DRN-4398214

The complaint

Mrs M complains about the suitability of the advice provided by Kirby Thomas & Co (IFA) Ltd ("Kirby Thomas") to secure a lifetime annuity rather than a fixed term annuity ("FTA"). She also complains that Kirby Thomas failed to advise her regarding the management and investment of her defined contribution ("DC") workplace pension plan which she believes led to her suffering a significant financial loss.

What happened

Mrs M had built up benefits in a defined benefits ("DB") pension scheme. The cash equivalent transfer value of her DB pension was £618,826. She was interested in transferring this amount to a private pension arrangement so that she could convert it into flexible benefits to achieve several objectives. She approached Kirby Thomas for advice.

On 3 May 2022, Mrs M completed a fact find document and returned it to Kirby Thomas ahead of their meeting to discuss her objectives. This confirmed her personal and financial circumstances at that time, summarised as follows:

- She was aged 60 but was due to turn age 61 shortly. Her husband was aged 65. They were both retired;
- Their assets comprised the marital home valued at £525,000, cash savings of about £150,000, a yacht valued at about £50,000 and shares valued at about £11,000;
- They didn't have any debts or liabilities (the marital home was owned outright);
- Their joint monthly expenditure was about £3,000. Her husband was already in receipt of gross annual pension income of about £29,000; and
- She had built up benefits in a DB pension scheme (as noted above). In addition, she had built up benefits in a DC workplace pension scheme which was valued at about £174,000. She was also on course to receive the state pension from age 67.

Mrs M noted her objectives in connection with her DB pension in the fact find document. This included her wish to start drawing gross annual pension income of around £24,000. In addition, she stated:

> *"Ability to access significantly more tax free cash as an initial lump sum.*
>
> *Flexibility of income payments.*
>
> *Upon death the remaining investment can be inherited by either my spouse or children.*
>
> *It is highly unlikely that my husband will live beyond 10/15 years and in any event should I die first he will have the remainder of the investment. My health is not 100% I am currently going through heart checks due to low heart beat and occasional heart*

rhythm problems.

I understand that I am taking on the risk myself and that the markets can fluctuate significantly but the investment is long term and not short term. I would not want to invest in high risk funds and I am not expecting the fund to grow significantly I would be happy for investment to cover IFA and management expenses with very small growth."

Kirby Thomas assessed the information provided by Mrs M. As part of this assessment process, it determined that she had a *'Moderately Cautious'* attitude to investment risk.

On 12 May 2022, Kirby Thomas sent a suitability report to Mrs M. It recommended that she transfer the combined value of her benefits in the DB pension scheme and DC workplace pension scheme to a self-invested personal pension ("SIPP") – and then invest the underlying fund to align with her *'Moderately Cautious'* risk profile. It said that this course of action would meet her flexible income and death benefit objectives. It was noted in the suitability report that alternative options including lifetime annuities and FTAs had been considered but were discounted.

On 13 May 2022, after reading through the suitability report, Mrs M emailed Kirby Thomas to say that she had changed her mind and didn't want to transfer to a SIPP. She indicated that she wanted to:

- take the DB pension as a scheme pension because it was risk-free; and
- use her DC workplace pension plan for flexi-access drawdown ("FAD").

Kirby Thomas arranged to cancel the two proposed pension transfers to the SIPP so that Mrs M was effectively placed back into the position she was in before. There then followed an exchange of correspondence between Mrs M and Kirby Thomas regarding how she wished to proceed. This included the consideration of alternative options. Kirby Thomas's letter dated 15 June 2022 (which it has since described as an addendum to its earlier suitability report dated 12 May 2022) confirmed the outcome of those discussions:

- Mrs M had decided to cancel the proposed transfers to the SIPP, as previously recommended by Kirby Thomas on 12 May 2022;
- As an alternative option, she had decided to transfer away from the DB pension scheme and use the cash equivalent transfer value of £618,826 to take an immediate tax-free lump sum of £154,706 (25% of the fund value) and use the residual fund of £464,120 to secure a lifetime annuity on the open market. Kirby Thomas identified that Legal & General offered the highest annuity income at that time. It recommended that Mrs M use the residual fund of £464,120 to secure a level, gross annual annuity of £21,649 with a guaranteed period of 30 years. Kirby Thomas confirmed that Legal & General offered a higher level of immediate income than compared to the DB pension scheme (which offered a maximum tax-free lump sum of £97,312 and a reduced gross annual pension of £14,596); and
- Kirby Thomas would charge a fee of £13,000 for arranging and advising on the transaction – this would be paid by Legal & General after payment of the tax-free lump sum.

