DRN-3539870

The complaint

Mr E complains that Gate Capital Group Ltd (Gate Capital) advised him to transfer his existing Defined Benefit Occupational Pension Scheme (OPS) benefits to a Self-Invested Personal Pension (SIPP) and invest with Beaufort Securities Discretionary Fund Management Service (Beaufort) and that he's lost out as a result of this. He's raised concerns about the suitability of the transfer advice, the choice of provider and the subsequent investments made.

What happened

Mr E was advised by Gate Capital to transfer his existing OPS to a SIPP and invest via a Discretionary Fund Manager (DFM), Beaufort.

A fact-find was signed by Mr E on 25 September 2015. The prelude to the fact-find is a script this says:

> *"Hello, my name is … and I am calling about the review of your pension plan.*
>
> *I have to inform you that I am not the adviser. I am an administrator / para-pallner* [sic] *who is responsible for preparing the research and a report. I then give this report to the adviser* [full name of Gate Capital's adviser].
>
> *We need to ensure that when we compare your pension and explore your options that any advice you are given is relevant and specific for you. I help prepare the report and then forward this to the adviser who will make a personal recommendation. The adviser may say that we cannot add value or it is not worth transferring your pension. I cannot give you that advice. I can only deal with factual information and not opinion.*
>
> *The purpose of this call is to gather information about your personal and financial circumstances (Known as Fact-finding) and will include questions about your health, your income, the household expenditure and your assets and liabilities. This means we can make a tailored recommendation.*
>
> *The call will take approximately 30 minutes to complete."*

The fact-find had various sections covering issues that may be relevant to considering the merits of transferring one's OPS, such as *"desire for guaranteed income"* (this was qualified – "*although a secure and guaranteed retirement income is desirable, this is not your highest priority"*). The sections had pre-populated objectives to be ticked. For example, under the desire for guaranteed income section the selectable objectives were:

- Take the maximum available tax-free capital from your plan.
- You would be prepared to sacrifice a guaranteed income for life in exchange for having control and flexibility to vary your income in retirement.

- Provide a benefit for your beneficiaries in the event of your death that allows them the flexibility and control to take these benefits in a tax efficient manner, depending on their circumstances at the time.
- Provide the opportunity to obtain a potential fund from your pension.
- Provide the facility to pass benefits to future generations in an Inheritance Tax efficient manner.
- You do not like the idea of the capital being 'lost' in the event of your death.
- You will accept a reasonable degree of risk and wish to defer annuity purchase and take full advantage of the flexibility gained by retaining control over your pension benefits.

The annual income Mr E would like in retirement wasn't listed in the fact-find. It stated Mr E confirmed he wanted to explore taking benefits now. In relation to Mr E's personal pension there was a handwritten note saying:

> *"The above* [name of personal pension provider] *plan has exit penalties, client doesn't want to take at the moment."*

It's also confirmed that he wanted take benefits in order to release tax-free cash and that he wanted to withdraw the maximum he could take to help pay down his mortgage.

A pension transfer analysis was prepared by Gate Capital on 23 September 2015. The critical yield required to match the scheme benefits assuming Mr E took benefits at 65 in the form of cash and a reduced single life pension was 7.6% and if Mr E took a full pension 9.1%. Based on Mr E taking benefits at 60 the critical yield increased to 12.7% and 20.3% respectively. The critical yields based on benefits being taken on a joint life basis at 65 were 11.2% and 9.9% respectively and at age 60 they were 26.3.% and 19.4% respectively.

These were based on the full transfer value of just under £128,000.

A suitability report was subsequently issued. The suitability report set out that it's focused on the merits of transferring Mr E's OPS only. Mr E's circumstances were described as:

- Employed
- Aged 57
- In good health
- Income of around £55,000
- Outstanding interest-only mortgage of £118,000 due in March 2016
- Intended retirement at age 65
- Personal pension valued at £229,511
- Approximate income required in retirement £11,000

Some of Mr E's objectives, amongst others, were listed as:

- *"You are not seeking to retire at this time but would like to take benefits from your* [name of OPS] *pension plan. You have a shortfall in your mortgage in March 2016 of £68,000. Your outstanding mortgage is £118,000 and your endowment is due to mature with a value of £50,000. You wish to repay as much of your mortgage as possible to clear this debt and reduce your outgoings."*
- To be able to vary his pension income each year depending on his needs.
- Whilst valuable these benefits don't represent a major proportion of his retirement portfolio.
- For death benefits to be payable to his beneficiaries and them to have the freedom to choose how these are taken.

- He didn't want capital to be lost in the event of his death.
- Although a secure and guaranteed retirement income is desirable, this wasn't Mr E's highest priority. He was willing to forego these to be able to control and take benefits flexibly.
- He wanted to retire at 65 without suffering a penalty.

