DRN-3851934

The complaint

I set out the background to this complaint in my earlier provisional decision, for clarity, I repeat it here.

Mr B complains about a switch from his Self-Invested Personal Pension (SIPP) plan to another SIPP. He says he was advised by B K Luker Financial Services Ltd trading as Luxe Capital (Luxe) to move his SIPP in December 2019 and this advice was unsuitable. Mr B would like to be put back in the same position as if the transfer had not taken place.

Mr B is being represented by a third party, but for ease, I'll refer to all representations as being made by Mr B.

What happened

In November 2019, Mr B received a telephone call from an Adviser at Luxe offering a review of his retirement planning needs. At the time, he held a SIPP with Aegon that Luxe subsequently advised he move into a SIPP with Davies & Co. The Adviser recommended a discretionary fund management (DFM) portfolio. At the same time, Luxe would then provide an ongoing service to him.

At the time the recommendation was made, Mr B was aged 57 and married. The fact-find (FF) indicated he was a Watchmaker with no savings or other investments and that he owned his home which had a mortgage of £270,000 on it. The Aegon plan had a transfer value of £34,661 and his desired retirement age was noted as 75. His wife's details and personal financial information was not collected.

Luxe carried out a risk profiling exercise and determined Mr B had a 'high medium' (or 7 out of 10) attitude to risk (ATR). Luxe wrote to Mr B on 26 November 2019 and recommended that he transfer his Aegon plan into a new SIPP on 5 December 2019.

The SIPP was established on 10 January 2020 and the transferred funds were invested into a discretionary portfolio as follows:

- 39% Fixed Income
- 56% Global Equity
- 5% private equities and cash

In March 2021, Mr B submitted a complaint to Luxe. He told them, in summary, the original advice to transfer from Aegon to the SIPP was unsuitable and didn't take full out account of his circumstances. He didn't feel a bespoke discretionary arrangement was either necessary or suitable for him.

Luxe issued its final response letter on 19 May 2021, declining his complaint. They stated they had explained to him from the outset they were providing restricted financial advice. They went on to say:

- Complete disclosure of their restricted proposition and the fees were made upfront and in writing. They said Mr B was happy to proceed at the time.
- The fact-find meeting with Mr B was complimentary with no obligation on his part to proceed with Luxe.
- They had completed a detailed 'know your customer' exercise to determine Mr B's personal and financial circumstances including his objectives, priorities, affordability, his ATR and his capacity for loss (CFL).
- Luxe had fully complied with COBS (the Regulators Conduct of Business rules).
- The investment Luxe made was in line with his stated ATR and CFL along with his stated objectives and time horizon.
- The ATR tool that Luxe used has been independently approved and is used industry wide.
- They feel all the risks, charges and drawbacks were clearly explained by the Adviser at the time of the advice.

Dissatisfied, Mr B brought his complaint to this service on 20 June 2021.

Luxe told this service they believed Mr B's case was without merit and reiterated the points they made in their complaint resolution letter.

In August 2021, Luxe advised Mr B to move out of the Davies & Co SIPP and into an Aviva Personal Pension. The Adviser recommended Mr B invest in Aviva's Investors Multi-Asset Fund Plus III. According to Aviva's fund factsheet, it has a risk measurement score of 5 out of 7. By this point Mr B's SIPP had reduced in value to £28,381 and the Adviser had determined his ATR was now a 'medium'.

The complaint was considered by one of our investigators in January 2022. He concluded that Luxe had treated Mr B unfairly. He wasn't satisfied the transfer was in Mr B's best interests. He also said, in summary:

- He wasn't convinced given the size of Mr B's pension fund that he needed someone managing the monies on a bespoke basis.
- He felt Mr B's objective of the potential for greater growth, could've been met by staying where he was and simply switching funds.
- Advisers must ensure recommendations are suitable and it's not enough to simply explain the new plan would cost more without proving the new plan is in the best interests of the customer.
- He didn't feel the alternative options were properly discounted.

Luxe however, disagreed with our investigator's findings. In summary, they said they take suitability and treating customers fairly extremely seriously within their firm and found the decision unjust. They also said the following:

- They felt the advice was suitable because it had been independently checked by their third-party compliance provider.

- The decision to switch was driven solely by Mr B who was already invested and was attracted by the potential of higher growth.

