

The complaint

The estate of Mrs C complains about the advice Mrs C was given by Atomos Financial Planning Limited ('Atomos'). The estate complains that the advice for Mrs C to purchase an immediate care fees plan wasn't suitable for her. This is because the care fees plan didn't have any guarantees on death and the estate has now lost all the money that was invested. The estate would like a refund of the amounts paid into the plan.

What happened

Our Investigator thought the complaint should be upheld. Atomos disagreed with the Investigator's opinion. The complaint was then passed to me.

I issued my provisional decision saying that the estate of Mrs C's complaint should be upheld, for slightly different reasons than our Investigator. A copy of the background to the complaint and my provisional findings are below in italics and form part of this final decision.

What I said in my provisional decision

The estates of Mr and Mrs C have complained about the advice both were given to start immediate care fees plans. Mr C's complaint is being considered separately. But as the advice was given to them jointly, I'll refer to both of their circumstances in this decision at times.

Mr and Mrs C, and their representatives, had contact with Atomos over 2021 and 2022. I can see from the notes and information that both sides have provided that there was significant contact throughout this time. This was because Mr and Mrs C were moving into full time residential care and they were making the necessary financial arrangements to do this.

In February 2022, care fee plans were first discussed. And in March 2022 a care fee plan questionnaire was completed in a telephone call. I can also see that around this time Mr and Mrs C, and their representatives, were looking at bank accounts to place their money in. But they were concerned at leaving larger amounts on deposit and earning a very low return for significant lengths of time.

I've looked at all the correspondence, but I'll use some excerpts from the 'Your Financial Plan' document which is dated 4 July 2022 to illustrate the discussions that were had in relation to Mr and Mrs C's circumstances. I appreciate the situation changed over time and Mrs C's representatives did annotate this in some detail with respect to some of the amounts in the report. But the information in it gives an overview of Mr and Mrs C's situation at the time and this is enough to allow me to decide this complaint.

It shows that Mrs C was 81 years old and she was resident in a care home along with Mr C. They had assets of over £1,000,000. This was split in the following ways.

- *Cash from a house sale which was held jointly, this was valued at £750,000.*
- *Mrs C had cash savings of £95,000.*
- *Mrs C had investment bonds with a value of about £61,500.*
- *Mr C had investments value at about £134,000.*
- *Mr C had a personal pension with a value of about £40,000.*

They both had a medium attitude to risk.

Mrs C had a total income of just under £11,000 per year. Mr C had a total income of just over £15,000 year. Their yearly care fees were estimated to be around £63,000 for Mrs C and £60,000 for Mr C. The income shortfall for Mrs C was just over £52,000 and for Mr C it was around £45,000.

The suitability letter said that, using data from the Office of National Statistics ('ONS'), that the life expectancy of a female was eleven years from age 80 and seven years for a male aged 85.

Mrs C had some health problems. In brief these were a stroke in 2014 and a further smaller stroke in 2019. She'd had a hip replacement and some heart problems. It wasn't documented that her life expectancy was reduced due to these. The point-of-sale documentation, and the advice was based on, the premise that the life expectancy for a female her age was 91.

In July 2022, the suitability letter was sent to Mr and Mrs C. Mrs C was advised to start an immediate care fees plan with a premium of £455,939. This is a form of annuity that pays a regular income to the policyholder's residential accommodation provider. I can see that Mrs C's representatives had several questions after this advice, which were answered to some degree but perhaps not completely. I'll outline some of these questions later on.

The care fees plan was started on 26 September 2022. It provided an income of £52,032 each year increasing at 6% per year and this was paid directly to Mrs C's residential accommodation. This care fees plan had a guarantee period of one month.

Mr C also purchased an immediate care fees plan which cost £242,759. It provided an income of £44,889 per year increasing at 6% per year. The income was paid directly to the care home. This had a guaranteed period of six months on a sliding scale.

Mrs C passed away on 6 November 2022. Please accept my condolences for this.

Following this, Mrs C's estate complained on the basis that all the money placed in the care fees plan had been lost. And that the plan should have had a longer guarantee period.

Atomos has considered Mrs C's estate complaint and has not upheld it. It said that the care fees plan was a suitable recommendation for Mrs C and met her needs to provide an income to cover her care home costs. The annuity was tax efficient, and inflation linked. Based on her life expectancy it was a reasonable assumption that she would live long enough to have received a benefit at least as high as the initial cost of the annuity.

And Atomos has said in response to the Financial Ombudsman Service information request that guarantee periods are bad value and are inherently unsuitable for immediate care annuities. They are only available for 12 months. It has also said that significant steps were undertaken to ensure that the customers understood the advice.

