summary

1. This dispute is about the sale in 1997 of a payment protection insurance (PPI) policy to support a charge card (with the number ending 9676) sold by Marks & Spencer Financial Services Plc, who were acting on behalf of Allianz.

2. I cannot consider this complaint against Marks & Spencer Financial Service Plc directly. This is because the sale occurred before 12 April 2001, before that firm, or its predecessor-in-title, were regulated by the Financial Services Authority ("FSA") for insurance intermediation activities, or were otherwise covered by our jurisdiction (for example through membership of a former scheme such as the Banking Ombudsman Scheme). As a result, in the rest of this decision I will refer only to Allianz unless it is appropriate to differentiate between Allianz and its agent, for example in the application of codes of practice.

3. Mr S complains that Allianz did not properly explain the policy's features, exclusions and limitations. If it had, he says he would not have taken the policy out.

4. Allianz considers the sale met the standards expected of it at the time. But in any event, it says, Mr S would have taken out the policy even if it had given him clearer information, so it does not think he lost out.

5. 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.

6. 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 Allianz, to the extent that I have not made an award in favour of Mr S.

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

   - Mr S made his decision to take out the policy based on the information Allianz gave him about the policy.

   - Taking into account the law, industry codes of practice and what I consider to have been good practice in 1997 (there were no applicable regulations at the time), Allianz should fairly and reasonably have provided Mr S with sufficient clear, fair and not misleading information about the policy it was offering to enable him to make an informed decision about whether to take it out.

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

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

- It would not be fair in those circumstances to make an award to compensate Mr S for the money he spent in connection with the policy.

8. Under the rules of the Financial Ombudsman Service, I am required t ask Mr S to accept or reject my decision before 19 July 2019.

background to the complaint

a) events leading up to the complaint

9. Mr S applied for the charge card on 8 April 1997. The application form was filled in – in a store – requesting both the card and 'Payment Protection'.

10. Mr S requested a credit limit of £500.

11. The application for the card was successful and Mr S has made use of the account over the intervening years.

12. As I understand it, the card account and PPI policy are still active.

b) Mr S's circumstances in 1997

13. The charge card application form Mr S signed contains some information about his circumstances at the time. He was a homeowner, he was working as a computer manager and had been with his employer for 14 years and his gross annual income was less than £28,000. He also had life cover and a company pension.

14. Separately, Mr S has told us that:

- He had worked for his employer for four years when he applied for the card and was earning £42,000 a year.

- He would have received at least six months' full pay (but less than 12 months' pay) if he was off work due to sickness or accident. He also would have received some redundancy pay and had death in service benefit.

- He would not have any other way of making his card repayments if he wasn't able to work.

- He was past retirement age and so may not have been eligible for the policy. However Mr S. has now said that this part of his complaint can be disregarded as he agrees that he was in fact 31 years old in 1997.

15. I am satisfied it is more likely than not that Mr S is mistaken in his recollection and that the point of sale documentation provides an accurate record of his income and length of service.

16. Mr S hasn't specified the amount of redundancy pay he thinks he would have received. The statutory redundancy provisions that applied at the time meant he would have been entitled to half a week's pay for each year of employment in which he was under 22 and a week's pay for each year of employment when he was between the ages of 22 and 40. In Mr S's case that would equate to a statutory right to nearly three months' pay from his employer were he made redundant.

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

17. Allianz has provided a copy of the full terms and conditions it says – and which I accept on the balance of probabilities – applied to policies like Mr S's sold in 1997.

18. The terms and conditions were set out in a three page 'Certificate of Insurance' document. Among other things, these show that:

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

    - The policy provided life cover – it would pay off the amount Mr S owed on his card in the event of his death up to a maximum of £30,000.

    - The policy provided disability cover. Broadly, if Mr S was unable to carry out the duties of his work due to injury, sickness or disease, it would pay a fixed amount (usually equal to 15% of the outstanding balance at the start of the claim), each month, until the disability came to an end, or until the outstanding balance at the start of the disability was cleared.

