DRN-4761739

The complaint

Mr D complains that Capital Professional Limited (then trading as Cowgills Wealth Limited) did not provide him with the agreed ongoing advice service and that its service didn't justify the charges that it took from his pension.

What happened

In 2013 Mr D received financial advice from Cowgill Holloway Wealth Management to switch an existing pension into a self-invested personal pension (SIPP). Mr D followed that recommendation and transferred around £196,000 into a SIPP which was invested in line with the recommendation he'd received.

Cowgill Holloway Wealth Management changed its name to Cowgill Wealth Limited but continued its agreement with Mr D for the provision of ongoing financial advice. Around 2023 Cowgill Wealth Limited was acquired by Ascot Lloyd which is a trading name of Capital Professional Limited. And Capital Professional Limited ('CPL') have confirmed that it is now the respondent business for the purposes of Mr D's complaint. So, for ease of reading, I will simply refer to CPL as the respondent in this decision.

Mr D was asked to sign client agreements a number of times by CPL over the course of his relationship with them. They indicated that CPL would provide him with its 'gold' service option, for which he would pay 1% of his fund value a year. The original agreement indicated that the service was subject to a minimum annual charge of £2,500.

CPL have shown us that the client agreement meant that CPL would provide the following service for the fee it would take from Mr D's pension fund:

BRONZE:

- Review meeting via the telephone or Skype once a year to review pension plan and provide a written report;
- On-going assistance from adviser;
- Forward provider correspondence.

SILVER:

- Everything provided to 'bronze' customers, plus;
- The meeting will be face to face;
- Investment portfolio review analysis (involving a detailed review of existing investment portfolio, considering the asset allocation and performance of the funds held. Comparing each fund with its peers to determine its suitability).

GOLD:

- Everything provided to 'silver' and 'bronze' customers, plus;
- Interim review meeting followed up by a written report;

- Interim investment portfolio review analysis;
- Liaising with third party firms;
- Production of end of year tax statement – within wrap.

In an email on 4 November 2022 Mr D complained to CPL about a number of things. He was unhappy with the overall performance of his SIPP. He was unhappy about the overall level of charges that he'd paid. He pointed out that he was told in 2019 that his fee would be reduced to 0.5% a year and had now calculated that CPL had instead continued to take a 1% fee each year since then. He also explained that he'd paid for a 'gold' service level and hadn't got what he had paid for. Specifically he didn't think that the reporting or the reviews had been adequate.

CPL responded to his complaint points as follows:

- It provided an explanation and background of the fund performance since 2013. It explained that Mr D's SIPP had been invested in a single investment fund which it considered had underperformed between 2016 and 2018. Which was why it recommended, in 2017, moving some of the fund to a different investment. Then the rest of the SIPP was removed from the underperforming fund in 2018. So, CPL didn't uphold Mr D's complaint about the management of his SIPP funds.
- It considered whether the service it provided Mr D was in line with its client agreement. It said that it provided consistent contact and documentation in line with its process. It said that review meetings had often been requested by its adviser and declined by Mr D.
- It agreed that it had told Mr D that it would reduce his annual adviser fee from 1% to 0.5% and that it hadn't done that. It said that was an administrative error that it said had been corrected and it agreed to repay the over charged amount. It calculated this to be £4,193.90 and offered an additional £500 payment as a gesture of goodwill.

Mr D wasn't satisfied with CPLs response and referred his complaint to us. He told us that his specific complaint relates to the level of ongoing service he's received since starting his SIPP in 2013. He didn't think CPLs service delivered what was promised in the client agreement and he wanted all fees refunded from the inception of his policy.

Our investigator considered what parts of Mr D's complaint our service could help with. She explained the time limits that govern our services jurisdiction. And said that we could only consider the service that CPL provided in the six years prior to Mr D making his complaint.

Our investigator then went on to explain her opinion on whether or not CPL had provided the agreed level of service it was paid for in those six years. And didn't think that it had. She said that CPL had agreed to provide its Gold service standard. Which meant that the onus was on CPL to provide that service and not just to offer it. She acknowledged that CPL provided evidence that it had offered to conduct in person reviews in the period 2013 to 2023. But thought that, in the period she was considering, these only took place between April 2018 and April 2019. So she thought it would be fair for CPL to refund the charges it took in those years that it didn't provide the service that was agreed.