Mrs C's estate didn't agree and brought her complaint to the Financial Ombudsman Service. One of our Investigators considered this complaint and has upheld it. He said that a care fees plan was suitable in principle. But not enough emphasis was placed on the short-term risk of Mrs C dying and a plan that protected the amount invested should have been considered. This was because her representatives had expressed concern about what would happen if Mrs C died. And the premium increase for a guaranteed plan was affordable. So, our Investigator thought that Mrs C and her representatives would have started a policy with this kind of guarantee, and her estate would have received the full value of it back on her death.

Atomos didn't agree with our Investigator and said that:

- Mrs C's representative had multiple opportunities to request further guarantees about the annuity and did not request these.*
- The representative was aware that these were an option as she was actively engaged in the process.*
- The care plan could have included a one-year guarantee, but this was expensive and there was no guarantees that Mrs C would have proceeded with this type of policy.*

- *If guarantees were included the total cost of both plans exceeded the amount Mr and Mrs C had received from their recent property sale. So, they would have cost more than they wanted to pay.*
- *The consumers had said that Mrs C would live a reasonable amount of time.*

As no agreement has been reached the complaint has been passed to me to consider and issue a decision.

What I've provisionally decided – and why

I've considered all the available evidence and arguments to provisionally decide what's fair and reasonable in the circumstances of this complaint.

It's clear that the advice Mrs C and her representatives were given was on the basis that Mrs C needed to look at how to fund her care fees going forward. This is a complicated and difficult decision, with many moving parts to it. On the one hand the care fees were high and would need to be paid for an indeterminate amount of time. And there could also be unknown expenditures on top of this. Taking the care fees plan would have provided some degree of certainty that these would be always paid – although large increases in the care fees cannot be ruled out.

But the care fees plan did use up a large amount of capital and this would be expensive if Mrs C would pass away in the early on in the plan, as there was no return of capital. And this leads to the key consideration in this advice, which is could it be estimated how long Mrs C would live and were all the parties to the transaction provided with enough correct information about this to make an informed decision.

It's clear this was discussed and in the email of January 2022 Mrs C's representative said:

'... we now think Mum has a good innings ahead of her. Since being out of isolation the past two weeks, she has been walking up and down the corridors 2/3 times a day, her physical strength and speech is much improved! She's so much brighter in herself and getting involved in lots of activities... I think she's realised she'll be around for longer than she thought ...'

And losing the capital following the advice due to Mrs C's early death was clearly a concern to her family. In response to the suitability letter her representative said that:

'Conclusion: I am still cautious about paying out so much money in one go; I understand the sensible reasoning behind it, but it's a huge risk if our parents were not to have such a life expectancy.'

And she went on to say:

'No payment will be received on death, unless you choose a guaranteed period or the capital protection option' ??HELP!! What should we do here?'

Atomos addressed these concerns by saying, in summary

'...I understand but there is a huge risk that your parents live longer than expected and run out of capital to support themselves.... By taking an annuity your parents care is taken care no matter the length of time of their care. The residual assets are largely protected from the risk of being eroded and can grow unimpeded from drawdowns to support your parents (assuming your parents needs are largely cared for by the annuity).

This means there are additional funds to support your parents (if necessary) and potential inheritable funds, which may not happen if you chose to fund the care with investable assets and they live longer than expected. The reason we have recommended an annuity is that it removes the long-term risk of not being able to fund the care but it does increase the short term risk of an earlier than expected death'

So, it's clear to me that the advice centred on the life expectancy of Mrs C. As the consumers were investing a significant amount, I would have expected a robust investigation into this. Having looked at everything, I'm not persuaded that this happened.

The suitability letter says that Atomos used ONS data that showed that Mrs C could expect to live for around eleven years. I'm not currently persuaded that this was reasonable data to use in this instance. I'll explain why.

In doing this, I'm conscious that I, and all the other parties to the complaint, are not medical professionals and I don't exactly know what 'average' health is at Mrs C's age. I would expect this to mean no significant indicators of poor health, or evidence of illness that would ordinarily be expected to reduce life expectancy. I don't have access to Mrs C's full medical history (and I don't think I need to) but she did have poor health as I've outlined above. Both a stroke and heart problems, at her age, do generally lead to lower life expectancies.

As far as I can see, Atomos didn't use the information it had about Mrs C's health at all. It didn't consider if Mrs C's health problems would lead to a shortened life expectancy either by consulting a medical professional or looking at the widely available information about how instances of strokes and heart problems can lead to a shorter life. I don't think it was enough here to say that the care home had not indicated that Mrs C's health problems would lead to a shorter life.

