DRN-5190846

The complaint

Mr C has complained about advice given to him by Gate Capital Group Ltd ('Gate') to transfer his personal pension with Aviva to a self-invested personal pension ('SIPP') and invest the proceeds through Organic, a Discretionary Fund Manager ('DFM'). Mr C now believes the advice was unsuitable and has caused financial loss.

What happened

The advice Mr C has complained about was documented in a suitability letter signed and dated on 1 September 2016. This document confirmed the adviser was a Mr F, working for a business called Huntsman Hawkes Wealth Management LLP ('HHWM').

The documentation states that at the time of advice Mr C:

- Was aged 59, married, with one dependent child.
- Had a desired retirement age of 66.
- Was employed with annual income of £29,000, and in good health.
- Had total household expenditure, documented as £1,377 per month leaving disposable income of £921 each month.
- Had a family home valued at £160,000, with a £70,000 mortgage in place.
- Had savings, which were documented as £6,000 in cash, £21,000 in ISA's, endowments valued at £60,000, and pensions of around £100,000.

Mr C's objectives regarding his existing pension provision were also documented as being to:

- Improve the performance potential of the funds, as Mr C was documented as being unhappy with the performance of his existing Aviva policies.
- To improve the death benefits available to Mrs C and his children.
- To be able to take benefits flexibly.
- To have ongoing service.

Having completed a risk profiling questionnaire, the suitability letter recorded Mr C as having been assessed as a medium risk investor.

At the time of advice Mr C held two pension policies with Aviva. One of these was valued at around £23,000, with the second valued at around £77,000 (including the terminal bonus).

The advice was to retain the smaller policy as this contained a Guaranteed Annuity Rate of 12.22%.

The second policy did not contain any such guarantees. It was invested in two with-profits funds - Aviva Pension With-Profit 2 S9 (28.5%) and the Aviva Pension With-Profit 3 S9 Amount (71.5%).

The annual bonus rates for the two with-profits funds were documented as being 3.75% for the with-profit 3 fund, and 5% for the with-profit 2 fund.

Total policy charges were recorded as 0.6% a year, with the commentary confirming that the policy did not facilitate adviser charging.

The adviser also noted that the Aviva projections of what the policy could provide at retirement were unclear and misleading as it appeared they showed a greater value than the growth rate would suggest. The adviser went on to state that *"I am unable to provide you with an analysis or cost comparison of your existing plan. Because this is not your only consideration or objective. However, I can still provide you with advice in the absence of this information".*

Leaving the fund within the Aviva pension was considered, however dismissed as an option on the basis that it did not provide Mr C with the same flexibility in terms of investment choices, it didn't facilitate adviser charging, with Aviva policy also not offering a Successor Drawdown facility.

The recommendation to transfer the funds to a SIPP was made, with the adviser confirming the reasons being:

- *"A wide range of funds, including those offered by external fund managers.*
- *Competitive charges and charging structure.*
- *Further options at retirement, e.g., Drawdown.*
- *Access to a Discretionary Fund Manager.*
- *Greater control and choice in respect of death benefits from the plan."*

The charges levied on the new policy were documented as being an initial fund charge of 0.25%, an initial platform charge of 0.09%, an administration charge of 0.19% per year, and an annual management charge of 0.4% per year. In addition to the product charges, advice charges were also incurred. These charges were a 3% initial advice charge and an ongoing advice charge of 1% per year.

The adviser accepted that the new policy was more expensive however concluded that the additional cost was justified as the new policy met Mr C's objectives.

Organic were recommended as a DFM for Mr C's transferred funds with all the monies being placed into the Organic Investment Management Service.

Following investment losses, Mr C registered a complaint.

Gate issued its complaint response in September 2023.

This stated that they did not consider themselves responsible for the advice provided to Mr C as they did not believe the adviser, Mr F, and HHWM, were acting under Gate's authorisations at the time of advice.

