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

I issued a Provisional Decision on 12 January 2018 ("the Provisional Decision") explaining that I was not minded to uphold the complaint and setting out my reasons for reaching those provisional conclusions. I explained that I would consider the parties' further representations (together with the evidence and arguments submitted before the Provisional Decision) before reaching my final decision.

Both parties made further submissions, all of which I have considered carefully. This is my final decision on Mr K's complaint.

**summary**

1. This dispute is about the sale in 1998 of a payment protection insurance (PPI) policy to support a Lloyds Bank PLC credit card.

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

3. Lloyds says Mr K was eligible for the policy and it was suitable for him. It says more information about the features of the policy would not have affected his decision to take it out. It does not think compensation is due to him.

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

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

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

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

    - Taking into account the law, industry codes of practice and what I consider to have been good practice in 1998 (there were no applicable statutory regulations relating to the sale of payment protection contracts like this at the time), Lloyds should fairly and reasonably have advised Mr K with reasonable care and skill. In particular, it should have considered whether the policy was appropriate or 'suitable' for him, given his needs and circumstances. It should also fairly and reasonably have provided Mr K with sufficient clear, fair and not misleading information about the policy it was recommending to him, to enable him to make an informed decision about whether to follow the recommendation and take out the policy.

- Lloyds did not act fairly and reasonably in its dealings with Mr K. It did not advise Mr K with reasonable care and skill, in that it did not take sufficient steps to establish whether the policy was suitable for Mr K (although the policy it recommended was ultimately suitable for him). And it did not provide Mr K with all the information he needed to make an informed decision about whether to take out the policy.

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

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

7. Under the rules of the Financial Ombudsman Service, I am required to ask Mr K either to accept or reject my decision before 12 January 2019.

## background to the complaint

### a) *events leading up to the complaint*

8. In October 1998, Mr K applied for a Lloyds credit card and a 'Payment Protection Plan'. Lloyds says it does not know how it came to sell him the PPI. It has a copy of a completed application form and has assumed the sale took place during a branch meeting.

9. Mr K's personal details on the application form were handwritten, including the request for an additional card. Both Mr K and the proposed additional cardholder signed the form. There appears to be a cross on the form to indicate where Mr K's signature was required. This is consistent with the sale of the card and PPI having taken place with him present at a meeting in a Lloyds branch – and I consider it most likely that this is what happened.

10. Lloyds' records show the account started on 21 October 1998 and that a card limit of £2,000 was agreed. It does not hold any statements from before January 2000 so the statement history is incomplete. The first available statement is from January 2000 and shows that Mr K was charged a PPI premium of £15.33.

11. I have not been provided with a list of all of the transactions on the account. But Lloyds says Mr K paid his last PPI premium in June 2006 before the account ended on 31 October 2006. It is not known how many PPI premiums Mr K paid while his account was active.

### *b) Mr K's circumstances in 1998*

12. Mr K's credit card application contains some information about his circumstances at the time. He was 41 years old and had been living at his address for 2 years and 11

months. He was employed as a quality controller earning £12,500 per year and had been with his employer for 12 years and 7 months.

13. Separately, Mr K told us that:

    - He took out the policy in January 2000.

    - He was a labourer/forklift driver and had worked for his employer for 14 years when he applied for the card.

    - He would have received at least 12 months' pay if he was made redundant and full pay if he was off work due to sickness or accident. We asked Mr K to elaborate on his sick pay entitlement but he did not respond.

    - He had measles and chickenpox in around 1964.

### *c) the policy – what was Lloyds selling and what did Mr K buy?*

14. Lloyds has provided a copy of the full policy terms and conditions it says – and which I accept on the balance of probabilities – applied to policies like Mr K's sold in 1998.

15. The policy terms and conditions were set out in a four-page booklet called 'Lloyds Bank MasterCard Payment Protection Plan Certificate of Insurance'. Among other things, these show that:

    - There were eligibility criteria for life, disability and unemployment benefits, including requirements for the applicant to be aged 18 or over, but under 65, and working (in paid work for 16 or more hours per week) at the start date. Had Mr K not started work until after the start date he would only have become eligible for disability and unemployment benefits once he had been at work for six months without a break. But from the information I have, Mr K was working at the start date and did meet these criteria.