Mr E's risk profile was assessed to be "balanced" based on his risk profile and capacity for loss.

The report also states:

> *"**You confirmed that these assets are an important part of your planning for a long term sustainable retirement income** in the future. However, you are willing to put them at risk, in exchange for potential growth and confirmed that you can afford to lose an element of these assets without it having a significant impact on your standard of basic living in retirement."* [my emphasis]

And

> *"Appendix 1 contains an actuarial report, prepared for you, which contains our full pension analysis and appraisal in relation to your present arrangements. We have already discussed this with you, and would refer you to this section for confirmation of figures."*

In relation to the critical yield the report explains:

> *"The critical yield has been calculated assuming that the Retail Price Index (RPI) increases at a rate of 2.5% per annum. This means that the Critical Yield implies that a real rate of return of 8.7% p.a. over inflation (based on RPI as a worst case scenario) will be necessary for an individual pension to match the benefits of your former employer's scheme."*

And

> *"The key question, which needs to be answered, is whether or not a real rate of return of 8.7% is achievable or not. Our expectation for an investor with your risk profile is that a 2.69% average growth rate is realistically expected in the longer term."*

It was noted that there was a penalty for accessing Mr E's other pension and that, upon discussion with the adviser who looked after that pension, it was deemed too large.

In relation to Mr E's expenditure it stated:

> *"Your current core household expenditure is £1,429 per month.*
>
> *You have stated that your 'core' expenditure will change because you will repay your mortgage in 2016. You expect your 'core' household expenditure to be £879 each month."*

The report goes on to explain the various options available to Mr E and dismisses each in turn apart from flexi-access drawdown, which it concludes best meets his objectives.

Under summary of recommendations the report notes that:

> *"The Critical Yield of 11.2% per annum is above that which would be considered realistically achievable and our normal recommendation would be that you leave your benefits with your former employer's scheme for this reason as well. Any yield that exceeds 5.79% would lead us to recommend not transferring your benefits."*

Under funds recommended it says:

> *"Taking into account your capacity for loss and your attitude towards risk, I recommended that you invest 100% in the Beaufort Securities Discretionary Fund Management Service to cover ongoing policy costs. I have made these recommendations because of the following reasons…"*

Gate Capital's fee was listed as £2,871.

Mr E signed a declaration confirming he'd read and understood the contents of the report on 2 October 2015.

Mr E's OPS was transferred and on 24 November 2015 just under £92,000 was invested with Beaufort. The funds were subsequently invested as followed:

- Aegis Power Bond (No 1) Plc 10% Debentures 2025 £1 per unit (1 December 2015, £7,573.25)
- Carduus Housing Plc 6.25% Unsecured 2020 (15 December 2015, £33,381.88)
- NQ Minerals Plc Ordinary Shares of GBP 0.001 (22 December 2015, £1,217.75)
- Silex Plc 8% SECD BDS 31/12/20 EUR 1 (4 February 2016, £62,458)

Based on what Mr E's told us he did use his tax-free cash towards repaying his interest-only mortgage.

On 16 October 2017, Gate Capital wrote to Mr E informing him that his adviser was no longer an appointed representative of it and offered to review Mr E's portfolio.

Beaufort subsequently wrote to its investors about *"concerns identified regarding the systems and controls"* and saying that *"we have agreed with the FCA that it is desirable in the interests of our customers for us to cease our DFM business"*. There had been allegations of fraud concerning the conduct of Beaufort's employees and the UK regulator (the Financial Conduct Authority) later ordered its assets be frozen in March 2018.

Background to the complaint

Mr E complained to Gate Capital about the suitability of its advice, it didn't uphold his complaint. Briefly, it said:

- The original advice was correct, justified and in accordance with Mr E's objectives.
- The adviser's assessment of his circumstances was based on information provided by Mr E and the business which introduced him to Gate Capital.
- Critical Yield calculated in real terms was 8.7% p.a. The expectation for an investor with his risk profile was recorded as 2.69% p.a. But, his objective to repay his mortgage outweighed this.
- It wasn't responsible for how Mr E's pension was invested. The fund was under the discretionary management of Beaufort.

One of our investigators reviewed Mr E's complaint and concluded it should be upheld. In summary he found:

- The advice to transfer Mr E's pension wasn't suitable, his objective of paying off his interest-only mortgage could've been met by other means and these weren't sufficiently explored.
- The use of a DFM wasn't suitable for Mr E.
- It's not clear why Gate Capital chose Beaufort as the DFM above other more established providers.
- Gate Capital didn't ensure that the manner in which Mr E's pension would be invested was suitable – and, the manner in which it was invested was clearly unsuitable.

