DRN-5148891

The complaint

Mrs C's complaint against Chase de Vere Independent Financial Advisers limited is that it misadvised her late husband to buy an annuity that didn't provide a spouse's pension.

What happened

I've issued two provisional decisions on this complaint. The first dated 24 May 2024, and the second dated 25 October 2024. The background and circumstances to the complaint and the reasons why I wasn't provisionally minded to uphold it were set out in those decisions. I've copied the relevant part of the 25 October 2024 decision (which also summarised the 24 May 2024 decision) at the end of this decision, and it forms part of this final decision.

I asked Mrs C and Chase de Vere Independent Financial Advisers limited to let me have any further evidence or arguments that they wanted me to consider before I made my final decision.

Mrs C's representative provided further evidence and arguments which I've taken into account in making my decision as set out below.

Chase de Vere Independent Financial Advisers limited said it agreed with my provisional decision.

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.

Mrs C's representative has raised concerns about the fairness of my provisional decisions and with how I've interpreted the evidence. She has asked if I've taken independent legal advice. She also said there was onus on Chase de Vere to adduce some evidence to rebut the presumption that the decision made by Mr C was predicated on the flawed advice (which had been established) and must have been influenced by that advice.

The Financial Ombudsman Service provides an informal dispute resolution service, and we don't operate in the same way as a court. We are bound by the Dispute Resolution Rules (DISP Rules) set out in the industry regulator's Handbook. Unlike a Court, we have the power to carry out our own investigation. And the rules (DISP 3.5.8R) mean I, as the Ombudsman determining this complaint, am able to decide the issues on which evidence is required and how that evidence should be presented.

Section 228 of the Financial Services and Markets Act 2000 (FSMA) provides that *'A complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case.'* That is reflected in DISP 3.6.1R.

In deciding what is fair and reasonable in all the circumstances, I have to take into account, amongst other things, relevant law and regulations; regulators' rules, guidance and where appropriate good industry practice, which is what I have done in this case. Whilst I have to

take relevant law into account, I'm not necessarily bound by it. This is consistent with the court's findings in Heather Moor & Edgecomb v Financial Ombudsman Service [2008]**.** However in this case I've carefully considered the legal position, and I'm satisfied I haven't departed from relevant law.

Having said that, it seems to me that Mrs C's representative is more concerned with the way I've interpreted the evidence and the fairness of my findings. As I've said above, it is for the ombudsman to decide what is fair and reasonable in all the circumstances, and it's for the ombudsman to assesses all the evidence and arguments and place weight on it as he considers is appropriate.

Mrs C's representative set out her further evidence and arguments under a number of headings. I've used similar headings below for ease, albeit some points overlap and so may come under a different heading.

FSA review of pension advice given by Chase de Vere

Mrs C's representative referred back to the findings of the FSA's review of pension advice, including annuities, given by Chase de Vere around the time that advice was given to Mr C, and the multiple systematic failings that were found. She said given the failings identified (which included amongst other things in the suitability of advice), she considered it wouldn't be fair and reasonable to consider it more likely than not that some other documentation was completed. And that the missing advice was somehow given in undocumented meetings, but not referred to in the final meeting record. She said Mr C kept comprehensive records, and if other written advice had been given they would have found it. She noted the FSA investigation recognised that 28% of the annuity sales examined had been mis-sold – in other words greater than one in four had been mis-sold.

As I said in my provisional decision, the regulator did find unsuitable advice had been given in a significant number of cases (25%). However the regulator didn't identify they had all been mis-sold – a significant proportion weren't. But what's key is the regulator rightly considered each case on its own facts and merits, and the evidence available on each case. That's what I've done here. I set out the reasons why I thought other documentation had likely been completed in my provisional decision, but as I said, I don't think it was likely there was a further suitability/formal advice letter.

Fundamental flaw and failings in advice

The representative said the advice given to Mr C was flawed, pejorative language was used around the widow's pension decision, and it all deflected Mr C away from selecting a spouse's pension. She said the adviser's error stating the widow's pension wouldn't benefit from a guaranteed annuity rate was a gross error, and went to the root of the advice given. She said if the adviser had confirmed the widow's pension would benefit from a guaranteed annuity rate, it was inconceivable that Mr C would have dismissed that option.

I accept that the adviser got this wrong. This would breach the regulator's Principle 7 to not provide misleading information. However an error or omission in itself doesn't give rise to a right to compensation. It would have to be shown that the error or omission caused the client to make a decision that they would otherwise not have made and which caused them harm.

As I explained in my provisional decision, the documentation available showed that Mr C and the adviser had been considering Mr C's retirement for several months leading up to his retirement date. The adviser's letter dated 8 November 2004 about 'Retirement Planning' said Mr C wished to continue receiving a similar level of income to which he was currently receiving as he didn't see his lifestyle changing over the following few years. Mr C

confirmed this in his letter to the adviser dated 14 February 2005. And I think this was consistent with the content of the 17 November letter. I think it's reasonable to conclude the adviser's understanding of Mr C's objective was to maintain his income level as far as he could, as long as Mrs C was provided for from their wider provision.

