

## complaint

Mr and Mrs A complain about advice they received from Barrow Financial Services in 2007 to invest in a Prudential investment plan. They believe they were misled about the commission that would be paid to the adviser. They also do not believe that their adviser acted in their "*best interests*" or gave them "*independent advice*" and they complain about the suitability of the advice.

## background

A meeting took place with the adviser in October 2007. Following that meeting a pre-sale illustration was generated. There is a conflict of evidence as to whether it was provided to Mr and Mrs A. The application to take out the investment was completed in December 2007. A suitability letter dated December 2007 was generated by the adviser; again there is a conflict of evidence as to whether this was provided to the consumers. Mr and Mrs A say they did receive an illustration and cancellation notice from the provider in December 2007. They say this led them to contact the business and the provider to ask about the way commission was paid. Mr A has provided an email he sent to the business in December 2007.

An adjudicator considered the complaint and recommended it be upheld. He considered that the advice was unsuitable. The business disagreed and responded making a number of points. In summary it said:

- The advice provided was suitable and consistent with the level of risk that Mr and Mrs A agreed to take and that it met their overall needs and requirements.
- It did not accept Mr and Mrs A's assertion they were not provided with the suitability letter dated December 2007. It considered that a definitive conclusion needed to be reached about whether Mr and Mrs A received this letter before this case was decided.
- It stated that it had outlined the reasons for surrender of the existing policies in previous correspondence to this service. It stated that it did not process the surrender of the existing investments and that Mr and Mrs A had time for reflection and to decide whether the advice was suitable for them. It said the consumers took the decision to reinvest the surrender proceeds in to the 'new' investment plan and that the business did not place them under any pressure to do so.
- It does not accept that it was inappropriate to recommend a single fund and states that one of the reasons the fund was recommended was because it consisted of a diverse asset backed fund containing multiple asset classes.

The business has also complained that the subject of this complaint has evolved over the time it has been with this service. It says that the complaint was initially brought over the issue of commission and not the suitability of the advice given. It also says that complaint has not been handled correctly.

I issued a provisional decision in February upholding the complaint and in that decision I invited both parties to respond with any further submissions which they wished to make. Both parties responded to the provisional decision.

Mr and Mrs A responded to say, in summary, that:

- It is not fair that the business will be allowed to retain the commission paid.
- They maintain that the suitability letter of December 2007 was not received.
- They consider that it is unfair that as there may be no loss on their investment they may not receive any compensation despite being given unsuitable advice.

Barrow Financial Services responded to say, in summary, that:

- The original concerns raised by Mr and Mrs A only related to the commission received and “nothing else”. Therefore it feels that this Service should not have investigated the suitability of the advice provided.
- The advantages and disadvantages of surrendering Mr and Mrs A’s existing investments were discussed and consent was obtained from Mr A before the actual surrender of his Guaranteed Investment Plan from another financial services provider.
- Discussions surrounding the surrender of existing investments were explained orally and therefore the business would like me to *“treat these verbal disclosures with equal credibility”*.
- The bond allowed withdrawal of 5% of the investment amount and there was the option of partial surrender. Mr and Mrs A had not accessed income or withdrawal.
- It believes that the advice provided was suitable and consistent with the level of risk that Mr and Mrs A agreed to take. It also refers to the capital guarantee that the Investment plan provides and considers that it is likely that Mr and Mrs A have not suffered an actual financial loss.
- Mr and Mrs A were left with adequate emergency funds.
- It does not accept Mr and Mrs A would have left their capital invested in deposit based accounts at the time of sale and considers that they would have continued to invest in the same products in which they had previously invested.

## **my findings**

I have reconsidered all the available evidence and arguments, as well as the responses to my provisional decision, to decide what is fair and reasonable in the circumstances of this complaint. Having done so, I am not minded to depart from my findings as set out in the provisional decision.

The business has reiterated its point that this complaint started out as a complaint about commission and subsequently expanded to include a complaint about suitability. As indicated in my provisional decision it seems to me that Mr and Mrs A did indicate in their complaint that they did not believe the adviser acted in their best interests. This service has an inquisitorial remit which means it can look beyond the exact words of the complaint and try to identify what may be an underlying part of the complaint. Mr and Mrs A subsequently confirmed to the adjudicator that they wished to complain about the suitability of the advice

provided. They said that they relied upon the advice and the hand written projections the advisor provided before taking the decision to surrender their existing investments and reinvest the proceeds and the majority of their life time savings (including pension cash lump sum and redundancy payment) in to the 'new' investment plan. I am satisfied therefore that in the circumstances I can consider their complaint regarding suitability.

Where there is a dispute about what happened, I have based my decision on the balance of probabilities – in other words, on what I consider is most likely to have happened in light of the evidence and wider circumstances.

