DRN-4508361

The complaint

Through a representative, Mr G complains that Gate Capital Group Ltd (which was at that time known as Plutus Group) unsuitably advised him to transfer his personal pensions to an Intelligent Money SIPP in order to access a portfolio managed on a discretionary basis by Organic Investment Management (OIM).

What happened

On 15 & 20 June 2016, Gate wrote to Mr G's existing pension providers (Scottish Widows and Phoenix) from its central email address requesting policy information and enclosing a letter of authority signed by Mr G, detailing its FCA registration number.

The responses it received confirmed that the Scottish Widows plan was invested in Pension Portfolio Two with a value of £56,207. Its Annual Management Charge (AMC) was 0.45%. There were 73 funds to choose from with a maximum of 10 at any time.

The Phoenix plan was invested in a with-profits fund and had implicit annual charges of 1.27% (including the policy fee) if it grew at the regulator's middle projection rate. It was based on a guaranteed basic sum of £2,781 to which accrued bonus of £927 had been added, but was then reduced for early payment. Including a terminal bonus of £666 the amount payable was £2,875.

Gate also obtained an Intelligent Money (IM) illustration on 22 August 2016. It then wrote to Mr G on 2 September, enclosing two suitability reports, an IM SIPP application and a disclosure form for Valbury, the custodian of the OIM discretionary portfolio. The reports noted the below about Mr G:

- He was 46 and divorced with 2 dependent children aged 11 and 9
- He had recently been made redundant and was using his savings to support his lifestyle
- He was in good health
- Core household expenditure was £2,884 per month and total expenditure was £3,067 per month
- Assets were recorded as £32,000 cash, £28,000 ISA's and £50,000 Premium Bonds
- Liabilities were recorded as a £3,000 credit card
- He also held a defined benefit (DB) occupational pension projected to pay him £5,850pa at age 65
- If Mr G was entitled to a full state pension it would be £8,093pa at age 67

Gate also recorded that Mr G had a Medium High attitude to risk (5 on a scale from 1-6 where 1 was 'No risk'), based on the results of its questionnaire. He had confirmed that the two personal pensions were an important part of his retirement planning but was willing to put them at risk in exchange for potential growth. So, he could afford to lose about 18% in any 12-month period without it significantly impacting on his standard of basic living in retirement. He had experience of investing in this way as his Scottish Widows policy had an element invested in shares.

His objectives were recorded as:

- To understand how pensions work and what they are worth
- To achieve better growth than from his current pension plans
- To take tax free cash at 55 and then retire at 65, taking income as required
- He would require an approximate income of £24,000pa for core expenditure at age 65
- To provide better and more flexible death benefits for his two children
- To receive ongoing advice

One report advised Mr G not to transfer his DB pension. The second report advised him to transfer his two personal pensions to an IM SIPP and invest in OIM's discretionary portfolio. It appears to be partly because of the existing plans' inability to facilitate charges for ongoing advice from the fund that a transfer was recommended. But also because neither plan allowed drawdown of income when the time came to do that.

Gate highlighted that a SIPP would allow him control over his funds and the opportunity to outperform his existing investments, plus provide for his children better on his death – including by 'successor drawdown'. Under a drawdown strategy the adviser estimated that Mr G's funds could sustain an income of £11,790pa for him until age 100, based on annual returns of 5.88% net of charges. So, he would only be short of his retirement objective by £2,466pa. This was why additional monthly contributions were recommended.

However the new SIPP was more expensive to run overall than his existing plans for reasons including the £150 annual charge to IM. Gate said that this was a better option than a stakeholder pension which had a cap on its charges, but didn't allow access to a discretionary manager or beneficiary drawdown.

Gate indicated it had carried out due diligence into using OIM as a discretionary manager. It highlighted this was a boutique investment house, didn't manage its own funds and wasn't constrained in its investment selection. Although it acknowledged OIM's overall cost could be higher than others in the marketplace, it considered the selection was justified by its approach to researching and analysing investments, and acting entirely independently by making decisions without emotional ties via automated assessment tools.

The suitability report said OIM mapped Mr G's attitude to risk across to its Ambitious model portfolio. A very recent factsheet was provided for this portfolio which indicated that it would be invested as follows:

Corporate bonds	34.4%	Market neutral	19%
Developed markets equities	25.2%	Commodities	8%
Emerging markets equities	8.4%	Cash	2%
Government bonds	8.0%	*[sic - the percentages total 105%]*	

The factsheet said the portfolio was designed to provide long-term growth by investing in bonds, ETFs, global equities and UCITS funds. It was *"designed to move dynamically to adjust to major trends within the marketplace."* The portfolio had been established in January 2015 and had performed similarly to its benchmark (75% world equity, 25% global capital bond) since then, although had outperformed it by about 7% in the last 12 months.

The 'small print' on the factsheet added that *"A proportion of the portfolio may be in higher risk securities. A proportion of the portfolio may be invested in funds in which Organic Investment Management have an agreement to manage such funds. Early redemption charges may apply to some investments. The investments and services referred to in this document may not be suitable for all investors…"*

Gate signed a Valbury/OIM SIPP application form on 2 September 2016, confirming advice had been given on the suitability of the investments and the risks involved. OIM charged a 0.25% dealing fee, 0.30%pa ongoing fee and 0.10%pa custody fee. In addition there was a 4% initial adviser fee and a 1%pa ongoing adviser fee. Mr G signed the document together with IM's application form on 5 September 2016 with Power of Attorney to be granted to OIM from 9 September 2016.

