DRN-4562206

The complaint

The estate of Mrs H ("the estate") complains that Aviva Life Services UK Limited ("Aviva") gave incorrect information in 2014, which later led to the estate incurring an unexpected inheritance tax (IHT) liability.

In bringing this complaint the estate is represented by Ms C, who is one of Mrs H's daughters and one of the executors of her will.

What happened

The late Mrs H and her late husband (Mr H) invested in two capital plans ("the plans") with Norwich Union (now Aviva) in March 1990 – one in Mrs H's name and one in Mr H's name. The plans were set up with an initial investment of £25,000 each, with both Mr and Mrs H as the lives assured and would pay out on the second death. The plans were settled in trust and the trustees were Mr and Mrs H, and their adviser (Mr B).

As the plans were set up to pay out on the second death, nothing was payable after Mr H passed away in 2014. At that time, Mrs H and Ms C contacted Aviva to check that the plans were in trust and outside of Mr and Mrs H's respective estates. Aviva wrote to Mrs H to confirm that was the case. After Mr H's death, Mr and Mrs H's two other daughters were also added as trustees.

After Mrs H passed away in 2022, the estate found that the information provided by Aviva in 2014 had been incorrect. While the plans were settled in trust, an amendment made to the trust deeds at the time the plans were taken out meant the settlor retained a benefit to the asset held within it. That meant the plans still fell to the estate.

The estate complained to Aviva about the impact of the incorrect information they had given in 2014. It said Aviva should meet the additional IHT due and other costs that had arisen as a result of the plans falling to the estate. That included the legal and accountancy costs involved in resolving the issue and resubmitting IHT forms and the cost of interest charged by HMRC for the additional IHT that had been paid late.

Aviva accepted that they had provided incorrect information. They said they were not trust experts and that their letter in 2014 had directed Mrs H and Ms C to seek legal advice. They also said they were unable to comment on what Mrs H may or may not have done to make changes to her plan if she had been given the correct information in 2014. Aviva offered the estate compensation of £600 by way of an apology. The estate wasn't satisfied with Aviva's response and referred its complaint to our service.

Our investigator thought the estate's complaint should be upheld. She said:

- Having looked at documents from the time the plans were taken out in 1990, she was satisfied that the trustees ought to have been aware that the plans might fall back into the settlors' estates and thus attract IHT in the future.

- Aviva had accepted they gave Mrs H and Ms C the wrong information in 2014. Although they were not trust experts, they were in possession of the facts – the information they held on file included memos from 1990 explaining the tax position. If Aviva had been unsure about the position of the plans or felt strongly that they couldn't provide advice, they could have decided not to answer Mrs H and Ms C's question and refer them to a solicitor.

- Ms C had said Mrs H reviewed her IHT position annually and so our investigator was satisfied that, had Aviva not provided incorrect information in 2014, she would have acted to exclude herself as a beneficiary by submitting a deed of amendment. Had she done so in 2014, the estate would not have faced an IHT liability on her plan.

- In calculating redress, she didn't think it was fair to hold Aviva responsible for the additional IHT that had arisen because Mr H's nil rate band had been reduced by the value of his plan, thus passing a reduced nil rate band over to Mrs H's estate. That was because Mr H had passed away before Aviva gave Mrs H the incorrect information and so there was no way for him to mitigate IHT on the plan.

- She said Aviva should reimburse the estate for the IHT incurred on Mrs H's plan; subject to an itemised bill, refund the reasonable costs in relation to the amendments needed to the estate's IHT forms; and subject to reasonable evidence, pay the cost of the HMRC fines the estate incurred due to the late inclusion of her plan. Simple interest of 8% should be added in each case.

In response to our investigator's findings Ms C, on behalf of the estate, said:

- The complaint was made on behalf of the beneficiaries of the late Mr and Mrs H's estates. The beneficiaries have been adversely impacted in that their inheritances have been reduced by additional and unexpected IHT, interest and associated legal and trust adviser fees. Any payments made by Aviva should be made to the beneficiaries rather than to Mrs H's estate.

