DRN-4359867

The complaint

Mr W complains about the advice given by Lockhart Consultancy Ltd ('LCL') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme and two other personal pensions to a self-invested personal pension ('SIPP'). He says the advice was unsuitable for him and believes this has caused a financial loss.

Mr W is being represented by a professional third party but for ease of reading this decision I'll largely refer to representations as having been made by Mr W.

What happened

Mr W held deferred benefits in a DB scheme pension from a period of employment between 1997 and 2004. On 9 February 2010, Mr W obtained a transfer value from his DB scheme, which confirmed the cash equivalent transfer value ('CETV') of his benefits was £42,610.51.

Mr W spoke to LCL in May 2010, for advice about his pension. Mr W's representative says LCL approached him unprompted. LCL however says that it did not contact customers unprompted. And LCL says that Mr W approached it, having been referred by a friend of his who was an established customer of LCL, as he wanted to transfer his pension and use it to purchase a commercial property.

LCL completed a fact-find to gather information about Mr W's circumstances and objectives. It recorded that he was 41, in good health and married with four dependent children. Mr W was self-employed and he and Mrs W's income was recorded as exceeding their outgoings. In addition to his DB scheme pension, it was noted that Mr W had two other personal pensions.

Mr W said he didn't expect to retire until age 65. And LCL recorded that he wanted to take control of his pension as he was looking at self-investing in commercial property. He had extensive experience in the property market and would class himself as adventurous in this market.

LCL also carried out an assessment of Mr W's attitude to risk. In this he was asked to rank a list of six different priorities based on their importance to him, from which he said increasing his pension was most important and the security of his pension least. Mr W was also asked to select the risk profile he wished to adopt, if a transfer was suitable. The option circled was 'medium / high' or 7/8 out of 10 on a scale of 1-10.

On 26 May 2010, LCL advised Mr W to transfer his DB pension into a SIPP. It said, having discussed his attitude to risk it was felt this was in fact 6 on a scale of 1-10. The suitability report said it was important to understand that Mr W would be giving up the guaranteed benefits the DB scheme provided by transferring and his pension would become dependent on investment returns – including rental income if he purchased a property as intended. But LCL said it felt the returns required to match the benefits the DB scheme would provide at retirement were achievable. And a transfer provided Mr W the control over his pension that he wanted, as he was seeking an adventurous approach to his investment. LCL recommended a SIPP provider while confirming that Mr W's pension would initially be invested in cash, as he was looking to shortly invest in a commercial property purchase – again noting he had significant experience in the property market due to his profession and had a property in mind. The transfer of the DB scheme to the SIPP went ahead in line with LCL's recommendations in August 2010.

Shortly after LCL advised Mr W to transfer his DB scheme, it also requested details from the providers of Mr W's two personal pensions personal pensions. And some details were provided to it in June 2010. A meeting note from several weeks later says that the transfer of these two pensions to Mr W's SIPP was also being considered. But this was put on hold after the purchase of the first commercial property Mr W was considering fell through.

The transfer of the two smaller pensions was revisited in 2011. And on 14 June 2011 LCL advised Mr W to transfer the benefits from his two personal pensions (with transfer values of £4,720.63 and £3,077.98) into the SIPP that had been established in 2010. It said Mr W was again looking into purchasing a commercial property through his SIPP and the transfer met Mr W's objective of providing further funds for this purpose and giving him full control over how his pensions were invested.

Mr W received further advice from LCL in October 2011 – involving a change of SIPP provider. And in February 2012 a property was purchased through the new SIPP. This has been complained about separately by Mr W and doesn't form part of the complaint being considered here. But I do note that I've seen information that Mr W elected to be the property manager for the SIPP, receiving the rental income and hasn't received ongoing advice relating to its investment.

Mr W complained to LCL in May 2022 about the recommendations to transfer his DB scheme and personal pensions to a SIPP. His representative said that Mr W now thought this advice was unsuitable.

LCL did not uphold Mr W's complaint as it said it was suitable based on his circumstances at the time and met his objectives.

Mr W referred his complaint to our service. LCL said it felt that the complaint might be one that we couldn't consider. I issued a decision in August 2023, in which I said I was satisfied that the complaint was one that fell within our jurisdiction to consider and that we could look into the merits of the matter.

