

## **complaint**

Mrs B has complained that The Prudential Assurance Company Limited will apply an 'early cash-in charge' to the value of a Flexible Investment Plan (FIP) she originally took out in 2007 if she dies within five years of making a large 'top-up' to the FIP in June 2017.

She's represented by her son-in-law, Mr N, who had recommended the FIP to her in 2007. He says that, as this 'top-up' in June 2017 was essentially a replacement for a large withdrawal Mrs B made from the FIP two months' earlier as a 'bridging loan' to move house, it's not fair that a FIP she has held for more than 12 years should suffer such a charge if she dies before June 2022.

He added that Mrs B didn't receive the 'Product Particulars Notice' illustration (including her statutory right to 'cool-off) for the 'top-up' which confirmed that such a charge on a reducing scale would occur if she died within five years of making the top-up. Otherwise, she wouldn't have reinvested the money in the FIP.

Although Prudential has confirmed that this charge is an integral part of the FIP, Mr N says it was applied to claw back setting-up costs, including commission, if Mrs B died or surrendered it early. But commission hasn't been paid since 2013 and, in any event, the top-up in June 2017 was arranged by her direct. Prudential could make a huge profit out of her death which can't be justified and goes against the Financial Conduct Authority's principle of 'treating customers' fairly'.

## **background**

In January 2007, Mrs B was approaching age 80 and invested £180,000 in the With Profits fund of a Flexible Investment Plan (FIP).

The 'key features document' (KFD) dated February 2006 confirmed that, as she was aged 75 or more and chose the 'no initial charge option', Prudential applied an 'early cash-in charge' to the value of the Plan if Mrs B surrendered it, or died, within five years of making the investment (including subsequent 'top-ups'), on the following reducing scale: nine per cent in year one; seven per cent in year two; five per cent in year three; three per cent in year four and one per cent in year five.

However, the illustration Mrs B received when she took out the FIP in January 2007 confirmed that the 'early cash-in charges' would be seven per cent in year one; five per cent in year two; three per cent in year three and one per cent in year four.

In September 2008, Mrs B did make a top-up to the FIP of £32,000, so the same scale of early cash-in charges applied to this part of the investment until September 2012. She also started to take annual capital withdrawals of £1,500 from the value of the FIP, payable monthly.

It seems Mrs B decided to move house in 2017 and needed funds to purchase her new home because she hadn't yet sold her existing property. So, she applied to part-surrender the FIP for £305,000, leaving it in force with a minimal value of £1,700, and stopped the regular monthly withdrawal after the March payment. It appears that this transaction was overseen by Mr N.

When Mrs B sold her previous property less than two months' later, she applied direct to Prudential to reinvest £370,000 in the FIP and to restart her annual withdrawals at £1,800, payable monthly. Prudential sent a Product Particulars illustration (including a statutory 'Cooling-off Notice) to Mrs B at her new address which confirmed that she requested this investment on a 'no initial charges option' basis and that: "*We pay out 100.1% of the value of the plan, less any early cash-in charge, upon death.*" The Product Particulars also confirmed that this charge applied in the first five years of this top-up and on the same reducing scale set out in the February 2006 KFD.

While Mrs B has said that Mr N called Prudential to confirm her intention to reinvest in the FIP, it nevertheless wrote to her current servicing adviser for this investment notifying it of her request "*to allow you the opportunity, if you wish, to make contact with your client in regards to this.*" It seems Mrs B completed her application direct with Prudential without receiving or requesting contact from this adviser.

Prudential rejected Mrs B's complaint because the Product Particulars illustration she received when she took out the FIP in January 2007 confirmed that 'early cash-in charges' applied in the first four years for each investment (including top-ups). This condition was repeated in the proposal Mrs B completed to arrange the top-up in September 2008. Prudential emphasised that the 'early cash-in charge' is a key feature of the policy and is not related to the 'clawback' of commission. It also pointed out that a Product Particulars Notice (including Mrs B's statutory right to 'cool-off' within 30 days) was sent to her new address in June 2017 and this set out a similar scale of charges for this reinvested sum. It couldn't explain why Mrs B failed to receive this Notice.

The complaint was considered by one of our investigators, who didn't think it could be upheld. Briefly, he said that:

- Prudential did not advise Mrs B to take out the FIP in 2007 or in relation to any subsequent activity on it and, therefore, it has no responsibility to ensure it was appropriate for her needs at all times;
- the original 'key features document for the FIP states: "*There's a charge for taking money from the plan... in the first five years of each investment or top up.*" "*If the person(s) covered is (are) aged 75 or more when you take out your plan, we will apply an Early Cash-In Charge on death.*" "*If the person covered dies within five years (or three years if you selected the 3-Year Early Cash-In Charge option) from the date of each investment (including top-ups) we will apply the charge.*" So, he was satisfied that the documentation Prudential provided Mrs B at outset clearly set out the circumstances in which this charge would apply;
- while he acknowledged Mrs B says she didn't receive the Product Particulars in June 2017 which confirmed these charges again, he could see that it's addressed correctly and Prudential has said it was sent. Therefore, on the balance of probabilities it was most likely sent out to Mrs B;
- it's important to note that Mr N was her financial advisor who arranged this policy for her in 2007. It's also evident that he oversaw all activity on the FIP up-to-and-including Mrs B's request to reinvest £370,000 in the FIP in June 2017. He ought to have known that a Product Particulars Notice would have been issued for this application;
- Mr N has argued that an early cash-in charge shouldn't apply in June 2017 because commission was no longer paid to advisers by then (and Mrs B applied direct to Prudential for the top-up anyway). But the purpose of the early cash-in charge is not to take back unearned commission - it's an integral part of the product's features.

