DRN-3102099

The complaint

Mrs A complains that Plutusgroup Ltd, now known as Gate Capital Group Ltd (Gate Capital) gave her unsuitable advice to transfer the benefits from a deferred annuity pension into a self-invested personal pension (SIPP).

What happened

Mrs A had a deferred annuity pension arising from a period of previous employment. She sought retirement planning advice from Gate Capital in 2015 as she wanted to establish if the value of her pension could be improved upon, especially when it came to the death benefits included.

Gate Capital completed a fact-find to gather information about Mrs A's circumstances and objectives. Those included:

- She was aged 48, married with children.
- She was in good health.
- She had her own limited company earning a gross salary of £60,000 a year (although other figures are mentioned elsewhere in the documentation). Her husband's basic salary was more than that.
- She owned her own home in relation to which she had an offset mortgage of £90,000. She paid £225 a month towards that.
- She had savings of £15,000 in an ISA and shares worth £2,000. She also had joint savings of £18,000 with her husband.
- Mrs A was expecting to receive a sizeable inheritance imminently.
- Her state pension age was 67, although she was hoping to retire at age 65.
- Mrs A's deferred annuity pension entitled her to various guaranteed benefits. Its transfer value was around £136,000. She had no other retirement provision.
- Gate Capital carried out an assessment of Mrs A's attitude to risk, which it deemed to be balanced.

In a suitability report it set out various options that were open to Mrs A. Those included:

- Leaving her pension where it was – it said that would usually be considered the best option and *"tends to be our default position".* But it didn't think that was suitable for Mrs A's objectives.
- Transferring to a personal pension plan – Gate Capital noted that it was the eventual value of the fund that would provide retirement benefits (subject to things such as how well the fund performs) and that Mrs A would lose any guarantees available within her existing scheme. But this route allowed control over investment choices and in the event of her death the "*full fund'* is paid as a lump sum or as a "*successor drawdown*" to whoever she nominated. It felt this best allowed control over Mrs A's funds with the potential for future growth whilst also providing a benefit for family members.
- Transfer to a Section 32 plan or a new employer's scheme were not considered viable options.

Gate Capital said a critical yield of 5.4% was needed to match the benefits Mrs A would be giving up. It recommended Mrs A transfer her pension benefits into a SIPP, which was to be managed by a firm I'll call 'B'. This was to be managed under B's securities discretionary fund management (DFM) service. It felt that the wide range of funds, and access to a discretionary fund manager in particular, would be advantageous.

The suitability report said the recommendation met the stated objectives of:

- Ensuring that, in the event of her death, the benefits would pass to Mrs A's husband then ultimately to her children, allowing them flexibility and control over how they were used.
- Providing greater control and opportunity for investment with the potential opportunity to outperform the guaranteed income from the current plan.

It felt this type of investment suited Mrs A's attitude to risk and noted that she had access to alternative sources of retirement income provided by her husband. That said, it also noted that Mrs A would lose any guarantees applicable to her benefits by transferring.

Mrs A says she lost significant amounts of money as B had since collapsed. She complained to Gate Capital in 2020 about the suitability of the transfer advice, also pointing out that unregulated assets were held within the SIPP. She also questioned whether Gate Capital's recommendation fitted her risk profile at the time and why Gate Capital chose B and the DFM model as opposed to a mainstream provider.

Gate Capital didn't uphold Mrs A's complaint. It said:

- It had fully explored her circumstances and objectives and what could best achieve them.
- At the time, B was FCA regulated, and was chosen because it was an *'award winning'* DFM. Due diligence was carried out first. B could offer investments across the risk scale including 'balanced' portfolios and Mrs A was given a brochure before she decided to invest. At the time, B was following an investment strategy of buying ETFs (exchange traded funds) on behalf of investors and also had a range of recognised regulated investments. Capital preservation was key to B's strategy.
- As Mrs A agreed to invest on a fully discretionary basis, Gate Capital had no say or influence in the investments chosen.
- It was satisfied B offered a competitive pricing model and a bespoke portfolio construction service suited to the client's risk profile. All risks were explained before a transfer took place and there was a cooling off period of 30 days if Mrs A had changed her mind.

