

## **The complaint**

Mrs B complains about the advice she was given by Advance Investments Limited (Advance). In particular, she says she was misadvised about the impact the investment could have on a future application for care funding.

Mrs B is represented with this complaint by her son and daughter, who are also attorneys appointed to act on her behalf.

## **What happened**

Mrs B originally held two investment bonds. In 2015, she was advised by Advance in regard to the encashment of those two bonds and reinvesting the proceeds in an international offshore bond. She went ahead with the advice.

An application for care funding support was made to the local authority in 2022, once the level of the investment had fallen to what the attorneys thought would mean there would be financial support. However, the application was declined on the basis of deliberate deprivation of assets from 2015.

Mrs B complained to Advance, through her attorneys, in October 2022. They said that the advice should never have been given in 2015, as it meant the reinvestment saw the funds assessable and included in her assets for the purpose of the care funding application. They said that the amount would have been disregarded had the original bonds remained invested and that Advance should have known this.

Advance responded to the complaint in December 2022. They said that they had attempted to have the proceeds paid directly to the new provider in 2015, but that hadn't been possible and so they weren't sent to Mrs B to forward on. They said the advice was given so to achieve a better return for Mrs B.

Advance didn't feel they had done anything wrong and didn't agree with the decision from the local authority. They said the source of the new investment was an existing investment and therefore shouldn't be considered under the assessment.

The complaint was brought to our service for an independent review. Our investigator looked into it. She thought the 2015 advice was suitable and didn't think Advance should be held responsible to the bonds becoming admissible in the later funding application.

Mrs B's representative responded in full and provided further evidence from who they deemed to be a care funding specialist. They also provided the Local Government Ombudsman (LGO) appeal decision which upheld the local authority funding rejection. They say this evidence shows that the 2015 advice was wrong as the funding application was intended and the adviser was aware. They said it was foreseeable that the advice would mean the application would be rejected and they said that it showed that had the 2015 advice not been given, the application would have been accepted. Causing Mrs B significant financial loss.

As no agreement was reached, the case has been passed to me to reach a decision. I issued a provisional decision on this case on 19 September 2024, an extract of which forms part of my decision below:

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 currently intend to uphold the complaint. I'll explain why.

I would like to start by making clear that I am considering whether the advice given in 2015 was suitable. At the time Mrs B was invested into two investment bonds with a total value of approximately £135,000. She was said to be looking for better growth and was advised to encash the two bonds and reinvest the proceeds into another bond. Having reviewed the file in full, I haven't seen enough to conclude that this advice wasn't suitable for her objective of better growth or her attitude to risk at the time.

However, the focus of this complaint is that the advice wasn't suitable as Mrs B's attorneys were intending a future care funding application and didn't want this advice to detriment their position with that. I am satisfied from the suitability report that the advisor was aware of this. He mentions, "We also discussed the position with your mother's capital as it may be assessed by the local authority, should she need to have nursing care". He also says, "Care should be taken to ensure that the deliberate deprivation rules are not revoked". I am satisfied that a future funding application was foreseeable by the advisor. And further, that ensuring Mrs B's assets were kept outside of the assessment formed part of her overall financial objectives. I therefore think in order to give suitable advice it was fair and reasonable for the adviser to take this into account.

The advisor was giving advice specifically noting the need for care and utilising the support funding from the local authority. Acting with due skill and care – and in order to give suitable advice – the advisor would therefore reasonably need to take into account the relevant regulations and guidance.

I am satisfied that the guidance at the time was clear. Annexe B, Section 54 of the Charging for Residential Accommodation Guide (CRAG) says, "Where an investment bond includes one or more element of life insurance policies that contain cashing-in rights by way of options for total or partial surrender, then the value of those rights must be disregarded as a capital asset in the financial assessment". From the evidence provided, I am satisfied that the existing bonds at the time of the 2015 advice met these criteria.

