This final decision is issued by me, Jan Ferrari, an Ombudsman with the Financial Ombudsman Service.

My colleague, Ombudsman Julian Cridge, issued a provisional decision on 19 February 2018 ("the provisional decision") explaining that he was not minded to uphold the complaint, and setting out his reasons for reaching those provisional conclusions.

As the parties are aware, the complaint has now been passed to me to determine. I wrote to the parties on 21 August 2018 explaining that:

- Having considered the evidence and arguments presented by the parties prior to the provisional decision, I was minded to reach the same conclusions as Ombudsman Cridge provisionally reached about what is fair and reasonable in the circumstances of Mr H's complaint. I also said that I agreed with the reasons he gave for reaching those conclusions.

- In the circumstances, and subject to any further evidence and representations submitted by the parties after the provisional decision, I was minded to determine the complaint, and issue a final decision, in the terms set out in the provisional decision.

- I would consider the parties' further representations (together with the evidence and arguments submitted before the provisional decision) before reaching my final decision.

Both parties had made submissions in response to the provisional decision, all of which I have carefully considered. No further submissions were made in response to my letter of 21 August. This is my final decision on Mr H's complaint.

summary

1. This dispute is about the sale, in 2002, of a payment protection insurance ("PPI") policy to support a Lloyds Bank plc ("Lloyds") loan.

2. Mr H complains that Lloyds did not properly explain the policy's cost, features, exclusions and limitations. He says that, if it had, he would not have taken the policy out.

3. Lloyds says the PPI was suitable for Mr H. Its position is that Mr H would still have taken the policy, even if it had given him more information about it. So Lloyds does not think Mr H lost out if he did not know some of the things he said he did not know.

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

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

- Taking into account the law, industry codes of practice and what I consider to have been good practice in 2002 (the sale took place before the Financial Services Authority ("FSA") began to regulate the sale of payment protection contracts like these), Lloyds 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 him, to enable him to make an informed decision about whether to follow the recommendation and take out the policy.

- Lloyds did not act fairly and reasonably in its dealings with Mr 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 the recommendation and incomplete information. But if things had happened as they should, on the evidence available in this case, it is more likely than not Mr 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'm required to ask Mr H to accept or reject my decision before 1 November 2018.

background to the complaint

a) events leading up to the complaint

8. In July 2002 Mr H applied for a £700 personal loan in a branch of Lloyds. The application was made during a face-to-face meeting with a member of Lloyds' staff.

9. Mr H signed a loan agreement during the meeting. That agreement also contained an application for PPI to be applied to the loan. The policy's one off upfront premium of £85.67 was paid in advance by being added to the loan (a 'single premium'). The policy ran for the same term as the loan.

10. The loan was repayable over an 18 month term with interest payable at an annual percentage rate of 17.9%. The monthly loan repayment was £44.20 with the PPI costing an additional £5.41, making the total monthly repayment £49.61. So, if the loan and policy had run to the full term of 18 months, the PPI would have cost £97.38.

11. Mr H repaid the loan just under six months before it was due to finish, in late July 2003.

b) Mr H's circumstances in 2002

12. Mr H told us, in the payment protection insurance questionnaire (PPIQ) he completed to help with the investigation into his complaint, that he:

- had been working as a security guard earning £13,000;
- had been with the same employer for about five years, although he was not now sure who that employer was;
- would not have received any pay (beyond statutory pay) if he was off work due to sickness, accident or redundancy;
- had no other ways himself of making his monthly loan repayments but says he could have asked for help from his family;
- had broken a bone in 1986 and had had some time off work as a result. There is nothing to suggest this continued to trouble Mr H after that time.

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

13. Lloyds has provided a copy of the 'your loan protection policy' which sets out the full policy terms and conditions which applied to policies like Mr H's sold in July 2002.

