

complaint

Mrs S, who acts for herself and also her two sons, Mr F1 and Mr F2, is unhappy that her late husband (Mr F)'s pension death benefits from Scottish Widows Limited were split between Mr F1, Mr F2 and Mr F's cohabiting partner Ms T – but no payment was made to her as his estranged wife. Whilst Mr F1 and Mr F2 are joined into this complaint, the dispute doesn't centre on the payment they should receive but on Mrs S – so I will in the main refer to Mrs S in this decision. She is represented by a solicitor, "L".

background

I've already issued a provisional decision on this complaint dated 4 September 2020, which is attached and forms part of this final decision.

In my provisional decision I had significant concerns about the explanations Scottish Widows had provided around its fourth discretionary decision on the distribution of death benefits in September 2018, and how it had considered Mrs S's evidence. So I proposed that Scottish Widows should make a fifth discretionary decision.

I explained I wasn't going to make an award for costs because, in summary:

- I wasn't persuaded that when Scottish Widows initially changed its mind to being willing to pay benefits to the late Mr F's estate, this in itself caused Mrs S further costs. If anything, Mrs S avoided incurring costs while that temporarily was the position.
- There was a loss of expectation when Scottish Widows then changed its mind again, but the new position it adopted (that it needed to see further evidence) was the logical one to take in the face of a potential counter-claim from the other beneficiaries.
- Although the need to provide further evidence has caused Mrs S costs in engaging L, it is a matter for the complainant to decide if they wish to be represented.
- It's unusual for us to make an award for costs where the complainant wouldn't need specialist assistance to tell us in layman's terms why they were unhappy – so that we could then look into the complexities of the situation ourselves.
- We originally referred L to the Frequently Asked Questions on our website, which explain this. Whilst English wasn't Mrs S's first language, we have translation and interpretation services available in order to provide a level playing field for consumers.

I also made Mrs S and L aware that her costs might be considered as part of any award a court might make – but if she accepts a decision from me which doesn't award costs, it's unlikely she'll be able to go to court to recover those same costs.

On the matter of upset caused, I could only fairly consider the extent to which Scottish Widows added unnecessary distress or inconvenience onto a matter which would undoubtedly have been distressing due to Mr F's sudden death. And the position Scottish Widows had adopted at the point the complaint was referred to us (that it would consider further evidence) was in my view the right one. So I considered an award of £350 would reflect the unnecessary distress and inconvenience caused by Scottish Widows' earlier actions up to that point.

In response to the provisional decision, L asked if I was going to make findings on the following:

- Whether Mrs S qualified for a share of Mr F's pension under s. 1(1)(a) Inheritance (Provision for Family and Dependents) Act 1975;

- Whether Scottish Widows as trustees of the pension scheme, are subject to s. 1 Trustee Act 2000;
- Whether Scottish Widows are subject to CPR PD 57.16(5) para. (1)

L added that Mrs S disagreed that Mr F had moved out of their home shortly after 2000 (they had in fact lived together until 2006). She also wanted it to be noted that Mr F's new partner Ms T didn't move in until just 3 months before Mr F passed away, as Mr F's sons were still visiting him at home inbetween their studies and Ms T's children were also still at home. I've since apologised to L that this information had been taken from the Pensions Ombudsman decision, which they provided in their evidence and I wasn't aware was in dispute. I'm happy for this final decision to reflect the position as stated here.

L had highlighted that I had already said the case had become a complex one, and Mrs S was not aware the ombudsman service provided translation services. It would always have required a native Spanish and English speaking DPA counsel, practicing commercial law, to assist her. Reference was made to information having been provided by Mr F's brother and that this information should have been 'approved' by Mrs S. Her own comments concluded,

'I have always been in a disadvantaged position. My husband knew I looked after our children to the best of my ability despite my low income and weak health. It saddens me that so much weight was put on the false and brief points provided by my husband's brother without counting on me. Human factors were not considered, such as the fact I didn't have the means to provide for my children after my husband's passing. I was excluded and not given the opportunity to prove my dependency on my husband.'

I understand that C also copied this response to Scottish Widows.

Shortly afterwards, Scottish Widows informed us that it had agreed to re-assess the claim as per my provisional decision and also intended to pay the £350 I had awarded for distress and inconvenience.

Scottish Widows then communicated the outcome of reassessing the claim to L before I was in a position to issue my final decision.

L has made clear to this service that it doesn't agree with how the claim has been reassessed and therefore, *'the entire matter is not yet resolved'*. It sought a further payment from Scottish Widows in respect of the claim by a deadline it set of 18 November 2020 – and requested that I issue a final decision on this complaint after that date.

