

## **The complaint**

Mr O is represented by his uncle (Mr H), but I will refer to Mr O as the complainant here. Mr O complains that he had an account held in trust which shouldn't have formed part of the amount paid to his mother's estate by Nationwide Building Society (NWide).

## **What happened**

It's important to set out the sequence of events:

In December 2005, Mr O's father was tragically killed. He died intestate. Under the intestacy rules, the estate passed to his two sons, with the funds held in trust until they reached the age of 18.

In 2008, the late Mr O's partner and mother of Mr O (who I will call Ms H) invested £15,000 for each of her two sons – in four-year bonds with the Cheshire Building Society ('Cheshire'), with Mrs H as trustee for each son. The investment of £15,000 for Mr O (then aged nine) is the subject of this complaint. After Mr O's bond matured, it was held in a 'Black Cat Bond Issue 16'.

In April 2014, Mr O's mother, Ms H sadly died.

In August 2014, Cheshire wrote to the late Ms H to advise that the trust account was to be transferred to NWide as part of the acquisition of Cheshire by NWide.

In October 2014, NWide opened a 'Smart 2' account in the name of Ms H for her son, Mr O. In December 2014, the balance of the Smart 2 account (£15,041) was sent to the solicitors dealing with Ms H's estate.

Mr O complained. He says the account opened by NWide was not a trust account – when it should've been so. The account with Cheshire was a trust account and NWide should've opened a similar trust account when the balance was transferred to NWide in October 2014.

Because that didn't happen, when Ms H's estate was wound up, the funds were amalgamated with her other assets and were subject to inheritance tax. If the trust account had been so designated, then inheritance tax would not have been paid. So – he says the inheritance tax (IHT) should be refunded to him. The IHT rate was 40% - so £6,000 should be paid.

NWide's response: NWide initially said there wasn't an account open for Mr O. But in a second response, NWide said there was a trust account opened with Cheshire in April 2008, and this was maintained as a trust account until October 2014 – when it was transferred to a 'Smart Parent account' (sic). This was not a trustee account but was a child's account managed by a parent or guardian. NWide said this was the nearest account to the old trustee account held with Cheshire. In December 2014, the Smart account was closed along with other accounts in the name of Ms H.

In a further response, NWide said that the terms and conditions of a Smart account (sic) said that on the death of the adult, the funds should be paid to the personal representative of the adult – and that's what happened in this case.

Because there had been delays and several errors in dealing with Mr O's complaint, NWide paid compensation totalling £350.

Mr O brought his complaint to us. Initially, it was thought the complaint was out of time under our rules, but we then considered it was brought to us in time, and NWide agreed with that. Our investigator went on to not uphold the complaint. She said NWide had acted in accordance with the Smart account terms and conditions when paying the money to the late Ms H's personal representatives (in this case, the solicitors dealing with her estate). Mr O disagreed and asked that an ombudsman look at his complaint, and so it has come to me to do that.

*I issued a provisional decision which upheld the complaint:*

This is a complex complaint, and given the passage of time, and the fact that the first account was originally held with Cheshire and then transferred to NWide, some evidence is not available. Where the information I've got is incomplete, unclear, or contradictory (as some of it is here) I must base my decision on the balance of probabilities. That is – what's more likely than not to have happened in all of the circumstances here, based on the available evidence.

The crux of this complaint is what happened when the account (balance £15,000) held by Ms H in trust for Mr O was transferred from Cheshire to NWide.

I can see that the account with Cheshire was clearly a trust account. NWide have shown us the Cheshire's account opening documents and this confirms it was a trust account, with Ms H holding the funds as trustee for Mr O. In August 2014, Cheshire wrote to Ms H (Mr O showed us the letter) and this was headed "*Matured Black Cat Bond Issue 16...Miss H trustee for Mr O...*". This further confirms the Cheshire account was a trust account. The letter went on to say "*...there'll be some differences in the way things work...but we're working hard to keep these to the minimum...*". The letter said that the account would be transferred to NWide in October 2014.

*Smart 2 account:* NWide then opened a 'Smart 2' account. I've seen the statements and these show the account was so designated. NWide say they didn't have an equivalent 'trustee' account. I've reviewed the terms and conditions of the Smart 2 account – and indeed, this confirms it is not a trustee account. It's an account whereby funds are held by an adult 'on behalf of a child'. And as NWide (and our investigator) have said, on the death of the adult, funds should be paid to the personal representatives of the adult – and that's what happened here.

But – that's not the end of the story.

