

The complaint

Mrs M has complained, through her representative, that in 1990 she was unsuitably advised by a precursor business to Mercer Limited to transfer defined benefits from her occupational pension scheme (OPS) to a personal pension policy (PPP)

What happened

The investigator who considered this matter set out the background to the complaint in his assessment of the case. I'm broadly setting out the same background below, with some amendments for the purposes of this decision.

At the time of the advice, the Frizzel Group comprised of two legal entities – Frizzell Life & Employee Benefits Ltd (“FLEB”) and Frizzell Life & Financial Planning Ltd (“FLFP”). In 1991 these entities were incorporated into different firms and have changed several times since.

As of now, the following was relevant:

- Liverpool Victoria (“LV”) is responsible for complaints against FLFP
- Mercer is responsible for complaints against FLEB

Mercer has said that there isn't any evidence to show that when FLEB was incorporated into “Antony Gibbs Consulting Group”, it took responsibility for past advice.

On 12 December 2022, Mercer sent its initial response to the complaint in which it concluded LV would be responsible for the complaint. This was because FLFP was named as the advising firm on the point-of-sale documentation.

On 18 January 2023, Aviva confirmed the following:

- The policy was sold by FLFP (and it provided the “agent number”).
- FLFP received the original commission.

On 13 February 2023, LV sent its own final response to Mrs M. It acknowledged that FLFP was recorded as the adviser on some point-of-sale documentation, but it believed this to be a mistake. It said that both FLFP and FLEB worked closely together, and it would be easy for a pension provider to become confused.

LV further said that the commission was later changed on its records as being paid to FLEB. It added that there was no record of the adviser working for FLFP and that Mercer had upheld a similar complaint previously.

On 12 May 2023, Mercer sent another response to the complaint. It said the following:

- There was no evidence that shows FLEB are responsible for the advice.

- There was no evidence that, when FLEB was incorporated into Antony Gibbs Consulting Group, it took on responsibility for past advice.
- Even if Mercer was responsible for the advice, the advice to transfer seemed suitable.
- The complaint should be time-barred.

Having considered the matter, the investigator didn't think it should be upheld, saying the following in summary:

- In terms of the Mercer's comments on time barring the complaint, there was nothing to suggest that Mrs M either was, or ought to have been, aware of having cause for complaint more than three years before she actually did raised it (in November 2022) – which was the relevant consideration here under the "DISP" rules. And so the complaint had been made in time.
- There were letters on FLEB headed paper indicating that it had set up the PPP and that it had also sent terms of business to Mrs M. But the investigator didn't think, on balance, that this demonstrated that FLEB had advised on the transfer.
- In support of this position, he said that FLFP was only firm referenced as the "adviser" and the only firm which Aviva said received commission.
- It was known that FLEB went on to service the policy, and it would be expected that it would be in touch with Mrs M at the time of the policy being set up. It would also be possible to set up the policy without having given advice on the transfer. And if the firms did work closely together, then it wouldn't be surprising that Mrs M had received correspondence from both.
- It was possible that the adviser could have worked in some capacity for both FLEB and FLFP.
- Although Mercer had upheld a previous complaint with some similarities to this, the facts and available evidence were different in that case, and so it didn't follow that this complaint should also be upheld.

Mrs M's representative said that they understood the investigator's position and the points made, and that they would be referring the matter back to LV. But as no definitive progress was made in that regard, it was agreed that this complaint would be referred to an ombudsman for review and a decision to be issued on the matter.

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'd firstly say that this is quite an unusual case, in that there are two potential respondent businesses here, neither of whom it seems have historically been prepared to accept responsibility for the advice given to Mrs M.

But I would also confirm at the outset that this decision solely concerns whether Mercer is responsible for the advice. I'm not in a position to make definitive findings on whether another business, namely LV, is responsible for the advice which was given to Mrs M. It

would be unfair of me to do so without first receiving a complaint against that business and giving it an opportunity to respond and provide any further evidence if it wished to.

