summary

1. This dispute is about the sale in 2001 of a joint payment protection insurance (PPI) policy to support a Yorkshire Building Society (YBS) (trading as Chelsea Building Society) mortgage.

2. Mr and Mrs M complain that YBS did not properly explain the policy's features, exclusions and limitations. If it had, they say they would not have taken the policy out.

3. YBS says it gave Mr and Mrs M information about the policy so they could make up their own mind about whether to take it out. It says it told them about the policy's features and limitations before the sale was concluded. But in any event, it says the policy was suitable for Mr and Mrs M, so they would have taken it out even if it had given them more information.

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 determine the complaint in favour of YBS, to the extent that I do not make an award in favour of Mr and Mrs M.

6. This is a 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 and Mrs M made their decision to take out the policy based on the information YBS gave them about the policy.

   - Taking into account the law, industry codes of practice and what I consider to have been good practice in 2001 (there were no applicable regulations at the time), YBS should fairly and reasonably have provided Mr and Mrs M with sufficient clear, fair and not misleading information about the policy it was offering to enable them to make an informed decision about whether or not to take it out.

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

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

   - It would not be fair in those circumstances to make an award to compensate Mr and Mrs M for the money they spent in connection with the policy.

7. Under the rules of the Financial Ombudsman Service, I am required to ask Mr and Mrs M to accept or reject my decision before xx November 2018.

background to the complaint

a) events leading up to the complaint

8. In 1998 Mr and Mrs M met with a mortgage introducer at their home to discuss arranging a mortgage. On the YBS mortgage application form, Mr and Mrs M ticked a box to decline PPI. The subsequent mortgage offer makes no mention of PPI.

9. In 2001 YBS sent Mr and Mrs M a mailshot about PPI. The leaflet explained the cost as being £4.73 per £100 of monthly benefit and included a tear off slip that could be completed and returned if someone wanted to apply for PPI. Mr and Mrs M ticked the relevant box to request PPI and signed and returned the slip.

10. In August 2001 Mr and Mrs M were sent a welcome letter, which enclosed the policy booklet and schedule, to confirm that the policy had been set up. The insurance schedule detailed the benefit as £209 per month for a monthly premium of £9.87.

11. The policy began on 20 August 2001. The monthly premium was paid as part of Mr and Mrs M's mortgage payments.

12. The policy was cancelled on 13 September 2006 at the point that the mortgage was redeemed.

b) Mr and Mrs M's circumstances in 2001

13. Mr and Mrs M took out the mortgage in order to buy their council house under the right to buy scheme. By 2001 the mortgage had been running for three years.

14. According to the mortgage application form that was completed in 1998, Mr M earned £17,949 and Mrs M earned £10,114 per year. Mr M had been with his employer since 1983 and Mrs M since 1988. Mr M's job is recorded as being a Works Engineer and Mrs M's as a Machine Setter.

15. Although Mr and Mrs M completed the PPI questionnaire thinking that the policy had been taken out in 1998 with the mortgage, they have confirmed that their circumstances remained the same in 2001. So Mr and Mrs M have told us separately that:

    - Mr M worked as a spring maker and had been with his employer for twenty years

    - Mrs M worked for the same employer as a machine operator and had been there for fourteen years

        - They would have received redundancy pay from their employer.

        - They would not have received sick pay from their employer and they did not have any savings or other insurance.

        - Mrs M was pregnant at the time.

        - Mr M had broken his back as a child but this injury had not resulted in any need to take time off work as an adult.

16. Based on the statutory redundancy provisions at the time, it seems likely Mr M would have been entitled to statutory redundancy of around eighteen weeks' pay and Mrs M would have been entitled to statutory redundancy of around twelve weeks' pay.

c) the policy – what was YBS selling and what did Mr and Mrs M buy?

17. YBS has provided a copy of the 'Chelsea Payment Protection' policy which it says sets out the full policy terms and conditions which – and I accept on the balance of probabilities - applied to policies like Mr and Mrs M's sold from June 2001.

18. The policy conditions were set out in a 21 page policy booklet. Among other things, these show that:

    - There were eligibility criteria which Mr and Mrs M met – for example they had to be 18 or over, but under 65 and working for the past six months at the start date. The cover would end when they reached 65.

    - The policy provided a total benefit of £209 per month and was split equally between Mr and Mrs M. So if one of them had made a claim they would have received £104.50 per month. If they both claimed at the same time they would have received a total of £209 per month.

    - The policy provided disability cover. Broadly, if Mr and/or Mrs M were unable to carry out the duties of their work (or any other work which in the insurer's view they might reasonably become qualified for in view of their knowledge, training and ability) due to injury, sickness or disease, it would pay Mr and Mrs M the monthly benefit described above, which would continue until the disability came to an end or 12 payments had been made, whichever came first.

    - The policy would provide unemployment benefits. Broadly, the policy would pay the monthly benefit as described above, which would continue until Mr and/or Mrs M ceased to be unemployed or 12 payments had been made, whichever came first.

    - The policy would have paid out after 30 consecutive days of disability or unemployment.

    - The insurer was Axa General Insurance Limited.

