DRN-3462656

The complaint

Mrs P complains that an adviser from Axa (subsequently Friends Life and now part of Aviva Life & Pensions UK Limited) failed to take into account that her existing NatWest Life whole of life policy was subject to an inappropriate type of trust, when he advised her to take out further term assurance and critical illness cover in 2009.

She has previously made a separate complaint that Aviva, who administered the NatWest Life policy in 2004, failed to notice there was an absolute trust – and allowed her to gain the impression that she had successfully amended the beneficiaries. I'm addressing all Mrs P's complaint points against Aviva in this decision. She is represented by her husband Mr P.

What happened

1997: Original sale of the existing NatWest policy and trust

Mrs P and her ex-husband Mr C were each advised to take out a National Westminster (NatWest) Life reviewable whole of life policy including critical illness and total and permanent disability cover by an adviser at her bank in July 1997. According to the bank, the reason for this meeting was to discuss family protection following the birth of their two children. (The recommendation was entered onto the 'family protection' and 'serious illness' sections of its 'Balanced Planner' document, rather than the 'loan protection' section.)

The bank's adviser wasn't employed by NatWest Life (which has since been taken over by Aviva), and I'm not considering his actions in this decision. The bank denies that this policy was a requirement of any mortgage, and says that Mrs P and Mr C had a mortgage (and associated cover) with another bank at that time. (The policies recommended also weren't for a specific term which would normally be sold to fit in with the length of a mortgage.)

Each policy was written in trust with Mrs P and Mr C as joint trustees, and each other as sole beneficiary. Absolute trusts were used, meaning the beneficiaries can't be changed. It is common ground between Mrs P and the bank that a flexible trust should have been used instead. Mrs P's policy had £148,000 life cover and £54,447 critical illness/total & permanent disability cover, both with annual indexation at National Average Earnings. It has a (small) ongoing investment value. The policy terms said that NatWest would review whether the premiums could sustain the level of benefits to be provided, one month before the 10th anniversary and each fifth anniversary after that. If they couldn't, the options were to reduce the benefits (or the indexation), or increase the premiums accordingly.

1999: Sale of the Scottish Provident policy

In December 1999 Mrs P and Mr C also took out a joint decreasing term (or earlier critical illness) policy with Scottish Provident. Mr P says this was following a house move and increase in mortgage. Again that is not something for which Aviva is responsible. The sum assured was £115,592, stated to reduce in line with the capital outstanding on a repayment mortgage until December 2020, with a total and permanent disability benefit of £62,789. Additionally, it appears there was a family income benefit payable on death or earlier *terminal* illness of £19,121pa, increasing with inflation until ending on December 2015.

The features of these two policies suggest that the decreasing term assurance would have

been taken out to support a repayment mortgage, and the family income benefit was – as its name suggests – to replace lost income if something serious happened to Mr P or Mrs C. Mr P and Mrs C later divorced and in November 2003 Scottish Provident confirmed it had removed Mr C as a life assured. The term of this cover was later extended by five years.

2004: 'Amendment' of the NatWest Life trust

At Mrs P's request in November 2004 Aviva (in its role administering the NatWest Life policy) then sent her a deed form to change the beneficiaries of the trust around her whole of life policy to her children. She returned the witnessed deed form to vary a 'flexible trust', but as the trust was an absolute trust it wasn't possible to change beneficiaries – and Aviva didn't inform Mrs P of this. On top of the original trust document (which reads *'Once you have chosen the person or persons who is to benefit under the Trust you cannot change your mind'*), Mrs P had handwritten: *'Changed to be in trust for* [children]*'.*

2008: Sale of the Axa policy

Mrs P subsequently married Mr P and they sought financial advice from Axa (Mr P's employer). Following a transfer of business from Friends Life (Axa's successors) under Part VII of the Financial Services And Markets Act 2000 on 1 October 2017, Aviva now accepts responsibility for the Axa adviser's actions. In December 2008 the adviser contacted Scottish Provident to ask for details of Mrs P's term assurance policy. Scottish Provident responded to confirm the policy was not written under trust, and gave a policy summary.