14. The terms and conditions were set out in a 27 page booklet. Among other things, these show that:

- the policy had eligibility criteria that were met by Mr H (who was 44 years old when he took the loan). These criteria included, for example, that Mr H had to be 18 or over but must not reach 75 during the term of the loan agreement;
- the policy provided life cover as well as cancer benefit and would have paid off the remaining loan balance had Mr H died or been diagnosed with an invasive cancer;
- the policy gave accidental permanent total disability benefit of £2,500. This would have been paid to Mr H's bank account and would not have had to be used to pay off the loan unless he wanted to do so;
- the policy provided disability cover. Broadly, if Mr H was unable to carry out the duties of his job (or any other job which he could do, bearing in mind his knowledge and training) due to accidental bodily injury or sickness, it would have paid 1/30th of the monthly loan repayment for each day Mr H could not work. This would have been calculated from the first day Mr H could not work, but there was a 15 day waiting period before Mr H would have been able to claim. The benefit was payable monthly and would have been paid until Mr H was fit to return to work or until the end of the loan term – whichever came first;
- the policy provided unemployment benefits. Broadly, it would also have paid 1/30th of the monthly loan repayment for each day Mr H was unemployed. Again, this would have been calculated from the first day Mr H was unemployed, but there was a 15 day waiting period before Mr H would have been able to claim. The benefit was payable monthly until Mr H ceased to be unemployed, the loan term ended, or Mr H had received twelve monthly benefit payments – whichever came first;
- there were two insurers – Scottish Amicable Life plc provided the life cover and Lloyds TSB General Insurance Limited provided the rest of the cover.

15. To put the benefits into context, if Mr H had made a successful claim for 12 months, the policy would have paid loan repayments totalling £595.32.

16. Returning to the policy terms and conditions, there were also exclusions. These included, for example, claims not being covered if they resulted from pre-existing medical conditions which Mr H knew about or should reasonably have known about at the start date.

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

18. The policy stated that an 'appropriate amount' of the single premium would be refunded if Mr H repaid the loan early and cancelled the policy. The examples given in the document show this was not a pro-rata refund of the premium.

19. Instead, the policy said the 'appropriate amount' was a maximum of 80% of the single premium and – by way of illustration – examples of a 36-month and a 60-month £3,000 loan were given. These showed different refund amounts depending on when each loan was repaid. The illustrations showed the premium refunds would be 61% for the 60 month loan and 41% for the 36 month loan if the loans were repaid after 12 months.

d) the complaint and Lloyds' response

20. Mr H's representative We Fight Any Claim Ltd (WFAC) made lengthy and substantial representations on his behalf, before the issue of the provisional decision.

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

- He felt pressured and rushed into taking the policy with the loan. Mr H says that the way it was put across to him, he thought he could not have the loan without taking the policy.
- The policy was not suitable for him – particularly as he was financially stretched at the time – and offered very little.
- Lloyds did not give him clear information about the policy's cancellation and refund terms. If he had been clearly told there was no proportionate refund of the premium if the loan was settled early, he would never have bought the policy.
- Lloyds did not give him clear information about the full cost and benefits associated with the policy.
- Lloyds did not tell him about the poor value of the policy, which is illustrated by the low claims ratio. Most of the money went toward costs, profits and commission rather than claims. Lloyds' failure to explain this to him was a breach of the common law duty of utmost good faith.

- Lloyds did not tell him about the limitations affecting the policy, in particular that claims for back injury, stress, mental health and pre-existing medical conditions were subject to exclusions and restrictions. This reduced further the policy's value, especially as back injury and stress are the most common reasons for long term absence from work.

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

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

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

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

22. Lloyds has also made representations. Again I will not restate them all, but I have read and considered them carefully. In essence Lloyds says the following:

    - Mr H applied for the loan in a branch meeting. Because this took place so many years ago, it cannot now be certain exactly what was said in that meeting. But it would have properly considered Mr H's circumstances at the time to assess the policy's suitability for his needs.

    - The policy was suitable for Mr H.

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

23. Both parties made further representations in response to the provisional decision, all of which I have read and considered carefully. The parties, in large part, restated the substance of their earlier representations.

24. I will refer at relevant times in this decision to some of the specific representations made, but, briefly and in summary, Mr H says I ought to take the following into account:

    - DISP App 3 has not been applied lawfully.

    - The provisional decision misrepresents the position on utmost good faith.

    - The provisional decision does not consider the poor value of the contract.

- The firm undertook to offer advice, but the fact that the policy would have been useful does not mean that the advice was suitable – and our position is at odds with the case of *Saville v Central Capital (2014) EWCA Civ 337* ("Saville")

- The inadequate disclosure of stringent unemployment exclusions, in particular how the exclusion of voluntary redundancy/unemployment (taking into account standard and usual compromise agreements) dramatically reduces the scope of cover.

- The relevant policy condition meant that Mr H could only claim for accident or sickness if he was unable to carry out any occupation, rather than just his own, further limiting the cover.

25. Briefly, and in summary, Lloyds says:

- It agrees with the overall conclusions drawn in the provisional decision.

