

The complaint

Mr S complains that Wealth Solutions (UK) Limited (Wealth Solutions) failed to advise him about Lifetime Allowance (LTA) protection resulting in him incurring additional LTA tax charges on his Self Invested Personal Pension Plan. He would like compensation for the losses suffered.

What happened

Wealth Solutions and its predecessors had acted for Mr S for many years. He says the agreement with it was for it to provide him with ongoing advice and recommendations about his financial affairs. It says he was an experienced investor who took an active lead in the underlying investment decisions and tax matters. Mr S says he was encouraged to pay pension contributions by Wealth Solutions because of the tax planning benefits and did so in March 2016, 2018, 2019 and February 2020.

Mr S says the potential impact of the LTA wasn't considered until February 2021, around eight months before his 75th birthday, when his pension would be tested against his available LTA and any excess subject to tax. Wealth Solutions estimated the LTA tax charge payable by his fund would be around £71,000. He says it suggested he could apply for Fixed Protection 2016 (FP2016), which would increase his LTA limit and reduce the tax charge. But a few days later it said, having checked HMRC's rules, FP2016 wasn't available because he'd paid contributions after April 2016.

When the pension provider carried out the LTA check at age 75, Mr S's fund exceeded the limit available to him by around £284,000, resulting in an LTA tax charge of £71,066.04. He complained about this to Wealth Solutions. He said had he been advised about FP2016 he wouldn't have paid contributions and the tax charge would have been significantly lower. It rejected his complaint, saying Mr S had paid contributions after April 2016 without asking for or receiving advice from it. But it said there was some benefit in making the contributions. As income tax relief had been provided and the funds were outside his estate for IHT, which was his prime objective. And pension contributions were more efficient than alternatives he'd suggested like EIS and VCT schemes.

Wealth Solutions said the value of the pension on 6 April 2016 was around £140,000 lower than Mr S's available LTA. And the LTA was expected to increase by inflation each year as provided for by legislation in 2015. It said its calculations showed investment returns of around 9% per annum would be needed over a period of over 5 years to exceed the likely LTA at age 75. It said this was an *"excessive investment return"* that wouldn't *"have been predicted or considered a likely investment outcome"*. And the only reason the LTA had been exceeded was because exceptional returns had been achieved. And it said the change in legislation in 2016, that the LTA wouldn't increase by inflation wasn't its responsibility.

Mr S referred his complaint to our service and our investigator looked into it, and she upheld the complaint.

She said Mr S was paying Wealth Solutions for ongoing advice and that it had a responsibility to act in his best interests and consider the impact of him paying further

contributions to his plan. She said by 2018 it should have been clear that the plan value was close to the LTA. And it should have known Mr S might want to apply for FP2016 and that if any further contributions were paid this option would be lost. So, it should have intervened and made him aware of the issue. She said there was no particular need for Mr S to make contributions in 2018 and it was likely that he would have accepted its guidance as his pension adviser.

Our investigator said with FP2016 Mr S's pension fund would have paid less in LTA tax charges. So, Wealth Solutions should undertake a calculation to establish if there was a loss and if so, pay this to him, adding interest at 8% per year simple from 15 March 2022 (when the tax was paid) until settled. She also said Mr S had been inconvenienced by what had happened and it should pay him £350 in compensation for this.

Mr S said he accepted our investigators view but Wealth Solutions did not. It agreed it knew Mr S *"intended"* to pay a contribution in March 2018 and said it *"could have taken the opportunity to point out the LTA position"*. But it said it was *"imperative"* to understand that Mr S viewed his pension as an IHT mitigation strategy. And that this was demonstrated as he hadn't accessed the fund and *"has no intention of doing so"*.

Because of this Wealth Solutions said any loss calculation should reflect the IHT saving offered by the contributions and their investment growth compared to the amounts remaining invested and in Mr S' estate. It set out calculations in respect of this to both age 75 and 86, which it said was Mr S's life expectancy, showing a benefit in having paid the contributions. It also said its calculations showed that had Mr S asked for its advice about paying the contributions it was *"unlikely that it would be predicted that he exceed the LTA"* by age 75, so FP2016 *"is irrelevant"*.

Mr S said Wealth Solutions had provided him with the paperwork to make the contribution in March 2018, having discussed it during the review meeting in January 2018. He said he *"totally refuted"* that he only saw the pension as an IHT mitigation strategy. He said he was now considering drawing some benefits as pension payments from another arrangement had been reduced. And if he hadn't made pension contributions, he would have used other tax efficient investments instead.