Aviva (as administrator of the NatWest Life policy) has also said that it received a letter from Mrs P dated February 2009 asking it to send the Axa adviser details of her policy. It says it replied that her plan was 'under trust' and that it *didn't* specify the type of trust in place. Mr P says that the Axa adviser made handwritten comments on a copy of the earlier bank's 'Balanced Planner' document from the 1997 sale, confirming that he'd established Mrs P had a Scottish Provident, NatWest and Swiss Life policy (for income protection).

The Axa adviser carried out a fact find on 30 July 2009 recording:

- Mr P earned about £61,000pa and Mrs P about £100,000pa, plus £9,500 income from a buy-to-let and £10,000pa maintenance from her ex-husband.
- Some minor issues were noted in their medical history for underwriting purposes.
- They had three dependent children.
- They planned to retire at age 62 (Mr P) and 60 (Mrs P) - both in 2029.
- They had a £105,000 interest-only mortgage on their main residence worth £525,000, due for repayment in 2019.
- Mrs P owned the £270,000 buy-to-let property with a £230,000 mortgage. *[Mr P has said in response to the provisional decison that this was her former home with Mr C]*
- They had about £120,000 in savings and £39,000 shares (and some endowment policies originally used to support a mortgage, but no further details are given).
- **Life cover:** They didn't want to protect liabilities (other than mortgages) or loss of income on death, as they thought these areas were covered.
- **Critical illness:** They only wanted to review this in respect of the mortgage amount.
- **Income protection:** They wouldn't be able to protect their income in the event of illness and also wanted to review this.
- **Estate planning:** They wanted to review these arrangements 'later'.

Two days before the adviser had emailed this to Mr P: ***'[Mrs P's] Nat West Review:*** *The papers from Nat West do not confirm what the premium would need to be following the review. I have asked them to send me some information.'*

A specific section of the fact find (C3) detailing their existing cover (at least, in relation to mortgage protection) should have been completed. This was left blank and Mr and Mrs P then signed at the end of this document to confirm the details were correct. The adviser also

completed a shortfall analysis document on the basis of Mr and Mrs P having no existing life or critical illness cover. Comments on this document included, with my emphasis:

> *'At this stage you did not wish to protect this* [buy to let] *mortgage. Your priority is to ensure that the mortgage on your* ***main residence*** *is properly protected in the event that either of you should die or suffer critical illness* ***without depleting the amounts available for family protection.'***

Whilst the adviser calculated that they would need additional family income of £30,000 if one of them died, he explained: *'Provided your mortgage is properly covered there is no need for additional life cover to provide the specified family protection of £30,000 p.a. due to the level of death benefits provided by your respective employers. This should be reviewed should you change employers in the future.'*

They then completed a fact find update document on 3 November 2009 as further time had passed. Again the sections to record existing cover for income on death, critical illness and mortgage protection were left blank and Mr and Mrs P signed at the end. The adviser had emailed Mr P the day before saying as follows:

> 'Y*ou had also informed me that your Buy-to-Let property has been sold and that the level of cover under the existing endowment plans cannot be reduced to make them more efficient savings plans...*
>
> *I will supply figures for the IHT* [inheritance tax] *liability based on existing employee death benefits and also assuming that there are none. I will also investigate with NatWest Life to see if the existing* ***whole-of-life plan*** *that [Mrs P] has can be amended so that it can be used to reduce the impact of Inheritance Tax on your children.'*

The adviser's first suitability letter of 20 November 2009 recommended as follows:

- *'…your immediate need was for Income Protection and Mortgage Protection Planning. Estate Planning was identified as a further need and we have agreed to address this at the next review…'*
- Income protection was recommended for Mr P (Mrs P had sufficient arrangements).
- **Decreasing** term assurance was appropriate for a repayment **[not interest-only]** mortgage of £105,000. [My emphasis]
- *'You each have some policies that existed before you married and that were put in place for previous mortgages. The levels of cover are not suitable and neither are the terms of the cover. You will retain the endowments that you have a savings plans. When these mature if you reduce your mortgage balance significantly you could consider reducing the mortgage cover that we are about to put in place…'*
- He recommended further joint decreasing term assurance with earlier critical illness cover to support the mortgage he recorded of £105,000, with a 15-year guaranteed premium term until 2024.