- The documents provided by Aviva from 1990 are not proof that either Mr B or Mr and Mrs H themselves were aware that the plans had created 'Gifts with Reservation' and might fall back into the settlors' estates, thus attracting IHT in the future. Mr B has said he wasn't contacted by Aviva between 30 April and 2 May 1990 to be told the plans would be considered to be 'Gifts with Reservation'. If he had been, he would have advised Mr and Mrs H against proceeding with the plans. Aviva were aware there was a tax problem with the plans but did not make Mr B or Mr and Mrs H aware and so the plans were mis-sold.

- She agreed with our investigator's finding that Aviva did not act fairly with regard to their actions from 2014 onwards. However, it was not correct to say that only Mrs H's plan would have been unwound in 2014 had she been aware of the 'Gift with Reservation' issue. Both plans would have been unwound, which is something Mrs H would have been able to do as a beneficiary and trustee of Mr H's plan. Mrs H would have undertaken a review of all legal and financial matters. She had more than enough assets to have done so, and she survived for seven years from 2014. All the additional IHT that had to be paid by Mrs H's estate (plus interest on late payment) is therefore a direct result of Aviva's error in 2014.

- Aviva should also compensate the beneficiaries of Mrs H's estate for: legal costs for submitting the Corrective Account; tax accountant costs specifically related to the issue with the plans; interest incurred from late payment of the additional IHT; and interest at

8% on all these amounts.

- If the estate remained in administration on 1 January 2024 it would need to be registered as a Trust, incurring further accounting and legal costs. The only reason that might be necessary is because of the ongoing dispute with Aviva, so Aviva should meet any such costs. If Aviva reimburse Mrs H's estate, they should also bear any costs that would arise as a result of the payment itself incurring IHT liability.

Aviva disagreed with our investigator's findings and said:

- The plans were made subject to IHT because of amendments made by the settlors to the standard trust documents at the time of inception. The Trust was set up with the assistance of an adviser. That meant Aviva would treat the Trust as "non-standard".

- Aviva's error was in not flagging in their records that the Trust should be treated in that way. As a result, when they wrote to Mrs H and Ms C in 2014, they treated it as a standard trust arrangement and provided incorrect information. The amendment made to the trust deeds in 1990 meant that the plans still fell to the settlors' estates.

- Aviva's letter in 2014 made clear that Mrs H and Ms C should seek their own advice. It is fair to assume that if IHT was a concern they would have taken this up with a legal or tax expert at the time of considering any amendments to the Trust.

- Even at payment stage the plan itself was not subject to IHT, however the estate would be. The plan was paid to the Trustees and therefore still does not form part of the estate until it is distributed by the Trustees.

- They have maintained throughout that they are not tax experts and that customers should seek their own expert advice. They cannot comment on whether the policyholders or Trustees sought this advice, only that they have carried out the actions requested by the Trustees regarding payment.

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 done so, I have decided to uphold the complaint for broadly the same reasons as those given by our investigator. I have however already notified both parties that I was minded to reach some different conclusions to our investigator on what Aviva should do to put things right. I will now explain the reasons for my decision.

Authority

This complaint has been brought by the estate of Mrs H. The estate complains that Mrs H was given incorrect information in 2014 and that the estate has lost out as a result. I am satisfied that the estate is eligible to bring this complaint and that any award would need to be made to the estate and not directly to the beneficiaries.

The estate has raised points in relation to both Mrs H and Mr H's plans. I note that all those named as trustees of the plans have given their authority or consent to the complaint. I am therefore satisfied that I have the appropriate consent to look at the complaint points I will consider below and make my award of redress.

Sale of the plans

In this decision I'm not looking at the sale of Mr and Mrs H's plans in 1990. That would require a separate complaint. I have however taken account of documents that Aviva have provided from the time the plans were sold.

It is clear from those documents that Aviva identified internally that because of amendments made to the standard trust documents, it was likely that the trusts would be regarded as creating a Gift with Reservation and the proceeds of the plans would be liable for IHT.