As I have explained, Mr C was the client. The adviser had a duty to take Mrs C into account in the context of Mr C's intentions - that Mrs C would have sufficient provision on Mr C's death when taking their overall wealth and assets into account. At the heart of ensuring advice is suitable, it needs to meet the client's objectives. Whilst advisers are bound to ask questions and, in Mrs C's words, act as a critical friend, that has to be considered in the appropriate context. It wasn't the adviser's role to set Mr C's objectives or persuade him to change what was a reasonable objective. I accept that if a client asks an adviser to do something that the adviser considers is unsuitable, he would need to advise that it was unsuitable. But that wasn't the case here.

So I think the events need to be considered in the context of the objectives that the adviser was working to.

Mr C was clearly presented with the actual figures for each of the types of annuity available – with a spouse's pension and without. Irrespective of whether the annuity providing for a spouse's pension was based on the guaranteed rate or not, the actual amounts payable as stated were correct, set out in monetary terms, and in an easily understandable format. Mr C was able to see the difference in the amounts payable and so, in effect, the actual costs of the different options. It was recorded that he thought providing the annuity with the 10-year guarantee was worth the extra cost – which is consistent with him actively considering the different options and their relative costs.

I accept the incorrect information provided by the adviser could have had some influence on Mr C's decision. But I think most clients, including Mr C, would likely rely mostly on the actual figures provided in assessing the different annuities available.

Mrs C's representative has said if the adviser had confirmed the widow's pension would benefit from a guaranteed annuity rate it was 'inconceivable' that Mr C would have dismissed that option. However I don't agree. I think it's reasonable to put more weight on the fact that the actual figures were provided which, as I say, I think it's more likely Mr C would rely on in making his decision. So although I accept the adviser made an error, I don't think, on balance, it likely caused Mr C to make a decision he would otherwise not have made.

Health

Mrs C's representative said Mr C wouldn't have known the time frame for dialysis as it was dependent of the speed of deterioration of his condition. But the adviser was clearly on notice of Mr C's ill health, had a lower life expectancy, and had Mr C died within 5-10 years the loss of the widow's annuity would have been catastrophic over the course of Mrs C's life. She said Mr C's ill health and limiting life condition was at the heart of whether it was reasonable to not provide a spouse's pension.

I agree that the adviser was on notice of Mr C's ill health, and more widely that due to his health he would generally have a lower life expectancy. However for the reasons I set out in my provisional decision, I've seen no evidence that the adviser was alerted that Mr C's life expectancy was 5 to 10 years. The adviser wasn't required to be a medical expert, and it would have been for Mr C to alert the adviser if his life expectancy was significantly shortened. Several references have been made in the evidence that Mr C was open about his health condition – but also that he had a very positive outlook. So I think the adviser would likely have been considering the position in the context that Mr C would have a

generally lower life expectancy, but not in the context it was expected to be 5 to 10 years.

Vulnerability

Mrs C's representative said Mr C's condition made him vulnerable because he found it hard to address his impending death, and the consequences of his early death on Mrs C. It made him more vulnerable when making financial decisions, and therefore deserving or additional care, critical thinking and appropriate questioning.

I agree that Mr C's condition *potentially* made him more vulnerable. However I think the potential impact of vulnerability was less well known within the industry in 2005. The FCA has since published papers on it, and there is now more focus on mitigating the risk of harm. But this was some time after Mr C was advised.

On the one hand the adviser was clearly aware of Mr C's medical history. But as I've said, I don't think he was alerted that Mr C had a 5-to-10-year life expectancy. Mr C hadn't actually started dialysis at that time, and it wasn't known when that might be. And as also has been acknowledged, he had a positive outlook on his future.

It's obviously very difficult to assess around 19 years after the event whether Mr C displayed any signs of behaviour that the adviser should have picked up on that suggested Mr C's health impacted on his ability to process information or make an informed decision. Mr C's correspondence from the time appears to show he was articulate, and that he understood what had been discussed with the adviser. In my opinion, the evidence, which I accept is limited, doesn't suggest Mr C wasn't able to make an informed decision at the time because his health, and the issues arising therefrom, affected his capacity to do so.

No evidence that the adviser assessed Mr C's assets & Different decision

Mrs C's representative noted that in the adviser's letter dated 17 November 2004 the adviser had said Mr C "felt" he had sufficient assets to provide for Mrs C in the event of his death. The adviser hadn't anywhere stated he himself had assessed the assets or reviewed them. Or that he assessed whether Mrs C had sufficient assets to live on without a widow's pension, or that it would require her to sell her home. She said there was no evidence of a financial or risk assessment. And in failing to assess if Mrs C's provision was adequate the adviser wasn't able to act as a critical friend; identify and disclose risks; provide suitable advice; or disclose the potentially high value of the widow's pension being given up.