- It agrees that the General Insurance Standards Council (GISC) and Association of British Insurers (ABI) guidelines referred to in the provisional decision are relevant considerations in this case, but they are not determinative of its liabilities. A court might take them into account when determining whether there has been a common law breach of a duty of care, but the GISC and ABI publications do not have the status of binding obligations owed to Mr H as if they were FCA rules.

- The overarching questions set out in the provisional decision appear to include wording and expectations derived from irrelevant considerations such as the FCA's Principles for Businesses. It would be helpful if I could clarify which of the standards I rely on for my final conclusions and the source.

- The provisional decision set out what, in the Ombudsman's view, Lloyds should and should not have done. It would be helpful if I were to explain what I think the legal consequences are and whether those breaches amounted to an actionable legal breach making Lloyds legally liable.

- Its view is that there were no actionable legal breaches - it provided Mr H with the information it was required to provide as a matter of law, it did not owe him a legal duty to point out that he ought to read the terms and conditions of the policy, and the GISC and ABI publications did not create any additional legal duty.

- As there were no actionable breaches it would be difficult for me to reach a different conclusion to the conclusion a court might reach on the basis that it is fair and reasonable to do so – the sorts of considerations that are relevant to whether or not there has been an actionable breach of a legal duty of care will normally lead to a fair and reasonable result.

my findings

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

a) relevant considerations

27. 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.

28. This sale took place in 2002, before the sale of general insurance products like these became regulated by the FSA in January 2005. So the FSA's and FCA's overarching Principles for Businesses, Perimeter Guidance and insurance conduct rules (ICOB and ICOBS) are not applicable to this complaint.

29. The credit agreement itself concluded in 2003. That means the unfair relationship provisions set out at s140A of the Consumer Credit Act, the Supreme Court judgment in *Plevin*[1] about s140A of that Act and the rules and guidance made by the FCA about the handling of complaints about the non-disclosure of commission in the light of the *Plevin* judgment, are not applicable.

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

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

31. In Mr H's case, the sale was made during the period of industry 'self-regulation' by the General Insurance Standards Council ("GISC"). It published the GISC Code which set out minimum standards of good practice for its members to follow when selling insurance, including PPI. Lloyds was a member of GISC when it sold Mr H's policy.

32. Of particular relevance to this dispute:

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

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

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

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

…

Matching your requirements

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

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

Information about products and services

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

…

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

…

Information on costs

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

- *details of any fees and charges other than the insurance premium, and the purpose of each fee or charge (this will include any possible future fees or charges, such as for changing or cancelling the policy or handling claims)*
- *…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.'*

33. The Association of British Insurers (ABI) also published a number of codes, which I consider to be indicative of the standards of good practice expected of intermediaries, like Lloyds, selling insurance at the time. Lloyds has indicated it was a member of the ABI so would have agreed to comply with the codes below.

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

34. 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 shall:*
  - *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

35. 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.

36. 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…

37. The 'Resume for Intermediaries', published in July 1999 and relating to the ABI Code in place at the time of sale, explained how insurers should interpret some of the key requirements of the code including:

"Explain all the essential provisions"

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

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

"Draw attention to any restrictions and exclusions"

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

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

38. 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

39. 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.*

40. Lloyds was a member of GISC and had agreed to comply with the GISC Private Customer Code. I also consider the ABI Codes to be indicative of the standards of good practice expected of intermediaries like Lloyds at the time.

41. So I am satisfied I should take the GISC Code, ABI Code and the other codes into account when deciding what is, in my opinion, fair and reasonable in the circumstances of Mr H's case.

42. Whilst I note Lloyds's representations about the status of the various GISC and ABI publications, I am satisfied they are relevant considerations in their own right to be taken into account when deciding what is, in my opinion, fair and reasonable (either as relevant codes of practice, or as indicators of good practice), and not just to the extent that a court might take them into account when considering the existence or standard of a common law duty of care.

The law

43. 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.

44. I have considered carefully the parties' representations about the law set out in a number of documents including WFAC's letters to this office about complaints generally dated 2 March and 5 June 2017. and its response of 27 March 2018 to the Provisional Decision, and the response from Lloyds dated 16 March 2018 (which also referred to points raised in a response to a similar case from Freshfields Bruckhaus Deringer, dated 1 August 2017).

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

45. I am also mindful of the evidential provisions and guidance set out at DISP App 3, first issued by the FSA in 2010, which sets out how firms should handle complaints relating to the sale of payment protection contracts like Mr H's.