After cancelling the transfer to the SIPP, Kirby Thomas didn't provide further advice to Mrs M in connection with her DC workplace pension plan – and so it remained invested in the same investment strategy as before. In August 2022, the transfer from the DB Pension scheme to

Legal & General was completed. As previously agreed, Mrs M took an immediate tax-free lump sum and secured a lifetime annuity with the residual fund.

In September 2022, after she had received the first annuity income payment, Mrs M emailed Kirby Thomas to ask whether the lifetime annuity could be changed to a FTA. She stated, amongst other things, *“I really think it would be best for me to have a set annuity for a couple of years with the lump sum at the end”.* There followed an exchange of correspondence between Mrs M, Kirby Thomas and Legal & General. The outcome was that Legal & General stated it was unable to unwind the lifetime annuity – it explained this was because HMRC rules prevented it from cancelling the arrangement after the cooling off period had expired and income payments to Mrs M had already started.

This complaint

Mrs M was unhappy with the outcome that her lifetime annuity couldn’t be unwound and changed to a FTA. So in late 2022 she complained to Kirby Thomas about the suitability of its advice to secure a lifetime annuity. She said that the advice didn’t meet her needs for flexible income and death benefits and that she had lost access to her fund. In her view, she should’ve been advised to secure a FTA which would’ve enabled her to benefit from secure income in the short term while keeping her options open regarding future flexibility. She also complained that it had failed to advise her regarding the management and investment of her DC workplace pension plan which she believed led to her suffering a significant financial loss of about £40,000.

Kirby Thomas’s position

Kirby Thomas didn’t uphold this complaint. It noted that Mrs M had rejected its initial recommendation to transfer to a SIPP because she wasn’t comfortable with the investment risks associated with that option. Rather, she had said she wanted a ‘no risk’ option and certainty of income. And so it believed that the only viable options were a scheme pension or lifetime annuity. Overall, it was satisfied its recommendation for the lifetime annuity was suitable because it met Mrs M’s recorded needs, objectives and *‘Moderately Cautious’* risk profile – and provided a higher level of immediate income and tax-free lump sum compared to the DB pension scheme. With regard to her DC workplace pension plan, it stated that Mrs M had decided, without advice from Kirby Thomas, to use the value of that plan for FAD. As such, it didn’t think it was responsible for the decisions she made in connection with that plan including the underlying investment selection or any reduction in the fund value flowing from this.

But it recognised that Mrs M had spent time complaining and, as a result, had experienced some distress and inconvenience – so it offered her £450 compensation in connection with this.

Our investigator’s view

Mrs M didn’t accept Kirby Thomas’s final response or its offer of compensation. She referred the matter to this service. Our investigator didn’t recommend upholding this complaint because she was satisfied that Kirby Thomas’s recommendation for the lifetime annuity was suitable in the circumstances. And she also concluded that Kirby Thomas wasn’t responsible for either Mrs M’s decision to use her DC workplace pension plan for FAD or its investment performance – so she didn’t think it was responsible for the reduction in fund value complained about. Overall, she didn’t think that Kirby Thomas had made an error or treated Mrs M unfairly in its dealings with her.

Mrs M didn't agree with our investigator's opinion. She provided substantial additional comments setting out her reasons why and requested that this complaint be referred to an ombudsman for review.

This complaint has now been allocated to me to review and decide. This is the last stage of our process.

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.

I've taken into account the law, any relevant regulatory rules, guidance and good industry practice at the time. Where the evidence is unclear, or there are conflicts, I've made my decision based on the balance of probabilities. In other words, I've looked at what evidence we do have, and the surrounding circumstances, to help me decide what I think is more likely to, or should, have happened.

