Financial Ombudsman Service

complaint

Ms G complains, on behalf of Miss B, that Thornton & Baines Independent Financial Advisers Limited wrongly advised her to cash-in existing investments and reinvest the money in a new bond inside a discounted gift trust (DGT). She has now lost access to this money and cannot afford to pay for her ongoing care costs.

background

The background and circumstances of this complaint are set out within my provisional decision of 5 January 2017. A copy of this is attached and forms part of this decision.

Ms G said:

- Miss B definitely paid £85,000 into the bond but beyond the £34,000 she can't be sure where the rest of the money came from; Thornton & Baines' planning report only has one page referring to assets and doesn't show where the overall £85,000 should come from

- Thornton & Baines recommended she sell a cash ISA worth £17,979 in March 2011

Thornton & Baines said:

- It only advised Miss B to cash in the Prudential bond (valued at £34,000). She subsequently surrendered this bond and four other investments (including a former PEP and TESSA) valued at around £80,000. She invested a total of £85,000 in the new bond placed, with the DGT, and kept the remaining £29,000 on deposit

- There were no encashment penalties from the various surrenders. The bond produced a small chargeable gain but this was within Miss B's capital gains' allowance so she didn't have to pay any tax

- In 2013 she invested £30,000 in a collective investment which, in part, utilised her ISA allowance for that year

- It received a 5% fee for setting up the bond and 2% for setting up the discounted gift trust (DGT). This amounted to £4,250 and £1,700 respectively

- The bond is now worth £78,362; £24,436 has been taken in income withdrawals, meaning it has produced £102,798 as of today

- Miss B made her will five years before the 2010 meeting so it was reasonable to suggest she update this

- She was having regular check-ups after a breast cancer operation five years earlier and by 2011 she was more likely to die than need long-term care

- The estate was actually valued at £362,000 but the IHT calculation was based on £350,000, hence the IHT liability recorded as £10,000; based on the correct figure of £362,000 it was nearly £15,000

- Miss B was happy to gift some capital while retaining the right to draw income of 5%, partly to pay for home improvements and to boost her emergency fund

- The Fact Find recorded that she wanted to keep her bank funds for emergencies, to revise her will and encash the £34,000 bond to put this in a DGT-wrapped product

- Alternatives were discussed along with long-term care needs

- The DGT resulted in a large sum being immediately removed from her estate for IHT purposes, with more to follow; it also helped built in some leeway for future growth in the value of her estate

- The money in the DGT can't now be used for care costs and is unlikely to be considered as asset deprivation by Miss B's local authority; it may be the only part of her estate that remains intact in the long run

I sent Ms G a brief summary of Thornton & Baines' submission and asked her if she had any further information about the additional £ 51,000 Miss B invested.

She said a different Thornton & Baines advisor recommended she withdraw £50,000 from her investments and put this money in a bond within a DGT back in 2008; another one made the same recommendation in 2009. She enclosed extracts from two documents which seemed to confirm this.

I asked Thornton & Baines if it had any additional records relating to these extracts.

It provided a full copy of the 2008 Estate Planning Report in which the advisor recommended Miss B to surrender £50,000 from her existing investments and put the money in a bond set up within a DGT.

This report said Miss B was a low risk investor and recommended putting the bond money in a cash fund, leaving open the option of drip-feeding money it into equities at some future date. It did not specify where the £50,000 should be taken from. Thornton & Baines didn't supply any information about the 2009 letter.

It also reiterated a number of its earlier arguments, and added:

- My comments about Miss B's potential IHT saving were subjective; this could only be known upon her death. Its notes stated she specifically approached it about IHT advice, and chose to come to Thornton & Baines because of its expertise in this area

- She wished to bequeath £85,000 to her niece and nephews, and this was the core reason for its recommendation

- If she hadn't set up the DGT her brother would've acted against her wishes and used this money for her care

- The advisor was under the impression she gifted money to her family, and this is another reason why the income would've been useful

my findings

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

In my view Thornton & Baines' recent submissions largely expand on its earlier arguments. For the reasons previously outlined, I still don't believe its advice was suitable.

Its advisor's report said Miss B wanted to take a regular income without eroding her capital, reduce her IHT liability and protect her funds from stock market fluctuations. I am not persuaded there is sufficient evidence to justify either of the first two claims while I don't believe the advice met the third objective.