19. To put the benefits into context, if either Mr or Mrs M had made a successful claim for 12 months they would have received £1,254. And they could have claimed more than once during the life of the policy.

20. Returning to the policy terms and conditions, there were also exclusions – for example, claims resulting from pre-existing medical conditions which Mr and Mrs M knew, or should have known about at the start date, were not covered.

21. There were also limitations restricting the circumstances in which a successful claim could be made, for example:

    - The policy would cover Mr and Mrs M if they were unable to work because of a mental health condition, provided it had been investigated and diagnosed by a member of the Royal College of Psychiatrists.

- The policy would cover Mr and Mrs M if they could not work because of back complaint and associated conditions, but only if there was specialist medical evidence.

d) the complaint and YBS's response

22. Mr and Mrs M's representative We Fight Any Claim Ltd (WFAC) has made lengthy and substantial representations on their behalf.

23. I will not restate them all here and I will refer to some of the specific representations they have made at relevant times in this decision. But I have read and considered them all carefully. In essence, Mr and Mrs M say:

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

- YBS did not tell them about the poor value of the policy, which is illustrated by the low claims ratio – for example the average claims ratio for this type of policy was 35%, meaning that around 35p in every pound was used to pay claims, the rest paid for costs, profits and commission. Additionally Mr and Mrs M have also said that research has shown that claims ratios were typically rooted below 20%. YBS's failure to explain this to them was a breach of the common law duty of utmost good faith and of the FCA's principles, which require firms to treat customers fairly.

- YBS did not tell them about the limitations affecting the policy, in particular: that the policy would only pay out if Mr and Mrs M were unable to do both his or her own job and other work which the insurer thought they were reasonably qualified to do; and that claims arising from back injury and mental health were subject to restrictions and evidential requirements which significantly reduced the cover provided by the policy and the prospects of making a successful claim. This reduced further the policy's value, particularly as those conditions are the cause of the most common reasons for long term absence.

- The common law duty of utmost good faith meant YBS should have done more than simply draw the limitations to their attention, it should also have explained the significance of them and the impact they would have on Mr and Mrs M's chances of making a claim.

- The policy was not suitable because it only protected payments for the short-term, whereas a mortgage is generally someone's biggest ever long-term transaction. Evidence from the National Institute of Clinical Evidence (NICE) in 2009 confirmed that four out of five people who are off work for six months actually end up being off work for five years. Most people could cope with a relatively short-term absence such as the absence this policy protected – using a combination of residual earnings, savings, family support and a helpful approach from the lender. But cover under the policy would cease at just the time it would be most needed.

- These policies were promoted as providing peace of mind, but the number of exclusions, limitations and restrictions on the scope of the cover meant that this was untrue. The adviser knew how the insurance worked and they trusted the adviser and were entitled to rely on what was said.

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

- In any event, the FCA's guidance at DISP App 3.6.2E makes it clear that it should be presumed they 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.

- YBS should pay compensation to put them in the position they would have been in if they had not taken out the policy.

YBS says:

- The sale was the result of a mailshot sent to Mr and Mrs M who completed and returned the PPI application form in their own time without any input from YBS staff. So it did not recommend the policy to them. Instead it provided Mr and Mrs M with information about the policy so they could make up their own minds about whether or not it was right for them.

- Mr and Mrs M were eligible for the policy and the paperwork suggests that Mr and Mrs M were given a choice about whether or not to apply for it.

- The policy met Mr and Mrs M's needs. The policy could have been useful to them if Mr and/or Mrs M had not been able to work, they were not affected by the significant exclusions and limitations and the policy was affordable.

- The tear off application strip that Mr and Mrs M returned was physically attached to a policy summary outlining the key features and exclusions of the policy. A policy booklet was sent out after the sale.

- Mr and Mrs M's decision to take out the policy would not have changed if it had done more.

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

24. YBS had nothing further to add following the provisional decision.

25. Mr and Mrs M's representative made further submissions in response to the provisional decision, all of which I have read and considered carefully. In large part, they have restated the substance of their prior representations.

26. I will refer to some of the specific representations made at relevant times in this decision, but briefly and in summary, Mr and Mrs M say:

    - The provisional decision uses an unlawful causation test.

    - The provisional decision does not properly apply 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.

    - The provisional decision does not properly consider utmost good faith and misrepresents WFAC's position on this.

    - The provisional decision reflects this service's standardised approach to such cases rather than being a consideration of the individual circumstances.

    - The provisional decision does not consider the poor value of the policy, which is an important consideration when considering fairness.

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

    - Mr and Mrs M had risks they might well have wished to cover, but there is no evidence this policy covered them. In particular, the policy only covered the first 12 months of sickness or unemployment. Whilst that in itself was not inappropriate, it was inappropriate to not address the post 12 month period.

    - The limitations relating to back pain and mental health significantly reduce the cover and are unfair and a breach of utmost good faith.

    - The relevant policy condition meant that Mr and Mrs M could only claim for accident or sickness if they were unable to carry out any occupation, rather than just their own, further limiting the cover.