I'd also like to clarify that the purpose of this final decision isn't to repeat or address every single point raised by Mrs M and Kirby Thomas. So if I haven't commented on any specific point, it's because I don't believe it's affected what I think is the right outcome. I've considered all the evidence afresh including Mrs M's comments in response to our investigator's assessment.

Was Kirby Thomas's recommendation for the lifetime annuity suitable?

Mrs M believes that Kirby Thomas should've advised her to secure a FTA and not a lifetime annuity. This is on the basis that she feels a FTA was a 'no risk' option because it would've enabled her to benefit from secure income in the short term while keeping her options open regarding future flexibility.

When assessing suitability, I take into account the regulator's rules and guidance. These state that firms must take reasonable steps to ensure a personal recommendation is suitable for their client. The rules also set out the need to gather information about the client so that the firm has a reasonable basis for believing the recommendation is suitable based on the client's:

- knowledge and experience to understand the risks relevant to the specific type of advice or service being recommended;
- financial situation (including capacity for loss); and
- investment objectives (including risk profile, risk preferences, term and purpose of the investment)

There are usually several different options which can be suitable for a particular client. So the fact that Kirby Thomas could've recommended an alternative option doesn't automatically mean its recommendation for a lifetime annuity wasn't suitable. What matters is whether Kirby Thomas took reasonable steps to ensure its recommendation for a lifetime annuity was suitable taking into account the factors above. In my view, a recommendation can be regarded as suitable if a demonstrably better alternative option wasn't available at the time of the advice.

As for the advice given to Mrs M, I think it's important to note that the primary purpose of a pension is to meet the income needs of an individual during retirement. Mrs M stated in the fact find document that she required gross annual pension income of around £24,000. Her DB pension represented her most valuable asset at that time. While it's true that she had access to substantial cash savings and a DC workplace pension plan, I think it's clear that she would be heavily reliant on the income generated by her DB pension to meet her core income needs in retirement. Given Mrs M's limited capacity for loss, I think it was important not to expose the value of her DB pension to unnecessary risk by treating flexibility, control and maximisation of death benefits as a high priority at the expense of the primary income purpose – unless there was a suitable reason to do so.

Kirby Thomas initially recommended a transfer to a SIPP. But Mrs M rejected that recommendation. I've read through the emails she sent to Kirby Thomas at the time explaining her reasons why. Amongst other things, she stated, *"After 3 sleepless nights and running through the risks I have decided that I don't feel comfortable with transferring into the [recommended SIPP] or at all. I have decided that I want to take benefits from my DB scheme as this is as risk free as investments can be. With regard to my* [DC workplace pension plan] *I will take as a drawdown… We* [Mrs M and her husband] *will have a comfortable life and we collectively will have some investment in stocks and shares and guaranteed income which is for us a better spread".* In other emails, Mrs M referred to her concerns about ongoing turmoil in the investment markets, rising inflation, global conflicts and her belief that the UK was about to go into a recession.

I think it's fair to say that Mrs M wasn't a risk taker at the time. Rather, the evidence shows that she was a cautious investor who didn't like taking investment risk. This supports Kirby Thomas's assessment that she had a *'Moderately Cautious'* risk profile at the time. Mrs M decided that she wanted to take benefits from the DB pension scheme because this was *"as risk free as investments can be".* Her comments strongly indicated that she wasn't willing or able to tolerate exposing her main retirement provision to investment risk. With reference to the tax-free lump sum available, Mrs M stated that she wanted to invest it in a "*safe"* account or bond where she didn't expect its value to grow because her primary objective was capital preservation – this is further evidence that she wasn't a risk taker.

Based on what Mrs M said in response to the initial recommendation, Kirby Thomas concluded that she required certainty of income and that this meant the only viable options were either a scheme pension offered by her DB pension scheme or a lifetime annuity secured on the open market. Based on what I've seen, I agree. I'm not persuaded that Mrs M had the necessary knowledge and experience, risk profile or capacity for loss to convert her DB pension into flexible benefits either at that time or in the future which would've exposed her main retirement provision to investment, inflation and longevity risk.