Firstly, I don't believe there is sufficient evidence to conclude Miss B wanted or needed to take an income from her investments. From what I've read, she hadn't taken any income from her previous investments and her pension income exceeded her outgoings by more than £400 month with the surplus going into her current account. The income she was required take from the DGT-held bond simply accumulated in her bank account.

After this £85,000 investment she still had nearly £70,000 left in cash and other easily-accessible sources. I've seen no persuasive evidence to suggest she either wanted or needed to build up her 'emergency fund' as Thornton & Baines claims. As a result of cashing in other investments she appeared to have an additional £29,000 in readily-accessible sources. Overall, I don't accept Miss B either needed or wanted this extra income.

If Miss B didn't want or need to draw an income from her investments, there was no need for her to surrender her with-profits bond (or other investments) and reinvest most of this money in a new bond within a DGT. She could have moved some of her existing investments into a different type of trust without encashing them or paying for new set-up fees. This would've still offered some IHT relief which Thornton & Baines says she wanted.

If she intended to leave up to £85,000 to her brother's children this sum could easily have been gifted via a bare or discretionary trust.

Given the modest sums involved (compared to the overall size of her estate) she could also have made significant transfers via her annual exemptions and/or exemption applying to lifetime gifts out of income. I don't believe the advisor fully explored these options.

That said, I'm not convinced Miss B had a sufficient IHT liability to warrant surrendering any of her existing investments in order to reinvest the money in a DGT-held bond.

Whether Miss B's IHT liability at the time was £10,000, or closer to £15,000 as Thornton & Baines now says, her estate was worth at least £350,000. Even the higher IHT liability wouldn't have prevented her leaving the money concerned to her brother's children.

I've considered Thornton & Baines' most recent evidence including the references to various attachments. I don't believe this demonstrates Miss B specifically approached it for IHT advice or that this was a priority for her. From what I've read, these documents simply indicate that advice meetings took place. In any event I don't believe its actual advice was suitable.

I'm also not persuaded the replacement bond was suitable for her circumstances or objectives based on the information available. In particular, I don't see how it meets Miss B's objective, as recorded by the advisor, of protecting her funds from stock market fluctuations.

Finally, I considered Thornton & Baines' evidence about the long-term care issue, and how the DGT may well prove beneficial in protecting this money from being included in any local authority financial assessment.

But the advisor didn't recommendation the DGT as a means of protecting her money from the local authority, and I accepted Thornton & Baines view that care costs didn't appear to be a priority for Miss B at the time. I've therefore solely considered whether its investment/ trust recommendations were suitable for Miss B's declared needs and objectives at the time.

<u>compensation</u>

I've not seen any evidence that Thornton & Baines recommended surrendering any investments beyond the £34,000-valued bond (in 2010). Miss B may well have been influenced by its previous IHT/DGT recommendations when she chose to surrender other investments and invest an additional £51,000 in this bond. But I can't safely say it recommended her to do this.

But it did recommend she put £85,000 into the new bond and place this is in a DGT, so my compensation encompasses this element of its advice.

I therefore instruct Thornton & Baines to pay compensation as follows:

a) It should compare the current value of her surrendered Pru bond, assuming she had not surrendered it, with the current value of the comparable investment in the replacement bond. As £34,000 of the £85,000 came from the Pru bond, it needs to compare the equivalent proportioned value (34/85ths). This is because we are only concerned with the part of the investment that comes from the £34,000.

   It order to fairly take account of the income withdrawals from the replacement bond, it should assume 34/85ths of these came from the original bond's inappropriate surrender. It is therefore entitled to deduct this portion of the withdrawals to produce a fair comparison. For simplicity, I suggest it carries out this deduction after it has completed the 'loss' comparison above. If this final calculation shows Miss B still suffered a loss it should pay this difference.

b) It should repay any standalone set-up fee related to the entire £85,000 new investment which I believe is 5% along with any ongoing fees not included in the comparison above. It should add 8% simple interest to each payment from the date it was taken to the date of settlement of this complaint.

