DRN-3568183

The complaint

Mr A complains that First With Mortgages Limited (FWML) failed to advise him to take out protection against lifetime allowance (LTA) charges in connection with his pension arrangements.

What happened

In brief, FWML has been advising Mr A in connection with his pensions and other investments since about 2009. Mr A had an index linked occupational pension scheme (OPS) which had been in payment since before April 2006. Mr A had continued to work – he had his own limited company.

A fact find completed in early 2009 with FWML records that Mr A's income from his OPS was £42,720 pa. He had £85,500 in personal pension plans. Over the following years Mr A was advised to make further substantial contributions to his personal pension plans, both from his company and his personal resources.

In late 2010 reductions to the LTA were announced. The new LTA of £1,500,000 (a reduction from £1,800,000) would take effect from 6 April 2012. Various protections were introduced to allow a higher LTA to be retained, such as Fixed Protection. To maintain a LTA of £1,800,000 an application needed to have been made by 5 April 2012. And for Fixed Protection 2014 to maintain a LTA of £1,500,000, an application needed to have been submitted by 5 April 2014.

FWML advised Mr A in connection with his pension arrangements at various times between 2009 and 2014. A problem arose in 2017. Mr A says he discovered then that the overall value of his pension arrangements exceeded the LTA which was by then £1,000,000. Mr A says FWML never advised him about the LTA and that the value of his pension arrangements might exceed it. FWML didn't agree. Its position is that Mr A knew about the LTA but had chosen not to take any action. FWML didn't uphold Mr A's complaint and it was referred to us.

Our investigator upheld the complaint. FWML didn't agree with his findings and the complaint was referred to me. I issued a provisional decision on 9 December 2021. For the reasons I set out I agreed the complaint should be upheld. I explained that we'd made enquiries of Mr A's accountant. He'd confirmed his advice didn't extend to the LTA. He said it was outside his remit and his role was largely confined to dealing with Mr A's limited company. And I didn't think Mr A would've known about the LTA from the administrators of his OPS or from the press. So I concentrated on Mr A's dealings with FWML.

I noted that FWML had worked with Mr A since 2009. There'd been regular meetings. In my view, taxation was an integral part of financial planning. Especially for pensions, where a special taxation regime applied. FWML knew about Mr A's overall pension provision, which included his OPS in payment.

I examined all the contemporaneous evidence to see how that reflected the parties' differing recollections and against the background of the reductions to the LTA announced in 2010 which would start to take effect from 2012. There'd been discussions about Mr A's pension arrangements in June 2011, May 2012, January and April 2013 and May 2014. All in all I hadn't seen anything to show the LTA had been mentioned, much less discussed with Mr A and calculations undertaken to ascertain how close he was to the LTA or by how much he was already exceeding it.

FWML didn't accept what I'd said. FWML said it wanted me to address a number of points before it responded in full to my provisional decision. In summary:

- FWML wanted sight of the accountant's working notes from 2009 to 2016. FWML said there were discrepancies about the discussions between Mr A and his accountant and the information provided by the accountant. If the records weren't produced, FWML would want to make representations about inferences that should be drawn.
- FWML maintained the LTA was tax, not investment, advice and within the accountant's remit. The key issue was Mr A's claim that FWML hadn't advised him about the LTA and he remained unaware of it. FWML's adviser was certain, despite the absence of notes in support, that he'd dealt with the LTA and referred Mr A to his accountant for advice. Mr A's assertion – that the accountant didn't mention or advise about the LTA as it wasn't within the accountant's remit needed further examination.
- My provisional decision recorded that the accountant had told us he'd been presented with contributions made by Mr A's company and he'd incorporate that information into the accounts he prepared for the company. The inference is there'd been no discussions until after the pension contributions had been made. That's different to what Mr A had said – that he'd consulted his accountant when pension contributions were to be made by his company and about whether the contributions should be in Mrs A's name, which is what FWML had recommended, or Mr A's.
- FWML said the accountant was part of the decision making process prior to the contributions being made and was the '*main contributor*' in terms of in whose names they should be allocated. The LTA should've formed part of that consideration and, if proved by the accountant's notes, will undermine the whole basis of the complaint.
- FWML's adviser says he then reminded Mr A he'd be liable for higher rate tax on any benefits and it would be part of his LTA (then a fairly minor consideration as the LTA was £1.8 million) but the funds would grow tax free in the pension. Mr A had said he didn't need the income or the tax free cash from the pension.
- Mr A had said that the accountant was unaware of Mr A's investments. But the accountant had confirmed he'd completed self assessment tax returns for Mr A and his wife. That meant the accountant was giving personal tax advice to Mr A and his wife. To complete those returns, he'd need to know all the details of pension income, dividends, investment and rental income and interest on savings. So he'd have been aware of all of Mr A's investments.
- FWML accepted that the accountant was never involved in investment advice. But he did give tax advice – as to in whose name the pension contributions were to be made and when to make them. He should also have been involved in LTA tax advice even though Mr A was then some way from the limit. The accountant had said that in 40 years he'd never carried out a LTA calculation. But it had only been relevant since A Day. It was something he should've been aware of and considered fully before recommending the allocation of the pension contributions in Mr A's name. He'd have had other clients in a similar position after 2006.
- FWML also asked for sight of the 150 or so emails that Mr A had referred to and which I'd mentioned in my provisional decision.

We asked the accountant for some further information. He agreed he'd look through his files to see if there was any relevant information. He sent us an email saying as follows:

'Further to your recent request regarding a review of my files in relation to Life Time Allowance (LTA).

