DRN-4526362

The complaint

Mr T complains that unsuitable advice given by Wilcocks & Associates Limited (trading as Wilcocks and Wilcocks) to transfer his occupational defined contribution pension scheme to a self-invested personal pension ("SIPP") in order to purchase unlisted shares caused him a financial loss.

Mr T is represented in this complaint by a claims management company ("CMC")

What happened

In 2016 Mr T was working in IT for a law firm. He was interested in investing in D, a local company providing professional services to the legal sector. Mr T was friendly with D's chief executive Mr B, who introduced him to Mr W, a partner in Wilcocks & Associates Limited ("Wilcocks"). Mr T wanted to use his pension funds to purchase £80,000 of shares in D. Wilcocks told Mr B they might be able to open a SIPP to hold the shares but would need to assess the proposal.

Wilcocks met with Mr T and captured the following information about his circumstances:

- He was aged 47, in good health, single with one dependent child;
- Salary of around £50,000, which after outgoings left annual disposable income of around £29,000;
- He owned his home worth around £150,000, with a mortgage;

Mr T had the following pension provision:

- An occupational defined contribution pension plan with Standard Life ("SL") valued at around £91,336, which had a 4% guaranteed bonus rate and enhanced tax-free cash of around 30%
- He also had two smaller plans with providers "R" (£8,576) and "A" (£2,348)

Mr T completed a risk tolerance questionnaire which assessed him as 6/7 ("very high").

Having considered Mr T's proposal and the prospects for D, Wilcocks recommended he transfer his pensions into a SIPP with James Hay, being one of the few providers which would permit such an investment. This would enable Mr T to hold £80,000 of shares in D, with the remaining funds to be invested in a portfolio of passive investment funds. Wilcocks' initial advice fee was £5,000, plus ongoing charges of 1% of the funds not invested in D.

The director's statement Mr B signed on 19 May 2016 confirmed the valuation of D's share price was arrived at "*following a detailed, professional assessment of the company*".
A specialist accountancy firm "R" produced a business and share valuation report for D in May 2016. Section 4.8 of the report stated an investment of £80,000 would be entitled to 117 new shares, representing 3.5% of D's issued share capital. The accountant's letter signed on 23 May 2016 confirmed that D was trading, to the best of his knowledge it hadn't been involved in or established for the purpose of pension liberation, there was nothing about the company's business activities which would conflict with its shares being held in a SIPP, and that none of the directors was involved in any activity that would result in an unauthorised payment tax charge.

Wilcocks' advice, confirmed in its pension suitability report dated 4 August 2016, noted Mr T was aware that investing the majority of his pension in a single unquoted share was a "*high-risk strategy*" which Wilcocks would not normally recommend, due to "*insufficient liquidity, diversification and access to valuations*". But after reviewing the available information the adviser concluded D appeared to have *"excellent long-term potential and could achieve significant returns, although clearly this cannot be guaranteed*".

Before proceeding with the transfer Mr T was required to sign a number of risk warnings and disclaimers confirming he understood the high-risk nature of investments in unquoted shares, and that he might lose all his money. He was told the lack of an official market made such shares difficult to value and sell, the company's performance may affect their appeal to buyers, and the lack of liquidity may be an issue when he came to take benefits. So he was told to carefully consider the suitability of the investment in light of his "*experience, objectives, risk appetite, financial resources and other relevant circumstances*". The disclaimer released the adviser and Wilcocks from any redress or liability should the investment in D not deliver as expected. It noted Mr T's legal background, and his confidence that over the longer term the investment would provide for his retirement. Mr T signed to agree the risks had been made clear to him by Wilcocks, and he understood he should not go ahead without being comfortable with the extent of his exposure to such risks.

James Hay's investment committee had a number of requirements in order to accept the investment into its SIPP. It asked Wilcocks to confirm it had recommended the investment, so on 27 July 2016 Wilcocks confirmed it had done so as "*an exception*", following research and due diligence into the company.