- They said it met his objectives, he fully understood the proposition and was extremely keen to proceed.

- They pointed out that Mr B had been given ample time to read and reflect upon the Suitability Report (SR) they'd sent him along with all of the necessary pre-sale information before reaching an informed decision.

- They also felt his existing Aegon plan wasn't suitable for his needs because part of the monies were invested outside of his stated risk appetite.

Luxe believe Mr B only complained because of the performance of his plan and wouldn't have done so had it not been for the significant economic and political factors that have negatively impacted fund values over recent months.

Our investigator was not persuaded to change his view as Luxe did not present any new arguments he'd not already considered.

Luxe asked the investigator to pass the case to an Ombudsman to review that outcome.

After receiving my provisional decision, Mr B contacted this service to confirm they accepted the decision and had no further comment to make.

Luxe however explained they did not agree with the provisional decision. Luxe said they've always acted in Mr B's best interests and treated him fairly. I've summarised Luxe's points in far less detail than them and I've done so using my own words. I'm not going to respond to every single point made by Luxe. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here. Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts. If there's something I've not mentioned, it isn't because I've ignored it. I haven't. I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome. Luxe also said, in summary:

- That following their discussions with Mr B, he was in total agreement with the ATR level their adviser had confirmed.

- Luxe also said that despite a DFM solution being recommended, the risk was limited by a moderate risk portfolio being arranged. They felt the small increase in charges was worth the potential for higher returns.

- Luxe went on to say they always discuss potential returns with clients, setting out that past performance is only hypothetical and not a guide to the future.

- Luxe concluded by stating Mr B had willingly accepted their recommendation and decided to proceed.

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.

In my provisional decision, I said I think what's at the heart of this complaint is, whether it was right for Luxe to move Mr B from his existing SIPP at Aegon, into a DFM with a new provider, Davies & Co. I didn't think it was and I'll explain why below.

At the time of Luxe's advice to Mr B, he was 57 years old, a Watchmaker and in good health. He was a standard retail investor with just over 17 years until retirement. The plan being switched was most if not all of his retirement provision. His main objectives were noted in the suitability report as:

- *You have a pension with Aegon that you would now like to review and consider its ongoing suitability*
- *You moved into the pension with Aegon around 2 years ago, since then you feel the investment has not really performed very well and stayed pretty much the same. You would like to look at the possibility of transferring to a new arrangement where you could get better returns and perhaps take a bit more risk with your money than your Aegon policy.*
- *You said it would be helpful to speak with someone regularly who can help you understand the pension, where the money has been invested and any potential changes that could be made to keep the pension on track to fund your retirement, advice on making contributions etc.*
- *We discussed both our service with regular reviews and updated, and that of a discretionary fund manager. Although cheaper alternatives may be available via independent advice, you felt our service would benefit you so you can keep on top of how your investments are performing and be able to make any changes if needed. I explained that this service would work out more expensive but has the potential to generate better returns and you were to pay the extra for this*.

In my provisional decision, I said I didn't believe any of those objectives provide a compelling enough catalyst when considering Mr B's wider financial circumstances to switch his existing pension. Whilst Mr B, when educated about the differences between DFM and a passive or managed fund, may have been attracted to the potential benefits of having his money managed in a bespoke style, that doesn't necessarily mean it was the right thing for him. Indeed, Luxe have explained in their submissions to this service, that '*the decision to switch was driven solely by Mr B who was already invested and was attracted by the potential of higher growth'*. The advice to transfer in this instance wasn't undertaken on an insistent client basis, it was adviser led. Just because a client is keen and wishes to act, doesn't necessarily mean it's in their best interest to do so and in such circumstances, it's incumbent on the adviser to help guide the consumer down the route that's right for them. That's particularly more important when the adviser is aware the client is inexperienced.

Luxe have indicated within the FF they've categorised Mr B as inexperienced. What little knowledge he has of the market appears to have been gained from holding his former pension plan. The FF is silent on whether Mr B has previously held or made any other active decisions to buy and sell equity-based investments of his own accord.

