

complaint

Mr M complains, through his representative Mr M1, about the advice given to him and his late wife, Mrs M, to invest in a Discretionary Loan Trust by The Prudential Assurance Company Limited.

background

Mr and Mrs M were advised to each invest £200,000 in two separate investments bonds to be held within a Discretionary Loan Trust. If one of them died they wanted the money invested to be paid to the survivor.

I issued a provisional decision on this complaint on 27 September 2018 a copy of which is attached and forms part of this final decision. In short I found that Prudential didn't make clear that Mr and Mrs M needed to be named as beneficiaries in each other's wills in order for their objective to be satisfied.

But although I decided that Prudential was responsible for Mr M not receiving the money Mrs M had invested when she died, I wasn't satisfied that Prudential should pay him the amount he would've received if it hadn't got things wrong. This was because the money had instead gone to the children – in effect the children had received now what they would've received at some point in the future when Mr M passed away.

I decided that it wouldn't be fair and reasonable for Prudential to have to pay this amount again in the circumstances and that its offer of £5,000 compensation – made before referral to us and still available for acceptance - was more than I would've awarded for the distress and inconvenience suffered by Mr M.

I gave both parties the opportunity of responding. Prudential said it had no further comments to make. Mr M1 didn't agree with my provisional decision. He said he was very disappointed in my decision and as I had found Prudential had done something wrong – which it hadn't admitted – I should uphold the complaint.

Mr M1 also referred to the failure of the adviser to link the changing of the wills to the success of the advice and that the advice was badly executed and displayed incompetent administration on behalf of the adviser.

Mr M1 noted I had placed great emphasis on the fact the money had gone to Mr M's children not outside the family. He asked me to re-think the impact on Mr M of losing this money. He referred to two of the children having a current need for their share of the money so that they wouldn't be able to help Mr M out financially. He also referred to the fact that Mr M didn't own his current accommodation and had shown an interest in moving to a retirement house near to where his wife is buried.

Mr M1 said that Mr M hasn't just suffered distress and inconvenience but also has been materially financially impacted by the errors made by Prudential.

my findings

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

I have been provided with no further information or evidence by either party in this complaint. But Mr M1 has provided a detailed response to my provisional decision and argued strongly that Mr M should be compensated for the actual financial loss he has suffered.

I note Mr M1 has commented on the extent of what the adviser got wrong but this doesn't affect my findings. I have already decided that the adviser didn't give Mr and Mrs M the advice they needed about their wills so that their objective that Mr M would get back the money invested by Mrs M on her death was met. And what is currently in issue in this complaint is the amount of redress payable for the adviser's failings. This is not affected by the extent of Prudential's failings in this complaint, and I don't think I need to make any further comment on this.

Mr M1 has suggested that I should uphold the complaint because I have decided that the adviser didn't make clear what Mr and Mrs M needed to do with their wills to achieve their objective and Prudential hadn't admitted this. I note Prudential did accept the documentation it provided didn't make the position clear and upheld the complaint on that basis although I acknowledge it didn't accept the adviser hadn't discussed what needed to be done with the wills.

But my decision not to uphold was based on me not awarding as much for distress and inconvenience as Prudential had offered to resolve the complaint before it was referred to us. My decision about the amount of redress payable hasn't changed and even if I treated the complaint as upheld it wouldn't change what Mr M received.

I accept Mr M should've received the money from his wife's investment when she sadly died and understand why Mr M1 feels strongly that Prudential should pay Mr M the money that should've come to him. And in most cases we try and put the customer in the position they would've been in if something hadn't gone wrong.

But I also have to make decisions that are fair and reasonable. And, as I said in my provisional decision, I can't ignore the fact that this money has been received by the children, who are more likely, than not, to have got this money at some later date upon Mr M passing away.

In circumstances where the money has been received by the children I don't think it would be fair to ask Prudential to pay anything more. Whilst I accept that some of the children may have an immediate need for the money, they are also aware this should have been paid to Mr M and isn't money they expected to get.

