

The complaint

The estate of Ms B complains that Frenkel Topping Limited (Frenkel) mis-advised Ms B to take out an annuity to pay care home fees and make unsuitable investments resulting in losses to the estate of around £100,000. The estate wants compensation for the losses incurred.

The estate is represented by Mr B, and I will refer to Mr B in this decision.

What happened

Mr B is the executor of the estate of his late great aunt, Ms B. Following her death, he was contacted by her Court of Protection Deputies (the Deputy). Prior to that the Deputy understood that she had no living relatives. Ms B went into care in 2018 and had been diagnosed with dementia. In 2019 the Deputy sought guidance from Frenkel over her financial matters. She was then 86 years old. Frenkel provided a due diligence report in October 2019. This said the Deputy wanted to “ensure” that her ongoing care costs would be met for the remainder of her life. It said she had assets of around £350,000 and an income of around £30,000 per annum. Her expenses including care home costs and the Deputy’s fees were around £48,000 per annum, a shortfall of around £18,000 per annum.

Frenkel said Ms B was likely to live for seven years and it made a number of proposals. These were, to consolidate her existing deposit accounts, to review and possibly switch some existing investments and to invest some of the cash into long term investments. And to purchase an immediate care annuity (ICA) which would provide a guaranteed income to cover the shortfall between her current income and her expenditure. The estimated cost of the ICA was £108,000.

A suitability report was issued on 20 October 2020. This recommended purchasing the ICA with a provider called Just at a cost of £98,711 to provide income of £18,072 per annum, increasing by the retail prices index. Along with investments into a Discretionary investment portfolio (the portfolio) managed by Ascencia Investment Management, with the objective of providing a real return over inflation over the medium to long term.

The recommendations were accepted by the Deputy. Some investments were made promptly but the ICA wasn’t set up until 29 April 2021, when £107,339 was invested, which included Frenkel’s fee of around £2,100. The ICA provided an initial income of £20,672 per annum, payable monthly. Unfortunately, Ms B died on 22 December 2021, with only a few months income payments having been made. The cause of death was recorded as a “*Lower Respiratory Tract Infection*” and “*Dementia, Frailty*”. Under the terms of the ICA the payments stopped and there was no return on the premium paid.

In dealing with the estate Mr B became concerned about Frenkel’s advice and he made a complaint. He said it was unsuitable given her age, state of health and life expectancy for over 25% of Ms B’s capital had been invested in something offering no return on death because a capital protected option hadn’t been selected.

Frenkel didn't accept the complaint. It said it had provided advice to the Deputy who acted on Ms B's behalf. It said according to standard mortality tables her life expectancy was six years. And, as she had "*moderate dementia*" and it "*was reasonable for the adviser to predict that Mr B would live for years, rather than months.*" It said she was recorded as having no known relatives, so it concluded that it was reasonable for the adviser to seek to cover the care fees rather than considering capital preservation, which was in line with her best interests and the Deputy's duty of care to her. It said the ICA provided structure and certainty and had Ms B lived as long as expected, "*it would have been reasonably expected that care costs would have dwarfed the cost of the annuity.*"

In terms of capital protection on the ICA, Frenkel said a return was provided if death occurred in the first six months. It said to otherwise protect capital for, "*someone of such an advanced age, we predict that if not impossible, it would be prohibitively expensive to have done so*".

Mr B referred the complaint to our service. He said Ms B's medical records showed her life expectancy was "*very limited*" having been diagnosed with dementia in 2014. He said her income and capital would have paid the care fees even if she'd lived to be 113 years old and there was no need for the ICA. He also complained about the other investments made by Frenkel. He said around £120,000 had been invested into high cost, high risk funds, now showing large losses of around £30,000. He said Frenkel had already refunded some advice fees taken from the investments after Ms B's death. He said he now had proof that no medical underwriting had been done on the annuity other than a brief assessment with Ms B's care home. He said,

"Why a broker would even envisage putting over a quarter of a million pounds into an annuity, and risk-profile investment funds for an 87-year-old pensioner with extreme dementia and BP problems and at risk living in a care home during the C19 pandemic is anyone's guess."

Our investigator looked into the complaint, but she didn't uphold it.

