DRN-3553298

The complaint

Mr M complained to us that Capital Professional Limited (trading as Ascot Lloyd) gave him poor advice to transfer out of his defined benefit (DB) occupational pension scheme. Sadly, Mr M died in April 2021 before our consideration of his complaint was concluded.

Mr M's estate is now pursuing the complaint and is seeking to recover the losses it believes Mr M suffered.

The advice at the heart of this complaint was given by a different firm, B. Aspects of B's business were then taken over by another firm, C. Ascot Lloyd later became responsible for C through an acquisition agreement, so this complaint has ultimately been made against Ascot Lloyd. For ease of reading I'll refer to Ascot Lloyd throughout my decision.

The estate is supported by a professional representative in bringing this complaint. But for ease of reading, all actions and comments will be noted as Mr M's and his estate's.

What happened

Mr M had a deferred pension from a former employer.

According to what Mr M later recalled, in 1999, "*private pensions were all the big thing",* not least because it was possible to access a private pension earlier than in a workplace scheme, whilst releasing a lump sum payment. Mr M thought his DB pension might be "*better off*" in one of the new pension schemes, so he approached Ascot Lloyd for advice about potentially transferring out of his DB pension scheme.

Ascot Lloyd completed a 'fact find' in February 1999. At that point, Mr M would have been around age 50. It noted the following about him:

- He was divorced;
- He was in excellent health;
- He had no dependents;
- He was self-employed with an income of around £1,200 a month. All of his income went towards household bills and living expenses. Mr M had no other disposable income;
- He was a deferred member of his former employer's DB scheme. His pension fund had a transfer value of £28,837.00, which was subject to a 5-year guaranteed period once the pension was in payment. That figure included excess benefits of £21,256.00 (which would have been subject to increases by the RPI) and guaranteed minimum pension benefits of £7,581.00;
- He owned a property valued at £36,000 with an outstanding mortgage of £16,000. He paid around £145.00 a month towards his mortgage payments;

- His total assets in terms of his pension benefits; home; contents; car and personal possessions amounted to £78,837.00;
- His liabilities were £17,200, including his mortgage and a credit card debt of £1,200.

According to the fact-find, Mr M's recorded aims were:

- To restructure his pension benefits using the early retirement rules to obtain the maximum tax-free cash. This would enable Mr M to make home improvements and go on a "*much needed*" holiday.

Other ways of meeting these aims were apparently discussed and discounted. Those included securing an additional mortgage or loan. Mr M also didn't have a life assurance policy or other readily realisable assets.

Ascot Lloyd noted, from a pension transfer analysis report, the benefits Mr M might expect to get from his DB pension if he remained within the scheme until normal retirement age. It then compared that with the amounts Mr M might receive from other types of pensions, including a personal pension and a section 32 buy-out plan.

Pension payable	Existing scheme	Personal pension	Buy-out plan
From age 65	£4,260	£3,890	£4,400
Investment return needed to match the benefits from the existing scheme		6.7%	6.7%

Ascot Lloyd said *"there are no clear guidelines as to what is an acceptable investment return required to match benefits from your ex-employer's scheme, your own attitude to risk should be the deciding factor".*

However, it said that as well as the annual return, there were other things that might affect Mr M's decision to transfer, such as the amount of tax-free cash that can be taken at retirement; how much would be paid if Mr M were to die before retirement age or the amounts he might receive if he were to retire early. But in terms of maximising his retirement income, it said early retirement and pension transfer were not suitable, as any benefit taken from the fund would reduce the income available in retirement. It added that "*You should consider carefully the future benefits you will be giving up for those you are gaining today".*

Ascot Lloyd described Mr M's attitude to risk as 'balanced' – meaning he was prepared to see his investments fluctuate in return for potentially higher growth. It also noted Mr M wanted a reasonable proportion of his pension invested in equity-based investments (which Ascot Lloyd noted can go down as well as up in value) and possibly a higher risk fund.

However, as Mr M had stated that he wished to maximise the tax-free cash lump sum available whilst deferring the rest, it recommended he transfer his pension into a personal pension and section 32 buy-out plan (excess benefits transferred to this plan could be payable from age 50) as that best suited his overall needs. Ascot Lloyd also noted that by splitting Mr M's benefits into two plans, the Guaranteed Minimum Pension (GMP) could be accepted into a separate contract, which would remain invested and could potentially become payable from age 60 (although it felt it would be better left invested until age 65).

