DRN-3669946

The complaint

Mr P complains that Plutusgroup Ltd, now trading as Gate Capital Group Ltd ('Gate'), gave him unsuitable advice to switch his two existing personal pensions to a Self-Invested Personal Pension (SIPP) and invest his funds through Organic, a Discretionary Fund Manager ('DFM'). For ease of reading I'll refer to Gate throughout my decision.

What happened

Mr P approached the adviser to review two personal pensions he held. The fact find recorded that Mr P was 58, self-employed and was living with his partner. He held £3,500 in cash, £12,500 in a business account, £14,000 in a stock and shares ISA and £24,000 in investment bonds. His partner wasn't working and had no income, initially as her business had closed down and then due to poor health. She had savings of £5,000 (in the suitability report this was changed to £500). Mr P had a net monthly income of £1,000 and the couple had joint outgoings of £1,300. Mr P was paying for the outgoings exceeding his income from savings whilst his partner wasn't working. They were hoping she would continue to work if her health improved.

He was looking to release the maximum possible tax-free cash ('TFC') to pay for a new car and take his partner on a holiday of a lifetime. He also was interested in providing the most death benefits for his partner if he predeceased her. It was recorded that when he retired he wanted to take benefits flexibly when he required them.

His two pensions had a combined value of around £53,000. Both plans had annual charges of 1%. One of his plans included a guaranteed annuity rate ('GAR').

He was looking to retire at 66 with a joint required income of £15,000 per year. His attitude to risk was recorded as balanced. The adviser recommended the transfer to the SIPP to meet Mr P's objectives of:

- Obtaining the maximum level of tax-free cash as a lump sum.
- Providing his partner with flexibility in respect of any death benefits should he die.
- Leaving the remaining funds invested and under his control while not committing him to an annuity purchase.

In September 2016, Mr P was recommended to transfer both plans to a SIPP and invest through a DFM. He took a tax-free cash lump sum and left the remainder of his funds invested.

Mr P said he shouldn't have been advised to transfer and that he is financially disadvantaged as a result and the investments were too high risk.

Gate said they can't be held responsible for advice given by Mr P's adviser as at the time, between March and 12 September 2016, he didn't hold authority to act for Gate. Another ombudsman issued a jurisdiction decision on a similar case where advice happened around the same time and found Gate could be held responsible for advice given after mid-August 2016 and likely after May 2016. Gate was informed that we would proceed with merits assessments on cases where advice was given during these times.

Our investigator thought Gate was responsible for the advice. She then considered the merits of Mr P's complaint and thought it should be upheld. She didn't think Mr P had a strong need for tax-free cash from his pension and shouldn't have given up his existing policies which included valuable guarantees.

Gate disagreed and so the complaint was passed to me for a decision.

I previously issued a provisional decision explaining that I thought I could consider the complaint and that I was also intending to uphold the complaint. However, I was looking to award slightly different compensation taking into account that I didn't think it was fair to hold Gate responsible for all investment losses Mr P suffered. And I didn't think the value of Mr P's GAR which he lost by transferring had been fully taken into account by the previously recommended redress.

Mr P agreed with my provisional decision. Gate did not respond.

As I wasn't provided with any further comments or information by either party, I see no reason to depart from my findings in my provisional decision which are set out again below.

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.

Was the advice to transfer Mr P's pensions suitable?

Neither of Mr P's pensions allowed him to take a lump sum and keep the rest of his funds invested until retirement. He would have had to draw an income straight away which is not something Mr P wanted or needed. He was still working and was planning to do so for another eight years. He would lose the opportunity for accruing returns on his pension funds in a tax-efficient environment if he took his benefits from his existing plans straight away which was not advisable in my view.

So I accept transferring his plans to a drawdown plan instead looked like a reasonable alternative. Whilst Gate should of course consider what Mr P would like to do, they needed to act in Mr P's best interest and I can't see that Mr P's objectives were properly explored, tested and that alternatives were discussed in a meaningful way.

