

The complaint

Mrs S complains about the advice provided by Clochgate Financial Services Scotland Limited (trading as Clochgate) to transfer her final salary pension into a James Hay Self Invested Personal Pension (SIPP) and the subsequent investment into Optima Wide Group (OWG) bonds.

Mrs S says she has lost out financially due the unsuitable advice she received from Clochgate.

What happened

Mrs S was a deferred member of her former employer's final salary pension scheme. At the time of advice her guaranteed transfer value was £100,268.48.

Clochgate carried out a fact find interview with Mrs S on 21 October 2013. The notes showed that:

- Mrs S was in her early fifties, married with two children, one dependent.
- She was employed and earning around £15,000 a year. She intended to retire at 65.
- She owned her home through a mortgage. No details were taken down about the amount of her mortgage or the equity (if any) she had in her home.
- She had no savings or investments.

In the fact find notes it was recorded that Mrs S and her husband had contacted the adviser about Mrs S's pension. It said:

"They want me to facilitate a SIPP for them as they want control of their funds and the ability to self-invest in the future. I asked [Mrs S] to complete our Pension Questionnaire and took the documentation she received from Legal & General to enable me to run a TVAS report. They only wanted me to concentrate on the pension and did not wish advice on any other areas. I said I would contact them as soon as I received the report back."

A pension transfer attitude questionnaire was signed by Mrs S 25 October 2013. It recorded she was a member of her employer's pension scheme. The following options were ticked on the form:

- She wished to break all ties with her ex-employer and would prefer to move her funds to an individual plan which was under her control.
- The pension being discussed was an insignificant part of her overall potential pension.
- For Lumpsum death benefits – Her dependents would receive significant sums upon her death and whilst a greater amount would be beneficial, it was not an absolute priority for her.

- She wanted to maximise the benefits payable to her during her lifetime as her spouse had significant pension benefits in his own rights.
- Under attitude to investment risk – it was marked as Medium/High (UK Equity/Overseas Equity)

A Transfer Value Analysis Report (TVAS) was produced. In that it said that a critical yield of 7.8% per annum would be needed to replace the benefits provided by her current scheme at the normal retirement age of 60.

Clochgate provided Mrs S with advice to transfer her benefits on 8 November 2013. The recommendation was to set up a James Hay SIPP and invest as a balanced/moderately adventurous investor. The asset allocation was 5% in cash, 15% in Corporate bonds, 40% in Large Cap, 20% in Small Cap, 10% in Overseas Equities and 10% in property.

The initial adviser charge was recorded as 3%. The provider fees were recorded as £50 transfer in charge, the basic annual fee of £180 and an investment centre monthly fee of 0.18%.

An application was made to open the James Hay SIPP. After the James Hay SIPP was set up, Strand Capital were appointed as the investment manager and they invested in an Optima Worldwide Group (OWG) corporate bond on Mrs S's behalf.

James Hay paperwork shows that James Hay received instructions to set up Strand Capital as the investment manager on 11 December 2013. Further, that James Hay sent Clochgate a letter confirming the Strand Capital account opening on 15 December 2013.

According to the SIPP statement, the transfer from Mrs S's final salary scheme was received by James Hay on 3 December 2013. A transfer of £95,000 was made very shortly afterwards to Strand Capital on 18 December 2013.

Mrs S expected to receive an annual return of 8% from the OWG bond and a return of capital at the end of a 5-year term. However, the annual payments ceased, and the capital has not been returned.

In June 2017, James Hay, informed Mrs S that Strand Capital had entered administration.

Mrs S raised a complaint with Clochgate on 15 July 2020 about the suitability of the advice she received to transfer out of her former employer's defined benefit pension scheme.

In its final response letter of 24 August 2020, Clochgate said that Mrs S's complaint had been brought out of time. It also said that as Clochgate was not responsible for the investment in the OWG Corporate Bond, as no advice or recommendation was provided by Clochgate, it being provided by Strand Capital, it was not responsible for her loss.

Mrs S referred her complaint to this service on 5 November 2020.

Because Clochgate did not consent to this service dealing with Mrs S's complaint, I considered whether we had jurisdiction to deal with her complaint and issued a final decision on this in January 2022. I found that her complaint had been brought to this service in time and it was one, therefore, that we could investigate.

Mrs S's complaint was sent back to the investigator to issue a view on the merits of her complaint.

Our investigator issued her view on the merits, concluding that Mrs S's complaint should be upheld because she had been provided with unsuitable advice to transfer her benefits out of her final salary pension scheme.