Mr M followed Ascot Lloyd's advice and transferred his DB pension as recommended.

The pension provider indicated that Mr M started taking his pension benefits at age 60.

Having seen adverts about pension transfers, around 2019, Mr M sought advice about whether he'd been wrongly advised to transfer out of his DB scheme.

He then wrote to Ascot Lloyd in January 2020 complaining about the advice he'd received in 1999. Amongst other things he said:

- The personal pensions weren't suitable for him;
- The adviser didn't properly establish his attitude to risk, or carry out an adequate 'fact-find';
- The adviser didn't discuss in full the funds to be invested in or the fees involved and how they'd affect his investment returns.

Ascot Lloyd responded in May 2020. Amongst other things it said it could find no evidence that B (as I mentioned earlier, a firm whose advice it later became responsible for) had given advice to Mr M. In any event, it said that even if B had given advice in 1999, the complaint had been made too late.

Mr M complained to this service. Amongst other things he explained that the greater returns he'd been led to expect by transferring his DB pension hadn't materialised. So, he felt he'd been wrongly advised by Ascot Lloyd.

We asked Ascot Lloyd for its file and it made similar comments about there being no evidence of any advice being given. And, again, it felt that the complaint had been made too late. It added that Mr M ought to have known much earlier that the benefits from the scheme he transferred into may not be as good as if he hadn't transferred. Ascot Lloyd didn't give its consent for us to look into the complaint.

Following a review by an Investigator, another Ombudsman here looked into the complaint and decided it had been made in time for the purposes of our rules.

Although Ascot Lloyd initially said Mr M hadn't been given advice, the contemporaneous evidence we received, including a 'fact find', suggested otherwise. So, our investigator went on to consider the merits of the complaint. Having done that, he concluded that Ascot Lloyd hadn't acted fairly. Amongst his reasons for saying so, our investigator said:

- The advice to transfer wasn't suitable – Mr M was only 50 years old at the time and the pension benefits he'd built up would have been relatively secure and would have formed a significant part of his pension provision;
- Whilst the critical yield needed to match the benefits being given up wasn't "*far off*" the expected growth level, that would only have the effect of matching the level of benefits being given up if achieved. So, in order to make a transfer worthwhile, a higher rate of return would be needed to exceed the benefits being given up. But that needed to be considered alongside Mr M's attitude to risk. Realistically, the investigator thought that Mr M's investment would need to grow at a level between the lower and medium projections (around 6-9%). And, whilst Ascot Lloyd suggested that Mr M was a 'balanced' investor, it hadn't shown its assessment of Mr M's

attitude to risk to check that it was consistent. However, the investigator thought Mr M was probably more a low risk investor with no capacity for loss. And, if he had invested in funds more suited to his attitude to risk, it was unlikely the growth would match the critical yield, let alone exceed it.

In summary, the investigator didn't see any compelling reason for Mr M to transfer his pension, nor did he think it was reasonable to give up pension benefits for the things Mr M wanted to do. In addition, he didn't think Ascot Lloyd had given Mr M strong enough reasons to indicate why he shouldn't transfer out of his DB scheme. And he didn't think its wording could be considered a recommendation *not* to transfer. If anything, the investigator thought the wording would be considered a recommendation to transfer as it said "*Given your objectives of maximising the cash lump sum available to you and then deferring as much of the pension as possible, we recommend option 4. This will result in the conversion of the maximum possible amount of your pension fund to a tax-free lump sum.* Had Ascot Lloyd given a clearer recommendation not to transfer, the investigator didn't think Mr M would have gone ahead.

Whilst Ascot Lloyd didn't agree with the findings the investigator reached, it also said it was no longer responsible for the advice given due to the terms of a revised acquisition agreement made some years earlier. In short, as the other firms involved had ceased trading, Ascot Lloyd felt it was no longer liable for the advice given.

Our investigator considered Ascot Lloyd's comments and, based on the evidence held, he concluded that it was responsible for the advice. Amongst his reasons he said that, (regardless of Ascot Lloyd's latest position), it had taken responsibility for responding to Mr M's complaint and had given him a final response. And as it hadn't given us a copy of an agreement, which clearly showed it was no longer responsible for the advice, the investigator concluded it was responsible.

