DRN-3795206

The complaint

Mr and Mrs W, as trustees of the W Trust, complain about the advice they received to take out two whole of life policies. Phoenix Life Limited is responsible for the advice.

What happened

In 1993, Mr and Mrs W sought advice to mitigate their potential Inheritance Tax (IHT) liability. The adviser, who Phoenix is responsible for, suggested investing a lump sum into an investment bond to produce annual withdrawals which could pay the premiums for a whole-of-life policy.

As a result of the advice, Mr and Mrs W took out the following:

- Single premium investment of £150,000.84 into an Investment Plan with 5% annual withdrawals of around £7,400.
- Covermaster whole of life policy set up on joint lives, second death basis with a sum assured of £452,927 and an annual premium of around £7,400
- Covermaster whole of life policy – index linked – on Mr W's life with a sum assured of £100,000 and an annual premium of around £2,900

The purpose of the investment plan was to pay for the joint life policy. The additional plan was taken for Mr W to increase the life assurance.

As a result of the first review in 2003, Mr and Mrs W's sum assured on their policy decreased. Across both policies, this has happened over time and currently their whole of life policies are worth £298,201 and £70,348 respectively.

Mr and Mrs W, with the help of representatives, complained that this advice wasn't suitable. Mr and Mrs W believe they ought to have been advised to take out a single premium whole of life policy. Their representative strongly believed the premium should be £250,000 and asked Phoenix to conduct an actuarial calculation to put this in place.

Phoenix said it didn't offer single premium policies at the time. It said it felt the policies were unsuitable for Mr and Mrs W at the time. It has said that there was a lack of information to show the adviser discussed the reviewable nature with Mr and Mrs W and the future affordability. So, it offered a refund of premiums, less the cost of life cover plus interest. It also offered to reconstruct the investment into the bond and pay interest of Bank of England base rate plus 1% - less withdrawals. The offer of redress is in excess of £450,000.

Mr and Mrs W didn't accept the offer. They said the purpose of the policy was to reduce their IHT liability and accepting this redress would put a significant sum of money back into their estate. They again asked for a single premium.

Our Investigator upheld this complaint. She said it wouldn't be reasonable to ask Phoenix to reconstruct the policies on a single premium basis as this wasn't offered at the time, nor did she agree that Phoenix should pay to have the actuarial calculations done for a single premium policy. But she felt the refund of premiums wasn't useful either. She concluded that more appropriate advice would've been to give Mr and Mrs W the whole of life policies set up on a minimum basis. These would've likely needed no changes throughout the life of the policies.

The Investigator recommended Phoenix reconstruct the policies as if they were set up on a minimum basis and absorb the additional premiums to the date of reconstruction, with Mr and Mrs W being responsible for paying more going forward.

Mr and Mrs W disagreed and said they want a single premium policy to be set up to reflect a £250,000 single premium being paid in 1993. Effectively they feel they could've had around £700,000 of cover if this was the case and so this is the position they should now be in.

Phoenix also disagreed. It said that it felt the additional cost of the policy may have been prohibitive and that its unlikely Mr and Mrs W would've paid this given the option. It also said that Mr and Mrs W didn't choose to increase premiums to maintain the life cover so it doesn't think they'd have paid over £17,000 annually for the minimum cover basis. It also explained the cover was put in place to fit the lump sum Mr and Mrs W were willing to invest to cover the annual premiums, and a policy set up on a minimum basis would've cost more than that. Phoenix finally raised concerns about the tax status of the policies – which would have surrender values in excess of £700,000 – if they were reconstructed.

I sent my provisional decision on 27 September 2022. My findings, which also form part of this decision, were as follows:

My provisional findings

Phoenix has decided to uphold this complaint and felt it was mis-sold so I don't intend to comment on whether I think the advice to invest in this policy was suitable. I'll focus on whether Phoenix's offer is fair and reasonable or whether it should do something differently to put things right.

