

## Ombudsman's Determination

Applicant	The Estate of Mr T
Scheme	Rees T. Coghlan (Norwich) Limited VIP Scheme ( <b>the Scheme</b> )
Respondent	Phoenix Life

## Outcome

1. I do not uphold Mrs F's complaint and no further action is required by Phoenix Life

## Complaint summary

2. Mrs F, daughter of the late Mr T and a co-executrix of his estate, believes that his pension policy owes a payment to his estate, equal to approximately ten months of arrears in pension payments. However, Phoenix Life has said that the policy was set up in arrears without proportion, so no payment is due.

## Background information, including submissions from the parties

3. Mr T was a pharmacist and worked for an independent chemist called Rees T. Coghlan. His company set up a pension policy for him with London Life (now part of Phoenix Life) under the Scheme.
4. In a London Life document entitled 'Retirement Form of Authority' from London Life to "The Trustees of Rees T Coghlan (Norwich)" (**the Trustees**) it was noted that Mr T's date of retirement was 6 April 1990. The retirement options available to the Trustees were:
  - A personal annuity to the retiring member of £23,216.78 per annum
  - A tax-free cash sum of £40,000 together with a personal annuity of £17,616.78
  - The total policy proceeds of £188,316.09
  - A tax free cash sum to the retiring member of £40,000 together with an open market option of £148,316.09
5. In this document, under 'Notes on the Annuity', the following was stated:

“(i) It will be paid yearly in arrears, from the date of retirement throughout the Member’s lifetime, and with a guaranteed period of five years. If death occurs within the guaranteed period, a lump sum shall be paid equivalent to the actuarial value of any outstanding instalments.

(ii) It will increase annually by 3% per annum compound from the date of retirement.

(iii) A Widow’s annuity is also included which will commence after the Member’s death...”

6. In a ‘Group Immediate Annuities Instruction Form’ dated 9 May 1990, from ‘Executive Pensions’ to ‘Life New Business Annuities Section’ in relation to Mr T’s annuity, the following was recorded:

“Commencement date 6/4/90

J.L.L.S Annuity of £17,616.78 p.a. without proportion payable by yearly instalments (in arrears)”.

7. On 10 May 1990, London Life wrote to Mr T saying it had enclosed a cheque for his tax-free cash. It said his annuity of £17,616.78 per annum was being processed and the first instalment would be made on 6 April 1991.
8. In January 2010, Mr T wrote to London Life to inform it that his wife, Mrs T, had died.
9. On 9 February 2010, London Life responded saying that it had updated its system and his policy now converted to a life only policy, which would continue to pay for his lifetime.
10. In January 2018, Mr T died.
11. In April 2018, Phoenix Life wrote to the executors of Mr T’s estate saying it had received notification of his death. It asked for further information to allow it to carry out its administration.
12. On 22 May 2018, a legal and financial firm acting in the administration of Mr T’s estate (**the Representative**), wrote to Phoenix Life asking a series of questions regarding the Scheme. Specifically, it enquired into whether any further payments were due from the Scheme.
13. Phoenix Life replied saying that the annuity was a life only annuity and therefore ceased at the date of death with no further benefits payable. It also provided details of a payment it said was made for the period 6 April 2017 to the date of Mr T’s death in January 2018:

“Gross amount: £41,455.20

Tax deducted: £9,993.60”

14. On 10 July 2018, Mrs F wrote to Phoenix Life saying she wished to appeal its decision not to pay her late father's pension up to 17 January 2018, the day before his death. She said:-

- The policy contract was originally drawn up and officiated by London Life and later transferred under the same terms and conditions.
- It was documented that the pension annuity would be paid yearly in arrears "throughout the Member's Lifetime."
- The annuity would be payable for life and only stopped by the "Members bankruptcy" or if they were "mentally physically ill" – none of these applied.
- In London Life's letter of 9 February 2010, which followed notification of Mrs T's death, it said it had updated its records and that the policy now converted to a life only policy and would continue to pay for Mr T's lifetime.

15. Phoenix Life replied saying:-

- It could confirm the annuity basis selected by Mr T was for a single life annuity, paid annually in arrears with no proportional final payment relative to the date of death, and with no guaranteed minimum payment period. This was the annuity basis required to receive the guaranteed annuity rates (**GAR**) offered on his plan.
- At retirement, Mr T had the option to select an annuity on a different basis, however, this would have resulted in the loss of the GARs, resulting in a less favourable annuity rate being applied to his pension fund.

16. Mrs F queried this further.

17. On 20 September 2018, Phoenix Life said:

"We can confirm that the original pension arrangement was owned by the Trustees of the Rees T. Coghlan (Norwich) Limited VIP Scheme, who would have agreed the terms at the outset.

A policy cannot mention everything that it does not offer, only what it does offer. In this instance, instalments at annual intervals were payable from a year after commencement until the annuitant died. This was a joint annuity with a pension payable to the surviving spouse of [Mr T] upon is [sic] death. Sadly [Mr T] died a widower, so the plan was effectively a single life annuity which ended upon Mr T's death as the guaranteed period of 5 years had expired."