Clochgate did not agree with our investigator's view. It also submitted further representations as to why this complaint was not within jurisdiction. On the merits part of the complaint it said:

- Mr and Mrs S, both of whom were present at meetings, were well aware of the risks involved. Mr S was involved in the finance industry and it was a joint decision.
- Mrs S said she wanted to limit her advice to retirement planning and facilitating a SIPP. Mr and Mrs S had thoroughly researched their options and wanted the control a SIPP offered. There was no indication that Mrs S would subsequently invest as she did.
- The Pensions Transfer Analysis Form was completed by Mrs S and this information was transferred on to the suitability letter.
- It was not known at that time that Mrs S would invest via Strand Capital.
- Mrs S said she was a balanced/moderately adventurous investor after seeing the explanations for each risk category.
- All factors need to be considered, not just the critical yield, eg flexibility, death benefits and own control.
- The recommended portfolio was regulated. The funds were never invested in it..
- A financial adviser would not be expected to see that the advice was followed through.
- Strand Capital was never mentioned at the meeting. Had it been mentioned, Clochgate would have rejected it as an unregulated investment. Clochgate cannot be held responsible for an investment that was unforeseen.
- Clochgate only became aware of Strand Capital when subsequent documents advised them of the switch. It had been agreed that Clochgate would provide no further advice. The adviser thought it strange that it happened so quickly, but it now seems that it was pre-conceived to facilitate the transfer.
- Likely had the client been contacted at the time, she would have confirmed that she had done of this of her own accord, which she was entitled to do.
- The investment made was against advice.
- A decision to hold Clochgate responsible for an investment it did not know about and did not recommend is incorrect.
- The complaint against Clochgate, if within jurisdiction, should be limited to the transfer out into the recommended portfolio and not the actions taken by the client outside of this advice

Mrs S said in response to Clochgate's points:

- Her husband was last employed in the financial services sector 25 years prior the one meeting she had with Clochgate and was not a pensions expert.
- Risk was never mentioned during the meeting. Had she thought there would be a risk of her losing her pension fund she would never have transferred out.
- She considered herself low risk.
- She did not complete the forms stating that she was medium to high risk.
- The introducer from Strand Capital definitely knew the IFA. They were on first name terms. Strand Capital's adviser told her to take advice from this particular adviser at Clochgate. Clochgate's offices were 42 miles from her home address and she

queried whether she could approach a more local adviser for advice. She was told by the Strand Capital adviser that the Clochgate adviser was the only one that could complete the paperwork for her.

- Clochgate was appointed as independent financial advisers and she paid a fee to get the 'best advice', in her circumstances.
- She was not aware of the risks involved and considers Clochgate responsible for her loss.

Mrs S's complaint comes back to me to decide the merits of it.

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.

A final decision has already been made concluding that this service can investigate Mrs S's complaint. What I am deciding now is the merits, in particular whether the advice Mrs S was given by Clochgate was suitable, in her circumstances. Further, if it wasn't, what can be done now to put that right.

It's not in dispute that Mrs S contacted Clochgate and appeared to be interested in releasing her pension and wanted some advice.

Where to start

When advising Mrs S, Clochgate had to have regard to relevant guidance issued by the industry regulator. At the time of advice the industry regulator had stated in its Conduct of Business Source Book (under COBS 19.1.16), the following in relation to transfers from defined benefit occupational pension schemes – which Mrs S's final salary pension scheme was::

“When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interests.”

At the time of advice, it was further said:

“When giving a personal recommendation about a pension transfer, a firm should clearly inform the retail client about the loss of the fixed benefits and the consequent transfer of risk from the defined benefits pension scheme to the retail client, including:

- 1. the extent to which benefits may fall short of replicating those in the defined benefits pension scheme ;*
- 2. the uncertainty of the level of benefit that can be obtained from the purchase of a future annuity and the prior investment risk to which the retail client is exposed until an annuity is purchased with the proceeds of the proposed personal pension scheme or stakeholder pension scheme; and*
- 3. the potential lack of availability of annuity types (for instance,*

annuity increases linked to different indices) to replicate the benefits being given up in the defined benefits pension scheme."

Clochgate's starting position should have been to assume that advice to transfer from Mrs S's occupational schemes would be unsuitable. Further, that it should only recommend that she transfer out, if it could be clearly shown that was in Mrs S's best interests in her particular circumstances.

Clochgate recommended the transfer out, so I can see this is not a situation where Mrs S was insisting on transferring out, irrespective of what Clochgate recommended. Instead, Mrs S transferred out, having been advised by Clochgate that this was something it *recommended* in her situation.

Based on the information recorded in the fact find notes, I can't see that Mrs S had a significant level of investment experience. Nor does it seem that she was a high net worth investor, potentially able to take a higher level of risk due to the resources available to her.

The recommendation to transfer saw Mrs S giving up 16 years worth of guaranteed benefits from her final salary scheme, in return for benefits dependent on investment returns.

Priorities

Mrs S was asked on the form she signed to say what her priorities were ranked 1-6. This section of the form was not completed at all.

