

## **complaint**

Mrs P, represented by her daughter Mrs R, complains that Openwork Limited ('Openwork') gave unsuitable advice to buy an Immediate Care Needs annuity ('the annuity').

Mrs P is suffering from dementia and needs to be looked after in a care home. The objective of Mrs P's family when they consulted Openwork on her behalf was to pay for Mrs P's care home fees through the most advantageous combination of her own financial resources and any available local authority funding ('LA funding').

Openwork recommended that she establish an annuity the income from which, when combined with the LA funding was designed to meet the cost of the care home fees.

As a result of Openwork's recommendation, Mrs P bought the annuity for approximately £162,000. However, the local authority declined Mrs P's application for it to part fund her care home fees. It did so because it said it had to take into account Mrs P's annuity income which took her income above the limit for it to contribute to Mrs P's care home fees.

Mrs R, on behalf of Mrs P, has complained that the recommendation to buy the annuity was unsuitable as it was inconsistent with the intention that Mrs P would secure LA funding towards her care fees and prevented her being suitable to receive such funding.

## **background**

I issued a provisional decision on 15<sup>th</sup> February 2019. A copy is attached. It informs my final decision in respect of the background to this complaint. My provisional decision gives a narrative summary of how this complaint has evolved prior to further exchanges in response to the issue of redress which is appropriate in this case and described in more detail below. Neither party has disputed the background.

The outstanding matter, which I address in more detail below, is the question of redress and how it should be calculated. Both parties made further submissions about this discrete issue in response to my provisional decision.

In responding to my provisional decision, Openwork questioned (as it had previously) whether the source of funds used to open an account with AA in the late Mr P's sole name and from which he then made the loan to Mrs P to buy the annuity, was a sole asset of Mr P or whether it came from joint assets of Mr and Mrs P.

In short, its concern was that if those funds came from funds owned by the late Mr P and his wife jointly, by way of a joint bank account, then this would impact the amount of Mrs P's personal financial resources when she obtained the annuity and should be taken into account when calculating the amount of redress that she is awarded.

This service had since April 2016, repeatedly raised with Mrs P's representative the question of whether Mrs P had joint ownership with Mr P of the monies invested in his AA account which had been recorded in June 2014 as a joint asset worth £154,000. Mrs P's representatives had adopted the position that this record was mistaken and the monies were solely owned by Mr P.

However, as a result of continuing lack of evidence of the source of the monies on the AA account, I asked our adjudicator to approach the bank and Mrs R to see if they could provide evidence of who held the funds in the account from which the AA account was funded.

Mrs R agreed to approach the bank and our adjudicator confirmed that we would make our own enquiries of the bank to see if the source of these funds could be established.

In May 2019 it transpired that the AA account had been funded from a bank account held in the joint names of Mr and Mrs P. This was contrary to the information previously provided, so I asked Mrs P's representatives for further information about the reason for the transfer from joint names to the sole name of Mr P and evidence such as tax returns as to the beneficial

ownership of the monies. Ultimately, as described below, Mrs P's representatives chose, having sought legal advice, not to answer my enquiries.

Mrs R meanwhile has provided a further submission from her legal representative. It did not address the source of funds referred to above in respect of the enquiries of the bank Mrs R had previously made.

The submission on Mrs P's behalf did though make several substantive points.

First, it said that Openwork's questioning of the source of funds effectively amounted to an accusation by it of 'deprivation of assets' by Mrs P. In other words, that she was guilty of deliberately alienating assets in order to improve her prospects of obtaining financial support from the local authority.

Mrs R's legal representative pointed out that to substantiate an accusation of 'Deprivation of Assets' so that a local authority takes account of alienated assets when evaluating the capital resources of an applicant requires a high evidential test to be met.

Secondly, he said that the continuing care financial contribution from the NHS for Mrs P's ongoing care costs was not relevant in assessing redress for the unsuitable advice from Openwork to buy the care annuity.

He concluded that although he acknowledged he had not read the full detail of the redress solution in my provisional decision, he thought it complex and difficult to follow.

Mrs R added that as it was considered my proposed redress solution was complex and difficult to follow, as a result, '*accessible justice*' was potentially being denied to her mother.

In light of these comments, I wrote to both parties setting out an alternative redress formula which I hoped would be more transparent and less complex. In doing so, I gave both parties an indicative provisional current value for the annuity which I pointed out was subject to Mrs P's then state of health. Mrs R responded to this revised redress proposal and my request for medical evidence to the effect that Mrs P was in very poor health but without providing medical evidence or details.

In the event, Mrs R eventually confirmed that she was not willing to provide the further information necessary for Openwork to calculate redress as set out in my revised proposal. In particular, Mrs R said her mother's health was very frail. I inferred from Mrs R's comments that it would not be fair or reasonable to expect Mrs P to undergo a medical assessment in order to provide a credible basis on which to establish the current value of her annuity.

I am grateful for the further submissions from both parties to this longstanding and complex complaint. I have though decided that to bring this complaint to a resolution I consider fair and reasonable, I now have sufficient evidence and submissions to issue a final decision.

I say this because Openwork has previously acknowledged its advice to buy the annuity was unsuitable. It has only questioned the basis on which redress should be calculated. That is also the case in respect of Mrs P's representative's submissions following my provisional decision and my subsequent revised redress proposal.

Accordingly, determining a fair and reasonable calculation of redress is the focus of my final decision although I do comment on the submissions from both parties to my provisional decision where I think these are relevant to my redress solution.

### **my findings**

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

For the avoidance of doubt, I emphasise that I am obliged under this service's remit to decide the outcome of complaints on the basis of what I consider fair and reasonable having taken account of all the circumstances and the evidence provided by all parties.

Whilst I am obliged to take account of relevant law in reaching my decision, I am not obliged to follow it. This service is an informal dispute resolution service. We are an alternative to the courts, not a substitute for them.

The redress in this case is complex because it reflects the complex circumstances of this complaint. I do not agree that in these circumstances, '*accessible justice*' is being denied to Mrs P particularly as, following my provisional decision and having taken account of the submissions from Mrs P's representatives, I proposed a simplified redress solution albeit this was not accepted by Mrs P's representatives.

