DRN-4289361

The complaint

Mrs T complained on behalf of her husband that the advice given to Mr T by Lyon & Co LLP (Lyon) to transfer his pension plans to a new arrangement in 2011 and then again in 2015, had been unsuitable. She also complained that vulnerable customer procedures were not followed and that ongoing review services were not provided to Mr T when they ought to have been.

Mr T was not well enough to bring his complaint to this service. He died shortly after I issued a provisional decision on the merits of this complaint earlier in 2023.

What happened

Mr T first met with Lyon in around 2008, however, there was no client agreement in place until June 2011 when Mr T and his wife approached them for pension advice.

A fact-find document was completed by Lyon detailing Mr T's circumstances and signed by him in June 2011. At that time it was recorded he was in his late 40's and employed in sales earning £32,000 a year. The fact-find document did not record Mr T had other assets, although later documents suggest he and his wife owned their home with a small outstanding mortgage. Mr T's planned retirement age was confirmed as 60, in both the suitability report that followed and the subsequent application to the new pension provider (Provider A).

Mr T had previously experienced serious poor health but by 2011 the treatment had finished and had apparently been successful. By 2012 Mr T's Doctor confirmed Mr T was in remission and the Doctor did not consider there was a likelihood of recurrence. In 2015 it's recorded that Mr T was still in remission.

In 2011 Mr T had three personal pension plans (PPPs). These were all paid up. Mr T also held limited deferred benefits in an occupational pension scheme. Information on this scheme was obtained by Lyon but ultimately did not form part of their advice.

Mr T had PPPs invested in with-profits funds. The with-profits plans were subject to a market value adjustment at the time. The larger plan was unit-linked with a transfer value in the region of £36,500 and contained an element of protected rights. The other was a Group Personal Pension which offered a 4% guaranteed bonus rate on nearly 87% of the total fund, with a transfer value of just over £6,000 after the market value adjustment of just over £2,200.

Mr T also held a with-profits Executive Pension Plan (EPP) which provided for an enhanced rate of tax-free cash to be taken. It had a transfer value in the region of £11,700 after an adjustment of just over £1,830. Lyon's suitability report recorded that Mr T wanted to lose the entitlement to a "*slightly higher tax-free sum in return for potentially higher growth and guarantees*".

A risk assessment was completed, and Mr T was classed as having a 'low-medium' risk profile and his attitude to accepting risk was below average.

The fact-find confirmed Mr T's attitude to investment risk was conservative and this was the lowest category available on the scale provided. A person with a conservative attitude to investment risk was described as preferring not to invest in the stock market and being willing to accept potentially lower returns from investments where his capital is not at risk. Throughout the fact-find and suitability report (which contained Lyon's recommendations) it was documented that Mr T was *'concerned about volatility of stock market and wants to protect his pension.'* The suitability report said he also wanted to retain "*the potential for capital growth*".

The suitability report repeated the information from the risk assessment and said that because Mr T had been classed as 'low-medium' this meant he was concerned about the possibility of losing money but didn't want to completely ignore the possibility of making higher returns. As such he wanted to achieve higher returns than those offered by bank accounts and other low risk investments.

Lyon told us that they had informed Mr T of alternative products offering guarantees, and that he had asked them to investigate this further. As such, Provider A's Retirement Portfolio and other options were considered as an alternative to his existing PPPs.

Lyon did not include charge comparisons in their analysis but said they did use a comparison service to produce figures for Mr T's target retirement age.

In their suitability report Lyon wrote "*it is not possible to prepare a 'like for like' comparison with your existing plans as your current plans do not offer any guarantees*".

The suitability report went on to say: *'We have discussed the benefits under your existing plans that you would be giving up if you were to transfer your [*two of the PPPs*] plans elsewhere… [*and advised that*] It would be possible to switch funds under these plans to meet your risk profile but these plans do not offer guarantees and I have therefore concluded that a transfer would be appropriate in order to meet your objectives'.*

The report records in relation to one of the PPPs that: *'we have discussed the penalty and you have decided that you are prepared to accept the reduction in return for guarantees and potentially greater growth.'* With regards to the EPP it records that: *'You are prepared to lose the entitlement to a slightly higher tax-free cash sum in return-for-potentially-higher growth and guarantees.'*

It was recommended that Mr T transfer all his PPP benefits into Provider A's arrangement. Lyon told Mr T their recommended option meant he was guaranteed a minimum income for life with complete protection. Lyon said they considered the plan had a competitive charging structure. Lyon stressed the offering of death benefits and the potential benefit of delaying taking an income.

A client agreement was signed in June 2011, which set out that different fees applied for ongoing reviews and for new investment advice. When it came to paying for investment advice services and fees, Lyon said they would discuss options, commission, sums, and rates for all work. In the client agreement it was noted that in respect of investment services to be provided, these would "*not be kept under review*".

The suitability report set out that the attached illustration allowed for Provider A to pay Lyon an initial commission of 3% of the transfer value. In addition *"a fund-based fee of 0.5% was included to cover the ongoing costs in the services we will provide to you on an ongoing basis. This will include regularly reviewing the performance and ongoing suitability of your* *investments plus an ongoing review of your circumstances to ensure the product remains suitable for you*".

Lyon say they discounted their usual fee of 4.5% for smaller pension funds under £100,000, to 3% given their existing relationship with Mr T.

