DRN-3857273

The complaint

Mr A's complaint against Capital Professional Limited (trading as Ascot Lloyd) is about the advice he was given to switch two pension plans to another pension provider. He says as a result of the switch he lost out on guaranteed annuity rates (GARs).

What happened

I issued my provisional decision on this complaint on 29 November 2022. The background and circumstances to the complaint and the reasons why I was provisionally minded to uphold it were set out in that decision. I've copied the relevant parts of it below, and it forms part of this final decision.

Copy of Provisional Decision

What happened

Mr A was advised to switch his pension in 2013. He complained about the advice he was given and the resulting loss of the GARs in 2021. The firm didn't uphold his complaint. It said, in summary, that its meeting notes from 9 July 2013 recorded that Mr A wanted to do something better with his pensions and explore new options. The notes recorded Mr A *"…feels they are old and tired, however there is a lot of noise concerning guarantees, tfc etc that we need to have a grip on before final decisions can be made. – He wants to achieve a much more modern approach which can be capable of delivering returns of around 6%-7%."*

Notes recorded from the time included – for one plan:

- *The GAR will not be used as he wants to provide for [Mrs A].*
- *Protected tax-free cash is not important he is happy with 25% of the fund. Salary in 1996 was 20K and he had 25 years' service with the LTA uplift he would be at about 25K.*
- *The guaranteed growth rate of 4% is nice but not enough.*

And for another plan:

- *The GAR is of no concern and is only on the WP element of the fund.*
- *Protected tax-free cash again limited by salary and service.*
- *Life cover included at 250K - this is of interest, however if a new policy can be arranged to age 65 for reasonable cost then we can let it lapse.*

Meeting notes from 23 July 2013 included:

We firstly went back through our discussion of 9 July 2013 to double check the guarantees, and A-day tax free cash were not a problem… [Mr A] *was a little concerned of losing his 4% per annum guaranteed growth on his one plan, but decided that he needs to bite the bullet and modernise his pension investments.*

The firm said the notes relating to the GARs stated:

These issues were discussed at further meetings and it was agreed that as the guaranteed annuity rates were only applicable to a single life annuity they were of no value.

And it was also recorded:

Similarly, some of the investments contained a guaranteed 4% bonus rate on the with profit element of the investment. As {Mr and Mrs A] *require higher levels of long-term growth these guaranteed (sic) can be discounted.*

The Financial Planning Report said:

I do stress that if you were to transfer this pension you would give up this guaranteed annuity rate for an unknown rate which could turn out to be less when you come to take an income from your pension. Although a guaranteed annuity rate is obviously an important potential benefit it should still be balanced with your overall objectives. You have confirmed that you have no intention on annuitizing your benefits at retirement as your objective would be to ensure that your spouse is provided for. You are aware of the guarantees and are happy to forego them for this plan.

The firm said it thought the loss of guarantees had been covered with Mr A, and therefore didn't think it had acted incorrectly in advising his to switch his pensions.

Mr A referred his complaint to us. It was considered by one of our investigators. He sent both parties his assessment of the complaint in April 2022. The investigator didn't think the complaint should be upheld. In summary, he thought the transfer was in line with Mr A's financial commitments. And he thought the records from the time showed there had been discussions about the GARs and other guarantees and their loss. The investigator said the pension Mr A had switched to had attracted better growth than he had expected. He said Mr A had wanted to provide for his wife on his death, but that the annuity with the GAR on a single life basis wouldn't have achieved that.

What I've provisionally 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've given a brief summary of what's happened with Mr A's complaint and the investigator's assessment of it. However since that assessment we asked the original pension provider for further information. And I think it's provided something that is key to deciding the outcome of the complaint.

In summary, it confirmed that a GAR would have been available on an annuity which included a spouse's pension. It said the GAR available for each policy based on a single male life aged 60, and with a 5-year guarantee was 8.34%. It said if a 50% spouse's pension was chosen, assuming the spouse was 3 years younger, the rate would have been 7.25%.

