This final decision is issued by me, Carole Clark, an Ombudsman with the Financial Ombudsman Service.

My provisional decision from November 2018 explained that I was minded not to uphold Mr C's complaint, subject to any further evidence and representations submitted by the parties. Both National Westminster Bank Plc and Mr C had nothing further to add.

summary

1. This dispute is about the sale in 2009 of a payment protection insurance (PPI) policy to support a National Westminster Bank Plc (Nat West) mortgage.

2. Mr C complains that Nat West included the policy as part of a package with his mortgage without making it clear he had a choice about buying it. He also says that Nat West did not properly explain the policy's features, exclusions and limitations. If it had, he says he would not have taken the policy out.

3. Nat West says it gave Mr C information about the policy so he could make up his own mind about whether to take it out. It says it told him about the policy's features and limitations before the sale was concluded. But in any event, it says the policy was suitable for Mr C, so he would have taken it out even if it had given him 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 Nat West, to the extent that I do not make an award in favour of Mr C.

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

   - Mr C made his decision to take out the policy based on the information Nat West gave him about the policy.

   - Taking into account the law, regulations, industry codes of practice and what I consider to have been good practice in 2009, Nat West should fairly and reasonably have provided Mr C with sufficient clear, fair and not misleading information about the policy it was offering to enable him to make an informed decision about whether or not to take it out.

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

   - Mr C made his 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 C would still have taken out the policy.

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

7. Under the rules of the Financial Ombudsman Service, I am required to ask Mr C to accept or reject my decision before 13 January 2019.

background to the complaint

a) events leading up to the complaint

8. Mr C was already living in his house. But in February 2009 he applied to Nat West to re-mortgage the property from a different lender. Mr C says he attended a branch of Nat West. Although Nat West says it can't confirm the sales channel, it seems to accept Mr C's recollection of events. Looking at the sales documents, on balance I think that Mr C met with a member of Nat West staff who completed a mortgage application form, a 'Giving your Agreement' form and a separate direct debit form for the PPI. Following the meeting he was sent a mortgage offer.

9. The mortgage application form included a section headed 'Your Protection'. Mr C's name is printed in the relevant area to indicate that he wished to protect his mortgage payments. The cover is detailed as being for accident, sickness and unemployment. On the 'Giving your Agreement' form, which Mr C has signed, a box has been crossed to confirm that Mr C wanted to apply for Mortgage Repayment Protector (PPI). Mr C also signed a separate direct debit mandate for the premiums.

10. Mr C was borrowing £116,250. He took the mortgage out over a period of 25 years. The monthly repayment on the mortgage was £597.04.

11. The policy began on 17 March 2009. Mr C paid the monthly premium of £30.72 by direct debit.

12. It's my understanding that the mortgage is still active, although the policy was cancelled in October 2016.

b) Mr C's circumstances in 2009

13. According to the mortgage application form, Mr C had a salary of £32,000.

14. Separately Mr C has told us that:

- He worked as a merchandiser manager and had been in his job for seven years.

- He was earning £25,000 and was entitled to death in service and redundancy pay.
- He would have received at least three months full pay from his employer if he was off work due to sickness or accident.

- He did not have any savings or other insurance policies.
- He did not have any health problems at the time.

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

c) the policy – what was Nat West selling and what did Mr C buy?

16. Nat West has provided a copy of the Mortgage Repayment Protector policy which it says sets out the full policy terms and conditions - and which I accept on the balance of probabilities applied to policies like Mr C's incepted in March 2009.

17. The policy conditions were set out in a 24 page booklet. Among other things, these show that:

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

    - The policy provided disability cover. Broadly, if Mr C was unable to carry out the duties of his work (or any other work which in the insurer's view he might reasonably become qualified for in view of his education, training and ability) due to injury, sickness or disease, it would pay Mr C £600 each month. The monthly benefit 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 £600 each month. The monthly benefit would continue until Mr C ceased to be unemployed or 12 payments had been made, whichever came first.

    - The policy would have paid out after 14 consecutive days of disability or unemployment.

    - The insurer was UK Insurance Ltd.

18. To put the benefits into context, if Mr C had made a successful claim for 12 months he would have received £7,200. And he could have claimed more than once during the life of the policy.

19. Returning to the policy terms and conditions, there were also exclusions – for example, unemployment claims resulting from the policyholder's own misconduct.

