DRN-4138875

The complaint

Mrs S's representative has complained, on her behalf, about the advice she received from TMS Financial Solutions Limited to transfer defined pension benefits from her occupational pension scheme (OPS) to a self invested personal pension (SIPP) – in order to invest in commercial property.

What happened

The investigator who considered this matter set out the background to the complaint in his assessment of the case. I'm broadly setting out the same background below, with some amendments for the purposes of this decision.

Mrs S had deferred pension benefits in a defined benefit occupational pension scheme from a previous employment. She'd accrued eight years' membership in that scheme, from 1989 to 1997.

In December 2008, Mrs S set up a limited company and, in July 2009, she requested a transfer value quotation from her DB scheme provider. This was provided, with a value of around £35,000.

Following this, Mrs S sought the advice of a financial adviser to discuss her retirement planning needs. This is what led her to meeting with an adviser from TMS in October 2009.

TMS completed a fact-finding exercise to establish Mrs S's circumstances and financial objectives. An assessment of Mrs S's attitude towards risk determined her risk appetite as being "medium".

The investigator set out his understanding of Mrs S's circumstances at the time as follows:

- She was 46 years old, married, in good health and had no financial dependants.
- She was working part-time for a building society, whilst building her own business as a beauty therapist.
- She owned a shop, which was at the time being rented out.
- She also had a small personal pension plan with Hargreaves Lansdown.

TMS issued two suitability reports. The first was produced on 26 January 2010. TMS said that it didn't favour the proposed transfer, but as it considered that Mrs S was determined to undertake the transfer, it recommended a two-part transaction. TMS said Mrs S should transfer her funds to a pension account with Cofunds. Mrs S was keen to buy a residential property, and so when she was ready to do so, she would transfer her funds to a SIPP with Suffolk Life, and the SIPP would then buy her commercial property – thereby freeing up funds to invest in the residential property.

A revised suitability report was issued on 16 April 2010 as Mrs S was keen to complete the purchase of her property sooner rather than later. In light of this, TMS recommended Mrs S transfer her funds directly to Suffolk Life, so she could buy her property.

The suitability reports noted Mrs S had the following objectives, which formed the basis of its reason for recommending the transfer:

1. Using her pension fund to purchase her own commercial property.

2. Control access to the content of her pension before and after her normal retirement date and be flexible with her retirement dates.

3. Transfer the funds from her OPS in order to secure these under her own scheme.

4. Keep her pension funds separate from her partner's - and he would use his to purchase property under his own SIPP.

Mrs S accepted TMS' revised recommendation and the transfer took place shortly afterwards. The money was to remain in the deposit account until specific investment instructions were provided. The purchase of the commercial property by the SIPP then completed on 23 February 2011.

TMS charged £150 per hour for financial advice, and £50 per hour for administration work. However, the charge for the work involved with the transfer was capped at £500.

On 4 August 2022, Mrs S's representative complained to TMS on her behalf. It raised concerns that the advice was unsuitable for the following reasons:

- She had a low attitude towards risk and low capacity for loss.

- She wasn't an experienced or informed investor.

- She wasn't well placed to understand or take the risks associated with giving up valuable guaranteed benefits.

- She wasn't informed of the implications in making a high-risk investment that didn't carry protection from the FCA.

Succession Wealth, which had recently acquired TMS, responded to Mrs S's complaint on 10 February 2023, but didn't uphold it. To summarise, it said that it was clear that Mrs S had been considering transferring away from her OPS long before she engaged with TMS, and that she was determined to transfer and had clear reasons for doing so.

It further said that she was fully aware of the risks and consequences of completing the transfer. It added that it had been clear to the TMS adviser that transferring wouldn't be advantageous, but given Mrs S's objectives and determination to achieve those objectives, he had made a recommendation in Mrs S's best interests.

Dissatisfied with this response, Mrs S referred her complaint to our service through her representative.

On 3 March 2023, the liquidators for TMS, Interpath LLP, responded to Mrs S's complaint. It reiterated what Succession Wealth had said. On 24 March 2023, Interpath LLP confirmed that it would only move to closure once all active claims and creditors were settled, meaning this complaint could be considered.

Our investigator assessed the complaint, but didn't think it should be upheld. He said the following in summary:

- Overall, he wasn't persuaded that the advice to transfer was suitable, but he considered that, had TMS advised against the transfer, Mrs S would have sought assistance with the transfer elsewhere.

