details he has given us I do not think either his redundancy lump sum in relation to his salary would have amounted to – or that his sick pay would have been paid for a period equivalent to – six months' pay or more. So the policy would have helped Mr H manage the consequences were he unable to work.

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

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

    - There were limits to the cover provided by the policy, including the 'experience, education or training' condition. But the policy still provided valuable cover given Mr H's limited provisions, which meant the policy could play an important role to help preserve those provisions, or after they were exhausted.

- Whilst the policy would only pay benefits for a maximum of 12 months for each disability or unemployment claim, in my view it still provided useful cover given Mr H's circumstances, and the potential consequences if Mr H were to be unable to meet the credit card repayments.

70. I have also considered whether when providing advice Halifax gave Mr H sufficient information about the cover provided by the policy to enable Mr H to understand what Halifax was recommending to him and make an informed decision about whether to follow that advice and take out the policy.
71. I am satisfied it is more likely than not that Mr H was given a broad description of what the policy was intended to cover (that is, that the policy would protect his card payments in the event he was unable to work through disability or unemployment). I have reached this conclusion because I think Mr H would have been told this – at the very least – during the discussion with the adviser. I think it is unlikely Mr H would have taken out the policy without any sense of what the policy was. The Credit Card Agreement he signed also described the policy as 'Credit Card Repayment Cover', which would have given him some idea of what the policy was for.

72. But the evidence from the time of the sale does not tell us whether Halifax gave sufficient information about Mr H having to make payments during a claim (although it did not suggest he would not have to either) or – as Mr H says – that the payments would be added to the account balance attracting interest if unpaid at the end of the month. The policy would meet his 'repayments' (rather than pay off his 'balance' like, for example, the life cover) if he was unable to work because of disability or unemployment. But he would not have understood from this that it would pay out a fixed monthly amount of 10% of the outstanding balance at the start of the claim, that the unemployment cover was limited to 12 payments, nor would he have known what exclusions and limitations on cover there were.

73. Whilst I am satisfied Halifax sent Mr H the full policy conditions which gave information about the benefits, limitations and exclusions after he applied for it, I do not consider that means Halifax gave Mr H 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 H did not base the decision he made at the meeting to take out the policy on the full policy conditions. Halifax says the Demands and Needs Statement was completed by the adviser based on Mr H's answers to a series of questions designed to consider the suitability of the policy. But that document is undated and it is uncertain as to if, or when, Mr H saw it. The same applies to the Summary of Cover, which Halifax simply says was provided to Mr H and formed part of the sale process – it is unclear as to when it was provided to him.

    - Notwithstanding the uncertainty over the Demands and Needs Statement and the Summary of Cover, the former only says if Mr H's application was accepted he would be sent detailed policy documentation, which Halifax advised Mr H to read carefully. There is nothing to suggest Mr H was told that he should delay making a final decision about the policy until he had received and considered the contents of the policy documentation.

- It was for Halifax to provide Mr H with the most important information he required to make his decision before he took out the policy (see the ICOB requirements) and the full policy conditions later.

74. Overall, having considered the parties' representations about what happened, whilst I am satisfied that the policy was a suitable recommendation for Mr H, I am not persuaded Halifax did enough to present information about the policy it was recommending in a way that was fair and reasonable to Mr H. I am not persuaded Halifax gave Mr H 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.

75. In reaching these conclusions, I am mindful of the representations made by Halifax suggesting that it did all it was required to do by providing the information to Mr H. Whilst I am mindful of Halifax's view, I am satisfied the rules meant Halifax ought fairly and reasonably to have done more than it did to draw the important information about the policy to Mr H's attention before he decided to take out the policy.

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

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

78. It is also arguable that Halifax failed to disclose the costs information envisaged at DISP App 3.6.2 E (8). Halifax did refer to how the premium was calculated in the Demands And Needs Statement – a very important piece of information. But it could have made clearer the fact that Mr H would continue to be charged premiums during a claim and that the premiums would attract interest. Also, setting out the cost as 78p for every £100 does not necessarily mean Mr H would have known what the policy was likely to cost on a monthly basis given its dependency on a potentially changing outstanding balance.

