

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

My provisional decision from October 2018 explained that I was minded not to uphold Mrs E's complaint, subject to any further evidence and representations submitted by the parties.

Lloyds Bank PLC made some further submissions that I will comment on below. Mrs E's representative commented that they fundamentally disagreed with my provisional decision in a number of ways, but beyond that they said they had no further comment to make.

summary

1. This dispute is about the sale in 2010 of a payment protection insurance (PPI) policy to support a Lloyds Bank PLC (Lloyds) mortgage.
2. Mrs E complains that Lloyds did not properly explain the policy's features, exclusions and limitations. If it had, she says she would not have taken the policy out.
3. Lloyds says Mrs E was given a choice about whether or not to take out the policy, the policy was suitable for her and if it had given Mrs E more information about the policy, it would not have affected her decision to take it out.
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 Lloyds, to the extent that I do not make an award in favour of Mrs E.
6. This is a final decision. In summary, based on the evidence and arguments submitted so far, my final conclusions are as follows:
 - Mrs E made her decision to take out the policy based on advice and information Lloyds gave her about the policy.
 - Taking into account the law, applicable regulations, industry codes of practice and what I consider to have been good practice in 2010, Lloyds should fairly and reasonably have advised Mrs E with reasonable care and skill. In particular, it should have considered whether the policy was appropriate or 'suitable' for her, given her needs and circumstances. It should also fairly and reasonably have provided Mrs E with sufficient clear, fair and not misleading information about the policy it was recommending to her, to enable Mrs E to make an informed decision about whether to follow the recommendation and take out the policy.
 - Lloyds did not act fairly and reasonably in its dealings with Mrs E. It did not advise Mrs E with reasonable care and skill – it did not take sufficient steps to establish whether the policy was suitable for Mrs E (although the policy it recommended was ultimately suitable for her). And it did not provide her with all the information she needed to make an informed decision about whether to take out the policy.

- Mrs E made her decision to take out the policy based on the recommendation and incomplete information. But if things had happened as they should, on the evidence available in this case, it is more likely than not Mrs E would still have taken out the policy.
 - It would not be fair in those circumstances to make an award to compensate Mrs E for the money she spent in connection with the policy.
7. Under the rules of the Financial Ombudsman Service, I am required to ask Mrs E to accept or reject my decision before 11 January 2019.

background to the complaint

a) events leading up to the complaint

8. Mrs E was already living in her house. But in March 2010 she applied to Lloyds to re-mortgage the property from a different lender. Although Mrs E says she can't remember how the policy was sold to her, Lloyds records show that she met with a member of Lloyds staff who completed a loan assessment form, a mortgage application form, a statement of demands and needs and a Payment Protection Plus application form.
9. The loan assessment form and the mortgage application form do not mention PPI. The statement of demands and needs has a section for Payment Protection Plus. Boxes have been ticked to show that, following discussion, Mrs E has an identified need for accident, sickness and unemployment cover for her mortgage and that Mrs E has accepted the recommendation for this cover. Mrs E also signed the Payment Protection Plus application form and the direct debit mandate for the policy.
10. Mrs E's existing mortgage at that time was £26,000. She was borrowing an additional amount from Lloyds to consolidate other debt. In total she was borrowing £46,000 over a period of 15 years. The monthly repayment on the mortgage was £359.02.
11. The loans and the policy started on 19 April 2010. Mrs E paid the £23 monthly premium for the PPI by direct debit.
12. It's my understanding that the mortgage and policy are still active.

b) Mrs E's circumstances in 2010

13. According to the mortgage application form, Mrs E earned £14,500 per year in a clerical/secretarial position and had been with her employer for thirteen months. She also had income from other sources totalling £15,080.
14. Separately, Mrs E has told us that:
- She was a property inspector and had been in her job for two years.
 - She was earning £16,000.
 - She would not have received any pay from her employer if she was off work due to sickness or accident.

- She did not have any savings or other insurance policies.
 - She had back problems and was seeing a chiropractor in 2010, although she has not missed work as a result of the back problem.
 - She was financially stretched and often ran an overdraft.
15. I am satisfied it is more likely than not that Mrs E is mistaken in some of her recollections and that the point of sale documentation provides an accurate record of her income and type of employment at the time.

c) the policy – what was Lloyds selling and what did Mrs E buy?

