DRN-3683506

Financial Ombudsman Service

The complaint

Mr T's representative has complained, on his behalf, that deVere and Partners (UK) Limited failed to inform him of the financial implications – specifically with regard to lifetime allowance (LTA) issues – of transferring his occupational pension scheme (OPS) benefits to a Self Invested Personal Pension (SIPP).

What happened

Mr T had deferred benefits with his employer's occupational pension scheme and, in 2016, the trustees offered members the opportunity to access an immediate pension from the scheme. The employer paid for members to receive advice on their options from an appointed representative of deVere, but for simplicity, I'll refer to deVere as the respondent business in this decision.

Mr T capitalised on the offer of advice in October 2016, and his circumstances were recorded as follows:

- He was 56, married and in good health. He had three financially dependent children.
- He was employed as a director, earning approximately £169,000 pa.
- Mr T had further pension savings within a separate defined contribution scheme, valued at around £320,000.
- He had enhanced protection in place, and had not made any pension contributions since it had been secured.

deVere recommended in an initial report that Mr T take no action, given that he had no need for income or capital. As such, no assessment of Mr T's attitude to investment risk was undertaken – although it was recorded that he didn't wish to take any investment risk with his pension provision, and so transferring to a personal pension type arrangement, such as a SIPP, was ruled out.

Mr T had ceased active membership of the OPS in question in December 2008, at which point he was entitled to a pension income of around £38,000 pa at the scheme retirement age. Under the offer being made by the pension scheme trustees, Mr T could take an immediate pension of just under £37,000 pa, or receive a tax free lump sum of around £170,600 and a reduced pension income of just under £25,600.

At the time of the advice, Mr T's revalued scheme benefits at 65 were projected to be an income of £57,500 pa, or a lump sum of £250,000 and a reduced pension of just under £41,000 pa. This translated to a cash equivalent transfer value (CETV) of £1,216,000.

A further advice letter was issued in February 2017, in which deVere reiterated its advice to retain the scheme benefits. But it said that Mr T had indicated that he'd like to act

against that advice and transfer his deferred benefits into a SIPP. deVere had therefore agreed to facilitate the transfer and source an appropriate SIPP and investment options.

The same letter noted that, although Mr T had previously indicated that he didn't want to expose his pension funds to investment risk, he now wished to have his pension provision within his control and capitalise on the potential for enhanced growth within a SIPP. An "average" investment risk attitude was recorded for Mr T. deVere recommended what it considered to be an appropriate SIPP provider and a discretionary managed investment portfolio.

The scheme benefits were subsequently transferred into the SIPP.

In December 2019, Mr T's representative complained that the advice hadn't taken proper account of the transitional LTA protection which Mr T had in place – Fixed Protection 2016 (FP16) – rather than enhanced protection which had been recorded by deVere in the point of sale documentation. The representative said that Mr T was now liable to pay an LTA charge of around £126,000 due to the transfer – and that deVere hadn't disclosed this specific risk to Mr T.

deVere declined to uphold the complaint, saying in summary that Mr T had informed it that he'd secured enhanced protection before engaging its services, but it was now apparent that he'd in fact secured FP16, and the information provided by HMRC would have made it clear that this meant his pension fund was protected so long as it didn't exceed £1.25m.

It further said that, because of the value of the defined benefits – amounting to £1.15m, and the additional pension fund valued at £320,000, Mr T would, either with or without advice from deVere, have exceeded the £1.25m lifetime allowance by over £200,000 and would have incurred a £50,000 tax charge. This would have been exacerbated by even modest growth on the defined contribution fund.

deVere said that the transfer hadn't been the driver behind the tax charge – rather it was the nature of the protection Mr T had secured, alongside any subsequent investment growth.

Despite clear advice from deVere not to transfer, Mr T nevertheless said he wished to proceed, it said.

Dissatisfied with the response, Mr T's representative referred the matter to this service, where one of our investigators considered the complaint. He didn't think the complaint should be upheld, saying the following in summary:

- He noted that Mr T wasn't holding deVere responsible for the transfer itself, but rather what he considered to be a failure to disclose all the relevant information, specifically with regard to the impact on the LTA.

- It was also clear from the documentation that Mr T was acting against deVere's advice to not transfer.

- There was an obligation on an advising firm to gather the necessary facts on which to base its advice – similarly, it was up to the client to disclose accurate information about their circumstances.

- Nevertheless, he thought that the adviser ought to have requested further information from Mr T as to the type of LTA protection he held. This was because enhanced protection would have been lost where there was pension benefit

accrual after April 2006. The fact that Mr T remained a member of the scheme until 2008 implied that he'd been accruing pension benefits up to that point.

- But he also noted that Mr T must have applied for FP16 relatively shortly before the advice, and so he ought to have been aware of what it was and why he'd applied for it. The suitability letters referred to enhanced protection and Mr T hadn't queried this.

- From deVere's perspective, the proposed transfer was "permitted" under HMRC's rules and so wouldn't in itself have compromised enhanced protection.

