This final decision is issued by me, Martin Purcell, an Ombudsman with the Financial Ombudsman Service.

I issued a Provisional Decision on 31 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.

Both parties made further submissions, which I have carefully considered. This is my final decision on Miss B's complaint.

summary

1. This dispute is about the sale in 1999 of a payment protection insurance ('PPI') policy to support a Lloyds Bank PLC ('Lloyds') credit card.

2. Miss B complains that Lloyds did not properly explain the policy's features, exclusions and limitations. She says that, if it had, she would not have taken the policy out.

3. Lloyds says Miss B chose to take out the policy. It also says it gave Miss B information about the policy so she could make up her own mind about whether to take it out. It says it told her about the policy's features and limitations before the sale was concluded. But in its initial investigations of Miss B's complaint it went on to consider whether aspects of the policy were 'suitable' for Miss B and it concluded the policy was suitable.

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 Miss B.

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

   - Miss B made her decision to take out the policy based on the information Lloyds gave her about the policy.

   - Taking into account the law, industry codes of practice and what I consider to have been good practice in 1999 (the sale took place before the regulation of the sale of payment protection contracts like these by the Financial Services Authority ('FSA')), Lloyds should fairly and reasonably have provided Miss B with sufficient clear, fair and not misleading information about the policy it was offering to enable her to make an informed decision about whether to take it out.

   - Lloyds did not act fairly and reasonably in its dealings with Miss B. Lloyds did not provide Miss B with sufficient information about the costs, benefits and exclusions affecting the cover in a clear, fair and not misleading way to enable her to make an informed choice about whether to take out the policy.

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

- It would not be fair in those circumstances to make an award to compensate Miss B for the money she spent in connection with the policy.

7. Under the rules of the Financial Ombudsman Service, I'm required to ask Miss B to accept or reject my decision before 7 September 2018.

background to the complaint

a) events leading up to the complaint

8. In March 1999, Miss B applied for a Lloyds credit card. She completed an application form – called a 'Gold Card Application' – requesting both the card and 'card payment protection plan'.

9. Lloyds processed the application in mid-March 1999.

10. Lloyds are not able to provide any credit card statements until January 2000. I have seen a copy of Miss B's first available credit card statement from January 2000 and it shows that Miss B was using the card.

11. Lloyds say that the last PPI payment was made on the credit card statement in January 2006. I have seen a copy of this and Miss B was charged £2.93 for 'Payment Protection Cover'.

12. In February 2008, Lloyds closed the account.

b) Miss B's circumstances in 1999

13. The 'Gold Card Application' Miss B completed contains some information about her circumstances at the time. She was 40 years old, employed and earning a gross annual salary of £31,362.

14. Separately, Miss B has told us that:

    - She had worked as a teacher for 7 years when she applied for the card.

    - She would have been '*entitled to at least 6 months full sick pay from my employer*'. She '*was also entitled to death in service benefit. The death in service amount was at least twice my annual salary*'.

    - She would not have had any other way of making her card repayments if she wasn't able to work.

15. I note that most recently, in response to the Provisional Decision Miss B's representative has now said – in passing – she would have received 12 months sick pay. In relation to her sick pay entitlement, on balance, I think it's more likely than not

that Miss B was, as she said in her earlier representations, entitled to around six months' pay.

c) the policy – what was Lloyds selling and what did Miss B buy?

16. The application form Miss B completed referred to a 'brochure' containing information about insurance. Lloyds has provided a copy of a brochure which it says applied to applications like Miss B's from 4 November 1997. The brochure is headed 'Lloyds Bank Gold Card'. The brochure included the credit card terms and conditions as well as a section summarising the terms of the payment protection policy – including the cost of the policy.

17. I have not seen a copy of the actual full policy terms and conditions. And Lloyds has not given us one in its submissions. Presumably because the sale happened a long time ago and Lloyds has limited documentation from around that time. But, my understanding is that around the time Miss B took out this payment protection policy the insurance was likely underwritten by London and Edinburgh Insurance Company Limited – this is confirmed by the credit card brochure Lloyds did provide. For the purposes of this decision I will refer to a Certificate of Insurance ('policy document') I have seen for a Lloyds Bank Gold Card – also underwritten by London and Edinburgh Insurance Company Limited. The policy document is dated March 1997 – two years before Miss B took out her policy. The credit card brochure does mention that a Certificate of Insurance will be sent out after the credit card application is received.

18. It is possible that the terms and conditions of the payment protection policy Lloyds offered at the point Miss B applied for her card may have been slightly different to those set out in the brochure. Having considered the brochure carefully, I am satisfied it is more likely than not that the terms and conditions which applied to the policy Miss B took out when her credit card account started were those set out in the brochure provided by Lloyds.

19. In any event, the important question I shall go onto consider later in this decision is whether Lloyds gave Miss B sufficient information to enable her to make an informed choice about whether or not to take out the policy she ultimately took out in March 1999.

20. The summary of the terms and conditions were set out in the brochure. Among other things, this shows that:

    - There were eligibility criteria Miss B had to meet (and did meet). She had to be the principal account holder, 18 or over but under 65 and not in receipt of State Retirement Benefit, employed or self-employed for 16 hours or more per week, at work and not aware of any likely unemployment and not absent from work due to sickness or injury.

