DRN-4506507

The complaint

Mr A complains about the advice he was given by Montfort International Limited to transfer the benefits he held in a defined-benefit ('DB') occupational pension scheme to a self-invested personal pension ('SIPP'). He believes the advice was unsuitable and has caused him a financial loss.

What happened

Mr A, along with his wife, first got in touch with Montfort in 2008. They were in the process of emigrating to Australia, and it appears the company that handled their visa applications recommended Montfort to them to provide financial advice connected to this move.

In May 2008, Montfort completed a fact-find to gather information about Mr A's circumstances. This recorded that he was 37, married with one dependent child and another due approximately seven months later. Mr A worked full time, earning a salary of approximately £29,000 per year, as well as also working in a separate role on a self-employed basis, earning an additional income. Mr A was recorded as having small savings of approximately £600 and no significant assets or liabilities.

Montfort noted that Mr and Mrs A had made the decision to emigrate several years earlier, in around 2005. The different climate and lifestyle, as well as affordability, were noted as the reasons they'd decided to move. It was noted that Mr A had a sibling already living in Australia and, when he and Mrs A moved, his parents intended to potentially spend extended periods there as well, visiting them. At the time, Mr and Mrs A's intention was to emigrate permanently, renting a house initially but Montfort noted they hoped to buy a property within twelve months.

Mr A had a DB pension which had a cash equivalent transfer value ('CETV') at the time of the fact find of £61,751.18.

Montfort also asked Mr A to indicate his attitude to investment risk based on a list of six different profiles. It recorded that Mr A felt he had a 'cautious to medium' attitude to risk.

On 29 May 2008, Mr and Mrs A signed a client agreement with Montfort, confirming they wanted it to produce a Personal Migration Financial Plan on their behalf. This set out the fee for that service and noted this included implementing the plan. But Montfort would also receive fees for any financial restructuring that took place as a result of implementing the plan, including transferring any pension benefits to an Australian Superannuation ('AS') scheme. Authority was also provided for Montfort to gather relevant information from Mr A's existing financial providers.

Montfort has explained that the 'Personal Migration Plan' was provided in three stages.

Stage one was a package of helpful information, which Montfort has described as an 'education programme' to assist with planning Mr and Mrs A's move. This included information about the Australian tax system, and how this would be applied to their assets if they remained UK residents or became Australian residents. The notes indicate this was shared with Mr and Mrs A during their first meeting with Montfort.

Montfort also introduced Mr and Mrs A to an independent financial adviser ('IFA') in Australia, to provide any financial advice they required once there.

Stage two, which was issued in July 2008, was a summary of Montfort's understanding of their circumstances and objectives, including information gathered from existing financial providers.

On 21 July 2008, Montfort produced a transfer value analysis ('TVAS') report for Mr A's DB pension based on the CETV of £61,751.18.

Stage three of the personal migration plan was then provided to Mr and Mrs A on 25 July 2008. This was a report of Montfort's preliminary advice and recommendations. It said if Mr and Mrs A were remaining in the UK, it would not recommend that they transfer out of their DB schemes. However, based on the assumption that they were emigrating to Australia permanently, Montfort's advice was that once Mr and Mrs A had ceased employment in the UK, it would recommend that they transfer out of their DB schemes to a complying AS scheme, but possibly initially via a UK-based SIPP. Montfort said that the advice as to which AS scheme the funds should be transferred to would be provided by their Australian IFA.

There were some addendums issued to the recommendations in the weeks that followed as circumstances changed - most notably about whether Mr and Mrs A intended to retain ownership of their UK property – which the fact find noted was in Mrs A's name. There was also an illustration provided, on 26 August 2008, indicating what the DB pensions could be worth after they were transferred to Australia, based on assumptions about the exchange rate and investment returns. For Mr A, this was an updated version of the illustration set out in the stage three report. This version assumed a retirement age of 60 rather than age 55.

On 4 September 2008, Montfort wrote to Mr and Mrs A to provide some additional information about SIPPs. It said it couldn't make a firm recommendation at that stage as it needed to carry out further analysis. But it noted an advantage of transferring their pension funds to a SIPP, before transferring to a pension scheme in Australia, was that they could convert their holdings in the SIPP when the currency exchange rate was preferable.

Mr and Mrs A moved to Australia as planned at the end of May 2009.

By this time the CETV of Mr A's pension had expired so new valuation was required. This was obtained from the trustees of the DB scheme at the start of June 2009, and the CETV increased to £86,477.54. A further TVAS was carried out in light of the revised CETV.

On 11 June 2009, Montfort issued a letter summarising the reasons for its recommendation in relation to Mr A's pension.

Montfort said it recommended Mr A's pension benefits be transferred to Australia, but before that said they should be moved into a SIPP. It said the SIPP it recommended allowed the holdings to be converted into Australian Dollars ('AUD'), meaning there would be no exchange rate fluctuations impacting the onward move to an Australian pension. It said it recommended the funds be transferred to Australia because, following emigration, Mr A would become a tax resident there.

It noted Australia's tax rules were different to that of the UK, and in relation to pensions, tax was largely levied before retirement, as opposed to on income drawn in retirement. Montfort said this had implications for benefits left behind and once transferred funds would be considered 'tax-paid' and Mr A could draw these at retirement, tax-free. The letter noted:

"You need to be aware that if you transfer your funds to Australia, and subsequently decide to return to the UK, it is very difficult to transfer your funds back as this can only be done under certain circumstances." It also noted, *"If you were remaining in the UK, we would not be recommending a transfer for any of the schemes, but it is the fact that you are migrating permanently to Australia that has resulted in our end recommendation to transfer."*

The recommendation letter went on to note the main drawback of transferring away from the DB scheme was that Mr A would be losing guaranteed benefits. And it explained that the TVAS had been carried out to demonstrate the value of the benefits being lost. But Montfort noted that the TVAS didn't take account of Australian tax charges, relevant to Mr A's specific circumstances, so was not strictly accurate.

Montfort recommended a UK-based SIPP provider. And, although Mr A had a 'cautious to medium' attitude to risk and wanted to benefit from long term investment growth, Montfort recommended that the funds should not be invested initially and should instead be held in cash. This was because the SIPP was only intended as a short-term home for the funds before onward transfer to Australia. And it said the Australian IFA would advise on the most suitable receiving pension, as Montfort could not give Australian-based advice.

Mr A's DB scheme benefits were transferred to a SIPP in line with Montfort's recommendation in August 2009.

Mr and Mrs A indicated that they wanted to wait for the exchange rate to improve before moving the SIPP funds into Australian dollars and making an onwards transfer to an AS scheme. So, Mr A's funds remained in the UK-based SIPP. Correspondence between Mr and Mrs A and Montfort continued, including about potentially converting funds to AUD and investing Mr A's funds in the interim.

In 2010, Mrs A raised a number of concerns about the SIPP charges and the impact this had made on the value of Mr A's pension while the funds were not benefiting from investment growth in the SIPP. And in 2011, Mr and Mrs A terminated their ongoing advisor relationship with Montfort.

Mr A's SIPP was not exchanged to AUD or transferred on to an AS scheme.