Mr T went on to accept Lyon's advice and transferred the benefits he held in the PPPs into an arrangement with Provider A, (their Conservative Index portfolio).

Provider A confirmed receipt of just over £6,100 in August 2011, followed by funds from the remaining PPPs of just over £11,800 and just over £34,500 in September 2011. Lyon received just over £1,500 on the transfer.

In August 2012, Lyon wrote to Mr T inviting him to arrange an annual review at no additional cost. Mr T didn't take Lyon up on this.

In June 2013, Lyon arranged a claim with Provider A for Mr T to take his benefits from the scheme early, as a result of ill-health. The claim was declined as Mr T did not meet the requirements. A letter was provided by Mr T's Doctor at the time, this recorded that Mr T's short-term memory was not particularly good.

Lyon say that by 2015, they were experiencing difficulty in the service they received from Provider A, so they had stopped sending them new business.

It is clear from Lyon's advice letter of April 2015 that Lyon contacted Mr T setting out they had concerns about Provider A and suggesting it might benefit him to transfer to Provider B. And it was following this, that Lyon and Mr T met in April 2015. A risk assessment was completed and concluded Mr T now had a 'medium risk' attitude to investment risk; the notes record *'client acknowledges the risk outcome but prefers to maintain a profile 2'.* Mr T's health was recorded as reasonable.

A cost comparison between Providers A and B was undertaken and showed that, although the guarantee charge was 0.15% higher with Provider B, their policy/fund charges were 0.48% lower and Provider B also offered a higher deferral bonus to the locked in value, with no cap.

A suitability report was produced, and recommended Mr T transfer just over £65,780 from his plan with Provider A into a plan with Provider B. Mr T's priorities were recorded as including:

- To secure a higher absolute minimum guaranteed income for life, commencing at anticipated target retirement age.
- To increase the overall annual deferral bonus.
- To have no upper limit on the annual lock-in feature.

The reasons given for the recommendation included:

- A higher level of guaranteed income at his target retirement date.
- A higher guaranteed deferral bonus each year between now and retirement.
- Lock-ins of a level of investment growth.

A retirement age of 65 was now selected. An early exit charge of just over £560 was documented. The report stated: *"I believe that these reasons for switching outweigh the following disadvantages:*

- *Initial charges will apply to your new plan*
- *You will incur the transfer penalty noted*
- *There is no guarantee that this plan will out-perform the existing plan"*

The 2015 report and Lyon's engagement document (which Mr T signed in April 2015) provided information about Lyon's fees and charges and ongoing support. An application to transfer all funds from Provider A was completed in April 2015. Mr T signed this, which confirmed Lyon would receive a 0.5% ongoing advice (which entitled him to an annual review) and a further 3% initial advice fee.

On 11 May 2015, just over £64,660. was transferred to Provider B after the deduction of an early exit penalty. The fee paid to Lyon was in the region of £1,900.

In May 2016, a letter was sent by Lyon to Mr T with a risk questionnaire, requesting an annual review. This was followed by a reminder. No review was sought or arranged. In May 2017, another request for an annual review was sent with a reminder in June 2017.
In October 2017 a review was held. It is recorded that Mr T declined to complete a risk questionnaire. Lyon's documents note that Mr T was "*in between jobs*" and receiving no income and all expenses were being paid by his wife; there is however an additional entry that Mr T was "*employed*".

Mr T is said to have described himself as being in reasonable health and was happy with his plan with Provider B but that he wanted to take his maximum tax-free cash. Lyon recorded that they had suggested Mr T only take the sum needed but that Mr T had been adamant he wanted the maximum available. It is also recorded that they had suggested considering equity release, but that Mr T had said his wife would never agree to this.

Lyon submitted the paperwork and Provider B paid out around £15,800 to Mr T in December 2017 and the remainder of just over £47,800 went into drawdown.

In May 2018, May 2019 and June 2020 Lyon sent out letters requesting an annual review. The letters advised: *'please contact me on the above telephone number to arrange a meeting during which I will be happy to review your plans and aspirations. The cost of your annual review is already built into your plan'.*

Each invitation was followed up with the reminder saying: *'assuming you do not want a review now, we will be in touch again at the same time next year, though if you need any help in the meantime please do not hesitate to contact me. If you do want a review now, please call the above telephone number to arrange a meeting during which I will be happy to review your plans and aspirations. Remember that the cost of your annual review is already included in your plan.'*

In 2019 Lyon had further contact with Mr T and Mrs T when they were involved in setting up a power of attorney for Mr T, with his wife holding the power of attorney.

<u>Complaint</u>

Mrs T complained on behalf of Mr T about the transfers recommended and the penalties and commission paid. She questioned the motivation and suitability of these transfers and wasn't happy with the service provided She also thought ongoing adviser fees had inappropriately been taken, particularly as Lyon had never provided ongoing reviews.

Mrs T said Lyon had been aware of her husband being vulnerable, and in particular in respect of his short-term memory, and said they had failed to act as they ought to have done, and she gave the example of continuing to meet with him on his own. She also referred to Lyon knowing Mr T had been diagnosed with a degenerative disease. We have been sent a copy of a formal complaint letter from January 2021.

