DRN-4224640

The complaint

Mr S complains that, because of advice given by LEBC Group Limited in 2018 in respect of his pensions, the potential lifetime allowance (LTA) charge he will face at age 75 will be higher than it should be.

What happened

Mr S had a meeting with an adviser at LEBC in 2018. He had three pensions with a total value of around £1.8m, with a protected LTA of £1.5m. He was recorded as having a low/medium attitude to risk with some capacity for loss, though a large loss would affect his lifestyle.

At the time, Mr S was aged 61. He was retired from full time work but still did consultancy work for various organisations. His wife was also aged 61 and was still working.

He was advised to transfer all of the funds in one pension to another of his pensions. The reason for this was that it was an old style plan that did not allow for drawdown. He was advised to leave the third pension as it was, on the basis that it had the functionality he wanted as it allowed drawdown, and the charges were reasonable.

Mr S was advised to crystallise his pensions up to his lifetime allowance and access the maximum tax-free cash from the two remaining pensions and use this to reduce his mortgage.

The smaller pension was crystallised in full; the maximum tax-free cash was taken and the remainder of the fund, around £159,000, was to be left in cash and used to withdraw income over the next few years.

The adviser’s rationale for this was that this pension charged a percentage of fund value, whereas the larger pension was on a fixed charge. So by depleting the smaller pension first, the overall pension charges would reduce.

Mr S withdrew £65,000 in each of the following two tax years, leaving around £29,000 in the pension by the time he complained to LEBC in December 2021. Mr S said he should have been advised to consolidate the pensions or take balanced withdrawals from both, because using up the funds from one pension first would lead to a higher LTA charge at age 75.

LEBC didn’t uphold the complaint so Mr S referred it to this service but our investigator didn’t think it should be upheld either. He said:

- There might be a higher charge at age 75 as a result of fully depleting one pension but Mr S was only 65 and at the time when the advice was given he was only 61. So it was many years before the charge would arise and he had plenty of time to plan for this and mitigate the effect.
- This had to be considered in the context of the wider advice, being an ongoing plan to manage his income until he reached age 75.
- Repaying his mortgage was said to be his main aim and the adviser gave clear

reasons for using up one fund first for income, which took into account the charges on each pension. The longer term aim also involved drawing income from the larger pension once the funds from the smaller pension had been used.

Mr S disagreed and provided further detailed comments. I won't set them out in full but they include:

- The adviser didn't understand the implications of keeping two pensions and the fact this would increase the charge he has to pay. The investigator agreed he would have a higher LTA charge at age 75 but said the lower charges was a justification for this.
- That isn't correct – the difference in charges is very small and the potential loss through higher LTA tax charge is much greater.
- The other reason given for not upholding the complaint is that there is plenty of time for him to mitigate any loss before age 75. But that isn't realistic – the only way to mitigate the loss would be to grow the £29,000 left in the smaller pension by 18.55% per year – which isn't possible.
- The investigator's view is also based on the assumption that using funds to pay off the mortgage would reduce the value of the pension and therefore the tax charge. But the payments he's already taken reduced the mortgage to £140,000. Money from an inheritance and other sources then reduced it to £54,000. He could pay that off from other assets, but the interest he is earning is more than the interest charged on the mortgage, so it's not worthwhile.
- To keep the larger pension below the LTA limit, it would have to grow by no more than 1.4% which is not likely.
- It's not acceptable to say he can't be compensated for something that hasn't happened yet.

The investigator considered Mr S' comments but didn't change his view. He also mentioned that from 6 April 2023 the Lifetime Allowance charge was removed, so the concern Mr S had about the charge at age 75 would appear to have resolved itself.

Mr S says the change in the LTA is likely to be reversed if there is a change of government and we don't know what might come next. He also says not following this through means LEBC can give any advice it likes, including wrong advice that affects things in future, without any recourse.

I issued a provisional decision on the complaint. I explained that I intended to uphold the complaint and direct LEBC to pay compensation of £300. I set out my reasons as follows:

The LTA was a limit on the maximum value of pension benefits someone could hold before being taxed at higher rate of income tax than their usual rate when they withdraw benefits. At the point when Mr S had the advice from LEBC he had pensions worth around £1.8m. This was above the LTA limit (which in Mr S' case was £1.5m). So when he reached age 75 there would be a test of any uncrystallised funds and, for funds already in drawdown, a test comparing the value of these funds against the original amount that went into drawdown.

Mr S says LEBC failed to advise him correctly because the adviser didn't understand the way the LTA charge would apply - in particular, the implications of depleting one pension

below its starting level first, which might increase the charge he has to pay later at age 75.

I appreciate that the way Mr S dealt with his pensions as a result of the advice may have led to a higher charge at age 75. But even where something has gone wrong, I have to consider the consequences of that. And it's reasonable to expect someone to take steps to mitigate their loss where that can be done.

Mr S argues that it's not possible to mitigate against the effects of the LTA but given the length of time between the advice and when the charge would have applied, there was time for him to consider his options.

If the charge did apply it would be due to growth in his investments. I don't necessarily agree the only way to mitigate the loss would be to grow the £29,000 left in the smaller pension by 18.55% per year. But even if possible, this might not have been the best solution; given that he has a range of assets, it may have been better to use other assets to pay off his mortgage. But as I've said, there was time to look at other options.

In any event, under the current rules the LTA won't now apply. I appreciate Mr S says this may change in future but as he also says, we don't know what might happen about this going forward. It's not possible to say now that he will suffer a loss or what that loss might be. I can't compensate him for something that, as it stands, won't happen. There's no way to calculate any loss.