16. Lloyds has provided a copy of the Payment Protection Plus policy document which it says sets out the full policy terms and conditions – and which I accept on the balance of probabilities – applied to policies like Mrs E's sold in March 2010.
17. The policy conditions were set out in a 23 page booklet. Among other things, these show that:
- There were eligibility criteria which Mrs E met – for example she had to be 18 or over, but less than 65 and working at the start date. The cover would end when she reached 65.
 - The policy provided disability cover. Broadly, if Mrs E was unable to carry out the duties of her work due to injury, sickness or disease, it would pay, direct to Mrs E's mortgage, her normal mortgage payment each month. The policy would also pay an additional cash payment to Mrs E of £3 per month for every £1,000 of the opening mortgage balance. 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 the normal mortgage payment each month, plus an additional cash benefit of £3 per month for every £1,000 of the opening mortgage balance. The monthly benefit would continue until Mrs E ceased to be unemployed or she had received 12 payments, whichever came first.
 - The policy would have paid out after 60 consecutive days of disability or unemployment.
 - The insurer was Lloyds TSB General Insurance Limited.
18. To put the benefits into context, if Mrs E had made a successful claim for 12 months she would have received £5,964.24 – made up of £359.02 per month paid directly to the mortgage account (totalling £4,308.24) and an additional cash benefit of £138 per month (totalling £1,656).
19. Returning to the policy terms and conditions, there were also exclusions – for example, claims resulting from pre-existing medical conditions which Mrs E knew, or should have known about, were not covered for the first 24 months of the policy being in place.

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

d) the complaint and Lloyds' response

21. Mrs E's representative We Fight Any Claim Ltd (WFAC) has made lengthy and substantial representations on her 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, Mrs E says:
- Lloyds did not give her the information it should have given her about the costs and benefits associated with the policy.
 - Lloyds did not tell her 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. Lloyds' claims ratio is below 10%. Lloyds' failure to explain this to her 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.
 - Lloyds did not tell her about the limitations affecting the policy, in particular: that the policy would only pay out if Mrs E was unable to do both her own job and other work which the insurer thought she 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 Lloyds should have done more than simply draw the limitations to her attention, it should also have explained the significance of them and the impact they would have on Mrs E'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 she trusted the adviser and was entitled to rely on what was said.
- There were substantial flaws in the sale process. Had she known the true cost of the policy, the limits on the cover and its poor value, she 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 she would not have taken out the policy unless there is evidence to outweigh the presumption. I am required to take that regulatory guidance into account when deciding what is fair and reasonable and should not depart from it, other than in exceptional circumstances when there is sufficiently good reason to take a different approach.
- Lloyds should pay compensation to put her in the position she would have been in if she had not taken out the policy.

23. Lloyds says:

- The sale took place in branch so it is likely that it would have provided Mrs E with advice about the policy based on the information she provided.
- Mrs E was eligible for the policy and the paperwork suggests that Mrs E was given a choice about whether or not to apply for it.
- The policy was suitable for her. Mrs E had a need for the insurance to protect her payments should she not have been able to work, she was not affected by the significant exclusions and limitations and the policy was affordable.
- It is more likely than not that the adviser explained the policy features and limitations to Mrs E and gave her appropriate documentation before the sale concluded.
- Mrs E's decision to take out the policy would not have changed if it had done more.
- It was not required to disclose the commission it received.

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

24. Mrs E's representative disagrees with how I have dealt with their point about utmost good faith. They have also said that the provisional decision is unlawful in a number of other areas – particularly in the way it deals with advice duties and the presumptions in DISP App 3. But beyond these statements they have not expanded further on any points or made any further submissions.

