DRN-4242504

The complaint

Mrs C complains that The Prudential Assurance Company Limited gave her husband (Mr C) unsuitable advice to take his pension benefits in the form of an annuity. She says this caused her to receive lower pension death benefits following her husband passing away.

What happened

Mr C was a customer of Prudential's, having held two personal pension policies.

Policy 1 (policy number ending 220) was a retirement annuity policy which was started on 1 March 1985. It included guaranteed annuity rates. Policy 2 (policy number ending 411) was a personal pension policy which was started on 1 March 1993.

In 2013 Mr C received advice from one of Prudential's tied advisers. The adviser went through a fact-find with Mr C to establish his personal circumstances. It showed that Mr C:

- Was 57 years old;
- Was employed earning around £28,000 a year;
- Was married and his wife was working;
- Jointly owned his own home worth £200,000 with no outstanding mortgage;
- Jointly owned a holiday cottage with his wife raising rental income around £6,000 a year;
- Had savings around £10,000;
- Had two pensions with Prudential that he was paying premiums into;
- Intended to continue working until his state pension age of 66.

The adviser identified an objective for Mr C of raising funds towards the possible purchase of another holiday cottage to let.

Prudential's adviser recommended that Mr C take the pension commencement lump sum (PCLS) from both of his pension policies, raising in the region of £30,000, and then purchase annuities with the remaining funds in each policy. The recommendation was for annuities paying 100% spouse benefit. Mr C was additionally advised to take a whole of life policy (WOL) to provide payment to Mrs C in the event that she survived him.

Mr C followed the recommendation and the annuities commenced in 2013.

Mr C sadly passed away in early 2021 and Mrs C became the beneficiary of the annuities. And Prudential settled the WOL policy paying Mrs C the benefits.

Mrs C complained, via a personal representative, to Prudential about the advice it gave Mr C in 2013. The representative complained that Mr C shouldn't have been advised to take benefits from his Prudential policies at age 57 when he still planned to work for a further nine years and had no specific need for the additional income at that time.

Prudential rejected Mrs C's complaint. It said that its adviser had considered Mr C's circumstances and objectives at the time. And its fact-find from the time indicated that Mr C wanted to purchase a further holiday cottage to let. And that he needed to release the PCLS from his pensions to enable him to do that.

Mrs C didn't agree with Prudential's outcome and referred her complaint to our Service. Our investigator explained that he didn't think the advice given to Mr C was suitable for him. He didn't think that it was in Mr C's best interests to take an annuity income from these pensions at 57 whilst still working, without giving any regard to Mr C's income requirements when he retired. He thought it more likely that Mr C should have been advised to have waited until nearer his retirement age. So he suggested what he thought Prudential ought to do to put things right.

Prudential didn't agree with our investigator's view and asked for the case to be referred to an ombudsman. The case was assigned to me and after considering all of the evidence I issued both parties a provisional decision explaining why I thought Mrs C's complaint should be upheld. I said that I didn't think Mr C was given suitable advice to annuitize his pension in 2013. And why I thought it would have meant his taking his benefits at the normal retirement of the plans. I also explained what I thought Prudential ought to do to put things right, calculating whether there had been a loss up to this point, and for the future loss by Mrs C receiving a lower spouse pension.

Mrs C's representative agreed with the reasons that I'd given regarding the suitability of the advice in 2013. But disagreed with my suggested outcome. Still arguing that Mr C may not have annuitized these pensions when her reached the normal retirement age for them.

Prudential disagreed with my outcome for what were the same reasons that it had argued previously. It raised a number of questions regarding the redress I proposed that I will address below.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having re-considered all of the evidence as well as the responses received to my provisional decision, my final decision is to uphold Mrs C's complaint. I've received no new evidence. Subsequently my following reasoning closely follows what the provisional decision that both parties have already seen.

In considering this complaint I've considered the regulations around providing personal recommendations to retail clients. The Financial Conduct Authority (FCA) publishes a Conduct of Business Sourcebook (COBS) in its handbook. Relevant in this is COBS 9 which sets out Prudential's obligations in assessing suitability for customers. I've also considered the Principles for businesses that are published in the FCA Handbook under PRIN. These include:

- Principle 2 - which requires a firm to conduct its business with due skill, care and diligence.
- Principle 6 - which requires a firm to pay due regard to the interests of its customers.
- Principle 7 - which requires a firm to 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.

