

Complaint

The complaint, in brief, relates to the advice Mrs K and her late son ("B") received in connection with mortgage protection. The advice was given by Independent Mortgages (SW) Limited. Mrs K says that, as a result of the adviser's failure to advise them appropriately, she has suffered a financial loss.

background

On 1 June 2012, I issued a provisional decision which set out the background to this complaint, together with my provisional findings.

In this provisional decision I said that it was my intention to uphold this complaint on the basis that the business had not provided Mrs K and her late son with appropriate advice. That failure to advise properly, in my view, caused loss to Mrs K. I invited comments.

I issued a second provisional decision on 4 March 2013 explaining that it remained my view that Mrs K and her late son were provided with poor advice and set out the following redress I intended to award:

- any mortgage interest costs incurred between a date (21 days after death) and the calculation date (of which see below)
- any legal costs incurred from the date of death to the calculation date. I accept that some legal costs may have been incurred even if the business had got things right but I agree with Mrs K's representatives that they would have been "minimal"
- the costs should include the cost of dealing with HMRC, the costs of counsel's opinion and associated legal costs and the cost of advising Mrs K on the effect of that opinion
- the calculation date should be one calendar month after advice was received by instructing solicitors from counsel. The one month "breathing space" is simply a recognition of the fact that in my view Mrs K needed time in any event to consider what counsel advised and take the suggested action.

I said that to the redress interest at 8% simple should be added from the date the cost was incurred to the date of my final decision.

I also awarded Mrs K £1,000 for the distress and inconvenience this matter has caused her.

I asked both parties to respond by 4 April 2013. I attach below anonymised extracts from those provisional decisions.

Developments

The firm acting for Mrs K responded on her behalf. It stated the following:

- It accepts 26 September 2008 as the start date for the redress calculation. However, it believes that the end date should be 6 October 2011 as this was when the mortgage was actually repaid.

- Mrs K would have needed to obtain capital from another source to cover other liabilities. It has stated that it is not clear how she would have funded these liabilities if not with the policy proceeds.
- It requires clarification of the legal costs that I intend to award and wanted confirmation that all legal costs incurred between the two dates should be reimbursed.
- If interest is not paid up to 6 October 2011, the losses that Mrs K has suffered as a result of selling the business should be reflected somehow.

Mrs K also made the following comments:

- Because of the business' error, her ex husband, who was never a part of her late son's life, has benefited.
- My second provisional decision does not repay the money that was paid to her ex husband.
- If the business had advised them correctly, the funds would have been correctly paid to her.

The business's representative firm also responded. It stated the following:

- It has queried whether the sum assured accrued any interest and if so, should this be offset against the mortgage interest paid.
- It believes that the start date should be 42 days after the date Mrs K's son passed away.
- It has stated that Mrs K would not have needed capital from another source to pay her ex husband, because there was never any liability to pay him anything other than 50% of what remained of the estate after the mortgage had been discharged in full.
- It agrees that the fee for the opinion is payable, together with the reasonable costs of instructing counsel and the subsequent correspondence with HMRC as regards to the implied trust.
- It does not believe the costs of advice subsequent to receiving counsel's advice should be recoverable.
- It does not agree that 8% interest is appropriate and believes that the interest rate prior to the final decision should be at the commercial rate. It would agree a rate of 3% to the date of the final decision.
- It believes that the end date of interest should be 1 June 2012.
- It does not agree with the award of £1,000 for the distress and inconvenience Mrs K has suffered and has requested justification if this suggested award.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. I think there is now little point in continuing to ask for comments from the parties. My view as to the fair outcome (that the complaint should be upheld) has not changed. In my view the only matter for discussion was the issue of the detail of how redress should be calculated. I think both sides have had an opportunity to make their views clear and I will now deal with those comments and make my final decision.

I would like to reassure Mrs K that I have read her final submissions. I can see this has been exceptionally difficult for her at already a very difficult time. I must be fair to both sides and only award redress arising from any failures of the business.

I will first deal with the responses from the parties to my provisional decision.