Mr E accepted our investigator's findings. Gate Capital disagreed and made further submissions in support of its position. I've read and considered these submissions in their entirety, here I've included a summary of what I think are the key points:

- During a conversation with Mr E about his complaint, he told Gate Capital that he'd been receiving assistance from a Mr S, an adviser with a different business, and that he would supply Gate Capital with some paperwork.
- Gate Capital's records indicate that Mr E was introduced to it by Mr S.
- Mr S met with Mr E on 25 September 2015, where he completed a fact-find and discussed Mr E's attitude to risk and capacity for loss. This information was used to assess the suitability of transferring Mr E's OPS.
- Mr S would've explained the report and strategy with him.
- Gate Capital took into full consideration Mr E's circumstances and requirements as agreed with Mr S.
- Leaving the scheme where it was wouldn't have met Mr E's requirements as he wanted to access his benefits immediately.
- He was told that by retaining his OPS he would have a higher income in retirement.
- An annuity purchase was discounted because Mr E would've lost control over how he could take income in the future and of the flexibility in the event of his death for his wife and children, the income would also have added to his taxable income.
- The critical yield was documented in the suitability report which was discussed with Mr E. The report detailed that Gate Capital wouldn't recommend a transfer where the critical yield was in excess of 5.79% but that Mr E placed less importance on this because he needed access to benefits immediately.
- Mr E had a pension with another provider being looked after by Mr S, who advised him that there was a penalty for accessing the pension, the suitability report suggested Mr E speak to that adviser again about this option.
- The transfer was the only option that met all of Mr E's objectives.
- Gate Capital carried out the necessary due diligence on Beaufort, it was a FCA regulated firm and award-winning DFM with millions of pounds under management.
- It had offerings across the spectrum of risk, a brochure explaining the offerings was provided to Mr E.
- Gate Capital had no influence or say as to what Beaufort invested Mr E in, its stated strategy was to invest in ETFs and a range of regulated investments.
- Beaufort was chosen because they were competitively priced and offered a bespoke portfolio construction service. Gate Capital had no reason to believe at the time that Beaufort wouldn't honour the mandate or would mismanage Mr E's funds.

Our investigator reviewed Gate Capital's response to his view and wrote to it explaining that its submissions didn't change his view of the complaint and, in summary, said:

- Mr E could've accessed tax-free cash from his other pension (which wasn't a defined benefit scheme) to help pay down his outstanding mortgage.

- There isn't enough detail in the suitability report to establish how much income Mr E would require in retirement.
- Based on the forecasts provided, if Mr E withdrew an income from his new pension his fund would've depleted by the time he turned 86, which shows the risk he was taking by moving his pension.
- Gate Capital hadn't been able to demonstrate how it selected Beaufort over other DFMs in the market. No documented due diligence showing the criteria used to select Beaufort over other longer established DFMs had been provided.
- Mr E was invested in two high-risk bonds and one high-risk debenture, these don't match the investment strategy Gate Capital described as being the reason Beaufort was chosen.
- The investments were clearly not suitable for Mr E and he wouldn't have gone ahead had he understood that he could lose most or all of his pension fund.
- Despite some involvement from Mr S, Gate Capital was responsible for the advice to transfer and subsequently invest through Beaufort.
- In line with its responsibilities, Gate Capital couldn't advise on/only consider the transfer in isolation, it had to consider the suitability of the intended investment upon transfer.

Gate Capital's representatives disagreed and asked that the complaint be referred for an ombudsman to review but made no further submissions. I sent Mr E and Gate Capital my provisional decision explaining why I thought this complaint should be upheld. Mr E didn't make any further submissions. Gate Capital sent us emails exchanged around the time of the sale, I explained why I didn't think these changed my findings about the complaint and, ultimately, Gate Capital accepted my provisional decision. My findings remain as set out in my provisional decision I've largely reiterated these below.

In its submissions on this complaint Gate Capital referenced a Beaufort brochure and information about the funds offered. We haven't been provided with either in this case, but Gate Capital has submitted a brochure and a fund factsheet on other cases. I've taken these into account in this case in order to properly assess the arguments it's made.

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.

The parties to this complaint have provided detailed submissions to support their position and I'm grateful to them for taking the time to do so. I've considered these submissions in their entirety. However, I trust that they will not take the fact that my decision focuses on what I consider to be the central issues as a discourtesy. The purpose of this decision isn't to address every point raised in detail, but to set out my findings, on what I consider to be the main points, and reasons for reaching them.

Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

When considering what's fair and reasonable, I've taken into account relevant law and regulations; regulator's rules, guidance and codes of practice; and what I consider to have been good industry practice at the time.

