DRN-5478351

Financial Ombudsman Service

The complaint

The estate of Mrs W ('the estate') is represented by its executor ('E').

In 2018 Mrs W suffered a loss of capacity, she moved into residential care and, later in the year, a Lasting Power of Attorney ('LPA') was registered for her. In 2019 her attorneys engaged an Appointed Representative ('AR') of St. James's Place Wealth Management Plc ('SJP') for advice on investing part of her savings to cover a shortfall between her income and the costs of her care home residence. An Immediate Needs Annuity was subsequently recommended and put in place in 2021. The annuity payments continued until 2023 when Mrs W sadly passed away.

The estate says the recommendation was unsuitable, because Mrs W's health was deteriorating and it was clear she had more than sufficient savings to cover the shortfall for as long as she was likely to remain in residential care. E queries the AR's approach towards the recommendation, on the grounds that the attorneys had vulnerability/capacity issues of their own, and Mrs W's life expectancy at the time appears to have been absent from its considerations.

The estate claims as follows – the annuity cost around £353,000, the annuity payments lasted less than two years and when they stopped a total of around £73,000 had been paid out, so a loss of around £280,000 has been incurred and should be compensated for.

SJP disputes the complaint and says the AR's advice was suitable for Mrs W.

What happened

SJP says –

- The annuity recommendation matched the need to ensure that the shortfall was covered indefinitely. There was no indication of a limited life expectancy at the time, hence the indefinite outlook.
- The AR was aware of the attorneys' circumstances but none of those circumstances meant they lacked ability or mental capacity. It applied additional measures in this respect by conducting all meetings with both in attendance, thereby ensuring they shared the decision making; and by holding many meetings (in 2019, 2020 and 2021) to ensure the matter was properly discussed with them and that they were given plenty of time (as much as they wanted/needed) to consider and make a decision in Mrs W's best interests.
- There was disclosure of Mrs W's state of health in the annuity application.

One of our investigators looked into the complaint and concluded that it should not be upheld. She broadly agreed with the points made by SJP and, in addition, noted the following –

- The estate has referred to a background of disagreement(s) between the attorneys and Mrs W's family around the time of advice, but the fact is that the LPA placed authority in the attorneys to make the relevant decisions for her in her best interests.

- In the absence of evidence that the attorneys lacked mental capacity, the AR would not reasonably have thought that they did.
- The annual shortfall between Mrs W's income and her living and residential care costs was around £46,000; she had a total of around £623,000 in savings; there was a need to cover the ongoing shortfall indefinitely and on a guaranteed basis; the AR considered other types of solutions but they did not meet this need like the annuity did; the estate argues, with hindsight, that her savings could have covered the shortfall for at least 15 years after which it could have been met by state assistance, but that scenario was not without risks (the inflationary effect on the buying power of the savings mismatching increases in the care home costs over time); so the scenario might not have played out as argued; furthermore, there is no evidence that Mrs W was given a limited life expectancy at the time of advice.
- It would have been prudent for the AR to consider capital protection insurance as part of the advice, and its suitability report shows that it did, but the attorneys declined this. They considered that priority ought to be given to applying Mrs W's money towards her own needs in the stated objective.
- There is evidence that a number of different annuity quotes were considered, and the one selected was deemed to be the most cost effective.

The estate disagreed with this outcome and asked for an Ombudsman's decision. E shared additional information about the disagreements between the attorneys and Mrs W's family and explained that the estate's complaint resulted from its pursuit for transparency over how her affairs had been handled, leading to its view(s) about the annuity advice. The estate maintains its position, and E's response to the investigator's view stressed its concerns about the attorneys' vulnerabilities at the time of advice.

The matter was referred to an Ombudsman.

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 have reached the same outcome expressed by the investigator. I do not uphold the estate's complaint because, on balance, I do not consider that the AR's annuity recommendation was unsuitable in the circumstances.

Principles 2 and 6 of the regulator's *Principles for Businesses* require, in broad terms, firms to conduct their services with due skill, care and diligence and to uphold their customers' interests and treat them fairly. Ouseley J in R (British Bankers Association) v Financial Services Authority [2011] EWHC 999 (Admin) confirmed that *The Principles* are ever present requirements that firms must comply with, so these requirements applied to the AR in its advisory service to Mrs W (through her attorneys).

Furthermore, the Conduct of Business Sourcebook ('COBS') section of the regulator's *Handbook* contains, at COBS 2.1.1R, the *client's best interests rule*. As the title suggests, this rule requires firms to uphold their clients' best interests, so it essentially reinforces the requirement in Principle 6 for firms to uphold their customers' interests and treat them fairly.

Like the investigator, I have noted the background information shared by E concerning the dispute(s) between the attorneys and Mrs W's family around the time of advice. I do not consider it necessary to recite information about this background or to make findings on it, because neither is relevant to the task of determining the complaint. Application of the aforementioned rules means the only person who mattered in the facts of the complaint was Mrs W, and the AR's obligation to give suitable advice was owed only and directly to her.