It also confirmed that the normal retirement date for each policy was 60. And that under the policy ending 898, if benefits were switched to the with-profits fund more than 5 years prior to the normal retirement date then the GAR would apply on the total fund.

The advice to switch was given in August 2013. At that time the average rate for a 60-year-old male providing a spouse's pension with a 5-year guarantee was approximately 4.7%. This was on the basis that the annuity would reduce by one-third on death and that the spouse was 5 years younger.

So the GAR with the spouse's pension (assuming a spouse was 3 years younger) was approximately 65% higher than a similar shaped annuity at prevailing annuity rates in 2013 (which only reduced by a third on death (rather than 50%), but assumed the spouse was 5 years younger). I accept that a slight adjustment would need to be made to make a like for like comparison. But I think the point is the GAR provided by the original pensions were likely to be around 65% higher than those available at that time.

It therefore follows that after switching pensions, Mr A's new pension would have needed to have been around 65% higher at retirement date to provide the same level of benefits.

Mr A was advised to switch two plans. One was an Executive Pension Plan (EPP). And the other a personal pension plan. The Financial Planning Report dated 27 August 2013 said the personal pension had a transfer value of £73,032. And the EPP a transfer value of £84,599. The EPP transfer value was net of a Market Value Adjustment (MVA) of £3,519.

The report went on to provide projected fund values from both plans at age 60. Plan ending 456 was projected to provide £84,700 at a 5% return and £102,000 at a 9% return. The projections for the proposed alternative were £81,900 and £98,800 at the same respective returns.

Plan ending 898 was projected to provide £105,000 at age 60 at a 5% return, and £127,000 at 9%. The projections for the proposed alternative were £112,000 and £134,000 at the same respective rates.

If the projections for Plan 456 and 898 at 5% had been met and the £84,700 and £105,000 had been achieved, applying the GAR of 7.25% (so including the spouse's pension) at age 60 to those values would have provided a pension of £6,140 and £7,612 respectively.

In order to provide equivalent pensions, the new arrangement would have needed to grow to £130,638 and £161,957 respectively assuming a 4.7% annuity rate. So returns of approximately 12 and 14% net of charges would have been required. In other words, the new arrangement would have needed to grow at a rate significantly in excess of the existing plan merely to provide the same level of benefits (7 and 9% in excess if the original plan achieved 5%). So the 0.58% and 1.00% additional return required as noted in the Financial Planning Report was clearly misleading. And in my view the rates of return required on the new plan were unrealistic, and not aligned to the balanced level of risk that Mr A had agreed to take.

The report was also clearly misleading in that it downplayed the value and suitability of the GAR: discounting it because it said the GAR was only available on a single life basis. The Financial Planning Report said, in respect to the GAR *"…the overall effect of the guaranteed annuity rate is of limited benefit…..Although the guaranteed rate applying to this plan is very competitive, the basis on which the annuity must be established to receive this rate is extremely restrictive and does not reflect your requirements in retirement."*

My understanding is that the original pension provider sent Ascot Lloyd a transfer value for the EPP which said, under Guaranteed Annuity Rates:

*"**Only Units invested in the With Profits fund when the benefits are taken, will be entitled to the Guaranteed Rates.** Please note that it is not possible to switch in to the With Profits Fund, or make any additional investment, once you are within five years of the members Selected Retirement Date.*

…It is also possible to take the benefits using an annuity rate other than that quoted in the policy document and still be entitled to the Guaranteed Rates."

Before advising Mr A to switch plans and give up the GAR, which was clearly of considerable value irrespective of its 'shape', Ascot Lloyd should have satisfied itself that the GAR was only available on a single life basis. And it appears that it was, in any event, alerted that this might not be the case.

Ascot Lloyd was bound by the Conduct of Business Sourcebook (COBS) rules set out in the Regulator's Handbook. COBS 9.2 required the firm to provide suitable advice. It was required to obtain the necessary information about its client's position to enable it to make a recommendation that was suitable.