Mr A complained to Montfort in 2021 about the suitability of the advice he'd received. Montfort responded, saying it thought the advice it had given was suitable. It said this had been given on the understanding Mr A was permanently emigrating to Australia and so the tax implications of doing so made moving his pension benefits appropriate. And upon death, the remaining funds in an Australian pension would all transfer to Mr A's beneficiaries, rather than Mrs A just receiving a spouse's pension. Montfort added that direct transfers from DB schemes to overseas pension schemes were notoriously lengthy, so transferring the funds to a SIPP first helped address this while also providing control over the exchange rate used.

Mr A asked the Financial Ombudsman Service to consider the complaint. He said that he and Mrs A had returned to the UK in 2012 and Montfort had not assessed the likelihood of the move not being permanent or discussed the risks of this. He also didn't think Montfort had analysed the likelihood of achieving the returns required to address the impact of giving up the guaranteed benefits.

One of our Investigators considered the complaint. He thought it should be upheld and that Montfort should compensate Mr A for any loss the DB transfer had led to. He said Mr A didn't have a need for alternative death benefits at the time, and although he might have been interested in potential pension growth, he thought it was unlikely that he'd be able to achieve the level needed to exceed the benefits the DB scheme already guaranteed. And he noted that Montfort had said in its recommendation that it wouldn't have recommended a transfer if Mr A intended to return to the UK.

The Investigator acknowledged that the main reason for the advice seems to have been the taxation treatment of the pension after Mr A emigrated. But he didn't think this necessarily meant a transfer was in Mr A's best interests – as it meant he was giving up a guaranteed escalating benefit and exposing his pension to risk. He also didn't think, even though Mr A had indicated he intended to permanently emigrate, that a decision about a pension transfer needed to be made at that time – particularly considering how far away from retiring he was. So, he didn't think the advice given was in Mr A's best interests.

Montfort disagreed. It felt the Investigator hadn't appropriately considered Mr A's circumstances – that his plan at the time was to emigrate and this was expected to be permanent. And therefore, the tax treatment of the pension was vital and could not be disregarded, so transferring the pension was suitable. Montfort believed that the Investigator had not understood the tax implications of leaving the pensions in the UK and drawing benefits from them at retirement. It added that it had devised an alternative method of assessing the financial viability of the transfer, which it had done with the regulator's knowledge and encouragement. So, it had also conducted a financial viability assessment from an Australian perspective, by taking the critical yields and building in the tax consequences. Montfort maintained Mr A would be better off by transferring his DB pension to an AS scheme and it was entitled to accept what Mr and Mrs A had told it about their move being permanent.

The Investigator wasn't persuaded to change their opinion, so the complaint was referred to me to make a final decision.

I requested some additional information from each side in order to reach a decision.

I then issued a provisional decision upholding the complaint. I didn't think the advice Mr A received to transfer out of his DB scheme to a SIPP was suitable, so I recommended that Mr A should be compensated on the basis that he had remained in his DB scheme and set out how Montfort should calculate this. I also thought Montfort should pay Mr A £750 for the significant distress and inconvenience its advice had caused him.

Mr A largely accepted my provisional decision, although he felt the £750 I had awarded him for the distress and inconvenience caused by the unsuitable advice was too low.

Mr A said that Montfort had purposefully and deliberately delayed and not submitted information they were legally required to submit from the outset of the Financial Ombudsman Service's investigation, for example, the stage three report. He said the amount of money he had spent on legal fees was hugely significant, and Montfort not supplying all the information at the outset had caused this, as it had delayed the complaint resolution at the Ombudsman stage.

Mr A said that in addition to the legal fees he had already incurred, he'd had to vacate his court date to finalise his divorce and refile, which would result in around another six-month wait. Mr A said he and Mrs A had not been able to market their house for sale as they had not been able to progress critical areas of the divorce financials. Mr A added that their mortgage was increasing by almost £2k per month (interest only) from 1st December and they were going to have pay this whilst they waited for a further court date. Mr A felt that he and Mrs A each should receive compensation of £5,000, which would still nowhere near cover the legal costs already incurred and will continue to be incurred in addition to the incremental mortgage charges.

Montfort responded at length to my provisional decision, which I have summarised below.

Montfort provided copies of emails between it and Mr and Mrs A from 2008 to 2010. It said they showed Mr and Mrs A were very clear that they intended to emigrate permanently and that Montfort had checked in at appropriate points to ensure that was still the case. It maintains it was fair for it to accept what Mr and Mrs A said about their move being permanent and it would not have recommended they transfer their pensions if they were intending to return to the UK. Mr and Mrs A were fully aware of the consequences of transferring.

Montfort said I had referred to it advising Mr and Mrs A to put off transferring their pensions until they were 'settled', but I had not offered any definition of 'settled'.

Montfort also said there were serious technical discrepancies and interpretations in the provisional decision surrounding the tax understanding. It said there was no reference to the means test and how this would impact Mr A's entitlement to the Age pension in Australia. It also said that said Australia did not treat DB or DC schemes differently for tax purposes; a DB scheme is simply considered to be a non-complying foreign superannuation fund. It said that when a foreign pension is transferred to an AS scheme it is treated as a contribution and income tax must be paid on the part of a foreign transfer that is 'applicable fund earnings'. Montfort referred me to an Australian Tax Office ('ATO') webpage[1], which stated:

"The applicable fund earnings are the earnings on your foreign super interest that have accrued since you became an Australian resident for tax purposes. 'Super interest' is any amount, benefit or entitlement a member holds in a fund."

Montfort explained that when considering a DB scheme such as the scheme Mr A held deferred benefits in, the 'super interest' would represent the difference between the CETV on the date of arrival in Australia and the future value of the benefits on the date they were transferred to Australia. So, my view that Mr A would not accrue a tax liability on the value of his DB scheme benefits if he left them intact in the UK until a later date, was not accurate.

Montfort said that expert opinion on the tax issues ought to have been obtained before I made my provisional decision and it was not for Montfort to educate the Ombudsman Service on this issue.

Montfort added that I hadn't given adequate consideration to the currency risk if Mr A had remained in his DB scheme and the impact of the exchange rate plummeting. It also disputed that death benefits were not important to Mr A.

Lastly Montfort considered that Mr A's complaint had been made too late. It said that Mr A was aware he was giving up guarantees associated with his DB scheme when he was given the advice by Montfort. And that upon Mr A's return to the UK, he ought to have considered whether the advice to transfer out of his DB scheme was right for him. This was more than three years before he complained.

Given the number of issues that had been raised since my provisional decision by both sides, I issued a further provisional decision on 17 November 2023. Although I made some different findings in respect of the tax burdens facing Mr A if he left his DB scheme intact

---

[1] https://www.ato.gov.au/individuals/super/foreign-super-funds/transfer-from-a-foreign-super-fund-to-an-australian-super-fund/

until a later date, I maintained that the complaint should be upheld for largely the same reasons.

Mr A accepted my findings.

