

## **The complaint**

Mrs B complains that St James's Place Wealth Management Plc (SJP) allowed a transfer of her personal pension with Guaranteed Annuity Rates (GAR) to an SJP pension. She says she lost valuable guarantees and has a lower pension as a result.

## **What happened**

In July 2002 Mrs B transferred a former occupational pension to an SJP pension plan.

Mrs B's husband, Mr B was a self-employed financial adviser at the time, who was an Appointed Representative of SJP. He was able to advise on all aspects of financial planning, including pensions. SJP refer to this relationship as being a Partner.

Mrs B has told us that her former colleague (her co-director) took his pension benefits that he'd retained in the same scheme as her former scheme. His pension had a GAR which, for his age was over 11%. This caused Mrs B to compare the benefits she'd given up with what she had in her SJP pension plan.

Mrs B complained to SJP that she shouldn't have been allowed to switch her former pension to SJP in light of the lost GAR.

SJP looked into what had happened and didn't uphold Mrs B's complaint. It explained that the transfer of Mrs B's former pension (with the GAR) was transferred on an execution only basis. It said that SJP policy at the time allowed its Partners and their spouses to access its pension products without requiring advice. It said that Mrs B would've signed to acknowledge the switch was transacted on an execution only basis.

Our investigator looked into Mrs B's complaint and sent his initial opinion on this case in April 2021. He thought that Mrs B's complaint should be upheld. He acknowledged that SJP had processed the application as execution only. So had no audit trail of a formal advice process. But he didn't think it was likely that Mrs B would have instigated this pension switch without some form of advice, albeit informally. So considered that Mrs B was acting on the recommendation of Mr B, in his capacity as a Partner of SJP.

SJP ultimately rejected our investigators view and asked for the case to be decided by an ombudsman.

I issued a provisional decision explaining to both parties why I thought Mrs B's complaint should be upheld. And I proposed a means to put things right, to recognise the income Mrs B had missed out on as well as her future lost annuity income.

Mrs B has offered no further comment to my provisional decision.

SJP responded accepting my provisional outcome but offering comments on my proposed means of putting things right. It also explained that the commission charge that Mrs B paid was the same as it would have been if advice had been provided by a more conventional

route. But SJP explained it wasn't an advice charge. It suggested that Mrs B benefitted from that commission payment and asked whether that should be reflected in the redress.

### **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.

I thank both parties in this complaint for their responses. I note SJP's request that this complaint be informally resolved prior to the issue of a final decision. I'm grateful for its offer, and consideration for the sensitivities of this case. But I'm mindful of the length of time this case has been with us, and the need to provide a final resolution to conclude this matter for both parties. In this instance I believe that is best achieved by issuing a final decision.

Having considered all the evidence and final submissions, my decision is that this complaint should be upheld for similar reasons to those outlined in my provisional decision.

The issue in dispute is the way in which Mrs B's pension switch was arranged. SJP have explained that the switch was an execution only transaction. Which means that it doesn't consider that it provided Mrs B with any recommendation regarding the suitability of the switch.

#### *The rules at the time*

The regulatory framework has changed over time. In 2002 the then regulator – the Financial Services Agency (FSA) published its Conduct of Business rules (COB). And it's the regulatory framework relevant at that time that I've considered.

COB 5 is particularly relevant as it relates to the rules and guidance regarding Advising and selling. COB 5.1 relates to advising on packaged products (which includes pensions). It defined advice. In summary it is:

*“advising a person if the advice is:*

- (a) given to the person in his capacity as an investor or potential investor....,AND*
- (b) advice on the merits of his doing any of the following*

*(i) buying, selling, ... a particular investment which is ...[a] relevant investment (that is, any designated investment, [which includes pension policies] ....”*

The definition of what constitutes advice does not, in itself limit it to written recommendations. It merely requires that advice is given to an investor about the merits of buying a particular investment. In this case Mrs B's SJP pension policy.

The FSA also published high level principles for the conduct of regulated businesses. These were published in the handbook under PRIN. Of relevance to my decision is:

*“principle 6 - Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly”*

#### *Was Mrs B provided advice to transfer?*

SJP has provided some evidence from the time to indicate that it was dealing with the transaction as execution-only. We've been shown a PPP (personal pension plan) Advice

form that marked the application as an execution-only transaction. It was signed by an office manager on 31 July 2002. So I understand why SJP say that it provided no formally recorded advice. It has explained that it has no fact-find or suitability letter in which a recommendation was made to Mrs B.

And SJP have explained that it had a scheme for its Partners that enabled them to process such transactions for themselves or their spouses as execution-only. SJP said that Mrs B would have signed to agree to that.