20. Part of Mr C's complaint is that the policy was poor value because it excluded or limited claims arising from pre-existing medical conditions and common conditions such as back injury and mental health issues. Whilst the policy required Mr C to provide satisfactory proof of disability to make a claim, including providing a certificate from his doctor, it did not exclude pre-existing medical conditions, back or mental health conditions, or place any additional restrictions or more onerous evidential requirements on claims relating to back and mental health issues than would have applied to any other disability.

d) the complaint and Nat West's response

21. Mr C's representative We Fight Any Claim Ltd (WFAC) has made lengthy and substantial representations on his behalf.

22. 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 C says:

- Nat West included the policy as a package with his mortgage.

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

- Nat West did not tell him about the poor value of the policy, which is illustrated by the low claims ratio – for example the Competition Commission reported that the average claims ratio for mortgage payment protection insurance was 28%, meaning that around 28p in every pound was used to pay claims, the rest paid for costs, profits and commission. Nat West's failure to explain this to him 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.

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

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

- The policy 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 he trusted the adviser and was entitled to rely on what was said.

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

- In any event, the FCA's guidance at DISP App 3.6.2E makes it clear that it should be presumed he would not have taken out the policy unless there is evidence to outweigh the presumption. I am required to take that regulatory

guidance into account when deciding what is fair and reasonable and should not depart from it, other than in exceptional circumstances when there is sufficiently good reason to take a different approach.

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

23. Nat West says:

- Its process at the time was to sell PPI on a non-advised basis. So it did not recommend the policy to Mr C. Instead it provided Mr C with information about the policy so he could make up his own mind about whether or not the policy was right for him.

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

- Mr C does not appear to have been affected by the exclusions and limitations in the policy and it met his needs. Therefore Mr C's decision to take out the policy would not have changed if it had done more.

- It is more likely than not that the adviser explained the policy features and limitations to Mr C and gave him appropriate documentation before the sale concluded.

the parties' representations in response to the provisional decision

24. Nat West had nothing further to add following the provisional decision.

25. Mr C's representative also had nothing further to add following the provisional decision.

my findings

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

a) relevant considerations

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

28. The mortgage was arranged in February 2009 after mortgage lending became regulated in October 2004 - as such this was an FCA regulated mortgage. 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.

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

29. This sale took place after the sale of general insurance products like this became regulated by the Financial Services Authority (FSA) in January 2005 and after the FSA renewed its insurance conduct rules in January 2008. So the FSA's and the FCA's overarching Principles for Businesses and insurance conduct rules (ICOBS) are applicable to this complaint. And I have set out in detail below how I have taken them into account when considering this complaint.

30. It is also relevant to note that there has for some time been codes governing the sale of insurance products such as PPI. There is much in common between the present statutory regulatory regime and the non-statutory provisions that preceded it (and, indeed, the position in law).

31. Although the non-statutory provisions no longer apply as specific requirements on those selling insurance, I consider that they still represent a helpful guide to good industry practice. As a result it is appropriate for me to also take them into account along with the relevant ICOBS rules and the other relevant considerations set out below.

Principles for Businesses – 'the Principles'

32. The Principles apply to all authorised firms including Nat West (acting as an insurance intermediary). Of particular relevance to this dispute are:

> Principle 1 (integrity):
> "*A firm must conduct its business with integrity.*"
>
> Principle 6 (customers' interests):
> "*A firm must pay due regard to the interests of its customers and treat them fairly.*"
>
> Principle 7 (communications with clients):
> "*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 8 (conflicts of interest):
> *"A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client."*
>
> Principle 9 (customers: relationships of trust):
> *"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."*

Insurance Conduct of Business rules (ICOBS)

33. Whereas the codes on the sale of insurance were voluntary prior to 14 January 2005, the FSA –who became responsible for the regulation of the sale of general insurance (including PPI) by intermediaries from that date – introduced the more detailed rules set out in ICOB and later ICOBS. Among them was the requirement that intermediaries were a) more specific about the information that should be provided before and after a sale and b) when making personal recommendations, ensure the suitability of those recommendations in view of the customer's demands and needs. Intermediaries had to provide a statement setting out the demands and needs

identified, confirming whether they have personally recommended a contract of insurance and any reasons for personally recommending the contract.