I have carefully reflected on the submissions in response to my provisional decision and subsequent exchanges with both parties. These principally concerned redress and its method of calculation.

Mrs R, in an email of 15<sup>th</sup> October 2019, said:

*"your suggested current value of the annuity seems likely to hugely detract from the value of any compensation which is also an unfair approach. Our mother is aged 82 and in poor health, so logically the annuity should not be worth much. She has been on CHC now for over two years and at our last meeting the CHC doctor described her as very frail indicating that even the most minor ailment could now prove fatal."*

I concluded it would not be appropriate to subject Mrs P to a necessarily intrusive medical examination. I therefore formulated an alternative redress proposal. It dispensed with the need to establish the current value of Mrs P's annuity.

I wrote to both parties setting out my revised proposal. In summary, I said that the normal practice of this service when determining any financial loss is to quantify that loss once and for all, using whatever estimates and valuations are necessary to arrive at an all-inclusive figure for redress. But because of the unique circumstances of this case, I am unable to apply our normal approach.

Rather, in fairness to the parties, I proposed to make a direction to compensate Mrs P's estate for the loss (if any) she will have suffered when she dies. This is fair to Mrs P, because the alternative I would otherwise favour (given the absence of detailed information about Mrs P's health) would be to conclude she is unlikely to have suffered a loss.

That is because, based on normal market annuity prices for a person of her age, living in care, and taking into account the money she has received from the annuity I did not think there would be any loss to compensate. I also said it is fair to Openwork, because it means it will have to pay, and pay only, Mrs P's eventual loss (if any).

I am satisfied that my further revised redress proposal which sets out the form and amount of redress Openwork is to pay will provide fair and reasonable compensation for Mrs P. This will be payable to her estate if she dies before the annuity payments have continued for a long time to have made the annuity profitable for her.

Both parties indicated that in principle, they were content with my revised proposal.

Mindful of Mrs R's comments – reiterated in her email of 15<sup>th</sup> October – of her difficulty in accepting a redress formula without monetary values included, I incorporated monetary values in my revised formula. These values reflect information previously provided to this service by Mrs R.

In calculating Mrs P's loss as a result of buying the annuity there is one further matter to be addressed. It is that Mrs P's representatives have said that her entire capital when she bought the annuity was £95,000, whereas Openwork has pointed to the fact (as has eventually emerged during the course of my investigation) that Mr and Mrs P held a valuable joint account which was used in October 2013, just six months before Mrs P's family consulted a different financial adviser in April 2014 about funding her care, to finance an AA account in Mr P's sole name.

As Mrs P had by that date suffered from dementia for several years, it seems unlikely that any change in ownership of the joint account monies can have been intended, or agreed to, by her when this took place. Moreover, the AA account funds were described as jointly owned in the report by the different financial adviser which was sent out in June 2014.

In attempting to resolve this matter, I asked Mrs P's representatives for any evidence, such as the late Mr P and Mrs P's tax returns and evidence of Mrs P's banking arrangements at the time, to show whether the funds in the joint account which were moved to the AA account should be regarded as wholly the late Mr P's or jointly owned by the late Mr P and Mrs P.

Mrs R initially indicated she was willing to provide this information. She subsequently confirmed that she had received information from HMRC but only in respect of one (unspecified) account holder but was pursuing with HMRC details of the other account holder.

However, in her email of 15<sup>th</sup> October 2019, Mrs R said that she was not willing to provide this service with the information she had received or with any other details in respect of this discrete matter.

In these circumstances I have concluded that in the absence of any persuasive evidence to show otherwise, the funds held in Mr P's name in the AA account should be assumed to have been held by him on behalf of Mr P and Mrs P jointly.

#### **The methodology for calculating redress**

The redress to which Mrs P ought fairly and reasonably to be entitled should reflect the difference between the position that she is in having purchased the annuity and the position she would have been in if she had received suitable advice from Openwork. The suitable advice would have been that she expend her own resources rather than applying these to buy the annuity and apply for LA funding when her capital and income were beneath the levels at which such funding could be available to her.

On that basis, Mrs P's present loss (which includes losses she has funded by borrowing more from family lenders than would have been the case without the annuity) can be expressed as follows:

$$\mathbf{A + B + I - C - D}$$

Where:

**A** is the cost of the annuity

**B** is the total local authority funding which Mrs P would have received if she had been properly advised

**I** is the interest that Mrs P would have received on her depleting capital as it was applied towards her care home fees

**C** is the annuity payments so far received and

**D** is the present capital value of the annuity.

But I have concluded that it is not possible to implement this formula fairly in the present circumstances because of the difficulty of ascertaining the present capital value of the annuity as in 'D'.

In the absence of detailed medical evidence, my view now is that the fairest course is to ascertain the amount by which Mrs P is currently out of pocket without seeking to place a capital value on the annuity and to direct that future annuity income be counted against that deficit and that the amount of the ultimate deficit, if any, be paid to her estate following her death. This avoids the need to place a current value on the annuity.

Using that methodology Mrs P's present deficit, disregarding the capital value of the annuity, her February 2020 cash-flow deficit can be expressed as:

**A + B + I - C**

And the amount to be paid to Mrs P's personal representatives following her death is her February 2020 cash-flow deficit, calculated as shown above, reduced by the annuity income she receives hereafter.

So, in order to put figures into that calculation, it is necessary to quantify each of **A, B, I** and **C**.

### **Quantifying A**

**A** is the cost of the annuity: £162,289.

### **Quantifying B**

**B** is the total LA funding which Mrs P would have received if she had been suitably advised by Openwork. The amount of this funding potentially depends on its duration and rate.

As regards duration, LA funding would have ceased when Mrs P started to receive continuing healthcare funding, as she did on 5 July 2017.

The question therefore is when LA funding would have started. Mrs P's representatives have stated that the £23,000 capital threshold would have been reached, and LA funding would have commenced, on 17 February 2016. That was on the basis that her starting capital was £95,000, and would have depleted at £880 per week, reaching £23,000 in 71 weeks.