I've not seen evidence that Aviva told Mr and Mrs H what they had identified internally. So, while I note that, as Aviva have said, the amendments were made by Mr and Mrs H and the Trust was set up with the assistance of their adviser (Mr B), I can't be sure whether Mr and Mrs H were aware at the time of the likely impact of the amendments to the trust documents.

Information provided in 2014

It appears that following Mr H's death in 2014, Mrs H thought his plan should not be included in his estate for probate purposes. She wrote to Aviva asking them to confirm this and Aviva's reply of 20 March 2014 said:

> "Please note the above numbered policies do not need to be declared for probate purposes as they are held under trust and do not form part of the deceased's estate."

Aviva have accepted that this information was wrong. They should have been aware from their file of what their own adviser had said in 1990; namely that the proceeds of the plans would likely be liable for IHT.

I acknowledge that Aviva's letter recommended that Mrs H should seek legal advice before completing the deed of appointment that was enclosed with the letter. However, the letter gave a very clear statement on whether the plans needed to be declared for probate purposes. If Aviva had been unsure of the position, they could have decided not to answer the question and suggest that Mrs H obtain her own legal or tax advice on that question.

I accept that Mrs H, along with late Mr H and Mr B, had been responsible for setting up the trusts back in 1990. But I think it's understandable after so much time had passed that the exact details of arrangements made some 24 years earlier might not be remembered. So, it was natural and not unexpected that Mrs H might ask questions of Aviva about the plans and the associated trust arrangements. In those circumstances, I don't think it was unreasonable for Mrs H and Ms C to rely on Aviva's letter and proceed with probate for Mr H's estate on the basis that the letter had provided accurate information.

I am therefore satisfied that Aviva provided incorrect information to Mrs H and Ms C, who then reasonably relied on that information in handling Mr H's estate and considering Mrs H's own IHT position. I now need to consider what would most likely have happened if Aviva had not provided incorrect information and therefore what they should do to put things right.

In so doing, I consider that my aim is to put the estate in the position it would now be in but for the error caused by Aviva. That includes considering the financial loss reasonably incurred by the estate, which includes any additional tax paid and any costs that have reasonably been incurred as a result.

The estate has made detailed submissions on the costs it has incurred, and I have considered these carefully. I would stress that we are an informal service and while our aim

is to put complainants as close to the correct position as possible, we cannot always account precisely for everything. I am satisfied that my findings on the compensation that Aviva should pay the estate are fair and reasonable in all the circumstances of this case.

Mrs H's plan

I note that Ms C has said that Mrs H reviewed her IHT position annually and has provided copies of spreadsheets dating back to 2014 in which she estimated her IHT liability. Based on the evidence I've seen I think Mrs H was concerned to minimise the IHT that would be due on her estate. Having specifically asked Aviva in 2014 if Mr H's plan should be included in his estate for probate purposes, if Aviva had provided Mrs H with the correct information, then I think it is most likely that she would have taken steps to try and ensure that her plan would not be liable for IHT.

Ms C has said Mrs H would have acted to exclude herself as a beneficiary of the plans by submitting a deed of amendment. It might also have been possible for Mrs H to surrender her plan and invest the proceeds differently. While I can't be sure precisely what action Mrs H would have taken, given that she survived for more than seven years, I think it's most likely that her estate would not have faced an IHT liability on her plan on her death in 2022. I therefore find that Aviva should reimburse the estate for the IHT incurred as a result of Mrs H's plan being included within her estate.

I note that Aviva have said that the plan was paid to the trustees and did not form part of the estate until it was distributed by the trustees. But the estate has lost out because of Aviva's mistake, and I think it is right that Aviva should compensate the estate for its loss.

Mr H's plan

As I've already noted, our investigator said that, in compensating the estate, it would not be fair to include the impact of Mr H's nil rate band reducing by the value of his plan. That was because the incorrect information from Aviva was received after Mr H had passed away so there was no way for him to mitigate the IHT that had already fallen to his estate.

