DRN-3370534

The complaint

Miss R says the advice given and the arrangements made by Rogate Capital Limited (RCL), to transfer her Occupational Pension Scheme (OPS) into a Family Suntrust Self-invested Personal Pension Plan (SIPP) with Axa Wealth was unsuitable.

What happened

Miss R and her long-term partner (Mr Z) sought advice about their pension arrangements in 2012. Information was gathered from them about their circumstances, objectives and their attitude to risk.

I note the fact-find completed by RCL was signed by its adviser on 9 January 2012. It was also signed by Mr Z the same day. Most of the details captured relate to his situation. I don't know if Miss R was present at the meeting. But she signed the form on 18 January 2012.

The fact-find records that Miss R was 53. She and her partner had a dependent daughter. They also lived with two of Mr Z's older children from a former relationship. Miss R wasn't working. Household outgoings were recorded as £7,000 per month. But no details were captured about monthly income.

Miss R and Mr Z had a family home worth around £2.5 million, with an outstanding mortgage at the time of around £1 million. Mr Z was said to have significant capital investments. He also had life assurance and protection policies. The fact-find summarised these household assets as joint - Miss R disputes this was the case.

Miss R was said to want to retire at 60 and to maximise her income. She was a member of an OPS with deferred benefits which she'd accrued with a former employer. The normal retirement date (NRD) for her scheme was 62. This was her only pension provision.

In terms of their investment risk profile and asset allocation proposals, separate details weren't recorded for Miss R and Mr Z. The highest risk category was circled by the adviser – suitable for confident investors. The Leopard Rock fund (hedge and direct investment) was indicated, with further details to be provided.

As part of its fact-find exercise, RCL recommended that Miss R transfer her OPS benefits to the specialised Family Suntrust SIPP in January 2012. It arranged for her to partially complete an application to join the new plan, which she also signed on 18 January 2012.

On 4 May 2012 Miss R's scheme provider undertook a Transfer Value Analysis (TVAS) of her OPS benefits. It reported these had a cash equivalent transfer value (CETV) of around £330,000. It also estimated the pension income and tax-free cash (TFC) she would be able to access at either age 60 or 62. A spouse's pension was provided for in the event of her passing. This was set at 50% of what she would've received.

Miss R's objectives for pension planning seem to be best discerned from a passage in RCL's suitability letter to her dated 6 July 2012, which states:

"…it was agreed that the increased flexibility in which the benefits can be paid to your beneficiaries in the event of death (i.e. a lump sum) and the manner in which they can be paid when you decide to draw a pension was preferable. In addition, you wanted to have overall control when investing the pension fund and secure investment in esoteric pension funds similar to those selected by [Mr Z]."

RCL restated its recommendation for Miss R to transfer her OPS benefits into the Family Suntrust SIPP in its suitability letter. Aside from listing in broad terms what investment opportunities were available through her new pension plan, no specific investment recommendations were made. I understand Miss R's OPS funds were moved into her SIPP on 17 July 2012.

It's important background information to note Miss R separated from Mr Z in November 2016.

In November 2019 Miss R wrote to RCL complaining about the recommendation she'd received in 2012 to transfer her pension. She raised several concerns, including that its advice had been inappropriate for her. And she said she'd been financially disadvantaged by what had happened.

RCL acknowledged Miss R's complaint in December 2019. There were two elements to the response it provided – an updated suitability report and a covering letter, both dated 16 January 2020. The main reason for producing a suitability report appears to have been because RCL had uncovered a significant flaw in the advice it provided her in 2012.

RCL said Miss R's OPS provider had overstated the value of her pension benefits at the date of her leaving the scheme and this had fed through to subsequent calculations, overstating her projected benefits at retirement. It asserted that the revised information made its original recommendation more favourable.

RCL said its advice for Miss R to transfer was suitable. It said she hadn't been financially disadvantaged. Amongst other arguments it said she hadn't been reliant on her OPS for her retirement income. It also noted the specialist SIPP gave her freedoms that her OPS didn't, such as taking benefits early. And that it provided her with better death benefits.

After Miss R had referred her complaint to this Service, RCL also objected to our consideration of her case. It said she'd brought it outside of the applicable time limits.

The Investigator thought that Miss R had brought her case in time, so he concluded it was within our jurisdiction. He went on to consider the merits of her case and upheld it. He didn't think RCL's advice for her to transfer her OPS benefits had been suitable.

RCL disputed the Investigator's findings and conclusions, in particular it challenged his view that Miss R had brought her complaint in time. So her case was passed to me to review and for a decision.

Jurisdiction

Our service was set up by Parliament under the Financial Services and Markets Act 2000 (FSMA). It's important to make clear that as a public body we don't have a general, 'at large', power to investigate any complaint. We can only investigate what FSMA and the rules made under it say we can – this sets the boundaries of our scheme. And we have no legal power to investigate complaints that are beyond our jurisdiction.