She said Frenkel's rationale for the recommendations was reasonable and the advice was suitable given the objectives of the Deputy to ensure that Ms B had adequate funds to provide for her care for the rest of her life. She said care fees might have increased in future and depleted funds more quickly than Mr B had stated. And the ICA offered some inflation protection. She said Frenkel had used an independent actuarial consultant to provide life expectancy probabilities. And for an 87-year-old female there was a 55% chance she would live for five years and a 20% chance she would have lived for ten years. She said it was for the annuity provider to assess Ms B's health rather than Frenkel and it wasn't possible to know when someone would die, and the ICA had offered six months capital protection in the event of death and 12 months if due to Covid. She said protecting the entire capital would involve setting up an insurance policy which wasn't affordable and would further reduce assets outside the annuity. And there was a high chance Ms B might have lived more than five years which would have depleted her estate by more than the cost of the annuity, leaving less than was available now.

Our investigator said the Deputy was required to seek a real return on investments after inflation to retain purchasing power. And she thought the other investments Frenkel had recommended were in keeping with this objective, so this advice was also suitable.

Mr B didn't agree. He said that no adequate fact finding, or medical assessment had been carried out with only a medical questionnaire sent to the care home to be completed. He said there was no need for the products sold and the point about investing in risky investments had been missed.

As Mr B doesn't agree it has come to me to decide.

My provisional decision

I issued my provision decision on 6 September 2024; I explained the reasons why I was planning to uphold the complaint. I said:

I've thought carefully about what appears to have happened here and I asked Frenkel a number of questions to clarify this and the rationale behind the advice. Particularly with regard to the ICA and the underwriting process, and the annuity rate secured, but it provided limited responses. So, I asked further questions. It again provided a limited response, reiterating that Ms B had no known relatives at the time of the advice. It said the adviser had left the business and couldn't answer specific questions, but it thought its process had been followed. It said it didn't "appear to have access to the actual rate applied" in respect of the annuity. It said it had "no involvement in the underwriting process". And it said as Ms B had no relatives known to it or the Deputy, there was "nobody to make representations on her behalf".

So, I've considered what Frenkel's role was. This was, as an expert, to advise on the options and the advantages and disadvantages of them, specific to Ms B's own circumstances.

The regulator's Conduct of Business rules (COBS) 9 states with regard to giving advice that:

"A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:

- (a) meets his investment objectives;*
- (b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and*
- (c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio."*

So, Frenkel's role wasn't just to just sell whatever products happened to be in the marketplace promoted as providing for long term care costs. It needed to know enough about Ms B's circumstances show that its recommendations were suitable and provided value.

The interests of the Deputy, and the legal responsibilities did relate to Ms B's wellbeing rather than that of any potential beneficiaries of the estate. And absence of potential future beneficiaries might suggest certain investment options could be appropriate, but these still needed to be fully assessed in order for arranging them to be in Ms B's best interests. But, from the evidence so far, I think the recommendations made were generic based on inappropriate standardised assumptions that lacked the necessary focus on Ms B's own circumstances to be suitable advice.

Given Ms B's advanced age and what was clearly known about her health at the time, I think specific further enquiries were needed for any long-term investment recommendations to have been suitable. Particularly if there were upfront costs which would take time to be recovered, or if the investment offered no return on the capital in the event of death. I understand a Deputy is required to take life expectancy into account when coming to decisions about the persons needs and finances and it seems reasonable those advising the

Deputy would similarly need to consider this. I don't think that this was adequately considered.

The ICA

It's important to note that the ICA itself did not in fact guarantee to pay Ms B's care fees for the rest of her life, only to contribute towards them. It provided an inflation linked income for life, so like all annuities it was a gamble on life expectancy. That meant the income the ICA offered from the capital permanently given up needed to be weighed against the likelihood of breakeven being achieved. That was essential to establish whether the investment was likely to be suitable or whether other options might be preferable. So, having an accurate understanding of Ms B's health and likely life expectancy was perhaps the most "essential fact" in my view.

The suitability report does confirm the risk that the capital might not be returned, illustrating this graphically. But it does this using standard rather than personalised life expectancy. When the suitability report was issued (October 2020) it put the life expectancy of an 87-year-old woman (although whether this was exactly aged 87 or 87 years and four months old as Ms B was at the time isn't clear) as being six years. With the breakeven point for the annuity as being her living for "5.6 years", so months really are quite important here. So, Ms B would need to live to be nearly 93 years old for the cumulative income paid to meet the purchase cost, perhaps a little less given there were to be inflation increases.