    - The policy would provide unemployment benefits. Broadly, the policy would pay a fixed amount (usually equal to 15% of the outstanding balance at the point Mr S knew he would become unemployed), each month, until Mr S ceased to be unemployed, or the outstanding balance at the start of the claim was repaid.

    - The policy would have paid out after 14 consecutive days of time off for disability or 28 consecutive days for time off due to unemployment.

19. To put the benefits into context, I have calculated roughly what would happen to Mr S's account, assuming he made a successful claim after spending £500 on his card on purchases.

20. The calculation assumes: a 1.96% per month interest rate (the rate charged on purchases), the PPI cost 64p per £100 of balance and that the minimum payment was 5% of the monthly balance or £10 (as the application form shows was the case).

21. I began by looking at what would happen over a 12-month period. But as the table below shows, the policy would not only have covered the contractual monthly minimum payment, but would have cleared the balance on the account after nine months.

Month	Opening balance	Spend	PPI premium	Interest	Insurance payment	Closing balance	Minimum payment
1	£0.00	£500.00	£0.00	£0.00	£0.00	£500.00	£0.00
2	£500.00	£0.00	£2.78	£9.82	£75.00	£437.61	£25.00
3	£437.61	£0.00	£2.38	£8.60	£75.00	£373.58	£21.88
4	£373.58	£0.00	£1.96	£7.34	£75.00	£307.88	£18.68
5	£307.88	£0.00	£1.53	£6.05	£75.00	£240.46	£15.39
6	£240.46	£0.00	£1.09	£4.72	£75.00	£171.27	£12.02
7	£171.27	£0.00	£0.64	£3.37	£75.00	£100.27	£10.00

8	£100.27	£0.00	£0.17	£1.97	£75.00	£27.42	£10.00
9	£27.42	£0.00	£0.00	£0.54	£27.96	£0.00	£0.00
10	£0.00	£0.00	£0.00	£0.00	£0.00	£0.00	£0.00
11	£0.00	£0.00	£0.00	£0.00	£0.00	£0.00	£0.00
12	£0.00	£0.00	£0.00	£0.00	£0.00	£0.00	£0.00
13	£0.00	£0.00	£0.00	£0.00	£0.00	£0.00	£0.00

22. Returning to the policy terms and conditions, there were also exclusions – for example, claims resulting from pre-existing medical conditions which Mr S knew, or should have known about, were not covered (albeit with some time limits). The policy excluded '*any physical defect, infirmity, disease or previously diagnosed condition and any subsequent associated complaint for which you were treated within the twelve months before you applied for this policy.'*

23. Part of Mr S'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 Mr S to provide satisfactory proof of disability to make a claim, including providing a certificate from his doctor, it did not exclude back or mental health conditions, or place any additional restrictions or more onerous evidential requirements on claims relating to back and mental health issues than would have applied to any other disability.

24. However, Mr S told us that he had no pre-existing health problems at the time of the sale, so I've no reason to think he would have been affected by this exclusion.

d) the complaint and Allianz's response

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

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

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

- It was not enough to say the premium was 64p per £100 of outstanding balance. 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.

- Allianz did not tell him about the poor value of the policy, which is illustrated by the low claims ratio, which Mr S says was an average of 14% for these policies. So on average this means that only 14% was going towards providing the insurance benefits. The rest paid for costs and profits. Allianz's failure to explain this to him was a breach of the common law duty of utmost good faith.

- Allianz did not tell him about the limitations affecting the policy, in particular: that the policy would only pay out if he was unable to do both his own job and other

work which the insurer thought he was reasonably qualified to do; and that claims arising from back injury and mental health were subject to restrictions and evidential requirements which significantly reduced the cover provided by the policy and the prospects of making a successful claim. This reduced further the policy's value, particularly as those conditions are the cause of the most common reasons for long-term absence.

- The common law duty of utmost good faith meant Allianz should have done more than simply draw the limitations to his attention, it should also have explained the significance of them and the affect they would have 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 3.6.2 E makes it clear that it should be presumed he would not have taken out the policy unless there is evidence to outweigh the presumption. I am required to take that provision into account when deciding what is fair and reasonable and should not depart from it, other than in exceptional circumstances when there is sufficiently good reason to take a different approach.