FSMA gives the FCA the power to say what complaints we can and can't consider. The FCA has set these out in the Dispute Resolution chapter of the FCA Handbook (also known as 'DISP' or 'the DISP rules').

If a business doesn't consent, this Service can't consider a complaint which isn't made within specified time limits. Dispute Resolution rule 2.8.2R says:

The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

2. More than:

a) six years after the event complained of; or (if later)

b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;… unless:

3. In the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R or DISP 2.8.7 R was as a result of exceptional circumstances.

Miss R is worried she's lost out because of the advice she received from RCL to transfer her OPS into the Family Suntrust SIPP in 2012. She doesn't think the advice was appropriate.

Taking the six-year rule first, a complaint is out of time if it's referred to our Service more than six years after the event complained about. That's unless the complaint was referred to the respondent business within that period and the complainant has a written acknowledgement or other record of the complaint having been received.

Miss R's complaint was raised with RCL in November 2019. It issued a final response to her in January 2020. As the advice complained about happened in 2012, her case is out of time on the six-year limb of the test.

In respect of the three-year test. I need to decide when Miss R became aware, *or ought reasonably to have become aware*, that she had a cause to complain. And having established that date, determine whether she brought her complaint within three years of it.

In making its case to time bar Miss R, RCL identified several points at which it says the three year limb of the jurisdiction test bites, meaning her case shouldn't be considered. These included that she could've raised a complaint around:

- July 2012, when she received advice to transfer her pension.
- April-May 2015 when Miss R was considering and then took benefits from her pension.
- March-April 2017 when she met with it to discuss future arrangements for her pension following the separation from Mr Z.
- When she received annual statements from Phoenix Wealth between 2013 and 2016, showing her benefits would be considerably less than her OPS would've provided for.

In responding to my provisional decision, RCL's main arguments centred on the time limits I must apply for considering Miss R's complaint. I've thought carefully about each of the points RCL has raised. But I still disagree with its position. I'll explain why.

Turning to RCL's contention that Miss R should've been aware of a problem when it was giving her advice. There are two fundamental problems with its position here.

Firstly, when considering if Miss R had a *cause for complaint,* this means thinking about whether she had, or ought reasonably to have had, knowledge that there was a problem; that she had suffered or may have suffered a loss; and that someone was responsible for this problem (and who that was).

If Miss R had been concerned during the advice process, it's unlikely she would've gone ahead with the transfer. There's no evidence Miss R thought there were problems with the service she received from RCL in 2012 – indeed she was happy to proceed.

I also think it's unfair to expect someone with no knowledge or experience of pensions to know she may have been mis-advised about her future pension arrangements at the point of sale. Highlighting risks in a suitability report is good practice and what is expected when giving financial advice. But this wouldn't necessarily have alerted Miss R she may have been badly advised.

RCL says it spoke with Miss R on 28 April 2015 about how TFC could be taken from her pension pot. I've seen a file note from the meeting, which suggests the call was with Mr Z, and that the discussion covered his and Miss R's desire to access benefits from their SIPP. This was to reduce debts (meet mortgage payments) and cover other family expenditure.

Interestingly, the file note suggests Mr Z was in the lead and that he relayed some communications from Miss R. It's recorded she raised some doubts about the decision to transfer her pension. RCL said she should contact one of its advisers and note down any concerns so that her mind could be put at rest. RCL says at no point during this process did it receive any information or correspondence from Miss R raising concerns.

RCL considers this was a key event which ought reasonably to have given her awareness of cause for complaint. It says she raised the initial transfer advice. And that she was taking benefits from her pension plan. So, this was the ideal time to ask questions about whether the transfer from the OPS had achieved its desired outcomes and how this would compare to the benefits that may have been payable under her OPS.

We know that RCL didn't treat what she'd said as an expression of dissatisfaction. If that had been the case it would've needed to have responded as part of its complaints process. And Miss R has no recollection of sending any communication on this matter to RCL after the phone conversation with Mr Z. No complaint was made.

We don't know the substance of the doubts Miss R raised in 2015 about her pension transfer in 2012. We do know the context of the meeting was about accessing pension benefits, so perhaps it was related to the transaction at hand? RCL suggested Miss R contact its adviser and let him know about any issues, so he could put her mind at rest. It's problematic to read too far into a short file note, but I think a fair reading here is that it was trying to give her reassurance about what had happened.

Further, Miss R was taking benefits from her pension earlier than possible under her OPS, this was recorded by RCL in its suitability letter as something that she wanted to do. It hasn't provided telling evidence setting out why this event should've given her cause to complain.

In responding to my provisional decision RCL said:

"We haven't provided any evidence as there was no compelling reason to consider that the client was dissatisfied. If this methodology of thinking were to be applied, it would mean that whenever a client might be considering taking benefits from a pension fund that had involved a transfer of pension rights the adviser would be obliged to ask the client directly whether they feel it appropriate to make a complaint."