Mrs C's representative said she thought Mr C's aspiration to maintain his income levels for the benefit of both of them was being misinterpreted as an intention by Mr C to look after himself at the detriment of Mrs C. She said this was out of character, and Mr C would have wanted to ensure he and Mrs C achieved the best value for money from the annuity, and have left Mrs C financially secure. She said Mr C would no doubt have made a different decision had the risks been explained to him and knowing the implication to Mrs C.

As I've said before, I don't think Mr C's intention was to look after himself at the expense of Mrs C. Mr C clearly considered whether there was sufficient provision for Mrs C, but was balancing that with the benefits of the extra immediate income provided by the annuity that he selected. I'm not saying that Mr C was at the extreme end of the 'spectrum' where he wished to do the best he could for himself to the full extent he could – as I said previously, I don't think that's the case. But I think the 'spectrum' shows that there are a range of different reasonable decisions that could be made by individuals in what appear to be similar circumstances, depending on their objectives and how they weigh up all the different relevant factors to consider.

I understand that Mrs C's representative thinks that financially the spouse's pension was so overwhelmingly financially favourable that the adviser should have steered Mr C towards it/recommended it or, if Mr C had been aware of its value he would definitely have selected it.

The documentary evidence available from the time and which I have placed weight on, suggests that Mr C's objective was securing the higher income (in the context that their other wealth would be sufficient to support Mrs C). I think this is also consistent with the evidence provided in support of the complaint, that Mr C had a limited pension pot and a relatively low income, and was worried about annuity rates.

As I've said, I've seen no evidence to suggest that the adviser was working on the basis that Mr C had a 5-to-10-year life expectancy. So although he ought to have been aware it was likely that more income would be paid out from the annuity overall if the spouse's pension was paid, it has to be considered in that light. Whilst reasonable expectations would be that Mr C generally had a lower life expectancy, it wasn't the case that it was severely limited, for example within 12 months. There was still a lot of uncertainty, and the annuity selected could have been payable for a significantly longer period than the 10-year guarantee protected. A lot can change over time. So I don't think the adviser ought to have formed the opinion that the spouse's pension was so overwhelmingly financially favourable that it outweighed Mr C meeting his objective.

The 17 November 2005 letter said whether to provide for a spouse's pension had been discussed. This is strong evidence that it was likely discussed, and it had also been referred to in previous correspondence and over a period of time. It said Mr C thought providing the 10-year guarantee was worthwhile considering the modest cost and he'd know he'd at least receive more than the current value of the fund. So this suggests Mr C had at least considered what he was getting out of the fund overall in that sense. In my experience knowing that you, in effect, at least get your money back, provides a degree of comfort/satisfaction in these type of decisions. And he knew that as well as their other provision Mrs C would have the full income if he died within the 10-year guarantee period.

Clearly I can't say whether Mr C himself had thought about the overall income received being higher selecting a spouse's pension or whether this was part of the adviser's discussion. But in particular given his objectives, and that he had the knowledge he had the 10 year guarantee and in light of their other provision, on balance, I don't think it was more likely than not that Mr C would have selected a spouse's pension if he'd been aware it would likely pay out more overall (assuming he didn't realise that).

For the reasons I set out previously, I think it was likely that the adviser had completed a fact find or some other similar document recording Mr and Mrs C's financial circumstances at some point, and would have been aware of their overall financial provision. The letter dated 8 November 2004 referred to a number of details about Mr and Mrs C's financial circumstances which the adviser wouldn't have known without collecting such information from Mr C.

As I've said in my provisional decision, I don't think the adviser would likely have undertaken a detailed cashflow analysis of Mrs C's position in the event of Mr C's death, as that wasn't recognised practice at that time. But the adviser should have considered Mrs C's provision generally, and given his opinion of whether the provision was likely to be sufficient. Again, clearly I can't determine with any reasonable degree of certainty in what depth it was discussed. But I agree there's no specific evidence that the adviser gave his own opinion on whether there was sufficient provision for Mrs C without a spouse's pension.

The value of Mr and Mrs C's overall wealth was recorded as £750,000. That was a

significant sum in 2005, and has to be considered in light of its value at the time. It would likely have been considered more than sufficient to provide for Mrs C.

That said, I recognise this included the value of the family home which it's been said made up the majority of the £750,000. And I understand that a lack of a current adequate income stream is now an issue and Mrs C is having to sell it. As I've said before, I do appreciate the emotions in having to sell that home now after Mr C passed away.