Mr and Mrs P completed the application forms for these policies in December 2009. Next to "do you wish to write your life cover under trust?", "yes" had been crossed out and replaced with "no" and "please discuss". Mrs P confirmed on the application that including the *new* proposal she would have £337,711 life and £188,178 critical illness cover in total (stated to *include* employer's death in service cover, but exclude policies she intended to cancel). That suggests the assumed existing cover was £232,711 life / £83,178 critical illness: consistent with the NatWest Life benefits indexed at National Average Earnings to 2009, without the Scottish Provident or any employer benefits.

In April 2010 the adviser informing his compliance department that *'They have taken a long*

time to decide what they wanted to cover.' He was required to send an amended suitability letter on 27 April 2010 which explained:

> *'Although the term of your mortgage only extends until 2019 you anticipate that you will have to extend the mortgage term beyond this date. You are planning to buy another buy-to-let property and this will divert funds away from repaying the mortgage on your main residence. You therefore expect to retain a mortgage on your home until 2025 and therefore requested that the life & Critical Illness cover* [is] *for a 15 year term.*
>
> *If you anticipated repaying your mortgage steadily over this term and arranged a repayment mortgage* ***we could have recommended a decreasing basis*** *for your life or critical illness cover. However, you prefer the flexibility of an interest only mortgage as this allows you to divert a larger percentage of your income towards your buy to let project. Accordingly a level cover is most appropriate as this provides a constant level of cover regardless of the actual repayment schedule.* [my emphasis]

The rest of this letter repeated the mistake of referring to the recommended policy being a £105,000 *decreasing* term – it was *level* term including total permanent disability cover.

2015: Mrs P's accident

In June 2015 Mrs P suffered permanent injury which resulted in her being unable to work, so she attempted to claim the Aviva (NatWest Life) critical illness benefit. Aviva established that the nature of Mrs P's injury (a traumatic brain injury) wasn't one of the defined illnesses on the policy, and she wouldn't at that time meet the conditions for it to qualify as *'total and permanent disability'*. The latter was defined under the policy in relation to activities of daily living, such as transfer and mobility, dressing, toileting and eating.

Mrs P was successful in claiming £52,297 on the Scottish Provident term or earlier critical illness policy. Her claim on the Axa policy was initially declined in 2016, but £105,000 was paid out in February 2018. She continued to pay premiums to NatWest Life, but became aware it was held under an absolute trust, meaning any successful claim would be paid out to Mr C. This formed her first complaint to Aviva, which I'll set below.

She also sought legal advice in an attempt to change the beneficiaries of the trust, and the advice was that this would attract further costs in excess of £10,000 and might not be successful. Those costs Mrs P did incur are the subject of a separate complaint to the bank who originally sold the NatWest Life policy, which I'm not discussing here.

My first provisional decision of 25 May 2021: the administration of the NatWest policy

Mr and Mrs P complained that instead of sending her forms in 2004 to change the beneficiaries, Aviva (as NatWest Life) should have told Mrs P that this wasn't possible.

Aviva responded that it wasn't responsible for its sale and therefore the type of trust used (a point I agree with). However it accepted it should not have issued or accepted the deed of assignment in 2004. It agreed it should have identified from the limited records available (from when the policy was held with NatWest Life) that there was an absolute trust. And had it done so, it was more than likely this matter would have been resolved many years ago by Mrs P. However it continued to think that opportunities were also missed by Mrs P and her advisers at the time and subsequently.

One of those advisers was, of course, employed by Axa – and Aviva coincidentally became responsible for his actions at around the time it was dealing with the first complaint. Mr P pointed this out to Aviva at the time, but rather than agreeing to include that issue in its investigation Aviva asked Mr P to refer that complaint to a different department.