- TMS hadn't been able to evidence the fact finding process which would have preceded the suitability reports, but the defined benefits accrued in the OPS would have offered a guaranteed income for life and would have formed a valuable part of Mrs S's overall pension provision.

- Mrs S's representative had said that she had a low capacity for loss, which meant that the guaranteed benefits of the OPS would have been very important to her. They would have been accrued then paid with no risk to her.

- The regulator had said that the starting point for the consideration of such a transfer should be an assumption that the transfer would be unsuitable, unless it could be clearly demonstrated that it was in a client's best interests.

- In terms of financial viability, the critical yield required to match the OPS benefits at retirement was quoted as being 9.3% pa, and the "discount rate", or in other words the growth rate which was deemed achievable at the time for the 12 years Mrs S had left to retirement according to the loss assessment methodology published by this service, was 6.2% pa.

- The regulator's growth assumptions at the time were a higher rate projection of 9% pa, a mid rate projection of 7% pa and a lower rate projection of 5% pa.

- Having considered these factors, along with composition of assets in the discount rate, Mrs S's attitude to risk, and the term to retirement, the investigator thought that she was likely to receive benefits of lower overall value than from the OPS at retirement, as a result of transferring and buying the commercial property through her SIPP.

- From a financial perspective, the transfer didn't therefore appear to be in Mrs S's best interests.

- But the suitability report recorded that TMs was only advising Mrs S as she seemed determined to transfer. And so the investigator considered other reasons for transferring and their suitability.

- Mrs S's top priority was to buy her shop from herself, and the declaration signed by Mrs S on 28 January 2010 had eight detailed bullet points which set out the risks of transferring and that she was aware of the loss of the guaranteed benefits which would result from the transfer – but that she nevertheless wished to go ahead.

- Mrs S had also requested the transfer value quotation before any involvement from TMS – issued on 28 July 2009. And Mrs S had also already set up a property management company on 19 December 2008.

- Mrs S's partner had over 40 years' experience in the commercial property sector and, at the time, was a department lead for a property consultancy business. It was reasonable to conclude that he would have been aware of the risks involved in such a transaction.

- Although Mrs S had said that family members would have been willing to lend her money to buy the intended property, and so there was no need for her to transfer her OPS benefits, there was the following email from Mrs S's partner to TMS on 27 February 2010:

  "…we now need to move very quickly on the above as we wish to buy our shop in [location] in [Mrs S's] SIPP to release £70K odd to purchase a residential property in [location] at £164,950 with the SIPP drawdown of £42K with a loan of £64K from [Mrs S's] Dad. We need the [OPS] pension money in her property SIPP ready to do this asap…"

  And a follow up email on 1 March 2010 from Mrs S's partner to TMS as follows:

  "We need to speed up on this. Our lawyer…wants the name of [Mrs S's] SIPP and its acc number asap…Please can you confirm it is all done and completed as a property SIPP. We have had our offer accepted on the flat in [location] as long as we complete by 31 March 2010 as it is the only flat left…"

- This, the investigator said, both demonstrated the urgency of the situation and that, whilst Mrs S could rely upon her family for some of the required amount, this wouldn't have been for the whole amount.

- The investigator considered that there were clear indications that Mrs S had decided to proceed with the transfer for the commercial property purchase – which completed on 23 February 2011.

- He agreed that the objective wouldn't have justified the transfer from a suitability perspective. He also took into account the comment from Mrs S's representative that she had equity in another property of around £308,000 which could have been used to buy the second property instead of transferring her OPS benefits.

- But whilst he appreciated that this is something which could have been explored at the time, it could only look at the advice TMS had given, and what would then have happened if it had advised against the transfer.

- There was no regulatory advice or guidance at the time relating to "insistent clients", but the COBS rules within the regulator's handbook nevertheless required TMS to *"act honestly, fairly and professionally in accordance with the best interest of its client".* COBS also required TMS to provide information to Mrs S that was clear, fair and not misleading.

- Therefore, if TMS had advised against transferring the OPS benefits, Mrs S needed to have understood the consequences of acting contrary to that recommendation.

- The investigator considered that the declaration signed by Mrs S on 28 January 2010 was confirmation that she was aware that transferring the benefits carried risks. And he could see no reason why Mrs S wouldn't have signed the same declaration had TMS advised against transferring, especially given the communication with Mrs S on 16 February 2010 in which TMS said that its financial adviser was against transferring the OPS benefits, and that the transfer value analysis reports were in support of this position.