- He agreed with deVere's position that, on the basis of the "multiple of 20" methodology which was used to calculate the cash value of defined benefits, along with the value of Mr T's defined contributions, he would always have exceeded the LTA and have faced a charge. This was because Mr T didn't plan to retire until age 66.

- It was also the case that, although Mr T had decided to transfer for the potential of enhanced growth within the SIPP, this would further exacerbate the LTA charge which would need to be paid. But until pension benefits began to be paid, it was unknown as to whether Mr T would be exposed to a greater LTA liability than he would have, had he remained within the scheme.

- The investigator said that it was Mr T's decision to transfer, against the advice of deVere, and he thought it likely that Mr T would in any case have decided to transfer, irrespective of what deVere had said about the potential impact on the LTA.

Mr T's representative disagreed, however, saying that although it might have been a permitted transfer under enhanced protection, this would be lost if the transfer was above the "appropriate limit". This test wasn't carried out, and so it must be assumed that deVere would have needed to consider Mr T's position on the basis of a £1.25m protected lifetime allowance.

Even if Mr T was in any case on course to pay an excess charge on the LTA, an analysis should have been undertaken to establish how much extra this might need to be if the transfer occurred. Mr T made a decision based on the wrong information, and it needed to be determined what he would have done if he'd been in possession of accurate information. Its view was that, had this happened, Mr T would have opted to retain his benefits in the scheme.

The investigator noted the comments, but didn't think that, even if deVere had undertaken the appropriate limit test on the basis of Mr T having had enhanced protection (which he didn't), he didn't think it would have breached this – the requirement being that the value of the benefits hadn't increased by over 5% pa compound.

He remained of the view that Mr T had disclosed inaccurate information, even though the details of, and application for, FP16 must have been fresh in his mind. He must have understood the benefits of FP16 to be motivated to apply for it, he said.

The investigator agreed that it was always going to be the case that Mr T would exceed the LTA, but it couldn't be known until the benefits were crystallised as to how much the excess charge would be.

But ultimately, he said, it remained the case that Mr T ignored deVere's advice to retain his benefits in the scheme. This may have been on the basis of incorrect information, but this information had been supplied by Mr T himself. He further reiterated his view that Mr T would have proceeded with the transfer, irrespective of what risks had been disclosed.

The representative still disagreed, however, saying the following:

- Mr T didn't mislead the adviser – rather he didn't understand the full import of the lifetime allowance, the effect of the protection, nor the difference between the protections available.

- Mr T's decision to transfer was based upon conversations with colleagues and the financial analysis undertaken by deVere. deVere had an obligation to engage in detail with Mr T and provide an appropriate, complete and correct financial analysis.

- It should have been clear that Mr T couldn't have had enhanced protection, and that if he did, a transfer could mean that this would be lost. And this fact couldn't be avoided by asserting that the advice from deVere was to not transfer – Mr T's decision to act against that advice was based upon the quality of the analysis given.

- Further, Mr T's forecast benefits already exceed the LTA, and so this shouldn't have simply formed part of a checklist of issues to consider – it was of considerable significance in assessing Mr T's overall position. The transfer value was over 20 times' the forecast level of Mr T's pension, which would inevitably increase the LTA charge, as would any increase in the value of the transfer due to investment performance, but these aspects weren't brought to Mr T's attention.

- It was Mr T's position that he knew he had protection, and, as he'd ceased pension contributions, he thought he wouldn't be affected by significant tax charges in the future.

- Mr T was provided with a critical yield which the transferred sum would need to achieve to match the scheme benefits, but this didn't take into account the increase in the LTA charge which would be incurred through transferring. This was misleading. Once the tax charge on any investment growth was factored in, the critical yield would be 8.8% pa, rather than 6.6% pa as referred to in the suitability report.

Had Mr T been provided with the correct analysis, he wouldn't have transferred, the representative concluded. Redress should therefore be calculated on the basis of the regulator's guidance for unsuitable defined benefits transfers, with an adjustment for the LTA charge he would have to pay on the scheme benefits. This would then need to be compared to the value of the SIPP, allowing for the LTA charge on that.

Mr T's representative then provided a detailed calculation which it said demonstrated that, if Mr T had been informed about the LTA, he would have remained in the scheme.

In response, the investigator acknowledged that the analysis provided by deVere hadn't included the impact on the LTA, but he didn't think a more detailed analysis would have extended to the kind of actuarial assessment which the representative had presented.

In the investigator's opinion, deVere had recommended the correct course of action – to not transfer – but Mr T had acted against this advice. It wasn't clear to him that, even if the impact on the LTA had been pointed out to Mr T, this would have altered Mr T's decision.

As agreement couldn't be reached on the matter, it was referred to me to review.

I issued a provisional decision on the matter on 7 July 2022, in which I firstly noted that Mr T's representative had asked that both a provisional decision be issued on the complaint before any final decision was made, and that it also be afforded an oral hearing.

But I in any case issued a provisional decision as I reached different conclusions to those set out by the investigator, and as such both parties had the opportunity to respond further.

