DRN-4606559

The complaint

Mr D has complained he was given unsuitable advice by Reliance Financial Services in connection with buying a property by taking out a mortgage and using funds from his pension.

Reliance Financial Services is an appointed representative of Openwork Limited trading as The Openwork Partnership (Openwork). Openwork is responsible for the advice that was given. For ease I've just referred to Openwork below.

What happened

I issued a provisional decision on 18 January 2024. I've recapped here what I said about what had happened and my provisional findings. As I said, I didn't refer to everything, just what I saw as central.

'Mr D owned a property which he didn't live in. He was in rented accommodation. He wanted to buy a property to live in and which later might be a retirement property for him and his wife. Mr D met with Openwork's adviser on 25 August 2021. A fact find was completed. Amongst other things it recorded that Mr D wanted to access the tax free cash available in a personal pension arrangement to put towards the deposit for a new house. As I've mentioned below, it seems there was some misunderstanding about how the balance of the deposit would be made up. The adviser thought Mr D had savings of at least £12,000 to put towards it but Mr D says that was to fund stamp duty and other expenses.

On 7 September 2021 Mr D emailed the adviser and said he'd had an offer of £140,000 accepted on a property. The next day he forwarded a mortgage in principle letter for a loan of £133,000. Mr D had another meeting with the adviser on 20 September 2021. The adviser completed a mortgage application. Mr D was looking to borrow £105,000 so he'd need a deposit of £35,000. Mr D received a mortgage offer of £105,000 on 30 September 2021. Openwork sent a suitability letter relating to the mortgage on 8 October 2021. Openwork recommended that Mr D took out a mortgage of £105,000 over a 19 year term.

Mr D received tax free cash – I think it was about £16,576 – on 1 November 2021. That was in line with what had been discussed with Openwork's adviser although the adviser's formal recommendation letter wasn't issued until 12 November 2021. Mr D met with the adviser again then and the adviser had prepared a financial planning report for Mr D's pensions. In summary the report said Mr D had three paid up pensions, two of which were deferred benefit schemes which he'd be retaining. He was also an active member of his current employer's pension scheme. He wanted to access his self invested personal pension (SIPP) with Scottish Widows to release funds for a deposit for a new property. Openwork recommended Mr D transfer to an Embark platform pension account and take the tax free cash element to use towards the purchase of his new house. I think by then Mr D had already transferred to Embark, and as I've said above, he'd received the tax free cash.

Mr D emailed the adviser on 30 November 2021. He said the money paid into his bank account at the beginning of the month accounted for nearly half of the deposit but he was wondering where the rest would come from as he needed about £35,000 in total. In an email *sent the same day, the adviser said that at the first meeting Mr D had said he had £12,000 saved towards the deposit. The adviser asked if that had increased or decreased. He said the balance would come from the taxable part of the pension as discussed. And he asked how much Mr D needed. Mr D replied saying there'd been a misunderstanding and the £12,000 he'd saved was to pay stamp duty, solicitors fees, moving costs and decorating. He said he'd need a further £18,000 for the deposit. The adviser replied saying that could be released but Mr D would pay tax on it.*

The adviser issued a further recommendation letter on 10 December 2021 about taking a one off withdrawal of £24,500 from Mr D's pension and setting out why that was suitable. Taking that sum would impact the value of Mr D's residual pension savings and his current contributions would be impacted. And, if he overfunded, tax charges would apply to the surplus over the threshold. The adviser said, with some schemes, it was possible to opt to have these paid from within the scheme. Whilst noting that Mr D could potentially borrow from a family member, he'd still have to pay back that amount. Accessing the funds by withdrawing from his Embark platform would be the best way for Mr D to access the additional funds he needed. Under the 'risk' section, the letter said taking funds from the pot now would impact the amount that Mr D's pension could produce in future. It added that his payment would be taxed at Mr D 's highest rate. Under the heading 'Money Purchase Annual Allowance', the letter said any new pension savings Mr D made would be limited each year. And, if exceeded, would be liable for the annual allowance charge. I think there's some issue about when the letter was sent and if it was emailed to Mr D.