Montfort didn't accept my provisional decision and made the following points:

- It maintained Mr A had awareness of his cause for complaint from the date of the advice because of the extensive education programme he went through about the differences between the Australian and UK pensions and tax systems.
- Mr and Mrs A had actually started looking into the pension advice they received in 2019 – Mrs A had requested sight of the stage one, two and three reports in August 2019. This should cast doubt on Mr and Mrs A's testimony about when they became aware of their cause for complaint.
- Mr A could have complained when he decided not to exchange his SIPP funds for AUD because of the exchange rate falling.
- Montfort provided a holistic migration plan to Mr A, not just retirement planning, and it was unreasonable to focus only on the pensions advice.
- Montfort sets high standards when dealing with customers such as Mr A, but his case has not been judged in accordance with those standards.
- I had incorrectly referred to Mr A's DB scheme when I should be referring to it as a foreign superannuation fund.
- It checked Mr and Mrs A's intentions as to the permanence of their emigration at stage three and not enough consideration had been given to this. It couldn't have done more to check their intentions.
- The fact Mr A's sibling was already in Australia and that his parents were intending to make frequent visits made the permanence of their emigration more likely. Montfort did not consider Mr and Mrs A at high risk of returning to the UK and the fact Mrs A chose to move her pension to Australia demonstrates their commitment to the move.
- Montfort maintains that I had misinterpreted the reason for the recommendation of life cover. Mr and Mrs A said that the only reason they would return to the UK was if one of them were to die prematurely, so this was why bridging life cover was recommended.
- In the provisional decision I said that I had considered all of Mr A's options but there were many other factors that had an impact on transferring his pension including death, failing health, divorce and currency exchange movements.
- It said I hadn't been clear about what taxes I was referring to when I talked about the level of investment growth required in the AS scheme "before the deduction of taxes" to replicate Mr A's DB scheme benefits.
- It maintained that the means test effectively reduced any pension Mr A took from his DB scheme by 50%.
- It is clear and obvious that Mr A would've been better off if he'd moved his pension to Australia and remained there.
- Montfort added that I hadn't factored in Mr A's entitlement to his UK state pension or Australian Age pension, all of which were taxable and subject to the means test.
- I had not given adequate consideration to the currency exchange rate risk of waiting to transfer the pension benefits.
- Montfort refutes that any distress had been caused and says it provided all evidence and documents requested of it. It provided Mr and Mrs A with copies of the reports they requested and responded to their complaint promptly.

As I've now received both parties' responses to my provisional decision, I'm now making my final decision.

What I've decided – and why

Jurisdiction

Montfort maintains that Mr A made his complaint to it outside of the relevant time limits. So, I've reconsidered all the available evidence and arguments in order to decide whether we can consider Mr A's complaint.

The rules I must follow in determining whether we can consider this complaint are set out in the Dispute Resolution ('DISP') rules, published as part of the Financial Conduct Authority's ('FCA') Handbook. DISP 2.8.2R says that, where a business doesn't consent (as Montfort doesn't here), I can't consider a complaint made more than six years after the event complained of, or if later, more than three years after the complainant was aware, or ought reasonably to have become aware, of their cause for complaint.

Montfort says that Mr A's complaint was raised outside of these time limits. Montfort received Mr and Mrs A's complaint by email on 11 June 2021 but believes that they ought reasonably to have questioned whether the advice was suitable for them when they relocated back to the UK, which it believes was in 2012/2013. So, Montfort believes that Mr and Mrs A ought reasonably to have complained by 2015/2016. That's particularly the case given the education programme Montfort says it took Mr and Mrs A through, during which Montfort says they were made fully aware of the differences between the UK and Australian systems. In Mr A's case in particular, Montfort questions why he didn't complain in 2010/2011 when he decided not to exchange his funds for AUD because the exchange rate was falling. Overall, Montfort believes that Mr and Mrs A ought reasonably to have complained by 2015/2016.

When Mr and Mrs A first referred their complaint to the Financial Ombudsman Service, the Investigator asked them what had prompted them to complain now, given the advice was in 2008/2009. Mrs A explained that when Mr A had turned 50 (in December 2020) he'd started to think about his retirement plans, particularly as he'd been in quite poor health. At that point, Mrs A said he realised his current pension wasn't worth anywhere near what his previous pension was worth, given the guaranteed pension he was entitled to. Mrs A has since added that Mr A had been suffering with his health since April 2020, and that he started looking into his pension arrangements to see whether this could potentially support him with his income needs. They had initially believed that Mr A could've accessed his DB scheme from age 50.

Having considered this testimony carefully I'm persuaded that this was the first time Mr and Mrs A realised that something might not have been right with the advice they received. Mrs A said she returned to the UK with her children in November 2012 and Mr A followed in early 2013. But I don't think that relocating to the UK ought reasonably to have led them to question the pension advice they received. At that point, Mrs A was 40 years old and Mr A was 43; they say that they were not thinking about their pension arrangements, given their retirement some way off in the future. And I don't think that position was unreasonable.

I also haven't seen anything to persuade me that Mr and Mrs A would've received any documentation between then and when they started to look into things in 2020 that would've given them cause to question the advice. For example, I haven't seen any statements they received that would've allowed them to easily compare the benefits they'd be entitled to through their new arrangements and the guaranteed benefits provided by the previous DB schemes, that would've led them to question whether the advice was right for them.

Montfort's advice stated that it was recommending Mr and Mrs A transfer their pensions to a SIPP and onwards to an AS scheme on the basis that they'd be better off financially.

Mrs A's AS scheme statements simply provided a fund value in AUD. So, this would've been difficult for her to compare it with her original DB benefits. Montfort says Mrs A could've simply converted the value to British Pounds ('GBP'). But I still don't think that would've allowed her to make a comparison with the annual pension she'd be able to take from her DB scheme at retirement because she wouldn't be aware of or be able to predict what annuity she could buy with her fund. Furthermore, Montfort's advice was based on Mrs A leaving her funds invested to age 60, so it was also difficult for her to establish whether her funds were performing in line with the expectations Montfort gave her at that stage.

Although Mr A initially wasn't achieving growth on his pension because it remained in cash until such time it was going to be transferred to Australia, once it was invested, the value increased. Similarly, Montfort's advice was based on Mr A transferring his funds to Australia and leaving them invested until age 60. So, it was also difficult for him to know whether his pension was growing in line with the expectations Montfort gave him, as his pension funds remained in the UK, whereas Montfort's projections were based on AUD at age 60. And for the same reasons as above, knowing the fund value wouldn't have allowed Mr A to make a comparison with the annual pension he'd be able to take from his DB scheme at retirement.

So, at the point Mr and Mrs A returned to the UK, their pension plans were intended to remain invested for at least another 15-20 years, meaning they'd be expecting further growth in line with Montfort's projections. For this reason, I don't think they'd have been in a position to otherwise establish whether the advice was right for them until they started looking into things more forensically in 2020.

It's clear that in 2020 things changed. Mr A's retirement in particular was less certain; he may have needed to access his pension early due to his health. So, I think it was only at that stage did he have reason to look into things in more detail, and make comparisons with the DB scheme he'd been advised to transfer out of. I also think he came to realise how valuable the guarantees were, in light of his health. With all of this in mind, I don't think either Mr A or Mrs A were in an informed position to question whether the advice was suitable for them, before December 2020.

Mrs A also adds that during the moves between the UK to Australia then back to the UK they realised they had lost Montfort's reports. So, they asked for copies in 2021 and complained soon after.

