FINAL DECISION	
complaint by:	Mr and Mrs V
complaint about:	Bank D
complaint reference:	
date of decision:	June 2012

This final decision is issued by me, Tony Boorman, an ombudsman with the Financial Ombudsman Service. It sets out my conclusions on the dispute between Mr and Mrs V and Bank D. Under the rules of the Financial Ombudsman Service, I am required to ask Mr and Mrs V either to accept or to reject my conclusions, in writing, before 28 July 2012.

summary of complaint

This dispute is about the advice given to Mr and Mrs V by Bank D to invest in the AIG Life Premier Access Bond (PAB) Enhanced Variable Rate Fund (the Enhanced Fund) in 2008.

my provisional decision

I issued a provisional decision on 7 February 2012 substantially upholding this complaint. Both parties have responded to my provisional decision.

Mr and Mrs V broadly accepted my provisional decision but highlighted further costs and losses they attribute to their investment in the PAB:

- When they encashed their bond, they have said they were concerned about the tax implications and, because Bank D would not provide tax advice, needed to seek this elsewhere. They have provided invoices (totalling £5,922.50) from two advisers that appear to show they received advice about the tax implications of encashing the bond at around the time they withdrew their money. They believe Bank D should reimburse these costs.

- They have also provided evidence that they purchased a boat in June 2008 (before the AIG fund ran into difficulty) that was sold shortly afterwards at a significant loss. Mr and Mrs V have said they only sold the boat because of the uncertainty around AIG and believe Bank D should also compensate them for the loss incurred.

Bank D did not accept my provisional decision. It provided extensive submissions, which can be summarised as follows.

the product

- My conclusion that the EVRF was not suitable for Mr and Mrs V appears in the view of Bank D to be based on a misunderstanding of the nature and characteristics of the product. I do not have the same *'deep level of understanding'* as Bank D had. Further, Bank D was in regular contact with AIG Life concerning its management of the fund.
- The fund was designed to provide a high level of capital security under normal circumstances and was suitable for low risk investors looking for a good level of return. It also had certain tax benefits for higher rate taxpayers.
- The fund was a low risk product, with at least 75% of the portfolio in AA or higher rated assets and all assets at least A rated. Further, it never held any investments in US sub-prime markets, any other US mortgage or US securitised paper, nor did it invest in structured investment vehicles or asset backed commercial paper.
- The fund offered instant access in normal market conditions. In view of its track record, it was reasonable for Bank D to treat this as a suitable fund for investors requiring instant access. Even following Eliot Spitzer's investigations into AIG Inc in 2005 and the subsequent increase in demand for withdrawals, these were met without the need for a moratorium or reduction in capital. Continued access was possible because AIG Life actively monitored the inflow and outflow activity of the fund and adjusted liquidity levels when appropriate.
- Mr and Mrs V held other products within Bank D's liquidity management service, including £1,109,996 in other accounts, with £631,996 on instant access and £106,205 in traditional bank and building society accounts. The Enhanced Fund offered a better enhanced return than their other holdings and better protection through the FSCS in the event of default by AIG Life.

risk profile

- The sales documentation records Mr and Mrs V were 'low risk' rather than 'no risk' investors. My characterisation of Mr and Mrs V as 'no risk' investors is based solely on their recollections and is ill-founded.
- The banker (who advised Mr and Mrs V) says he has no recollection of them saying they were not prepared to take any risks. If they had done he would have explained that there is no such thing as a 'no risk' investment.
- The banker has also observed that Mr and Mrs V were retiring in their mid 40s and would always have needed to invest outside the pure cash environment to fund their retirement. It was the bespoke and long-term assistance required by Mr and Mrs V to fund a lengthy retirement that prompted the banker's comment about Mr V being *'an inexperienced investor who will need guidance and education over the years to manage his wealth effectively'*.

investment objectives

- The suitability letter, which contained standard wording approved by Bank D's compliance department, records Mr and Mrs V's *'main priority'* was to obtain higher returns than were available from cash deposits *'without exposing the capital to a significant increase in investment risk'*. This is at odds with my conclusion that Mr and Mrs V were primarily concerned with secure cash investments over the short term.
- I have misunderstood certain references to *'cash'* in the documentation. This is Bank D's internal shorthand for products with its liquidity management service and is not evidence Mr and Mrs V requested a cash investment.

- The banker says he did not use potentially greater FSCS protection as a selling tool. Instead he provided factual information following questions posed by Mr and Mrs V. It was common for consumers to ask about FSCS protection following the problems at Northern Rock.

risk warnings, the suitability letter and other documentation

- The risks associated with the investment were clearly explained in the documentation issued, including the suitability letter and key features document.
- This documentation was provided at a time when Mr and Mrs V could have cancelled their investment if it was not what they initially believed it to be.
- Mr and Mrs V ran a successful business for 18 years and had recently been through the process of selling it. Any suggestion they did not understand the explanatory documentation is not credible.

overall conclusions on suitability

- My view that Mr and Mrs V's comments about their desire for an entirely secure and accessible investment are *'plausible and persuasive'* is contradictory to the documentary evidence, which shows clear risk warnings were provided.
- The fund was not recommended as an alternative to traditional bank and building society deposits. My reference to the FSA's Final Notice in respect of Coutts is irrelevant and inappropriate as it specifically refers to Coutts' sales process. Bank D's suitability letter did not describe the fund as a *'cash product'*.
- Mr and Mrs V were not looking for a pure cash investment. They were instead seeking a better return than deposits could offer. For investors seeking higher returns than deposit accounts, Bank D's liquidity management service was the appropriate service and the Enhanced Fund offered the best instant access return.

what Mr and Mrs V would have done but for the advice

- A deposit account would not have been appropriate advice for Mr and Mrs V as they were looking for higher returns. In any event, deposit accounts are not 'no risk' investments. Putting all their money in a single account would have meant Mr and Mrs V did not benefit from the greater FSCS protection they sought and would actually have put a greater portion of their money at risk.
- Mr and Mrs V's comments that they believed they were investing in the Standard Fund, which is also not a 'no risk' product, is further evidence they were willing to accept some risk to their capital.
- If the complaint is to be upheld, a comparison with the returns Mr and Mrs V would have achieved if they had invested in the Standard Fund is a more appropriate method of assessing their loss.

fair compensation

- Bank D has requested details of how I determined returns of 4% and 2.5% per year would have reasonably achievable.
- It has also requested clarification of how compensation should be calculated using this method – essentially whether income tax should be deducted from the hypothetical return before compensation is paid. Bank D argues that if Mr and Mrs V had invested in a

deposit account, their money would have been taxed. To return them to the correct financial position, a similar deduction should be made from any compensation.

is it fair to require Bank D to pay all of the losses incurred?

- In considering whether Mr and Mrs V's losses were foreseeable or too remote, I have dismissed the relevant legal tests and case law without explanation or else I have misunderstood those tests.
- The cause of Mr and Mrs V's loss were the combined effect of a number of factors that could not have been foreseen, including the rapid deterioration in AIG Inc's financial position, financial markets around the world entering a period of turmoil, a concentrated period of investor panic, and the deterioration of the secondary market for certain types of asset following the collapse of Lehman Brothers.
- The judge's ruling in the Rubenstein case supports Bank D's view that the loss was not foreseeable. In any event, this ruling is being appealed and I should defer issuing my final decision until the appeals have been determined.

exit plan

- Mr and Mrs V opted for the exit plan against Bank D's advice. Had they selected the maturity plan, it is likely they would receive 100% of the December 2008 value of their investment in July 2012, thereby suffering no capital loss.
- To imply the closure of the fund denied Mr and Mrs V access to their assets between September 2008 and July 2012 is incorrect. In addition to the money moved to the Standard Fund, Bank D offered loans to clients choosing the maturity plan (secured against their holding in the protected fund) to alleviate any liquidity concerns.

Finally, Bank D believes it should meet with me to discuss some of the points raised in its submissions in further detail. It believes such discussions will be key to my analysis in preparing my final decision.