Mr T had to sign an unquoted shares risk warning, a policy waiver (as the holding would exceed 40% of his SIPP value) and agree to provide James Hay with an annual share valuation. Point (g) of its Unquoted Shares application document which Mr T signed on 19 July 2016 read "*I accept unquoted shares are a very high-risk investment and I may lose all of the money invested. I am aware that there is not an official market for the shares which might make them difficult to sell*", particularly if the company failed to meet expectations. Mr T signed the SIPP application on 21 July 2016, which included James Hay's "*Specialist Investments Module"*. And Mr T signed a specific warning about the high-risk nature of unlisted shares on 3 August 2016. He was given James Hay's guide to *"pension scheme investments in unquoted shares*" due to the possibility of pension schemes being set up to hold unquoted shares involving tax avoidance.

On 16 September 2016 around £104,686 was transferred from SL to James Hay, of which Mr T used £80,000 to purchase 117 shares in D for £682.11 each. The remainder of his fund after fees and charges (around £9,916) was invested in a passive fund with Vanguard. In July and August 2017 Mr T's plans with R and A were transferred into the SIPP, bringing the total value to around £115,782.

The following year Mr T wasn't able to provide an annual share valuation as he'd agreed, so James Hay carried out its own using the "*weighted average price*" methodology, which arrived at a figure of £265.59 per share, far lower than Mr T had paid.
In 2018 James Hay valued Mr T's holding in D at just £31,074, or £265 per share. Mr T was concerned his investment had been diluted by another significant share purchase made around the same time and wanted D to buy his shares back. Mr B refused, saying it was the wrong time to value the company, and anyway the investment was intended to be long-term. Mr T subsequently told Wilcocks there'd been a "*mis-understanding*" and he was happy to maintain his investment in D. In 2019 James Hay's calculation arrived at a share value of only £130.18 but they decided to maintain it at £265.59 as the accounts showed the net asset value had actually increased. And in 2021 the valuation was £140.80 per share using

the “*net asset valuation”* methodology. Mr B dismissed this as a “*paper exercise”,* and maintained the shares were still worth what Mr T had originally paid for them.

Due to Mr T’s concern about the SIPP fees, Wilcocks stopped taking its ongoing advice fee from October 2019. And at Mr T’s request were exploring cheaper alternative SIPP providers, but this proved difficult for non-standard assets. By now Mr T thought his investment had gone *“catastrophically wrong*”.

Mr T complained to Wilcocks in August 2021 that its advice to transfer his pensions hadn’t been in his best interests, and he’d made a financial loss as his investment in D was now only worth £16,476. Mr T said at the time of the advice he’d been “*financially and medically vulnerable, and in dire emotional and financial circumstances”.* He’d been going through a separation and custody dispute, and rather than annual disposable income of £29,000 he actually had significant debts. He’d converted his outstanding £155,000 mortgage to interest-only, taken out a second mortgage to pay the legal costs arising from the custody proceedings, and had around £8,000 of credit card debt. He disputed the assessment of his attitude to risk, and said his lack of investment experience meant he hadn’t understood the risks involved. He was sceptical about the accuracy of the initial share valuation, due to the relationship between the accountant and Mr B. And he admitted accepting a £10,000 loan as an inducement to invest in D.

Wilcocks didn’t uphold the complaint, saying Mr T had “*strategically”* withheld information about his financial and personal circumstances, as he hadn’t wanted anything to stand in the way of investing in D. He’d willingly provided a client testimonial and hadn’t appeared vulnerable or stressed. The adviser said Mr T and Mr B’s shared background in the legal profession had “*sold the vision*” for the investment in D. He’d known nothing of the £10,000 loan incentive, as evidenced from an online meeting recording in which Mr T admitted he’d been told by Mr B to “*keep it quiet”*. Wilcocks said since stopping its on-going adviser fees in 2018 they’d provided Mr T with over 100 hours of unpaid assistance. Mr T had signed written disclaimers confirming he understood the risks and had been confident about the prospects for D. Wilcocks was satisfied its file was compliant, and they weren’t responsible for Mr T’s loss.