The SIPP application detailed a normal retirement age of 65, named Mr G's beneficiaries as his son and daughter, stated he was unemployed and detailed a £10 per month contribution. Gate was also stated on the application form as the adviser, with an address in Kent which I'm aware was the address registered with the FCA for one of its Appointed Representatives (ARs) at the time. The covering letter to IM stated clearly that the adviser was representing that AR and his principal was Gate.

On 12 and 13 September 2016, Phoenix and Scottish Widows paid a total of £65,407 to IM. Forms supplied by Intelligent Money for the Origo Options online transfer system it used, detail Gate as the adviser for both these transfers.

On 22 September 2016, Gate sent Mr G a further suitability report and declaration page. The agreed risk profile was detailed as 'Growth', which was the 5th highest of the 6 risk profiles detailed. There is no such portfolio of that name on the Valbury disclosure form, where OIM's "Ambitious" Model Portfolio (risk level 4 out of 6) has been selected. It appears that £59,082 was to be transferred into that portfolio.

On 17 March 2017 the same adviser that had signed all of the transfer documentation for Gate wrote to Mr G explaining that his custom had been moved to the adviser's new firm, which I'll call "H". He followed this up on 18 October 2017 to offer an annual review. The letter detailed Mr G was a Moderately Adventurous / Medium High investor and that he was invested in the OIM Medium High Portfolio fund, adding *'This portfolio is suitable for your current risk profile'*. A similar letter was sent on 30 November 2018.

I note that Mr G was still paying his £10 monthly contributions in 2019. IM wrote to him in March that year to explain that OIM had entered administration, and a portion of the Organic Bond and Organic Long Short Alpha fund included in his portfolio were illiquid. H had also entered administration. But before doing so H had instructed IM to disinvest as much as possible from OIM. This meant Mr G held £48,656 in the SIPP bank account and £7,028 remained in illiquid investments with OIM. It appears some of this was later returned to the bank account by OIM's administrators.

The last letter Mr G has from H is dated 3 May 2019. This marks the conclusion of a period of correspondence advising him that it had made a claim for the outstanding sum from OIM and put him in touch with a solicitor regarding making a claim (through the Financial Services Compensation Scheme – FSCS) about the management of those funds, because it did not intend to apply for a separate Claims Management licence.

On 1 May 2020 IM as trustee of Mr G's SIPP signed an application to transfer £48,531 from his SIPP bank account to be managed by A J Bell. An individual holding a controlled function at Plutus Wealth Management LLP was apparently copied into A J Bell's letter of 18 May advising IM of the same. That firm took a £500 initial adviser charge for reinvesting Mr G's money and a 0.9%pa ongoing charge. Despite the name being similar to Gate's former name, I've been unable to identify a connection in directorships or ownership between the two firms.

Mr G's representative complained on his behalf in August 2022 that a transfer to a SIPP was considered by FCA to be unsuitable for less than £100,000 due to the high fees involved. And it thought the discretionary portfolio was unsuitable for his attitude to risk.

As Gate didn't respond, Mr G's representative referred the complaint to the Financial Ombudsman Service. Gate told us that it had no records of advice given other than a SIPP application form filled out by an adviser it said was its former appointed representative.

The representative supplied the evidence it had gathered from IM and Valbury to this service. They added that they had complained to the FSCS on account of OIM's collapse – and that scheme had been unable to consider its complaint against OIM until completion of this complaint against Gate.

Gate also provided the following comments to our investigator which are relevant to this decision:

- On previous occasions, this service had determined that losses should only be calculated up to the point the adviser moved the clients to H (March 2017) and was responsible for giving advice. At the most this date should be pushed back by a few months to allow the adviser time to make revised recommendations.
- Further, we had said that Gate's due diligence into OIM as an investment manager wasn't defective to the extent that it should become responsible for losses caused by OIM's mismanagement of, amongst others, the Organic Bond and Organic Long Short Alpha fund mentioned above. So a proxy value should be used for a portfolio based on the benchmark it was originally intended to be managed to.
- Excluding advice fees, the difference in the middle regulatory projection between the Scottish Widows plan and the entire SIPP was £81,400 vs £78,600. This could be bridged by the anticipated outperformance in the OIM portfolio.
- Mr G could have switched off the ongoing advice fee if he'd wanted to, but it would be reasonable to expect him to pay an ongoing fee through the Scottish Widows plan if advised to switch funds within this plan.
- OIM had a proven track record as a discretionary manager and met Mr G's aim of achieving more growth, notwithstanding the 'slightly higher' charges.
- Gate's cashflow modelling mis-stated the amount payable separately from Mr G's DB pension at retirement as £1,651pa, when in fact the suitability report for this transfer projected it to be £5,850pa. So the anticipated drawdown income would likely cover Mr G's entire income shortfall.
- The guarantee in the Phoenix plan only amounted to a built-in return of 1.3%pa (unless further bonuses were added).
- The OIM Ambitious model portfolio matched Mr G's 'medium high' attitude to risk. Gate asked Mr G to accept responsibility for ensuring that the definition of this category was appropriate for him at the time.
- It has access to details of the reviews at H where Mr G was assessed as having a medium high attitude to risk in both October 2017 and November 2018.