The position Mr and Mrs W find themselves in is difficult. The policies they have won't provide the sum assured they wanted at the outset, but to accept Phoenix's offer means a large sum of money being put back into their estate at a time where it may be more difficult to place this outside of the estate. Having considered everything on file, I don't agree with the redress that our Investigator has recommended. Whilst this goes some way in addressing Mr and Mrs W's current shortfall in cover, I don't think it's what was likely to have happened. And I think the redress Phoenix has offered is in line with our guidance and is a fair offer. I'll explain why.

Phoenix has said it upheld the complaint based on the lack of evidence that the reviewable nature of the policy was made clear to Mr and Mrs W, or that the premiums could increase in the future. So, the redress it has proposed has assumed that Mr and Mrs W wouldn't have taken the policy out – although also assumes they'd have taken out some life cover as they had the intention of writing it into trust to assist with a potential IHT bill when they'd passed away. On that basis, a refund of premiums less the cost of life cover plus interest is what we'd expect Phoenix to offer, and it has done so. It has also ensured that Mr and Mrs W haven't lost out with the lump sum they invested to pay for the premiums, and has offered a refund of the full lump sum plus interest at BOE +1% less withdrawals. So, I'm satisfied Phoenix has offered redress in line with the assumption that Mr and Mrs W wouldn't have taken this policy out.

Mr and Mrs W have continued to say they ought to have been sold a policy for a single premium of £250,000. As Phoenix didn't offer these policies I don't agree that this would be fair redress. I've also not been provided with evidence to show that Mr and Mrs W were *willing to invest a lump sum of £250,000 to pay for life cover, without the benefit of hindsight. The proposed solution put forward by Mr and Mrs W's representative appears to be something that would now deliver what they wanted but with the use of hindsight. I've not seen sufficient evidence it's something that they would've invested in at the time, and more importantly, it's not something Phoenix would've been able to provide so I don't think this proposed redress is fair and reasonable in the circumstances of this complaint.*

I'll now turn to the redress our Investigator recommended. Mr and Mrs W had a good level of income in 1993 when they were given this advice. And it's not unfeasible to say they may have been able to afford a policy set up on a minimum basis. But, looking at everything that has happened, I don't think it's likely they'd have taken a policy out on that basis if it was discussed.

Firstly, the policy Phoenix advised them to take was set up on a standard basis, that is that it was expected to last their lifetime. We know that this wasn't the case, and Phoenix upheld the complaint because the reviewable nature might not have been made clear. But a minimum basis policy was unlikely to have been taken had it all been made clear, because the policy set up on a standard basis was supposed to be able to last the lifetime. I don't think it's likely Mr and Mrs W would've paid an additional £7,000 per year to take out a policy on a minimum basis.

And whilst they may have been able to afford it at the time, it's clear from the letter Mr and Mrs W sent to Phoenix in 2003 that they were aware they could've maintained their level of cover by increasing their premium/taking out a top up and they chose not to do this. So, I find it hard to argue they'd pay anything more in premiums than they currently do.

It's also clear from the point of sale documents that the annual premium was to be generated by a single premium investment and tax-free withdrawals from that. So, I think it's likely the policy they were advised to take linked up with the withdrawals available from the lump sum they were willing to invest. I don't agree, in this case, that a policy offered on a minimum basis was necessarily the "best advice" fitting with Mr and Mrs W's circumstances, and even if it was, I'm not persuaded they'd have taken it out.

It follows that I think the offer Phoenix has made is fair and reasonable in this case. I leave it to Mr and Mrs W to decide whether they wish to accept that offer going forward. I do note that Mr and Mrs W's representative has drawn comparisons to what a court would say in this scenario, but it's important to note that the Financial Ombudsman Service is an informal alternative to court, and this is reflected in the length of this decision. Mr and Mrs W are free to pursue the complaint in court if they decide not to accept the decision.

Response to provisional decision

Mr and Mrs W's representative initially responded to say they were happy with the amount but wanted it to remain in trust. It also asked if Mr and Mrs W's death benefit could be increased without increased premiums. Our Investigator responded to explain that acceptance of the offer would cancel the policies and that the redress would be paid directly to Mr and Mrs W. The Investigator also explained that if Mr and Mrs W kept the policy in place, they would have to pay the additional premium for the higher cover.