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

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

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

DISP App 3.1.3G

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

(1) for some breaches or failings (see DISP App 3.6.2E), 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 3.7.7E), where the complainant bought a single premium payment protection contract, the firm may presume that the complainant would have bought a regular premium payment protection contract instead of the payment protection contract he bought.

DISP 3.1.4G

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

DISP App 3.6.1E

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

DISP App 3.6.2E

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

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

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

(9) recommended a single premium payment protection contract without taking reasonable steps, where the policy did not have a pro-rata refund, to establish whether there was a prospect that the complainant would repay or refinance the loan before the end of the term;

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

(11) sold the complainant a policy where the total cost of the policy (including any interest paid on the premium) would exceed the benefits payable under the policy (other than benefits payable under life cover); or

(12) in a sale of a single premium payment protection contract, failed to disclose to the complainant, in good time before the sale was concluded, and in a way that was fair, clear and not misleading:

(a) that the premium would be added to the amount provided under the credit agreement, that interest would be payable on the premium and the amount of that interest; or

(b) (if applicable) that the term of the cover was shorter than the term of the credit agreement and the consequences of that mismatch; or

(c) (if applicable) that the complainant would not receive a pro-rata refund if the complainant were to repay or refinance the loan or otherwise cancel the single premium policy after the cooling-off period.

DISP App 3.6.3E

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

DISP App 3.7.7E

Where the only breach or failing was within DISP App 3.6.2E (9) and/or DISP App 3.6.2E (12), and in the absence of evidence to the contrary, the firm may presume that instead of buying the single premium payment protection contract he bought, the complainant would have bought a regular premium payment protection contract.

Overall

49. 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 as follows:

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

    - Whether Lloyds 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.

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

51. Lloyds has suggested these overarching questions incorrectly draw upon the wording of subsequent regulatory requirements such as the FCA Principles for Businesses. I disagree.

52. I accept that the FCA's Principles for Businesses place similar requirements on businesses carrying on regulated activities to the overarching questions I have set out here. But, for the reasons I have explained, the Principles for Businesses do not apply to this complaint, and I have not taken them into account. Rather, I have distilled the overarching questions from the various relevant considerations which *do* apply, and which I have set out above

b) the sale – what actually happened?

53. The parties agree the sale took place in July 2002 in a face-to-face meeting between Mr H and Lloyds' representative at a Lloyds branch. They also agree Lloyds gave advice and recommended that Mr H take the policy with the loan.

54. During the course of the complaint Mr H submitted a PPIQ setting out his recollections of what happened. In it he indicated his recollection that he paid for the PPI by a premium paid each month. He also said that the purpose of the loan was to buy presents for his grandchildren.

55. Lloyds has said the policy was paid for by way of a single premium, the cost of which was added to the loan at the outset and then repaid over the rest of the loan term. It has provided a copy of the actual loan agreement Mr H signed, which supports this.

56. The loan agreement itself (including the detailed loan terms and conditions that were attached to the copy I have seen) do not provide any detail about the terms of the PPI itself, beyond the premium cost of £85.67 and its monthly cost (including interest) of £5.41.

57. Lloyds has said that its representative would have gone through the policy's cost, features and limitations in the meeting. Mr H has said this about the sale in his PPIQ:

It was during a meeting that I was sold the PPI policy in July 2002. The sale took place at a local branch […]. During the conversation we discussed the loan amount. During the discussion with the advisor we talked about the insurance would cover me for sickness. The way it was put across to me, if I did not take out the insurance I would have not got the agreement. The fact that I was rushed / pressured influenced my decision to take out the PPI – I would not have taken it out otherwise.

58. Having considered the representations of both sides and keeping in mind the limitations on the evidence available about what happened during a meeting over 16 years ago, I find it more likely than not that:

- Lloyds gave Mr H advice about the PPI, given Lloyds's own representations that it recommended the policy to Mr H,

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

59. There is a reference on the loan agreement to a Loan Protection Policy booklet. However, I have no information about whether this booklet contained the full terms and conditions, or was a summary. Overall I have not seen enough evidence for me to be satisfied Mr H was given a copy of the policy's full terms and conditions at the point of sale.

c) did things happen as they should in 2002?

60. For reasons I shall explain, I consider it is more likely than not that Lloyds fell short of what was reasonably expected of it. Exactly how, and the extent to which, Lloyds fell short, and its relevance to Mr 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 Lloyds had advised and explained things properly.

61. Lloyds needed to make clear to Mr H that he had a choice about whether to take the policy. In other words, it needed to make it clear that it was optional and seek Mr H's explicit agreement to take the policy without him being unfairly pressured by Lloyds.