Ascot Lloyd maintained the position that it wasn't responsible for the advice. As it didn't accept our investigator's assessment, the matter has been passed to me to decide.

My provisional decision

I sent Mr M's estate and Ascot Lloyd my provisional decision on 1 June 2022.

In it I said the following:

"Our service's authority to look into this complaint

Given Ascot Lloyd's position that it's not liable for the advice given in this case, I've first considered, based on the evidence available to me, whether this is a complaint we have authority to look into.

Amongst its arguments, whilst appearing to accept that it was previously liable for any advice given, Ascot Lloyd said a variation agreement superseded the original agreement. It's also indicated that the later agreement was only enforceable until such time as the companies involved ceased trading. And, as both firms had apparently been dissolved, it said it no longer has any liability in relation to the advice given.

Despite requests, I haven't been given a copy of an acquisition agreement that sets out the definitive position Ascot Lloyd's referred to. In cases like this, where the evidence is incomplete or conflicting, I need to decide, on balance, what's most likely to have happened.

As I've stated, it doesn't appear to be in dispute that Ascot Lloyd did at one point assume responsibility for advice given by another firm. But Ascot Lloyd thinks any liability it had ended when the company acquired ceased trading. And it's also argued that company can no longer fulfil its responsibilities such as providing Ascot Lloyd with information and case files. Nor can it enforce Ascot Lloyd's obligations under the agreement. In Ascot Lloyd's view, any claims against the firm that gave the original advice should now be referred to the Financial Services Compensation Scheme (FSCS).

I've thought about all of this. And whilst I acknowledge the points Ascot Lloyd makes, I'm not persuaded by its position. Ascot Lloyd hasn't given me any persuasive evidence to show that any liability it had concerning advice given by firm B ceased when it stopped trading. Whereas the professional representative acting for Mr M's estate has given me other evidence, which does suggest that Ascot Lloyd may in fact have an ongoing liability in cases such as this. Whilst that evidence (in the form of a letter from the FSCS) does relate to a different (and unconnected) complaint, the circumstances do appear similar to those in this case. And, on balance, I'm more persuaded by that evidence than Ascot Lloyd's account of its position. That being the case and unless I receive further evidence that sets out a more definitive position, I'm intending to say that Ascot Lloyd is responsible for the advice in this case and the complaint is one that this service has authority to look into.

So, I've now gone on to consider the substance of the complaint.

My provisional findings

I've considered all of the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I've also taken into account the law; any relevant regulatory rules and good industry practice at the time.

Having done so, I'm intending to uphold this complaint for many of the same reasons our investigator gave.

What was Ascot Lloyd required to do?

The advice was provided by Ascot Lloyd in early 1999. At that time it was regulated by the Personal Investment Authority, (PIA). PIA set out various obligations for financial firms when advising on pension transfers. In doing so, it also adopted some of the rules and best practice in place from previous regulatory frameworks.

In short, Ascot Lloyd was expected to demonstrate that any advice and recommendations it made were in the client's best interests. In doing so, it would be expected to show that its advice and recommendation reflected Mr M's circumstances; objectives and risk profile.

So, it's against that backdrop that I've considered whether Ascot Lloyd acted fairly and reasonably in Mr M's particular case.

Did Ascot Lloyd act in Mr M's best interests?

Ascot Lloyd had to bear in mind that Mr M had accrued a certain amount of valuable benefits and guarantees as a member of the DB scheme. Unlike other types of pension, those weren't based on investment returns, and some were subject to incremental increases.

The pension that Mr M was looking to transfer had a value of over £28,000. And at retirement age it was expected to give him an annual income of just over £4,000 a year *(reduced if he took the maximum tax-free cash available). There's no mention in the fact find of Mr M having access to another pension fund apart from his state pension, so it's reasonable to assume his pension benefits would have been a fairly important source of guaranteed income for him in retirement. It's also worth noting that at the time of the advice, Mr M was self-employed. Assuming his employment status stayed that way until retirement, it's possible his earnings may have been subject to fluctuation and may not have been guaranteed. So, I'd have thought having a guaranteed source of income in retirement would become all the more important. And I think that was something that Ascot Lloyd needed to give careful consideration to when recommending a transfer.*

Income needs

Mr M said he was interested in transferring his DB pension to release some tax-free cash to carry out home improvements and have a 'much needed' holiday. In themselves, they're not unusual objectives. And, later on when recalling why he sought advice about transferring his DB pension, Mr M said that "private pensions were all the big thing" around 1999 and were seen as attractive to many customers, not least because benefits could potentially be accessed earlier than in a DB scheme.

