

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

I issued a Provisional Decision on 4 January 2018 (“the Provisional Decision”) explaining that I was not minded to uphold the complaint and setting out my reasons for reaching those provisional conclusions. I explained that I would consider the parties’ further representations (together with the evidence and arguments submitted before the Provisional Decision) before reaching my final decision.

Both parties made further submissions, all of which I have considered carefully. This is my final decision on Mrs R’s complaint.

summary

1. This dispute is about the sale in 2007 of a payment protection insurance (PPI) policy to support a National Westminster Bank Plc (NatWest) mortgage.
2. Mrs R complains that NatWest included the policy as part of a package with her mortgage without making it clear she had a choice about buying it. She also says NatWest 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. NatWest says Mrs R was given a choice about whether or not to take out the policy and that it gave her the information about the policy she needed.
4. I have carefully considered all of the evidence and arguments submitted by both sides, in order to decide what is, in my opinion, fair and reasonable in all the circumstances of this complaint.
5. This is not a straightforward complaint, with both parties making credible arguments in support of their positions. But for the reasons I explain in detail below, I have decided to determine the complaint in favour of NatWest, to the extent that I have not made an award in favour of Mrs R.
6. This is my final decision. In summary, having considered all of the evidence and arguments submitted by the parties during the course of the complaint, my final conclusions are as follows:
 - Mrs R made her decision to take out the policy based on information NatWest gave her about the policy.
 - Taking into account the law, regulations, industry codes of practice and what I consider to have been good practice in 2007, NatWest should fairly and reasonably have provided Mrs R with sufficient clear, fair and not misleading information about the policy it was offering to enable her to make an informed decision about whether to take it out.
 - NatWest did not act fairly and reasonably in its dealings with Mrs R. It did not provide her with all the information she needed to make an informed decision about whether to take out the policy.

- Mrs R made her 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 Mrs R would still have taken out the policy.
 - It would not be fair in those circumstances to make an award to compensate Mrs R 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 R either to accept or reject my decision before 30 November 2018.

background to the complaint

a) events leading up to the complaint

8. In April 2007, Mrs R applied for a NatWest mortgage. She says she made the application in a branch meeting. NatWest initially said it could not confirm if that was the case. Subsequently it accepted there was a face-to-face meeting. Either way, we have copies of a completed 'Mortgage Application' form and a form headed 'Giving your agreement'.
9. The Mortgage Application included a section headed 'Your protection'. Mrs R's name was printed in the relevant box to indicate that she wished to protect her mortgage payments against accident, sickness and unemployment. Mrs R signed the 'Giving your agreement' form which included a box marked with a cross to say she wanted to apply for 'Mortgage Repayment Protection' through NatWest. Mrs R also signed a separate direct debit mandate for the policy premiums.
10. Mrs R's mortgage had a term of 14 years and 3 months and she borrowed £27,500.
11. The mortgage started on 22 May 2007 and the policy started on 23 May 2007. Mrs R paid the £12.80 monthly premium by direct debit.
12. The policy was cancelled on 17 December 2012 but the mortgage was left running. In total, Mrs R made 66 PPI payments totalling £844.80.

b) Mrs R's circumstances in 2007

13. Mrs R was re-mortgaging from a different lender. She was 40 years old at the time.
14. According to the Mortgage Application, Mrs R earned £13,500 per year as an office clerk. She had worked for her employer since 1997.
15. Separately, Mrs R has told us that:
- She would have received between three and six months' pay if she was off work due to sickness or accident and that at least three months of that would have been at full pay.
 - She would have received death in service benefit.

- She did not have any savings or other insurance policies.
 - She was diagnosed with scoliosis in around 1981 and underwent a hysterectomy in around 1996.
16. I note for the sake of completeness that Mrs R indicated on the payment protection insurance questionnaire (PPIQ) she completed in bringing her complaint that the policy was sold in 2002, at which time she earned £13,000 per year. In the same questionnaire, she said she was entitled to at least six months' full pay from her employer if she was made redundant. Later on in the questionnaire she also said she was entitled to full pay worth at least three months' pay but less than six months' pay.
17. The parties do not dispute that Mrs R is mistaken in her recollection of events in that the Mortgage Application form provides an accurate record of her income and the date of the sale.

c) the policy – what was NatWest selling and what did Mrs R buy?