I'm not proceeding in the way L has requested, because the outcome of a reconsidered claim isn't part of this complaint. In my provisional decision I required Scottish Widows to reassess the claim – but I made very clear that it was still Scottish Widows' judgement and not my own that determined whether and to what extent the claim should succeed. So for that reason, nothing will be gained by waiting in the context of this complaint about the historical way Scottish Widows had considered the evidence on the claim.

Indeed it will only serve to create further confusion. I explained in my provisional decision that it's not the Financial Ombudsman Service's role to be involved in administering Mrs S's claim. We can only consider what it is alleged Scottish Widows has got wrong in administering it. Scottish Widows' actions in reconsidering the claim after my provisional decision was issued can be subject to a new complaint. To that end it has confirmed to this

service that it will issue a new final response letter in relation to L's concerns. If they are not satisfied with Scottish Widows' response, that matter can be dealt with as a new complaint.

my findings

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

For the reasons that I explained in my provisional decision, I was satisfied that the claim should be reconsidered in light of the concerns I had about the way Mrs S's evidence was considered – and the new evidence that had emerged since that time. Both parties seem to be in agreement on that, putting aside for the purposes of this decision that they don't agree on the result. As that was the extent to which I'll be considering the claim in this final decision there is little further I have to say.

Given that Scottish Widows has already agreed to reassess the claim I'm not going to comment specifically on L's observations about the Inheritance (Provision for Family and Dependants) Act 1975, the Trustee Act 2000 or the Civil Procedure Rules Practice Directions. I don't see that commenting specifically on these would alter the overall outcome reached.

Our ombudsmen make decisions on the basis of what is fair and reasonable. I will however confirm that in my provisional decision I had regard for Scottish Widows' obligations as trustee of the late Mr F's death benefits to take into account the law, which also includes who qualified to benefit under the pension death benefit rules. And for Scottish Widows to ensure that it considered all relevant evidence and arguments, and didn't consider irrelevant evidence or arguments, when it exercised its discretion. I didn't find that Scottish Widows' conduct meant it was necessary for me to make an award for Mrs S's costs, but I did find that Scottish Widows should pay £350 for the distress and inconvenience caused.

I understand why L has picked up on my comment that the case has 'become' complex. To be clear, I meant that the case had become more protracted as a result of the time it took Mrs S's new evidence to emerge; not because of the circumstances that led to me upholding the complaint itself. I mentioned in my provisional decision that there were a number of opportunities for L to provide evidence directly to Scottish Widows which were not taken up. If the evidence which emerged later on during the complaint had been provided directly by Mrs S, I would still have upheld the complaint and asked for the claim to be reconsidered.

The remaining aspect which L considers meant it necessary for Mrs S to use a representative and claim for costs was that English was not her first language. But this is an observation that could be made of many of our complainants. I will feed L's comments about our translation services back to our area that handles publications and our website content. But I think it's relevant to point out here that Mrs S had already engaged L as her representative before she came to the ombudsman service. I have sympathy for any complainant faced with claiming death benefits in the more unusual circumstances Mrs S was in, but I consider Mrs S appointed her representative knowing there was no guarantee she would be able to recover her cost. So nothing here has persuaded me that an award for costs would be warranted in this case.

my final decision

I uphold Mrs S's complaint and require Scottish Widows Limited to review its discretionary decision on the payment of death benefits from the late Mr F's policy again (something I understand it has now already done). I also require Scottish Widows Limited to pay Mrs S the sum of £350 for the distress and inconvenience caused by its handling of the claim.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S (and Mr F1 and Mr F2, on whose behalf she is also acting) to accept or reject my decision before 9 December 2020.

Gideon Moore
ombudsman

Provisional decision of 4 September 2020

background

The late Mr F had invested in two personal pension plans with Scottish Widows, but it says he hadn't completed an expression of wish (EoW) form for the individuals he'd like to benefit from the funds on his death before retirement.

Under the terms of the discretionary trust which commonly covers death benefits on personal pensions, providers would take into account, but not necessarily follow, such a nomination – as they retain discretion on which eligible parties the benefits are paid to and in what proportions. (The reason the pension provider has that discretion is in order for the death benefits not to be subject to inheritance tax.)

After being notified of Mr F's death in January 2017, I gather that in communications I haven't seen Scottish Widows indicated that it would consider an EoW form the late Mr F *had* completed in deciding where to pay the death benefits. In any event, a provider would have asked the person notifying Mr F's death for details of his closest relatives and those dependent on him, in order to contact those individuals to gather evidence of their eligibility.

In the meantime Mrs S appointed a legal representative, whom I'll call "L". Scottish Widows gave its decision to L in July 2017 that it had exercised its discretion in favour of Mr F1, Mr F2 and Ms T in equal shares. It added that it needed to ensure that any death benefit was paid within two years of notification of Mr F's death, otherwise any benefits paid as a lump sum (rather than an annuity or income drawdown) must then be paid to his estate.