RCL undermines its own argument that Miss R ought to have had cause for complaint when she took benefits from her pension in 2015. And I disagree when it says the implication of my finding is that whenever a client takes benefits from a pension pot an adviser would be obliged to ask whether they wanted to make a complaint about the original transfer. The matter I am trying to discern is when Miss R had cause for complaint. And RCL hasn't persuaded me the events of April and May 2015 was that point.

Regarding events around March-April 2017, Miss R told us that in making arrangements to break away from the SIPP her former partner had led on, RCL's adviser told her about the transfer values being achieved from her former OPS, which were substantially in excess of what she'd received in 2012. She says she was shocked by this information.

RCL has no record of this conversation. But it has subsequently said:

"…What is more likely is that I told Miss R that final salary pension transfer values are closely linked to the value of gilt yields and, therefore, as they go down transfer values go up. At the time mentioned (around March-April 2017) gilt yields, linked to interest rates, would have been at an all-time low so many people would have seen their transfer values soar. Other than that, I could surmise that this comment was mentioned by the other adviser that Miss R was working with."

So, RCL acknowledges it's possible it alerted Miss R, or another adviser did, to the fact that OPS transfer values were much higher subsequent to her transaction.

The Investigator thought the March 2017 meeting Miss R had with RCL was the point at which Miss R ought reasonably to have become aware there might have been a problem with the transfer of her pension in 2012. In responding to his view RCL said:

"At no point during 2017 did [Miss R] make any representation to [RCL] about any concerns or issues she may have had. Had [she] made [us] aware that she had cause for complaint then we would have dealt with this in accordance with regulatory processes. The fact that [Miss R] did not means that this statement should be disregarded as we were not given the opportunity to do so."

"In April 2017 [Miss R's] pension rights were transferred to a pension scheme in her name only. We assisted in the process and at no point did [she] raise any concerns or issues with [RCL] that might have given us cause for us to consider that a complaint may be made."

"We would consider that during 2017 there was ample opportunity for [Miss R] to have raised questions or indeed a complaint about our advice, however none was forthcoming."

I understand the point RCL makes. It's frustrated that Miss R didn't make her complaint in 2017. She's told us that at the time she was focussed on resolving even more substantial matters with HM Revenue & Customs (HMRC). While I recognise her point – this wouldn't constitute exceptional circumstances and so wouldn't extend the time available to her to bring a complaint to this Service.

In responding to my provisional decision RCL said:

"This should not be the basis for upholding the time bar issue because this pre-supposes that if transfer values were higher that the transfer would have taken place. It also discounts the fact that Miss R had already enjoyed the benefits of taking tax-free cash earlier which had not been subject to any actuarial reduction or the need to take a significantly reduce pension benefit due to early retirement. The fact that transfer values may or may not have been higher is purely speculative and there is no evidence provided to prove otherwise."

I still think RCL misses the main point here. A customer can bring a complaint against a firm, within three years of when they first became aware, or ought reasonably to have become aware, of cause for complaint. That cause maybe justified or not. And some of the matters it touches are more relevant to the merits of the advice I'll turn to later, such as Miss R's ability to access benefits earlier than she could've done under her OPS.

Like the Investigator, based on the available evidence, I think there's a strong argument to conclude the earliest Miss R had cause for complaint was March 2017 when she says she was shocked by what she'd been told about transfer values for OPS benefits. On this basis the rules this Service operates within say she had to raise a complaint by March 2020.

In July 2017 Miss R was contacted by HMRC about a very substantial potential personal tax liability. After seeking professional advice she was able to demonstrate the liability didn't arise out of her dealings and interests. And rather than being investigated, she became a witness in these matters. The point being, she was alerted to serious problems emanating from her pension arrangements. This would've been another trigger that should've put Miss R on the path to discovery about potential problems with the advice she received in 2012 about her pension transfer.

Finally, RCL refers to a decision made by this Service in 2014 in relation to our jurisdiction over a complaint about a pension transfer. It notes the Ombudsman in that case decided we couldn't look at the complaint because the customer had received regular statements setting out the projected pension from the new arrangements, and that this was considerably less than the former scheme provided for. The Ombudsman concluded this was enough to have made the customer aware they might have cause for complaint.

RCL said:

"Miss R received annual statements from Phoenix Wealth (whilst a member of the Family SunTrust Scheme) on 22nd January 2013, 7th March 2014, 6th March 2015 and 9th May 2016…Each of [these] annual statements clearly indicate that the full pension payable (prior to her [taking TFC] on 8th May 2015) was lower than the revalued full pension from [her OPS]."

RCL will know that this Service must review individual cases in light of the specific circumstances and facts relevant to each. Nevertheless, RCL makes a reasonable challenge, which I've thought about carefully.