In September 2021 Mr T referred his complaint to this service, but it wasn’t upheld by an investigator. So his representatives asked for an ombudsman’s decision, maintaining Mr T wouldn’t have invested in D if Wilcocks had advised him not to. And that his losses only arose as a result of Wilcocks advice, which they described as “*negligent”.*

<u>Provisional findings</u>

I issued a provisional decision on this case in July 2023. I’ve summarised my provisional findings below, which covered the suitability of the advice, Wilcocks’ awareness of Mr T’s financial difficulties and mental state, and the share price valuation.

I didn’t think Wilcocks’ advice to recommend the transfer of Mr T’s personal pensions to a SIPP in order to invest in D had been suitable, even as an *“exception”.* The SL plan formed a substantial part of Mr T’s retirement provision, the investment in unlisted shares was too high risk, it lacked liquidity and diversity, and he didn’t have the necessary capacity for loss. I didn’t think Mr T’s attitude to risk had been properly assessed, and the impact of the additional and higher charges hadn’t been adequately explored.

However, I didn’t think a positive recommendation was a foregone conclusion, as Wilcocks had told Mr B that they could potentially open a SIPP to hold unlisted shares, but only after a discussion and risk profile assessment. But rather than be influenced by Mr T’s enthusiasm for the transaction, the regulator’s rules still required Wilcocks to make a recommendation based on the his financial circumstances, objectives, attitude to risk and capacity for loss. In particular:

Principle 2 – a firm must conduct its business with due skill, care and diligence;
Principle 6 – a firm must pay due care to its customers and treat them fairly;
Principle 7 – a firm must pay due care to the information needs of its clients and communicate with them in a way which is clear, fair and not misleading.

In addition COBS 2.1.1R from the Conduct of Business sourcebook requires firms to act honestly, fairly and professionally in accordance with the best interests of their client.

Mr T's SL plan was a paid-up defined contribution ex-occupational scheme, which came with benefits he'd lose by transferring (discounted annual management charge and protected tax-free cash), and the with-profits element was guaranteed to grow by 4% before charges. The transfer value in January 2016 was £91,336, with mid-rate growth projected to be £122,000 by Mr T's normal retirement date in 2034. This was expected to generate an annual pension of £6,190 (or £4,640 after taking tax-free cash of £30,600), the level of which I thought might have made the prospects for an investment in D seem attractive. But in order to recommend the transfer for the purpose of the investment in D, I said Wilcocks needed to be satisfied it was in Mr T's best interests, that he understood the benefits he'd lose by transferring, the risks of loss if D didn't perform as expected, ensure it was suitable for his attitude to risk and capacity for loss, and he understood the charges and costs involved.

I could see Mr T had been warned about the risks involved in investing in D. The suitability report said "*Please bear in mind, the failure of this business venture could mean that your investment into it loses most, or all, of its value. You need to be completely comfortable with this risk and its potential impact on your future financial security before proceeding*".

As well as the risk warnings relating to the transfer of a pension, Mr T had been required to acknowledge he understood the specific risks relating to investments in unquoted shares which may be difficult to value and sell. So I couldn't say Mr T hadn't been made aware of the high-risk nature of investing in unquoted shares, and the uncertain prospect of his investment outperforming his existing plan with SL.

Although Wilcocks said it had been the subject of several conversations, I was concerned it looked like Mr T's attitude to risk had only been formally assessed after the advice, as the risk tolerance report was based on a questionnaire he'd completed on 7 October 2016. Mr T had assessed himself as 5/7 (a high risk-taker), but I thought Wilcocks should have questioned some of his responses, and whether a score higher than 95% of respondents was realistic, given Mr T's relatively modest finances and lack of investment experience.