But individual health is obviously highly relevant to life expectancy, influencing the shape of what actuaries refer to as the "Survival Curve". As some conditions tend to have high rates of mortality initially, that typically decrease in force the longer someone survives, like some forms of cancer. Compared to conditions that initially exhibit a low, but increasing force of mortality over time, like dementia. Insurance companies have been using medical information to decide whether or not to offer life cover and how much to charge for it for hundreds of years and medically underwritten annuities have been available for decades. And the worse a person's health is, the higher the annuity rate will be, providing more income for the same purchase price.

The timeline around the ICA is somewhat confused but it appears there was (given Ms B's age) a significant delay between an illustration being requested with some, I think limited, medical details provided to Just. And the application then being signed, and the annuity then being set up. Ms B was around 86 years 4 months old when Frenkel first proposed the ICA in October 2019, and around 87 years and 4 months old when the suitability report was written in October 2020. She was around 87 years 11 months old when the annuity started.

Frenkel's fact find (July 2020) states Ms B had "moderate dementia", with a hip problem requiring surgery but that she had no reduction in typical life expectancy. It isn't clear how it came to this conclusion. Frenkel's suitability report says ICA illustrations have been obtained and;

"based on Mr Hxxxxx"s (sic) current health and needs. The results are summarised in the table below"

It isn't clear who "Mr H" is, whose surname is completely different from Ms B's, so this wasn't just a simple typing error. And the ICA details summarised show a lower purchase cost than was subsequently proceeded with for Ms B, with no further explanation of this discrepancy being provided. It might be that the financial analysis, such as it was, that followed was based on Mr H rather than Ms B. It's hard to tell due to the scale used on the graphs. I think these errors further evidence of the generic nature of the advice Frenkel was offering. And when I first asked it about what underwriting had been carried out it said,

“the Just annuity would have to undergo full medical underwriting before coming into payment so full medical reports would have been provided to the deputy.”

Mr B says Ms B’s GP wasn’t contacted by any of the parties. If so, then it’s difficult to see how the annuity could have undergone “full medical underwriting”. I asked Just about this. It said the annuity, “was underwritten using a medical report obtained from her Care provider” before it provided a quotation. Frenkel’s fact find was completed in July 2020, nearly nine months after it had provided its initial report to the Deputy. It appears that the illustration request questionnaire, of which I have seen a copy, was completed in August 2020, but it isn’t dated or signed, so it isn’t clear whether it was completed by a medical professional or not.

Mr B says Ms B’s health was much worse than the information provided to Just and she was deteriorating with an “almost complete lack of cognitive and memory issues” and her realistic life expectancy was short. I asked Mr B for evidence of this, and after some delay he provided a copy of her medical records from her GP.

I’m not a medical expert, but I think Ms B’s GP records show a frail, elderly lady with numerous reoccurring, age related health issues. There’s no reference in the notes to any enquiries being made by the Deputy, Frenkel or Just about Ms B. As her state of health is at the heart of the complaint and the decisions made, I think it’s relevant to briefly summarise the records.

It seems Ms B was first referred to the memory clinic in 2015. Following falls and injuries, her friends reached out in 2016 concerned she had showed signs of dementia for some years, which led to the local authority being approached. Memory problems are noted in accident and emergency admissions following falls in 2017, and she was referred to the community memory clinic. But they didn’t meet with her, as she failed to keep the appointments. In April 2018 following a further hospital admission, it was concluded Ms B couldn’t live independently and she went into care and was referred back to the memory clinic. She was moved to another care home out of area which seems to have required referral to a different team. Suffering with a hip problem Ms B was prescribed increasingly strong pain killers. In December 2018 she was assessed as being of “moderate frailty”, which an internet search suggests is worse than it sounds.

Late onset Alzheimer’s was formally diagnosed in April 2019 with Ms B’s cognition described as being “grossly impaired”. Her hip problem became worse, impacting her mobility further and there were problems with pain control, despite being on “highest doses of pre meds for pain relief” and recurrent cellulitis, eye, and skin infections. These and other issues continued over the coming months.

The illustration request seems to have been sent to Just in August 2020, it asks some basic broad questions about specific medical conditions like heart attacks, cancer and so on. It also asks questions about Ms B’s ability to complete “activities of daily living” such as bathing and feeding herself. Due to Covid Ms B hadn’t been physically seen by her GP for some time. And no information is given about the recurrent infections and reducing mobility, which I think, are widely known to be negative indicators for elderly people, particularly those with dementia. So, I think the information requested by Just might have been adequate for its needs, but it wasn’t adequate for Ms B’s.