On 17 December 2021 Mr D emailed the adviser to say the house purchase had completed. But, as he hadn't yet received the additional funds from his pension, he'd borrowed funds from a family member to enable the purchase to complete.

The additional withdrawal, with tax deducted, totalled £15,131.36, which Mr D received on 20 December 2021. On the same date Embark wrote to Mr D saying that he'd taken a withdrawal from flexi-access drawdown on 20 December 2021 and future payments to that arrangement and any other defined contribution plan would be limited by the Money Purchase Annual Allowance (MPAA), then £4,000. Any payments in excess of that would be subject to an annual allowance tax charge.

An 'addendum to the suitability letter' dated 13 January 2022 was issued. It said it was to give Mr D a clearer picture of his future pension benefits now that he'd accessed the crystalised part of his Embark pension fund. It included two projections – one at age 65 in relation to Mr D's DB pensions and another at state retirement age of 67. It reminded Mr D that tax charges above the MPAA threshold of £4,000 a year could be paid from within the scheme fund.

Between 12 and 18 January 2022, Mr D queried if he'd been sent the suitability report. On 30 January 2022 Mr D complained to Openwork. His main points were about not being informed about the MPAA and the suitability of the mortgage and pension advice. Openwork sent its final response letter on 25 March 2022. It said it hadn't done anything wrong as it was satisfied the MPAA was discussed and its advice was suitable for Mr D's needs and circumstances.

The complaint was referred to us. One of our investigators looked into what had happened before writing to Mr D and Openwork with his findings. In summary:

- *Mr D had always intended to access his pension to help fund the deposit for the property purchase. Openwork had prepared separate suitability reports for the mortgage and the pension. It would've been better if advice about both had been given at the same time. As it was, the suitability report for the pension had been sent* *after a mortgage application had been completed, Mr D had received a mortgage offer and had accessed the tax free cash from one of his pensions.*

- *Mr D had suggested Openwork should've known he couldn't afford the deposit. From the fact find it appeared Mr D was intending to finance the deposit from savings and tax free cash from one of his pensions. His savings were at least £12,000 and possibly £15,000. The tax free cash was just over £16,000. So there was always going to be some shortfall. And extra expenditure could arise.*
- *In the end Mr D didn't use his savings which, in part, meant he needed to withdraw extra funds from his pension. That wasn't something the adviser could've foreseen. Even if Mr D wasn't financially knowledgeable, he should've known, if he incurred extra expense or rerouted some of the funds he'd intended to use towards the deposit, he'd have to find further funds.*
- *Mr D had suggested the adviser should've explored other options to finance the purchase or arranged a different mortgage. But it was unclear what Mr D may have had in mind. And, bearing in mind his circumstances, his options may have been limited. Openwork had said other lenders had been considered and discussed with Mr D. He didn't have to proceed with the application or accept the mortgage offer if he hadn't been happy with the product offered.*
- *Although advising Mr D about his pension after he'd already taken the tax free cash wasn't helpful, it was reasonable to advise Mr D to do that and put it towards the deposit.*
- *Mr D's objective was to avoid paying rent. Paying a mortgage instead didn't increase his monthly expenses by much in relation to his salary. Property is also a relatively low risk investment. Using the tax free cash from one of his pension arrangements would've had minimal implications for his overall pension provision and taking into account his other pensions.*
- *It was clear from an email Mr D sent on 10 December 2021 that he knew, if he took more than the tax free cash from his pension, he'd have to pay more tax. But it was only when he received the letter from Embark that he became unhappy with the advice he'd been given.*
- *The suitability report dated 8 October 2021 doesn't mention the MPAA or the increased cost if funds needed to be taken from the taxable part of Mr D's pension. The impact of the MPAA was explained in the letter of 10 December 2021 but Mr D had said he'd never received it. Both parties had given conflicting accounts as to if and when it was discussed but Mr D's phone records didn't show any calls between him and the adviser around that time.*
- *The 12 November 2021 suitability report does mention the impact of the MPAA but only once. The investigator didn't think that was enough for Mr D to have been aware of the MPAA when he decided to use the taxable part of his pension. The adviser needed to do more to alert Mr D to it and what it could mean in practice. It seemed Mr D did understand in around December 2021 that he'd have to pay more tax. But arguably the MPAA is the more onerous consequence but Mr D didn't mention it. Which suggested to the investigator that Mr D hadn't known about it.*
- *Openwork had said an email was sent on 10 December 2021 but later said that wasn't the case, although a letter had been sent in the post. The investigator wasn't persuaded about that. The email hadn't been sent due to a lack of staff resource and sending a letter involved more effort, so the letter might not have been sent. And there's no guarantee it would've arrived in time, especially given the festive period.*
- *Mr D had seemed relatively happy with the advice until he received Embark's letter which set out how the MPAA impacted him. That suggested it hadn't been made sufficiently clear to him earlier. It was Openwork's responsibility to ensure Mr D was fully aware of taking more from his pension.*
- *If the MPAA had been explained properly the investigator thought Mr D likely would've done something different, such as borrowing from a family member to pay*