I confirm that I have reviewed the following files covering the below mentioned date ranges. I have found no references, notes or emails relating to LTA:

[File for Mr A's company]

Permanent file - 31 March 2003 to 31 March 2018
Working papers file - 31 March 2010 to 31 March 2018
Tax and correspondence file - 16 July 2004 to 13 August 2018
Statutory file - 18 July 2002 to 14 December 2018

[File for Mr A]

Tax and correspondence file - 28 January 2013 to 5 March 2019

[File for Mrs A]

Tax and correspondence file - 1 January 2013 to 5 March 2019

We also asked Mr A for copies of the emails he'd referred to. Mr A supplied over 100 emails and attachments.

I issued a further provisional decision on 3 May 2022. I've set out here in full my (further) provisional findings.

'*FWML says the LTA is tax, not investment, advice and so within the accountant's remit. First, and as I said in my provisional decision, taxation issues, which would include the LTA, are an integral part of financial planning, and that's particularly the case with pensions which are subject to a specialist taxation regime. I also explained, with reference to when the LTA was introduced and how it changed, why it was relevant to Mr A and why I considered, regardless of the accountant's remit, FWML should have drawn the LTA to Mr A's attention when giving him pension advice and when FWML was aware of Mr A's substantial OPS pension in payment.*

I think FWML accepts that. Its position is that it did deal with the LTA and referred Mr A to his accountant for further advice. But Mr A says that didn't happen. In that sort of situation I need to look at what other evidence (apart from what the parties say) there is to show what happened or what is likely to have taken place. Where the evidence is incomplete, inconclusive, or contradictory, I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in light of all the available evidence and the wider circumstances.

I've first considered if there's anything to support what FWML says about having told Mr A about the LTA and suggested he seek advice from his accountant. But FWML hasn't been able to produce anything – there's no fact find, recommendation report, letter, email, or file note (whether of a meeting or telephone conversation) or anything else – which refers to or mentions the LTA.

As I said in my provisional decision, I'd have expected FWML to have had some record to show that the LTA was at least discussed with Mr A, especially if, as FWML asserts, he

declined to take any action. FWML's adviser knew that protections were available (he's said he sought and obtained protection himself) and the tax implications that can arise if LTA protection isn't sought can be significant – and as this case demonstrates.

I maintain an adviser would know, if an issue later arose, it would be at least prudent to have some record of any discussions about the LTA. That's especially the case if, as FWML suggests, Mr A declined to take any action and so left himself exposed to the possibility that he'd face a LTA charge. Even if Mr A had put forward reasons as to why he wasn't taking any action (for example, if he'd said he didn't intend to ever draw on the fund), I'd expect that to have been recorded, together with any advice FWML gave about that and if it had recommended that Mr A seek protection anyway. Here FWML has been unable to produce any evidence to substantiate its claim that it did discuss the LTA with Mr A.

FWML argues that Mr A would have discussed the LTA with his accountant. We've looked into that and made enquiries of the accountant. I set out in my provisional decision what he'd told us. As I said, I didn't see any reason to think that the accountant's recollections weren't accurate. He's a third party professional and his evidence should be reliable. But, as I've said above, we have got some further evidence from the accountant. He was prepared to assist us further by going through his files. But he didn't find any mention of the LTA.

FWML has requested sight of the accountant's working notes. My understanding of the legal position is that (and subject to any express contractual provision), some documents belong to the client and must be supplied to the client on request. But ownership of other documents, including drafts, working papers and internal file notes, are the property of the accountant. So an accountant does not have to agree to allow the client access. It would only be in the context of legal proceedings against the accountant that such documents would need to be produced under the discovery process. That means Mr A has no legal right to require the accountant to disclose his working papers.

My powers in relation to evidence are set out in DISP (Dispute Resolution) 3.5.8R and DISP 3.5.9R. I have a fairly wide discretion as to the way in which evidence is presented and what information I accept. I can exclude evidence that would otherwise be admissible in court or include evidence that a court wouldn't accept. DISP 3.5.10G, DISP 3.5.11G and DISP 3.5.12G give guidance. DISP 3.5.11G says I have the power to require a party to provide evidence and that failure to comply with the request can be dealt with by the court. But I don't see that assists here. The accountant isn't a party to the complainant and, as I've said, Mr A has no legal right to insist that the accountant provides his working papers. So I can't require Mr A to provide that evidence.

Even if the accountant was prepared to release his working papers to Mr A (who could then share that evidence with us) I think there'd be complications and data protection issues arising from the fact that some of the information relates to Mrs A (who isn't a party to this complaint) and to others. And I don't think FWML would be entitled to sight of that evidence anyway. I think that sort of financial information would be sensitive and such that I might only accept it in confidence as provided for by DISP 3.5.9R (2). In that situation, FWML would only get to see an edited version, summary or description. That would be meaningless when, according to the accountant, there's no evidence to show that the LTA was discussed. And FWML could continue to argue that there might be other papers which hadn't been disclosed. But I mention that largely in passing given that I don't think I can compel the accountant to produce what FWML is seeking.

DISP 3.5.12G says I can take into account evidence from third parties. Although he was instructed by Mr A, the accountant isn't a party to the complaint. So he's a third party and I've taken into account his evidence.

The accountant has told us that he hasn't ever advised in connection with the LTA or carried out any LTA calculations. He's explained his experience and why the LTA wouldn't have arisen in connection with the type of work he did for Mr A or other clients. As an accountant for a small business, his main focus was on making sure that Mr A's company and Mr A and his wife as directors met their statutory and compliance obligations. The accountant was responsible for ensuring that all documents including tax returns were filled out correctly and filed on time and that any tax due was paid by the due date. The accountant has told us, from memory, that he didn't discuss the LTA with Mr A. He's since gone through his records and has told us there's no mention of the LTA. The accountant is a professional. I'd expect his evidence to be truthful, complete, accurate and reliable. I don't see any reason to question what the accountant has told us. So it seems he and Mr A didn't discuss the LTA.