In my view Ascot Lloyd either failed to obtain information about the nature of the GAR or failed to understand its full benefits. It seems clear that the reason Ascot Lloyd discounted the suitability of the GAR was because it thought it was only available on a single life basis. This wasn't the case – it could have provided a spouse's pension and met Mr A's need to want to provide for his wife on his death. In my view the GAR was a very valuable benefit; it was highly unlikely the benefits from the new arrangement would meet the level of outperformance required over the existing plan to improve on the benefits payable at retirement.

My understanding is there were additional benefits associated with Mr A remaining in his EPP. The financial report says Mr A' may have been entitled to taking more than the usual 25% tax-free cash from the EPP. However it doesn't state what percentage may have been available. Mr A was also able to switch his investments into the with-profits fund to take advantage of the valuable GAR attached to it. This needed to be done more than five years before he reached the selected retirement age.

Accordingly, taking all this into account, I don't think the advice to switch was suitable in the particular circumstances of the case.

Fair compensation

In assessing what would be fair compensation, my aim is to put Mr A as close as possible to the position he would probably now be in if he had been suitably advised and had remained in his original pension plans.

As I've said above, my understanding is that the personal pension plan was invested in a with-profits fund. And the EPP was partly invested in with-profits. But Mr A had the option to switch the whole fund into the with-profits fund more than five years away from the selected retirement date. I also understand the regular contributions were also eligible to switch into the with profits fund as they were existing premiums rather than 'additional' (albeit if that's not the case, it doesn't affect the outcome of the complaint, however the firm can take that into account in its calculation). Mr A was more than 5 years away from his selected retirement date when he had his meeting with the firm (in July 2013) and at the date of the Financial Planning Report dated 27 August 2013.

If Ascot Lloyd had identified the valuable nature of the GAR, I think it's clear that suitable advice would have been to switch those funds that weren't already in the with profits fund to that fund (given it was highly unlikely any other fund would be able to match the benefits available through the GAR). I'm satisfied there would have been time before the 5 year deadline for Mr A to have switched all his fund and future contributions into the with profits fund if he'd been advised to do so.

The provider has said that for policy ending 699, the GARs would only apply on contracted out rebates received prior to April 2001. Any received after that date would not be entitled to the GAR under the policy. I think the provider has referred to the wrong policy number and this relates to Mrs A's plan. However if I am wrong about that (and this does relate to one of Mr A's plans) Capital Professional Limited should take this into account in its calculation.

I intend to order that Capital Professional Limited calculates and pays compensation to Mr A on the following basis. Capital Professional Limited should:

1. Obtain the notional value of Mr A's plan from the original provider as at the date Mr A reached aged 60 assuming he hadn't switched out of the plan. It should obtain a notional value based on the assumptions outlined above; that is that Mr A switched all his funds and future contributions into the with-profits fund one day prior to the five-year deadline.

2. It should then adjust 75% of the value in 1 (to reflect that I think it's fair to assume that Mr

A would have taken 25% tax free cash) by the ratio GAR/CAR, where the GAR rate is the rate assuming a level annuity including a spouse's pension with a five year guarantee (it should obtain the GAR from the provider based on Mrs A's age, but is likely to be around the 7.25% I referred to). The CAR (current annuity rate at that time) should be based on a competitive annuity rate that was available on the same basis and at that same date (Mr A reaching age 60). I accept that, on the one hand, Mr A may have decided to take less or no tax-free cash given the value of the GAR. I'm also aware that it's possible the EPP may have provided more than the 25% tax-free cash. However on the other, I understand Mr A has taken almost his entire fund out of the plan since 2018. Mr A has said this was to fund alternative means of generating pension income given the loss of the GARs. However given the additional flexibility and the benefit of access to and enjoyment of those monies, I think its fair overall to assume he'd have taken a proportion of the money (25%) at age 60, even though it meant the GAR wouldn't be applicable to it. To clarify, the value of 2 includes the uplift to 75% of the fund by applying the ratio, plus taking the 25% tax-free cash into account.