34. Of particular note are the following:

ICOBS 5.3.2 which includes that:
- In taking reasonable care to ensure the suitability of advice on a payment protection contract or a pure protection contract a firm should:
(1) establish the customer's demands and needs by using information readily available and accessible to the firm and by obtaining further relevant information from the customer, including details of existing insurance cover, it need not consider alternatives to policies nor customer needs that are not relevant to the type of policy in which the customer is interested.
(2) take reasonable care to ensure that a policy is suitable for the customer's demands and needs, taking into account its level of cover and cost, and relevant exclusions, excesses, limitations and conditions and
(3) inform the customer of any demands and needs that are not met.

35. ICOBS 6.4 Pre- and post-contract information: protection policies that says:

36. ICOBS 6.4.2 Oral sales: ensuring customers can make an informed decision
(1) If a firm provides information orally during a sales dialogue with a customer on a main characteristic of a policy, it must do so for all the policy's main characteristics.
(2) a firm must take reasonable steps to ensure that the information provided orally is sufficient to enable the customer to take an informed decision on the basis of that information, without overloading the customer or obscuring other parts of the information.

ICOBS 6.4.3
(1) A policy's main characteristics include its significant benefits, its significant exclusions and limitations, its duration and price information.

(2) A significant exclusion or limitation is one that would tend to affect the decision of customers generally to buy. In determining what exclusions or limitations are significant, a firm should particularly consider the exclusions or limitations that relate to the significant features and benefits of a policy and factors which may have an adverse effect on the benefit payable under it. Another type of significant limitation might be that the contract only operates through certain means of communication eg. telephone or internet.

37. ICOBS 6.4.4 Policy summary
A firm must provide a consumer with a policy summary in good time before the conclusion of a contract.

38. ICOBS 6.4.5 Payment protection contracts: importance of reading documentation
(1) A firm must draw a consumer's attention to the importance of reading payment protection contract documentation before the end of the cancellation period to check that the policy is suitable for the consumer.
(2) This must be done orally if a firm provides information orally on any main characteristic of a policy.

39. ICOBS 6.4.6 Price information: general

A firm must provide price information in a way calculated to enable the customer to relate it to a regular budget.

ICOBS 6.4.7 Price information is likely also to include at least the total premium (or the basis for calculating it so that the customer can verify it) and, where relevant:
(1) for policies of over one year with reviewable premiums, the period for which the quoted premium is valid, and the timing of reviews;
(2) other fees, administrative charges and taxes payable by the customer through the firm; and
(3) a statement identifying separately the possibility of any taxes not payable through the firm.

ICOBS 6.4.8 Price information should be given in writing or another durable medium in good time before conclusion of the contract. This is in addition to any requirement or decision to provide the information orally. In the case of a distance contract concluded over the telephone, it may be provided in writing or another durable medium no later than immediately after conclusion.

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

40. In the period immediately before statutory regulation in 2005, there was a 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.

41. Of particular interest:

- 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':

'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.'*

42. The sale took place after the sale of mortgage products became regulated by the FSA. So the mortgage conduct of business rules (MCOB) are applicable to this complaint. Prior to regulation subscribing lenders and mortgage intermediaries followed a voluntary mortgage code. There is much in common between the pre and post regulatory position.

The Mortgage Code

43. Whilst predominantly about mortgage related matters, the mortgage code also included some insurance related commitments.

44. 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)'*.

45. 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'

46. 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

47. 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.

48. 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…*

49. 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.

50. 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

51. 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 and CML Statement of Practice for Sales of Mortgage Payment Protection Insurance

52. 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.

53. 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 Nat West at the time.

54. So I am satisfied it is right that I should take them into account when deciding what is, in my opinion, fair and reasonable in the circumstances of Mr C's case.

The law

55. 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.

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

57. 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 C's.

58. The sale took place after insurance mediation became a regulated activity in January 2005, so Nat West was required to take into account the evidential provisions in DISP App 3 when considering Mr C's complaint.

59. 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.

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

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

(1) for some breaches or failings (see DISP App 3.6.2 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

61. 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 Nat West gave advice, whether it advised Mr C with reasonable care and skill – in particular, whether the policy was appropriate or 'suitable' for Mr C, given his needs and circumstances.

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

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

62. Mr C says Nat West ought fairly and reasonably to have gone further than I have suggested. I shall address Mr C's representations about this later on.

b) the sale - what actually happened?