    - The policy provided life cover – it would pay off the amount Miss B owed on the card in the event of her death, up to a maximum of £10,000.

    - The policy provided disability cover. Broadly, this was payable if Miss B suffered accidental injury or an illness that prevented her from doing her work. The monthly benefit was a fixed amount of 10% of the outstanding balance (if more

than £50) at the start of the claim. This was payable until the disability ended, until the account was cleared, or until 12 consecutive monthly benefits had been paid for any one claim, whichever came first.

- The policy provided unemployment cover. Again, the monthly benefit was a fixed amount of 10% of the outstanding balance at the start of the claim, payable until Miss B's unemployment ended, the account was cleared, or until 12 consecutive monthly benefits had been paid for any one claim, whichever came first.

21. To put the benefit payments into context, I have calculated roughly what would happen to Miss B's account, assuming she made a successful claim for 12 months after spending £4,800. I have used the amount of £4,800 because the earliest statement available from January 2000 shows this was the credit limit at the time and I do not have enough information about Miss B's actual spending pattern.

22. The calculation assumes: a 1.201% per month interest rate (the rate Lloyds charged). It also assumes the payment protection policy cost 77 pence per £100 of the outstanding balance and that the minimum payment was 3% of the monthly balance (or £5, whichever was greater), as the card conditions suggest was the case.

23. 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 account balance in full.

Month	**Opening balance**	**Spend**	**PPI**	**Interest**	**Insurance payment**	**Closing balance**	**Minimum payment**
1	£0.00	£4,800.00	£0.00	£0.00	£0.00	£4,800.00	£0.00
2	£4,800.00	£0.00	£33.71	£57.65	£480.00	£4,411.36	£144.00
3	£4,411.36	£0.00	£30.68	£52.98	£480.00	£4,015.02	£132.34
4	£4,015.02	£0.00	£27.59	£48.22	£480.00	£3,610.83	£120.45
5	£3,610.83	£0.00	£24.44	£43.37	£480.00	£3,198.63	£108.32
6	£3,198.63	£0.00	£21.23	£38.42	£480.00	£2,778.28	£95.96
7	£2,778.28	£0.00	£17.95	£33.37	£480.00	£2,349.60	£83.35
8	£2,349.60	£0.00	£14.61	£28.22	£480.00	£1,912.43	£70.49
9	£1,912.43	£0.00	£11.21	£22.97	£480.00	£1,466.61	£57.37
10	£1,466.61	£0.00	£7.73	£17.61	£480.00	£1,011.95	£44.00
11	£1,011.95	£0.00	£4.19	£12.15	£480.00	£548.30	£30.36
12	£548.30	£0.00	£0.58	£6.59	£480.00	£75.46	£16.45
13	£75.46	£0.00	£0.00	£0.91	£76.36	£0.00	£5.00

24. Returning to the policy terms and conditions, there were also exclusions – for example, claims resulting from pre-existing medical conditions. The summary of cover states that, '*benefits for disability and hospitalisation will not be payable for any medical condition occurring within 12 months from the start date of the insurance which you knew about or had consulted or received treatment from a doctor during the 12 months before the start of your insurance'*.

25. So, after 12 months, Miss B might in some circumstances have been able to make a successful claim under the policy for a condition that had previously occurred.

26. Part of Miss B's complaint (as I explain below) 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 Miss B to provide satisfactory proof of accident and sickness to make a claim, including providing evidence from her doctor, it did not exclude back or mental health conditions, or place any additional restrictions or more onerous evidential requirements on claims relating to back and mental health issues than would have applied to any other accident and sickness.

d) the complaint and Lloyds' response

27. Miss B's representative We Fight Any Claim Ltd ('WFAC') made lengthy and substantial representations on her behalf.

28. I will not restate them all here, and I will refer to some of the specific representations she has made at relevant times in this decision. But I have read and considered them all carefully. In essence, Miss B says:

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

    - It was not enough to say the premium was 77 pence per £100 of the outstanding balance as Lloyds did in the brochure. The true costs were much higher, as the premiums were added to the account attracting interest (which compounded over time) and the premiums would continue to be charged during the period of a successful claim, reducing the benefit. This meant the policy was both expensive and represented exceptionally poor value.

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

    - Lloyds did not explain the exclusions and limitations in the policy, and in particular, that the most likely reasons for people missing work were excluded, such as bad backs and mental health conditions such as stress, depression and anxiety. So the policy would not do what it was supposed to do.

    - Lloyds also did not explain that pre-existing conditions were excluded.

    - The policy was supposed to pay out if Miss B was off work sick but it was unlikely to have done that.

    - Miss B did not need the policy, given her employee benefits, and would not have taken the policy out if Lloyds had not told her it was a good idea.

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

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

- In any event, the Financial Conduct Authority's ('FCA') guidance at DISP App 3.6.2E makes it clear that it should be presumed she would not have taken out the policy unless there is evidence to outweigh that 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 her in the position she would have been in if she had not taken out the policy.

29. Lloyds also provided us with its submissions. Again I will not restate them all, but I have read and considered them carefully. In essence Lloyds said:

  - Miss B took out the policy when she applied for a credit card. Lloyds think it is most likely that Miss B applied for the credit card through a postal application – so it's likely that it did not have any immediate contact with Miss B or it did not give her advice about what she should do. Instead, it gave her information about the policy so that she could make up her own mind about whether the policy was right for her.