Mr T's representatives said Mr T had been in significant debt at the time of the advice, following a relationship breakdown and legal custody dispute, alleging Wilcocks had been aware his finances were "*very precarious*".

I acknowledged that COBS 9.2.1R requires a firm to make a personal recommendation which is suitable for its client, by obtaining the necessary information regarding the client's:

(a) Knowledge and experience (…..)
(b) financial situation.
(c) Investment objectives

But to do that, COBS 9.2.5 allows Wilcocks to rely on the information Mr T provided, stating "*A firm is entitled to rely on the information provided by its clients, unless it is aware that the information is manifestly out of date, inaccurate or incomplete".* As Mr T hadn't disputed it, I thought it was reasonable for Wilcocks to have relied on the information he disclosed at the time.

The fact find contained quite a detailed analysis of Mr T's annual and monthly expenditure, arriving at an annual net disposable income figure of £29,000. Apart from the residential mortgage, no other debts were recorded. The suitability report stated Mr T had "*no financial dependents, a sizeable surplus income over expenditure and comfortably manageable borrowings on [his] mortgage*", the only discrepancy being that the fact find correctly stated Mr T had one financial dependent. And Mr T had assessed his own net worth (personal assets less what he owed) in the range of £100,000 to £199,000, suggesting he'd under-stated, or excluded the second mortgage and credit card debts he later disclosed. Unless Mr T had said so, I didn't think Wilcocks could've known the information was inaccurate or incomplete.

I could see the advice fees and charges had been set out in the suitability report, but I wasn't sure Mr T would've fully understood the level of investment growth necessary to meet the ongoing advice fees, SIPP fees, and James Hay's "*specialist investment*" charge for holding non-standard assets in the SIPP. So even without awareness of Mr T's financial difficulties, I didn't think Wilcocks should've recommended Mr T transfer his pensions to a SIPP for the purpose of investing in D.

Mr T says if he'd been advised not to transfer his pensions to invest in D, he wouldn't have gone ahead. But I thought on balance, he probably would have. I was satisfied the evidence showed Mr T had already decided to use his pension to invest in D before he was introduced to Wilcocks. It was framed as such in the suitability report, which Mr T didn't challenge at the time. And because in December 2015 when Mr B initially approached Wilcocks, he already knew details of Mr T's pension plans which I said could only have come from Mr T himself.

This was supported by an email from Mr B to Mr T which read "*Once again, I would repeat, I did not invite you to become a shareholder, you showed a keen interest and asked if you could, and I accepted your offer*".

I'd also seen Mr T's email to Wilcocks on 25 July 2016 which confirmed "*I am keen to invest in [D] as I believe the business will grow and increase in value substantially over the next 3-5 years. I also think I can help the business through connections within the legal sector" [……] I believe I can bring a new technical element to [D] to assist with the growth and scalability of the business"*. Mr T's email concluded "*I believe that the return on my investment will be greater than it would if my funds were to remain with Standard Life*".

So I thought at the time of the advice Mr T was confident in D's prospects for success, he hadn't wanted to miss out on what he considered to be a lucrative investment opportunity, and had envisaged some element of collaboration with the company.

I was satisfied Mr T had been made aware of the benefits he'd lose by transferring his pension, the additional specific risks related to investments in a single unlisted share, and the loss he could incur if D was to fail. The suitability report warned there's no guarantee the investment in D would perform better than his SL pension, direct shareholdings are difficult to value and sell, and that Mr T could lose some or all of his money. He'd signed to confirm he'd read and understood the risk warnings from Wilcocks and the SIPP provider James Hay, yet these hadn't deterred him.

SL also had its own due diligence process for transfer requests, based on regulatory guidance introduced in 2013 to help prevent pension "liberation" (whereby people receive unauthorised payments from a pension, for instance before the age of 55), and pension scams more generally. Known as the "*scorpion"* guidance, it warned of some factors which may be indicative of a scam or liberation scheme, such as being cold called, put under time pressure, the investment being a one-off opportunity, unrealistic investment returns and financial inducements. Wilcocks provided a copy of SL's transfer pack, which included its pension scam leaflet. This contained the following warning: "*Scammers …….. will try to lure you with promises of one-off investments, pension loans or **upfront cash***" (my bold emphasis). And *"a proposal to put your money in a single investment*" was another potential indicator to look for.