The business will only be responsible for the period during which repayment of the mortgage was needlessly delayed as a result of its error. I think the period I specified is long enough for the advice from counsel to be considered and acted upon.

I am not able to take into account the question of whether Mrs K used any other funding to repay the mortgage as, (as far as I can see), I have been provided with no evidence that any "external" funding was used. In any event, the rate of interest specified for the award (explained below) will, I suspect be greater than any additional cost of borrowing Mrs K may have paid.

I appreciate Mrs K's former husband may appear to have benefitted from the business' error. However, I have no jurisdiction over him and had Mrs K followed her counsel's advice (although see below) the issue would not have arisen. In my view the claim made by B's father is not relevant. The claim in question arose from the laws of intestacy. The failures of the business may have had an impact on the value of the son's estate but not on the principle of whether an amount was payable to the beneficiaries of his estate under intestacy law.

That claim would have arisen even if the business had got things right. Instead of a claim in B's estate over part of the proceeds of the claim under the policy, the claim would have been against the estate which would have included a share in the value of the (by then) mortgage free business. I cannot see that the claim by B's father and any payment made as a result of that claim have been increased as a result of the business' failures. To put it another way the claim by B's father was against the estate which benefitted from the proceeds of a policy instead of the value of a partnership.

However the position is not as simple as those representing the business would have me believe. Counsel's opinion was not clear cut that all the proceeds of the policy should be taken out of the estate. Mrs K was put in a very difficult position and had to try as a member of the public to deal with the very complex issues arising. Once that advice had been given Mrs K had to try and "navigate" a complex path between competing claims and complex legal issues relating to her position, the position of her son's estate and claimants on her son's estate. This was an exceptionally difficult matter much of which arose as a direct result of the business' failures.

I note that in its letter of 10 July 2012, Mrs K's representatives indicate that interest was added by the product provider to the date of payment. The policy proceeds were increased as a result.

Having carefully read the whole file again I remain of the view that this was bad advice and that the matter complained of should be upheld. I also remain of the view that "but for" that bad advice much of the expense, delay, distress and inconvenience suffered by Mrs K would have been avoided.

This is an appropriate point to deal with the distress and inconvenience suffered by Mrs K. The business has objected to my proposed award of £1,000 in this regard. I remain of the

view that this is an appropriate amount. The untimely death of a child is the most appalling tragedy. That of course is not something the business or anyone else could have anticipated. The business could and should have anticipated that a death *could* occur - that is of course the whole basis for the need for life cover.

However on top of dealing with that tragedy Mrs K had to deal with what is for most ordinary members of the public a very complex, uncertain and difficult process of dealing with legal disputes, engaging advisors, dealing with mortgage lenders on top of her already onerous and no doubt distressing duties of dealing with her son's death. Had the business got things right either the lender would have been paid direct from the policy or Mrs K would have been put in funds to do so clearly and unambiguously very shortly after her son's accident.

This matter has also taken a great deal of time to resolve. Both parties have made representations as they have been invited to do so but to invite further comments would as I say I think simply delay matters further to no purpose.

Therefore I set out my final conclusions on redress below.

Calculation dates:

It remains my view that the start date for mortgage interest repayment should be 21 days after the death of Mrs K's son.

Whilst I have noted that Mrs K's representative believes that the end date should be 6 October 2011. I cannot agree with this.

Mrs K was provided with advice in February 2009 to use the proceeds to pay the mortgage debt and was in a position to do this in May 2009. In fact, she made a part payment on 7 May 2008.

The fact that she did not fully pay off the mortgage until 6 October 2011, was her own decision (although a decision made from a limited set of unappealing alternatives) and I am unable to penalise the business for her decision.

Therefore, the end date of the calculation is one month after Mrs K received advice to use the proceeds to pay the mortgage debt.

Legal costs

The business shall pay the costs that Mrs K suffered between the dates B passed away to the calculation date (defined below). I consider it fair and reasonable that all the costs should be paid. I agree that had the business got things right legal costs would have been very modest. I do not think it is necessary to spend the time and cost needed to further break down the costs further.