In my 25 May 2021 provisional decision and subsequent 1 July 2021 email I summarised Mr P's arguments into three main ways Mrs P (or her children) might have suffered a financial loss for which Aviva, as administrator of the NatWest Life policy, could potentially be held responsible:

1. ***There might be a claim on the NatWest Life policy which is paid to the absolute trust, from which Mr C then benefits instead of Mrs P's children.***
   I decided that *if* Mrs P did meet the conditions to successfully claim under the policy (which didn't on the face of it appear likely) it wasn't appropriate for the Financial Ombudsman Service to continue an investigation into this area until she had made contact with Mr C (directly or through our service) to establish whether he was prepared to yield the proceeds of any claim to her. This was due to the expectation that a complainant will make reasonable attempts to mitigate their loss.

2. ***Mrs P has lost money paying premiums for a policy that she doesn't consider she could have directly benefited from.***
   I decided that if the policy itself (rather than the trust around the policy) was suitable for Mrs P in 1997 – noting here that its suitability was the bank's rather than Aviva's responsibility – the most likely thing Mrs P would have done was taken out the same policy out under a flexible trust which would have allowed the beneficiaries to be amended. So she actually paid the same premiums for the first seven years that she likely would have done, had the bank (as is common ground) not mis-sold her an absolute trust in the first place.

   In respect of the period from 2004 onwards:
   - on the one hand there was Aviva's admitted clerical error in administering the NatWest Life policy, which constituted maladministration but wasn't governed by by any specific regulations or codes;
   - I also considered that Mrs P shared some responsibility for the error going unnoticed in 2004 when she wrote on her copy of the original deed which stated the beneficiaries couldn't be amended, that she had in fact amended them;
   - but ultimately it was a problem set in motion by the use of the apparently wrong trust by the bank seven years earlier. There were well-understood regulatory obligations on the bank to provide suitable advice which was my overriding point.

   I considered the possibility of upholding the complaint by apportioning some (but not all) responsibility to Aviva for the 'lost opportunity' of Mrs P not being able to take out a more appropriate policy after 2004. She would potentially have cancelled the NatWest Life policy and replaced it with one which may have had different terms and conditions, and which may or may not have paid out for her condition in 2015. So was careful not to give Mrs P the total benefit of hindsight on this point.

   I concluded the most I could potentially award in a complaint about Aviva's administration of the NatWest Life policy is a refund of the premiums Mrs P had paid from around November 2004. I thought the rest of any loss Mrs P might have suffered from missing out on a possible claim on a policy with another provider would normally have been her loss to bear. However, Mr P hd also made a third argument:

3. ***If Aviva, when administering the NatWest Life policy in 2009, had told the Axa adviser its policy was under absolute trust, Mrs P may have been advised to cancel it in favour of a larger Axa policy – which we know would have paid out for her condition.***
   It appeared the Axa adviser may have made an assumption when accepting Aviva's 'under trust' answer that the policy was under a flexible trust. Aviva's non-specific answer was factually correct and not uncommon to give. And any assumption the

Axa adviser made that it was a flexible trust would also be correct the vast majority of the time, as absolute trusts are uncommon – but it was an assumption nonetheless.

I couldn't fairly say that Aviva misinformed the Axa adviser in 2009. But it was arguable that the answer 'under trust' should lead the Axa adviser to ask the policyholder for the actual trust documentation if they needed to see it. So I thought Mrs P may have more prospects for success when complaining about what happened in 2009 if she made that complaint about the Axa adviser's actions, rather than Aviva's administration of her her policy. And I wouldn't yet finalise a partial award against Aviva, when that would likely prompt a further complaint about the Axa adviser's actions in 2009 which could then be dealt with at the same time.

My second provisional decision of 22 December 2021: the subsequent Axa advice

Mr and Mrs P then made the second complaint that the Axa adviser failed to follow up on his enquiries with NatWest Life (Aviva) when advising him and Mrs P between 2008-10, and missed that the policy was under an absolute trust. They say he should instead have made the Axa recommendation for a higher level of benefit to replace the NatWest policy.