Gate Capital said all of the above was explained in its suitability report, which Mrs A confirmed she'd read and understood. With hindsight, B hadn't performed well, but it was in full control of Mrs A's investments. Mrs A was in a fully informed position at the time of the advice. In conclusion, it felt the advice for Mrs A to transfer her pension into a SIPP was justified and in line with her wishes and objectives.

Mrs A referred her complaint to our service. An investigator upheld the complaint and recommended Gate Capital pay compensation. Amongst other things the investigator said:

- The calculations done at the time showed that the new plan probably wasn't capable of exceeding the benefits that Mrs A gave up in the existing scheme.
- She didn't believe Mrs A's circumstances and investment experience were such to suggest she needed access to the wider choice of funds mentioned, or a DFM. And

even if Mrs A had an appetite for higher risk, it was unlikely she'd be able to achieve the investment growth needed to outperform her existing pension.

- As it was her only pension provision, the investigator didn't think Mrs A had the capacity for loss with her pension that Gate Capital suggested, or significant savings to fall back on.
- The investigator also recommended that Gate Capital pay Mrs A £300 compensation in respect of the distress and inconvenience caused in losing valuable benefits from her pension scheme.

Gate Capital disagreed, saying it wanted an Ombudsman to consider the matter afresh. So, it's been passed to me to decide.

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.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Mrs A clearly wanted to explore whether her pension benefits could be improved upon if she transferred out of her existing scheme into another pension elsewhere. According to what was recorded in the suitability report, she was particularly interested in having greater flexibility and control over the death benefits. And, apparently, that was of greater importance to her than her future income.

Gate Capital's role here wasn't to simply do what Mrs A wanted. It needed to make sure it explored and, where necessary, tested her objectives to satisfy itself that they were viable. I say that in particular because the regulator, the Financial Conduct Authority ('FCA') makes clear in its Conduct of Business Sourcebook ('COBS') that the starting assumption for a transfer from a defined benefit, or another scheme with safeguarded benefits (as Mrs A's pension was), is that it is unsuitable. So, Gate Capital should only have considered a transfer if it could *clearly* demonstrate that it was in Mrs A's best interests overall (COBS 19.1.6). In other words, I think it needed to show that there were fairly compelling reasons for the transfer to go ahead taking account of Mrs A's circumstances and objectives.

For the reasons I'll now go on to explain, I don't think Gate Capital has done enough to demonstrate that the transfer was in Mrs A's best interests overall. And I think its advice should have been for Mrs A not to transfer her deferred annuity pension. As it didn't do that, it follows that I think its advice was unsuitable. So, I'm going to uphold this complaint. My detailed reasoning is set out below.

Death benefits

Mrs A said she wanted her beneficiaries to have control over how they accessed and used the benefits according to their circumstances at the time. The objective in itself isn't an unusual one. And, as far as I'm aware, the same flexibility probably wouldn't have applied in the deferred annuity pension. So, in that sense, I can see why having greater flexibility might have been an attractive prospect to Mrs A.

But, whilst I do appreciate that death benefits are important to consumers, and Mrs A might have thought that alone was a good enough reason to transfer her existing scheme to a personal pension, the priority here was for Gate Capital to advise Mrs A about what was best for her *retirement* provision. A pension is savings for retirement and is primarily designed to provide income in retirement.

In these circumstances, I think Gate Capital needed to really explore and understand this objective. There's lots of details about Mrs A's circumstances and financial position recorded. It's evident from the suitability report that Mrs A wasn't prepared to set aside any of her disposable income in respect of further needs or shortfalls in retirement planning. And, she may well have felt that all necessary provision should come from the same pension pot - including for her dependents. According to the suitability report, Mrs A had also indicated that flexible death benefits was more of a priority than future income (although that's noted as still an important consideration). But I don't think that *automatically* means she was prepared to accept a potentially lower retirement income in exchange for higher or more flexible death benefits. And had things been discussed in those really clear terms, Mrs A may well have taken a different view. I'm not persuaded they were.