The accountant completed self assessment tax returns for Mr A and his wife. But I don't think it follows that must mean he gave them personal tax advice extending to the overall value of Mr A's pension provision, the LTA and if he needed to take steps to mitigate any extra tax he might incur for breaching the LTA. The self assessment returns require details of income whether that's from salary, dividends, income or interest from investments, pensions in payment, rented properties or anything else, for example, a trust fund. But it's mainly information which the accountant would ask a director client to provide so the client's liability to income tax can calculated. I think there's a difference between knowing all the details of Mr A's income, including that from investments and pensions, and being familiar with the underlying assets and any taxation issues, beyond income tax liabilities, that might arise in connection with any of them.

I'd expect an accountant retained to deal with a director client's limited company to give certain tax advice. For example, in connection with dividend payments where the rate of tax payable is dependent on other income, which would include any income from a pension in payment. But I don't see that it would be within that sort of accountant's remit to give specialist pension taxation advice, extending to the value, for LTA purposes, of Mr A's overall pension provision and whether he might breach the LTA. The bulk of Mr A's pension provision was his OPS benefits. I'm not sure that all accountants would be familiar with the formula required to value for LTA purposes an OPS in payment prior to 2006.

FWML has said that it wants sight of the accountant's working papers because FWML considers there's a contradiction between what the accountant and Mr A say. I don't really agree. To clarify, as I understand things, there would have been some discussions about pension contributions between Mr A and his accountant before any contributions were made. Mr A would then implement whatever had been agreed – such as the payment of pension contributions by the company into Mr A's SIPP. Those payments would then be recorded in the company accounts the accountant later prepared.

I think any discussions with the accountant would first be around if Mr A's company was in a position to make any pension contributions. Employer pension contributions for company directors are an allowable business expense and will reduce corporation tax but only provided the contributions pass HMRC's 'wholly and exclusively' test. In deciding that, HMRC will look at things like the company's annual profits (which will need at least to cover the proposed contribution) and whether the total remuneration package (salary, dividends, bonuses etc as well as the pension contributions) is reasonable for the work that the director does.

Assuming that the wholly and exclusively test is met, the next question would be in whose name any contributions should be made, Mr A and his wife both being company directors. Aside from the LTA issues and which as I've said weren't within the accountant's remit, I can't see any real reason for the accountant to advise that the pension contributions should be in Mrs A's name. Mr A was the main generator of the company's income. Given his

concern not to fall foul of IR 35, it may have been thought safer to make the contributions in his name. And that's consistent with what FWML says – that Mr A had confirmed that to avoid any IR 35 implications, he and the accountant had agreed that the contributions should be in Mr A's name. I don't see any problem with that, on the basis that the accountant was unaware of any other issues which might mean that it would be better for the contributions to be made for Mrs A.

FWML has said its advice was that contributions should be in Mr A's wife's name and had that been the case Mr A wouldn't now be facing a LTA charge. I can see that but the difficulty for FWML remains that it can't evidence that the LTA was ever mentioned. Much less that Mr A was told any employer contributions his company was in a position to make should be in his wife's name to avoid or mitigate any LTA issues. Or that when Mr A confirmed the contributions would be in his name, FWML pointed out that it had advised against and warned that he could face a LTA charge.

I've also looked at the timeline for the contributions made by Mr A and his company to his personal pensions. Before being consolidated into the SIPP in May 2012, Mr A had three personal pension plans, two with one provider and another with a different provider. A fact find completed in early 2009 shows Mr A's personal pensions were then worth £85,500. It seems there was a conversation about contributing £80,000 pa for the next three years to bring the pensions up to £240,000 of which £60,000 could be accessed tax free.

In March 2009 Mr A was advised to make a personal contribution of £30,000 (£24,000 net) along with a £50,000 contribution from his company. And the following year a further £80,000 in total was contributed on the same basis. The personal contributions were paid into one of the plans with the same provider and the employer contributions into the other plan with that provider. Regular contributions then ceased so the third planned £80,000 contribution was never made. In May 2012, when FWML advised Mr A to consolidate his pension plans into a SIPP, the total fund value was just under £300,000. No further contributions were made.

In 2009 the LTA was £1,650,000 and due to increase to £1,750,000 from 6 April 2009. And from 6 April 2010 it increased again to £1,800,000. It remained at that level until 6 April 2012 when it reduced to £1,500,000. Against that background, even if there's some suggestion the accountant should've been aware of and considered the LTA (although I don't accept that), the LTA had been increasing or was stable when the contributions were made. So the risk that Mr A might breach the LTA wouldn't have been immediately apparent. I think it would have been later, against the background of the reductions to the LTA that consideration should've been given to whether Mr A might breach it. As by then contributions to Mr A's personal pension (his SIPP) had ceased, I can't see there'd have been anything for the accountant and Mr A to discuss.

I don't doubt that if Mr A's SIPP fund had been approaching the LTA that would've been picked up by FWML. But because the bulk of Mr A's pension provision was his OPS in payment, it appears that breaching the LTA was overlooked.

As I've said above, I accept the accountant's evidence and that he didn't discuss the LTA with Mr A. And I don't agree with FWML that the LTA was part of the accountant's remit. But, in any event, I don't see the issue is really whether the accountant ought to have given advice about the LTA. I've said FWML should've given that advice. FWML doesn't disagree and says it did tell Mr A about the LTA. If FWML can't show it did something which it accepts it should've done, it can point to another party and say that party told Mr A about the LTA anyway. If that's right, then no loss will have flowed from FWML's omission – because Mr A knew about the LTA anyway. But, if it can't be shown that the other party did tell Mr A about the LTA, I think that's a problem for FWML. I don't think it can escape liability for its omission

by saying that another party should've done what it failed to do.