    - Other eligibility criteria were that the applicant must not have been in receipt of a state pension or be aware of any likely unemployment. I have no reason to consider Mr K to have been affected by these criteria.

    - There were also eligibility criteria for life and hospitalisation benefits only, including that the applicant must be 65 or over but under 75 at the start date or 18 or over but under 65 and not be at work at the start date. From the information I have, Mr K did not meet these criteria.

    - The policy provided life cover – it would pay off the amount owed on the credit card, up to £7,500, in the event of death. As I say, Mr K was not eligible for this benefit.

    - The policy provided disability cover. Broadly, if Mr K was unable to do his normal work due to injury, sickness or disease it would pay 10% of the outstanding balance at the start of the disability, up to £750 a month. This was payable each month until the disability came to an end, or until the outstanding

balance at the start of the disability was cleared, or Mr K had received 12 payments, whichever came first.

- The policy provided unemployment benefits. The policy would pay 10% of the outstanding balance at the start of unemployment each month, up to £750 a month, until Mr K ceased to be unemployed, the outstanding balance at the start of the unemployment was cleared, or Mr K had received 12 payments, whichever came first.

- There were two insurers – London and Edinburgh Life Assurance Company Limited provided the life cover and London and Edinburgh Insurance Company Limited provided the hospitalisation, disability and unemployment cover.

16. To put the benefit payments into context, I have calculated roughly what would happen to Mr K's account, assuming he made a successful disability or unemployment claim for 12 months after spending £2,000 on his card on purchases.

17. The calculation assumes: a 1.53% per month interest rate (the rate Lloyds charged on purchases), the PPI cost 77p per £100 of the outstanding balance; and that the minimum contractual payment was 3% of the monthly balance (or £5, whichever was higher), as the card conditions suggest was the case.

18. 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 | £2,000.00 | £0 | £0.00 | £0 | £2,000.00 | £0 |
| 2 | £2,000.00 | £0 | £14.10 | £30.60 | £200.00 | £1,844.70 | £60.00 |
| 3 | £1,844.70 | £0 | £12.88 | £28.22 | £200.00 | £1,685.80 | £55.34 |
| 4 | £1,685.80 | £0 | £11.64 | £25.79 | £200.00 | £1,523.23 | £50.57 |
| 5 | £1,523.23 | £0 | £10.37 | £23.31 | £200.00 | £1,356.91 | £45.70 |
| 6 | £1,356.91 | £0 | £9.07 | £20.76 | £200.00 | £1,186.74 | £40.71 |
| 7 | £1,186.74 | £0 | £7.74 | £18.16 | £200.00 | £1,012.63 | £35.60 |
| 8 | £1,012.63 | £0 | £6.38 | £15.49 | £200.00 | £834.50 | £30.38 |
| 9 | £834.50 | £0 | £4.98 | £12.77 | £200.00 | £652.25 | £25.04 |
| 10 | £652.25 | £0 | £3.56 | £9.98 | £200.00 | £465.79 | £19.57 |
| 11 | £465.79 | £0 | £2.10 | £7.13 | £200.00 | £275.02 | £13.97 |
| 12 | £275.02 | £0 | £0.61 | £4.21 | £200.00 | £79.84 | £8.25 |
| 13 | £79.84 | £0 | £0.00 | £1.22 | £81.06 | £0 | £5.00 |

19. Returning to the Certificate of Insurance, there were also exclusions – for example, for disability and hospitalisation claims occurring within 12 months of the start date due to pre-existing medical conditions. The policy defined a pre-existing medical condition

as: *"Any condition, injury, illness, disease or sickness during the 12 months before the Start Date:*

- *which You knew about, or should have known about, at the Start Date, or*
- *which You had seen or arranged to see a Doctor about, during the 12 months immediately before the Start Date."*

20. Whilst the policy required Mr K to provide satisfactory evidence of disability to make a claim, 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.