Mr and Mrs A met with the adviser in October 2007. Following that meeting they surrendered certain investments and took a lump sum payment from Mr A's pension. They then added these amounts to a redundancy settlement received by Mr A in order to invest £205,000 in the product recommended by the adviser. The consumers say they only surrendered their existing investments because they were advised to do so. Mr and Mrs A say they relied upon the advice they received. They say that they took out the investment because they were advised to do so but that they do not believe it was suitable for them. They also say that they did not receive the suitability letter issued by the business until they made a complaint a number of years later.

Mr and Mrs A say that the commission structure was not explained to them at the time of sale and that they did not receive any documents regarding the way commission was charged until they raised the issue of commission a number of years later, and they did not receive any information as to the amount of commission the adviser would receive until after the sale.

The business says that the advice provided was in line with the consumers' circumstances and objectives at the time. It says that the consumers were looking to invest for growth and were not happy with the performance of their existing investments. The business also says that this investment was suitable because the fund provided a mixture of assets. It says that the consumers surrendered their investments themselves and that the advantages and disadvantages of surrendering were discussed with Mr and Mrs A.

The business says that consumers were provided with the terms of business letter which they signed, together with information about how commission was charged. It also says a pre-sale illustration was generated and provided to the consumers. It says the suitability letter was sent to the consumers on around the date of the letter in December 2007.

There is a conflict of evidence in relation to information that has been provided. As indicated in my provisional decision it seems to me that the terms of business letter has been signed by the consumers and makes specific reference to the "*guide to the cost of our services*" document. It seems to me to be likely in those circumstances that the document was provided in October but that Mr and Mrs A did not pay a lot of attention to it at the time. I also take into account that the pre-sale illustration was generated for Mr and Mrs A personally and it is dated November 2007, so I consider it likely that this document was also provided. I note what Mr A says about the fact he raised an issue on cost when he received the post-sale illustration but that does not mean he did not receive the pre-sale illustration. It may well be that Mr and Mrs A were not particularly focused on the issue of commission at that stage.

There is a conflict of evidence regarding the provision of the suitability letter of December 2007. The business says it was sent and the consumers say it was not received by them at

that time. It is difficult for the business to demonstrate a number of years after the event that it sent a particular letter. However it has provided a copy of the letter which appears to be addressed correctly. It seems to me therefore on balance that the letter was sent. The consumers have stated that the fact a letter/document dated from the material time is produced by the business does not mean it was sent. I appreciate the point they make however I have to consider on balance whether it was sent and on the available evidence I have concluded it was.

The consumers say they did not receive the suitability letter but that they did receive a letter from the provider with a cancellation notice around the same time. It seems unlikely to me that they would accept receiving the cancellation notice and not be honest about receiving the suitability letter. It also seems to me they would have remembered receiving this document as it was an important document which set out the reasons for the recommendation. I accept therefore that for whatever reason it was not seen by them at the time. However on the basis that I have concluded on balance that the business sent the letter I have to judge the business on that basis even if unfortunately it was not seen by the consumers.

The fact that I have concluded that the business on balance sent the letter and that its actions will be assessed on that basis does not mean that I conclude that the letter gave sufficient and clear information. As I indicated in my provisional decision I would expect the suitability letter to summarise the important points of discussion regarding the recommendation made by the business.

The business says that the consumers made the decision to surrender their existing investments and this was not due to its recommendation. I am not persuaded this was the case. It seems to me that at the point of the first meeting with the adviser the consumers held certain investments and that those investments were surrendered shortly after that meeting, and then the money was used to invest in the product recommended by the adviser. It also seems from the notes provided that comparisons were drawn between the existing plans held by the consumers and the recommended investment. I am satisfied therefore on balance that the adviser recommended that the consumers surrendered those investments in order to invest in the product recommended and that the consumers relied upon that advice.

I also consider that they were advised to use monies from a redundancy payment and lump sum pension to invest in this product. In addition the consumers have indicated that this is the case. However, this is not covered in the suitability letter.

Nothing is said in the suitability letter regarding the advantages and disadvantages of surrendering an existing plan to reinvest in a new one. I note that the existing GIP plan had only been taken out in 2005 and that it had a guarantee at the fifth year. So if the consumers had kept this existing investment they would have been able to access their capital earlier without losing the guarantee rather than taking out a new investment which did not have a guarantee until the fifth year. It also seems that the suitability letter said that this money was held on deposit which, in my judgment, missed out the important step of where that money had come from, just a short while before.

The business asks me to accept that Mr and Mrs A were informed verbally of the advantages and disadvantages of surrendering their investments. However, I consider that if the advantages and disadvantages of surrender had been thoroughly discussed that this would and should have been set out in the suitability letter in these circumstances. I am not

convinced, on balance, and on the available evidence, therefore that these issues were properly discussed with the consumers and that these factors were sufficiently brought to their attention.

I also am not persuaded that the advice to take money which had been spread across different investments and deposits and place it all into one product which was invested in one fund was suitable. I accept what the business says that this fund had a mix of assets. But, if the fund did badly a large proportion of Mr and Mrs A's money was tied up in one place.