There are also the emails Mr A has now shared with us. We aren't in a position to disclose all of them to FWML. There are data protection issues. Many of the emails contain personal information, not just relating to Mr A and to his wife but to others too. But we've reviewed all of them. Only a very small number are directly relevant in terms of being anything to do with Mr A's pension arrangements. We've identified only six emails which have some form of reference to a pension or a pension related issue. We'll disclose those emails and attachments. We've removed the accountant's and Mr A's wife's email addresses. In general there's nothing in the emails which calls into question what I've said about the accountant's role and that it didn't extend to advice about the LTA.

I'd comment on the email dated 17 June 2014 forwarding FWML's adviser's details to the accountant. It appears there was going to be some discussion between the adviser and the accountant. But I understand that contact wasn't made and there was no conversation. We've asked Mr A if he recalls what the discussion was going to be about but he doesn't. He was however able to let us have his notes of meetings with FWML's adviser on 15 May 2014 and 1 July 2014. We'll share those too.

The notes of the meeting in May 2014 refer to the recent budget. The LTA had reduced to £1,250,000. The meeting note infers that Mr A can take income from his pension and just pay 40% income tax. But Mr A's OPS income was in excess of £50,000 pa at the time of the meeting. So he was by then exceeding the LTA. Yet there was no discussion around the lower LTA and what that meant for Mr A.

The note does refer to Mrs A's pension. And it records the adviser's advice that money shouldn't be put into Mr A's pension but into Mrs A's. FWML has argued throughout that, had contributions been made into Mrs A's pension instead of Mr A's, that would've avoided or mitigated the problem with the LTA that Mr A now faces. But, as I've said, there's no record of any LTA discussion or any record of FWML having advised that pension contributions be made in Mrs A's name specifically to avoid or reduce any LTA issues for Mr A.

In May 2014 Mr A's company was no longer active – Mr A had stopped working by then – and the company wasn't in a position to pay pension contributions (whether for Mr A or his wife). It seems that the advice in May 2014 may have been more to do with Mr A's plans to wind up the company and which included making Mrs A redundant. I think the proposed discussions with the accountant would've been around those issues and the possibility of taking capital out of the company and paying it into Mrs A's pension.

But, as I've said, no conversation took place. The note of the meeting on 1 July 2014 records that the accountant hadn't been in touch with FWML's adviser. The note appears to focus on inheritance tax planning (IHT). It refers to what happens to Mr A's pension pot (his SIPP) should he die before reaching age 75 in which case it would pass free of tax to his family. And that 'you have to do something' when Mr A reached age 75. That's a benefit crystallisation event (BCE). There are a number of BCEs: when pension benefits are taken, on death, at age 75 and on transfer overseas. I think in talking about IHT the LTA should've been mentioned. Again I think FWML's focus was on Mr A's SIPP and his OPS benefits in payment and their value for LTA purposes appear to have been overlooked.

I think, if the LTA had been mentioned, during either meeting (or indeed at any meeting with FWML), Mr and Mrs A's meeting notes would've recorded that. The LTA was an important issue which, if breached, had serious taxation consequences for Mr A. I can't see that they'd have ignored the issue. And, as I've already said, if it was discussed and Mr A elected to take no action, I'd have expected FWML to have recorded that and Mr A's reasons.

All in all, having considered everything again very carefully, I maintain the views set out in my earlier provisional decision.'

We asked FWML for any further comments. We also told the parties on 31 May 2022 that I'd thought again about redress and we set out a revised approach to redress.

FWML commented in response to my further provisional decision on 29 June 2022. It said important points had been overlooked and my provisional decision was unjust. In summary FWML made the following main points (to be read in conjunction with its earlier comments):

- The accountant hadn't provided any real evidence or notes to back up why the LTA wasn't discussed after Mr A's meetings with FWML's adviser – all tax issues were dealt with by the accountant and Mr A was always advised to consult his accountant. It was '*impossible*' to think the accountant has never advised on LTA issues. He was Mr A's business and personal accountant and dealt with all Mr A's tax affairs. The accountant would've been aware of the issues since A Day in 2006 and would've had updates from his professional body/HMRC to use when giving tax advice to a client.
- I'd referred to the accountant as a professional and said that I'd expect his evidence to be '*truthful, complete, accurate and reliable*'. Reaching a decision based on hearsay from Mr A and his accountant was unfair and FWML hadn't been afforded the same consideration. The adviser's evidence, as a Chartered Financial Planner, should be deemed the same. And the conclusion drawn that he did discuss the LTA with Mr A at various times but Mr A had chosen to ignore it – as evidenced by the annuity discussions in 2013.
- The accountant is pivotal and it was unjust to simply accept his reply without any evidence and discount FWML's version. Mr A could request the accountant's full working notes. It was unfair to reach a decision without that relevant information. If it isn't produced that's suspicious. An ombudsman should be looking at the case as an independent adjudicator and factoring in that the accountant has not produced his working notes.
- Mr A's wife is involved as she attended the meetings and made notes which have been relied on. In January 2013 she noted discussions around taking benefits when annuity quotations were produced and again in April 2013. She fully recorded the figures around the annuity options but she isn't a professional notetaker and she forgot to write down the reason – the LTA. There was no other reason for providing annuity quotations. Mr A didn't want to take benefits because of tax implications; he didn't want or need his tax free cash; and he wanted the option to pay more into his pension.
- Diary notes for the meeting on 28 January 2013 were attached together with an article used by the adviser at the time regarding LTA timelines and reductions and which were discussed with Mr A.
- In April 2014 the reduction to the LTA was again discussed. Again in December 2015 taking benefits and LTA implications were discussed. In July 2017 there are notes from the adviser specifically highlighting the LTA and calculations to discuss with the accountant.
- FWML said it had serious concerns about redress. It said Mr A was aware of Fixed Protection 2012 but didn't take it because he was still working and may have made further pension contributions. Fixed Protection 2012 is irrelevant and shouldn't form part of any potential redress calculations. Mr A will have calculated he'll get more compensation. Mr A discussed the LTA and protection in meetings in 2014, 2015 and 2017 with budget updates. Mr A didn't take protection in 2014 or 2017. And it should be noted that he still hasn't taken Fixed Protection 2016 despite apparently telling this service he had. FWML was unable to apply on his behalf. FWML said Mr A was trying to blame someone for his own inaction. He'd also complained to other