As I’ve noted it appears to have been another three months or so before the application form for the ICA was signed (by the Deputy) and around nine months before the annuity commenced. The application form itself contains no medical or health information at all. There are no contact details for Ms B’s GP. There are two issues here. An update on Ms B’s

health doesn't seem to have been obtained and as she was now around nine months older this would clearly impact how long she could be expected to live. This potentially impacted the breakeven point on the annuity, although the rate itself would normally increase with age, but this doesn't appear to have been reassessed.

And unfortunately, during this period it seems Ms B's health did begin to deteriorate quite markedly. From March 2021 from a normal body mass index, she was rapidly losing weight. A "clinically significant" 18.4% over the three months to June 2021. By July 2021 the care home was noting her "general decline", she was doubly incontinent, bed and chair bound. By August 2021 she was suffering with pressure sores and cellulitis with a note to call 999 if she deteriorated. Weight loss continued and hospital admissions for breathing difficulties followed. In mid-December 2021 Ms B was returned to the care home under palliative care.

I've thought carefully about this evidence, particularly with regards to hindsight. Relatively old people can die quite suddenly even if in "good" health. But Ms B wasn't in good health and again I think it's well known even to non-medical professionals that old, frail people with mobility issues and multiple other health concerns like recurrent, hard to treat infections, and what appears to be quite advanced dementia, can deteriorate very rapidly. And, basing financial recommendations on the presumption of "normal" life expectancy on limited and out of date "medical" information appears fundamentally inadequate to me.

I can't tell Frenkel to change its procedures but for Ms B to have been treated fairly I think it was necessary that proper medical evidence and opinion be obtained. Possibly independent to that of the annuity provider, whose financial interests are the exact opposite of the annuitant. What was then required was an analysis and advice about whether the ICA income rate offered by Just or any other annuity provider was likely to be a sound investment in Ms B's specific circumstances. And in the event of any delay in proceeding with the arrangements, for the position to be monitored for changes which might render the advice unsuitable, or that a superior annuity rate might be obtained if the advice remained suitable. That doesn't appear to have been done.

On the evidence so far, it isn't clear to me how it "was reasonable for the adviser to predict that Ms B would live for years, rather than months" as Frenkel stated in its final response. I don't think that Frenkel has shown its advice was suitable for Ms B. And the argument that it has made, that as she had no known beneficiaries at the time this was all irrelevant, doesn't change that.

That's because if an ICA was appropriate, annuity providers compete for business. And it was Frenkel's role to secure the best annuity rate possible, not just to sell what Just or any other provider was offering. A more inquisitive underwriting process might have made a better annuity rate available, lowering the purchase cost for the same amount of income. That would better preserve the overall funds otherwise available to support Ms B's care, which I think was the prime objective here.

And given the funds Ms B did have available to fund her care for many years there was no pressing need for Frenkel to proceed when it did, with information now many months out of date. Had there been a reassessment I think the reasonable course of action would have been to defer setting up the ICA and that doesn't require the benefit of hindsight. The information that leads me to this conclusion was already becoming available by March 2021 and given what did happen it does appear the estate of Ms B has suffered a loss as a consequence of the unsuitable advice.

Capital protection

Mr B has made a number of comments in respect of this but given my thoughts so far, this point is somewhat mute, so I won't consider this further at this stage, unless further evidence or comments make this relevant.

The other investments

Mr B says these were high risk and unnecessary and losses of around £30,000 were incurred. I asked Frenkel about this and it says the value of the investments recovered and the loss when these were encashed was less than £5,000. It noted the challenging investment conditions during 2022 in particular. Total investments of £126,082.52 were made between December 2020 and May 2021.

There was a general requirement on the Deputy to seek real returns (above inflation) and that does tend to require investment in assets like shares and bonds where the capital value is at risk and can fluctuate, particularly over the shorter term. But I think the same considerations about life expectancy would apply, as if this was short the initial costs and short-term risk of holding non-cash assets might not be justified.