D appears to be a genuine company which continues to trade, there's no evidence to suggest it's a scam or liberation scheme. But I thought the indicators in the scam leaflet, such as the purchase of a single investment, and the cash incentive, which Mr T had been told to conceal from Wilcocks, ought to have resonated with him. The incentive payment couldn't have rung alarm bells with Wilcocks, as I was satisfied they'd been unaware of it, until the online meeting in March 2021 in which Mr T disclosed it.

It didn't appear the higher charges of a SIPP had deterred Mr T either. I said this because in 2017 he queried the proportionate value of Wilcock's fees to transfer the two smaller plans from R and A. He was told by Wilcocks that the analysis report incurred a fixed fee, but when given the option to transfer those plans or not, he still decided to go ahead. And he subsequently described concerns he raised in 2018 about the share price valuation and impact on his investment as a "*misunderstanding*".

As the transfer advice process took a number of weeks, I thought Mr T had time to reflect on whether to proceed, given the risk warnings he'd read and acknowledged from Wilcocks, James Hay and SL. But these hadn't put him off, indeed I'd seen a chaser email Mr T sent to James Hay on 15 August 2016, in which he urged the process to complete as quickly as possible.

Mr T claimed Wilcocks took advantage of his "*dire"* financial situation, which he said the adviser had been fully aware of. As the only debt noted in the fact find was his residential mortgage, but without saying it was in arrears or had been changed to interest-only, and the second mortgage or the credit card debts were not recorded, there was no evidence to show Wilcocks had known.

Mr T also said a £10,000 incentive wasn't enough to risk his £80,000 pension pot. But I thought if he'd been in significant debt at the time, an immediate payment he wouldn't otherwise have access to would have been a powerful incentive. It's reasonable to expect his liabilities arising from the ongoing court proceedings and the interest on his borrowings would continue to increase. And being 47, Mr T couldn't have legitimately accessed his pension for another eight years. So it wasn't clear how else he'd have addressed his immediate financial pressure.

Mr T also referred to the stress the situation has caused him. But the fact find recorded his health as "*good*", although he was an occasional smoker. The medical evidence Mr T subsequently provided showed he'd been diagnosed with anxiety, following a "*gateway assessment*" in 2019, suggesting he sought medical help several years after the advice. And the photograph Mr T posed for along with Mr B and Mr W accompanying his customer testimonial appeared to show him smiling and relaxed.

I didn't think the text message exchanges from May 2017 supported Mr T's claim that Wilcocks had been aware of his difficulties at the time. A message from Mr T read "*in court tomorrow for a final contact hearing*" to which Mr W had replied "*good luck tomorrow, fingers crossed for you*". I thought it plausible Wilcocks had been aware of Mr T's custody dispute, but without knowing the financial implications, and in any case the exchange took place almost a year after the advice, so wasn't evidence of awareness at the relevant time.

And in the recorded online meeting on 25 March 2021, Mr T directed his anger at being "*misled*" by Mr B about the prospects for D, and his belief the share purchase price was based on a "*fictitious*" valuation. But I didn't think he appeared distressed or mentally unwell. I recognised it's not always possible to tell how someone is feeling, but I couldn't say Wilcocks should have made allowances for Mr T's mental state at the time of the advice. I also thought it likely if Wilcocks had been aware of Mr T's financial difficulties or considered him to have been in a highly emotional state, they may have declined to give advice, or at least suggested delaying.