    - The policy gives the impression that unemployment is covered but in reality the vast majority of unemployment is excluded. In particular the use of compromise agreements effectively makes most redundancies voluntary.

    - The mailshot that was sent to Mr and Mrs M presents alcohol, self-inflicted injuries and pregnancy as the main exclusions and makes no mention of the 12 month limit on claims. It deliberately presented a short term policy as a long term solution.

    - The mailshot states things like '*you can now use this saving to your immediate benefit'* and '*an opportunity too good to be missed'.* Expressing an opinion on the merits in such a way is clearly advice and goes a long way beyond providing neutral information to enable the client to make an informed decision (not that it did that either). The mailshot was calculated to influence the clients and it did so.

my findings

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

28. With regard to what Mr and Mrs M's representative calls the 'industrial' application of the causation argument, I can confirm that I have considered this complaint on the particular evidence of this case, including Mr and Mrs M's individual circumstances and what they have said about the sale of the policy.

a) relevant considerations

29. 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.

30. This sale took place in 2001 before the sale of general insurance products like this became regulated by the Financial Services Authority in January 2005 and before mortgage lending became regulated in October 2004. So the FSA's and FCA's overarching Principles for Businesses and insurance conduct rules (ICOB and ICOBS) are not applicable to this complaint.

31. The mortgage was redeemed in 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.

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

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

33. Mr and Mrs M's policy was sold during the period of 'self-regulation' by the General Insurance Standards Council (GISC). It published the GISC code which set out minimum standards of good practice for its members to follow when selling insurance, including PPI. I am satisfied it represented good practice for non-members too.

34. Of particular relevance to this dispute:

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

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

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

…

Matching your requirements

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

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

Information about products and services

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

…

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

…

Information on costs

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

…

- *if we are acting on your behalf in arranging your insurance and you ask us to, we will tell you what our commission is and any other amounts we receive for arranging your insurance or providing you with any other services.*

…

Advice and recommendations

3.5 If we give you any advice or recommendations, we will:

- *only discuss or advise on matters that we have knowledge of;*
- *make sure that any advice we give you or recommendations we make are aimed at meeting your interests; and*

- *not make any misleading claims for the products or services we offer or make any unfair criticisms about products and services that are offered by anyone else.'*

The Mortgage Code

35. The Mortgage Code was a voluntary code followed by subscribing lenders and mortgage intermediaries. Whilst predominantly about mortgage related matters, it also included some insurance related commitments.

36. Among other things, the Mortgage Code said that when providing information to help customers choose a mortgage, subscribers would give customers:

- *'…a description of any insurance services which we can arrange (for example, buildings, contents, mortgage payment protection and life insurance);*
- *whether it is a condition of the mortgage that such insurance be taken out and whose responsibility it is to ensure that it is taken out*;
- *whether it is a condition of the mortgage that such insurance must be arranged by us;*
- a *general description of any costs, fees or other charges in connection with the mortgage which may be payable by you (for example, mortgage valuation fees, arrangement fees, early repayment charges, legal fees and insurance premiums)'*.

37. Subscribing lenders (but not mortgage intermediaries) also agreed to comply with relevant codes including the ABI Code (below).

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

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

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

- The intermediary should:

  - *'ensure as far as possible that the policy proposed is suitable to the needs and resources of the prospective policyholder.'*

  - *'explain all the essential provisions of the cover afforded by the policy, or policies, which he is recommending, so as to ensure as far as possible that the prospective policyholder understands what he is buying.'*

  - *'draw attention to any restrictions and exclusions applying to the policy.'*

Guidance on the application of the ABI Code

39. 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.

40. 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…

41. The 'Resume for Intermediaries' published in July 1999 explained how insurers should interpret some of the key requirements of the code including:

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

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

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

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

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

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

The ABI Statement of Practice for Payment Protection Insurance

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

> *Providers will give sufficient detail of the essential provisions of the cover afforded by the policy so as to ensure, as far as is possible, that the prospective insured person understands what he/she is buying.*
>
> *In particular:*
>
> *the suitability of a contract will be explained to those who are self-employed, those on contract or part time work, and those with pre-existing medical conditions;*
>
> *details of the main features of the cover as well as important and relevant restrictions will be made available and highlighted at the time the insurance is taken out with full details being sent afterwards;*
>
> *all written material will be clear and not misleading;*
>
> *full details of the cover will be provided as soon as possible after completion of the contract.*

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

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

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

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

The ABI and CML Statement of Practice for Sales of Mortgage Payment Protection Insurance

46. The ABI jointly published a statement with the Council of Mortgage Lenders in July 1999. Among other things, it said:

> *Is the policy suitable for the consumer?*
>
> *The ABI Code requires sellers of MPPI to ensure as far as possible that the insurance policy being proposed is suitable for the prospective insured person's needs and resources.*

This means the customer should be encouraged to assess the levels of risks they face as a homeowner, and particularly how they would keep up mortgage repayments if they lost their income via unemployment or ill health. Issues that need to be addressed during the sales process include:

- *security of the customer's employment, bearing in mind the duration of financial commitment they are about to undertake,*
- *what level of sick pay they could expect from their employer if they fell ill, and*
- *whether they have savings or alternative sources of income*

This type of information will help customers to decide whether they need MPPI, and which kind of policy would be best for them.