However I have to consider the matter as it would have appeared at the time. Downsizing is a common method of generating funds in retirement, and I don't think – in looking forwards at the time – that Mr C would likely have seen it as problematic. In the adviser's letter to Mr C dated 8 November 2004 which recording his discussion about Mr C's future plans, the adviser noted that there may be a point where Mr C wished to sell the family home and downsize. So selling the house at some point was something Mr C had already considered, he hadn't said it was something off the table or that it might be a problem. Taking all this into account, I don't think Mr C would likely have made a different decision knowing the family home would need to be sold at some point if he didn't realise that already (given it made up the majority of the £750,000 at that time).

Mrs C's representative said although there may not have been a financial motive for the adviser to have steered Mr C away from selecting a spouse's annuity, there did appear to have a pattern of behaviour, as evidenced by the widow of one of Mr C's relations.

The widow said, in summary, that her husband was a fellow director of the company Mr C was also a director of, and likely a member of the same scheme. In a meeting with a company which subsequently became a part of Chase de Vere (she said the Regional Manager of that company was the adviser who advised Mr C – Mrs C's representative thinks the same adviser was involved on both occasions) she recalls there was no mention made of provision for a widow's pension until she asked about it. She said the adviser explained that providing a widow's pension would reduce the amount payable to her husband during his lifetime, and that the widow's pension would be less than this. She said after further discussion they opted for an annuity with a widow's pension. But she said whilst she couldn't be certain, she thought if she hadn't attended the meeting a widow's pension might not have been considered by the adviser.

I appreciate the point being made here – that the adviser may, for some reason, have had a tendency to steer clients away from providing a spouse's pension or be generally negative about them. But that is based on a single other example, of recollections from a meeting held a number of years ago where it might have been the same adviser, and he 'might' not have gone onto cover a spouse's pension. Mr C was clearly alerted to a spouse's pension and it was discussed with the adviser.

Several other people close to Mr C provided further representations. I've considered them all in full, but have summarised them here. A common theme throughout was about Mr C's good character, that he wouldn't want to do the best for himself and would have wanted to provide for Mrs C. Another was that Mr C was very positive about his future right up to his death. It was also said that Mr C didn't have a big pension pot and he was concerned with annuity rates and wanted to maximise the benefits for both Mr and Mrs C. And that Mr C took professional advice wisely and trusted and relied on that advice.

As I've said above, a common theme throughout was about Mr C's good character, and that he would have wanted to make sure Mrs C was provided for. Whilst I accept this was the case, I don't think his decision about which annuity to select should be considered as a one-off 'binary' decision, in so far as Mrs C was either provided for or she had nothing. There were a number of different ways provision could be made for Mrs C, and the annuity was just

part of Mr and Mrs C's overall financial wealth, and at that point in time. It was recorded that future pension funding had been discussed, which could also have been directed to help provide for Mrs C.

As I've said, Mr C was balancing the additional income payable by the single life annuity (which they would both benefit from during Mr C's lifetime), against the cost of the spouse's pension, but in the light that he had ample other financial provision for Mrs C. I don't think that was an unreasonable decision to take, or shows he wasn't thinking of Mrs C and that such a decision was out of character.

The adviser's understanding was that Mr C's objective was to maintain his income as far as possible, as long as there was other sufficient provision for Mrs C. This was a reasonable objective, and the events need to be considered in that context. In my opinion the annuity that the adviser arranged was suitable given Mr C's objectives and circumstances as the adviser reasonably understood them at the time.

I've also considered whether Mr C would more likely than not have made a different decision but for the failings or potential failings be the adviser. But having carefully considered all the evidence and for the reasons I've outlined above, I'm not persuaded that the failings or potential failings on the adviser's part caused Mr C to make a decision he would otherwise not have made.

As I've said before, I appreciate that this is a very sensitive and emotional matter, and has significant financial implications for Mrs C. I also recognise that Mrs C's representative strongly disagrees with my decision. However having considered all the evidence and arguments that have been provided, in my opinion it wouldn't be fair and reasonable to uphold the complaint and I've seen no reason to depart from my provisional decision.

My final decision

Accordingly, my final decision is that I don't uphold Mrs C's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C to accept or reject my decision before 10 January 2025.

Copy of relevant part of Provisional Decision

What happened

I issued my provisional decision on this complaint on 24 May 2024. The background and circumstances of the complaint and the reasons why I wasn't provisionally minded to uphold it were set in that decision. But to recap, in 2005 Mr C arranged an annuity through Chase de Vere Independent Financial Advisers limited from the benefits built up in his occupational pension scheme. The annuity was arranged on a single life basis with a 10-year guarantee period. When Mr C passed away in 2023 Mrs C discovered that the annuity didn't provide a spouse's pension. The guarantee period had already ended. So the annuity ceased and Mrs C received no further benefit from it.

Mrs C complained to Chase de Vere Independent Financial Advisers limited with the help of her representative – her daughter, who is also an Executor of Mr C's Estate. She subsequently referred the matter to us.