The complaint was considered by one of our Investigator's. They didn't think the complaint should be upheld. In respect of the transfer of the DB scheme, the information from the time indicated that a transfer provided a reasonable opportunity for Mr W to improve on the benefits he already held. And given his stated objective to maximise his pension and desire for control and to invest in property – which they believed was genuine based on the information they'd seen – they didn't think the advice to transfer was unsuitable. And, they also felt that, based on his objectives, Mr W would likely have always sought to transfer.

Mr W's representative said he disagreed. They said he had no financial background or investment experience. And they said he'd relied on LCL's advice, the guarantees he'd be giving up weren't explained and no alternative methods for investing in commercial property were discussed.

The complaint was reviewed by another Investigator, but they weren't inclined to reach a different opinion. They were satisfied that Mr W always intended to invest his pension in property when seeking advice from LCL – given his background and knowledge of this area. And they felt his attitude to risk had been correctly considered. In respect of the later advice for Mr W to switch his personal pensions to the SIPP, they felt this was also suitable. By that time the SIPP had already been established but Mr W required additional funds to complete his investment. He still had over 20 years to retirement in which to achieve growth and he had a clear intention to proceed.

Mr W's representatives then said, prior to receiving advice from LCL, he had no intention to invest his pension in property.

The Investigator wasn't persuaded to change their opinion, so the complaint has been passed 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.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Businesses (PRIN) and the Conduct of Business Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of LCL's actions here.

PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*

PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

The provisions in COBS 9 which deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 which specifically relate to a DB pension transfer, including COBS 19.1.16 in which the regulator, the Financial Conduct Authority ('FCA'), states the starting assumption for a transfer from a DB scheme is that it is unsuitable.

Having considered all of this and the evidence in this case, I've decided not to uphold the complaint for largely the same reasons given by the investigator.

Mr W's circumstances at the time of the advice

There are conflicting accounts from the parties involved around several important points in this complaint.

Mr W's representative says he was contacted unprompted by LCL about a review of his pension. And more recently it has said that he was not considering investing his pension in property prior to speaking to LCL.

LCL says it doesn't contact potential customers directly and Mr W contacted it on the recommendation of a friend, who was already a customer of LCL. It also says that Mr W was considering investing his pension in property before speaking to it and had a clear ambition to do so.

Mr W obtained a transfer value for his DB scheme benefits from the trustees of the scheme in February 2010. This was addressed directly to him. And the information I've seen indicates he first started discussing his pension with LCL in May 2010. Given he'd sought information from the scheme directly before speaking to LCL, on balance I believe Mr W contacted LCL for advice. And Mr W obtaining information about the value of his pension benefits also, in my view, indicates he was considering potentially making a change to his pension.

His representative said, in its most recent response, that Mr W had not considered investing his pension in property before taking advice from LCL. But, when they initially submitted a complaint to our service on his behalf, the representative said Mr W had confirmed he wanted access to some funds to help him invest in properties, but LCL didn't explore alternatives with him. And it reiterated that argument in response to the first Investigator's opinion. These arguments are contradictory.

I've considered the available information from the time of the advice. The fact find, which Mr W signed a copy of, referred to Mr W wanting to self-invest in commercial property. The suitability report also made multiple references to Mr W looking to invest in commercial property. It also noted Mr W having extensive experience of the property market through his profession and said he would rather the investment of the pension be made in this area. And it also referred to Mr W not being in a position to wait, that he'd considered other funding options and required the pension to be used for a property purchase which needed to be concluded in a short timescale. I've seen nothing to suggest that Mr W challenged any of the information contained in the suitability report, or its accuracy, at the time.

Similar information about Mr W's intentions for his pension was repeated when he later came to move his personal pensions. And when a property was eventually purchased using his pension, Mr W became the property manager for the SIPP – utilising his experience in that area.

Taking all of this into account, and again bearing in mind Mr W obtained information about the value of his pension before speaking to LCL, I think using his pension to invest in property was an objective of his before speaking to LCL.

Mr W's representative has also said that he didn't want to take any risk with his pension. But again, I think he had already thought about investing his pension in property before speaking to LCL. And his relevant professional experience would, in my view, have meant that Mr W would've been aware this involved risk.