25. Briefly, and in summary, Lloyds has said:

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

- It agrees that the General Insurance Standards Council (GISC) and Association of British Insurers (ABI) guidelines referred to in the Provisional Decision are relevant considerations in this case, but they are not determinative of its liabilities. A court might take them into account when determining whether there has been a common law breach of a duty of care, but the GISC and ABI publications do not have the status of binding obligations owed to Mr B as if they were FCA rules.
- The overarching questions set out in the Provisional Decision appear to include wording and expectations derived from irrelevant considerations such as the FCA's Principles for Businesses. It would be helpful if I could clarify which of the standards I rely on for my final conclusions and the source.
- The Provisional Decision sets out what, in the Ombudsman's view, Lloyds should and should not have done. It would be helpful if I were to explain what I think the legal consequences are and whether those breaches amounted to an actionable legal breach making Lloyds legally liable.
- Its view is that there were no actionable legal breaches - it provided Mrs E with the information it was required to provide as a matter of law, it did not owe her a legal duty to point out that she ought to read the terms and conditions of the policy, and the GISC and ABI publications did not create any additional legal duty.
- As there were no actionable breaches it would be difficult for me to reach a different conclusion to the conclusion a court might reach on the basis that it is fair and reasonable to do so – the sorts of considerations that are relevant to whether or not there has been an actionable breach of a legal duty of care will normally lead to a fair and reasonable result.

my findings

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; regulator's rules, guidance and standards, and codes of practice; and where appropriate, what I consider to have been good industry practice at the time.
28. The mortgage was arranged 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 in March 2010 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 Lloyds (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:

- 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.

- 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.

- 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.

- 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'

36. 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.

37. 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.'*

38. 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

39. 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.

40. 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)’.
41. 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’

42. 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

43. 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.
44. 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...

45. 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.

The ABI Statement of Practice for Payment Protection Insurance

46. 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

47. 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.

48. 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 C&G at the time.
49. 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 Mrs E's case.
50. Whilst I note Lloyd's representations about the status of the various GISC and ABI publications, I am satisfied they are relevant considerations in their own right to be taken into account when deciding what is, in my opinion, fair and reasonable (either as relevant codes of practice, or as indicators of good practice), and not just to the extent that a court might take them into account when considering the existence or standard of a common law duty of care.

The law

51. 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.
52. I have also considered carefully the parties' representations about the law set out in a number of documents. These include, most recently, WFAC's letters to this office about complaints generally of 2 March and 5 June 2017, and the response from Lloyds to the provisional decision (which also referred to points raised in a response to a similar case from Freshfields Bruckhaus Deringer, dated 1 August 2017).

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 Mrs E's.
54. The sale took place after insurance mediation became a regulated activity in January 2005, so Lloyds was required to take into account the evidential provisions in DISP App 3 when considering Mrs E'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 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 Lloyds gave advice, whether it advised Mrs E with reasonable care and skill – in particular, whether the policy was appropriate or ‘suitable’ for Mrs E, given her needs and circumstances.
 - Whether Lloyds gave Mrs E sufficient, appropriate and timely information to enable her to make an informed choice about whether to take out the policy, including drawing to her 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 Mrs E, I must then go on to consider whether and to what extent Mrs E suffered loss or damage and what I consider would amount to fair compensation for that loss or damage.
58. Mrs E says Lloyds ought fairly and reasonably to have gone further than I have suggested. I shall address Mrs E’s representations about this later on.
59. Lloyds has suggested these overarching questions incorrectly draw upon the wording of subsequent regulatory requirements such as the FCA Principles for Businesses. I disagree.
60. I have distilled the overarching questions from the various relevant considerations, which I have set out above. And, for the reasons I have explained, the Principles for Businesses do apply to this complaint, and I have therefore taken them into account.

b) the sale - what actually happened?

61. Mrs E attended a meeting in a branch of Lloyds. She was looking to re-mortgage and to refinance existing debt. Mrs E says she can’t remember how the policy was sold to her or whether Lloyds advised her to buy it.
62. Lloyds says that as the sale took place in a branch, an adviser would have given advice and made recommendations based on information provided by Mrs E.
63. Lloyds has provided copies of a number of documents that were completed during the meeting on 31 March 2010:
- The loan assessment form, the mortgage application form and the Key Facts document, none of which make any mention of PPI. The Key Facts document, under the heading of ‘Insurance’ states that there was no obligation to take out any insurance as a condition of the mortgage.