Does the customer understand what he/she is buying?

Sellers of MPPI must explain all the essential provisions of the policy, including restrictions and exclusion, at the point of sale.

The key aims at the point of sale should be to identify:

- *The level and type of cover being provided. This includes benefit levels and whether they cover disability and/or unemployment, length of time for which payments will be made and the duration of the policy in relation to the mortgage.*
- *All the main restrictions and exclusions. These include any eligibility criteria, conditions relating to pre-existing health conditions, time limits relating to claim payments and age restrictions.*

The needs of individual customers may vary. For example, self-employed or contract workers will need to understand clearly any restrictions that apply to them and affect their cover. Wherever possible, sellers should take account of individual circumstances and adjust the information they provide accordingly.

47. The other codes produced by the ABI supplemented the ABI Code and I consider them to be indicative of the standards of good practice expected of intermediaries like YBS at the time.

48. So I am satisfied it is right that I should take them into account, together with the codes YBS subscribed to when deciding what is, in my opinion, fair and reasonable in the circumstances of Mr and Mrs M's case.

The law

49. 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.

50. I have also considered carefully WFAC's representations about the law set out in a number of documents including WFAC's letters to this office about complaints generally of 2 March and 5 June 2017.

The approach taken by former schemes

51. 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.

52. 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'*.

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

53. 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 and Mrs M's.

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

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

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

> *DISP App 3.1.3G*
> *Where the* firm *determines that there was a breach or failing, the* firm *should consider whether the complainant would have bought the* payment protection contract *in the absence of that breach or failing. This appendix*

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

establishes presumptions for the firm *to apply about how the complainant would have acted if there had instead been no breach or failing by the* firm*. The presumptions are:*

> *(1) for some breaches or failings (see* DISP App 3.6.2 E*), the firm should presume that the complainant would not have bought the* payment protection contract *he bought; and*
>
> *(2) for certain of those breaches or failings (see* DISP App 3.7.7 E*), where the complainant bought a single premium* payment protection contract*, the* firm *may presume that the complainant would have bought a regular premium* payment protection contract *instead of the* payment protection contract *he bought.*

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

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

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

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

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

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

DISP App 3.6.3E

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

Overall

57. 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 YBS gave advice, whether it advised Mr and Mrs M with reasonable care and skill – in particular, whether the policy was appropriate or 'suitable' for Mr and Mrs M, given their needs and circumstances.

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

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

58. Mr and Mrs M say YBS ought fairly and reasonably to have gone further than I have suggested. I shall address Mr and Mrs M's representations about this later on.

b) the sale - what actually happened?

59. Mr and Mrs M believed that they had taken out the policy at the same time as arranging their mortgage in 1998. In fact they chose not to buy PPI when discussing their mortgage and associated insurance needs with a mortgage introducer during a meeting at their home. Instead they took out PPI following receipt of a mailshot sent to them by YBS in 2001.

60. Mr and Mrs M originally said that they were not advised to buy the policy.

61. YBS also says that it did not provide advice but gave Mr and Mrs M sufficient information about the PPI for them to decide if it was right for them.

62. YBS has provided copies of some relevant documentation

    - The Mortgage Application form and Mortgage Offer dating from 1998 that show Mr and Mrs M did not take out the policy at that time they were arranging their mortgage.

    - An example of the mailshot letter that was sent to Mr and Mrs M in 2001.

    - A copy of the confirmation slip that Mr and Mrs M signed and returned. The slip says they must reply by 1 August 2001. They have ticked a box to request PPI. They have also ticked another box to have joint cover, rather than cover just for the first named borrower.

    - A Welcome letter sent to Mr and Mrs M on 23 August 2001 confirming that the Chelsea Payment Protection had been set up and enclosing the policy booklet and insurance schedule.

63. Having considered the representation of both sides and keeping in mind the limitations on the evidence available about what happened 17 years ago, I find:

- Both Mr and Mrs M and YBS had said that no advice was provided during the sale. It was a postal sale and there is nothing to suggest they spoke to anyone from YBS. Although the leaflet may have been positive about the potential benefits of the policy and encouraged the reader to consider taking it out, I don't think that generic language amounted to – or would have been reasonable to interpret in a postal sale – as a personal recommendation to take out the PPI.

- Mr and Mrs M had access to the policy summary when deciding to take out the PPI. Mr and Mrs M may not have known all there was to know about the policy, but it is unlikely they took out the policy without knowing anything about it at all.

- It is more likely than not that the full policy conditions were sent to Mr and Mrs M as part of the welcome pack received after they returned their signed PPI confirmation slip.

c) did things happen as they should in 2001?

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

65. 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 and Mrs M agreed to the policy YBS offered knowing that they did not have to take it out and that it was separate to the mortgage. In reaching that conclusion I note that the sale took place almost three years after the mortgage had gone live and that Mr and Mrs M completed the necessary form to buy the policy themselves at home, without any input from YBS staff.