It's my role to fairly and reasonably decide if the business has done anything wrong in respect of the individual circumstances of the complaint made and – if I find that the business has done something wrong – award compensation for any material loss or distress and inconvenience suffered by the complainant as a result of this.

What was Gate Capital's role in the transaction?

It's not in dispute that Gate Capital advised Mr E to transfer his OPS to a SIPP and invest via a DFM (Beaufort). This means it was responsible for assessing the suitability of:

- The OPS transfer itself
- The SIPP
- The use of a DFM service in principle
- The use of the chosen DFM provider (Beaufort)
- The suitability of the investment proposition

Gate Capital appears to broadly accept that it was responsible for the suitability of the transfer advice, use of a DFM and the selection of Beaufort. However, it maintains that the transfer was suitable in light of Mr E's objectives and wider circumstances, the use of Beaufort's DFM service was suitable and that it conducted sufficient due diligence into Beaufort itself. But it doesn't accept responsibility for the suitability of the subsequent investments made, in light of Beaufort's role as DFM.

I'll address the suitability of the transfer to a SIPP and use of a DFM in detail in the next section of this decision. First, I'll clarify what I think Gate Capital's responsibilities reasonably were in respect of due diligence into Beaufort and the suitability of the investment proposition considering its role in this transaction.

In July 2012 the former regulator (FSA) issued finalised guidance on assessing suitability of centralised investment propositions (such as DFM). This set out that even if an advice firm adopted a proposition created by a third party, it must conduct adequate due diligence to ensure the proposition is likely to be suitable for its target clients and met their needs and objectives. There was a non-exhaustive list of features to consider: including charges; reputation and financial standing; type of underlying assets in which the proposition invests; and the DFM's own approach to undertaking due diligence on those investments.

The FSA further said that a personal recommendation should be based on the reasonable belief that a client has the necessary knowledge and experience to understand the nature of the risks of the underlying investments held in the proposition. It also warned against the use of risk-rated portfolios without checking that the underlying investments aligned accurately with the risk descriptions used – and, went on to say:

> *'Where a firm refers investment selections to a discretionary manager, both the introducing firm and the discretionary management firm have obligations to ensure that a personal recommendation or a decision to trade is suitable for the client.* ***The obligations on each party will depend upon the nature and extent of the respective service provided. Both parties should be clear on their respective service, and ensure they meet the corresponding suitability obligations. If either or both parties are not clear, there is a risk that clients may receive unsuitable advice and/or have their portfolios managed inappropriately'.*** [my emphasis]

To successfully 'hand over' part of the responsibility of assessing suitability of Mr E's portfolio to Beaufort, there was an overarching responsibility on Gate Capital to ensure that the respective obligations of both firms were agreed and understood. That was also highlighted in contemporaneous good practice guides published by the Personal Finance Society (PFS).

Taking all of this into account, like the investigator, I think Gate Capital's responsibilities went beyond what it appears to have accepted and that it did bear responsibility for the suitability of the investment proposition. In terms of understanding and agreeing how Beaufort would invest Mr E's monies and ensuring that the proposition was aligned with Mr E's attitude to risk and capacity for loss in line with its own assessment.

In this instance, I haven't seen any evidence that Gate Capital met these obligations. Or, indeed, took any steps whatsoever to ensure Mr E's pension would be suitably invested.

Even the limited literature we've seen from Beaufort, that Gate Capital apparently had regard to, ought to have been concerning. I note, *for example*, from a "medium risk" portfolio factsheet provided on other cases we've seen that Beaufort had a very wide discretion as to what it would hold in a medium risk portfolio.

The 'typical asset allocation' from which a supposed 15% limit in corporate bonds can be assumed, the accompanying description makes clear what freedom Beaufort had in selecting the bonds:

> *'The fund will take an unconstrained approach to investing in high yielding corporate debt, investment grade debt, global equity and highly liquid money market instruments. The management team will have the flexibility to switch between high yielding, investment grade and money market dependent upon the macro economic outlook.'*

There is clearly a difference between high yielding (non-investment grade) debt and investment grade debt – the former has high yields in direct relation to the higher risk of default and therefore loss of the investor's capital. Already this description suggests Beaufort had the freedom to fill this typical 15% bond allocation up with non-investment grade debt. But on page two it's then also clear that 15% is not a limit, as the following 'target asset allocation' ranges are given:

- Fixed Income 0%-60%
- Alternatives 0%-35%
- Equity 0%-60%
- Multi Asset 0%-15%
- Commodities 0%-15%
- Money Market & Cash 0%-100%

So, the upper limit for investing in potentially non-investment grade debt (which would appear to correspond to 'fixed income') was 60%.

