DRN-3969873

The complaint

Mrs A's complaint against Capital Professional Limited (trading as Ascot Lloyd) is about the advice she was given to switch her pension plan to another pension provider. She says as a result of the switch she lost out on a guaranteed annuity rate (GAR).

What happened

I issued my provisional decision on this complaint on 3 February 2023. 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 reproduced the relevant parts of it below, and it forms part of this final decision.

Copy of provisional decision

Mrs A was advised to switch her pension in 2013. She complained about the advice she was given and the resulting loss of the GAR in 2021. The firm didn't uphold her complaint. It said, in summary, that its meeting notes from 9 July 2013 recorded that Mr A wanted to do something better with his and Mrs A's pensions and explore new options.

The notes recorded that Mr A (in respect of his and Mrs A's pensions) "…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."

Notes recorded from that time also included:

- *The GAR is of no concern she would but a spouses benefit [sic] and it only applies to 23k of the fund.*
- *Tax free cash protection – her salary at A day was only about 12k with 10 years' service so not an issue.*
- *Life cover – if we can arrange a replacement policy for reasonable cost then they are happy for it to lapse.*

Meeting notes from a meeting with both Mrs and Mr A on 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. [Mrs A] is all for moving to [the new provider] as we had previously discussed."

The firm said notes relating to the GARs said:

"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."

The part of the Financial Planning Report relating to Mrs A's pension said:

"Guaranteed Annuity Rate - This pension plan incorporates a guaranteed annuity rate (only applies to With Profits Fund) which could prove valuable when compared to the annuity rates available on the open market at the time of taking benefits. However, it is worth bearing in

mind that a number of companies place restrictions on the "shape" of benefits the annuity can provide if the guaranteed annuity rate is to be applied. Usually if any other basis is required then current annuity rates will apply. 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 are comfortable to forego this benefit for this plan when you transfer."

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

Mrs A referred her 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.

Mrs A didn't agree with the investigator's findings. And the complaint was subsequently passed to me to consider.

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 Mrs A's complaint to date. However since the investigator sent his assessment further information has come to light which I think is material to deciding the outcome of the complaint.

In summary, the former pension provider 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 female life aged 55, and with a 5-year guarantee was 6.87%. But that if a 50% spouse's pension was chosen, assuming the spouse was 3 years older, the rate would have been 6.61%.

It also confirmed that the normal retirement date for the policy was 55. And that under the policy 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 providing a spouse's pension with a 5-year guarantee was approximately 4.5%. This was on the basis that the annuity would reduce by one-third on death and that the spouse was 5 years younger. Unfortunately I don't have access to data for a 55 year-old. But the rate would be lower than for a 60 year-old.

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So the GAR with the spouse's pension at age 55 was approximately 50% higher than a similar shaped annuity at prevailing annuity rates in 2013 (for a 60 year-old and which only reduced by a third on death rather than 50%). Adjustments would need to be made to make a like for like comparison. But I think the point is the GAR provided by the original pension was likely to be at least 50% higher than a comparable rate in 2013.

It therefore follows that after switching pensions, Mrs A's new pension would needed to have been around 50% higher at retirement date to provide the same level of benefits if the relative rates stayed the same.

The Financial Planning Report dated 27 August 2013 said the transfer value was £56,201. This was net of a Market Value Adjustment (MVA) of £3,406. So the MVA was about 6% of the transfer value and would have been a negative factor to consider in assessing the suitability of a transfer.

The report went on to provide projected fund values for the existing pension at age 55. It was *projected to provide £92,500 at a 5% return and £118,000 at a 9% return. The projections for the proposed alternative were £86,900 and £110,000 at the same respective returns. So the projected pensions from the proposed plans were already lower than for Mrs A's existing plan.*

However, once the GARs were taken into account, 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. In my view that level of outperformance was unlikely to have been achievable and the returns required to do so were higher than the balanced level of risk that Mrs 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 Mr A's pension 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 Mrs 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. I think the letter about Mr A's GAR ought to have prompted it to investigate its understanding of the GAR available on Mrs A's pension.

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 Mrs A's need to want to provide for her husband 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 Mrs A remaining in her existing pension. The financial report says Mrs A' may have been entitled to taking more than the usual 25% tax-free cash from her existing plan. However it doesn't state what percentage may have been available. Mrs A was also able to switch her 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 she 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 Mrs A as close as possible to the position she would probably now be in if she had been suitably advised and had remained in her original pension plan.

As I've said above, my understanding is that the existing pension was partly invested in with-profits. But Mrs 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). Mrs A was more than 5 years away from her selected retirement date when she was being advised by the firm in 2013.

I therefore intend to order that Capital Professional Limited calculates and pays compensation to Mrs A on the following basis.

Mrs A has said that she hasn't yet taken any benefits from her pension. It's not entirely clear to me whether the GAR was only available at age 55 (Mrs A has passed that age). If the GAR was only available at age 55 Capital Professional Limited should:

1. Obtain the notional value of Mrs A's plan from the original provider, as at the date Mrs A reached aged 55, assuming she hadn't switched out of the plan. It should obtain the notional value based on the assumption that Mrs A switched all her 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 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, but it should be the 6.61% 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. I've thought about whether the GAR should be applied to the whole fund rather than 75% of it (to reflect Mrs A taking tax-free cash). Mrs A has said that she hasn't taken any of the benefits from the plan to date. On the one hand the GAR was still above the prevailing annuity rates. But on the other, Mrs A does retain the flexibility in her current fund which she wouldn't have had if she had annuitized. I think assuming that she took 25% tax free cash is fair overall in the circumstances – it would have meant she had some flexibility, and the GAR wasn't so high as to make such a decision improbable. 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 Mrs A switched into on that same date (Mrs A reaching age 55).

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 Mrs A.

Interest at the rate of 8% simple per annum should be added to any loss calculated in 4 from the date Mrs A reached aged 55 to settlement date, to reflect the loss of use of these monies for that period.

Mrs A hasn't yet taken any benefits from her pension. I think if the GAR was available on the original pension plan at ages above 55 (Capital Professional Limited should confirm with the provider when doing its loss calculation), then it should calculate the loss using the principles/steps outlined above but as at the date of a final decision (i.e using Mrs A's age and the GAR applicable at that age on the fund value as at the date of a final decision). In that case interest at the rate of 8% simple should be added from the date of that decision.

If there is a loss, Capital Professional Limited should pay it into a pension arrangement for Mrs 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 Mrs A's pension plan, it should pay that amount direct to her. 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 Mrs A won't be able to reclaim any of the reduction after compensation is paid. The notional allowance should be calculated using Mrs A's marginal rate of tax at her selected retirement age. I think Mrs A is likely to be a basic rate taxpayer at the selected retirement age, so the reduction should equal 20%. However, if Mrs 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 Mrs A £300 for the distress and inconvenience the matter has caused to her.

My provisional decision

My provisional decision is that Mrs A's complaint should be upheld. I intend to order that Capital Professional Limited should pay Mrs 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 Mrs 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 Mrs A and Capital Professional Limited to let me have any further evidence or arguments that they wanted me to consider before I made my final decision.

Mrs A said she agreed with the provisional decision.

Capital Professional Limited said it had nothing 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 the findings set out in my provisional decision that Mrs A's complaint should be upheld.

My final decision

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

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

Capital Professional Limited should also provide Mrs 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 Mrs 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 Mrs A can accept my decision and go to court to ask for the balance. Mrs 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 Mrs A to accept or reject my decision before 16 March 2023.

David Ashley
Ombudsman