Our investigator said her view hadn't changed. She said the loss calculation she proposed was based around LTA considerations not Mr S's future IHT position which was subject to change. She said there wasn't a direct link between the additional LTA charge paid and the possible mitigation of IHT.

As Wealth Solutions doesn't agree it has come to me to decide.

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 done so I am upholding the complaint.

I think Wealth Solutions did make an error in not considering and discussing with Mr S whether he should have made the election for FP2016. Any possible impact of the LTA on a client's pension funds would be something I would expect a financial adviser providing ongoing advice and recommendations to have under active review, as the issues were well known. I don't agree that its calculations demonstrate FP2016 was *"irrelevant"*. Or that it's clear that the payment of the further contributions has benefited his estate to offset the impact of the additional LTA charge incurred.

Wealth Solutions says the contributions after 2016 were on a:

“non-advised execution only basis ... without seeking our advice regarding the suitability of the contributions”.

It hasn't shown evidence of how it received these execution instructions before Mr S paid the contribution in March 2018, despite accepting it knew he *“intended”* to pay a contribution. This contribution prevented him from being able to make an election for FP2016.

Even if the contributions were on an execution only basis, Wealth Solutions was providing Mr S with ongoing advice on his financial arrangements and receiving payment for this. This was on its highest level of service, referred to as *“Tailored”*. This provided for ongoing reviews of his *“financial situation”*. The *“Service Proposition”* document provided to Mr S said there would be *“Ongoing Reviews and Changes to Existing Investments”*, including *“an assessment of your circumstances”*. So, I think it had a responsibility to consider matters potentially or actually impacting on Mr S's pension arrangement.

Little evidence has been provided about the review meetings which were held twice a year. Wealth Solutions says it generally didn't follow up on these meeting with a written report. And, it hasn't provided any notes of these meetings or similar fact find type records. But one report was provided following the review meeting in July 2018, which says this was *“part of the ongoing service”* previously agreed and that it had:

“reviewed your investments to ensure they are still suitable for your personal and financial situation ...

As part of this review, we assessed the investments funds within the existing Pensions”

I think it's reasonable to conclude that this ongoing service was the basis of the relationship since Wealth Solutions began acting to Mr S in 2015. The report of July 2018 confirms the IHT treatment of the pension was discussed. It also advises that Mr S's daughter shouldn't be a trustee of family trusts in place as she now resided outside the UK, which might cause tax issues. I think this shows that the consideration of wider tax matters was in Wealth Solutions remit and it provided wide ranging advice to Mr S.

But emails from February 2021 suggest that Wealth Solutions didn't consider the implications of the LTA for Mr S until then, shortly before his benefits would be tested against the LTA at age 75. It now accepts it hadn't previously raised the matter with him. But says its calculations show this fund couldn't have been expected to exceed the LTA limit, making considerations about FP2016 irrelevant. And that the LTA tax charge incurred is offset by tax savings elsewhere, particularly IHT. But I'm not persuaded by these arguments.

In terms of the offsetting argument, I don't disagree the tax treatment of pensions including income tax relief and IHT is attractive. Particularly in the event of death before age 75. But the position changes after this, with the overall *“after tax”* position being less clear cut. Depending on the circumstances, the beneficiaries of a pension fund would be taxed at their own marginal rate of income tax. So, it isn't tax free. That means it isn't possible to say the payment of the contributions has or will lead to an overall advantage and offset some or all of the additional lifetime allowance charge that has actually been incurred.

And there was always going to be a test against the LTA, either when Mr S drew benefits, died or reached age 75. In this case this generated a higher charge to *“tax”* than would have been incurred had the FP2016 been made. So, paying pension contributions when the

existing pension fund exceeds or is likely to exceed the available LTA limit, particularly as a person approached age 75 required some caution as a “*guaranteed*” LTA tax charge (since abolished) would undermine the other tax benefits – both actual and potential - of paying further contributions.

As for the calculations using the April 2016 fund value showing that exceeding the expected LTA at 75 was unlikely. I think it’s fair to say that this argument would carry more weight had the calculation been made in 2016 rather than 2021. And had then been periodically updated in the interim to reflect what was actually happening to both the value of the fund and any relevant legislative changes. It isn’t reasonable to argue that a retrospective calculation of the situation in April 2016 justifies the failure to provide advice to Mr S over 18 months later, when the situation had changed significantly and FP2016 was no longer “*irrelevant*”.