  - Miss B was eligible for the policy, and asked for the cover to be added to the card.

  - Miss B does not appear to have been affected by the exclusions and limitations on the policy and it was suitable for her, so she would have taken the policy out anyway, even if Lloyds did not do all it should have done when it sold the policy.

  - It tried to get additional information from Miss B about her circumstances but she did not respond. Based on what Miss B had provided, it did not identify any failings during the sale that would have affected her decision to buy the policy.

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

30. Both parties made further representations in response to the Provisional Decision, all of which I have read and considered carefully. The parties, in the large part, restated much of what was said before.

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

  - The cost of the policy was not disclosed properly and it was misrepresented as 'excellent value for money'.

  - Many of the significant exclusions were not disclosed.

  - The unemployment benefit was worthless.

- The above two points should be considered in the context she had 12 months' sick pay and had she been made redundant (which was unlikely) a 'compromise agreement' would've been used.

- The incorrect causation test is being used.

- The Provisional Decision doesn't look at the duty of utmost good faith correctly.

- The failure of Lloyds presenting the poor value of the policy is misrepresentation and a break of the duty of utmost good faith.

32. Briefly, and in summary, Lloyds says:

    - It agrees with the main finding in the Provisional Decision.

    - It would be helpful if I could clarify how I took the ABI guidelines and statements into account in the Provisional Decision. It says the ABI guidelines are one of many things that should be considered but are not determinative of Lloyds' liability.

    - It would be helpful if I could clarify which of the many standards referred to I have relied on.

    - It would be helpful if I explain what I think the legal consequences are in Miss B's case, bearing in mind the sale took place in 1999.

33. I have considered both parties representations carefully.

my findings

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

a) relevant considerations

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

36. This sale took place in 1999, before the General Insurance Standards Council ('GISC') published its code of practice in June 2000 and before the sale of general insurance products like this became regulated by the FSA in January 2005. So the GISC code, the FSA's (and FCA's) overarching Principles for Businesses and insurance conduct rules (ICOB and ICOBS) are not applicable to this complaint;

37. The credit agreement itself started in 1999 and concluded in February 2008. 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 recently 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 either.

38. 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 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 – shortly after the sale of Miss B's policy, but relating to the ABI Code in place at the time of sale – explained how insurers should interpret some of the key requirements of the ABI Code including:

"Explain all the essential provisions"

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

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.

The ABI Statement of Practice for Payment Protection Insurance

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

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

In particular:

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

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

all written material will be clear and not misleading;

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

The ABI General Business Code of Practice for Telephone Sales, Direct Marketing/Direct Mail and the Internet

44. This code published in June 1997 explained that the original ABI Code was intended to relate principally to face-face selling, so this focused on remote selling methods and was to be read in conjunction with the main ABI Code.

45. It said that in direct marketing and direct mail cases where the advertisement or mailshot is accompanied by an application form giving the individual the opportunity to commit themselves to the insurance, ABI Code compliance required:

"…

(i) a summary of cover highlighting the main provisions, restrictions and exclusions should be provided…"

46. Looking at the policy document I've seen from around March 1997 – it seems Lloyds was a member of the ABI around the time the policy was sold, so it was directly subject to the codes. I also consider the ABI Code to have been indicative of standards of good practice for those, like Lloyds, offering or selling insurance to consumers in 1999.

47. The importance of the ABI Code in 1999 can be seen from the expectations at the time. As the 'Resume for Intermediaries' I referred to in paragraph 41 explained.

'*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'*

48. The Resume for Intermediaries was published in July 1999, but the status of the ABI Code and compliance arrangements it described were the same when Miss B took out her policy shortly before in March 1999[2]. The ABI was responsible for making sure that member insurers followed the ABI Code, the Department of Trade and Industry was responsible for making sure that non-member insurers complied with the ABI Code and the ABI Code itself required those insurers to use their '*best endeavours to ensure that all those involved in selling their policies observe its provisions*'.

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

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

51. I am also satisfied the various ABI publications 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.

<u>The law</u>

52. 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.

53. I have considered carefully the parties' representations about the law set out in a number of documents. These include most recently, WFAC's letters to this office about complaints generally dated 2 March and 5 June 2017, and its response dated 26 February 2018 to the Provisional Decision, and the response from Lloyds dated 7 March 2018 (which also referred to points raised in a response to a similar case from Freshfields Bruckhaus Deringer, dated 1 August 2017).

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[2] See for example the House of Commons Library Research Paper 95/129 *Financial Services: Regulators and Ombudsman* published on 13 December 1995 which said at page 8:

> '*The ABI's Code of Practice for the selling of General Insurance, which aims to ensure the terms of contracts and the status of intermediaries are clear to consumers, is mandatory for ABI members. The Department of Trade and Industry is responsible for seeing that the terms of the Code are observed by non-ABI members.*'

The approach taken by former schemes

54. Under the transitional provisions[3] which continue to apply to complaints like this about acts or omissions before 1 December 2001, I am also required to take into account what determination the relevant former scheme – in this case the Office of the Banking Ombudsman – might have been expected to reach in relation to an equivalent complaint.

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

    - The Ombudsman was required to decide complaints by reference to what was, in his opinion fair in all the circumstances.

    - The Ombudsman was required to observe any applicable rule of law or relevant judicial authority.