But I do need to draw a conclusion in this case as to whether I think Mercer is responsible, based upon the available evidence – and that includes the evidence provided by all parties here, including the comments and documentation which has been referred to by LV.

I also note the “time barring” arguments presented by Mercer, which I might ordinarily address before a consideration of the merits of the case. But as this decision doesn’t in any case address the merits of the transfer advice, instead focussing upon whether Mercer was responsible for the advice, I don’t think I need to do so – for reasons which will become clearer below.

In my consideration of whether Mercer is responsible for the advice given to Mrs M in 1990, I’d comment – to the surprise of neither party I imagine - that the picture isn’t particularly clear, with some seemingly contradictory information from the time of the advice. But in such a situation, and as with the investigator, I would reach a determination on what I think, on balance, is more likely than not to have been the case.

And the following are what I consider to be the main points of evidence here.

I’ve firstly noted that Mrs M has herself said that she thought advice had been given by FLEB, and she named the adviser who gave that advice – I’ll refer to him as Mr H.

Mr H was also the signatory to the letter dated 9 August 1990 confirming the setting up of the policies into which Mrs M’s defined benefits were transferred – and this letter was sent with FLEB on the letter header.

This might therefore reasonably suggest that FLEB was the entity which gave the advice. But the position is more complicated than this.

Aviva (the current provider of Mrs M’s policies) has confirmed that commission was paid to FLFP and it also provided the illustrations, which predated the sale of the policy (dated February 1990), which described Mrs M (under her former name) as a client of FLFP.

The confirmation letter from Provident Mutual (the original PPP provider) of the setting up of the policy dated 15 August 1990 also confirmed that the commission payable in respect of the initial contribution would be to FLFP.

Anthony Gibbs, which in its header said it was “incorporating business of FLEB”, then issued later correspondence relating to the servicing of the policy, e.g. contribution levels. But this would quite reasonably relate to that post sale servicing, rather than the initial transfer advice.

I can see that LV has asserted that FLEB and FLFP were two entirely separate entities, and that it considered it strange that Mrs M had received correspondence at the time quoting both company names. But it also confirmed that both FLEB and FLFP were two entities within the same group – the Frizzell Group, as noted by the investigator. And so I don’t think it is particularly strange that there may have been some overlap between the entities and their respective functions.

Precisely what that overlap was, and to what extent either entity was involved in the actual advice provision, is something I think that it would be very difficult to determine with certainty, especially given the number of years which have passed and the evolution of the entities themselves since.

But as I've said above, I need to decide, on balance, what I think is more likely than not to have been the case here.

And whilst I think that Mr H was likely the individual adviser who gave the advice to transfer, as corroborated by Mrs M, and that the initial confirmation letter bears the FLEB heading, given the evidence contained in the illustrations relating to Mrs M being a client of FLFP and also that relating to FLFP being the recipient of the commission for the initial contribution – i.e. the transfer sum – I think it's more likely than not that FLEB *wasn't* the entity which provided the actual transfer advice. Arranging for illustrations to be sent and receiving commission are two quite significant indicators of involvement in providing advice, and neither of these seem to relate to FLEB.

I appreciate what LV has said about its own records being changed to show that FLFP didn't receive the commission. But as the successor organisation to that which originally paid the commission, I think Aviva ought reasonably to be best placed to confirm which entity was paid that commission. And according to Aviva, this wasn't FLEB.

As I've said above, I can't make a definitive determination in this decision as to whether FLFP instead gave the advice – this wouldn't be appropriate, although I appreciate that inferences may be drawn from my findings. And I am able to "signpost" Mrs M to that entity in its current form - LV - so that she may refer the matter back to it for its further comments. If she's dissatisfied with the response, she may then refer the matter to this service.

My final decision

My final decision is that I don't uphold the complaint.

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

Philip Miller
Ombudsman