On balance, the investigator couldn't see that Prudential had done anything wrong in its dealings with Mrs B, who either took independent advice or dealt direct with Prudential without adviser involvement.

In response, Mr N disagreed with the investigator's assessment and said that:

- the focus of the Financial Conduct Authority during the last few years has been on high charges for investments, which are deemed not to be within the spirit of "treating customers fairly". Consequently, payment of commission to advisers has been banned;
- while Prudential strictly may not have done anything wrong, in applying a severe penalty on a financial product, whose purpose is to claw back commission, when no commission has been paid on this top-up in 2017, is not within the spirit of treating customers fairly;
- Prudential makes £6,475 each year from Mrs B's policy and it's patently unfair to charge another £26,000 from her death. It is pure profiteering and morally repugnant to hide behind outdated and now banned terms and conditions.

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

## **findings**

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

I'll first address the issue raised by Mr N that, in the interests of fairness and because no commission was paid that needed to be clawed-back, the 'early cash-in charge' should not apply to the top-up investment Mrs B made in June 2017. As he says, Mrs B applied to Prudential for this top-up investment in June 2017 without requesting or receiving advice.

The removal of commission paid by providers to advisers came with the initial implementation of the Retail Distribution Review (RDR) in January 2013.

Briefly, RDR is concerned with ensuring greater transparency in the provision of advice, removing product bias by moving from a commission-based, to a fee-based, system of remuneration and ensuring advisers are better qualified. But RDR didn't prescribe how the charging structure of insurers' existing products should be amended accordingly.

The Financial Conduct Authority's principle of 'treating customers fairly (TCF)' does not look to ensure if a customer has been disadvantaged by the terms and conditions of a product in his or her individual circumstances. It relies on seeing a number of outcomes that show firms have adopted a culture that commonly treats its customers fairly: that products and services generally are designed to meet the needs of customers, that customers are provided clear information before, during and after the point of sale, that advice provided is suitable, that products perform, and services are provided, as customers were led to expect and that they are free to change product, switch provider, make a claim or bring a complaint.

What 'treating customers fairly' doesn't mean is that Prudential should have made a concession, or changed the original terms and conditions of the FIP, specifically for Mrs B because she made a 'top-up' to the FIP at an age which meant she might not live another five years.

Mrs B was already almost 80 when she took out the FIP in January 2007. When she withdrew £305,000 from it in March 2017, it remained in force with a nominal value on its original terms and conditions.

Both the key features document and the illustration Mrs B received at outset, and the illustration she was provided in respect of the top-up in September 2008, confirmed that an 'early cash-in charge' would be made to the fund on her death within four years of each investment. Accordingly, when Mrs B withdrew £305,000 from the FIP in April 2017, no such charge applied.

But, in returning £370,000 to the FIP two months later, Mrs B was making a 'top-up' to it and she acknowledges in her complaint that it was a 'top-up'. As such, she should have expected the original terms and conditions to apply; i.e. that this 'top-up' would be subject to a fresh 'early cash-in charge'. That the FIP did apply another 'early cash-in charge' from June 2017 doesn't mean that Prudential has treated her unfairly. It wasn't Prudential's responsibility to warn Mrs B what this might mean for her, and whether it was advisable to make this investment, at her age. She was aged 90 by then and it was for her to decide whether it was appropriate to make this investment based on its existing terms and conditions that applied. I agree with Mr N that it may not have been advisable for Mrs B to take the risk of suffering a significant charge to her fund given the probability that she may not live another five years. But that was a decision Prudential couldn't make for her.

I also have to bear in mind that Prudential did follow the principle of treating Mrs B fairly by ensuring that it sent her a Product Particulars illustration in June 2017 enabling her to consider the terms and conditions of this investment and to change her mind within 30 days if she decided it wasn't suitable. It also notified her current servicing adviser that she had applied to make this investment so it could discuss the merits of making this top-up with her. But it's evident that Mrs B continued to be guided by Mr N.

Having said that, I've listened to a telephone conversation between Mr N and Prudential from May 2017 when Mrs B was considering the reinvestment of £370,000 in the FIP. In this call, Mr N gave Mrs B's date of birth as part of the initial caller verification process. So it was apparent she was more than 75 years old. Later, Mr N comments that her age didn't allow her to invest in a brand new FIP - the maximum age at entry was 89. This alone might suggest there was some disadvantage in making a new investment beyond that age.