Mr T claims his loss arose in part due to the unrealistic initial valuation of D's shares. As an unlisted company, D's shares were not traded on the open market. So to arrive at the purchase price, the valuation was carried out by a firm of accountants with the relevant expertise, which I thought it was reasonable for Wilcocks to have relied on. Mr B had provided a director's statement to James Hay which said that D wished to attract investors with an "*understanding of the sector*", and the investment would be used to "*help underpin [D's] growth plans*". I couldn't say the original valuation was "*fictitious*", or that Wilcocks should have challenged the methodology used.

When opening the SIPP, Mr T had agreed to provide James Hay with an annual share valuation, but hadn't actually been able to. So they carried out their own, using a different methodology which produced a lower valuation. I acknowledged Mr T's concerns about the inconsistency, but as Wilcocks hadn't carried out the valuations I couldn't hold them responsible for that.

And finally Mr T claimed Mr W and Mr B conspired together to encourage him to invest in D. I said the individuals clearly knew each other, their firms' offices were in the same building, they attended the same corporate events, and put business each other's way. But I didn't think working together on business dealings was unusual or suspicious, and didn't mean they had conspired together to encourage Mr T to invest in D.

I understood Mr T's regret at transferring his pension to invest in D, which hasn't yet produced the anticipated return for shareholders, or been bought out by a larger company. The investment was based on a horizon of ten years (from 2016), and Mr T had been warned shares in an unlisted company would always be difficult to value and trade. He went ahead with the transfer despite several risk warnings and being aware of increased fees and charges. I thought that although Wilcocks had recommended the transfer which I didn't think they should have, it's most likely Mr T would've gone ahead anyway due to his confidence in D's prospects, believing his investment would generate retirement income higher than he could expect from SL. And he accepted the £10,000 incentive to alleviate his financial difficulties which he'd concealed from the adviser.

I wasn't persuaded Mr T would've simply given up the idea of using his pension to invest in D if Wilcocks had advised against it.

So my provisional decision was that despite Wilcocks' unsuitable advice, I couldn't fairly uphold the complaint.

<u>Responses to the provisional decision</u>

Wilcocks didn't respond.

Mr T through his representatives responded in detail, making the following points (in summary):

- It is "*astonishing and manifestly unfair*" that the ombudsman found Wilcocks to be "*negligent",* yet despite no evidence other than Mr T's financial vulnerability says he'd have invested in D anyway.
- Wilcocks owed Mr T a duty of care, including protecting him from himself; and should not have encouraged him in the way they did.
- Mr T was clearly desperate, as no-one gambles away £80,000 for a small loan, although his failure to disclose the £10,000 incentive was "*a silly thing to do*".
- It is moot whether Wilcocks knew about the £10,000 incentive Mr T accepted, or his financial and personal difficulties at the time.
- It is "*completely unrealistic to the point of being nearly impossible*" that Wilcocks did not hear about Mr T's financial difficulties through their social contact.
- Wilcocks didn't know its client, so should not have provided financial advice.
- Mr T was vulnerable person "*caught in a pincer movement*" between Wilcocks and D.
- It was unfair to say an oral hearing wasn't necessary, as what case would be more deserving?
- The ombudsman has ignored the findings in a separate decision (which upheld the complaint), which amounts to a "*misapplication of the law".*
- The unpaid time Wilcocks spent assisting Mr T was to remedy the problem they caused.
- The complaint should be upheld, given the impact on Mr T of his divorce, financial struggles, mental illness and being taken advantage of by D and Wilcocks.

So I'm now in a position to issue my final decision.

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.

I'd like to reassure Mr T I have carefully considered the points he has made, and I acknowledge this is a complex and finely balanced case. I sympathise with the difficult situation Mr T finds himself in, and the stress he continues to experience. But my role is to decide if his financial loss is wholly due to Wilcocks' unsuitable advice, and for a number of reasons I don't think it was.

But I'll first address the other points made by Mr T's representatives.

Hearing request

I've already explained why I don't think an oral hearing is necessary to fairly decide this complaint. DISP 3.5.5 of the FCA rule book says "*If the Ombudsman considers that the complaint can be fairly determined without convening a hearing, he will determine the complaint. If not he will invite the parties to take part in a hearing*".