Prudential have shown us the fact-find that it obtained from Mr C. And I have summarised the things that Prudential established earlier. There is no doubt in my mind that Prudential understood that Mr C was employed and that he intended to remain working until he reached age 66. Plans could change of course. But Mr C's intention wasn't unreasonable or unusual. There's no evidence that he was unhappy in his work. And it's common for people to work up to their state retirement age. So Prudential's advice ought to have been based on the likelihood that Mr C wouldn't retire imminently.

Prudential say that its recommendation was based on the fact that Mr C wanted to purchase another holiday cottage. Mr C already had one holiday cottage that was generating additional income. So I can see why he'd be interested in the idea of having a second one. But there is no further exploration by Prudential's adviser on this matter. It seems that Mr C hadn't identified a property to purchase. I say this because there is no mention of it in the fact-find and we know that Mr C never used the PCLS to purchase a property.

I recognise that the fact he hadn't located a property didn't mean that he didn't want to have the funds available to purchase one if it became available. Sadly, we're unable to find out exactly what Mr C's intentions were in 2013. But I consider that Principle 6 placed an obligation on Prudential to consider Mr C's best interests more closely. Prudential have re-iterated its view that it didn't need to explore Mr C's intentions fully. It says it was okay to accept he wanted to buy a holiday home and so recommend he use his pensions to do that. But I disagree. Prudential was the professional adviser in this situation. I think it needed to properly assess Mr C's objective and, where necessary, probe with Mr C whether his objective was viable. Simply transacting his request may not have been the most financially suitable thing for Mr C to do with these pensions.

Prudential should have identified that a PCLS of £30,000 wouldn't be enough to buy a holiday cottage of the type Mr C already owned. Which would have meant Mr C taking some form of additional borrowing. But the suitability report doesn't indicate that Prudential's adviser gave that any consideration at all. I can see that the suitability letter tells Mr C that the advice was focussed on his pension and arranging WOL cover. Which it says was Mr C's preference. But this didn't limit Prudential's responsibility to give Mr C a recommendation that was in his best interests.

I understand that Prudential's adviser was a tied adviser, and therefore could not recommend mortgage products for Mr C. But that doesn't mean that it couldn't have considered the implications of Mr C being able to actually use his PCLS to purchase a property. Instead, it used this as the only reason to crystallise his pension benefits at that time. I'm not persuaded that Prudential's actions went far enough.

Most importantly though, is the fact that Mr C's personal pensions were products that were intended to provide benefits in retirement. They formed a key part of retirement planning for Mr C. Prudential knew that Mr C wasn't retiring though. And it was likely he wouldn't be until nearer to his state pension age. He had reached an age where he could take benefits from his personal pensions already. But that doesn't mean it was in his overall best interests to do so. I say that because he was paying premiums into the policies and could most likely have afforded to continue doing so. So they would have continued to grow until he retired. And the annuity rates used to buy his pension meant he was likely to have a much larger income when he stopped working. Which might have been when he needed it more.

Prudential should have done more to explore that for Mr C. It should have asked about other pensions he may have had. Given that it was addressing retirement planning it should have established the income he wanted to have in his retirement. That should have meant comparing taking his benefits in 2013 with taking them later. So it should have fairly informed Mr C what he would be giving up later in order to access benefits in 2013. But it didn't.

Instead it recommended that he take annuities in 2013 without it really being clear that he actually needed either the additional income or the cash lump sum at that time. And it didn't establish whether that would leave Mr C with the income he might later want or need when he stopped working in the future. It simply said that it calculated that he and Mrs C could live off their state pensions.

In the suitability report, under the heading "*planned expenditure*", Prudential confirmed that Mr C had no planned expenditure and didn't need to retain significant money on deposit other than weighing up the purchase of another holiday let. So I don't think that Mr C was ever truly in need of the PCLS.