- Overall, based upon Mrs S's own actions, her partner's position and experience in the commercial property business, the awareness of the risks involved, and his significant involvement in the transfer, the investigator was satisfied that, even if TMS had advised against transferring, Mrs S would likely have still proceeded on what was now known as the insistent client basis. And had that not been possible with TMS, then he thought that she would have processed the transfer through another financial adviser to facilitate the commercial property purchase.

Mrs S's representative disagreed, however, saying the following in summary:

- Mrs S wasn't working for a building society at the time – she was solely working as a beauty therapist. Further, the limited company which Mrs S had set up wasn't a property company – her husband had intended to set up a business which didn't end up moving forward.

- Further, whilst Mrs S had originally planned to buy a shop, this didn't go ahead. She also didn't borrow any money from her father, but had confirmed that he was willing to lend her the money if required. And Mrs S had savings and equity in her property.

- The investigator had said that he could only consider the advice given by TMS, but this was the vital aspect of Mrs S's complaint. It should have explored other ways of meeting Mrs S's objective instead of focussing on the pension transfer. It wasn't necessary, as she had other ways of raising cash.

- The investigator had himself noted that the transfer wasn't justified by the stated objective as it exposed her pension provision to higher risk than she was willing to take. Mrs S lost out on valuable guaranteed OPS benefits and the transfer didn't match her attitude to risk. It therefore wasn't suitable.

- With regard to the investigator's comments about Mrs S's husband, he was a property surveyor and didn't have experience with SIPPs, pensions, defined benefits schemes, or investments within a SIPP. He didn't know how a SIPP worked or the risks associated with them. He also didn't understand the loss which Mrs S would face as a result of the transfer.

- It was in any case Mrs S's understanding of the transfer which should have been at the heart of the advice. And Mrs S had confirmed that, had she been made aware of the risks involved with the transfer, she wouldn't have proceeded with it.

- Mrs S trusted TMS to provide her with advice relating to her pension and retirement planning, regardless of her own intentions or plans prior to receiving the advice. It had a duty to ensure that Mrs S was fully informed of the implications of transferring her OPS benefits.

The investigator considered the points raised and responded as follows:

- The record of Mrs S working for a building society derived of the initial suitability report.

- With regard to the company set up by Mrs S, this had been done in her sole name and her husband wasn't registered as a director or a company officer. If it wasn't a property management company, the investigator enquired as to its purpose.

- The investigator further said that the documentation issued by the SIPP provider evidenced that the commercial property purchase had completed – and so he was unsure as to why Mrs S's representative had asserted that it hadn't.

- Although the representative had said that TMS hadn't explored other options such as using Mrs S's savings or remortgaging, the investigator noted that Mrs S had requested the transfer value quotation before engaging TMS's services, and it was unlikely that she would have done so without first exploring other alternatives.

- The investigator maintained his view that there were strong indications that, although the transfer may have been unsuitable, Mrs S would in any case have proceeded. And that, although Mrs S's husband may not have been experienced in pension matters, his knowledge and experience with commercial property would likely have played an important role in Mrs S's decision making.

The investigator concluded that, although with the benefit of hindsight Mrs S may have regretted the decision to transfer her OPS benefits, his view on the matter remained the same.

But he said that, as agreement hadn't been reached on the matter, he would refer it to an ombudsman for review.

Mrs S's representative submitted further comments as follows:

- Mrs S had confirmed that the company was set up as her husband was intending to set up a business to work on a self employed basis, but this didn't ultimately happen.

- Mrs S had also confirmed that the intended property purchase didn't proceed, and that it would request evidence of this and send it to the investigator.

- It maintained that, although Mrs S's husband would have had input on the matter, Mrs S had approached TMS for sound advice and the recommendation to transfer her OPS benefits hadn't been suitable.

The investigator and the representative then clarified that the property which hadn't been purchased was the residential property – not the initial commercial property which had been bought by the SIPP.

As notified by the investigator, the complaint has been referred to me for review.

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.

Addressing firstly the discrepancies noted by Mrs S's representative, I acknowledge the comment relating to Mrs S not being employed by the building society, but this was what was recorded at the time, and if this wasn't the case, then I think it might reasonably be expected that Mrs S would have corrected this. And I think the comment about Mrs S's limited company not being a property company sheds little light on its actual purpose – for example, if it was Mrs S's husband who intended on setting up a business, no explanation has been offered as to why he didn't set up a limited company for himself.