I think if most inexperienced customers were asked if they'd like better returns on their investment, most would likely say yes. Mr B moved into the Aegon plan in July 2018 and received advice from Luxe to transfer the monies only 17 months later. The SR states that '*you feel the investment has not really performed very well and stayed pretty much the* *same'*. Whilst that may be the view of the consumer, it doesn't appear the Adviser has challenged that perspective because later within the SR, it suggests rather than staying static, the Aegon funds have broadly performed reasonably well. Allied to this, it appears to ignore the fact that equity-based investments should be considered over the medium term and the adviser has failed to challenge this view by looking at less than 2 years' worth of performance in isolation.

In respect of Mr B's other objectives, it appears the existing arrangement he held was already meeting those needs. The objectives within the SR fail to identify what he's not getting from his existing service that Luxe were able to offer to warrant changing the status-quo.

I also said in my provisional decision that Luxe explained they used generic industry software to help determine Mr B's ATR. Whilst I have no reason to doubt the accuracy of the output noted, it's incumbent on Advisers to ensure that information is considered in light of other facts they know about the consumers wider personal circumstances. So, whilst it's important Luxe establish the level of risk Mr B wanted to take, I don't believe they've considered that robustly enough against the risk he is *able* to take in light of his wider financial circumstances. That's why the CFL assessment is so important.

The overriding aim of the capacity for loss discussion is to understand what impact, if any, a fall in the value of the investments would have on the customer's standard of living. In the SR that Luxe sent to Mr B, they determined he had a 'medium' CFL, which they defined as follows:

Although you could tolerate the loss of a significant portion of your investment, you should consider this against your expected timeframe for the investment. In view of your financial circumstances, you confirmed that you are willing and able to accept the potential volatility of investments and the possible losses that may be incurred in adopting the above risk category, whilst still maintaining your current standard of living'.

The FF completed at the time, stated that apart from a workplace pension scheme, Mr B had no savings or any other assets he could rely on to fund his retirement. Despite the fact the FF suggested he had disposable income of around £7,700 per annum, he held no emergency fund or other investments. Allied to this, he had an outstanding loan of £11,000 and an outstanding interest only mortgage, for which there is no repayment vehicle in place, of £270,000.

I explained that I acknowledged Mr B's occupation as a Watchmaker would likely mean any health issues may have a limited impact on his ability to work until 75. So, whilst he may have around 17 years on his side to invest and ride out the ups and downs of the market, I remain unconvinced Luxe's CFL assessment is a fair conclusion of his financial circumstances given his very limited wider wealth. The Adviser has stated Mr B has only just started paying into his employer's pension plan so, the benefits from that scheme will be limited. In addition, with no other savings or investments, the Aegon scheme made up the majority of Mr B's retirement fund. Therefore, should that fund fall in value, even to a limited extent, given its modest value of just over £30,000, I'm very much of the view it's likely to have a significant impact on his longer-term plans. I'm therefore not persuaded that Mr B has the capacity to take risks at the level Luxe claim.

In my provisional decision, I also thought it was important to acknowledge Mr B's plan is fully crystalised and as such, there is no scope to extract any tax-free cash from the fund. If Mr B does need to draw funds from the plan to cover short term emergency costs, given his current income, any withdrawal is likely to be taxable.

Moving to a bespoke managed solution will always cost customers more. Put simply, that's because there's more work involved in running those types of arrangement. Whilst they cost more than a typical 'off the shelf' managed or packaged fund, they still have a very important role to play in the financial advice market. More often than not, they're well suited to consumers who are experienced and have large funds to invest. With a more tailored investment service, comes increased costs. Therefore, a larger fund is more readily able to absorb those charges limiting the overall impact of the fees on the end fund. Whilst I should acknowledge Luxe provided a full cost disclosure to Mr B ahead of him investing, just because he was advised about the charges, doesn't necessarily make the decision to proceed the right one. I can think of no plausible reason why Mr B would benefit from having his monies managed on a bespoke basis when considering the size of fund and the increased drag the higher charges would have on it.

Any additional charge to a consumer would provide a strong reason not to proceed with a course of action. So, the benefits of switching would need to outweigh the cost to Mr B's pension, as he was unlikely to be able to recoup these charges through improved fund performance over the short to medium term.