66. The policy confirmation slip they were sent invited Mr and Mrs M to indicate whether or not they wanted payment protection cover. Mr and Mrs M have ticked the box next to option B and the statement: *'Please continue my/our current mortgage payments at the amount shown including Chelsea Payment Protection premiums.'*

67. Directly above this statement there is an equally prominent option A; to continue the mortgage payments without payment protection.

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

69. Having considered all of the information, including Mr and Mrs M's further representations made in response to the provisional decision about the wording of the leaflet having been calculated to unfairly influence clients, I am not persuaded the information YBS gave Mr and Mrs M could reasonably be considered to amount to advice. I have not seen anything which persuades me that YBS recommended they

take out the policy, rather it alerted Mr and Mrs M to the fact that they could take out the policy and gave Mr and Mrs M information about this.

70. The question I need to consider is whether YBS provided Mr and Mrs M with sufficient information in an appropriate way to enable them to make a properly informed decision about whether to take out the policy.

71. The policy summary that the confirmation slip was attached to would have given Mr and Mrs M a broad sense of what the policy covered – but by no means all of the information they needed to make a properly informed choice.

72. Whilst Mr and Mrs M signed to confirm that they had *'read and understood the summary of the terms and conditions'* the covering letter did not alert them to the fact that important information about the policy could be found there.

73. By taking this approach, YBS ran the risk that Mr and Mrs M might not identify or give proper consideration to the important information about the cover, benefits, exclusions and limitations, which it was required to draw to their attention, to enable them to make an informed choice.

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

75. In this case, the confirmation slip prompts Mr and Mrs M to read the policy summary. As they are signing to confirm that they have read and understood the summary, I think it is more likely than not that they would have looked at the summary (which was on the reverse of the declaration), even if only briefly.

76. The policy summary takes up one side of the leaflet with some clearly defined headings such as: *'Do you qualify for Chelsea Payment Protection', ''Is there any period when you can't make a claim for unemployment?', What general exclusions does the Policy have?', 'What if you've had, or still have, health problems?'* and *'Do you qualify if you are self-employed?'* So I think it is more likely than not that Mr and Mrs B would have come across the information about benefits and exclusions found there and have been encouraged to read the short passages under the various headings.

77. I am satisfied Mr and Mrs M ought reasonably to have understood from the information in the covering letter that the policy cost £4.73 per £100 of monthly benefit. But this does not mean that they would have necessarily appreciated what the exact premium might be each month.

78. But even with the benefit of the information set out in the leaflet, Mr and Mrs M would not have known all of what they needed to know to make a fully informed choice. I am satisfied YBS gave them a certain amount of the information they needed to know to make an informed choice. But I am not persuaded it did enough to present that information in a way that was fair and reasonable to Mr and Mrs M. I am not persuaded YBS did enough to draw the important information in the policy to Mr and Mrs M's attention. It did not present the important information in a way that was clear, fair and not misleading.

79. 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.

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

81. It is also arguable that YBS failed to disclose the costs information envisaged at DISP App 3.6.2E (8). Setting out the cost in the application form as £4.73 per £100 of monthly benefit does not necessarily mean Mr and Mrs M would have known what the policy was likely to cost on a monthly basis.

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

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

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

    But having done so, I am not persuaded by Mr and Mrs M's views about what the duty of utmost good faith required.

83. 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.

84. 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.

85. 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]

86. MacGillivray on Insurance Law[4] explains that the duty does not extend to giving the insured the benefit of the insurer's market experience, such as for instance, that the same risk could be covered for a lower premium either by another insurer or,

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

presumably, by the same insurer under a different type of insurance contract; and the insurer is not required to perform the role of the insured's broker in this regard.

87. 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 and Mrs M say YBS 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 YBS.

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

88. YBS 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.

89. The Guidance Notes for Intermediaries and the Resume for Intermediaries about the application of the ABI Code which I have referred to in this provisional 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.

90. 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.

- With regard to the limitations in the policy, I note WFAC's representations that the vast majority of back and mental health conditions are treated in primary care, and the current health guidelines actively steer primary care doctors away from referrals to consultants or for radiological scans, and therefore the limitations in the PPI policy are effectively exclusions.

- However, looking at these guidelines they post-date the sale of Mr and Mrs M's policy. I have been unable to find any reference to central guidelines on the treatment of these conditions being in force at the time of Mr and Mrs M's PPI sale. So I have no evidence to suggest that Mr and Mrs M would have been unable to meet the conditions in the policy had they needed to claim, or that they would have been unable to make a sickness claim. So I do not agree that the limitations were so onerous as to amount to exclusions.

- I also note WFAC's representations that the unemployment terms dramatically reduced the scope of cover, in that voluntary redundancy is not covered and that 'almost without exception' anyone being made redundant is obliged to sign a compromise agreement, rendering the redundancy – in practical terms – voluntary. I consider this to be 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 accepting or declining the claim.

91. I also note there was no expectation at the time under the provisions of the ABI Code or the GISC Code that insurers or intermediaries should proactively disclose commission. For example, the guidance to the ABI Code published in December 1994 said only that independent intermediaries should disclose commission on request and the GISC Code said that members would disclose information about commission and other amounts received if asked.