My earlier Provisional Decisions

I've issued two Provisional Decisions on this complaint, on 21 July and 6 November 2013. The following is a summary of the overall conclusions reached at the conclusion of the second Provisional Decision:

<u>Did Gate provide Mr G with suitable advice?</u>

- Mr G's existing Scottish Widows plan was invested in portfolio two of its four pension portfolios, with only portfolio one containing more shares. So, it was broadly the same as the 5 out of 6 Gate assessed him as on risk (or the 4/6 for the OIM portfolio Gate placed him in).

- His other smaller pension took a more cautious investment approach in with-profits funds. He also had an existing DB pension. Taking all of these into account and noting he was a moderate way from retirement, I'm satisfied he was willing to take broadly a medium risk with his pension provision.
- I share the investigator's concerns that the advice to switch the personal pensions didn't follow the standards expected by the Financial Services Authority (FSA) in its 2008 thematic review on quality of advice on pension switching, including where a pension incurred extra product costs without good reason.
- Gate's view that the comparison of illustrations didn't need to take the advice charges into account was flawed. It is only if a product can be shown to benefit the client overall, after the impact of charges, that suitability can be demonstrated.
- The Scottish Widows plan had practically unbeatable low charges and was set up in such a way that the portfolio was proactively managed to Mr G's attitude to risk.
- If the new plan had features that were worth paying for, including superior fund performance, I would expect that to be demonstrated contemporaneously. It isn't sufficient to simply opt to receive ongoing advice and use that as the reason to change to a plan that was much more expensive.
- I explained why I thought a reasonable estimate would be that the total cost of using OIM (based on what OIM itself said) would be about 0.4%pa more than the 0.4% IM had already allowed for in its illustration. So the reduction in yield based on all these charges – including spreading the initial advice cost over the full term to age 65 – would have been about 2.3%pa: over five times the Scottish Widows charges.
- The Phoenix charge at 1.27%pa was still a lot less than IM and with-profits provided underlying guarantees, bringing added diversification to Mr G's planning. The weighted average across both policies was much closer to Scottish Widows' 0.45%.
- The future ability to use income drawdown wasn't a reason to transfer early and pay charges that were this much higher. There wasn't an overwhelming need to have funds managed on a discretionary basis. The terminal bonus on the Phoenix plan could have been crystallised if desired and more cheaply transferred to Scottish Widows, which was already managed to one overall attitude to risk.

My assertion that the transfer increased the overall costs of Mr G's pension five-fold continued to be disputed by Gate – principally because it didn't think the initial and ongoing advice charges should be included in that comparison. In its view this totally changed the basis of my decision, as it was possible to overcome this differential with the expected superior performance from OIM. In my second Provisional Decision I addressed this point:

"Gate's fees appear to have been contingent on the transfer going ahead, to the extent that the adviser said to Mr G it wouldn't be able to add an ongoing advice charge to his current plans if he remained in those. But I've already argued that there was no need to move the plans: they were substantially cheaper and proactively managed broadly to Mr G's attitude to risk already. So in effect the need to charge for ongoing advice was actually created by moving the pensions and not the other way around. That means it is reasonable to take the total cost of the proposition into account, including the initial and ongoing advice fees, in line with the concerns raised by the FSA's thematic review.

So, when it comes to providing redress, I'm still of the view that the starting position is that the losses Mr G suffered from these higher charges, and the performance of the OIM portfolio, all flow from Gate's advice. That's what this service would normally award as compensation: we don't expect the complainant to pursue each fund manager alleging that they'd made the matter worse. The fact that Mr G in this case has tried to pursue OIM with FSCS isn't something I'm bound to take into account, as clearly I cannot anticipate the outcome of any other action. Similarly, we wouldn't look to exclude the impact of the 1%pa ongoing advice charge simply because it went to H subsequently and not Gate. That's irrelevant as none of these losses would *have occurred but for Gate's advice, because Mr G wouldn't have been in a pension plan which allowed them to occur."*