79. I have considered carefully Mr H's arguments that Halifax should have done more than I have found it should have done and provided additional information. I have given particular thought to Mr H's view that the FCA's Principles for Businesses (i.e. Principle 6 – "A firm must pay due regard to the interests of its customers and treat them fairly") and the common law duty of utmost good faith meant that:

    - Halifax 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 Halifax rather than the insurer.

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

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

80. Ultimately it is a matter for the FCA as to what its intentions were in terms of the Principles and what they meant for businesses when selling PPI. But I think it is unlikely the FCA's intention was for the Principles to require businesses to disclose the type of information Mr H says should have been disclosed in addition to the information I have set out above.

81. In reaching this conclusion I am mindful that in its Policy Statement 17/3 – in the context of non-disclosure of high levels of commission but in my view relevant to the FCA's broader intentions – the FCA says disclosure of commission in PPI sales was not required by ICOB and so a firm's failure to disclose was not a breach of those rules (or the industry codes beforehand which did not require the proactive disclosure of commission) – and so is unlikely in and of itself to have been a breach of its Principles.

82. 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.

83. 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.

84. 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]

85. 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.

86. 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 H says Halifax 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 Halifax. I note that in response to the Provisional Decision, Mr H made some additional representations about the duty of utmost good faith. I have considered those – along with the other representations in this respect, but they have not changed my view about Mr H's complaint.

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

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

87. Halifax 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.

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

89. 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.

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

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

92. 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 H says Halifax should have done.

93. 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 H suggests it should.

94. This is equally true of ICOB – because intermediaries are not required to proactively disclose commission. So on this issue there is again much in common between the pre and post-regulatory position.

95. 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.

96. Overall, taking into account the law and regulations, regulator's rules and Principles, industry codes and standards of good practice applicable to this complaint, I am not persuaded that Halifax ought fairly and reasonably to have provided the additional information Mr H says it should have done.

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

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

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

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

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

101. Mr H 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 Halifax can produce evidence to show he would have taken out the policy, which Mr H says it cannot because its failings were so fundamental).

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

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

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

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

106. Rather, I mean when Halifax advised Mr H that there was a suitable product he could buy that would protect his credit card payments in the event he was unable to work

because of disability or unemployment, that resonated with him in some way and he concluded that he wanted that product.

107. The issue here is that the decision Mr H made to accept Halifax's 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 Halifax had told him everything it should have done about the policy it was recommending.

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

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

110. Whilst Mr H 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.

111. Mr H's own evidence or 'testimony' is that, if he could not work through unemployment, he would have been entitled to redundancy pay from his employer. But he has not provided details of what he would have got. He has not said he was entitled to any enhanced sick pay from his employer. He said he had death in service benefits but, unlike the PPI policy, that would not have provided a regular benefit payment if he was unable to work due to disability or unemployment. Although he also said he had mortgage protection insurance in place, presumably that would have protected his mortgage payments as opposed to his credit card payments. Mr H said he would have had no other means of making his credit card payments if he was not working.

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

113. In relation to the costs, Halifax might have told him about an important part of the costs information – that the policy cost 78p per £100 of outstanding balance each month.

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

115. Even if Mr H had not been shown the Demands and Needs Statement or Summary of Cover, the Credit Card Application and Agreement showed that the policy was

described as credit card *repayment* cover (my emphasis). Mr H could have interpreted that in a number of ways, but it seems unlikely that he would have thought that meant the policy would pay off his balance in full immediately. Instead, I think it is more likely he would have thought from the limited information in the Credit Card Application and Agreement that the policy would meet the regular repayments he was due to make.

116. As the example I set out earlier in this decision illustrates, the policy would more than cover the contractual payment and the costs added to the account during the period of the claim and the interest associated with it. So if Mr H had not looked at the Summary of Cover or Credit Card Repayments Cover Conditions it is possible that the 10% monthly benefit the policy offered would actually have been better than Mr H expected.

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

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

119. I am not persuaded Halifax told Mr H that any claim he made would be limited to a 12-month period. But I believe at the time 12 months was likely to have been a longer period than Mr H would have received full sick pay for, and it is unlikely any redundancy lump sum would have equated to that amount of pay. It would also have allowed him time to explore other income options, for example to find a new job in the event of an unemployment claim.