The purpose of the call was to obtain information around Mrs B's intention to make a large investment in her existing policy. Later in the call, Mr N confirmed this figure as £370,000. Much of the initial conversation concerned chargeable gains and tax implications of making withdrawals.

But Mr N then asked: if the value of the FIP reduces, whether it still paid the original amount invested on death or if Mrs B ever went into care. The representative didn't comment on the nursing home option, which does pay the surrender value (less any MVA that might be applicable) with no 'early cash-in charge'. Mr N was alluding to the "*Guaranteed Minimum Death Benefit - Return of Premium Option*" at extra cost. This option was never available to Mrs B, as she was more than 74 years old when she took out the FIP in 2007.

The Prudential representative did provide Mr N information with regard to the amount payable on Mrs B's death that was incorrect, as follows:

- that the FIP would pay 101 per cent of the fund value to Mrs B's estate. No mention is made that an 'early cash-in charge' would apply if Mrs B died within five years of making the 'top-up' of £370,000. (As Mrs B was more than 74 years old at outset, the death benefit is 100.1 per cent of the current fund value, less the 'early cash-in charge');
- that the policy was joint life. (But Mrs B was the only life assured, so the FIP would be surrendered on her death and the proceeds paid into her estate);
- that there is no chargeable event on her death (But the FIP is a 'non-qualifying' whole life policy and death is a chargeable event).

So, based on this conversation and what Mr N knew, or ought to have known, from the policy documentation Mrs B had received from Prudential since January 2007, I have to consider what Mr N is likely to have told her in good faith before she decided to 'top-up' the FIP by £370,000 in June 2017.

As the Product Particulars Notice was correctly addressed to Mrs B in June 2017, I can't explain why she didn't receive it. It seems she did receive this documentation when she took out the FIP in January 2007, and when she applied for the top-up in September 2008. So, I would have thought both she and Mr N should have expected to receive similar paperwork in June 2017, and the same terms and conditions to apply. I do note that, when Mr N called Prudential in 2018 to make this complaint, it incorrectly confirmed (albeit after the event) that Mrs B would not have received a Product Particulars Notice for this top-up in June 2017.

The application of 'early cash-in charges' on death is entirely due to Mrs B being more than 74 years old each time she invested in the FIP. She was the only life assured and, therefore, the FIP would be cashed-in on her death. But this 'early cash-in charge' is a *potential* charge, whose purpose is not to claw-back setting-up costs, including commission, because Mrs B may not die within five years and, therefore, the charge may never be made.

Also, FIPs taken out, or topped-up, by investors who are under 75 years old at the time do not suffer an 'early cash-in charge' on death, whether the investment was taken out before or after payment of commission to advisers ended in 2013. This charge is age-related and is applied so that Prudential can be fair to all policyholders investing in this product. In the fund chosen by Mrs B, any final bonus declared is added to death benefits and a market value adjustment (MVA) that might otherwise be applied to a surrender value doesn't apply on death. A charge is applied to cover these concessions on death.

While I acknowledge that Mrs B has held the FIP for 12 years, she did withdraw all but £1,700 of its total fund value in April 2017, including all the growth it had made. So, when she topped-up the nominal sum left in her FIP with £370,000, in terms of her contribution to the value of the fund, she essentially became a new investor from June 2017. And, as this top-up constituted almost the whole of her fund value, it attracted an 'early cash-in charge' on surrender or death to protect the overall value of the fund, and investors' share of that fund who remain in it over the longer term, from early exit payments.

On balance, I don't think Mr N should have believed that 'early cash-in charges' would no longer apply just because Prudential didn't pay commission on the top-up investment Mrs B made in June 2017.

I've also considered whether Mrs B and Mr N could have reasonably believed that no 'early cash-in charge' would apply to the FIP in June 2017 in any event.

There were errors and omissions made by Prudential in its telephone conversation with Mr N in May 2017. And there were moments during that conversation when the representative might have been prompted to mention that an 'early cash-in charge' would apply if Mrs B died within five years. But Prudential was not Mrs B's adviser, and it couldn't be expected to provide Mr N all the information and potential consequences of investing £370,000 in the FIP at her age as if it was her adviser. Mr N was her adviser, and it's reasonable to expect he would have known that the same terms and conditions of the FIP from the two previous investments he arranged for Mrs B in January 2007 and September 2008 would apply to the 'top-up' she proposed to make in June 2017.

It is not the role of this service to comment on the design of a product as it affects Mrs B where Prudential didn't recommend the policy to her. If she believes the terms and conditions of the FIP don't support the principle of 'treating customers fairly', she would need to refer the matter to the Financial Conduct Authority (FCA). But I should emphasise that the FCA doesn't resolve individual disputes; it would consider whether Mrs B's comments raise systemic issues with this product that merit its attention.

### **decision**

My final decision is that I don't uphold Mrs B's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 7 December 2019.

Kim Davenport  
**ombudsman**