I have carefully considered the points made by Bank D and Mr and Mrs V. Having done so, I am not persuaded that I should depart substantially from the findings set out in my provisional decision. I consider that many of the issues Bank D has raised in its most recent correspondence were points made previously or which had already been adequately addressed in my provisional decision. That said, where appropriate I have addressed below specific points made by Bank D and Mr and Mrs V in reaching my final decision.

background to complaint

a) events leading up to the complaint

In early 2008 Mr and Mrs V sought investment planning advice from Bank D. I understand that Mr V owned and ran an industrial business established by his grandfather, which he was in the process of selling. He received £4.2 million from the sale.

Acting on the advice given by Bank D, Mr and Mrs V invested around £3.2 million in the AIG Life PAB Enhanced Fund and a further £1 million elsewhere.

On Monday 15 September 2008 (the day Lehman Brothers filed for Chapter 11 bankruptcy protection) AIG Life suspended withdrawals from the Enhanced Fund for a period of 3 months owing to the large number of withdrawal requests it had received following media speculation over the weekend of 13/14 September about the financial viability of American International Group (AIG), the American insurer which owned AIG Life.

AIG Life subsequently announced that it would close the fund at the end of the 3 month suspension – on 15 December 2008, because of the large volumes of withdrawal requests.

Following the announcement AIG Life divided the fund in two, moving one half (the cash elements of the fund) into the Standard Variable Rate Fund (the Standard Fund) which investors could withdraw – known as the 'initial switch' – and offering investors a choice about what to do with the second half. Investors could:

- Surrender their investment or move it to the Standard Fund (known as the 'exit plan') by selling assets early at the best achievable market prices, which because of market conditions meant investors would receive less than the paper value of their investment. Investors could withdraw their money from the Standard Fund if they wanted.

- Keep their investment (known as the 'maturity plan') in a new fund – the Protected Recovery Fund, with a guarantee that on 1 July 2012 policyholders would receive at least the full value of their investment as at 14 December 2008.

Mr and Mrs V had withdrawn about £430,000 before the fund's suspension. They opted to surrender their remaining investment, which on paper was worth around £2.8 million. They received back around £1,375,000 following the initial switch and a further £1,040,000 through the exit plan. They subsequently complained to Bank D, concerned about the extent of their loss and the advice they had received from Bank D in 2008.

b) the complaint and the firm's response

Mr and Mrs V complained to Bank D that the PAB Enhanced Fund was unsuitable for them because it presented more risk than they were prepared to take. They said:

- They understood they were investing in the Standard Fund. They wanted a short term investment and required immediate access to their money.

- They did not want to take any risk (and were not told about the risks) – they wanted security, rather than high interest returns, and understood their money was in cash and safe.

- They were not told that the value of their money could fall or that AIG Life could withhold their funds for 90 days in exceptional circumstances.

Bank D did not agree. It said it recommended the investment in the PAB Enhanced Fund following a series of meetings in early 2008. Its view has always been that the PAB provided a high level of capital security under normal circumstances. The fund was managed on a passive basis with assets bought and held to maturity, rather than traded – so, in the normal course of events, it did not expose Mr and Mrs V to market risk. And consequently, the PAB Enhanced Fund was suitable for very low and no risk investors looking for a good level of return.

Mr and Mrs V were not satisfied with Bank D's response and referred the complaint to this service. The complaint was investigated by one of our adjudicators who recommended that it should succeed.

Bank D did not accept the adjudicator's assessment. In summary, it said:

- Mr and Mrs V were looking to invest for a higher after tax return than could be obtained from pure cash deposits but without exposing their capital to a significant increase in investment risk.

- The suitability letter explained the risks and would have left Mr and Mrs V in no doubt that there was a risk to their capital.

- Mr and Mrs V were recorded as low risk investors – the PAB Enhanced Fund was suitable for them.

- The possibility that there might be restrictions on access in some circumstances does not make an investment unsuitable for someone who requires access. In any event the possibility that access might be restricted was made clear to Mr and Mrs V.

- The PAB (which in August 2008 invested in 192 separate holdings in 111 companies) provided diversification to reduce counterparty risk, as did the other investments Mr and Mrs V made at the time. That would have been difficult to achieve through multiple deposit takers given the size of the investment.

Mr and Mrs V raised no objections to the adjudicator's opinion.

In the light of these developments and in particular the responses to my provisional decision I have now reached a final decision on this case.

my findings

I have included only a brief summary of the complaint (above), but I have read and considered all the evidence and arguments available to me from the outset (including but not limited to the responses to my provisional decision), in order to decide what is fair and reasonable in all the circumstances of this complaint.

a) relevant considerations

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

Bank D gave Mr and Mrs V advice about a regulated investment at meetings in early 2008. It is important to note the relevant regulatory regime that applied at the time.

The FSA principles – these apply to all authorised firms including Bank D and have done so since 2001. Of particular relevance to this and other similar complaints are:

- Principle 6
  "A firm must pay due regard to the interests of its customers and treat them fairly."

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

- Principle 9
  "A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment."

In addition, where investment advice is given, the more detailed FSA's Conduct of Business Sourcebook (COBS) rules apply. These came into force on 1 November 2007 and before that date the Conduct of Business (COB) rules applied, which provide similar guidance. Of particular relevance to this complaint are:

COBS 9.2.1R
(1) A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client.
(2) When making the personal recommendation or managing his investments, the firm must obtain the necessary information regarding the client's:
(a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;
(b) financial situation; and
(c) investment objectives;
so as to enable the firm to make the recommendation, or take the decision, which is suitable for him.

COBS 9.2.2 R:
(1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:
(a) meets his investment objectives;
(b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and
(c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.

(2) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.

(3) The information regarding the financial situation of a client must include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.

COBS 9.3 sets out Guidance on assessing suitability:

COBS 9.3.1G
(1) A transaction may be unsuitable for a client because if the risks of the designated investments involved, the type of transaction, the characteristics of the order or the frequency of the trading.

(2) In the case of managing investments, a transaction might also be unsuitable if it would result in an unsuitable portfolio.

COBS 9.2.3 R

The information regarding a client's knowledge and experience in the investment field includes, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, information on:
(1) the types of service, transaction and designated investment with which the client is familiar;
(2) the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out;
(3) the level of education, profession or relevant former profession of the client.

If a firm has supplied a 'suitability report':

COBS 9.4.7R
The suitability report must, at least:
(1) specify the client's demands and needs;
(2) explain why the firm has concluded that the recommended transaction is suitable for the client having regard to the information provided by the client; and
(3) explain any possible disadvantages of the transaction for the client.

COBS 9.4.8G:
A firm should give the client such details as are appropriate according to the complexity of the transaction.

I am also mindful of the general legal position including: the law relating to negligence, misrepresentation and contract (including the express or implied duty on professional advisers to give advice with reasonable skill, care and diligence); and the law relating to causation and remoteness.

There is no dispute that this was an advised sale of an investment product where Bank D assessed the suitability of the product for these (potential) investors.

Therefore, taking the relevant considerations into account, it seems to me that the overarching question I need to consider in this case is whether the recommendation to invest in the fund was a suitable recommendation for Mr and Mrs V in their individual circumstances.

In deciding this question, I need to take into account the nature and complexity of the investment and the consumers': financial circumstances, needs and objectives; understanding and relevant investment experience; and tolerance to investment risk.

If having considered all the relevant circumstances, I find that the recommendation was unsuitable for the consumers, I then need to consider:

- whether they relied on the recommendation and have lost out as a consequence of that (by considering what the consumers would have done 'but for' the poor advice); *and*

- if they did, how fair compensation should be calculated in all the circumstances of the case.