***d) the complaint and Lloyds' response***

21. Mr K's representative, We Fight Any Claim Ltd (WFAC), made lengthy and substantial representations on his behalf prior to the Provisional Decision.

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

- Lloyds 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 77p per £100 of the outstanding balance as Lloyds did. The true costs were much higher as the premiums were added to the account, attracting interest (which compounded over time), and the premiums would continue to be charged during the period of a successful claim, reducing the benefit. This meant the policy was both expensive and represented exceptionally poor value.

- The policy was unnecessary because he was covered anyway – he was entitled to full sick pay and redundancy pay.

- Lloyds did not tell him 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 him was a breach of the common law duty of utmost good faith.

- Lloyds did not tell him about the limitations affecting the policy, in particular: claims for pre-existing medical conditions were not covered, one of which he had, which significantly reduced the cover provided by the policy.

- The common law duty of utmost good faith meant Lloyds should have done more than simply draw the limitations to his attention, it should also have explained the significance of them and the impact they would have on 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, the Financial Conduct Authority (FCA) 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 regulatory guidance into account when deciding what is fair and reasonable and should not depart from it, other than in exceptional circumstances when there is sufficiently good reason to take a different approach.

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

23. Lloyds also provided us with its submissions prior to the Provisional Decision. In essence Lloyds said:

- Mr K was eligible for the cover. For example, he was within the age range and was working.

- The policy was suitable for him – while he had some employee benefits, the lack of detail provided about them meant it could not say these were sufficient to make the cover unsuitable. And he was not suffering from a pre-existing medical condition which would have affected his ability to make a claim.

- The full cost was, more likely than not, verbally explained to Mr K prior to the conclusion of the sale.

- Mr K consented to take out the policy. He does not have a detailed recollection of the sale. But the application form shows the policy was selected with a handwritten tick.

- At the time Mr K bought the policy, there was no requirement to disclose the amount of premium that would be retained as commission. And because of the dates Mr K's policy and credit card were both in force, it does not have to re-examine his complaint to establish whether there was an unfair relationship caused by the non-disclosure of commission.

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

24. Both parties made further representations in response to the Provisional Decision, all of which I have read and considered carefully. The parties, in large part, restated the substance of their prior representations.

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

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

- The Provisional Decision does not properly take into account the FCA's guidance at DISP App 3.6.2, misconstrues the tests the guidance sets out and fails to properly assess and weigh up the evidence in the complaint.

- There is no reason to believe that, if open and fair questions had been asked to properly identify his sick pay arrangements and to ask what income he wanted to replace and at what time, he would have ended up with this policy.

- Lloyds did not draw his attention to, or explain, the limitations in the policy. For example, he says the policy excludes cover for voluntary unemployment or unemployment resulting from resignation. He says this only leaves cover for redundancy, but that this would not result in a successful claim either because those made redundant almost always sign a voluntary 'compromise' agreement with their employer. The policy also unfairly allowed the insurer to unilaterally change its terms having given written notice. In addition, the policy unfairly limited disability claims where another disability claim had been made just prior – whether or not the new claim was for the same or a related condition.

- The Provisional Decision concludes that the sale was made on an 'advised' basis, and that the sale was flawed, but that the policy was suitable anyway without considering how proper advice ought to have been given and what the process should have entailed. The policy was unsuitable for him given his requirements and the limitations on cover.

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

26. Briefly, and in summary, Lloyds says:

- It agrees with the overall conclusions drawn in the Provisional Decision.

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

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

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

- If there were no actionable breaches it would be difficult for me to reach a different conclusion to the conclusion a court might reach on the basis that it is fair and reasonable to do so – the sorts of considerations that are relevant to

whether or not there has been an actionable breach of a legal duty of care will normally lead to a fair and reasonable result.

**my findings**

27. 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***

28. 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.

29. This sale took place in 1998, 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 Financial Services Authority (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.

30. The credit agreement itself concluded in October 2006. That means the unfair relationship provisions set out at s140A of the Consumer Credit Act, the Supreme Court judgment in *Plevin*[1] about S140A of that Act and the rules and guidance made by the FCA recently about the handling of complaints about the non-disclosure of commission in the light of the *Plevin* judgment, are not applicable either.