Additionally, Gate stated that even if they were responsible for the advice, they considered this suitable. The SIPP was considered an appropriate product, which met Mr C's objectives with the Organic DFM solution matching Mr C's attitude to risk.

Unhappy with Gate's response, Mr C registered his complaint with this service in October 2023.

Our investigator looked into things and upheld the complaint.

Having looked at the chain of events which transpired the investigator concluded that Gate was responsible for the initial advice provided to Mr C and that the advice was unsuitable. As such the investigator upheld the complaint and provided redress recommendations both parties.

Gate did not agree with the findings issued. They remained of the opinion that they were not responsible for the advice, and that the advice was suitable. Gate additionally disagreed with the redress methodology outlined by our investigator.

These additional points were considered however the investigator was not minded to change their opinion, as such the case has been passed to me for a 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.

Jurisdiction

Before considered the complaint issue itself I must first be satisfied that this complaint is one which this service can consider.

The chain of events which transpired in this case are substantively the same as other cases which have previously been considered by this service.

This service has investigated our jurisdiction at length on these previous cases and concluded that Gate are responsible for the advice provided by Mr F / HHWM on the dates in question.

I do not intend to repeat all the arguments previously made, as Gate are already in receipt of these. However, in summary, Mr F / HHWM were recorded on the FCA register as being appointed representatives of Gate Capital Group Ltd from 7 July 2016 until 9 May 2017.

Given Gate have not provided any arguments or evidence regarding our jurisdiction which has not already been considered I see no reason to deviate from our previously outlined stance. As such they are considered responsible for the advice provided to Mr C in September 2016.

Given this, I have gone on to consider the merits of Mr C's complaint.

Suitability of the advice

There was significant regulation and guidance in force regarding advice such as this in 2016 and this must be considered when assessing the suitability of the recommendation.

The FCA Handbook contains the principles for businesses, which it says are fundamental obligations firms must adhere to. These principles include:

- Principle 2, which requires a firm to conduct its business with due skill, care and diligence.

- Principle 6, which requires a firm to pay due regard to the interests of its customers.
- Principle 7, which requires a firm to pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair, and not misleading.

COBS 9.2.1R sets out the obligations on firms when assessing the suitability of investments.

In short, the business must obtain the necessary information regarding: the consumer's knowledge and experience in the investment field relevant to the advice; their financial situation; and their investment objectives.

In 2009 the Financial Conduct Authority (FCA), then the Financial Services Authority, published a checklist for pension switching.

This highlighted four key issues it thought should be focussed on:

- Charges - has the consumer been switched to a pension that is more expensive than their existing one(s) or a stakeholder pension, without good reason?
- Existing benefits - has the consumer lost benefits in the switch without good reason? This could include the loss of ongoing contributions from an employer, a guaranteed annuity rate or the right to take benefits early.
- Risk - has the consumer switched into a pension that doesn't match their recorded attitude to risk (ATR) and personal circumstances?
- Ongoing fund management - has the consumer switched into a pension with a need for ongoing investment reviews but this was not explained, offered, or put in place.

Additionally, when considering the use of a discretionary fund management (DFM) arrangement, the regulator has made clear that amongst other matters, firms need to consider issues such as:

- Likely cost: do the overall costs justify the potential for improved performance?
- Size of funds under management: once a consumer has a moderately-sized fund, they may benefit from a model portfolio which is rebalanced automatically by a DFM ranging all the way up to bespoke arrangements for clients with larger funds.
- Investor's knowledge and experience: FCA has said the adviser needed a reasonable belief that the investor could understand the nature of the risks of the underlying investments the DFM might make.
- Level of disclosure: whether the benefits vs costs of the arrangement were explained to the investor in terms they were likely to (or appeared to) understand.

Having looked at the documentation available on file, I have reached the same conclusion as our investigator and for broadly the same reasons.