Interest

Interest will be at 8% simple from the end date to the date payment is made. The reason why 8% is awarded is to compensate the consumer for the fact that she has been deprived of the redress. There are a significant number of alternative rates of interest which could be used. No doubt a great deal of effort could be expended by all the parties in trying to determine the appropriate rate. The redress money when distributed could have been used

for any number of alternative purposes from paying credit card or other debts to funding other routine expenditure. Our default rate and the rate commonly used by the courts is 8% simple. I see no good reason in this case to depart from that rate.

my final decision

I uphold this complaint. Redress should be calculated and paid in full and final settlement by Independent Mortgages (SW) Limited. Redress must be calculated as follows

- any mortgage interest costs incurred between the start date (21 days after the date B passed away) and the calculation date (of which see below)
- any legal costs incurred from the start date to the calculation date. I accept that some legal costs may have been incurred even if the business had got things right but I agree with Mrs K's representatives that they would have been "minimal". As I say I am of the view that it would needlessly delay matters to further analyse the costs.
- the costs should include the cost of dealing with HMRC, the costs of counsel's opinion and associated legal costs and the cost of advising Mrs K on the effect of that opinion
- the calculation date should be one calendar month after advice was received by instructing solicitors from counsel. The one month "breathing space" is simply a recognition of the fact that in my view Mrs K needed time in any event to consider what counsel advised and take the suggested action.

As regards the capital sum, I find as follows. I include in that term other items claimed such as losses arising from the sale of the business and any related matters dealing with payments to third party claimants on Mrs K's son's estate. I cannot for the reasons already given make any award in this respect. In any event I think it is simply too speculative to say what Mrs K would have done had the life cover been set up properly. She may or may not have sold the business or carried it on. I do not think I can make any award in this regard and I do not do so.

To the redress interest at 8% simple should be added from the date the individual cost was incurred to the date of this final decision. The award should be paid within 28 days of Mrs K accepting my final decision, presuming she does. If it is not paid within that time interest at 8% simple should be added from the date of the final decision to the date of payment. If the business is advised that it should deduct tax from any interest paid it may do so but must provide a tax deduction certificate to allow Mrs K to recover the tax if appropriate.

Mike Boyall
ombudsman

Summarised 2nd Provisional Decision

(The summary of the complaint and background were an updated version of my earlier summarised in my first provisional decision set out below)

Developments

Solicitors for the business responded. They did not accept my provisional decision and have made a number of points, the main points which I have summarised:

- Advice was given to Mrs K by her own counsel to use the proceeds of the policy to discharge the mortgage debt in full. Therefore, Mrs K's late Son's father was only ever entitled to 50% of the surplus, in accordance with the usual intestacy rules, after the mortgage had been discharged.
- It was never the case that Mrs K was not in a position to pay off the entire mortgage. She could clearly have done so, and should have done so in accordance with the advice given to her.
- The full amount of £590,367 was available to discharge the mortgage of £543,000, leaving a surplus belonging to Mrs K's late Son's estate in the amount of £47,367.
- It does not know why Mrs K decided not to discharge the mortgage in full and decided instead to agree a Deed of Variation providing a payment to Mr K plus interest. Mr K's maximum entitlement from the estate could only ever have been 50% of the surplus of (the estate) after the mortgage had been discharged.
- The consumers representative accepts in its letter dated 12 December 2011 that : *'Whilst (Counsel)'s advice had been that (the whole amount) should be paid to the lender, Mrs K chose to retain a sum within the estate pending the resolution of her negotiations with (B's Father) and other issues. This was a practical decision which she made in her capacity as administrator'*.
- What Mrs K chose to do was to make a gift to Mr K from monies which were available to her to discharge the mortgage and she is now seeking to recover from the business this amount.
- Mrs K's dealings with the HMRC are immaterial in terms of her loss. It was accepted by the HMRC that an implied trust existed and, ultimately, there was no IHT liability in respect of the estate.
- A grant was made on 20 April 2009 and the policy proceeds paid to the estate on 3 May 2009, whereupon the sum of £311,505 was immediately paid to the lender in part discharge of the loan. It does not accept that it is responsible for the delay that occurred between Mrs K's late Son's death and the issue of the grant.
- A grant of probate was always required, as Mrs K's late Son died intestate and there was a surplus over and above the policy proceeds which would need to be administered in accordance with the rules of intestacy, therefore the time spent in obtaining the grant could not have been avoided.
- As Mrs K could and should have paid off the mortgage in full, it does not accept that she is entitled to any interest in respect of the unpaid balance.
- It believes my decision not only compensates Mrs K for the amount of the gift which she chose to pay to Mr K, despite having no legal obligation to do so, but also to compensate her