And Mrs C had recently moved into a residential care home. This usually happens when a person can no longer look after themselves. This is itself an indicator of a reduced life expectancy.

The ONS does produce statistics about this in its index [Life expectancy in care homes, England and Wales - Office for National Statistics \(ons.gov.uk\)](#).

The latest set of data, from 2011, shows that the life expectancy for a female entering a care home between the ages of 80 and 84 years is 4.9 years. For a male aged 85 to 89 years the same figure is 3.2 years. There is more recent data produced in 2023 (after the advice) but this doesn't show a material difference. This is less than half the life expectancy that the advice was based on. This is a significant difference in the ages that were shown to Mrs C and her family.

Atomos, as advisors specialising in products of this type, ought reasonably to have known of the detrimental impact of being in a care home on life expectancy and also to be able to identify the relevant ONS data sets. So, it's not clear to me why Atomos did not refer to, or use, this data. At the very least in conjunction with the other data it had. This information is clearly a relevant consideration.

It has been established Mrs C needed to live for around another seven years for the care fees plan to provide back the amount that was invested. I appreciate there are other reasons to start the plan than this 'break even' consideration. It did provide a level of certainty in respect of the care fees planning, and indeed if Mrs C had lived a long time, then it would have helped ensure more of her estate remained on her death. That said, I don't think it likely that these considerations would make the advice suitable for Mrs C given the length of time she had to live break even, and the likelihood of this.

But having considered everything I think the chances of Mrs C living a long time were not as high as was assumed at the time of sale. And her life expectancy, using readily available information, was likely to be far lower than the ten to eleven years the advice was based on.

So, given all of this, I don't currently think that the advice given to Mrs C and her representatives at the time was suitable for her. I think if these consumers were given further information about Mrs C's life expectancy, then I don't think that they would have gone ahead with the care fees plan. It's clear the consumers were very concerned with Mrs C not living long enough to make the care fees plan worthwhile, almost to the point of not proceeding. If they had received further information that showed this was even more uncertain, then I don't think they would have proceeded.

I also think that if Atomos had considered a reasonable level of information it ought to have concluded the recommendation was not a suitable for Mrs C.

So, I think Mrs C's estate should be compensated for this on the basis the annuity was not started.

I have noted the correspondence about the guarantee period. It would have been better if this was discussed in more detail with the consumers at the time of sale. But I don't think better information about this guarantee period, or an inclusion of a guarantee period, would have led to the consumers starting a care fees plan.

Developments

Atomos, and the estate of Mrs C, received my provisional decision and responded to it.

Mrs P, on behalf of the estate, said that:

- She provided some further information about Mrs C which she said showed she was in poor health when the advice was given.
- She provided some context around the email where Mrs C's family said Mrs C '*would have a good innings*'. She said this was in response to a health scare Mrs C had in 2021 when she was very unwell and not expected to live.

Atomos didn't agree with my provisional decision. Atomos said that:

- It was a judgment based about not providing a legacy which wasn't right.
- Mrs C needed to pay for residential care and the advice was given to solve the problem of providing an income for the rest of her life to do this. The annuity provided peace of mind and would prevent disruptions such as care home moves. It was a standard solution to this kind of scenario.
- Mrs C's health and life expectancy were considered. The annuity was underwritten, and the annuity provider would also have fully considered Mrs C's health.
- The ONS data Atomos referred to was not key to any judgement about Mrs C's longevity or essential to the recommendation. It was referred to as 'statistical life expectancy' and was not overemphasised.
- The ONS care home data I have referred to is 'experimental'. It would be right to be cautious about using this data, given the caveats around it.
- Atomos doesn't agree Mrs C's representatives were concerned with the 'short term risk' of the annuity. They raised several questions following the suitability report, but the risk of capital loss (or short-term risk) was not prominent amongst these.
- It's not right to say the consumers expressed doubt 'almost to the point of not proceeding' due to the risk of capital loss. If Mrs P had expressed short term concerns about Mrs C's premature death, Atomos would have considered a guaranteed policy or no policy at all.
- Mrs P did not cancel Mr C's policy when Mrs C died, even though it was within the cancellation window.

As no agreement has been reached, I've gone on to reconsider the complaint and issue my Final Decision.

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 think it's fair to say that Atomos and the estate of Mrs C didn't raise any materially new points after receiving my provisional decision. So, I've reached the same conclusions I reached before, for the same reasons.

I'd firstly like to confirm that I've not based my decision on the circumstances of the representatives. I do accept that Mrs C's estate will be the beneficiaries of this decision, but I've not decided this complaint because of this.