   I am satisfied it should pay back all the set-up fee because I don't think there is sufficient evidence to justify exposing any of Miss B's money to the risk level posed by this bond. In this respect, I believe the previous advisor's analysis of her attitude to risk was more likely to reflect her attitude to this issue.

c) It should repay all the costs, including ongoing fees, associated with setting up the DGT and the placing of £85,000 in it. It should also add 8% simple interest from the date each fee was paid to the date of settlement of this complaint.

my final decision

I uphold this complaint and instruct Thornton & Baines Independent Financial Advisers Limited to pay compensation as outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss B to accept or reject my decision before 10 April 2017.

Tony Moss
ombudsman

copy of provisional decision

complaint

Ms G complains, on behalf of Miss B, that Thornton & Baines Independent Financial Advisers Limited wrongly advised her to put investments in a discounted gift trust (DGT) which has meant she can't afford to pay for her ongoing care costs.

background

At the time of the sale Miss B had around £152,000 in cash, ISAs, unit trusts and with-profit bonds. She was single, with no dependants and wanted to leave some money for her niece and nephew.

In his recommendations' letter, the advisor recorded that Miss B had three priorities:

- To draw a tax-free income without eroding her capital
- Reduce her IHT liability
- Protect her funds from stock market fluctuations

He said that her overall estate had a potential tax liability of around £37,000 which could result in an IHT bill of around £7,500. He recommended she surrender her with-profits bond valued at £34,000 and put this in a new bond to be placed in a DGT. He said this would secure an immediate IHT saving of around £13,000 with the entire sum becoming free of IHT liability after seven years.

He said this would ensure she could leave money to her chosen relatives. According to Miss B's representative, she also agreed to cash in various ISAs, which meant she invested a total of £85,000 in the new bond.

Based on Miss B's responses to a series of investment risk questions, the advisor categorised her as a 'motivated investor' (level 7 on its risk scale), willing to accept a higher level of risk to achieve higher return in the long run. She was, by definition, prepared to accept considerable fluctuations in the value of her money, including it falling by more than a quarter.

Ms G says the advice wasn't suitable as Miss B's long term care needs hadn't been considered and the adviser failed to carry out a holistic planning review.

Thornton & Baines rejected her complaint, saying:

- Miss B's priorities were to boost her income and reduce her IHT liability as she wanted to leave as much as possible to her brother's children
- She did not need to access to the capital itself and said she was happy to take some risk with her money; she also said she did not want to plan for any future care needs
- She first met one of its advisors to discuss this in 2008 and had numerous meetings up to 2010, and didn't decide to go ahead until 2011 so she had ample opportunity to consider whether to go ahead with its recommendation
- Her existing with-profits bond didn't benefit from IHT relief so couldn't meet her requirements
- She referred to her brother as her financial advisor and he was present at several meetings, agreed with the recommendation and became a trustee of the DGT

An adjudicator at this service didn't feel the complaint should succeed.

She said Miss B was provided with an estate planning report which set out the reasons for the recommendation. She noted that Miss B's brother said he discussed this with his sister and she insisted that she understood what she was doing to the point of becoming upset that he was questioning her judgment.

Ms G did not agree, and said:

- She accepted Thornton & Baines had produced a suitability report but said this didn't include a holistic view, looking at the bigger picture and Ms B's objectives
- The adviser should have questioned the need to reduce IHT liability given Miss B was single with no dependents and had little need to protect her estate from IHT
- Whether or not long-term care was a priority, the costs of care should've been pointed out
- Miss B didn't need income from the bond, and had already provided for her niece and nephew in her will and so no trust was needed
- Miss B's brother was adamant this advice was not in his sister's best interest, but had to bend to his sister's will to avoid a family split

Thornton & Baines said:

- Holistic planning did take place but this does not mean that any plan taken could meet all her future needs
- It was not made aware Mr B disagreed with his sister
- Mr B could have contacted it separately to express his concerns
- Miss B was of sound mind when she took advice. She attended meetings with her brother and took documentation to read between the meetings

As no agreement has been reached, this complaint has been referred to me for review.

my provisional findings

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

In order to fully assess the merits of this complaint I asked Ms G various additional questions. She said:

- Miss B did not take an income from her previous with-profits bond
- Her income from various sources exceeded her expenditure by roughly £400 a month, and the advisor recorded this
- The monthly income from the DGT went into Miss B's current account
- The cashed-in with-profits bond had a cautious risk profile but she is not particularly concerned with the risk level of the replacement bond
- Her prime concern remains the suitability of the inheritance tax advice given Miss B had no dependants and a modest IHT liability at the time – advice which resulted in £6,000 being taken in fees

- Her original will bequeathed a total of 30% of her estate, approximately £85,000
- Thornton & Baines subsequently tried to persuade Miss B to surrender her cash ISA and put this money into the new investment, but her brother intervened to stop this; he always felt she should've left her money where it was so she could access it as and when a need arose

Ms G's latest information reinforces my view that this complaint should be upheld as I don't believe there is sufficient evidence to justify the advisor's recommendations which don't appear to match up with Miss B's objectives or circumstances.

