

The complaint

Mr G complains that Lairgate Financial Ltd gave him unsuitable advice to transfer his defined benefit (DB) occupational pension scheme (OPS) into his Small Self-Administered Scheme (SSAS). He says he'll be financially worse off in retirement as a result.

What happened

Mr G was introduced to Lairgate by an unregulated party who I'll refer to as Firm A.

In 2017 Firm A had helped Mr G open a SSAS and invest in loan notes with Dolphin Capital – an unregulated property investment located in Germany.

In 2018 Lairgate gave Mr G advice on the deferred benefits he held in an OPS.

At the time of the advice, Lairgate completed a fact-find with Mr G which recorded;

- He was single, not in a relationship and had no plans to marry anytime soon.
- He had an annual income of £100,000 with a net monthly income of £6,000. And his monthly outgoings were £1,964.
- He was a residential landlord and provided a spreadsheet containing information on his property portfolio. Three of the properties were owned by a limited company he'd set up. A further eight properties were owned as a partnership on a self-employed basis.
- His property portfolio was worth around £2,600,000 with £1,760,000 of it mortgaged.
- He held around £20,000 in shares in his ex-employer's business and had recently invested £30,000 in cryptocurrency which had lost £10,000 of its value.
- His DB scheme had a transfer value of £195,282.05.
- His property portfolio provided enough income, so he had zero reliance on his pension for income in retirement.
- He already held a SSAS in which he held an investment in Dolphin Capital. So, he didn't require advice on the suitability of the SSAS or a recommendation for a suitable investment solution as he wanted to invest in commercial property.

Following the fact-find Lairgate recommended Mr G transfer the deferred benefits of his OPS into his existing SSAS. They set out the reasons for their recommendation in a suitability report which said;

- Mr G didn't require investment advice so an assessment of his attitude to risk hadn't been completed. But they considered he was generally a high risk taker due to his recent investments.
- Mr G had unlimited capacity for loss of his pension as even a total loss wouldn't impact on his standard of living.
- The critical yield – the returns required to match his existing scheme – was 6.23%
- Due to Mr G being single with no dependants, the death benefits in the OPS offered no benefit.

- The SSAS would be able to facilitate Mr G's objective of investing in commercial property. And based on his successful property investments so far, it was likely Mr G could invest the funds in a way that would provide a higher level of retirement income.

Mr G complained to Lairgate in August 2020 about the suitability of the transfer advice because he said they'd failed to consider his attitude to investment risk and the underlying investments in the SSAS. He said Lairgate didn't act in his best interest as he lost the guaranteed benefits of his OPS. And the OPS was his entire pension savings, so he didn't have the capacity for loss to tolerate the risks of their recommendation.

Lairgate didn't uphold Mr G's complaint. In summary, they said it was Mr G's objective and intention to invest in commercial property. At the time there was no indication Mr G wanted to make further investments in unregulated investments like Dolphin Capital in his SSAS. And they weren't responsible for Mr G's investment choices that he later made. Lairgate said that they had considered the underlying investments as being an investment in commercial property. And they concluded such an investment was suitable. They also said that although Firm A introduced Mr G to them, they had no relationship with Firm A.

Mr G referred his complaint to our service. In his submissions to our service Mr G said before he met Firm A he'd had no investment experience, and had been told the investment in Dolphin Capital was low risk. So, he disputed he had a high attitude to risk. Furthermore, he said Lairgate's fact-find was incorrect in terms of his earnings which he said had never come close to £100,000. He provided some financial information from his company at the time which he says shows he made a loss that year. He said Lairgate didn't act in line with the regulators expectations as they had a duty to consider the suitability of the whole transaction and couldn't just limit their advice to the transfer.

I sent Lairgate and Mr G my provisional decision in which I said I was minded to uphold Mr G's complaint. In summary I said I didn't think Lairgate had met the regulators expectations in considering the transfer as a whole, including the underlying investments. And without that information, Lairgate shouldn't have recommended the transfer.

In response to my provisional decision Lairgate sent a detailed submission for my consideration. I've carefully considered all of the arguments. But my final decision below will focus on those points which I think are materially relevant to this complaint.

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.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time. These include the overarching Principles for Businesses ('PRIN'). Principles 1 (integrity), 2 (skill, care and diligence), 6 (customers' interests) and 9 (reasonable care) are of particular relevance here.

The regulator, the Financial Conduct Authority ('FCA'), also states in its Conduct of Business Sourcebook ('COBS') that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Lairgate should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr G's best interests (COBS 19.1.6).

COBS also required Lairgate to take reasonable steps to ensure their personal recommendation was suitable for Mr G. And they had to obtain information on Mr G's investment knowledge and experience relevant to the specific type of investment (COBS 9.2.1R).