I think it's significant that when the Investigator asked RCL why many of its communications were with Mr Z, it told him that although it had asked for Miss R's email address, she hadn't provided it. Miss R has confirmed that she had an email address at the time.

Leaving aside the matter of whether *or not* Miss R received the information about her SIPP, having reviewed the statements RCL refers to, I'm not persuaded these would've provided her with sufficient information to have raised her concerns.

I note her pension pot had grown between 2012 to 2016 from around £300,000 (allowing for initial fees) to about £340,000. Although not a major return over three years, it was significant growth. I can't see this would've alerted her to problems with the advice.

Further, I can't see where RCL provided Miss R with a clear comparison of the pension income she could've expected from her OPS over time, compared with what she might secure from her SIPP arrangement. And there's nothing in the SIPP statements that would've provided such a comparison over time to alert her to any problem either.

I've thought about what information RCL provided to Miss R in its suitability letter on 6 July 2012. In recommending the transfer it said (bolding was its emphasis):

"The FSA have indicated that advisers and their clients should not rely unduly on the Critical Yield Figures and should also take into account other aspects. This is why when considering the advice and recommendations we only use this as one of the factors to consider. Other factors such as your health, existing death benefits, investment restrictions etc are taken into account…"

"Ordinarily, the critical yield quoted would suggest that [your OPS] benefits should remain in situ but it was agreed that the increased flexibility in which the benefits can be paid to your beneficiaries in the event of death (i.e. a lump sum) and the manner in which they can be paid when you decide to draw a pension was preferable. In addition, you wanted to have overall control when investing the pension fund and secure investment in esoteric pension funds similar to those selected by [Mr Z]."

Given RCL's assertion here that Miss R's objectives - for example flexibility around death benefits and when her pension benefits could be taken - were paramount in making its recommendation to transfer, if this was correct then the matter of the value of her OPS pension versus what was delivered through her new arrangements was secondary.

Miss R says she only became aware of cause to complain when she was discussing various financial matters with the husband of a close friend in 2019, when they were on holiday. She says that he made it clear to her the transfer had been unsuitable. I don't agree with her position.

My conclusion is that Miss R ought reasonably to have become aware of potential problems with the advice she received in 2017. In particular, when she met with RCL in March of that year and says she was shocked by what she was told about the transfer values being achieved with her former OPS provider. And certainly by July 2017 when she was put on notice by HMRC about serious tax liability issues related to her pension arrangements.

In responding to my provisional conclusion on these matters RCL said:

"None of these issues were ever communicated with RCL so it cannot be correct that somehow RCL should have been aware of these matters."

I've no reason to doubt what RCL says here. But it misses the point. I'm trying to understand when Miss R was aware or ought reasonably to have been aware of cause for complaint. That's where our time limit rules bite.

RCL summarised its position on jurisdiction in the following terms:

"I still have a problem deciphering the process that FOS has adopted regarding the time barring of this case. If this is FOS' interpretation of the rules, then it seems credible that the 3-year rule can never be effectively used. A client will never have enough knowledge to decide whether a complaint should or should not be made."

I'd simply observe that jurisdiction is a matter of fact. A complaint is either something this Service can or can't consider according to the DISP rules. The problem for RCL is that it hasn't been able to provide telling evidence which demonstrates Miss R should've brought her complaint more than three years before she did.

Miss R raised her case with RCL in November 2019 and this was acknowledged by it in December 2019. Her complaint was duly made within three years of when she ought reasonably to have been aware of cause to raise her concerns, which based on the information I've seen was in 2017.

This Service can consider Miss R's complaint. I'll now move on to review the merits of her case.

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.

Where there's conflicting information about what happened and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what's most likely to have happened.

I've not provided a detailed response to all the points raised in this case. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. While I've taken into account all submissions, I've concentrated my findings on what I think is relevant and at the heart of this complaint.

I'm upholding Miss R's complaint. I'll explain why.

How does the regulatory framework inform the consideration of Miss R's case?

The first thing I've considered is the extensive regulation around transactions like those performed by RCL for Miss R. The FCA Handbook contains eleven Principles for businesses, which it says are fundamental obligations firms must adhere to (PRIN 1.1.2 G in the FCA Handbook). These include:

- Principle 2 - which requires a firm to conduct its business with due skill, care and diligence.
- Principle 3 - which requires a firm to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
- Principle 6 - which requires a firm to pay due regard to the interests of its customers.
- Principle 7 – which requires a firm to pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.

So, the Principles are relevant and form part of the regulatory framework that existed at the relevant time. They must always be complied with by regulated firms like RCL. As such, I need to have regard to them in deciding Miss R's complaint.