However, that calculation is (in my view, incorrectly) based upon Mrs P having no interest in an AA savings account which was recorded in June 2014 as standing at £154,000. As noted above, I am persuaded the AA saving account (although held in Mr P's sole name) had been funded from monies standing to the credit of Mr and Mrs P's joint account.

I consider that those monies were most likely to have been a joint asset of Mr and Mrs P when they were held in their joint names and I have been provided with no evidence that Mrs P agreed, or even (given her dementia) that she would have been capable of agreeing to relinquish her joint ownership of those monies when they were moved into the AA account.

In those circumstances, I consider that it is fair and reasonable to regard Mrs P as having at least an equal right with her husband to that money, and that this gave her an additional £77,000 of capital or, looking at what I regard as fair and reasonable, to have given her access to that amount of money which she ought to have been applied towards her own care. So the additional sum of £77,000 should have been applied to her care and would need to have been run down before LA funding became available to her.

The additional capital would have run down at a faster rate than the £95,000 already mentioned, because the care home's fees rose by £43 per week on 1 April 2016 and by a further £40 per week on 1 April 2017. So, the additional capital would have been diminished

by £5,280 by end March 2016, and by £53,276 by end March 2017. It would have been exhausted 25 weeks later, that is by 21 September 2017.

So, Mrs P would still have had more than the threshold amount of capital for LA funding in July 2017 when she started to receive continuing healthcare funding. For that reason, if Mrs P had used her sole and joint capital in the manner that I regard as fair and reasonable to have expected, Mrs P would not have received LA funding.

And so the value of B is zero.

### **Quantifying I**

**I** is the interest that Mrs P would have received on her depleting capital as it was applied towards her care home fees.

This item represents the cost to Mrs P in lost interest of having parted with £95,000 of her solely owned capital by purchasing the annuity in October 2014, as opposed to applying that capital more gradually towards the payment of her care home fees. That would have taken approximately 2 years.

Assuming Mrs P could have earned interest at the time at the rate of 2.5% p.a. I estimate the value of **I** to be £1,200.

### **Quantifying C**

**C** is the total annuity payments so far received. These started in November 2014 at a rate of £20,973 per annum. They rise with the Retail Price Index.

Applying the annual RPI increments starting each successive November, I estimate that the annuity has yielded approximately the following amounts:

<i>period (y/e)</i>	<i>payments (£)</i>
Oct 2015	20,973
Oct 2016	21,193
Oct 2017	21,657
Oct 2018	22,497
Oct 2019	23,214
Sub-Total	= 109,534
Period Nov 2019 to end Feb 2020	= 7,920
<b>Total (C) = £117,454</b>	

### **Mrs P's February 2020 cash-flow deficit**

Applying those values to calculate Mrs P's February 2020 cash-flow deficit (i.e. **A + B + I - C**) gives:

£162,289 + £0 + £1,200 - £117,454 = **£46,035**.

On that basis, I think that it is fair and reasonable to regard Mrs P as out of pocket by £46,035 on 1 March 2020 on a cash-flow basis, i.e. without taking account of the fact that she has the continuing benefit of the annuity.

### **Continuing income from the annuity**

As a result of the annuity increasing with RPI, I expect this year's annuity payments to amount to approximately £23,780, or about £1,980 per month.

So, for as long as she lives, Mrs P's cash-flow deficit should diminish at a rate of approximately £1,980 per month, so that, if she survives that long, it will be extinguished after 24 months (i.e. at end February 2022). After that point, Mrs P will move into profit from having invested in the annuity. This may occur slightly sooner than that, if the RPI rises significantly, but that cannot be known and is not a matter that I propose to take into account.

I sent my revised proposal, based on the formula and calculations above, to both Openwork and Mrs P's representatives. At the time, the cash flow deficit was approximately £55,000. My calculations above are adjusted to take account of the passage of time between receiving Mrs P's representatives and Openwork's responses to my proposal and the date of my decision here.

In my revised redress formula and calculations, I also proposed that in order to secure Openwork's payment to the estate of its ultimate liability, it be required to deposit the present amount of the deficit in a special trust account for Mrs P's benefit from which Openwork can only withdraw monies to the extent that its liability diminishes as a result of Mrs P's future receipt of annuity payments.

Openwork accepted my revised proposal. Mrs R, on behalf of Mrs P, accepted my revised proposal in principle but made a number of additional points. In summary, she said:

*1. We are in a position to agree to the FO's formula now that it has been fleshed out with actual figures subject to what we consider to be qualifications and amendments which are, in the context, minor in value but important in principle and in relation to the outcome.*

*2. We think that interest on the award should be added at the rate of 8% in accordance with the FOS website narrative indicating that "in most cases, we think a rate of 8% simple per year is appropriate to reflect the cost of being deprived of money in the past". Clearly our mother was deprived of a large lump sum from October 2014.*

*3. Unless we have misunderstood, it appears that the FO has omitted to allocate interest in the future on the £55,000 element of monies due to our mother as otherwise the cash flow deficit will diminish in real terms as time goes on.*

*4. We require confirmation, that the policy will remain active until our mother's death, in the event that she outlives the drawing down of the remaining £55,000.*

*5. The drawing down should be capped at £55,000. Any interest accumulated should be paid out to our mother or her estate, whichever is appropriate.*

*6. The cost of the policy included commission of £5488.04. The commission was earned on a wholly unsuitable product that provided no benefit to our mother and regardless of any other calculations, it should be returned immediately with 8% interest.*

*7. The attitude of the FO to legal costs remains misguided and is harsh. From memory, we believe we have conceded that it was our choice to employ the services of Senior Counsel to draft the initial complaint to ensure clarity for the FOS in relation to issues. To be clear, we do NOT seek to recover his costs in relation to the settling and filing of the complaint. However, matters immediately spiralled into a melee of confusion, misunderstanding and misinterpretation of the claim by the FOS. This is clearly evident from the tortuous route and time it has taken to reach this stage. We received more than one PD clearly stating that no fault lay with the business and it has taken just over four years to reach the stage of proposals being made to settle the claim, during which time the FOS admitted (27 March 2017) that it had failed utterly to grasp the issues, made*