I am also mindful when considering how these questions apply in the context of Mr and Mrs V's complaint that the High Court has recently decided a case – Rubenstein v HSBC Bank [2011] EWHC 2304 (QB), involving the sale of an investment in the AIG Life Enhanced Fund. Briefly, in that case, which concerned advice given in 2005, the Judge concluded that:

- HSBC advised Mr Rubenstein to invest in the Enhanced Fund. That recommendation was not suitable for him. Mr Rubenstein relied on the advice and but for it, would not have invested in the Enhanced Fund.

- But the loss the claimants had suffered was not caused by HSBC's poor advice. It was caused by a run on the fund based on rumours in America that AIG was going to go bankrupt by investors ignorant of the fact that the assets of AIG Life were held separately from AIG.

- In addition, the loss was not foreseeable by HSBC in 2005 and too remote in law to be recoverable as damages for breach of contract or in tort. And so HSBC should pay only nominal damages (for the breaches of the conduct of business rules).

- If his conclusions about liability were wrong – the appropriate award would have been to put Mr Rubenstein in the position he would now have been in with suitable advice.

- In the circumstances of the case, that would have meant calculating compensation on the basis that 10% of Mr Rubenstein's investment had been in an instant access account and 90% in a 3 month notice deposit account assuming Mr Rubenstein would have invested in the best rate available from the UK clearing banks at the date of the advice.

The decision is relevant to my considerations here, but I am mindful of the Judge's cautionary warning about the relevance of the judgment to other Premier Access Bond claims in the courts:

> *"It is necessarily based on the issues which were debated at the trial in this case. Those issues may have been narrower than the issues raised by other cases, and the evidence and arguments correspondingly limited."*

b) was the investment a suitable recommendation?

In considering this question I need to take careful account of the investment objectives of Mr and Mrs V at the time this investment was made. I will then compare this with what Bank D knew (or should have known) as a professional adviser about the product it recommended.

Mr and Mrs V's investment objectives

Bank D recommended Mr and Mrs V invest £3,187,939.25 in the PAB Enhanced Fund. In addition, although these do not form part of the complaint, Bank D recommended they pay £388,000 in to an AIG Guaranteed Investment Bond maturing on 20 January 2009 (to meet a tax bill), £85,000 into a Building Society and £533,000 in the Bank D Global Investors Institutional Fund (in Mrs V's name).

Bank D states that Mr and Mrs V's investment objectives and financial understanding were not properly characterised in my provisional decision. I do not agree, as I have carefully considered Mr and Mrs V's particular circumstances at the time the advice was given by Bank D. For the avoidance of doubt I shall set these out again as part of my reasoning. According to Bank D's own information, at the time of sale:

- Mr V was 45 and owned an industrial business, which his family had owned since the 1940s. They were selling the business, which Mrs V also worked for (as the company secretary).

- Prior to the sale Mr and Mrs V had earned about £80,000 per year between them. They had two school-aged children.

- They owned a house in England valued at £400,000, a holiday home in Spain worth £120,000, and approximately £120,000 in cash.

Bank D had, it seems, been a private and business banker for Mr and Mrs V for some time.

There were various meetings between Bank D and Mr and Mrs V leading up to the investment. Mr and Mrs V say that they told the Bank D adviser that they did not want to take any risk with their money. They say that:

> *"We stressed to him that we are 'no risk' investors and we wanted our money to be completely safe. We are extremely cautious people and have never taken risks with our money".*

Bank D completed a 'KYC' (presumably meaning 'know your client') meeting-report following a meeting on 18 January 2008. Bank D completed a second KYC following a meeting on 6 February 2008. It recorded Mr and Mrs V's investment objectives as:

> *"Purpose of Investment – Place business sale proceeds in cash, asset mapping etc to take place after business sale and clients have adjusted to new circumstances."*

The summary section recorded Mr and Mrs V's 'needs' as:

> *"Place sale proceeds on simple cash terms pay out income".*

Bank D's file includes a 'Regulatory Profile' document for Mr V which the adviser completed on 6 February 2008. It recorded Mr V's risk profile as 'low' on a five point scale – the choices were low, medium/low, medium, medium/high, and high.

The Regulatory Profile also recorded his investment preference as cash/low risk, the length of time to invest as two to three years and the income requirement 'to be confirmed'. The adviser noted that:

> *"[Mr V] is an inexperienced investor who will need guidance and education over the years to manage his wealth effectively. Happy to stay in cash in the short term for security & income."*

Mr and Mrs V have provided a second Regulatory Profile document for Mrs V, which is in identical terms.

Mr and Mrs V also completed a 'Liquidity Management Service' application form, which explained that:

> *"The Liquidity Management Service (LMS) is provided to you on an advisory basis. This means that we will draw your attention to investment opportunities, principally in relation to cash deposits, debt instruments, insurance products and Mutual Funds, and provide you with advice on them if you request it. Where you request it we will purchase investments or enter into the transactions on your behalf or assist you in doing so. Your funds may be placed on deposit with institutions outside the United Kingdom. The market price of investments held in your portfolio may be subject to fluctuation."*

Mr and Mrs V indicated (in the Investment Management Mandate section) that their preferred maturity period was the shortest offered: less than 1 year – the other options were 1 to 3 years, 3 to 5 years, and 5 years plus.

Bank D subsequently wrote to Mr and Mrs V on 27 March 2008 about the PAB – the letter Bank D refers to as the suitability letter. The letter is some three pages long and appears to be somewhat standard in form. It enclosed the PAB Key Features document, brochure and a UK tax summary. The letter from Bank D covers the clients' needs as follows:

> *"I understand that you are seeking our advice on investments which may suit your needs and that your main priority is to invest for higher after tax return than can be obtained from pure cash deposits but without exposing the capital to a significant increase in investment risk."*

There is, therefore, a strong indication from the written material that Mr and Mrs V were primarily concerned with secure 'cash investments' over the short term. Whilst they had long term needs because of their early retirement it is clear that at the time of the advice they had not decided how to proceed with a number of matters and wished to retain financial flexibility over the short term.

It is perhaps noteworthy that the period when this investment was advised was at around the time of the widespread publicity for the problems experienced then by Northern Rock – when six months earlier queues had built up outside its branches and some customers feared they would lose their deposits (although, of course, by the time the investment was made it was clear that no customer would in fact lose any money as a result of Northern Rock's problems).

Indeed, Mr and Mrs V recall much being made by the adviser of the 90% Compensation Scheme protection for insurance based products and how this compared favourably with the protection available on deposit accounts.

Bank D's records suggest Mr and Mrs V were prepared to take a 'low risk' with their money. Whilst attitude to risk scales such as these can provide a helpful indication of the risks a consumer is prepared to take, they are not always of great assistance when considering the actual objectives and wishes of inexperienced investors – especially when as in this case no distinction is made between 'no' and 'low' risk.

No doubt Mr and Mrs V were interested in some means of improving the return they could earn on the substantial sum they were investing, but the fact that they are recorded as being prepared to take a low risk (the lowest option available) is not in itself sufficient to persuade me that they were in fact prepared to take any risk with their capital. And I note Bank D's Regulatory Profile appears to equate 'cash' to 'low risk' (in the investment preferences response), which might suggest Mr and Mrs V thought that low risk in this context meant the risks of investing in cash.

In response to my comments about the sales documentation, Bank D has highlighted that I have misunderstood certain references to *'cash'* in the documents. Rather it says that these references are *'internal shorthand'* for products within the LMS. It accepts that it is regrettable that such shorthand is capable of creating confusion but goes onto highlight that this is not evidence Mr and Mrs V requested a cash investment.

I have to say that I am surprised at this explanation. Whatever 'cash' may or may not have meant to Bank D's staff I think it most unlikely that Mr and Mrs V would have been aware of this *'internal shorthand'*.