*Smart account:* NWide also sent to us the terms and conditions of its 'Smart account'. Note this is different to the Smart 2 account – the Smart account appears to be a trustee account. The terms say: "*If the account is opened by an adult, the adult will be acting on behalf of the child (as a 'bare trustee'). Although the account is in the name of the adult, the money in the account is held for and belongs to the child. As a 'bare trustee', the adult will have duties and obligations to the child (for example, the adult will need to act in the best interests of the child).*"

Therefore, it seems reasonable to me that this was the account which should've been used to receive the previous Cheshire trustee account funds – and not the 'Smart 2' account. NWide haven't been able to confirm to us that 'Smart' was available in October 2014 – but I can see in a letter to Mr O dated 6 August 2019, NWide have listed both Smart and Smart 2 accounts as being in operation and both were closed and the funds sent to the solicitors on 11 December 2014. Therefore, on the balance of probability, and in making this provisional decision, I assume the Smart (trustee) account was available in October 2014 when the transfer from Cheshire was made.

Even if Smart account wasn't available in October 2014 (and it appears it was) - I think it would've been reasonable for NWide to have advised the Ms H/Mr O that the NWide account to be used was not a trustee account – to enable a decision to be made as to whether to continue with a 'non trustee' account, or to make other arrangements. It's reasonable to expect that NWide to have done so rather than transferring the funds to a non – trustee account. I can't see any evidence that NWide did so.

What then happened was that the funds from Ms H's accounts (including the Smart 2 account) were paid to the solicitors dealing with the estate in accordance with the Grant of Probate. I can see a letter from the solicitors dated 27 October 2014 which said, "*we look forward to receiving from you confirmation of closure of all accounts held by the deceased together with the funds due to the estate...*". It follows that if the account in question was a trust account, then the balance on it would not have been transferred to the solicitors – as the funds were held in trust for Mr O and were not part of or due to Ms H's estate.

Mr O has also referred to some failings by NWide in dealing with the complaint – I can see the first final response was sent in August 2019 and the last final response was dated October 2022. There has been a lot of correspondence in the meantime. And – NWide referred in one letter to Mr O that "*Ms H was fully aware of the transfer...*" – when she had passed away several months before. I've considered these aspects. And while I can appreciate the distress and frustration this must have caused, I think the compensation of £350 already paid is sufficient for this.

Therefore, in the circumstances of this case, and on the balance of what likely happened, my provisional decision is to uphold this complaint, and ask NWide to refund 40% (£6,000) to Mr O (he is now aged 24) – being the amount of IHT paid on the amount. NWide should also pay 8% per annum simple interest on the amount from when it was paid to Ms H's estate (December 2014) to the date of settlement.

This is subject to:

- Any comments that either Mr O or NWide may have.
- I would like to see evidence that IHT was paid by Ms H's estate – as we do need to see the loss was incurred. This should be provided by Mr O when responding to this provisional decision.

**(continued)**

#### Responses to the provisional decision:

Mr O accepted the findings and provided satisfactory evidence that IHT was paid by the estate in 2014. But NWide made a substantial push back. They said:

- It was accepted that the Cheshire account was a trust account. The Smart 2 account was set up for trust migrations to NWide.
- The Smart 2 account was held on behalf of a child by the adult, and the terms and conditions say that on the death of the account holder, the balance would be paid to the adult's personal representatives – in this case, the solicitors acting in the winding up of Ms H's estate.
- The terms and conditions of Smart 2 make it clear the funds were held (controlled) by the main account holder on behalf of the named child – and it was then up to the personal representatives on what to do with the money.
- From the evidence available, it appears the solicitors were informed that the funds were for the benefit of a child, and not part of Ms H's estate. It was for the solicitors acting to make further enquiries as to whether the funds in the account formed part of Ms H's estate.
- NWide were required under the terms and conditions to pay the money to the solicitors.
- NWide noted that the terms of Smart 2 said "*The adult's estate will indemnify us against any claim by the child concerning this payment to the adult's personal representatives*". NWide said that if they are required to pay the funds back to Mr O, they will look to recover this from the estate, so cancelling out the redress payment.
- NWide said that transferring to a Smart account wouldn't have made a difference – as this was the same as a Smart 2 account and required the funds to be paid to the personal representatives in the same way as for Smart 2.
- Notice was provided to Ms H at the time of the transfer of the account from Cheshire.
- They said the complaint was out of time in any case – as the final response was sent in August 2019, and the complaint wasn't brought to our service within six months of that letter.

I now need to consider these comments and make a final decision.

### **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.

I've considered fully the points made by NWide, for which I thank them. I will address them in turn.