- A statement of demands and needs which suggests there was a discussion about Mrs E’s insurance needs. This indicates that Mrs E chose not to receive recommendations for home insurance and life and critical illness insurance, but that she accepted the recommendation for PPI. In the box for listing reasons why Mrs E had accepted the recommendation it says: *‘You want to be protected for your mortgage payments in the event of accident, sickness or unemployment’*.
 - The Payment Protection Plus application form which Mrs E signed on the same day. This says the total amount of borrowing to be covered by the policy was £46,000.
 - A direct debit mandate for the PPI that has also been signed by Mrs E. It details that the monthly premium is £23.
64. Having considered the representation of both sides and keeping in mind the limitations on the evidence available about what happened during a meeting over 8 years ago, I find:
- Whilst it is possible that Lloyds may not have provided any advice in this case, it is more likely than not that it did, given Lloyds’ own representations that it recommended the policy to Mrs E.
 - It is more likely than not that there were some discussions about the policy Lloyds was recommending at the meeting between Mrs E and the adviser. Mrs E may not have known all there was to know about the policy, but it is unlikely she took out the policy without knowing anything about it at all.
 - In the normal course of events the full policy document would be sent to an applicant once the PPI agreement had been set up. I have no reason to believe that did not happen in this case, so I consider it likely that the full policy conditions were sent to Mrs E after the meeting.

c) did things happen as they should in 2010?

65. For reasons I shall explain, I consider it is more likely than not that Lloyds fell short of what was reasonably expected of it. Exactly how, and the extent to which, Lloyds fell short and its relevance to Mrs E, is in my view important to my consideration of the question which ultimately lies at the heart of this complaint: would Mrs E have acted differently if Lloyds had advised and explained things properly?
66. 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 Mrs E agreed to the policy Lloyds recommended knowing that she did not have to take it out and that it was separate to the mortgage.
67. In reaching that conclusion, I note that the documentation relating to PPI was completely separate from the mortgage paperwork. I also note that Mrs E declined recommendations for other types of insurance.

68. 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, albeit insurance the adviser recommended Mrs E take out. I am not persuaded it is more likely than not that the Lloyds' adviser incorrectly (or inadvertently) told Mrs E she 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.
69. I have concluded Lloyds recommended the policy to Mrs E, so I consider it appropriate to consider whether it advised Mrs E with reasonable care and skill, in particular whether the policy was appropriate or 'suitable' given her needs and circumstances.
70. Whilst I don't know what was discussed in the meeting, the documentary evidence suggests that Lloyds took some steps to establish whether the policy was a suitable recommendation for Mrs E. The adviser had information about some of Mrs E's financial circumstances as part of the mortgage application. But although a demands and needs statement was completed to try and establish whether Mrs E's had a need for the policy - by asking questions about her wider circumstances such as any health issues and existing means – I don't think it did enough to ensure that the PPI was suitable. For example, the section about '*existing arrangements*' seems very much geared towards existing cover in the form of other insurance policies. There is nothing to suggest Lloyds considered whether Mrs E had any savings or work benefits.
71. Overall, I am not persuaded on the balance of probabilities that Lloyds did all it should have done to determine whether the policy was suitable for Mrs E given her circumstances. So in that sense, I am not persuaded Lloyds advised with reasonable care and skill.
72. I am satisfied it is more likely than not that the policy was suitable for her given what I am satisfied were Mrs E's needs and circumstances at the time. In reaching that conclusion I have taken into consideration:
 - Mrs E met the eligibility criteria for the policy.
 - Mrs E had a need for the policy – she would not have received any sick pay if she was unable to work due to illness and she didn't have any savings she could fall back on. The policy would have helped Mrs E manage the consequences were she unable to work.
 - The monthly premium of £23 was affordable for Mrs E.
 - The exclusions and limitations did not make the policy unsuitable for Mrs E. There was nothing about Mrs E's employment or occupation which would have made it difficult for her to claim.