Due diligence into OIM

- OIM didn't have a track record, so the growth potential was relatively unknown and Gate had to be more rigorous in its due diligence.
- Gate's due diligence was been based on specific questions the adviser put to an OIM director between May and August 2016. The adviser didn't simply accept OIM's marketing material without question. He went on to check out the pedigree of those running the business, and its external compliance consultants.
- The adviser recorded his overall conclusions in a summary document which set out concerns he had at the time about OIM's balance sheet and separation between internal management and the external compliance function. But he felt this was mitigated by Valbury rather than OIM itself having custody of client funds.
- He perceived that there were potentially benefits as well as risks in OIM being a smaller, more nimble operation. But from what I can see, he also wasn't yet confident about what would be the result. His notes show that he was looking to confirm that the situation had improved in the next filing of accounts, and that *"Portfolio checks required, at least when performing client reviews".*
- In August 2016 OIM provided assurances to Gate that the model portfolios wouldn't be invested in "non-standard assets" and that they would not be managing any funds directly; the latter being apparently at odds to the small print on the factsheet.
- OIM's later demise seems to be partly attributable to their decision to do these things, but I think Gate was entitled to conclude that OIM didn't intend at that time to do so; nor (as I believe has been the case) to increase their charges to 0.75%pa more than the upper limit of 1% that OIM implied originally.
- Monitoring of the portfolio by the adviser would represent good industry practice. But the adviser changed agency on Mr G's SIPP within six months, and I'm not considering a complaint about H. I accept that it would have been difficult during the brief time Gate was responsible for advising Mr G, for it to pick up on the subsequent changes that took place within the OIM portfolio.
- In December 2018 OIM's permissions as an investment manager were revoked by the FCA, which said it had become concerned not only by the illiquid assets in the funds OIM managed itself but also some of the things which the adviser himself noted in his original due diligence. This included OIM's low staff count (which had become lower still) and reliance on an external compliance function.
- Whilst I think the extent of Gate's due diligence enquiries here was reasonable, I have to question why it would have been suitable advice for Mr G to go into any sort of discretionary managed portfolio as this would involve leaving the significantly lower cost Scottish Widows plan. Charges were likely to have the most influence on the amount of growth Mr G could achieve.
- It was unrealistic to expect any discretionary manager to better Mr G's existing plans by some 2%pa with a broadly medium attitude to risk.
- The redress that would normally result from such a conclusion is that Gate would become responsible for the subsequent underperformance of the OIM portfolio – which it recommended – as part of putting Mr G back into the position he would have been in but for its advice.

Consistency of the ombudsman service's decisions

Gate had argued that consistency should be applied between this service's decisions, and there was no compelling rationale to depart from a previous decision we'd issued that had excluded OIM's losses from what Gate should pay; or another that allowed those losses to be capped after the client changed advisers. If there was such a rationale, Gate said that I should set that out those reasons clearly.

I responded as follows in my second Provisional Decision:

"It is a matter for the ombudsman in an individual case to set out what fair compensation looks like for that case. Whilst I understand Gate's point about consistency, due to the range of competing considerations being weighed up in the judgement of the ombudsman, compensation might look different in cases that share some similar features, because two cases are rarely exactly the same. In the particular circumstances of some complaints, the performance of the OIM portfolio was replaced by an index when working out compensation. That is also an approximation as from what I can see, the portfolio didn't go wrong from 'day one'. But in any event Gate seems to be mistaken if it thinks compensation has always been awarded this way.

Gate referred me to two decisions where it says my colleague didn't award any losses suffered in the OIM portfolio as part of the compensation. From what I can see, she did do that: there was no instruction to replace the value of the OIM portfolio by any sort of alternative index, which Gate is asking me to do here. I think this has become confused with another matter, which is the question of whether the growing losses are capped at a subsequent point when the consumer was no longer Gate's client. In some of the cases Gate has mentioned, this capping took place before the Organic Bond fund and Long/Short Alpha funds were suspended, which would have had a similar effect [to what Gate is asking me to do here] *if a large part of the losses in the OIM portfolio were excluded as a result".*

As the focus of Gate's points about consistency are how I address the potential responsibility of two other parties – OIM and H – I've also summarised my findings on those issues at the point of the second Provisional Decision, below.

<u>Should Gate be responsible for all of Mr G's losses?</u>

a) OIM's potential responsibility

- Gate had argued that the portfolio only became unsuitable after Mr G had transferred his agency away from Gate and OIM began to invest in a higher proportion of unregulated products with higher charges.
- At the point when Mr G moved to the AJ Bell SIPP in May 2020, the underperformance of the non-suspended funds doesn't appear catastrophic. A significant part of that underperformance was going to be due to the increase in charges I referred to and which I didn't think Mr G needed to suffer.
- The FSA's Finalised Guidance on *Assessing suitability: Replacement business and centralised investment propositions*[1] (July 2012) highlighted firms not considering the impact of additional charges, and said that it wasn't acceptable to shoe-horn all clients into the same solution. From what I could see, that's what Gate had been doing with all its clients here.
- I was struck in Mr G's case by just how unsuitable the recommendation was, when the pension he transferred out of was being appropriately managed to his attitude to risk, without a need for annual advisory reviews, for a charge as low as 0.45%pa in total. The prospect of Mr G benefiting at all from the recommendation in this particular case was vanishingly small.
- I thought that Gate's advice was given with total disregard for his circumstances and exposed him to significant losses caused by higher charges – notwithstanding that OIM may have exacerbated that differential in charges further.

[1] https://www.fca.org.uk/publication/finalised-guidance/fg12-16.pdf

- What happened with OIM could also be seen as the fruition (albeit not one which Gate necessarily expected and to the same degree) of risks from higher charges and the liquidity risk of 'alternative investments' that the adviser said in the suitability report Mr G should accept.

b) H's [and Mr G's] potential responsibility

- H carried out annual reviews in October 2017 and November 2018. All we know of what actually happened is that at some point between its November 2018 review and IM writing to Mr G in March 2019, the adviser had asked for the OIM funds to be disinvested – and the two Organic funds (Bond and Long Short Alpha) couldn't be sold, as they were illiquid.
- As of 31 August 2017, Mr G already had 6.4% in the Bond fund and 18.6% in the Long/Short Alpha fund. By 27 November 2018 he had £17,275 (28.3%) in the Bond fund and £13,339 (21.9%) in the Long/Short Alpha fund.
- The FCA had been issuing warnings to OIM since December 2016 but had not made those public at the time. Its later Final Notice[2] confirms the two funds above were suspended on 14 November 2018.
- I cannot safely conclude that warning signs that were apparent to the FCA but not publicised, would already have been apparent to H at the time of its October 2017 annual review. That was both because the extent of exposure to the two problematic funds had begun low and was increasing over this period, and because Gate itself says it wasn't aware of these issues until March 2018.
- Potentially a very significant part of Mr G's losses were caused by leaving the much lower-charging environment of the Scottish Widows pension, which was likely a special deal Mr G previously enjoyed which couldn't simply be restored by H.