CPL responded to explain that it disagreed with this suggested resolution for the following reasons:

- That there was a disparity in the client agreement where a client can bind it to the provision of its service knowing that he can refuse any part of it and get a refund of fees.
- It said that it met Mr D in several years, providing advice. It said that in 2021 Mr D

received a review and advice to make a pension contribution. In 2017, 2018 and 2019 reviews took place with further advice and only interim reviews were declined by Mr D.
- It didn't think that the essence of COBS 6.1A.22 meant that it needed to provide 100% of its service to charge anything at all.
- It said it had done its best to provide Mr D with the agreed service.
- It said that Mr D had never previously complained about the level of service he received and it considered his complaint was mostly about his disappointment in the performance of his pension.
- It doesn't consider that the service it provided failed to comply with COBS rules and it should be entitled to retain the fees it charged.

I considered the facts of Mr D's complaint and issued a provisional decision to both parties. In that I explained why we only had jurisdiction to consider the six years running up to the date Mr D raised his complaint. And then went on to explain why I didn't think that CPL had delivered the service that it agreed to, in its client agreement, in some of those years. And I set out what I thought was a fair and reasonable way to put things right.

Mr D responded to accept my decision on jurisdiction and what I'd provisionally decided on merits. CPL responded to say that it had no further comments to offer.

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 thank both parties for their consideration of my provisional decision and their prompt responses to that. I've received no further evidence or arguments to consider. So based on a final consideration of the evidence I have been provided, my final decision remains the same as the provisional decision that both parties have already seen. I am upholding Mr D's complaint for the reasons that I set out below.

What parts of Mr D's complaint can we look into?

Our investigator has explained to both parties that the rules that govern our service mean that Mr D had six years to complain about the service he received for the annual fee he paid CPL. I've also considered the impact of this rule, which is set out in the dispute resolution (DISP) part of the regulator's handbook in DISP 2.8. Our investigator has already explained this to both parties so I will not set it out again.

What this means in this case is that we are not able to consider the annual fee taken in all of the years that Mr D has been CPL's client. We can consider whether CPL provided the agreed service in the six years prior to Mr D making his complaint. And there is another part of the rule in DISP 2.8 which allows a consumer to complain later than six years if that complaint is made within three years of the point of awareness of the issue. In this case however, as Mr D ought to have been aware at the end of each year whether or not CPL had provided the agreed service, the point of awareness is the same as the event. So does not allow us to look at any events that the six year time limit does not.

Given that I agree with our investigator that we are only able to consider the service that CPL delivered against its client agreement for the six years prior to Mr D's initial complaint I now need to determine when Mr D made that complaint.

A complaint is defined in DISP as:

> "*any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service or redress determination, which: …Alleges that the complainant has suffered (or may suffer) a financial loss, material distress or material inconvenience*…"

Mr D has made us aware of a letter he sent CPL on 6 January 2019 when returning an updated copy of CPL's attitude to risk questionnaire. Whilst I understand that CPL didn't treat that as a complaint I have considered whether it should have. And for similar reasons to our investigator I don't think it was a complaint. It is clear that Mr D was expressing dissatisfaction about what he saw as poor investment performance. And was asking CPL for suggestions on how to achieve better returns. Given that CPL were not managing the funds held in the SIPP, it wasn't unreasonable for CPL to conclude that Mr D understood that. and that his dissatisfaction related to the way those funds performed. And given that the crux of this complaint is about whether or not Mr D had the appropriate service from CPL, that was not raised at all in the letter of 2019.

Mr D wrote to CPL on 4 November 2022 clearly making out his complaint. Which I summarised earlier. I note that letter explained that it followed a meeting held with CPL on 3 November 2022 where Mr D would appear to have been dissatisfied. And Mr D also refers to a meeting in August 2022 where he says he complained.