I think Gate should've anticipated there would be a problem if Beaufort used its freedom to this extent for a medium/balanced risk investor like Mr E. It wouldn't represent a medium risk, balanced, approach to have a significant part of the portfolio invested in high-yield (and therefore high-risk) debt.

Having set out Gate Capital's responsibilities considering its role in the activities that are the subject of this complaint – and highlighted some of my concerns about its fulfilment of its duties in conducting due diligence on Beaufort and ensuring the suitability of the investment proposition – I've gone on to consider the suitability of the advice.

Was the advice suitable?

Gate Capital was required to follow the relevant rules set out by the regulator. These include the overarching Principles for Businesses – principles 1 (*integrity*), 2 (*due skill, care and diligence*), 6 (*customers' interests*) and 9 (*reasonable care)* are of particular relevance here.

Amongst other things, to fulfil its duties Gate Capital had to know its client, act in his best interests and give suitable advice.

In relation to advising on OPS transfers, COBS 19.1.6 G states that:

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

So, as the investigator set out, the starting point when advising on OPS transfers is that the transfer isn't suitable.

Gate Capital did take some steps to know its client. Taking into account what we do know about Mr E's circumstances and the critical yield required to just match the benefits, I don't think it's been demonstrated that the transfer was suitable.

Mr E completed a fact-find, Gate Capital says this was completed with an adviser with a different business, but I think the fact-find was Gate Capital's. In sections of the fact-find, an example of which I set out in the background to this complaint, it asks what I think are somewhat leading questions to which most people would answer yes. For example, wanting flexibility, control, the best death benefits, the highest growth, wanting better service than his current plans provided, and not wanting to suffer penalties when retiring early.

There was no context offered for these comments – in terms of the guarantees the OPS offered (which couldn't directly be compared with an investment that grew in value); or what flexibility or control Mr E actually required at that time beyond access to tax-free cash.

Mr E's main objective appears to have been to access funds – by way of tax-free cash – to help pay off the balance of his interest-only mortgage. Given what Mr E's told us and the fact that he's ultimately used the tax-free cash towards paying off his interest-only mortgage, I think this was a genuine and compelling objective for him.

Mr E had another pension, which wasn't a defined benefit scheme with valuable guarantees. Accessing this to fund the repayment of his mortgage was effectively discounted on the basis that an exit charge would've applied. Gate Capital recommended that Mr E discuss this further with the adviser looking after that pension but, ultimately, it recommended that he transfer his OPS. I don't think Gate Capital did enough by suggesting Mr E discuss accessing his personal pension particularly when it had already recommended that he transfer out of his OPS. There were other ways that Mr E could've funded the repayment of his mortgage, that would likely not have been unsuitable and didn't involve giving up valuable guaranteed benefits. Indeed, the tax-free cash available under his personal pension would've been significantly higher.

We don't have details of the exit penalty applicable in Mr E's circumstances because Gate Capital never explored this. I'm not sure that a penalty would've applied to him accessing funds rather than transferring funds away to another provider. If it did, I'm not persuaded it was such that it was better to, or suitable for, Mr E to transfer his OPS.

It may not have been open to Gate Capital to provide a recommendation in respect of Mr E's personal pension under the circumstances but it certainly was open to it to conclude that transferring his defined benefit OPS for this purpose – given Mr E's circumstances – wasn't suitable and, in turn, recommend against this course of action.

Flexibility in taking benefits and death benefits that his elected beneficiaries could benefit from were also both listed as objectives. At the time of the advice Mr E had both a defined benefit scheme (the OPS that was transferred) and a defined contribution personal pension. To the extent that he might not choose to draw on all his pensions at the same time, it would've made sense for him to be able to rely on some benefits which were guaranteed – as his other pension wasn't. Also, the other pension already provided a return of fund on his death which his elected beneficiaries could benefit from, whereas the OPS pension didn't. So, at the time, the combination of his pension provisions could've afforded him some flexibility.

I don't think transferring his OPS was suitable for Mr E, so I don't think the transfer should've gone ahead at all. It hasn't been suggested that Mr E was an insistent client or that he was otherwise likely to go against suitable advice from his adviser. But, for the sake of completeness, I've considered this – and, I haven't seen anything that would lead me to conclude that Mr E was likely to disregard suitable advice. I find that Mr E wouldn't have transferred his defined benefit OPS had Gate Capital provided suitable, clear and appropriate advice.

As a starting point I've found that the advice for Mr E to transfer his OPS wasn't suitable and that, if suitable advice had been given, the transfer most likely wouldn't have gone ahead. I've also considered the suitability of the use of a DFM.