18. NatWest has provided a copy of the 'Mortgage Repayments Protector Insurance – further information' document which sets out the full policy terms and conditions which applied to policies like the one it sold Mrs R.
19. The policy conditions were set out in a 24-page booklet. Among other things, these show that:
- There were eligibility criteria which Mrs R met – for example she had to be aged between 18 and 64 and working at least 16 hours a week.
 - The policy provided accident and sickness cover. Broadly, if Mrs R was unable to carry out the duties of her 'Normal Occupation' (or similar occupation that she was able to perform or may reasonably become qualified to perform based on her education, training and ability) due to accident or sickness, it would pay the monthly benefit amount of £250 direct to Mrs R each month. The monthly benefit would continue until she was no longer off sick or 12 payments had been made, whichever came first.
 - The policy would provide unemployment benefits. The policy would pay the monthly benefit to Mrs R. The monthly benefit would continue until Mrs R ceased to be unemployed or she had received 12 payments, whichever came first.
 - The policy would have paid out a cash lump sum of £20,000 for accidental death. That is, if Mrs R died solely as a result of bodily injury caused by accidental, external, visible and violent means.
 - The policy would have paid out after 14 consecutive days of time off for accident and sickness or unemployment.
 - The insurer was UK Insurance Limited.

20. To put the benefits into context, if Mrs R had made a successful claim for 12 months she would have received £3,000 – made up of £250 per month.
21. Returning to the policy terms and conditions, there were also exclusions – for example, for claims resulting from normal pregnancy or childbirth.
22. Part of Mrs R's complaint (as I explain below) 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 R to provide satisfactory proof of accident and sickness to make a claim, including providing evidence 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 accident and sickness.

d) the complaint and NatWest's response

23. Mrs R's representative We Fight Any Claim Ltd (WFAC) made lengthy and substantial representations on her behalf before I issued the Provisional Decision.
24. I will not restate them all here and I will refer to some of the specific representations she has made at relevant times in this decision. But I have read and considered them all carefully. In essence, Mrs R said:
 - NatWest included the policy as a package with her mortgage.
 - NatWest did not give her the information it should have given her about the costs and benefits associated with the policy.
 - NatWest 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. NatWest's failure to explain this to her was a breach of the common law duty of utmost good faith and of the FCA's Principles for Businesses, which require firms to treat customers fairly.
 - NatWest did not tell her about the limitations affecting the policy, in particular: that the policy would only pay out if Mrs R was unable to do both her own job and other work which the insurer thought she was able to perform or may reasonably become qualified to perform based on her education, training and ability; 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 NatWest 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 R'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 requirements at DISP App 3.6.2 E 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 those rules into account when deciding what is fair and reasonable and should not depart from them, other than in exceptional circumstances when there is sufficiently good reason to take a different approach.
- NatWest should pay compensation to put her in the position she would have been in if she had not taken out the policy.

25. Prior to the Provisional Decision NatWest said:

- Mrs R was eligible for the policy and the paperwork suggests that she was given a choice about whether or not to apply for it.
- Its standard sales process was to sell PPI on a 'non-advised' basis, meaning it did not offer a tailored recommendation based on Mrs R's specific circumstances.
- It is more likely than not that the representative explained the policy features and limitations to Mrs R and gave her appropriate documentation before the sale concluded.
- The policy did not exclude claims for pre-existing medical conditions, bad backs or stress, depression or anxiety as alleged.
- It was not required to disclose the commission it received.
- There is no evidence of any failings on its part in the sale of the policy.

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

26. Both parties made further representations in response to the Provisional Decision, all of which I have read and considered carefully. The parties, in large part, restated the substance of their prior representations.
27. I will refer to some of the specific representations made at relevant times in this decision but briefly, and in summary, Mrs R says:
- The Provisional Decision fails to properly deal with matters raised in earlier correspondence.
 - The Provisional Decision does not properly take into account the FCA's rules at DISP App 3.6.2, misconstrues the tests the provisions set out and fails to properly assess and weigh up the evidence in the complaint.
 - NatWest advised her to buy the policy despite my finding that it did not.
 - There were significant limitations on the cover the policy provided. For example, to claim for accident and sickness Mrs R would need to show she could not carry out her own occupation or another similar occupation. The policy only paid benefits for up to 12 months. She also says the policy excludes cover for voluntary unemployment or unemployment resulting from resignation. She says this only leaves cover for redundancy, but that this would not result in a successful claim either because those made redundant almost always sign a voluntary 'compromise' agreement with their employer.
 - The Provisional Decision does not set out the relevant ICOB requirements or how they were met.
 - The policy was poor value, which is an important consideration when considering fairness.
28. Briefly, and in summary, NatWest says:
- The policy was sold in a face-to-face meeting. Its adviser would have provided Mrs R with a copy of the 'Insuring you and your home' brochure – which included the Key Facts of the policy – while discussing the policy with her.
 - The Key Facts of the policy would have been discussed as per the ICOB sales process. The Key Facts say the consumer should read the policy terms and conditions carefully to ensure the cover meets their needs.
 - Mrs R would have been provided with sufficient information at the time of the sale in order to make an informed choice about whether or not to buy the policy.