The suitability letter on file is key in this case as this documents Mr C's circumstances at the time of advice, the ceding pension schemes, the charges on both the ceding and recommended pension, and the reasons given by the adviser in support of a transfer.

The regulatory guidance detailed above is clear that increasing the charges levied on a consumer's pension was a key consideration, and our investigator concluded that the additional charges applied to Mr C's pension as a result of the transfer were not justified. I have reached the same decision.

The Aviva pension transferred had charges of 0.6% a year, which the adviser himself confirmed in the suitability letter were lower than those applicable to the new pension.

Whilst the ongoing annual charges for the SIPP were similar to those applicable to the Aviva pension, the initial set up costs, initial advice charge, and the ongoing advice charge would all have an adverse impact on the value of the new SIPP.

In addition to this, I am aware that within the due diligence Gate carried out on Organic they had been made aware that Organic's charges could reach as high as 1% - increasing the charges on the new pension further.

I accept that the initial advice fee and the annual advice charge (of 1%) were additional charges paying for services that Mr C was not receiving on the Aviva pension, however they would have an impact on Mr C's pension provision and as such cannot be totally disregarded.

Further, whilst ongoing advice can be a valuable service ensuring the ongoing suitability of a consumer's pension / investments, Mr C's funds were being placed with a DFM, who would also be actively managing the investments and ensuring their ongoing appropriateness, as such there is also the real possibility that the recommendation led to a duplication of work and / or charging.

I have considered whether the increased ongoing charges post transfer could be considered justified based on Mr C's needs and objectives at that time. However, again, I have reached the same conclusion as our investigator.

I do not consider any of the reasons documented in the suitability letter in support of the transfer as sufficient to justify the higher charges.

Whilst access to a DFM strategy has been recorded as an objective, the only investments I can see Mr C held at the time of advice were with-profits based investments. Whilst these did expose Mr C to returns based on the performance of stocks and shares, the way a with-profits investment operates mean Mr C would have been shielded from any price volatility. As such, based on the evidence on file, Mr C could only be considered to have had limited investment experience.

Further, the value of Mr C's pension fund was not one which required any level of discretionary management, with the file not recording Mr C as having any specific requirements in relation to his investments that would necessitate a DFM solution.

Overall, I can see no reason why a DFM solution was required for Mr C.

Whilst flexibility at retirement was also recorded as a justification for transfer, Mr C was around seven years from retirement at the time of advice, as such the need for any flexibility was several years away and is considered a weak justification for transfer. Leaving the existing pension in place and transferring nearer to Mr C's retirement age would have allowed Mr C to postpone paying higher fees for several years, until the need for any such flexibility was much closer.

Finally, I have noted that the way death benefits were payable was also noted as a reason for transfer. whilst I accept that the recommended SIPP would have allowed the pension proceeds to be moved into a Successor Drawdown facility there is no confirmation on file as to why this was so important to Mr C. He was relatively young and noted as being in good health at the time of advice, with there being no discussion as to why Mrs C (or other beneficiaries) wanted the pension proceeds transferred to another pension upon Mr C's death, rather than being paid out directly to them as a lump sum.

Overall, the transfer of the pension from Aviva to the SIPP is considered unsuitable. It exposed Mr C to higher ongoing costs with inadequate justification. If suitable advice had been given, I have concluded based on the evidence available, that it is most likely Mr C would have retained the existing Aviva pension.

I have gone on to consider what level of redress would be appropriate in this case.

As above, I have concluded that Gate are responsible for the September 2016 advice given to Mr C, and that had that advice been suitable, Mr C would have retained his Aviva pension.

However, HHWM ceased being an appointed representative of Gate on 9 May 2017.

In line with what our investigator has already said, I do not think it is reasonable to hold Gate responsible for any losses which Mr C may have incurred after this date. From 9 May 2017 another adviser was responsible conducting ongoing due diligence on Organic as the DFM, and for ensuring the suitability of Mr C's pension / investments.