Lyon's response to complaint

Lyon didn't uphold the complaint. They concluded their advice had been suitable for Mr T and had addressed and met his concerns and objectives at the time. Lyon said they'd sufficiently explained what Mr T would be losing on transfer, but that Mr T had valued the guarantees provided by both Providers A and B. Lyon noted they had reduced their usual charge.

When it came to the complaint about the service they'd provided, Lyon suggested that over 20 years they had completed dozens of meetings and calls with Mr T. They also stressed that despite offering annual reviews, these offers had not been followed up. We have not been provided with call or meeting notes, or anything that demonstrates dozens of meetings or times of contact.

Lyon went on to tell us:

- Guaranteed investments are very complex products.
- In 2011 there was little to choose between Providers A and B. Lyon say they chose to spread the risk by recommending a guaranteed plan with Provider B for Mrs T and a guaranteed plan with provider A for Mr T at the same meeting.
- During early 2015 Provider B updated and significantly improved their guaranteed pension offering so Lyon compared the offerings of provider A and B as well as completing the usual review. Lyon say they had a two-hour meeting with Mr T (without Mrs T) where they made sure he understood. It is not explained what steps were taken in respect of this, and whether Lyon suggest they took extra care around comprehension or why this might have been. Their letter followed up with the reasons why they said the transfer was sound.
- Lyon say they never knew of any suggestion Mr T might have the degenerative disease. They told us they were only aware of his historic diagnosis in 2013 when the application was made for Mr T to take benefits early on ill-health grounds.
- They say Mr T never mentioned the degenerative disease and he always said his health was reasonable. They describe their experience of Mr T was that he was sharp and alert with a "*fair degree of understanding and knowledge*" when it came to investments. They don't think they could have been expected to know there were any problems and when Mrs T came to arrange the power of attorney she didn't mention the degenerative disease. No record has been provided of conversations with Mr T at this time.

Overall Lyon say they provided suitable advice, which benefitted Mr T, and they only received money in-line with the terms agreed by Mr T. They say they offered the ongoing service being paid for and had no reason to think they needed to treat Mr T as a vulnerable client requiring any particular care or adjustments.

Investigator's view

The investigator didn't think the transfer recommendation made to Mr T in 2011 had been suitable, nor did they think the advice to transfer again in 2015 had been suitable. The investigator didn't conclude Lyon ought to have treated Mr T as a vulnerable customer and didn't think it was right to say annual advice services hadn't been offered.

The investigator went on to explain what they thought Lyon ought to do to identify whether any loss had been suffered by Mr T as a consequence of the unsuitable advice. The investigator set out a redress calculation that allowed for the use of a suitable benchmark and which would take account of all fees and deductions. The investigator also recommended Lyon pay Mr T the sum of £250 to represent his distress and inconvenience.

Lyon's response to view

Lyon thought the investigator's proposed redress exercise was inappropriate. They told us they thought the calculations were difficult. They said why they thought various matters needed to be taken into account.

They continue to think the guarantees that came with transfer were of real value to Mr T, making the advice suitable and ought to be accounted for in the redress calculation. Lyon also thought the redress exercise recommended by the investigator ignored the fact Mr T had already taken tax-free cash. They said they were undertaking a redress calculation and asked for a provisional decision instead of a final decision if the complaint was upheld, so they could query the redress method.

Investigator's response

The investigator didn't think Lyon had raised any new submissions on the merits of the complaint. Whilst it might be said Mr T did place value in guarantees, he already had arrangements with guarantees. Mr T was someone who had reasonably relied on professional advice for what was suitable for him. The investigator concluded the reasons for transfer didn't justify the impact of the significant costs incurred by Mr T's pension provision that would need to be recovered for the value to return to what it had been, let alone improve it. And there was only a limited period available in which this could happen.

The investigator provided some further explanation on how redress was to be approached and highlighted the exercise set out what should be done *if* the previous provider(s) were unable to calculate a notional value (in other words here, the use of a benchmark).
The investigator repeated why they had selected the benchmark proposed and highlighted that redress did allow for account to be made of the tax-free cash being taken. The investigator indicated that the value of guarantees was not relevant to the calculation.

Lyon's further submissions and letter

Lyon went on to tell us there was a delay in getting information from some of the original providers.

Lyon provided a letter to this service and also to Mrs T in which they set out their understanding of what parts of the complaint the investigator had not upheld. I have previously explained this part of the letter did not appear to me to be accurate.

Lyon suggested none of the providers had been willing to provide a notional value taking into account the tax-free cash taken 2017, so they had taken a different approach to the redress recommended by the investigator (albeit they didn't identify this was what they had done) and they said there were other considerations to apply. Lyon set out what they said they had done and how they said they had concluded Mr T had suffered no loss. Lyon have gone on to let me know they don't agree that the providers had not been willing to provide a notional value. Lyon did not accept the investigator's view.

My provisional decision

On 7 February 2023 I issued my provisional decision setting out that I intended to uphold the complaint and why, and what I intended to say Lyon ought to be required to do. In this provisional decision I set out two potential approaches to completing a loss calculation. I indicated that given what Lyon had said, it might be more appropriate to follow the approach using a benchmark.

Events following my provisional decision

I was sad to hear that Mr T died shortly after my provisional decision was issued. This service is grateful to Mrs T for providing the necessary administrative information needed. This complaint is now brought on behalf of Mr T's estate. Mrs T is sole executor and beneficiary of his estate. I don't have any information as to how any pension benefits are to be dealt with.