*Smart 2 had the characteristics of a trust account:* NWide appear to argue that Smart 2 was a 'trust' account and the funds had to be paid to the personal representatives (the solicitors acting in this case).

This goes to the crux of this complaint. And I disagree with these points – Smart 2 was for money held by an adult 'on behalf of a child'. Essentially, I consider the account was in the name of an adult – and is the adult's money, the money is put aside for the child, but is the adult's money. It is part of the adult's estate / assets.

That's very different to a trust account – where the money is formally ring-fenced and where

the child is the beneficial owner of the funds.

The provisional decision set out clearly why I considered the Smart 2 account wasn't a trust account, by comparison with (for example) the Smart account. I quoted by way of example the terms and conditions of Smart which are different and signal clearly that it's a trust account. I repeat them here: *"If the account is opened by an adult, the adult will be acting on behalf of the child (as a 'bare trustee'). Although the account is in the name of the adult, the money in the account is held for and belongs to the child. As a 'bare trustee', the adult will have duties and obligations to the child (for example, the adult will need to act in the best interests of the child)."* No such terms (or similar) apply to Smart 2.

Therefore, I still maintain that Smart 2 wasn't a trust account. So, it's not reasonable for NWide to argue what their obligations and rights under Smart 2 were – as it wasn't reasonable that Ms H was given a Smart 2 account in the migration. Smart 2 wasn't a trust account in the same way that the Cheshire account was.

*Payment of monies to the solicitors:* I don't disagree the terms and conditions of Smart 2 said that on the death of the account holder (Ms H), the monies should be paid to the personal representatives. But the point is – I don't consider that it was reasonable for NWide to have migrated the Cheshire trust account to Smart 2 in the first place. So in that respect, as I consider NWide were operating an inappropriate account, this argument falls away.

*The solicitors should've been aware that Smart 2 wasn't a trust account and should've made further inquiries:* NWide quoted here a letter from the solicitors dated 25 November 2014 which said *"ALL accounts held by the deceased are to be closed and the balance released to us...."*. I considered these points and accept there's an argument that the solicitors might have questioned the source of funds.

But equally, the letter I quoted in the provisional decision (dated 27 October 2014) said, *"we look forward to receiving from you confirmation of closure of all accounts held by the deceased together with the funds due to the estate..."*. So – in that respect, NWide should've reasonably have advised the solicitors that the account was (or should've been) a trust account, with the funds being for the benefit of Mr O. NWide's bereavement team were the experts here, and it's reasonable to expect this to have happened. But I've seen no evidence it did.

*The balance of a Smart account would've been paid to the solicitors anyway:* I agree that would've been the case, but if this had happened (and it's hypothetical as a Smart account wasn't used) – it would also have been reasonable for NWide to have advised the solicitors that it was a trust account and therefore excluded from the estate. And I haven't seen evidence that was done in the case of the Smart 2 that was held.

*NWide seeking to claim the money back under an indemnity:* While I can't direct NWide not to do this (as it is a commercial decision for them to take), I think this would be particularly unreasonable. I say that as:

- This service has the application of fair and reasonable principles at its heart. For NWide to reclaim the money under an indemnity following an ombudsman decision in favour of a customer - goes against those principles and contradicts the decision. Therefore, I don't consider it appropriate.
- The estate was wound up in 2014 – so the practicality of such a claim is limited.
- As I've said that the Smart 2 account wasn't appropriate, to exercise one of its terms isn't reasonable either.

*Notice was provided to Ms H at the time of the transfer:* Ms H had sadly died by the time NWide wrote to her. But setting that aside, the letter didn't say the transfer was to a non-trust account. And it would've been reasonable that it did so - as I set out in the provisional decision.

*Time limitation:* I'm surprised NWide have raised this so late in the consideration of this complaint. And in any case, NWide gave consent for us to look into the complaint – their email date 19 April 2023 said “...we don't have any issue in terms of jurisdiction regarding the six months period...”. So – I set that point aside.

### **Putting things right**

This hasn't been a straightforward complaint to decide upon. I must make a decision based on the balance of evidence presented by both parties, accepting the passage of time since the events took place and that some of the evidence is unclear or conflicting. I accept the strength of feeling that is reflected in the points NWide has put forward. But having considered NWide's further arguments, my final decision is unchanged from the provisional decision.

### **My final decision**

I uphold this complaint. Nationwide Building Society must:

- Pay £6,000, plus interest at 8% per annum simple from December 2014 to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 19 February 2024.

Martin Lord  
**Ombudsman**