At around this time HM Courts and Tribunals Service acknowledged Mrs S, Mr F1 and Mr F2's application for a Grant of Letters of Administration (I believe a Grant of Probate would not apply as I understand Mr F died without leaving a will.) Due to details of a number of other death benefit claims L has supplied to this service we know that the wider circumstances at the time of Mr F's death were as follows:

- Mr F and Mrs S had been married since 1990 with two children, but Mr F had moved out of their home shortly after 2000.
- A decree nisi was agreed on 24 March 2014 on the basis that they had lived apart for at least five years.
- As L puts it, they decided not to divorce and no decree absolute was granted.
- Mr F's relationship with Ms T began in 2007 and moved into a situation of permanently cohabiting when each of their respective children moved away from home.
- Before his death, Mr F and Ms T's holiday home was purchased in Ms T's name.

L subsequently complained to Scottish Widows that Mrs S had been excluded from its distribution of death benefits. He cited Scottish Widows' admission that it now didn't hold EoW forms and the fact that it hadn't provided lawful justification for its decision.

In October 2017 Scottish Widows initially decided to uphold the complaint. It offered Mrs S £100 for the upset caused and said it had decided to ask for Grant of Probate and settle the claim to the late Mr F's estate – so this represented its second discretionary decision on distributing the benefits. L seems to have been satisfied in a phone call with this outcome.

However Scottish Widows then reversed its decision in a third decision dated 13 November 2017. It said:

‘...having considered the matter further internally we have decided it would not be appropriate to redact our original decision in this way and payment should be made to the identified permitted beneficiaries.

...Our original decision had been to pay to three of the identified potential beneficiaries [Mr F1, Mr F2 and Ms T]... as we received evidence that satisfied us that [Ms T] and [the late Mr F] were financially dependent on each other at the date of his death.

...Although we did consider [Mrs S] as a potential beneficiary when we made our original decision we did not choose to include her as a beneficiary based on the information we had at the time of making the decision. We have come to the conclusion we should have given her the opportunity to provide us with information in support of her claim to allow us to take full account of all the individual circumstances of all the potential beneficiaries. We understand that divorce proceedings were underway, however if [Mrs S] can provide proof of on-going financial dependency between [the late Mr F] and herself as well as any other information which she considers would support her claim then this information will be fully considered and we will consider whether an amendment of the original decision would be warranted in this case.’

L then complained about Scottish Widows’ second change of decision. He noted that Scottish Widows referred to having received evidence in support of Ms T’s financial dependence but also referred to Mrs S as a beneficiary of the pension. He considered it had a contractual obligation to Mrs S as well as her two sons under the Contract Rights of Third Parties Act 1999, to at the very least provide copies of the evidence it had relied upon and/or the late Mr F’s EoW form. He referred the complaint on behalf of her and her two sons to our service in January 2018, as she’d been given six months from October 2017 to refer that complaint. We confirmed to Scottish Widows that we’d received the complaint.

It doesn’t appear Scottish Widows received the evidence of dependency it sought from Mrs S or L. It wrote to L (and Ms T) again in March 2018 confirming its decision to distribute the death benefits in three equal shares to Mr F1, Mr F2 and Ms T. It told the ombudsman service it reached this decision in part based on information it had from another party which is isn’t authorised to disclose. The payments were apparently made on 25 May 2018.

L told us that Scottish Widows wrongfully reneged on its October 2017 promises; refused to provide any information to confirm how such an arbitrary decision was reached; and acted contrary to *Jessop -v- Jessop* [1992] 1 FLR 591, the principle of Estoppel, and the Contract Rights of Third Parties Act 1999. He wanted the October 2017 decision reinstated.

One of our adjudicators investigated the complaint. She took the view that Scottish Widows exercised legitimate discretion when paying out the death benefits of the plans. Given that, as noted above, we didn’t have all of the evidence Scottish Widows had considered, that view seems to have been reached as much because Scottish Widows had given Mrs S an opportunity to substantiate her own claim – which it appeared she had not taken.

However in response to the adjudicator’s view, in June 2018 L provided evidence that he considered shows that Mrs S was financially dependent on the late Mr F. Although he’s since said this evidence was also provided directly to Scottish Widows, I’ve noted above that Scottish Widows doesn’t appear to have received it. As he’s also questioned how much of

this evidence was passed on to Scottish Widows by the ombudsman service, I'll list here what evidence we received at that time:

1. Mortgage statements for the year to January 2017, addressed to Mr F at the flat at which Mrs S resided (an interest-only mortgage of about £174,000).
2. Letter dated 14 May 2018 from Mrs S's doctor.
3. Child Maintenance Service letters dated 30 October and 8 November 2013 confirming Mr F was responsible for paying child maintenance (although it appears he chose to pay more than the amounts in these letters).
4. Mrs S's redacted bank statements showing receipt of maintenance from Mr F from August 2014 to December 2016.
5. HM Courts & Tribunals Service's acknowledgement dated 13 July 2017 of Mrs S, Mr F1 and Mr F2's application for a grant of representation (including the application form). I note that Mr F's main asset at the time of his death was the abovementioned flat worth about £491,000, but subject to the above mortgage.
6. Mr F's bank statements showing expenses (such as utilities) and gifts paid for Mrs S, Mr F1 and Mr F2 from December 2012 to January 2014.