the deposit (and as actually happened as there was a delay in receiving the pension funds).

Mr D accepted the investigator's view. Openwork didn't. The investigator responded to the points raised by Openwork but he maintained the 12 November 2021 letter didn't do enough to make Mr D aware of the MPAA consequences of making a withdrawal from his pension.

What I've provisionally 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 concentrated on what's still in dispute following the investigator's view – the issue about the MPAA and if Openwork did enough to make Mr D aware of the consequences of making a withdrawal (over and above the tax free cash) from his pension fund.

I'm issuing a provisional decision as my views differ from those of the investigator. He upheld this part of the complaint and concluded that Mr D hadn't been fully informed about the MPAA. I know it's going to come as a disappointment to Mr D when, based on the same evidence as the investigator considered, I've reached a different outcome. From what I've seen, I think Openwork's adviser did make Mr D aware of the MPAA and how it would impact on pension contributions going forwards. I've explained below my reasoning and why I've taken a different view to the investigator.

Where, as here, what's happened isn't agreed, I reach my conclusions on the balance of probabilities – that is what I consider likely to have happened, taking into account all the evidence – which includes what Mr D and Openwork say about what happened as well as the documentary evidence – and the wider circumstances.

I agree with the investigator that, notwithstanding any lack of financial expertise, Mr D would've known how much he needed to pay to complete the property purchase. He was paying £140,000 for the property and he was taking a mortgage of £105,000 which left a balance of £35,000. It seems there may have been some misunderstanding about what the £12,000 Mr D had saved up was to be used for and whether it would be put towards the deposit. But I don't think it's unreasonable to expect Mr D to know what funds he needed to complete the purchase and what his other expenses would be. I don't think it's Openwork's fault that a shortfall arose.

Mr D met that by drawing down extra money from his pension plan and not just the tax free cash. The MPAA is a reduction in the amount which can be contributed to money purchase pension plans, including employer and employee contributions, once someone has flexibly accessed their money purchase pension savings which is what Mr D did here.

I've carefully considered what Mr D and Openwork have said about what happened. Mr D's position is that the MPAA wasn't fully, if at all, discussed. Whereas the adviser's recollection is that the MPAA was discussed.

The suitability report dated 12 November 2021 noted (about investing the new pension in a model portfolio in line with Mr D's assessed adventurous attitude to risk):

'We have decided to phase investment in the fund over a 12 month period just in case you need further access to cash to assise with your purchase however I have advised this would mean that it would be taxed at your highest nominal rate and would mean an upper limit of £4,000 pa into further pension contributions if utilised.'

The MPAA isn't mentioned by name. But the report is clear that if Mr D did need to access his pension fund (over and above the tax free cash) that would impact in tax terms and his ability to make further pension contributions. My understanding is that this report was handed to Mr D at the meeting on 12 November 2021 so he did receive it. I've not taken into account later communications as it seems there's some dispute about if and when Mr D received them. So my conclusions centre on the 12 November 2021 report. I think it does evidence that Mr D was sufficiently informed about the MPAA.