31. But there were a number of publications 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'*

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

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

    - The intermediary shall:

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

- *'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*

33. 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.

34. 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…*

35. The 'Resume for Intermediaries' published in July 1999 – shortly after the sale of Mr K'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"*
>
> *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.*

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

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

*The ABI Statement of Practice for Payment Protection Insurance*

37. 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.*

38. I consider these publications to be indicative of the standards of good practice expected of intermediaries like Lloyds at the time.

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

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

*The law*

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 considered carefully the parties' representations about the law set out in a number of documents, including most recently Lloyds' letter of 24 January 2018 and WFAC's letters of 19 May 2017 and 30 January 2018 and its email of 12 February 2018 in relation to Mr K's complaint together with its letters to this office about complaints generally of 2 March and 5 June 2017.

*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 Office of the Banking Ombudsman – might have been expected to reach in relation to an equivalent complaint.

44. In that respect, it is of 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 a 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'*.

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

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

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

46. 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 Mr K's complaint.

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

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

> *DISP App 3.1.3 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 App 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 Lloyds gave advice, whether it advised Mr K with reasonable care and skill – in particular, whether the policy was appropriate or 'suitable' for him, given his needs and circumstances.

- Whether Lloyds gave Mr K sufficient, appropriate and timely information to enable him to make an informed choice about whether to take out the policy, including drawing his attention to and highlighting – in a clear, fair and not misleading way – the main provisions of the policy and the significant limitations and exclusions.

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

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

51. Lloyds has suggested these overarching questions incorrectly draw upon the wording of subsequent regulatory requirements such as the FCA Principles for Businesses. I do not agree.

52. I accept 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, which I have set out above.

***b) the sale - what actually happened?***

53. Not surprisingly given the passage of time since Mr K took out the policy, there are differing views about how he came to take out the policy and what information or advice (if any) Lloyds gave him about it.

54. Mr K completed a Payment Protection Insurance Questionnaire (PPIQ) and submitted it to Lloyds when making his complaint. In it, he says he took out the policy by filling in a leaflet in January 2000.

55. I note Mr K did not complete the section of the PPIQ that asked whether Lloyds advised him to take out the policy. I can understand if that is because Mr K does not remember either way, given the sale took place nearly 20 years ago and he may well have paid only brief and passing attention to it at the time.

56. I have explained above that Lloyds cannot confirm how the policy was sold to Mr K but has assumed it was sold in a Lloyds branch and that it advised him to take it out. If anything, Lloyds' position on this point favours Mr K because, as well as having to provide him with enough information about the policy, it had to take steps to ensure it gave him suitable advice. In the absence of persuasive evidence to the contrary I have considered the complaint on the same basis.

57. Lloyds has provided the signed credit agreement dated 1998, which also includes Mr K's signature and a 'tick' asking for payment protection cover charged *'at 77p per month per £100 outstanding balance'* to protect him in the event of unemployment, accident and sickness.

58. Lloyds has also referred to the Certificate of Insurance which repeats the above information and also included additional details. Presumably this would normally have been sent once the application for the credit card and payment protection contract had been processed and approved, rather than provided at the meeting.

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

- Whilst it is possible Mr K simply filled in a leaflet for the credit card and policy without any face-to-face contact with Lloyds, as I have already explained, it is more likely than not that it resulted from a visit he made to the branch in 1998.

- Whilst it is possible that Lloyds might not have provided any advice to Mr K, it is more likely than not that it did – given Lloyds' own representations that it recommended the policy to Mr K and the lack of any submissions from Mr K to the contrary.

- The application form included only brief details about payment protection cover, containing the information I have set out above.

- It is more likely than not that Lloyds did not provide Mr K with the Certificate of Insurance until after it approved his card application.

***c) did things happen as they should in 1998?***

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

61. Having considered the evidence from the time of sale and the parties' representations about what happened, I am satisfied it is more likely than not that Mr K agreed to the policy Lloyds recommended, knowing that he did not have to take it out.