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

27. Allianz's representations were set out in its response to Mr S's complaint. In summary it has stated:

    - Mr S applied for his credit card in store on 8 April 1997 and the PPI would have been presented as being optional at that point. Allianz noted that Mr S ticked the section of the application form relating to PPI.

    - No advice or recommendations would have been given about the PPI. The store assistants did not provide financial advice.

    - Sufficient information would have been provided at the point of sale for Mr S to make an informed decision, including about the cost. He would also have been sent the full details of the policy after he took out the card, as well as regular updates.

    - Overall, it said there was no evidence that the policy was mis-sold.

the parties' representations in response to the provisional decision

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

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

my findings

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

a) relevant considerations

31. 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.

32. This sale took place in 1997 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 in January 2005. So the GISC code, the FSA's (and FCA's) overarching Principles for Businesses and insurance conduct rules (ICOB and ICOBS) aren't applicable to this complaint

33. Allianz was the insurer, not the lender. That means the unfair relationship provisions set out at s140A of the Consumer Credit Act, the Supreme Court judgment in *Plevin*[1] about s140A of that Act and the rules and guidance made by the FCA recently about the handling of complaints about the non-disclosure of commission in the light of the *Plevin* judgment aren't applicable either.

34. 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'

35. 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.'*

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

Guidance on the application of the ABI Code

36. 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.

37. 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…*

38. The 'Resumè for Intermediaries' published in July 1999 explained how insurers should interpret some of the key requirements of the ABI Code including:

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

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. As I've explained, Allianz was a member of the ABI, so it was subject to the ABI Code and its associated requirements as set out above. So I am satisfied it is right that I should take these Codes into account when deciding what is, in my opinion, fair and reasonable in the circumstances of Mr S's complaint.

The law

41. 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.

42. I have also considered carefully CAB's representations about the law, and complaints generally, as set out in its letter dated 22 January 2019.

The approach taken by former schemes

43. Under the transitional provisions[2] 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 Insurance Ombudsman Bureau (which Allianz subscribed to) – might have been expected to reach in relation to an equivalent complaint.

44. In that respect, I note that, under the Insurance Ombudsman's terms or reference, the Ombudsman's duties were, among other things:

> *(i) To have regard to and act in conformity with*

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

(a) the terms of any contract;

(b) any applicable rule of law, judicial authority or statutory provision; and

(c) the general principles of good insurance, investment or marketing practice, the ABI's Statement and Codes of Insurance Practice, and the LAUTRO and IMRO rules; but with (c) prevailing over (b) in favour of the complainant.

(ii) To have regard to (without being bound by) any previous decision of any Ombudsman.

(iii) To have regard to (without being bound by) any guidance of a general nature given by Council.

(iv) In the light of (i) (ii) and (iii), to assess what solution would be fair and reasonable in all the circumstances.

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

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

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

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

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

DISP App 3.1.3 G
Where the firm determines that there was a breach or failing, the firm should consider whether the complainant would have bought the payment protection contract in the absence of that breach or failing. This appendix establishes presumptions for the firm to apply about how the complainant would have acted if there had instead been no breach or failing by the firm. The presumptions are:

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

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

regular premium payment protection contract instead of the payment protection contract he bought.

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

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

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

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

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

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

DISP App 3.6.3 E

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

Overall

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:

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

- Whether Allianz gave Mr S sufficient, appropriate and timely information to enable him to make an informed choice about whether to take out the policy, including drawing to his attention and highlighting – in a clear, fair and not

misleading way – the main provisions of the policy and significant limitations and exclusions.

- If, having considered these questions, I determine the complaint in favour of Mr S, I must then go on to consider whether and to what extent Mr S suffered loss or damage and what I consider would amount to fair compensation for that loss or damage.

50. Mr S says Allianz ought fairly and reasonably to have gone further than I have suggested when providing information. I shall address Mr S's representations about this later on.

b) the sale - what actually happened?

51. Mr S's recollection is that the policy was sold to him when he applied for the charge card over the internet. He hasn't commented on whether he thought it was an advised sale or not.