for the interest which accrued on the mortgage as a consequence of that gift being paid to Mr K.

- It would accept that the reasonable costs of liaising with HMRC as regards to the implied trust are recoverable, however, the cost of applying for the grant and administering the estate generally are not recoverable since such costs would have been incurred in any event.
- The costs incurred by Mrs K in dealing with the deed of variation are not recoverable as Mrs K elected to enter into the deed of variation.
- The maximum which Mrs K is entitled to is: the reasonable costs of liaising with HMRC, but only as regards to the implied trust and such loss which she is able to demonstrate was incurred as a direct consequence of any delay which was itself a direct result of the fact that the proceeds of Mrs K's late Son's policy were not subject to an express trust.

The consumer's representative responded to my provisional decision and has stated the following:

- It has said that the loss from the policy is at least £85,364.77. It has calculated this to be as follows:

Mrs K has received the proceeds of the life policy (the amount paid by L&G) less an amount paid to Mr K.

Therefore the loss plus interest at 8% simple from 5 September 2008 to 7 June 2012 amounts to £85,364.77.

- The sum of £311,505 was paid to the lender from the estate proceeds on 7 May 2009. The remainder, £193,263, was paid to Mrs K on 11 May 2009, with the rest being used to pay fees and charges relating to the administration of the estate.
- The sum paid to Mrs K did not cover the balance of the outstanding loan so Mrs K was forced to sell the business to make up the difference. It is concerned that this was not factored into my award.

Mrs K eventually paid £245,543.25 to the lender to redeem the loan on 6 October 2011, upon the sale of the business.

The interest incurred from 5 September 2008 to 7 May 2009 was £19,801.57. It is still awaiting confirmation of the interest incurred from 7 May 2009 to 6 October 2011.

- Its legal costs are £30,927.72 plus interest of £7,055.34.
- It does not believe that it would be appropriate to provide a detailed breakdown of its charges yet, as the redress exceeds £100,000. The costs will be payable by Mrs K and it does wish to involve her in further costs, if it will not bring any additional benefit.

The consumer was asked to comment on the business' submissions and she has stated in summary:

- The business' representative has misunderstood the advice that was given to Mrs K by her counsel. More than half of the policy proceeds fell inside Mrs K's late Son's estate and his father was entitled to 50% of his estate under the intestacy rules, namely £93,409.50. It is equally incorrect that the payment to (B's father) was a gift.
- Although Mrs K is aware that she was advised to apply the policy proceeds to repaying the mortgage debt. However, this was impractical as (B's father) was owed £93,409.50, which was more than the 'surplus' policy proceeds. She also had various legal costs to pay.

- Although HMRC have accepted the implied trust arguments and as a result there is no inheritance tax to pay, however, in order to reach this position it was necessary for Mrs K to incur significant legal costs.
- If the policy had been written in trust, the proceeds could have been paid out immediately, bypassing the estate, but as it was not written in trust, it was necessary to obtain the Grant Letters of Administration, which could not be done until matters were in order.

my provisional findings

Firstly I must apologise for the delays in bringing this matter to a conclusion.

I have reviewed the further correspondence received from the solicitors of both parties and I can confirm that I remain satisfied that the crux of the issue is the poor advice received by Mrs K and her Son.

To repeat my conclusions Mrs K and her Son was badly advised by the business. The life cover required was not set up properly. They could have been advised to place their policies in trust or have them assigned to the mortgage lender, or indeed the policies could have been set up on each others lives.