- Mrs E has told us that she suffered from back problems in 2010 and was seeing a chiropractor. The statement of demands and needs records her as answering ‘No’ to the questions: ‘*Are you aware of any current or existing health conditions (injury, illness, disease, etc)?*’ and ‘*Have you seen or arranged to see a qualified health professional about any health problems during the past 12 months?*’ So I am satisfied that Mrs E is either mistaken about the date of her back problems, or if they did occur in 2010 it was after the sale of the policy. The policy had no additional restrictions on the cover for mental health or back problems.
 - Whilst the policy included a requirement that Mrs E be disabled for 60 days before she could make a disability claim and would only pay benefits for a maximum of 12 months for each claim, it still provided valuable cover given: Mrs E’s circumstances, the fact the policy protected the mortgage repayments relating to her house and the potential consequences should Mrs E be unable to make the repayments on loans secured against her house.
73. I have also considered whether when providing advice Lloyds gave Mrs E sufficient information about the cover provided by the policy to enable Mrs E to understand what Lloyds was recommending to her and make an informed decision about whether to follow that advice and take out the policy.
74. I am satisfied it is more likely than not that Mrs E was given a broad description of what the policy was intended to cover (that is that the policy would protect her payments if Mrs E was unable to work through accident, sickness and disability) and of the cost. I have reached this conclusion because I think it is unlikely that Mrs E would have taken out the policy without any sense of what the policy was for and of how much the premium might be.
75. But the evidence from the time of sale does not tell us whether Lloyds gave sufficient information about the actual monthly benefit or about the exclusions and limitations before Mrs E agreed to take out the policy. It is likely she was provided with a policy booklet but it is unclear if she was told about its contents or whether she was given time to read and understand the terms and conditions.
76. Whilst I am satisfied Lloyds likely sent Mrs E the full policy conditions which gave information about the benefits, limitations and exclusions after she applied for it, I do not consider that means Lloyds gave Mrs E the information she fairly and reasonably needed to make an informed decision about whether to follow the recommendation and take out the policy. I am mindful:
- Mrs E most likely based the decision on what she was told by the adviser rather than on the written policy conditions.
 - There is nothing to suggest Mrs E was forewarned that she should delay making a final decision about the policy until she had received and considered the contents of that document.
 - It was incumbent on Lloyds to provide her with the most important information she required to make her decision before she took out the policy (see the good practice I set out earlier).

77. Overall, having considered the parties' representations about what happened, whilst I am satisfied that the policy was a suitable recommendation for Mrs E, I am not persuaded Lloyds did enough to present information about the policy it was recommending in a way that was fair and reasonable to Mrs E. I am not persuaded Lloyds gave Mrs E all of the information she needed about the policy to make an informed decision about whether to follow the recommendation and take out the policy.
78. 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.
79. It seems to me that it would be reasonable to conclude that there were significant failings in this case. Lloyds did not for example disclose to Mrs E 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)]. Lloyds may also have failed to disclose the cost information envisaged at DISP App 3.6.2E(8).
80. I have considered carefully Mrs E's arguments that Lloyds should have done more than I have found it should have done and provided additional information. I have given particular thought to Mrs E's view that the FCA's Principles for Businesses (ie. 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:
- Lloyds 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 Lloyds rather than the insurer.
 - Lloyds should have told her not just about the limitations and exclusions, but also about the significance of them.

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

81. 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.
82. 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.
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.²

86. MacGillivray on Insurance Law³ 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.

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 Mrs E says Lloyds should have done by virtue of the duty of utmost good faith. In any event, I do not think it would be fair or reasonable in the circumstances of this case to impose such requirements on Lloyds.

88. Lloyds was not the insurer in this transaction. Regardless, the ABI Code also referred to an overriding duty on the intermediary to act with utmost good faith and integrity.

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

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.

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

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 Mrs E says Lloyds 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 Mrs E 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.
94. 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 Lloyds ought fairly and reasonably to have provided the additional information Mrs E says it should have done.
95. But for the reasons and in the ways I have set out, I find the information Lloyds gave Mrs E was insufficient. Lloyds failed to explain in a clear way all the features of the policy it was recommending, so the information Mrs E based her decision on was incomplete. I am not persuaded that was fair and reasonable in all the circumstances.