The suitability report confirms that the Deputy wished to adopt a risk profile of four out of ten on Frenkel's scale of risk categorisations, described as "Lowest Medium". The report says investing more cautiously than this had been considered but discounted due to the "obligation to grow the real value of the money". The report doesn't provide a direct commentary on the asset allocation of the recommended Ascencia Investment Management Income & Growth 4 Portfolio or the likely level of returns it anticipated. I asked Frenkel about this, but it didn't provide any further information. But the investments outlined seem in keeping with the selected risk categorisation, so this wasn't unreasonable in itself.

However, when giving advice Frenkel needed to also consider the impact of both its own and any product charges in assessing whether the recommendations were likely to be of value to Ms B.

The illustration for the General Investment Account (GIA) used the mid-growth rate return of 4.5% per annum. The ISA illustration, invested in the same funds used a 5% growth rate in view of the tax advantages. These growth rates are set out by the regulator and reflect typical longer-term returns on the type of asset to be invested in. It isn't clear at this stage whether the 2% initial charge and the quite high annual charges estimated at over 2% (for the investment and Frenkel's ongoing advice), realistically allowed a real return to be achieved after inflation, given the risk to capital that was involved.

And neither illustration reflects the 2% initial charge identified in the suitability report and subsequently taken by Frenkel. I asked it why the illustrations didn't include the 2% initial charge, as this would have reduced the projected future values. It didn't respond on this point either.

For the GIA investment of £95,876, the illustration projects a fund value assuming the mid growth rate of 4.5% per annum, before charges, is achieved. After five years the projected value is £107,830, so about a £12,000 gain, but as the initial 2% charge isn't reflected, the actual return (if this performance was achieved) would be less than £10,000. No assumption is given about inflation in the suitability report, but the Bank of England target is 2%, so I think that is a reasonable reference. So, over five years to match inflation at 2% the investment would need to grow to around £105,854. So, it seems likely that after inflation and charges the mid growth rate wouldn't actually provide a real return. Over a ten-year investment period the investment shows around a £2,000 advantage over the necessary 2% inflation return.

The forecast position for the ISA investment is slightly better as the tax benefits result in a higher growth rate being assumed. But charges still accounted for around half the forecast return at the mid growth rate over a five-year period. So, it's questionable then whether the recommended investments were likely to achieve a better return than inflation, other than over very long timeframes. And that has to be put into the context of the life expectancy of someone already 87 years old, with multiple health issues.

I've already referred to the regulator's Conduct of Business rules (COBS) 9 requiring advisers to "understand the essential facts" about their client.

And COBS 6.1A.16 also makes it clear that;

"In order to meet its responsibilities under the client's best interest rule and Principle 6 (Customer's interests)

a firm should consider whether the personal recommendation or any other related service is likely to be of value to the retail client when the total charges the retail client is likely to be required to pay are taken into account."

The Deputy knew that there were initial charges (from the suitability report) but wouldn't have been fully aware of their impact from the illustrations Frenkel provided. And the overall impact of charges is such that I think the recommendations weren't "likely to be of value", which means they weren't suitable.

Frenkel should have fully disclosed the impact of all charges and I think it should have recommended a lower charged solution that would make meeting the investment objective more likely. If it couldn't do this, then it should have confirmed this and not proceeded with the investment.

These investments didn't present the same "cliff edge" risk to capital as the ICA in terms of Ms B's life expectancy. So, I think it's likely that the Deputy would have made some investment at the time - December 2020. But due to the failings in Frenkel's advice it's possible that Ms B's estate has suffered additional losses, and if so, it is fair that compensation should be paid.

Putting things right

I said my aim in awarding compensation is to put Ms B's estate most closely back into the position it should have been in but for the unsuitable advice Frenkel provided. I set out how I thought that should be done. This was to refund the difference between the total cost of the ICA and the income it had paid, with added interest. And to compare the performance of the investments to a suitable benchmark, and if this showed a loss pay compensation accordingly.

I asked both parties to send me any further information or comments they would like me to consider.

Response to provisional decision

The estate of Ms B accepted my provisional decision.

Frenkel didn't accept my provisional decision and provided a detailed response. It said it considered the advice was suitable and the deputy had been fully informed about the costs, charges and risks involved, including that of early death. It said it hadn't provided generic advice. Frenkel strongly argued it was entitled to and had relied on information provided by

the deputy and care home and knew enough about Ms B to make the recommendations. It said the medical information I had set out was “*inconsistent*” with the “*detailed and coherent medical information*”, which it had been provided with and it wasn’t its role to have challenged this, which would have been “*entirely speculative at the time and arguably cynical*”. It said the ICA had been underwritten for Just by a third party, who I’ll refer to as MA.

