DRN-4205584

The complaint

Mr and Mrs C complain Argyle Consulting Ltd ("Argyle") should have done more to stop them from encashing funds from their pension and investment portfolios. They say instructions were accepted from Mr C, despite Argyle knowing he was vulnerable and experiencing a significant episode of mental illness.

Mr and Mrs C are being represented in this complaint, but for ease of reading I have referred to some comments as being those of Mr and Mrs C.

What happened

Argyle have managed investment and pension portfolios for Mr and Mrs C jointly and individually, for many years.

In April 2021, Mr C contacted their advisor at Argyle, asking about the tax implications of withdrawing money from across their portfolios. Argyle say they wrote to Mr and Mrs C at the beginning of May 2021 with this information and advised them against it. Following this Mr C raised a complaint about the advisor, regarding a lack of communication and the tax advice they were given. Argyle say Mr and Mrs C went ahead with the encashment anyway.

Mr and Mrs C subsequently complained to Argyle. They said Argyle were aware that Mr C suffered with bipolar disorder and provided significant amounts of evidence (including emails and messages) which they say show that Argyle was aware that Mr C didn't have the mental capacity to make such a decision. They say Argyle should have done more to stop the encashment by ceasing to act. They said not doing so has caused them significant emotional distress and financial loss.

Argyle responded to say that they advised Mr and Mrs C against encashment. Whilst they acknowledged that Mr C had been unwell when he made the request, they had spoken to Mrs C and their son, who had both told Argyle to go ahead with the request.

Mr and Mrs C remained dissatisfied and through the representative they now have, they said that Argyle hadn't done enough. Amongst several complaint issues, they said:

- Mrs C had not given express authority for the encashment;
- Argyle were aware that Mr C didn't have mental capacity at the time of the request;
- Mr C wasn't appropriately treated as a vulnerable customer; and
- Argyle should have ceased to act and that it wasn't relevant whether Mr and Mrs C had already entered into a forward contract with the proceeds.

Our investigator looked into it, but he thought Argyle had taken reasonable steps to check the request. He didn't think that it was fair to expect Argyle not to have gone through with the encashment, after checking with Mr C's wife and son.

As no agreement was reached, the case was passed to me for a final decision. The representative has provided details of other cases this service has decided on, in similar circumstances. Whilst I am aware of them and the decisions reached, each case is decided on its own merits.

I issued a provisional decision, an extract of which is below and forms part of this decision.

> "My provisional decision
>
> Firstly, I would like to empathise with what Mr and Mrs C have been going through. As well as ill health, they have said they have suffered considerable financial loss and I know this has been a very difficult period for them. However, my decision is focused on whether Argyle should have done more before acting on their encashment request. I don't think they should have and I will explain why.
>
> The capacity of Mr C and the decision of Argyle to continue to act for him and Mrs C
>
> Following Mr C's request in April 2021 for advice on the tax implications of any encashment, he contacted Argyle on 5 May 2021 requesting withdrawals. He later made it clear this was for a currency purchase contract he had entered into (with the intention to buy property and a business abroad) and provided a copy of this.
>
> Argyle were aware that Mr C suffered with bipolar disorder and had previous significant mental ill health. I am also aware from the evidence provided by Mr and Mrs C's representative, that the advisor at Argyle will have been aware that Mr C was not well at the time of this request. I say this having been provided with many emails and messages exchanged between Mr C and the advisor. I agree that they appear almost incoherent, irrational and not in line with Mr C's previous communications. I think this should have given Argyle reasonable doubt over Mr C's capacity at the time.
>
> Whilst I wouldn't have expected Argyle to immediately cease to act for Mr and Mrs C, I would have expected them to put some reasonable adjustments in place and take some further steps to legitimise the withdrawal request. I have gone on to consider what they did following the request and whether I would have expected them to do anything more.
>
> Argyle have said that despite communication between the advisor and Mr C breaking down following an initial complaint being raised, he did continue to correspond with Mrs C. They have provided me with a copy of separate letters and emails to Mrs C. These explained the full implications and cost of the withdrawals.
>
> Argyle were subsequently made aware that the encashment was for a forward currency contract that Mr C had entered into. They were provided with a copy of it and were told by email that it was for property purchases abroad. Argyle have said they contacted the currency provider with their concerns. They were reassured that they had spoken to both Mr and Mrs C, who were *"having coffee on their balcony in Tenerife"* and there was no apparent concern from Mrs C.

Argyle also spoke to Mrs C separately on the phone. I have been provided with a transcript of this call. This call was two weeks after the initial request and no concerns were raised by Mrs C. She confirmed on several occasions that she was happy for the trades to proceed. Whilst I appreciate that Mrs C has subsequently said she was coerced into this communication by Mr C, I have to base my decision on what Argyle were aware of at the time.