He said contrary to Scottish Widows' assertions – stated in its decision – that divorce proceedings were 'underway', Mrs S and the late Mr F ultimately decided not to divorce; despite it being plainly possible for this to be done without the need for Mrs S's agreement or consent after five years of physical separation.

He also set out why he believed Scottish Widows had acted beyond its lawful discretion. He referenced a number of legal arguments, including the right to fair disclosure of evidence in the interests of natural justice. L also referred to ICOBS rule 8.1.1 on the settlement of claims. In terms of the way the adjudicator reached her findings, L said:

- She had failed to consider the other legal principles and cases cited above.
- (Whether or not this evidence was disclosable to the other parties) there was no indication she'd considered the evidence Scottish Widows said it had of Ms T's dependence on the late Mr F.
- There was no indication that she'd confirmed Scottish Widows had discretion to make the payment of death benefits.

A new adjudicator took over the complaint in July 2018. He sent Scottish Widows items 1-6 above and asked Scottish Widows if it stood by its decision. Scottish Widows responded asking if the regular monthly receipts from Mr F on Mrs S's bank statements of £1,460.89 were child maintenance payments. Yet at the same time it said that bank statements from 'a number of years prior to [Mr F's] death' weren't relevant due to their age. We passed this response on to L.

Mrs S confirmed that whilst these exceeded the amounts assessed by the Child Maintenance Service, *'the Child Support Agency ("CSA"), started charging £25 monthly for its interventions in the collection of the payments, but they also gave the option to parents of being able to save the said sum if it was so agreed between them (the parents), which is why my husband...and I, agreed that the deposits should be made without the CSA's intervention.'*

Scottish Widows took the view that the evidence Mrs S had provided only showed that the late Mr F was making regular child support payments, and only demonstrated that his

children were dependent on him. It did not, in Scottish Widows' view, confirm that Mrs S was financially dependent on Mr F. This therefore was Scottish Widows' fourth decision. It said:

'We have reviewed our initial decision with fresh eyes and those who were not involved in the initial claim, and all are comfortable with the decision to pay to the partner and children of the deceased only based on the evidence we've seen previously and the new evidence provided.'

Scottish Widows referred to a Central Family Court Financial Order it had obtained, amended 1 August 2014 between Mr F and Mrs S. This was said to be in full and final satisfaction of all claims including income, capital, each others' pensions, their estates on death and *'all other claims of any nature which one may have against the other as a result of their marriage/civil partnership howsoever arising...'* The main provisions were that:

- Mrs S was solely responsible for paying the mortgage and other bills, rates and utilities on the family home – and where possible to have Mr F's name removed from the mortgage.
- Mr F was solely responsible for another loan secured against the family home and existing maintenance work on the home.
- Mr F was to transfer his beneficial interest in the family home to Mrs S before decree absolute was granted, and Mrs S was to make best efforts to sell the home (subject to other conditions that allowed her to remain in it until at least July 2018).
- Mr F was to pay maintenance to Mrs S at £11,100pa but this would end on his death or Mrs S's remarriage or at the latest by January 2019.
- Mr F was to pay further maintenance of £10,800pa until Mr F1 finished full-time secondary education, or reached age 18 (if later).
- Provision was made for a Pension Sharing Order (PSO) to be levied against Mr F's pension (but I understand Scottish Widows doesn't have a record of this proceeding; it would have been Mrs S's responsibility to implement the PSO if one was agreed and she so wished).

Scottish Widows added:

'Under Clause 20 [of the Financial Order] the maintenance was due to stop on death so we think it is reasonable we do not consider these payments when settling the benefits. If there was an intention for the estate or a death benefit to be settled we would expect that to be set out in the agreement. The payment was also time limited which shows that the maintenance payment relates not only to the spouse but ongoing care of children who were near adulthood. The children were both considered as potential beneficiaries and received 2/3rds of the overall benefit between them.'

There was a remedy under Clause 22 - for [Mrs S] to make a claim in court for the PSO listed in the settlement to be made after [Mr F's] death if it had not taken effect by then.'

L disagreed with Scottish Widows' fourth decision. He said Mrs S's evidence showed dependence on the late Mr F for the mortgage, food and utilities. He suggested that Mrs S was prevented from providing this evidence earlier because of Scottish Widows' refusal to disclose the evidence it had relied on in its original decision (a Data Subject Access Request (DSAR) was made to Scottish Widows in December 2017).