Moreover, and very importantly, even assuming that they did not see the reference to cash in the internal documents, similar terminology was used in Bank D's correspondence with them. The clearest example of this is in the adviser's letter dated 14 March 2008, which said;

> *"All of the solutions we discussed are based around instant access cash, with AIG Premier Access Bond proving a current rate of 6.24% GER".*

Bank D accepts that Mr and Mrs V were inexperienced investors. To my mind it would seem entirely unreasonable to expect Mr and Mrs V to understand that when it enclosed details of the PAB with a short accompanying letter which says that it is an instant access cash solution, it was not talking about cash at all (as most customers will understand the term) but was talking about other products within the LMS. I consider that it was entirely reasonable for Mr and Mrs V to take this letter and the explanation of the PAB at face value.

Moreover, I am unable to accept that I have misunderstood Bank D's references to cash. But in any event if what it really meant to say was products within the LMS then it should have made this clear both within its own documents and, critically, in its correspondence with Mr and Mrs V.

Overall it seems (from the evidence of the documentation completed at the time and from Mr and Mrs V's subsequent accounts) that their plan was to wait for six months or so from receipt of the sale proceeds. Depending on various personal arrangements Mr and Mrs V wanted to consider the option of early retirement.

So they wanted to keep the sale proceeds available for expenditure and/or alternative investment, to reconsider any longer term needs when their plans firmed up. The Enhanced Fund investment would account for about three-quarters of their wealth, if the value of their home is excluded.

So I conclude that the contemporaneous documentation submitted by Bank D supports the view that Mr and Mrs V's primary concern, in respect of their investment objectives, was for short term reasonable return but secure cash investment. They did not wish to take risks with this money. In simple terms they were "no risk" customers (or at least wished to take the minimum possible risk) – not "low risk".

- *about the product*

I have carefully considered the documentation relating to the PAB Enhanced Fund, much as I am sure Bank D did, along with any other information it had access to before making any recommendation.

The Key Features document explained that:

> *"The Premier Access Bond is a single premium life assurance Bond offering a range of unit linked funds that invest in a variety of financial and money market instruments in order to generate gross equivalent returns that are competitive against bank and building society deposits."*

It described the 'Risks Factors' as follows:

- *Your investment, and the return from it, is only as secure as the selected range of assets purchased by the funds you choose. Your investment is only at risk if any of these financial instruments fail to meet their obligations.*

- *The value of your investment can go down as well as up and you may get back less than you put in.*

- *For investments in the Notice Funds, if you require access to these funds and are unable to give us the required notice, there will be a withdrawal penalty.*

- *Investors cannot recover any tax paid by AIG Life; therefore the Premier Access Bond may not be suitable for non-tax payers.*

- *You must be aware of the tax position if you are, or become, a higher rate tax payer or entitled to Age Allowance.*

- *If large numbers of Bonds are encashed at the same time, the funds may incur costs in selling assets prior to the intended maturity date to meet these encashments, and these costs may cause a fall in the unit prices and therefore the return on your Bond. Alternatively AIG Life may defer encashments for up to three months if it considers that this would be more beneficial to Bondholders generally. This would only happen in very exceptional circumstances.*

- *The effect of inflation may reduce the spending power of your investment.*

Among other things, the PAB brochure provided information about the Standard Fund and the Enhanced Fund. The Enhanced Fund was described as:

> *The Enhanced Variable Rate Fund ("the Enhanced Fund") is similar to the Standard Fund but is aimed at achieving a slightly higher growth rate by investing in more sophisticated assets issued by a wide range of companies. The fund offers a high degree of safety by holding the highest quality assets commensurate with its enhanced yield.*
>
> *The fund's main objective is to produce a competitive return by investing in a wide range of high quality assets. While maintaining a high degree of security, unsurprisingly the fund will contain many of the same names as the Standard Fund, with most of the fund invested in assets issued by financial institutions.*
>
> *The Enhanced Fund will contain exposure mainly to AAA and AA rated assets, with the reminder in A rated assets, and will use a wide range of high quality instruments issued by the companies identified.*
>
> *The fund should achieve a higher yield than the Standard Variable Rate Fund because it has access to:*
> *(1) a wider range of companies … The companies are subject to strict quality checks and are still considered to be very safe investments.*
> *(2) a wider range of investments issued by the companies identified. These assets will have a slightly higher yield as they have a smaller target market and may be more difficult to sell before they mature. However, as the fund usually purchases assets to hold until maturity, it is in a position to take advantage of any yield enhancements.*
> *(3) a greater amount of sophistication …*
> *(4) assets with slightly longer periods to maturity. This enables the fund manager to take advantage of a positive sloping yield curve which rewards longer investments with higher yields.*
> *Although the fund carries slightly more risk than the Standard Fund it should still be considered to be a cautious fund. Although the criteria are clearly wider than those of the Standard Fund, the fund places high importance on the preservation of capital.*

AIG Life also published information about the fund make up in regular updates, which would have been available to Bank D – among other things, these gave further information about the make up of the funds.

I note Bank D considers Financial Service Authority's (FSA's) Final Notice in respect of Coutts & Company (dated 7 November 2011) irrelevant and inappropriate as it refers specifically to Coutts' sales process. I of course accept that the Notice does deal with the sales process of a different bank. However, I still believe it provides a helpful summary in slightly more accessible terms about the make-up of the Enhanced Fund:

> *'The Fund was invested in financial and money market instruments, including certificates of deposit, bank deposits and commercial paper. However, unlike a standard money market fund, it was seeking to deliver an enhanced return by investing a material proportion of the Fund's assets in:*
>
> *(1) asset backed securities. These comprised on average 27% of the Fund's assets between 6 July 2005 and 28 December 2007 and reduced to between 23% and 15% in the*

period 1 February 2008 to 8 August 2008, varying over the Sales Period between approximately 31% and 14%. They were primarily backed by UK residential and commercial mortgages;

(2) floating rate notes. These comprised on average 38% of the Fund's assets between 6 July 2005 and 28 December 2007 and reduced to between 30% and 27% in the period 1 February 2008 to 8 August 2008, varying over the Sales Period between approximately 51% and 27%; and

(3) assets which had terms to maturity of between 3 and 5 years. Again, these comprised on average 54% of the Fund's assets between 6 July 2005 and 28 December 2007 and reduced to between 41% and 15% in the period 1 February 2008 to 8 August 2008, varying between approximately 65% and 15% of the Fund's assets.

What might Bank D have concluded from the information that was reasonably available to a professional adviser at the time this investment was made?

Of course, the potential problems with these types of investments are now well known. So it is important to avoid the benefit of hindsight in the assessment of these matters today. That said, I think it is (and was) clear, from AIG's own description and from the other information readily available to Bank D about the fund, that the Enhanced Fund was not a standard money market fund. The fund presented some risk to capital. Investors could lose money if AIG Life failed, if the financial instruments failed to meet their obligations, or if it became necessary for the fund to sell assets prior to their intended maturity date to meet the encashment demands on the funds.

But the extent of those risks was difficult to assess in the Enhanced Fund as the quality of the underlying investments was not clear.

And given the nature of the underlying investments and the significant holdings held, it should also have been apparent that liquidity issues could arise, thereby preventing investors accessing their funds in certain circumstances. Of course, that possibility was at least in part reflected in the term that allowed AIG to defer payments in exceptional circumstances.

Even if the detail of these issues was not apparent to those outside AIG itself, the special nature of the funds and the opacity of some of the investments was (or at least should have been) clear to any professional adviser. In my view, these factors were (or should have been) sufficient to place the adviser on notice that this was not a normal 'cash' fund suitable as an alternative to normal deposit accounts, but something distinctly more 'exotic'.

As the FSA explained in the Coutts Final Notice – any description of the product as a 'cash product' was inaccurate:

"This was an inaccurate description of the Fund because it contained a significant proportion of non-cash assets, including the asset backed securities (which were backed by UK residential and commercial mortgages and generally had terms to their maturity of three to five years) and floating rate notes (which generally had terms to their maturity of one to three years)."

