DRN-3867020

The complaint

Mrs W complains Pen-Life Associates Limited ("PLA") set up an offshore bond with an unsuitable life assured.

What happened

The bond Mrs W opened was put in a discounted gift trust. That trust was set up to make regular payments to Mrs W. But the bond was set up by PLA with Mrs W's husband as the life assured. That meant when he died in 2019 the bond was encashed and Mrs W had to pay tax on its gains.

Mrs W complains that her husband was a poor choice for the life assured. She feels ones should have been chosen that kept the bond invested for at least her lifetime, if not longer.

In their response to the complaint, PLA suggested having Mrs W's husband as the life assured on the bond was reasonable, considering the life expectancy of men his age at the time. They didn't though have a record saying why he'd been chosen. PLA acknowledged that 'with hindsight' a younger life assured could have worked out better. They offered to pay Mrs W £3,000 as an 'ex-gratia payment'.

That wasn't accepted, and the complaint came to us. One of our investigators agreed with Mrs W's complaint. They said PLA shouldn't have set the life assured on the bond as only Mrs W's husband. To put this right, they said PLA should refund their advice fee, pay interest on that amount, and pay Mrs W £600 compensation for the trouble and upset caused.

On the tax incurred, our investigator initially noted this would be payable at some point when the bond was disinvested. But they later concluded that the difference here was the tax liability was for Mrs W to pay, as she was the living settlor of the trust that held the bond. If different lives assured had been used that allowed the bond to continue after Mrs W dies, responsibility for paying the tax will sit with the trustees of the trust.

On that basis, our investigator said PLA should reimburse Mrs W the tax she'd had to pay.

Mrs W accepted this remedy, but PLA didn't. They referred back to their earlier response to the complaint, and felt it was too speculative to say the tax bill could have been entirely avoided with younger lives assured on the bond.

With no agreement on resolving this complaint, it's come to me for a formal decision.

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.

Having done so, I've decided to uphold Mrs W's complaint. I'll briefly explain why, and what PLA must do to put things right.

Our investigator highlighted part of the key features document for this bond that said neither a settlor nor their spouse should be set as the lives assured if the bond was being put in a discounted gift trust. That's because a trust like that is expected to make a regular payment to its settlor until either they die or the money held in the trust runs out.

To go against that guidance is unusual, to the extent I'd expect to see a clear justification for it in PLA's advice letter to Mrs W. I've read that letter though, and the reasoning behind having Mrs W's husband as the life assured isn't given. It feels more like the use of Mrs W's husband as the life assured didn't do enough to consider the guidance, or the foreseeable negative impact on the bond and the trust if he died before Mrs W.

I agree with Mrs W's complaint that having younger lives assured was more in keeping with her objectives. It would have helped the trustees time the encashment of the bond after she'd died to minimise tax. Had PLA made it clearer how using younger lives assured could have helped meet Mrs W's objectives, I'm satisfied she'd have chosen that approach.

The question then is how PLA should put this right.

Putting things right

The tax payable here reflects that the bond has gained value while the money Mrs W gifted to the trust was invested. Mrs W – via a representative who is also a trustee for the trust she set up – has confirmed she personally had to pay the tax bill, using her own money not what was in the trust.

While PLA have said speculation is needed to know exactly how the bond will be encashed in the future, that seems only to be the case for how the trustees will manage the tax position. For Mrs W, things are clearer.

If younger lives assured were used, then the bond would – baring any deaths – have paid Mrs W an income for 20 years before she had to pay any tax. Payments after that point would incur a tax bill, but just on what Mrs W received – a relatively small amount, which could have fallen within her personal allowance at that point.

When Mrs W died, the bond wouldn't necessarily have had to be encashed in the same tax year. That would mean the liability for tax didn't fall on her estate, instead becoming a trustee liability.

So I find it's more likely than not that the tax Mrs W has had to pay because of the way PLA set up the lives assured could have been avoided. It's a cost she personally has incurred entirely because of their mistake, so it's fair PLA should reimburse Mrs W that cost.

I've checked with the trustees that Mrs W hasn't sought to claim the tax cost back from them. They've confirmed she hasn't. I've also asked PLA if the tax rules would allow Mrs W to do that, but they've told me she can't. Based on that, I'm satisfied this was a cost incurred by Mrs W alone. PLA should reimburse her for this amount, as soon as Mrs W provides them proof it's been paid.

As well as reimbursing this cost, the value of the original advice has been significantly undermined by PLA's failing. To remedy that, I find it'll be reasonable to have PLA refund what was paid for that advice.

Both these amounts should receive a payment of interest from PLA. This reflects that Mrs W has been without the money since it was paid, when if the service had been reasonable she would have had the use of it for other things. I've decided to use the court's standard rate of

8% simple interest, to be applied from the point each amount was paid by Mrs W.

Tax may be payable on this interest. PLA should account to Mrs W for this, so she can consider whether she may be able to claim some of it back from HMRC.

Mrs W's complaint talked about the cost of reinvesting the money held by the trust. But that appears to be distinctly a trust expense, rather than a cost that falls on Mrs W to pay. As such, I'm not going to direct a remedy for that cost.

I can though appreciate how unpleasant the whole situation has been for Mrs W. She's received an unexpected – and large – tax bill following the death of her husband. This could have been avoided had PLA given more reasonable advice. She's also incurred some tax penalties and seemingly had some of the income due from the discounted gift trust delayed.

To acknowledge this, PLA should pay some compensation to Mrs W. Picking an amount is a matter of opinion, but I've settled on £600 as a reasonable amount. It reflects how significant the financial impact on her was in terms of the cost. But it also acknowledges that Mrs W had inherited some funds to allow her to bear that unwelcome burden a little easier.

My final decision

I've decided to uphold Mrs W's complaint about Pen-Life Associates Limited. To put this right, they should:

- reimburse the tax Mrs W can show them she's paid;
- refund the initial advice fee paid by Mrs W;
- pay 8% simple interest on those two amounts from the time Mrs W made the payments to the time she receives the reimbursement or refund; and
- pay £600 compensation to Mrs W to acknowledge the emotional impact on her.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 17 April 2023.

Paul Mellor
Ombudsman