18. Phoenix Life's position is:-

- Mr T's policy was a compulsory purchase annuity which commenced on 6 April 1990, payable annually in arrears without proportion. The customer chose the £40,000 tax free cash and an annuity of £17,616.78, with the annuity escalating at 3% per annum (with the first escalation on 6 April 1992).

- Its records showed it paid Mr T's annuity on 6 April 2018 but this was returned by the bank confirming that he had died. It subsequently received a letter from the Representative acting on behalf of Mr T's estate along with a death certificate. It confirmed in a letter to them on 31 May 2018, that the annuity was a life only annuity and there were no further benefits payable.
- Mrs F disputed this. It replied on 27 July 2018, confirming that the annuity selected was single life, paid annually without a proportional final payment and no guaranteed period. The policy had a GAR and this was therefore the basis required to receive the guaranteed rate. Mr T had the option at retirement to select a different option but this would have meant the loss of GARs, resulting in a less favourable annuity rate being applied to the fund. He would have therefore received lower payments throughout the annuity duration.
- On 20 September 2018, it confirmed that as the original pension arrangements were owned by the Trustees, they would have agreed the terms of the contract at the outset.
- Due to the time that had elapsed, it only had limited paperwork from when the annuity was set up. Its system record showed that there were no proportional payments, as did the Group Immediate Annuities Instruction Form. Therefore, the evidence suggested that no further payment was due to Mr T's estate.

19. Mrs F's position is:-

- The original Scheme pension contract was with London Life. She held a copy of a retirement form of authority which showed the Australian Mutual Pension (**AMP**) logo. AMP took over London Life and was itself then taken over by Phoenix Life but from the correspondence, it was clear nothing changed with regard to the policy benefits.
- No reference was made in the policy that paying annually in arrears contributed to a more favourable GAR. Rather, the 3% increase was conditional as part of the VIP policy, the benefits of which may require the member to contribute more towards the Scheme in order to reach target, underwritten by the company.
- It was of significance that in no way did this policy refer to 'no proportional payments.' Having read the Scheme's explanatory booklet which accompanied the policy, it reaffirmed the compound rate of interest determined by the employer, normally at the rate of 3%. Further, it stated the pension, "will be payable in monthly instalments throughout your life" and for a widow's pension, "throughout the remainder of the life of the widow, ceasing with the instalment immediately preceding her death." Therefore, Phoenix Life's understanding that no proportional payment was due could instead refer to monthly annuity payments, where no pro rata payment for a month was due.
- Her father was meticulous in his record keeping. Any type of amendment or addendum to the contract would need to be signed by both parties; he would have

kept a copy of this. He often talked about his pension and said he was happy in the knowledge that his income would run to the date of his death to help cover any liabilities of his estate.

- An attempted payment was made by Phoenix Life into Mr T's account on 6 April 2018, but then withdrawn the same day. The amount credited matched a pro rata payment from 7 April 2017 to Mr T's date of death in January 2018. If Phoenix Life's system suggested no proportional payment was due, why was such a payment made.
- She felt the matter was not ambiguous and it would also be justified to claim interest on the funds that should have been paid in April 2018.

## **Adjudicator's Opinion**

20. Mrs F's complaint was considered by one of our Adjudicators who concluded that no further action was required by Phoenix Life. The Adjudicator's findings are summarised below:-

- The question is whether Mr T's policy was set up to pay with or without proportion. Mrs F had described Mr T as a meticulous person and it was clear that he paid a high level of attention to his pension. Mr T told his family that his pension would pay (in proportion) in the event of his death and this would help with any liabilities.
- The most accurate way to address whether this was the case would be to consider contemporaneous information and specifically, documentation from the time the policy was set up. Phoenix Life had said there was limited information available and did not have any documentation from the policy's inception. Mrs F had provided a scheme booklet and highlighted certain statements within this which she deemed applicable to Mr T's policy. However, a scheme booklet, by its nature, is just a general guide so cannot apply specifically to each and every plan. For example, although the booklet mentioned monthly instalments, Mr T's policy was set up to pay annually.
- Mrs F argued that where a pension, paid in monthly instalments, would pay for part of the year in the event of the member's death, it would also be intended that an annuity paid annually would do this. However, this is not a strong argument where one pension arrangement did not necessarily follow another, and essentially, Mr T's annuity was set up on a different basis.
- The documentation shows that the Trustees were given four options by London Life regarding how Mr T could take his benefits. Mr T selected a tax-free cash sum and an annuity of £17,616.78. In the Group Immediate Annuities Instruction Form, which applied specifically to Mr T's annuity, referencing his date of retirement and the amount payable, it was stated that an annuity would be paid "without proportion." This was the clearest and most explicit authority on this point.