agencies before bringing a complaint to this service.

The adviser, FWML's Chief Executive, added a statement. His main points were:

- The purpose of the ombudsman service was to give a fair hearing to both sides and act as an independent adjudicator and come to a decision based on facts provided by both sides. He likened the complaint to a '*car crash*' insurance claim. He reiterated that Mr A had complained to other parties about his situation so he was aware of it. He'd even looked into the possibility of divorcing to reduce the tax payable. He was looking to blame someone for his own inaction.
- The case has been going on for years and FWML had spent much time defending it during a very difficult period. All FWML will save is the excess on its Professional Indemnity Insurance (although renewal costs would rise if the complaint succeeded). FWML wouldn't have done that if wasn't certain of its advice to Mr A. It was about stopping unjust claims which affect everyone in the industry and puts up insurance costs.
- I'd said that Mr A's wife wasn't part of the claim but all the notes were hers. It wasn't the adviser's fault that she didn't write down or record everything despite the LTA being discussed during various meetings. If she isn't part of the claim then her notes shouldn't be included and when I wasn't asking for the accountant's notes in full.
- The adviser found it difficult to accept what the accountant had said about never having completed a LTA calculation and presumably never having discussed with clients or assessed the effect of A Day or LTA changes. The adviser suggested there'd be negligence on the part of the accountant when his job was getting all the client's financial details including about pensions to complete full tax returns and accounts. The accountant should've taken the LTA into consideration at that point, even though Mr A was then way below the limit. The adviser reiterated that the accountant had contradicted what Mr A had said.
- FWML had never claimed LTA protection for clients. FWML isn't a tax adviser and doesn't have the necessary authority. FWML doesn't collect tax refunds on pension contributions for higher rate tax payers but directs them to their accountant as their tax adviser. Nor does FWML complete wills or powers of attorney but will tell clients about those and direct them to a solicitor.
- The notes about discussions in client meetings ten or twelve years ago weren't as comprehensive as they are now. But the adviser queried why there'd be annuity quotes and notes regarding the LTA if there weren't discussions about taking benefits to avoid the LTA. And why the adviser would have an article and diary notes about the LTA if it hadn't been discussed.
- Mr A had contradicted himself and his accountant, whose evidence I'd accepted. The adviser asked why his evidence hadn't been afforded the same credibility. The adviser felt that all the available evidence pointed to the fact that he'd discussed LTA implications with Mr A.
- The adviser has been in practice for 43 years and he's never had a case dealt with by this service. He suggested Mr A had '*client amnesia'*. The adviser set out his business ethos, his enthusiasm for the industry, his personal ethics and his commitment to education and charity. There was no reason why he wouldn't have told Mr A about the LTA. On the balance of probabilities on the available evidence it has to be concluded that it was discussed but ignored by Mr A.

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 can see how unhappy FWML is with my provisional decision(s) and with the redress I suggested. I've considered very carefully FWML's comments and taking into account all FWML has said previously.

FWML and its adviser have pointed to what I said about the accountant's evidence being truthful, complete, accurate and reliable. In saying that I meant no discourtesy to FWML's adviser and I apologise if it appeared otherwise. I entirely accept all the adviser has said about his business and personal ethics. And I agree that the fact he's never had a complaint referred to this service before is commendable and supports what he's said about how he conducts himself and his business. I can understand why he suggests I should accept what he's said and that he did discuss, more than once, the LTA and its implications with Mr A and advised him to seek advice from his accountant.

But Mr A has disputed what the adviser has said. And in that sort of situation it won't usually be fair to just accept what's been said – by one or other party – about what happened and what was or wasn't discussed. We'd instead look into the dispute further and examine what each party has said and try to find any further supporting and corroborating evidence. That will include any direct evidence, such as written contemporaneous records (although there may be a dispute about the accuracy or completeness of that evidence). And we'll consider any indirect or circumstantial evidence as well as any evidence from any third parties. We'll then come to a decision on the balance of probabilities, after taking into account and weighing up all the evidence we've seen and the wider circumstances.

Against that background I hope FWML can understand why I'm unable to simply accept what the adviser has said. Mr A has challenged the adviser's version of events. I need to look at all the information and decide what weight I should attach to particular evidence in order to reach a conclusion, on the balance of probabilities, about the issues which are in dispute. The central issue is whether FWML did discuss the LTA with Mr A. I've looked at what evidence there is to substantiate the adviser's assertion that the LTA was discussed more than once with Mr A and he chose to take no action.