I've considered Montfort's point that Mr and Mrs A started looking into their pension arrangements earlier than this, as Mrs A had asked for copies of Montfort's reports in August 2019. But even if Mr and Mrs A had access to the reports from August 2019, I'm still persuaded that the catalyst for them looking into their pension arrangements in more detail was Mr A's health deteriorating in 2020. And even if I think they ought reasonably to have looked into their pension arrangements more closely on receipt of the reports in August 2019, I still think they complained within three years of this date. This is because they complained to Montfort in June 2021, around two years later. So, as Mr A complained within three years of August 2019 and December 2020, I'm satisfied he made his complaint in time.

For completeness, I also don't think Mr A had reason to complain about the advice in 2010/2011 when he decided not to exchange his funds for AUD. While I appreciate he was concerned about the exchange rate decreasing, Montfort had advised Mr A to transfer his funds to a SIPP so he could manage at which point in time he exchanged his funds for AUD. So I think the exchange rate fluctuating was anticipated and accounted for in the advice Mr A received. So, I remain of the view that Mr A did not have grounds to complain about the advice before August 2019.

Merits of the complaint

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'm still upholding it in line with the findings I made in my second provisional decision. So, I've set those findings out again below.

Both sides have provided a large amount of information to us in connection with this complaint. Please be assured that I've read and considered the whole file, but I'll concentrate my comments on what I think is relevant. If I don't mention any specific point, it's not because I've failed to take it on board and think about it, but because I don't think I need to comment on it to reach my decision.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Businesses ('PRIN') and the Conduct of Business Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Montfort's actions here.

PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*

PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer.

Montfort says that I haven't taken into account Australian tax rules and regulations when making my decision. But in reaching this decision I have taken Australian tax rules into account, where relevant, as set out below.

I agree with Montfort that it was important for it to take into account all of Mr A's material circumstances and objectives when giving the advice. And it is evident that the advice was sought from Montfort because Mr and Mrs A had decided to emigrate to Australia. So, they needed to know how this move affected their finances, including their existing pension arrangements. As such, the advice had to be given with this key fact in mind.

Nevertheless, the FCA states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Montfort should have only considered a transfer out of Mr A's DB scheme to be suitable if it could clearly demonstrate that it was in his best interests. And having looked at all the evidence available and considered Mr A's circumstances overall, I'm not satisfied it was in his best interests.

Mr A was aged 38 at the time of the advice and told Montfort that his intention was to emigrate permanently to Australia. He had a DB pension, which represented all of his retirement provisions at the time. I acknowledge that in Australian terms, a DB pension is described as a foreign superannuation fund, but for ease of reading, I will continue to refer to the pension as a DB pension scheme.

I also acknowledge that the pensions advice Montfort gave was part of a holistic migration plan covering all aspects of Mr and Mrs A's proposed move to Australia. As Mr A has only complained about the pension advice he received, I've only considered this aspect of the advice, although in doing so I have had regard to the wider context in which this pension advice was provided.

In my view, Montfort had to consider whether transferring Mr A's DB pension to Australia was clearly in his best interests. And in doing so, I think Montfort had to weigh up this option, against Mr A's other options. So, I've thought about the options Montfort ought to have considered when delivering its advice to Mr A.

Montfort considered whether Mr A should leave his DB scheme in the UK and withdraw benefits from it directly in Australia. However, it determined that this was not suitable for Mr A. Instead, it recommended that Mr A should transfer his DB scheme to an AS scheme, via a UK SIPP. The intention behind the initial transfer to a SIPP was so that Mr A could exchange his funds for AUD at a time when the currency exchange rate was favourable.

In order to consider whether this advice was suitable, I've first considered the financial viability of the transfer. In accordance with the regulator's requirements, Montfort carried out a TVAS showing how much Mr A's pension fund would need to grow by each year in order to be able to provide the same benefits as his DB scheme (the critical yield).

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The first TVAS is dated 21 July 2008 and it is these figures which are referred to in the stage three report. The TVAS was based on a CETV of £61,751.18. It said the scheme normal retirement age ('NRA') was 55 and that Mr A could expect a full pension of £10,717 per year. The critical yield required to match Mr A's DB scheme benefits at age 55 was 11.5% if he took a full pension and 10.9% if he took tax-free cash ('TFC') and a reduced pension.

However, when the time came for Montfort to finalise its recommendation to Mr A following his migration to Australia in May 2009, his CETV had expired. So a new one was sought and this prompted a further TVAS to be completed. This TVAS, from June 2009, used a CETV of £86,477.53. But it said the scheme NRA was age 60 and that Mr A would be entitled to a full pension of £12,937 per year. The critical yield required to match Mr A's DB scheme benefits at age 60 was 8.55% if he took a full pension.

These critical yield rates compare with the discount rate of 7% per year for 16 years to retirement at age 55 and 7.2% for 21 years to retirement at age 60. For further comparison, the regulator's upper projection rate at the time was 9%, the middle projection rate 7%, and the lower projection rate 5%.

I've taken this into account, along with the composition of assets in the discount rate, Mr A's 'cautious to medium' attitude to risk and also the term to retirement. There would be little point in Mr A giving up the guarantees available to him through his DB scheme only to achieve, at best, the same level of benefits outside the scheme. But here, the lowest critical yield was 8.55%, which was more than both the discount rate and the middle projection rate. So, if Mr A transferred his benefits out of the DB scheme into a SIPP, which was the advice he was given, I think he was likely to receive benefits of a substantially lower overall value than the DB scheme at retirement, as a result of investing in line with that attitude to risk.

I'm mindful, however, that the intention behind the recommendation to transfer out of the DB scheme to a SIPP was so that Mr A could then transfer his pension benefits to an AS scheme. So, the figures I've quoted here don't tell the full story as they don't compare the benefits Mr A was entitled to through his DB scheme, with the AS scheme pension he could achieve. And Montfort said as much in the stage three report – it explained that it had to carry out a TVAS but the figures produced were not accurate because, *"they do not take account of Australian tax charges and the consequences of not transferring".*

Nevertheless, Montfort has also said that it did carry out a financial viability assessment from an Australian perspective, by taking the critical yields and building in the tax consequences. It says that it was encouraged to formulate a different approach by the regulator following a meetings in 2008 and 2009. I don't know what Montfort discussed with the regulator over 13 years ago, but I don't think it matters for my decision. I have already acknowledged that the TVAS undertaken by Montfort didn't show the full picture, so I've considered what additional comparisons Montfort made.

I can see that in the stage three report Montfort set out an illustration of the benefits that might be payable from an AS scheme at age 55. In the absence of any other analysis provided by Montfort, I have assumed that this is the Australian financial viability assessment that it says it carried out and Montfort hasn't disputed this. The figures assumed an exchange rate of $2.10 AUD = £1 and assumed a yield rate of 6.25%. It projected the following retirement income based on assumed growth net of all taxes and charges:

- 5% - $18,914.75 AUD per year
- 6% - $22,330.45 AUD per year
- 7% - $26,240.60 AUD per year

However, in August 2008 Montfort provided an updated version of the illustrated benefits, based on Mr A retiring at age 60 instead. It projected the following retirement income based on assumed growth net of all taxes and charges:

- 5% - $23,920.93 AUD per year
- 6% - $29,575.60 AUD per year
- 7% - $36,288.67 AUD per year

The stage three report stated:

"The basic premise behind this recommendation is that you will be financially better off in your retirement by doing so. The tax implications of retaining your pension in the UK as an Australian resident and the potential advantages of investing in the concessionally taxed superannuation environment in Australia mean that this course of action will prove over the long term to be the most beneficial."

