DRN-4698311

The complaint

The estate of Mr M Complains about Waverton Wealth Planning LLP (Waverton). It says that Waverton didn't have the correct authority to conduct a sale of Mr M's portfolio on his death. If the portfolio had remained invested, it would have had a higher value when confirmation was granted, and the portfolio was fully surrendered.

What happened

This complaint concerns the estate of Mr M. I've seen a copy of Mr M's will and he left his estate to his daughter Mrs M, (with some modest exceptions). Both Mrs M and her husband, were named as the two executors in the will. I'll refer to Mrs M's husband as the second executor (Mrs M being the first executor) to avoid confusion with Mr M, whose estate this complaint concerns.

And the estate of Mr M is represented by a third party, but I'll largely refer to any correspondence as being from the estate itself for ease of reading.

Mr M died in June 2020 and Waverton were notified of this shortly afterwards. Towards the end of June 2020 Waverton and Mrs M had a telephone conversation about Mr M's investment portfolio that now formed part of the estate. Waverton were the advising business for this portfolio. It's agreed that Mrs M and Waverton discussed the volatility of equity markets at this time and Mrs M gave Waverton an instruction that the portfolio should be disinvested and held in cash going forward. This was to avoid any future falls in value.

The second executor wasn't present when this instruction was given to Waverton and Waverton didn't have sight of the will before it acted. Waverton has said that it accepts it made an error when it didn't request sight of the will and it should have had the agreement of both executors before it made the changes to the portfolio.

At the end of June 2020 Waverton provided a written acknowledgement that Mr M's accounts were closed to dealing requests and payments out. And it listed the documentation it would need to disburse the portfolio. This included the grant of probate, some other forms, and documents to prove their identity.

In June 2022 the estate of Mr M complained on the basis that Waverton shouldn't have accepted the oral instruction it was given to disinvest the portfolio. This is firstly because confirmation (the Scottish law version of probate) wasn't granted at the time and so Mrs M didn't have legal title to the investments. And secondly both executors should have given this instruction.

The estate says that instructions to sell or change the portfolio could have been given on 15 December 2020 when some inheritance tax needed to be paid or when confirmation was granted on 26 July 2021.

The estate of Mr M has said that at the time of the disinvestment of 23 June 2020 the portfolio had a value of about £430,000. If had remained invested until 26 July 2021, when

confirmation was granted, its value would have been £58,000 higher. The estate would like the loss of £58,000 to be paid to it.

Waverton has considered the estate of Mr M's complaint and has partly upheld it. This is because:

- It has accepted that it should have seen the will and got the agreement of both executors before disinvesting the portfolio.
- But it thought it was highly likely that the second executor would have agreed to this at the time.
- The subsequent correspondence was clear that both executors understood the portfolio had been transferred to cash but raised no issues until much later when a potential loss had been established.
- Disinvesting a portfolio is a normal and cautious approach in this situation. It said the grant of confirmation relates to the disbursement of funds and not investment instructions when dealing with an estate.
- It offered to pay £1,500 for the distress that this issue may have caused Mr M's estate.

Waverton has also said that it would have acted on any instructions it may have been given to reinvest the account, but it was not given these instructions. The estate of Mr M says it would not have been able to give these instructions as it did not have the legal standing to do so as confirmation had not been granted.

And in some further correspondence Waverton has said that the executor who gave the instruction was the main beneficiary of the will and all the relevant parties, including the estates legal representative were aware this took place. The instruction was given at a time of great uncertainty due to the Covid-19 pandemic.

The business that manages the investment has also confirmed that if the estate of Mr M had asked it to disinvest the portfolio before confirmation it would have acted on this instruction (albeit with the agreement of both executors and a letter of indemnity). The investment manager has confirmed deceased estates portfolios can be changed before confirmation.

Mr M's estate doesn't agree and has brought this complaint to the Financial Ombudsman Service. One of our Investigators considered the complaint and initially thought that it should be upheld as he thought the instruction to disinvest the portfolio shouldn't have been accepted.

Waverton didn't agree with this, and our Investigator reconsidered the complaint. He said it was established that one of the executors did want to disinvest the portfolio to cash. And this was a reasonable decision at the time given the turbulent investment markets following the start of the Covid-19 pandemic. And he thought that if both executors had been asked to give their agreement it's likely that they would have done, and it would have been right for Waverton to act on this. He thought the £1,500 compensation Waverton had offered as a reasonable way to resolve the complaint.