62. In reaching that conclusion, I note the credit card application form invited Mr K, under the heading *'Optional Features'*, to indicate whether or not he wanted the payment protection plan. It asked him to tick a box either to say he wanted the policy or that he was declining it.

63. The copy provided by Lloyds indicates Mr K ticked the box to say he wanted the policy.

64. The credit card application does not say the insurance is compulsory, and by having to tick to take out the insurance, I am not persuaded Mr K would have been given the impression that he did not have a choice about whether to take it out or not.

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

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

67. I cannot say for certain what steps Lloyds took to establish whether the policy was a suitable recommendation for Mr K. It seems Mr K cannot remember clearly what happened and there is no record of what the adviser discussed in relation to the policy. This is unsurprising in respect of a sale during a meeting. The adviser had some limited information about Mr K's financial circumstances, but there is no specific evidence to show that the adviser took steps to establish whether Mr K would have been caught by the significant exclusions and limitations which might have meant the policy did not fully meet his needs. For example, there is nothing to suggest Lloyds considered whether Mr K had any pre-existing medical conditions. Although Mr K's previous measles and chickenpox would not be considered pre-existing medical conditions as he had them well before the 12 months before the start date and with no suggestion that they recurred during that period.

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

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

    - Mr K met the eligibility criteria for the policy.

    - Mr K had a need for the policy – it seems likely that Mr K's ability to continue to meet his credit card repayments would have been put under strain if he were not working for an extended period of time – even allowing for the redundancy benefits he says he was entitled to. Mr K has not provided details of his sick pay entitlement but I do not think it would have been extensive in the light of who his employer was and his occupation. The policy would have helped Mr K manage the consequences were he unable to work.

    - The monthly cost of the policy appears to have been affordable for Mr K.

    - The exclusions and limitations did not make the policy unsuitable for Mr K. There was nothing about Mr K's employment or occupation which would have made it difficult for him to claim. Regarding pre-existing medical conditions, Mr K has told us about the measles and chickenpox he had around 24 years prior to the sale. But these do not appear to be caught by the specific terms and conditions on limitations and exclusions. There were also no additional restrictions on the cover for mental health or back problems.

    - Whilst the policy would only pay benefits for a maximum of 12 months for each claim for disability, unemployment or hospitalisation, it still provided useful cover given Mr K's circumstances and the fact the policy could have cleared his outstanding card balance.

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

71. I am satisfied it is more likely than not that Mr K was given a very broad description of what the policy was intended to cover (that is, that the policy would protect his card payments in the event he was unable to work through disability or unemployment). I have reached this conclusion because I think Mr K would have been told this – at the very least – during the discussion with the adviser. I think it is unlikely Mr K would have taken out the policy without any sense of what the policy was. The application form he signed also described the policy as a 'Payment Protection Plan', which would have given him some idea of what the policy was for.

72. I am also satisfied from the credit card application that Mr K ought reasonably to have understood from this that the policy cost 77p per £100 of the statement balance – if he was not also told this by the adviser during the discussion.

73. But the evidence from the time of the sale does not tell us whether Lloyds gave sufficient information about the actual monthly benefit, the actual 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 Mr K agreed to take out the policy. The limited evidence there is does not suggest that Lloyds can rely, for example, on a policy summary set out in an accompanying leaflet with the credit card application to deliver that information. If Mr K spoke to an adviser, I think it is more likely than not that he based his decision on the things he was told, rather than on anything he was given – particularly as it does not seem likely that Mr K would have had an obvious opportunity during a meeting to have been able to take the time to read and digest the information in a summary before deciding to take out the policy.

74. While I think Lloyds probably sent Mr K the full policy conditions which gave information about the benefits, limitations and exclusions after he applied for it, I do not consider that means Lloyds gave Mr K the information he fairly and reasonably needed to make an informed decision about whether to follow the recommendation and take out the policy. I am mindful:

    - Mr K did not base the decision he made during the meeting and discussion to take out the policy on the full policy conditions.

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

    - It was for Lloyds to provide him with the most important information he required to make his decision before he took out the policy (see the good practice I set out earlier).