I accept Mr M and Mr M1 will think it is unfair that I have not told Prudential it has to pay anything over and above the £5,000 it has previously offered given Mr M hasn't received the money from Mrs M's bond that he should've done. But as I have explained, I don't think it would be fair or reasonable for Prudential to pay Mr M the money received by the children in the circumstances of this complaint.

If Mr M wants to accept the offer of £5,000 made by Prudential he should contact it directly.

my final decision

For the reasons explained above and in my provisional decision I don't uphold this complaint and I make no award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 2 December 2018.

Philip Gibbons
ombudsman

COPY PROVISIONAL DECISION

complaint

Mr M complains, through his representative Mr M1, about the advice given to him and his late wife, Mrs M, to invest in a Discretionary Loan Trust by The Prudential Assurance Company Limited.

background

Mr and Mrs M and Mr M1 met with an adviser on 6 February 2016 and again on 19 March 2016 to discuss investing the proceeds from the sale of Mr M's business. The adviser recommended they invest £200,000 each into two investment bonds, one in Mr M's name and one in Mrs M's. The bonds were each to be held within a Discretionary Loan Trust. The only trustee was Mr M1.

Mrs M sadly died in June 2017 and the loan was repaid to her estate. Mr M wasn't a beneficiary of Mrs M's estate so didn't get back the loan amount.

Prudential upheld the complaint. It said the documentation didn't make clear enough that Mr and Mrs M's objective that Mr M would receive the capital from the loan trust on Mrs M's death wouldn't be met unless her will was amended. It said the documentation should have made it very clear of the need to change the will and the impact on the advice provided if this didn't happen. It also upheld the complaint that Mr M wasn't named as a trustee on the loan trust as Mrs M and Mr M wanted. It suggested trying to resolve the complaint by meeting with Mr M to discuss matters but this never happened and the complaint was referred to us.

One of our adjudicator's didn't think Prudential had done anything wrong. She said the adviser had noted that Mr M wasn't a beneficiary under Mrs M's Will and this was going to be looked at by Mrs M.

Mr M1 didn't agree with the adjudicator. In short he made the following points:

- Any conversation about Wills was about the remainder of the Estate not covered by the loan trust. It was Mr and Mrs M's clear understanding that the loans would be cancelled on death but the relevant part of the form wasn't ticked to allow that.
- The adviser made two false statements in the suitability report - It wasn't confirmed that Mrs and Mr M had Wills leaving everything to each other. And the adviser was never told the Wills were being amended.
- Prudential accepted it failed to link the change of Wills to the advice to invest in the loan trusts.
- It is believed that this is because the advice wasn't dependent on the Wills.
- The adviser gave Mrs and Mr M blank application forms which he then completed so the error in not ticking the appropriate box to ensure the loans would be cancelled on death.
- Mr M is eligible as a beneficiary of the loan trust but the trustees can only distribute the growth in the investment.
- It is agreed there was nothing wrong with the advice to invest in a Discretionary Loan Trust. The error was in the way the loan trust was set up.

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.

I note that the complaint was initially bought by Mr M but we said that it should be bought on behalf of the estate of Mrs M. I'm satisfied that the correct complainant is Mr M. The advice was given to him and Mrs M jointly and he is the person who has potentially suffered a loss as a result of what he says Prudential did wrong. The estate has suffered no loss as it has already received the money from the loan trust. The issue is about Mr M not being a beneficiary of that estate and the adviser's responsibility for that.

I don't think there is any dispute that Mr and Mrs M wanted to ensure that the money they invested through the loan trust would come back to the survivor when one of them died.

There were two ways Mr M could have received the amount Mrs M paid into the loan trust on her death. The first was an option that could be chosen within the application for the loan trust that cancelled the loan on death. This would have led to the money going into the trust to be distributed under the provisions of that trust. Mr M was a beneficiary under the trust along with his children. But as the trust was discretionary the trustee, Mr M1, could have decided to give the whole amount to Mr M if he chose.

The suitability report prepared by the adviser made reference to this option being discussed but that the loan was going to revert to Mrs M's estate to allow financial security for the surviving spouse.