In my provisional decision I said that I thought Mr C would most likely have deferred taking his benefits until nearer his planned retirement if Prudential had advised him to do that. Prudential has pointed out in its response that we do not know what Mr C would have done if it had advised him differently. Which is obviously true. And, sadly, we are no longer able to ask him. So I have to decide on a balance of probability what I think would have been the case. In deciding this I've attached weight to the fact that he sought advice from Prudential and trusted them. And he followed its recommendation when they gave it to him. Which I find compelling. Proper advice from Prudential ought to have included a comparison of benefits in 2013 with normal retirement age to support the recommendation. And faced with that information from a trusted source, along with the fact that Mr C had no clearly formed plan or need for the PCLS, I think he would have followed Prudential's recommendation not to annuitize early

Mrs C, through her representative, has similarly pointed out that we do not know what Mr C would have instead done. Although she accepts that Mr C wouldn't have taken the 2013 annuity if suitably advised. Mrs C's representative puts forward a counter scenario where he argues Mr C wouldn't have taken any benefits from these pensions at all thereby leaving Mrs C with lump sum pension benefits instead. And identifies a number of options that may have been considered by Mr C.

In a similar way that I have had to decide what Mr C may have decided to do if advised differently, which of course I cannot know for certain, I also need to decide what Mr C may subsequently have done with these pensions if faced with different circumstances. Which is unfortunately complicated by the fact that Mr C never chose to complain about his annuities in all of the years that he was in receipt of them. I have accepted that the full impact of his decision may not have been known to him until such time he stopped working and his income reduced significantly. But I think the fact that Mr C had no complaint about the annuities for over seven years is an indication that he most likely wasn't averse to the concept of annuities as a way to take pension benefits. In circumstances where I cannot possibly know what may have happened but for an earlier mistake I think the most fair and reasonable decision is that Mr C would, more likely than not, have taken the benefits from these schemes in the same way, only at their intended retirement ages.

Prudential have provided us with the terms and conditions of Policy 1. Which indicated that it was set up to mature on its anniversary date prior to Mr C's 65th birthday. Which would have been on the anniversary date of 1 March in 2020. I would have expected that, in the normal course of events, Mr C would have received a wake up pack and then quotes for this pension to coincide with that. I think that this would have most likely been the point at which Mr C would have taken the benefits from his Prudential pensions. Whilst Policy 2 would most likely have had a retirement date set at his 65th birthday, it seems more likely than not that Mr C would have taken both at the same time in the same way.

There was a further element of the advice that Prudential provided that I have yet to comment on. Which was the WOL policy. That was set up to cover the expenses that would be incurred following his death. The cover was set up to pay £20,000. It was not intended to provide cover to replace the death benefits that may have been available through his pension funds. And Mr C set up annuities to continue paying 100% to Mrs C in the event that she survived him. Mr C was clearly concerned with ensuring that Mrs C was left in the best financial position in the event of his death. So I think that, even if Prudential had recommended deferring taking his annuities until nearer his retirement, it wouldn't necessarily have been inappropriate to recommend a WOL policy. So, on balance, I don't think Mr C would have done anything differently regarding this.

Putting things right

In assessing what would be fair compensation, my aim is to put Mrs C (as the person for whose benefit a contract of insurance was taken out) as close as possible into the position she would probably now be in if Mr C had been given suitable advice.

As stated above, rather than taking out the annuities in 2013, I think Mr C would have retained Policy 1 until 1 March 2020 when he would have taken benefits from the plan using the guaranteed annuity rate available. I also think Mr C would have taken the benefits from Policy 2 at the same time, as he did when accessing these pensions in 2013. It follows that I think it is fair to assume that Mr C would have taken his maximum PCLS on 1 March 2020 prior to annuitizing in the same way as he did in 2013. And the steps below account for that in determining whether there was a past loss.

Both parties have seen and commented on what I am directing Prudential to do to put things right. I have responded to Prudential and Mrs C to provide further clarification where Prudential was unable to understand what I proposed. I now consider that the steps I set out below are sufficiently clear for it to follow. If it considers it is unable to calculate the redress on the below basis it should submit the calculation to an independent actuary.