I have asked CPL to provide me with copies of meeting records and call logs for all meetings that it had with Mr D since August 2016. But it has not provided any meeting notes for meetings that it suggests took place. As a consequence I do not know what was specifically discussed in the meeting of August 2022.

I note that Mr D considers that he made his complaint in August 2022. CPL however provided its adviser's recollections in its complaint response. It acknowledged that Mr D again raised concerns about performance. But the adviser didn't consider that Mr D's disappointment with the way the investments had performed was a complaint about its service. I can see that Mr D then waited until he was provided with further information in October about the charges on his SIPP. And then met with CPL in November after which his complaint was clearly made. So, on a balance of probability, I am not persuaded that it's more likely than not, that Mr D made his complaint about this matter until his email of 4 November 2022.

For the above reasons our service only has jurisdiction to consider whether CPL provided the service that it charged for the six years prior to this complaint. So from 5 November 2016.

<u>My provisional decision on the merits of Mr D's complaint</u>

When considering what is fair and reasonable, I take into account relevant laws and regulations as well as the regulator's rules, guidance and standards. Where appropriate I also consider what was good industry practice at the time of the advice.

What the regulator had said?

As a regulated firm, CPL had many rules and principles that it needed to adhere to when providing advice to Mr D. Many of these were found in the regulators handbook under the Conduct of Business Sourcebook (COBS) and Principles for Businesses (PRIN).

The most relevant rules for this complaint are;

COBS 6.1A.22

> *A firm must not use an adviser charge which is structured to be payable by the retail client over a period of time unless (1) or (2) applies:*
>
> *(1) the adviser charge is in respect of an ongoing service for the provision of personal recommendations or related services and:*
>
> *(a) the firm has disclosed that service along with the adviser charge; and*
> *(b) the retail client is provided with a right to cancel the ongoing service, which must be reasonable in all the circumstances, without penalty and without requiring the retail client to give any reason; or*
>
> *(2) the adviser charge relates to a retail investment product for which an instruction from the retail client for regular payments is in place and the firm has disclosed that no ongoing personal recommendations or service will be provided.*

COBS 2.1.1R - Client's best interest rule

PRIN 2.1.1R – Principles for business

> *Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly.*

The regulator also produced guidance in 2014 in the form of an FCA factsheet (For investment advisers - Setting out what we require from advisers on how they charge their clients). The factsheet said;

> *Ongoing adviser charges*
>
> *Ongoing charges should only be levied where a consumer is paying for ongoing service, such as a performance review of their investments, or where the product is a regular payment one. If you are providing an ongoing service, you should clearly confirm the details of the ongoing service, any associated charges and how the client can cancel it. This can be written or orally disclosed.* ***You must ensure you have robust systems and controls in place to make sure your clients receive the ongoing service you have committed to*** [my emphasis]***.***

Did CPL do what it agreed to do for its fee?

In assessing this I will be considering the guidance that the regulator put in place prior to the events complained of here. It is worth noting that the regulator didn't set out the extent of the service an adviser should provide for an ongoing advice charge. Merely that a firm should clearly confirm the details of its ongoing service. So it will be the ongoing service that CPL chose to offer that I will be considering. And CPL had considerable discretion in what service it elected to provide.

The evidence seems clear that Mr D was originally signed up to what CPL described as its 'Gold service' offering. I have summarised above what it included. Which I think was clearly set out in the client agreements signed by Mr D. Including the one signed in 2016 ahead of the period I'm considering in this case. I think this complied with the regulator's requirement under COBS 6.1A.22. Whilst CPL asked Mr D to periodically renew his client agreement I haven't seen that the service it promised altered materially. This was an agreement CPL

entered into with Mr D. He agreed to CPL taking a fee every year from his pension, and CPL agreed to do the things that it decided to offer in its client agreement.

In order for CPL to deliver on its promised service it had to basically do the following, for the products it had arranged for Mr D:

- Provide an annual review with Mr D that it said would be face to face, and would include investment portfolio review analysis.
- Provide an interim review meeting followed up with a written report, including investment portfolio review analysis.
- Provide ongoing phone and email assistance.