Which means the ombudsman, not the parties in the case, decides whether it's necessary to hold a hearing. Mr T's complaint has been with this service for over two years, so I'm satisfied he's had ample opportunity to make his views heard, directly, and through his representatives. He's also provided a written statement, which I've considered along with all the evidence on the file. It seems likely if Mr T had pertinent evidence he'd have already disclosed it. So I'm not persuaded he could provide any further oral evidence we don't already have. Even if a hearing was held, we don't have the same power as a court to compel people to tell the truth by giving information on oath failing which there is a sanction. Nor can we cross-examine witnesses. Mr T has already admitted withholding information, and anything he says now would inevitably be his recollections at a seven-year distance, with the benefit of hindsight. Whereas my consideration has focussed on the evidence from the time of the advice. Having considered the matter carefully, I'm satisfied I have enough information to determine the complaint, without the need to delay matters further to convene a hearing.

Comparison with another case

Mr T's representatives say it's unreasonable that I haven't followed the reasoning in another decision, which upheld the complaint. Each case is decided on its own individual facts and circumstances, which means cases which appear similar can also have material differences which are key to the outcome. Our decisions do not set precedent, so failing to follow another ombudsman's findings on a separate case isn't a misapplication of the law.

But for completeness I have read the decision referred to, but the facts are different in a number of ways:

- The advice was to transfer a final salary (defined benefit) pension scheme with an enhanced transfer value
- it involved an unregulated introducer
- the investment was into unregulated, speculative overseas investments which the consumer had no experience of, and was supposedly to "balance" an existing portfolio
- the consumer had a far lower attitude to risk
- they were not in financial difficulties, so the incentive was less of a driver
- another financial adviser had previously been unable to complete the transfer
- the consumer had been advised not to transfer, but the respondent firm had facilitated it, on an "insistent client" basis
- the ombudsman wasn't satisfied the insistent client letter was in the consumer's own words, as the investments didn't "balance" their portfolio

Although the complaint was about the transfer of a pension into unsuitable investments, the cases are so dissimilar I'm satisfied there's no reason why the findings in Mr T's complaint should follow that one.

So I'll now explain why I still can't fairly uphold Mr T's complaint. I haven't addressed every single point made by Mr T's representatives, I've focussed on what I think are the most relevant points in this case. I understand why Mr T thinks Wilcocks shouldn't avoid the consequences of its unsuitable advice. I don't dispute they had a professional obligation to follow the regulatory guidance set out above, and act in Mr T's best interests. But to be clear, I didn't suggest Wilcocks' advice was negligent, I said it was unsuitable.

Mr T's SL pension came with some benefits that would be lost by transferring. Although as a defined contribution plan, it was already subject to some investment risk, and the pension it was expected to provide at retirement wasn't guaranteed. Mr T was warned about the risks of transferring, the additional risks involved with holding unlisted shares, and the consequences if D didn't perform as hoped. Indeed in the recorded meeting with Wilcocks on 25 May 2021 Mr T agreed with the adviser he'd been prepared to take "*excessive risks"* based on what Mr B had told him about D's prospects. But it doesn't look like Wilcocks properly assessed the likelihood of the investment in D producing a better pension at retirement than Mr T's existing plans. Investing a significant proportion of his pension provision in one unlisted share was too risky, and he didn't have the necessary capacity for loss. Even if D's growth prospects proved to be well founded, being able to access the funds when Mr T wished to take his pension benefits was uncertain, as unlisted shares would always be difficult to value and trade. So however persuasive Mr T had been about D's prospects, and his faith that an investment in D would outperform his SL plan, Wilcocks should have said it didn't recommend the transfer.