But I don't think that this is necessarily clear from the analysis Montfort carried out. The FCA required Montfort to compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme with the benefits afforded by a personal pension scheme (COBS 19.1.2R). And under COBS 19.1.3R the FCA said, *"the comparison should:*

1) *take into account all of the retail client's relevant circumstances;*
2) *have regard to the benefits and options available under the ceding scheme and the effect of replacing them with the benefits and options under the proposed scheme; and*
3) *explain the assumptions on which it is based and the rates of return that would have to be achieved to replicate the benefits being given up."*

So, I don't think Montfort met its obligation under this rule as it didn't explain what rate of return Mr A would need to achieve to replicate his DB scheme benefits if he transferred them to an AS scheme. Instead, it told him what pension income he might be able to achieve if he achieved certain levels of growth *net* of tax and charges. So, it isn't clear what actual level of investment growth would be required *before* the deduction of tax and charges or whether that level of growth was actually achievable given Mr A's attitude to risk.

Montfort has questioned what taxes I am referring to here, but I am simply reflecting the language used in the illustration it produced. Montfort set out the different levels of "assumed growth – net of all taxes/charges" in a table format. My point here is that Montfort hasn't set out the levels of assumed growth before taxes/charges are deducted. So, it doesn't show Mr A the complete picture of how much growth he'd need to achieve to obtain the income Montfort projected in the illustration.

Based on the projected benefits set out in the updated illustration, even if Mr A achieved net growth of 5%, that would still only provide him with an approximate income of around £11,390.92 per year, using the AUD exchange rate Montfort gave. It isn't clear whether this was based on Mr A purchasing an annuity (with associated escalations and/or spouse benefits) or whether taken on a drawdown basis.

Whilst this sum would be payable to him tax-free (because in Australia tax is paid on pension contributions rather than on retirement income), this sum was less than the £12,937 per year the TVAS of June 2009 said Mr A would be entitled to draw directly from the scheme at age 60. And as I've said above, it isn't clear whether this income would increase in retirement or provide a spouse's pension, whereas the income from Mr A's DB scheme was guaranteed, increased each year and included a spouse's pension on his death.

I accept that if Mr A drew his full DB pension directly from the scheme it would likely be subject to income tax at his marginal rate. However, because Australia has a double-taxation agreement with the UK, assuming Mr A was a permanent resident in Australia (which was his intention) then he would only pay income tax in Australia. Montfort has said that the pension would be effectively reduced by 50%. But in Montfort's stage one report, it set out the following Australian income tax rates applicable until 30 June 2008:

- 0% on $0 - $6,000 AUD
- 15% on $6,001 - $30,000 AUD
- 30% on $30,001 – $75,000 AUD
- 40% on $75,001 - $150,000 AUD

However, by the time this advice was given in June 2009 this had changed to:

- 0% on $0 - $6,000 AUD
- 15% on $6,001 - $34,000 AUD
- 30% on $34,001 – $80,000 AUD

- 40% on $80,001 - $180,000 AUD

At the time there was also an additional levy for Medicare at a rate of 1.5%.

So, based on what I've seen, if Mr A took his annual pension directly from the DB scheme while in Australia, it wouldn't be reduced by 50%, it would be taxed at his marginal income tax rate in Australia.

I think it's unlikely Mr A would be expecting to be earning more than $80,000 AUD in retirement, which would include any entitlement he had to the UK state pension and the Australian Age Pension. And given this was Mr A's only pension at the time, it's possible his total taxable income in retirement would stay within the lower tax band, particularly as the trend is generally for the upper limit of each tax bracket to increase over time to account for inflation. However, based on the tax brackets as they were at the time of the advice, if Mr A stayed within the 15% tax bracket, I don't think he's likely to have been able to exceed the pension he could take through his DB scheme if he achieved a net return of 5%. Though I accept he could've exceeded his DB starting pension if returns were higher than this or if his total taxable income in retirement put him into a higher tax band.

So, based on this illustration alone I'm not satisfied Montfort has shown that Mr A would most likely be better off in retirement, even allowing for the tax-free payment of pension benefits in Australia, if he transferred out of his DB scheme. Although Mr A could've exceeded his starting DB scheme pension, that was dependent on net investment returns being consistently above 5% over the next 20 years. And I think that was far from certain.

Montfort says that I have not taken into account the effect of Mr A receiving this pension on the 'means test'. In the stage one report, Montfort explained that the Australian state pension, called the 'Age Pension' is means tested. The report further explained:

"This is to ensure that Social Security benefits are only paid to people who really need them. The Age Pension is subject to an income test and an asset test, the test that relates to the lower rate of payment is the one that is applied."

Montfort says that if Mr A drew benefits directly from his DB scheme he would be unable to maximise his Age Pension (which he would be able to mitigate if the benefits were transferred to an AS scheme) and that it could have the effect of reducing his entitlement to it. It also says that this would have an impact on disability benefits. But I still don't think that was a good enough reason to recommend that Mr A transfer out of his DB scheme at that point. I don't think Montfort could say either way at the point it gave advice that it would have an impact on his entitlement to the Age Pension. And I don't think mitigating this risk outweighed the guaranteed pension he would be giving up if he transferred out of the DB scheme.

Notwithstanding what I've said above, I also think that it was too soon for Mr A to make the decision to move his DB pension to Australia. Mr A was 38, and although his plan was to emigrate and remain in Australia permanently, that was still around 20 years away and his plans could've changed. In my view, there was a significant risk that the move to Australia may have not proved successful, and transferring Mr A's pension prematurely, before he was settled in Australia also came with disadvantages. Indeed, Montfort has been very clear that it would not have recommended that Mr A transfer his pension to Australia if he wasn't intending to remain there permanently.

Montfort asserts that Mr and Mrs A were very clear that they had decided to move to Australia permanently and they did not intend to return. It said that they didn't present as being at high risk of returning to the UK, particularly as Mr A already had a sibling in

Australia. So, its advice was based on this fact and Montfort made it very clear throughout the advice process that its recommendation was based on the understanding that Mr and Mrs A had no intention to return to the UK to live, work or retire. Montfort also stated in the recommendation letter:

“You need to be aware that if you transfer your funds to Australia, and subsequently decide to return to the UK, it is very difficult to transfer your funds back as this can only be done under certain circumstances.”

Montfort adds that it couldn’t have done more to check Mr and Mrs A’s intentions and says that Mrs A’s decision to move her pension to Australia demonstrated their commitment to the move.

I don’t doubt that Mr and Mrs A believed at the time that their move to Australia would be permanent. And I accept that Montfort checked this several times throughout the process and Mr and Mrs A assured them that they intended their move to be permanent. So, I accept that was a key factor when providing suitable advice. However, I think Montfort was aware that there was a risk that Mr and Mrs A’s move to Australia might not work out as intended. Indeed, it recommended that they take out ‘bridging life cover’ citing this very reason.

