

The complaint

Mr W is represented. He says Lockhart Consultancy Ltd ('LCL') gave him unsuitable advice in 2011 to switch his pension from a Scottish Equitable Aegon ('Aegon') Self-Invested Personal Pension ('SIPP') to a Yorsipp SIPP, and to invest the Yorsipp SIPP in commercial property. He complained in 2022.

LCL disputes the complaint, and it says the complaint is out of time.

What happened

Mr W made an initial complaint (also in 2022) about LCL's advice (in 2010, and continuing into 2011) to transfer his Defined Benefits ('DB') pension and Personal Pension Plans ('PPPs') to the Aegon SIPP. That complaint was addressed separately and an Ombudsman recently issued a final decision on it.

This decision is only about the matter summarised above (the 2011 SIPP switch and the commercial property investment). However, its background extends to the pension transfer, mainly as follows:

- In May 2010 LCL advised Mr W to transfer his DB pension to the Aegon SIPP, and in August 2010 this was executed. The recommendation was based on his objective to take control of his pension arrangements, including having the ability to explore an alternative approach to investing his pension. Following the transfer, the Aegon SIPP was held in cash because he intended to use it for a commercial property purchase at the time. The purchase subsequently fell through, and did not happen.
- After the May 2010 advice, both parties also looked into transferring Mr W's PPPs (two of them).
- By June 2011 LCL advised Mr W to transfer his PPPs to the Aegon SIPP. This appears to have happened to provide additional money in the Aegon SIPP for investment in commercial property, which he continued to look into.
- Around September 2011 Mr W found a commercial property he wanted to invest in, through the Aegon SIPP, and that he wanted to manage personally. In October 2011 LCL advised him to conduct the switch to the Yorsipp SIPP because it allowed for the purchase and for the self-management that he wanted to conduct. The Aegon SIPP did not allow for the latter.
- The switch to the Yorsipp SIPP happened in November 2011, and cash was transferred into it in December 2011. In February 2012 Mr W made the commercial property investment. Available evidence is that he self-managed the investment and dealt directly with Yorsipp thereafter, he received no further advice from LCL in this respect, and rent from the property appears to have been received outside the SIPP.

One of our investigators looked into the complaint and did not find that it is out of time. He

acknowledged that the 2022 complaint happened more than six years after the 2011 advice, placing it outside the regulator's six years time limit for complaints, but he concluded that it happened within the regulator's three years time limit.

The investigator noted LCL's reference to the 2012 and 2013 SIPP statements Mr W received, showing no growth in the fund. However, he found that the previous SIPP was held in cash so there was no basis on which to compare growth, that the SIPP switch appeared to have achieved Mr W's objective and that he received income from the commercial property (which wasn't paid into the SIPP). Overall, the investigator said Mr W had no cause to question the 2011 advice until he received professional advice (from his representative) to do so in 2021; and his complaint in 2022 happened within three years of that, so it is in time.

However, the investigator also concluded that the complaint lacks merit, and that it should not be upheld. He mainly said:

- LCL's suitability letter to Mr W confirmed his objective was to invest his pension in commercial property. This directly matched a specific aspect of his profile, and he understood the potential tax benefits of investing through his pension.
- The reason behind his request for advice from LCL at the time was his commercial property investment objective. His representative argues that LCL failed to advise on alternatives, but the suitability report says Mr W had considered other options but retained the same objective.
- His risk profile was scored as '7 out of 10' and he was made aware of the risks in property investment. Apart from his mortgage he had no debt liability. He had some capacity for loss in his financial circumstances.
- Furthermore, beyond his objective he also had over 20 years to retirement at the time so he had time to diversify the pension in the future; he was to receive income from the investment; and he had some familiarity with the property market.
- Even if LCL had advised against the SIPP switch, it is likely that Mr W would have conducted the switch anyway, for the purpose of the commercial property investment he intended to make. He had been pursuing that intention for some time. Conducting the switch allowed him to purchase the particular property he had already made an offer on, and to self-manage it (which the Aegon SIPP did not allow for).

Mr W's representative confirmed his disagreement with this outcome and his request for an Ombudsman's decision – on the grounds that Mr W was unaware, at the time of advice, that investing in commercial property was an unregulated activity; LCL failed to inform him of this; therefore he was unable to make an informed decision on the investment and on its appropriateness for him; regardless of his familiarity with the property market it was the first time he made such an investment; and LCL should have ensured he understood the risks involved in the pension switch.