Gate Capital concluded that a suitable risk profile for Mr E in relation to his pension was "balanced". The suitability report noted the Mr E had confirmed that these assets were:

> *"…an important part of your planning for a long term sustainable retirement income in the future. However, you are willing to put them at risk, in exchange for potential growth and confirmed that you can afford to lose an element of these assets without it having a significant impact on your standard of basic living in retirement."*

Whilst Mr E arguably had an up to a medium attitude to risk overall, the risk he could afford to take on his former OPS was in my view limited by two things. The fund available for investing would be significantly reduced by him accessing a 25% tax-free cash sum towards paying off the balance of his interest-only mortgage upon transfer. And, secondly, as he'd relinquished the guarantees of the OPS, the need to replicate some more security with part of his overall pension provision.

In relation to the recommendation to invest via Beaufort, the suitability report states:

> *"Taking into account your capacity for loss and your attitude towards risk, I recommended that you invest 100% in the Beaufort Securities Discretionary Fund Management Service to cover ongoing policy costs. I have made these recommendations because of the following:*
>
> - *You would like funds that match your attitude to risk*
> - *You like the simplicity of having highly sophisticated fund managers managing your pensions on your behalf*

- *You're investing for at least a medium term (approximately 5 to 10 years)*
- *You would like a proportion of your portfolio not invested in equities, but to still have the capacity for good potential returns. At the same time reducing your overall portfolio volatility.*

Please see the Appendix 3 for the further details of the recommended funds and Discretionary Fund Management Service."

There appears to have been some confusion within the suitability report as to what was the content of Appendix 3. The appendices are listed at the beginning and the end of the suitability report, both list these as:

- Appendix 1 (Transfer Value Analysis Report)
- Appendix 2 (Retirement Options Report)
- Appendix 3 (Risk Definition)
- Appendix 4 (Investment Details)
- Appendix 5 (One Document Containing):
    - Pension Legislation
    - Pension Product
    - Definition of Charges
    - Investment Diversification
    - Product Inherent Risk

Based on this it seems likely that the information referenced was more likely in Appendix 4. Regardless, we've not been provided with a copy of the information provided to Mr E in this case. There's no mention within the suitability report as to how Mr E's fund was to be invested and no express recommendation as to which specific fund or portfolio was suitable/had been selected.

On balance I'm not satisfied that a recommendation to use DFM was warranted here. In effect Mr E neither had the fund size nor tolerance for risk for the use of a DFM to *potentially* be suitable.

Gate Capital hasn't been able to satisfactorily demonstrate how it selected Beaufort as the DFM over the range of other DFMs in the market – some of which I think would've been cheaper than Beaufort, and many of which would've had risk-rated portfolios established long before Beaufort's.

In response to our investigator's view Gate Capital stated that Beaufort "*had offerings across the risk scale including 'balanced' and a brochure explaining their offerings was provided to* [Mr E's name] *prior to his decision whether to invest or not."*

It also said:

> *"BDFM stated that it had adopted and was following an investment strategy of trading on behalf of investors by purchasing Exchange Traded Funds (ETFs) and a range of recognised regulated investments. BDFM also stated that capital preservation was key to their strategy."*

And

> *"BDFM are fully responsible for what they have bought and are culpable if they did not follow the spirit and rules associated with the mandate, they presented to GC and* [Mr E's name] *for a balanced portfolio."*

And

> *"The information that Beaufort Securities had provided was plausible and outlined a strategy and ethos that was in line with both GC's and* [Mr E's name] *own attitude to risk."*

It's concerning that Gate Capital makes no mention in its suitability report of the typical assets in which Mr E would be invested. It simply says Beaufort Securities Discretionary Fund Management Service and refers Mr E to an Appendix, as mentioned above, we haven't been provided with a copy of this.

As part of his duty of care to Mr E and the requirement to ensure his advice was suitable under COBS 9.2, I would've expected the adviser to ensure he clearly stated to Beaufort what Mr E's attitude to risk was – and ensured he (the adviser) was familiar with the typical asset mix or model portfolio that Beaufort would use for that attitude to risk. No information has been provided as to what attitude to risk the intended portfolio aligned to, what the investment proposition was likely to look like in detail or, indeed, how Gate Capital communicated Mr E's attitude to risk to Beaufort. Without this it's not clear how Gate Capital could possibly ensure that the recommendation to invest via Beaufort was suitable.

I would expect the adviser to have checked that the portfolio Mr E went into was broadly what he expected it to be, as the adviser had the overarching duty to ensure that the entire pension transfer was suitable under COBS 9.2. In my view the initial investments into high risk investments should've caused immediate concern. I don't think that the nomination of a DFM absolved Gate Capital of all responsibility to oversee this process, given its suitability obligations and the client's best interests rule (COBS 2.1.1).