I can certainly see how accessing a pension pot a number of years earlier than expected might seem like a very attractive proposition – especially if the customer had limited or no other disposable income, as appears to have been the case with Mr M. But before it did anything else, it seems to me that Ascot Lloyd needed to understand, bearing in mind what Mr M would be giving up if he did transfer, just how important it was for him to access his tax-free cash to meet his objectives. I say that because there's a world of difference between it being 'nice to have' early access to retirement funds and Mr M needing access to them. So, this is something that Ascot Lloyd should have explored and advised Mr M about. And, having done that, I think it should have pointed out to Mr M that using his pension to fund home improvements and a holiday wasn't a good idea. But, other than noting the objectives themselves, there's no evidence the conversation went much beyond that.

Ascot Lloyd did tell Mr M that accessing his retirement savings early was likely to lead to a reduced income in retirement. I don't disagree with that statement per se. But I'd have thought any such statement needed to be made in the context of what his actual income needs in retirement were likely to be. Again, there's no evidence this was discussed.

Furthermore, Mr M was only around age 50 at the time of the advice and there's no evidence to suggest he had any concrete retirement plans, so it seems to me that it was probably too soon to make any firm decisions about transferring out of the DB scheme, especially as it's not clear what his income needs in retirement would be. If Mr M later had reason to transfer out of the DB scheme, he could have revisited the position then.

In any event, early retirement from Mr M's DB scheme wasn't an option. So, if Mr M was intent on transferring his DB pension as a means of ultimately accessing the tax-free cash he was looking for, Ascot Lloyd needed to clearly explain the implications of doing so. And whilst I can see that in the suitability report it said "in terms of maximising your retirement income, early retirement and pension transfer are not suitable. You should consider carefully the future benefits you will be giving up for those you are gaining today" I think Ascot Lloyd also needed to explain what that meant in real terms. For instance, I think it should have made sure Mr M understood that once invested, his pension would be exposed to a level of risk that wasn't previously the case. And that could mean an already reduced pension pot at retirement (having already taken his tax-free cash some years earlier) could reduce even further. Again, I haven't seen anything that persuades me Ascot

Lloyd explained things in these sufficiently clear terms.

Financial viability

The advice was given during the period when the regulator was publishing 'discount rates' for use in loss assessments resulting from the industry-wide Pensions Review. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

Ascot Lloyd said the critical yield needed to match the benefits Mr M would be giving up at age 65 would be 6.7% if he took a full pension. The suitability report doesn't appear to mention the critical yield needed if Mr M were to take tax-free cash and a reduced pension.

The relevant discount rate closest to when the advice was given which I can refer to was 6.6% for 15 years to retirement. The regulator made clear at the time of this advice that a consumer shouldn't be any worse off by transferring out of a DB scheme. On the face of it at least, the growth rate didn't seem wholly unachievable. However, I think it was probably understated, especially when things such as charges were factored in. And, that was important if Mr M was to be able to make a true comparison and satisfy himself that he'd be no worse off in retirement if he went ahead with the transfer.

But all of this needed to be considered in the context of Mr M's attitude to risk and capacity for loss. And I'm not persuaded that Ascot Lloyd accurately assessed those things. It said Mr M had a 'balanced' attitude to risk. That's someone typically comfortable with their investments fluctuating to achieve a greater level of return. It also noted that Mr M was comfortable investing a proportion of his pension in a higher risk fund. I've seen no completed risk questionnaires, so I don't know how Mr M answered the various questions put to him.

Ascot Lloyd's since argued that it assessed his attitude to risk fairly using the various risk assessment tools in place at the time. Whilst that might be the case, I'm not persuaded that alone was enough. I say that because as far as I can tell, Mr M had no investment experience. And Ascot Lloyd ought to have known from its fact-find that Mr M had no leftover disposable income each month or assets that he could readily fall back on if he needed to. And whilst it's possible that he may have indicated he was comfortable in taking some risk, that's not the same as having the capacity to do so or the means to absorb any losses that might follow. Given Mr M's circumstances, it seems more likely to me that he had no capacity for loss. That being the case, by describing Mr M as a balanced investor (despite his investment inexperience) realistically, his pension funds are likely to have been exposed to a level of risk, and potential losses, that Mr M had no capacity to absorb. And I think Ascot Lloyd ought to have known that.