I didn't therefore consider at that time that an oral hearing was necessary. And I said that these are only likely to be held where it's felt that the outcome of a complaint couldn't fairly and reasonably be determined on the basis of the available documentary evidence.

But I also said that, if Mr T's representative felt that this was the case here, it should set out its reasons and I could then consider the request.

As to my findings within that provisional decision, I said that I thought that the complaint should be upheld. In summary, my view was that, if Mr T had been properly informed of the effect of the transfer on the LTA excess charge, and particularly on the critical yield to match the scheme benefits, it was more likely than not that he wouldn't have transferred.

But I also set out a "third option", which was that Mr T could have retained and taken his scheme benefits at an optimal point in the near future which would have crystallised the OPS benefits, combined with his defined contribution pension funds, comfortably below the FP16 limit of £1.25m, and provided headroom for investment growth on the defined contribution fund.

The following is an extract from that provisional decision.

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I intend to keep these provisional findings fairly brief, for what I hope will be obvious reasons. Put simply, I think there was an additional option for Mr T which wasn't explored as part of the analysis undertaken by deVere, and one which, if set out to him as a means of either significantly reducing or eliminating altogether his liability to a LTA charge, I think it's more likely than not he would have chosen.

As a preliminary finding, I don't think there's disagreement between the investigator and Mr T's representative that deVere's analysis should have factored in the effect on the LTA of the transfer. The investigator's view is that this wouldn't have made a difference to Mr T's ultimate decision to transfer, whereas the representative firmly believes the opposite to be true.

And I have sympathy with the latter's viewpoint. deVere did need to provide a sufficiently detailed analysis of Mr T's position for him to be in a fully informed position to make a decision – including one which was to act against the advice of deVere. I think the investigator makes a good point about Mr T having recently secured FP16, giving him a fixed LTA of £1.25m and it being more likely than not that this isn't something he would

have entered into lightly, or without understanding what it meant – especially given the potential impact in terms of the charge for exceeding the LTA.

It seems improbable to me that Mr T wouldn't have appreciated what was intended by securing FP16. But I do then acknowledge what Mr T's representative has said about him not being a financial professional, and not readily understanding the differences between the available protections and what this might mean for his pension benefits. And I think it's one thing to have the general notion that protection is in place, but another to have sufficient financial - specifically pensions - acumen to appreciate what this might mean for a transfer of defined benefits. This was much more the domain of deVere, and I do think it was its responsibility to ensure that Mr T appreciated the financial consequences of what was being proposed.

And even on the basis that the transfer would immediately increase any LTA charge, as set out by the representative, and that this would increase the critical yield by approximately a third, I think that this would have given Mr T significant pause for thought. He may have been keen to take control of his pension and capitalise on the potential for enhanced growth, but if it had been explained to him that any such growth would also be impacted by an LTA charge, I think this would, more likely than not, have altered his perspective on this.

But as I've alluded to above, I think there was a further option here, and one which I think should have been explored by deVere. My understanding is that, on the basis of the scheme income which would have been immediately available to Mr T in 2016, this wouldn't have exceeded the LTA. On the basis of the "20 times" calculation, the income of just under £37,000 pa would have amounted to just under £740,000. If the additional defined contribution fund value of around £320,000 was added, this was still comfortably below £1.25m, and would have provided headroom for investment growth on the latter of nearly £200,000.

I've noted that Mr T didn't envisage needing to withdraw pension income or capital at the time, but if he'd been made aware of the LTA charge which would otherwise be imposed, either as a result of the transfer, or by taking revalued scheme benefits later on, I can't currently see why he wouldn't simply have been best advised to begin taking the scheme benefits either at that point, or perhaps – given the headroom available as set out above – in a few years' time. This situation could in fact have been monitored so that the optimal time for taking the scheme benefits could be judged.

Mr T would then have taken benefits when he was approaching the LTA limit, taking into account his other pension assets. Although this would have meant receiving pension benefits earlier than planned, with a lower starting income, he would of course receive the income for longer – and if the income wasn't required, he could either invest it as he saw fit or immediately gift it away so as to avoid liability on it to inheritance tax.

But perhaps most compellingly of all, the otherwise presumed inevitability of Mr T needing to pay an LTA charge of some description could, as far as I can tell, be avoided altogether.

If this had been presented as an option, and as a means of avoiding the LTA charge but still receiving the benefit of the guaranteed scheme income (and I've also noted Mr T's originally recorded aversion to taking any risk with his pension funds) I think it's more likely than not that he would have opted for this and simply crystallised the scheme benefits at the most advantageous point.

My current view, therefore, is that deVere should determine at which age it would have been best for Mr T to have begun taking his scheme benefits, on the basis that his overall

pension benefits, including the separate defined contribution fund, would be lower than the FP16 LTA of £1.25m, and that there would remain headroom for investment growth of the defined contribution fund of, say, £50,000. I appreciate that deVere may not have been advising Mr T beyond a recommendation to begin taking scheme benefits at the optimal time, but with such a recommendation, Mr T would have been in a position to seek this type of rudimentary yearly analysis elsewhere.