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

121. So, whilst Mr H 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.

122. Possibly the most significant differences between what Mr H thought he had bought and what he had actually bought were the limitations on back and mental health claims. The terms of the policy also differed from what Mr H might have expected because he could only claim disability benefits if he was unable to do his own, or any similar, job or a job to which he was qualified by way of his experience, education or training. If Mr H had known this, it might have played into his thinking about what he would have done and how these restrictions might have affected him. And I accept they might have given him pause for thought – although it is possible he might not have been overly concerned given that if Mr H was unable (through disability) to carry on his own occupation the chances that he would be able to take up a similar job or a job for which he was qualified by way of his experience, education or training would also, in all

probability, be limited. I have considered the further representations made in response to my Provisional Decision, but they have not changed my mind on this point.

123. In response to the Provisional Decision, Mr H has complained about the following paragraph in the terms and conditions of the policy:

> "*We have the right to change the terms in this policy (including the percentage rate which is used to work out the monthly premium) by giving you 30 days' notice in writing. If you are not happy with the change, you may cancel your cover with effect from the date of this change.*"

He says that this gives the firm the right to unilaterally vary the cover and the premium, and this is a contractual term which is unfair. He refers to a previous edition of a newsletter published by the Financial Ombudsman Service (Ombudsman News Issue 36), which considered the issue of unilateral variation of terms. Mr H also says that the non-disclosure of this term is a breach of the duty of utmost good faith.

I have considered these arguments carefully.

124. In this case the complaint is against the seller of the policy, Halifax, who is also the lender, but who is not the insurer. The right to vary the cover and premium is a right that has been put into the contract by the insurer and can only be exercised by the insurer. So what the insurer can and cannot do and whether it has acted unfairly or not is not something I can consider here – although, in any event, I cannot see the insurer ever did exercise the right to vary the terms. My consideration in this case is whether Halifax acted fairly and reasonably towards Mr H when it sold him the policy. And if it did not, whether and to what extent I think he has lost out as a result.

125. I have therefore considered whether Halifax should have done more to clearly bring the contractual term about the insurer's right to unilaterally vary the cover and the premium to Mr H's attention. And having done so I think it should have done more. I think this was a significant term. So I think Mr H would have wanted to know about this. Because Mr H was not clearly told, I do not think Halifax acted fairly and reasonably towards him.

126. But even if Halifax had done more to highlight the term clearly to Mr H, I do not think this would have made a difference to his decision to buy the PPI for the reasons I have already explained in detail.

127. I am also mindful that both parties had the right to withdraw from the policy agreement with 30 days' notice at any time throughout the duration of the contract or – if Mr H was unhappy with any changes made to the policy – he could withdraw with effect from the date of those changes. And so if any new terms were proposed by the insurer, Mr H had a reasonable amount of time to consider whether he wanted to continue with the policy. If Mr H did not like any newly proposed terms and conditions, he could have chosen not to accept them and sought cover elsewhere – if he still wanted this type of cover.

128. So overall while I accept Halifax should have done more to bring the above paragraph from the terms and conditions to Mr H's attention, for the reasons I have set out

above and in my Provisional Decision I do not think he would have been put off buying the policy if Halifax had done more.

129. I note that Mr H says that the failure to tell him clearly about this clause was a breach of the duty of utmost good faith. In my Provisional Decision and above, I set out my findings in connection with the duty of utmost good faith in detail. I consider that similar considerations apply in connection with this clause, and I am not persuaded by Mr H's further submissions on this point.

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

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

WFAC have explained to me that the majority of reasons you were likely to miss work were excluded – in particular stress and bad backs – which are the most common reasons people miss work and on their own cut out more than half potential claims. If Halifax had said that they were excluding some of the most common reasons people miss work I would not have wanted this PPI for that reason alone. WFAC have pointed out this just makes it obvious that the PPI was never going to do what it was supposed to be for. It was supposed to protect payments if you couldn't work, but wouldn't have done that in a huge proportion of cases. WFAC have also explained to me that the limitations of contractors claiming are very severe, making it very difficult, if not impossible to claim.

As well as everything else, I was financially stretched. I have often had to run an overdraft. In fact I have struggled to pay my debts and gone into arrears. WFAC say that for me, even more than anybody else, it was wrong for me to spend money on this PPI which was both really expensive, and unlikely to pay out.