In response, Gate asserted that it had pro-actively contacted all former clients including Mr G, and also the former adviser at H directly, to inform them of its concerns about OIM's management of the portfolio. It argued that Gate cannot be held responsible simply because H simply failed to act on the prompting of Gate's contact with him, and his clients.

Gate said it shouldn't matter whether H was unaware of the FCA investigation, if I've determined that the SIPP portfolio was already unsuitable at the outset. On that basis, H should have advised Mr G that the total ongoing charges were too much, so that he could have moved again to a cheaper provider; at the same time steering him away from the increasingly unsuitable OIM portfolio.

I addressed these arguments in my second Provisional Decision as follows:

"Gate's…provided a template of two letters it recorded on a spreadsheet as being sent to 16 clients, who it understands all moved with the adviser to H. I attach the letter templates to this [Provisional] *decision, dated 23 February and 12 July 2018. Gate's also sent us its notes of progress it was making to contact each of the 16 clients individually. Mr G is one of those clients, and obviously one it was unsuccessful in obtaining a response from. Notably, 12 clients did respond to the letters and this resulted in their funds being moved from IM (and OIM) to a new Nucleus SIPP.*

For most of these clients, the process of disinvesting from IM (and OIM) was started during April-May 2018 (after receipt of Gate's first letter). There's evidence of some delays in disinvestment of between 4-6 weeks. Gate's notes say: "The mutual funds take between 5 and 10 days for the proceeds to be returned and allocated to the custody account." Delays

[2] https://www.fca.org.uk/publication/supervisory-notices/first-supervisory-notice-organic-investment-management-limited-2019.pdf

were also experienced where "Once trades are settled and correctly allocated to the Valbury custody account, Organic create a redemption request for Valbury send monies back to Intelligent Money." The last client responded to Gate's July 2018 letter, and was still extricated into a new SIPP by 17 September 2018 – two months before the OIM funds became illiquid.

Gate also says it notified the former adviser directly at H with its concerns about OIM. It states that it had various conversations with him in the last three months of 2017, including a meeting in November 2017, in which Gate informed him it would be writing to clients to recommend that they disinvest from OIM portfolios. The subsequent letters saying this show Gate clearly did have concerns by at least then about the portfolios. As a majority of clients responded to the letters, I find it plausible both that they were sent, and that discussions with the adviser consistent with these letters took place.

All of this calls into question whether the adviser, whilst at H, could reasonably wait until the next annual review (by which it would have been too late) to discuss this pressing matter with Mr G. It's more likely than not he would have known what Gate's concerns were, even though the results of the FCA investigation weren't public.

Gate's spreadsheet gives an address to which letters were sent which corresponds to Mr G's address at the time he took out the SIPP. I noticed that H sent its October 2017 annual review letter to that address, but the November 2018 letter to a different one. So, I asked Mr G's representative if they could provide evidence of when he moved. It produced a new tenancy agreement dated 8 August 2018 (for occupation from 1 September 2018). As Gate had Mr G's correct address in both February and July that year, and there is wider evidence to show he was on a list of people it was writing to (12 of whom responded), I think it's more likely than not that the letters were sent and received by Mr G.

The first letter is little more specific than saying OIM no longer met Gate's 'criteria'. It was captioned as urgent, said that Gate wouldn't accept any future claim from Mr G in relation to these investments, and "strongly recommend[ed]" he took advice on alternatives to OIM. But it wasn't clear that this was because Gate thought the portfolio was being mismanaged in a way that could seriously affect Mr G's pension, and I think that in order to limit its liability in this way Gate would have needed to say this. Gate had originally recommended OIM as an investment, and COBS 2.1.2R in the regulator's handbook makes clear that Gate can't simply restrict a duty or liability it otherwise owes to a client under the regulatory system.

The second letter did go further than the first. Again marked as urgent, it said that Gate had carried out due diligence into OIM which had raised some concerns about the service it was providing. And what it wasn't accepting responsibility for included any liquidity issue with the investments. Bearing in mind that Gate couldn't actually provide advice to Mr G as he was no longer its client, I think this broadly did enough to highlight there were matters of sufficient concern that he should speak to the adviser at H without further delay.

I'm also now satisfied that the action Gate took with those clients who did respond to the letters shows that the adviser, whilst at H, would have been capable of moving Mr G into something more suitable before the Organic Bond and Organic Long Short Alpha funds were suspended. As the number of Gate's former clients still with the same adviser and yet to move funds doesn't appear to be substantial, I no longer think it's likely that the suspension date would simply have been moved forward and thwarted their attempts to move.