- Mrs F had said that no reference was made in policy documentation to there being no proportional payment due. It could equally be argued that the lack of reference to the policy paying with a proportional payment, was that it was not a feature of the Scheme. Therefore this argument did not assist in understanding how the Scheme, or Mr T's plan specifically, was set up.
- The Retirement Form of Authority stated that the annuity would be paid "yearly, in arrears, from the date of retirement throughout the Member's lifetime." This statement, or any other statements regarding payment being for life, did not go far enough to suggest that the pension should be paid in proportion for the year of the member's death. Generally, in most pension policy documentation, a pension would be described as being paid for a member's lifetime to differentiate it from many other financial policies which were set for a fixed term. Many pension policies, described in such a way, did not include a with proportion payment.
- Taking the statement of a pension being paid for a member's lifetime, together with the scheme booklet's reference to monthly instalments, could lead to one reasonably concluding that the Scheme was set up to pay in proportion. However, such a conclusion would be less than certain. The Group Immediate Annuities Instruction Form, which stated "without proportion", served as stronger evidence.
- The purported part payment made by Phoenix Life in April 2018, did not serve as evidence for the position that a with proportion payment was due.
- While this was a sensitive matter and one of great significance to Mrs F and her family, objectively, there was not enough evidence to substantiate a with proportion payment.

21. Phoenix Life accepted the Adjudicator's Opinion. Mrs F did not accept the Adjudicator's Opinion and made the following comments:-

- The terms of agreement set out in the original London Life Retirement of Authority was prima facie evidence. Nowhere, did it mention a clause to pay "non proportion" upon death. This should override the system record of "non proportion" when the policy was transferred at a later date.
- She had identified additional evidence, a letter from London Life to Mr T dated 25 August 1999, which reaffirmed that there were no changes to the policy. This said: "[the issue of this policy] does not in any way affect your entitlement to your pension benefits and your pension will continue to be paid in the same manner." Therefore, the original terms of the contract should prevail. When London Life was taken over by Australian Mutual, then by Phoenix Life, the policy number changed, but the aforementioned letter stated that Mr T's entitlement remained the same. Where on the journey from London Life to Phoenix Life had the "no proportion" clause emerged? This clause had appeared on the Group Immediate Annuities Instruction Form, which stated "Life New Business Annuities section."

Her father's pension was not new business, but a transfer of the same rights and entitlements from the original policy.

- Further, the Group Immediate Annuities Instruction Form appeared sketchy and incomplete, including no reference against the "checked by" box and the words "no-proportion" were pre-typed rather than being an "either/or option." Phoenix Life said they had no documentation from the policy's inception and that there was nothing they could send, adding "tech provided wording which we wrote out to the customer."
- In terms of relying on computer records, according to some definitions, evidence recorded and processed by the computer entered by a person could be considered as hearsay. Phoenix Life's computer record "evidence" should be considered hearsay rather than permissible evidence.
- The guaranteed annuity rate was determined by the original London Life policy at 3% annual compound interest based upon being paid annually in arrears only and not affected by a later incorporation of a non-proportion clause, where there was no evidence for such an arrangement.
- It seemed unusual for a policy paid annually in arrears to elect for a no proportion option, bearing in mind the potential loss of up to 364 days' pension. Any agreement to such an arrangement should be transparent, agreed and properly documented. Her father was not aware of any such arrangement and did not sign up to this in his policy agreement. Not long before passing away, Mr T had said that his pension, paid annually in arrears, was owed.
- When the Representative wrote to Phoenix Life after Mr T's death asking for details of his pension, its answer was incorrect, as the payment it said was made was not actually paid; this was what they were disputing. This coupled with the fact that the system generated a pro-rata payment to her late father's bank account on the anniversary date 6 April 2018 of £21,675.66, which was later retracted, led her to question any reliance on the limited information available.
- On the 'VIP Scheme of Nomination' signed by Mr T on 9 July 1975, stated under the heading "Proportion" was "All benefits." As mentioned, the 25 August 1999 letter from London Life said that the policy "secures exactly the same pension benefits."

22. The complaint has now been passed to me to consider. Mrs F's further comments do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the main points made by Mrs F.

### **Ombudsman's decision**

23. I appreciate that this is a very sensitive matter for Mrs F in that it concerns her late father and statements he made in relation to the Scheme.

24. However, I do not consider that the evidence Mrs F has put forward, this being part documentary and part circumstantial, supports her position that a with proportion payment is due.
25. Mrs F has expressed her doubt on the Group Immediate Annuities Instruction Form, which is the only evidence available in relation to a proportion payment. There is a lack of contemporaneous documentary evidence available on this point and I understand Mrs F's concerns over this single document, with pre-typed wording, standing as critical evidence in this matter. However, while Mrs F has doubts as to the accuracy of this document, there remains no definitive evidence in support of her position.
26. Overall, I am more persuaded by the fact that none of the original or early documentation makes reference to a with proportion payment, as opposed to the argument in the alternative, whereby broad statements are interpreted to mean a with proportion payment is due, together with there being no explicit reference made to the policy paying "without proportion."
27. Mrs F has been keen to emphasise that there were no changes made to Mr T's policy, providing a London Life letter from 1999. However, on the balance of probability I do not find it has been proven that Mr T's plan was set up to pay with proportion originally.
28. I do not uphold Mrs F's complaint.

**Anthony Arter**

Pensions Ombudsman  
13 March 2020