Mr S says this means LEBC could give poor advice without any consequence. But it's not my role to punish a firm or say how it should conduct its business. I can only consider the circumstances of the complaint and, if any harm has been caused as a result of poor advice, how to put that right for the individual.

As I've explained, I'm unable to say whether Mr S will suffer any loss or calculate what that might be. But I do think he was caused some distress by what happened and should be compensated for that. I say that because:

- *Mr S was well above the inheritance tax threshold so there would be a charge either on his or his wife's death.*
- *He had other sources of income (including a defined benefit pension) and his wife had her own pensions. I don't think it was foreseeable he would need so much income that the second drawdown policy would not end up above its starting value; it was likely to be above.*
- *They didn't have enough funds to pay off the mortgage and wouldn't have wanted to use up all of their savings. So he did need to use pension funds for the mortgage.*
- *But even allowing for that, he would want to keep assets in his pension to avoid making the inheritance tax position worse.*

The adviser's report – which he didn't query – said inheritance tax wasn't a priority as he was resigned to there being a large inheritance tax charge. His priority was to pay off the mortgage. But even so, I think he found himself in a position where he was worried that the advice potentially left him worse off, with a higher LTA charge while not assisting with the inheritance tax position. That would have been upsetting. I think it would be fair to acknowledge this with a payment of £300.

Replies to the provisional decision

LEBC has not provided any further comments but Mr S has. In summary, he says:

- The loss was baked in at the point when the advice was actioned by LEBC in the incorrect drawdown of the pension – there's no way to reduce that loss, which would be payable under the rules in place on or before the 75th birthday.
- His adviser prepared the best case to mitigate this loss and in March 2023 prepared papers to crystalise pension funds that would immediately attract lifetime allowance charges as the first excess payment of those to be phased over the following nine years. When rumours of the removal of the LTA test at 75 appeared, he had to stop the processing of that request to avoid paying tax that it appeared would no longer need paying.
- Part of that payment was to deal with the excess caused by the bad advice. So every

year he would have paid down the loss that would be imposed otherwise at 75. He was, under advice, mitigating the cost of this.

- The law hasn't changed yet on LTA testing. Whether or not there is change in government the change might not be implemented or reverted. This should be looked at in light of legislation at the time of the bad advice.
- Even if it's not possible to recompense a loss that has not happened, a structure should be put in place that if he reasonably mitigates and pays down yearly, or at 75, the escrow funds are immediately released according to the loss (and topped up if the loss is even higher).
- The amount for potential recompense was reasonably calculated as £47,000. That should now be recalculated given what has happened in the stock market. 5% is no longer a medium risk expectation in the medium/long term; it's now around 4% and given the time taken the calculation is now revised to £49,400. So LEBC should be directed to place £49,400 in escrow to allow for release based on his reasonable payment of excess drawdown for the excess LTA tax.
- It's not clear why the adviser fees are not to be repaid; he had advice that was bad and yet it appears he should just suffer that loss as well.
- His complaint is not that there was a potential increase in LTA charge but that the advice immediately gave him a liability of an excess LTA charge that wouldn't exist otherwise and that LEBC did not understand the law relating to the age 75 testing of individual pensions and its implications.
- The compensation of £300 for distress is an insulting amount. The complaint took many hours and much cost to prepare, but even though it's found in his favour the decision considers this to be worth less than an hour's professional advice. An amount of £30,000 would be reasonable.

Mr S says the summary of the complaint should be clarified to show there was a loss and the remedies set out above should be put in place.

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.

Mr S has provided detailed submissions setting out why he does not consider the remedy proposed in the provisional decision is fair. Although I have only summarised some of the key points above, I have considered everything carefully. But having done so, I'm not persuaded that my decision should change.

I appreciate Mr S feels very strongly about the matter and has put a good deal of effort into pursuing his complaint. My role is to focus on the crux of the complaint and explain my reasons for the conclusion I have reached.

The crux of the matter here is not what went wrong but whether Mr S has suffered a loss as a result of the advice he was given. That's the issue I need to determine. He says there is not just a potential loss but an immediate loss that was "baked in" when the advice was actioned in the incorrect drawdown of the pension. And he says there's no way to reduce that actual loss, which would be payable under the rules in place. But as I explained in the provisional decision, there is no certainty that he will suffer a loss.

While I may need to consider the suitability of the advice against the rules in place at the time it was given, any consideration of the loss has to take into account the position as it is now. As things stand there is no loss to be calculated. While the LTA charge might change again in future I can't say whether it will or, if it is reinstated, whether it will be the same or in some different format. Mr S has explained the steps he toko and payments he says he would have had to make but, as he explains, that was stopped when the LTA change was announced. As things stand, there isn't a loss.

With regard to the proposed compensation, that is intended to reflect the distress caused to Mr S on finding out he might have a higher charge at age 75. I don't doubt that Mr S has spent time on his complaint but it's inevitable that pursuing a complaint will take some time and trouble. If that had been greater than it should have been – perhaps because the business caused unnecessary long delays, then more compensation might be appropriate for the additional inconvenience caused by this. But in my view the payment of £300 would be reasonable to reflect the distress caused to Mr S in this case. It's not intended to compensate for the equivalent cost of professional advice.

As for the fees Mr S paid, those covered the work carried out as a whole. What I've considered is whether that work has caused a loss and, if so, how to compensate for that. I have set out above why I don't consider there is a loss to be compensated for.

My final decision

I uphold the complaint and direct LEBC Group Limited to pay compensation of £300 to Mr S.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 3 August 2023.

Peter Whiteley
Ombudsman