    - The Ombudsman was required to have regard to the general principles of good banking practice and any '*relevant code of practice applicable to the subject matter of the complaint*'.

    - The Ombudsman could make money awards, but '*no award shall be of greater amount than in the opinion of the Ombudsman is appropriate to compensate the complainant for loss or damage or inconvenience suffered by him by reason of the acts or omissions of the Bank against which the award is made'*.

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

56. 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 Miss B's.

57. The sale took place before insurance mediation became an FSA-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 Miss B's complaint.

58. 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.

[3] The Financial Services and Markets Act 2000 (Transitional Provisions) (Ombudsman Scheme and Complaints Scheme) Order 2001 (SI 2001/2326)

59. 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 3.7.7 E), where the complainant bought a single premium payment protection contract, the firm may presume that the complainant would have bought a regular premium payment protection contract instead of the payment protection contract he bought.*

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

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

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

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

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

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

DISP App 3.6.3E
Relevant evidence might include the complainant's demands, needs and intentions at the time of the sale and any other relevant evidence, including any testimony by the complainant about his reasons at the time of the sale for purchasing the payment protection contract.

<u>*Overall*</u>

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

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

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

61. Miss B says Lloyds ought fairly and reasonably to have gone further than I have suggested when providing information. I shall address Miss B's representations about this later on.

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

63. 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?

64. Not surprisingly given the passage of time since Miss B took out the policy, it is not entirely certain how she came to take out the policy and what information or advice (if any) Lloyds gave her about it.

65. Miss B told us she applied for the credit card by post and that she wasn't advised to take out PPI. But she said Lloyds did not explain the PPI. However, Miss B has not mentioned speaking to a Lloyds representative or said anything to suggest that advice might have been given.

66. Lloyds cannot say for certain how the credit card and the PPI policy were taken out. But it said it was most likely taken out via a postal application.

67. Lloyds has provided copies of some documents relating to the sale:

    - The credit card application form completed and signed by Miss B, in which she also ticked a box to request the payment protection insurance policy.

    - A brochure headed 'Lloyds Bank Gold Card' dated 4 November 1997, which was most likely an accurate representation of the brochure posted alongside the credit card application form.

68. The application form that Miss B filled in shows a pre-printed name and address, with other details being handwritten. The pre-printed name and address is that of Miss B.

69. The credit card application form was signed by Miss B on 1 March 1999 and by a Lloyds representative on what appears to be 16 March 1999.

70. The credit card application form refers to a brochure that was provided with the mailing. Underneath the heading '*Card Payment Protection Plan – CPP*' it says '(*please refer to the Gold Card brochure*)'. I think it is more likely than not that this brochure to be the brochure that Lloyds has referred to in its submissions. It includes, among other things, the following information:

    …Other benefits of the Lloyds Bank Gold Card include:

    …easy to arrange Payment Protection which ensures repayments are maintained should accident, sickness or unemployment strike. Excellent value for money, this insurance costs only 77p per £100 outstanding every month.

    Payment Protection Plan – Summary of cover
    What are the benefits and who is eligible for card payment protection?

    Life, unemployment and disability cover for persons aged 18 or over and under 65 and in full time employment (working 16 hours or more per week)

    If you are off work due to accident, illness or involuntary unemployment for 30 consecutive days, a monthly benefit equal to 10% of your outstanding balance (if more than £50) will be paid, up to a maximum of £1,000. The benefit is payable for 12 months or until your account is cleared or you return to work, whichever happens first. In the event of death the whole of your outstanding balance (up to £10,000) will be cleared. You will be able to take advantage of the above Protection, if you are:

    - *the principal account holder;*
    - *18 or over but under 65 and are not in receipt of State Retirement Benefit;*
    - *employed or self-employed for 16 hours or more per week;*
    - *at work and not aware of any likely unemployment;*
    - *not absent from work due to sickness or injury.*

What is not covered

As you would expect, there are some exclusions, but these have been kept to a minimum:

Benefits for disability and hospitalisation will not be payable for any medical condition occurring within 12 months from the start date of the insurance which you knew about or had consulted or received treatment from a doctor during the 12 months before the start of your insurance.
…
Benefits for unemployment will not be payable for unemployment which is:

- *normal, regular or seasonal in your job;*
- *known about at the start of the insurance;*
- *due to dismissal because of misconduct, resignation or voluntary redundancy;*
- *after certain fixed term contracts;*
- *within 90 days after the start date;*
- *whilst you are outside of the UK, Channel Islands or Isle of Man for more than 30 days;*
- *for any period for which you have received or are entitled to receive payment instead of working your notice.*

…
Benefits for unemployment, disability and hospitalisation will not be payable when related to:

- *war and nuclear risks;*
- *your own wilful actions;*
- *drug and alcohol abuse;*
- *pregnancy.*

The only exclusion under the life cover is death caused by war or nuclear related risks.

How much does this cover cost?

The price of this peace of mind is remarkably low; just 77p per month for every £100 outstanding on your account at the date of your statement (and in proportion for other outstanding amounts). If your balance is less than £50, you pay no premium at all and benefit cannot be claimed for that month.