I asked Mr B about MA, who said this hadn’t been mentioned previously. He contacted it and was provided with a copy of a telephone interview questionnaire completed by one of its nurses with the care home manager, who wasn’t a medical professional, on 7 January 2021.

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.

Having done so, I’ve decided to uphold the complaint.

I’ve carefully considered all the further points made in coming to my decision. I still don’t think Frenkel made adequate or reasonable enquiries about Ms B’s health to be able to give the advice it did, and the impact of costs and charges weren’t properly disclosed. I’ll set out why I think this along with my thoughts on the other main points it has made.

Ultimately the main risk for the consumer when buying any type of lifetime annuity is their life expectancy. As Ms B couldn’t make that decision herself, I think adequate consideration of her individual health and life expectancy was essential to establish the relative merits of purchasing the ICA. An ICA might be an appropriate option to help meet future care costs, but I think Frenkel simply didn’t know enough to make the recommendation it did at the time. The information it had was both limited and out of date. But from that Frenkel considered it could conclude that Ms B could be expected to “*live for years*”. I don’t think that was reasonable.

Frenkel said the COBS rules I’d referenced on assessing the suitability of investments also said under 9.2.5 that,

“A firm is entitled to rely on the information provided by its clients unless it is aware that that information is manifestly out of date, inaccurate or incomplete.”

Frenkel said it did have all the necessary information and details from the deputy to make the recommendations, which the deputy had confirmed were correct when applications were completed.

But COBS 9.2.6 continues,

“If a firm does not obtain the necessary information to assess suitability, it must not make a personal recommendation to the client or take a decision to trade for him.”

As the financial expert I think Frenkel needed to ask the right questions, in adequate detail to demonstrate it had obtained complete, accurate and up to date information it needed to make suitable recommendations. It says the only clearly known information was from the deputy and the care home, but it seems to me that was the only information Frenkel asked for. And I think the information it did receive should have prompted it to ask further questions and, if necessary, obtain expert medical advice. It didn’t do that. It is hardly unusual for a

financial adviser to need to clarify information provided by clients. The covid situation at the time might have complicated that but was in itself a further reason to proceed cautiously.

For the ICA I think the key factor was Ms B's individual life expectancy. Frenkel said its calculations around this were based on the information provided by the deputy. But contradicting this it also said that its research *"didn't relate to Ms B's unique circumstances"*. And that the suitability report showed that if the information provided by the deputy *"had been correct"* then in *"all likelihood Ms B would have been better off on the reasonable assumptions/life expectancy analysis set out"* with the annuity in place.

I think using average life expectancy for a person with known life shortening conditions for the financial analysis is inadequate. As the certainty of future income an annuity offers can't be put into proper context to the risk to capital. And it was clearly known Ms B suffered and had suffered for some time from significant health issues. And whilst Frenkel has said its suitability report confirmed, *"life expectancy is unknown"*, it wasn't necessary to precisely know this, and proper enquiry would have made some judgement possible.

What did Frenkel know about Ms B's health

Previously Frenkel told me the ICA would have undergone full medical underwriting *"so full medical reports would have been provided to the deputy."* And it had asked the deputy to provide updates, but none were given. It said it hadn't seen the GP records I'd referred to, and I've asked that it be sent a copy.

Frenkel said the medical information I'd summarised from the GP records was *"inconsistent"* with that provided by the care home, wasn't known to the deputy and seemingly the care home at the time. It said it was usual for the care home to provide medical information. And, as the care home saw her on a daily basis it was *"quite clear"* its report should be preferable as an *"accurate record of Ms B's conditions at the relevant time"*. It said the information provided by the care home in August 2020 stated she had moderate dementia and needed minor assistance with activities of daily living. This unsigned, undated form confirms dementia, but doesn't request information on how long the condition has been present. It states the memory score is *"Not known"*. The questions *"Orientation in place"* and *"Orientation in time"* are answered *"No"* and her memory was *"poor"*. Ms B is said to be continent and her health stable *"over time"*. And she was able to carry out some activities unassisted but needed help with others.