*mistakes, caused a ridiculous delay and required to take its own legal advice. We cannot agree that we could or should have been expected to deal with the claim without legal assistance whilst the FOS employed the many resources of a large organisation and expected us, two housewives working at our kitchen tables, albeit with professional backgrounds, to deal unsupported. In the event that we are not awarded costs, we shall be making efforts to recover these against the FOS directly after settlement of the claim. Our claim for costs is more than reasonable in the context of the conduct of the claim and we urge the FO to do the decent and fair 'thing' against the backdrop of the statement on the FOS website ("Costs awards aren't common, but we need to think about what's fair in each individual case") and include these in the award.*

**8. The attitude of the FO to a 'distress' payment is also harsh and heartless. We have dealt with matters on behalf of our mother. The compensation payment is not for my sister and me. We are mere representatives.**

*It was open to the business to settle this claim years ago. Our mother must surely fit the description of a complainant who has been affected 'practically' and 'financially' been caused 'inconvenience' ie the work and effort necessary to reach where we are today vis a vis a decision in her favour regardless.'*

I have carefully reflected on these comments from Mrs R. I respond to each as follows.

Mrs R makes three separate claims for interest under her points **2, 3 and 5**. Respectively these are enhanced interest (i.e. at 8%) on the capital cost of the annuity, unspecified future interest on the present cash-flow deficit (which was £55,000 and is now £46,035) and payment of any interest on the blocked account to Mrs P or her estate irrespective of whether any other monies become due under the redress direction.

I cannot agree with these claims to interest because I do not think they take into account the rationale for my decision, which is to indemnify Mrs P against suffering a loss rather than to provide financial compensation for any existing loss which has not yet been established she has yet suffered. My detailed reasoning is:

- a.** I have provided for a realistic rate of return on Mrs P's initial cash outlay in purchasing the annuity. This has been selected and applied to compensate Mrs P for the fact that she depleted her capital more quickly buying the annuity than she would have applying her capital to care home fees. Mrs R suggests a higher rate of 8% should be applied because the Service can award this where a complainant has been deprived of money in the past. But Mrs P's initial cash outlay is not equivalent to her having been deprived of money (i.e. suffering a financial loss) in the amount of the cash outlay because the cash was used to purchase a valuable asset (the annuity).
- b.** The present cash flow deficit of £46,035 is likewise not a financial loss which should attract interest in Mrs P's favour. If I were forced to estimate her loss today, it would be zero, because the annuity's value is likely to exceed £46,035. The direction I make in Mrs P's favour is intended to forestall the risk of loss, which will only eventuate if Mrs P dies relatively soon. To add 8% interest to one aspect of the calculation upon which the direction is based (the present cash-flow deficit) would distort the calculation because that element of the calculation is not Mrs P's loss (she still enjoys a valuable capital asset, the annuity, which might if valued be worth considerably more).
- c.** To require any interest that may accrue on the trust account to be paid to Mrs R is unjustified. The trust account arrangement is *security* for Openwork's compliance with its payment obligation, nothing more. It is not intended to result in additional payments beyond the sum (if any) that may be required under the direction's formula.

4. The policy provider has not been party to this complaint. Its obligations are not affected by the proposed direction.

6. The idea of separating out the commission paid for acquiring the annuity from the amount paid to the annuity provider is contrary to the basis for the proposed redress direction. The direction gives Mrs P credit for all her factual cash outflows (including her payment of commission) and deducts all her factual receipts, present and, if and when they may arise, future. To award her the commission separately would either doubly compensate her for that element, if her estate receives a pay out under the direction, or pay her compensation in a respect of an annuity from which (taking account of the commission she paid for it) she will have actually made a profit, if she survives the period to which the direction applies. So I cannot agree with this suggestion.

8. Mrs R has not identified any distress or inconvenience suffered by the complainant, Mrs P. Our power to award redress for distress and inconvenience arises under s.229(2) FSMA, which says that the ombudsman's determination of a complaint may include

*"an award against the respondent of such amount as the ombudsman considers fair compensation for loss or damage ... suffered by the complainant".*

Mrs R's argument is that Mrs P should be compensated for the work and effort that has been put in to advance her complaint. I understand this to mean that those who have represented Mrs P have suffered distress and inconvenience and that this has occurred because they have dealt with the complaint on her behalf.

Whilst I do not in any way minimise the time and effort expended by her representatives in pursuing Mrs P's complaint, I have not seen evidence to persuade me that Mrs P, the complainant, has suffered distress or inconvenience from the purchase of the annuity, in first making her complaint to Openwork, or from its referral to this service.

The difficulty is that loss and damage suffered by those representing the complainant is outside s229(2). The effect of this is that I lack the authority to award compensation for it.

I have therefore concluded that under our rules, it is not open to me to direct Openwork to make a further payment in respect of distress and inconvenience.

7. Mrs R has again reiterated that the legal costs incurred in bringing this complaint should be reimbursed as part of my redress determination.

But our general approach is that legal representation is not necessary for a complainant to refer their complaint to this service. Legal representations were made by Mrs R on behalf of Mrs P when first bringing her complaint to this service. There was a further submission from Mrs R's legal representative in respect of deprivation of assets and an earlier proposed redress solution.

But this service is free to consumers. Legal representation is not a prerequisite. Mrs R made her own decision to take legal advice. Although complex in nature, I do not consider the matters at issue here required legal representation to bring them to this service. I am not persuaded to change my earlier expressed view that it would not be reasonable to hold either this service or Openwork responsible for the legal costs Mrs R says she has incurred in bringing her complaint to this service or in managing its progression whilst being considered by this service, notwithstanding that because of its unique circumstances, it has taken a considerable time to reach a final resolution.

I do not accept Mrs R's characterisation of the progress of this complaint whilst at this service. Mrs P's circumstances changed during the progression of this complaint; further evidence which I asked for took time to be produced; Mrs R changed her mind about the suitability of an earlier redress proposal which I put forward; there was conflicting evidence about Mr and Mrs P's assets; and in view of Mrs P's frail health, it was necessary to reformulate my approach to suitable redress whilst reaching a fair and reasonable outcome for all party's to this complaint.