my findings

29. 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

30. When considering what is fair and reasonable, I am required to take into account relevant law and regulations; relevant regulator's rules, guidance and standards, relevant codes of practice; and where appropriate, what I consider to have been good industry practice at the time.
31. This sale took place in 2007 after mortgage lending became regulated in October 2004. So the unfair relationship provisions set out at s140A of the Consumer Credit Act, the Supreme Court judgment in *Plevin*¹ about s140A of that Act and the rules and guidance made by the FCA recently about the handling of complaints about the non-disclosure of commission in the light of the *Plevin* judgment are not applicable.
32. The sale took place after the sale of general insurance products like this became regulated by the Financial Services Authority in January 2005. So the FSA's and FCA's overarching Principles for Businesses and insurance conduct rules (ICOB) are applicable to this complaint. And for clarity I have set out in detail below how I have taken them into account when considering this complaint.
33. It is also relevant to note that there have 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 at law).
34. 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 ICOB rules and the other relevant considerations set out below.

Principles for Businesses – 'the Principles'

35. The Principles apply to all authorised firms including NatWest (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."

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

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 (ICOB)

36. 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. 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.

Of particular note are the following:

ICOB 4.3.1 R, which includes that:

"(1) An insurance intermediary must take reasonable steps to ensure that, if in the course of insurance mediation activities it makes any personal recommendation to a customer to buy or sell a non-investment insurance contract, the personal recommendation is suitable for the customer's demands and needs at the time the personal recommendation is made."

ICOB 5.3 'Provision of information to retail customers' says, at 5.3.1 R, an insurance intermediary must provide the following to a retail customer in good time before the conclusion of a relevant contract:

- a policy summary
- a statement of price; and
- draw the attention of the retail customer orally to the importance of reading the policy summary, and in particular the section of the policy summary on significant and unusual exclusions or limitations.

ICOB 5.3.24 R includes that:

"For the duration of a non-investment contract, an insurance intermediary must notify a retail customer of:

- (1) changes to the premium, unless the change conforms to a previously disclosed formula;*
- (2) changes to any term or condition of the contract, together with an explanation of any implications of the change where necessary..."*

ICOB 5.5.14 R says:

"A statement of price must include the following information:

- (1) the total amount of the premium for the non-investment insurance contract or, if the premium cannot be indicated, the basis for the calculation of the premium enabling the retail customer to verify it;*
- (2) for non-investment insurance contracts of more than one year, details of the period for which the premium is valid, whether it will be reviewed at a certain time or at set periods and, if so, when it will be reviewed;*
- (3) fees, administrative charges and taxes payable by the retail customer via the insurance intermediary in addition to the premium. Fees and administrative charges include any interest payable on the premium, including where the premium is paid by way of a credit agreement taken out either for payment of the premium only or for the purpose of purchasing goods or services as well;*
- (4) a statement identifying separately the possibility of any taxes not payable via the insurance intermediary;*
- (5) where the non-investment insurance contract is purchased in connection with other goods or services:*
 - (a) the premium for the non-investment insurance contract, separately from all other prices in relation to the other goods or services, if an additional price is charged; and*
 - (b) whether purchase of the non-investment insurance contract is a requirement of purchasing the other goods or services or not; and*
- (6) the total price to be paid by the retail customer for the non-investment insurance contract."*

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

37. In the period immediately before statutory regulation in 2005, there was a period of industry '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.

38. 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.'*

The Mortgage Code

39. As I have noted, 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. Whilst predominantly about mortgage related matters, it also included some insurance-related commitments. As with the sale of general insurance, there is much in common between the pre and post-regulatory position.
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 ABI Code including:

“Explain all the essential provisions”

It is necessary for the intermediary (insurer, if dealing direct) to provide an overview of the policy. The detail will vary depending on the particular class of insurance.