So, at this point Frenkel knew Ms B had dementia, but not for how long, but that she'd not had capacity to make decisions for herself and had been in care for more than two years as a consequence. She clearly wasn't in average health even on the basis of this, I think, quite limited information. Which suggests mid-stage dementia at best and she was already 87 years old. Information from the Alzheimer's Society states this stage of dementia typically lasts for two to four years. It seems to me that how long she had been in that stage would therefore be highly relevant. And this would reasonably warrant further consideration of her prognosis, the potential impact on her life expectancy and how that might impact the need for or financial benefit of an ICA in her own circumstances not those of someone with typical life expectancy for her age.

Instead as Frenkel said in its final response to Mr B it decided it was reasonable to conclude *"that MS B would live for years rather than months"*, thus making the ICA suitable, seemingly without any further enquiry. It has provided no explanation as to why this was a reasonable conclusion. Its expert's opinion was that typical life expectancy at Ms B's age might only be six years or so. It isn't clear to me that her health and life expectancy was anything like typical at that time from that limited information.

And in my view the “*relevant time*” was when the annuity started in April 2021 and by then even this information was many months out of date. With Ms B then nearly 88 years old and in care for around three years. I don’t agree that there is anything speculative or cynical about acquiring timely, relevant, health information from medical professionals, before making irreversible financial decisions. Frenkel could, and I think reasonably should, have recommended the deputy seek further and up to date medical information from both the care home and Ms B’s GP with a medical examination if appropriate. So, the key aspect of her realistic life expectancy could be considered. This would have allowed this part of the recommendations to be properly framed.

And I think the further information now available by MA from January 2021 only confirms this conclusion. This document doesn’t give any opinion on Ms B’s life expectancy but seems more in line with the GP records than the information obtained in August 2020. There are numerous health questions and those under section 31 relate to dementia. Ms B’s Alzheimer’s is confirmed.

But the diagnosis date is given as “*unknown*”, and no memory score or other cognitive assessment was available. A question about her symptoms is answered, “*Memory loss, Confusion/Wandering, Inappropriate behaviour, Failure to recognise family or friends*”. Her cognitive function across all areas is assessed as “*poor*” or “*limited*”, without defining those terms. She could feed herself prepared food but needed assistance with most other tasks and was incontinent. It is noted that the deterioration in her mental and physical health over the previous six months was “*little or none*”. Some answers are slightly contradictory, for example Ms B was said to need a zimmer frame to move from room to room most of the time, but also needed a wheelchair to move from room most of the time and wasn’t capable of washing herself but could brush her teeth unassisted.

This more detailed information suggests Ms B’s health as the annuity started was worse than indicated in August 2020. It isn’t my role to retrospectively estimate her likely life expectancy, that should have been considered at the time. But I think it’s fair to conclude that her dementia couldn’t then be reasonably described as being “*moderate*” and she was very much moving toward the end of her life with her Alzheimer’s either in or entering the final stages as described by the Alzheimer’s Society, with typical life expectancy then being one to two years. So, it would appear she very much did not have average life expectancy for a woman of her age without which the benefits of the ICA were questionable, despite the certainty of income it would provide.

Frenkel might not have the medical expertise itself to undertake this type of assessment, but health professionals could be called on to do so. And it did use independent expert opinion to rather meaninglessly comment on average life expectancy in the financial analysis for Ms B. So, also seeking appropriately qualified guidance on how existing health conditions might impact that would seem important and reasonable, particularly in her circumstances, when as Frenkel has put it, there was “*nobody to make representations on her behalf*”.

The annuity provider is free to offer whatever rate it wants, but it takes on the opposite risk to the purchaser. I think it was Frenkel’s role to put the income available into context. That required the most detailed and up to date information available. It was in control of the application process with Just, and I think it should have requested a full update here and considered the impact, if any, on the annuity rate being offered. Mr B has been able to obtain full medical information and Frenkel could have requested the same be obtained by the deputy. Without that I don’t think it is possible to show that the advice to take out the ICA was suitable given the breakeven point was still around five years. And whilst the MA interview was undertaken nearer to the time of the annuity commencing, it was still nearly another four months before the start date. And as the GP records, containing comments from the care home, show Ms B’s final decline had begun by then.

Frenkel has said based on the information available had it changed its advice and recommended deferral of the ICA both it and the deputy would have been open to criticism that the ongoing care costs were unreasonably eroding Ms B's capital when the ICA was available and should have been bought.