None of that though detracts from my conclusion that Mrs P was poorly advised by Openwork Limited and so should be redressed for that poor advice.

In conclusion, I direct Openwork Limited to pay to Mrs P's personal representatives following her death the sum, which is to be calculated by reference to the number (**N**) of complete calendar months that Mrs P survives after 1 March 2020:

**£46,035 minus (N x £1,980)**

I also direct that in order to secure Openwork's compliance with the above direction, it must open a trust account for the benefit of Mrs P and pay into it the sum of £46,035 from which, until it is informed of Mrs P's death, it may withdraw for itself a sum of £1,980 per month.

But in order to create a reasonable buffer, such withdrawals are not to commence before 31 May 2020.

### **my final decision**

I uphold this complaint.

Openwork Limited must compensate Mrs P in accordance with the directions I have set out above.

Under the rules of the Financial Ombudsman Service, I am required to ask Mrs R, on behalf of Mrs P, to accept or reject my decision before 4 April 2020.

Terry Connor  
**ombudsman**

## **Provisional Decision**

### **complaint**

Mrs P, represented by her daughter Mrs R, complains that Openwork Limited ('Openwork') gave unsuitable advice to buy an Immediate Care Needs annuity ('ICN').

The objective was to pay for Mrs P's care home fees through the most advantageous combination of her own financial resources and any available local authority funding. Openwork recommended that she establish an annuity – this, combined with the local authority funding, was designed to meet the cost of the care home fees.

But having bought the annuity, the local authority then declined Mrs P's application for it to part fund her care home fees. It did so because it said it had to take into account Mrs P's annuity income which took her income above the income limit for it to contribute to Mrs P's care home fees.

### **background**

In May 2014 Mrs P became resident in a care home. The fees were £880 a week, which was around twice the "standard" funding the local authority would provide.

According to the records made at the time of the advice, Mrs P had savings of in excess of £90,000 which meant she wasn't eligible for local authority help. The local authority limit for such funding was then approximately £23,000.

Mrs R and her brother sought financial advice from Openwork on behalf of Mrs P. Its advice was then discussed amongst Mrs P's family, including her husband, the late Mr P.

Openwork advised the family to buy an annuity on Mrs P's behalf. It was to be funded from Mrs P's savings and a loan from her husband of the amount needed to cover the capital cost of the annuity, less Mrs P's savings. The amount to be invested in the annuity was calculated so that it would produce enough to bridge the gap between the care home fees and the "standard" local authority funding.

The capital cost of the annuity was £162,289. At the time of advice, it generated an annual income of £20,973, increasing annually in line with increases, if any, in the Retail Price Index.

Openwork advised the family that by buying the annuity Mrs P's capital would be reduced to below the capital threshold for local authority funding. However, once the annuity was in place it became clear that this plan was flawed.

Mrs R said that this was because the local authority took into account Mrs P's total income from the annuity when assessing her entitlement to funding. It said that as Mrs P's annuity income was £403.33 per week, her pension income was £70.76 per week and her Attendance Allowance was £81.30 per week, Mrs P's income was above the threshold for local authority funding. This has meant her late husband had to pay the shortfall in fees (the difference between the total cost and the amount generated from the annuity) from his savings.

When Mrs P complained to Openwork, it upheld her complaint but said it wasn't wholly responsible for the advice. This was because, having advised Mrs P (represented by Mrs R and her brother) of the overall strategy, it referred them to another, albeit related, business to establish the annuity.

But it offered £2,000 by way of settlement for those aspects of the advice for which it accepted responsibility

### **first provisional decision**

In my first provisional decision I explained that I was satisfied that Openwork Limited was responsible for the advice to buy an annuity. But I said that I didn't think I could look at the *reasons* for taking out the annuity – to redistribute Mrs P's assets so that she became eligible for funding – because that wasn't a regulated activity.

And I didn't think the annuity was *intrinsically* unsuitable, or that Mrs P had necessarily suffered a loss by taking out the annuity. So my first provisional decision was not to uphold the complaint.

Mrs R, on behalf of Mrs P, didn't agree with my decision and made further comments. In summary she maintained the annuity was unsuitable because it didn't, and couldn't have, achieved the objective of "topping-up" the care home fees after the usual contribution made by the local authority.

Mrs R also explained why she thought Openwork's advice had effectively rendered Mrs P's income permanently over the threshold for local authority support and so caused a continuing loss of some £400 a week.

### **second provisional decision**

On reflection, I agreed that Openwork was liable for the loss that has been incurred by Mrs P as a result of establishing the annuity. I issued a further provisional decision to that effect and set out a formula for it to calculate redress.

In summary, I concluded that Openwork was wholly responsible for the unsuitable advice to buy an ICN. I said that suitable advice would have been for Mrs P to have depleted her capital by paying her care home fees from it.

At the point her capital was depleted to a level below the local authority threshold, she would then have been eligible for local authority funding. But the permanent income from the annuity denied Mrs P, under existing provisions, the opportunity to benefit from local authority funding and so Mrs P should be compensated for this.

Further representations were made by Mrs R. In summary, Mrs R reiterated that her father, Mr P, should also be treated as an eligible complainant. In view of the continuing uncertainty of the quantum of suitable redress, Mrs R suggested an actuary should calculate this.

Meanwhile, Mrs R said it would be appropriate for Openwork to make a significant interim payment whilst final redress was calculated. Mrs R also asked that the legal costs incurred by her family in bringing this complaint should be included in the final redress payment.

Openwork also made a further submission. It queried the source of funds used by Mrs P to buy the annuity. It referred to earlier advice to Mrs R and her family from a previous adviser which it said should be taken into account in determining the outcome of this complaint.

Mrs R also explained why she thought Openwork's advice had effectively rendered Mrs P's income permanently over the threshold for local authority support and so caused a continuing loss of some £400 a week.