By then, instead of increasing by inflation, the LTA limit had been frozen indefinitely, reducing the buffer between the current fund value and the now fixed LTA. And there had been a marked increase in the value of the pension fund. Something Wealth Solutions was well aware of as the value and performance of the investments were discussed at the six-monthly review meetings. The purpose of which was to “*ensure*” Mr S’s financial arrangements were “*still suitable*” for him.

The report letter following the July 2018 review confirms a value of around £753,000. This was around 70% of the £1,073,000 standard LTA and Mr S had already used 33.68% of his LTA. So, his fund exceeded his available LTA then. The report confirms that over “*the last six months the funds had stagnated in value*”. That suggests the fund also exceeded or was very close to the available LTA at the January 2018 review. This was before the contribution was paid in March 2018, that Wealth Solutions accepts it knew was intended. And once this had been paid the FP2016 LTA election was no longer available.

The report continues that the overall annualised return on pension portfolio was 9%. And that no changes to the portfolio were suggested. It states that Mr S’s investment risk profile was scored as “*8 of 10 High*”. It continues that such a portfolio would have:

“a very strong potential for returns from your investments to go above the rate of inflation”

This suggests that the portfolio had the potential to continue to provide higher returns and might be likely to remain above the frozen £1,073,000 LTA.

Wealth Solutions says that most of the LTA charge incurred is a result of good investment performance on the fund and legislative changes outside its control. That is true to an extent. But there was the planning opportunity to increase Mr S’s available LTA limit considerably to mitigate any charge. And the contributory legislative changes also occurred during this window of opportunity. So, I think all these issues were within Wealth Solutions control and it had a responsibility to raise them with Mr S and should have done so as part of its ongoing advice.

If it had done so and then Mr S had decided against making the FP2016 election because of perceived advantages in paying further contributions, this would have been an informed decision. But I think it is more likely than not that he would have opted to use FP2016, securing the higher LTA limit and it’s likely a lower LTA charge would have been incurred. He could have then considered other IHT planning strategies if this issue was a concern to him. So, I don’t think Mr S has been treated reasonably and if he has suffered losses as a consequence, it’s fair that this be put right.

Putting things right

Wealth Solutions should now put Mr S, as closely as possible, back into the position he should have been in had he been provided with suitable advice and applied for FP2016.

In order to do so, Wealth Solutions will need to follow these steps;

1. Work out the total benefit value for LTA purposes that Mr S's fund would have been worth at his 75th birthday. Do not include in this value additional contributions that should have been stopped as a result of an application for Fixed Protection.
2. If the actual LTA Mr S had is higher than the total benefit value determined above, then no loss has been suffered. If this applies, no further steps are needed.
3. If the total benefit value determined above exceeds the actual LTA Wealth solutions needs to calculate what tax would have been payable had the notional protected LTA Mr S would have been entitled to on appropriate advice, applied.
4. Mr S's loss is the difference between the tax he paid (£71,066.04) and the tax he would have paid on the total benefit value calculated above had the notional protected LTA applied.
5. 8% simple interest is to be added to the loss from 15 March 2022 (when the LTA charge was paid) until the date of settlement.

Income tax may be payable on any interest paid. If Wealth solutions considers it's required by HM Revenue & Customs to deduct income tax from the interest, it should tell Mr S how much it's taken off. It should also give Mr S a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate. Wealth Solutions should pay the resulting overall compensation directly to Mr S as a cash settlement.

I consider this compensation fair as although Mr S received basic rate tax relief on the additional contributions he made – which he wouldn't have been able to make had he applied for fixed protection. However, he's likely to pay basic tax rate when the funds are drawn out of the pension, so no further adjustment to the calculation is needed. And, had Mr S had use of the funds outside of his pension, I think it's likely he would have invested them in a similar way to his pension. So, the returns would have likely been equal and no further adjustment is needed for that.

I think Mr S has suffered distress and inconvenience due to Wealth Solutions errors and it should pay him £350 in compensation for this.

My final decision

My final decision is that I uphold the complaint against Wealth Solutions (UK) Limited.

I direct Wealth Solutions (UK) Limited to carry out the loss calculations set out above and if there is a loss, pay compensation to Mr S as outlined.

I further direct Wealth Solutions (UK) Limited to pay Mr S £350 in compensation for his distress and inconvenience.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or

reject my decision before 28 July 2023.

Nigel Bracken
Ombudsman