71. Having considered the representation of both sides and keeping in mind the limitations on the evidence available about what happened nearly 19 years ago, I find:

    - It is most likely that Miss B took out the credit card and PPI by responding to a direct mail invitation from Lloyds – who at a later date processed the application;

    - I am not persuaded it is more likely than not that there was a discussion between Miss B and Lloyds about the payment protection contract before she agreed to it. I am satisfied this was a sale by paper;

    - The application form was part of a pack which included the credit card terms and conditions brochure which contained a section headed ‘Payment Protection Plan – summary of cover’. The information in this section was as set out above.

- It is more likely than not that Lloyds sent the full policy terms and conditions to Miss B after it approved her credit card application – quite probably with other documents relating to the card. Although this would not have played a part in her decision to apply for the policy, it would have clarified what Miss B bought.

c) did things happen as they should in 1999?

72. I have found that the information Lloyds gave Miss B about the policy was set out in the credit card application form and the credit card brochure.

73. Within the summary of cover set out in the credit card brochure it says, '*this is only a summary of the cover provided, a Certificate of Insurance giving full terms and conditions including details of how to claim will be issued to you on receipt of your application form*'. So while I think Lloyds likely also sent Miss B a document that contained the full policy conditions after the event (something it was required to do) I do not consider that means Lloyds gave Miss B the information she fairly and reasonably needed to make an informed decision about whether to take out the policy. I am mindful;

    - Miss B did not base her decision to take out the policy based on these full policy conditions.

    - Miss B was not forewarned in the credit card application that she would receive the document and should not make a final decision about taking out the policy until she had considered it. The policy summary just mentioned that full terms and conditions would be sent out afterwards, as shown above.

    - It was incumbent on Lloyds to provide Miss B with the most important information she required to make her decision *before* she took out the policy (see the 1996 ABI Statement of Practice for PPI) and full conditions later.

74. I am not persuaded the information Lloyds gave Miss B could reasonably be considered advice. I have not seen anything which persuades me that Lloyds recommended she take out the policy, rather it alerted Miss B to the fact that she could take out the policy and gave Miss B information about it.

75. The question I need to consider is in essence (as I set out at paragraph 60 above) whether Lloyds provided Miss B with sufficient information in an appropriate and timely way to enable her to make a properly informed decision about whether to take out the policy.

76. For the reasons I shall explain, I do not think it did. Exactly how, and the extent to which, Lloyds fell short of what was reasonably expected of it and its relevance to Miss B, is in my view important to my consideration of the question which ultimately lies at the heart of this complaint: would Miss B have acted differently if Lloyds had explained things properly?

77. The credit card application form invited Miss B to indicate whether or not she wanted payment protection cover. In a section headed '*Optional Features*' - all in capital letters - there was an option for a product called, '*Card Payment Protection Plan – CPP*'. Underneath this it said;

    If you wish to take out CPP and protect your payments if you can't work due to accident, sickness or unemployment, please tick Yes.

78. Directly below this statement there is an equally prominent option to say no to the policy. In the same section, it said;

    If you do not wish to protect them, please tick No

79. I am satisfied this would have been sufficient to make Miss B aware that she had a choice about whether or not to take out the policy – in other words, that the policy was optional and that she explicitly agreed to the policy without undue pressure.

80. This information would also have given her a broad sense of what the policy covered – but by no means all of the information she needed to make a properly informed choice.

81. The application form also referred Miss B to an enclosed brochure. I am satisfied it is more likely than not that this was a reference to the credit card brochure Lloyds has referred to in its submissions.

82. Whilst Miss B, in effect, is encouraged to look at the brochure, the application form did not alert her to the fact that important information about the policy could be found there, nor did it encourage her to consider that information.

83. By taking this approach, Lloyds ran the risk that Miss B might not identify or give proper consideration to the important information about the cover, benefits, exclusions and limitations, which it was required to draw to her attention, to enable her to make an informed choice.

84. I am also mindful this was a sale by paper – Miss B was making her decision about whether to take out both the card and the policy solely on the information she was given. So I consider it is reasonable to expect Miss B to have given greater consideration to that paperwork than if, for example, a policy had been sold during face-to-face discussions in a branch, or by telephone, where the consumer had relied on what they were told during those conversations.

85. In this case, the application form prompted Miss B to look at the conditions in the leaflet relating to eligibility. In those circumstances, and given I consider it unlikely Miss B would have wanted to take the risk she might end up paying for insurance that she was not eligible for, I think it is more likely than not that Miss B would have looked at the brochure to establish whether she was eligible for the policy.

86. The information about eligibility in the brochure formed part of a whole section about payment protection. When checking eligibility, I think it is more likely than not in this instance that Miss B would also have come across the additional information about the cost, benefits and exclusions found there. The information was all in that section, which wasn't particularly long and some of it appeared under headings which themselves might have encouraged Miss B to keep reading, like '*what is not covered*?' and '*how much does this cover cost*?'.

87. I am satisfied Miss B ought reasonably to have understood from the information in the brochure that the policy cost 77 pence per £100 of the statement balance and that she would have to pay that each month. But this does not mean she would have necessarily appreciated what that might be in actual pounds and pence each month as that would depend on her use of the credit and account balance. Also, it did not make clear that she would have to make payments during a claim (although it did not suggest she would not have to either), or that the premiums would be added to the account balance, attracting interest if unpaid at the end of the month.

88. I think it is likely that Lloyds included the information about the cover provided and things like the significant restrictions on disability and unemployment cover, in the credit card brochure, because that was the kind of information it was required to draw to the customer's attention by the ABI Code (and to include a summary of cover – see paragraph 40 above).