As with Mr T's representative, I think the most prudent manner of then calculating the loss caused to Mr T by not doing so would be to undertake a pension review style calculation, assuming that Mr T would have begun to take scheme benefits at the date identified above, and that he would have taken the full amount of tax free cash.

This would effectively offset the loss of income and capital since the optimal date of taking scheme benefits against any future gain produced by Mr T's SIPP and defined contribution benefits.

But within that calculation should also be factored in the likely LTA charge, using pension review discount rates, which Mr T would need to pay at age 65 as a result of transferring and not taking scheme benefits at the optimal time.

Any payment of loss into a pension plan would only exacerbate Mr T's liability to an LTA charge, and so any identified loss should be paid to him directly, with a notional deduction to reflect the fact that he would have income tax on the benefits. I'm assuming that Mr T would be a basic rate taxpayer in retirement, given the likely starting income from the scheme, but I appreciate that there may be alternative views on this, given the size of his overall pension fund. As such, my current view is that the notional deduction of 20% should be applied to 75% of the loss – resulting in an overall notional deduction of 15%."

In response, Mr T's representative said that deVere should either agree or consult with Mr T regarding the optimal date that he would have taken his scheme benefits to avoid paying the LTA.

deVere disagreed with my findings, saying the following in summary relating to the submissions made by Mr T's representative and the investigator's findings:

- The submissions from Mr T and his representative were flawed, misleading, incomplete and inaccurate.
- The assertions made regarding what might have transpired, had the adviser provided more information to Mr T, weren't relevant given the broader evidence relating to the case (as set out below).
- It wasn't fair to require a higher burden of disclosure from an adviser in an insistent client scenario, particularly when the adviser had sought to provide a recommendation based upon the objectives and needs as required by COBS 2.1.
- The additional actions which Mr T's representative had said should have happened here were outside the remit of an adviser when dealing with an insistent client, as defined by COBS 9.5A.
- The FCA guidance on insistent clients said that advisers should follow the normal advice rules first, in terms of gaining knowledge of the client's financial situation and objectives, and then also act honestly, fairly and professionally in the best interests of the clients.

- It also required firms to communicate in a way which was clear, fair and not misleading. But there was no rule to prevent advisers transacting business against the advice which had been given.

- Mr T gave clear reasons for his insistence on transferring in his own words and the advice given to Mr T was clear, fair and not misleading. Mr T confirmed that he understood the implications of the transfer on his LTA protection, and having identified factors which would mean that the transfer couldn't be recommended, the adviser hadn't been obliged to then provide additional evidence in support of the recommendation to retain the scheme benefits.

- The regulator's presumption was that such transfers would be unsuitable unless the client could demonstrate otherwise. It wasn't the role of the adviser to persuade the client to retain their scheme benefits and it didn't need to provide additional evidence to support the status quo.

- Mr T was already in breach of the LTA protection when the advice was given, and he acknowledged this himself. It was reasonable to therefore conclude that he was determined to transfer benefits irrespective of the advice he received.

- The outcome of the provisional decision was based on what might have happened had Mr T been in possession of additional information. But if this was tenable, there was a corollary, which was what the adviser would have done had they been in possession of the undisclosed correct information.

- Mr T had provided inaccurate information about his finances, which, as a director and shareholder of the scheme's sponsor, it found difficult to believe was an oversight.

- The steps taken by the adviser to assess Mr T's objectives were documented in the file. It was recorded that Mr T didn't want to take any risk with his pension fund, which was a contributory factor in recommending against the transfer. He didn't receive a questionnaire to assess his attitude to risk because the situation didn't warrant it.

- Mr T reverted to the adviser with the request to transfer and an exercise was then undertaken to assess his risk attitude, which was determined as being "high" – although he and the adviser agreed to reduce this to "average" to reflect the size of the pension fund.

- Mr T's shift in risk attitude remained an anomaly, and had apparently happened following discussions with peers, despite advice to the contrary. But it was possible to infer the motives by assessing the corporate actions and decisions made. The advice was not to transfer, but Mr T pursued the matter via the insistent client route.

- As a board director of a large company, it was reasonable to assume that Mr T understood the statements he was making and their financial implications, along with having an understanding of the LTA protection he'd put in place.

- Mr T would have been aware of the LTA protection he had in place, either through previous advice or his own business acumen, and it was unreasonable to uphold the complaint when he had withheld this important information.

- Mr T was an active director of the scheme sponsor (the employer), and according to the February 2019 accounts, had share options amounting to 12.7% of the total available options. In light of the sale of his employer in August 2019, these options would have become worth more than their face value. And having removed his pension liability from the defined benefits scheme, the company also became a more valuable entity, from which Mr T would have benefitted.

- The due diligence associated with the purchase of a company is a lengthy activity and the impact of defined benefit liabilities on the value of a firm was well documented. Mr T, as a significant shareholding director of the company being sold, would have been actively involved in, or at least aware of, discussions around the sale, and the sale of the business would therefore have played a major part in his decision to transfer.