At the time of the advice RCL gave Miss R, COBS 19.1.6 made the following specific point about advising on a transfer from OPS schemes (bolding is my emphasis):

*"When advising a retail client who is…a member of a defined benefits occupational pension scheme…with safeguarded benefits whether to transfer…**a firm should start by assuming that a transfer…will not be suitable.** A firm **should only then consider** a transfer…to be suitable **if it can clearly demonstrate**, on contemporary evidence, **that the transfer…is in the client's best interests**."*

Under COBS 19.1.2, RCL was required to:

- Compare the benefits likely to be paid under the ceding arrangement with the benefits afforded by the proposed arrangement.

- Ensure that the comparison included enough information for Miss R to be able to make an informed decision.
- Give Miss R a copy of the comparison, drawing her attention to the factors that do and don't support its personal recommendation, in good time.
- Take reasonable steps to ensure that Miss R understood its comparison and how it contributed towards the personal recommendation.

In simple terms, RCL had to assess the benefits likely to be paid and options available under the OPS and compare this with those available under the new arrangements proposed *before* it advised Miss R on what to do.

Further, COBS 2.1.1 R requires a firm to act honestly, fairly and professionally in accordance with the best interests of its clients, in relation to designated investment business carried on for a retail client. The definition of "designated investment business" includes "arranging (bringing about) deals in investments".

COBS 9.2.1R sets out the obligations on firms in assessing the suitability of investments. They are the same things that I look at when reaching a decision about whether the advice was suitable. In summary, the business must obtain the necessary information regarding: the consumer's knowledge and experience in the investment field relevant to the advice; their financial situation; and their investment objectives.

It's also important to review the FCA's specific stance on advice provided about SIPP's. For example, in January 2013 it issued an industry alert which said:

"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to [SIPPs] that invest wholly or primarily in high risk, often highly illiquid unregulated investments…"

"Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect. The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes..''

"If, taking into account the individual circumstances of the customer, the original pension product, including its underlying holdings, is more suitable for the customer, then the SIPP is not suitable. This is because if you give regulated advice and the recommendation will enable investment in unregulated items you cannot separate out the unregulated elements from the regulated elements. There are clear requirements under the FSA Principles and Conduct of Business rules."

Although the alert was issued after the advice given to Miss R, it wasn't new guidance; it was the regulator re-stating its position.

Did RCL adhere to the regulatory requirements placed on it?

In short, I don't think RCL met the regulatory requirements placed on it. I'll explain why.

There are several documents relating to RCL's transaction with Miss R that are important to my consideration, these include its fact-find, the TVAS report, the SIPP application and the suitability letter it produced for her.

The fact-find from January 2012 records that Miss R was 53. She and her partner had a dependent daughter. Miss R wasn't working. Household outgoings were recorded as £7,000 per month. But no details were captured about monthly income.

Miss R and Mr Z had a family home worth around £2.5 million, with an outstanding mortgage at the time of around £1 million. Mr Z was said to have capital investments worth around £2.75 million and Miss R none. Mr Z was said to have life assurance and protection policies with cover of around £3.75 million. Miss R had no cover. Savings weren't disclosed. The fact-find summarised these household assets as joint - Miss R disputes this was the case.

Miss R was said to want to retire at 60 and to maximise her income. But no specific income targets were established.

The regulatory position set a high bar, which meant that RCL had to be able to *clearly* demonstrate, based on contemporary evidence, that the transfer was in Miss R's best interests. I'm not satisfied it managed to do this in the circumstances of this case.

I've several concerns about the advice process RCL followed with Miss R.

The fact-find conducted by RCL in January 2012 also contained a recommendation that Miss R should transfer her OPS funds into a Family SunTrust SIPP with Axa Wealth, which had already been established for Mr Z in the previous year. This was prior to receiving a TVAS report, which would've provided an analysis of her existing pension benefits.

RCL says the recommendation was to look at the viability of transferring Miss R's OPS benefits subject to proper tests – it says it can't be inferred that a recommendation had been given without due process.

But there are other examples of where the cart appears to have been placed in front of the horse in RCL's process. For example, it arranged for Miss R to sign an application to join the new SIPP, which she did on 18 January 2012 (the same day she signed the fact-find).

RCL says information from Miss R's OPS provider wasn't received until February 2012. And that the TVAS report was posted to her on 4 May 2012.

On 8 May Miss R signed another SIPP form – this was a 'Unanimous agreement', which effectively meant that any investment decisions had to be taken by all nominated members of the SIPP. On 9 May 2012 RCL sent an email to Mr Z to confirm it had started the process of transferring Miss R's OPS benefits into the SIPP. On 31 May 2012 Miss R signed a declaration authorising the transfer of her OPS funds to her new SIPP arrangement.

RCL says all the paperwork wasn't ready for submission to the OPS administrators until 27 June 2012. It didn't issue its suitability letter to Miss R until 6 July 2012 confirming its recommendation from 6 months earlier.