In response Ms C, on behalf the estate, said that, if Aviva had provided the correct information in 2014, Mrs H would have taken steps to mitigate the impact of the IHT that would ultimately arise in relation to Mr H's plan, as well as her own plan. She said that Mrs H would have undertaken a review of all legal and financial matters, in all likelihood varying Mr H's will, unwinding both plans and setting up a new trust which would fall outside her estate for IHT purposes provided she survived seven years (which she did). She could have used the funds from both plans plus some of her excess funds, including a share portfolio of over £80,000 that she inherited from Mr H, to meet the estimated IHT liability on her death. Ms C has provided documents which appear to confirm that Mrs H would have had funds available at the time.

Following my review of the evidence, I told Aviva that I was minded to find that if Mrs H had been provided with correct information in 2014, then she and the Trustees would most likely have taken steps to mitigate the estimated IHT liability arising from Mr H's plan; and that Aviva should therefore compensate the estate for the liability that ultimately arose.

I invited Aviva, as provider of the plan, to comment on what steps would have been open to Mrs H and the trustees of Mr H's plan, following Mr H's death. I asked Aviva to comment specifically on what Ms C had said and whether they were aware of any reason why Mrs H and the trustees could not have taken the action she had suggested. Aviva did not respond to my request or provide any further information.

Having reviewed the available evidence again, I still think that Mrs H would most likely have sought to mitigate the IHT arising from Mr H's plan. While I can't be sure precisely what Mrs H would have done, I think it is plausible she would have taken the steps suggested by Ms C. And overall, I think it is most likely – given that she survived more than seven years – that Mrs H would successfully have mitigated the IHT that fell to her estate. I therefore think that Aviva should compensate the estate for the additional IHT liability that ultimately arose from Mr H's plan.

Other costs

I am satisfied that the estate has incurred other costs that would not otherwise have arisen if it were not for Aviva's mistake.

I agree with our investigator that Aviva should therefore meet the following costs:

- subject to an itemised solicitor's bill, the reasonable costs in relation to the amendments needed to the estate's IHT forms; and

- subject to the provision of evidence from HMRC, the amount incurred by the estate in HMRC fines due to the late declaration of Mrs H's plan.

I agree that the above costs arose as a result of Aviva's mistake and that Aviva should therefore compensate the estate for them. They should also add simple interest of 8%.

In response to our investigator's view, the estate said Aviva should also pay compensation for further costs that it has incurred or is likely to incur. Having considered what the estate had said, I notified both parties that I thought these further costs also arose as a result of Aviva's mistake and that I was minded to say that Aviva should meet them. I have received no further comments from Aviva and having considered this further I have come to the same conclusion. I therefore think Aviva should also meet the following costs:

- Subject to provision of an itemised bill, other reasonable legal and accountancy costs specifically related to confirming the status of the plans and the submission of the Corrective Account in relation to the estate. I am satisfied that this was a sufficiently complex situation that the estate reasonably needed professional help to resolve it.

- Interest incurred from late payment of the additional IHT on the estate.

- Simple interest at 8% on the above amounts.

- Subject to provision of itemised invoices, any reasonable accounting and legal costs that arise directly from registering the estate as a Trust with HMRC. The estate had said that if the estate remained in administration on 1 January 2024 it would need to be registered as a Trust.

Putting things right

In summary, to compensate the estate fairly, Aviva should:

- Reimburse the estate the full amount of the additional IHT it paid following the submission of the Corrective Account in November 2022. But for Aviva's mistake the money held in the plans would not have been considered part of Mr and Mrs H's estates and so the estate has in effect been required to overpay tax. Simple interest

of 8% should be added from the date the estate paid the liability to the date of settlement.

- Pay the other costs arising to the estate as a result of Aviva's mistake, as set out above.

My final decision

For the reasons I've explained, my final decision is that I uphold the estate of Mrs H's complaint against Aviva Life Services UK Limited.

Aviva should compensate the estate of Mrs H as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mrs H to accept or reject my decision before 13 February 2024.

Matthew Young
Ombudsman