In any event, I also think the death benefits attached to the existing scheme were underplayed. Mrs A was married with children and so the spousal pension provided by the existing scheme would've been useful in particular to Mrs A's husband in the event that she predeceased him. Gate Capital did say that this benefit wouldn't exist if Mrs A transferred her existing pension and that the guaranteed increases to all her benefits would stop. There was also an alternative death benefit payable in her existing scheme if nobody qualified for a dependents benefit. However, I think Gate Capital could have done more to make the value of these benefits really clear. I say that because COBS 19.1.7 A said that the adviser needed to explain to the client the extent to which the benefits may fall short of replicating those in the existing scheme. It went on to say that the adviser should also be clear about the investment risk to which the client is exposed until an annuity is bought with the proceeds of a personal pension. I think Gate Capital could specifically have said that the spousal benefit, which was guaranteed, was also not dependent on investment performance. Whereas the sum that remained in a personal pension on death was.

Gate Capital did say that it was the eventual value of Mrs A's fund that would provide for her retirement (and that this was dependant on things such as how well the fund performs and the effect of charges). However, it's entirely possible that, if Mrs A lives a long life, or there was a period of poor investment performance, there may not be a large sum – if indeed any sum – left to pass on to her family members as she might have hoped. Again, I'd have expected Gate Capital to explain things in this really clear way, so that Mrs A was able to make a balanced and well-informed decision. I've seen no evidence it did so. In fact, elsewhere in the suitability report it says that in the event of Mrs A's death the "*full fund'* is paid as a lump sum. It also suggested that leaving Mrs A's pension where it was wouldn't provide the maximum available death benefit for her beneficiaries in the event of her death. Given her objective, Mrs A may have thought that was in her best interests. But, given the loss of safeguarded benefits with no guarantee of a better outcome, I don't think it was.

In any event, Mrs A was also in good health at the time, so I don't think different death benefits justified the likely decrease in retirement benefits for Mrs A.

Flexibility
Having greater flexibility surrounding an investment is also a fairly common objective recorded by advising firms. But, Mrs A was aged 48 and she wasn't planning to retire until age 65. There's nothing to indicate that she was looking to access her pension any earlier or needed to rely on tax-free cash. In fact, all of the information recorded points to the fact that she (and jointly with her husband) was financially very stable. According to the suitability report, Mrs A also expected to benefit from a sizeable inheritance imminently.

Given all of these factors, and bearing in mind what I've said earlier about the initial presumption of unsuitability, I think a key question that Gate Capital needed to ask Mrs A was why she needed to do anything at all about her pension at that time. I say that also bearing in mind that this was apparently Mrs A's only pension provision. I'd have thought therefore that having a secure and guaranteed income in retirement would be seen as a positive thing. However, the suitability report suggests that Mrs A was potentially willing to sacrifice a guaranteed income for life in exchange for having control over her investments and achieving investment growth. Again, Gate Capital needed to understand what this meant in the context of Mrs A's circumstances and investment experience. And it needed to satisfy itself that this was a viable objective in light of those factors.

Mrs A indicated she'd probably be looking for a plan that gave her more flexibility (as a result of pension freedoms) when she started to take her benefits. I can certainly see why she'd want to be thinking about all possible options at the right time. But bearing in mind that Mrs A was about 17 years away from her preferred retirement age, I think it would have been quite difficult to say what the best way for her to access her pension would be at that point. And I think that any decisions Mrs A took in relation to her impending inheritance may well have had a bearing on any decisions she later took surrounding her pension.

She'd also indicated that she was looking to retire at age 65 without penalty - something she would have been able to do if she'd stayed within the existing pension. So, I think that's another factor in favour of leaving her pension where it was. Again, Gate Capital should have pointed this out to Mrs A.

Financial viability

Seeking an investment with the potential to outperform a guaranteed income from an existing scheme isn't necessarily unusual. But Gate Capital had to also consider this objective in the context of Mrs A's experience as an investor, her circumstances and her attitude to risk.