52. Allianz states that the policy was sold to Mr S in a store when he was given an application form to complete and that he would not have received advice from the salesperson.

53. Allianz has provided a copy of the charge card application form, which includes the option to take payment protection. There is a tick in the PPI section to request the policy and Mr S signed the form on 8 April 1997.

54. The form contains the name of the salesperson and the name of the branch in which the leaflet was given out. There is also a tick in the box next to the wording: '*Apply by post'.* Allianz has said that this could mean either that: a) Mr S could have taken the form away and completed it before posting it back, or: b) he could have completed it in store and handed it to the salesperson who posted it back for processing. Allianz have a record of receiving the form on 9 April 1997 and the card account being opened on 12 April 1997.

55. Looking at the form, there is a section for office use only, which is where the 'Apply by Post' box appears, next to a box for 'Accept'. There are also boxes that could be ticked to denote what type of identification an applicant had provided. It looks as if an application could be accepted on the spot, presumably if someone had been able to provide suitable identification. Otherwise the application would need to be sent off for processing. The form doesn't appear to be a typical postal form that an applicant could pick up and complete in their own time. For instance it doesn't contain wording instructing an applicant to complete and return it to a particular address or by using an attached envelope. On balance, I think it is more likely that the sale was completed in store and that it was the salesperson that sent the application form off for processing.

56. On the card application form there was a section entitled '*Payment Protection'.* Below this it stated: *'Protect your Account Card payments against accident, death, unemployment or sickness (For details see condition 5 of the Terms and Conditions' section and Additional Information). The premium rate is 64p per £100 of the outstanding balance. The insured person must be over 18 and under 65 and permanently employed for 16 hours + per week. If you are not eligible, you may nominate your spouse/partner.' We strongly recommend you take cover by ticking the*

box.' As well as the tick box, there was also a box in which to print the full name of the person to be insured. Mr S has printed his name in that section.

57. Allianz has also provided a copy of the Terms and Conditions and Additional Information referred to in the Payment Protection section of the application form.

58. Most of the information in the terms and conditions refers to the credit card. However, under Additional Information it states:

'Payment Protection is only available to people aged over 18 and under 65 who have been in permanent employment of at least 16 hours per week for at least six months. Eligible partners or spouses can take out cover on behalf of those that do not qualify. Payment Protection does not cover pregnancy, cosmetic treatment, drug abuse, HIV related illnesses including AIDS, armed forces overseas, war or similar risks. No cover is provided against voluntary or regular unemployment (such as seasonal work) or dismissal as a result of wilful misconduct. No cover is provided for any period where payment is received in lieu of notice. Cardholders benefitting from Payment Protection insurance will be charged monthly with the current premium. If you wish to cancel you can do so by telephone or in writing.'

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

- Mr S took out the charge card and policy whilst in a store, with the form being sent off for processing and the account being opened a few days later.

- It's more likely than not that the credit agreement was part of a pack, given out at the point of sale, which contained more information about the policy – as the wording on the application form suggests was the case.

- It is more likely than not that Allianz *did* send the policy document to Mr S after he took out the store card, even though Mr S does not remember receiving it - but that wouldn't have played a part in his decision to apply for the policy, so it's of little consequence to the sale (other than to clarify what Mr S bought).

- It is more likely than not that the policy terms and conditions were those set out in the policy document that Allianz supplied, and as I have found, this was more likely than not to have been sent out after the sale.

c) did things happen as they should in 1997?

60. As I have already found, I think it is more likely than not that the sale took place in store. Although the form itself uses the words: '*We strongly recommend you take cover by ticking the box',* I am not persuaded Mr S would reasonably have taken this to be a personal recommendation for him, given that it was a leaflet that he picked up in store, rather than something that was individually addressed to him. I am not persuaded the information Allianz gave Mr S could reasonably be considered to amount to advice. I have not seen anything which persuades me that Allianz recommended he take out the policy, rather it alerted Mr S to the fact that he could take out the policy and gave Mr S information about it.

61. The question I need to consider is whether Allianz provided Mr S with sufficient information in an appropriate and timely way to enable him to make a properly informed decision about whether to take out the policy.