Kirby Thomas's research on the open market established that Legal & General offered the highest level of lifetime annuity income at that time. The gross annual annuity income of £21,649 which was eventually secured was higher than the alternative option of a scheme pension of £14,596 offered by the DB pension scheme. While it's likely that the scheme pension paid by the DB pension scheme would escalate in payment, it would've taken many years for it to catch up and exceed the total level annual income of £21,649 provided by the lifetime annuity. In an email to Kirby Thomas confirming her agreement to proceed with the lifetime annuity option, Mrs M stated, *"Just under £21k for 30 years guaranteed would actually suit me".* So she was content at the time that the level of income produced by the lifetime annuity would meet her needs (even though this was less than her previously stated target annual income need of £24,000). Securing the lifetime annuity also enabled Mrs M to obtain a maximum tax-free lump sum of £154,706 compared to £97,312 available under the DB pension scheme. It's important to note that the difference in tax-free lump sum would need to be taken into account in any income comparison between the lifetime annuity and DB pension scheme options.

In addition, while the DB pension scheme likely offered a spouse's pension, this would've been based on a proportion rather than the full amount of Mrs M's scheme pension. And it would've stopped on her husband's death – on this point, I note in the fact find document that Mrs M believed her husband had a reduced life expectancy. But the lifetime annuity recommended by Kirby Thomas included a guarantee period – this is a death benefit option that switches the same annuity payments to a nominated beneficiary for the remainder of a certain period of time. In Mrs M's case, the guarantee period is 30 years from the date the annuity started. This means that the level, gross annual annuity income of £21,649 will continue to be paid to Mrs M or any other nominated beneficiaries until 2052, no matter what happens.

So it's my view that compared to the alternative DB pension scheme option, the recommended lifetime annuity option provided a higher level of:

- income
- tax-free lump sum; and
- death benefit

I've thought about Mrs M's health. According to the Office for National Statistics, life expectancy at age 65 in the UK in 2020 to 2022 was around 21 years for females. Mrs M was aged 61 when the lifetime annuity was secured. So I think it's fair to say at the time that she had an average life expectancy of around her mid to late 80s.

The lifetime annuity secured for Mrs M was based on standard terms with no enhancement linked to her medical history or state of health. In the fact find document she disclosed that she had some health concerns related to her heart and had occasionally smoked tobacco in the preceding 12 months. These health-related factors may have entitled Mrs M to a higher or enhanced level of income – in simple terms, the reason for the enhancement is because the annuity provider assumes that the annuitant has a reduced life expectancy meaning it anticipates paying the annuity income for a shorter period of time compared to an individual with an average life expectancy. Legal & General confirmed to Kirby Thomas at the time of its advice that any health-related enhancement linked to Mrs M's medical history or state of health (assuming she was eligible for an enhancement) would've been negated by the fact that the proposed annuity had a guarantee period of 30 years extending to when Mrs M would be aged 91. I think that's a reasonable conclusion bearing in mind the guarantee period expired beyond Mrs M's average life expectancy, as noted above. Based on this, I don't have any concerns on this point.

Overall, based on what I've seen, I'm satisfied that the recommended lifetime annuity was suitable for Mrs M based on her recorded knowledge and experience, financial situation and investment objectives.

Would a FTA have been a demonstrably better alternative option for Mrs M?

Mrs M believes that a FTA was the most suitable option for her because it would provide secure income in the short term while keeping her options open regarding future flexibility. In her view, a FTA was a 'no risk' option and that Kirby Thomas failed to properly explore it at the time.