I'm also concerned that there's also no evidence of what instructions the adviser actually gave to Beaufort to manage Mr E's funds.

If Gate Capital had carried out adequate due diligence into where existing clients in Beaufort's relevant model portfolios were being invested, it would likely have established the presence of investments like those Mr E's pension funds went into, or similar – as they appear frequently in other cases the ombudsman service has seen. Alternatively, it should've been just as concerning if Gate Capital had been unable to find out what the existing investments in the portfolio looked like – and there's certainly no evidence that it did find out.

In summary I've found that:

- The advice to transfer Mr E's OPS wasn't suitable.
- If suitable advice had been given, Mr E would most likely have retained his OPS.
- The use of a DFM wasn't suitable for Mr E.
- Gate Capital didn't undertake sufficient due diligence in respect of Beaufort and didn't take reasonable steps to ensure that Mr E's fund would be suitably invested.

So, I think that Mr E's complaint should be upheld and that but for Gate Capital's unsuitable advice he would've retained his OPS. As a starting point, therefore, I think that Gate Capital should compensate Mr E in full for any losses he's suffered as a result of transferring his OPS. I've gone on to consider Gate Capital's arguments relating to the role of other parties involved in the transaction and subsequently, and apportionment of redress.

The involvement of other parties in the transaction

I've carefully considered the role of all of the relevant parties involved in the transaction that's the subject of this complaint and subsequently.

Gate Capital submitted in response to the investigator's view that:

- Beaufort had discretion to manage Mr E's investment, was responsible for the suitability of the investments made and is at least partly responsible for Mr E's losses.
- We need to take into account Mr S' role in relation to the transaction and that of Gate Capital's adviser who gave advice in this instance, Mr F, after he left Gate Capital.
- Any advice Mr E later received should be considered.

I recognise that it can be argued Beaufort's actions may have also separately caused some of the overall loss Mr E suffered. So, I've considered whether I should apportion only part of the responsibility for compensating the loss to Gate Capital.

In the circumstances, though, I think it fair to make an award for the whole loss against Gate Capital. Gate Capital alone (as the advising firm at the time) could've intervened to prevent the losses Mr E has experienced. As a starting point, I've found that the transfer of Mr E's OPS was unsuitable. If suitable advice had been given, Mr E's OPS would've been retained and wouldn't have been available to invest via a DFM at all.

Further, Gate Capital placed Mr E in the DFM portfolio in the first place when I don't consider this would've been likely to benefit Mr E even if it had been managed appropriately. Gate Capital acted with a complete disregard for Mr E's interests, in recommending the transfer of his OPS scheme, recommending the use of a DFM and in failing to ensure that Mr E's funds were going to be suitably managed by Beaufort to an agreed attitude to risk. That provides further grounds for me to say that Mr E wouldn't have been exposed to the possibility of wrongdoing at Beaufort if Gate Capital had suitably advised him.

There's no doubt Gate Capital was responsible for ensuring the initial suitability of the portfolio being recommended in line with the regulator's rules, guidance and industry best practice. That the investments were made flows directly as a consequence of Gate Capital's poor advice and lack of due diligence into how the portfolio would be managed.

I acknowledge that Mr S, of a different advisory firm may have assisted Mr E with paperwork but, ultimately, Gate Capital was the advisory firm in relation to this transaction complained about and was responsible for the suitability of its advice.

Gate Capital has said it thinks that the ongoing service of Mr E's pension moved to its adviser's new firm after he left. I haven't been provided with any evidence of this or of ongoing reviews taking place. Given the nature of the investments made, I'm not convinced that any attempt to rectify the position would've been successful. These were likely to have been illiquid after initial investment, they weren't commonly traded investments, and, in my view, they had a limited market.

It's possible that Mr E could pursue claims against the other parties involved in this transaction, I don't know if any potential claim is likely to be successful – but, as part of considering Gate Capital's argument for apportionment, I considered this possibility.

As a scheme of last resort, it's possible the FSCS won't make a payment to Mr E if a third party could also be held liable. This means an apportionment of only part of Mr E's losses to Gate Capital could leave Mr E out of pocket. Given that Mr E wouldn't have lost out at all but for Gate Capital's failings in this case, I don't think that would be a fair outcome. Overall, like the investigator, I'm satisfied that holding Gate Capital responsible for all of Mr E's losses as result of the transfer and subsequent investments is fair and reasonable in the circumstances of this complaint.

However, in my award I'm going to allow for the possibility that Mr E pursues claims against any other parties to this transaction and the FSCS both pays Mr E compensation which takes him over the total loss he's suffered, and doesn't seek to recover this. Gate Capital may ask Mr E to provide an undertaking to repay Gate Capital any of the total compensation that he receives which exceeds the total losses that he's suffered, as calculated below.