89. But even with the benefit of the information set out in the leaflet, Miss B would not have known all of what she needed to know to make a fully informed choice. I am satisfied Lloyds gave her a certain amount of the information she needed to know to make an informed choice. But I am not persuaded it did enough to present that information in a way that was fair and reasonable to Miss B. I am not persuaded Lloyds did enough to draw the important information set out in the brochure to Miss B's attention. It did not present the important information in a way that was clear, fair and not misleading.

90. Overall, whilst I am satisfied Lloyds provided Miss B with much of the information she needed to make an informed choice, I am not persuaded it gave her all of the information.

91. 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.

92. 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 Miss B 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)]

93. It is also arguable that Lloyds failed to disclose the costs information envisaged at DISP App 3.6.2E (8). Lloyds did not disclose the cost of the payment protection in the credit card application – a very important piece of information. It did in the credit card brochure referred to in the application. But it could have made clearer the fact that Miss B would continue to be charged premiums during any successful claim and the fact the premiums would attract interest. Also, setting the cost out as 77 pence for every £100 does not necessarily mean Miss B would have known what the policy was likely to cost on a monthly basis, given its dependency on a potentially changing outstanding balance.

94. I have considered carefully Miss B'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 Miss B's view that the common law duty of utmost good faith meant that:

    - Lloyds should have explained the low claims ratio (and what she 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 her not just about the limitations and exclusions, but also about the significance of them.

    But having done so, I am not persuaded by Miss B's views in that regard.

95. 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.

96. 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.

97. 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.[4]

98. MacGillivray on Insurance Law[5] 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.

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[4] *Banque Keyser Ullman SA v Skandia (U.K.) Insurance Co. Ltd [1990] 1Q.B. 665, 772*
[5] MacGillivray on Insurance Law 13th edition 17-094

99. 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 Miss B 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.

100. 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.

101. 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.

102. 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.

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

104. 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 Miss B says Lloyds should have done.

105. So it seems very unlikely that it was ever the intention of the ABI Code that intermediaries should provide the kind of additional information Miss B 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.

106. Overall, taking into the 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 Miss B says it should have done.

107. I also note Miss B's opinion that;

- Lloyds misrepresented the policy by referring to it as '*excellent value for money*' in the brochure.

- The cost of the policy and how it was charged wasn't disclosed properly.

- The significant limitations and exclusions were not brought to her attention clearly.

- The unemployment cover was worthless.

108. But I am mindful that;

- I have found that Miss B was also given, at the same time as taking out the policy, information about the key exclusions, limitations and period of cover in the brochure (including when a consumer couldn't claim the unemployment benefit) – and a court when considering a misrepresentation claim would ordinarily look at all of the information given.

- The premiums were calculated in the way Lloyds represented. The issue in this case is that Miss B may not have made the link between that information and the other information she was given about the credit card to realise the policy premiums would attract interest if unpaid.

- As my calculation shows, the policy would more than cover the contractual payment and the PPI costs added to the policy during the period of a claim and the interest associated with it. Whilst there were limitations on cover, the policy did provide cover in a variety of circumstances.

109. Whilst I accept there is a possibility a court might conclude Lloyds misrepresented the contract, in my opinion the reason why Lloyds failed to act fairly and reasonably was not because of what Lloyds said or didn't say in the brochure, but because the overall information Lloyds gave Miss B, in the way it did, was insufficient to meet the standards I consider it fair and reasonable to expect it to have met, in 1999, when providing information about an insurance policy.

110. Overall, for the reasons and in the ways I have set out, I find the information Lloyds gave Miss B, in the way it did, was insufficient and presented the policy in an unbalanced way.

111. In particular, Lloyds failed to draw Miss B's attention in a clear and fair way to the important information about the policy in the credit card brochure, and so the information Miss B based her decision on was ultimately misleading. It could also have made clearer the fact that the premiums charged would attract interest and that Miss B would continue to be charged premiums during a claim. I am not persuaded these shortcomings were fair and reasonable in all the circumstances.

d) what effect did Lloyds' shortcomings have on Miss B?

to what extent did Miss B suffer loss or damage as a result?

112. I have found Lloyds did not do all it should fairly and reasonably have done when it sold this policy to Miss B, so I have gone on to consider whether it would be fair and reasonable to conclude Miss B suffered loss and damage as a result.

113. It seems to me that, whether or not Miss B has suffered loss or damage in this case primarily depends on whether, if Lloyds had explained things properly, Miss B would have acted differently, or whether she would have taken out the policy in any event.

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

115. Miss B directed me towards other submissions made by her representative WFAC – these include its submissions about how a court may take a different approach if it were to find there were misrepresentations. For example, certain passages from *Raiffeisen v RBS [2010] EWHC 1392 (Comm).*

*'However, even if the misrepresentations had been merely negligent or innocent, the correct test for rescission in misrepresentation is not: "what would the innocent party have done if he had been told the truth?" (FOS's approach) but: "were the misrepresentations a real/substantial cause of the innocent party entering into the contract at all/in those terms, even if there were other causes, such that but for the misrepresentation the innocent party would probably not have entered into the contract/in those terms?" (**Raiffeisen-v-RBS** [2010] EWHC 1392 Comm ("**Raiffeisen**"), at 153-191).*

*In particular, in the misrepresentation context, it is irrelevant to ask how the innocent party would have acted if the misrepresentations had not been made (**Raiffeisen** at 186-190).'*

116. Lloyds says Miss B would still have taken out the policy because:

    - She was eligible for the policy and asked for the cover.
    - She does not appear to have been affected by the exclusions and limitations of the policy.
    - The policy was suitable for her.