FWML says Mr A is trying to play on the fact that there's no direct written evidence to show that the LTA was discussed. But the lack of any direct evidence is the central problem for FWML. The complaint that Mr A wasn't told about the LTA should be relatively easy to answer – by production of clear, contemporaneous, written evidence. Such as a letter or email to Mr A, noting the value for LTA purposes of his OPS pension in payment plus his growing SIPP fund and alerting him to the LTA and possible implications. Or a meeting note or fact find (preferably signed by Mr A) mentioning the LTA. If such evidence can't be produced then FWML's position is difficult unless there's other evidence to demonstrate that FWML told Mr A about the LTA.

FWML has pointed in particular to the discussions in 2013 and the further advice that FWML gave then. It was against the background that the LTA had reduced from £1,800,000 to £1,500,000 with effect from April 2012. And there'd be a further reduction to £1,250,000 in April 2014. My understanding is that in 2013 Mr A was already exceeding the LTA although FWML's understanding (based on an out of date figure for Mr A's OPS in payment) was that Mr A's pension provision was less than the LTA but would exceed the reduced LTA which would apply from April 2014. Either way, I can see that discussions about the LTA in 2013 would've been pertinent. I've considered again the evidence about what happened in 2013 and if it indicates that the LTA was discussed.

There was a meeting on 28 January 2013. FWML has produced a copy of the adviser's paper diary for that date. We asked for confirmation of exactly what the handwritten notes which appear under the appointment for Mr A and his wife say. FWML told us:

'Call when on way
Pension review etc
Annuities
LTA ETC
Girls [a reference to Mr A's daughters]'

That's a contemporaneous record – which carries weight – as to what the adviser planned to discuss with Mr A at the meeting. I've considered it very carefully and whether it's enough for me to say that the LTA was discussed with Mr A at the meeting on 28 January 2013. But, on balance, and taking other evidence into account, including FWML's suitability letter sent the following day, I don't think it is.

We've seen the notes Mrs A took at the meeting. They show that annuity options were discussed. The notes record that the then current SIPP fund of £294,000 would buy an immediate single life annuity, payable for a minimum of ten years, of £13,400 pa. Or a joint lives annuity of £11,665 pa payable until the second annuitant's death. And a short term (five years) annuity with a residual capital balance is noted too. But there's no mention of the LTA or any indication that buying an annuity might mitigate any LTA charge.

FWML issued a suitability report on 29 January 2013. The covering letter refers to the meeting having been to discuss pension investments and ongoing retirement strategy. The report itself says it is a reminder of what was discussed and the thinking behind the recommendations. The report details investment recommendations for Mr A's SIPP and charges – both product charges and FWML's advice fees – which had been reduced from £4,350 to £2,500. The investment recommendations for Mr A's SIPP fund (the then fund value was £294,133) were set out, leaving some £4,133 in cash after initial fees to cover ongoing fees and charges.

Toward the end of the report taxation is mentioned. It says, under the heading, '*Important points to remember concerning investment taxation'* as follows:

- *Special tax rules apply to when you chose to receive benefits from a pension plan.*
- *At retirement, you may draw benefits from your pension as income, or as a tax free cash payment plus income. Up to 25% of the pension fund may be withdrawn as a cash lump sum free of income tax.*
- *The remainder of the fund must be used to provide a retirement income and this will be subject to income tax. Pension income will be treated as earned income for tax purposes and the rate payable will depend on how much income you receive in retirement.*

The LTA isn't mentioned. I'd have thought, if it had been identified by then that there'd be other taxation implications for Mr A – specifically that his overall pension benefits meant that he was or would be in breach of the LTA – that would've been noted. Especially if that had been discussed at the meeting only the day before, along with annuity options aimed at mitigating any LTA charge.

FWML says there was no reason why annuity options would've been explored, other than to reduce Mr A's exposure to the LTA. It's possible if, as FWML says, Mr A discounted annuity purchase because he didn't want or need the income and he didn't want to pay (higher rate) tax on it, that the discussion then moved onto how the SIPP should be invested. And so the suitability letter only recorded those recommendations. But the problem for FWML is that there's no record of any discussions about the LTA. The LTA is a very important factor in pension planning for those clients whose overall pension benefits are substantial. Discussions about it should be recorded. Especially, and as I've said before, if a potential problem is identified and the client then decides against taking any steps to address that.

I think there was a further meeting on 30 January 2013. Mrs A's notes record that and it's shown on the adviser's diary entries. I don't think I've seen a note of that meeting. It may just have been to sign the paperwork to enable the investment recommendations to be implemented.

I've noted the article the adviser has provided. But I'm not sure it's particularly relevant. I accept that the adviser did know about changes to the LTA – including as the article notes that it would fall to £1,250,000 from April 2014. I don't doubt he'd have identified that some clients should seek protection and advised them accordingly. And he's said he sought and obtained protection himself. But the issue here is whether that advice was given to Mr A. His position wasn't straightforward in that his SIPP fund, on its own, was well below the LTA. But he also had a substantial OPS in payment.

There was as further meeting on 4 April 2013. Again Mrs A made notes. They record how £280,000 of the overall SIPP fund was invested – in line with the recommendations set out in FWML's letter of 29 January 2013. There's a note that 25% of the fund can be taken tax free. Again there's no mention of the LTA, that Mr A would exceed it, and what further tax charges that might create.

As I said in my further provisional decision, the notes of the meeting in May 2014 refer to the recent budget. The LTA had reduced to £1,250,000. That's not included in the notes. FWML suggests that may have been an omission on Mrs A's part. But the meeting note infers that Mr A can take income from his pension and just pay 40% income tax. Mr A's OPS income was in excess of £50,000 pa at the time of the meeting. So he was by then exceeding the LTA. There's no note of any discussion around the lower LTA and what that meant for Mr A – that his tax bill wouldn't just be limited to paying higher rate tax on the income he took from his SIPP. As the note stands, it reads as if Mr A can simply take income from his SIPP, subject to paying income tax at 40% on that income.

