DRN-3891977

The complaint

Mr E complains that Lyncombe Consultants Ltd, trading as Merlyn Wealth Management, treated him unfairly whilst providing advice, causing him a financial loss.

What happened

In 2019, when Mr E was aged 62, he approached a financial advisor (the advisor) to seek advice about taking his pension early. At the time, the advisor worked for Merlyn Wealth Management, but for regulatory purposes was an appointed representative of a firm I'll call 'NDL' here.

The advisor recommended Mr E access his pension via a drawdown policy with Aviva Life and Pensions. Mr E was made aware any funds drawn down would be classed as income and taxed accordingly if the amount exceeded his personal allowance. The plan was set up in December 2019 – Mr E took an immediate tax-free cash amount of just under £40,000 and invested the remainder – just under £120,000 – in the Aviva plan.

In November 2020, NDL ceased trading, and the advisor, whilst still working for Merlyn, became an authorised representative of Lyncombe Consultants Ltd (LCL).

In January 2021, Mr E had an accident that meant he was unable to work for the rest of that calendar year. He had a yearly review meeting with the advisor on 7 December 2021, during which he said he wanted to drawdown £12,500 (equivalent to his personal allowance) in that financial year (2021/2022). He explained he wanted to use these funds, together with other savings he had access to, to invest in an Individual Savings Account. He also explained he had no other income in that tax year and so none of this amount would be subject to income tax. The advisor said he'd arrange the relevant paperwork for this to happen.

The advisor submitted a recommendation for this proposed drawdown to LCL's compliance department in March 2022. It was refused, on the basis it was felt the transaction wasn't in Mr E's best financial interests. The advisor appealed this refusal, but the outcome remained the same – Mr E had access to over £100,000 of savings, which he could have used to invest in the ISA (and another investment) had he wished. And it wasn't best practice to release funds from a personal pension to invest in another speculative investment product.

The advisor contacted Mr E on 18 March 2022, arranging a meeting for 25 March 2022. At this meeting, Mr E was told LCL couldn't recommend the drawdown request. Mr E questioned why he was only being told this then, ten days before the end of the tax year. He said he hadn't been made aware a compliance director, any other person, could veto a request to access his own personal pension. Mr E was worried he'd lose the benefit of his tax-free allowance in that financial year. The advisor suggested the only option for Mr E to get his funds in that tax year was for him to be removed as Mr E's representative with Aviva, allowing Mr E to instruct them individually. The advisor contacted Aviva later that day and removed himself as Mr E's advisor (without having confirmed to Mr E that he was going to do this). Mr E then contacted Aviva, to be told it was now too late for him to be able to process a drawdown and be paid in that tax year.

Unhappy with this, Mr E complained to LCL, but they didn't uphold his complaint. They said they'd considered his drawdown request, and communicated their outcome to the advisor, promptly. They confirmed why the advisor needed to get their authorisation to submit the drawdown request – as they are ultimately responsible for any advice provided, and liable if that advice was found to be unsuitable – and why they felt the drawdown wasn't in his best interests. But they did accept there had been poor service and communications and offered £200 compensation in recognition of this. Unhappy with this response, Mr E brought his complaint to this service. One of our Investigators upheld Mr E's complaint in part, concluding as follows:

- This service was only able to consider complaints against LCL for issues that occurred after the advisor became an appointed representative of theirs – in November 2020.
- Because NDL was no longer trading, the concerns Mr E had raised about the advisor's actions when the Aviva plan was recommended would need to be considered by the Financial Services Compensation Scheme (our Investigator has provided material from our files to the FSCS to support a separate complaint Mr E has raised in this regard).
- The advisor's communications with Mr E were poor – there were no updates between the December 2021 and 25 March 2022 meetings.
- Similarly, Mr E hadn't been notified of the change of authorising firm (NDL to LCL)
- LCL's review (and re-review) of the advisor's recommendation was timely, but it was too late by the time this was communicated to Mr E for him to have dis-instructed LCL and deal with Aviva directly.
- LCL ignored their own terms and conditions, which stipulated they must give 20 working days written notice in the event they terminated the agreement.
- LCL should pay Mr E compensation of £600 for the loss of opportunity, and the concern caused by their immediate removal as his representative.

LCL didn't accept the Investigator's view and felt £200 was a fair compensation award. Mr E also didn't accept the Investigator's view. Whilst accepting LCL were only responsible for the period after November 2020, he repeated the advisor hadn't ever mentioned the change from NDL to LCL or explained the importance of LCL's involvement. He was unhappy about the fees charged. He said the advisor had never mentioned 'compliance', and he should have been told in advance what that process was, and why it was needed. And he said he'd felt shocked and abandoned after the advisor immediately ended his engagement with him.