I take the point about Mrs S's husband not having experience of pension matters, being a property surveyor, but I think the comment about him having no experience of investment within SIPPs, or an understanding of the risks involved with a SIPP, is somewhat undermined by the actual investment which was to be held within this SIPP – commercial property. I think it's fair to say that he was likely to have had some experience with that type of investment.

But Mrs S's representative is right in saying that TMS still had a duty to provide suitable advice. And so, as with the investigator, I've firstly considered the recommendation to transfer and whether this could reasonably be said to constitute suitable advice.

From a financial viability perspective, I think there's little disagreement relating to this between the investigator and Mrs S's representative. And I also agree – I think the critical yield simply to match the ceding scheme benefits was higher than the likely growth rate which would have been achieved according to Mrs S's medium risk rating (and was in fact higher than the top rate of projected growth assumed achievable by the regulator at the time), and so I think it's unlikely that the benefits in terms of income would have been matched, let alone improved upon, by the transfer.

And other than the commercial property purchase, there appear to be no other requirements or objectives which needed to be met from the transfer, such as ill health and a requirement to format death benefits in a different way to that offered by the scheme. I note that flexibility was recorded as an objective, but there was no accompanying narrative as to why such flexibility would have been so important to Mrs S as to justify the transfer and the loss of guaranteed benefits.

And so, from a straightforward suitability perspective – and again, as I think is agreed by both the investigator and Mrs S's representative, the transfer wasn't suitable. And I agree that TMS should have advised against it.

But as also commented upon by the investigator, there are additional considerations here, not least of which is how Mrs S was likely to have acted had TMS specifically advised against it and /or declined to transact the business – or, as I address further below, explored other options for achieving her objective.

Mrs S's understanding of the risks involved

In my consideration of this aspect, I've firstly noted the letter of 28 January 2010, which Mrs S signed to confirm her understanding of the risks of transferring her OPS benefits. The letter was seemingly prepared by TMS rather than being in Mrs S's own words or handwriting, but as also noted by the investigator, the transfer predated the regulator's guidance on such documents being conveyed in the client's own words. I'm also satisfied that the letter explained the risks and possible losses which might be associated with the transfer in clear and understandable terms.

I think it would be useful to set out the content of that letter:

"This letter it to confirm that having read the above suitability report I am aware of the possible losses of the benefit incurred. These include the following:

- *if you do not spread your retirement savings over a range of pension schemes you run the risk that if the scheme fails to mature in the way you expect, you have no separate options on which to fall back*
- *leaving a defined benefit scheme, unless you are transferring to another defined benefit scheme, means giving up a guaranteed amount of pension on retirement.*
- *joining a money purchase scheme means risking your retirement income on the*

inconsistencies of the economy, and hoping for favourable conditions when you buy your annuity

- *you may have to pay fees when you decide to leave your existing scheme, and pay higher administration fees with your new scheme*
- *you will be giving up any guaranteed benefits that your old scheme offered you on retirement*
- *you may be offered a relatively small transferable pension fund, and run the risk that it will not grow sufficiently to provide you with the retirement income you want*
- *your invested pension fund may suffer losses if there is a stock-market crash and your investment portfolio was a high risk one*
- *you may not be able to find a new scheme that will offer you the same benefits that your old scheme could, and lose retirement income*

I have considered all of the above points and confirm that I still want to transfer the benefits from my [name of OPS] scheme to a SIPP."

This was therefore a detailed list of the risks of transferring, several of which alluded specifically to the loss of guaranteed benefits within the OPS. And this wasn't simply an explanation of risks which might otherwise appear in the middle or at the end of a suitability report, and so might arguably be "lost" in the wider content of such a report. This was a specific and dedicated separate letter intended to unambiguously demonstrate that Mrs S was, or ought reasonably to have been, aware of the risks involved in the transfer.

Other means of achieving the objective

However, notwithstanding Mrs S's understanding of the risks, when she sought advice from TMS, it did still need to provide suitable advice - and explore other potential options for Mrs S to be able to achieve her objective.

That objective was clearly very firm, evidenced by the comments in the suitability reports and the emails sent to TMS by Mrs S's husband. I've noted the comment that the purchase of the residential property didn't ultimately proceed, but I think there can be little doubt that this was nevertheless the firm intention at the time, and there was also a distinct sense of urgency around it.

And so I also need to consider other options which might have been open to Mrs S to achieve that objective.