I note what FWML has said about the notes taken by Mr A's wife. And the suggestion that she omitted to record – on several occasions – discussions about the LTA. I've born in mind that she wasn't what FWML refers to as a professional notetaker. It's possible she may not have recorded all that was discussed. But, if the LTA had been mentioned – and the possible taxation implications for Mr A – I don't really see why Mrs A wouldn't have noted that and when she noted other tax considerations – such as tax free cash and paying higher rate income tax. As the LTA reduced and the value of Mr A's SIPP increased, the issue became increasingly pertinent. I think it would've led to queries and further questions which would've been noted too. And if Mr A had been advised to seek advice from his accountant, I think Mrs A would've noted that Mr A needed to follow up with the accountant.

FWML has suggested Mr A should have his own notes. I don't see why he'd have made notes himself when Mrs A was present at the meetings and took notes. I don't agree that her notes should be disregarded. As I've explained, I've considered carefully all the available evidence from all sources and what weight it should carry to reach a decision on the balance of probabilities about the issues which are in dispute in this case.

I note what FWML has said about record keeping requirements being more stringent now than they were some ten or so years ago. I agree that what happened should be judged on the basis of the regulations and industry standards at the time. But, although financial advice may be subject now to increased regulation, I'd still expect a firm, as a matter of good practice, to have made and retained file and meeting notes. And to record all advice that's given, even if (or perhaps especially if) a client declined to take it.

From everything I've seen, there's only one direct contemporaneous reference to the LTA – in the adviser's diary note. There's nothing else (that is before 2017 when the issue came to light) which refers to the LTA despite FWML saying that the issue was discussed with Mr A more than once over the years. Against the background I've set out and the other evidence I've considered, I don't think the diary note is enough for me to say that the LTA was discussed with Mr A, that he understood the implications and that he could take steps to mitigate his position but decided against.

As to the accountant's part in the matter, FWML makes two points: first that the accountant would've discussed the LTA with Mr A; and, secondly, even if that didn't happen, the accountant should've advised Mr A about the LTA.

As I've said before, even if FWML can't show that it did discuss the LTA with Mr A no loss would flow from any omission if it was clear that Mr A knew about the LTA anyway from another source. But again there's a dispute – Mr A says the LTA didn't form part of any discussions with the accountant. We've investigated what the accountant may have said about the LTA. We've asked the accountant what he recalls. His position is that what Mr A has said is right and that the LTA didn't form part of any discussions with or advice to Mr A. And the accountant has checked his records to see if there's any mention of the LTA but there isn't.

FWML is concerned that the accountant's full working notes haven't been produced. But we've taken evidence from the accountant and I'm satisfied I've seen enough to make a fair decision. I don't think I need to see all the working notes. Especially as what we'd be looking for is something the accountant says doesn't exist – mention of the LTA – because it wasn't discussed.

I don't agree that the accountant's evidence is hearsay. We aren't relying on what Mr A says the accountant would say. I'm relying on what the accountant himself has told us and having gone through his records to check his recollection is correct.

The accountant has explained that the LTA wasn't discussed as it was outside his remit. In my further provisional decision I set out why, despite all FWML had said, I accepted that. Essentially, the accountant was retained to deal with Mr A's limited company. That included some personal taxation issues, such as completing self assessment returns. And to do that the accountant would've needed full details of Mr A's income, including his OPS pension in payment. But self assessment is about taxable income and capital gains. As Mr A wasn't taking any income from his SIPP, I don't see the SIPP would've featured. I don't think the accountant's remit extended to matters such as the value of Mr A's overall pension provision and whether he might exceed the LTA. Those issues related to Mr A's retirement planning generally and which FWML was advising him about.

I don't think any apparent contradiction in what Mr A said and what his accountant has said about pension contributions is particularly significant. The point is, even if the accountant advised as to in whose name the contributions should be made, he did that from the perspective of advising Mr A as the director of a limited company and someone who didn't want to breach IR35. FWML says that problem with the LTA wouldn't have arisen if the pension contributions had been made in Mrs A's name. But there's no documentary evidence to back up what FWML says about having advised Mr A to that effect and with specific reference to the LTA.

As to the emails which Mr A has produced, they were contemporaneous exchanges between Mr A and FWML and other parties, including the accountant, going back several years. They aren't emails to this service about Mr A's complaint. We've gone through the emails. We've

explained why we can't disclose them all. But we've shared what's relevant. We haven't seen any refence to the LTA.

With regard to FWML's comments about the revised redress, we've explained why I'd thought again about redress. I don't think it's the case that Mr A is seeking to maximise the redress. I've based redress on what I think Mr A is likely to have done if he'd been advised about the reductions to the LTA, that he was likely to breach the LTA and what steps he could take to mitigate his position. I don't think Individual Protection 2016 is relevant. I've repeated below the revised redress notified to FWML and Mr A.

Putting things right

My aim, in awarding redress, is to put Mr A in the position he'd be in now, had he had what I consider would've been correct and complete advice. It's obviously difficult, after the event and without using the benefit of hindsight, to say exactly what Mr A would've done, had he been properly advised. In that sort of situation, I reach a decision on the balance of probabilities, that is what I consider is most likely to have happened in the light of all the available evidence and the wider circumstances. In a case such as this, that will involve making some assumptions as to what decisions Mr A may have made and what actions he may have taken and when.

My starting point remains that with proper advice Mr A would have obtained Fixed Protection 2012 which would've given him a LTA of £1,800,000. The application for Fixed Protection 2012 had to be made by 5 April 2012. It would've been lost if further contributions were made after that date but Mr A's contributions to his SIPP had ceased by then.