Our Investigator responded - she didn't think Mr E would have acted differently had he known the advisor's authorisation had moved from NDL to LCL. She also reiterated she couldn't agree there had been a direct financial loss – Mr E may have used his savings to fund his investment choices, but his pension value remained untouched and invested, ready to be drawn down at a later date. She also felt LCL's fees had been fairly applied, as they'd provided advice – which is what they were engaged to do – based on Mr E's specific circumstances and wishes at the time.

Further exchanges between Mr E and our Investigator took place, but Mr E remained unhappy with the outcome, and asked that his complaint be considered by an Ombudsman – so it's been passed to me to conduct a further independent review.

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.

And having done so, I've reached essentially the same outcome as our Investigator, for broadly the same reasons. I appreciate this will come as an extreme disappointment to Mr E, whose strength of feeling I acknowledge, so I'll explain why.

At the heart of this complaint is the meeting that took place between Mr E and the advisor on 7 December 2021. It's not in dispute between the parties what was discussed. Mr E wanted to drawdown £12,500 from his pension before the end of the 2021/2022 tax year - an accident had prevented him from working in that year, and he wanted to utilise his tax-free allowance. Mr E wanted to use the funds, together with some savings, to pay into an Aviva Individual Savings Plan (ISA). It was also discussed about using a further £45,000 of his savings to invest in a separate general investment account (GIA) – a separate matter not forming part of this complaint.

It's also not in dispute the advisor told Mr E he'd undertake the necessary steps to progress this drawdown (and the other investments). Mr E says he was left with a clear impression – and based on what I've seen, I agree – that following that meeting, there wouldn't be any problems with his drawdown request, and he'd receive the drawdown funds before the end of the tax year to use in the way discussed above. With that in mind, I'll now address the main complaint themes Mr E has raised.

The transfer from NDL to LCL

Mr E says he was never told about this, which he should have been. Having looked at the evidence available, I agree with Mr E. I haven't seen any evidence the advisor told Mr E about the problems NDL experienced, and that LCL would be replacing NDL as the entity that would be authorising the advisor to provide regulated advice under the Financial Service and Markets Act 2000. But I think it's unlikely this would have made any difference here.

Where a business has done something wrong, I need to think about what would have happened if it had done the right thing instead – and put the consumer back in the position they would have been in had the business' mistake not happened. Here, that means thinking about what would have happened if Mr E had been told. Of course, it's not possible to know that for certain now, so I need to think about what most likely would have happened.

I've not seen anything to suggest there were any problems with Mr E's relationship with the advisor following the 2019 advice. I believe yearly reviews took place, without issue. So, had the advisor told Mr E the company authorising him to provide financial advice had changed – but in every other sense things would remain as before, with the advisor continuing to provide advice – I can't see any reason why that should or would have caused Mr E to question the advisor's continuing engagement. Mr E appears to accept this point.

Mr E also appears to suggest that, at the time of the NDL to LCL change, he should have been made aware that LCL's compliance function would likely have assessed the type of request he subsequently made more stringently that NDL would have done. I disagree.

LCL, or NDL (or any other advisor), can only review a proposed recommendation at the time it is made – and a decision whether to recommend it can only be made based on the specific circumstances at the time. Further, I'm not aware Mr E had expressed any indication that he'd be looking to drawdown his funds to re-invest in other investment products in the future - so I don't think this would have been something the advisor would have needed to be mindful of when LCL took over the authorisation of the advisor.

The advisor's actions between the 7 December 2021 and 25 March 2022 meetings

The advisor submitted Mr E's drawdown (and ISA and GIA) recommendation for compliance approval on 9 March 2022. There had been no contact between Mr E and the advisor after the December 2021 meeting by this point. The recommendation was immediately assessed, and the advisor made aware the following day that the drawdown request wouldn't be approved. The advisor immediately appealed this decision (again, no contact with Mr E) but following a re-review the outcome remained the same. The advisor was told this on Thursday 17 March 2022. The advisor then called Mr E on 18 March 2022, to book a meeting to discuss the above outcome. The meeting was booked for the following week on 25 March 2022. It was only at this meeting the advisor told Mr E he couldn't recommend/proceed with the drawdown request as previously discussed. I think there are two things for me to consider here. The first is the amount of time it took for the advisor to submit the recommendation for compliance approval.