Scottish Widows maintained that the payments Mrs S had evidenced were for the benefit of Mr F1 and Mr F2 'in the majority' – and reminded L that third-party evidence it relied on was

not disclosable under a DSAR. *'Our decision to favour one third of the policy values to each of [Mr F's] sons reflects their age and the on-going financial dependency on their father and we believe this best reflects [Mr F's] wishes at his time of death.'*

The adjudicator still thought Scottish Widows had exercised its discretion legitimately and didn't think Mrs S's complaint could be resolved without referral to an ombudsman. He referred to Scottish Widows' Policy Provisions (PP 2015) which has generated comments from L in response. As this is only one of two documents that govern how Mrs S's policy operates, I'm also attaching the Trust Deed and Rules for the policy, which I'll be referring to in this provisional decision.

L continued to disagree, in summary for the following reasons:

- Scottish Widows couldn't rely on the policy provisions because Mr F never completed an EoW form, and the explanations contained in those provisions say that they *'...do not form part of the contract between you and us. They are included only to help you understand the policy'*.
- Clause 10.1 of those conditions is contractually binding and states, *'The lump sum will be applied by the Scheme Administrator to provide benefits (including an annuity payable to your surviving spouse and/or dependant if you have so chosen) in accordance with the Rules'*.
- Even if Scottish Widows had a wider discretion than indicated, it ought to have drawn that prominently to the late Mr F's attention, following Lord Denning's well-known judgment in *Thornton v Shoe Lane Parking Ltd* [1971] 2 Q.B. 163.
- The Financial Order was only a draft which was never agreed, signed or finalised. If the late Mr F had truly intended to end Mrs S's financial provision in 2019 or at all, he would and/or could have done so without Mrs S's signing, consent or approval.
- Scottish Widows couldn't have it both ways, as if the Financial Order was effective then so was Clause 22 regarding the PSO.
- His client had been misled both in terms of the outcome and in terms of £100 compensation that she still has not received. She incurred additional costs in being represented as a result of Scottish Widows' change in position.
- Mrs S had in fact submitted her evidence of dependency directly to Scottish Widows, and strongly maintained that she remains entirely dependent on Mr F's estate for her survival.

As agreement was not reached the matter was referred to an ombudsman for a final decision. At this point Scottish Widows informed us that the same complaint had been referred to the Pensions Ombudsman. My understanding is that the Pensions Ombudsman informed L that it would not get involved in a dispute on which the Financial Ombudsman Service has already given a view.

In March 2020 L again provided additional evidence:

- Correspondence about the mortgage addressed to Mr F's personal representatives in April 2018, revealing that the mortgage was in arrears by £5,000 (around 14 months' payments, which would go back to Mr F's death in January 2017).
- Unredacted copies of Mrs S's bank statements from September 2016 to February 2017, which I note show that Mrs S was in receipt of 'DWP DLA' and 'DWP EESA' – these are likely references to Disability Living Allowance and Enhanced Employment & Support Allowance and weren't mentioned to Scottish Widows or this service previously.
- Copy of the entry for Mr F in the Probate Registry dated June 2018.

- Two decisions made by the Pensions Ombudsman in November 2019 regarding other pension providers' discretionary decisions over death benefits.

This latest evidence wasn't shared with Scottish Widows when we first received it. But in light of concerns raised by L that we haven't shared all of his client's evidence, I'm attaching the above together with L's most recent submissions from March 2020 to the copy Scottish Widows is receiving of this provisional decision. That means Scottish Widows has received all the evidence Mrs S has submitted to us to date. I would ask both parties to note my comments which follow later in this provisional decision on how I consider the provision of evidence should be handled going forwards.

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. As this has become a complex claim I've split up my reasoning under the headings below.

Does Scottish Widows have discretion to decide who receives the death benefits?

L now has, with this provisional decision, a copy of the pension plan's Trust Deed and Rules. Where the policy provisions mention the Rules, this is where they are referring. In my view and as noted by L, the policy provisions give further explanation of how the benefits *might* be paid, but need to be read as a whole with the rules.

Under section 8, 'Member dies before benefit starts', the rules make clear that Scottish Widows has discretion to pay benefits to a dependant, nominee, or any other persons in rule 8.10.

I appreciate L is concerned that Scottish Widows initially suggested Mr F had nominated someone to receive the death benefits by completing an EoW form, and now requires a copy of that form. But I think it's clear that Scottish Widows said this in error. Most often these forms have been completed and it's not unusual for standard wording in a death claim to state that the provider will consider who was nominated on the form. But the policyholder isn't obliged to make a nomination and I can't require Scottish Widows to provide a completed form which I have no reason to doubt it says doesn't exist.