- Mr T hadn't shared any of this with deVere, and it only uncovered this after the event. It had evidence that discussions around the sale of the business were well advanced by the time of its involvement with the scheme membership, to the extent that it sought assurances that no pressure had been placed on members to transfer in light of the transaction. But the fact that Mr T chose not to share either his share ownership or his knowledge of the transaction reinforced its view that he didn't engage with it in good faith.

- It was possible to apply for enhanced protection up until 2009 and so Mr T would have been able to accrue further pension benefits beyond 2006. But as its advice was in any case to retain the scheme benefits, a relevant benefits accrual test wouldn't have been carried out. It would also have expected the scheme administrator to have highlighted any enhanced protection members had at the time of sharing member information.

- But the focus on LTA issues was misplaced. Mr T's change in risk attitude demonstrated that something else motivated him to transfer his defined benefits – likely the sale of the business – and so he was determined to transfer irrespective of any LTA consequences.

- It didn't agree that there was a requirement to undertake an appropriate limit test to see if the transfer would be permitted under enhanced protection. The advice was to not transfer. Furthermore, Mr T was aware of the value of his accrued pension rights, hence the reason for applying for FP16, and he'd told the adviser that he was aware of how the excess would be treated.

- As to the position of Mr T's representative that, even if Mr T was on course to pay an excess charge, an analysis should have been undertaken to determine the effect of this if the transfer occurred, it said that this was flawed as Mr T would in any case have transferred for the sake of the gain he would achieve through the sale of the employer.

- In any case, Mr T was aware that his pension benefits exceeded the LTA at the point of the transfer, was aware of how the excess would be treated and so will also have been aware that the bigger the fund, the higher the tax charge.

- With regard to the assertion that Mr T hadn't misled the adviser about the protection he held, but rather hadn't understood the full import of the LTA, the effect of protection, nor the different protections available, deVere said that the

only protections available to Mr T in 2016 were FP or Individual Protection (IP), or both. Whoever provided advice to him at that point would have made the difference clear to him. That Mr T had said that he'd ceased pension contributions demonstrated that he understood the difference between FP and IP.

- The recommendation to not transfer was based upon Mr T's wants, needs and objectives, his desire to keep his options open at retirement and the security it provided - and that he had no need to access his pension at that stage. It repeated its view that Mr T's decision to transfer, some three months after the recommendation to not do so, was motivated by other factors, in particular the significant gain as a shareholder, which would in any case have superseded the LTA considerations.

- These additional considerations weren't known by, or disclosed to, the adviser, and so they couldn't be incorporated into the advice.

- As to the point relating to the increased critical yield to match the scheme benefits due to the tax charge which would be levied on the excess over the LTA following the transfer, deVere said that a TVAS and critical yield are generic and not specific to an individual's circumstances. They shouldn't be the foundation on which a decision about whether or not to transfer should be based. Rather, this should be based on an individual's objectives. Its advice was in any case to retain the benefits.

- deVere also disagreed with the position of Mr T's representative that he wouldn't have transferred if he'd been presented with the "correct analysis". The correct analysis was undertaken on the basis of Mr T's objectives, wants and needs. Advice shouldn't be given on the basis of achieving specific rates of return. If it was, due to the manner of calculating CETVs, all transfer proposals would be dismissed. The point was that, to justify a transfer of defined benefits, there needed to be a requirement to take benefits in a different form from those offered by the scheme, and this wasn't present here, hence the recommendation to not transfer.

Specifically addressing my findings in the provisional decision, deVere said the following:

- It repeated its point that Mr T must have understood the nature of the protection he had secured by way of FP16, and if he didn't then this wasn't the fault of its adviser. It could only assume that Mr T had sought advice on this, and would have been aware of the need to do so given the significant sums involved. Further, Mr T indicated that he understood the implications of transferring on his LTA and was nevertheless determined to transfer.

- It was unverifiable hypothesis to conclude that Mr T would have changed his mind about transferring if the correct critical yield had been presented to him.

- The LTA tax charge could have been planned for at age 75, but Mr T removed deVere as his advisers in 2018.

- The position that Mr T was allowed by the adviser to proceed with the transfer in the absence of full information wasn't tenable in light of the corporate activity from which Mr T was due to make a substantial gain.

- As to my suggestion that Mr T could have begun to take the retained scheme benefits at the optimal time, deVere said that he was an additional rate taxpayer and he had no need to access the scheme pension. It would have been taxed at 45%, and he wouldn't have been able to redirect the income into a pension wrapper due to the fixed protection.

- There was no harm in building funds above the LTA, so long as careful management and advice was implemented. A decision on whether to access scheme benefits early shouldn't be made in order to mitigate an LTA tax charge, but be focussed on future income needs. If Mr T took his scheme income early, this would have been half of what he needed to cover his outgoings. He would be financially compromised if he became ill and couldn't work, or died suddenly.