75. Overall, having considered the parties' representations about what happened, while I am satisfied that the policy was a suitable recommendation for Mr K, I am not persuaded Lloyds did enough to present information about the policy it was recommending in a way that was fair and reasonable to Mr K. I am not persuaded that Lloyds gave Mr K all of the information he needed about the policy to make an informed decision about whether to follow the recommendation and take out the policy.

76. 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.

77. It seems to me that it would be reasonable to conclude that there were significant failings in this case. Lloyds did not, for example, disclose to Mr K 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 3.6.2 E (4)].

78. Lloyds may also have failed to disclose the cost information envisaged at DISP App 3.6.2 E (8). Lloyds did refer to how the premium was calculated in the application form – a very important piece of information. But it could have made clearer the fact that Mr K would continue to be charged premiums during a claim and that the premiums would attract interest.

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

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

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

Lloyds did have to consider the features of the policy and weigh up the significance of the exclusions and limitations to ensure the policy it was recommending was suitable for Mr K's needs and resources and it also had to explain the features of the cover. But I am not persuaded by Mr K's views about what the duty of utmost good faith required.

80. 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.

81. 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.

82. 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]

83. 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

[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

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.

84. 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 K 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.

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

86. 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.

87. 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.

88. 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.

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

90. I also note Mr K's representations that the policy unfairly limited disability claims that followed claims that had been paid for 12 months, either because he would have been required to return to work for at least 6 months without a break in between before claiming again or because, if claiming for the same or a related condition, there needed to be a period of at least 6 months in between claims whereby he was free of symptoms and had not consulted a doctor or received treatment.

91. I do not agree with the representations because I do not believe that the effect of the terms is to unfairly limit the insurer's liability or effectively exclude claims for chronic conditions, as argued. I say this because after 12 months of claiming the credit card balance could have been paid off in full as shown as shown in paragraph 18 above. And I do not think it is unreasonable for the insurer to set out a short period before being able to claim again in either circumstance. I also do not think this made the policy unsuitable for Mr K or that he would have decided against taking it out if he had been given full information. I believe he would have seen the potential benefits of having a claim paid for 12 months as outweighing the requalification period to claim again.

92. 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.

93. 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 K says Lloyds should have done.

94. 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 K 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.

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

96. But, for the reasons and in the ways I have set out, I find the information Lloyds gave Mr K, in the way it did, was insufficient.

97. In particular, Lloyds failed to explain in a clear way all the features of the policy it was recommending, so the information Mr K based his decision on was incomplete. Lloyds could also have made clearer the fact that the premiums charged would attract interest and that Mr K 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 Mr K?***
***to what extent did Mr K suffer loss or damage as a result?***

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

99. While I am not persuaded that Lloyds took the steps it should have done to establish whether the policy it recommended was suitable for Mr K, I have found that the policy *was* ultimately suitable for him.

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

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

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

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

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

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

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

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

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

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

110. While Mr K was interested in the policy, was eligible and had good reason for wanting the cover provided by a suitable policy, the policy did not work entirely as he might have thought.

111. Mr K's own evidence or 'testimony' is that, if he had lost his job through redundancy, he would have had 12 months' redundancy pay. He would have got sick pay but he had no other means to help him make the credit card payments along with the rest of his usual outgoings.

112. I think it is reasonable to conclude that, from Mr K's perspective, he saw some benefit in having insurance, and it would have been reasonable for Lloyds to recommend it to him. If the risk the policy was concerned about came to fruition, the policy would help him manage the consequences. It would help him reduce his outgoings during what would likely be a difficult period, even though he may have been able to manage for a time with his employment benefits, especially if he had been made redundant. As well as meeting the monthly payments, the policy would reduce his 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.

113. In relation to the costs, Lloyds did tell him about an important part of the cost information – that the premium cost 77p per £100 of the outstanding balance each month.

114. But as Mr K says, Lloyds did not explain that he would continue to be charged for the policy in the event of a claim, or spell out that that the premiums were added to the account balance (so would attract interest). On the other hand, there was no suggestion the premiums would be paid in some other way, and presumably they appeared on his statements, so it is possible Mr K might have expected this.