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

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

64. The application form shows Mr S ticked the box for PPI and then printed his name underneath as the person to be insured.

65. I have set out above the wording in the policy section of the application form. This does not say the insurance is compulsory, and, by having to tick separately to take out the policy, I am not persuaded Mr S would have been given the impression that he did not have a choice about whether to take it out or not.

66. I have also considered whether the salesperson gave Mr S sufficient information about the cover provided by the policy to enable him to make an informed decision about whether to take out the policy.

67. Mr S clearly has no recollection of completing the leaflet in store – which is unsurprising given the length of time since the sale.

68. Because of the limited evidence, I cannot know what happened in the store when Mr S took out the card and policy. Allianz says only that information in respect of the policy was provided on the application form, and has provided the signed charge card and policy application form, together with a page containing the Terms and Conditions and Additional Information. Given the sale was carried out in a non-financial business, I consider it more likely that any reference to the policy would have been fleeting – nothing which might reasonably be described as a discussion or conversation about it.

69. The evidence from the time of the sale does not tell us whether Mr S was given any verbal information about the premiums – even in passing – or information about the actual monthly cost (the fact that the premiums would be added to the account balance, attracting interest if unpaid at the end of the month, and were payable during a claim) or about the exclusions and limitations, before he agreed to take out the policy. The limited evidence there is suggests that Allianz relied on the policy summary set out in the Additional Information to provide that information.

70. The application form did refer Mr S to *'condition 5 of the Terms and Conditions' section and Additional Information*' where he could learn more about the important features of the policy. I have found that Mr S would most likely have been given this document as part of a pack. Most of the document is taken up with the terms and conditions relating to the charge card. I cannot know what opportunity Mr S may have had to read the document at the time of the sale.

71. Whilst I am satisfied Allianz sent the full policy conditions to Mr S after the event, which it was required to do, I do not consider that means Allianz gave Mr S the information he fairly and reasonably needed to make an informed decision about whether to take out the policy before he did so. I am mindful:

    - Mr S did not base his decision to take out the policy on the policy document.

    - I have no evidence to suggest that Mr S was forewarned that he would receive the policy document and should not make a final decision about taking out the policy until he had considered it.

    - It was incumbent on Allianz – and indeed its agent - to provide him with the most important information he required to make his decision before he took out the policy (see the 1996 ABI Statement of Practice for PPI), with full conditions afterwards.

72. I think it is more likely than not that Allianz included some information about the premiums, cover provided, and things like the significant restrictions on disability cover, in the wider leaflet, because that was the kind of information it was required to draw to the customer's attention by the ABI Code, which it had undertaken to comply with.

73. But I am not persuaded it did enough to present that information in a way that was fair and reasonable to Mr S. I am not persuaded that the reference on the application form to the Terms and Conditions and Additional Information was enough, in itself, to draw the important information about the policy terms to Mr S's attention, especially in the context of a sale in a store. And although I cannot say what took place in the store at the point of sale, I consider it unlikely that Mr S was given much information about the policy verbally – as I've said above, I consider it likely that any mention of the policy was fleeting.

74. Overall, having considered the parties' representations about what happened, I am not persuaded Allianz did enough to present information about the policy in a way that was fair and reasonable to Mr S. I am not persuaded that Mr S was given all of the information he needed about the policy at the point of sale to make an informed decision about whether to take it out.

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

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

77. It is also arguable that Allianz failed to disclose the costs information envisaged at DISP App 3.6.2 E (8). Allianz did disclose how the premium was calculated on the application form – a very important piece of information. But it could have made clearer the fact that he would continue to be charged premiums during the claim and the fact the premiums would attract interest.

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

    - Allianz 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 Allianz as the insurer.

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

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

79. 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.

80. 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.

81. 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.[3]

82. MacGillivray on Insurance Law[4] 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,

[3] *Banque Keyser Ullmann SA v Skandia (U.K.) Insurance Co. Ltd [1990] 1Q.B. 665, 772*
[4] MacGillivray on Insurance Law 14th edition 17-094

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.