We informed Lyon of Mr T's death, and how I intended to change the way the case is recorded and looking at how any loss is to be approached and paid. They have not raised any objection to the administrative change or to how I suggest any loss is paid.
Since issuing my provisional decision I have communicated with all parties on my thinking about redress and how I intended to approach it in my final decision. Parties were given the opportunity to provide further information and submissions.

Mrs T's current financial adviser confirmed sight of my provisional decision and further communications. My provisional decision and updated indication on the loss calculation and payment was accepted by Mr T's estate.

Lyon provided their further thinking. I was also asked to consider jurisdiction by Lyon and issued my decision on this.

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.

Based on everything I have seen I haven't changed my thinking from that previously shared with parties. I have already explained why this complaint was made within time and why. I am upholding Mr T's complaint in part. I don't think Mr T was suitably advised to transfer in 2011 (or in 2015), and Lyon will need to complete a loss calculation exercise and pay any sum due. Lyon must also pay Mr T's estate £250 to represent Mr T's distress and inconvenience.

I don't conclude however that Mr T ought to have been treated as a vulnerable client or that Lyon ought to have adopted a tailored or particular process when advising Mr T. Nor do I conclude Lyon failed to provide, or here, failed to offer to provide, the ongoing review service for which they were receiving payment. I am not upholding that part of the original complaint.
In reaching my provisional decision, I've taken into account the relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider was good industry practice at the time. This includes the regulator's Principles for Business (PRIN) and the Conduct of Business Sourcebook (COBS). Where the evidence is incomplete, inconclusive, or contradictory, I reach my conclusions on the balance of probabilities, that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice but provides useful context for my assessment of Lyon's actions here.

- PRIN 6: A firm must pay due regard to the interests of its customers and treat them fairly.
- PRIN 7: A firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair, and not misleading.
- COBS 2.1.1R: A firm must act honestly, fairly, and professionally in accordance with the best interests of its client (the client's best interests' rule).
- The provisions in COBS 9 deal with the obligations when giving a personal recommendation and assessing suitability. COBS 9.2.1R (1) says:

  "*A firm must take reasonable steps to ensure that a personal recommendation is suitable for its client*".

Complaint about Transfer advice

Mr T was not suitably advised when he transferred his PPPs into Provider A's product in 2011. Mr T had a limited appetite for investment risk and there is no suggestion his existing arrangements were unsuitable for him. His existing PPPs also came with various valuable guarantees. I don't think a transfer was necessary nor demonstrably likely to be in his best interests.

Lyon said they recommended Mr T transfer his PPPs in 2011 primarily because he was concerned about recent economic volatility and wished to protect the fund values accrued.

This is not sufficient rationale to support the transfers that followed. I don't accept this is what this transfer was likely to achieve in preference to remaining where he was. I haven't seen anything that suggests to me his plans had been unsuitably invested for him prior to transfer, nor that any adequate attempt was made to consider whether other investments within the existing plans might be available. Mr T's had PPPs invested in 'with-profits', and there is nothing to suggest these investments, or any held within his PPPs were unsuitable for Mr T. It might reasonably be suggested that the with-profits investments offered some protection against market volatility through 'smoothing' without any increased costs, I can't see this was considered, and certainly not sufficiently.

I also don't accept transferring provided a meaningful protection of the fund values Mr T had accrued to date.

In 2011 alone Mr T lost the sum of just over £4,000 through transferring (simply due to market value adjustments), in addition to the loss of other valuable guarantees attached to his arrangements (such as enhanced tax- free cash and the 4% guaranteed growth rates). He also paid over £1,575 as an initial advice fee and was then subject to ongoing advice fees of 0.50% on top of Provider A's plan charges (put at 2.02% a year). So these were losses to his overall fund value the new arrangement would need to overcome to come close to just matching the existing arrangements, let alone to exceed them.

For it to have been suitable for Mr T to have transferred I would expect there to have been a strong likelihood that transferring was more likely than not, going to put Mr T in a better position than if he didn't transfer, as a starting point. This reflects the regulatory requirements. I don't think this was the case and I don't think the review and advice provided by Lyon demonstrated this. Nor do I accept Mr T had any meaningful needs or objectives that were not met by his existing arrangements.

I am not persuaded that it was accurate to consider or treat Mr T as someone with real experience and knowledge of pensions and investing. Even if he had some relevant experience (which I am not sufficiently persuaded was the position), it is clear he sought the advice of an expert and was entitled to rely on it (as I consider he did here).

Mr T had relatively limited pension funds that needed to be invested in-line with his below average appetite for risk. On transfer his fund would need to perform and grow in such a way that the impact of the additional costs and charges was also met within a limited period of time. These are all factors that inform against a transfer, and I have not seen anything so compelling such as to say these concerns were likely to be met.

In 2008 the regulator issued a report entitled "*quality of advice on pension switching*". The report provided examples of poor, compliant, and good examples of advice given since pensions A-day (the date in April 2006 when a number of changes were introduced, some of which were intended to simplify pensions and relevant tax rules). It provided some examples of what it thought would constitute unsuitable advice. This included:

- *A pension incurring extra product costs without good reason*

It was also acknowledged that where the reason for the switch was for investment flexibility, but this was not something likely to be used, this was not a sufficiently good reason. And where the reason was fund performance, but there was no evidence the new scheme was likely to be better, this was not a sufficiently good reason.