92. 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 and Mrs M say YBS should have done.

93. 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 and Mrs M suggest 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.

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

95. I also note Mr and Mrs M's view that the mailshot leaflet not only omitted material facts but misrepresented the terms of the policy in a number of its statements, including:

- *'Most of us will know someone who has been made redundant, through no fault of their own and suddenly, has to find the money to continue to meet their monthly mortgage commitment…without their normal monthly income…sometimes for a long time to come…putting their partner and family under tremendous strain. Chelsea Payment Protection overcomes these problems by paying the mortgage when you can't (please see the enclosed leaflet for further details).'*

- '*Please find below a summary of the full policy wording which is designed to provide you with all the information you should need to make an informed decision as to the suitability of this insurance for your circumstances'*

- I accept there is a possibility a court might conclude these statements in the mail-shot leaflet mis-represented the contract. In my opinion the reason why YBS failed to act fairly and reasonably was not because of what YBS said or didn't say in the mailshot, but because the overall information YBS gave Mr and Mrs M, in the way it did, was insufficient to meet the standards I consider it fair and reasonable to expect it to have met, in 2001, when providing information about an insurance policy.

96. Overall, for the reasons and in the ways I have set out, I find the information YBS gave Mr and Mrs M was insufficient. YBS failed to explain in a clear way all the features of the policy, so the information Mr and Mrs M based their decision on was incomplete. I am not persuaded that was fair and reasonable in all the circumstances.

e) what effect did YBS's shortcomings have on Mr and Mrs M? to what extent did Mr and Mrs M suffer loss or damage as a result?

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

98. In those circumstances, it seems to me that whether or not Mr and Mrs M have suffered loss or damage in this case primarily depends on whether, if YBS had explained things properly, Mr and Mrs M would have acted differently, or whether they would have taken out the policy in any event.

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

- WFAC also says that a court would take a different approach if it were to find there were misrepresentations. It has cited a selected passage from *BP Exploration Operating Co Ltd v Chevron Transport (Scotland) [2001] UKHL 50* in its response to my provisional decision:

  "I am satisfied that he need not take this further step, which involves a hypothetical inquiry which can never be answered precisely and may sometimes be incapable of being answered at all. A representee can say why he acted as he did…..But he can only speculate on what he would have done if the representation had not been made. As a matter of English law, a representee must always be prepared to prove that the representation had an effect upon his mind….Whether, if a full disclosure of the truth had been made he would, or would not have acted differently is a question to which English law does not require an answer, it is sufficient that he might have done so,"

  They say that the correct test is whether that representation was an effective cause in inducing the contract; it need not be the sole or even the dominant cause.

100. YBS says Mr and Mrs M would still have taken out the policy because:

- They made the decision to buy the policy in their own time, at home, so they clearly had an interest in the policy.

- They were not affected by the exclusions and limitations in the policy and it could have provided them with a useful benefit in the event of a successful claim.

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

102. Taking out insurance like this, based on information only, requires the consumer to weigh up a number of factors to decide whether the insurance is right for them. Payment protection policies typically provide cover in a variety of situations, some of which may be of greater interest or relevance to the consumer than others.

103. Effectively the consumer has to weigh up in their own minds the cost of the policy against the benefits offered in return and the potential consequences they will suffer if they don't have insurance should the risks come to fruition. That is why it was incumbent on the intermediary to provide the information about the policy's features, so the consumer could make that assessment.

104. The evidence in this case suggests that Mr and Mrs M clearly had some interest in taking out payment protection insurance. In saying that, I do not mean they actively sought insurance or that it was their intention to take out insurance before they were sent the mailshot – I have seen nothing to suggest they did.

105. Rather, I mean when YBS contacted them with details of a product they could buy that would protect their mortgage payments in the event they were unable to work because of accident, sickness or unemployment, that resonated with them in some way and they concluded that they wanted that product to provide cover for them.

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

    - While I have taken into account WFAC's submissions on the *BP Exploration Operating Co Ltd v Chevron Transport (Scotland) case,* I have borne in mind that that case related to *the Prescription and Limitation (Scotland) Act 1973*, whether an error induced by the debtor caused the creditor to refrain from enforcement action and how that interplayed with the relevant limitation period. Although the submissions refer to a select paragraph on general English law, it has not changed my considerations in this case. As I said above, I must decide what is fair and reasonable in all the circumstances of Mr and Mrs M's case, taking into account the factors in DISP 3.6.4R.

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

108. In this case, as I explained earlier, I am satisfied from the evidence about Mr and Mrs M's circumstances at the time of the sale that the policy was not fundamentally wrong or inappropriate for them.

109. Whilst Mr and Mrs M were interested in the policy, were eligible and had good reason for wanting the cover, the policy did not work entirely as they might have thought.

110. Although I consider it more likely than not that Mr and Mrs M knew they would have to pay something for the policy, it appears that YBS did not set out the exact premium at the point Mr and Mrs M applied for the policy. Having said that, the application form explained the cost as being £4.73 per £100 of monthly benefit. Given that Mr and Mrs M's mortgage payment at the time was just over £200, it would not have been difficult for Mr and Mrs M to work out the approximate cost of the policy. Mr and Mrs M paid

for the policy for a number of years, so if the costs were significantly at odds with their expectations at the point of sale, it is possible they might have raised that with YBS at the time, or reconsidered their decision.