62. Mr H has said this was not done and that he felt rushed and pressured which he says influenced his decision to take the policy. Mr H also said he was given the impression that if he did not take the insurance he would not get the loan.

63. On the other hand, Lloyds says that its adviser would have explained that Mr H had a choice about the policy and that it did not think it likely Mr H was pressured into taking it. Lloyds also said the loan agreement made it clear the policy was optional.

64. Neither party has been able to give me any real detail about what was said during the sale. I only have limited evidence from both parties about how the policy was sold. So I have looked at the rest of the evidence too.

65. The only contemporaneous document from the sale is the copy of the loan agreement signed by Mr H. The agreement is a pre-printed form, with the only handwritten

elements being the parties' signatures on it. The signature boxes for the parties are at the bottom of the first page of the agreement.

66. The remaining pages of the agreement are the loan's densely written terms and conditions which, as I have said, contain no real reference to the detail of the PPI itself. As this was a meeting, I do not think it likely that Mr H would have given those loan terms much attention. I think it is more likely he would have relied on what he was being told.

67. I do, though, think Mr H would have been likely to have paid more attention to the front page of the loan agreement. I say that because this page was – for him at least – what he had come to the meeting for. It also gives some prominence to some of the important sections of the agreement.

68. Just above where Mr H signed to take the loan there is a box with this wording:

"OPTIONAL LOAN PROTECTION?"

Next to that are *"YES"/"NO"* boxes – the *YES* box contains a pre-printed 'X' showing the loan protection has been taken.

Next to that wording is this:

PREMIUM ADVANCED AS PART OF LOAN?

Again with the same type of "*YES"/"NO*" boxes – and again a pre-printed 'X' in the *YES* box.

69. The PPI is also described as 'Optional Loan Protection Insurance loan' in the part of the loan agreement that deals with the loan costs.

70. Although not conclusive, as it is possible Mr H was told something different to this during the meeting, I do think it is clear that the intention was for the applicant to be given a choice about the policy. I also think that the use of capitals and boxes around the two questions I have referred to make the wording stand out. And its position just above the space where Mr H signed makes it more likely than not that he would have seen that the policy was being described as optional.

71. Mr H says that he felt he had to take the PPI to get the loan and that he felt pressured to agree to it. As I said above, I accept this is possible. But having considered all of the evidence on this point carefully, I do not think it more likely than not that things happened in the way Mr H now describes.

72. In reaching this conclusion I am mindful that these events took place roughly 16 years ago and that the particular discussion in question is unlikely to have been all that memorable for Mr H (and he has taken several loans with PPI since). Any vague memories Mr H might have of pressure seem to me to be more likely to have been Lloyds' adviser making a recommendation that he *should* have the policy as it was suited to his needs. I do not think a statement like this would have amounted to unfair pressure. On balance, I consider it more likely than not that Mr H agreed to the policy knowing he did not have to and that Lloyds' adviser did not pressure him to agree to it.

73. The parties agree that Lloyds advised or recommended Mr H take out the policy. So given what I said earlier, it had to give that advice with reasonable care and skill to

ensure the policy was appropriate or 'suitable' for Mr H, given his needs and circumstances.

74. The evidence of what was said during the meeting is limited. However, I do think it likely the basics of the policy would have been explained when presenting Mr H with a choice (such as that it was to cover the monthly loan repayments if he was off work due to accident, sickness or unemployment). I say this because I find it unlikely Mr H would have agreed to pay for something if he had no idea what it was.

75. Having said that, I have looked at the paperwork Mr H signed and there is nothing which suggests questions were asked of him by the adviser to determine whether the policy was suitable for him; such as whether he had any pre-existing medical conditions. The credit agreement he signed has a note which says he should read the terms and conditions of the policy booklet before signing. I am not sure how practical it would be for Lloyds to expect Mr H to have been able to read the lengthy policy booklet setting out the full terms and conditions (if that *is* what was referred to on the loan agreement) during a meeting. In any event, as an advised sale it was for Lloyds' adviser to ask questions and establish the suitability of the policy rather than expect Mr H to determine this for himself based on the paperwork.

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

77. Whilst I am not persuaded Lloyds 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 the following:

- Mr H met the eligibility criteria for the insurance.

- Mr H had a need for the policy; it would have helped him maintain the loan repayments for a time if he was unable to work. It seems likely his finances would have been put under strain if he was not working – even allowing for statutory sickness and redundancy payments he may have been entitled to. The policy would have provided a useful benefit during a difficult time and would have allowed him to manage the consequences of being unable to work.