Had any of the above happened, then on Mrs K's late Son's death the policy proceeds would have been paid entirely outside Mrs K's late Son K's estate.

The fact that the proceeds initially were treated as falling into Mrs K's late Son's estate has caused significant expense, distress and inconvenience to Mrs K which could have been avoided had the adviser advised properly.

This complaint is an object lesson in what can happen when advisors fail to arrange life cover properly.

However I do accept that my original proposal for redress needs amending. For the avoidance of doubt this provisional decision is simply about the fair redress. I have seen nothing to persuade me to change my view of the fair outcome in terms of the merits

I intend to set out my proposed redress in two parts. Firstly what I will describe and costs and expenses and then secondly what I will call the capital sums. I deal with the issue of distress and inconvenience at the end of this decision.

As regards costs and expenses my view of the fair redress is as follows:

Firstly as I am sure the parties' representatives are aware it not the usual practice of this service to award legal costs. However there is nothing preventing me from doing so where I think it fair.

I note the points raised by the business in relation to the interest payments and that it is of the view that a grant of probate would have been required anyway. As I understand it given the size of Mrs K's late Son's Estate and the lack of a will it is highly likely that probate would have been required in any event therefore it would not be fair of me to require the business to pay that amount. If Mrs K's representatives can persuade me otherwise I will of course reconsider the point.

Upon Mrs K's late Son's death the mortgage debt could have been paid off almost immediately thereby avoiding any further interest payments on the mortgage.

Although I am satisfied that being poorly advised by the business caused Mrs K significant expense, I cannot ignore the fact that she obtained advice from her own counsel in February 2009 who, in summary, stated that

' it follows in my view that the proceeds of Mrs K's late Son's policy should first be applied in discharging the mortgage debt in full. In effect so much of the policy proceeds as is required to discharge the debt will be held beneficially for Mrs K's late Son's estate and Mrs K in equal shares. If, as appears possible, there is a small surplus after discharge of the debt, this must belong to Mrs K's late Son's estate'. He goes on to confirm that 'Mrs K is clearly entitled to require the policy proceeds to be used for its primary purpose of discharging the mortgage debt in full...'

Mrs K was advised that she needed to discharge the mortgage debt first; however she did not heed her own counsel's advice. For the avoidance of doubt this is not intended as any criticism of Mrs K's actions at what must have been a very difficult time for her. However as a result I cannot hold the business liable for any costs that Mrs K incurred as a result of not taking the advice given to her by her own counsel.

Therefore, the issue is what costs have been incurred as a result of the business' failure to provide adequate advice.

I am satisfied that had the advice been given properly Mrs K would have been able to pay off the mortgage debt almost immediately after Mrs K's late Son's death.

My current view is therefore redress should be;

Here, Mrs K was faced, at what must have been an exceptionally difficult time, with dealing with a number of highly complex legal issues. I think it entirely reasonable for her to have had to seek legal advice and Counsel's opinion. I accept of course the tragic death of Mrs K's Son was an unforeseen intervening event, although of course always a possibility, however remote.

Redress is intended to put someone in the position they would have been in but for the bad advice complained of. Here I take the view that if the business had got things right the mortgage to which the life cover related would have been paid off, probably within 21 days of death. That is the starting point for redress in my view.

Redress should therefore include

- any mortgage interest costs incurred between that date (21 days after death) and the calculation date (of which see below)
- any legal costs incurred from the date of death to the calculation date. I accept that some legal costs may have been incurred even if the business had got things right but I agree with Mrs K's representatives that they would have been "minimal"
- the costs should include the cost of dealing with HMRC, the costs of Counsel's opinion and associated legal costs and the cost of advising Mrs K on the effect of that opinion
- the calculation date should be one calendar month after advice was received by instructing solicitors from counsel. The one month "breathing space" is simply a recognition of the fact that in my view Mrs K needed time in any event to consider what counsel advised and take the suggested action.

As regards the capital sum I find as follows. I include in that term other items claimed such as losses arising from the sale of the business and any related matters dealing with payments to third party claimants on Mrs K's late Son's estate.