63. Mr C attended a meeting in a branch of Nat West to arrange a re-mortgage on his existing property. Mr C says that Nat West did not advise him to buy the policy but instead it was automatically added as part of the mortgage package.

64. Nat West says that their adviser did not recommend the policy but gave Mr C sufficient information about the PPI for him to decide if it was right for him.

65. Nat West has provided copies of some documents relating to the sale:

- The mortgage application form which included details of the level of PPI cover and amount of benefit.

- A 'Giving your Agreement' form that says '*Please read the information below, together with the leaflet 'Important information about your mortgage application' which includes the section 'Key Facts about our services'. Please tick the boxes below as necessary, then sign and date.'* Then under the heading 'Your p*rotection arrangements'*, there is a cross in the box next to the statement *'I want to apply for Mortgage Repayment Protector'*. Mr C has signed and dated the form.

- A direct debit mandate for the Mortgage Repayments Protector that has been signed by Mr C to instruct that the premiums be taken from his bank account.

- The mortgage offer form which, under the heading of '*Optional Insurance that you do not have to take out through National Westminster Home Loans Ltd*' details that Mortgage Repayment Protector has been taken at a cost of £30.72 per month.

- A copy of the relevant policy document which includes a statement that Nat West '*is not providing you with a personal recommendation as to whether this policy is suitable for your specific needs.'*

66. Having considered the representations of both sides and keeping in mind the limitations on the evidence available about what happened during a meeting nine years ago, I find:

- Whilst it is possible that Nat West may have provided advice in this case, it is more likely that it did not. WFAC has said that face to face meetings can stray into advice with the client being influenced by the member of staff. But the evidence I've seen indicates that Nat West followed a standard non-advised sales process at the time and I've seen nothing to indicate that this was deviated from in this case, and Mr C says that he was not advised to buy the policy.

- It is more likely than not that there were some discussions between Mr C and the adviser about the policy Nat West was offering. Mr C may not have known all there was to know about the policy, but it is unlikely he 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 C following the meeting.

c) did things happen as they should in 2009?

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

68. 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 C agreed to the policy Nat West offered knowing that he did not have to take it out and that it was separate to the mortgage.

69. In reaching that conclusion I note the wording in the mortgage application and mortgage offer forms presents the policy as optional. I am also mindful that there was a separate 'Giving Your Agreement' form and direct debit mandate for the PPI.

70. On the balance of probabilities, I consider it more likely than not that the adviser presented the policy as an optional extra to the mortgage. I am not persuaded it is more likely than not that the Nat West adviser incorrectly (or inadvertently) told Mr C he had to agree to the payment protection policy for the mortgage to be approved or that the insurance was an inseparable feature of the mortgage.

71. I am not persuaded the information Nat West gave Mr C could reasonably be considered to amount to advice. I have not seen anything which persuades me that Nat West recommended he take out the policy, rather it alerted Mr C to the fact that he could take out the policy and gave Mr C information about it.

72. The question I need to consider is whether Nat West provided Mr C with sufficient information in an appropriate way to enable him to make a properly informed decision about whether to take out the policy.

73. I am satisfied it is more likely than not that Mr C was given a broad description of what the policy was intended to cover (that is that the policy would protect his

payments if Mr C was unable to work through accident, sickness and disability) and of the approximate costs. I have reached this conclusion because I think it is unlikely that Mr C would have taken out the policy without any sense of what the policy was for and of how much the premium might be.

74. But the evidence from the time of sale does not tell us whether Nat West gave sufficient information about the actual cost or about the exclusions and limitations before Mr C agreed to take out the policy. It is likely he was provided with the policy booklet but it is unclear if he was told about its contents or whether he was given time to read and understand the terms and conditions.

75. Whilst I am satisfied Nat West gave Mr C the full policy conditions which contained details about the benefits, limitations and exclusions, I do not consider that means Nat West gave Mr C the information he fairly and reasonably needed to make an informed decision about whether to take out the policy. I am mindful:

- Mr C most likely based the decision on what he was told by the adviser rather than on the written policy conditions.

- It was incumbent on Nat West to provide him with the most important information he required to make his decision before he took out the policy (see the good practice I set out earlier). And handing him a policy booklet is not enough on its own to satisfy this requirement.

76. Overall, having considered the parties' representations about what happened, I am not persuaded Nat West did enough to present information about the policy in a way that was fair and reasonable to Mr C. I am not persuaded Nat West gave Mr C all of the information he needed about the policy to make an informed decision about whether to take out the policy.