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

According to the transfer value analysis report (TVAS) the critical yield required to match Mrs A's benefits at the normal scheme retirement age of 65 was 5.4% if she took a full pension and 4.4% if she took tax-free cash and a reduced pension. Gate Capital thought an investor with Mrs A's risk profile could realistically achieve growth of 5.76% in the longer term.

This compares with the discount rate of 4.6% per year for around 17 years to retirement. For further comparison, the regulator's upper projection rate at the time was 8%, the middle projection rate 5%, and the lower projection rate 2% per year.

I've taken this into account, along with the composition of assets in the discount rate, Mrs A's balanced attitude to risk and also the term to retirement. It's possible, based on the figures I've referred to, that growth of a similar level to the discount rate could be achieved if Mrs A were to take a tax-free cash lump sum and a reduced pension. But it seems unlikely that a new plan could outperform the level of pension within the existing scheme so as to secure a greater level of income for Mrs A in retirement. And as I've said, there's no firm evidence that Mrs A would require the maximum TFC in retirement in any event.

And there would be little point in Mrs A giving up the guarantees available to her through her existing pension only to achieve, at best, the same level of benefits outside the scheme. Indeed, the regulator has stated that a consumer should not be given advice to transfer only for things to stand still. I think that's particularly relevant in Mrs A's case, as one of her key objectives was to see whether transferring her pension would give it the opportunity to outperform her existing scheme. Based on the figures I've mentioned, I think there was little likelihood of that happening. And I think there was a real risk of Mrs A receiving benefits of a substantially lower overall value than her existing scheme at retirement - particularly when things such as investment risk were factored in. And I think this is something that Gate Capital ought reasonably to have foreseen and warned Mrs A about.

There's no suggestion that Mrs A needed a variable income throughout her retirement. According to the suitability report, Mrs A and her husband were expecting to need a retirement income of £36,000 a year, of which Mrs A's husband's pension would make up about £28,000. Mrs A's existing pension expected to give her an income of £9,313 a year and so comfortably made up the remainder. So, I'm satisfied that Mrs A could have met her income needs in retirement through the existing pension at 65. Again, a factor in favour of remaining within the scheme, especially given the other reasons I've mentioned. So, for the reasons given above, I don't think that Gate Capital's advice for Mrs A to transfer out of her existing scheme was suitable.

The use of a DFM

As I'm upholding the complaint on the grounds that a transfer out of her existing scheme wasn't suitable for Mrs A, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mrs A should have been advised to remain in the scheme and so the DFM would not have had the opportunity to manage her funds if suitable advice had been given.

Summary

I don't doubt that the flexibility, control and potential for higher death benefits on offer through a personal pension would have sounded like attractive features to Mrs A at the time. But, as I said earlier, Gate Capital wasn't there to just transact what Mrs A might have thought she wanted. The adviser's role was to really understand what Mrs A needed and recommend what was in her best interests.

Ultimately, I don't think the advice given to Mrs A was suitable. She was giving up a guaranteed, risk-free and increasing income. By transferring, Mrs A was very likely to obtain lower retirement benefits and, in my view, there were no other particular reasons which would justify a transfer at the time and outweigh this. So, I think Gate Capital should've advised Mrs A to remain in her existing pension.

Of course, I have to consider whether Mrs A would've gone ahead anyway, against Gate Capital's advice. I've considered this carefully, but I'm not persuaded that Mrs A would've insisted on transferring out of the existing scheme against advice. I say this because Mrs A appears to have been a relatively inexperienced investor with a balanced attitude to risk and this pension was her only retirement provision. So, if Gate Capital had provided her with clear advice against transferring out of the existing scheme, explaining why it wasn't in her best interests to do so, I think she would've accepted that advice.