I've asked SJP to provide evidence of the declaration Mrs B might have signed to say that the transfer was done on an execution only basis. And also for SJP to provide evidence of the terms of the Partners scheme that enabled the normal advisory process to be circumvented. But it's been unable to provide us with this evidence. The events in question happened nearly 20 years ago. So records over that period of time can be incomplete. Where evidence is incomplete, I have to base my decision on what I think was more likely than not to have been the case.

I have testimony of Mr and Mrs B. Based on their recollections of the time. Mr B recalls that he was advised by SJP that Mrs B's pension switch could be processed as execution only. So he doesn't seem to dispute that SJP didn't require the normal advisory process to be followed in his wife's case.

I can understand why such a scheme may be a benefit extended to Partners, who were advisers. It would not be unreasonable for SJP to assume that its Appointed representatives could make informed decisions for themselves. So it would seem counter intuitive to expect an adviser to formerly make and record a recommendation to himself. Or to be compelled to obtain independent advice from an identically qualified colleague. And it may not be unreasonable to suppose that the adviser, based on their own knowledge, would then assume responsibility for the suitability of their decision.

But Mrs B, as the spouse of an SJP adviser, didn't appear to have specific financial planning knowledge. She explains that she worked in a secretarial role at the time and had no relevant financial background. So couldn't be assumed to be able to possess the insight that an SJP Partner would. Without being able to see any documented policy, it seems likely to me that, by its very nature, this Partners scheme relied on the understanding that the SJP Partner was qualified to suitably advice his or her spouse. In which case, it relied on the assumption that Mr B was able to assess whether the switch was suitable.

Amongst the contemporary evidence that SJP have provided is a document entitled "*Personal Pension Investment Plan Transfer Value*". It was prepared by SJP for Mrs B on 30 July 2002. And showed her Adviser to be Mr B. The document provided an illustration of projected fund performance and potential benefits. I've not interpreted this document as constituting a recommendation. But it does point to Mr B being the adviser, for the purposes of the transaction. Not only did it refer to Mr B as the 'Adviser' at the top of the document, it included a section entitled "*How much will the advice cost?*" And explained:

*"For arranging this plan and providing ongoing servicing throughout its term, we will provide your advisors practice with direct remuneration and administrative services. These have been valued at £1667.18 in the first year."*

I've asked SJP why Mr B was shown on the illustration as being Mrs B's adviser. It explained that it is simply that he was an SJP Partner so was her link through the proposed plan. And it also says that, irrespective of whether Mrs B received advice, the product followed a standard format which included initial and ongoing advice charges. But I think that the implication of citing Mr B as the adviser, and that Mrs B was still charged the same fee as

she would have been if she'd received more formal advice, is that SJP understood that its Partner was, more likely than not, providing advice.

I don't think it's reasonable to conclude that this pension switch could have come about without Mr and Mrs B having discussed it. Mr B explains that the issue was discussed with his 'manager' at SJP. He's provided the recollection that his manager had informed him that it would have to be processed as an execution-only transaction. Which seems plausible in light of what SJP have explained of the Partners scheme and the way that it says Mrs B's pension was treated.

I think that it's likely that Mrs B would have trusted her husband to act in her best interests. And she knew that he was qualified to provide advice. I consequently think it extremely unlikely that she would have asked him to transfer her pension without asking for his opinion on whether it was suitable or not. And similarly unlikely that he wouldn't then have offered an opinion. Quite simply, if it were not for Mr B's position as an SJP Partner, Mrs B most likely wouldn't have considered or been able to make the switch in 2002 that she did. On balance, I think that Mrs B was acting on a personal recommendation by an SJP Partner. I've asked Mr B about this, and he has agreed that Mrs B transferred on his advice.

#### *Was the transfer execution-only?*

I've also considered what COB said about 'execution-only' transactions. COB 5.2.2 explained that a firm that arranged an execution-only transaction for a customer wasn't generally required to obtain any personal or financial information about that customer. And it provided the definition of 'execution only transaction' as:

*"a transaction executed by a firm upon the specific instructions of a client where the firm does not give advice on investments relating to the merits of the transaction"*

As I've concluded above, I think it is far more likely that Mrs B was acting on advice that she'd received from an SJP Partner. Which means that her transaction couldn't in fact qualify as an execution-only transaction under the COB definition. Even if Mrs B signed to say that it was (which isn't clear), it didn't alter this fact.

In treating Mrs B in this way I don't think it complied with its obligations set out under principle 6, referred to above. Mrs B was charged for the service she received from SJP in the standard way, with no oversight from SJP that its Partner had carried out an appropriate assessment. And this pension switch would not have ever come about without it being recommended by that Partner.

#### *Was the advice suitable?*

Having concluded that Mrs B was, more likely than not, advised to switch pensions, I've considered whether it was suitable to recommend this transfer for Mrs B. And I don't think it was.