It's difficult to know what was known about Mrs S's other assets or savings at the time as the fact finding is absent, but I think it's unlikely that Mrs S had sufficient savings if she needed to borrow from her father for much of the cost of the residential property purchase. And although Mrs S may have had a lot of equity in another property, she would of course have needed to borrow more money against that property, rather than diverting resources from another available asset.

I do nevertheless agree with Mrs S's representative that this is something which ought to have been explored.

Would advice to not transfer or a recommendation to remortgage have made a difference to the outcome?

But I then need to think about Mrs S's likely decision even if the possibility of remortgaging had been set out as an option. This isn't straightforward to determine, and it's clearly impossible to know with certainty what Mrs S would have done. But there are several factors which I think are indicative of Mrs S, on balance, more likely than not still choosing to transfer her OPS benefits.

Firstly, Mrs S and her husband, who was employed in the property sector, would have been well aware that she had significant equity in the other property, but Mrs S had, before the involvement of TMS, requested a transfer value quote from her OPS administrators. I think this suggests an awareness of the options which preceded any advice given by TMS, and that Mrs S was, at the very least, interested in the option of using her OPS benefits to buy her commercial property over and above that of mortgaging and taking on more debt.

And so I don't think the available evidence supports the position that, had TMS recommended that Mrs S investigate the remortgaging option, she would have done so.

I've then thought about Mrs S's likely actions had TMS simply recommended that she not transfer. I'd note in that regard that there's persuasive evidence that the adviser informed Mrs S that he wasn't in favour of the transfer. The following is an extract from the letter sent to Mrs S by TMS on 16 February 2010, in which it enclosed a number of documents, including the transfer value analysis and illustrations of future potential pension benefits:

"As you are aware, [adviser] advised against transferring this pension, and enclosures 1 and 2 are in support of this position.

Enclosure 4 is provided in view of your decision to transfer…"

I think this supports the position that a conversation around the merits of transferring OPS defined benefits took place, even if the detail of this wasn't set out in the suitability report.

So I think it's fair to say that, although not encompassed within the body of the suitability report itself, there was enough detail about both the risk of transferring – as evidenced by the letter of 28 January 2010 - and the adviser's noted aversion to it, for Mrs S to have been in little doubt as to the ramifications of transferring.

Further, the second suitability report, which followed Mrs S's confirmation that she wished to transfer straight into the SIPP to expedite the commercial property purchase, said the following:

"You are still determined to switch away from [OPS name] and I have modified my recommendation based on your immediate property choices (post my report of 26th January). All the same caveats apply regarding the move away from the Final Salary arrangement."

I think it's arguable that the determination referred to above related more to the objective of investing in further property – I don't think transferring away from the OPS was an objective in itself, but more a means to an end.

But when weighing up what Mrs S would, or should, have known about the consequences of transferring her OPS benefits, along with her determination to achieve her objective and the absence of a realistic or palatable alternative to do so, my view is that she would more likely than not have still opted to transfer her OPS benefits to achieve that objective.

I therefore think that it's more likely than not that, even if the adviser's aversion to the transfer had specifically been included in the suitability report itself, or that the actual recommendation had been to not transfer, Mrs S would still have proceeded with the transfer, either through TMS on an insistent client basis, or through another firm.

<u>*Summary*</u>

As I've said above, my view is aligned to that of the investigator and Mrs S's representative in that I don't think the transfer was a suitable course of action, given the valuable guaranteed benefits which Mrs S would be relinquishing.

But I have also needed to consider Mrs S recorded determination – as recorded in the suitability report and also illustrated by the emails at the time - to quickly achieve her objective of releasing funds from her pension arrangements to buy a residential property.

And my overall view is that, even if TMS had recommended investigating the possibility of remortgaging on another property to raise the funds, or had simply recommended against transferring, Mrs S would nevertheless had proceed by another route.

For the reasons given, therefore, on the basis of a fair and reasonable assessment of the circumstances of the complaint, my view is that the complaint shouldn't be upheld.

In closing, and whilst this has no bearing on the merits-based outcome of the complaint, I have also noted the figures provided by Mrs S's representative in its letter of complaint to TMS of August 2022. It said that the current value of Mrs S's SIPP was around £94,000, whereas it considered that Mrs S's OPS benefits would be worth around £83,000. I think it may therefore be the case that Mrs S hasn't suffered a financial loss here.

My final decision

For the reasons given above, my final decision is that I don't uphold the complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 31 July 2023.

Philip Miller
Ombudsman