This is a potentially reasonable argument provided the information available was and remained adequately accurate, up to date and relevant. I don't think it was and failing to specifically reappraise the situation or revisiting the financial analysis was also unreasonable in the circumstances. An ICA might be an appropriate option to help meet future care costs, but I think Frenkel simply didn't know enough to make the recommendation it did at the time. The information it had was both limited and out of date. Deferring for a period to seek proper information would have had a minor impact on the capital available which was adequate to meet the shortfall in Ms B's income to meet the care costs for many years.

The investment recommendations

Frenkel said both the charges and recommendations weren't *"inappropriate"* and it rejected the *"rationale"* in my provisional decision that it *"should offer compensation because the fees were quite high"*. It said it had been *"entirely clear"* about the charges with the deputy.

However, Frenkel didn't address the failure to disclose its initial fees in the illustrations as it should have done. Through understating the fees, the illustrations provided to the deputy therefore overstated the potential growth. I think that is misleading and would have prevented the deputy from making an informed decision about the recommendations made to them. And in total the fees were sufficiently high to have potentially undermined the stated investment objective, regardless of ongoing services also offered, and the suitability of the advice overall.

The loss calculation I proposed would compare the actual returns achieved to those from a comparable benchmark. And if no loss is shown, then no compensation would be due, despite the clear failure to disclose fees and charges as required by the financial regulator. So, I think this is a fair and reasonable way to resolve this part of the complaint.

Taking everything together I don't think the advice was suitable and it's possible that this has caused financial losses to the estate of Ms B. If so, it is fair that compensation should be paid.

Putting things right

My aim in awarding compensation is to put Ms B's estate most closely back into the position it should have been in but for the unsuitable advice Frenkel provided.

The ICA

I don't think this should have been purchased when it was.

- I think it's fair that Frenkel calculates the difference between the total cost of the annuity including the adviser charge and the actual income paid by the annuity and pays this sum to Ms B's estate, with interest added at 8% per year simple from the date of her death (22 December 2021) until the date of settlement.

- Frenkel should provide the estate of Ms B with a simple calculation showing how it worked the figures out.

The Investments

As there was a requirement to seek a real return, I think the Deputy would have still made investments had it been advised correctly, but I don't know exactly what they would have done. So, I think it's fair that the value of the investments made by Frenkel should be compared to that of a suitable benchmark. If that comparison shows a loss, then compensation should be paid.

Fair compensation

I think Ms B would have invested differently. It is not possible to say *precisely* what she would have done, but I am satisfied that what I have set out below is fair and reasonable given Ms B's circumstances and objectives when she invested.

What must Frenkel do?

To compensate the estate of Ms B fairly, Frenkel should:

- Compare the performance of Ms B's investments with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investments. If the *actual value* is greater than the *fair value*, no compensation is payable.
- Frenkel must also add any interest set out below to the compensation payable.
- Frenkel must provide the estate of Ms B with a simple calculation showing how it worked the figures out.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Ascencia Income & Growth 4 Portfolio	No longer in force	FTSE UK Private Investors Income Total Return Index	Date of investment	Date ceased to be held	8% simple per year on any loss from the end date to the date of settlement

- Income tax may be payable on any interest paid. If Frenkel deducts income tax from the interest, it should tell Ms B's estate how much has been taken off. Frenkel should give Ms B's estate a tax deduction certificate in respect of interest if it asks for one, so it can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Actual value

This means the actual amount paid from the investment at the end date.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Any additional sum that Ms B's estate paid into the investment should be added to the *fair value* calculation at the point it was actually paid in.

Any fees previously refunded by Frenkel may be added to the *actual value* calculation.

Any withdrawal from the Ascencia Income & Growth 4 Portfolio should be deducted from the fair 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, to keep calculations simpler, I'll accept if Frenkel totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

Why is this remedy suitable?

I have chosen this method of compensation because:

- Ms B's 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 a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be 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 Ms B's circumstances and risk attitude.

For clarity, given the advice to take out an ICA and the advice to invest funds were independent from another, I don't think it's reasonable to allow any offset if the investment calculation shows a gain.

My final decision

For the reasons I've given above and in my provisional decision, my final decision is that I uphold this complaint against Frenkel Topping Limited.

I direct Frenkel Topping Limited to undertake the calculations set out above and pay any compensation due to the estate of Ms B.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Ms B to accept or reject my decision before 9 January 2025.

Nigel Bracken
Ombudsman