I do accept that Mrs C and her estate sought advice due to Mrs C (and Mr C) moving into a care home and the financial considerations that this brings. The cost of care was expensive, and all the parties were considering how it could be funded. But as Atomos has said there were a number of ways this could be arranged such as the immediate care fees plan, starting a similar plan with more or longer guarantees, or funding the care fees from the capital available.

The main risk of the care fees plan arises because the policyholder could die shortly after it starts. As the capital is not returned the payments made for the residential care will be far less than the amount paid into the annuity. So, one of the main considerations when starting a policy such as this is the life expectancy of the annuitant. Given Mrs C's age and health, I would have expected this to have been considered in some detail, taking into account nationwide life expectancy data and information about Mrs C's own situation with particular emphasis on how this could reduce the time she may live.

I still don't think this was considered in enough detail. The only information about this in the suitability letter was the ONS data on average life expectancy Atomos provided. This was the statistical average life expectancy for a female of Mrs C's age which was 11 years.

But there are a number of other factors that should also have been considered about Mrs C's health such as her having a stroke and some heart problems. All of these could, and often do, lead to a reduced life expectancy. And, as I said in my earlier decision, the ONS does produce statistics relating to residents of care homes. I do note these are 'experimental', but I don't think this means they are unreliable or shouldn't be used. The methodology of how they are calculated is fully explained and seems very robust. I still think this data set could have formed part of the overall information given to the estate of Mrs C.

I think if Atomos had acted correctly here then the estate of Mrs C would have realised that Mrs C's life expectancy was likely to be much lower than the 11 years detailed in the July 2022 suitability letter.

I still think it's clear that Mrs C, and her representatives, were very concerned with losing all of this capital. I can see that Atomos doesn't agree with this, but I think the excerpts from the point-of-sale correspondence do show it. Having considered what Atomos has said this isn't just a concern about immediate death, or what it now calls the 'short-term risk'. Mrs C and her representatives are clearly very concerned about committing such a significant sum of money, when it may not prove to be the best option for them, as they said. And this does indicate that they had doubts about proceeding.

And even though the annuity did provide a level of certainty about Mrs C's care fee payments, and this of course was of benefit to her and her representatives. They were committing a large proportion of their joint capital, which would have funded their care fees for a significant number of years. And the annuity left less funds available for any unforeseen expenditures. So, even with the advantages that Atomos has outlined there were also disadvantages. And because of these, and the consumers evident concerns, I'm not persuaded that the advice was suitable in any event.

I don't think this is altered by the fact that the care fees policy was underwritten by the annuity provider. I've not seen all of the information that formed part of this underwriting process and so it wouldn't be right for me to comment on that in this decision.

And I also don't think that the fact Mr C's policy was not cancelled has much bearing on this complaint. Whilst I can see why Atomos has raised this, Mr C's circumstances were different in some ways, and I can't reasonably say that a lack of action here was a definite indication they agreed with the advice Mrs C was given. As a counterpoint they have also complained about the advice both Mr and Mrs C were given.

Because of the above I still think the estate of Mrs C's complaint should be upheld.

Putting things right

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £375,000, plus any interest that I think is appropriate. If I think that fair compensation is more than £375,000, I may recommend that the business pays the balance.

So, to put things right for the estate of Mrs C, I think Atomos Financial Planning Limited should put the estate in the position it would've been in had an immediate care fees plan not been started.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as follows:

- A is the premium Mrs C paid into the immediate care fees plan. I understand this was £455,939.
- B is the payments the immediate care fee plan has made to the care home under the plan from its inception up to Mrs C's death. I understand this was £6,406.88.
- The loss is C, which is calculated by subtracting B from A.

My decision is that Atomos Financial Planning Limited should pay the estate of Mrs C the amount produced by that calculation – up to a maximum of £375,000.

It should also pay interest on C, calculated at the rate of 8% simple from the date Mrs C's estate informed the immediate care fees provider of Mrs C's death to the date the settlement is paid to the estate.

Recommendation: If the amount produced by the calculation of fair compensation is more than £375,000, I recommend that Atomos Financial Planning Limited pays the estate of Mrs C the balance.

This recommendation is not part of my determination or award. Atomos Financial Planning Limited doesn't have to do what I recommend. It's unlikely that the estate of Mrs C can accept my decision and go to court to ask for the balance. The estate of Mrs C may want to get independent legal advice before deciding whether to accept my final decision when issued.

My final decision

For the reasons I've explained, I uphold Mrs C's complaint.

Atomos Financial Planning Limited should put things right by doing what I've said above.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mrs C to accept or reject my decision before 10 September 2024.

Andy Burlinson
Ombudsman