83. I cannot be certain, but I think it is unlikely a court would conclude an insurer should have disclosed the claims ratio and 'value' information, or contextualised the information about the limitations on disability cover in the way Mr S says Allianz 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 Allianz.

84. Allianz was the insurer in this transaction - and as I have explained the sale was carried out by its agent. The agent is an intermediary for the purposes of the ABI Code, and that Code also referred to an overriding duty on the intermediary to act with utmost good faith and integrity.

85. The Guidance Notes for Intermediaries and the Resumè 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.

86. 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.

87. 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.

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

89. So it seems very unlikely that it was ever the intention of the ABI Code that intermediaries should provide the kind of additional information Mr S suggests it should.

90. 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.

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

92. But for the reasons and in the ways I have set out, I find the information Allianz gave Mr S was insufficient and presented the policy in an unbalanced way. I've no

evidence to say that Mr S's attention was drawn – in a clear and fair manner – to the important information that I consider it likely to have been set out in the wider leaflet that included the credit agreement. So the information Mr S based his decision on was – most likely – ultimately misleading. I am not persuaded that was fair and reasonable in all the circumstances.

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

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

94. It seems to me that whether or not Mr S has suffered loss or damage in this case depends on whether, if Allianz had explained things properly, Mr S would have acted differently, or whether he would have taken out the policy in any event?

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

96. Allianz says Mr S would still have taken out the policy because:

    - Any amount paid under the policy was in addition to his employer benefits.

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

98. 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.

99. 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 Allianz (through its agent) to provide the information about the policy's features, so the consumer could make that assessment.

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

101. Rather, I mean when he was given information in the store that there was a product he could buy that would protect his charge card payments in the event that he was unable to work because of accident, sickness or unemployment and which would pay off his entire balance if he died, that resonated with him in some way and he concluded that he wanted that product.

102. The issue here is that the decision he made 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 Allianz had provided the information in an appropriate way.

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

104. In this case, the evidence about Mr S's circumstances at the time of sale shows that the policy was not fundamentally wrong or unsuitable for him. He was eligible for its benefits and it provided cover that could have proved useful to him should the insured risks have come to fruition – even allowing for the limitations on the disability cover it provided.

105. Mr S's own evidence or 'testimony' is that if he had lost his job through accident or sickness, he was entitled to at least six months' full pay. He would also receive a payment on redundancy. He said he had no other ways of covering the card repayments beyond that. I have also noted that the existence of those employment benefits did not put Mr S off asking for the policy in the first place.

106. I think it is reasonable to conclude that from Mr S's perspective he saw some benefit in having insurance in his circumstances. If the risk the policy was concerned about came to fruition, he may well have been keen to minimise his outgoings during what would likely be a difficult period, even though he may have been able to manage for a time with just his employment benefits. This policy would have helped to do that by taking care of his charge card repayments in the event of a successful claim. It could also (depending on the balance at the date of claim) have reduced his outstanding card balance by a sizeable amount each month, as the table I set out earlier in this decision shows. It would do it at such a rate that the entire balance could be cleared if Mr S's claim lasted for nine months.

107. Whilst Mr S was interested in the policy, was eligible and had good reason for wanting the cover, the policy did not work entirely as he might have thought.

108. In relation to the costs, Allianz did tell him about an important part of the costs information – that the policy cost 64p per £100 of outstanding balance each month.

109. But, as Mr S says, and I consider it more likely than not, that it was not highlighted to him that he would continue to be charged for the policy in the event of a claim or that the premiums would be added to the account balance (so would attract interest). On the other hand, there was no suggestion the premiums would have been paid in some other way and Allianz said that they appeared on his statements, so it's possible Mr S might have expected this.

110. In addition, it may not have been made sufficiently clear exactly what Mr S would get back in return if he made a successful claim. But the 15% benefit had the potential to clear the charge card balance. And given the section of the application form Mr S signed described the policy as protecting his account payments, I think this is what he would have broadly anticipated. If anything, 15% might have been better than he expected, for example if he only intended to make the minimum repayment of 5% of the outstanding balance on the card each month.