  (I appreciate Mr H said his family would've helped with the loan repayments. But his family weren't legally liable for the repayments. Also, people's circumstances can change – his family's help couldn't be guaranteed. So I don't think it's likely Mr H's family's help could have been relied upon to the extent it made recommending PPI unsuitable. Indeed, taking the policy would've meant Mr H *didn't* need to ask his family for help.)

- The PPI element of the monthly loan repayment was most likely affordable for Mr H given the cost was, in my opinion, low - being £5.41 per month and less than £100 in total over the term of the loan. 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. Although Mr H broke a bone in 1986 and had had some time off work as a result, that was some 16 years before the policy was sold. There is nothing to

suggest it continued to trouble Mr H over those 16 years such that it might limit his ability to claim under the policy in the future. Also, there were no restrictions on the cover for mental health or back problems which made it unsuitable.

- Whilst the policy would not pay for the first 15 days of a potential claim and was payable for a maximum of 12 months in the case of unemployment benefit, it still provided useful cover in Mr H's circumstances.

- Although a pro-rata refund would not have been paid if Mr H cancelled the policy early, the loan was only for a period of 18 months and there is nothing to suggest (at the time) that he had plans to repay the loan early. The purpose of the loan was not debt consolidation or anything else which might suggest a need to repay the loan early, or that this was likely to happen; instead, Mr H has said the loan was to buy presents for his grandchildren. And in any event, given the upfront premium was under £90, the difference in actual pounds and pence between a pro-rata and a non-pro rata refund is, in my view, less likely to have been material to Mr H's decision to go ahead or not.

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

79. 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 cover his payments if he was unable to work through accident, sickness and unemployment), as I think it unlikely he would have agreed to take something out without having a broad idea of what it was. And I think he also knew that the single premium being added to the loan was £85.67 and the monthly cost was £5.41 each month (as this information was, in my view, sufficiently clear on the loan agreement he signed).

80. But the evidence from the time of the sale does not tell us whether Lloyds gave sufficient information about the cost. For example, the loan agreement does not show the total cost of the policy over the term of the loan, including the interest. The agreement included the interest rate but not what that actually meant for Mr H. It also doesn't show that Lloyds gave sufficient information about the exclusions and limitations. The loan agreement suggests it was relying on Mr H to read the lengthy policy booklet (or such policy information as the agreement referred to) during the meeting for that information. But I explained earlier that I did not think that was practical during the meeting or that he'd necessarily been given the policy booklet. But even if Mr H had read the booklet, I do not think that was sufficiently clear about the position if he cancelled the policy early.

81. Whilst I am satisfied Lloyds provided Mr H with the full policy terms and conditions which gave information about the benefits, limitations and exclusions, I don't consider that means Lloyds gave him the information Mr H fairly and reasonably needed to make an informed decision about whether to follow the recommendation and take out the policy. In coming to this conclusion, I am mindful that:

- Mr H did not base the decision he made at the meeting to take out the policy on the full policy conditions – I've found it more likely he relied on what he was being told,

- there is nothing to suggest that Mr H was forewarned that he should delay making a final decision about the policy until he had considered the contents of the terms and conditions, and

- it was incumbent on Lloyds to provide Mr H with the most important information he needed to make his decision before Mr H took out the policy.

82. 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 Lloyds 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 Lloyds 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.

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

84. It seems to me that it would be reasonable to conclude that there were significant failings in this case. Lloyds did not, for example, disclose to Mr H before the sale was concluded and in a way that was clear, fair and not misleading the significant limitations and exclusions that would tend to affect the decision of customers generally to take out the policy [DISP App 3.6.2E(4)]. There is also no evidence to suggest Lloyds explored the potential for Mr H repaying the loan early [DISP App 3.6.2E (9)].

85. It is also arguable that Lloyds also failed to disclose the cost information envisaged at DISP App 3.6.2E (8) as the credit agreement did not include details of the actual amount of interest which would result from the policy.

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

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

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

87. Lloyds did have to consider the features of the policy and weigh up the significance of the exclusions and limitations to ensure the policy it was recommending was suitable for Mr 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 duty of utmost good faith required.

88. Under the law existing 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.

89. 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.

90. 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]

91. 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.

92. 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 Lloyds should have done by virtue of the duty of utmost good faith. In any event, I do not think it would be fair or reasonable in the circumstances of this case to impose such requirements on Lloyds.