The way in which the recommendation came about seems to have meant that it wasn't given very comprehensive consideration. SJP have an illustration of the projected benefits of its scheme after transfer. With no comparison of the benefits given up.

Mrs B's ceding scheme had GARs. Although It's likely that SJP were unaware of that. The GARs made the end benefits in that scheme valuable. Transferring would mean the loss of these guarantees. With no suitability letter, I only now have Mrs B's recollection of why she transferred. Which is that she was encouraged to do so for better fund performance. But at the very least, suitable advice ought to have considered the loss of the guarantees. It ought

to have identified that replicating the benefits she may have had would be difficult based on fund performance alone. I don't think that Mrs B should have been recommended this pension switch.

I appreciate that SJP consider that Mr B is responsible for having failed to properly identify the issues with Mrs B's pension switch. But he was acting as their Appointed Representative. SJP were responsible for the actions and advice of its Appointed Representatives. It allowed the discretion in this case, for this transaction to be processed without being fully assessed. It did it on the basis that Mrs B was acting in execution only. But this wasn't fair, when she was being so closely guided in her choices by an SJP adviser.

### **Putting things right**

My aim is to put Mrs B, as far as is possible, into the position she'd have been if she hadn't been unsuitably advised. I consider that she'd have remained in her ceding scheme and retained her pension benefits with her GAR.

Her ceding scheme had a normal retirement age of 55. And on transfer, she retained that retirement age. Mrs B reached age 55 and elected not to take the benefits in her SJP pension, instead preferring to defer retirement age to 65. So I think that, on balance, that would have been the same had she remained in the ceding scheme.

Following my provisional decision, SJP queried whether I considered whether tax-free cash would have been taken. But Mrs B has now passed age 65 and I understand has taken no benefits from this pension. When she could in fact have taken TFC at any point since age 55. I think on balance, that if Mrs B had retained her former scheme, she'd have taken the benefits as an annuity, using the GAR.

#### *Compensation for past loss*

Mrs B would have been in receipt of an annuity from age 65. To compensate her for the amount of pension benefit that she has already missed out on SJP should calculate the total of all the *notional annuity payments* which Mrs B should have received, net of her marginal rate of tax<sup>‡</sup>, from age 65 up to the date of my final decision.

*Notional annuity payment* shall be calculated by contacting the ceding scheme to establish the notional value of Mrs B's ceding scheme when she reached age 65, and then using that scheme's GAR for a female aged 65.

#### *Compensation for future loss*

SJP should calculate the following:

- A) **The notional gross pension per year** Mrs B should have been receiving from the date of my final decision onwards
- B) **The actual gross pension** per year Mrs B could be receiving from her existing pension from the date of my final decision onwards. As Mrs B still has a pension fund, the gross pension per year they could receive from it is determined by applying the rate from step D) below.
- C) **Future Gross Loss per year** = A – B.
- D) **SJP must then work out** what it would cost to replace the lost income in C) by buying an annuity on the open market with the same features for Mrs B's ceding scheme's GAR. It will need to refer to the published annuity rate tables to get a quote from a competitive provider.

E) **The purchase price of the annuity found in D) is Mrs B's gross future loss.** This should be paid directly to her as a lump sum after making a notional reduction to allow for income tax that would otherwise be paid<sup>‡</sup>.

<sup>‡</sup> Likely marginal rate of income tax in retirement presumed to be 20%.

### *Total compensation*

The total compensation to be paid to Mrs B will be the combined compensation for past and future losses.

If payment of compensation is not made within 28 days of SJP receiving Mrs B's acceptance of my final decision, interest must be added to the compensation at the rate of 8% per year simple from the date of my final decision to the date of payment.

Income tax may be payable on any interest paid. If SJP deducts income tax from the interest, it should tell Mrs B how much has been taken off. SJP should give Mrs B a tax deduction certificate in respect of interest if she asks for one, so she can reclaim the tax on interest from HMRC if appropriate.

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

**Determination and money award:** I require SJP to pay Mrs B the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I additionally require SJP to pay Mrs B any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I only require SJP to pay Mrs B any interest as set out above on the sum of £160,000.

**Recommendation:** If the compensation amount exceeds £160,000, I also recommend that SJP pays Mrs B the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mrs B.

If Mrs B accepts my decision, the money award is binding on SJP. My recommendation is not binding on SJP. Further, it's unlikely that Mrs B can accept my decision and go to court to ask for the balance. Mrs B may want to consider getting independent legal advice before deciding whether to accept this decision.

### **My final decision**

For the above reasons, I uphold Mrs B's complaint.

St. James's Place Wealth Management Plc must compensate Mrs B in the manner I've set out in '*putting things right*' above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 29 July 2022.

Gary Lane

**Ombudsman**