I have to say I find it difficult in the light of counsel's advice, to make any award in this respect. I think it is simply too speculative to say what Mrs K would have done had the life cover been set up properly. She may or may not have sold the business or carried it on. I do not think I can make any award in this regard and I do not propose to do so.

To the redress interest at 8% simple should be added from the date the cost was incurred to the date of my final decision. The award should be paid within 28 days of Mrs K accepting my final decision, presuming she does. If it is not paid within that time interest at 8% simple should be added from the date of the final decision to the date of payment.

If the business is advised that it should deduct tax from any interest paid it may do so but must provide a tax deduction certificate to allow Mrs K to recover the tax if appropriate.

my 2nd provisional decision

It therefore follows that my provisional decision is that the business should pay Mrs K all her costs and expenses that she incurred as set out above.

I also consider that the business has exposed Mrs K to a considerable amount of avoidable distress and inconvenience at a very difficult time for her and should therefore pay her the sum of £1000 in recognition of that.

Mike Boyall
Ombudsman

Summary of the first Provisional Decision

I have carefully considered all the information and evidence submitted by all parties about this complaint. As a result, I am considering departing substantially from the conclusions reached by the adjudicator.

Subject to any further comments and evidence that I receive by 3 July 2012, I intend to issue a Final Decision along the following lines.

Summary of complaint

This complaint relates to advice in connection with mortgage protection received by Mrs K and her late son, Mrs K's late Son, who died in September 2008. Mrs K says that, as a result of the adviser's failure to advise them appropriately, she has suffered a financial loss.

Background to complaint

Mrs K and Mrs K's late Son K needed life cover to protect a mortgage they were arranging in order fund a joint business venture. The adviser recommended they each take out a single life policy on an own life basis for the full amount of the loan. However, Mrs K, who was the primary point of contact with the adviser, says he failed to advise that either policy should be written in trust or assigned to the mortgage. As a result, upon Mrs K's late Son's death, the proceeds of his policy were paid to his estate and, as he died intestate, some of the proceeds must be paid to his father rather than to clear the mortgage on the business.

Because of this, Mrs K has incurred legal costs in order to satisfy HM Revenue and Customs as to her right to a portion of the funds. She also faces further peril due to the fact that a substantial portion of the life policy proceeds must be paid to Mrs K's late Son's father, her ex-husband, rather than be used to pay the mortgage as was intended.

Mrs K and her solicitor brought her complaint to the Financial Ombudsman Service after it was rejected by Independent Mortgages (SW) Limited (the business). The adjudicator who considered the matter was of the view that the matter would be better dealt with by the courts, on the basis that Mrs K's late Son's wishes could now not be ascertained.

Mrs K's solicitor rejected these findings, contending that the issues were straightforward and that Mrs K had already exhausted her funds in pursuit of the complaint and it would therefore be burdensome to expect her to take the matter to court at this stage.

The business had nothing further to add to its stance in the matter.

The complaint remains unresolved and has been passed to me for review.

My Provisional Findings

First of all, may I express my condolences to Mrs K for her loss. I must also apologise to both parties for the delays while we considered the issues.

I have considered all the evidence and arguments from the outset, in order to decide what is fair and reasonable in the circumstances of this complaint. Having considered the evidence, I have concluded that the issues are straightforward and that I do have enough evidence to determine the matter. That does not however mean the matters in dispute are easy to decide.

Accordingly, I set out below my provisional findings.

Most of the facts here are not in dispute. Also most of the advice given does not appear to be disputed or complained about.

Mrs K and her son wanted life cover for the mortgage attached to their new business venture. Accordingly two life policies were sold. Generally for this kind of mortgage and circumstances I suggest that the sale of decreasing term cover would be unobjectionable. To some extent this is about what the advisor did not do rather than what he did do.