It is worth noting that Mr D complied with his part of this client agreement by default. The fees were collected in full throughout the course of each year by CPL. Although it acknowledges that it made a mistake after it agreed to amend the level of its fee from 1% a year to 0.5% a year on 1 March 2019. After which it instead continued to take the 1% fee until Mr D noticed in 2022. So Mr D has in fact paid more than he agreed to for the service CPL promised. And this has not been refunded as CPL only offered to do so in final settlement of this complaint. Which Mr D rejected.

So, given that Mr D kept to his end of the agreement, I need to decide whether CPL did enough to keep to its end of this agreement. In deciding this I will be weighing up the evidence that I have been provided. Where that is incomplete I will make my decision on a balance of probability, that is, what I think was most likely the case. I will now consider the evidence CPL has provided of its service provision. CPL have not made it clear at what points it should have been providing annual reviews or interim reviews. I have seen correspondence sent around June and around December with both at different times referring to annual reviews. So to avoid confusion I have considered the following annual periods in the same way as our investigator has already set out:

1. *November 2016 to March 2017*

   In 2016 CPL emailed Mr D on 5 December. It said, "*I am contacting you with regard your six month review which falls due this month, Please confirm if you wish to arrange a meeting with* [named advisor] *to discuss your investment in detail or if you are happy for us to forward your valuation in the post?".* Mr D responded to ask CPL to send him his valuation. The tone of CPL's email was leading and made it very simple for Mr D to agree to be sent his valuation. But that wasn't the service CPL owed Mr D at this interim review. Referring again to the above guidance, that I emphasized, I don't think this is evidence of a robust system to ensure CPL provided its service. It was followed by a short letter the same day providing the valuation of his SIPP on that date. No commentary or analysis was provided which ought to have formed part of its service offering.

   I conclude that CPL did not do enough in this period to provide Mr D with the full service it agreed to.

2. *April 2017 to March 2018*

   In 2017 CPL sent Mr D a recommendation letter on 4 September. This was out of sync with his review anniversaries. But it referred to a recent meeting held with Mr D and was addressing issues regarding his SIPP. Again, no meeting notes have been provided. But the context of the letter and the recommended fund switch persuade me, on balance, that there was more likely than not a meeting held to review the SIPP. And there was no additional fee levied, indicating that this formed part of CPLs ongoing advice.

In 2018 CPL wrote to Mr D on 3 January sending a brief letter enclosing a valuation of his SIPP and an offer to discuss the valuation if Mr D wanted to. Referring again to the regulatory guidance, I don't agree that this letter is evidence of a robust system to ensure CPL delivered the service it agreed to for this review.

I conclude that CPL did not do enough in this period to provide Mr D with the full service it agreed to.

3. *April 2018 to March 2019*

In 2018 CPL wrote to Mr D on 22 June sending a summary of a recommendation regarding the fund choices. It indicated this was in place of the normal annual review that would be due. It is not clear from the content whether this followed a meeting or how that meeting was conducted. However, CPL say that this followed a meeting with Mr D, and Mr D has not disputed this or that he had some contact with CPL.

In 2018 CPL wrote to Mr D on 18 December. It told Mr D that the annual review of his portfolio was due and it enclosed a summary of his portfolio. Which was in fact a simple valuation with no analysis. The letter offered Mr D the option to discuss the valuation if he wished. And enclosed an attitude to risk questionnaire for Mr D to complete and return. Mr D returned this questionnaire on 6 January 2019 along with his letter expressing his concern in the investment performance of his SIPP. I infer from this that he required advice on investments. Although I am not clear exactly when CPL responded to this request.

In 2019 CPL wrote to Mr D on 1 March. It started with "*further to our recent meeting*" and then went on to discuss an investment recommendation. In the absence again of any meeting record I have little information about that meeting. But it appears to most likely have been in response to Mr D's request for assistance on 6 January 2019. That it is referred to as a meeting implies it was most likely face to face. And not long before the date of that letter. This letter agreed to reduce the cost of its ongoing advice to 0.5%. But did not refer to any alteration in the service level it was providing. No specific client agreement was completed to amend this fee. I think this represented a meeting and some evidence of CPL delivering its service at that point.