Bank D says that unlike the Coutts' suitability letter its standard suitability letter does not refer to the EVRF as a cash product. However, I would reiterate that its letter dated 14 March 2008 which enclosed the details of the PAB did specifically advise that it was an instant access cash

solution. Consequently, I remain of the view that the FSA's view on whether it was accurate to describe the fund as a cash product is a relevant consideration

Moreover, nor should an adviser have suggested, at least not without further explanation, that the fund was 'an alternative to traditional banking and building society deposits'. As the FSA noted:

> *"In order to generate an enhanced return, the Fund exposed customers to greater level of capital and liquidity risk than that typically associated with a traditional bank or building society account."*

Accordingly, in my view, to an experienced financial adviser and to a business like Bank D, these investments would not – and should not – have appeared to represent a risk-free approach, nor would they have been suitable for investors looking to invest in cash, or for investors looking for instant access who were not prepared to accept the possibility that they might have to wait to access their money.

It was important for advisers to take these things into account when assessing the suitability of the product for an individual investor, and for potential investors to understand that the fund presented more risk than an ordinary cash fund. And Bank D should have identified those risks and taken them into consideration when recommending the investment to Mr and Mrs V.

- *risk warnings*

Mr and Mrs V were entitled to rely on the recommendation that Bank D made. However, for the sake of completeness I have also considered whether the information that Bank D provided to Mr and Mrs V was sufficiently clear that it should have alerted them to the fact that the investment was not suitable for their needs.

I have already referred to some of the correspondence Bank D sent Mr and Mrs V including the letter from Bank D dated 14 March 2008 which in addition to saying that the PAB offered an instant access cash solution also highlighted that it *'can be used for your cash over and above the amounts we will be holding in the Building societies and Bank D Global Investors'*. This, according to Bank D, would enable Mr and Mrs V to stay as standard rate tax payers while the money remained in the PAB.

As noted previously, Bank D wrote to Mr and Mrs V on 27 March 2008 about the PAB – the letter Bank D refers to as the suitability letter. The letter is some three pages long and appears to be somewhat standard in form. It enclosed the PAB Key Features document, brochure and a UK tax summary. The letter describes in general terms the Standard Variable Rate Fund as well as the Enhanced Fund. It also provided details about the Standard Fund including warnings that:

> *"The return on the Standard Fund moves in line with money markets. Funds can be withdrawn by surrendering the policies either wholly or in part, without penalty and usually without notice. AIG reserves the right to defer the payment for up to 3 months in very exceptional circumstances."*

And it warned that there was a 'counterparty risk' arising because the investment was with AIG Life and a second element arising because the fund invested with other deposit takers which meant the fund might suffer a loss if one of the deposit-takers should become insolvent. The letter explained that:

"There remains a risk that the value of the fund could fall as well as rise."

The letter also provided details of the Enhanced Fund, explaining that:

- The fund '*has the same characteristics as the Standard Fund*', but it looked to obtain a better return by investing in a wider range of money market assets.

- The risks were greater than the Standard Fund and again, the fund could fall as well as rise.

At the end of the Enhanced Fund section there is a brief paragraph setting out the current gross rate of return for the size of investment recommended and a note saying that, '*It is this fund that we recommend you link your investment to*'.

Overall, the letter is, in my view, far from clear about the nature of the 'investment' or the relationship between the Standard and Enhanced funds – or indeed, about what precisely Bank D was recommending. It would not, in my view, make easy reading or be readily understood by most investors – and certainly not by an investor described as "inexperienced" and needing 'guidance and education over the years to manage his wealth effectively' (as Bank D described Mr V).

And I think caution should be exercised in taking risk warnings out of the wider context of the overall information that the adviser provides. It is clear from the overall balance of communication that Bank D gave Mr and Mrs V considerable assurance about the security of the fund and its viability as an alternative to cash deposits.

I note Bank D's comments about Mr and Mrs V's experience of running a company. However, the nature of their business does not suggest any in-depth knowledge in the area of financial investment. Ultimately, Mr and Mrs V sought advice from Bank D (presumably because they did not feel sufficiently knowledgeable to make their own arrangements) and they were entitled to rely on that advice. It is clear to me that this is precisely what they did.

But even if they took care to read all the material that Bank D provided (and I have no reason to doubt they did so) I do not consider that the warnings and description of the funds were sufficiently clear in the circumstances (and taking account of the overall representations made by Bank D) to suggest to Mr and Mrs V at that time that they should act otherwise than on the advice of their professional adviser.

- *overall conclusions on suitability*

So overall, having considered the position carefully, I find Mr and Mrs V's representations – that they did not wish to take risks with their capital and wanted their cash to be readily accessible – to be both plausible and persuasive. I am unable to agree with Bank D that there is nothing to show Mr and Mrs V were 'no risk' investors (or at least wished to take the minimum possible risk).

I also disagree that they would have readily understood the risks set out in the suitability letter. Rather, having carefully weighed the available evidence I find that it supports my counter view. As a result, it remains my position that the investment was not suitable for them.

I have carefully considered whether it makes any difference to my findings that Mr and Mrs V seem to have been under the impression that they had invested in the Standard Fund and on balance I find that it does not. It would appear that Mr and Mrs V's comments are based on the mistaken understanding that the Standard Fund was a nil-risk investment. There is no dispute that the Standard Fund was not a nil-risk fund. The fact that even now Mr and Mrs V do not properly understand the nature of the funds reinforces my view that the risks were not properly explained to them at the time they invested.

Bank D says the Enhanced Fund is a low risk, instant access fund suitable for people with a desire for instant access to their money. However it is my opinion that the Enhanced Fund was not a proper alternative to a cash fund or building society or similar cash deposit. It involved risks to capital and of liquidity that were material and made it unsuitable for investors such as Mr and Mrs V. I do not believe it likely that Mr and Mrs V appreciated the nature of the risks involved in the Enhanced Fund or that they would have invested if they had done.

This is not a view reached with hindsight. I have based my findings on the product suitability for Mr and Mrs V, based on what Bank D knew or would be expected to find out about the investment at the time of the sale – and based on a reasonable expectation of how it would operate.

In summary I have therefore concluded that:

- Mr and Mrs V were inexperienced investors who did not wish to put their newly acquired capital at risk (or at least wished to take the minimum possible risk), but did wish to explore the possibility of finding a better interest rate than a deposit account offered;

- the PAB Enhanced Fund was not a fund suitable for such investors and this should have been apparent from the information readily available to an experienced financial adviser or bank like Bank D;

- the information provided to Mr and Mrs V, who were inexperienced investors, was not sufficient to alert them to the risks they had been advised to take.

Accordingly, I conclude that the recommendation made by Bank D to invest in the PAB Enhanced Fund was not a suitable recommendation for Mr and Mrs V in their individual circumstances.

In response to my provisional decision, Bank D has made much of my first bullet point as it says that this demonstrates that Mr and Mrs V's risk profile was above the no risk (or minimum possible risk) that my findings are based upon. However, all I am saying is that the whole purpose of seeking advice from Bank D was to *explore* the possibility of finding a better rate than offered by a deposit account. It was then the responsibility of Bank D to ensure that the advice it gave them was suitable.

I have set out in some detail why in the circumstances I do not think the advice was suitable. The fact that I acknowledge that Mr and Mrs V had wanted to *explore* the possibility of achieving a better rate does not mean that they should have been advised to invest in an unsuitable fund.

(c) what would Mr and Mrs Vs have done but for the unsuitable advice?

I have concluded Bank D's recommendation to invest in the Enhanced Fund was not suitable for Mr and Mrs V. I therefore need to consider what Mr and Mrs V would have done 'but for' the advice they received.

I have not seen anything which suggests to me – and I find it highly unlikely – that they would have invested in the Enhanced Fund, if it had *not* been recommended to them.

When reaching that finding, I am mindful that some investors looking for cash-fund options – properly informed about the enhanced risks associated with this fund – might have been prepared to accept those risks. The fund offered tax advantages, the possibility of higher returns than deposit accounts and some cash funds, with what was perceived to be fairly limited risk (notwithstanding the asset make-up) due partly to the spread of underlying investments.