RCL disputed my finding about the chronology of events. But the matters it's raised haven't altered my overall view of its process. I think by the time Miss R had received the suitability reports, wheels had been turning on the transfer of her OPS benefits for some time. I think she could reasonably have formed that impression. And yet, it wasn't until this point she'd have been able to have read in any detail the analysis and information supporting its recommendation for her to transfer her funds.

Miss R’s objectives for pension planning seem to be best discerned from a passage in RCL’s suitability letter, which states:

“…it was agreed that the increased flexibility in which the benefits can be paid to your beneficiaries in the event of death (i.e. a lump sum) and the manner in which they can be paid when you decide to draw a pension was preferable. In addition, you wanted to have overall control when investing the pension fund and secure investment in esoteric pension funds similar to those selected by [Mr Z].”

Miss R’s objectives don’t appear particularly compelling. RCL was in a good position to have analysed, tested, challenged and advised Miss R about what was in *her* best interest for retirement planning. It knew pension pots built up over many years are to provide for retirement. And certainly, when moving away from an OPS there need to be compelling reasons. That’s not the case here based on the available evidence.

I also find that Miss R’s stated objectives are at odds with some of the responses she gave to a pension transfer questionnaire completed on 8 May 2012, as follows:

- The OPS benefits under discussion represented a significant proportion of her pension benefits.
- Her dependents would receive significant sums upon her death from other sources and so extra death benefits were not an absolute priority.
- Miss R wanted the maximum possible lump sum at retirement. She wanted to retire at 60 and understood that this would reduce her benefits.
- Miss R had a moderate risk appetite.
- She had no reason to question the security of her OPS.
- Miss R indicated that she would like to have control of her pension benefits and to consolidate these.

I’ve already mentioned in my consideration of our jurisdiction in this case, that there were weaknesses in RCL’s suitability letter. For example, it didn’t provide a clear comparison of the level of pension income she could expect from the new arrangement compared with her OPS. And it has told us that key information in its letter about the critical yield was materially incorrect. Further, the actual amount transferred was around £15,000 less than advised because the CETV it had originally obtained had expired during the process.

There’s no record of what income Miss R would need in retirement. I’ve seen no evidence of an attempt by RCL to get to the bottom of this key question. I think this would’ve been important to her being able to take an informed view about the transfer of her OPS benefits.

So, RCL hasn’t’ done enough to satisfy me the process it followed was thorough, and therefore fair.

From reading the paperwork available, it’s arguable that RCL was influenced too much in its dealings with Miss R, by the interests of Mr Z who was a significant client.

I note that the specialised SIPP had already been established for him, prior to its meeting with Miss R. One of the key benefits RCL suggested for the arrangement was to help Mr Z manage his pension tax liabilities. The risk assessment process was performed jointly, despite it being clear to RCL they had different risk appetites. And, as I’ve already mentioned, most of its key communications were with him.

I note in responding to the Investigator RCL told him:

"[Miss R] had confirmed that she had a very limited knowledge of investment markets, their charges and risks and was happy for [Mr Z], a sophisticated investor with decades of experience with large financial institutions, to help manage their pension investments. The Family Suntrust Scheme allowed [them] to do this as all of the assets formed part of a pooled fund."

I think the problem here for RCL is that it was providing a service for Miss R. It needed to have her interests in mind. It would've known the status of the relationship between her and Mr Z, they weren't married or in a civil partnership, they were in an unmarried partnership.

The main difference is that those in civil law relationships are recognised and protected by UK law while unmarried partnerships are not. Legal protection for civil law partnerships offers clear cut guidance and outlines rights relating to things such as inheritance, pensions and taxes. Without this framework, legal issues, rights and responsibilities arising from common-law relationships are often more difficult to settle.

It was RCL's role to discern what Miss R's wants and needs were and why. Its role wasn't simply to facilitate what it thought she wanted without any critical thinking. And it wasn't providing a basic transactional service. It had to use due care and skill. It had to do these things because it had to act in her best interests. It hasn't demonstrated that it met these obligations.

Turning to the financial case for this transaction. Miss R was a member of an OPS with deferred benefits which she'd accrued with a former employer between 1981 and 1995. The normal retirement date (NRD) for her scheme was 62. She could've taken her benefits earlier, but they would be actuarily reduced. This was her only pension provision.

On 4 May 2012 Miss R's scheme provider undertook a TVAS of the value of her OPS benefits. It found they had a cash equivalent transfer value CETV of around £330,000.

It was estimated that at Miss R's NRD this would deliver an annual pension of around £40,000 or TFC of £190,300 and a reduced pension of about £28,500. Alternatively, if she retired early at 60 Miss R's could've received an annual pension of around £36,600 or TFC of £174,000 and a reduced pension of about £26,100. A spouse's pension was provided for in the event of Miss R's passing. This was set at 50% of what she would've received.

The TVAS report also detailed the critical yield – the estimated annual return required from Miss R's new pension arrangements to equal the estimated benefits provided by her then existing OPS. These ranged from around 15% to nearly 22%, depending on whether she took TFC and when she retired.