I e-mailed Mrs C's representative saying I didn't think the complaint would be upheld. I said it was clear from a letter the adviser sent to Mr C dated 17 November 2005 that the different

options had been considered. I said Mr C had arranged an annuity with a guarantee period. The annuity with a spouse's pension was about £3,000 less than without it. And given the annuity was arranged in 2005, I said Mr and Mrs C had gained the benefit of that extra money for that period (approx. £54,000), and a financial loss wouldn't actually be suffered for approximately another six years. Ultimately, I thought the evidence showed Mr C was alerted to the different options and was in a position to make an informed decision, and that he'd thought the option selected provided better value for money. I thought Mr C had made a reasonable and rational decision, and I didn't think there was an obviously right or wrong option.

In my provisional decision I went onto say the documentation available showed that Mr C and the adviser had been considering Mr C's retirement for several months leading up to his retirement date. The adviser had sent a letter to Mr C dated 8 November 2004 about 'Retirement Planning' which provided a broad overview of the discussions in a meeting held on 3 November 2004. It listed 'Maintaining Income Levels' as one of the areas discussed.

The letter said Mr C wished to continue receiving a similar level of income to which he was currently receiving as he didn't see his lifestyle changing over the following few years. It said he may at some point want to step down from his current role and may wish to sell his current home and consider a property of a more manageable size. The letter went onto explain what Mr C might receive from the pension, and discussed the scope for further pension contributions for Mr and Mrs C. It also went onto discuss inheritance tax planning given the then size of Mr and Mrs C's joint estate which was approximately £750,000 at that time.

There was further correspondence between Mr C and the adviser about the pension during 2005. And the adviser sent Mr C a letter dated 17 November 2005 which referred to a meeting they'd had on 3 November. The letter said, amongst other things:

At the meeting, I was able to provide you with the various retirement options provided by [the pension provider]. *I had previously established that* [the pension provider's] *guaranteed annuity rates were more attractive than annuity rates currently available from other life offices. I had also obtained improved rates for you based on your past medical history, although these were still less attractive than the guaranteed rates offered by* [the pension provider].

And later:

We then considered whether a spouse's pension should be purchased for [Mrs C]. *The various options offered by* [the pension provider], *which were as follows;*

- *Single life pension, guaranteed for five years, with no spouse's pension, £21,174.84per annum.*
- *Single life, guaranteed for ten years, £20,650.92.*
- *Single life, guaranteed for five years, with spouse's pension of 50%, £17,978.69.*

I explained that the guaranteed annuity rates only applied to a single life annuity, guaranteed for five years, providing no escalation. Although a spouse's pension and escalation could be provided, these additional costs would be based on current annuity rates and not on guaranteed annuity rates. You felt the sacrifice of over £3,000 worth of annual pension was too great to provide for a spouse's pension and felt that you had sufficient assets, in the event of your death, for [Mrs C] *to be adequately provided for. However, you did feel it was worth providing a ten-year guarantee (which is the longest guaranteed period that can be provided), as the extra cost for this was quite modest, and that at least you had the*

knowledge that you and/or your estate would receive total payments greater than the current open market option figure currently being offered by [the pension provider].

I said although there was limited documentation available from the time that the advice was given I thought it was clear that the adviser had a number of meetings and discussions with Mr C about his pension. And must have had details of Mr and Mrs C's financial circumstances, at least as at the time he wrote the letter dated 8 November 2004.

I said it also appeared that Mr C's attitude to risk was established in an earlier meeting (to that on 3 November referred to in the 17 November 2005 letter). So I thought there was likely to have been some other documentation completed around that time, albeit there were no records/meeting notes of exactly what was discussed and in what depth.

I said I wasn't aware of any financial motive for the adviser to have steered Mr C away from selecting an annuity that included a spouse's pension as he'd get paid commission on the value of the fund used to buy the annuity. I thought it was clear the adviser had had a number of discussions with Mr C about his pension, and he'd obtained different annuity quotations from other providers based on Mr C's health. I said he'd identified the value of taking the guaranteed benefits and set out the different annuity options available to Mr C both with and without a spouse's pension, in monetary terms, and in an easily understandable format. And I said it was specifically recorded that the adviser and Mr C *'considered whether a spouse's pension should be purchased'* for Mrs C.

I said I accepted that the letter didn't set out Mrs C's circumstances, and it wasn't clear to what degree the adviser considered them himself or discussed them with Mr C. But I didn't think the discussions would necessarily have been limited to exactly what was said in the 17 November 2005 letter.