As the investigator noted, written evidence does tend to carry weight. Particularly contemporaneous written evidence. I think that's relevant here. What the suitability letter said does evidence there was some discussion about the MPAA. Even if it was not referred to as such, the report clearly notes that taking more than the available tax free cash would have implications, not just in terms of attracting tax at Mr D's highest marginal rate, but on the amount of pension contributions he could, in the future, make.

Further the adviser recalls looking at one of Mr D's payslips which showed he was making employee contributions to his employer's pension scheme (a defined contribution scheme) of £276.76 pm and his employer was paying £553.53 pm. So in total that would be £830.29 pm which would exceed the then MPAA of £4,000. I'd have thought the adviser would've wanted to make sure Mr D understood that, if contributions continued at that level, the MPAA would have an impact if Mr D took more than just the tax free cash.

And it seems that drawing down more than just the tax free cash was recognised as a possibility. The suitability report says 'just in case' Mr D needed further access to cash which suggests the fact that need might arise had been recognised and discussed. If Mr D's savings were £12,000 and he was getting a mortgage of £105,000, he'd always need more to complete the purchase. And there'd be other expenses too – such as those Mr D has pointed to. I further note that it was a condition of the mortgage offer that an outstanding liability was paid off so Mr D would have to find that money too. If it seemed likely that Mr D would have to withdraw more than just his tax free cash I think the adviser would've been careful to ensure that the implications of doing that were discussed. I know Mr D doesn't recall any discussion. I don't intend any discourtesy to Mr D. But I think the 12 November 2021 report is evidence that the MPAA was discussed. So I think when Mr D made the further withdrawal he'd have known (or ought to have known) the impact of the MPAA. I don't think there's much debate that he knew he'd pay more tax.

I think there's also another potential issue. If Mr D hadn't been able to take the funds from his pension it's unclear how he'd have made up the difference to complete the property purchase. I know he borrowed the money from a relative but that was presumably on the basis that it was a short term loan and Mr D would repay it once the withdrawal from his pension had been completed and the money paid to him. He's said he hasn't paid the money back yet which might indicate that the loan could've been longer term. But that may not be the case and, in any event, it remains a debt which Mr D is liable to repay. But I mention that largely in passing as my view is that Mr D was made aware of the MPAA and its implications.

Against that background I'm not upholding any complaint about the MPAA and I'm not making an award. In respect of other aspects of the complaint I agree with the investigator. I think there were some issues, for example, as to the timing of the reports and the failure to deal with the mortgage and the pensions advice together and when the property purchase involved both a mortgage and accessing Mr D's pension. It would also appear that the transfer to Embark had already taken place and the tax free cash withdrawn by the time the pensions suitability report was issued. But overall I think the advice was suitable for Mr D.'

Mr D was disappointed with my provisional decision. He said it was always going to be his word against the adviser's about the MPAA and the provision of the pension suitability report. Mr D said he stood by the following:

- Openwork's adviser had failed to provide a clear and comprehensive explanation of the consequences of accessing his pension to fund his mortgage deposit.
- A combined report would've given him a holistic understanding of the financial implications. Separate suitability reports for the mortgage and pension contributed to his confusion.
- There were issues with the timing of the reports. The mortgage suitability report was sent to him after he'd completed the mortgage application and received a mortgage offer. That delayed provision of information hindered his decision making process and added to his uncertainty. Openwork didn't complete the pension suitability report (and there remained questions about its receipt) until after the tax free cash had been drawn down. And, during the investigation, two different copies of the report cover letter had been provided, both dated 12 November 2021, but one with a detailed explanation of the MPAA on the reverse.
- There was a lack of clarity about the deposit funding. Openwork didn't sufficiently address his concerns about the source of the remaining deposit funds. It may not have been Openwork's responsibility to explore alternative financing options, but the lack of clarity about the matter added to his confusion.
- Limited mortgage options from primarily only one lender were presented which limited his choices and potentially affected the suitability of the product.
- Openwork had provided two copies of the pension suitability report. Both confirmed MPAA but to a very limited extent. Openwork hadn't explained why there was more than one copy and which one was given to Mr D. And it's unclear why Openwork considered it necessary to send another letter dated 10 December 2021 if the discussions had been adequate in the first place. That letter was emailed then posted or not sent at all until the transaction to draw down the funds had been completed.
- The email conversation between Mr D and the adviser between the end of November and 10 December 2021 reiterated the tax position but didn't discuss the MPAA. Openwork had also said the position was explained during a call. It's unclear why Openwork and the adviser felt that was necessary and it had been proven that the call had never been made.