Where there is no nomination, the Rules make clear that Scottish Widows may direct that the fund '*should be applied to or for the benefit of one or more individuals that it nominates as a nominee*'. And rule 8.10 details that the classes of person that qualify include the member's surviving spouse and (separately) dependants.

As to whether this discretion was made clear to Mr F at the time he applied for the policy, strictly the complaint I'm considering here is from Mrs S (and Mr F1 and Mr F2) as beneficiaries or potential beneficiaries of Mr F's pension. So the manner in which the policy was sold to Mr F originally doesn't form part of this complaint. But I would ask L to bear in mind that pension plans will almost all contain this wide discretion over death benefits, in order to avoid the possibility of inheritance tax applying.

So it would typically be difficult to say this is a significant or onerous term such that it should be highlighted as per *Thornton v Shoe Lane Parking Ltd*. It would also be difficult to see how Mr F could have taken out the pension plan (or one similar to it) without agreeing that the provider had this wide discretion.

What did Scottish Widows do wrong in assessing Mrs S's original claim?

At the point this complaint was referred to the ombudsman service, Scottish Widows had admitted that it failed to give Mrs S the opportunity to present evidence on the strength of her claim, when it had (I assume) received evidence from other parties such as Ms T, before it made its first decision in July 2017.

Scottish Widows also compounded matters by then significantly altering that decision in favour of making a payment to Mr F's estate, as soon as L challenged it. But then reinstating its original decision (subject to possible revision if Mrs S provided further evidence). This raised a number of further questions from L:

- *Is Scottish Widows estopped from revising its decision?* In my view, estoppel doesn't apply here any more than it did when Scottish Widows initially made a decision that wasn't in Mrs S's favour. Scottish Widows was entitled to amend its decision, if it had good reason to do so (which I appreciate is another one of L's questions).

Reference has also been made to ICOBS requiring the prompt settlement of claims. Whilst this is technically a pension rather than a pure insurance contract, to the extent which ICOBS might apply I don't think it means what L suggests. No insurer is prevented from changing its mind on the payment of a claim. It does of course face consequences (including complaints) if expectations have been raised, but that's different to a requirement for it to settle a claim it no longer considers it should settle.

- *Did Scottish Widows provide justification for its decision?* I consider there is always going to be a difficulty here in Mrs S being satisfied that Scottish Widows has weighed up all the evidence, because Scottish Widows isn't obliged to share with her the evidence it received from Ms T. As L found out, a DSAR doesn't assist Mrs S in this regard because she wouldn't be entitled to obtain someone else's personal data – Ms T's.

That being said, Scottish Widows would need to justify to the Financial Ombudsman Service that it exercised its discretion appropriately by including all the relevant factors and not including irrelevant factors. So I think L took a reasonable course of action in referring Mrs S's complaint to us, so that if necessary we could ask to see all of the evidence Scottish Widows considered. (I should however say for completeness that if this service obtained any information relating to Ms T we also wouldn't be able to share it with Mrs S.)

It is in any event also understandable that Mrs S referred her dispute to us in view of the upset caused by Scottish Widows' original mistake, twice changing its mind and its somewhat low offer of £100 as compensation for this. I'll return to what level of compensation I consider would be appropriate for these errors at the end of this decision.

What should have happened when Mrs S referred the complaint to our service?

It would certainly have been helpful if L had provided all of Mrs S's evidence of financial dependency which we've received in piecemeal fashion, directly to Scottish Widows in accordance with its request, so that it could reconsider the claim. Had he done so then Scottish Widows would have been in a position to consider the evidence – including even the evidence advanced in March 2020 (other than the recent Pensions Ombudsman decisions) – before it actually paid out on the claim.

On the matter of the Pensions Ombudsman, had we known what we now know – that two parallel complaints against other providers were made to the Pensions Ombudsman – we would have sought Mrs S's consent to refer this complaint to them under our Memorandum of Understanding, so that related complaints could be looked at together. It's unclear to me why L referred the same complaint against Scottish Widows to both schemes, but as we only became aware of this after the adjudicator had issued her initial view, and the Pensions Ombudsman sought to close its file, we've continued to consider this complaint.

As I've said above, I understand why Mrs S was seeking an ombudsman's decision on her situation. However I don't agree with L's explanation for why she wasn't prepared to provide the evidence Scottish Widows had asked for, which is essentially that Scottish Widows was refusing to share the evidence it received from third parties. The discretionary decision was Scottish Widows' – not Mrs S's or L's – to make and it was under no obligation to share third party evidence with them. Scottish Widows had two years to pay any lump sums directly to individuals, so as it couldn't keep the claim open indefinitely it was inevitable that it would likely maintain its decision and settle it if Mrs S didn't respond. In my view it was in her interests to provide this evidence directly to Scottish Widows, even though some confusion has likely been caused by being in a complaints process.