- The prospect of Mr T paying an income tax bill of over £165,000 from 2016 to his selected retirement age wasn't an acceptable customer outcome.

deVere also said that my proposal for it to calculate redress wasn't a fair outcome and failed to take account of Mr T's wider situation which it had described and produced evidence for. It added that, as my provisional decision had been constrained and informed by the information presented by Mr T and his representative, it requested that I reconsider the position.

It further said that it would be happy to demonstrate the benefit to Mr T over the longer term of not taking his scheme benefits at the earlier point, but it said that this would require valuations of Mr T's SIPP and his other defined contribution pension funds. It said that it could show that, with careful planning, he and his family will be better off.

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'd firstly reassure deVere that no higher burden of disclosure on its adviser has been applied here. As commented on within the regulator's guidance which it has quoted, I would expect the same level of disclosure for both insistent and non-insistent clients, and this would involve the provision of important and relevant information so that a consumer could make a fully informed decision as to whether to transfer their defined benefits.

And my view here is that the information provided by deVere was misleading – it omitted the effect of the transfer on the charge on the LTA excess, and on the critical yields which it quoted, and should very much have been a part of a rationale as to whether Mr T should transfer, especially if it was then in any case going to transact the business on an insistent client basis.

The regulatory presumption is indeed that such a transfer would unsuitable, but a firm must still give the reasons for this, especially, as I've said above, if it is then going to transact the business anyway. deVere failed to provide the complete picture, and so Mr T was in an uniformed position. The natural conclusion otherwise would be that a firm could simply say a transfer was unsuitable because a client hadn't demonstrated that it was, provide no or very few reasons for this, but then transact the business anyway. Reasons have to be given – otherwise, the client cannot reasonably or credibly be said to be insistent.

deVere has said that it covered what it needed to when providing the recommendation to not transfer, and that it didn't need to provide "additional evidence". But I'd query as to what it considers might constitute "additional evidence". deVere seems to be under the impression

that information such as the correct critical yield, which should either factor in the effect of the LTA excess tax charge, or at the very least have some commentary that this would be higher due its effect, is optional “additional evidence”.

For clarity, my firm view is that it’s not. Put simply, the rationale for either transferring or not transferring – especially where the latter is followed by an insistent client process - must include all aspects relevant to the suitability of the transfer. It should be an accurate assessment of the reasons to transfer or not, and this would reasonably include a fair representation of both the critical yield and any adverse effects, such as that on the LTA tax charge, which might be incurred by transferring. To omit such important aspects from a suitability assessment, and then transact the business on an insistent client basis, would not be acting in a client’s best interests.

As to the matter of enhanced protection, my understanding is that, whilst it could have been applied for up to 2009, benefit accrual for defined contributions needed to have ceased by April 2006. For defined benefit schemes, this could continue up to an appropriate limit, but no test was applied to determine whether this was the case.

But if deVere expected the scheme administrator to have shared any details of enhanced protection with it, but none was forthcoming, this must surely have been a clear indication, if not confirmation, that Mr T didn’t have enhanced protection in place. And it may not have thought that it needed to conduct an appropriate limit test to determine whether the transfer would be permitted under enhanced protection, but if Mr T was determined to proceed, these are the types of consequences of which he needed to be aware, and again, especially if deVere was going to transact the business on an insistent client basis.

Notwithstanding the above, on the assumption that Mr T did have enhanced protection, deVere ought reasonably to have identified that he may have already breached this. But he could still have secured FP16 (as was in fact the case), taken scheme benefits at the optimal time, and then not been in breach of the £1.25m LTA.

The capitalised value of Mr T’s pension benefits didn’t exceed £1.25m (the level of protection provided by FP16) before the transfer – this is I’m afraid a flawed point repeated by deVere throughout. And although deVere has also said that Mr T was aware and accepting of this, it should in my view have pointed out that this wasn’t in fact the case. He may have been on course to exceed his LTA at retirement, but Mr T could have remained below the limit of £1.25m through prudent management of his defined benefit and defined contributions benefits.

And I don’t think it was beyond its remit, when providing advice, to confirm that Mr T shouldn’t transfer on the basis that such prudent planning and management of his defined benefits and defined contributions pension funds could ensure that he wouldn’t breach his LTA. Even if it didn’t provide advice specific as to when Mr T should begin drawing on is scheme benefits to avoid the LTA, my view is that the general principle of doing so would reasonably have fallen within a holistic assessment of whether the transfer was suitable – and if not, as would have been the case here, why that was so.

deVere has also downplayed the effect of the LTA charge on the required critical yield by saying that such measures are generic, rather than specific to an individual’s circumstances. I’m afraid I don’t understand this point. The critical yield is determined by comparing the specific scheme benefits which will likely be received by a member against those specific pension fund benefits which will be created through the transfer – taking into account all the individual’s specific circumstances, including age, term to retirement, married status etc. They’re not therefore generic, but determined by the individual’s specific circumstances.