And the issues involved in investing several million pounds in cash are rather different from the cash investment issues that most customers face. The PAB offered some protection (under the Financial Services Compensation Scheme for policyholders) from the risk that AIG Life might fail. As Bank D has pointed out, to achieve a similar position by investing in deposit accounts might have necessitated investing in multiple deposit-takers (although it should also be remembered that whilst in broad terms the scheme provided protection for up to 90% of the surrender value of this policy, the surrender value itself was not guaranteed).

But in Mr and Mrs V's case, I am not persuaded that they would have invested in the PAB Enhanced Fund if they had understood the risks that they might lose money, depending on market conditions.

I have therefore considered what Mr and Mrs V would have done if they had not been advised to invest in the fund. In cases like this, the consumer's circumstances and objectives at the time of the advice often provide a good indication of what they would have done.

In this case, there is no compelling evidence from the time of sale to demonstrate exactly what Mr and Mrs V would have done if they had not invested their money in the fund. But for the reasons discussed earlier in this decision, it seems unlikely that they would have invested in any way which exposed their capital to risk (other than the minimum possible risk).

I cannot now, of course, be sure of the decisions Mr and Mrs V would have made but I do not accept they would have invested in the Standard Fund as Bank D suggests. I say this because although they were under the impression that they had invested in this fund, as outlined previously, this was on the mistaken belief that this fund was a nil-risk investment. That is not the case and so it would not be fair or reasonable to assume that they would have invested in that fund if they had been properly advised.

Rather, having considered their aims, intentions and circumstances at the time, I am satisfied that on the balance of probabilities Mr and Mrs V would most probably have kept their money in 'traditional' bank or building society deposit accounts and searched for the best possible rates. While I accept it may have been impractical for Mr and Mrs V to spread their capital across a very wide range of accounts to ensure each one stayed within FSCS compensation limits, I am certainly not suggesting all of their money would have been placed in a single account as Bank D seems to be suggesting I implied in my provisional decision.

My view on this is supported by the fact that in their most recent correspondence with us, Mr and Mrs V have confirmed that they have indeed used a selection of deposit accounts for their money since they encashed the AIG bond.

I am also conscious of the fact that the arrangements made by Mr and Mrs V with Bank D were intended to be short term. They wanted to consider how best to utilise the cash they had

received once their own personal circumstances became clearer. In principle therefore I cannot assume that Mr and Mrs V would have left their cash in the traditional deposit account(s) for the entire period since the (poor) advice was given.

No doubt alternative uses of the money they were kept out of would have arisen. But this only raises new and further uncertainties about what might have happened but for the poor advice and the fact that a large proportion of Mr and Mrs V's wealth has been tied up in this fund.

d) fair compensation

I have found that Bank D gave unsuitable advice that was relied on by Mr and Mrs V and were it not for that poor advice; they would not have invested in the PAB Enhanced Fund. I therefore need to consider how I should assess fair compensation in all the circumstances of this case.

As I have already discussed, there is no compelling evidence about how this capital would otherwise have been 'invested'. So I consider it fairest to assume that, with reasonable advice, Mr and Mrs V would have invested their money in higher interest-rate paying instant-access deposit accounts available from the UK clearing banks on 10 March 2008 (and would from time to time have searched out 'best rates' after this).

No doubt much time and effort could be expended by all concerned to identify precisely which accounts might have been used. Notwithstanding the large sums involved, I think it sensible to deal with this issue in a simplified manner rather than engage in further conjecture. When Mr and Mrs V made their investment, base rates were 5.25%. Of course, the rate has fallen since. By the end of 2008 base rate had been reduced to 2.0% and since March 2009 it has been 0.5% a year.

However, for much of the last three years readily achievable deposit-rates have been in excess of base rate. Following a review of available rates during the period in question, I conclude that Mr and Mrs V's investment could reasonably have increased at the rate of 4.0% per year compounded annually until 6 November 2008 (when the base rate was reduced to 3%) and by 2.5% per year compounded annually after this.

I settled on these assumed rates of return following a review of historically available savings rates using 'Moneyfacts'. My research showed the highest paying instant access savings accounts were attracting interest rates in excess of 6.0% per year at the time Mr and Mrs V first invested and continued to do so up until November 2008. Although the base rate was reduced in November, I note that at the time Mr and Mrs V received the final payment from their bond, in December 2008, a number of savings accounts were still attracting interest rates in excess of 5%. Subsequently rates of 2.5% or above have been obtainable.

While these rates include those involving short term bonuses and similar arrangements this does demonstrate that for a careful investor rates of around the sums I have set out were achievable during the period.

Having once again reviewed my assumptions I am satisfied that the rates chosen do provide a reasonable benchmark for me to calculate investment loss. If Bank D considered that these rates were not fair or reasonable it was open to it to provide persuasive evidence to me that my assumed rates were unrealistic. It has not provided any such evidence and I therefore see no reason to deviate from my original view on what rates it would be fair and reasonable to apply.

I turn now to consider Bank D's comments about the method of calculating compensation, particularly in relation to whether or not income tax should be deducted from the award. While I do understand the points that have been raised, the award of 4% and 2.5% per year (up to the point Mr and Mrs V encashed their bond) is not intended to reflect the interest they would have received, but rather it reflects my reasonable assessment of their investment loss.

I am unable to give any tax advice. But my approach accords with our long established understanding of when compensation we award is taxable as set out in a technical note on our website (http://www.financial-ombudsman.org.uk/publications/guidance/comp_tax.htm).

Any tax that may be due will be a matter for Mr and Mrs V to resolve with HM Revenue and Customs. However, it remains my view that the element of my award which represents investment loss is unlikely to be subject to income tax, even though it has been calculated by reference to an interest rate. It is also my understanding that the law does not require a financial business to deduct income tax from this element of the award.

My view that this element of the award is compensation for investment loss is supported by the fact that while I consider it most likely that they would have put their money on deposit, I cannot be sure exactly what Mr and Mrs V would have done but for the advice. Accordingly, I do not believe it is appropriate to assume that a particular tax regime would have applied.

I also consider it relevant to reiterate that I have not used the highest rates available at the relevant time, but rather I have chosen benchmark rates which I am satisfied provide a fair indication of what Mr and Mrs V's investment loss would have likely been.

So on this basis, I conclude that Mr and Mrs V's investment loss should be calculated by reference to an assumed alternative investment that would have earned compound growth of 4.0% a year until November 2008 and 2.5% per year until they cashed the bond in December 2008 – at which point the investment loss was crystallised.

The return on this element of the calculation should be assumed to be growth and in accordance with our normal approach it should not be subject to any deduction for income tax at source - although as outlined above, any tax that may be due will be a matter for Mr and Mrs V to resolve with HM Revenue and Customs.

I have also considered what award I should make in respect of interest, given that Mr and Mrs V incurred a loss when value was released from the fund following the initial switch and through the exit plan. In such cases, my usual approach is to require the financial business to add interest from the date the consumer should have had the money until the date the money is actually paid, to compensate the consumer for being kept out of that money.

In many cases, the effect on the consumer's finances can only be discovered by making speculative assumptions. So unless it is apparent what the consumer's borrowing cost (or investment loss) actually were, I am likely to award interest at 8% a year simple. This is not intended to be an interest rate in the way that a bank deposit account pays interest. Rather it is a rate which I consider to be a broadly fair yardstick for compensating consumers for a wide range of possible losses and lost opportunities they may have incurred.

The consumer might, for example, have:

- borrowed money, or continued to borrow money, at credit card or loan rates which they would not have done if the money had been available to them;

- saved or invested the money in some way producing a variety or possible returns;

- spent the money on holidays, home improvements, or any number of goods which might have given them an unquantifiable return;

- or any combination of these things.

The 8% simple interest rate is gross and is subject to tax – and is a rate often (but not always) used by the courts in not dissimilar situations. There are, however, some cases, where there will be an identifiable loss or particular circumstances which may lead me to take a different approach.