I don't doubt Mr P was interested in releasing TFC from his pensions. However, I would have expected Gate to discuss with Mr P how much he realistically needed and if he could fund what he needed in other ways. Mr P was using his savings to supplement his income, so I don't think he would have used his cash savings or would have wanted to take up a loan. The documents I've seen also imply that his investment bonds possibly were tied up and couldn't have been easily cashed in. However, Mr P did have a stocks and shares ISA of £14,000. Mr P might have thought he didn't want to miss out on tax-free growth in his ISA, but this wasn't much different to his pension. So I think using his ISA was an alternative that should been have been explored. Whilst the information from the non-GAR plan didn't specifically mention TFC, I also don't see any particular reason why this wouldn't have been offered. So he possibly could have transferred only this pension to a drawdown plan if he really wanted to. It's recorded he wanted "maximum tax-free cash". However, buying a car and going on holiday could be achieved with a varying amount of money. Based on the evidence provided I'm not persuaded Mr P had an urgent need for as much as £14,000 and even if he wanted to spend some money, other avenues could have been explored.

Other than Mr P wanting to access some cash, I can't see any good reason why Mr P needed to transfer. It was recorded he wanted to access his pension flexibly from 66, however this was still eight years away and it wasn't established why Mr P needed flexible income when he retired. If he died before retirement, he could leave his pensions to his partner as a lump sum and she could use them flexibly. And if at the point he eventually did retire Mr P thought he needed more flexible benefits he could still decide to transfer then.

One of the key issues here is that Mr P had a GAR on one of his plans. In the fact find the adviser noted that the GAR was lower than current annuity rates. However, this is contradicted in the suitability report which notes that [with my emphasis]:

'The Pre 97 Guaranteed Annuity Rate available from your plan is 5%, and is subject to conditions. The basis of the guaranteed annuity rate is 50% Joint Life, 3% escalation, 5-year guarantee period and paid monthly in advance. This cannot be altered.
The current rate available on the open market for this annuity basis is 2.79%.

The Post 97 Guaranteed Annuity Rate available from your plans is 3.5%, and is subject to conditions. The basis of the guaranteed annuity rate is 50% Joint Life, 5% escalation, 5-year guarantee period and paid monthly in advance. This cannot be altered.
The current rate available on the open market for this annuity basis is 1.94%.

Given that the suitability report refers to actual figures, I've put more weight on this. It's clear the GARs could provide a valuable guarantee should Mr P have decided to take an annuity in retirement.

The suitability report said Mr P didn't want an annuity. However, again this might have changed nearer to retirement. I accept it's possible he never would have chosen an annuity, but I don't think there was a persuasive need to give up the GAR in 2016. Once he transferred, this guarantee was lost.

Gate said that Mr P and his partner had sufficient retirement income which was in the main based on their state pensions and so meeting the TFC objective was possible. However, this still doesn't take away from the fact that Mr P was giving up a guarantee he likely didn't have to. And I note that Gate didn't have any details from Mr P's partner so they just made an assumption about whether she would receive a full state pension and also it wasn't clear when she would receive this. Also, given her poor health at the time, I think Gate should have considered that if she predeceased Mr P he would highly depend on his own personal pension provisions.

I'm also concerned about the fact Gate made no comparison of charges and brushed this aside by saying the plans were so different it didn't matter. Yes, the plans were different. But I still consider the costs of an arrangement and setting out the differences in charges crucial to make an informed decision. And I see no reason why a comparison wasn't possible.

It's clear that charges in the SIPP and DFM would have been higher than the 1% charged in his existing plans. A SIPP illustration on a similar case shows that the reduction in yield taking into account the SIPP charges, initial adviser charge of 3% and DFM fees would be 1.1%. In response to Gate's due diligence queries Organic did say that *'We will endeavour to keep TER's* [total expense ratios] *as low as possible; realistically below 0.8%, which includes Organic's management charges but could be as high as 1.00%'*. So I think there was a realistic possibility Organic's charges alone could be as high as 1%, pushing this reduction in yield higher. This still only would have been slightly higher than Mr P's existing plans. However, in addition Gate was also going to charge an ongoing adviser fee of 1% which would have more than doubled the effect of charges. This would have a considerable effect on Mr P’s returns and I can’t see this was explained or considered.