This was, on the face of it, a fairly straightforward potential transaction - a recommendation to drawdown funds from an existing plan. But I appreciate there were other elements to the advice/submission – the advisor needed to source potential new investments for the ISA and the GIA (which I note he did), and sourcing these products for Mr E would reasonably have taken some time. And I accept there was a Christmas and New Year holiday period in the middle which would have impacted too.

The advisor was aware Mr E wanted to drawdown funds before the end of the tax year (Tuesday 5 April 2022). At the time the advisor submitted the recommendation, there were just under four weeks before the end of the tax year. Mr E has since been advised by Aviva that the last date for processing a drawdown request for that tax year was 21 March 2021, so it appears clear there was enough time, had the recommendation been approved, for the drawdown to have been processed in time.

The second is whether there was an unreasonable delay in the advisor telling Mr E he couldn't recommend the drawdown. The advisor was aware the submission had been refused on 10 March 2022, so still nearly four weeks before the end of the tax year. I acknowledge the advisor immediately, and robustly, challenged the refusal internally at LCL. But, given the fast approaching tax-year end – and the advisor's likely knowledge (he was a very experienced advisor) that any drawdown request would still need to have been submitted a couple of weeks before the year end to allow for processing – I think he should have alerted Mr E the recommendation had been refused.

But I don't think Mr E would have immediately sought to disengage the advisor, had he been told then, about the non-authorisation. Mr E had clearly built up a relationship with the advisor by this point, who'd made strong representations to LCL's compliance department. I think had Mr E been made aware of this, I can't discount he'd have been comforted by these representations. I've no reason to doubt the review, and indeed initial recommendations, were submitted by the advisor in good faith and fully expecting them to be authorised – and I think Mr E would likely have been persuaded by this too. But it could/would have allowed Mr E to be put on alert about his options in the event the re-review didn't change the outcome.

The advisor was made aware on 17 March 2022 that LCL's compliance position remained unchanged, so knew on that date he/LCL would not be able to recommend (and process) the drawdown request that Mr E wanted. For the same reasons mentioned above, I think the advisor should have told Mr E immediately what the outcome of the review was, to give Mr E the maximum opportunity to consider his options, and decide whether disengagement and approaching Aviva himself was something he would need to pursue. It would, or should, have been abundantly clear to the advisor Mr E's window of opportunity to process the drawdown he wanted was very small by this time. Instead, he simply called Mr E to arrange a face to face meeting in a further weeks' time – 25 March 2022.

We now know Monday 21 March 2022 was the latest date for submitting a drawdown request to allow processing in that tax year, although neither party knew that at the time. However, had Mr E been contacted on 10 March 2022, which I think he should have been, he'd have been put on notice there was a possibility the drawdown request may not be authorised by LCL. So, when it was confirmed on 17 March 2022 it wouldn't be authorised, he would have had two working days to contact Aviva himself. And I think, based on what *did* happen after Mr E was made aware (following the 25 March meeting), he would most likely have taken urgent steps to agree the disengagement and instruct Aviva himself.

Accordingly, I think the advisor's (and therefore LCL's) lack of communication between 10 March 2022 and 25 March 2022 caused Mr E to lose out on the opportunity to contact Aviva and secure the drawdown of funds from his pension which was his stated intention.

But, what loss, if any, did Mr E suffer because of this?

I acknowledge what Mr E has said on this subject but having carefully considered the evidence here I don't think he did suffer a 'loss'. I'll explain why.

I note Mr E had accessible savings of just over £100,000 at the time. He also had the Aviva pension pot with a broadly similar amount in it. So, two 'pots' of cash, both with about £100,000 in them. Had he taken £12,500 from the pension, it would have reduced that pot by that amount, but it would have increased the 'cash' pot by the same amount. The net result would have been the same. Mr E says he 'lost' an amount equivalent to the tax-free allowance. However, I think a better description would be to say he lost the ability to use his tax-free allowance – it wasn't a real loss of funds, as the above basic analogy shows.

I acknowledge Mr E says he's now having to consider taking two lots of £12,500 in one year and will therefore incur a tax liability of £2,500 that would otherwise have been avoided. But that is a choice Mr E is making. It isn't one forced upon him by the advisor's actions – Mr E had/has access to savings that he could access if he *needed* £25,000 in one calendar year.

And I appreciate too that Mr E will be eligible to draw his full state pension at the end of 2023, which will use up most of his tax free allowance – and that future drawings from his pension will then most likely attract a tax charge at his marginal rate.