On 24 July 2008 it wrote to Mr and Mrs A with its reasons for recommending life cover, and an accompanying appendix stated:

“Whilst it goes without saying that you are proposing to stay in Australia / New Zealand for the duration, it is an unfortunate fact that many families change their minds and return to the UK. After all, Australia / New Zealand is a totally different environment, let alone country, and with the best will in the world some people will find that it is just not for them. Consequently we do our best to provide our Clients with as much flexibility in their cover as we can, within the restraints of individual budgets. We refer to this as ‘Bridging Life Cover’ – quite literally to bridge the gap between two entirely different legislative regimes…

…We recommend a five year term plan, and expect our Clients to keep their plan for a good four years. This has proved to be the time of greatest risk for most of our Clients – broadly coinciding with the time it takes to attain citizenship, and to reach a finite decision as to whether they will return or stay.”

So, I think this shows that Montfort was aware, through its experience of advising customers in a similar position to Mr and Mrs A, that the first five years of any move was deemed to be a critical period for customers determining whether or not they would stay in Australia or move back to the UK. And I think that this should’ve been factored into the pension advice it gave Mr A.

Montfort says that this has been taken out of context. It says it recommends life cover for the first five years of any move because if the worst were to happen during that time, the widow/widower is more likely to decide to return to the UK and the money would be required to cover relocation costs. It says Mr and Mrs A agreed to take out the life cover as this was the only circumstances under which they could envisage returning home. But I think the sentiment of what Montfort said in the appendix applies to anyone emigrating. Montfort stated that despite a customer proposing to stay in Australia, it was ‘an unfortunate fact’ that many families return home because it is a ‘totally different environment’ and many find it is ‘not for them’. And I think it’s likely to have reached that view based on its experience. While Montfort may have used this rationale in order to recommend Mr and Mrs A life assurance, I still think that a move abroad not working out because of the ‘different environment’ or it ‘not being for them’ is a reasonably foreseeable consequence of any migration.

In Montfort's latest response it said that, *"many families change their minds but not Montfort families as Montfort families plan."* The suggestion being with enough planning, a migration will be successful. So, there was no reason for Montfort to believe Mr and Mrs A's migration would fail given the planning they had undertaken and that they already had a support network there (Mr A's sibling). But I don't think that is realistic, one cannot plan for every eventuality. And the reality is that Mr and Mrs A were proposing to emigrate at a relatively young age with a young family to a completely different environment, so it was very possible that it would not prove to be a good fit for them.

Furthermore, I don't think that Mrs A moving her pension to Australia is evidence of Mr and Mrs A's commitment to emigrating permanently. In my view, Mrs A was simply following Montfort's recommendation.

With this in mind, I don't think it was sufficient for Montfort to simply warn Mr A that its advice was based on him moving permanently away from the UK, particularly as it knew how difficult it would be to move pension funds back from Australia if Mr A returned to the UK. So, this is another reason why I don't think it was suitable advice to recommend that Mr A transfer out of his DB scheme at the time.

I think Montfort could have instead advised Mr A not to consider moving his pension for at least five years because of the risk that the move may not prove successful. And I also think that this would've been suitable advice taking into account all of Mr A's circumstances. By remaining in his DB scheme for at least five years, and until closer to his retirement age, he mitigated the risk of the move not becoming permanent and his funds becoming 'stuck' in Australia and him being unable to access them until age 60. He also would've been sheltered from any investment risk during that time, because his DB pension was guaranteed and his entitlement increased the closer he got to his normal retirement age.

Montfort says there is no objective way to measure at what point a customer could be said to be 'settled' and more likely to remain permanently in a country they had emigrated to. In the absence of this, Montfort asks how any advice it gives to a customer in the same circumstances as Mr A can be seen as suitable.

But in making this decision, I'm only considering the circumstances of Mr A. Given his age at the point the advice was taken, and the fact he had a young family, I think there was considerable scope for his plans changing, including the possibility of him returning to the UK to live, between now and his retirement. Montfort's role wasn't to simply transact what Mr A thought he wanted. It had a duty to act in his interests overall and I think that this included acknowledging and accounting for the reasonably foreseeable risk of his plans changing in the advice it gave him.

Could Mr A have left his DB pension in the UK and transferred it at a later date?

Montfort says that there were other significant tax implications that meant transferring out of Mr A's DB scheme as soon as he emigrated was in his best interests. It said that the tax treatment of pension transfers from UK pension schemes, if made more than six months after arrival in Australia, are punitive under Section 27CAA of the Income Tax Assessment Act 1936 and Section 305 of the Income Tax Assessment Act 1997. It added that if Mr A remained in his DB scheme, any death benefits payable to his spouse would be substantially reduced by tax, whereas if the pension was transferred to an AS scheme the remaining fund would be paid as a lump sum to his spouse, free of tax. I've considered these points carefully below.

I accept that Mr A would've attracted a tax charge if he moved his pension to an AS scheme at a future date.

According to the stage three report, Montfort said:

"Certain UK pensions are subject to Australia's Foreign Investment Fund (FIF) tax regime which seeks to tax the annual growth on an unrealised basis until you reach retirement age.

However, pension funds which are employer-sponsored and maintained by your employer (or former employer) are exempt from Foreign Investment Fund measures. As such there will be no tax on the annual growth of your pension schemes if they remain in their current format."

So, it seems to me that Mr A's DB scheme would not be subject to the FIF tax regime if he left it behind in the UK. And I note Montfort says this was abolished in 2010.

Montfort went on to say:

"The alternative option to leaving your pension funds in the UK is to transfer your UK pension entitlements into an appropriate Australian superannuation fund. Generally, this can be done directly from each plan but, in some cases, consolidation into a new UK personal pension before transferring to Australia may be advisable.

You will need to consider Section 27CAA of the Australian Income Tax Assessment Act, now referred to as Section 305/10 (please see page 12 of Stage 1) on transfer under which you have six months to complete the transfer to Australia without any liability to 27CAA (305/10) tax. If the transfer is not completed within this time you will pay tax on the growth from arrival value.

This tax can be paid personally (at your highest rate of tax)."

Going back to page 12 of the stage one report, it states:

*"**Pension Transfers from the UK to Australia***

The Six Month 'Window'

A 6 month exemption exists allowing a window of opportunity for people to transfer a pension fund from the UK to Australia without becoming subject to S27CAA. This is seen as encouragement for people to move funds within 6 months of residency.

Transfers outside six months

If a UK pension fund is transferred to an Australian superannuation fund six months or more after a person became an Australian resident for tax purposes, a portion of the payment will be included as assessable income.

In general terms, the formula to calculate the assessable amount ensures that you are only taxed on the growth component of the benefit that accrued from the time you became a resident of Australia.

This growth is included in your assessable income and taxed at your marginal rate of income tax…"

As I understand it, if Mr A transferred the CETV of his DB scheme to an AS scheme, it would be treated as 'assessable income' and the 'applicable fund earnings' would be taxed according to section 305.

That’s because according to the ATO, the applicable fund earnings are the earnings on a foreign super interest that have accrued since becoming an Australian resident for tax purposes. And 'super interest' is any amount, benefit or entitlement a member holds in a fund. Montfort says this would include an entitlement to a pension through a DB scheme. So, that would mean if Mr A did not transfer the CETV of his DB scheme to Australia within six months of his arrival, he would be required to pay income tax on the applicable fund earnings. And that would essentially represent the difference between the CETV on the day of his arrival and the eventual CETV transferred.