LCL carried out an assessment of Mr W's attitude to risk. During this he seems to have self-identified as having a 'medium high' attitude to risk (7 or 8 on a scale of 1-10) as he signed a declaration confirming this reflected his view. The DB scheme pension does seem to have made up the majority of Mr W's private retirement provisions. So, he didn't have significant capacity for loss, based on what I've seen – although he was 23 years from when he expected to retire and could therefore take some risk. But the suitability report says, after further discussion, it was agreed that Mr W's attitude to risk was more correctly summarised as 'medium', or 6 on a scale of 1-10. And based on what I've seen from the time, I think LCL has assessed this fairly. So, contrary to what his representative argues, I think Mr W was willing to take risk with his pension, to achieve his objectives.

Financial viability

Mr W was asked to rank certain objectives relating to his pension in the attitude to risk questionnaire he completed and signed. And he said increasing his pension was the most important to him from the list of priorities.

LCL carried out a transfer value analysis ('TVAS') report (as required by the regulator). LCL's suitability report says a copy was provided to Mr W to consider. And I've seen nothing to suggest he disputed this at the time. Which leads me to think, on balance, he was provided this information. The TVAS outlined the level of pension the DB scheme was expected to provide at retirement. And emphasised the benefits under the scheme were guaranteed. The TVAS also included a calculation of how much Mr W's pension fund would need to grow by each year in order to provide the same benefits as his DB scheme at retirement (the critical yield). The TVAS said that for retiring at age 65, which Mr W had indicated he expected to be the case, the critical yield was 5.2%. The suitability report later quoted this figure as 4.96%. But the reason for this difference is unclear based on the information I've been provided.

The advice was given during the period when the Financial Ombudsman Service was publishing 'discount rates' on our website for use in loss assessments where a complaint about a past pension transfer was being upheld. Whilst businesses weren't required to refer to these rates when giving advice on pension transfers, I consider they provide a useful indication of what growth rates would have been considered reasonably achievable when the advice was given in this case.

The discount rate at the point of the advice for 23 years to retirement – the case if Mr W retired at 65 – was 6.7% per year. For further comparison, the regulator's upper projection rate at the time was 9%, the middle projection rate 7%, and the lower projection rate 5%.

I've taken this into account, along with the composition of assets in the discount rate, Mr W's attitude to risk and also the term to retirement. And here, even using the higher of the critical yields quoted, 5.2%, I think it was reasonable to say this was achievable, based on the position at the time. And so, it was fair for LCL to conclude Mr W was likely to receive benefits of a higher overall value than the DB scheme at retirement, as a result of investing in line with his attitude to risk.

With this in mind, I don't think the recommendation to transfer out of the DB scheme was unsuitable for Mr W, bearing in mind his stated aim to increase his pension. And it also allowed him to achieve some of his other stated objectives.

Flexibility

LCL said Mr W was interested in having the flexibility to retire early if possible – although he didn't anticipate being in a position to do so.

Mr W could've taken benefits early under the DB scheme, if he had needed to retire early. These would've been reduced in comparison to those available at the scheme normal retirement age, as an actuarial reduction would've been applied. But he was able to take his pension early under the DB scheme if he'd needed to.

As a result, and given he seems to have believed he was unlikely to retire early, I don't think Mr W had a genuine need for flexibility.

But, as I've already explained, it appears he was likely to improve on his retirement benefits by transferring. And I note the suitability report also looked at the critical yield required to match the benefits the DB scheme would've provided at age 60, which it said was 5%. The discount rate applicable at the time for 18 years to retirement was 6.5% and the regulators standard projections were the same as those already mentioned. So, it was reasonable to believe that Mr W would also have been able to improve on the benefits the DB scheme would've provided if retiring early by transferring and investing in line with his attitude to risk. So, while I don't think he needed flexibility, I don't think the transfer disadvantaged Mr W, and it provided this option.

Death benefits

Mr W was married and had children. So, the death benefits provided by the DB scheme – which included a spouse or dependents pension, could've been useful to his family in the event of his death. But the fact-find and suitability report noted that, while Mr W had insurance in place that would cover his mortgage, he hadn't made any other provisions for his family and the option of leaving his pension as a lump sum appealed to him.