115. Overall I am not persuaded Mr K would have found the cost unacceptable if he had been given complete information about the cost during the branch visit and discussion.

116. In addition, Lloyds might not have made it sufficiently clear exactly what he would get back in return if he made a successful claim. But as I have said the 10% benefit had the potential to clear the credit card balance in certain circumstances. And given the section of the application form Mr K signed described the policy as a 'Payment Protection Plan' I think this is what he would have broadly anticipated; if anything, 10% might have been better than he expected if he only intended to make the minimum contractual repayment of 3% of the outstanding balance on the card each month.

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

118. Mr K did not, for example, have any pre-existing medical conditions. I have considered Mr K's measles and chickenpox many years before the sale, but they were not a concern in the 12 months before the start date and so would not have fallen within the scope of the exclusion clause. So I do not think knowing about the pre-existing medical condition exclusion and limitation would have deterred Mr K.

119. 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 K would have expected to make a disability claim on the policy without providing some evidence to support that claim.

120. So, while Mr K 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 any advice and information he based his decision to take out the policy on and found acceptable.

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

> "*We will not change the rate of monthly premium or the terms and conditions of this insurance without writing to tell You at least 30 days in advance.*"

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

I have considered these arguments carefully.

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

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

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

125. I am also mindful that both parties had the right to withdraw from the policy agreement at any time throughout the duration of the contract. And so if any new terms were proposed by the insurer, Mr K had a reasonable amount of time to consider whether he wanted to continue with the policy. If Mr K did not like any newly proposed terms and conditions, he could have chosen not to accept them and sought cover elsewhere – if he still wanted this type of cover.

126. So overall while I accept Lloyds should have done more to bring the paragraph quoted above from the terms and conditions to Mr K's attention, for the reasons I have set out above and in my Provisional Decision I do not think he would have been put off buying the policy if Lloyds had done more.

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

128. I have considered all of Mr K's submissions, among the latest of which included that I was wrong to state in correspondence that Lloyds was acting for the insurer rather than for Mr K in selling the policy and he pointed to the following policy terms which, he says, show the policy had been arranged by Lloyds Bank Insurance Services Limited (LBIS):

> "*This certificate gives details of Your insurance which has been specifically arranged by Lloyds Bank Insurance Services Limited for customers of Lloyds Bank Plc who have a MasterCard Account.*"

129. Mr K says that LBIS arranged the policy for Mr K and that, as a member of the Insurance Brokers Registration Council (IBRC), it should have put the interests of Mr K, as its client, before any other consideration. Mr K also says the relationship was clearly one of trust and confidence and that the case of *McWilliam and another v Norton Finance (UK) Limited trading as Norton Finance in liquidation* [2015] EWCA Civ 186 meant LBIS owed him a fiduciary duty. That is to say LBIS had an obligation to be loyal to Mr K and to act in good faith. He says LBIS breached its duty of trust and confidence and its fiduciary duty by not disclosing to Mr K the commission it received in selling the policy.

    I have considered these arguments carefully.

130. My understanding, which Lloyds' submissions have confirmed, is that Lloyds and LBIS are two separate entities. LBIS was a broker that sourced the insurance policy on behalf of Lloyds and Lloyds then acted as the seller of the policy and the lender of the finance to Mr K. However, this complaint is about the actions of Lloyds and not LBIS. I remain of the view that Lloyds was acting as the agent of the insurer in selling the policy.

131. I have considered the *McWilliam* case Mr K raises but do not believe it is relevant to his complaint. I say that because that case was about the obligations owed by an independent broker who was acting as an agent of its consumer clients. Mr K's complaint, on the other hand, is very different as it concerns the actions of a lender in selling a PPI policy as an agent of the insurer.

    So, overall, I do not believe Lloyds owed Mr K the duties he says it did or, as a result, that it breached those duties.