The regulator clearly outlined what should be considered and stated that cost was a factor when considering whether it was suitable or appropriate to move pension funds, as well as the provision of suitable reasons for transfer. Thus, if additional costs are involved with the advice to switch, or if the client ended up paying for services they were unlikely to utilise, this was likely to indicate that the advice was unsuitable.

I've seen what Lyon say about why Provider A's product was their preferred option at the time. My decision isn't concerned with the product per se, but with the need and cost to Mr T in changing provider(s) at all, in addition to what followed.

There were additional costs involved as a consequence of transferring to a new provider and there is nothing that persuades me that appropriate consideration was given to the cost implications, let alone consideration as to whether it was necessary, and I don't think sufficient consideration was made of any alternatives to transfer.

It's accepted that no charges comparison was completed in 2011 between the existing arrangements and the proposed plan. I don't accept the reasons for this given in the suitability report were accurate and I would have expected this to be the type of work that was completed as a basic requirement prior to a transfer. The regulator's *Quality of advice on pension switching* report issued in December 2008, noted that failing to ascertain whether the new scheme was more expensive than the old scheme(s) is a procedural failing when giving advice.

Given Mr T's age and circumstances I'm not persuaded the transfer (even when it provided a different form of guarantee) was of sufficient value to outweigh the costs involved in the advice, new product, and transfer. I haven't seen anything that persuades me there was a sound reason for the costs involved in this transfer.

Whilst Mr T might have felt guarantees were important to him, I do not think there is sufficient evidence to explain Mr T's motivation behind this preference and how it was met by the advice to transfer, and how this would meet his long-term retirement planning objectives, when he had no other pension aside from a small deferred occupational scheme. Even if he held preconceived ideas about wanting guarantees, he was not an experienced investor and so Lyon ought to be expected to have advised what was in his best interests, while taking into consideration the impact of increased charges on his fund value. Here this might have involved challenging the value of some perceived guarantees, particularly when looking at the impact of charges.

In any event here Mr T already had valuable guarantees attached to his existing arrangements. So Lyon were wrong to write in their advice to Mr T "*it is not possible to prepare a 'like for like' comparison with your existing plans as your current plans do not offer any guarantees*".

Not only ought they to have completed a meaningful costs comparison, but they also didn't sufficiently identify the loss of guarantees on transfer. I accept he might have gained different guarantees, but I am not persuaded this was well enough understood by Mr T nor that it represented any meaningful benefit to him over and above his existing arrangements, particularly when the costs of transfer are taken into account.

It appears Lyon also suggested that Mr T was interested in the merits of consolidation of his multiple plans in terms of simplicity of future management. I don't think there's enough to show this was a financial priority for Mr T at the time, nor that it was sufficiently beneficial to support a recommendation to transfer.

I previously concluded the advice given to Mr T to transfer again in 2015 was also unsuitable. I have not changed my thinking. Since the 2011 transfer advice had been unsuitable, the potential detriment ran from 2011 and encompassed the 2015 advice, as '*but for'* the 2011 advice, the 2015 further transfer would not have happened.

In addition, whilst Lyon might not have been satisfied with Provider A's service to them by 2015, the examples given don't make me think there was any concern around Mr T's plan, and Mr T wasn't concerned.

Lyon suggest they had balanced the reasons for and against transfer on the basis of the offerings of the different arrangements (Providers A and B), but I am not persuaded this was the right or appropriate approach. Nor do I think their exercise sufficiently took into account the impact of the transfers in 2011 (including the impact of the additional cost of Lyon's advice and additional costs incurred by a further transfer). Overall I don't accept the question of whether a further transfer was actually necessary or suitable, was adequately considered or addressed, nor were other options (including doing nothing) sufficiently considered. I find it hard to conclude anything needed to be done in 2011 or 2015 to meet Mr T's needs and objectives and in-line with his appetite for risk and capacity for loss.

In 2015, Lyon's adviser completed an internal checklist about moving a guaranteed pension to an alternative guaranteed pension. This has the appearance of an internal compliance document. The reasons given for the move were for "*better guarantees*" and that Mr T liked a "*guaranteed income*" and he was not happy with "*an ordinary pension subject to volatility*". It was noted he wanted full guarantees but that it was agreed 70% of the fund value would be guaranteed.

It is hard to understand the rationale provided, particularly given the history of his previous arrangements. At best the benefit of any improved guarantee might be considered marginal. I don't consider the other reasons recorded were relevant to Mr T or this second transfer. I don't consider Lyon appropriately contemplated or explained how any potential new benefit would enable Mr T's fund value to overcome the impact of the two transfers. I don't think it was likely it would. I don't consider they met the requirements on this transfer, and they have failed to persuade me it can reasonably be concluded the transfer was in his best interests.

Lyon said they told Mr T of their concerns about Provider A and that they considered it beneficial for him to transfer to Provider B. I don't consider it reasonable to have expected Mr T to have questioned their advice, particularly in these circumstances. I think it's likely Lyon's explanation to Mr T that they were dis-satisfied with Provider A, would have contributed significantly to Mr T accepting their advice to transfer, again.