Gate did have responsibilities to do due diligence on any DFM they recommended.

I am aware that Gate raised specific questions with Organic between May and August 2016 – rather than simply accepting Organic's marketing material without question. Gate also sent queries about those running Organic and its external compliance consultants.

Gate recorded its overall conclusions in a summary document which it has previously provided to this service.

In August 2016 Organic 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.

Based on what I've seen I think the extent of Gate's due diligence enquiries were reasonable and I don't consider they acted negligently in this respect. I'm satisfied the due diligence Gate carried out in mid-2016 would have provided reasonable assurance that the portfolio would be managed appropriately. And looking at the advertised asset allocation at the time, I think the portfolio recommended matched Mr C's medium / balanced attitude to risk.

Organic diverged from what they had told Gate and invested into higher risk investments, managed their own funds and charged higher fees. Gate started having concerns about Organic after doing a due diligence review and wrote to their customers in 2018 and advised them to change their investments. At this point, funds were still liquid and from what I've seen the majority of losses and liquidity issues happened from October 2018 onwards.

But as noted above, on 9 May 2017, HHWM ceased being an appointed representative of Gate, so they are not considered responsible for any acts or omissions after this date.

Mr C has said he continued to receive advice from Mr F, with documentation on file confirming this was still the case when some of the Organic investments became illiquid.

I also don't think it was reasonable to have expected Gate to have carried out a review of its existing advice to Mr C in early 2017 as it was before an annual review would've been expected to have been carried out.

Whilst the redress instructions below do cap the first part of the redress calculation at 9 May 2017, further steps are required in order to ensure Mr C is put as closely as possible to the position he would most likely be in had he received suitable advice.

Any losses which Mr C may have incurred at 9 May 2017 need to be brought up to today's date as those losses would have remained invested over the years that followed, subsequently been transferred to another provider and them ultimately used to purchase an annuity.

I have considered Gate's argument that the advice fee should be excluded from the redress calculation however I am of the opinion that the redress below (in line with that outlined by our investigator) is fair. Mr C did not need to transfer his pension with the existing Aviva pension being considered suitable.

Putting things right

In assessing what would be fair compensation, my aim is to put Mr C as close as possible to the position he would probably now be in if he had been given suitable advice.

The redress has to take account of the change of adviser in 2017, a further adviser change in 2019 (To Firm B) and that after this, Firm B advised Mr C to transfer the funds out of the SIPP to Scottish Widows. Lastly, I need to take account of the fact that Mr C bought an annuity in 2023.

To compensate Mr C fairly Gate should:

1. Ask Aviva to calculate the notional value of Mr C's former policy on 9 May 2017, as if it had never been transferred.

A notional value is the fairest comparator here, but if Aviva is unable to calculate a notional value, Gate will need to determine a notional value for Mr C's previous plan instead, using this benchmark: FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index).

Mr C wanted growth with some risk to his capital, so I think this benchmark is fair. The 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.

It does not mean that Mr C would have invested in an index tracker investment. Rather, I consider this a reasonable benchmark that likely reflects the sort of return Mr C could have obtained from investments in his existing plans.

There is guidance on how to carry out calculations available on our website, which can be found by following this link: https://www.financial-ombudsman.org.uk/businesses/resolving-complaint/understanding-compensation/compensation-investment-complaints.

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

Any additional sum or regular contributions that Mr C paid into the SIPP should be added to notional value calculations at the point it was actually paid in. Any withdrawal, income or other distributions paid out of the SIPP should be deducted from the notional value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments and the providers aren't able to factor this into the notional values, to keep calculations simpler, I'll accept if Gate totals all those payments and deducts that figure at the end.

2. Compare the value obtained in step 1 above with Mr C's SIPP value on 9 May 2017.

3. The loss to Mr C's pension funds on 9 May 2017 is the difference between the SIPP value and value obtained in step 1 above. If the SIPP value is higher, there's a gain and no redress is payable.