3. Capital Professional Limited should obtain the notional transfer value of the new plan that Mr A switched into on that same date (Mr A reaching age 60).

4. It should compare the value calculated in 2 with the value calculated in 3. If the value of 2 is higher than the value of 3 the difference is a loss to Mr A.

The above assumes that Mr A hadn't made any withdrawals from his plan before he reached age 60. If he did he should let us know when responding to this decision.

Interest at the rate of 8% simple per annum should be added to any loss calculated in 4 from the date Mr A reached aged 60 to settlement date, to reflect the loss of use of these monies for that period.

If there is a loss, Capital Professional Limited should pay it into a pension arrangement for Mr A to increase its value by the amount of the compensation and any interest. Capital Professional Limited's payment should allow for the effect of charges and any available tax relief.

However Capital Professional Limited shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance. If Capital Professional Limited is unable to pay the compensation into Mr A'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 A won't be able to reclaim any of the reduction after compensation is paid. The notional allowance should be calculated using Mr A's marginal rate of tax at his selected retirement age. I think Mr A is likely to be a basic rate taxpayer at the selected retirement age, so the reduction should equal 20%. However, if Mr A 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%.

Capital Professional Limited should also pay Mr A £300 for the distress and inconvenience the matter has caused to him.

My provisional decision

My provisional decision is that Mr A's complaint should be upheld. I intend to order that Capital Professional Limited should pay Mr A the amount produced by the calculation I have set out above, up to the maximum of £160,000, plus any interest on the balance as I also set out above.

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend that Capital

Professional Limited pays the balance.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I intend to recommend that Capital Professional Limited pays Mr A the balance plus any interest on the balance as set out above. However this recommendation is not part of a decision or award and Capital Professional Limited would not be bound by it."

I asked Mr A and Capital Professional Limited to let me have any further evidence or arguments that they wanted me to consider before I made a final decision by 13 December 2022.

Mr A said he hadn't taken any money out of the plan before he reached aged 60. And he thought the plan I had referred to in my provisional decision as ending in 699 was likely the plan ending 899, which was Mrs A's.

He said he took the 25% tax-free cash as there was a thought at the time that the government might stop this in future. However, he said having the opportunity to get an 8.75% return when interest rates were at an all time low, if he'd known to combine the funds five years before he *"…may well not have taken the tax free cash and put the whole amount into the guaranteed annuity".*

Mr A said given the firm hadn't provided the right advice about his pension, how could he trust it to perform the loss calculation. He asked if he would be given detailed workings so that it could be scrutinized?

Capital Professional Limited said it didn't have anything further to add.

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.

Having done so, I've seen no reason to depart from my provisional decision to uphold the complaint as I have set out above.

Mr A has said that he *"…may well"* not have taken the tax-free cash and put it all into the annuity given the 8.75% annuity rate. I accept that might have been his choice. However, for the reasons I set out in my provisional decision, I think it's fair, on balance, to base the loss calculation on the assumption that he did take the 25% tax-free cash in the particular circumstances of the case.

Mr A has also asked how he can trust Capital Professional Limited to carry out the loss calculation. In my experience the vast majority of firms act in good faith when completing such calculations. However I have also asked Capital Professional Limited to provide a copy of the calculation to Mr A in any event.

My final decision

My final decision is that I uphold Mr A's complaint.

I order Capital Professional Limited to calculate and pay any compensation due to Mr A as I set out under "Putting things right" in my provisional decision copied above.

Capital Professional Limited should also provide Mr A with details of the calculation in a clear, simple format.

As I said in that provisional decision, where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend that Capital Professional Limited pays the balance.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that Capital Professional Limited pays Mr A the balance plus any interest on the balance as set out above. However this recommendation is not part of a decision or award. Capital Professional Limited doesn't have to do what I recommend. It's unlikely that Mr A can accept my decision and go to court to ask for the balance. Mr A may want to get independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 13 January 2023.
David Ashley
Ombudsman