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 considered Mr D's comments very carefully. I can understand his disappointment. But I don't think the points made are new and I've not been persuaded to change the views I reached in my provisional decision.

As to whether the MPPA was discussed, it is mentioned (albeit not by name) in the suitability report. Mr D has said he never received the report – it wasn't handed to him at the meeting on 12 November 2021 and he didn't receive a copy by post or email. He says he only saw it when he emailed the adviser requesting a copy in January 2022. On the one hand, I don't have any reason to doubt what Mr D says. But, on the other, I don't see why the adviser, having prepared a suitability report (and consistent with his regulatory responsibilities) wouldn't have given it to Mr D and/or sent a copy in the post. I've seen the covering letter which appears to have been correctly addressed and so I'd assume the report was sent and Mr D received it. I note he said in January 2022 that he was unable to locate both the pension and the mortgage suitability reports. I think it's probably unlikely that neither was given to him, even if he didn't subsequently recall receiving them. In any event, there's no dispute that Mr D met with the adviser on 12 November 2021. The pension suitability report confirms what was discussed. So, even if there's some question about whether the report was received, I still think, on balance, the MPAA was mentioned.

It may be that a combined report as to the pension and mortgage would've made things easier and clearer for Mr D. But I don't think separate reports meant that he was unable to reach informed decisions about both the mortgage and his pension arrangements. A mortgage suitability report can be issued after a mortgage offer has been received. I'd assume the recommendation was explained at the time the application was made. Although it seems Mr D's choices may have been limited, I haven't seen anything to suggest the product wasn't suitable for him.

Mr D has pointed to some inconsistencies in the evidence. As to there being two different versions of the pension suitability report, that isn't altogether unusual – sometimes a firm's file will include draft reports. Here there's no dispute that the MPAA was mentioned in both versions. I don't think any discrepancy in the covering letters or the issue of the call the adviser says took place but which doesn't appear in his phone records changes things, given what I've said about why I think the MPAA was brought to Mr D's attention. He may view the fact that Openwork says it explained the MPAA during a telephone call as indicating that there'd been no earlier discussion or any that had taken place had been lacking. But I don't think that necessarily follows. Advice may be confirmed or reiterated at different stages of the process.

The follow up recommendation report dated 10 December 2021 was necessary as Mr D would be making the withdrawal of £24,500 to fund the balance of the deposit. I don't think it suggests the MPAA wasn't discussed earlier. Nor does the MPAA feature in the email exchanges but I think the focus would've been on releasing the funds and the tax charge that would be incurred. There's also the addendum to the suitability letter dated 13 January 2022. It said it was intended to give a clearer picture of Mr D's pension benefits now that he'd accessed his tax free cash and drawn down on his fund. I think it's logical that the adviser would want to confirm Mr D's position after he'd taken that money. The MPAA is mentioned but albeit briefly and in the context of tax charges above the MPAA threshold of £4,000 being paid from within the scheme. I don't view that as inconsistent with a more detailed discussion having taken place earlier.

As to how the deposit for the purchase would be met, I think it was primarily Mr D's responsibility to work out what he'd need to fund the balance of the purchase price, taking into account the amount raised by way of the mortgage and other expenses and costs. I note Mr D may have incurred some unexpected expenditure unrelated to the property purchase. That may have put some strain on his finances but I don't see that was Openwork's fault or responsibility.

All in all I maintain what I said in my provisional decision. I've set out my provisional findings in full above and these form part of my final decision.

My final decision

I don't uphold the complaint and I'm not making any award.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr D to accept or reject my decision before 21 March 2024.

Lesley Stead
Ombudsman