The advisor also needed to take into account the guidance regarding deliberate deprivation of assets. Here is stated that anyone who places funds into investment bonds, where a motive for the investment is to avoid a care fees charge, runs the risk of triggering the deprivation rules and having the value of those bonds treated as a capital asset for the purposes of means-testing. Paragraph 9(g) of Annex E of the guidance for England states this includes, “assets have been used to purchase an investment bond with life insurance”.

Whilst the advisor couldn't have known for sure the outcome of the LA or LGO decision, taking out a new bond when the advice was about care fees clearly at least introduced a significant risk the capital would no longer be disregarded. A new investment was being made which was stated as being intended to avoid the money being assessable for the purposes of the care funding. I'm satisfied it was therefore likely, and foreseeable, that this may well have led to the bond being considered under the deliberate deprivation rules above. In my view, the risk this introduced in terms of the likely cost Mrs B would have to bear were she unable to secure local authority funding for her care, outweighed the potential benefit of better returns and meant the advice wasn't suitable for Mrs B's overall circumstances and objectives

In summary, Advance were giving advice specifically noting the need for care and utilising the support funding from the LA. They needed to act with due skill and care in order to give suitable advice. Therefore, taking into account the relevant regulations and guidance. I find this to be explicit that the original bonds would have been disregarded. The advice to take out the new bond clearly introduced a significant risk that it would be considered a deliberate deprivation of funds, and no longer disregarded. I believe this to have been evidenced by the decision and summary of the LA and LGO. This made the advice unsuitable and Advance should put things right for Mrs B as set out below.

Advance responded in full and amongst their points in reply, they said in summary:

- The LA should be consulted as to whether the previous 2010 advice and bond investment, would also have been deemed a deprivation of assets. Suggesting the 2015 advice didn't change the ultimate decision and cause any impact.
- Following response from the LA, Advance said, noting the factors the LA would consider, the 2010 advice showed deliberate intent to avoid care fees. They believe the LA would have deemed the 2010 advice as a deprivation of assets and therefore no redress is due.

Mrs B's representatives also responded in full. In summary, they said:

- The LA have not given any indication or basis to suggest that the original bonds would not have been disregarded and the LGO has stated that they believe the bonds would have been disregarded.

They focused their comments in response to the redress. They said:

- It will be difficult to determine the notional value of the bond had it stayed in place. Due to time and that the bond has subsequently been allocated to a with-profits fund and bonuses will be difficult to determine.

- Suggested calculating notional value of new bond (following 2015 advice), especially as 2015 advice hasn't been deemed unsuitable, just that it caused a failed funding application.
- As well as providing figures, they also made a claim for Personal Expense allowance which they believe Mrs B would be able to retain.
- They also had concerns regarding the annuity purchase, the time it would take and whether Advance could progress with it. They raised concerns regarding the level of benefit the annuity would provide and that costs have recently increased due to more care being needed. They also raised concern regarding inflation and annuities rising to a fixed level.
- They also said distress and inconvenience should be awarded as well as costs incurred for obtaining expert advice to help resolve the matter.

### **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, and having considered the responses, my decision remains as I set out provisionally. Let me explain why.

Advance's response has focused on whether the investment would have been considered a deprivation of assets regardless, following the 2010 advice. To establish this, I asked the LA for their thoughts, but they declined to give a definitive answer. I therefore have to base my decision on a balance of probabilities and what I think is more likely than not, the LA would have decided on the 2010 advice.

In considering this, I have regard for the guidance and also what the LA have said they would have considered. This includes the adult's care needs at that time, the likelihood of the adult needing care in near future, the reasons why this type of bond was chosen to invest capital, what financial advice taken prior to investing capital and whether the adult or representatives were aware of charging policies and financial thresholds at that time.

Having considered this, I think it is most likely, the invested bond following the 2010 advice, would have been disregarded, and not considered a deprivation of assets. I say this because, whilst there was an eye to long term planning and a consideration that care may be needed in the future, there was no need for care in 2010 or any suggestion of an increased likelihood of needing care in the future. I believe that the guidance is quite explicit that the funds would be disregarded if there was no foreseeability, of a likely need for care at the time of the investment being made. Here the situation in 2010 was clearly different to that in 2015.