By 2015 Mr T's target retirement age had been amended to age 65, as opposed to age 60 which had formed part of illustration provided in 2011. Given Mr T had hoped to take benefits in 2013 and went on to take his maximum tax-free cash in 2017, this seems a surprising amendment. It will have made it all the harder for Mr T to have made any meaningful comparison about fund values, guarantees and potential income, as well as the impact of costs and charges and lost guarantees, although I don't consider he (or his wife) ought to have been reasonably expected to challenge the advice.

It appears that whilst the subsequent transfer in 2015 may have reduced some or all of the ongoing costs, this was not to the extent that they were then lower than those Mr T had been paying prior to transfer in 2011. As a result of this switch Mr T's fund value had to also absorb the impact of another transfer penalty in the region of £560 as well as the further advice fee.

I don't consider the advice to transfer again was suitable, necessary, or likely to have been in Mr T's best interests.

<u>Complaint that Lyon failed to treat Mr T as a vulnerable client</u>

I previously explained it did not appear to me that this part of Mr T's complaint was pursued following the investigator's view. I have not been told my understanding was wrong, so I am only summarising my thinking.

By 2011 Mr T had completed treatment due to his previous diagnosis and there was nothing to suggest he required any additional care when it came to how financial advice was provided. He described himself in *'good health'* in the fact-find signed in June 2011 with Lyon, and his wife was part of the same advice process. I think Lyon were in error when they told us they didn't know about Mr T's previous diagnosis until 2013, as the 2011 fact-find records Mr T's historic significant diagnosis.

Lyon were also in error to suggest they were not aware of the thrust of Mrs T's complaint that her husband had problems with his short-term memory. Lyon assisted Mr T in his claim to take ill-health benefits in 2013 (which was ultimately unsuccessful), and as such they would have seen (or ought reasonably to have been expected to have seen) his Doctor's letter which recorded Mr T said he had residual short-term memory problems.

However I don't consider this was enough to expect Lyon to have followed a different process. Whilst more recently Mr T was diagnosed with a different and degenerative illness, I haven't seen anything that makes me think this was something disclosed to Lyon at the time they advised Mr T in 2015. The report also stated that: *"It is essential that you notify me of any material changes to your circumstances, which may require your financial situation to be reviewed prior to this."* There's nothing that suggests to me this happened.

In any event, letters were sent to Mr T containing recommendations, which would have given him (and his wife) the opportunity to understand and reflect on the changes being recommended and for them to pose any questions.

In 2019 when Lyon assisted Mr and Mrs T in setting up the power of attorney, Lyon say they were not told of Mr T's diagnosis. Very recently they have told us that Mrs T assured Lyon in 2019 Mr T had mental capacity.

I note for completeness this last comment was provided much more recently and no notes of conversations at the time have been provided. I also note that in completing the power of attorney documentation, a certificate provider (such as Lyon) has to confirm to the Office of the Public Guardian that the donor (Mr T) has capacity at the time, that they understand the document and the power they are giving, and that they are entering into the arrangement of their free will. Thus they must act independently of the donor and any attorney (here Mrs T) and not in reliance of what they are told by a third party. However I haven't seen enough to make me think Lyon had been sufficiently informed of Mr T's health and if he had any additional needs at the time that means they ought to have done something differently. I haven't changed my thinking from that shared previously and I don't uphold this part of the complaint.

<u>Complaint that Lyon failed to provide the ongoing service they were paid to provide</u>

Again it did not appear to me that Mr T pursued this part of his complaint following the investigator's view. I agreed with the investigator and explained why I didn't think this part ought to be upheld. In summary Mr T signed agreements with Lyon in June 2011 and then later in April 2015, both set out the basis of charges to be made for Lyon's services. These agreements on their own didn't have sufficient detail to understand the level of the costs to be applied. However the information provided with the recommendations went on to set out what the level of charges and costs would be, including those that were ongoing.

The transfer advice fee was paid as a percentage of the fund value on transfer. This was sufficiently set out. Mr T also agreed to pay 0.5% a year and this entitled him to annual review meetings and ongoing support. Lyon didn't always provide the annual review meetings, but they did offer them and sent a further reminder when an invitation wasn't followed up. It's also sufficiently clear there was ongoing contact and service between Mr T and Lyon in 2012-2013 and 2017.

Lyon made reasonable endeavours to discharge their undertaking to providing ongoing advice, in accordance with their client agreement. As such the charging of an initial advice fee on both occasions was properly agreed and authorised in-line with the terms of service. It would not be reasonable to say Lyon failed to provide the ongoing service (i.e. annual reviews) they were being paid for, on the basis that in some years Mr T did not take up an invitation for a review.

However the advice provided by Lyon in 2011 and 2015 in relation to Mr T's pension arrangements was unsuitable and led to additional and unnecessary costs and charges being incurred. As part of the redress exercise, the costs and charges will be taken into consideration. Had Mr T not transferred in 2011 he would not have incurred additional and ongoing charges and fees. This is also true of transfer fees, servicing fees and provider charges.

Redress

Lyon told us they thought the investigator's proposed loss calculation was flawed. They went on to say that I was wrong to suggest the original providers had said they could not provide notional values. I've previously explained I didn't agree with what was said by Lyon about the investigator's proposal, as I considered it followed our service's usual approach.