132. Mr K has provided information in his PPIQ submission to us about what he would have done with more information, which I have considered carefully. He says:

*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 how the effects of compound interest being charged at credit card 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 would really 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. On top of this, I also now understand 'pre-existing medical conditions' were not covered. This sounds like a piece of jargon to me, but WFAC have explained what it meant. I have had the following health problems:*

*Condition: measles, Date: circa 1964, Treatment: i* [sic] *also had german* [sic] *measles*

*Condition: chickenpox, Date: circa 1964,*

*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 labourer/forklift driver, I also had redundancy and would have got at least 12 months or more 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. In fact I have struggled to pay my debts and gone into arrears. WFAC say that for me, even more than anybody else, it was wrong for me to spend money on this PPI which was both really expensive, and unlikely to pay out.*

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

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

134. In light of the findings I have already made, I do not think Mr K's representations demonstrate what he claims, because much of the information he says would have affected his decision would not have been known to him at the time of sale if everything had happened as it should. And some of the things he has mentioned would not have been relevant to the decision he was making. For example:

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

- I am satisfied the requirement for Lloyds in 1998 was to consider the features of the policy and weigh up the significance of the exclusions and limitations to ensure the policy it was recommending was suitable for Mr K's needs and resources. It also had to explain the features of the cover as I have discussed.

- Mr K's conditions prior to the sale were not pre-existing medical conditions as defined in the Certificate of Insurance.

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

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

137. Having considered all of the evidence and arguments in this case I consider it more likely than not that Mr K would still have taken out the policy. The policy was suitable for him, was sufficiently close to what he thought he was getting and provided benefits that would help him manage the consequences if he were made unemployed, or unable to work through disability. In the circumstances I consider it more likely than not that Mr K would have taken out the policy in any event notwithstanding the limitations on cover.

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

139. I note that the S*aville* case involved very different circumstances to those in Mr K's complaint. For instance, *Saville* involved a term mismatch between a 5-year single premium PPI policy and a 25-year loan and a consideration of the requirements of the Insurance Conduct of Business Rules that applied to sales between 2005 and 2008 – neither of which apply here. But in any event, even if Lloyds had asked the kinds of questions Mr K says it should have done and pointed out the limitations on cover associated with the policy recommended, I think it is more likely than not that Mr K would have taken out the policy in any event given the benefits it still provided and his overall circumstances.

140. I have considered Mr K's representations about causation and DISP App 3, including the general opinion of Stephen Knafler QC, provided by WFAC on behalf of Mr K 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 I take into account, along with many other things, when I decide what is, in my opinion, fair and reasonable.

141. 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. 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 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.*

[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 44 to 45

142. 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…*

143. I have thought about what outcome applying the FCA's guidance to this complaint might lead to. In the language of DISP App 3, I have found it would be reasonable to conclude there were substantial flaws in the sales process. In those circumstances, DISP App 3 says it should be presumed Mr K 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.

144. 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 K's circumstances I have considered above I consider it reasonable to conclude the position Mr K 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 K would have bought the policy in the absence of the breach or failing.

145. I am mindful of Mr K'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.

146. Even if I am ultimately departing from the guidance 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 K in the position he would have been in if he had not bought the policy.

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

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

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

150. I have also carefully considered Mr K's 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 misrepresented the contract to Mr K 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 Mr K in a better position than if everything had happened as it should have done.

151. In its response to the Provisional Decision, WFAC has referred to the *Plevin* judgment and also to the case of *R (on the application of British Bankers Association) v Financial Services Authority and another* [2011] EWHC 999 (Admin), which commented on the FSA Principles. WFAC has quoted select passages from these cases and asked me to consider how the wider considerations about fairness are relevant to Mr K's complaint. I have already explained why I do not consider the *Plevin* judgment or the Principles to be applicable to Mr K's complaint. In any event, I have considered the submissions made by WFAC about these passages – and they have not changed my view about what is fair and reasonable in the circumstances of Mr K's complaint.

152. I have thought about whether it would be appropriate to make an award of some kind because of the flaws I have identified in the sale process, even though I have found Mr K 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 K 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

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

**154. I now ask Mr K to either accept or reject my decision by 12 January 2019.**

Nimish Patel
**ombudsman**