So, whilst I don't think Mr E has suffered any loss of funds now, I acknowledge that at some point in the future it's possible he'll be drawing down funds (and paying tax on these) that would otherwise have been drawn down tax-free in the 2021/2022 tax year – and at that unknown date in the future his 'loss' may be known.

However, there are too many unknowns at this stage – tax allowances may change for instance, Mr E's personal circumstances are such that he never needs to drawdown the entirety of his pension funds - to reach a meaningful conclusion regarding how to calculate any such potential future loss. And, I must reiterate we are an informal dispute resolution service.

As such, I agree with the approach taken by our investigator – I think Mr E experienced a loss of expectation, and opportunity to instruct Aviva directly, and Mr E should be paid compensation to reflect that loss. I'll comment below on what I think LCL should pay.

Withdrawal of the advisor's services

LCL's client agreement terms and conditions, under Section 3, Cancellation and Amendments Ending this agreement, says as follows:

> *"…we may terminate this agreement by giving you at least 20 business days' written notice…"*

LCL accept they/the advisor didn't follow these terms. The advisor contacted Aviva within minutes of leaving the meeting with Mr E, on 25 March 2022, to remove himself as his nominated advisor. The advisor said this was done to maximise the amount of time Mr E would have had to try and arrange the drawdown himself - it had been discussed as a possible solution to the drawdown problem during the meeting. But Mr E thinks the advisor was trying to 'wash his hands' of Mr E, and the problems LCL's refusal to authorise the drawdown had created.

On balance, I think it's more likely the advisor was trying to help. It appears clear during the 25 March meeting that Mr E remained determined to try and progress a drawdown. And it was similarly clear LCL would not authorise a drawdown request in the way Mr E had hoped. There appears to have been no 'middle-ground' that would have allowed the advisor to remain engaged as Mr E's advisor, and Mr E to drawdown the funds for the reasons he'd stated. The only immediate option appeared to be the advisor disengaging himself. And given what both parties have said, I think it's unlikely Mr E would have refused the advisor's offer to immediately disengage himself had he been asked – as it appears he was determined to explore the drawdown individually with Aviva.

Nevertheless, I think the advisor acted inappropriately by contacting Aviva in the way he did without confirming to Mr E in advance what he was going to do. And I'm satisfied this sudden development caused Mr E avoidable distress and uncertainty at that time. I think LCL should compensate Mr E for this too.

The fees the advisor charged

Mr E has suggested that LCL repay the fees charged since their involvement on the basis they've essentially prevented him from accessing his own pension funds. I disagree.

I've seen a list of the monthly servicing fees Mr E paid, both pre and post November 2020 – and it's clear these remained broadly constant and in line with the fee agreement signed by Mr E in 2019. And I've no reason to question that the advisor (and LCL) provided the service they'd agreed to provide to Mr E when the agreement started in 2019 (whilst at NDL).

I appreciate Mr E is unhappy that his drawdown request was ultimately refused. However, the advisor did undertake advisory tasks in 2021/2022. And just because LCL concluded they couldn't authorise one part of the recommendation (they said no authorisation would have been needed to proceed with an ISA and GIA investment using funds from Mr E's existing savings), that doesn't mean they shouldn't be paid for that work. No further charges were levied as soon as the advisor disengaged. Accordingly, I won't be asking LCL to refund any charges to Mr E.

Distress and Inconvenience

I've said above that I think LCL should pay compensation to Mr E for the distress and loss of expectation the advisor's actions caused him. However, calculating a fair amount to compensate for distress isn't an exact science.

LCL offered £200 as compensation, whereas our Investigator thought £600 was a better reflection of the distress and loss of expectation caused. I've thought carefully about this and agree with the amount our Investigator suggested. It’s clear to me that Mr E has experienced significant distress regarding the loss of opportunity to proceed with the drawdown himself. And the abrupt removal by the advisor of his services, whilst I acknowledge was likely to happen anyway, came as a shock, causing further sudden anxiety for Mr E. It’s for these reasons that I feel LCL’s offer is too small and £600, in total, is a better reflection of the total distress caused. And this is the amount I think LCL should pay to Mr E.

My final decision

I uphold Mr E’s complaint against Lyncombe Consultants Ltd, trading as Merlyn Wealth Management, and require them to pay Mr E £600 in total compensation (to include the £200 previously offered, if not already paid) for distress and loss of expectation and opportunity.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr E to accept or reject my decision before 23 June 2023.

Mark Evans
Ombudsman