93. In its response to the provisional decision, WFAC referred to a decision of the Federal Court of Australia, (AMP Financial Planning PTY Limited v CGU Insurance Limited [2005] FCAFC 185) and quoted selectively from it. It also made some additional representations about the duty of utmost good faith. I have considered this point – along with its other representations in this respect, but they have not changed my view about Mr H's complaint.

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

95. 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.

96. In my view 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.

97. I also note there was no expectation at the time under the provisions of the ABI Code or the GISC Code that insurers or intermediaries should proactively disclose commission. For example, the guidance to the ABI Code published in December 1994 said only that independent intermediaries should disclose commission on request and

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

[3] MacGillivray on Insurance Law 13th edition 17-094

the GISC Code said that members would disclose information about commission and other amounts received to customers if asked.

98. 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 Lloyds should have done.

99. 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. 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.

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

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

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

102. I am mindful that the FSA (the FCA's predecessor body) told authorised firms to stop selling single premium PPI policies with unsecured loans by May 2009. Broadly speaking, this was due to the FSA's concerns about a general failure within the financial services industry to meet sales and related compliance standards on these types of policy. I am also aware that in the majority of single premium cases it has been clear that – if properly advised and informed about the policy and its cost – a consumer would not have taken a PPI policy that was paid by a single premium included upfront as part of the loan. But not all such policies were unsuitable or wrongly sold. My view, as I shall now explain, is that the sale of the policy in Mr H's case falls within this latter group.

103. I have found Lloyds 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.

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

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

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

107. Lloyds says Mr H would still have taken out the policy because it believed the policy was suitable for him, including that he had no other real means to pay his debts if he could not work.

108. I have carefully considered the representations of both sides and the evidence relating to them.

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

110. 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 incumbent on the intermediary to provide the information about the policy's features when recommending the policy, so the consumer could make that assessment.

111. 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 loan – I have seen nothing to suggest he did.

112. Rather, I mean when Lloyds advised him that there was a suitable product he could buy that would protect his loan repayments in the event he was unable to work because of accident, sickness or unemployment, that resonated with him in some way and (as I have found, above) he concluded that he wanted that product.

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

114. 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.

115. In this case, as I explained earlier, the evidence about Mr H's circumstances at the time of the sale shows that the policy was not fundamentally wrong or unsuitable for him.

116. 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.

117. In relation to the costs, Lloyds (from what can be seen on the loan agreement) did most likely make him aware of an important part of the cost information – that the policy cost £5.41 each month. And that the single premium being added to the loan was £85.67.

118. But Lloyds did not show the total cost of the policy over the term of the loan including the interest. The agreement included the interest rate but not what that actually meant for Mr H. Having said that, given the loan was small and interest would only accrue over 18 months, and the interest would not have made the policy cost significantly more than he realised - it added £11.71 to the policy cost on the agreement of £85.67, making a total

over the 18 months of £97.38 - I do not think it likely such a relatively small amount would have affected Mr H's decision to buy the policy in his circumstances.

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

120. Mr H did not, for example, have anything which would be deemed to be a pre-existing medical condition. Also, the policy did not exclude back or mental health conditions, or place any additional restrictions or more onerous evidence requirements (in the event of a claim on those grounds) than would have applied to any other disability claim. I also think it is unlikely Mr H would have expected to make a disability claim on the policy without having to provide some evidence to support that claim.

121. Mr H might not have realised that unemployment benefit was payable for a maximum of 12 months. But given the loan was only for 18 months and the policy would not have covered any unemployment he knew was due to happen, I do not think knowing about this limitation would have deterred him. He would not have been expecting immediate redundancy and the policy would still have covered the majority of the term of the loan even if notice of redundancy was given soon after the policy started. It would still have helped reduce his outgoings at a difficult and uncertain time.

122. I have also thought about whether Mr H's decision would have been any different if the cancellation terms had been explained to him. Although I have already concluded that a refund which was not calculated on a pro-rata basis did not make the policy unsuitable for Mr H in his circumstances, that does not automatically mean he would have been willing to go ahead with the policy if the cancellation terms had been clearly explained to him. There would still have been a chance of the loan being repaid early and the policy being cancelled as a consequence, and this possibility alone might have been sufficient to put some people off.

123. But I have to bear in mind Mr H's circumstances and his strong need for this cover as well as the relatively low cost of the policy which would mean any refund on early cancellation would only have been reduced by a few pounds. Overall, I think it is more likely than not that Mr H would not have been concerned about the position on early cancellation if the terms had been clearly explained to him.

124. 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.