But if they'd recommended against the transfer and Mr T still wanted to go ahead, there was nothing stopping Wilcocks treating Mr T as an "*insistent client*" and facilitating the transfer for him. The regulations in place prior to 2018 enabled Wilcocks to do this, as long as they'd provided Mr T with a personal recommendation which was suitable for him, warned him about the risks of his chosen course of action, and communicated in such a way that he clearly understood the transaction was against their advice. And I think if that had been offered to Mr T at the time it's more likely than not he'd have transferred anyway. As he was determined to invest in D, and wasn't deterred by the risk warnings he'd been provided with in the suitability report, and by James Hay and SL.

Mr T says that "but for" Wilcocks' advice, he'd still have the security of his pensions with SL, R and A, and it makes no sense to risk £80,000 in his pension for only £10,000. But if Mr T had retained his pensions, he'd also still be faced with his more pressing financial obligations, which without the £10,000 incentive payment it's hard to see how else he'd have addressed. With that in mind, I'm not persuaded Mr T's priority at the time would've been retaining pensions he couldn't legitimately access for at least eight years. Particularly as his faith in D's prospects meant he believed this to be an investment rather than a "gamble". Which together with the offer of an immediate cash payment he wouldn't otherwise have, would've been powerful motivation to transfer anyway, even if Wilcocks had advised against it.

Prior to being introduced to Wilcocks, Mr T indicated his interest in investing in D by providing Mr B with details of his SL plan to show he had funds to invest. He believed the investment in D would outperform the benefits he could expect from his SL plan, 18 years in the future. Mr T and Mr B were friends at the time, with a shared background in the legal profession, and Mr T believed there'd be opportunities for collaboration to grow the business further.

I think Mr T deliberately presented a positive picture of his finances, in order to minimise the obstacles to investing in D. It's possible Mr T's social circle were aware of the custody dispute, but I think it's unlikely the same would apply to the extent of his financial difficulties, as people tend to keep such matters private. If Wilcocks had known or suspected Mr T was in financial difficulties they'd need to have considered that as part of the advice process, and presumably correct the fact-find. But if Mr T believed his personal business to be common knowledge, there'd have been little point in him concealing the true picture from the adviser. Mr T has admitted keeping quiet about receiving the incentive payment. So it seems plausible he'd also have been prepared to withhold information about his debts to achieve the outcome he wanted. Understandably Mr T's financial situation has affected his mental health. It's not clear when his health started to deteriorate, but the evidence shows he wasn't diagnosed until 2019. I can't know how Mr T presented himself when dealing with Wilcocks, but based on the recorded information they didn't consider him to be vulnerable. And I've seen nothing which makes me think they should have done so, at the time of the advice.

While I've no doubt he regrets the investment in D now, I'm not convinced at the time Mr T was genuinely interested in receiving financial advice about his pension provision. I think he simply needed Wilcocks' assistance to achieve his objective of investing in D. Had Mr T wanted proper advice and been openminded about what to do, I think he'd have fully disclosed his circumstances, and paid close attention to the risk warnings from Wilcocks, James Hay and SL. Instead, there's evidence of Mr T pushing for the transfer to go through quickly, suggesting he had no second thoughts or doubts. Given Mr T wasn't deterred by all the risk warnings he signed to acknowledge he'd understood, I'm not persuaded he would have been put off transferring to invest in D simply if Wilcocks had advised against it.

While I have considered everything carefully, nothing provided in response to the provisional decision has changed my view around the facts of this complaint. So I still think Wilcocks gave Mr T unsuitable advice, but it's more likely than not he'd have wanted to transfer to invest in D, even if Wilcocks had advised against it. Wilcocks could have facilitated the transfer by treating Mr T as an insistent client, meaning he'd be in the same position as he is now. So I'm satisfied Wilcocks' unsuitable advice didn't cause the financial loss to Mr T's pension.

My final decision

While I realise it will be disappointing for Mr T, I don't uphold this complaint, and don't require Wilcocks & Associates Limited (trading as Wilcocks and Wilcocks) to take any action to put things right.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 31 January 2024.

Sarah Milne
Ombudsman