

complaint

Mrs H complained about delays in paying the 25% tax-free cash sum from her pension. The transfer of her pension was arranged by Gerard Associates Limited. She would like to be assured that her investments are safe; to receive her 25% tax-free lump sum and an apology.

background

Mrs H was called about her pensions by First Review Pensions. That business was not regulated in the UK. She cannot recall why she received that call. She told us she had been looking at ways of raising some money on line. That included using her pension. After the call she was referred to Gerard Associates. Gerard Associates is regulated in the UK by the Financial Conduct Authority (FCA).

Mrs H signed what appears to be a pre-printed letter on 2 December 2014. This confirmed that she had received, read and understood the relevant promotion literature for the following funds:

- The Resort Group Plc
- Managed Fund Element
- Core Satellite Fund
- Quantum Managed F Fund

The declaration above Mrs H's signature said:

I understand that these investments are unregulated and only suitable for sophisticated investors and confirm that I wish to receive advice on the transfer of my pension funds(s).

Mrs H completed and signed a fact find on 2 December 2014. This recorded that:

- She was aged 58, married, in good health.
- Her preferred retirement age was 65, at which time she wanted an annual income of £23,000.
- She was in her employer's pension scheme (OPS). This was a defined benefit scheme.
- Her risk profile was low to medium which was described as suitable for cash, bonds and shares.

Gerard Associates has supplied a copy of a pension report dated 14 January 2015. Page one, second paragraph said:

We have received a Fact Find and Risk Profiler completed by you. This does not highlight you as a higher risk investor or qualify under the sophisticated investor category as shown in the attached documents. Please consider the documents as to proceed you need to be a sophisticated or self-certificated sophisticated investor which means you fully understood the risks associated with the expressly requested pension investments.

This 26 page report commented on the London Quantum RBS:

- Accommodation of the requested investments.

- The need to agree and sign a sophisticated or high net worth investor declaration or a self-certificated declaration.
- Set up charges of £400 and annual administration charge of £400 payable in advance.
- Access to alternatively regulated or unregulated investments not available to Mrs H's existing pensions.
- Competitive way to access the requested investment strategy.
- No self-investment.

Also enclosed was a transfer analysis report for Mrs H's preserved pension with the OPS. This was a defined benefit scheme. This report said that the critical yield for a retirement age of 60 was 66.9% for full income or 60.1% if tax-free cash taken. For a retirement age of 65, the critical yields were 17.3% and 16.6% respectively. A transfer value of £41,563.13 was paid to the London Quantum RBS on 16 April 2015.

A separate transfer value of £6,770.46 was paid to the scheme on 2 March 2015 from a Scottish Widows pension plan.

We have a copy of the Client Agreement & Fee Agreement between Gerard Associates and Mrs H dated 10 February 2015.

Under the section – Services to be provided, it said:

Any advice and information given solely comments on the possible transfer of your pension fund for you to make your own investment decisions and does not constitute any advice or recommendation as to the suitability of any investments.

The investments may not be suitable for all investors and you should take reasonable steps to make yourself fully aware of the scope of the investments and all associated risks. The investments you make will not be kept under review...

The fees were shown as a minimum of £2,595 or 4% of the transfer value up to £100,000, whichever is the higher. Then 2% of the next £400,000 and 1% for balances over £500,000.

The declaration signed by Mrs H said:

I understand and agree that Gerard Associates Limited have provided me with guidance on a pension transfer only and have not given me advice or recommendations as to the suitability of the RBS investment. (RBS was the London Quantum Retirement Benefits Scheme). This was described as an occupational pension scheme in the copy of the Member Booklet given to this service).

A Sophisticated Investor Declaration was also signed on 10 February 2015. The reasons given were:

- Likes to spread risk with not all eggs in one basket.
- Bigger tax-free cash.
- Lump sum available 10 years earlier.
- Likes guaranteed bond investment.
- Current pension in deficit.

A risk profiler document had concluded that Mrs H was low to medium risk.

Soon after the transfers took place, Mrs H tried to access the tax-free cash. She was informed by Dalriada Trustees that the assets of the scheme had been frozen. Dalriada had been appointed by The Pensions Regulator (TPR) to replace the existing trustees – as the regulator had concerns about the scheme.

Mrs H was not able to access the tax-free cash and complained to Gerard Associates. They acknowledged the complaint but gave no explanation to Mrs H about why she could not access the tax-free cash.

Mrs H then referred her complaint to this service.