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

118. Taking out insurance like this, based only on information, requires the consumer to weigh up a number of factors before deciding whether to proceed. PPI policies typically provide cover in a variety of situations, some of which may be of greater interest or relevance to the consumer than others.

119. Effectively the consumer has to weigh up in their own minds the cost of the policy against 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, so the consumer could make that assessment.

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

121. Rather, I mean when Lloyds told her – on the credit card application form – that there was a product she could buy that would protect her credit card payments in the event she was unable to work because of accident, sickness or unemployment, that resonated with her in some way and she concluded that she wanted that product.

122. The issue here is that the decision she made was based on incomplete information, meaning what she thought she was getting is not exactly what she got. And she would have had different things to weigh up when deciding to take out the policy if Lloyds had provided the information in an appropriate way.

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

124. In this case, the evidence about Miss B's circumstances at the time of sale shows that the policy was not fundamentally wrong or inappropriate for her. She was eligible for its benefits and it provided cover that could prove valuable to her should the insured risks come to fruition – even allowing for the limitations on the disability cover it provided.

125. Miss B's own evidence or 'testimony' is that, if she could not work through accident or sickness, she would have been entitled to sick pay from her employer of at least six months' full pay. As I've mentioned above, she has since said she was entitled to 12 months sick pay. She has also said she would have had no other means of making her credit card payments, and her sick pay entitlements do not seem to have put her off applying for the policy in the first place.

126. I think it is reasonable to conclude that from Miss B's perspective she saw some benefit in having insurance in her circumstances. If the risk the policy was concerned about came to fruition, the policy would have helped her manage the consequences – it would have helped her reduce her outgoings during what would likely be a difficult period, even though she may have been able to manage for a time with just her employment benefits. And as well as meeting the monthly payments, the policy would reduce her outstanding credit card balance each month by a significant amount, as the table I set out earlier in this decision shows, clearing the balance if the claim lasted for a year.

127. I also note that the credit card brochure suggests that when taking out a Lloyds Gold Card the minimum credit limit that you can have on it is £2,500. So that may also have

factored into her thinking, as she may have expected there to be a sizeable balance to protect.

128. Whilst Miss B was interested in the policy, was eligible and had good reason for wanting cover, the policy did not work entirely as she thought.

129. In relation to the costs, Miss B might not have realised there was a cost to this policy at all – this wasn't immediately apparent from the credit card application. But if that was the case, I would have expected her to have questioned that once she saw the payment appearing on her statements. If Miss B had read the credit card brochure she might have been aware of some of the important cost information. Lloyds did mention in the brochure that the PPI premium was 77 pence per £100 of the outstanding balance each month.

130. But as Miss B says, Lloyds did not explain that she 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 her statements, so it is possible that Miss B might have expected this.

131. If, as I have found she ought reasonably to have done in the circumstances of this case, Miss B had read the credit card brochure, she would have had most of the information she needed to weigh up about the 10% benefit calculation.

132. But even if she had not read the brochure, the application form said that the policy would protect her monthly payments and was described as 'card *payment* protection' (my emphasis). Miss B could have interpreted that in a number of ways, but it seems unlikely that she would have thought that meant the policy would pay off her balance in full immediately. Instead, I think it is more likely she would have thought from the very limited information in the credit card application that the policy would meet the regular repayments she was due to make.

133. As the example I set out earlier in this decision illustrates, the policy would more than cover the minimum contractual payment and the costs added to the account during the period of the claim and the interest associated with it. So if Miss B had not looked at the brochure it is possible that the 10% monthly benefit of the policy offered would actually have been better than Miss B expected.

134. As I mentioned above, I have not seen a copy of the actual full policy terms and conditions. And Lloyds has not given us one in its submissions. The credit card brochure does mention that a Certificate of Insurance will be sent out after the credit card application is received. The policy document I've referred to in this decision goes into more detail about pre-existing medical conditions and they do differ slightly to the summary of cover which I have referenced in this decision.

135. But Miss B has not said anything in her representations to suggest that there were any existing or ongoing issues with her health at the time she took out the policy. So, I do not think knowing about these terms would have had any impact on her decision. And as I've said the policy did not exclude or place any additional requirements on claims for back or mental health conditions.

136. So, whilst Miss B didn't know some things about the policy, I am satisfied the ultimate position in the event of a successful claim was not dissimilar to what she would reasonably have thought from the information she based her decision to take out the policy on and found acceptable.

137. Miss B has provided information about what she would have done with more information, which I have considered carefully. She says:

I did not require a PPI policy. I would have been entitled to at least 6 months full sick pay from my employer. I was also entitled to death in service benefit. The death in service amount was at least twice my annual salary.