The cost of being deprived of the money that Mr and Mrs V lost because of the poor recommendation by Bank D is not straightforward to assess. But it seems to me that it is unlikely to have involved the broad spectrum of possibilities and lost opportunities I have mentioned above. It seems unlikely, for example, that Mr and Mrs V would have borrowed unnecessarily or missed out on opportunities to take holidays or purchase goods.

Rather, it seems likely that, in their particular circumstances, they would have invested the money in some way (as they did with their other money) and that they have been deprived of an opportunity to obtain a return on that money.

As I have already discussed, there is no compelling evidence about how Mr and Mrs V's capital would otherwise have been 'invested' if they had not invested in the Enhanced Fund. And it seems to me that the same can be said of the money they lost when cashing in the second half of their investment.

Having considered these things, I find, as before, it fairest to assume Mr and Mrs V would have invested this money in higher interest-rate paying instant-access deposit accounts available from the UK clearing banks and would from time to time have searched out 'best rates' after this.

From the date the bond was encashed, I conclude compensation for being deprived of this money should be calculated as compound interest at a rate of 2.5% per year – from which Bank D may consider that it is legally obliged to deduct income tax.

I had not previously been aware of the additional payment made to Mr and Mrs V in April 2011 and this needs to be taken into account.

With regard to the loss Mr and Mrs V are claiming in respect of the sale of their boat, I do not propose to make any award as I am unable to conclude this was solely down to the advice received from Bank D. In saying this, I having taken account of the fact that Mr and Mrs V appear to have had significant other capital and whilst I understand that "the wheels were in motion" for some time before they found a buyer for the boat, I cannot ignore that they had already received half their money from the PAB by the time the boat was sold.

As a result, I am not sufficiently persuaded the problems with the AIG fund put them in a position where they were forced to sell the boat at a loss. It follows that it would not be fair or reasonable that Bank D should be held responsible for this loss.

That said, given the circumstances, I can understand the reason why Mr and Mrs V would have wanted to obtain advice about the tax implications of encashing their bond. If Bank D was unable to provide this advice or Mr and Mrs V did not wish to take advice from Bank D because they had lost some of their trust in the business, I do not believe it was unreasonable for them to seek it elsewhere.

As a result I find it fair and reasonable for Bank D to meet these costs together with interest to compensate Mr and Mrs V for being deprived of the money – as they would not have arisen but for the unsuitable advice to invest in the PAB. I am satisfied that it would also be appropriate for interest to be calculated at 2.5% per year for the same reasons as I have set out above.

Mr and Mrs V have provided receipts for this advice, confirming they paid sums of £2,587.50 on 8 January 2009, £2,645 on 14 January 2009 and a further £690 on 13 February 2009.

Overall, I consider that my assessment of what represents fair compensation is fair and reasonable to both parties. Where I am unable to say with certainty how a particular consumer would otherwise have invested their capital, I must use my judgement to arrive at what I consider is fair and reasonable in the circumstances. This process cannot be an exact science, but I am satisfied here that I have adopted reasonable assumptions in order to arrive at a fair assessment of investment loss and, where appropriate, compensation for being deprived of money.

e) is it fair to require Bank D to pay all of the losses incurred?

I have noted Bank D's comments that the loss suffered by Mr and Mrs V following the 'run' on the fund was not foreseeable. In assessing fair compensation in this case, I have again carefully considered the question of whether the losses were actually caused by the poor advice and whether they were foreseeable or too remote.

I am mindful of the difficult market conditions that occurred in late 2008 and since. It is sometimes said that these were not foreseeable. It is certainly the case that many did not foresee them. But in at least one sense, the outcome of any investment is inherently "unforeseeable" – that is, simply put, the risk of investment.

In the years before Lehman Brothers' collapse, the possibility of significant financial institution running into difficulty was an unlikely, but not a remote possibility. Whilst the last run on a bank before Northern Rock occurred in 1878, other banks have run into difficulties. For example, in July 1991 the Bank of Credit and Commerce was closed causing substantial losses for many depositors, whilst in February 1995 Barings became insolvent as a result of unauthorised dealings. And in September 2007 there was a run on Northern Rock forcing the government to take ownership.

Extreme market conditions are a feature of financial markets. Anyone who purchased a house in 1988 before the collapse in the UK housing market, or had a mortgage in 1989 when mortgage rates rose to 15% – levels that would seem inconceivable now – would also know that a feature of many markets is that extreme conditions can occur.

That there could be major falls in stock markets, that a range of assets are identified as having been significantly over-valued by markets, and that financial institutions and others are placed under intense financial stress may not be common circumstances.

But they are not unknown to investors, either. To put this simplistically, even if severe market turbulence only happens three times a century – there is more than a one in ten chance that such an event will happen during the life of a five-year investment.

In this case, I am satisfied that Bank D exposed Mr and Mrs V to the risk of capital loss which it should not have done. As a consequence of Bank D's negligent advice, Mr and Mrs V were in an investment that they should not have been and in consequence lost money.

It is sometimes argued that the extent of the loss in a case such as this was not foreseeable and/or was not itself caused by the negligent advice. It is certainly the case that following the investment, a string of events and decisions followed, which resulted in the losses which Mr and Mrs V have suffered. Some of those events were the direct consequence of market conditions – albeit extreme market conditions. Others were decisions made by the fund managers.

Of course, the precise form of these events may not have been predicted. But that does not mean they were not foreseeable. As noted above, extreme market conditions are an established risk of all investments. And this investment relied also on the actions of fund managers. That fund managers might make decisions about the operation of the fund is, of course, an established feature of all managed funds.

That those decisions might result in significant losses for investors is not unforeseeable – it may be an undesired and unintended set of events but it is a risk inherent in the product. That other investors might act irrationally or unusually, or en masse, is also an established feature of investment risk.

My general approach in assessing fair compensation in retail markets is to seek to return customers to the position they would have been in but for the negligent advice. The fact that there were (relatively) extreme market conditions in this case does not appear to me to justify a change in that approach – the losses Mr and Mrs V experienced would not have occurred but for that bad advice and in my view it was foreseeable that such losses could occur.

It is important to note that in this case there is no suggestion of fraud or negligence in the conduct of the fund. Whilst the actions of AIG in suspending the fund were clearly not popular with many investors, they appear on balance to have retained value for policyholders generally that would have been lost in the event of an uncontrolled collapse of the fund. So I do not believe that the fund manager's decisions mark a clear break in the "chain of causation" arising from the negligent initial advice.

But even if that is not correct, it does not necessarily follow that compensation to customers should be limited. My approach to such cases is difficult to describe in general terms – much depends on the particular combination of circumstances. But two points can be made. First, no liability attaches to an adviser who has given satisfactory advice (even if a fund is subsequently poorly or even fraudulently managed).

Second, and in contrast, particular difficulties arise in assessing fair compensation when it seems clear that the customer would not have been in that class of investment at all, had it not been for the negligent advice. In such circumstances, I might assess fair compensation to be awarded against the negligent adviser as putting the customer back in the financial position they would have been in but for the poor advice – notwithstanding the arguments around possible breaks in a chain of causation or of remoteness of loss – because I believe this is a fair and reasonable outcome.

In this case, the risk Bank D exposed Mr and Mrs V to (and the foundations of the poor advice) was that they might lose money, if the financial instruments purchased by the funds failed to meet their obligations – or that they might lose money if large numbers of investors encashed their bonds at the same time forcing assets to be sold at reduced market prices.

Ultimately, these risks came to fruition, forcing AIG Life to close the fund – and Mr and Mrs V to make the difficult decision between cashing in their investment at a significant loss, or retaining it and facing the prospect of not having access to a substantial sum of money for nearly four years without much prospect of obtaining any return.