Mrs C's representative had said the adviser's letter read like a "You Said, We Did" letter as opposed to a letter recording the provision of good quality advice that took proper account of Mr and Mrs C's circumstances. I said the letter did say that Mr C 'felt' that the £3,000 was too costly; Mr C 'felt' that he had sufficient assets in the event of his death for Mrs C to adequately provided for, and Mr C 'did feel' it was worth providing a ten-year guarantee. I said the adviser had provided advice about other aspects of the pension, and that it wasn't his role to simply facilitate what Mr C wanted without any critical thinking. But I said I couldn't say exactly what was discussed with Mr C and in what depth. And I thought it was clear the possibility of providing a spouse's pension was specifically discussed and considered.

I said financial provision for retirement wasn't restricted to formal pension provision and could include income generated from all assets. I noted the letter dated 8 November 2004 said Mr C might downsize property as some point, had other investments, and there was discussion in both letters about making further pension provision for both Mr and Mrs C. I accepted that Mr C was in ill health and this may have deteriorated through 2005. However I said his written correspondence wasn't indicative of someone who wasn't in a position to make an informed decision.

I said although Mr C may have initially arranged to pay extra into the pension to provide a spouse's pension, the pension provided the flexibility to select what shape of benefits to buy at retirement date and this wasn't unusual. And I said I wasn't aware of any obligations on the adviser to have notified Mrs C that a spouse's pension hadn't been provided.

I said we didn't have any documentation recording Mr C's specific objectives. However he effectively maximised the income paid (for both Mr and Mrs C) during his lifetime which was consistent with his plans in November 2004 and at the same time provided for a guaranteed

income for Mrs C if Mr C passed away within the 10-year guaranteed period. I said this was in the context that he thought there were sufficient assets to fall back on in the event of his death to provide for Mrs C. I said I thought if Mr C had concerns about his health this would likely have brought the issue more into focus. I thought, irrespective of the degree of input from the adviser, Mr C would likely have had a reasonable appreciation of his overall wealth/assets.

Ultimately, I said I didn't think Mr C's decision to buy the type of annuity he did was unreasonable in the particular circumstances, or inconsistent with the evidence in the documentation available. So I said my provisional decision was that I didn't uphold the complaint.

I asked Mrs C and Chase de Vere Independent Financial Advisers limited to let me have any further evidence or arguments that they wanted me to consider before I made my final decision.

Mrs C's representative provided further evidence and arguments which I've taken into account in making my decision as set out below.

Chase de Vere Independent Financial Advisers limited didn't provide any further evidence or arguments to consider.

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.

Whilst I've taken into account the points raised by Mrs C's representative following my provisional decision, I've only addressed them where I think it's appropriate to do so. Both parties now have another opportunity to provide further evidence or arguments in light of my further findings.

Mrs C's representative previously questioned whether Mrs C should have been notified when the annuity without the spouse's pension was selected, particularly given Mr C had paid extra into the pension to provide a spouse's pension. In my provisional decision I said I wasn't aware of any obligations on the adviser to have notified Mrs C of Mr C's decision. And in responding to the provisional decision, Mrs C's representative said the advice was inconsistent with Mr C's previous wishes with the existing arrangement providing a spouse's pension, and this was indicative of Mr C wanting to provide for Mrs C.

As I've said, when taking benefits Mr C had the flexibility to select a particular type of annuity – he wasn't bound to opt for a spouse's pension. This flexibility is typical in pensions, and it allows the member to decide their requirements at retirement date, and knowing their circumstances at that time.

The documents available indicate that the adviser was instructed by Mr C, who was the client. So the adviser's primary concern was with Mr C. Whilst I accept that the adviser had a general duty of care to Mrs C as a potential beneficiary who it was reasonably foreseeable would be affected, I've found no legal or regulatory obligation for the adviser to have informed Mrs C of Mr C's decision.

In my experience it's not a recognised practice for advisers to need to consult a spouse or beneficiary where similar decisions about such matters are being made. That could, in some circumstances, create difficulties and conflicts of interest where the intentions of the pension member and potential beneficiary(s) aren't aligned. The adviser's primary duty was to Mr C.

I've seen nothing which indicates that the adviser's failure to consult with Mrs C was negligent or out of the ordinary.

In a case considered by the Court of Appeal (Gorham v British Telecommunications Plc [2000]), a claimant was a beneficiary under her late husband's pension, and she contended that negligent pension advice had been given to him. She argued that a pension adviser owed a duty of care to all the potential beneficiaries under the pension scheme. The court determined that the duty of care owed by an insurance company to a customer did extend to the dependants of a customer where it was clear that the customer intended the dependants to benefit. However it said:

'Inevitably in insurance contracts of this kind, there is a potential conflict of interest between the customer and his dependants. ***One customer will wish to do the best he can for himself, by way of a pension during his lifetime. Another will sacrifice, to the full extent he can, his interests to those of his dependants.*** *The existence of the duty cannot in my view depend on the category into which the customer falls or on how far along the spectrum of providing for his dependants he travels. I do not see the conflict of interest as an obstacle to the creation of a duty of care to the dependants however. The duty is not one to ensure that the dependants are properly provided for. It is, in the present context, a duty to the dependants not to give negligent advice to the customer which adversely affects their interests* ***as he intends them to be.'*** *My emphasis added.*

As I've said, I think it's clear from the documentation that Mr C was considering Mrs C's interests when considering his pension options and his wider retirement planning, and the adviser was aware of this. However in my view the documentation doesn't suggest his intention was to provide the maximum provision from this pension for Mrs C on his death at all costs, and in all circumstances. In my opinion his intention was to ensure that Mrs C would have sufficient provision when taking everything into account, including their overall wealth and assets.