77. 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.

78. It seems to me that it would be reasonable to conclude that there were significant failings in this case. Nat West did not for example disclose to Mr C 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)]. Nat West may also have failed to disclose the cost information envisaged at DISP App 3.6.2E(8).

79. I have considered carefully Mr C's arguments that Nat West should have done more than I have found it should have done and provided additional information. I have given particular thought to Mr C's view that the FCA's Principles for Businesses (i.e. Principle 6 – "A firm must pay due regard to the interests of its customers and treat them fairly") and the common law duty of utmost good faith meant that:

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

- Nat West 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 C's views in that regard.

80. Ultimately it is a matter for the FCA as to what its intentions were in terms of the Principles and what they meant for businesses when selling PPI. But I think it is unlikely the FCA's intention was for the Principles to require businesses to disclose the type of information Mrs E says should have been disclosed in addition to the information I have set out above.

81. In reaching this conclusion I am mindful that in its policy statement 17/3 – in the context of non-disclosure of high levels of commission but in my view relevant to the FCA's broader intentions – the FCA says disclosure of commission in PPI sales was not required by ICOB/ICOBS and so a firm's failure to disclose was not a breach of those rules (or the industry codes beforehand which did not require the proactive disclosure of commission) – and so is unlikely in and of itself to have been a breach of its Principles.

82. 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.

83. 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.

84. 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.*[2]

85. MacGillivray on Insurance Law[3] explains that the duty does not extend to giving the insured the benefit of the insurer's market experience, such as for instance, that the same risk could be covered for a lower premium either by another insurer or, presumably, by the same insurer under a different type of insurance contract; and the insurer is not required to perform the role of the insured's broker in this regard.

86. 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 C says Nat West 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 Nat West.

87. Nat West 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.

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

88. The Guidance Notes for Intermediaries and the Resume for Intermediaries about the application of the ABI Code which I have referred to in this decision do not refer to that duty or elaborate on what it was intended to mean. But I think it is unlikely that it was intended to place a greater or substantially different obligation on the intermediary to that owed by the insurer.

89. 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.

90. I also note there was no expectation 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 on request.

91. 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 C says Nat West should have done.

92. 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 C suggests it should. I also note this is equally true of ICOBS – because intermediaries are not required to proactively disclose commission. So on this issue there is again much in common between the pre and post regulatory position. 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.

93. Overall, taking into account the law and regulations, regulator's rules and Principles, industry codes and standards of good practice applicable to this complaint, I am not persuaded that Nat West ought fairly and reasonably to have provided the additional information Mr C says it should have done.

94. But for the reasons and in the ways I have set out, I find the information Nat West gave Mr C was insufficient. Nat West failed to draw Mr C's attention in a clear and fair way to some important information about the policy, so the information Mr C based his decision on was incomplete. I am not persuaded that was fair and reasonable in all the circumstances.

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

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

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

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

98. Nat West says Mr C would still have taken out the policy because:

    - He was eligible for the policy and asked for the cover.

    - He does not appear to have been affected by the exclusions and limitations of the policy.

    - He had a need for the cover the policy provided and the policy was appropriate for him. He chose to buy it because he wanted the benefits and peace of mind it afforded.

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

100. 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.

101. 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.

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

103. Rather, I mean when Nat West told him – in applying for the mortgage - that there was a product available he could buy that would protect his mortgage payments in the event he was unable to work because of accident, sickness or unemployment, that resonated with him in some way and he concluded that he wanted that product to provide cover for him.

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

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

106. In this case, as I explained earlier, I am satisfied from the evidence about Mr C's circumstances at the time of the sale that the policy was not fundamentally wrong or inappropriate for him. He was eligible for its benefits and it provided cover that could prove valuable to him should the insured risks come to fruition.

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

108. Although I consider it more likely than not that Mr C knew he would have to pay something for the policy, it does not appear Nat West told him the exact premium at the point Mr C applied for the policy. Having said that, it seems that Mr C was told the cost before the policy started (in the mortgage offer) and he paid for the policy for a number of years, so if the costs were significantly at odds with his expectations at the point of sale, it is possible he might have raised that with Nat West at the time, or reconsidered his decision.

109. Overall, I am not persuaded Mr C would have found the cost unacceptable if he had been given the exact figure during the meeting in which he agreed to the policy.