These comments were shared with LCL and it replied. It mainly said it insists that the complaint is out of time; the commercial property investment was driven by Mr W, based on his knowledge of the market; he was actively looking for a commercial property investment even before the initial pension transfer advice, and he had obtained a transfer value directly from his DB pension scheme before approaching LCL; after the pension transfer the Aegon SIPP was held in cash for the property purchase he was pursuing at the time; after that purchase fell through he sought further advice, this time on purchasing a property abroad, which LCL advised against; and all relevant warnings were given to him in its advice on the

SIPP switch and the property he eventually invested in.

The matter was referred to an Ombudsman.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Jurisdiction

The Dispute Resolution ('DISP') section of the regulator's *Handbook* sets out the rules for our jurisdiction. DISP 2.8.2R says we cannot consider a complaint referred more than six years after the event or (if later) more than three years after the complainant knew or ought reasonably to have known there was cause to complain – unless the complainant has written (or some other) record that shows a complaint was received in time. A late complaint can be considered if exceptional circumstances caused its delay.

Like the investigator said, Mr W's 2022 complaint clearly happened more than six years after the 2011 advice, so it does not meet the six years time limit. He and his representative say his first awareness of cause for complaint arose in 2021, after the six years time limit expired. The rules allow us to apply the three years time limit to determine whether (or not), and *if later* than the six years time limit, a complaint has been made within three years of when the complainant knew or ought reasonably to have known of cause to complain.

LCL says Mr W knew or should have known of such cause much earlier than 2021. To support this, it referred to the Yorsipp SIPP's annual review statements he received in 2012 and 2013.

Both show that the commercial property's value was the same in both years as it was at the outset. This did not show growth, but it also did not show a loss. Furthermore, it is undisputed that Mr W received income from the property outside of the SIPP, so the statements do not appear to show this. Overall, he had invested in the commercial property that he wanted to buy, he was in receipt of income from that investment and I have not seen evidence that he was made aware of a significant loss of value in the investment during the relevant time. These factors support the investigator's finding that he had no cause to be concerned about the 2011 advice until he was advised of potential concerns in 2021. I share this finding.

Mr W's complaint about the SIPP switch and commercial property investment has evidently been influenced, if not defined, by the professional advice he received. There is nothing wrong with this. It is not uncommon for complaints to arise following a complainant's receipt of advice that makes him/her aware of cause to complain. I consider this is what happened in his case. I have read the Ombudsman's decision in the separate case I mentioned above, and I have considered the information available in the present case. It is reasonably clear that both complaints have been pursued on *technical* grounds of suitability, focused on the loss of the DB pension, the merits of transferring the PPPs, the switch between SIPPs and the commercial property investment – not on the basis of a particular negative event(s), since 2010/2011, that prompted a complaint.

It is in the above context that Mr W made his 2022 complaint. He did so after the advice he received in 2021 which led to his awareness of cause to complain, so his complaint is within the three years time limit, is in time and is in our jurisdiction.

Merits

There is ample evidence (not least within correspondence between the parties) that, as LCL says, Mr W was the driving force behind the commercial property investment, and that the

SIPP switch resulted from his wish to self-manage the investment. This does not mean LCL is absolved of its responsibility to give suitable advice in this case. It certainly had/has that responsibility. It expressly recommended the suitability of the switch, for the purpose of the commercial property investment. As such, it undertook, and retains, responsibility for that advice.

However, Mr W's role in the matter must feature alongside my consideration of LCL's because his role was important. For instance, the suitability letter does not focus on a recommendation to him to invest his pension in commercial property. Instead, it states this as his pre-determined objective and then limits its recommendation to the SIPP switch and to having a cash holding in the SIPP thereafter – pending discussion of further advice on the property purchase after its full costs were confirmed. LCL's advice was therefore focused on how to achieve Mr W's objective.

This also does not mean LCL gets to avoid responsibility for the suitability of the commercial property investment. It certainly had/has that responsibility. It knew that was the investment Mr W intended to make so it could not have reasonably, and properly, assessed suitability of the SIPP switch without being satisfied that the proposed commercial property investment was worthy (in terms of suitability) of conducting a switch.