I'm also not persuaded that Mrs A's concerns about her death benefits were so great that she would've insisted on the transfer knowing that a professional adviser, whose expertise she had sought, didn't think it was suitable for her or in her best interests. And had it explained things along the lines I suggested earlier (whilst also clearly explaining that the full pension pot was unlikely to be available to the family as death benefits in any event) I think that would've carried significant weight. And in those circumstances, I don't think Mrs A would have insisted on transferring out of the existing pension.

Putting things right

A fair and reasonable outcome would be for Gate Capital to put Mrs A as far as possible, into the position she would now be in but for its unsuitable advice.

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and has set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice**.** The consultation closed on 27 September 2022 with any changes expected to be implemented in early 2023.

In this consultation, the FCA has said it considers that the current redress methodology in Finalised Guidance (FG) 17/9 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. This redress methodology would also apply to Mrs A's pension. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 whilst the consultation takes place. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with any new rules and guidance that may come into force after the consultation has concluded.

We've previously asked Mrs A whether she preferred any redress to be calculated now in line with current guidance or wait for any new guidance/rules to be published. She has chosen not to wait for any new guidance to come into effect to settle her complaint.

I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mrs A.

A fair and reasonable outcome would be for Gate Capital to put Mrs A as far as possible, into the position she would now be in but for its unsuitable advice. I consider Mrs A would have most likely remained in her existing scheme if suitable advice had been given.

Gate Capital Group Ltd must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

For clarity, Mrs A has not yet retired, and, as far as I'm aware, she has no plans to do so at present. So, compensation should be based on her normal retirement age of 65, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mrs A's acceptance of the decision.

Gate Capital may wish to contact the Department for Work and Pensions (DWP) to obtain Mrs A's contribution history to the State Earnings Related Pension Scheme (SERPS or

S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the previous scheme on Mrs A's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs A's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mrs A as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to her likely income tax rate in retirement - presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

The payment resulting from all the steps above is the 'compensation amount'. This amount must where possible be paid to Mrs A within 90 days of the date Gate Capital receives notification of her acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Gate Capital to pay Mrs A.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above - and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

If the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect Gate Capital to carry out a calculation in line with the updated rules and/or guidance in any event.

Illiquid investments in a SIPP

As I indicated above, my aim is to return Mrs A to the position she would have been in but for Gate Capital's actions. This is complicated where some of the investments are illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. That appears to be the case here.

To calculate the compensation, Gate Capital should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs and take ownership of the investment. If Gate Capital is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything Gate Capital has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, Gate Capital may ask Mrs A to provide an undertaking to account to it for the net amount of any payment she may receive from the investment. That undertaking should allow for the effect of any tax and charges on what she receives.

Gate Capital will need to meet any costs in drawing up the undertaking. If Gate Capital asks Mrs A to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

If the SIPP still exists because of the illiquid investment, in order for the SIPP to be closed and further SIPP fees to be prevented, the investment needs to be removed from the SIPP.

I've set out above how this might be achieved over the investment. But I don't know how long that will take. Third parties are involved, and we don't have the power to tell them what to do. To provide certainty to all parties, I think it's fair that Gate Capital pay Mrs A an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

This matter has clearly been a source of distress to Mrs A due to the uncertainty that now exists surrounding the value of her pension at retirement. So, Gate Capital should pay Mrs A £300 compensation for the impact its unsuitable advice has had.

Gate Capital should provide its calculation to Mrs A in a clear and easy to understand format.

My final decision

I uphold this complaint. Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

Determination and money award: I uphold this complaint and require Gate Capital Group Ltd to pay Mrs A the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I would additionally require Gate Capital Group Ltd to pay Mrs A any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I would only require Gate Capital Group Ltd to pay Mrs A any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Gate Capital Group Ltd pays Mrs A the balance. I would additionally recommend any interest calculated as set out above on this balance to be paid to Mrs A.

If Mrs A accepts this decision, the money award becomes binding on Gate Capital Group Ltd.

My recommendation would not be binding. Further, it's unlikely that Mrs A can accept my decision and go to court to ask for the balance. Mrs A may want to consider getting independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs A to accept or reject my decision before 30 November 2022.

Amanda Scott
Ombudsman