RCL's advice was given during the period when this Service published '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, I think they provide a useful indication of what growth rates would've been considered reasonably achievable when the advice was given in Miss R's case.

Based on the information available to RCL when it gave Miss R the advice, the critical yield it was working to was between 15-22%. At this time, the relevant discount rate was 4.4% per year for 8 years to retirement.

The comparable growth rates this Service used were based on a typical investment spread across shares and bonds. So, it's arguable that if Miss R had a high appetite for risk, the investment portfolio selected in that case might've had an outside chance of big returns. But even then this would've been unlikely to bridge the gap here. The transfer was not financially viable.

In terms of risk profile and asset allocation, in the fact-find from January 2012 RCL seems to have assessed Mr Z and Miss R jointly. The Leopard Rock funds (hedge and direct investment) was indicated as a destination for her OPS pension funds, with further details to be provided. RCL also said one of her objectives was to be able to invest in the same *esoteric* pension funds as Mr Z.

RCL restated its recommendation for Miss R to transfer her OPS benefits into the Family SunTrust SIPP in its suitability letter in July 2012. Aside from listing in broad terms what investment opportunities were available through her new pension plan, no specific investment recommendations were made.

In responding to my provisional decision on this point RCL said:

"*Our email dated 9th May 2012 clearly stated that Miss R's transfer payment would be allocated to the Family SunTrust scheme bank account pending investment instructions. All member assets are aggregated for the purposes of investment within the Family SunTrust with a common and unanimously agreed investment approach."*

"Clearly, this common investment strategy may not match the investment strategy a member would choose if they were investing on their own. This could mean their share of the pooled fund is exposed to a different level of risk than if they invested independently. The value of the pooled fund may be lower than it would have been if it had followed the member's own investment strategy."

I understand the points RCL makes here. Unfortunately for it, I think it reinforces my concerns about what happened to Miss R. RCL had to understand how Miss R's OPS funds would be invested in the SIPP. That was a regulatory requirement. It effectively abdicated its responsibility here.

Further, RCL noted she would be investing in funds like those favoured by Mr Z. But as it said in the suitability letter, these were likely to be obscure and only understood or intended to be understood by a small number of people with specialist knowledge. It knew this wasn't right for Miss R who was inexperienced in pension and investment matters. And it knew she only had a moderate appetite for risk.

More generally on risk, I'm not satisfied that Miss R had significant capacity for loss. Her OPS was her only pension provision, and she was only 6-8 years away from retiring. I've seen no evidence she could've relied on a share of Mr Z's investment portfolio. I've already dealt with matters relating to the status of their relationship.

And I can't see that Miss R was properly informed that by moving away from her OPS scheme and using the funds to invest, she was moving from a situation where her former employer was bearing the risks related to the provision of her retirement income to one where she was taking on that risk.

Based on RCL's own analysis in 2012 the move of Miss R's OPS benefits would significantly erode value. While RCL acknowledged that ordinarily these return requirements would suggest that her OPS membership should be retained, it went on to reason why it was right for her to transfer based on her objectives. I've already set out the weaknesses in that argument.

Following receipt of Miss R's complaint, RCL informed her in 2020 that her OPS provider had overstated the value of her pension benefits at the date of her leaving the scheme when it undertook the original analysis in 2012. This had fed through to subsequent calculations, overstating her projected benefits at retirement and the critical yield figures it used in its original suitability letter.

RCL recalculated the critical yield figures. These were based on Miss R retiring at 62 and either selecting a joint or single annuity and deciding whether to take TFC. The results ranged between 5.7-8.1%, substantially lower than indicated in its original report.

But RCL noted that it hadn't been able to replicate certain elements of the TVAS from 2012, such as annuity interest rates and inflation indices, and that these would have an impact on its underlying calculations. But it asserted:

"Given [Miss R was] prepared to invest in high risk investments with your then partner's guidance and knowledge the stated critical yields would not seem unsuitable."

I disagree. There's no evidence Miss R had a high attitude to risk. And RCL has acknowledged its 2020 remodelling of assumptions is not a like-for-like exercise with that completed in 2012. And the remodelling of benefits its performed are not a like-for-like comparison of the benefits Miss R could've received from her OPS.

Leaving aside the effect of the fees and charges Miss R incurred under her SIPP, and even allowing for a moderate risk appetite, returns required from her pension arrangement would've been a stretch to match what she could've achieved at much lower risk through her OPS.

As the regulator made clear at the time, RCL needed to be able to demonstrate based on contemporaneous evidence in 2012 that the transfer of Miss R's OPS benefits was clearly in her best interests. It's failed to do this.

There's a note on RCL's file which shows that Miss R rang it on 10 July 2012 to discuss the suitability letter. The adviser indicates he explained to her it would be preferable to leave her OPS benefits where they were given the critical yield position. But the note records she wanted to take TFC early without having to take an income.