Lairgate gave their recommendation to Mr G in 2018 which was several years after the regulator had made their position clear that when assessing the suitability of a pension transfer, a firm needed to consider the suitability of the underlying investments intended to be held in it. This was evident in 2013 when the then regulator, The Financial Services Authority (FSA) issued an alert regarding advice to invest in SIPPs and other pension wrappers. The relevant parts said;

“It has been brought to the FSA’s attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers’ retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some of which may be in Unregulated Collective Investment Schemes)...

The FSA’s view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating.”

I appreciate that the example given in the regulators alert didn't exactly follow Mr G's circumstances. But I can see the regulator's alert makes it clear that suitable advice 'generally' requires a business to consider the underlying intended investments. And the alert pointed firms toward COBS and PRIN which asks firms when giving advice to first take time to familiarise themselves with the wider investment and financial circumstances of their customer.

In my view the regulator was alerting businesses to standards which have a broad application to pension switching and transfer advice. So, I think the alert is relevant to Lairgate in this case. This is further demonstrated when in 2014 the FCA issued a further alert containing similar warnings which said;

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

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

Furthermore, in January 2017 the FCA issued a news story entitled 'Advising on pension transfers – our expectations'. The FCA said;

“We are aware that some firms have been advising on pension transfers or switches without considering the assets in which their client’s funds will be invested. We are concerned that consumers receiving this advice are at risk of transferring into unsuitable investments or – worse – being scammed.

Transferring pension benefits is usually irreversible. The merits or otherwise of the transfer may only become apparent years into the future. So it is particularly important that firms advising on pension transfers ensure that their clients understand fully the implications of a proposed transfer before deciding whether or not to proceed.

What we expect

We expect a firm advising on a pension transfer from a defined benefit (DB) scheme or other scheme with safeguarded benefits to consider the assets in which the client’s funds will be invested as well as the specific receiving scheme. It is the responsibility of the firm advising on the transfer to take into account the characteristics of these assets.

Our rules set out what a firm must do in preparing and providing a transfer analysis. In particular, our rules (COBS 19.1.2R(1)) require a comparison between the likely benefits (on reasonable assumptions) to be paid under a DB scheme or other scheme with safeguarded benefits and the benefits afforded by a personal pension scheme, stakeholder scheme or other pension scheme with flexible benefits.

The comparison should explain the rates of return that would have to be achieved to replicate the benefits being given up and should be illustrated on rates of return which take into account the likely expected returns of the assets in which the client’s funds will be invested. Unless the advice has taken into account the likely expected returns of the assets, as well as the associated risks and all costs and charges that will be borne by the client, it is unlikely that the advice will meet our expectations (see guidance at COBS 19.1.2 and 19.1.6-19.1.8).”

The FCA went on to say firms shouldn’t undertake a comparison using generic assumptions for hypothetical receiving schemes. The firm must take into account the likely expected returns of the assets in which the client’s funds will be invested as well as the specific receiving scheme.

Lairgate seem to consider that it had assessed Mr G’s intended underlying investments when it referenced Mr G’s desire to invest in ‘commercial property’ in its suitability letter. But I don’t agree.

Lairgate’s recommendation isn’t based on a specific investment. They say the best properties aren’t on the market for long and because this type of transfer can take several months, it simply wasn’t possible to have a specific property in mind before the advice was given. But they say they had conversations with Mr G about investments in ‘bricks and mortar’ commercial property.

I accept it was likely to be the case that Mr G may not have been able to move on a specific property without first securing the funds. However, the whole suitability report is based on an investment in commercial property. And the term ‘commercial property’ is fairly broad. It could represent a wide range of different investments from investing in retail, hospitality or offices. It could also include land purchases for development or car parks. Therefore, the associated risks of the different types of commercial property is vast and depends on the specific commercial property investment. The likely returns would also be vast dependant on

the type of investment chosen. Many factors were likely to affect the potential returns and without any indication of the type of commercial property or geographical location, Lairgate couldn't give any indication of likely returns.

Lairgate say Mr G was confident in his own abilities to select a successful property. They said this was true especially with '*[Firm A's] SSAS Commercial property purchase service to assist him*'. They say it was Mr G's intention to invest in a commercial property of his choosing and from their point of view a further investment in Dolphin Capital was never on the table for Mr G. Furthermore, Lairgate say they spoke with Mr G about the dangers of an investment in Dolphin Capital. They say they pointed out to him that it was high risk and warned him against any further investment. However, there's no documented evidence from the time of the advice that Lairgate warned Mr G of these dangers. And considering Mr G made a further large investment into Dolphin Capital shortly after the transfer, on balance, I'm not persuaded that they did.