Two unconnected and unrelated policies were sold. As I say the policies themselves would be difficult to criticise but the fact that they were not joint life first death policies or put into trust or charged to the lender left an obvious gap in cover. Joint life first death policies will pay out on the death of one life insured to the benefit of the surviving policyholder. I would expect an advisor to be fully aware of the dangers of such gaps in cover and the possible disastrous consequences if as here some tragedy intervened before the mortgage was repaid in the normal way. I note that the identified need here was a requirement for "sufficient life assurance to repay your mortgage in the event of your dying (before the mortgage is paid off)"

That objective applies to both parties. In fact for these purposes Mrs K and her son can be treated as identical with the same circumstances and objectives.

Historically lenders would insist on life cover being taken out for loans, commonly taking a charge or noting their interest on such protection policies. For a number of reasons lenders stopped automatically taking charges over life policies.

At the risk of repeating the obvious there are a number of good reasons why joint life first death policies or policies in trust are more effective in providing life cover where the arrangement set up here is not. As here it may transpire that one life insured is intestate. Indeed the business suggests that the failure of Mrs K's late Son to make a will is the real cause of the problem here. I disagree. Even if a will has been made the estate can only be distributed in accordance with a will where there is an estate of value to distribute. If for whatever reason an estate has little or no value the existence of a will is largely irrelevant. Any assets coming into the estate will not only (potentially) be liable for taxation but will also be distributed pro rata amongst the creditors of the deceased insolvent estate. A joint life first death policy or trust arrangements completely avoid any such difficulties.

In effect the only matter I have to decide is whether the business fell below the standard to be expected at the time the advice was given. I note that it is not disputed that advice was given.

Having read the arguments put by Mrs K's solicitors I think the advice given did fall below the standard to be expected of an advisor at the time.

The policy sold simply did not meet the requirements of the client. (I use the singular here because this is in effect about the advice given to Mrs K's late Son and Mrs K and as I said above the situation is effectively identical as between them in any event).

From the evidence, I can see that it was Mrs K who was in contact with the adviser and she received the bulk of the advice on behalf of both herself and her son. Mrs K's late Son was available to answer questions when the adviser needed information in order to complete the proposal form for the cover.

On the basis of the evidence, I have concluded that Mrs K's late Son and Mrs K did both intend to protect the entire mortgage so that should either person die, the other could clear the mortgage in its entirety, leaving the business unencumbered by this debt. I think that is the only conclusion which can be drawn from the evidence.

I note the business' contention that Mrs K and Mrs K's late Son refused to attend its offices for a full review and it therefore provided limited advice. I also note its further contention that it was the intestacy of Mrs K's late Son's estate which caused the problems rather than its lack of advice. I have dealt with that above. However, I am not persuaded by either argument. The adviser was presented

with a simple request to arrange appropriate life cover to protect a joint mortgage for the purposes of buying a business. The information required to make a recommendation was all known at the outset.

I suspect it is often the case that the subject of whether a business or personal will existed is routinely discussed when life cover is being considered. I do not accept that because the clients were busy people who conducted much of their business with the adviser by phone, the advisor was prevented thereby from establishing such basic information.

In addition, I do not agree that it was for the solicitor arranging the purchase of the business or for Mrs K and/or Mrs K's late Son to raise the subject of putting the life cover under trust or assigning it to the lender, nor for the manner in which the cover should be arranged. It was for the adviser to explain the various methods by which the mortgage could be protected and to advise in relation to assignment and appropriate trusts.

As I said above I am aware that most lenders do not now insist on policy assignment. However, this does not extinguish the adviser's duty to sell the right product or at the very least to ensure that his clients are aware of what can happen if they do not have wills and the life cover is neither written in a trust nor assigned to the lender. At the very least, I would have expected a written recommendation that both Mrs K's late Son and Mrs K put the policies in trust or make personal wills and specifically that they make a business will for the new joint venture. I would have expected the advisor to either arrange (or at the least very strongly recommend) the assignment or to complete a trust form and arrange for the plans to be put in trust via the life company, or to say in his letter of recommendations why neither course of action was being recommended.

Since the advisor has not done so, I have concluded that Mrs K has been disadvantaged by the adviser's omissions. Accordingly, I need to consider what position Mrs K would be in had she received correct advice.