111. I also consider it unlikely that the limitations and exclusions were explained to Mr S. But I do not think that even if they had been explained to him adequately, it is unlikely to have dissuaded him from taking out the policy.

112. Mr S did not for example have any pre-existing medical conditions and the policy did not exclude back or mental health conditions, or place any additional restrictions or more onerous evidential requirements, in the event of a claim on those grounds, than would have applied to any other disability claim. And I think it is unlikely Mr S would have expected to make a disability claim on the policy without having to provide some evidence to support that claim.

113. Furthermore, part of Mr S's complaint is that the policy would only pay out for disability if he was unable to do both is own job or any other occupation for which he might be suited. However the policy only required that someone was unable to do their normal paid work.

114. So, whilst Mr S did not know some things about the policy, I am satisfied the ultimate position in the event of a successful claim was not dissimilar to what he would reasonably have thought from the information he based his decision to take out the policy on and found acceptable.

115. Mr S has provided information about what he would have done with more information, which I have considered carefully. He says:

> *The PPI was unnecessary as I was entitled to full sick pay from my employer. I would have been entitled to at least 6 months full sick pay from my employer. I would also have received death in service pay. The death in service was at least double my annual salary. Furthermore I would have received a payment if I were made redundant.*
>
> *When this was sold I understand I may not even have been 'eligible' for it. At that time, I was past retirement age. Claims Advice Bureau say if I was not eligible I obviously should not have been sold this. M&S 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.*
>
> *Claims Advice Bureau say M&S 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 M&S did not do this.*
>
> *Claims Advice Bureau 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 M&S had said that they were excluding the most*

common reasons people miss work I can say that 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 a majority of cases. Let me be clear – I would not have wanted this policy had I been told this.

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 an IT manager, I had sickness cover - see above. I also had redundancy and would have got at least redundancy pay if I had been made redundant. 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. As well as everything else, I was financially stretched. I have often had to run an overdraft.

Claims Advice Bureau 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.

Claims Advice Bureau say that M&S 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 M&S. 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 M&S had not included it with the package.

116. Mr S's representative added further comments as follows:

The non-disclosure of exclusions and limitations is a clear breach of professional duty by M&S, and a substantial flaw in the sale: see DISP Appendix 3.6.2 (4). The failure properly to disclose cost is a further separate breach of duty and substantial flaw in the sale: see DISP Appendix 3.6.2 (8). In accordance with DISP Appendix 3.6.2 there is a presumption the client would not have proceeded, once either of these breaches of duty has been established. That presumption can only be displaced by specific evidence that this client would have proceeded regardless. No such evidence exists. To be clear: here are at least two substantial flaws in the sale, and each of them gives rise to a presumption the client would not have proceeded. There would have to be clear and specific evidence to displace both, and there is no such evidence to displace either. Moreover, not only is there no evidence to displace either presumption, but the client has actually given evidence they would not have proceeded. Any suggestion they would have proceeded is therefore not simply unlawful by virtue of ignoring both presumptions, but would also involve ignoring, or disbelieving, without any reason, the client's own evidence.

It is, furthermore, utterly inadequate, unlawful and unreasonable to suggest that either of the presumptions - let alone the client's evidence - can be displaced by saying that this policy might have been reasonable or useful or otherwise of decent value. That is not evidence this client would have proceeded, even if it were true. On top of this, it is also abject nonsense. This was a poor quality, poor value product.

The exclusions were extremely onerous and unfair. Moreover, the average claims ratio for these policies was 14% - so in the typical case 86% of the premium went to costs and profits rather than to provide the client with insurance.

To be clear: this is also a complaint about unfairness under Section 140 of the Consumer Credit Act 1974 and under FCA Principle 6; and also a complaint about breach of the fundamental duty of utmost good faith. This includes but is not limited to undisclosed commission as per "Plevin", which is just one aspect of the above. The PPI sale and credit relationship are both unfair, and the duty of utmost good faith was breached.