The ATO webpage Montfort referred me to further sets out:

“Including applicable fund earnings in your fund’s assessable income

You may be able to choose to include some amount of your applicable fund earnings in your fund’s assessable income. In this case, the amount will be taxed in your fund instead of as part of your income. Your fund pays income tax at 15%, which may be less than the rate of tax you pay.

To make a choice, you must meet all of the following conditions:

- *you have been an Australian resident for tax purposes for more than 6 months or have terminated your employment more than 6 months ago*
- *you have transferred the whole of the foreign fund interest directly to a complying Australian super fund*
- *you no longer have a super interest in the foreign fund.*

If you don't meet these conditions you can't choose to include any amount in your fund’s assessable income. Instead, you must include any applicable fund earnings in your personal assessable income.”

It then gives the following example:

“Example: applicable fund earnings and assessable income

Tony transfers $160,000 from his foreign super fund to his Australian super fund. The transfer is the whole of his interest in his foreign fund. His applicable fund earnings amount is $40,000. If Tony doesn't elect to include any of this amount in his Australian super fund's assessable income, he must include the $40,000 in his personal assessable income for the year (taxed at his marginal tax rates).

If Tony elects to include $30,000 of the applicable fund earnings in his fund’s assessable income, his fund will include this amount in its assessable income (taxed at 15%) and he must include $10,000 in his personal assessable income (taxed at his marginal tax rate).

If Tony elects to include $40,000 of the applicable fund earnings in his fund’s assessable income, his fund will include this amount in its assessable income (taxed at 15%) and Tony won't have to include any of the applicable fund earnings in his personal assessable income.”

So, it seems to me that if Mr A transferred the CETV of his DB scheme more than six months after his arrival in Australia, he could elect to include the applicable fund earnings in his AS scheme’s assessable income, and pay income tax on it at 15%. This would essentially mean Mr A would pay income tax of 15% on the difference between the CETV on his arrival in Australia and the CETV transferred to the AS scheme.

According to the ATO website[2], when a customer transfers an amount from a UK-based pension to an AS scheme, the AS scheme will report the transfer as a contribution for the customer for that year.

"[The transfer] will be counted as either, or a combination of:

- *a non-assessable foreign fund amount, which is counted towards their non-concessional contributions;*
- *an assessable foreign fund amount, which is counted towards their concessional contributions.*

If you choose to include some of your applicable fund earnings in your fund's assessable income, the amount will be reported as part of your total contributions (increasing your total superannuation balance) but doesn't count towards your contributions caps.

Non-assessable foreign fund amount

Generally, most of a transfer from a foreign fund will consist of contributions you have made to the foreign fund and the earnings on those contributions.

The non-assessable amount is the amount that was vested (paid to you or for which you're entitled by law) at the time of the transfer. This will include earnings on your contributions from the foreign fund even if the earnings were not allocated to you at the time of the transfer.

Applicable fund earnings are included in the non-assessable foreign fund amount, less any amount you choose to include in the fund's assessable income. This amount is no longer treated as a contribution but treated like normal earnings of your fund."

So, based on what the ATO says here, it seems to me that the CETV Mr A would receive in future (which he would then go on to transfer to an AS scheme via a UK SIPP) would be classified as a non-assessable foreign fund amount which is counted towards his non-concessional contributions. But if Mr A elected to include his applicable fund earnings in his AS scheme's assessable income, then this amount wouldn't be counted towards the contributions cap.

In Montfort's recommendation letter of 11 June 2009, it stated:

"Contributions Cap

From the 1st July 2007, the Australian government introduced new provisions relating to 'non-concessional contributions', which typically take the form of pension contributions made from the individual taxpayer's after tax income.

Due to concerns that concessionally taxed superannuation may be too attractive for high net worth individuals a ceiling on the amount of non-concessional contributions has been introduced of A$150,000 per annum (or a total of A$450,000 averaged over 3 years).

The treasury has confirmed that the non-taxable portion of any amounts transferred from overseas superannuation funds will be subject to the non-concessional contribution cap.

---

[2] https://www.ato.gov.au/Individuals/Super/Foreign-super-funds/Transfer-from-a-foreign-super-fund-to-an-Australian-super-fund/#HowyourAustralianfundreportsaforeigntran

Contributions made in excess of the cap will be taxed at the top marginal rate plus medicare (46.5%).”

With all of this in mind, if Mr A transferred his DB scheme at a later date, and included his applicable fund earnings in his AS scheme's assessable income, then he would not likely fall foul of the non-concessional contribution cap. That’s because the CETV in May 2009, which is the non-taxable portion of the amount transferred, is well below the $150,000 AUD cap. In its latest response, Montfort said it agreed with this, though it said this rule had since tightened and breaching the cap was not an impossibility if Mr A made personal non-concessional contributions or if the currency exchange rate increased in Mr A’s favour.

Montfort believes that it was in Mr A’s best interests to transfer his DB pension immediately. This is because he’d avoid paying any income tax on the amount transferred that would otherwise be due if the transfer was delayed by more than six months. But I still think that had to be weighed up against the loss of the guarantees and the risk of the move to Australia not becoming permanent. And I don’t think it’s likely that the CETV would increase so drastically if Mr A delayed the transfer by five years, such that the income tax payable on the transfer would be prohibitive. That’s particularly the case given that the increase to Mr A’s DB pension was essentially guaranteed, whereas any increase to the fund if transferred to the AS scheme was dependent on investment returns and would be subject to charges.

Overall, I don’t think avoiding the potential for Mr A to pay income tax of 15% on any increase to the CETV between his arrival date in Australia and the eventual transfer date, was worth it in view of the other risks I’ve identified. And had this been explained to Mr A I think he would’ve accepted this, particularly as Montfort’s advice was that Mr A should retain his funds in a UK SIPP until such time that the currency exchange rate was favourable. And it then went on to discuss investment strategies with him in the interim. It’s evident that these funds would’ve also been taxable under section 305 when they were later transferred. So, I don’t think Mr A would’ve insisted on transferring this pension even if it meant paying income tax if he transferred it at a later date.

Currency risk

Montfort says that I also haven’t considered the currency risk of remaining in the DB scheme until such time that Mr A was ready to transfer his pension. It says transferring immediately to a SIPP allowed Mr A to immediately take advantage of the currency exchange rate when it was most favourable, whereas initiating a pension transfer can take months.

I accept that the exchange rate between GBP and AUD would fluctuate over time and that transferring to a SIPP would allow Mr A to take advantage of a higher rate more quickly. But I still don’t think that it was worth Mr A giving up his guaranteed DB pension, to potentially be able to take advantage of a more favourable exchange rate, given what I’ve already said above. That’s particularly the case given there was no guarantee of when or if the exchange rate would improve. And as Montfort recommended that Mr A transfer to a SIPP and remain in cash, until such time the currency exchange rate was favourable, there was a very real risk that his funds would reduce in value whilst waiting for a favourable exchange rate, given the charges payable.

So, I don’t think it was suitable advice to transfer out of the DB scheme for this reason.

Death benefits

Montfort has argued that Mrs A would be entitled to better death benefits as a result of Mr A transferring his DB pension. It says that the spouse's pension would be taxable, and would also have an impact on her other benefits because of the means test, whereas the remaining funds in an AS scheme would be paid to his spouse tax free. So, this was also a reason to support the transfer.