I'd agree that a critical yield shouldn't be the only determining factor when considering the suitability of a proposed transfer, but it's nevertheless a key indication of the level of growth which will need to be achieved to match the relinquished scheme benefits. And I maintain the view that the difference between 6.6% pa and 8.8% pa is significant, and is likely to have prompted Mr T to reconsider. I've noted the apparent elevation in Mr T's attitude to investment risk between October 2016 and February 2017, which deVere has described as anomalous, but I deal with this further below.

deVere has further said that there would be no harm in exceeding the LTA, so long as proper planning and management was implemented around this. But this is precisely my point, in that careful planning and management could and would have prevented Mr T from exceeding the LTA in the first place. And that this could, and should, have happened as a part of the assessment as to whether he should transfer his defined benefits. Had this happened, Mr T could then have received a guaranteed income, aligned with his original aversion to investment risk, which he could then invest, albeit not in a pension fund, but potentially in another type of tax efficient investment vehicle.

The scheme benefits would have been proportionally lower to reflect the earlier payment, but as I said in the provisional decision, would have been payable for longer.

Mr T may well also have been paying additional tax at 45% on the scheme income, but this compares on the face of it rather favourably to the 55% which would be levied on a lump sum withdrawal of the excess over the LTA, or the 25% in addition to the regular income tax rate of the individual which would be levied on income withdrawals. So if Mr T was presumed to be a basic rate taxpayer in retirement, then the effective tax charge on the excess would be 45% - 20% usual tax rate, plus the 25% LTA tax charge on top of his

Advice to not transfer and instead implement effective planning to not exceed the LTA would also have prevented the excess over the LTA escalating further as the pension fund would be presumed to grow in the intervening years up to Mr T's planned retirement. Mr T would effectively end up paying a higher tax charge on not just the transferred sum, but whatever that had grown to by the time he came to take the benefits.

deVere's points relating to the early accessed scheme pension representing half of what Mr T needed to cover outgoings, and what would happen if he lost his job or died, sound very much like reasons *to* transfer, which is contrary to the advice it actually gave. To clarify, had Mr T adhered to deVere's recommendation and not transferred, Mr or Mrs T would have found themselves in the same position with the scheme benefits. An unemployed Mr T would have either needed to find alternative employment, which I don't think can be ruled out, or begun to take the scheme benefits. The position would be the same. Unless of course the recommendation had been to transfer, which would mean that Mr T could take higher sums through flexi access drawdown. As I've said above, however, this was the opposite of deVere's advice to retain the scheme benefits.

And had Mr T died, then it seems likely that Mrs T would have received the same death in service benefits if he was still employed. If Mr T had begun to take the scheme pension benefits, Mrs T would receive a widow's scheme pension. Had Mr T retained the scheme benefits according to deVere's recommendation, but Mr T hadn't yet begun to take them, Mrs T would also at that point have begun to receive the widow's pension.

So on the basis of Mr T having retained the scheme benefits, as recommended by deVere, the position in terms of unemployment or death would have been broadly neutral.

Furthermore, Mr T had a defined contribution pension fund of over £300,000 which he or Mrs T could access if required in extreme change of circumstances. I think it's also likely that Mr

T is an individual of some significant financial means, illustrated to good effect by deVere's points relating to his shareholdings in his employer. And so it seems likely to me that, by accessing the scheme benefits earlier than planned, Mr T wouldn't have been jeopardizing his and Mrs T's future financial security. On the contrary, I think the prospect of not needing to pay an unknown, but likely substantial, charge on the excess over the LTA and instead receiving a guaranteed, escalating income, would have resulted in them feeling more, not less, financially secure.

deVere has said that an income tax bill of over £165,000 from 2016 to his retirement date wouldn't be an acceptable customer outcome, but for the reasons set out above, it's difficult to see how this would be any less palatable than the likely higher charge which will be levied on the excess over the LTA as a result of the transfer.

Would Mr T in any case have transferred if provided with a complete analysis and recommendation?

deVere has said that, even if it had provided what it considers to have been "additional information", Mr T would in any case have proceeded with the transfer.

My view as set out in the provisional decision was that, if properly informed about the effect of the transfer on the breach of the LTA, and on the critical yield required to match the scheme benefits, along with the possibility of avoiding the LTA excess charge altogether by retaining the scheme benefits and taking them at the optimal time, Mr T would have accepted the recommendation to retain those benefits.

But deVere has suggested what it considers to be an additionally motivating factor behind the transfer, and which is says may well account for the anomalous elevation in Mr T's attitude to investment risk between October 2016 and February 2017. This is that Mr T, as a shareholder in his employer, would have appreciated that, through a sale of the company which would be unencumbered by defined benefit pension liabilities such as his own, his shareholding would have increased in value.

And so I've put this argument to Mr T's representative, who has said that the potential to sell the company had been ongoing for several years and it was a matter of awaiting an acceptable offer. The exercise relating to the review of the scheme pension benefits was separate and very much a matter of individual choice, and the company set out to both the directors and employees that independent advice was being provided so that the merits of transferring could be assessed for each individual, it added.