***e) what effect did Lloyds' shortcomings have on Mrs E?
to what extent did Mrs E suffer loss or damage as a result?***

96. I have found Lloyds did not do all it should fairly and reasonably have done when it sold this policy to Mrs E, so I have considered whether it would be fair and reasonable to conclude Mrs E suffered loss and damage as a result.
97. In those circumstances, it seems to me that whether or not Mrs E has suffered loss or damage in this case primarily depends on whether, if Lloyds had explained things properly, Mrs E would have acted differently, or whether she would have taken out the policy in any event.
98. Mrs E says she would not have taken out the policy and I should, in any event, presume that she would not have taken it out given the substantial failings in the sales process I have identified (unless Lloyds can produce evidence to show they would have taken out the policy, which Mrs E says it cannot because its failings were so fundamental).
99. I have considered the representations of both sides and the evidence relating to this carefully.
100. Deciding whether to follow advice to take out insurance requires the consumer to weigh up a number of factors before deciding whether to proceed.
101. Effectively the consumer has to weigh up the advice to take out the policy, the cost of doing so given the benefits offered in return and the potential consequences they will suffer if they 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 when recommending the policy, so the consumer could make that assessment.

102. The evidence in this case suggests that Mrs E clearly had some interest in taking out payment protection insurance. In saying that, I do not mean she actively sought insurance or that it was her intention to take out insurance before she applied for the mortgage – I have seen nothing to suggest she did.
103. Rather, I mean when Lloyds advised her that there was a suitable product she could buy that would protect her mortgage payments in the event she was unable to work because of accident, sickness or unemployment, that resonated with her in some way and she concluded that she wanted that product to provide cover for her.
104. The issue here is that the decision she made about whether to accept Lloyds' recommendation was based on incomplete information, meaning what she thought she was getting is not exactly what she got. And she would have had different things to weigh up when deciding to take out the policy if Lloyds had told her everything it should have done about the policy it was recommending.
105. I consider that in deciding what is fair and reasonable in this case and whether Mrs E suffered loss or damage as a result, the evidence about the extent to which the product differed from what Mrs E might reasonably have expected from what she 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 Mrs E's circumstances at the time of the sale that the policy was not fundamentally wrong or unsuitable for her.
107. Whilst Mrs E was interested in the policy, was eligible and had good reason for wanting the cover provided by a suitable policy, the policy did not work entirely as she might have thought.
108. Although I consider it more likely than not that Mrs E knew she would have to pay something for the policy, and the cost of £23 is stated on the direct debit mandate, it is unclear if it was sufficiently drawn to her attention at the point Mrs E applied for the policy. Having said that, it seems likely Mrs E would have been told the cost before the policy started and she has paid for the policy for a number of years, so if the costs were significantly at odds with her expectations at the point of sale, it is possible she might have raised that with Lloyds at the time, or reconsidered her decision.
109. Overall, I am not persuaded Mrs E would have found the cost unacceptable if the exact figure had been drawn to her attention during the meeting in which she agreed to the policy.
110. In addition, I am not persuaded Lloyds made clear exactly what Mrs E would get back in return in the event she made a successful claim. But I think it is unlikely Mrs E's likely expectations about what the policy would pay in the event of a claim (an amount sufficient to meet her monthly mortgage payment) were significantly different to what the policy actually did – if anything, it is more likely than not that the policy actually paid more in the event of a claim than she would have expected as there was an additional cash payment.
111. I am not persuaded Lloyds explained the limitations and exclusions to Mrs E either. But I do not think it is more likely than not that the limitations and exclusions there were would have dissuaded Mrs E from taking out the policy.

112. Mrs E did not for example have any pre-existing medical conditions (as declared in the demands and needs statement) and the policy did not exclude back or mental health conditions, or place any additional restrictions or more onerous evidential requirements, in the event of a claim on those grounds, than would have applied to any other disability claim. And I think it is unlikely Mrs E 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 Lloyds told Mrs E that any claim she made would be limited to a 12-month period. This may have differed from what Mrs E expected, but she didn't have any savings or sick pay to fall back on.
114. In those circumstances, I consider it likely Mrs E would still have thought a policy that paid up to 12 monthly mortgage payments would have been of benefit to her and would help her manage the consequences should she be unable to work in the circumstances covered by the policy. The policy would help reduce her outgoings at a difficult and uncertain time and ensure that her home was not placed at risk.
115. So, whilst Mrs E 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 she would reasonably have thought from the advice and information she based her decision to take out the policy on and found acceptable.
116. Mrs E provided information in the PPI questionnaire about what she would have done with more information, which I have considered carefully. She 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 amongst the most likely reasons for anyone being off work and I can say that these exclusions were not disclosed to me. If Lloyds TSB had said that they were excluding 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 would not have done so in the majority of cases. Let me be clear – I would not have wanted this policy had I been told this. 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 I now also understand that 'pre-existing' conditions were not covered. This sounds like a piece of jargon to me, but WFAC have explained what it meant. I have had the following health problems: back problems, date circa 2010, treatment: chiropractor. So it turns out that bad backs might have been excluded TWICE because they were 'pre-existing' and possibly excluded anyway. On top of this I now understand that on average, firms kept 65% + of each premium as profit and expenses. The policy was appalling value for money. As well as everything else, I was financially stretched. I have often had to run an overdraft. WFAC say for me, even more than anybody else, it was wrong for me to spend money on this PPI which was both really expensive, and unlikely to pay out. I don't think this PPI should have been sold to me and I would not have wanted it if it had been properly explained. WFAC say that Lloyds