LCL's role wasn't to put in place what Mr W might've thought he wanted. But at the same time, the primary purpose of a pension is to provide for the holder's retirement, rather than a legacy for their family. And so, in the circumstances, given it seemed likely Mr W would've been able to improve on his pension benefits by transferring, I don't think he was disadvantaged by also having access to alternative death benefits that he indicated appealed to him.

Control of investments

As I've explained, I'm satisfied that Mr W was interested in investing his pension in property and managing this. His representatives have said he didn't have any experience with investments or pensions. But he does seem to have had relevant experience with property management and relevant associated knowledge about risks, rental yields, returns etc. So, while he was unlikely to be in a position to manage standard investments on his own, I think he did have the relevant knowledge regarding property investment, to take an active role in manging this as an investment within his pension. And this is in fact what he appears to have done.

His representative has said that LCL didn't explore alternative ways Mr W could've financed property investment. But the suitability report mentions that Mr W had already considered other options. And in any event, his objective appears to have been to invest his pension in this way – as it gave him control, in an area in which he had relevant knowledge.

As a result, and again because it was a reasonable conclusion that Mr W could improve his pension benefits by transferring, I think this objective, and achieving it, was reasonable.

Summary

For the reasons I've explained, I think the advice LCL gave Mr W to transfer the benefits from his DB scheme to a SIPP was suitable in the circumstances, at the time. He was likely, based on the assumptions at the time, to improve on the benefits which the DB scheme offered. And a transfer allowed him to achieve other objectives which I think he expressed an interest in. So, I don't think LCL has acted unfairly.

I'm also satisfied that LCL explained that Mr W would be giving up guarantees by transferring. The recommendation letter included a section titled 'Loss of Guarantees' and this outlined that by transferring the guarantees Mr W had through his DB scheme pension – the deferred escalating pension that the transfer valuation he obtained referred to and which the suitability report also summarised – would be lost. And his pension would become subject to risk and dependent on investment performance, specifically relating to the investment property.

Like our Investigator, I also think, even if LCL had advised Mr W not to proceed, he may have looked to do so anyway. He seems to have entered into the discussions with LCL with the intention of investing in property in mind. And he seems to have indicated to LCL that he was keen to do this promptly, as he'd already identified a property that he was looking to purchase and there was a time pressure to proceed (although this purchase seems to have later fallen through). So, given I think he was keen to proceed and he had knowledge in the area in which he wanted to invest, he may have always looked to go ahead. But regardless, as I've explained, I don't think the advice LCL provided him about his DB scheme pension was unsuitable.

2011 advice to transfer personal pensions

In June 2011, LCL advised Mr W to move the proceeds of two personal pensions he held, with a value totalling £7,798.61, to the SIPP that he'd opened the year before. It said Mr W wanted to move these funds to increase the amount available to him for investing in property.

LCL ran an analysis that suggested the provider charges in the SIPP, 1% per annum, were marginally greater than he was incurring in his existing personal pensions. And the suitability report explained that Mr W was therefore moving to a more expensive contract overall. But I've seen evidence that significant information had been gathered by that point regarding a potential commercial property purchase. So, I'm satisfied Mr W had a genuine intention at that time to use these funds for the purpose stated. And his existing personal pensions did not provide him the opportunity to make the investment he wanted to. So, he had a genuine reason to move these pensions.

Mr W's objective in terms of investment appears to have been in line with his attitude to risk. And the SIPP provided the same flexibility in terms of accessing pension benefits as the existing schemes. And, given Mr W's intention to manage the property purchased through the SIPP himself, there was no cause for him to take ongoing advice.

Taking all of this into account, as I'm satisfied Mr W intended to invest these pension funds in a way that he wasn't able to under his existing personal pensions, I think the advice to move these pensions was suitable for him. And again, given I think he had a firm intention to use the funds for the purpose stated – particularly bearing in mind has gone on to do so – I also think he'd have likely always looked to proceed.

Taking all of this into account, in the specific circumstances of Mr W's complaint, I think the advice LCL provided Mr W in relation to moving his pensions and consolidating these within the SIPP to enable him to meet his investment objectives was suitable. So, I don't require it LCL to take any action here.

My final decision

For the reasons I've explained, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 19 October 2023.

Ben Stoker
Ombudsman