The representative also said that Mr T had confirmed that he was unaware of any potential benefit to the value of the company as a result of him transferring his pension benefits, and he didn't consider it at all likely that, had he not transferred, the sale of the company wouldn't have achieved the same price.

Mr T further said that he was unaware of how many directors had transferred their defined benefits out of the scheme, and he suggested that we approach deVere for this information as it had advised many, if not all, of the company's employees.

And so we asked the question of deVere, which said that it was aware that, as at February 2018, five directors (56%) had transferred out of the scheme. It was unaware of what the other four had done, as it hadn't dealt with them. Of the five it did advise, it recommended that four (aside from Mr T) transfer out. Mr T proceeded against its advice to not transfer out.

It further said that it was aware that some other senior managers who weren't directors also transferred out.

I think deVere has raised an interesting point, and I've thought about it carefully, but overall, given the available evidence, I don't think that this demonstrates clearly, or even on the basis of what is more likely than not to have been the case, that Mr T was influenced in his decision making by the pending sale of the company.

I think that, had deVere advised against the other four directors transferring, but they had nevertheless done so, this might strengthen the argument made by deVere in that regard. But that isn't what happened here – they simply followed its advice to transfer.

As such, I think it's interesting speculation on potential influencing factors here, but not something which I think I could fairly or reasonably deem to be an actual determinative aspect. Moreover, if Mr T was acting against deVere's advice on the basis of seeking to improve the company's appeal to a potential buyer, I see no reason as to why Mr T wouldn't in any case have been transparent with deVere about this at the time. deVere has itself said that Mr T gave clear reasons as to why he still wished to proceed with the transfer, against its advice. If a personal benefit to him through the transferring out of his own pension liabilities featured in that rationale, and on the basis that the advice process would have been conducted in confidentiality, then it could only have strengthened his case. But it was absent from his reasoning.

And so, on balance, I don't think I can fairly or reasonably conclude that the pending sale of the company was the catalyst for Mr T to transfer. I think he did so on the basis of a consideration of the assessment undertaken by deVere, albeit with significant omissions which, for the reasons given, if corrected, I think would have changed his decision.

Summary

My view remains that, for all the reasons given, Mr T would have been better off retaining his scheme benefits and accessing them early to avoid the LTA excess charge altogether.

deVere's further suggested that it could demonstrate to Mr T how, with careful planning, and even having acted against its advice through transferring, Mr T would have been better off by not beginning to access his scheme benefits early. I think this will be a matter for Mr T and deVere, separate to this decision.

If deVere can demonstrate to Mr T by way of the redress calculation and other recommendations that he would still – and may still – be better off through not having accessed the scheme benefits early, then Mr T may accept that outcome.

As it stands, however, my view remains that deVere should undertake the redress calculation proposed in the provisional decision and pay any loss directly to him.

Putting things right

deVere and Partners (UK) Limited should determine at which age it would have been best for Mr T to have begun taking his scheme benefits, on the basis that his overall pension benefits, including the separate defined contribution fund, would be lower than the FP16 LTA of £1.25m, and that there would remain headroom for investment growth of £50,000 on the defined contribution fund. Mr T would then have needed to decide how and when he would access the latter, given that there would be an additional test of any remaining drawdown or uncrystallised funds at 75, but I think any further potential to an LTA charge at that age could have been addressed by the same kind of prudent management – and which deVere says it could itself have employed - which would have avoided the LTA earlier on.

As set out in the provisional decision, I appreciate that deVere and Partners (UK) Limited may not have been advising Mr T beyond a recommendation to retain his scheme benefits – which I think, for the reasons set out above, as part of the rationale should have included the manner of being able to avoid the LTA charge altogether - and begin taking them at the optimal time to avoid incurring an LTA charge, but with such a recommendation, Mr T would have been in a position to seek this type of rudimentary yearly analysis elsewhere.

And I remain of the view that the most prudent manner of then calculating the loss caused to Mr T by not doing so would be to undertake a pension review style calculation, assuming that Mr T would have begun to take scheme benefits at the date identified above, and that he would have taken the full amount of tax free cash.

This would effectively offset the loss of income and capital since the optimal date of taking scheme benefits against any future gain produced by Mr T's SIPP and defined contribution benefits.

But within that calculation should also be factored in the likely LTA charge, using pension review discount rates, which Mr T would need to pay at age 65 as a result of transferring and not taking scheme benefits at the optimal time.

Any payment of loss into a pension plan would only exacerbate Mr T's liability to an LTA charge, and so any identified loss should be paid to him directly, with a notional deduction to reflect the fact that he would have income tax on the benefits. I said in the provisional decision that I'd assumed that Mr T would be a basic rate taxpayer in retirement, given the likely starting income from the scheme, but I also said that I appreciated that there may be alternative views on this, given the size of his overall pension fund.

No dissenting views on this specific point have been forthcoming, however, and so the notional deduction of 20% should be applied to 75% of the loss – resulting in an overall notional deduction of 15%.

My final decision

My final decision is that I uphold the complaint and direct deVere and Partners (UK) Limited to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 3 February 2023.

Philip Miller
Ombudsman