Lairgate now say they had talks with Mr G about 'bricks and mortar' commercial property, discussing the various types, rental income and potential growth. But none of that is mentioned in any of the documented evidence from the time of the advice. So, on balance, I can't fairly conclude that it was discussed in any real detail. I've also seen no evidence that Mr G had a particular commercial property in mind when he spoke with Lairgate. And there's no written evidence that Lairgate explored with Mr G the type of property he was likely to invest in. Had they done so, I'd expect Lairgate to have been able to make a comparison between the likely benefits of the DB scheme and the benefits of that type of commercial property investment. Which was a key expectation of what would be contained in the suitability report. However, this level of comparison wasn't included and meant Mr G wasn't able to make an informed decision about whether the transfer was in his best interests.

Advising on the transfers of DB pensions is highly regulated and there's good reason for that. As the FCA pointed out, the decision is usually irreversible and the guaranteed benefits of a DB scheme can be very valuable. By assisting Mr G in moving his funds to a flexible arrangement like a SSAS, he was at risk of transferring into unsuitable funds or even being scammed as the regulator had warned. And that seems to be exactly what happened in Mr G's case.

I think it's important to note here that Lairgate knew Mr G was being assisted in his investment choices by Firm A who weren't regulated financial advisers. And Firm A had already advised Mr G to invest other pension provisions into a high risk, unregulated investment with Dolphin Capital. While Lairgate say a further investment into Dolphin Capital was never 'on the table' I don't think they could have said that with any certainty. Especially given they had no good indication at that time of the specific type of commercial property Mr G intended to invest in. And they knew that following the transfer, Mr G was going to go back to the same advisers that recommended his first investment into Dolphin Capital.

For these reasons, I don't think Lairgate met the regulators expectations that they'd laid out in various communications, COBS and PRIN rules for advisers.

Lairgate say it wasn't Mr G's intention to improve on his pension provisions. But I disagree. In the suitability report Lairgate say Mr G's main objective was to '*consider a transfer of the deferred benefits in your [OPS] and use the money available, to invest in commercial property and further enhance your retirement income provisions.*' So, I think it's fair to say Mr G was looking to enhance the financial benefit he was likely to receive from the DB scheme by transferring its value into his SSAS.

In the suitability report Lairgate went on to say; *'The critical yield mentioned above is relatively low and the potential to match the benefits you have within the scheme is likely, given your investment experience'*.

Lairgate recorded the critical yield as 6.23% but the critical yield was generated using a 'generic pension plan' with charges of 1% per year. Which is exactly what the regulator warned against. Lairgate were advising Mr G to move his funds into an already established SSAS. So, they should have researched the actual fees Mr G was likely to pay to obtain an accurate critical yield. Which may have been more, or less, than the one they used. They also needed to point out all of the costs and charges Mr G would face from his actual receiving scheme for the investments they say he was intending to make. It's typical in these types of arrangements to see extra fees for property purchases and for holding a commercial property in the SSAS. But these fees weren't explored or explained.

I also don't think it was possible for Lairgate to say it was 'likely' Mr G would be able to match the benefits he was giving up. That's because, as there was no specific underlying investment in mind, Lairgate wouldn't have been able to know the likely or projected returns of an investment that didn't yet exist. And while Mr G had substantial experience in investing in residential property, I've not seen any evidence he had experience in investing in commercial properties. Which are likely to hold different risks to what he was used to dependant on what the commercial property was.

In their latest submission Lairgate said *"In the event that he had invested in commercial property as he informed was his objective for the funds, then assuming a 5% return, we fail to see how [Mr G] can substantiate that he be financially worse off in retirement as a result"*. But I think this comment only serves to highlight the problems with Lairgate's advice. Only now are they suggesting what a possible annual return could be (which still doesn't exceed Lairgate's critical yield required to even match the DB schemes benefits). And dependant on the type of property investment, whether a mortgage was needed, or its likely occupancy (to name just a few factors of consideration), Lairgate had no way of assuming a likely return from Mr G's investment.

Without understanding the underlying investment Lairgate were unable to assess its suitability or comment on, with any certainty, its ability to meet Mr G's objective of enhancing his retirement income. And the regulator had made its position clear that if Lairgate didn't fully understand the underlying investment proposition intended to be held within the pension, then it shouldn't have offered advice on the pension transfer at all as it would not be able to assess the suitability of the transaction as a whole.

Summary

I don't doubt that the ability to invest in commercial property through his pension would have sounded attractive to Mr G. But Lairgate wasn't there to just transact what Mr G might have thought he wanted. The adviser's role was to really understand what Mr G needed and recommend what was in his best interests.