Lloyds TSB did not explain the terms and conditions of the policy. In particular they did not tell me how much the PPI really costs. They didn't explain the effects of compound interest being charged at credit card interest rates which I now understand means the balance would at least triple over a 10 year period or that premiums would continue during a claim. I was never given any indication of this true cost or how expensive it really would be. The point being that PPI was usually presented as being cheap but I now understand that it was very expensive. I would not have bought the policy if I had understood this. The exclusions and limitations were also not explained – the reasons it would not have paid out. WFAC say Lloyds TSB had a duty to explain these exclusions and limitations in a way that an ordinary person like me would have understood. I can definitely say that Lloyds TSB did not do this. WFAC have further explained that a high proportion of reasons anyone is likely to miss work were excluded – in particular bad backs and mental conditions such as stress, depression and anxiety. These statistically are among the most likely reasons for anyone being off work and I can say that these exclusions were not disclosed to me.

If Lloyds TSB had said that they were excluding the most common reasons people miss work I can say that [I] would not have wanted this PPI for that reason alone. This policy was meant to protect me from sickness. It is now obvious that it was never going to do what it was supposed to be for. It was supposed to protect payments if you couldn't work but would not have done that in the majority of cases. Let me be clear – I would not have wanted this policy had I been told this. 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 the following health problems:

In addition to the above, there are more reasons as well why I now understand this PPI should not have been sold to me, and why if it had been explained properly, I would not have wanted it. In my job as a teacher, I had sickness – see above. So the PPI was expensive and really unlikely to pay out and on top of that I was covered anyway. On top of this I now understand that on average, firms kept 86% of each premium payment as profit and expenses. The policy was appalling value for money. I am not in a position to waste money or make insurance businesses richer at my expense. Everybody knows that companies are entitled to make a fair profit, but not an unfair one – I would not have wanted to be taken advantage of. I don't think anybody would. I don't think this PPI should have been sold to me and I would not have wanted it if it had been properly explained. WFAC say that Lloyds TSB were supposed to treat me fairly and not take advantage of me, but it cannot be right to sell a product like this without explaining the exclusions, and that they were keeping so much money for something with so little value to me. I feel badly let down by Lloyds TSB. PPI was just

included as part of my package with my credit card. I had no interest in PPI and would not have had it if Lloyds TSB had not included it with the package.

138. Miss B is effectively saying that, as a result of what her representative WFAC has told her, both about what it considers should have happened, and what she should have decided at the time, she would not have taken out the policy.

139. In light of the findings I have already made, I don't think Miss B's representations demonstrate what she claims because much of the information she says would have affected her decision would not have been known to her at the time of sale, even if everything had happened as it should. And some of the other things she had mentioned would not have been relevant to the decision she 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 1999 was to draw her attention to the limitations, not to give the limitations the context Miss B says Lloyds should have given them.

    - The policy did not - as I have already explained - exclude claims based on back pain or stress, unless they were pre-existing conditions.

140. I am also mindful that: Miss B's recollections of the sale are, owing to the significant passage of time, likely to be limited; her representations about what she 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.

141. I consider it fair and reasonable to think Miss B would have weighed up the various other considerations, in particular her view that the policy could provide a useful benefit in a difficult time notwithstanding her employment benefits. It is likely she would also have thought about whether the cost to benefit proposition still worked for her.

142. Having considered all the evidence and arguments in this case I consider it more likely than not that Miss B would still have taken out the policy. The policy was sufficiently close to what she thought she was getting and provided benefits that would help her manage the consequences were she made redundant, or unable to work through accident or disability. In the circumstances I consider it more likely than not that she would have taken out the policy in any event.

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

144. I am mindful of the purpose of the guidance. I do not think it was ever intended to be at odds with the approach I have taken. FSA explained its thinking in the policy statement[6] 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."

145. 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 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 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.

[6] 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

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 sale (something which can be evidences 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…"

146. I have thought about what outcome applying the FCA's guidance to this complaint might lead to. In the language of DISP App 3, I have found it would be reasonable to conclude there were substantial flaws in the sales process. In those circumstances, DISP App 3 says it should be presumed Miss B would not have bought the payment protection insurance she bought unless, in the particular circumstances of the complaint, there is evidence to rebut the presumption.

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

148. I am mindful of Miss B'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 her own representations – that she would not have taken out the policy. But, I am not persuaded by those representations.

149. Even if I am ultimately departing from the guidance for firms set out in 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 Miss B in the position she would have been in if she had not bought the policy.

150. That is because, whilst I accept it is possible that she would not have taken out the policy, I am satisfied that of the two possibilities, it is more likely than not that she would still have taken out the policy if she had been given clear, fair and not misleading information about the policy she was buying.

151. I am satisfied it would not be fair and reasonable in those circumstances to conclude Lloyds should pay Miss B redress, as that would put her in a better position than she would have been in if everything had happened as it should have done.

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

153. Miss B directed me towards other submissions made by her representative WFAC – these include its submissions about negligent misrepresentation. I have also carefully considered these representations 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 Lloyds fraudulently or negligently misrepresented the contract to Miss B and about the remedy a court might award if it were to find that Lloyds 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 Miss B in a better position than if everything had happened as it should have done.

154. 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 sales process, even though I have found Miss B 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 Miss B suffered material distress or inconvenience, or any other form of non-pecuniary financial loss, because of the way the policy was sold. In those circumstances, I do not consider it would be fair to make an award.

my final decision

155. 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 Miss B.

156. I now ask Miss B to either accept or reject my decision by 7 August 2018.

Martin Purcell
ombudsman