4. Any loss amount as calculated under step 3 should be brought up to date from 10 May 2017 to 16 September 2019 (the date Mr C became a client of Firm B) by applying the same benchmark as mentioned above. This is to reflect the kind of returns Mr C likely could have expected given his attitude to risk if he had reasonably invested the loss amount.

5. Any loss amount as calculated under step 4 should be brought up to date from 17 September 2019 to the date Mr C bought his annuity in June 2023 by applying the performance he achieved on the funds that derived from the transferred Aviva pension as a client of Firm B. As said above, I understand the funds were transferred to a Scottish Widows pension in March 2020.

6. Mr C bought an annuity in June 2023 with the Scottish Widows pension and took 25% as a tax-free lump sum. So, Mr C would have taken 25% of any 'loss' as tax free cash in June 2023 and used the remainder to purchase the annuity. So, any loss amount as calculated under step 5, needs to be used to calculate the following:

- Total of the notional tax-free cash sum and all the net income payments which Mr C should have received from the annuity since it started, with interest added to each payment at 8% per year simple from the date it was due to the date of settlement. This is figure 'A'.
- Total of the actual tax-free cash sum and all the net income payments Mr C has received from his actual annuity since it started, with interest added to each payment at 8% per year simple from the date it was due to the date of settlement. This is figure 'B'.
- Mr C's past loss is figure "A" minus figure "B". If the answer is negative, there's a past gain and no redress is payable.

7. Gate should pay any loss calculated under step 6 directly to Mr C.

8. Mr C may also have suffered a future loss in respect of the income from the annuity. This is the higher annuity income that Mr C might receive for the rest of his lifetime, had it not been for Gate's actions.

To calculate this element of Mr C's potential loss, Gate needs to complete the following:

- Calculate the notional annual gross annuity income which Mr C should have been receiving from the date of settlement onwards. This is figure "X".
- Calculate the actual annual gross annuity income that Mr C is now receiving from the date of settlement onwards. This is figure "Y".

Mr C's future loss each year is figure "X" minus figure "Y". This is figure "Z".

If figure “Z” is negative, then there’s a future gain and no redress is payable to Mr C.

Gate will then need to calculate what the cost would be to replace any lost future annuity income as calculated as figure “Z”. They should do this by establishing how much it would cost to buy an annuity on the open market, with the same features as the annuity that Mr C has set up, to provide annuity income of figure “Z”. Gate will need to refer to published annuity rate tables and get a quote from a competitive provider.

The purchase price of this open market annuity is Mr C’s future loss. This should be paid directly to Mr C as a lump sum after making a notional reduction to allow for income tax that would otherwise have been paid at Mr C’s marginal rate of income tax. I think that it’s reasonable to assume that Mr C is likely to be a basic rate taxpayer in retirement, so the reduction would equal 20% unless evidence is provided to the contrary.

Income tax may be payable on any interest paid to Mr C. If Gate considers that they are required by HM Revenue & Customs to deduct income tax from that interest, they need to tell Mr C how much they have deducted and give Mr C a tax deduction certificate in respect of interest, should Mr C ask for one. Mr C will then be able to reclaim the tax on interest from HM Revenue & Customs if appropriate.

The purpose of the above redress is to put Mr C in the position he would have been had the error not occurred. It’s theoretically possible that one of the above stages might show a loss and other show a gain. Where this happens, I would expect Gate to offset one part against the other, for example, subtracting a loss from a gain to arrive at a net value, once all tax and interest calculations have been taken into consideration.

9. Lastly, Gate should pay Mr C £300 for the trouble and upset its unsuitable advice has caused him.

My final decision

I am upholding this complaint and require Gate Capital Group Ltd to calculate and pay redress in line with the methodology outlined above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr C to accept or reject my decision before 28 January 2025.

John Rogowski
Ombudsman