125. Possibly the most significant difference between what Mr H thought he had bought and what he might have expected were the terms for claiming disability – Mr H could only claim for disability if he was unable to do both his own job or any other job which he could do, bearing in mind his knowledge and training. If Mr H had known this, it may have played into his thinking about what he would have done.

126. I accept this may have given Mr H pause for thought – but on the other hand – and taking into account the employment information provided to us - it's possible he may have considered it unlikely that, if he was unable (through disability) to carry on his own job, he would have been able to do an alternative (bearing in mind his knowledge and training). I have considered the further representations made in response to the provisional decision, but they have not changed my mind on this point.

127. I also note Mr H's representations that the inadequate disclosure of stringent unemployment exclusions, in particular the exclusion of voluntary redundancy/unemployment (taking into account standard and usual compromise agreements) dramatically reduced the scope of cover. However, 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.

128. Mr H provided information in the PPIQ about what he would have done with more information, which I have considered carefully. He said:

WFAC say Lloyds TSB had to explain the exclusions and limitations, in a way that an ordinary person like me would have understood. I can definitely say Lloyds TSB did not do this. WFAC have explained 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 Lloyds TSB had said that they were excluding 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. On top of this I also now understand 'pre-existing conditions' were not covered. This sounds like a piece of jargon to me, but WFAC have explained what it meant. I have had the following health problems: Condition: broken bone, Date: July 1986. Treatment: went to specialist, hospital about wrist, Meds (inc non-prescription): operation, plaster, Work missed: 3-4 months.

As well as everything else, I was financially stretched. I have often had to run an overdraft. WFAC say that for me, even more than anybody else, it was wrong for me to spend money on this PPI which was both really expensive, and unlikely to pay out. I don't think this PPI should have been sold to me and I would not have wanted it if it had been properly explained. WFAC say that Lloyds TSB were supposed to treat me fairly and not take advantage of me, but it cannot be right to sell a product like this PPI without explaining the costs and exclusions, and keep so much money for something with so little value to me. I feel let down by Lloyds TSB. I would not have had PPI if Lloyds TSB had not told me it was a good idea. […] I can say for sure that Lloyds TSB did not explain important things about the PPI and that if I had known them, I would not have wanted this PPI.

129. 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.

130. 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 sale, even if everything had happened as it should. And some of the other things he had mentioned would not have been relevant to the decision he was making. For example:

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

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

- Mr H's broken bone many years before the sale would not have been deemed to be a pre-existing medical condition.

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

131. 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 parts of what I have quoted resemble quite closely the consumer representations made in other cases where WFAC represents the consumer.

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

133. 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 accident or sickness. And at a cost, which in my opinion was relatively low. In the circumstances I consider it more likely than not that Mr H would have taken the policy out in any event.

134. In response to the provisional decision, Mr H referred to the judgment in *Saville v Central Capital (2014) EWCA Civ 337 ("Saville"),* saying our position was at odds with that case.

135. In summary, the case referred to the need to elicit the genuine demands of the Savilles as to the policy term by means of an open and fair question. However, I can see that S*aville* involved very different circumstances to those in Mr H's complaint. For example, it involved a mismatch in term between a 5-year single premium PPI policy and a 25-year loan, and a consideration of the requirements of the Insurance Conduct of Business Rules that applied to sales between 2005 and 2008 – but neither of those applies here.

136. But in any event, even if Lloyds had asked the kinds of questions Mr H says it should have done, and pointed out the limitations on cover associated with the policy recommended, I think it is more likely than not that Mr H would have taken out the policy in any event given the benefits it still provided and his overall circumstances.

137. I have also 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. That guidance is for firms, but it is a relevant consideration I take into account along with many other things when I decide what is in my opinion fair and reasonable.

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

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

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

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

139. It also said:

A recording of the sale is not essential to rebut the presumptions. Where it is not available, firms must fairly assess the available evidence to make a decision about what they think would likely have happened, but for the failing, given the circumstances and the evidence about 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

[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 - 45

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…

140. I have thought about what outcome applying the FCA's guidance in DISP App 3 (including DISP 3.7.7) 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.

141. 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. It follows 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 – including an award that returned him to the position he would have been in had he taken out a monthly premium policy instead.

142. 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.

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

144. 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.

145. I am satisfied it would not be fair and reasonable in those circumstances to conclude Lloyds 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.

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

147. 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

148. 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.

149. I now ask Mr H to either accept or reject my decision by 1 November 2018**.**

Jan Ferrari
Ombudsman