Gerard Associates has told us:

- Their sole role was to provide a transfer analysis report and generic information / guidance that she had explicitly requested.
- They could not know that the scheme would be investigated and frozen.
- No pension liberation had occurred.
- Mrs H had been referred to them by Quantum Investment Management Solutions LLP (the scheme sponsor) and distributor of the investments.

I issued a provisional decision on 13 February 2018. I concluded that the complaint should be upheld. In summary, I said:

Arranging investments is a regulated activity. This includes making arrangements to buy or sell investments. Mrs H had a personal pension. Arranging for the investments to be sold and the value transferred to another scheme was a regulated activity.

the relevant rules

The regulator's handbook sets out the rules firms must follow. These start with the high level standards. Those standards include the principles that firms must follow. I think Principles 1 – integrity; 2 – skill, care and diligence; 6 - customers' interests and 8 - conflicts of interest all apply in this case.

The rulebook also sets out the business standards firms must follow. These are set out in the conduct of business sourcebook (COBS). I think COBS 2.1 is particularly relevant. This is known as the client's best interests rule and says:

A firm must act honestly, fairly and professionally in accordance with the best interests of its client.

London Quantum RBS

TPR investigated the London Quantum RBS. It then made an order to remove the existing trustees and appoint new trustees. That was to safeguard the assets in the scheme and ensure the trustees were competent to carry out the duties of a trustee. I think there is relevant information in the final notice issued by TPR on 8 February 2016.

The RBS was established in 2012. From about April 2014 it was open to new members. There is evidence in the final notice that Gerard Associates advised the trustees to appoint a new trustee. And further evidence that Gerard Associates brought a number of introducers on board. This included First Review who cold called Mrs H. I note the panel made no finding on that point.

Gerard Associates was responsible for producing various letters and forms to be sent to new members. This was after they had been introduced to the RBS by an introducer. The forms were then sent on to the trustees of the RBS.

Gerard Associates role was described as *"simply helped the process of people joining the scheme"*. It was also noted that Gerard Associates did not provide advice to new members of the scheme. Gerard Associates were paid about £220,000 in fees.

What did Gerard Associates do?

There is some evidence from the final notice of TPR that Gerard Associates was involved in organising the introducers for the RBS. The first evidence I have about Gerard Associates involvement with Mrs H is a letter dated 2 December 2014. That referred to a number of different unregulated funds. Mrs H asked for advice about the transfer of her pension funds.

The terms of business signed for Gerard Associates said that no advice was being given. They did obtain information from Mrs H about her personal and financial circumstances. Gerard Associates also established that she was not a high net worth or sophisticated investor.

Gerard Associates sent a 26 page report to Mrs H about the London Quantum RBS. A transfer value analysis was also provided to Mrs H. This is a complex document intended to show the financial viability of transferring a defined benefit pension scheme.

Gerard Associates charged a fee of 4% of the transfer value. But, it said it was providing guidance or information. It was not advising about the transfer. This was despite the initial request from Mrs H being a request for advice.

In my view the business process set up by Gerard Associates has all the hallmarks of being designed to avoid having to comply with the regulator's rules. I cannot say that any advice was given. That's despite Mrs H's initial request for advice.

I think the final notice from TPR is informative. It shows that there is evidence Gerard Associates was involved in promoting new members to the RBS. There is no doubt in my mind that Mrs H was referred to Gerard Associates with the specific intention that she would be transferred to the RBS.

Mrs H provided enough information for Gerard Associates to work out that she was not a high net worth or sophisticated investor. She should not have invested in the funds that had been promoted to her. Gerard Associates therefore had enough information to know that the transfer was not in Mrs H's best interests.

was Gerard Associates promoting the investments in London Quantum RBS?

There are restrictions about who is able to make a financial promotion to invite or induce others to engage in investment activity. And there are restrictions about the type of person an unregulated investment can be promoted to.

I think it is clear that a financial promotion was made to Mrs H. But I think that was made by an unregulated party. Mrs H was then referred to Gerard Associates. I think it is arguable that Gerard Associates was promoting the different investments to Mrs H. Although the initial contact was made by First Review Pensions I think there is some evidence Gerard Associates was involved in that contact. In particular, the evidence from the final notice of TPR indicates Gerard Associates was involved in organising those firms introducing business to it.

I think given the number of cases Gerard Associates processed and the unregulated investments involved it must have been aware that these were unlikely to be suitable for most investors. I am left with the impression that the process Gerard Associates adopted was to try and avoid any responsibility under the rules at the time. It produced a lengthy report, but stopped short of actually providing advice.

what should Gerard Associates have done?