However, the proposer should have a reasonable understanding of what he is buying, whether this is explained orally or whether he is given a summary and his attention drawn to the main points. In this respect, it is important to recognise the responsibility under the ABI Statement of General Insurance Practice that insurers will work towards clearer policy wordings.

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

“Draw attention to any restrictions and exclusions”

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

However, some will be more relevant and, indeed, significant to certain but not other policyholders. An example would be where benefit to self-employed people is either

excluded or severely restricted for redundancy cover under a creditor insurance policy. Clearly, self-employed people should be made aware of this so they can decide whether the other benefits under the policy and the premium to be paid justifies taking out such a policy.

46. 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

47. 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

48. 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.

The law

49. I have also taken account of the law, including: the law relating to negligence, misrepresentation and contract (including the express and implied duty on professional advisers to give advice with reasonable skill, care and diligence); the law relating to the duty of utmost good faith; and the law relating to causation and remoteness.
50. I have also considered carefully WFAC's representations about the law set out in a number of documents including most recently its letters of 16 June 2017 and 12 February 2018 in relation to Mrs R's complaint and its letters to this office about complaints generally of 2 March and 5 June 2017.

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

51. I am also mindful of the evidential provisions and rules 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 R's.

52. The sale took place after insurance mediation became a regulated activity in January 2005, so NatWest was required to take into account the evidential provisions in DISP App 3 when considering Mrs R's complaint.
53. I note DISP App 3 includes provisions 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.
54. DISP App 3 also contains provisions for firms about determining the way the complainant would have acted if a breach or failing by the firm had not occurred. In relation to that it says:

DISP App 3.1.3 G

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

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

DISP 3.1.4 G

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

DISP App 3.6.1 E

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

DISP App 3.6.2 E

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

- ...(4) *did not disclose to the complainant, in good time before the sale was concluded, and in a way that was fair, clear and not misleading, the significant exclusions and limitations, i.e. those that would tend to affect the decisions of customers generally to buy the policy;*
- ...(8) *did not disclose to the complainant, in good time before the sale was concluded and in a way that was fair, clear and not misleading, the total (not just monthly) cost of the policy separately from any other prices (or the basis for calculating it so that the complainant could verify it);*
- ...(10) *provided misleading or inaccurate information about the policy to the complainant;*

DISP App 3.6.3 E

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

Overall

55. And so 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 NatWest gave advice, whether it advised Mrs R with reasonable care and skill – in particular, whether the policy was appropriate or ‘suitable’ for Mrs R, given her needs and circumstances.
 - Whether NatWest gave Mrs R sufficient, appropriate and timely information to enable her to make an informed choice about whether to take out the policy, including drawing to their attention and highlighting – in a clear, fair and not misleading way – the main provisions of the policy and significant limitations and exclusions.
 - If, having considered these questions, I determine the complaint in favour of Mrs R, I must then go on to consider whether and to what extent Mrs R suffered loss or damage and what I consider would amount to fair compensation for that loss or damage.
56. Mrs R says NatWest ought fairly and reasonably to have gone further than I have suggested. I shall address Mrs R’s representations about this later on.

b) the sale - what actually happened?

57. Mrs R was looking to re-mortgage with NatWest.

58. Mrs R says the policy was sold in a branch meeting. She says in her PPI questionnaire that NatWest did not advise her to take out the policy and that it did not discuss the policy terms and conditions with her. More recently, Mrs R says NatWest did advise her to take out the policy.
59. NatWest now agrees the policy was sold in a meeting as Mrs R says. It says however it would not have advised her to buy the policy.
60. NatWest has provided copies of documents that were completed during the sale:
- The Mortgage Application form included a section headed 'Your Protection'. This indicates that Mrs R wanted NatWest to arrange her home insurance and also payment protection cover. The sections to be filled in to show she either did not want payment protection cover or that she already had cover were left blank.
 - The 'Giving your agreement' form which Mrs R signed indicates Mrs R wanted to apply for PPI (and home insurance) through NatWest. I note the form says Mrs R did not want to apply for life insurance through NatWest.
 - The 'Mortgage Repayments Protection Insurance' direct debit instruction which Mrs R signed on the same day as the 'Giving your agreement' form included the monthly benefit amount – £250.
61. Having considered the representations of both sides and keeping in mind the limitations on the evidence available about what happened more than ten years ago, I find:
- Whilst it is possible that NatWest sold the policy in some other way in this case, it is more likely than not that it did so in a branch meeting based on the documentation and from what the parties have said.
 - It is more likely than not that there were some discussions about the policy NatWest was providing information about at the meeting between Mrs R and the representative. Mrs R 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.
 - It is more likely than not that the full policy conditions were sent to Mrs R after the meeting.

c) did things happen as they should in 2007?