For clarification, Steps A to C will determine whether or not Mrs C has experienced a loss up until the date of my final decision, and if so what that is as a total sum. These steps take into consideration the difference in PCLS available in 2020 with that taken in 2013 as well as annuity payments. Steps D to E will determine the difference in the amount of annual annuity Mrs C was in receipt of on the date of my final decision, with the annuity Mrs C would have had at that time if Mr C had annuitized on 1 March 2020.

I understand that Mrs C's representative disagrees with what I'm directing here and has asked that I allow him the opportunity to try to discuss a suitable resolution with Prudential. I would point out that this complaint was first referred to us in October 2021, after Prudential and Mrs C were unable to agree a resolution. Our services efforts to resolve this matter informally have been unsuccessful and ultimately Prudential doesn't agree that it has done anything wrong. And Prudential has confirmed that it will not enter into any further negotiation to resolve this complaint. My final decision will end our services involvement in this complaint, and I am satisfied that what I have set out below is fair and reasonable in this situation. I also think it is fair to offset any loss in potential pension benefits with the benefits that Mr and Mrs C have had from the annuity payments and PCLS.

To calculate if Mrs C has suffered a past loss Prudential should work out:

- **A) Total of all the notional payments (PCLS and net income payments)** which should have been paid from Policy 1 and Policy 2, from 1 March 2020 until the date of my final decision (which I confirm means that Prudential must calculate the PCLS and annuities that would have been paid on those policies if they'd been taken in the same format as the annuities in 2013). This can be offset by the additional premiums that Mr C would have paid up until 1 March 2020 (as he would have had to continue paying premiums into the policies until he took the benefits).

- **B) Total of all the actual payments (PCLS and net income payments)** which have actually been paid from Policy 1 and Policy 2, up until the date of my final decision.

- **C) Past Loss = A – B.** If the answer is negative, there's a past gain.

In working out the net income payments, Prudential should assume that tax would have been paid at a rate of 20%.

To calculate if Mrs C will suffer a future loss Prudential should work out:

- **D) The notional gross pension per year** which should have been paid to Mrs C from the date of my final decision onwards (to clarify this would be based on the annuity that I've said Mr C would most likely have taken from these policies from 1 March 2020)

- **E) The actual gross pension per year** Mrs C currently will receive from the date of my final decision onwards

- **F) Future Gross Loss per year = D – E**. If the answer is negative, there's a future gain and no redress for future loss is payable. If the answer is positive then there's a loss and Prudential should proceed to step G)

- **G) Prudential must then work out** what it would cost to replace any lost income in F) by buying an annuity on the open market with these features. It will need to refer to published annuity rate tables and get a quote from a competitive provider (which could include its own currently available annuity rate if it includes the same features. This cannot be GARs that may have been available on these policies previously as the purpose is to identify the cost of replacing the lost annuity income in the market currently)

- **H) The purchase price of the annuity found in G) is Mrs C's gross future loss.** Prudential should make a reduction to allow for notional income tax that would otherwise have been paid at her likely marginal rate on the income in F) – presumed to be 20%.

Prudential should pay Mrs C compensation for her past loss ('**C**') and future loss ('**H**'). I think it is fair that any future loss figure, after adjustment for notional tax, is offset by any gain if the calculation at **C** is negative.

Prudential's error has also caused Mrs C a level of distress and inconvenience. It has left her in a difficult financial position in retirement that's unlikely to have been as severe if more suitable advice had been given. I agree with our investigator that Prudential should pay Mrs C £500 for the stress and inconvenience its unsuitable advice caused.

If payment of compensation is not made within 28 days of Prudential receiving Mrs C's acceptance of my final decision, interest must be added to the compensation at the rate of 8% per year simple from the date of my final decision to the date of payment.

Income tax may be payable on any interest paid. If Prudential deducts income tax from the interest, it should tell Mrs C how much has been taken off. Prudential should give Mrs C a tax deduction certificate in respect of interest if Mrs C asks for one, so she can reclaim the tax on interest from HMRC if appropriate.

My final decision

For the reasons that I've explained, I uphold Mrs C's complaint.

I direct The Prudential Assurance Company Limited to compensate Mrs C in the manner that I have explained under *'Putting things* right' above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C to accept or reject my decision before 24 August 2023.

Gary Lane
Ombudsman