111. Overall, I am not persuaded Mr and Mrs M would have found the cost unacceptable if they had been given the exact figure in the mailshot that prompted them to agree to the policy.

112. In addition, I am not persuaded YBS made clear exactly what Mr and Mrs M would get back in return in the event they made a successful claim. But I think it is unlikely Mr and Mrs M's likely expectations about what the policy would pay in the event of a claim were significantly different to what the policy actually did.

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

114. The policy excluded pre-existing medical conditions. Although Mr M had broken his back as a child, he had no ongoing problems with his back as an adult and had not missed any work as a result. Mr M was 41 when he took out the policy and on balance I do not think it is likely that Mr M would have expected a recurrence of the same condition. So I think it is unlikely that Mr M would have thought he would need to make a claim for disability for the same injury in the future. Therefore I do not think that knowing about the pre-existing medical condition exclusion would have deterred Mr and Mrs M from taking out the policy.

115. Possibly the most significant differences between what Mr and Mrs M thought they had bought and what they had actually bought were the limitations on back and mental health claims.

116. The terms of the policy also differed from what Mr and Mrs M might have expected because Mr and Mrs M could only claim for disability if they were unable to do both their own jobs and 'similar work'. If Mr and Mrs M had known this, it may have played into their thinking about what they would have done. I accept it may have given them pause for thought – although it is possible they may not have been overly concerned given that, if they weren't able (through disability) to carry on their own occupations the chances that they would be able to take up a similar occupation would also, in all probability, be limited. I have considered the further representations made in response to my provisional decision, but they have not changed my mind about this point.

117. I am also not persuaded YBS told Mr and Mrs M that any claim they made would be limited to a 12-month period. This may have differed from what Mr and Mrs M expected. But Mr and Mrs M wouldn't have received any sick pay from their employer and their redundancy entitlement was also significantly less than 12 months' income. The 12 month claim period would also allow them time to explore other income options, for example to find new jobs, in the event of an unemployment claim.

118. In those circumstances, I consider it likely Mr and Mrs M would still have thought a policy that paid up to 12 monthly mortgage payments would have been of benefit to them and would help them manage the consequences should Mr and/or Mrs M be unable to work in the circumstances covered by the policy. The policy would help reduce their outgoings at a difficult and uncertain time, ensure that their home was not placed at risk and might potentially help preserve their limited redundancy money for other use.

119. So, whilst Mr and Mrs M 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 they would reasonably have thought from the advice and information they based their decision to take out the policy on and found acceptable.

120. Mr and Mrs M provided information in the PPI questionnaire about what they would have done with more information, which I have considered carefully. In their most recent updated questionnaire, they say:

> *Chelsea Building Society did not explain the terms and conditions of the policy. In particular they did not tell us the exclusions and limitations – the reasons it would not have paid out. WFAC say Chelsea Building Society had a duty to explain these exclusions and limitations in a way that ordinary people like us would have understood. We can definitely say that Chelsea Building Society did not do this. WFAC have further explained that a high proportion of reasons anyone is likely to miss work were often excluded – in particular pre-existing conditions and often chronic conditions and sometimes common conditions such as bad backs and mental health conditions such as stress, depression and anxiety. These statistically are among the most likely reasons for anyone being off work and I can say that these exclusions were not disclosed to us.*
>
> *If Chelsea Building Society had said that they were excluding some of the most common reasons people miss work we can say that we would not have wanted this PPI for that reason alone.*
>
> *This mortgage was meant to protect our mortgage from sickness. It is now obvious that it was never going to do what it was supposed to. It was supposed to protect payments if you couldn't work, but wouldn't have done that in a majority of cases.*
>
> *Let us be clear – we would not have wanted this policy had we been told this. And this was particularly relevant to us because in my job both stress and bad backs are commonplace and among the main reasons people miss work. This makes it even more obvious as these exclusions affected us personally. In fact, I have suffered from back problems myself and although I have not yet lost time at work because of them, this shows how people are likely to be affected by them. On top of this, we now understand 'pre-existing conditions' were not covered. This sounds like a piece of jargon to us, but WFAC have explained what it meant. We have had the following health problems:*
>
> *Mr M:Condition: broken back. Date: circa 1974, Treatment: hospitalized for a few weeks and was in a case. I had physiotherapy. Work missed: 2 months off school Condition: fracture. Date: circa 1974, Treatment: fractured spine- hospitalized for a few weeks and was I in a case, i had physiotherapy. Work missed: 2 months off school. So it turns out that our bad backs might have been excluded TWICE because they were 'pre-existing' and possibly excluded anyway. If the exclusion for pre-existing conditions had been explained to us, it is clear we would not have wanted this policy. In addition, we believe pregnancy may be excluded too, Mrs T was pregnant at the time this was sold so another exclusion that was relevant to us was just not explained. On top of this we now understand that on average, firms kept 65% + of each premium payment as profit and expenses. The policy was appalling value for money. We are not in a position to waste money or make insurance businesses richer at our expense. Everybody knows that companies are entitled to make a fair*