### **third provisional decision**

I issued a further provisional decision because the formula for redress set out in the second provisional decision had to be revisited. It was confirmed that the annuity could not be unwound or reassigned, and I responded to both parties' comments.

In it, I set out why I was not persuaded that Mr P was an eligible complainant but stressed this issue had no material bearing on redress. I explained I had no power to compel Openwork to make an interim payment and that, as this service is free to complainants, I did not think it reasonable to reimburse the legal costs voluntarily incurred by Mrs P and her family.

I also explained why I was not persuaded by Openwork's argument that advice from a previous adviser was relevant and why I was satisfied that Mrs P had funded the annuity cost from her own resources and a loan from her late husband's own resources.

Further submissions have been made by both parties. These essentially reiterated previously stated positions which, in my view, I have addressed in my earlier provisional decisions.

In order to resolve this complaint I have set out below how I think a fair and reasonable resolution can now be achieved.

### **my findings**

I have carefully considered all the available evidence and arguments, including the responses from both parties to my earlier provisional decisions, in deciding a fair and reasonable outcome to this complaint.

The basis of my decision is that the advice from Openwork to buy the annuity was unsuitable. It did not meet the stated objective. Openwork accepts that its advice that led to the purchase of an annuity by Mrs P was unsuitable. It accepted this in response to the original complaint.

In its Final Response letter of 13 October 2015 to Mrs R, Openwork said:

*....I do acknowledge that you did receive emails on 17 July 2014 and 11 December 2014 from (Openwork adviser) and that these emails did suggest that if an annuity was purchased (Mrs P) was likely to obtain (local authority) funding for her long term care. ....I feel it is right to conclude that you were entitled to rely upon these emails....."*

Openwork has not sought subsequently, in response to my provisional decisions, to amend or reverse its admission that its advice was unsuitable.

It follows that the principal focus of my decision here concerns a fair and reasonable redress solution. However, for completeness, I'll address the points made by both parties in response to my provisional decisions where appropriate to do so.

### **the source of funds to buy the annuity.**

In response to my second provisional decision Openwork said as it was being asked to redress Mrs P for loan amounts it wanted evidence of the source of the funds to buy the annuity. It wanted to be confident that it was not joint capital and that Mrs P's resources had been correctly recorded. It also asked for evidence of the loan agreement.

It also queried why I concluded that suitable advice would have been to meet Mrs P's care home fees by gradual depletion of her assets rather than the purchase of an annuity.

It said of this that *'there comes a point when the assets have been fully depleted such that the Local Authority funding alone becomes insufficient for the client to remain at (care home). If an annuity is purchased and an arrangement made with (care home), the client remains at (care home) for the rest of her life.'*

Openwork has made similar points in representations made since my third provisional decision, including as to whether the loan from Mr P was from his own assets or from assets jointly held with Mrs P.

I understand from Mrs R that there is no documentation to verify the details of the loan but my decision is influenced by documentation available from the time of the original advice.

An email from Openwork to Mrs R on 17 July 2014 said "*Another option that could be considered is instead of your father paying the money from his own funds, he could lend the money to (Mrs P) with the money repayable from her estate. The loan could then be deducted from her share of the house after death.*"

The same email continued: "*If additional capital is required in future to fund the proportion of care that is not being paid by an insurance company and the (Local Authority) further loans could be advanced by (Mr P) as required.*'

It further said "*.....regarding a loan from (Mr P) to (Mrs P). Such a loan could be used to purchase a care plan*'.

In my view, this is persuasive evidence that a loan was made to Mrs P by her late husband. I appreciate Openwork says that prior to it advising Mrs P another financial adviser appears to have been given information which suggests the loan may actually have come from a reorganisation of Mr and Mrs P's joint assets and thus wasn't a loan in the accepted sense. This relates to the question of whether money was held in a particular account held jointly by Mr and Mrs P, or solely in Mr P's name.

My view is that Openwork advised Mrs P on the basis that a loan would be made to her by her late husband and that it did so because Mrs P did not have sufficient capital in her own right to buy the annuity. I have not seen evidence to persuade me that Mrs P effectively borrowed money from assets held jointly with her late husband.

In any event, as I set out above, documentation prepared by the Openwork adviser at the time of advice indicates that she was satisfied Mrs P had insufficient resources of her own to buy the annuity and so would have to borrow money from Mr P to fund the shortfall.

In those circumstances, I do not think it fair or reasonable of Openwork to now seek to retrospectively challenge a position its adviser was content with at the time of advice.

So from the evidence I have seen, taking account of the above but also further information as provided by Mrs R to show that her late father had, in fact, lent Mrs P funds to purchase the annuity from his own capital, I am satisfied Mrs P funded the annuity with a necessary loan from her late husband and so created a debt to him.

Accordingly, I have concluded that redress should take account of that loan in calculating any loss.

### **the effect of establishing the annuity**

In respect of its second point, the fact is that the annuity income alone did not meet the full cost of Mrs P's care home fees. Nor would local authority funding have done so alone had it been secured. The basis of Openwork's advice was that the combination of local authority funding and the annuity income would meet the care home fees.

But by buying an annuity at the outset, on Openwork's advice, all of Mrs P's capital was immediately and irrevocably swapped for an annuity which, in the event, produced an income that, under current provisions, denies Mrs P the opportunity to secure local authority funding. So the shortfall between the annuity income and the care home fees had to be funded by other means.

And of particular significance is that Openwork has accepted its advice was unsuitable because local authority funding was not secured.

So Mrs P should be redressed for any extra cost of meeting the funding gap as a consequence of local authority funding not being secured.

### **the suitable alternative**

Openwork has questioned why I concluded that Mrs P would have been better advised to meet her objective by gradual depletion of her assets rather than purchase of an annuity.

I reached this conclusion because Mrs P's objective was to meet the care home fees ideally utilising local authority funding. Her family has said that if Openwork had not given the advice that purchasing an annuity would allow Mrs P to obtain local authority funding, Mrs P would instead have depleted her capital to a point where it fell below the threshold to secure that funding.