I conclude that in this period CPL did enough to provide Mr D the service that it agreed to.

4. *April 2019 to March 2020*

In 2019 CPL wrote to Mr D on 20 November. This was a recommendation it provided regarding a life policy. It appears to have done this as part of its client agreement with Mr D and did not take a specific fee for that work. But it is unclear to me that was part of its agreement with Mr D. Which was to deliver a service regarding the SIPP. It is not evidence of specific service delivery or of any review of Mr D's pension.

In 2020 CPL wrote to Mr D on 7 January. This was another letter providing a valuation of the SIPP and offering to discuss it if Mr D wished. It is headed as the annual review. There is no indication of a meeting or contact being made ahead of this letter. As such it doesn't provide compelling evidence of a robust approach to ensuring that CPL delivered the service it had agreed.

I conclude that CPL did not do enough in this period to provide Mr D with the full service it agreed to.

5. *April 2020 to March 2021*

In 2020 CPL emailed Mr D on 30 June. This email said "*could you let me know when you would be free for a catch up please to run through pension valuation and current situation etc? I'm pretty flexible…"*. Which was I think a reasonable attempt to engage Mr D and arrange contact. Mr D responded by asking for the valuation to be sent as

he was avoiding seeing anyone due to the covid 19 pandemic. But I can't see that CPL responded to offer any alternative. During the pandemic the public and firms became more aware of online meeting options rather than meeting in person. I would expect a robust approach to ensuring the service was delivered would have made it clearer that Mr D could have had this meeting on the phone or an alternative like Skype or Zoom. And given that this was possibly the interim review, may not have been due to be held in person anyway.

I've not been provided any evidence of any form of review being offered or conducted around December when I think one was most likely due.

I conclude that CPL did not do enough in this period to provide Mr D with the full service it agreed to.

6. *April 2021 to March 2022*

   In 2021 CPL emailed Mr D on 16 June. This email said, "*it would be good to arrange a meeting (zoom or in person is fine, whichever is preferred)…*". And it included a performance summary. Mr D acknowledged that summary and declined the meeting invite saying, "*can we speak via Zoom in November?"*. In this case I think Mr D has provided a clear wish to defer a meeting following a genuine attempt to arrange it. But I would then expect to see CPL going as far as agreeing a date with Mr D for that meeting. Even if the earliest that Mr D could make was in November. But I've seen no evidence provided that CPL responded to Mr D. And no evidence of a meeting being held in November 2021.

   CPL wrote to Mr D on 15 December 2021. This letter represented a response to a query from Mr D about making an additional pension contribution. This letter is not evidence that there was any meeting and is not evidence of a review of his pension. Although it does provide evidence of CPL providing ongoing assistance regarding the SIPP. Which was an ad hoc part of its service delivery.

   I conclude that CPL did not do enough in this period to provide Mr D with the full service it agreed to.

7. *April 2022 to termination of agreement*

   It is apparent that CPL met with Mr D in August 2022. This is out of sync with the reviews that he should have been receiving. And no meeting notes or follow up letters or recommendations have been provided. So I am unable to determine that this meeting constituted one of Mr D's structured reviews.

   In 2022 CPL met with Mr D on 3 November after which Mr D formally submitted his complaint on 4 November.

   I conclude that CPL did not do enough in this period to provide Mr D with the full service it agreed to.

I have asked CPL to provide records of all meetings since 2016. And the above summarises all of the evidence it has provided in support of the service that it provided Mr D.

Reflecting again on the service that it agreed to provide, over the six years that I'm considering in this complaint, I would expect to see evidence of six 'face to face' meetings, and of six interim meetings held with Mr D. So 12 meetings in total. As well as 12 written records (including detailed reviews of the investment portfolio). This was the service level that CPL chose to set out in its client agreement. It was, in effect the contract that it entered into with Mr D. And, from the evidence I've been asked to consider, and have summarised above, my decision is that CPL did not fully provide the agreed service in any of the years with the exception of the period between April 2018 and March 2019.