I also explained that I had seen that Lyon had told us that original providers had said they could not provide notional figures taking into account the 2017 withdrawal. Lyon felt this was something they could account for in their calculations. However I was concerned when Lyon said they proposed to adapt a redress calculation to take account of what they said they continued to consider additional benefits to Mr T.

I have seen the contact this service has had with the original providers and taken into account my experience on these matters. Overall I think it's reasonable to conclude it's likely the original providers will be able to provide a notional figure on the basis Mr T had remained invested with them on the same terms up to the date of his death (the calculation date) and taking account of the withdrawals made.

I have shared my thinking on the appropriate approach to redress in my provisional decision and in the communications that have followed. I am satisfied the parties have had sufficient opportunity to understand my thinking and make submissions.

This service does not delay making a final decision to enable calculations to be completed, it is my role to set out what must be done where there is to be a loss and redress calculation completed. Once my final decision is accepted by and on behalf of Mr T's estate, it becomes binding on Lyon.

Having reviewed everything that has been provided I am satisfied that the most appropriate way to approach redress here can be reliably achieved with reference to the providers of Mr T's original pension arrangements. Previously I was concerned that a benchmark ought to be used given the information provided by Lyon and their thinking on how they wanted to approach figures and calculations.

I hope Lyon now understand the loss calculation proposed does include allowance for the withdrawal of the tax-free sum (and any subsequent withdrawals). I have previously explained the calculation date to be used and why it is fair to use it. There has been no disagreement with this.

Putting things right

<u>What Lyon must do</u>

The advice to transfer Mr T's PPPs from their original providers was unsuitable. Had Mr T been suitably advised I think it's more likely than not he would have remained with his original providers instead of transferring in 2011.

If Mr T's estate accepts my decision, my decision is binding, and Lyon must follow the redress exercise set out below.

Fair compensation

In assessing what would be fair compensation, my aim is to put Mr T (and now his estate) in as close as possible to the position he would probably now be in, if he had been given suitable advice. I consider my approach is a reasonable method in which to achieve this.

I think Mr T would have remained with his existing providers in 2011. Neither the Provider A plan nor the Provider B plan ought to have been established. Mr T lost valuable benefits when he transferred out of his original arrangements, albeit I accept some of the new plans had different benefits. He also incurred the impact of unnecessary charges and fees.

Lyon will need to obtain notional (fair) values from the providers of Mr T's original plans, had he remained invested in the same way and on the same terms up to the calculation date (8 February 2023). These notional values are to be used to identify any loss.

To enable the original providers to provide notional values, they are to be provided with details of all withdrawals (including the taking of tax-free cash) or contributions. Such sums are to be provided to each original provider having been adjusted to be in proportion to the proportion the original transfer-in sum from each provider represented to the 2011 sum received by Provider A. If there are a large number of regular withdrawals, to keep calculations simpler, I will accept the totalling of all those payments and deduct that figure at the end to determine the fair value instead of deducting periodically.

This method will also take account of all charges, costs, and fees (in the same proportional approach and at the relevant date) including those paid to Lyon and the providers. This information will need to be provided to enable the original (pre 2011 transfer) providers to calculate the notional values.

From what has been provided it appears the level of enhanced tax-free cash available with Mr T's EPP was marginal and I previously explained I don't think it is necessary to adjust the redress calculation to take account of this. No party took issue with this.

At least one of Mr T's original plans had a guaranteed growth rate and using the notional value will ensure this is reflected in the loss calculation.

Once the original providers have these notional (fair) values, Lyon must:

- Compare the value of Mr T's arrangement with Provider B (actual value) on the calculation date (8 February 2023) with the total notional value (fair value) if it had remained with the original providers prior to the 2011 transfer up to the calculation date.
- If the actual value is greater than the fair value, no compensation is payable. If the fair value is greater than the actual value, there is a loss and compensation is

payable.

So to compensate Mr T’s estate fairly Lyon will need to complete the following comparison:

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest until date of settlement
Plan with Provider A then held with Provider B	Still existed and liquid at the relevant date for calculation	Notional value from the three previous providers	For the notional values- from the date of transfers out from each original PPP provider as if the plan had remained invested	8 February 2023	8% simple a year

Actual value

This means the actual value at the end date (8 February 2023).

Fair Value

This is the value of Mr T's arrangements had they remained with the original providers prior to the 2011 transfers, until the end date (8 February 2023).

Any additional sum(s) paid into Plans A or B should be added to the *notional value* calculation from the point in time when it was actually paid in.

Any withdrawal from Plans A or B 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 Lyon total all those payments and deduct that figure at the end to determine the notional value instead of deducting periodically.

Alternative approach to calculating loss

I previously explained that I am satisfied the original providers (prior to the 2011 transfers) will be able to provide notional values as I have set out above.

It is not for any party to adapt or change the proposed loss calculation (including how the actual and fair values are calculated).

However, if all of the original providers cannot provide their notional value (fair value), then the redress approach I previously provided, using the benchmark, will need to be used.
If that situation arises, Lyon will need to determine a fair value for Mr T's arrangements to establish what the value at the calculation date (8 February 2023) had they not been transferred and on the basis they produced a return using a benchmark from the date each plan was disinvested and transferred to Provider A (making sure any associated charges are accounted for) until the 8 February 2023.