profit, but not an unfair one - We would not have wanted to be taken advantage of We don't think anybody would. In addition to the above, there are more reasons as well why we now understand this PPI should not have been sold to us, and why if it had been explained properly, we would not have wanted it.
In my job as a spring maker,! also had redundancy and would have got at least redundancy pay if I had been made redundant. In Mrs M's job as a machine operator, They also had redundancy and would have got at least redundancy pay if they had been made redundant. So the PPI was expensive and really unlikely to pay out and on top of that we were covered anyway. We don't think this PPI should have been sold to us and would not have wanted it if it had been properly explained.
WFAC say that Chelsea Building Society were supposed to treat us fairly and not take advantage of us, 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 us. We feel badly let down by Chelsea Building Society. PPI was just included as part of the package with our mortgage. We had no interest in PPI and would not have had it if Chelsea Building Society had not included it with the package.

121. Mr and Mrs M are effectively saying that as a result of what their representative WFAC has told them, both about what it considers should have happened and what they should have decided at the time, they would not have taken out the policy.

122. In light of the findings I have already made, I do not think Mr and Mrs M's representations demonstrate what they claim because much of the information they say would have affected their decision would not have been known to them at the time of the sale if everything had happened as it should. And some of the things they have mentioned would not have been relevant to the decision they were making. For example:

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

    - I am satisfied the requirement on YBS in 2001 was to explain the features of the cover as I have discussed.

    - Although normal pregnancy and childbirth was excluded from the policy, claims arising from pregnancy or childbirth of a more significant nature were likely to have been covered, subject to the policy terms.

123. I am also mindful that: Mr and Mrs M's recollections of the sale are, owing to the significant passage of time, likely to be limited (for instance they thought they had bought the policy when they took out the mortgage in 1998. When asked to clarify their circumstances at the correct point of sale in 2001, they said they were the same as in 1998, including that Mrs M was pregnant); their representations about what they 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.

124. I do accept the limitations on the policy might well have given Mr and Mrs M pause for thought – as Mr and Mrs M say, these are common conditions.

125. Whilst it is likely they would have expected to provide some medical evidence to support a claim arising from a back condition or mental health condition (as the policy required for other conditions), the steps required for these conditions were more onerous than they might reasonably have expected (which is ultimately why YBS should have brought them to their attention). Furthermore Mr M had previously suffered from a back problem – although I have earlier explained why I don't think this would have made a difference to their decision to take out the policy.

126. I accept Mr and Mrs M may have concluded that the policy was not as good as they thought and they might have decided not to proceed. This limitation on cover, when combined with the other shortcomings in the sale, might have dissuaded consumers in slightly different circumstances to Mr and Mrs M from taking out the policy.

127. But Mr and Mrs M, in their circumstances, still had some good reasons to take out the policy, notwithstanding the reduced value of the policy compared to what they might have expected from the information they were given.

128. In deciding with appropriate information whether to take out the policy, I consider it fair and reasonable to think Mr and Mrs M would have weighed up various other considerations, in particular their lack of savings and their financial circumstances and how they would be affected if one or other of them was not working and the consequences of being unable to meet their mortgage payments. It is likely they would also have thought about whether the cost to benefit proposition still worked for them.

129. Having considered all of the evidence and arguments in this case, I consider it more likely than not that Mr and Mrs M would still have taken out the policy. The policy met their needs, was sufficiently close to what they thought they were getting and provided benefits that would help them manage the consequences were either Mr and/or Mrs M made redundant, or unable to work through the accident or disability. In the circumstances I consider it more likely than not that Mr and Mrs M would have taken out the policy in any event notwithstanding the limitations on cover.

130. I have considered Mr and Mrs M's representations about causation and DISP App 3, including the general opinion of Stephen Knafler QC provided by WFAC on behalf of Mr and Mrs M. 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.

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

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

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.

132. 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…

133. 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 and Mrs M would not have bought the payment protection insurance they bought unless, in the particular circumstances of the complaint, there is evidence to rebut the presumption.

134. 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 and Mrs M's circumstances I have considered above, I consider it reasonable to conclude the position Mr and Mrs M found themselves in as a result of the sale was the same position they would have been in had the 'breach' or 'significant failings' not occurred. In other words, I am satisfied that Mr and Mrs M would have bought the policy in the absence of the breach or failing.

- I am mindful of Mr and Mrs M'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 their own representations – that they would not have take out the policy. However, I am not persuaded by those representations.

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

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

137. I am satisfied it would not be fair and reasonable in those circumstances to conclude YBS should pay Mr and Mrs M redress, as that would put them in a better position than they would have been in if everything had happened as it should have done.

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

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

140. 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 and Mrs M 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 and Mrs M suffered material distress or inconvenience because of the way the policy was sold or any other form of non-pecuniary financial loss. In those circumstances, I do not consider it would be fair to make an award.

my final decision

141. 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 and Mrs M.

Carole Clark
ombudsman