The options were, in summary:

- A To increase her pension
- B The security of her pension fund
- C Provision for spouse's and dependent's pension
- D Lump sum benefits upon her death before retirement
- E Tax free lump sum at retirement
- F The ability to retire early

It's not apparent to me that Mrs S was asked about her priorities, or that these were clearly apparent to the adviser at the time of advice.

Investment returns

The industry regulator also said that when considering a transfer from a defined benefit scheme, a calculation must be carried out to establish the investment performance which would be required by the new pension, in order to match the benefits available from the transferring scheme. This is called the critical yield.

At the time of advice, the Financial Ombudsman Service was publishing 'discount rates' on its 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, they did provide a useful indication of the growth rates considered reasonably achievable for a typical investor.

The investment return (critical yield) required to match Mrs S's defined benefits in her

final salary scheme, at a retirement at age 60, was around 7.8% per year. The relevant discount rate according to this service was 4.5% per year for 7 years to retirement. For further comparison, the regulator's upper projection rate at the time was 9%, the middle projection rate 7%, and the lower projection rate 5% per year.

To even match her benefits in the transferring scheme, Mrs S would have to take a middle to high level of risk.

Attitude to risk

The form Mrs S signed said this under the heading “*ATTITUDE TO INVESTMENT RISK*”.

“Assuming that a transfer is viable in your circumstances, please indicate the risk profile you wish to adopt from the table below.

” Please note: You may wish to consider this question at a later stage”.

There was then a table showing the following options:

<i>“Risk profile</i>	<i>Possible Investment Split</i>
<i>Low</i>	<i>With profits</i>
<i>Low/Medium</i>	<i>With Profits Managed</i>
<i>Medium</i>	<i>Managed</i>
<i>Medium/High</i>	<i>UK Equity Overseas Equity</i>
<i>High</i>	<i>Specialist Equity Funds/Specific Markets”</i>

I think Mrs S would have had a basic understanding that a pension dependent on investment returns carried a degree of risk. I note she had little experience of investing in stocks and shares and no savings and investments.

Looking at the information requested and provided on the form, firstly, I think it unlikely based on what the form said, that Mrs S would have understood her attitude to risk was a particularly significant consideration in the context of whether she should transfer her pension out of her final salary scheme.

I say this because she was told she may want to consider this question later, and this information was relevant “*assuming that a transfer is viable*”.

Further, the form seemed to suggest that it was up to her to decide which risk profile to adopt, rather than for Clochgate to assist her to properly assess her attitude to risk.

Like our investigator, I think had the discussion in this area been more comprehensive (or happened at all – Mrs S said it didn't), I think more likely that the overall assessment would have been that Mrs S was a cautious investor.

As a cautious investor, given the level of risk that Mrs S would have had to take to potentially achieve the critical yield required to just match her guaranteed benefits, I don't think she would have considered transferring worth it to her, in her particular circumstances.

Given that Mrs S more likely had a low attitude to risk, along with the term to retirement. I think Mrs S was likely to receive benefits of a substantially lower overall value than her final salary scheme at retirement. That she was taking this level of risk should have been made

much clearer to her.

Capacity for loss

Mrs S was in her early fifties, with a dependent child and a relatively modest personal income and household income. She said she had no savings or investments. It is not recorded whether there was equity in her mortgaged home.

Whilst the notes showed her pension was an insignificant part of her overall pension, her dependents would receive significant sums upon her death and her spouse had significant pension benefits in his own right, no factual information appears to have been collected which support these statements.

Given Mrs S's age and time to retirement, if her investments failed or did not reach the medium/high levels of return required, it seems unlikely, based on the information recorded, that she would have been able to cover this loss of guaranteed pension by other means.

I can't see that Mrs S had significant assets or there were expected sources of income to follow in retirement (other than any state pension). Like our investigator, I can't see that Mrs S had the capacity to absorb any pension losses.

I've not seen enough to show that the business considered the important starting point here and gathered relevant information to satisfy itself that Mrs S's personal circumstances and objectives demonstrably supported a moving away from that usual starting point. From what's recorded, it seems to me the adviser's starting point was to facilitate the setting up of a SIPP, irrespective of whether that was in Mrs S's best interests.

Recommendation Letter

As our investigator highlighted, the regulator said as far back as 1994 that the suitability letter shouldn't be a 'mechanistic recitation of stock motives applicable to any and every transaction'.

None of the objectives provided by Clochgate were enough, in my view, to justify a transfer from a scheme that would provide a risk-free guaranteed income from the age of 60 for Mrs S's lifetime.

Based on the above, I am satisfied that the advice to transfer was unsuitable. I am of the opinion that a cautious investor should have not been recommended to transfer from an OPS as this would have provided her with secure future income for life with negligible risk.