I can see that in an email exchange between Mrs M and Kirby Thomas in May 2022 – which was *before* the recommendation on 15 June 2022 for the lifetime annuity – she had in fact asked whether a FTA was a suitable option for her. She suggested a term of three years. Kirby Thomas replied at the time to express its view that it wasn't a suitable option because Mrs M would still be exposed to risk at the end of the three year term which would require a further decision at that time. It described the decision to secure a FTA rather than a lifetime annuity at that time as, *"kicking the can down the line for 3 years".*

I share Kirby Thomas's view. While it's true that a FTA would provide Mrs M secure income in the short term, it wasn't a 'no risk' option as she seems to think. For example, there was a risk that:

- annuity rates could be lower at the end of the fixed term such that she couldn't secure the same level as income as secured in 2022, meaning she'd be worse off

- the government may have changed legislation or tax rules during the fixed term;

- exit fees may have applied if she changed her mind during the fixed term; and

- In her emails to Kirby Thomas at the time of its advice, she mentioned her concerns about ongoing turmoil in the investment markets, rising inflation, global conflicts and her belief that the UK was about to go into a recession; there was obviously the risk that things may have worsened by the end of the fixed term

Flexibility and control might sound attractive but I cannot see that Mrs M had any concrete need for it based on her circumstances. I'm not persuaded that it was appropriate for a cautious investor like Mrs M to expose her main retirement provision to unknown future risks so that she could retain the option of flexibility. There's no real evidence that she required the flexibility of irregular lump sums or variable income during retirement. But if she did require it then any flexible needs could've been met by her substantial cash savings and DC workplace pension plan.

The course of action recommended by Kirby Thomas enabled Mrs M to have a blended approach whereby her core income needs would be met by the guaranteed lifetime annuity and state pension (once that started from age 67) and any flexible needs could be met by her cash savings and DC pension plan, as noted above.

Mrs M wanted to ensure that any unused pension benefits could be inherited by her family. While I understand that death benefits are important to consumers, the priority here, in my opinion, was to advise Mrs M about what was best for her own retirement provision. Using the residual fund of £464,120 to secure a series of FTAs and/or to invest in a SIPP at a later date for the purposes of drawing income through FAD would likely mean the size of the fund remaining in later years – when death is more likely – could be much smaller than expected. But Mrs M's lifetime annuity income of £21,649 will continue to be paid for the full 30-year guarantee period. On this point, I think it's important to highlight that in exchange for the residual fund of £464,120 used to secure the lifetime annuity, Legal & General will pay total income of £649,470 (£21,649 x 30 years) over the term of the guarantee period.

Taking into account the factors above, I'm not persuaded that a FTA was a demonstrably better alternative option for Mrs M compared to the lifetime annuity option she ultimately secured.

<u>*Was Kirby Thomas responsible for the investment loss under Mrs M's DC workplace pension plan?*</u>

Mrs M complains that Kirby Thomas failed to advise her regarding the management and investment of her DC workplace pension plan which she believes led to her suffering a significant financial loss of about £40,000.

The evidence shows that on 13 May 2022, Mrs M emailed Kirby Thomas to tell it that she had decided, without its advice, to use her DC workplace pension plan for FAD. Kirby Thomas clarified in an email sent to Mrs M on the same day that its research into lifetime annuities was based only on the value of her DB pension. So Mrs M knew the scope of Kirby Thomas's advice from that point onwards.

If Mrs M was expecting Kirby Thomas to advise her regarding the management and investment of her DC workplace pension plan, I think it's reasonable to conclude that she should've questioned things sooner. But there's no evidence she did until making this complaint in late 2022 after the value of her DC workplace pension plan had fallen in value. I don't think Kirby Thomas is responsible for this loss after it made clear in the email exchange on 13 May 2022 that the scope of its advice from that point onwards was limited only to the value of her DB pension.

Conclusion

This service's aim in resolving a complaint is to place the consumer, as close as possible, into the correct financial position had the error or unfair treatment not happened. In this case, I don't think that Kirby Thomas made an error or treated Mrs M unfairly for the reasons explained. Therefore, I don't consider it would be fair or reasonable in these circumstances for me to uphold this complaint or direct Kirby Thomas to pay compensation to Mrs M.

Kirby Thomas previously offered Mrs M £450 compensation in recognition of the time she had spent complaining and, as a result, had experienced some distress and inconvenience. I understand that the offer is still open to Mrs M should she wish to accept it now. If she does, she should contact Kirby Thomas separately to arrange settlement.

My final decision

For the reasons given above, I don't uphold this complaint or make any award against Kirby Thomas & Co (IFA) Ltd.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 17 April 2024.
Clint Penfold
Ombudsman