

The complaint

Mrs D complains as trustee of the JN discretionary trust about advice Tait Conisbee Seymour Life and Pensions Limited (“TCS”) gave to her predecessor trustees.

What happened

TCS advised Mrs D’s predecessor trustees about how to invest the JN trust’s money. This led to some bonds being taken out in 2007.

The bonds were all set up with Mrs D’s mother – JN – as the only life assured. That meant that when she died in October 2018 the bonds – three in total at that point – came to an end. That in turn created a chargeable event for tax purposes.

The tax owed was initially calculated against the trustees, and paid by them in 2021. But it seems that was a mistake. Mrs D’s shown us a tax calculation from 2023 showing the gains for the bonds factored into JN’s personal income tax return for the year in which she died.

I understand JN’s estate plans to have the tax cost it’s to pay reimbursed in some way by the trustees of the JN trust. Exactly how that’ll be done will be a matter for JN’s estate, the JN trust and HMRC to agree.

Mrs D complains TCS should have advised the trustees about setting the bonds up with more than one life assured. She believes this would have meant there was less tax to pay, and would have saved the trust the costs associated with reinvesting the money.

TCS responded to the complaint by explaining the history of their advice. They felt their recommendations had met the objectives of JN and her family. And they said the options and tax positions had been explained at the time.

Mrs D brought the complaint to us. I’ve made a couple of provisional decisions, as the tax situation has been adjusted. My most recent provisional decision is the important one now.

In that, I explained that I intended to uphold Mrs D’s complaint. While there was evidence of TCS explaining that the bond would come to an end when JN died and tax could be payable, there was no evidence they discussed other options with JN or the trustees. I considered it likely that if having different lives assured on the bonds had been discussed, the trustees would have chosen to have ones that would help the bond to stay invested after JN died.

I also explained how I intended to have TCS put the matter right. I said they should reimburse the trust for the tax it could show it had paid as a result of the bonds ending when JN died. I also said interest should be paid on that amount, from the point the trustees provided proof of what had been paid to the point the reimbursement was made. And I said TCS should separately pay the trustees £1,200 to acknowledge the trouble and upset caused by this matter.

Mrs D responded with a screenshot showing some tax paid in 2021. I believe this was being put forward as the proof of payment that I mentioned in my provisional decision. However, I

believe that relates to the incorrect payment that was made when the tax was worked out against the trustees. It doesn't seem like it could relate to the accurate tax picture, which appears to have been calculated in 2023.

TCS disagreed with my provisional decision, and provided some further copies of documents they considered relevant to the case. They raised points that can be broadly split between disagreeing with my intention to uphold the complaint, and disagreeing with the award I intended to make to put things right. I'll add to what I wrote last time to show how I've factored those comments into this, my final 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 D's complaints. I'll explain why, and set out how this leads me to my remedy for the case.

As I wrote last time, the notes and the correspondence we have showing the advice TCS gave the trustees are extensive. TCS have commented that this doesn't include a full record of the advice taken by the trustees when setting up the trust. But I'm not directly considering that here. I'm looking at the advice the trustees received from TCS when setting up investments to hold money the trust would receive from JN.

I've noted that in TCS's March 2021 complaint response they felt "*[a]ll of the details for these investments were included in the [September 2006] suitability report issued to [the trustees]... In April 2007 a further meeting took place with the Trustees... A similar Suitability Report to the one issued in September 2006 explaining in detail why the Investment Bonds were recommended was issued to the Trustees.*"

I've seen those reports, and notes from the meetings at the time. So I'm satisfied I'm working with a full picture of TCS's investment advice to the trustees.

I can't see any direct reference to TCS discussing what having more than one life assured on these bonds could achieve.

Looking generally at the type of bond used, it appears there was an option to have more than one life assured on them.

TCS have questioned who I would recommend should have been used as the alternative lives assured. That goes beyond the scope of my decision. But typically, younger family members could have been added alongside JN, with the expectation they would live longer than her. That would allow the bond to remain invested after JN passed away.

Doing that wouldn't appear to have affected the bond's ability to be invested for growth, or its ability to provide an income for JN while she was alive. And it wouldn't have reduced JN or the trustees' control over the bonds during her lifetime. The life assured doesn't – as far as I can see – gain any influence over the decisions about when to encash the bonds or over making payments from the trust to its beneficiaries.

The only difference it appears to make is to increase the flexibility for the trustees when JN died. The bonds wouldn't have to end at that point – they could have continued. That appears not to conflict with JN and the former trustees' objectives. And potentially it would have appealed to them at the time if the option had been discussed.

So I find the use of more than one life assured wasn't covered in TCS's advice when it should have been. Had it been discussed, I find it likely the bonds would have been set up with more than one life assured. The trust had beneficiaries who could be expected to outlive JN, so having the investments continue after she died – rather than ending and creating a chargeable event – would have had its appeal.

That in turn would have meant the bonds didn't have to end when JN died in 2018.

Putting things right

I've thought about what difference that would make to the position the trust is in now.

The trust has paid for advice to reinvest its money. However, I've seen an email from 2019 where TCS wrote to the then trustees and offered to reinvest the money with no charge. That was enough to put the trust in the position it would have been if there had been more than one life assured on the bonds – that is, still invested in the same bond. So I'm not directing compensation for the trustees' recent advice costs.