Mrs C did however, suggest that Argyle contact her son. I can see they did this and have been provided with a copy of an initial email and notes from the subsequent call. Again, this email made clear what Mr C's intentions were, that no action had yet been taken and that Mr C had raised a complaint already about Argyle and the advisor's handling of the request. The advisor spoke to Mr and Mrs C's son; he also raised no further concerns and suggested they go ahead as his father had requested.

Having considered all of this, I believe that Argyle took the necessary steps following the doubts over Mr C's capacity. They contacted Mrs C and her son separately and independently as well as the forward contract provider. They took their time with the request as they sought advice and made sure that all parties were aware of the costs and implications. A forward contract had been entered into and Mr C had also complained about the time being taken and the handling of the request. Considering this, I think Argyle acted fairly in continuing to act for Mr and Mrs C and proceeding with the encashments.

Express authority

Mr and Mrs C have complained that Argyle acted inappropriately as they didn't give express authority for the transactions. However, I don't agree that was the case. For these policies in particular, that were in Mr and Mrs C's name, they confirmed in writing and over the phone on 19 May 2021 that they wanted to go ahead with the encashment, as set out previously in writing by Mr C.

I think this sufficient confirmation and that Argyle acted fairly in accepting this as authority to proceed with the encashments.

Advice on tax and cost implications of encashments

I have also gone on to consider whether Argyle acted appropriately in making Mr and Mrs C aware of the tax and cost implications involved with encashing their policies. I can see that Argyle wrote to Mr and Mrs C on three occasions with this information, on 5, 7 and 10 May 2021. and I have been provided with these letters.

The letter dated 5 May 2021 set out what was required to realise the amount that Mr and Mrs C required and gave the exact cost in £1000's for this. The letter from Argyle explained that they did not know at the time what this money was intended for but said, *"based on the above I would add that I cannot envisage any investment that would be attractive enough to merit incurring such high levels of taxation. Any subsequent investment and associated costs would have to return this amount plus costs just to put you in the same position. As your risk profiles are cautious and you have regularly confirmed, I would urge you to consider this matter carefully before proceeding".*

The letter of 7 May 2021 explained that they were now aware that the intention was to purchase property in Spain. Argyle highlighted six points regarding concerns and

considerations for such purchases and went on to say, "*I hope that the above comments are helpful in your decision making and that you understand my concern that you fully consider all the implications of encashing the majority of your financial assets to invest in the holiday rental market in Spain*".

Argyle wrote again on 10 May 2021, giving updated figures for the costs payable for the new increased amount that Mr and Mrs C wanted to realise. They also included, "*As mentioned in my letters of 5th May and 7th May, I am disappointed you did not seek my advice before embarking on this course of action. Based on the taxation implications which are clearly significant it would not have been my advice to proceed with the encashment of your financial assets in this way. I outlined some of the additional factors which need to be considered around reinvesting the proceeds into holiday property lets in a foreign jurisdiction with all of the resultant implications*".

I believe Argyle gave Mr and Mrs C appropriate notice of the implications involved with their request. They also made it clear on several occasions that they didn't agree with the action being taken and that Mr and Mrs C were acting against their advice. Despite this Argyle advised them of what they believed to be the most suitable and tax efficient ways of encashing. They did this whilst stating that *"Argyle are not tax advisers and the above calculations are estimates only. Large pension withdrawals may attract higher rates of tax than indicated"*. I haven't seen anything to conclude that this advice was wrong or that the encashment should have been done another way.

Conclusions

In summary, I don't agree that Argyle should have ceased to act for Mr and Mrs C. It's fair to recognise that Mr and Mrs C had a legal entitlement to their own money and that Argyle were of the opinion that they needed the proceeds for a forward contract that they had already entered into.

Mr C was clearly a vulnerable customer of Argyle. This was evidenced by them being aware that he suffered from Bipolar disorder and the content of his communications with his advisor. Because of this we would expect Argyle to have put some further checks and support in place before carrying out the requested transactions.

However, they did this, taking express authority to act from Mrs C over the phone and also speaking to her son. I also believe that Argyle gave sufficient notice to Mr and Mrs C of the implications involved and that they didn't agree with the action being taken."

Mr and Mrs C responded through their representative to maintain that they didn't believe that Argyle had taken the necessary steps before processing the encashment. They provided several substantial responses. The main points of consideration were:

- Mrs C has not given proper instruction and authorisation, therefore Argyle have not followed their own policies for encashment. Specifically, that she never contacted the advisor in writing or over the phone between 5 and 19 May 2021.