Upon the death of her son, Mrs K's late Son, had the policy been assigned or put into an appropriate trust for her benefit, Mrs K (or the lender) would have received the entire policy proceeds. She could then have paid off the entire mortgage.

As it stands, she has succeeded in persuading HM Revenue & Customs to accept retrospective changes by regarding the sum assured as subject to an implied trust. However, this only covers part of the money, representing Mrs K's notional half of the mortgage liability at the date of Mrs K's late Son's death.

The balance has fallen to the estate which would normally be distributed according to the rules of intestacy. However, Mrs K and her ex-husband, have signed a deed of variation permitting him to inherit a sum plus interest at 6% per annum until date of payment, with Mrs K receiving the remainder.

This means that instead of receiving the full amount of the life assurance proceeds at the outset, Mrs K has received £527,791. She has also incurred legal costs in rearranging the estate so as to enable the part payment of capital and the payment to her ex-husband.

Mrs K and her solicitor should be aware that we do not automatically pay for solicitors' costs which have been incurred in bringing the complaint to us. However, the fees which have been necessarily incurred in rearranging the late Mrs K's late Son K's estate are costs which have been incurred due to the adviser's failure to provide adequate or any advice on the matter of wills and trusts for the policy.

I note Mrs K's solicitor has set out a schedule of costs which he believes are due to be paid to Mrs K. However, my aim is to put her *as near as possible* in the position she would have been in but for the lack of advice received from the adviser. I do not accept that the costs of sale of the business should be included since Mrs K would have had to reach a decision about how to proceed with the business in any event. We cannot *know* what she would have done, had the policy proceeds been paid to her upon the death rather than in tranches following legal representations to her ex-husband and to HM Revenue and Customs.

My Provisional Decision

Accordingly, my provisional decision is that I am minded to uphold this complaint. The business should pay Mrs K an amount equivalent to the full sum assured that was paid out on the policy. From that sum should be deducted the sum which has already been received (which I believe to be £ 527,792. To the remainder should be added interest at the rate of 8% simple between the date of Mrs K's late Son's death and the date of settlement of this complaint.

If any of the figures quoted above are wrong the parties should tell me.

In addition, the business is to obtain a mortgage statement from the mortgage provider and is to pay the interest charged on the loan between the date of Mrs K's late Son's death to the respective dates upon which Mrs K received the two tranches of capital from Mrs K's late Son's estate. It should also pay the interest charged on the remainder until either date of mortgage redemption or until date of settlement of this claim whichever is the sooner.

Further, the business is to pay Mrs K her legal expenses incurred in mediating with HM Revenue and Customs in respect of the implied trust issue and her legal expenses in relation to the agreement reached with her ex-husband including any costs of arranging the deed of variation. To this sum should be added interest at the rate of 8% simple. Should the business consider it necessary to deduct tax from this portion of the interest, it must provide Mrs K with the relevant tax certificate. Mrs K may then be able to arrange a refund via HM Revenue and Customers, depending upon her personal circumstances.

Mrs K's solicitor must provide a detailed breakdown of expenses. Mrs K is also to co-operate in the provision of any information reasonably required by the business so that it can prepare its redress calculation.

I consider that the business has exposed Mrs K to a considerable amount of avoidable distress and inconvenience at a very difficult time for her and should therefore pay her the sum of £500 in recognition of this situation.

Where I uphold a complaint, I can make a money award requiring the financial business to pay compensation of up to £100,000 plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £100,000, I may recommend the business to pay the balance. In this instance, my provisional decision is that the business shall pay Mrs K the amount produced by the above calculation – up to a maximum of £100,000 plus interest. The parties should be aware that if the final decision is accepted it appears that no legal action can be taken to recover any balance above £100,000.

If the amount produced by the calculation of fair compensation exceeds £100,000, I recommend that the business pays Mrs K the balance.

The parties should be aware that the award will be enforceable through the courts (in accordance with Part III of Schedule 17 of the Financial Services and Markets Act 2000) but only to the extent of the first £100,000 before addition of interest and any costs.

Mike Boyall
ombudsman