That advice had to be suitable and in her best interests. Unfortunately, she was unable to engage directly with the AR, but the legal and practical effect of the LPA was broadly that her attorneys essentially stood as her, and for her, in facing the AR. Whether (or not) her family agreed with this arrangement and whether (or not) they agreed with the decisions made by the attorneys was and is remote to the AR's role in the matter.

Having said the above, the estate remains entitled to a finding on their concern about the attorneys' capabilities and, as E has expressed, their vulnerabilities around the time of advice. As much as the AR could not have been reasonably expected to undertake any position in relation to the relationship between the family and the attorneys, in the context of upholding Mrs W's bests interests, if it was known or reasonably apparent that the attorneys' capability to act for her were impaired, that should have been addressed.

I have considered the personal characteristics of the attorneys that have given cause for the estate's concern. They are not in dispute. SJP has shared input from the AR confirming that said characteristics were known at the time and were catered for, but none of them amounted to grounds on which to conclude they could not properly discharge their roles as attorneys for Mrs W. On balance, I agree.

I need not go into the relevant details, because both parties are familiar with them. None of the cited characteristics automatically establishes a lack of mental capacity by either of the attorneys. I can see a potential argument for an assumption of *some* loss capacity in relation to the characteristics of one of the attorneys. However, at best and considered in isolation, such an assumption would rest on little or nothing more than a stereotype. I consider that it can only be viewed in isolation because there is no evidence that the particular attorney had any mental capacity issues. With regards to the other attorney, the relevant circumstances were serious, but they had nothing to do with the notion of lacking mental capacity.

In my view, the AR's adjustments for the attorneys and their circumstances were reasonable, and, if needed, they would have served as mitigation. The overall advice process was not rushed. It ran over the course of three years. Both attorneys attended the meetings that were held, and multiple meetings appear to have been held over the period. The attorneys would have had ample time and opportunity to discuss the stated objective, to have their enquiries addressed by the AR and to privately consider, during the gaps in the meeting, the advice and information they had been.

This would also have allowed all parties to review, over time, Mrs W's progress in the care home and her state of health. She had moved into the care home in 2018, so over 2019, 2020 and 2021 the attorneys, and the AR, would have had a chance to consider how she had settled in and whether (or not) her residence there was likely to be long term (as opposed to the likelihood of a change in care homes). Available evidence suggests that by the time the advice was confirmed and implemented in 2021, it was foreseeable that her residence would be long term – hence that residence forming the basis of the recommendation and its implementation.

Suitability of investment advice (including that related to retirement) broadly relates to matching a recommendation to a client's profile, whilst ensuring the advice is in the client's best interests. The profile usually includes the client's objective and financial capacity, and suitable advice would usually include the consideration of whether (or not) a solution to the objective can be found within the client's existing arrangements.

In Mrs W's case, the estate does not appear to dispute the existence of the shortfall or the need to cover it. It would seem that the estate also agrees with the AR's approach in using a long-term outlook. I give my reason for this observation further below. In any case, it is my

finding, on balance, that the use of a long-term outlook was reasonable. Evidence of her circumstances at the time of advice supports the conclusion that she was likely to remain in residential care for the rest of her life, and there was nothing to suggest she would be moving away from the care home she had resided in since 2018, so a long-term solution was required for the shortfall.

There is a suggestion in the estate's submissions that a different outlook could have been considered based on Mrs W's state of health at the time.

This decision will be published. I wish to avoid the risk of breaching Mrs W's anonymity, so I will acknowledge that she appears to have had some additional health problems between 2018 and 2021, but I will not go into the relevant details. Again, both parties are familiar with the evidence summarising these problems. Given their nature, and whilst they were not problems to be dismissed, I am not persuaded that they presented grounds for the AR to consider she had a limited life expectancy (and/or grounds to abandon the long-term outlook). In 2021, Mrs W was still in her late 60s.I have not seen medical evidence from the time, available to the AR, that conveyed grounds for such a consideration. Unfortunately, she passed away two years thereafter, but I do not consider that her passing was foreseeable to any of the parties involved in the 2021 advice.

The estate has argued an alternative scenario based on using Mrs W's substantial cash savings (plus a substantial addition to those savings that E says was impending at the time) to cover the shortfall. In other words, it says the annuity recommendation was unnecessary and that a suitable solution existed within her existing arrangements. Before I address this, I observe that this argument is also based on a long-term outlook – that being the idea that her savings could have covered the shortfall for at least 15 years, with state assistance obtained once depleted. Hence my comment above about the estate seemingly agreeing on the use of such an outlook.

It strikes me that the stated objective was not just about finding *any* solution to the shortfall problem, it was about finding a secure and guaranteed solution to the problem. Mrs W's existence at the time and for the future was tied to her residence in the care home, and the aim was to put in place an arrangement that completely covered her living and residential costs in the home for the indefinite future. Her income appears to have been secure, so the shortfall was the only loose end.