Did Mrs S provide her evidence to Scottish Widows?

L suggests at one point that she did, but in my view this isn't consistent with the reasons given for not providing it – and L's later questioning of whether the Financial Ombudsman Service was passing the information across to Scottish Widows (which we have now done). That suggests L and Mrs S were relying on our service to communicate the information to Scottish Widows.

To be clear, the Financial Ombudsman Service isn't an extension of Scottish Widows' claims handling function. If Mrs S has evidence she wants Scottish Widows to consider, she or L should provide that directly to Scottish Widows. If we receive information we think Scottish Widows ought to see we will endeavour to pass that on, but we can't assess whether that information should make a difference to Mrs S's claim because that decision is not ours to make. The discretion rests with Scottish Widows as trustees of the late Mr F's pension.

At one point during our investigation the culmination of evidence we'd forwarded on prompted Scottish Widows to reassess Mrs S's claim and give a new decision. That is what I would have required Scottish Widows to do in any event, had I been making a decision on the case at that point – because it was clear a significant amount of further evidence had been provided and it's not the role of this service to substitute Scottish Widows' discretion for our own judgement.

Mrs S's ongoing dissatisfaction with the outcome is essentially a new complaint about the outcome of Scottish Widows' *fourth* decision. However the second adjudicator went on to express a similar view on that outcome to the first adjudicator – that it was a legitimate exercise of Scottish Widows' discretion. So I'll consider the comments L has made in response to both of the adjudicators' views as part of this decision.

Has Scottish Widows adequately justified why Mrs S's evidence doesn't change its decision?

I appreciate Scottish Widows hasn't provided this service with all the evidence it received from other parties when assessing the claim. I would expect it to have been willing to provide

that evidence to us subject to undertakings that it wouldn't be shared with Mrs S or her representative. But even though we don't yet have that information (and may need to see it as part of a new complaint should Mrs S's claim for death benefits remain unresolved), I have significant concerns about the explanations Scottish Widows *has* provided around its fourth September 2018 decision and how it has considered Mrs S's evidence.

My role is not to replace Scottish Widows' discretion with how I might consider the death benefits should be paid. But the concerns I highlight below are sufficient for me to propose that Scottish Widows should undertake a fifth reassessment of the claim. I say this because:

- Scottish Widows relied on the fact that divorce proceedings were underway, but hasn't shown it considered the fact that a decree absolute wasn't sought between the decree nisi in March 2014 and Mr F's death in January 2017. Normally a decree absolute would be sought within 12 months, or the delay would need explaining to the court.
- It relied on a Financial Order from those proceedings. From what I can see L didn't provide this to Scottish Widows and now maintains this was a draft document which was never agreed. In support of that contention it appears that Mr F continued to pay the mortgage on the marital home, rather than Mrs S as envisaged in the agreement – a fact also noted in the Pensions Ombudsman's decisions – and so the 'clean break' between Mr F and Mrs S's finances achieved by a maintenance payment to Mrs S for only a set period (until around 2019) doesn't appear to have been achieved.
- Scottish Widows said that bank statements from '*a number of years prior to [Mr F's] death*' weren't relevant due to their age. The bank statements ran right up to Mr F's death.
- The latest evidence Mrs S has provided (which I appreciate Scottish Widows won't have seen before) indicates the mortgage fell straight into arrears after Mr F's death, and it appears possible Mrs S's ability to earn is limited if she is in receipt of disability and employment-related allowances as indicated on the bank statements.
- On further examination of the bank statements Scottish Widows is now conceding that there was at the very least a degree of cross-subsidy between Mr F1, Mr F2 and Mrs S in the payments Mr F made for things like rates and utilities on the flat in which they all lived. It now says the payments were for the benefit of Mr F1 and Mr F2 'in the majority'. Without further explanation that doesn't reconcile with a conclusion that Mrs S wasn't financially dependent on Mr F.
- Notwithstanding all of the above, Scottish Widows' argument seems to be focused on the requirement for Mrs S to prove her financial dependence on Mr F at the time of his death, but she would also qualify for potential consideration under the policy rules *as his spouse* as they weren't divorced. I can't see that Scottish Widows considered what weight it should place on this in its decision.
- Scottish Widows appears to be saying in its reasoning that Mrs S has a sufficient remedy in that she can force the PSO mentioned in the Financial Order to be implemented after Mr F's death. Putting aside that L says the Financial Order was never agreed, that seems to be an admission on Scottish Widows' part that Mrs S was potentially reliant on Mr F's pension. But in any event, I fail to see how Scottish Widows can expect a PSO to be applied on the policy after the death benefits have already been paid. Or that, if Mr F and Mrs S decided for some reason not to divorce, why Mrs S should have had the hindsight to implement the PSO before Mr F's death at the early age of 54.

