

complaint

This complaint is being made by Mr M as attorney for Mr H.

Mr M's complaint is about The Prudential Assurance Company Limited's ('Prudential') late identification of an error with a trust of Mr H's policy set up in 2007.

On realising the trust wasn't correctly set up, Prudential effectively cancelled the trust, leaving potential inheritance tax ('IHT') implications for Mr H's estate when he passes away.

background

Prudential wrote to Mr M in February 2007, asking that he sign a declaration of trust as Mr H's attorney, and also requesting trustees' signatures. Mr M and the other attorney, Mrs W, signed as trustees. Prudential confirmed receipt of the signed documents in a letter dated late February 2007, and the policy was supposedly then in trust.

In June 2014, Prudential wrote to Mr M saying that, following a review of its files, it had found that the declaration of trust hadn't been signed by Mr H himself but by Mr M as his attorney. It said a policy can't usually be placed in trust under an enduring power of attorney, unless the attorney's powers have been extended by a court order. It said it had 'unregistered' the trust, and had placed the policy directly into Mr H's name.

Prudential offered Mr H an early redemption option in July 2014, as he'd reached the age of 90. This wasn't taken up.

In November 2014 Mr M complained to Prudential. He said that Mr H didn't want to surrender his policy, and he raised concern about the trust being unregistered. He understood the error would need to be corrected but he considered Prudential should accept responsibility for the declaration of trust being set up incorrectly. He asked it to meet the costs of setting up a new trust.

Prudential responded in December 2014, apologising for its failure to notice that the trust hadn't been set up correctly. It offered compensation of £150 for the inconvenience caused. It didn't consider it should pay for any costs for setting up a new trust, as these costs would always have been necessary.

Our adjudicator considered the complaint and concluded it should be upheld. In summary he said:

- Prudential should have checked the trust was set up correctly at the start, in its administration function for Mr H's policy. It had agreed in its correspondence with the adjudicator that its process should have included checks for this.
- As the trust wasn't set up correctly, there was a potential IHT liability on Mr H's death.
- While Prudential was responsible for checking the trust was set up correctly, it had encouraged Mr M and Mrs W to discuss the setting up of the trust with a solicitor, accountant or other professional adviser. So Mr M and Mrs W were also partly responsible and should have checked whether a court order was required.

- Mr M had argued Prudential should cover the associated costs, including any legal fees, of setting up a new trust. But if Prudential had identified the error with the trust in 2007, any costs would still have been necessary. So Prudential shouldn't be liable for these costs.
- Prudential should meet any IHT liability which arose because of the trust not being in place, provided that a new trust was set up at Mr H's expense now.
- Prudential's offer of £150 was fair recognition of the inconvenience caused by its failure to spot earlier the flaw with the trust.

Prudential responded and explained it was willing to agree to the adjudicator's conclusions, but asked when the seven year period of potential IHT liability would begin. The adjudicator confirmed he would write to Mr M and present Prudential's offer, allowing him two weeks to respond. The liability would begin at the response date, should Mr M agree with the findings.

Mr M didn't agree with the adjudicator's findings or accept Prudential's offer. He made a number of points in reply. The adjudicator considered Mr M's points and replied to him, explaining why he maintained his opinion that the redress he recommended was appropriate.

my findings

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

The central question I have to decide is what should be the redress provided by Prudential. Prudential clearly had a major part to play in causing the situation which arose and has admitted as much. I don't think there's a case for reducing the compensation Mr M receives on Mr H's behalf, on the ground that Mr M was also partly to blame. In other words, I think Prudential is mostly if not completely to blame, on any analysis.

That still leaves the question what that compensation should be.

The usual aim of our redress is to put the wronged party in the position they would have been in if they hadn't been wronged. I don't agree, as Mr M has suggested, that it was an option for Prudential to treat the trust as if it had been valid when it wasn't (by just substituting Mr H's signature in 2014 for that of Mr M as attorney). Trust formalities matter, as they are expressions of intention and a court will always construe them objectively.

So what were the potential harmful consequences of the trust not existing since 2007?

inheritance tax

Prudential has already agreed with the adjudicator's recommendation to indemnify the estate against any additional inheritance tax.

extra costs

Mr M argues Mr H will have to pay costs now when setting up a replacement trust which he wouldn't have had to pay back in 2007.

possible financial prejudice to others

Mr M says that Mr H's wife and the beneficiaries of the trust may suffer financially.

inconvenience

Mr M says Mr H has suffered unnecessary inconvenience, including by the fact that Prudential just cancelled the trust without any notice or consultation.

Taking these points in the same order:

- I note Mr M says inheritance tax isn't really an issue anymore. But I will leave the indemnity in as part of the redress. I too think it should be conditional on Mr H creating a trust of the policy now, as this will serve towards mitigating the liability, even if not immediately. In fairness, I think the 'seven year period' should start as I've described it below, as before now Mr H's complaint hasn't been finally determined.
- Mr M hasn't been specific about the changes in tax rules and documentation causing extra costs. On the whole I think that if Mr H would pay these sorts of costs now, he would have paid equivalent or similar costs earlier.
- Our rules don't allow us to award compensation for harm caused to third parties in this situation. In any case, it seems to me the prejudice in question can be, and following discovery always could be, averted by simply creating a new trust.
- I've decided to increase the award for inconvenience from £150 to £300. As I've said, I don't think Mr M was significantly to blame for the situation that arose. I also agree with him that Prudential's communication and approach regarding the cancellation of the trust was poor.

my final decision

My decision is that I uphold Mr M's complaint for Mr H, to the extent I've described.

The Prudential Assurance Company Limited must do the following:

- It must pay Mr H £300.
- It must pay to Mr H's estate any extra inheritance tax that the estate has to pay solely because the trust wasn't set up properly in 2007. This obligation is unconditional if Mr H passes away within two months of the acceptance of this decision. Thereafter the obligation will be conditional on the policy having been put in trust on the same or similar terms as those in 2007 by no later than two months after the acceptance of this decision.

Prudential will not be obliged to pay any of the costs associated with setting up the new trust. Before being obliged to pay under the indemnity, Prudential will be entitled to receive from Mr H's estate such documents or other evidence as it may reasonably require in order to verify and quantify its liability under the indemnity.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision on Mr H's behalf before 4 January 2016.

Roger Yeomans
ombudsman