The AR's suitability letter recorded the attorneys' objectives, on behalf of Mrs W, as follows –

"*You wish to have an arrangement in place which will meet the following objectives:*

- *Provide a regular source of income to meet the care fees.*
- *Have an income source which is guaranteed for life.*
- *The need for income to escalate to cover potential inflationary increases in care fees.*"

Mrs W had around £604,000 in cash savings at the time, so I understand the estate's argument that those savings (plus the impending addition E has described) could have covered the £46,000 (approximately) annual shortfall for many years to come. In another case, depending on the circumstances, there could be merit in an argument like this. In the present case, and on balance, I am not persuaded that these savings automatically means the annuity recommendation was unsuitable.

I do not say that the cash savings alternative was unsuitable. I do not need to. The purpose of the complaint is to consider whether (or not), in the circumstances, the annuity recommendation was unsuitable, so that is what I need to address. The cash savings

alternative is relevant to the circumstances, and I consider it in this context below, but the point is that I do not need to find on its suitability.

If the attorneys chose to proceed with the cash savings alternative the likelihood is that no advice would have been obtained from the AR. They would have set up an arrangement for payments from the savings to the care home to cover the shortfall. They did not do that. If, as it appears, the estate disagrees with their decision, that has nothing to do with the AR.

From the AR's perspective, I acknowledge that it could have recommended the use of cash savings alternative. It did not do that. In considering whether (or not) this was a wrongdoing, I am mindful of the nature of the objective quoted above. The attorneys, on behalf of Mrs W, wanted regular income (to cover the shortfall) that was guaranteed for life and that would have capacity to escalate with increases in the residential care costs over time. Increases in care home costs over time can be relatively common, so this was an understandable part of the objective.

The £604,000 savings covered the shortfall (as it was at the time) for around 13 years. If increases in the residential care costs over time are factored into this consideration, the coverage might well reduce to somewhere around 10 years. However, the attorneys appear to have sought an arrangement that meant, once put in place, no-one would need to re-visit the matter of the shortfall again.

I do not consider it unreasonable for the AR to have reflected this in its approach.

A solution based on the cash savings included the likelihood of the shortfall having to be re-addressed when the savings became depleted – in around 10, 13 or even 15 years. In this context, I can understand why the AR did not recommend this solution. Further support for this finding exists in the inability of the cash savings (as they were) to guarantee, over time, increases in value to match inflation and/or inflationary increases in the care home costs.

In contrast, the annuity solution included indexation at 6% per year, based on the AR's consideration that Mrs W's care home fees had increased by 5.5% in 2021 and by a similar percentage in previous years. This met the objective for escalation in income to cover such increases.

The regular annuity payments stood to cover the shortfall and potential increases in the shortfall over time, and by its inherent nature the payments were guaranteed for life. These elements directly matched the stated objective.

An argument might also be made about the relative efficiency of the annuity solution, on the submissions that it used only around 60% of her savings, leaving her with a remainder of over £200,000; the remainder provided an additional resource to draw from if, for any reason, the 6% indexation featured in the annuity was surpassed by the rate of future increases in the care home costs; the cash savings solution would have used *all* of the savings, and with no indication about Mrs W's life expectancy, there was a possibility that a new solution would then be required when those savings became depleted.

I have noted the estate's concerns about quotes received for the annuity, and I am satisfied with evidence showing that quotes were received from three different providers and some quotes were also obtained on varied terms (with and without indexation, and with and without capital protection).

With regards to capital protection, as part of the annuity solution, the suitability letter said the following –

“*We discussed the benefits of including capital protection in* [Mrs W’s] *plan however you have chosen to discount this because* … *Under power of attorney, it is your task to invest* [her] *funds in* [her] *best interest. It is not in* [her] *best interests to pay an extra £65,042 from her cash reserves to add capital protection …*”

There is background that appears to be relevant to this, but I do not consider it necessary to go into the associated details. In essence, the attorneys appear to have considered it to be in Mrs W’s best interests to use her money for her and nothing else, as opposed to spending £65,042 of her savings to purchase insurance that would only benefit her estate after her passing.

In other words, the AR addressed the matter of capital protection, but the attorneys, on Mrs W’s behalf, declined. The estate might disagree with the attorneys’ action, but as far as the complaint against SJP is concerned, I do not find fault against the AR in the matter. Its advice was for Mrs W, its obligation was to uphold her best interests in the advice and the attorneys’ instruction about prioritising *only* her interests in the annuity solution was arguably consistent with that, so I do not consider that the AR did anything wrong by following that instruction.

Overall, on balance, and for the reasons given above, I am not persuaded to uphold the estate’s complaint.

My final decision

I do not uphold the estate of Mrs W’s complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask the estate of Mrs W to accept or reject my decision before 11 December 2025.

Roy Kuku
Ombudsman