The suitability report makes comparisons which suggest the new plan would provide a higher income until age 100 than income that could be provided by his existing plans. Gate have not provided enough information to evidence how this was calculated. But they haven’t compared like for like as far as I can see. Illustrations I’ve seen from existing plans did use returns of 5% which was the middle projection rate provided by the regulator, made allowances for charges and factored in 2.5% inflation. And then applied annuity rates (which don’t seem to be the GAR). The drawdown figures assumed a net return of 5.14% which considering charges of around 2% was working on returns of over 7%. I don’t know whether figures were adjusted for inflation. So I think this was misleading.

I think the impression was given that a drawdown plan would give a better pension. However, I don’t see any reason why Mr P’s new plan would have realistically outperformed his existing plans including the higher charges. He was invested in line with his risk profile and costs were lower, so I don’t think he would have been disadvantaged to stay in his plans. And as I said above he could have made a choice to transfer when he decided to retire and had a better idea of what he needed without prematurely giving up a GAR that might have been valuable to him in future. His situation was uncertain given his partner wasn’t working and they didn’t know how her health would develop. So what he wanted or needed from a pension could have changed.

Overall, I think the advice to transfer wasn’t suitable. I think the disadvantages of a transfer outweighed the perceived advantages. I think with suitable advice Mr P more likely than not would have chosen not to transfer his plans. I think he would have kept his existing plans.

The investigator held Gate responsible for all losses Mr P experienced. However, I don’t think it’s fair and reasonable in the circumstances of this case. It’s clear that the losses here were largely caused by how the investments performed and that they were too high risk.

As the adviser, Gate did have responsibilities to do due diligence on any DFM they recommended. We know that the Gate adviser’s due diligence into Organic had been based on specific questions they put to them between May and August 2016 – rather than simply accepting Organic’s marketing material without question. The adviser went on to check out the pedigree of those running the business, and its external compliance consultants – recording its overall conclusions in a summary document which it has provided to the Financial Ombudsman Service.

In August 2016 Organic provided assurances to Gate that the model portfolios wouldn’t be invested in *“non-standard assets”* and that they would not be managing any funds directly. Based on what I’ve seen I think the extent of Gate’s due diligence enquiries here was reasonable and I don’t consider they acted negligently in this respect. I’m satisfied the due diligence Gate had carried out in mid-2016 would have provided reasonable assurance that the portfolio would be managed appropriately. And looking at the advertised asset allocation at the time, the portfolio recommended matched Mr P’s risk profile in my view.

Organic diverged from what they had told Gate and invested into higher risk investments, manged their own funds and charged higher fees. Gate started having concerns about Organic after doing a due diligence review and wrote to their customers in 2018 and advised them to change their investments. At this point, funds were still liquid and from what I’ve seen the majority of losses and liquidity issued happened from October 2018 onwards.

Gate say they also wrote to former clients including Mr P informing him about the concerns over Organic. Gate say Mr P changed advisers on 4 May 2017. I have no reason to doubt their statement as the original adviser took a number of clients to his new firm around this time. I invited Mr P and his representatives to provide evidence to the contrary if they wished, however nothing was provided.

The change of agency happened before Mr P received an annual review from Gate. From this point on it was the new adviser's responsibility to ensure Mr P's investments were still right for him. And I think further losses could likely have been avoided if the new adviser had monitored the investments like Gate did and changed them when concerns became evident.

So I don't feel it's fair to hold Gate responsible for investment losses Mr P incurred after the new adviser took over in the circumstances of this case. The redress below reflects this.

Putting things right

To compensate Mr P fairly Gate should:

1) Ask the original provider to calculate the notional value of Mr P's former policy without a GAR on 4 May 2017, as if it had never been transferred.

2) Do the same for the GAR policy. The value needs to separately show pre and post April 97 benefits.