Pension benefits are tested against the LTA at benefit crystallisation events (BCEs). Any pensions already in payment before 6 April 2006 will be tested at the first BCE after 5 April 2006. The value is 25 times the yearly pension at the date of the BCE. Mr A's OPS in payment was substantial and annual increases would mean that, over the years, he'd eat into his protected £1,800,000 LTA. For example, First With Mortgages Limited's 2009 fact find records Mr A's pension income at £42,270. Mr A has told us that by 2015 it had increased to £53,399. I'm not sure of the current amount but annual increases will have augmented that figure substantially.

If that was Mr A's only pension provision then the LTA wouldn't have any impact – he'd have no uncrystallised pre April 2006 benefits and so there'd be no later BCE. But Mr A does have other pension provision – his SIPP. He's told us that at the end of 2021 his SIPP fund value was around £540,000.

My view is that, in addition to advising Mr A to secure a LTA of £1,800,000, an adviser should've also been alive to the likelihood that increases to Mr A's OPS in payment and growth on his SIPP fund (although no further contributions would be made) meant that Mr A would breach a LTA of £1,800,000 in any event at some point in the future. Ways in which he might mitigate his tax position and his exposure to a LTA charge should've been explored.

I recognise it's not possible to say now exactly what Mr A would've been advised to do and what he'd have done. But I need to come to a decision based on what I think is likely to have happened and which is fair and reasonable in all the circumstances of the complaint.

Mr A couldn't have done anything in relation to his OPS benefits and which continue to increase year on year. So attention would've focused on the SIPP. Taking tax free cash from the SIPP would've been a fairly easy way to take money out of the SIPP in a tax efficient

manner and limit future growth. I don't think it's unreasonable to assume that, as at April 2013 and following on from the discussions in 2012 which would've led to him securing a LTA of £1,800,000, Mr A would've gone on to take tax free cash from the SIPP. He may not have needed that money but it would've made sense from a tax planning perspective to take it. As he didn't need it, Mr A is likely to have invested the withdrawn tax free cash, possibly in Mrs A's name, in a tax efficient way. I don't think it's unreasonable to say it would've had similar growth to that achieved in the SIPP.

Taking the tax free cash would've been a BCE and so the value of Mr A's benefits on the date the BCE occurred would've been tested against the LTA. I propose that the date of the BCE should be assumed to be 6 April 2013. Based on what we've seen, that (notional) calculation won't indicate that any LTA charge would've arisen.

But that still leaves the problem of what would happen in the future and at what point a further BCE would have arisen and what the result would be. We know that Mr A hasn't taken any income from his SIPP. He's said, and I accept, that he doesn't need to have recourse to the SIPP. I think it would be reasonable to assume that, if Mr A had taken his tax free cash from the SIPP, he'd have kept the residual balance in drawdown and not taken any further income from the SIPP fund.

In that scenario, a further BCE would only arise in the event of Mr A's death or when he reaches age 75. That's some nine years away. But we need to finalise the complaint now. It is in both parties' interests for a line to be drawn under this matter. It wouldn't be fair or practicable for the complaint and payment of redress to remain outstanding and unresolved.

I think it would be fair and reasonable, and in the interests of simplicity and to allow the complaint to be concluded, to assume that Mr A is 75 as at the date of the calculation. The calculation should be based on the current value of his SIPP less 25% to allow for the tax free cash I've said Mr A would've taken.

The notional calculation should be compared to Mr A's actual position as at the date of the calculation – that is his actual liability to a LTA charge based on the value of his SIPP at the date of the calculation.

That comparison will generate a notional figure for any LTA charge. The usual expected income tax should be taken into account. The difference should be paid direct to Mr A.

As we've noted, Mr A hasn't got Individual Protection 2016. That would give him protection based on the value of all his pension benefits in as at 5 April 2016, including any pensions already in payment, up to a maximum of £1,250,000. But the value of Mr A's OPS pension in payment as at that date exceeded that amount. So the full value of his SIPP is subject to the LTA charge, with or without Individual Protection 2016.

First With Mortgages Limited needs to carry out a financial loss assessment as follows:

To work out the notional LTA Charge, at the date of settlement, First With Mortgages Limited should assume Fixed Protection 2012 had been obtained by 5 April 2012. And Mr A's SIPP was crystallised on 6 April 2013, with 25% being withdrawn as tax-free cash. This sum would likely be invested and achieve similar levels of growth to what has been achieved within the pension plan. The residual 75% of Mr A's SIPP would've remained invested as it has been, achieving the same growth up to the date of settlement. At the date of settlement, First With Mortgages Limited should calculate the LTA charge due on 75% of Mr A's actual SIPP value, accounting for the prior crystallised value on 6 April 2013.

The above notional LTA charge should be compared to the actual LTA charge due on Mr A's SIPP at the date of settlement, on the basis no prior BCE or LTA protection has been obtained. The difference is the loss payable to Mr A to redress him for the omission made by First With Mortgages Limited to provide suitable advice. There's also a payment of £300 in recognition of the distress and inconvenience caused to Mr A.

We haven't undertaken any calculations so I don't know how much redress might be. Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest and/or costs/ interest on costs I think are appropriate. If I think that fair compensation may be more than £160,000, I may recommend that the business pays the balance.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out above. My decision is that First With Mortgages Limited should pay Mr A the amount produced by that calculation – up to a maximum of £160,000.

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that First With Mortgages Limited pays Mr A the balance.

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

My final decision

I uphold the complaint. First With Mortgages Limited must redress Mr A as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 2 September 2022.
Lesley Stead
Ombudsman