I said in my earlier decision, I saw nothing to persuade me that Mr B was seeking a sophisticated investment proposition that would give him the chance to invest outside conventional funds that the SIPP would provide. Instead I think greater investment fund choice was of limited benefit when Mr B had little experience of investing in stocks and shares. There wasn't any explanation as to why he wanted a greater fund choice, or what investments he wanted to make that were not already available with his existing Aegon plan (which the SR acknowledges provides 4,800 fund choices). Furthermore, the value of his pension was relatively low, meaning that he was unlikely to be able to spread his investment across a significantly greater range of funds than his existing scheme already employed. And I don't think the adviser could reasonably conclude that Mr B wanted or needed access to non-standard investments, which the new SIPP could provide.

Finally, I explained that I had reflected on whether the DFM solution may have been suitable at that point because the Adviser was aware of other factors about the customer that may, for example, have justified investing in a bespoke portfolio with such a small fund. The file is silent on whether Mr B was potentially coming into further monies in the near future such as a large inheritance or significant pay increases that may have warranted a DFM over a packaged product. I therefore didn't believe it was either suitable for his current or future needs.

I also looked at the investment profiles of the Aegon and Davies & Co SIPPs pre and post recommendation. Prior to being moved to Luxe, Mr B's savings were invested in the following funds:

- L&G Pacific Index
- Fidelity Index Japan
- Fidelity Index UK
- Fidelity Index Emerging Markets
- Fidelity Index European
- Fidelity Index US
- FP Apollo Multi Asset Adventurous

- FP Apollo Multi Asset Balanced

The SR Luxe sent to Mr B said: '*You would like to look at the possibility of transferring to a new arrangement where you could get better returns and perhaps take a bit more risk with your money than your current Aegon policy'*. However, following the recommendation, his funds were actually exposed to a lower equity content, and therefore, lower risk:

- 39% Fixed Income

- 56% Global Equity

- 5% private equities and cash

Luxe on the face of it, reduced the risk Mr B was taking with his funds but importantly, that's the opposite of what they set out to do. The charges on the DFM solution were higher, the reduced equity content would have to work correspondingly harder to match the increased impact of those costs.

Within the SR, the Adviser has discounted a number of alternative options to transferring to Luxe, one of them being, moving the Aegon monies to his existing workplace scheme. In their letter to Mr B, they stated '*you did not provide full details and options for the existing scheme so we have been unable to review whether this is a viable option'*. However, within the FF, the Adviser noted '*we talked about the possibility of transferring into your workplace pension and that this is often a cheaper alternative but will have limited features eg fund choice, flexibility. You did not want to consider this because of the limited features. Also, I can only provide advice on our proposition'*.

In my provisional decision, I said that if the Adviser failed to collect full details of the existing scheme, it's unclear how they established the fund choices were limited. It's also unclear what the Adviser meant by a lack of flexibility because at this stage, the customer is still in the accumulation phase of their retirement planning and usually, flexible features would typically be of secondary importance. Whilst the Adviser has acknowledged they can only provide advice on their own proposition, they can't discount other potentially viable options just because they're not authorised to discuss them which is to the detriment of the customer.

Only 20 months after being advised to invest in their DFM solution, Luxe subsequently recommended Mr B move out of the Davies & Co SIPP and into an Aviva PP. Mr B was placed into a managed fund; the Aviva Investors Multi-Asset Fund Plus III. Whilst our investigator stated he didn't need to review that recommendation as it post-dated the advice to transfer the Aegon plan, I have considered it when reaching a conclusion. I've determined it's important because, I wanted to understand why, having only been invested for less than 2 years, Luxe felt it necessary to move Mr B into a low cost managed fund, not dissimilar to where he was originally. I also explained in my provisional decision that I had reviewed the paperwork issued to Mr B at the time of that subsequent advice. The SR issued to Mr B at the time states numerous objectives, however, the most relevant are:

- *You want to review the Davies & Co SIPP and invest the funds with another provider.*

- *You would like to reduce the charges you are paying and we have discussed before about alternative products that are more competitively priced whilst also looking at the potential for better returns.*

At the appointment in August 2021, Mr B's ATR was reduced from a 7 out of 10 ('High Medium') to a 6 out of 10, ('Balanced Growth'). His pension fund at that point had reduced in value to £28,381. When he originally invested with Luxe, his fund was worth around £33,620 (which takes account of the 3%, or £1,040 initial charge they originally levied to move the fund from Aegon). They explained the transfer to Aviva was suitable because:

- *Reduce charges – the charges for the recommended plan are significantly lower than the existing plan. Reducing charges provides the potential for superior returns as you are paying less in fees, although future return cannot be guaranteed.*

- *Performance – you have been disappointed with the performance of the existing SIPP and would like a retirement plan that provides the potential for improved performance.*

I'm of the view Luxe's subsequent recommendation to move to a basic Aviva PP with a packaged fund only 20 months later, undermines their original advice to invest in a DFM solution in the SIPP. Whilst the catalyst for changing to the Aviva PP may have been Mr B's ongoing complaint with this service, had a simple fund switch been properly explored in December 2019 rather than being discounted simply because Mr B liked the idea of having his money invested in a DFM, I'm of the opinion it's unlikely he would've had cause for complaint.

I have again, carefully considered all the information in respect of this complaint and I have reached the same conclusion as I did in my provisional decision. I appreciate Luxe may disagree but, they haven't provided any new or additional information to that which has already been provided to this service.

In my provisional decision I explained that Luxe had failed to determine what state pension provision Mr B may likely receive at retirement. Luxe have since come back and stated a BR19 state pension forecast was obtained. Whilst Luxe may have sourced his potential benefits, I don't think that detracts in anyway from my concerns about their CFL assessment.

Whilst Mr B may have willingly entered into the transaction, just because a consumer has been told about the risks, it doesn't necessarily make it right for them. It was down to Luxe to ensure it was right for him and, as I've already said, I haven't been convinced it was.
So, as there is no new information to consider it follows that I have reached the same conclusions for the same reasons as I did in my provisional decision, the details of which I have set out above.

Putting things right

My aim is that Mr B should be put as closely as possible into the position he would probably now be in if he had been given suitable advice.

I think Mr B would have remained with his previous provider, however I cannot be certain that a value will be obtainable for what the previous policy would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given Mr B's circumstances and objectives when he invested.

What must Luxe do?

To compensate Mr B fairly, Luxe must:

- Compare the performance of Mr B's investment with the notional value if it had remained with Aegon. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.

- Luxe should add interest as set out below.

- If there is a loss, Luxe should pay into Mr B's pension plan to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If Luxe is unable to pay the compensation into Mr B's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr B won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Mr B's actual or expected marginal rate of tax at his selected retirement age.

- It's reasonable to assume that Mr B is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr B would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

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

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Current investments made / Aviva PP	in force	Notional value from Aegon	Date transferred out of Aegon	Date of final decision	8% simple per year from final decision to settlement (if not settled within 60 days* of the business receiving the complainant' s acceptance and all the 3rd party information)

*As the business has stated they're having issues sourcing information from third parties to complete the calculation, this has been extended from the 28 days referred to in the provisional decision, to 60 days. The 60 days only starts once the business has both the third-party information necessary to do the calculation and the customer's acceptance of the final decision.

Actual value

This means the actual amount payable from the investment at the end date.

Notional Value

This is the value of Mr B's investment had it remained with Aegon until the end date. Luxe should request that the previous provider calculate this value.

Any withdrawal from the Davies & Co SIPP and the Aviva PP 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, to keep calculations simpler, I'll accept if Luxe totals all those payments and deducts that figure at the end to determine the notional value instead of deducting periodically.

If the previous provider is unable to calculate a notional value, Luxe will need to determine a fair value for Mr B's investment instead, using this benchmark: FTSE UK Private Investors Income Total Return Index. The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr B wanted Income with some growth and was willing to accept some investment risk.

- If the previous provider is unable to calculate a notional value, then I consider the measure below is appropriate.

- 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.

- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr B's circumstances and risk attitude.

There is guidance on how to carry out calculations available on our website, which can be found by following this link:

https://www.financial-ombudsman.org.uk/businesses/resolving-complaint/understandingcompensation/compensation-investment-complaints.

Alternatively, just type 'compensation for investment complaints' into the search bar on our website: www.financial-ombudsman.org.uk. Luxe should provide details of its calculation to Mr B in a clear, simple format.

My final decision

I uphold the complaint. My decision is that B K Luker Financial Services Ltd trading as Luxe Capital should pay the amount calculated as set out above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr B to accept or reject my decision before 6 January 2023.

Simon Fox
Ombudsman