Having said this, Mr W's role in the matter creates an additional and important consideration in determining his complaint. As I address further below, whether (or not) LCL's advice was suitable could arguably become redundant if the balance of facts show that Mr W's predetermined objective, and an associated need for a SIPP switch, would have been pursued regardless of what LCL advised.

Mr W presented his objective as being investment of his pension in commercial property, and self-managing the investment. This is the objective that is broadly presented in the suitability letter and I have not seen evidence that he disputed the letter's contents at the time, or that this objective is inaccurate. There is wider evidence in both of his complaints that shows the same objective. As LCL says, this had been his pursuit since 2010 and his first (and unsuccessful) attempt to invest in commercial property happened more than a year before the SIPP switch. He maintained the same pursuit throughout this period and up to the switch.

LCL had to strike the correct balance between respecting Mr W's right to define his own objective and its responsibility to ensure suitability of its advice (including suitability of the objective). It has mentioned how it advised, with reasons, against an overseas property investment considered by Mr W, so it is clear that it was aware of the need to ensure his objective was suitable.

Its evidence is that it did not consider commercial property investment unsuitable because it directly matched a specific part of his profile, that he knew the market and he had the required capabilities for such an investment. All these are true in fact, and are broadly undisputed. This decision will be published and it is important to maintain Mr W's anonymity, so I will not go into the details of his profile in this respect.

On balance, I am satisfied that the above factors – added to the facts that at the time of advice he had over 20 years (a considerable amount of time) ahead of him, before retirement, to make any necessary revisions to his pension arrangements and investments; and that he sought income from the intended property investment, in addition to growth in the medium/long term – meant his objective was not unsuitable.

His representative says the intended type of investment was his first of that kind. I am not persuaded that this, alone, is enough to render it unsuitable, especially as it is an argument

outweighed by the points summarised above. Whether (or not) the intended pension investment in commercial property was Mr W's first, at the time, the afore mentioned factors meant it was not an unsuitable venture for him. For another person with a different profile and circumstances, my consideration could be equally different, but in the circumstances of his case I conclude as stated above.

Such investments can have high risks, especially in terms of liquidity, but Mr W was aware of this (and was made aware of this). He had the risk profile ("7-8" out of "10, which was essentially a moderate/adventurous profile) to match and there is evidence in his risk assessment questionnaire confirming he was inclined to take above average risks. His exposure to property investment risks was also to be mitigated by his plan to self-manage the investment for rental income and by his somewhat unique capabilities, both of which stood to give him more overall control, including risk management control.

Available evidence is that the opportunity he identified was one he sourced himself and that it involved an outright purchase of a property through the SIPP. In other words, it was not an investment in a collective unregulated property scheme as one of his representative's arguments appears to suggest.

Without cause to find Mr W's objective unsuitable, LCL proceeded to advise him on how it could be achieved. He had already made the transfers to the Aegon SIPP (in 2010 and earlier in 2011) for the same commercial property investment purpose. The question arises as to why LCL advised him to move his pension yet again, from one SIPP to another (from Aegon to Yorsipp), also for the same purpose.

The answer has already been mentioned, earlier in this decision. Mr W wanted to self-manage the property investment. The Yorsipp property purchase questionnaire he completed in November 2011 confirmed this. Available evidence is that his overall investment and self-management pursuit could not be achieved in the previous SIPP. LCL's suitability letter refers to it approaching a Yorsipp official at the time to discuss, specifically, his objective and Yorsipp's ability to accommodate it. The letter said the official gave an assurance that Yorsipp could support Mr W's objective. In wider evidence, LCL also says the options of SIPP providers capable of meeting the objective were limited.

The SIPP switch therefore appears to have been inevitable, in the sense that it had to happen in order to achieve Mr W's objective. In this context, I do not find that it was unsuitable. I also have not seen, or been directed to, any other aspects of the switch that, on balance, made it unsuitable.

In conclusion, Mr W's complaint is in time but it is not upheld, because, on balance, LCL's advice to him (on the SIPP switch and commercial property investment) was not unsuitable.

My final decision

For the reasons given above, I do not uphold Mr W's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 11 December 2023.

Roy Kuku
Ombudsman