62. I have found that the information NatWest gave Mrs R about the policy was set out in the Mortgage Application form, the 'Giving your agreement' form and direct debt instruction, and the policy summary contained in the booklet 'Insuring you and your home'.
63. Whilst I am satisfied NatWest also sent the full policy conditions to Mrs R after the event, which it was required to do, I do not consider that means it gave her the

information she fairly and reasonably needed to make an informed decision about whether to take out the policy. I am mindful:

- Mrs R did not base her decision to take out the policy on the full terms and conditions.
- Mrs R was not told in the Mortgage Application form, the ‘Giving your agreement’ form or the ‘Insuring you and your home’ booklet that she would receive the terms and conditions document and should not make a final decision about taking out the policy until she had considered it.
- It was for NatWest to provide her with the most important information she required to make her decision before she took out the policy (see the ICOB requirements) and full conditions later.

64. Having considered all of the information, including Mrs R’s further representations made in response to the Provisional Decision, I am not persuaded the information NatWest gave Mrs R could reasonably be considered to amount to advice. I have not seen anything which persuades me that NatWest made a personal recommendation that she take out the policy, such as a statement of demands and needs specific to her. Rather it alerted Mrs R to the fact that she could take out the policy and gave her information about it, while providing a generic statement of demands and needs – which expressly stated that no personal recommendation had been made – as part of the ‘Insuring you and your home’ booklet.
65. I note when reaching the conclusion NatWest did not give advice that the ‘Giving your agreement’ form says NatWest has explained to Mrs R *‘how important it is to have the right protection in place to ensure my family and income are covered should the unexpected happen and I have considered how my family or I would repay my mortgage should my income stop’*. Mrs R says that amounts to advice. Nevertheless NatWest did not recommend the policy in the literature I am satisfied Mrs R was given, even taking into account what it said in the ‘Giving your agreement form’. And I am not persuaded to reach a different view by Mrs R’s representations in response to the Provisional Decision about the sale.
66. The question I need to consider is in essence (as I set out at paragraph 55 above) whether NatWest provided Mrs R with sufficient information in an appropriate and timely way to enable her to make a properly informed decision about whether to take out the policy.
67. For the reasons I shall explain, I do not think it did. Exactly how, and the extent to which, NatWest fell short and its relevance to Mrs R, is in my view important to my consideration of the question which ultimately lies at the heart of this complaint: would Mrs R have acted differently if NatWest 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 Mrs R agreed to the policy knowing that she did not have to take it out and that it was separate to the mortgage.
69. In reaching that conclusion, I note the Mortgage Application form included three options regarding PPI:

I wish to apply for Accident, Sickness and Unemployment

I have had the opportunity to review the information on the Mortgage repayment protector product. I confirm that I do not require this type of cover

I already have cover for my payments in the event of unemployment, accident or sickness

Whilst I realise the response and details entered were, like the other answers on the form, entered electronically (presumably by the representative) I am also mindful that: there were three options given, there were separate 'Giving your agreement' and direct debit forms which Mrs R signed, and Mrs R declined to apply for life insurance through NatWest and it would appear those arrangements were also discussed.

70. On the balance of probabilities, I consider it more likely than not that the representative presented the policy as an optional extra to the mortgage. I am not persuaded it is more likely than not that the representative incorrectly (or inadvertently) told Mrs R 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.
71. The information would also have given Mrs R a broad sense of what the policy covered – but by no means all of the information she needed to make a properly informed choice. For example, I am satisfied she ought reasonably to have understood:
- There were eligibility criteria for those who could apply for the policy, which she met.
 - The policy included accident and sickness and unemployment cover as well as accidental death cover of £20,000.
 - The policy premium was £5.12 (or £3 for accident and sickness only cover) for each £100 of cover and that she would have to pay that each month. But this did not mean she would necessarily have appreciated what that might be for her each month, based on a monthly benefit of £250.
 - There were some circumstances that the policy did not cover. Some of the circumstances were listed.
72. The information also referred Mrs R to the policy wording for the full terms and conditions.
73. Whilst Mrs R was, in effect, encouraged to look at the information about the policy, NatWest did not alert her to the fact that other important information about the policy could be found there or encourage her to consider that information.
74. By taking this approach, NatWest ran the risk that Mrs R might not identify or give proper consideration to the other important information about the cover, benefits, exclusions and limitations, which it was required to draw to her attention, to enable her to make an informed choice. And I consider it should have done more to alert her to the importance of reading the information about the policy.