I don't think this PPI should have been sold to me and I would not have wanted it if it had been properly explained. WFAC say that Halifax were supposed to treat me

fairly and not take advantage of me, but it cannot be right to sell a product like this without explaining the exclusions, and that they were keeping so much money for something with so little value to me. I feel badly let down by Halifax.

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

132. In light of the findings I have already made, I do not think Mr H'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. For example:

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

    - I am satisfied the requirement on Halifax in 2005 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 H's needs and resources and it also had to explain the features of the cover as I have discussed.

133. I am also mindful that: Mr H's recollections of the sale are, owing to the significant passage of time, likely to be limited; his representations about what he would have done are made in support of a claim for compensation; and the paragraphs I have quoted resemble quite closely the consumer representations made in other cases where WFAC represents the consumer. I note, for example, that although Mr H has consistently said he was employed at the time the PPI was sold these representations include reference to it being difficult for 'contractors' to make a successful claim under a PPI policy – **and i**ssue that does not appear to be relevant to Mr H's complaint.

134. I do accept the limitations on the disability cover provided by the policy might well have given Mr H pause for thought – as Mr H says, these are common conditions.

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

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

137. But Mr H, in his circumstances, still had some good reasons to take out the policy, as I have set out, notwithstanding the reduced benefit of the policy compared to what he might have expected from the information he was given.

138. Having considered all of the evidence and arguments in this case, I consider it more likely than not that Mr H would still have taken out the policy. The policy was suitable

for him, was sufficiently close to what he thought he was getting and provided benefits that would help him manage the consequences were he made redundant, or unable to work through disability. In the circumstances I consider it more likely than not that Mr H would have taken out the policy in any event notwithstanding the limitations on cover.

139. In reaching that conclusion, I have carefully considered Mr H's representations about the approach he considers a court would take when considering an 'advised sale'. In particular, Mr H has cited select paragraphs of the judgment in *Saville v Central Capital* [2014] EWCA Civ 337 (*Saville*). He suggests Halifax should have asked him 'open and fair' questions about his demands and needs at the time and if it had, he would not have taken out the policy.

140. I note that the S*aville* case involved different circumstances to those in Mr H's complaint. For instance, *Saville* involved a term mismatch between a 5-year single premium PPI policy and a 25-year loan which does not apply here. But in any event, even if Halifax had asked the kinds of questions Mr H suggests it should have done and pointed out the limitations on cover associated with the policy recommended, I think it is more likely than not that Mr H would have taken out the policy in any event given the benefits it still provided and his overall circumstances.

141. I have considered Mr H's representations about causation and DISP App 3, including the general opinion of Stephen Knafler QC provided by WFAC on behalf of Mr H and the further representations it has made about this issue in response to the Provisional Decision. Those rules are for firms but they are a relevant consideration I take into account, along with many other things, when I decide what is, in my opinion, fair and reasonable.

142. I am mindful of the purpose of the rules. I do not think it was ever intended to be at odds with the approach I have taken. The FSA explained its thinking in the policy statement[4] at the time:

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

[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

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.

143. It also said:

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

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

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

144. I have thought about what outcome applying the FCA's rules 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 H 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.

145. 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 H's circumstances I have considered above, I consider it

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

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

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

148. 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.

149. I am satisfied it would not be fair and reasonable in those circumstances to conclude Halifax should pay Mr H 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.

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

151. Mr H has referred me to submissions his representative WFAC made about misrepresentation in other complaints. I have carefully considered the submissions about the approach a court might take if (which in my view is by no means certain in this complex area of law) it were to conclude Halifax misrepresented the contract to Mr H and about the remedy a court might award if it were to find that Halifax had been in breach of its duty of utmost good faith. But they do not persuade me to alter my conclusions about what is fair and reasonable in all the circumstances of the complaint and what is fair compensation in the circumstances of this case. As I have explained above, I do not consider it would be fair and reasonable to put Mr H in a better position than if everything had happened as it should have done.

152. 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 H 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 H 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

153. 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 H.

154. I now ask Mr H to either accept or reject my decision by 13 January 2019.

Nimish Patel
ombudsman