It's obviously unfortunate that Miss B isn't able to offer her own evidence about what was discussed with the advisor including whether there was sufficient consideration of her future financial needs including potential care costs. So I can't safely say whether this issue was properly discussed and/or whether Miss B decided this was not something of concern at the time.

That said, I'm not persuaded the advisor was justified in recommending she surrender her existing with-profits bond (or other investments) in order to reinvest the money in a new bond inside a DGT.

Firstly, the advisor asserts that one of Miss B's key objectives was to draw a tax-free income, pointing out that a DGT is ideal for this purpose. But I can see scant evidence to support this conclusion. His own report states that Miss B only spent around two-thirds of her pension income, resulting in over £400 a month remaining in her current account.

I've seen nothing to suggest she needed or wanted the additional income which she was required to take as a result of an investment in a DGT. According to Ms G, this extra money simply accumulated in her current account, in effect increasing her IHT liability (as it sat within her estate).

Crucially, as Miss B didn't need to take income from any investment she did not need to cancel her existing bond (or ISAs) and reinvest the money inside a DGT. If she had wanted, as Thornton & Baines claims, to reduce her IHT liability and ensure this £34,000/£85,000 went to particular beneficiaries she could have simply put the existing bond and ISAs into a different type of trust.

However, I am not persuaded Miss B had a sufficiently large IHT liability to warrant doing this, particularly given the size of her overall estate and the sums she was hoping to bequeath to her brother's children.

At the time of this advice Miss B's estate was worth just over £350,000. £37,500 of this was potentially subject to IHT, which could result in a possible tax bill of around £7,500. So even if she'd done nothing about her IHT liability, this would still leave around £342,500 to be distributed to her beneficiaries.

I've seen no evidence to support Thornton & Baines' view that she wanted to ensure as much money as possible went to her brother's children possibly including, say, the full £350,000.

The evidence suggests she may have wanted to leave each of the children around 10% of her estate, so perhaps as much as £35,000 each. But given the value of her property and investments this was easily achievable without putting any money in trust. With no dependants or other bequests there was no realistic prospect of her estate being unable to distribute this sort of sum to her brother's children.

Overall, I don't believe there's sufficient evidence to justify cashing-in her existing investments or reinvesting the money in a new bond inside a DGT. I believe she'd have been best advised to keep her existing investments, and retain the flexibility of deciding if and when to put these into trust if her IHT liability increased – and this issue became a priority for her.

I suspect it is now too late to dissolve the DGT or withdraw the bond from it, so my compensation cannot effectively compensate Miss B for this poor advice by giving her back control over the money which has been put in trust.

Thornton & Baines should, however, calculate the current value of Miss B's original £85,000 investment (if this is the correct figure) if she had kept her existing ISAs and with-profits bond rather than surrendering these. It should then compare this value with the current value of the replacement bond.

If this shows a loss I intend to instruct it to pay Miss B this amount and add 8% simple interest as appropriate. In carrying out this calculation it should take account of the monthly income taken from the replacement bond but assume this would not have happened under the original investments.

As yet I've not seen all the relevant information about what charges/fees Miss B paid as a result of the surrender of existing investments, the setting-up of the new bond and the DGT. I would like Thornton & Baines to provide this as part of its response to this decision. So I cannot say whether it will need to refund any fees which fall outside the loss comparison.

Finally, while Ms G refers to the overall investment in the DGT as £85,000, I've only seen details concerning the £34,000 which came from the surrendered with-profits bond. I would like both parties to provide evidence as where the additional £51,000 came from – assuming this is correct.

my provisional decision

I currently intend to uphold this complaint and instruct Thornton & Baines to pay compensation as outlined above.

Tony Moss
ombudsman