The business has stated in its letter dated October 2012, "*the bond structure would have allowed me to recommend other funds if they were or became more appropriate.*" It is my understanding that investors only had a choice of two funds, the Prufund Growth Fund and the Prufund Growth & Income Fund and policyholders were only able to switch between the two funds. Therefore, it appears that the flexibility this plan offered was very limited.

I also consider that to take the money from the very low risk environment of being on deposit, as regards the redundancy and pension lump sum, and place it into a bond was a significant increase in risk. I appreciate that the recommended product had a guarantee at the fifth year but this left Mr and Mrs A at risk if they wished to access the money before then. The business says that as the consumers kept the money invested for that period they did not need to access it. However, the recommendation has to be made on the basis of information known at the time. I consider that there was a risk that money would be needed for unforeseen eventualities and this investment was a large proportion of their available funds. I also note the fact find records "*new job*" and university for their child as potential future changes in their circumstances.

The business does not appear to accept that there was an increase in risk. It says that the previous guaranteed investment plan had higher equity content and that the active management of this fund lowered the risk. However the previous existing investment referred to was for a much smaller amount. The investment recommended by the business represented a high percentage of Mr and Mrs A's available capital.

I am also not persuaded that this increase in risk was set out sufficiently to the consumers in the suitability letter or that it was expressly drawn to their attention by the adviser elsewhere. I would have expected to see documentary evidence which spelt this out clearly to the consumers.

I also agree with the adjudicator that this product appears to have had a significant equity holding which would have posed significant risk. The business says that there has been no loss as the product has performed well. However my consideration does not relate to the actual performance of the product, but rather the risk it posed and whether it was one the consumers wished to take. Having considered their existing position and investments including the fact that the redundancy payment and any lump sum pension would have been effectively on deposit, I am not persuaded that their attitude to risk could be described as balanced. I also take into account that Mr A had recently been made redundant which I consider would have in all likelihood made him more cautious. I consider that this investment posed more risk than they were willing to accept.

I consider that but for the advice they would have invested in low risk products spread across more than one fund. I also consider it likely that they would have held onto existing investments for longer. I note the business has said they would have invested in the same

risk products as existing investments but as already noted the existing GIP was for a much smaller amount.

The consumers have asked to be compensated for what they would have done if they had not invested in this product. I consider that as there is no compelling evidence as to what they would have invested in over that five-year period that the most reasonable form of compensation would be to assume they have their original capital intact and calculate a return on the basis of bank of England rate plus one percent. I consider that a fair and reasonable method of compensation in these circumstances.

As far as the issue of commission is concerned I am persuaded that the documents were provided by the business as I have set out above. I consider that the fact the consumers signed the terms of business document and that document gave a choice as to how payment for the advice would be made would indicate on balance that they were told that commission was payable. I have not seen evidence to suggest that the business agreed to forgo its commission and so I am not persuaded that this is the case. In any event as I am assessing compensation by way of the original capital back plus a return minus surrender value, I do not consider the issue of commission to have any material affect on the outcome as the commission paid will not affect the amount of capital the consumers' receive. In addition I should make it clear that this service is not a regulator and it not here to punish businesses but rather to compensate consumers for any loss that has been caused by the business.

I also note Mr and Mr A have stated that they may not receive any compensation according to the business and have asked for compensation to be awarded on a different basis. It seems to me that if the consumers have not effectively suffered any loss to there investment I cannot award compensation in order to reprimand the business. In addition the method of redress I have set out aims to compensate the consumers by way of a fair and reasonable return on their capital.

I consider it fairest to assume:

- With reasonable advice Mr and Mrs A would have had the original capital intact plus a reasonable rate of return
- The rate of return on the original capital would have been equivalent to 1 percent more than Bank of England base rate from time to time compounded yearly.
- The rate of return would have been by capital growth, rather than income, and may be taxable in the consumers' hands as a capital gain.

My final decision is that Barrow Financial Services should pay Mr and Mrs A compensation of D, where:

- A = the capital invested, less any amounts paid out by way of withdrawals, distributions of capital or before-tax income;
- B = a return on the amount from time to time of A by way of capital growth equivalent to 1% more than Bank of England base rate compounded yearly from the date of investment;
- C = the surrender value of the actual investment;

- $D = A + B - C$ , representing the investment loss.

For clarification, A and B above should work as follows: Any sum paid into the investment should be added to the calculation from the point in time when it was actually paid in so it accrues the “reasonable rate of return” within the calculation from that point on. Any reduction to the investment amount should be deducted from the calculation at the point in time when it was actually deducted so it ceases to accrue the “reasonable rate of return” within the calculation from that point on.

Payment should be made within 28 days of the business receiving the consumers’ acceptance form from the Financial Ombudsman Service and the business should calculate the figures to the date of payment. If the award is not paid within 28 days of the business receiving notification that Mr and Mrs A has accepted my decision, simple interest is to be added at a rate of 8% gross a year from the date of my decision to the date of settlement.

### **my final decision**

For the reasons outlined above and set out in my provisional decision I uphold the complaint.

Julia Chittenden  
**ombudsman**