How to redress Mrs S being provided with unsuitable advice

Had Mrs S been provided with suitable advice, I don't think she would have transferred out of her final salary scheme into the SIPP. I think she would have kept her deferred membership in the final salary scheme and on retirement she would have been eligible to receive those guaranteed benefits.

As a result of receiving unsuitable advice, Mrs S's pension was however transferred into a SIPP. To even match her guaranteed benefits pre transfer, she had to achieve a critical yield of 7.8% per annum.

Investment post transfer

Clochgate says it was not responsible for the investment advice Mrs S received post transfer and her investment into the OWG Bond.

Clochgate said initially, they were unaware of the change of investment into Strand Capital and the OWG Bond.

However, it seems to me that James Hay told Clochgate this on 15 December 2013, very shortly after Clochgate had advised Mrs S to transfer.

More recently, Clochgate has said that they thought it strange that Mrs S had made this transfer, but likely, had the client been contacted at the time, she would have confirmed that she had done of this of her own accord, which she was entitled to do.

I can't see that Clochgate did check the position with the client though, this being "*strange*" and coming so shortly after she had taken advice from Clochgate.

This was not the investment Clochgate recommended. I can't see that Clochgate did anything at this stage to assist Mrs S to mitigate the consequences of its earlier unsuitable advice to transfer. By doing nothing, I consider that it compounded a problem, of its own original making, that Mrs S's pension benefits were no longer safe and guaranteed in her defined benefit pension scheme.

Mrs S told this service, that the introduction to Clochgate was through a party that she had discussed the OWG bond with already. She was interested by the returns that had been promised and this is what led to her approaching Clochgate for advice in the first place. I think it likely, that the relationship between Clochgate and Strand Capital was not as arms length as Clochgate seems to suggest and the Strand Capital adviser and the Clochgate advisers were known to one another.

Guidance from the regulator about the suitability of the overall proposition including the underlying investments – January 2013

The FCA issued an alert to advisers on 18 January 2013 about advising on pension transfers, This said: -

"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. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating".

Clochgate ought to have been considering this guidance at the time of advice in October 2013.

This alert highlighted that some advisers were giving advice to customers on pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension.

It's not apparent from the paperwork that Mrs S told Clochgate about the Strand

Capital investment. However, it is equally not apparent from the paperwork that being aware of this alert, and what Mrs S was contemplating, shortly after the transfer, Clochgate did anything.

Financial Conduct Authority Alert April 2014

Whilst this alert was issued after the time of advice, I think the issues discussed in it were not new ones, and were ones that Clochgate ought reasonably to have been aware of.

This April 2014 stated:

“Where a financial adviser recommends a SIPP knowing that the customer will transfer or switch from a current pension arrangement to release funds to invest through a SIPP, then the suitability of the underlying investment must form part of the advice given to the customer. If the underlying investment is not suitable for the customer, then the overall advice is not suitable.

If a firm does not fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer or switch at all as it will not be able to assess suitability of the transaction as a whole.

The failings outlined in this alert are unacceptable and amount to conduct that falls well short of firms’ obligations under our Principles for Businesses and Conduct of Business rules. In particular, we are reminding firms that they must conduct their business with integrity (Principle 1), due skill, care and diligence (Principle 2) and must pay due regard to the interests of their customers and treat them fairly (Principle 6).”
So, in my view, Clochgate ought to have ensured they understood any subsequent investments.

Overall, for the reasons set out, I uphold Mrs S complaint and order Clochgate to pay fair compensation, as set out below. I consider that Clochgate was responsible for her loss as a result of providing unsuitable advice and failing to ensure that Mrs S was aware of the risks she was running.

Putting things right

I consider that Mrs S has been caused trouble and upset by Clochgate providing her with unsuitable advice and that a fair and reasonable amount to pay her for this disruption to her retirement planning is £300.

I consider Mrs S would not have transferred, if given more appropriate advice.

Clochgate should therefore undertake redress calculations 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.

This calculation should be carried out using the most recent financial assumptions at the date of the actual calculation. Clochgate may wish to contact the Department for Work and Pensions (DWP) to obtain Mrs S’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 Mrs S's SERPS/S2P entitlement.

If this demonstrates a loss, the compensation amount should if possible be paid into Mrs S'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 her 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.

My aim is to return Mrs S to the position she would have been in but for the actions of Clochgate. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined.

If this applies, to calculate the compensation, Clochgate 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 Clochgate 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 Clochgate has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, Clochgate may ask Mrs S 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. Clochgate will need to meet any costs in drawing up the undertaking. If Clochgate asks Mrs S to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

If the SIPP only 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 by Clochgate taking over the investment, or this is something that Mrs S can discuss with James Hay directly. 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 Clochgate pay Mrs S 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.

My final decision

I uphold this complaint and order Clochgate Financial Services Scotland Limited to put things right as set out above. .

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 23 June 2022.

Kim Parsons
Ombudsman