The estate of Mrs M didn't agree. It maintained that the executors did not have the legal title to instruct any movement or sales of the portfolio as confirmation had not been granted. The portfolio cannot be actively managed until confirmation takes place. The second executor did not have contact with Waverton to discuss this at the time the decision was made.

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.

The estate of Mr M has said that this complaint should be upheld, in the main, because it thinks the executors didn't have the power to instruct Waverton to take steps to disinvest Mr M's portfolio. This is because confirmation had not been granted. And the estate of Mr M believes it would only have had the power to give this instruction after confirmation.

I don't think this is correct. As I understand the law that surrounds this issue it's settled that an executor derives their title and authority from a will, and not from the probate or confirmation process. Any property of the deceased vests to the executor on death.

The probate, or confirmation process, acts as confirmation and legal recognition of these powers. And confirmation is the only way, under the rules of a court, that an executor can prove their title and authority.

So, I think it's reasonable to say that executors have a duty, and the power to, administer and manage an estate under the terms of a will. This is before confirmation is granted. And they shouldn't be impeded from doing this unreasonably. But it must be borne in mind there is also a risk that a probate or confirmation might not be granted. And it may be decided that executors do not have the standing to manage the estate, for example if a will is not accepted.

This general framework has led to the situation where businesses will usually act on some instructions before confirmation is granted, for example releasing lower amounts from a deceased estates bank account or changing investments. And it is common for businesses that manage investments to allow executors of a will to disinvest a share portfolio before probate is granted. This can be a prudent thing to do particularly if the value of the portfolio at the time of death is being used to calculate any inheritance tax liability, as any future falls in value can complicate this process. But releasing larger amounts of funds from a bank or investment, or finalising more complex transactions, would usually require confirmation to have been completed.

And this is reflected in the situation here. Waverton acted on an instruction given by an executor before confirmation. The investment manager has also confirmed that it would have disinvested this portfolio if the executors of Mr M's estate had requested it directly, subject to having sight of the will and a completed letter of indemnity. But confirmation was required before the portfolio could be fully closed and the funds distributed to the beneficiaries of the will, as they were significant.

This means that I have to decide if it was reasonable for Waverton to have acted on the instruction to disinvest the portfolio, given the information it had at the time. And if it wasn't reasonable, what should have happened instead.

Waverton has accepted that it wasn't correct to act on the instruction it was given to disinvest the portfolio. It should have asked for agreement from both executors and had sight of the will before it did this. I can accept that situations such as this were complicated due to the Covid-19 pandemic, but it's agreed that it should have acted differently here. So, I've thought about what would have happened if it had requested sight of the will and sought the instruction of both executors before it acted.

As I've said above, if Waverton has requested sight of the will it would have known that Mrs M was the first executor and the main beneficiary of the will. And Mr M was the second

executor. I think its clear Mrs M did want to disinvest this portfolio and she gave a definite instruction, as an executor and the main beneficiary of the will, to do this.

And whilst the second executor wasn't part of the instruction to disinvest the portfolio. I think it's likely that if asked he would have agreed. I've seen no persuasive evidence, either from the time or as part of the complaint correspondence, that Mrs M was acting on her own against the wishes of the second executor. And it's relevant to note that Mrs M and the second executor are married and would likely have discussed this. And the second executor would also have been aware of his status as an executor and his responsibilities.

Taking all of this into consideration, I think it's reasonable to conclude that if Waverton had acted correctly then the disinvestment of the portfolio would still have gone ahead. So, I don't think it's fair for Waverton to compensate the estate for any future rises the portfolio would have had if it had remained invested.

I don't think it's entirely relevant to consider whether Mr M's estate could have given an instruction to reinvest the portfolio. I don't think it's likely they wanted to actively manage the portfolio over this time. I think the estate took what they thought were reasonable steps to preserve the value of the investment given some challenging investment circumstances.

Waverton has agreed that it should pay Mrs M's estate £1,500 for the distress and inconvenience it caused due to its error. It has been established that it made a mistake here and this would have been distressing for the consumers at what would have already been a difficult time for them. I think it's fair that Waverton pay this to resolve the complaint.

Putting things right

Waverton should pay the estate of Mr M £1,500. If Waverton has already paid this, it does not have to pay this amount again.

My final decision

For the reasons I've explained, I partly uphold the estate of Mr M's complaint.

Waverton Wealth Planning LLP should put things right by doing what I've said above.

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

Andy Burlinson
Ombudsman