In its responses Aviva explained the basis for the adviser's recommendations as I've set out above and that Mr and Mrs P had agreed with those recommendations. It accepted that the Axa adviser had agreed to email NatWest Life (Aviva) about Mrs P's policy to see if it could be altered to reduce the IHT impact. But the information on file showed they were going to address any IHT liability at the next review. As the priority at the first review was mortgage and income protection, it didn't feel the NatWest policy was relevant to this sale.

Protection advice

It appeared from the background set out above that the Axa adviser likely knew in 2009 that:

- Mrs P had a whole of life (not term assurance) policy with NatWest, also providing critical illness and total & permanent disability cover. The paperwork said this policy was held under trust, but not which type of trust.
- Mrs P also had a Scottish Provident decreasing term assurance policy – suggesting she had a repayment mortgage at one point in the past. But she also had endowment policies likely taken out at other times to support an interest-only mortgage.
- Mr and Mrs P's main residential mortgage was stated to be for £105,000 on an interest-only basis and Mr and Mrs P were using their wider savings (of more than the mortgage amount) in a mortgage offset arrangement. Those (undetailed) endowment policies had been repurposed as savings vehicles.
- Mr and Mrs P weren't looking for advice to repay the mortgage at the end of the term; only on how they could best protect their mortgage in the event of death or earlier critical illness (or total & permanent disability).

I then addressed which of Mrs P's existing policies were within the scope of this advice:

- The decreasing term Scottish Provident policy wasn't suitable to protect an interest only mortgage. As its value wasn't included on the Axa application form, I thought it was either expected to be cancelled *or* retained to provide cover for Mrs P's children.
- I said the latter because another part of this policy *already* provided income from death until 2015 – so the value of that would reduce the later a claim was made. Essentially, the term assurance component would do the same, up to December 2020. The relevance of this was that by 2015 Mrs P's eldest sons would have passed age 18, and by 2020 Mr and Mrs P's youngest daughter would have reached age 12.
- That left the NatWest Life level whole of life policy, which also seems to have been taken out when Mrs P and Mr C approached their bank in 1997 for advice on

protecting their young family – i.e. it was not for the purposes of mortgage protection.

The Axa adviser referred to *none* of Mrs P's existing life/critical illness policies being available to protect the £105,000 mortgage – and it's clear he knew about the NatWest Life policy as well as the Scottish Provident policy. He also wrote on the shortfall analysis document that Mr and Mrs P didn't want their mortgage protection planning to *'…deplet[e] the amounts available for family protection'*.

Mrs P's employment benefits didn't include critical illness or total permanent disability cover, which would come within the term 'family protection' and were provided by the Natwest Life policy. Either way it seemed that the adviser had picked up on a wish to retain existing insurance policies which were in place for family protection, rather than mortgage purposes. And I considered that included the NatWest Life policy. Whether or not Mrs P intended to retain the Scottish Provident policy, it wasn't suitable for their interest-only mortgage and had now paid out on a claim, rendering this point somewhat moot.

So in summary, I didn't consider the Axa adviser was at fault for not looking further into Aviva's reply that the NatWest policy was "in trust", if that wasn't a policy he needed to consider to meet the purpose of the advice sought – to protect their mortgage.

Inheritance tax (IHT) advice

Whole of life policies are often put in trust, amongst other reasons, to meet an inheritance tax bill on death. Given that he'd been told Mrs P's policy was 'in trust', and didn't know it was an absolute trust, I wasn't sure what the adviser's comment that he would see if the policy could be 'amended' refers to. But his remarks to his compliance department suggest Mr and Mrs P were taking a long time to make decisions (and I think they would have been mindful of this too). So the adviser likely deferred his IHT investigation in order to ensure the protection arrangements were not delayed further.

So in summary here, I was also not persuaded the adviser acted unreasonably in not pursuing the IHT issue when it hadn't been identified as an immediate need. He had sufficient reason to separate his IHT enquiry from the recommendations he was making, given that Mr and Mrs P's position – as explained in his letter and not contradicted by them – was that the NatWest Life policy protected a different area to their mortgage.