In summary, Advance have not provided anything that changes my findings on this case. I don't believe the 2015 advice they gave was suitable as it introduced a significant risk that Mrs B's new bond would be considered to be deliberate deprivation of assets and caused a failed care funding application. I believe, based on a balance of probabilities, the funds would have been disregarded following the 2010 advice, having considered the guidance and considerations for the LA. And so, I'm satisfied that but for B's advice Mrs B would more likely than not received LA funding for her care needs. I therefore remain satisfied that B should compensate her for that, and as far as possible put her in the position she'd have been in but for their advice

Mrs B's son has provided several comments in response to the redress I proposed in my provisional decision. I remain of the view that what I set out is a fair and reasonable way to resolve this complaint in all the circumstances. I appreciate their comments regarding the complexity in calculating the notional value of the 2010 bond, but that is for Advance to work out following this decision. I'm satisfied this can be reasonably achieved based on the investments made within the bond. I have to put Mrs B as close to back to the position she would have been in, had the 2015 unsuitable advice not been given. And that is that the 2010 portfolio bond would have remained in place. I also note the concern regarding the difficulty in purchasing the annuity. However, I am satisfied one is available and have actually been provided with a quote from Mr B. Whilst I acknowledge the risk of care costs increasing, I have weighed up the need for finality with my decision and remain satisfied this is the fairest way to compensate. Mr B has also argued that Mrs B would be entitled to a personal expense allowance and that should be factored into the threshold amount. However, I can't be sure that would be granted and as above, whilst I have taken everything into consideration, no redress will fit perfectly. I am satisfied this is the fairest way to compensate Mrs B.

I maintain that I won't be awarding any compensation for distress and inconvenience caused or any refund of third-party advice costs. I can't award compensation for inconvenience caused to a representative (Mr B) and I haven't been provided with evidence that this has caused Mrs B any distress or inconvenience directly, such that it would be fair and reasonable for me to make a financial award to compensate for it. Further, Mr B sought the help of an independent advisor to help with the case and I appreciate the comments they have provided. However, he made the decision to do so of his own accord as a help to himself and we don't award costs to a third-party where a case could have been brought entirely independently. The redress remains as I set out previously.

### **Putting things right**

Had Mrs B's bonds not been encashed and reinvested, I'm satisfied she would have used her other savings to pay for care until her assets reached the limit at which she could get local authority support.

To calculate the position Mrs B should now be in Advance should:

- Assume Mrs B's bonds had remained in place, and calculate the notional value of what they'd be worth now.
- Assume Mrs B would have spent her other money until she was left with assets of £23,250.
- Assume after that point Mrs B had received funding to pay for her care.

So, the positions she should have been in ("A") is in effect the notional value of her existing bonds, plus £23,250.

Mrs B's actual current position should be calculated by totalling the value of her actual assets now, including the bonds Advance recommended ("B")

If A is greater than B, Mrs B has suffered a loss and Advance should pay her the difference between the two figures.

Going forward, Mrs B will continue to have to use money from her bonds to pay for her care. Had she been suitably advised, this wouldn't be the case. I therefore recommend that Advance sources and purchases an annuity on Mrs B's life, to pay an income stream equal to the amount Mrs B is currently withdrawing from the bond each month to fund her care. For simplicity, I think it's fair for Advance to use the average monthly withdrawal across the last 12 months when working out the value of the annuity it needs to purchase.

I'm satisfied this should allow Mrs B to pay for her care for the rest of her life without needing to spend any of her other assets – which would have been the case had she received local authority support.

I have considered whether Advance should pay any compensation for the impact of any distress and inconvenience caused. However, I am satisfied that this has been suffered mainly by the attorneys (who aren't the eligible complainant) and so I am not persuaded to award any.

### **My final decision**

My final decision is that I uphold this complaint and that Advance Investments Limited should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 6 January 2025.

Yoni Smith  
**Ombudsman**