Montfort says it has provided evidence showing that death benefits were important to Mr A. Whilst I appreciate death benefits are important to consumers, the priority here was to advise Mr A about what was best for his retirement provisions. A pension is primarily designed to provide income in retirement – not a lump sum to family after death. In any event, death benefits were not mentioned in either the stage three report or the recommendation letter. So, it seems to me that the different death benefits Mr A would be entitled to were simply highlighted as a consequence of transferring. Furthermore, Montfort had already recommended that Mr A should take out bridging life cover for five years. So, it seems to me his spouse was already covered for the first five years of his move, which allowed him time to consider transferring his DB pension after that period without having to worry about his spouse being provided for.

Summary

Ultimately, I don't think the advice Mr A was given was suitable or in his best interests. Mr A was giving up a guaranteed, risk-free and increasing income from the DB scheme and I don't think Montfort has demonstrated that he would most likely be better off by transferring it to an AS scheme, even if his move did end up being permanent. I also don't think Mr A needed to make a decision about transferring his pension at that time as there was a reasonably foreseeable risk that the move wouldn't work and he would return to the UK.

So, I don't think the recommendation Montfort gave to Mr A to transfer out of his DB scheme was suitable, because it exposed him to the risk of his pension becoming stuck in Australia if the move failed. And if it did fail, then Mr A would most likely receive a lower overall income in retirement.

Based on what I've seen, I think Mr A could've remained in his DB scheme for at least five years when he would likely be more settled in Australia, at which point he could then consider transferring his pension. This protected him against the very real risk that the move would fail – which it in fact did only three years later – and also sheltered him from investment risk in the meantime. While I accept that Mr A would likely have to pay income tax on his applicable fund earnings if he transferred the pension at a later date, I don't think having to pay this overrode the risks involved in Mr A transferring his pension immediately.

So, I don't think Montfort's advice was suitable as it was not clearly in Mr A's best interests to transfer his DB scheme benefits at that time. Of course, I have to consider whether Mr A would've gone ahead anyway, against Montfort's advice.

I've considered this carefully, but I'm not persuaded that Mr A would've insisted on transferring out of the DB scheme, against Montfort's advice. I say this because Mr A was an inexperienced investor with a 'cautious to medium' attitude to risk and this pension accounted for the majority of his retirement provision. There's no evidence to suggest that Mr A was interested in transferring out his DB scheme prior to meeting with Montfort, and the advice was given solely in connection with the planned move to Australia. So, if Montfort had provided Mr A with clear advice against transferring out of the DB scheme, explaining why it wasn't in his best interests to do so at that time, I think he would've accepted that advice.

In light of the above, I think Montfort should compensate Mr A for the unsuitable advice, in line with the rules for calculating redress for non-compliant pension transfer advice.

Investment performance

Montfort may argue that Mr A did not mitigate his loss because after transferring his pension to the SIPP, the funds remained in cash for some time before Mr A eventually appointed another firm to invest them. So, I have considered whether any award I make against Montfort should be reduced to take this into account. In the circumstances, though, I think it fair to make an award for the whole loss against Montfort.

Montfort should not have recommended Mr A transfer out of his DB scheme to a SIPP; it was only as a result of Montfort's involvement that Mr A transferred the funds held in his DB scheme to the SIPP. And in fact, it was Montfort's advice specifically that Mr A should keep his funds in cash until such time that the exchange rate was favourable to him. So to my mind the fact Mr A's funds were not invested until later was a direct result of Montfort's advice. As Mr A ended up returning to the UK only a few years later, it is understandable that it took some time for him to appoint a new adviser to manage his funds – the sole purpose of transferring out of his DB scheme was because of his move abroad and his plans had changed completely. Ultimately if Montfort had given Mr A suitable advice, I'm satisfied he would've remained in his DB scheme and as such, would not have had to think about how his pension funds were invested in future.

So, in my view, the entirety of Mr A's loss stems from Montfort's unsuitable advice to transfer away from his DB scheme.

Compensation for distress and inconvenience

Mr A has explained that he and Mrs A are intending to divorce, and their pensions are assets that will be considered in the divorce settlement. The ongoing dispute with Montfort means they're unable to settle the matter until redress is provided, and this is stopping his family from moving on with their lives. He said Montfort had caused delays whilst the complaint has been with the Financial Ombudsman Service which has meant he and Mrs A had to vacate court dates, and had incurred significant legal fees. He added that the inability to finalise their divorce also meant they were unable to sell their house, and this had resulted in a significant increase to their mortgage repayment due to their fixed rate ending.

Montfort disputes that Mr A has been caused any distress and inconvenience by the advice he received. And it says it provided any documents requested promptly and responded to his complaint within the relevant timeframe.

In each of my provisional decisions, I said I thought Montfort should pay Mr A £750 for the impact of the unsuitable advice.

I don't doubt that this has been a difficult time for Mr A and his family. I understand that the matter has caused Mr A significant distress and will continue to do so until it is settled. Mr A is understandably concerned that he has lost the guarantees associated with his DB pension and that has had an impact on his retirement plans – he says he would've been able to retire on a full pension at age 55 and he's lost this significant benefit. This is even more of a concern for him as he's suffered with health issues.

But overall, I think the £750 I have awarded is fair compensation for the impact of the unsuitable advice Mr A received in 2009. I don't think I can fairly attribute the additional legal fees or extra mortgage costs incurred to that event. Ultimately, these costs have arisen in connection with Mr A's impending divorce, and I think they are too far removed from the event complained about here. Although I appreciate the inability to resolve the complaint before now has had an impact, I had to be fair to both sides and provide them with the opportunity to comment on key pieces of evidence and my findings about them before making my final decision.

Putting things right

A fair and reasonable outcome would be for the business to put Mr A, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr A would have most likely remained in the occupational pension scheme if suitable advice had been given.

Montfort must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:
https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

For clarity, Mr A has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age, which I understand to be age 55 based on what Mr A has said about his length of service, as per the usual assumptions in the FCA's guidance. But Montfort should liaise with Mr A's DB scheme provider to ensure that it calculates redress correctly using Mr A's correct scheme normal retirement age.

This calculation should be carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr A's acceptance of the final decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Montfort should:

- always calculate and offer Mr A redress as a cash lump sum payment,
- explain to Mr A before starting the redress calculation that:
    - his redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest their redress prudently is to use it to augment their DC pension
- offer to calculate how much of any redress Mr A receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr A accepts Montfort's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr A for the calculation, even if he ultimately decides not to have any of their redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr A's end of year tax position.

Redress paid to Mr A as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, Montfort may make a notional deduction to cash lump sum payments to take account of tax that Mr A would otherwise pay on income from his pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr A's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

Montfort should pay Mr A £750 for the significant distress and inconvenience caused by the unsuitable advice.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require Montfort International Limited to pay Mr A the compensation amount as set out in the steps above, up to a maximum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Montfort International Limited pays Mr A the balance.

If Mr A accepts this decision, the money award becomes binding on Montfort International Limited.

My recommendation would not be binding. Further, it's unlikely that Mr A can accept my decision and go to court to ask for the balance. Mr A may want to consider getting independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 12 January 2024.

Hannah Wise
Ombudsman