The immediate cause of the risk coming to fruition – that investors, shaken by the problems affecting banks and institutions, thought AIG might go into bankruptcy, and thinking this would affect their investment – was not caused by Bank D. Indeed, risk could have come to fruition in a variety of what the Key Features document called 'exceptional circumstances', none of which were likely to be 'caused' by Bank D. But similarly, a person who negligently advises the purchase of shares to a client will not cause the poor management of the company, or the adverse market circumstances facing that company that result in it being declared insolvent.

Bank D exposed Mr and Mrs V to the risk of exceptional circumstances causing capital loss; and so it seems to me that it is fair to conclude that Bank D, in these circumstances, should pay compensation for the losses Mr and Mrs V have suffered.

I am, of course, mindful, when reaching my conclusions about what is fair compensation in the circumstances of this complaint, of the recent decision by the High Court in the Rubenstein case, which suggests the courts might come to a different conclusion.

But in this case, having considered all the circumstances – on the basis of the information available to me – and taking into account the findings of the High Court, I see no reason to limit the fair compensation I require Bank D to pay Mr and Mrs V on the basis of arguments around foreseeability, remoteness or potential breaks in the chain of causation. I am satisfied that it would be fair for Bank D to compensate Mr and Mrs V for the losses they would not have incurred if they had not invested in this way.

I have considered Bank D's request that I should await the Court of Appeal's decision before determining this case. However, given that the timetable for resolving that case is far from clear (especially if it is not resolved in the Court of Appeal), I do not consider that it would be fair or reasonable to await its final resolution. I fully appreciate that any decision I reach must have regard to the law and I have given careful thought to what implications the judgment has on this decision.

But I must also bear in mind that my role is to reach a decision that is fair and reasonable in the circumstances of the case having taken account of all material matters. For reasons I have set out, the judgment in the High Court - although undoubtedly a material consideration - has not resulted in my finding that Bank D should not be responsible for any loss suffered by Mr and Mrs V.

It follows that I am not persuaded that the result of the appeal against that judgment (whichever way that may be) would alter my conclusion on this issue. I am therefore content to proceed with issuing this final decision without waiting for the courts to have reached a conclusion in relation to those separate proceedings.

For the sake of completeness, I have also considered whether it was reasonable for Mr and Mrs V to take the 'exit plan', rather than hold on to their investment until July 2012. I am aware Bank D advised all investors to opt for the 'maturity plan' and offered loans to any investors facing liquidity problems.

However, Mr and Mrs V had to make a decision based on their own particular circumstances and requirements. Although Mr and Mrs V have a duty to mitigate any loss, it should not be forgotten that they were given two options to consider. Notwithstanding the offer of a loan, given the length of time until the funds would be available to them under the maturity option, and the turmoil in the markets, I think it was entirely reasonable for Mr and Mrs V to take the action they did.

f) procedures

I have considered whether any further enquiries and/or an oral hearing with the parties might help me, in reaching a fair conclusion on this matter. After nearly four years, memories of discussions will be fading and inevitably may be significantly influenced by subsequent events.

I have noted Bank D's request for a meeting. As I explained in my provisional decision, however, I understand I have been provided with the relevant written material that has been retained by both parties from 2008, and I am satisfied that this provides a reasonable basis for my decision. Bank D has had an adequate opportunity to set out its views and representations on this case and it has indeed provided very extensive further comment that I have considered carefully.

Accordingly, my view is that further enquiries by our service and/or hearings are not necessary – and would not be appropriate and proportionate in the circumstances of this case.

In view of the limits on my awards, I have also considered whether I should consider separately complaints in respect of Mr and Mrs V. However, I am satisfied in this case that the advice given by Bank D was joint advice to Mr and Mrs V, given to them as a single unit for financial planning and investment purposes. Accordingly, I am satisfied that it is correct to treat this as a single case, subject to a single limit of £100,000 plus interest on my award.

my final decision

My final decision is that I uphold Mr and Mrs V's complaint for the reasons set out above.

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £100,000, plus any interest that I consider appropriate. If I consider that fair compensation exceeds £100,000, I may recommend the business to pay the balance.

In short, my aim in terms of redress is to return Mr and Mrs V (as far as is possible and subject to limits on the amount of compensation I am able to award) to the financial position they would now be in if they had not invested in the PAB.

In simple terms, the first step is to calculate Mr and Mrs V's investment loss at the date the PAB was fully encashed, i.e. the date it was crystallised. In assessing the full extent of Mr and Mrs V's capital loss, an allowance will also need to be made for the additional amount they received from AIG in April 2011.

Once the extent of the investment loss has been calculated in this way, Mr and Mrs V should also receive compensation (by way of interest rather than capital growth at this stage) for being deprived of this money using a compound interest rate of 2.5% per year. This should apply to the outstanding capital sum from the date the bond was encashed until the date compensation is paid.

In addition, I find that Mr and Mrs V should be compensated for the cost of the tax advice they received and that these costs should be refunded in full plus compensation (again by way of interest) for being deprived of that money using a compound interest rate of 2.5% per year from the date each invoice was settled until the date compensation is paid.

determination and award

I uphold the complaint. The investment loss for which I am awarding compensation crystallised when Mr and Mrs V surrendered the second half of their PAB Enhanced Fund investment. I consider that fair compensation to that date should be calculated as follows:

- A = the capital invested, less any amounts paid out by way of withdrawals, distributions of capital or before-tax income and transfer to the Standard Fund as part of the initial switch, before Mr and Mrs V cashed in the second half of their investment;

- B = a return on the amount by way of capital growth from time to time of A at 4.0% per year until 6 November 2008 and by 2.5% per year thereafter, compounded annually from the date of investment to the date Mr and Mrs V cashed in the second half of their investment;

- C = the amount Mr and Mrs V received when they cashed in the second half of the investment at the date of encashment; *and*

- D = A + B – C, representing the investment loss to the date of encashment.

Since then Mr and Mr V have received an additional payment from AIG reducing their investment loss. And they have incurred an additional cost (the tax advice). So taking those things into account, I consider fair compensation to be calculated as E *plus* F where:

- E = D less £15,710.40, representing the continuing investment loss from 5 April 2011

- F = £5,922.50 (the cost of the tax advice received by Mr and Mrs V).

I am also satisfied that interest payable on the compensation should be calculated as follows:

- interest on the amount of D from the date of encashment to 5 April 2011;
- interest on the amount of E from 5 April 2011 until the date of payment;
- interest on the amount of F from the date Mr and Mrs V paid each invoice for the tax advice to the date of payment.

My final decision is that Bank D should pay Mr and Mrs V the amount produced by the calculation (that is the amount of E plus F) – up to a maximum of £100,000 – *plus* interest on that amount.

Assuming E is more than £100,000, interest should be calculated from the date Mr and Mrs V cashed in the second half of their investment until the date of payment. For the reasons explained above interest should be calculated at 2.5% per year on that amount from the date that Mr and Mrs V cashed in the second half of their investment until the date of payment.

If Bank D considers that it is legally obliged to deduct income tax from the interest element of my award (*ie* the interest added to D, E and F), it must send a tax deduction certificate with the payment.

recommendation

If the amount produced by the calculation of fair compensation exceeds £100,000, I recommend that Bank D pays Mr and Mrs V the balance plus interest (using the same rates as my award and from the appropriate dates applicable to each part of the compensation which I have set out above).

Bank D has completed a compensation calculation in line with my provisional decision, which shows that fair compensation could exceed £300,000. At that stage, however, it was not willing to indicate, without sight of my final decision, whether it would pay any recommendation made *in excess* of the maximum I can award.

Nonetheless, Bank D said it would confirm its intentions once my final decision was issued, so that Mr and Mrs V can make an informed decision about whether to accept my decision, and I now invite it to do so.

In any event, when considering whether to accept my decision, Mr and Mrs V should note the information on our website about compensation (http://www.financial-ombudsman.org.uk/publications/technical_notes/compensation.html) – in particular the sections, *'what if fair compensation exceeds £100,000?'* and *'can the consumer accept our decision and take the financial business to court for the balance?'.*

Tony Boorman
ombudsman