Ascot Lloyd's recommendation

Ascot Lloyd told Mr M he'd be better leaving his DB pension in place if he wanted to "maximise" his income in retirement. But it then went on to say that if he wished to maximise the tax-free cash lump sum (whilst deferring the rest of his pension until his scheme pension age), he'd be better transferring his DB pension into a combination of a personal pension and a section 32 buy-out plan. Essentially, Ascot Lloyd placed Mr M in an 'either/or' situation. And I think this made it far too easy for him to simply decide that transferring out was a suitable alternative to staying in the scheme. Especially as, in my opinion, Ascot Lloyd didn't do enough to persuade him otherwise. Ascot Lloyd ought to have known that, given his circumstances, a decision to transfer out of the DB scheme *was not in Mr M's best interests. And I think it should have explained that to him in no uncertain terms.*

Ascot Lloyd has since suggested that Mr M chose not to follow its full recommendation (the inference being that it recommended he didn't transfer). And as far as it seems to be concerned, Mr M was minded to go ahead with the transfer anyway, irrespective of the advice given, as it was his only means of accessing his tax-free cash.

I don't agree with Ascot Lloyd's interpretation of what happened. In my view, telling Mr M that he might be better off leaving his DB pension in place if he wanted to maximise his retirement income, doesn't amount to a clear recommendation not to transfer. Had Ascot Lloyd clearly stated its recommendation was for Mr M to leave his pension as it was, I think Mr M would have been left in little doubt about what Ascot Lloyd thought best for him. In the absence of a clear recommendation to show what was in Mr M's best interests overall, I can't fairly say Ascot Lloyd did what was expected. Nor did it enable Mr M to make a balanced and more informed decision.

Would Mr M have gone ahead anyway?

I've thought carefully about this question and whether Mr M is likely to have insisted on going ahead anyway even if he'd been given a clear recommendation not to transfer. And notwithstanding the fact that Mr M was clearly interested in accessing tax-free cash early, (which wasn't an option within his DB scheme), I don't think he would have done.

I say that because Mr M wasn't an experienced investor. And he'd gone to Ascot Lloyd for advice. So, I think Ascot Lloyd had an obligation to give him advice that was in his best interests overall. And for the reasons I've outlined, I don't think it's done that. Had Ascot Lloyd clearly explained that it didn't recommend Mr M transfer out of his DB scheme, not least because he may be worse off in retirement, I think he'd have listened to Ascot Lloyd and left things as they were.

My provisional decision

My provisional decision is that this service has authority to look into the complaint. I'm also intending to uphold the substance of the complaint.

I've set out below what I'm intending to say Ascot Lloyd should do to put things right.

Putting things right

When thinking about what Ascot Lloyd needs to do to put things right, I'm mindful that this complaint is now being pursued by Mr M's estate rather than Mr M himself. It's not clear if the estate has already received benefits from Mr M's pension plans. Nor is it completely clear, what, if any, benefits the estate would have been entitled to had Mr M remained in his DB scheme.So, we don't yet know whether the estate has actually suffered a financial loss.

The terms of Mr M's DB scheme didn't allow for early retirement and the normal scheme retirement age was 65. Given this, had he stayed in the DB scheme, it seems likely that Mr M would have started to take his benefits at age 65. Whereas, he apparently started taking some benefits from his personal pensions around the age of 60.

In order to ascertain whether there's been a loss that the estate might now be entitled to, I'm intending to say that Ascot Lloyd should:

- *compare the benefits that Mr M received from his personal pensions up to the date of his death compared with the income he would have received had he taken benefits from his DB scheme. (If there is a loss, that amount should be paid to Mr M's estate).*

- *provide its calculations to the estate in a clear and easy to understand format".*

Responses to my provisional decision

Mr M's estate responded to say that it had no further comments to make.

Ascot Lloyd hasn't responded.

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.

As neither Mr M's estate nor Ascot Lloyd has given me additional comments or new evidence to consider, I see no reason to change what I said in my provisional decision.

My final decision

I uphold this complaint. Capital Professional Limited now needs to put things right as I set out in my provisional decision and as noted above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M's estate to accept or reject my decision before 19 July 2022.

Amanda Scott
Ombudsman