The appropriate redress is, as a minimum, return of all the PPI premiums plus interest. This is not merely because of undisclosed commission but also because of: - the unfair and onerous exclusions and limitations; - the failure properly to disclose those exclusions and limitations; and - the high cost, which was not properly disclosed. Most fundamentally of all, the contract represented extremely poor value, as demonstrated by the claims ratio, and this poor value was not disclosed to the customer. This undisclosed poor value makes the relationship unfair according to section 140, where that is applicable. It also amounts to a breach of Principle 6. The failure to disclose the poor value always breached the duty of utmost good faith, which is applicable in all cases. If the poor value had been disclosed the customer would not have proceeded. Any rational customer would have been very unlikely to proceed, having been properly informed.

Furthermore, in this case, you have direct, personal testimony from the customer that had the poor value been disclosed they would not have taken the PPI. Please note that any 'Tipping Point' in the level of commission is irrelevant to the matters of unfairness, poor value and breach of duty referred to here. We would also remind you that under Section 140, the burden of proof rests with the firm. If a firm suggests it behaved fairly, it has to prove that (Section 140B(9).).

117. Mr S is effectively saying that as a result of what his representative CAB 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.

118. In light of the findings I have already made, I do not think Mr S's representations demonstrate what he claims because much of the information he says would have affected his decision would not have been known to him at the time of the sale if everything had happened as it should. For example:

- There was no legal, code, or good practice requirement on Allianz (or its agent) to disclose the commission.

- I am satisfied the requirement on Allianz in 1997 was to draw his attention to the limitations, not to give the limitations the context Mr S says Allianz should have given them.

- As previously mentioned, Mr S was 31 years old at the time and therefore not beyond retirement age.

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

119. I am also mindful that: Mr S's recollections of the sale are, owing to the significant passage of time, likely to be limited; his representations about what he would have done are made in support of a claim for compensation; and the paragraphs I have quoted resemble quite closely the consumer representations made in other cases where CAB represents the consumer.

120. Having considered all of the evidence and arguments in this case, I consider it more likely than not that Mr S would still have taken out the policy. The policy was suitable for him, was sufficiently close to what he likely thought he was getting, and could still have provided a useful benefit at a difficult time, notwithstanding his employment benefits. It would have helped minimise his outgoings, and it is possible that in the absence of any savings Mr S might have wanted to avoid using his sick pay or redundancy pay for the card repayments, so as to be able to manage his other everyday expenses. It is likely he would have thought about whether the cost to benefit proposition still worked for him, and I consider it more likely than not that he would have taken out the policy in any event.

121. I have considered Mr S's representations about causation and DISP App 3, including the general opinion of Stephen Knafler QC referred to by CAB on behalf of Mr S. That guidance is for firms, but it is a relevant consideration I take into account along with many other things when I decide what is in my opinion fair and reasonable.

122. 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. The FSA explained its thinking in the policy statement[5] 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*

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

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.

123. It also said:

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

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

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

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

125. I am satisfied, applying DISP App 3, it is reasonable to conclude the presumption is rebutted in the particular facts and circumstances of this complaint. Based on the

evidence pertaining to Mr S's circumstances I have considered above, I consider it reasonable to conclude the position Mr S found himself in as a result of the sale was the same position he would have been in had the 'breach' or 'significant failings' not occurred. In other words I am satisfied that Mr S would have bought the policy in the absence of the breach or failings.

126. I am mindful of Mr S'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.

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

128. 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 he had been given clear, fair and not misleading information about the policy he was buying.

129. I am satisfied it would not be fair and reasonable in those circumstances to conclude Allianz should pay Mr S redress, as that would put him in a better position than he would have been in if everything had happened as it should have done.

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

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

132. I have thought about whether it would be appropriate to make an award of some kind because of the flaws I have identified in the sale process even though I have found Mr S would still have taken out the policy. I have not seen anything in the evidence relating to this case which leads me to conclude that Mr S suffered material distress or inconvenience because of the way the policy was sold or any other form of non-pecuniary financial loss. In those circumstances, I do not consider it would be fair to make an award.

My final decision

133. Overall, having considered all the evidence and arguments to decide what is, in my opinion, fair and reasonable in all the circumstances of this complaint and for the reasons I have set out in detail above, my final decision is that I do not make an award or direction in favour of Mr S.

Carole Clark
ombudsman