In my view, if suitable advice had been given, then more likely than not Mrs P would have depleted her capital; such funding would, in all probability, then have been available.

Had this funding then not met the full cost of Mrs P's care home fees, she and her family would have had flexibility in deciding how to fund the full cost in the future.

### **Mrs R's further submissions**

Mrs R made a number of points in response to my third provisional decision. In particular, she disagreed with my conclusion that her late father, Mr P, was not an eligible complainant.

But I am not persuaded to change my conclusion that the late Mr P was not an eligible complainant under our rules. Although Mrs R says Mr P was an eligible complainant because he attended the first meeting with Openwork in 2014 and has provided a copy of an email to Openwork in which she set out what her father wanted to achieve, I don't think that alone is sufficient to say Mr P was a customer of Openwork.

I said of this issue in my second provisional decision:

*'Mr P was named as a complainant, along with Mrs P, in the complaint originally made to the business and also in the ombudsman service complaint form (with Mrs R complaining on behalf of her mother).*

*However, what's not clear is whether Mr P satisfies DISP 2.7.6R so as to be an eligible complainant. He is a consumer, so the main question is whether he was a customer or potential customer of the business who is the subject of the complaint, EM Gray & Co, who were an appointed representative of Openwork.*

*I have not seen evidence to show that Mr P corresponded with, or was written to, by Openwork. I have not seen evidence to show Mr P attended any meetings with Openwork at which advice was given. And for the further reasons set out above, I have concluded Mr P was not a customer of Openwork, and therefore is not an eligible complainant. But as I hope will be clear this has no bearing on what I propose in terms of redress'.*

I think that remains the position. I have not seen evidence to show Mr P corresponded directly with or was written to by Openwork. Even though Mr P attended the first meeting with Openwork, I am not persuaded that this, on balance, made him a customer of Openwork within the meaning of our rules.

I have also paid particular attention to Mrs R's submission to this service of 18 May 2018. In this submission, Mrs R confirmed several times that she and her family were always acting '*on behalf*' of Mr and Mrs P, either together or individually. This is the case for Mrs P, on whose behalf Mrs R and her brother are appointed to make decisions by way of an enduring power of attorney. I don't think that Mrs R acting '*on behalf*' of Mr P supports the view that he was a customer of Openwork for the purposes of this particular instance of advice.

In my view, the evidence shows that Mrs P was the customer; the annuity was in her name, she paid for it and the contract was with her. The customer relationship was with Mrs P albeit the late Mr P did attend the initial meeting with Openwork. But the late Mr P did not buy anything from Openwork or use its services. He was effectively at arm's length in the transaction even though I'm satisfied he lent funds to Mrs P to buy the annuity for her benefit alone.

But I reiterate that, in my view, this is a technicality in the circumstances of this complaint. It has no particular implications for its outcome.

### **summary**

For the reasons given, my overall finding in this case is that the advice to establish the annuity was unsuitable. Mrs P would have been better served in meeting her objective by a depletion of capital, to fund her care home fees.

Once depleted below the local authority threshold, Mrs P would likely then have been eligible for local authority funding. As such, I consider a fair and reasonable outcome here would be to put Mrs P, as closely as possible, in the position she would now be in had that suitable advice been given.

### **redress**

Mrs P's circumstances have changed significantly in recent months. Mrs P is still receiving an NHS funded financial allowance for her continuing care and I understand that she is now also receiving pension income from her late husband's pension arrangements.

Consequently, had Mrs P been receiving local authority funding, that would have stopped at the point Mrs P's income exceeded the local authority threshold. It follows that the fundamental cause of this complaint would in any case end at that point.

I understand though that the NHS funding is discretionary. It may be removed in future. That cannot be predicted with any certainty but I further understand that Mrs P's annuity income and dependent's pension income is now sufficient to meet the care home fees.

In determining redress, my aim is to put Mrs P, as far as possible, in the position she would have been but for unsuitable advice from Openwork. I previously suggested this might be achieved if the annuity provider would agree to 'unwinding' or reassigning the annuity.

But since I issued the second provisional decision, the annuity provider has confirmed that this isn't possible. Given that, putting Mrs P into the position she would have been in is clearly problematic. In any event, Mrs R has subsequently confirmed her preference on behalf of Mrs P for the annuity to remain in place.

In my second provisional decision, I asked for details of both the loan made by Mr P to Mrs P and details of any state benefits foregone by Mrs P as a result of buying the annuity. I said I would need these details in order to incorporate any losses on either of these into my redress award. Mrs R has confirmed that no repayments have been made to date and that the loan will be discharged on the sale of property held by the late Mr P and Mrs P.

I have carefully reflected on the details of Mrs P's costs and the total income she has received from various sources, including her state pension and state benefits.

Any such solution must be fair now and reflect Mrs P's past loss and any potential future gain. And as Mrs P's past or future income from her state pension and benefits is unlikely to be impacted by the redress solution I now propose (and in fact Mrs P's state benefits have not historically been impacted by the income from her annuity) she will not, in my view, be compromised by it.

Mrs R has asked this service to reimburse the legal costs incurred in bringing this complaint. But our general approach is that legal representation is not necessary for a complainant to refer their complaint to this service.

Legal representations were made by Mrs R on behalf of Mrs P when first bringing her complaint to this service. But this service is free to consumers and legal representation is not a prerequisite. Mrs R made her own decision to take legal advice. And although complex in nature, I do not consider that the matters at issue here required legal representation to bring them to this service. I therefore do not think it reasonable to hold either this service or Openwork responsible for the costs of that decision.

Mrs R has previously said, amongst other things, that redress should primarily involve Openwork buying a further annuity to cover the shortfall in Mrs P's care home fees. That is the difference between income from the existing annuity and Mrs P's care home fees.

In response, I've said in my previous decision that that this would not be reasonable. In effect, it would have meant that Openwork were being asked to pay redress that replaced the contribution that would have come from the local authority had the application for such funding been accepted – as well as Mrs P receiving an income from the annuity for the rest of her life.