On balance, I now think it probable that Mr G could still have left the OIM portfolio in time, and it would have been reasonable – based on the letters Gate sent – for Mr G to approach H (or if he preferred, Gate, or another adviser) seeking that advice. So, I accept that there is now a case for attributing more of a responsibility to the adviser (and Mr G himself) to act, than I did in the first Provisional Decision.

The actual content of the review letters H did send to Mr G is also revealing. The October 2017 annual review said that the OIM portfolio was still appropriate but discussed a change to the risk rating system H was using for clients, and a need to have a meeting to assess Mr G for the new system. The November 2018 annual review letter was almost identical, referring back to Mr G's original objectives (when at Gate) for this portfolio and making no reference to any meeting that had happened since October 2017. From what Mr G has sent us, statements of the OIM portfolio were only sent to him at these times: one dated 31 August 2017 and one dated 27 November 2018.

It doesn't therefore seem that Mr G hadn't engaged further with H, despite receiving these invitations which he's sent to us. I can't dismiss the possibility that the adviser might have sent them more as a means of justifying the collection of his annual charge, rather than any intention of giving further advice unless Mr G was proactive in seeking it – as the letters do make a point of reminding Mr G that the adviser is collecting this charge. And it's particularly striking that the letter in late November 2018 was unchanged, even though by that point the adviser should not only have been known of the problems with the portfolio (from Gate directly or through mutual clients), but also that the Organic Bond and Organic Long Short Alpha funds had already been suspended for two weeks.

For the November 2018 letter to be almost identical to the October 2017 one – despite the changing circumstances – obviously invites some serious questions, but those are not for me to answer in this decision. As a result, it's difficult to tell even what would have happened if Mr G had contacted the adviser at H at least after Gate's July 2018 letter, which I think it would have been reasonable for him to do – particularly as he had already paid to get advice from H. I can't exclude the possibility that the adviser would have maintained that the OIM portfolio remained suitable for Mr G, but he would have had to justify why the concerns raise by Gate in its letter weren't valid. And in any case, as such advice would have proven to be misplaced it would then have given Mr G cause for complaint against H.

Gate argues that if I consider the recommendation of OIM was unsuitable, then it was equally unsuitable when H took over the portfolio within six months of Gate setting it up, so H should immediately have recommended Mr G move away from the portfolio. But this misses the point that the reason I thought the portfolio was unsuitable was because it was part of an overall switch to the SIPP that was unsuitable on a more widespread basis.

If H gave Mr G advice again soon after he became his client, it would no longer be comparing the cost of his SIPP and DFM arrangement with the much lower cost and availability of managed funds in the pension plans Mr G had left the previous year. Mr G couldn't simply to back into the GPP he had with a special discounted charge of 0.45%pa. H would have had to repeat the exercise Gate should have carried out when it gave its advice – of assessing the overall cost (including any initial advice charge) of potentially switching providers again.

As I said in my [first] *Provisional Decision, I'm not in a position to conclude that H should have switched Mr G out of the OIM portfolio at a point before Gate itself was writing to clients saying it had concerns about this portfolio. That would make no sense. Realisation of this would have been a gradual process: in my* [first] *Provisional Decision I looked at the worsening position in the asset split in the OIM portfolio between 31 August 2017 and 27 November 2018.*

I don't have any more information than this to go on, but I've taken into account everything Gate has said about its meeting with the adviser and the letters it sent to mutual clients. I haven't been able to safely conclude that this advice from H (or anyone else) would have been triggered any sooner than around July 2018 – when Mr G received Gate's second letter, emphasizing more clearly the need for him to act. In effect it's Mr G's failure to mitigate his potential loss by seeking that advice from this point onwards that results in the *calculation of compensation being capped. To allow a reasonable period for advice to be taken I'm going to take the date of Gate's second letter to Mr G and add one month – resulting in the date of 12 August 2018 for the calculation to be capped."*

Responses to my second Provisional Decision

Mr G's representative responded that Mr G didn't recall receiving the letters from Gate dated 23 February and 12 July 2018. He keeps all correspondence received and those aren't there. He doubts these letters were sent. It added that Mr G would prefer compensation paid in cash because he required it to pay his representative's fees.

Gate responded under two main headings as follows:

Suitability

- It continues to disagree that that the 4% and 1%pa adviser fees were contingent on a pension switch taking place. The adviser's statement that the existing plans couldn't facilitate the ongoing adviser charge makes no difference, as it simply means the ongoing charge would have had to be paid *outside* the plans.
- The suitability report clearly highlights that Mr G could have chosen to pay the initial and ongoing adviser fees himself but had elected to have them paid from his pension fund.
- The 1% adviser fee could be shut off at any time, if Mr G decided not to take advantage of ongoing advice given that his Scottish Widows pension had over 50 funds to choose from.

Consistency

- Consistency on decision making suggests that this service should apply the same principles as it did in another decision I made because it addressed the same issue of OIM's mismanagement.
- Gate cannot understand why I appear to have changed my mind about the appropriate approach, and it is not fair or reasonable to do so.
- It continues to refer to a decision made by my colleague where Gate's liability was capped shortly after the appointment of the new adviser in May 2017 – even though it relates to similar circumstances (in that the proposed SIPP was deemed to be higher costing than the existing arrangements).