I think Gerard Associates should not have processed the transfer for Mrs H. She's told us that she was simply looking to raise some money. That could have been achieved by taking benefits directly from her personal pension. There was no need to transfer into the London Quantum RBS and the investments in that scheme were clearly unsuitable for her.

If Gerard Associates had acted in Mrs H's best interest they would have warned her about the transfer. In fact, I think they could have provided her with advice that she had originally asked for.

What would Mrs H have done?

I think Mrs H only transferred because she had been told about the scheme by First Review Pensions. In my view, Gerard Associates simply reinforced what she had been told. I don't think they warned her against the risks of investing. And they had identified she was not a sophisticated investor. She was simply looking to raise funds to improve her home. That could easily have been achieved by taking benefits from a personal pension. I don't think Mrs H would have transferred the personal pension if Gerard Associates had acted in her best interest.

The transfer of Mrs H's pension benefits from the OPS is not something this service can consider. But, we can consider complaints about regulated activities. Where a loss has been caused as a result of failings by a regulated firm dealing with regulated activities I need to consider what loss that has caused. I can think of no reason why Mrs H would transfer her benefits from the OPS, if she had been warned that transferring her personal pension into the London Quantum RBS would not have been in her best interest. I therefore think that the transfer from the OPS would not have happened.

Gerard Associates did not agree with my provisional decision. They said:

- They were not involved in the promotion of any investment to Mrs H. They did not provide any communication about whether the investments were suitable for her personal circumstances; or promotional documentation whatsoever.
- They did not advise on, or arrange, the investments. These had been agreed by the professional trustee of the scheme and promoted by the scheme sponsoring employer.
- Mrs H received their letter of 14 January 2015. They had no obvious evidence she was a sophisticated investor even though she had already stated in writing that she was. They guided her to their pension and investment risk document. Although Mrs H had the opportunity to discuss that with them she made no contact. Instead she confirmed she had read and understood and signed the sophisticated declaration.
- Whilst TPR suggested the sophisticated investor declaration had not been properly executed, they believe all the correct explanations in line with COBS 4.12.8 were provided.
- Mrs H's complaint was about not receiving the tax-free cash. The freezing of the bank account was something that Gerard Associates could not be involved in. This was an administration problem for the scheme. There were some liquid assets in the scheme. Gerard Associates were unaware why Mrs H had not received any benefits.
- They believe they acted in compliance with COBS 2.1. They made no representation to Mrs H that wasn't honest fair and with Mrs H's best interests in mind. They still allowed Mrs H to make her own decisions after reading their supporting guidance. This includes various statements signed by Mrs H.
- TPR's report is incorrect in stating Gerard Associates was involved in organising the introducers. They made no representation to any third party about the scheme.

my findings

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 remain of the view that the complaint should be upheld for the reasons given in my provisional decision and repeated above. I will also deal with the points Gerard Associates have made.

I am required to take into account the law; regulator's rules and guidance; codes of conduct and what I consider to have been industry good practice at the time.

what did Gerard Associates do?

Gerard Associates arranged the transfer of Mrs H's OPS benefits and her personal pension. It provided guidance and information as well as completing application forms. Gerard Associates charged fees for transfers. I'm satisfied that Gerard Associates did arrange the transfer of the personal pension. This meant that the relevant rules in the FCA Handbook should have been applied. It also arranged the transfer of the OPS benefits.

was Gerard Associates promoting the investments in London Quantum RBS?

I accept that the initial promotion of the investments to be made in the London Quantum RBS was not made by Gerard Associates. But, promotion of investments does not have to be a single act. I think provision of information and guidance can amount to promoting the investments. In my view, the part Gerard Associates played was important in the overall transaction. And Gerard Associates knew that money would be invested in unregulated investments. I think that does amount to promoting the investments.

was Mrs H a sophisticated investor?

The information set out in the background to this complaint shows that Mrs H was not a sophisticated investor. These investments should not have been promoted to her either by Gerard Associates or any other party.

did Gerard Associates act in Mrs H's best interests?

Gerard Associates knew, or should have known, that Mrs H was not a sophisticated investor. The investments were clearly not suitable for her. She wanted to raise money for home improvements. This could have been achieved in other ways. By arranging the transfers Gerard Associates put Mrs H's pension benefits at risk. In my view that was not in Mrs H's best interests.

what should Gerard Associates have done?

If Gerard Associates had acted in Mrs H's best interests they would not have arranged the transfer of the personal pension. And I am satisfied that Mrs H would not have transferred her OPS benefits.

what loss was caused by Gerard Associates actions?