The regulator required that CPL make its ongoing service clear. But CPL chose how to word and offer that service. It chose to tell Mr D that it would provide face to face meetings and a second interim meeting each year. And it should have had robust systems in place to make sure it delivered that. In too many of the years that I have looked at I don't think it did. The default approach seems to have been to have offered a meeting rather than make concerted efforts to schedule one. As a consequence too many years passed with no meaningful contact. Overall I don't agree that it is fair or reasonable for CPL to charge Mr D for a service that it didn't provide. I don't think that complies with *principle 6* referred to earlier in this decision.

Although CPL have said they don't think its fair to refund all of the fees it hasn't suggested what it thinks would instead be fair. I've therefore considered whether the client agreement provided any guidance about the relative costs of the components of the service CPL would provide. But it did not. From this I infer the only option it gave Mr D was to pay in full. And the only option CPL had was to provide its service in full.

CPL have expressed the view that it shouldn't be bound to provide Mr D with the full service, in order to take its fee, if Mr D could refuse it. But I don't agree. The terms of the agreement were clear. They didn't allow either party to amend its consideration. Mr D couldn't for example vary the amount of the fee he paid CPL. And similarly, I don't think it's fair or reasonable for CPL to vary the level of service it provided.

Remember that the regulator told firms, "***you must ensure you have robust systems and controls in place to make sure your clients receive the ongoing service you have committed to".*** If CPL had, then it ought to have become clear to it that it wasn't delivering the agreed service to Mr D. I think it would have been reasonable for it to draw Mr D's attention to this and sought to renegotiate the terms of its client agreement with him if necessary. But I've seen no evidence that it did.

I acknowledge that CPL changed the terms of its client agreement in March 2019 by reducing the fees. But nothing in its correspondence indicated a reduction in the service it would provide. So I am not inclined to accept that its service after that should be assessed against a different bar.

I also recognise that CPL partially upheld Mr D's complaint. But I don't think that the offer it made was a fair way to put things right in this case. Not even for the over charging that its response acknowledged. That's because the fee that it incorrectly took from Mr D's SIPP also permanently deprived him of any investment returns he should have made on those sums. And CPL's offer does nothing to correct that.

Putting things right

CPL can't retrospectively provide Mr D with the meetings and reviews that he was never provided. So I think the only fair and reasonable way to put things right is to refund the cost of the ongoing service charges in those years where I've decided that it didn't provide the service that it agreed to.

To do this CPL need to calculate the effect on Mr D's SIPP of the deduction of the fees taken from 4 November 2016 onwards (with the exception of those fees taken in the period 1 April 2018 to 31 March 2019). To be clear, this will mean calculating the lost investment returns on each fee, based on the actual investment returns Mr D's SIPP experienced from the date the fees were deducted to the date that CPL is told that Mr D accepts my decision.

When CPL have calculated this total loss to Mr D's SIPP (from the fees that should not have been paid, and the lost investment returns from those amounts) it should, if possible, pay

that total loss amount into Mr D's SIPP. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the SIPP if it would conflict with any existing protection or allowance.

If payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr D as a lump sum after making a notional reduction to allow for future income tax that would otherwise be paid.

If Mr D has remaining tax-free cash entitlement, 25% of the loss would be tax free and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So making a notional reduction of 15% overall from the loss adequately reflects this. CPL or Mr D must respond to let me know if it intends to dispute this assumption. This is so the assumption can be revisited as appropriate. It won't be possible to amend this assumption once I issue my final decision on the complaint.

If payment of compensation is not made within 28 days of CPL receiving notice of Mr D's acceptance of my final decision, interest must be added to the compensation at the rate of 8% per year simple from the date of my final decision to the date of payment.

Income tax may be payable on any interest paid. If CPL deducts income tax from the interest, it should tell Mr D how much has been taken off. CPL should give Mr D a tax deduction certificate in respect of interest if Mr D asks for one so he can reclaim the tax on the interest from HMRC if appropriate.

My final decision

My final decision is that I uphold Mr D's complaint for the reasons given above and direct Capital Professional Limited to put things right in the manner set out in '**putting things right**' above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 24 May 2024.

Gary Lane
Ombudsman