Phoenix responded to say it had received the provisional decision and was waiting to take action if Mr and Mrs W accepted it.

Mr and Mrs W's representative later responded to ask whether the full settlement value could be applied as a single premium contract on Mr W's life. They also said they didn't want the life cover to reduce and that the commission should also be refunded. The Investigator explained that if Mr and Mrs W only wanted to accept part of Phoenix's offer they can speak directly to the business about that. The representative then asked whether the policies could be left in place but that the death benefit should be increased as compensation.

Our Investigator explained again that Mr and Mrs W cannot keep the policies in place but also have the compensation. Mr and Mrs W's representative then said the compensation would fall back inside the estate which would be an issue. They asked whether an additional compensation payment could be given if there's a liability to IHT in the next seven years. Mr and Mrs W's different representative said the following:

- All reference to a single premium policy originally mentioned should be changed to a £150,000 single premium
- The settlement offer made by Phoenix isn't fair and reasonable as it exposes Mr and Mrs W to even more financial damage
- Mr and Mrs W will not be able to replace the life cover and would, if accepting this redress, have additional IHT liabilities so he cannot recommend any settlement that discontinues the life cover.

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.

Neither party has provided any additional evidence that leads me to reach a different conclusion here. I have noted the difficult position that Mr and Mrs W would be in if they accepted the offer, originally made in 2018, now. I understand the policy was taken out for IHT mitigation, and to receive a refund of premiums into their estate could prove problematic.

In this case, what Mr and Mrs W would like is something they wouldn't have had. They want a single premiums policy – something that Phoenix didn't offer at the time of advice. They also want a higher level of cover for no additional premiums – something again that wouldn't be possible. I note they took out cover on a standard basis – which would've been set up and intended to provide the same sum assured throughout their lives which ordinarily would match the objective of providing for an IHT liability. Due to a number of factors it appears this didn't happen. I've also mentioned that Mr and Mrs W had chosen not to increase their premiums in 2003 because it's clear to me they didn't want to pay anything more for their cover.

It was Phoenix that decided this was mis-sold, due to communication over the reviewable nature. And as it didn't offer anything else at the time that Mr and Mrs W would've taken to meet their objectives, it has offered redress to put them in the position had they not taken the policy – which is to refund the premiums plus interest. So, for the same reasons I've explained in my provisional decision – a extract of which is above and forms part of this decision – the offer Phoenix has made is fair and reasonable.

I have noted that Mr and Mrs W have asked for commission to be refunded as well, but I think it's likely they'd have taken some investment out had they not taken this policy and so commission was always likely to be paid. And, given I think that they were unlikely to pay for any of the other policies available, I actually think it's likely they'd have ended up with a similar policy set up on a similar basis.

I do understand Mr and Mrs W will be disappointed with this. They have thought of a number of different things that may help their situation, which includes accepting part of the offer. If they don't accept this decision they are free to approach Phoenix to come to an agreement.

My final decision

For the reasons I've explained the offer Phoenix Limited made to Mr and Mrs W is fair and reasonable. As this has yet to be paid, I uphold this complaint. I think that fair compensation should be calculated as follows (in line with Phoenix Life Limited's offer):

- Refund the premiums on both life cover policies from inception, less the cost of life cover. To this amount add 8% simple interest from the date the premiums were paid to the date of settlement.
- Refund the initial investment into the investment bond. To this add interest at Bank of England Base Rate plus 1% to the date of settlement less the withdrawals taken.

My decision is that Phoenix Life Limited should pay Mr and Mrs W the amount produced by that calculation – up to a maximum of £160,000 plus interest which is the maximum award limit based on the event complained about (the sale of the policies) and the date that complaint was referred to this service.

If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that Phoenix Life Limited pays Mr and Mrs W the balance – which Phoenix Life Limited has indicated it will do.

This recommendation is not part of my determination or award. Phoenix Life Limited doesn't have to do what I recommend. It's unlikely that Mr and Mrs W can accept my decision and go to court to ask for the balance. Mr and Mrs W may want to get independent legal advice before deciding whether to accept this decision.

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

Charlotte Wilson
Ombudsman