3) Only using the notional value of the GAR policy itself will not take into account the value of the guarantee that was lost by transferring. As I said above, Mr P might have never taken the GAR in which case he technically wouldn't have lost the value of it. However, it's difficult to say now what Mr P would have done when he retired if he had the choice as it would depend on his circumstances and available annuities on the market. So overall, I consider it's fair and reasonable to allow for the value of the GAR.

   To do this, it needs to be calculated what GAR he could have received in his existing policy on 4 May 2017 (Mr P was 59 at that point) and what he could have got at the same time on the open market. This doesn't mean I'm assuming he would have taken an annuity from his plan in May 2017 (in fact he couldn't have taken it as the GAR was only available from age 60) but simply helps to value the guarantee he lost.

4) For ease, Gate should be using the available annuity rates for Mr P at age 60 which were 4% for pre April 97 benefits and 2.8% for post April 97 benefits in his existing plan. The basis of this GAR was 50% Joint Life, 3% escalation, 5-year guarantee period and paid monthly in advance as this was the only option offered by his plan. It should be assumed Mr P would have chosen to take 25% of his pension as TFC.

   Based on Moneyfacts data available to this service the closest comparable rate I can refer to for early May 2017 is on the following basis: 66% Joint life, RPI linked without guarantee, paid monthly in advance. The average rate at the time on this basis was 1.85% assuming Mr P's partner was the same age as him. I appreciate it's not a perfect comparison, however given it's an average rate overall I believe it's close enough.

   I said in my provisional decision that if the parties could provide more accurate comparisons, they should let me know in response to this decision. However, neither party commented on this, so I'm satisfied what I set out above is reasonable and should be used.

5) Increase the pre-April notional value of the GAR policy by the ratio of 75% x (4% divided by 1.85%) and increase the post April 97 notional value of the GAR policy by the ratio of 75% x (2.8% divided by 1.85%).

6) Add the values calculated under 1) and 5) which is the total value of Mr P's former policies.

7) Compare this total value with Mr P's SIPP value on 4 May 2017.

8) The loss to Mr P's pension funds on 4 May 2017 is the difference between this SIPP value and the total value of Mr P's policies as calculated under 6). If the SIPP value is higher, there's a gain and no redress is payable.

9) A notional value is the fairest comparator here, but if one or both of the former providers are unable to calculate a notional value, Gate will need to determine a fair value for Mr P's previous plan(s) instead, using this benchmark:

   FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index)

   Mr P wanted growth with some risk to his capital so I think this benchmark is fair. The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.

   It does not mean that Mr P would have invested in some kind of index tracker investment. Rather, I consider this a reasonable benchmark that likely reflects the sort of return Mr P could have obtained from investments in his existing plans.

- Any loss amount as calculated under 8) should be brought up to date from 4 May 2017 to the day of my final decision by applying the same benchmark as mentioned above. Again this is to reflect the kind of returns Mr P likely could have expected given his attitude to risk if he had reasonably invested the loss amount.

- Any additional sum or regular contributions that Mr P paid into the SIPP should be added to notional value calculations at the point it was actually paid in. Any withdrawal, income or other distributions paid out of the SIPP should be deducted from the notional value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments and the providers aren't able to factor this into the notional values, to keep calculations simpler, I'll accept if Gate totals all those payments and deducts that figure at the end.

- If there is a loss, Gate should pay compensation into Mr P's pension plan, to increase its value by the amount of the compensation and any interest. Gate's payment should allow for the effect of charges and any available tax relief. Gate shouldn't pay the compensation 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 P 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 overall gross loss adequately reflects this.

- The compensation amount must where possible be paid to Mr P within 28 days of the date Gate receives notification of Mr P's acceptance of my final decision. Further interest must be added 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 28 days, that it takes Gate to pay Mr P.

  Income tax may be payable on any interest paid. If Gate consider that they are required by HM Revenue & Customs to deduct income tax from that interest, Gate should tell Mr P how much they've taken off. Gate should also give Mr P a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

- Provide the details of the calculation to Mr P in a clear, simple format.

My final decision

I uphold this complaint and direct Gate Capital Group Ltd to pay Mr P any compensation due following calculations as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 27 September 2022.

Nina Walter
Ombudsman