75. I am also mindful that this policy was sold during face-to-face discussions in a branch, which is the type of setting where many consumers might reasonably rely more on what they were told during those conversations than on any documentation they might be given.
76. The information about eligibility in the 'Insuring you and your home' booklet formed part of a larger section about the PPI. When checking eligibility, I think it is more likely than not in this instance that Mrs R would also have come across the additional information about the cost, benefits and exclusions found there, notwithstanding that NatWest did not also prompt her to look for that information or do all it should have done to encourage her to look at the policy terms and conditions. The information appeared under headings which themselves might have encouraged Mrs R to keep reading like 'What Are The Significant Exclusions and Limitations'.
77. In those circumstances, I am satisfied Mrs R ought reasonably to have known, in addition to the brief cost information, much of what she needed to know about the essential features of the cover provided by the policy, the benefits payable under the policy and some of the restrictions.
78. I think it is likely that NatWest included the information about the cover provided and things like the main exclusions in the policy summary, because that was the kind of information it was required to draw to the customer's attention.
79. Overall, whilst I am satisfied NatWest provided Mrs R with much of the information she needed to make an informed choice, I am not persuaded it gave her all of the information.
80. I have considered how my findings interact with the FCA's list of significant failings in its rules for firms handling PPI complaints set out at DISP App 3.
81. I consider it reasonable to conclude that there were significant failings in this case. Natwest did not for example disclose to Mrs R before the sale was concluded and in a way that was clear, fair and not misleading some of the significant limitations that would tend to affect the decision of customers generally to take out the policy [DISP App 3.6.2 E (4)].
82. It is also arguable that NatWest failed to disclose the costs information envisaged at DISP App 3.6.2 E (8). NatWest did disclose how the premium was calculated in the policy summary – a very important piece of information. But it could have made clearer how much she actually needed to pay based on her monthly benefit.
83. I have considered carefully Mrs R's arguments that NatWest should have done more than I have found it should have done and provided additional information. I have given particular thought to Mrs R'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:
 - NatWest should have explained the low claims ratio (and what she considers to be the inherent poor value) and the fact much of the premium went to NatWest rather than the insurer.

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

But having done so, I am not persuaded by Mrs R's views in that regard.

84. 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 R says should have been disclosed in addition to the information I have set out above.
85. 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 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.
86. 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.
87. 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.
88. 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
89. 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.
90. 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 R says NatWest 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 NatWest. I note that in response to the Provisional Decision, Mrs R made some additional representations about the duty of utmost good faith. I have

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

considered those – along with the other representations in this respect, but they have not changed my view about Mrs R's complaint.

91. NatWest 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.
92. 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.
93. 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.
94. With regard to the limitations of the policy, I note Mrs R's representations that the unemployment terms dramatically reduced the scope of cover, in that voluntary redundancy is not covered, and that 'almost without exception' anyone being made redundant is obliged to sign a compromise agreement, rendering the redundancy – in practical terms – voluntary. I consider this a generalisation. Whether or not a redundancy is voluntary (and indeed whether or not a compromise agreement is entered into by the parties) will depend on the individual circumstances, and our expectation would be that an insurer would take reasonable steps to establish the consumer's circumstances before paying or declining a claim.
95. I have also noted 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.
96. 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 R says NatWest should have done.
97. 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 R suggests it should.
98. This is equally true of ICOB – 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.

99. 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.
100. 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 NatWest ought fairly and reasonably to have provided the additional information Mrs R says it should have done.
101. But for the reasons and in the ways I have set out, I find the information NatWest gave Mrs R was insufficient. NatWest failed to explain in a clear way all the features of the policy, so the information Mrs R based her decision on was incomplete. I am not persuaded that was fair and reasonable in all the circumstances.