There's no *specific* record of Mr C's objectives at around the time the letter dated 17 November 2005 was sent. However the November 2004 letter said that Mr C wanted to maintain the same level of income in his retirement. Mr C confirmed this in his letter to the adviser dated 14 February 2005. And I think this was consistent with the content of the 17 November letter. Mr C had decided not to take the full amount of tax-free cash available from the scheme to take advantage of the very favourable annuity rate (over 11%). He chose not to have an annuity which escalated in payment which meant his starting income was higher. And the letter suggested he'd considered whether to have a 50% spouse's annuity or a 10-year guarantee period given the effective costs which were reflected in the differences in income that would be provided. I think all this is consistent with a high-level aim of wanting to have the higher level of starting income as far as reasonably possible.

As I said in my provisional decision, it was recorded that Mr and Mrs C's joint Estate was valued at approximately £750,000 in November 2004 (not including any share-holdings in the two companies Mr C was involved with. I don't know if these were material amounts, so I'd be grateful if details of Mr and Mrs C's interests in the two companies can be provided when responding to this decision). However the £750,000 itself was a significant sum in 2004 (that would be significantly higher in today's terms after inflation), and so on the face of it, I don't think it was an unreasonable assumption that his provision would be sufficient to provide for Mrs C.

Mrs C's representative has said the vast majority of the £750,000 was the matrimonial home, and that Mrs C had lived there for over 40 years. I do appreciate the emotions in having to sell that home in order to provide income after Mr C passed away. However as I've said, the evidence suggests Mr C had a number of discussions with the adviser and had they had

considered whether to include a spouse's pension. Mr C had mentioned he might downsize, which is a way or raising further funds going into retirement. Whilst I don't think the adviser likely set out a detailed cashflow analysis of Mrs C's position in the event of Mr C's death, as that wasn't recognised practice at that time, I think it's likely there would have been a general discussion about what Mrs C would rely on.

The adviser should have outlined the main disadvantages of the transaction at some point, and most probably in the 17 November 15 letter – which he didn't. I accept that if he had done there was a *possibility* that Mr C may have changed his mind. But that would have depended, at least in part, on where he was on the 'spectrum' as described by the court, his intentions, and where he placed greater value. Clearly I cannot know what was in Mr C's mind at that time, but the evidence that is available suggests that his intention was to have the higher income on the basis he had other sufficient assets to provide for Mrs C on his death. In my experience that's not an unusual approach to the matter, and I don't think it was unreasonable.

Mrs C's representative has said she doesn't think sufficient consideration has been given to Mr C's life expectancy at the time. Having revisited the evidence, it's not entirely clear to me that the adviser was alerted to Mr C's *very limited* life expectancy. He was aware of Mr C's medical history as Mr C had provided it to apply for enhanced rates and continued scheme life cover. His history was also referred to in correspondence.

In the medical information I have seen, Mr C said: *"At some point in the future I will probably require dialysis."* So he wasn't on dialysis at that point. And the adviser wouldn't have got the impression it was imminent. The documentation recording Mr C's plans said he'd continue with an active role associated with his company. Other correspondence was fairly positive about future plans, and I haven't seen anything suggesting he alerted the adviser he had a 5 to 10 year life expectancy at that time. Mrs C's representative may have other documentation I haven't seen that shows the adviser was aware of this (if so can she please provide it). But from what I've seen to date, although the adviser would have been aware Mr C would have a lower life expectancy generally given his medical history, I can't see he'd have been aware this was 5 to 10 years.

However in considering Mr C's decision about the annuity in my provisional decision, I did take the 5-to-10-year life expectancy into account. The 10-year guarantee with the annuity meant at least the amount of capital used to buy the annuity was returned. And Mrs C was always guaranteed to receive an income of £20,650 for 10 years. In my opinion the additional income was a material amount. And as I've said above, 'value' has to take into account the value derived by the particular client, which will vary person to person.

Mrs C's representative didn't agree there was no obviously right decision, and given the particular circumstances, thought selecting a spouse's pension was clearly the better option at the time, and on an objective basis provided the better value for money.