I also wasn't satisfied the Axa adviser was later responsible if Mr and Mrs P didn't pursue the IHT matter. A subsequent review meeting is a two-way process – both parties would need to be willing to engage with it. So it was equally open to Mr and Mrs P to go back to the adviser to cover those issues they'd agree to review later. It may be that they went elsewhere, but if not and they'd been expecting Axa to do a further review, they were free to ask.

This meant that in respect of both complaints against Aviva I only intended to ask it to refund Mrs P the premiums she paid to her NatWest Life policy from December 2004 to the date of settlement. I wasn't requiring it to add interest to the refund when the naure of their complaint was that she would most likely have spent these premiums on another policy. But I also thought £500 should be paid for the distress and inconvenience caused by Aviva's maladministration of the NatWest Life policy.

Responses to the second provisional decision

Mr P gave a partial response on his wife's behalf on 7 January 2022. This included a full copy of the email he'd alluded to from the Axa adviser explaining that there were problems with Aviva's IT system for the NatWest Life policy, which he says explain why the adviser's recommendations took so long to produce. The email shows the adviser was trying to find out when the policy reviews took place and how this affected the level of cover. It also shows

that options were being explored to include the Scottish Provident policy as part of the mortgage cover. So, he says finding out full information about the NatWest Life policy also was key to the adviser's recommendation.

Mr P also said at this point that *'the outstanding Mortgage at the time* [2008] *was £210k, £105k representing Mr Ps proportion'.* He requested further time to give more thought to the matter. Meanwhile, Aviva responded to reiterate that the covering letter under which it sent Mrs P the deed to appoint new beneficiaries in 2004 said, "'[it was] *unable to act as your legal adviser. It is therefore important you ensure your own legal advisers are satisfied that using the standard documentation provided will meet all of your objectives"*.

Mr and Mrs P then responded further on 25 March 2022. In summary, their new points were as follows:

- In respect of the original sale of the NatWest Life policy, I was wrong to say that both Mrs P and Mr C were beneficiaries. They maintain that they inferred this policy was a condition of what was their first joint (NatWest) mortgage in 1997, and the nature of the trust was so unusual it should have been explained fully.
- The Axa advice was triggered by the birth of Mr and Mrs P's first child, and took some time to complete as either they or the adviser had to travel 200 miles to meet. The advice was on protecting the £105,000 segment of their interest only mortgage because Mrs P's protection policies were *'more than adequate*' cover for the other £95,000 segment and her other buy to let investment.
- Mrs P's existing Scottish Provident and NatWest Life policies protected the £230,000 Northern Rock mortgage on the home she purchased on divorce in 2002, which became a buy to let. There was no intention to cancel any policy as a further buy to let was purchased in 2012.
- As a single mother with (from 2008) further family responsibilities, if Mrs P had known Mr C was the beneficiary of the NatWest policy she would have either have increased the cover of existing policies (Scottish Provident) or taken out a new policy in order to provide the mortgage and Income protection she considered she had at the time. This cover would have paid out following her accident in June 2015.
- Aviva had failed to inform them that automatic indexation on the NatWest Life policy had stopped and this policy should have been reviewed either in 2004 or 2012. Such reviews would have given an opportunity to increase cover elsewhere.
- They would like to know what now happens with their complaint against the bank for the 1997 sale.

What I've decided – and why

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

Both parties have made further comments following my second provisional decision, which I've considered in full. Aviva's comments about the covering letter to the deed it sent Mrs P into 2004 aren't new - I considered these points at the time I issued my first provisional decision. And I don't think directing Mrs P elsewhere for legal advice is an excuse for providing an inappropriate deed form to amend beneficiaries which couldn't be amended.

I did however note that Mrs P still retained a copy of the original deed (which she wrote on at the time) - and as that deed said that the beneficiaries couldn't be changed, it would have been reasonable for her to query this again with Aviva. Or, to take up the suggestion of taking her own advice for that reason. That is why I'm not holding Aviva responsible for a potential missed opportunity to claim on a different policy Mrs P might have taken out in

2004. I'm only requiring it to refund the premiums (without interest) that she paid to a policy within an inflexible trust that no longer met her needs, from that point onwards.