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

102. I have found NatWest did not do all it should fairly and reasonably have done when it sold this policy to Mrs R, so I have gone on to consider whether it would be fair and reasonable to conclude Mrs R suffered loss and damage as a result.
103. It seems to me that whether or not Mrs R has suffered loss or damage in this case primarily depends on whether, if NatWest had explained things properly, Mrs R would have acted differently, or whether she would have taken out the policy in any event.
104. Mrs R 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 NatWest can produce evidence to show she would have taken out the policy, which Mrs R says it cannot because its failings were so fundamental).
105. I have considered the representations of both sides and the evidence relating to this carefully.
106. Taking out insurance like this, based only on information, 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.
107. 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 do not have insurance should the risks come to fruition. That is why it was for the seller to provide the information about the policy's features, so the consumer could make that assessment.
108. The evidence in this case suggests that Mrs R 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.

109. Rather, I mean when NatWest told her – in applying for the mortgage – that there was a product she could buy that would protect her mortgage payments, that resonated with her in some way and she concluded that she wanted that product.
110. The issue here is that the decision she made 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 NatWest had provided the information in an appropriate way.
111. I consider that, in deciding what is fair and reasonable in this case and whether Mrs R suffered loss or damage as a result, the evidence about the extent to which the product differed from what Mrs R might reasonably have expected from what she was told, is relevant to the consideration of what would have happened.
112. In this case, as I explained earlier, I am satisfied from the evidence about Mrs R's circumstances at the time of the sale that the policy was not fundamentally wrong or inappropriate for her. She was eligible for its benefits and it provided cover that could prove useful to her should the insured risks come to fruition – especially as, for example, the policy did not exclude claims for pre-existing medical conditions.
113. Mrs R's own evidence or 'testimony' is that, if she could not work through accident or sickness, she would have been entitled to full pay from her employer for up to three months and would have received enhanced redundancy pay from her employer worth at least six months' pay. Mrs R said she had death in service benefits but, unlike the PPI policy, that would not have provided a regular benefit payment if she was unable to work due to accident, sickness or unemployment. She has also said she would have had no other means of making her mortgage payments if she was not working.
114. I think it is reasonable to conclude that from Mrs R's perspective she saw some benefit in having insurance in her circumstances. If the risk the policy was concerned about came to fruition, the policy would help her manage the consequences – it would help her reduce her outgoings during what would likely be a difficult period, despite her other means.
115. Whilst Mrs R 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.
116. Although I consider it more likely than not that Mrs R knew she would have to pay something for the policy, it does not appear NatWest told her the exact premium at the point Mrs R applied for the policy. Having said that, it seems likely Mrs R would have been told the cost before the policy started and she 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 NatWest at the time, or reconsidered her decision.
117. Overall, I am not persuaded Mrs R would have found the cost unacceptable if she had been given the exact figure during the meeting in which she agreed to the policy.
118. In addition, I am not persuaded NatWest made clear exactly what Mrs R would get back in return in the event she made a successful claim. But I think it is unlikely Mrs R'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.

119. I am not persuaded NatWest explained the limitations and exclusions to Mrs R either. But I do not think it is more likely than not that the limitations and exclusions there were would have dissuaded Mrs R from taking out the policy.
120. For example the policy did not exclude any pre-existing medical conditions or 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 accident and sickness claim. And I think it is unlikely Mrs R would have expected to make an accident and sickness claim on the policy without having to provide some evidence to support that claim.
121. More significantly I am not persuaded NatWest told Mrs R that any claim she made would be limited to a 12-month period. This may have differed from what Mrs R expected. But 12 months was a longer period than Mrs R would have received full sick pay for and her enhanced redundancy entitlement was also equivalent to less.
122. In those circumstances, I consider it likely Mrs R 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 Mrs R be unable to work in the circumstances covered by the policy. The policy would help reduce her outgoings at a difficult and uncertain time, ensure that her home was not placed at risk and might potentially help preserve Mrs R's sick pay or redundancy money for other use.
123. So, whilst Mrs R 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 information she based her decision to take out the policy on and found acceptable.
124. Where I think the terms of the policy differed from what Mrs R might have expected is in relation to the fact that she could only claim for accident and sickness if she was unable to do both her own occupation and any similar occupation she is able to perform based on her education, training and ability. If Mrs R had known this, it might have played into her thinking about what she would have done, and how these restrictions might have affected her. And I accept they might have given her pause for thought – although it is possible she might not have been overly concerned given that, if Mrs R was unable (through disability) to carry on her own occupation, the chances that she would be unable to take up a similar occupation that she may reasonably become qualified to perform based on her education, training and ability would also, in all probability, be limited. I have considered the further representations made by Mrs R in response to my Provisional Decision on this point, but they have not changed my mind.
125. Mrs R provided information in the PPI questionnaire about what she would have done with more information, which I have considered carefully. In her most recent updated questionnaire, she says:

Natwest did not explain the terms and conditions of the policy. In particular they did not tell me the exclusions and limitations – the reasons it would not have paid out. WFAC say Natwest had a duty to explain these exclusions and limitations in a way

that an ordinary person like me would have understood. I can definitely say that Natwest did not do this. WFAC have further explained that a high proportion of reasons anyone is likely to miss work were often excluded – in particular pre-existing conditions and often chronic conditions and sometimes common conditions such as bad backs and mental health conditions such as stress, depression and anxiety. These statistically are among the most likely reasons for anyone being off work and I can say that these exclusions were not disclosed to me.