110. In addition, I am not persuaded Nat West made clear exactly what Mr C would get back in return in the event he made a successful claim. But I think it is unlikely Mr C's likely expectations about what the policy would pay in the event of a claim were significantly different to what the policy actually did.

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

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

113. More significantly I am not persuaded Nat West told Mr C that any claim he made would be limited to a 12-month period. This may have differed from what Mr C expected. But 12 months was a longer period than Mr C would have received full sick pay for.

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

115. So, whilst Mr C did not know some things about the policy, I am satisfied the ultimate position in the event of a successful claim was not dissimilar to what he would

reasonably have thought from the information he based his decision to take out the policy on and found acceptable.

116. Mr C provided information in the PPI questionnaire about what he would have done with more information, which I have considered carefully. He says:

> *WFAC have further explained that a high proportion of reasons anyone is likely to miss work were excluded – in particular pre-existing conditions and often chronic conditions and sometimes common conditions such as bad backs and mental conditions such as stress, depression and anxiety. These statistically are among the most likely reasons for anyone being off work and I can say that these exclusions were not disclosed to me. If Nat West had said that they were excluding some of the most common reasons people miss work I can say that I would not have wanted this PPI for that reason alone. This policy was meant to protect my 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 me be clear – I would not have wanted this policy had I been told this. If the exclusion for pre-existing conditions had been explained to me, it is clear I would not have wanted this policy. On top of this I now understand that on average, firms kept 65% + of each premium payment as profit and expenses. The policy was appalling value for money. I am not in a position to waste money or make insurance businesses richer at my expense. Everybody know that companies are entitled to make a fair profit, but not an unfair one – I would not have wanted to be taken advantage of. I don't think anybody would. I don't think this PPI should have been sold to me and I would not have wanted it if it had been properly explained. WFAC say that Nat West were supposed to treat me fairly and not take advantage of me, but it cannot be right to sell a product like this without explaining the exclusions, and that they were keeping so much money for something with so little value to me. I feel badly let down by Nat West.*

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

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

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

- I am satisfied the requirement on Nat West in 2009 was to draw his attention to the exclusions and limitations, not to give him the context Mr C says Nat West should have done.

- The policy did not – as I have already explained – restrict claims based on pre-existing medical conditions or back and mental health conditions.

119. I am also mindful that: Mr C's recollections of the sale are, owing to the significant passage of time, likely to be limited; his representations about what he would have

done are made in support of a claim for compensation; and the paragraphs I have quoted resemble quite closely the consumer representations made in other cases where WFAC represents the consumer.

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

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

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

123. 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[4] at the time:

> *…we have taken as a starting point the typical approach in law (which we understand also to be the FOS's general approach) that the customer should be put in the position they would have been in if there had been no failure to comply with its obligations on the part of the firm. Typically that involves considering what the customer would have done 'but for' the firm's breach or failing. Firms have also been making such 'but for' judgements for many years, it being the basic tenet of complaint handling. Complaints about PPI are not new or unusual in this respect. We are satisfied that the 'but for' test is a reasonable one in the circumstances.*
>
> *The presumptions represent a way of judging what a customer would generally have done, in our view. Having given due consideration to responses concerning presumptions we remain of the view that the presumptions we have set out are reasonable ones fully in the tradition of, and informed by, the kinds of judgements that courts and ombudsmen have long and often been making when assessing claims and complaints and the potential need to put the claimant, as far as practicable, back in the position 'they would have been in' had the breach not occurred.*
> *We also recognise that it would not be possible to establish in every case what a customer would have done in every individual circumstance and that there has to be scope for a firm to depart from the presumptions. So, the presumptions are rebuttable – that is, it is open to the firm to evidence that the customer would have bought the policy notwithstanding the breach or failing, in which case no redress will then be required.*

[4] 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

124. 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…*

125. 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 C would not have bought the payment protection insurance he bought unless, in the particular circumstances of the complaint, there is evidence to rebut the presumption.

126. 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 C's circumstances I have considered above, I consider it reasonable to conclude the position Mr C found himself in as a result of the sale was the same position he would have been in had the 'breach' or 'significant failings' not occurred.

127. But 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 C in the position he would have been in if he had not bought the policy.

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

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

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

131. 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 C 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 C 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

132. 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 C.

Carole Clark
ombudsman