TSB were supposed to treat me fairly and not take advantage of me, but it cannot be right to sell a product like this without explaining the exclusions, and that they were keeping so much money for something with so little value to me. I feel badly let down by Lloyds TSB.

117. Mrs E is effectively saying that as a result of what her representative WFAC has told her, both about what it considers should have happened and what she should have decided at the time, she would not have taken out the policy.
118. In light of the findings I have already made, I do not think Mrs E's representations demonstrate what she claims because much of the information she says would have affected her decision would not have been known to her at the time of the sale if everything had happened as it should. And some of the things she has mentioned would not have been relevant to the decision she was making. For example:
- There was no legal, regulatory, code, or good practice requirement on Lloyds to disclose the commission it received.
 - I am satisfied the requirement on Lloyds in 2010 was to consider the features of the policy and weigh up the significance of the exclusions and limitations to ensure the policy it was recommending was suitable for Mrs E's needs and resources and it also had to explain the features of the cover as I have discussed.
 - Mrs E's back problems are unlikely to have been deemed to be pre-existing – because the point of sale evidence suggests she was not suffering from them prior to taking out the policy.
 - The policy did not – as I have already explained – restrict claims based on back or mental health conditions, unless they were pre-existing conditions.
119. I am also mindful that: Mrs E's recollections of the sale are, owing to the significant passage of time, likely to be limited; her representations about what she 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 follow the recommendation to take out the policy, I consider it fair and reasonable to think Mrs E would have weighed up various other considerations, in particular her lack of savings and sick pay, her financial circumstances and how she would be affected if she was not working. It is likely she would also have thought about whether the cost to benefit proposition still worked for her.
121. Having considered all of the evidence and arguments in this case, I consider it more likely than not that Mrs E would still have taken out the policy. The policy was suitable for her, was sufficiently close to what she thought she was getting and provided benefits that would help her manage the consequences were she made redundant, or unable to work through accident or disability. In the circumstances I consider it more likely than not that Mrs E would have taken out the policy in any event notwithstanding the limitations on cover.

122. I have considered Mrs E's representations about causation and DISP App 3, including the general opinion of Stephen Knafler QC provided by WFAC on behalf of Mrs E. 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 statement⁴ 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.

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 likely 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 illicit this information. The PPIQ, if properly completed, will however provide this information.

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

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 Mrs E would not have bought the payment protection insurance she 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 Mrs E's circumstances I have considered above, I consider it reasonable to conclude the position Mrs E found herself in as a result of the sale was the same position she would have been in had the 'breach' or 'significant failings' not occurred. In other words, I am satisfied that Mrs E would have bought the policy in the absence of the breach or failings.
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 Mrs E in the position she would have been in if she had not bought the policy.
128. That is because, whilst I accept it is possible that she would not have taken out the policy, I am satisfied that of the two possibilities, it is more likely than not that she would still have taken out the policy if her needs had been assessed correctly and she had been given clear, fair and not misleading information about the policy she was buying.
129. I am satisfied it would not be fair and reasonable in those circumstances to conclude Lloyds should pay Mrs E redress, as that would put her in a better position than she 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 Mrs E would have taken out the policy if things had happened as they should. I am not persuaded she 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 Mrs E 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 Mrs E 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 Mrs E.

Carole Clark
ombudsman