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.

Fundamentally, I think Gate gave Mr G unsuitable advice to leave his existing pension plans because of the increase in charges. However this is looked at, the charges increase was considerable because Mr G already enjoyed such low charges in the Scottish Widows policy which formed the vast majority of his pension provision. It is relatively rare to see overall charges for a policy with funds that are proactively managed as low as this. This is the key point from which my initial conclusions on suitability follow.

Gate is disputing whether the increase was as much as five-fold, compared with the charges Mr G would have had to pay if Gate had advised him to remain in the same funds in his existing pension and charged him for *that* advice. To address the 1%pa ongoing advice charges first, the FSA had explained the purpose of its thematic review of pension switching in 2008:

"The project was undertaken because we were concerned about the risk that consumers may have been switched into higher charging pensions with features or additional flexibility they did not need."

"Ongoing investment advice
Where an 'asset allocation' approach has been recommended, the scheme needs to be reviewed periodically and rebalanced where necessary, to ensure it continues to be suitable. Otherwise, a portfolio made up of individual funds to meet a certain asset allocation will become unbalanced over time and this may mean the solution no longer meets the customer's attitude to risk and personal circumstances. The same risk applies when funds with different risk profiles are used. In order to be suitable in these cases, the adviser has to explain the importance of such reviews, or offer them, or put them in place.
…
We use the expression 'asset allocation' approach to cover the situation where the adviser recommends a spread of individual funds (each usually investing in a single asset class or sector) to meet an asset allocation profile that is suitable for the customer's ATR and personal circumstances."

Mr G's existing pensions didn't take this 'asset allocation' approach that required ongoing advice: they were both being automatically rebalanced by the insurers. So I don't accept that Gate advising Mr G to stay in those policies and funds – which is the advice I think it should have given him – necessitated the sale of an ongoing review service. I don't think Gate would have been treating Mr G fairly to insist he took up that service and in any event it's much more likely Mr G would have cancelled it as there would have been no apparent benefit to it.

Turning to the initial charge, I accept that Gate can't be expected to provide its advice for free, but many advisers did operate at that time on a contingent charging basis (meaning, the charges taken from those clients who went ahead with a recommendation cross-subsidised those who did not).

Gate's suitability report says Mr G had chosen to pay the charges for its recommendation of the SIPP by deduction from the plan – rather than paying them in cash. As this report is predicated on Mr G going ahead with the SIPP, those charges include the cost of actually arranging the SIPP and I don't think are compelling evidence of what Gate would have sought to charge him if it had decided it couldn't support a transfer at all.

Neither Gate nor Mr G has produced a terms of business document signed by Mr G – with Gate initially telling Mr G's representative that it had no paperwork for the sale of Mr G's transfer at all. I've seen the standard terms of business document Gate used at the time on other cases and note that the 4% Mr G was charged here is referred to in these as a "*percentage of the amount you invest and/or transfer".* The terms of business go on to suggest that Gate had the right to charge a one-off fee of £500 for a consultation.

So, it's not entirely clear to me how Gate would have been able to justify on a fair and reasonable basis, charging 4% of Mr G's transfer value (£2,600) for the work that would be necessary to establish that the charges and fund selection in his current plans best met his needs; confirming to him that he should stay in those plans; and thereby not incurring the additional cost of arranging a SIPP. It looks to me that this is where the £500 cost of a consultation might have applied, as I think Gate would have had difficulty securing £2,600 from Mr G for advice to remain where he was – particularly if he hadn't signed something unequivocally stating this would be the charge in advance.

But even if I'm wrong on that, even a 4% initial charge alone, when spread out over the whole term to Mr G's planned retirement at age 65 (nearly twenty years from the advice), wouldn't materially alter the conclusion I've reached that the SIPP and discretionary management arrangement was substantially more expensive than Mr G's existing plans. So, I don't agree with Gate that my conclusions on suitability are fundamentally altered by its assessment of the overall financial impact of him transferring.

In any case the selection of a particular method of redress in this complaint isn't determined by whether the increase in charges was five-fold, or a lower multiple. I'm required to review all the circumstances of the complaint to decide what's fair and reasonable. I took into account the unsuitability of the advice Gate gave to Mr G, the impact that other parties (H, OIM and Mr G himself) had on the end result, but also the inherent limitations in the methods of redress Gate would prefer me to use.

Specifically, I've considered that replacing OIM's performance with an index from day one runs contrary to the fact that Gate's adviser recommended this discretionary manager *despite* it being a recent entrant into the market with a different compliance structure and unproven performance. I haven't said that these features made OIM an inappropriate selection in and of itself (if Mr G *had* required a SIPP, which I'm not persuaded he did). But one of my reasons for concluding this was that the adviser had written in his due diligence report for Gate that OIM would require more careful monitoring in view of these features.

Gate went on to do that monitoring after the adviser left (if not for Mr G, for its other clients), and it subsequently did identify some concerns. All of these actions are consistent with Gate accepting responsibility, as I think it reasonably should, for its choice of discretionary manager when the adviser worked for Gate. I've already said Gate (and H) couldn't have known from day one that OIM was going to depart from its mandate. If there were already signs of this from the very beginning, I wouldn't have concluded that OIM was an appropriate selection of discretionary manager in the first place.