Mrs H complained that she could not access her tax-free cash. This was caused because the London Quantum RBS did not have sufficient liquid assets. In my view this is entirely foreseeable. The investments to be made were unregulated and unlikely to be suitable for many investors. I think it was entirely foreseeable that the scheme could have problems by investing so heavily in these assets.

Mrs H has lost all of her pension benefits. This is from the personal pension and also the OPS. It is possible that some of the benefits will eventually be paid after the investigation into the assets of the London Quantum RBS has been completed. In my view, none of these losses would have happened if Gerard Associates had acted in Mrs H's best interests.

fair compensation

My aim is to put Mrs H as close to the position she would probably now be in if she had not been given unsuitable advice.

what should Gerard Associates do?

To compensate Mrs H fairly, Gerard Associates must:

for the personal pension:

- Pay Mrs H the amount of tax-free cash she would have received from Scottish Widows with simple interest of 8% gross a year from 2 March 2015 until payment is made.

For the personal pension funds after tax-free cash was paid:

I think Mrs H would have invested differently. It is not possible to say *precisely* what she would have done, but I am satisfied that what I have set out below is fair and reasonable given Mrs H's circumstances and objectives when she invested.

- Compare the performance of Mrs H's investment with that of the benchmark shown below. This should only be for the part of the London Quantum RBS produced by the transfer from the personal pension.

It's unlikely that Mrs H can pay into the London Quantum RBS. If there is a loss, Gerard Associates should pay the total amount direct to her. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid. The *notional* allowance should be calculated using Mrs H's marginal rate of tax in retirement.

Mrs H is likely to be a basic rate taxpayer in retirement. The *notional* allowance should equate to a reduction in the total amount equivalent to the current basic rate of tax.

- Pay Mrs H £300 for distress caused by the loss of her pension funds.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
London Quantum RBS	still exists	FTSE WMA Stock Market Income Total Return Index	date of investment	date of my decision	8% simple a year from date of decision to date of payment

actual value

This means the actual amount payable from the investment at the end date.

My aim is to return Mrs H to the position she would have been in but for the unsuitable advice. This is complicated where an investment is illiquid (meaning it could not be readily sold on the open market) as in this case. It would be difficult to know the *actual value* of the investment. In that case the *actual value* should be assumed to be nil to arrive at fair compensation. Gerard Associates should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the total payable to Mrs H and the balance be paid as I set out above.

Gerard Associates is unable to buy the investment. The *actual value* should be assumed to be nil for the purpose of calculation. Gerard Associates may wish to require Mrs H to provide an undertaking to pay Gerard Associates any amount she may receive from the investment in the future.

fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

why is this remedy suitable?

I have chosen this method of compensation because:

- Mrs H wanted capital growth and was willing to accept some investment risk.
- The WMA index is made up of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mrs H's circumstances and risk attitude.
- Mrs H has not yet used her pension plan to buy an annuity.

for the OPS benefits

- Perform a loss calculation for the transfer of Mrs H's OPS benefits. This should use the methodology issued by the Financial Conduct Authority in October 2017.
- This calculation should be carried out as at the date of this decision; using the most recent financial assumptions published (at the date of this decision). In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mrs H's acceptance of the decision.
- Gerard Associates may wish to contact the Department for Work and Pensions (DWP) to obtain Mrs H's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mrs H's SERPS/S2P entitlement.

- Only the part of the London Quantum RBS funded by the transfer from the OPS should be used in the calculation. If this shows a loss, the compensation amount should if possible be paid into Mrs H's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.
- If the payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mrs H as a lump sum after making a notional deduction of 15%. The payment would otherwise have been used to provide pension benefits, 25% of which would be tax free and the rest would have been taxed according to her likely income tax paying status in retirement – presumed to be 20%. And so the 15% deduction adequately reflects this.

my final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend that Gerard Associates pays the balance.

determination and award: I uphold the complaint. Fair compensation should be calculated as set out in my provisional decision. My decision is that Gerard Associates Limited should pay the amount produced by that calculation up to the maximum of £150,000 (including distress and/or inconvenience but excluding costs) plus any interest on the balance as set out above.

If Gerard Associates does not pay the recommended amount, then any investment currently illiquid should be retained by Mrs H. This is until any future benefit that she may receive from the investment together with the compensation paid by Gerard Associates (excluding any interest) equates to the full fair compensation as set out above.

Gerard Associates may request an undertaking from Mrs H that either she repays to Gerard Associates any amount Mrs H may receive from the investment thereafter, or if possible transfers the investment at that point.

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Gerard Associates pays Mrs H the balance plus any interest on the balance as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 15 July 2018.

Roy Milne
ombudsman