If Natwest 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. On top of this, I also now understand '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:

Condition: scoliosis, Date: circa 1981, Treatment: doctor- x-ray, Meds (inc. non-prescription): pain relief when needed, Work missed: 6 weeks

Condition: hysterectomy, Date: circa 1996, Treatment: operation, Meds (inc. non-prescription): pain relief for a few weeks, Work missed: 6 weeks

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 payment as profit and expenses. The policy was appalling value for money. I am not in a position to waste money or make insurance businesses richer at my expense. Everybody knows that companies are entitled to make a fair profit, but not an unfair one – I would not have wanted to be taken advantage of. I don't think anybody would.

In addition to the above, there are more reasons as well why I now understand this PPI should not have been sold to me, and why if it had been explained properly, I would not have wanted it.

In my job as a office work, I had sickness cover – see above. I also had redundancy and would have got at least 3 months or more, but less than 6 months redundancy pay if they had been made redundant.

So the PPI was expensive and really unlikely to pay out and on top of that I was covered anyway.

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 Natwest 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 Natwest. PPI was just included as part of the package with our mortgage. I had no interest in PPI and would not have had it if Natwest had not included it with the package.

126. Mrs R 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.
127. In light of the findings I have already made, I do not think Mrs R'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 NatWest to disclose the commission it received.
 - I am satisfied the requirement on NatWest in 2007 was to draw her attention to the exclusions and limitations, not to give her the context Mrs R says NatWest should have done.
 - Mrs R's prior illnesses were not relevant as the policy did not exclude pre-existing medical conditions.
 - The policy did not – as I have already explained – restrict claims based on back or mental health conditions, even if they were also pre-existing conditions.
128. I am also mindful that: Mrs R'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.
129. In deciding with appropriate information whether to take out the policy, I consider it fair and reasonable to think Mrs R would have weighed up various other considerations, in particular her lack of savings and 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.
130. Having considered all of the evidence and arguments in this case, I consider it more likely than not that Mrs R would still have taken out the policy. The policy 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 sickness. In the circumstances I consider it more likely than not that Mrs R would have taken out the policy in any event.

131. I have considered Mrs R's representations about causation and DISP App 3, including the general opinion of Stephen Knafler QC provided by WFAC on behalf of Mrs R and the further representations it has made about this issue in response to the Provisional Decision. Those rules are for firms, but they are a relevant consideration I take into account along with many other things when I decide what is in my opinion fair and reasonable.
132. I am mindful of the purpose of the rules. I do not think it was ever intended to be at odds with the approach I have taken. The FSA explained its thinking in the policy 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.

133. 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

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

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...

134. I have thought about what outcome applying the FCA's rules 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 R 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.
135. 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 R's circumstances I have considered above, I consider it reasonable to conclude the position Mrs R 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 Mrs R would have bought the policy in the absence of the breach or failing.
136. I am mindful of Mrs R's representations that the presumption may only be rebutted when the flaws in the sale process were immaterial, that the flaws in this case were highly material and I have failed to give proper weight to the evidence – including his own representations – that he would not have taken out the policy. However, I am not persuaded by those representations.
137. Even if I am ultimately departing from the rules for firms set out at DISP App 3 (which I do not consider I am), I am doing so because I do not consider, in this case, that it would represent fair compensation to put Mrs R in the position she would have been in if she had not bought the policy.
138. 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 she had been given clear, fair and not misleading information about the policy she was buying.

139. I am satisfied it would not be fair and reasonable in those circumstances to conclude NatWest should pay Mrs R 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.
140. It follows from my findings that on the balance of probabilities it is more likely than not that Mrs R 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.
141. 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 R 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 R 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

142. 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 R.
143. **I now ask Mrs R to either accept or reject my decision by 30 November 2018.**

Nimish Patel
ombudsman