To be clear, I'm not saying any of these factors – or any further points L has an opportunity to raise if it does so in response to this provisional decision – must alter Scottish Widows' decision. That is for Scottish Widows to decide. But I'm satisfied there are sufficient grounds for it to reassess all the evidence and make a decision again on the claim.

What compensation should be paid for the distress and inconvenience caused by Scottish Widows' handling of the claim to date, and any costs?

Scottish Widows decided to uphold the original complaint in October 2017. It offered Mrs S £100 for the upset caused in not gathering evidence of her claim, but at that point it indicated it would be looking to settle the claim to the late Mr F's estate. L says that when Scottish Widows reversed that decision this caused Mrs S further costs.

I'm not persuaded by this for two reasons. If anything, Mrs S avoided incurring costs during the short while she had a more favourable decision, as she was being saved the effort of providing further evidence to Scottish Widows. I can see that the application for a grant of representation had already happened earlier in 2017, so I don't think Scottish Widows' interim position caused her or L additional work.

There was clearly a loss of expectation when Scottish Widows changed its mind again, for which I can consider compensation for the upset caused. But in my view, the subsequent position Scottish Widows adopted was the more logical one. It was unlikely to be able to justify to the other beneficiaries a complete reversal of its discretionary decision, without supporting evidence from Mrs S as to the strength of her claim. Although providing this evidence (and indeed bringing the complaint to the Financial Ombudsman Service) has caused Mrs S costs in engaging L, it is a matter for the complainant to decide if they wish to be represented.

The case-handlers on Mrs S's complaint haven't given any undertakings that Mrs S can expect to receive an award for her costs even if she's successful in the complaint. It's unusual for us to make an award for costs where the complainant wouldn't need specialist assistance to tell us in layman's terms why they were unhappy – so that we could then look into the complexities of the situation ourselves. We're an alternative to the courts and don't require cases to be presented to us as legal pleadings.

When we acknowledged Mrs S's complaint we referred L to the Frequently Asked Questions on our website, which explain this and make clear that representatives' fees may come out of any award we make. I appreciate English is not Mrs S's first language but we have translation and interpretation services available in order to provide a level playing field for consumers. So whilst I appreciate this will be a disappointment, I'm not going to be making an award for Mrs S's costs in this case.

The Pensions Ombudsman decisions L has sent us indicate that the claims for costs in those cases (which it also didn't award) were substantial. So as Mrs S may be incurring legal costs and the Financial Ombudsman Service is an alternative to the courts, I'd like to make her aware that it is at least in theory possible those costs might be considered as part of any award a court might make. And if she accepts a decision from this service that doesn't award her legal costs incurred to date, it's unlikely she'll be able to go to court to recover those same costs.

Of course whether or not a court would uphold Mrs S's complaint at all would be a matter for the court to decide. However if Mrs S is intending going to court instead of accepting a final decision from this service, she should let us know in response to this provisional decision.

Much of the handling of Mrs S's claim from Scottish Widows' point of view has taken place *whilst* the complaint has been with the Financial Ombudsman Service, and in an unusual fashion as I noted above – as Mrs S could also have dealt directly with Scottish Widows in submitting her new evidence. That new evidence didn't form part of the complaint originally submitted to us. However as it's become part of an ongoing complaint I've provisionally found in this decision that Scottish Widows hasn't adequately justified how it reached its fourth discretionary decision – and should review the decision a fifth time. That doesn't necessarily mean the outcome of the claim is bound to change.

I understand that pursuing this claim would always have been upsetting for Mrs S, but I can only fairly consider the extent to which Scottish Widows caused unnecessary distress or inconvenience. So as we still don't know what ultimately the claim decision might be, I think it's reasonable to take into account here the initial upset Scottish Widows caused in September and October 2017 when it admitted that it failed to seek evidence at the right time, and changed its mind twice in quick succession (in my view unnecessarily).

Scottish Widows ultimately did reach a reasonable position that it would be willing to review its decision on the claim, subject to appropriate evidence – some of which it's only receiving today. Taking all of this into account, I consider an award of £350 would reflect the unnecessary distress and inconvenience caused by Scottish Widows' earlier actions.

my provisional decision

I intend to uphold Mrs S's complaint and require Scottish Widows Limited to review its discretionary decision on the payment of death benefits from the late Mr F's policy again.

I also consider it to be fair and reasonable to regard this as Mrs S's final opportunity to disclose all remaining evidence she may wish to rely on in her claim – and for her to supply any further evidence directly to Scottish Widows going forwards, so that the Financial Ombudsman Service isn't further involved in the handling of the claim as opposed to any complaint.

I also intend to require Scottish Widows Limited to pay Mrs S the sum of £350 for the distress and inconvenience caused by its handling of the claim.

Gideon Moore
ombudsman