The appropriate benchmark to use here is:

- For half the investment: FTSE UK Private Investors Income Total Return Index; and for the other half: the average rate from fixed rate bonds.

I have chosen this method of compensation as I think it is fair to conclude Mr T wanted capital growth with a small risk to his capital. There has been no disagreement about this.

- Any additional sum paid into Provider A or Provider B's plans should be added to the *fair value* calculation from the point in time when it was actually paid in.

- Any withdrawal from Provider A or Provider B should be deducted from the fair 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 Lyon total all those payments and deduct that figure at the end to determine the fair value instead of deducting periodically.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.

- To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Lyon should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Apply those rates to the investment on an annually compounded basis.

- 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.

- I consider that Mr T's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr T into that position. It does not mean that Mr T would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr T could have obtained from investments suited to his objective and risk attitude.

The information about the average rate can be found on the Bank of England's website by searching for 'quoted household interest rates' and then clicking on the related link to their database, or by entering this address www.bankofengland.co.uk/boeapps/database, clicking on: Interest & exchange rates data / Quoted household interest rates / Deposit rates - Fixed rate bonds / 1 year (IUMWTFA) and then exporting the source data.

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/understanding-compensation/compensation-investment-complaints.
Alternatively, just type 'compensation for investment complaints' into the search bar on our website: www.financial-ombudsman.org.uk.

Once the fair values for these plans have been calculated, Lyon will need to:

- Compare the actual value of Mr T's arrangement with Provider B as of 8 February 2023 with the notional fair value if they had remained with the original (pre-2011 transfers) providers.
- 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.

This method will take account of charges, costs, and fees as well any withdrawals or contributions (at the relevant date).

Any contribution should be added to the *fair value* calculation from the point in time when it was actually paid in. Any withdrawal should be deducted from the fair 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 are a large number of regular payments, to keep calculations simpler, I'll accept if Lyon total all those payments and deduct that figure at the end to determine the fair value instead of deducting periodically.

How any loss sum identified is to be paid

If there is any loss identified, interest must be paid on such a sum at the rate of 8% simple a year up to the date of settlement.

It is not clear to me in the circumstances if any deduction ought to be made to take account of taxation. The sum will not be able to be paid into Mr T's pension as far as I can see.

It doesn't appear to me I am in a position to say whether any sum identified ought to have a reduction as it would have otherwise been considered taxable income. It's likely Mr T would have taken the maximum of any tax-free sum available (as he apparently did from Provider B). But it is not my role to say how any redress payment in these circumstances will be treated by His Majesty's Revenue and Customs (HMRC).

Thus any loss sum ought to be paid tax-free. Since I am looking to put the estate of Mr T in a position as close to where it ought to be, this would ordinarily mean it was paid into the pension. Since Mr T was under 75 when he died, my understanding is it would be tax-free.

I have considered whether I was able to say Lyon need to make any reductions to allow for any adjustment, as required for tax purposes, and as required by HMRC. In addition whether anything ought to be done about any financial advice on this for Mr T's estate (Mrs T). I have not received any representations (or disagreement) on this aspect from any party. Taking everything into account I am satisfied that it's appropriate for Lyon to pay any sum simply as set out above. Of course, Lyon will need to provide the details of the calculation to Mr T's estate, in a clear, simple format.

Ordinarily the pension benefits of Mr T would be paid outside of the estate to the beneficiary. I don't know who the pension beneficiary is here, albeit it seems more likely than not to be Mrs T.

I previously explained it seems to me that whilst pension benefits fall outside Mr T's estate, this does not mean I can't require any redress due to be paid to Mr T's legal representative, here Mrs T. In my view she meets the requisite description as executor, Mr T's representative, as well as potential beneficiary. Even if she is not dealing with any redress payment as part of his estate, this does not prevent her from dealing with any redress payment as his legal representative. I have not received any representations (or disagreement) on this aspect from any party. More recently and following Mr T's death, Mrs T has had a financial adviser to review communications from this service.

I previously explained that I think it's reasonable for the sake of simplicity not to look at what Mr T might have obtained as tax-free cash in 2017. Of course the sum he did receive will be deducted from the overall loss calculation, as this was a benefit he received.

In addition, Lyon should also:

- Provide the details of the calculation to Mr T's representative (Mrs T), in a clear, simple format.
- Pay Mr T's representative (Mrs T) £250 for the distress Mr T experienced due to his worries over the detrimental impact on the value of his retirement funds due to fees, penalties, and increased charges on transfer.

I am not able to make an award to Mrs T for her undoubted distress and inconvenience. However I would like to acknowledge I have no doubt that pursuing this complaint on behalf of her husband when he was seriously unwell and following his death will have had a significant impact upon her, and I consider this unsatisfactory.

My final decision

For the reasons given I am upholding the complaint made originally on Mr T's behalf and now brought by Mr T's estate, against Lyon & Co LLP to the extent set out above.

Lyon & Co LLP are required to complete the loss assessment calculation set out above and to pay any sum due in the way set out. In addition they are to pay the sum of £250 to Mrs T as Mr T's representative and the representative of the estate. This represents the distress and inconvenience experienced by Mr T.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr T to accept or reject my decision before 13 December 2023.

Louise Wilson
Ombudsman