Ultimately, I don't think the evidence shows Lairgate knew enough about the intended underlying investment to make a recommendation that met with the regulators expectations. And so, they shouldn't have given Mr G a recommendation to move his pension from the DB scheme into a flexible arrangement that was open to unsuitable investments or even scams.

Mr G was giving up a guaranteed and increasing income. By transferring, Lairgate were unable to say with any certainty whether Mr G was likely to even match the retirement benefits he lost and in my view, there were no other particular reasons which would justify a transfer and outweigh this.

So, I think Lairgate should've advised Mr G to remain in his OPS.

Of course, I have to consider whether it's more likely than not that Mr G would've gone ahead anyway, against Lairgate's advice.

I've considered this carefully, but I'm not persuaded that Mr G would've insisted on transferring out of the OPS, against Lairgate's advice. I say this because this was most of Mr G's pension provisions and he hadn't got an investment beyond 'commercial property' in mind at that time. So, if Lairgate had provided him with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests, I think he would've accepted that advice.

I'm not persuaded that Mr G's objective of investing in commercial property was so great that he would've insisted on the transfer knowing that a professional adviser, whose expertise he had sought out and was paying for, didn't think it was suitable for him or in his best interests.

Lairgate don't believe they should be held responsible for the unsuitable investments that Mr G later made in his SSAS. But it was Lairgate's responsibility, as part of the advice to transfer his DB scheme benefits, to ensure Mr G's funds were being suitably invested once they reached the SSAS. And in failing to do so, they failed in their duty to consider whether the transfer as a whole was in his best interests or to protect Mr G against making unsuitable investments. They advised him to move his pension from a highly regulated and protected scheme into a scheme where Mr G was free to make his own choices. They knew he was being guided by the same unregulated advisers who'd already advised him to invest into a high risk, unregulated scheme. And if the transfer hadn't taken place, the subsequent investments via the SSAS could never have been made.

If Lairgate had explained to Mr G that it couldn't recommend the transfer without understanding the underlying investments Mr G intended to make, I think that would've carried significant weight. So, I don't think Mr G would have insisted on transferring out of the DB scheme and, again, the subsequent unsuitable investments couldn't have been made.

In light of the above, I think Lairgate should compensate Mr G for the unsuitable advice, using the regulator's defined benefits pension transfer redress methodology.

Putting things right

A fair and reasonable outcome would be for the business to put Mr G, as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have remained in the occupational scheme.

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and has set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice. The consultation closed on 27 September 2022 with any changes expected to be implemented in early 2023.

In this consultation, the FCA has said that it considers that the current redress methodology in Finalised Guidance (FG) 17/19 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 whilst the consultation takes place. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with any new rules and guidance that may come into force after the consultation has concluded.

We've previously asked Mr G whether he preferred any redress to be calculated now in line with current guidance or wait for any new guidance /rules to be published.

He has chosen not to wait for any new guidance to come into effect to settle his complaint.

I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr G.

Lairgate must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

This calculation should be carried out as at the date of my final decision, and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr G's acceptance of the decision.

Lairgate may wish to contact the Department for Work and Pensions (DWP) to obtain Mr G's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P).

These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr G's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr G's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr G as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The compensation amount must where possible be paid to Mr G within 90 days of the date Lairgate receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Lairgate to pay Mr G.

Income tax may be payable on any interest paid. If Lairgate deducts income tax from the interest, it should tell Mr G how much has been taken off. Lairgate should give Mr G a tax deduction certificate in respect of interest if Mr G asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any

period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

If the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect Lairgate to carry out a calculation in line with the updated rules and/or guidance in any event.

My aim is to return Mr G to the position he would have been in but for the actions of Lairgate. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. That appears to possibly be the case here.

To calculate the compensation, Lairgate should agree an amount with the SSAS provider as a commercial value, then pay the sum agreed to the SSAS plus any costs, and take ownership of the investment. If Lairgate is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation. The value of the SSAS used in the calculations should include anything Lairgate has paid into the SSAS and any outstanding charges yet to be applied to the SSAS should be deducted.

In return for this, Lairgate may ask Mr G to provide an undertaking to account to it for the net amount of any payment he may receive from the investment. That undertaking should allow for the effect of any tax and charges on what he receives. Lairgate will need to meet any costs in drawing up the undertaking. If Lairgate asks Mr G to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

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 Lairgate to pay Mr G 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 Lairgate to pay Mr G any interest on that amount in full, as set out above.

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

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

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

My final decision

My final decision is I uphold this complaint and Lairgate Financial Ltd should pay the amount calculated as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 6 December 2022.

Timothy Wilkes
Ombudsman