On the one hand, I do agree with the representative that the annuity with the spouse's pension would likely have provided the most income overall during both Mr and Mrs C's lifetime, and on that basis provided the best value for money. However, that doesn't take into account the 'value' that Mr C himself placed on the extra income received during his lifetime as I referred to above. As explained in the court's decision, different customers will have different priorities. That is consistent with my experience of these types of cases. So the 'value' placed on the different streams of income won't be based solely on the quantum of income likely received overall.

Mrs C's representative has said the industry regulator (the Financial Services Authority at the time) had found Chase de Vere to be in systematic breach of its Principles relating to

advice given to its clients. And it had been fined over £1 million. She said given the context of the systemic failings found at around the time Mr C was advised, and the concerns she'd set out, she thought it would be unfair and irrational to give the adviser the benefit of the doubt and assume that advice was not confined to what was documented in the letter of advice dated 17 November 2005.

The regulator did find unsuitable advice had been given about annuities in 25% of cases, and *possibly* in other cases, (which also included advice about other transactions). However each case was considered on its own merits, and I've considered the particular facts and evidence on this case.

In my provisional decision I said I didn't think the discussions surrounding the pension would necessarily have been limited to exactly what was said in the 17 November 2005 letter. I set out why, and why I thought it likely other documentation had been completed. The 17 November 2005 letter started:

"Following our meeting on 3 November, I promised that I would confirm to you the decisions you reached."

Mr C had already made his decision prior to the information provided in this letter. To clarify, I didn't mean I'd assumed another letter providing formal advice had been given to Mr C. A copy of any such letter isn't available, and I've not assumed such a letter was sent or relied on that being the case. What I was referring to was the likelihood that a fact-find or something similar had been completed at some point recording Mr C's financial circumstances – which the adviser was clearly aware of. And an attitude to risk questionnaire. And there were references to previous discussions in other correspondence.

In my opinion the documentary evidence points to there being a number of discussions between Mr C and the adviser about his pension and his requirements and over a period of time. I still don't think those discussions would have been limited to exactly what was set out in the 17 November 2005 letter.

Mrs C's representative has said the adviser's language was pejorative about the provision of a spouse's pension. And that it was also inaccurate, as the pension provider had confirmed the guaranteed annuity rate applied to the member's pension and the spouse's pension was 50% of it. As I've said, I'm not aware of any motivation for the adviser to have deliberately used negative language to try and steer Mr C away from providing a spouse's pension. I think the key issue was to see the different income options available and the actual amounts payable were all quoted in the letter to allow Mr C to compare them – the annuity with the spouse's pension providing income around £2,650 lower than the annuity with the ten-year guarantee. So I don't think it's likely the language used around the provision of a spouse's pension or it being inaccurate, was likely to have affected Mr C's decision-making process. In my opinion Mr C had sufficient information to reach an informed decision.

To sum up, the adviser and Mr C had a number of discussions about his pension. The 17 November 2005 letter specifically said they had "*…considered whether a spouse's pension should be purchased for* [Mrs C]." As the court said, "*One customer will wish to do the best he can for himself, by way of a pension during his lifetime. Another will sacrifice, to the full extent he can, his interests to those of his dependants."*

Clearly Mrs C and her representative will have their own opinion of where Mr C was on the 'spectrum'. However as I've said, I obviously cannot know Mr C's mind at that time. But in my opinion the documentation suggests Mr C's intention was to take the higher income during his lifetime, but on the basis that his and Mrs C's other assets were sufficient to provide for Mrs C on his death. The 10-year guarantee meant at least the capital used to buy

the annuity would be returned. Taking all the above into account, I think Mr C's decision about the annuity was a reasonable one made on that basis, and given in my opinion, that £750,000 in assets at that time would have been considered reasonable provision for when Mr C passed away.

Mrs C's representative has referred to a number of failings by the adviser. These include that he failed to consider/document his consideration of Mr C's limited life expectancy; take into account this made Mr C vulnerable because he found it hard to address his impending death; failed to critique and document the financial resources available to Mrs C on Mr C's death, or spell out the consequences of not providing a spouse's pension. She said it also didn't appear I'd taken appropriate account of Mr C's vulnerability in my provisional decision.

I think what's key here is that even if there were some failings, and if I accepted that Mr C may have been vulnerable at the time, ultimately, I'd still need then to be satisfied that there was sufficient weight of evidence to decide that Mr C would more likely than not have made a different decision, but for those failings. I think it follows from what was said in the court case I referred to above, that different reasonable decisions can be made by different customers presented by similar facts. As I've explained, in my opinion Mr C's original decision appeared to be in line with his intentions, wasn't atypical, or otherwise obviously unreasonable. And having carefully considered the matter, I've not seen sufficient weight of evidence to decide that Mr C would more likely than not have made a different decision.

Accordingly, I've not been persuaded that Mrs C's complaint should succeed.

My provisional decision

My provisional decision is that I don't uphold Mrs C's complaint.
David Ashley
Ombudsman