In conclusion, for the complaint I'm being asked to consider against Gate Capital, I'm satisfied that the adviser's failures in providing unsuitable advice to transfer, unsuitable advice to invest via a DFM, failure to undertake sufficient due diligence in respect of Beaufort and failure to ensure that Mr E's funds would be invested suitably were Gate Capital's responsibilities.

Had it not been for those errors by Gate Capital's adviser, I consider the transfer wouldn't have happened at all and Mr E would never have invested with Beaufort – and, in turn, Mr E wouldn't have gone on to suffer the losses he's suffered. So, I'm satisfied it's fair and reasonable for Gate Capital to meet all of the losses Mr E has suffered as a result of the transfer and subsequent investment with Beaufort. In addition to the financial losses suffered, I think the loss of a substantial proportion of his pension provision would've caused Mr E distress and upset and I think Gate Capital should compensate him for this as well.

Putting things right

A fair and reasonable outcome is for Gate Capital to put Mr E, as far as possible, into the position he would now be in but for what I consider to be its unsuitable advice.

I consider that, but for Gate Capital's failure, Mr E wouldn't have transferred from his existing defined benefit OPS.

In light of this Gate Capital should:

- Calculate the loss Mr E has suffered as a result of transferring his OPS.
- Take ownership of the illiquid investments held in his pension, if possible.
- Pay to Mr E £500 for distress and inconvenience.

I'll explain how Gate Capital should carry out these calculations in further detail below:

Calculate the loss Mr E has suffered as a result of making the transfer.

Gate Capital must 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.

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 Mr E's acceptance of the decision.

Gate Capital may wish to contact the Department for Work and Pensions (DWP) to obtain Mr E'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 Mr E's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr E'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 Mr E 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've been taxed according to his 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 Mr E within 90 days of the date Gate Capital receives notification of his 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 Mr E.

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.

Take ownership of the illiquid investments held in Mr E's SIPP.

In order for the SIPP to be closed and further SIPP fees prevented, the investments need to be removed from the SIPP**.** To do this Gate Capital should take ownership of the illiquid investments by paying a commercial value acceptable to the pension provider. This amount should be taken into account for the loss calculation.

If Gate Capital is unwilling or unable to purchase the investments, the value of them should be assumed to be nil for the purposes of the loss calculation.

Provided Mr E is compensated in *full*, Gate Capital may ask him to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the investments. That undertaking should allow for the effect of any tax and charges on the amount Mr E may receive from the investment and any eventual sums he would be able to access from the SIPP. Gate Capital will need to meet any costs in drawing up the undertaking.

The SIPP only exists because of the illiquid investments. In order for the SIPP to be closed and further SIPP fees to be prevented, the investments need to be removed from the SIPP. I've set out above how this might be achieved by Gate Capital taking over the investments. 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 Mr E 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.

Trouble and upset

I also think Mr E has been caused significant distress and inconvenience as a result of Gate Capital's actions. The sudden loss of a significant portion of his pension fund would've come as a shock to him and has clearly had a significant impact. I think it would be fair and reasonable for Gate Capital to pay to Mr E £500 in compensation for this.

Where I uphold a complaint, I can award fair compensation of up to £150,000, 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 £150,000, I may recommend that the business pays the balance.

Determination and money award:

I require Gate Capital Group Ltd to pay Mr E the compensation amount as set out in the steps above, up to a maximum of £150,000.

Where the compensation amount does not exceed £150,000, I additionally require Gate Capital Group Ltd to pay Mr E any interest on that amount in full, as set out above.
Where the compensation amount already exceeds £150,000, I only require Gate Capital Group Ltd to pay Mr E any interest as set out above on the sum of £150,000.

Recommendation:

If the compensation amount exceeds £150,000, I also recommend that Gate Capital Group Ltd pays Mr E the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mr E.

Given the possibility that Mr E may pursue other parties in respect of this transaction and that, if he makes a claim to them, the FSCS may award compensation to Mr E, Gate Capital Group Ltd may also require Mr E to provide an undertaking to repay Gate Capital Group Ltd any of the total compensation that he receives – and is entitled to retain – which exceeds the *total* losses that he's suffered, as calculated above.

If Mr E accepts my final decision, the money award is binding on Gate Capital Group Ltd. My recommendation is not binding on Gate Capital Group Ltd. Further, it's unlikely that Mr E can accept my decision and go to court to ask for the balance. Mr E may want to consider getting independent legal advice before deciding whether to accept my final decision.

My final decision

My final decision is that I uphold Mr E's complaint. I direct Gate Capital Group Ltd to compensate Mr E as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 11 July 2022.

Nicola Curnow
Ombudsman