This then left the second option, which was that Mr M would receive the benefit of the loan amount as a beneficiary under Mrs M's will. The adviser initially recorded that Mr M was a beneficiary and the first suitability report drafted by the adviser, dated 10 March 2016, records that Mr and Mrs M both had wills leaving everything to the surviving spouse.

But Mr M wasn't a beneficiary under Mrs M's will. The adviser became aware of this when he was provided with a copy of the wills. He met with Mr and Mrs M again on 19 March 2016, and the subsequent suitability report included the following:

"We noted that when we reviewed your Wills, the surviving spouse was not mentioned and you have immediately alerted your solicitor to this fact and he is amending the Will immediately."

This was added on to the original paragraph in the 10 March 2016 suitability report that stated Mr and Mrs M did leave their estates to each other. I note Mr M1 has questioned what the adviser has set out in the suitability report. He has said that the adviser wasn't told that Mr and Mrs M had left everything to each other or that the wills were being amended when he found out that this wasn't the case. He has said there was a general discussion about wills at the meeting but this was in relation to the remainder of Mr and Mrs M's money, not the money to be invested in the bonds.

But Mr M1 also says that they did contact the solicitor after the meeting, who said he could review Mrs M's will but that he had concerns over whether she had capacity to alter her will. So it was decided not to put her through an assessment and the will wasn't then amended. I think this makes it more likely than not there was some discussion about the will being amended at the meeting on 19 March.

But I also think the fact that Mr and Mrs M didn't go back to the adviser upon deciding not to amend the will, means it is more likely, than not, that the adviser hadn't made clear that their objective - that the survivor would receive the money back when the first of them died - wouldn't be achieved if the will wasn't amended. Prudential has accepted this wasn't made clear in the documentation. But I'm not persuaded he made it clear in the meeting either.

I think if the adviser had made clear – that Mr and Mrs M's intention that the money invested in the bonds wouldn't go to the surviving spouse unless they were named as beneficiaries under each other wills - it is more likely than not that they and Mr M1 would've contacted the adviser as soon as they decided not to change Mrs M's will. The fact they didn't do so indicates they didn't think there was a problem with Mrs M keeping her existing will. That isn't consistent with the clear objective that the money in Mrs M's loan trust would come back to Mr M.

I note there was also an issue over Mr M not being added as a trustee on Mrs M's loan trust and Prudential has accepted this should've been done.

But what Prudential should do to put things right isn't straightforward. The money in Mrs M's loan trust went to her estate under which the children were beneficiaries. So they have had the benefit of the money instead of Mr M. If the money had gone outside of the family then I would have told Prudential

to pay the money paid into the trust to Mr M – subject of course to me being limited to only awarding a maximum of £150,000.

But the money has gone to the children and that is something I can't ignore. Mr M1, on behalf of Mr M, has said that he has lost the financial security he should've had on the death of Mrs M. But I'm mindful firstly that he still has his own investment bond within a loan trust which he can take withdrawals from if needed. And secondly I think it's unlikely the children won't provide Mr M with the financial security he needs if that isn't sufficient.

They will be aware that the money they have received is money that should've been received by Mr M instead. In effect the children have received money now that they are likely to have received at some point in the future through Mr M's estate.

I asked Mr M1 for his comments about the children providing financial security for Mr M. He has pointed out that the various children are at different stages of their lives – so their financial needs are different – but acknowledges that if Mr M needed financial help the children would help him.

Mr M1 has indicated that the real issue is that Mr M's behaviour and spending habits are greatly influenced by his perceived lack of financial security and the loss of access to the money from Mrs M's loan trust. And that he would consider asking his children for help to be a personal failing. I accept what he has told me about this. But I think this leads towards a significant award for the distress and inconvenience caused rather than an award for payment of the amount of the loan trust, or part of it.

And Prudential has already offered £5,000 in settlement of his complaint and any claim he might make, which offer it has confirmed is still open. I would not make an award for distress and inconvenience above this amount. If Mr M wants to accept that offer he should contact Prudential directly. Given the offer was made before the complaint was referred to us this means I am not upholding the complaint.

my provisional decision

I don't uphold this complaint for the reasons I have explained above.

Philip Gibbons

ombudsman