Turning to the tax position, the end of the bond created a chargeable event which could have been delayed if there'd been more than one life assured. It now appears that although the trustees paid this at the trustee rate, corrections are being made. The income tax should – apparently – have been calculated against JN's other income, as she was the settlor of the trust and was alive in the tax year that the bond ended.

The new calculation I've seen shows encashing JN's investments when she died created a tax liability of over £77,000 after various reliefs were applied. Three of the investments appear to be held by the trusts Mrs D is trustee for. I understand that the tax rules may allow JN's estate to claim back the tax costs from the trustees.

Remedying this is complicated by the fact better explanation of the lives assured wouldn't guarantee no tax would need to be paid. It would just have helped the trustees try to manage the bonds in a way that minimised the tax payable.

TCS have commented that this is me saying some tax would always have been payable. That's not what I'm saying. The issue is I need to consider what could have happened and compare that to what did happen.

I'm conscious that the trust's beneficiaries don't appear to have been in a rush to have all of the money they were entitled to. They appear to have reinvested the trust's money for example, rather than distributing it to the trusts' beneficiaries. That tells me significant flexibility could have been applied to the timing of encashments, to help reduce the tax bill.

In my provisional decision, I put forward a remedy where TCS would reimburse the trustees for any tax cost that arises for the trust because of the trust's bonds ending when JN died. TCS have said that's unreasonable, as it means the trust achieved a gain without having to pay any tax.

But I'm satisfied that could have been achieved, by effectively choosing when to encash the bond and which beneficiary to direct the proceeds to. Use of a discretionary trust coupled with the use of more than one life assured could have achieved that.

TCS have also commented on the errors that seem to have been made in paying the tax to date. I appreciate that concern, as work still needs to be done to establish the final position. I can't direct or advise the trustees or JN's estate on how to get to that point. But I can account for that when directing a timescale for TCS to carry out the remedy here.

TCS have said they would like proof from the trustees not just of the amount of tax that they've paid, but also the calculation of that amount. I agree that's reasonable in this case. I'd expect the trustees – or their accountant – to be able to explain how the tax burden for JN's estate has been calculated, and why that's then become an unavoidable expense for the trustees.

Until TCS are provided with that sort of evidence, they won't have to pay the tax reimbursement that I'm directing. But that shouldn't create an undue burden on the trustees. It should be enough for them to show the work of their accountant or confirmations from HMRC to satisfy this requirement.

Last time I said the reimbursement wouldn't include tax already treated as paid on the investments. TCS asked for clarification on this. This was a reference to my understanding that onshore bonds are treated by HMRC to have already had income tax deducted at the 20% rate. This can't usually be reclaimed, even where the recipient of the bond's funds doesn't have to pay UK income tax.

As this part of the tax cost couldn't – as far as I'm aware – have been avoided, it can't be traced back to TCS's omission of information about using more than one life assured. It follows this part alone of the tax doesn't need to be factored into this remedy.

I appreciate that the trust has already paid something to HMRC. But that seems to have been an error in their accounting, rather than being caused by a failing by TCS. So TCS don't need to try to compensate the trust for the loss of use of that money to date.

But once the corrective action by JN's estate and the trustees has been completed, the trust will truly experience a lost opportunity to make gains on the amount of tax paid. To acknowledge this, the tax reimbursement paid by TCS should include simple interest at 8%.

This will need to run from the time TCS is presented with accurate evidence that the trust has paid the correct tax amount to either HMRC or JN's estate. TCS have commented that they'd like some time without interest being incurred to check the evidence they receive for errors. I've considered this, and will allow a week for TCS to check the figures. After that week, interest should begin being calculated and added to the reimbursement.

That interest will then run until the date TCS send the reimbursement to the trustees. Tax may need to be accounted for on this payment. If TCS apply a tax calculation to the interest, they should share the details of that with the trustees.

As well as the financial cost for the estate, there has also been the upset and inconvenience caused for Mrs D. I've decided compensation should be paid by TCS to acknowledge the non-financial impact on Mrs D and the trustees.

This matter affects the legacy JN was hoping to leave for her family, making the upset all the more disturbing for Mrs D as JN's daughter. The work needed to put things in a suitable position has been – and continues to be – complicated and laborious. To fully acknowledge that impact, TCS should pay the trustees – via Mrs D – £1,200.

That's not a significant amount in terms of the size of the trust. But it reflects our service's approach to this compensation in cases where the factors mentioned above are present.

My final decision

I've decided to uphold Mrs D's complaint about Tait Conisbee Seymour Life and Pensions Limited. Tait Conisbee Seymour Life and Pensions Limited should take the following actions

to put this matter right:

- Reimburse the trustees for the confirmed tax amount they've had to pay as a result of the trusts' bonds ending in 2018.
- Pay simple interest at 8% on that amount from one week after the trustees provide proof of its payment, to the time the reimbursement is sent to the trustees.
- Separately, pay the trustees – via Mrs D – £1,200 compensation to acknowledge the emotional impact this matter has had on them.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 26 April 2023.

Paul Mellor
Ombudsman