The file note also records Miss R thought Mr Z would achieve decent growth from his Leopard Rock funds as he had a lot of experience in these matters. The adviser also mentioned to Miss R that the reallocation of investment returns possible from Mr Z to her pension plan should help her position.

RCL hasn't provided a call recording of its conversation with Miss R. But whatever was discussed and in whatever terms, it didn't deal effectively with this interaction. And so I don't put much weight on it. I'll explain why.

The call to RCL was initiated by Miss R to discuss the suitability letter. The question is was RCL changing its recommendation during the conversation? I don't think so – otherwise it would've issued something formal, rather than just keeping a brief file note. I think it's more likely than not it was playing back to her the benefits of transferring it had set out in its letter.

RCL had the option of making clear in a suitability letter that it didn't recommend the transfer of Miss R's OPS. Then if she'd wanted to proceed it could've initiated an insistent client process. It chose not to do this.

Further, in the short file note it's clear RCL was also giving Miss R some reassurance about its advice. At least in part, concerning the reallocation of investment returns to her pension pot.

Finally, I'm grateful to Miss R for the openness she has shown in talking to the Investigator about her case. I know it was difficult for her to revisit some of her experiences. In particular, she told us about the extent to which Mr Z had influence over her. I need to consider what she's told the Service and what if any bearing this should have on the outcome of my decision.

When Miss R brought her complaint to this Service she mentioned she was suspicious the whole transfer had been driven by Mr Z. She told us about his high profile roles in financial services. And she told us about his influence over her, to the extent he could be controlling.

I'm mindful that I don't have testimony from Mr Z about these matters. And unlike a court, this Service can't join third parties to complaints or compel other parties to provide evidence.

Nevertheless, I need to think about whether Miss R's relationship with Mr Z was such that, irrespective of the advice RCL had given her she'd have gone ahead with the pension transfer anyway.

When the Investigator explored this matter with Miss R she was straight-forward in saying it was difficult to answer a hypothetical question several years after the event. But she did tell us about other events when she'd had to assert her own financial interests in the relationship. In particular, in 2016 when she'd insisted with their solicitors an agreement which made clear she was entitled to 50% of their housing assets.

On balance, I've decided it's more likely than not that had RCL given Miss R an explicit recommendation not to proceed with the transfer of her OPS benefits, I don't think she'd have gone ahead. Given the stakes and the fact that her and her partner's financial advisers were recommending against such a move, I think she'd have accepted the professional advice, irrespective of Mr Z's sentiments.

To conclude I don't think the transfer of Miss R's OPS benefits could sensibly be regarded as fair to her. As such I think RCL failed to meet the regulatory requirements when providing her with advice and making the arrangements. So, taking all the circumstances of the case into account, it's reasonable to uphold this complaint against RCL and for it to put things right.

Putting things right

I'm upholding Miss R's case. So, she needs to be returned to the position she would've been in now - or as close to that as reasonably possible – had it not been for the failures which I hold Rogate Capital Limited responsible for.

If RCL had done everything it should've, I don't think Miss R would've transferred her OPS benefits, into a SIPP. And she wouldn't have suffered the financial loss she's facing. I think it's most likely she would've left her pension where it had been.

So Rogate Capital Limited needs to do the following.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out below. My decision is Rogate Capital Limited should pay Miss R the amount produced by that calculation – up to a maximum of £160,000.

Recommendation: *If* the amount produced by the calculation of fair compensation is more than £160,000, I recommend that RCL pays Miss R the balance.

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

I consider Miss R would've remained in her former OPS. Rogate Capital Limited should therefore undertake a redress calculation in line with the pension review methodology, as updated by the FCA in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

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 Miss R's acceptance of the decision.

RCL may wish to contact the Department for Work and Pensions (DWP) to obtain Miss R'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 occupational scheme on Miss R's SERPS/S2P entitlement. In order to do this Miss R will need to cooperate with RCL to enable it to approach DWP for this information, which is likely to require her written authority.

If the redress calculation demonstrates a loss, the compensation amount should if possible be paid into Miss R'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 Miss R as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. 25% of the loss would be tax-free 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 compensation amount must where possible be paid to Miss R within 90 days of the date RCL 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 RCL to pay Miss R.

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.

Further information

Some examples of how calculations should be carried out are available on our website under 'Publications' / 'Online Technical Resource' / 'Investment' / 'Calculating compensation in investment complaints'

Distress and inconvenience

In addition, I consider that Rogate Capital Limited should pay Miss R compensation for distress and inconvenience of £300. This is in recognition of the failings I've identified and the impact these have had on her.

My final decision

For the reasons I've already set out, I'm upholding Miss R's complaint. As such, I require Rogate Capital Limited to put things right in the way I've outlined.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss R to accept or reject my decision before 18 April 2022.
Kevin Williamson
Ombudsman