I've reached the view that this departure from the mandate happened gradually over time such that it was apparent to Gate, by the time that it wrote to Mr G in mid-2018, that action needed to be taken. So as I've already explained, it follows that I haven't found reason to conclude that the adviser, when at H six months after the sale, should already have been advising Mr G to switch back out of the plan and discretionary manager he'd only recently selected when at Gate – particularly when it wasn't straightforward for Mr G to return to his previous scheme charging only 0.45%pa. That moment would reasonably have come later.

All of these features of this case mean that, in my view, it represents fair compensation for Gate to initially have responsibility for the performance of the OIM portfolio it recommended as suitable for Mr G, and for that not to be immediately stopped when H became the adviser on Mr G's SIPP.

Gate appears to be objecting that my view of these changes in the OIM portfolio happening gradually after H took over as Mr G's adviser, is a "new item" in my decision-making. The decision-making process has been iterative, or I would not have been issuing Provisional Decisions at all. I make no apology for refining my thinking as the case has progressed. I'm not bound by previous decisions I've issued on other complaints, nor those of my colleagues. Beyond what I've already said in the Provisional Decisions, this decision is not the vehicle to rehearse any further why decisions were reached in *other* complaints.

I've also carefully considered Mr G's comments in response to the second Provisional Decision. He's clear in his view that he ought to have copies of Gate's letters of 23 February and 12 July 2018 if they were sent to him, as he's kept copies of other correspondence relating to the advice Gate gave him. I realise that I must be persuaded on balance that Mr G received those letters for the arguments I made in my second Provisional Decision to apply – namely, that he ought to have acted to mitigate his loss by 12 August 2018.

I don't doubt that Mr G has made every effort to remember if he got these letters, or that he doesn't have them to hand now. However I've found the evidence Gate provided of its collation of responses from other clients to these letters persuasive, for the reasons I explained in my second Provisional Decision. I have more evidence than just letter templates and addresses they were sent to. The wider evidence suggests that Gate did indeed write to these clients and was successful in extricating some of them from the OIM portfolio when they responded to its letters.

So on balance, having weighed up what Mr G has said with the evidence Gate has provided, I'm satisfied on balance that Gate sent these letters to him. And as Gate had Mr G's correct address at the time, they would more likely than not have been received. I therefore remain of the view that it's appropriate to cap this part of the calculation on 12 August 2018.

Putting things right

In assessing what would be fair compensation, my aim is to put Mr G as close as possible to the position he would probably now be in if he had been given suitable advice. I think Mr G would likely have remained with his previous providers.

Gate should ask Scottish Widows to include a £12.50 monthly contribution including tax relief from 8 November 2016 until 8 August 2018 when requesting a notional value as at 12 August 2018 from that provider. Gate should also ask Phoenix to provide a notional value if Mr G's with-profits investment with that provider had continued until 12 August 2018.

To the extent that either provider cannot provide part or all of the valuations on this basis, the FTSE UK Private Investors Income Total Return index may be substituted to determine the necessary part of these notional values.

I've chosen this index because Mr G wanted capital growth and was willing to accept some investment risk. 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. Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr G's circumstances and risk attitude.

I'm satisfied what I've set out below is fair and reasonable, taking all of the above into account and given Mr G's circumstances and objectives when he invested. To compensate Mr G fairly, Gate Capital Group Ltd must:

- Compare the actual value of Mr G's SIPP on 12 August 2018 with the combined notional values set out above. If the actual value is greater than the combined notional value, no compensation is payable. If the combined notional value is greater than the actual value, there is a loss and compensation is payable.
- If there is a loss, this must then be adjusted up to the date of my Final Decision, again using the FTSE UK Private Investors Income Total Return index, which I consider remains appropriate for the same rationale given above.
- Gate should pay into Mr G's pension plan, to increase its value by the amount of the adjusted loss at the date of my Final Decision. Its payment should allow for the effect of charges and any available tax relief. It shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.
- If Gate is unable to pay the compensation into Mr G's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the compensation should be reduced to

notionally allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr G won't be able to reclaim any of the reduction after compensation is paid.

- The notional allowance should be calculated using Mr G's actual or expected marginal rate of tax at his selected retirement age. It's reasonable to assume that Mr G is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. As Mr G would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.
- In addition, Gate must pay Mr G £200 for inappropriate pension switching and investment advice that has resulted in unnecessarily high charges and less appropriate investments than his original providers, which has caused him undue distress.
- Gate must provide the details of the calculation to Mr G in a clear, simple format.

Mr G will presumably have been notified by his representative in accordance with CMCOB 4.2.9R that in the case of pension-related claims, its fee may become payable before he has access to his pension, and he will where necessary need to pay its fees from his own funds. If he hasn't been notified then it's a matter between him and his representative. This doesn't provide a reason for me to depart from our usual approach to redress which is, as far as is possible, to restore the missing funds to Mr G's pension plan.

My final decision

I uphold Mr G's complaint and require Gate Capital Group Ltd to pay him compensation as set out in the steps above. If compensation is not paid within 28 days of Gate receiving Mr G's acceptance of my final decision, interest must be added at the rate of 8% per year simple from the date of that decision to the date of payment.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 8 January 2024.

Gideon Moore
Ombudsman