It's possible that Mrs P might have been in a different position by now if, in order to get out of the absolute trust in 2004, she had fortuitously taken out a different policy to the NatWest Life one which happened to have terms and conditions that were more favourable to a claim for her current condition. But to the extent that Mrs P is worse off because of this, I think she had an opportunity herself to query how it was possible to change beneficiaries that the documentation itself said couldn't be changed at the time. So the award I'm making in this case acknowledges missed opportunities here on both Mrs P and Aviva's part.

I accept that some of the delays in the Axa advice may have been from trying to get the information from Aviva - although it doesn't seem to be the only reason. As Mr P says, the adviser was exploring the extent to which any of the existing policies could be used to provide cover, and each meeting required some logistics to organise. However I don't accept that these enquiries demonstrate that, in the adviser's final recommendation, it *was* possible to repurpose the Scottish Provident policy – because its decreasing term didn't match the interest-only mortgage. And the evidence points to Mr and Mrs P wanting to retain the NatWest Life policy for family protection; not for the mortgage.

The adviser's suitability letter stands as a record of the discussions held. He's required to send it by the regulator for the reason that Mr and Mrs P can then dispute anything in it that isn't accurate. So I think it's reasonable for me to conclude from this that:

- The adviser was only asked to advise protecting a mortgage of £105,000. I note from the statements Mr P has provided that statements for the other £95,000 mortgage segment were self-contained under a different reference number - and he and Mrs P seem to have regarded each part of the mortgage as their 'portion'.
- Had the adviser been made aware the mortgage was actually £200,000, I would expect that to have been acknowledged in the fact find or his recommendation. It was an opportunity for him to recommend a higher level of cover – or to explain why cover was not needed for it.
- The adviser's comment that '*You each have some policies ...put in place for previous mortgages. The levels of cover are not suitable and neither are the terms of the cover'* is likely to have referred (in Mrs P's case) to the Scottish Provident policy which has a fixed term to coincide with a previous mortgage repayment date. But it was not suitable for repaying an interest-only mortgage.
- The adviser's comments that Mr and Mrs P didn't want to deplete the amounts available for family protection and references to IHT planning are likely to apply to the NatWest Life policy which provided cover more suited to these aims. If Mr and Mrs P didn't agree that they wanted to leave some protection in place for family protection and not the mortgage, I would expect them to have questioned it at the time.
- Either way, the adviser made no comment that there was a further £95,000 segment to the mortgage and this was what the NatWest Life policy would be protecting. I would have expected him to do this if it was discussed, particularly as his compliance department was checking the advice.

I'm not satisfied by Mr P's account that the NatWest Life policy was simultaneously covering a £230,000 mortgage on a buy to let (which didn't exist between November 2009 and 2012), but also an additional £95,000 segment to the main residential mortgage. Not only do the adviser's recommendations not discuss a £95,000 segment, but he was not tasked with investigating mortgage protection for the buy to let mortgage at all. So, none of this, in my view, helps demonstrate that the adviser's failure to notice the absolute trust on the NatWest Life policy has affected the recommendations he was making at that time.

Mr P has raised the point about Aviva's policy reviews of the NatWest Life policy. According to the policy conditions, the first review would have been in 2007, so I can see why the Axa adviser was querying what had happened to this review. But this in any event post-dates the point (2004) that I'm already providing a refund of premiums to Mrs P as a result of the absolute trust going unnoticed.

Mr P's comments suggest the review was carried out and his resulted in the indexation of cover ceasing. I don't know if Aviva adequately notified Mrs P of this - but if that would have led to her cancelling the policy, the remedy for that (a refund of premiums) is what I'm already going to be awarding in this case. The theme of all the arguments Mr P has advanced is that his wife would have then paid for different cover elsewhere. Looking at the extent of the cover she has taken out over the years, I don't think it's likely she would have simply kept the money she saved. That is why I'm not requiring interest to be added to this refund.