And as I have previously set out if the annuity had not been established, Mrs P would have relied on her capital to fund the care home fees. And this would have run out some time ago. I therefore considered that to require Openwork to effectively fund nearly half of Mrs P's past and future care home costs would be disproportionate, given the existing annuity is providing a substantial, ongoing benefit.

Mrs R has said that unwinding the original annuity is no longer a prerequisite for suitable redress. But as I've said before this isn't, in any case, possible.

I therefore decided upon an alternative form of redress reflecting all the changed circumstances since this complaint was first referred here.

I formulated a pragmatic approach which I considered the most fair and reasonable basis for redress. I have not been persuaded by subsequent submissions from either party to change my view other than with regard to the calculation of any future gain.

I therefore consider the following redress methodology is a fair and reasonable resolution.

#### **past loss**

Openwork should reconstruct, as far as possible, what would have happened if suitable advice had been given. My view is that, suitably advised, Mrs P would have run down her capital to pay her care home fees. Mrs P's family have said this is "highly likely". And it seems reasonable to me to assume

that Mrs P's funds would have been invested in a series of competitive one year, fixed interest deposit accounts to fund this. In my view, these accounts would have attracted gross interest at 1.5% annually.

As part of the advice process, it had been estimated that the weekly funding from the local authority would be in the region of £400. This gave the basis of the required annuity. At the point Mrs P's funds fell below £23,500, this funding would in all likelihood have applied.

Once Mrs P's funds had become too low to sustain the fees, Mrs P would have begun to borrow the money from her husband.

But irrespective of the receipt of the annuity payments or the local authority funding, my understanding is that the non-means tested NHS funding which has been paid to Mrs P would also have applied.

Given the size of Mrs P's own assets, it seems certain that, in the absence of the annuity, she would some time ago have needed to begin borrowing from Mr P. But had the local authority funding been received, this debt would have been less than it now is.

Therefore, taking the circumstances above and the money which Mrs P has actually received into account, Openwork should compare the position of debt to her late husband, as at the date Mrs P started to receive a dependent's pension from her late husband's arrangements (and so the date at which local authority funding would have ceased) with the notional position of debt to Mr P's estate that she would otherwise have been in but for Openwork's advice at the same date.

Mrs P's debt position should include:

1. the amount of care home fees which have needed to be paid over the relevant period;
2. the amount initially lent to her by Mr P to buy the annuity (which I understand from Mrs P's representatives to be £87,121); and
3. any additional payments made by Mr P towards care funding since; and
4. take account of state pension and benefits received by Mrs P, as well as non-means tested NHS funding.

The notional debt position should take account of:

The amount of care home fees which have needed to be paid over the relevant period, the running down of Mrs P's capital, local authority, state pension and benefits and non- means tested NHS funding; and then the amount which would then have needed to be borrowed from Mr P.

If, on comparing the actual debt position against the notional debt position, Mrs P would have been in greater debt to her late husband as a result of buying the annuity, she has suffered a past loss.

### **future gain**

In my third provisional decision, I said there appeared to be approximate parity between the notional local authority funding and the annuity. And so Mrs P would in the future be no better or worse off as a result. I invited either party to further investigate the actual level of funding to which Mrs P would be entitled. Mrs R has provided these details.

However, the situation has changed as a result of Mrs P now receiving her dependent's pension from Mr P's arrangements. My understanding is that Mrs P would not now in any case be eligible for local authority funding. But she retains the benefit of her own annuity payments in the future.

As such, my current view is that, to whatever extent the amount of her annuity payment has exceeded the care home fees since Mrs P began receiving the dependent's pension, that is an additional benefit which she wouldn't have, had the capital been depleted as I've said should have happened above.

Accordingly, Openwork may calculate the capitalized value (determined by obtaining the cost of buying that annuity), as at the date Mrs P began receiving the dependents pension, of any part of her annuity which exceeds the care home fees and deduct this from any past loss calculated above.

Openwork should pay the resulting sum to Mrs P. And to that sum should be added interest at the rate of 8% simple from the date of Mrs P began receiving the dependents pension up to the date of settlement.

I appreciate that Mrs R has said that my redress should be expressed by reference to quantified amounts rather than on a formulaic basis.

Openwork, not unreasonably, will require confirmation of the exact timing and quantum of amounts received by Mrs P, particularly in respect of NHS contributions, pension income under the late Mr P's arrangements and changes, if any, to Mrs P's care home fees, in order to complete its redress calculations. The redress calculations are likely to be complex. Under our rules, I am therefore entitled to direct that the business -Openwork Limited – calculate the quantum of redress, if any, according to the formulaic principles I have set out.

I have therefore set out a formula and the information Mrs R will need to provide Openwork so that it can conclude its redress calculation. I do not know what amount of loss, if any, such a calculation will produce. But I am satisfied the formula I have set out provides a fair, reasonable and pragmatic basis on which to calculate redress.

As I have made a formulaic award, Openwork should work out the compensation in line with the approach I have set out above. It should then send a copy of its calculation to this service and Mrs R, on behalf of Mrs P.

The calculation should be set out in a way that is easy to understand.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £150,000, plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than £150,000, I may recommend that the business pays the balance.

**provisional decision and award:**

I provisionally uphold the complaint. I think that fair compensation should be calculated as set out above.

My provisional decision is that Openwork Limited should pay Mrs P the amount produced by that calculation – up to a maximum of £150,000.

**recommendation:**

If the amount produced by the calculation is more than £150,000, I may recommend in my final decision that Openwork Limited pays Mrs P the balance. This recommendation would not be part of my determination or award. Openwork Limited doesn't have to do what I might recommend. But it is unlikely that Mrs R, on behalf of Mrs P, could accept any such final decision and go to court to ask for the balance.

Mrs R, on behalf of Mrs P, may want to get independent legal advice before deciding whether to accept any such final decision. In addition, reflecting its earlier offer, I have provisionally decided Openwork Limited must pay Mrs P £2,000 for distress and inconvenience in pursuing this matter.

I think this fairly reflects the distress caused by Openwork Limited's unsuitable advice and is consistent with what I would have awarded if the offer had not been made.

Terry Connor  
**ombudsman**