- Mr and Mrs C's son had spoken to Argyle and given clear and sufficient concern. They provided copies of correspondence between him and the advisor.

- Argyle had not contacted the currency provider as I thought, so they disputed that Argyle were aware of a binding forward contract that Mr and Mrs C couldn't come out of.

Argyle were made aware of Mr and Mrs C's responses and maintained their position. Within this they said that:

- Mrs C was copied in on all correspondence and she gave written and verbal authorisation to Argyle, although not the advisor directly.

- They didn't take any instruction from Mr and Mrs C's son, that the correspondence provided wasn't a true reflection of the conversations that took place and that in any case they didn't feel it contradicted the version of events they had given.

- Argyle also said that they didn't have any call recording of the conversation with the currency provider. However, they maintained that their version of events was accurate and provided another summary of what was discussed.

What I've decided – and why

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

Having considered this and the responses to my provisional decision in full, I remain of the opinion that Argyle took reasonable steps and acted fairly, in continuing to act for Mr and Mrs C. I will address each of the specific considerations that their representative provided in response to my provisional decision.

The representatives have firstly disputed that Mrs C gave authorisation to sell the holdings and therefore allege that Argyle didn't follow their own policy, which said Argyle needed confirmation in writing and over the phone. The representatives have also shown that the legal advice that Argyle got, said Argyle should request written confirmation from Mrs C (rather than taking requests solely from Mr C as they had done previously).

Argyle have provided a copy of an email from Mrs C dated 18 May 2021, where she confirms she is in agreement with Mr C's request to encash the funds. They have also provided a copy of a call from Mrs C on 19 May 2021, where she confirms the same.

I think this was sufficient and was express authorisation from Mrs C. Argyle have said these communications were not with Mr and Mrs C's advisor but with other members of staff, as part of their complaint process which had begun. I think this was reasonable and the requests were clear, regardless who the calls and emails were with.

Mr and Mrs C have also provided evidence that their son did discuss concerns with Argyle about the encashments. This evidence includes an email from the advisor to their son, a written statement and exchanges between the son and his siblings about what was discussed. They have also complained that Argyle should not have taken instruction from their son, who they say was not aware of all information.

Argyle have responded to say they didn't take instruction from the son, and I am satisfied this was the case. They spoke to him on the request of Mrs C. They made him aware of their concerns of the encashments. Whilst the evidence provided shows he had concerns about

his father's health, I don't believe he suggested Argyle didn't act or suggested a different course of action. Argyle have provided their notes of the call and they state that the son told them that if Mr C had given an instruction, they should follow it.

Whilst the evidence from the representative doesn't support that Mr and Mrs C's son said this, it does show that he didn't feel he could tell Argyle not to act. On balance, I do think whilst the advisor and son had concerns, I don't think the calls increased Argyle's concern or made them aware of anything new. I don't think it is reasonable to expect Argyle to have ceased acting based on these conversations.

Argyle have consistently maintained that they spoke to the third-party currency provider on 5 May 2021, providing details and a time of the call. The importance of this was to stress that they believed a forward contract had been entered into and to add more legitimacy to the request from Mr C for encashment.

However, Argyle haven't been able to provide a call recording or call log to show it happened. Mr and Mrs C's representative has said that it didn't and provided a written email from the third-party company saying that it didn't.

However, on balance, I believe that the call did go ahead. I say this because I can see that the advisor was copied in on communications between the company and Mr C, so had the relevant contact details. Argyle have also been very consistent and detailed in what was discussed in this call and the time of it. Stating that it was 08.58am and that the person they spoke to had just spoken to Mr and Mrs C, whilst they were abroad. This seems to marry up with the circumstances of the day. They have notes from the time and referred to it from early correspondence.

I acknowledge the submission from the third party. However, this seems to be following looking for a record of a call. It isn't directly from the person the call was apparently with, or including phone records to show it didn't happen. Whilst I can't be sure, on balance I believe the call happened and I believe Argyle were of the view (from this call and from other email correspondence too) that Mr C had entered into a forward contract and so his request for funds had a purpose.

In summary, my findings on this case haven't changed following the responses to my provisional decision. I still believe it was fair and reasonable – in the specific circumstances of this complaint – for Argyle to continue to act for Mr and Mrs C. Whilst there is uncertainty over the discussions with the son and currency provider, I don't think anything that has been suggested should have meant Argyle ceased to act. They took reasonable steps, got further advice and made further checks before proceeding with the request of Mr and Mrs C.

My final decision

My final decision, for the reasons set out above, is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C and Mrs C to accept or reject my decision before 28 July 2023.

Yoni Smith
Ombudsman