I've never said that Mr C and Mrs P were beneficiaries of the NatWest Life trust but rather that they were both trustees. And whilst the complaints I'm considering here aren't against the bank who sold the trust and policy to Mrs P, I have reiterated to Mr P what the bank said in its final response letter that the whole of life policy was not a condition of the mortgage. I agree it's unlikely such a policy would be sold to protect a mortgage let alone be a condition of it, but if that is something Mr P disputes he should raise that in his dispute with the bank.

Putting things right

Aviva must compensate Mrs P on the basis she would have stopped paying premiums to the NatWest Life policy from December 2004. (This assumes that Mrs P would have acted within about one month of Aviva notifying her that it was under absolute trust.) This is a fair settlement given that she paid premiums for a policy that didn't continue to meet her needs due to the absolute trust structure, partly as a result partly of Aviva's failure to highlight this to her. But I won't be requiring Aviva to add interest to the refund when she would most likely have spent these premiums on another policy.

We don't know who that new policy would have been with and whether it would have paid out for Mrs P's current condition. But if it had done, as Mr P argues, I think it would be fair and reasonable for Mrs P to bear this potential (but uncertain) part of her loss – in view of the opportunity she also had in 2004 to notice what the terms of the absolute trust said. And the alternative policy paying out would likely have meant any other cover for life and critical illness (which Mrs P currently still has under her NatWest Life policy) ceasing.

I therefore require Aviva to refund all of the premiums Mrs P has paid to NatWest Life and then Aviva from December 2004 onwards.

If Mrs P accepts my decision, this is on the understanding that she will cease paying future premiums to the policy. My understanding is that this will result in the cover she still has for life and critical illness lapsing, so Mrs P will need to bear that in mind that if she wants to replace that cover elsewhere – as it may cost her more to do so, or there may be limitations as a result of her condition.

I'm not requiring Aviva to do anything further in respect of those issues as the only basis on which I think Mrs P would still have had life and critical illness cover running today is if the alternative cover she could have taken out in 2004 *wouldn't* yet have paid out for her condition. And that isn't the basis of the complaints brought to us. I don't consider there is a reasonable basis for me to require Aviva to replicate Mrs P's benefits outside of the trust. I can see its argument that it would frustrate the terms of the trust for me to do that. Mrs P has the right to stop paying premiums – and the refund reflects the fact that she would likely have chosen to do that in 2004.

If Mrs P accepts my decision the refund she will be receiving from Aviva can be put towards any higher costs of cover elsewhere in future, so that is an option for her to consider. Alternatively, if the cost of such cover is prohibitive Mrs P has the option of rejecting my decision and continuing to pay premiums to the NatWest Life (Aviva) policy if she considers there is a possiblity she may benefit from it in future.

If Mrs P wants to retain her Aviva policy she should not accept my decision. She or a representative would need to engage with Mr C in the event a claim is successfully made. I've explained previously why I consider that's a reasonable step to take in mitigation of any loss. A complaint may result in the event Mrs P can demonstrate she is unable to recover the proceeds of a claim from Mr C, but it would be premature to consider that complaint now.

If Mrs P accepts my decision and receives this refund, it's a matter for Aviva to decide how to terminate the policy given any considerations there may be around the trust structure. That is not a matter for me to give directions on.

I also think Aviva has added to Mrs P's distress - given that it could have given her information in 2004 that would have resulted in her changing her insurance arrangements before she suffered her accident. That would have avoided her trying to take legal advice and contemplating the awkward situation of making contact with her ex- husband.

Aviva had originally offered Mrs P £300 for the distress and inconvenience caused. But I don't consider Aviva took into account that it wasn't just responsible for the ongoing administration of NatWest Life's book of business in 2004. It subsequently accepted (through a Part VII transfer) responsibility for NatWest Life's liabilities. In my view that would include the way in which the trust was originally recorded on the systems NatWest Life used to administer the policies. I therefore require Aviva to pay £500 to Mrs P for the impact on her that it and its predecessor (NatWest Life)'s actions had in administering the policy.

My final decision

I uphold Mrs P's complaint and require Aviva to pay her compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P to accept or reject my decision before 8 July 2022.

Gideon Moore
Ombudsman