DRN-2313003

The complaint

Mr H has complained about the advice he was given by St Paul's Marketing Limited (an Appointed Representative of Alexander David Securities Limited) to transfer his pension to a self-invested personal pension (SIPP) and invest in an unsuitable investment.

What happened

Mr H had a personal pension policy with a third-party provider. In late 2015, he recalls being contacted by representatives of Alexander David through an unsolicited phone call. Mr H says he was told that he should transfer his pension, because it wasn't performing very well to another investment. He says he was told the investment would provide a guaranteed rate of return.

On 4 February 2016, Mr H received an application form from EasySIPP which he completed and returned. His personal pension was transferred on 2 March 2016 and £17,320 was transferred and used to invest in debentures, through an account with Beaufort Securities.

Mr H, through his representative, complained to Alexander David in September 2018. I understand Alexander David didn't provide a response to the complaint. The representative subsequently referred it to us.

One of our investigators looked into Mr B's complaint. He asked Alexander David for its files and to provide any evidence it wanted us to take into account. Despite reminders, he received no response. The investigator therefore assessed the complaint on the evidence that had been presented. This being testimony from Mr H and evidence from third parties. The investigator was satisfied Alexander David is involved in this complaint because following Mr H's testimony EasySIPP, which is operated and administered by Gaudi confirmed it was Alexander David's appointed representative who introduced Mr H to open the SIPP.

Because Mr H has complained he was given unsuitable advice, he said he would normally expect to see a suitability report and fact find detailing a firm's recommendations to its client. He hadn't been provided with copies of any such documentation but because of third party testimony he said that didn't mean Alexander David, operating through their representatives, didn't effectively provide advice in the form of a personal recommendation.

He went on to look at the definition of a personal recommendation in the FCA handbook. It says:

"A recommendation:

(a) made to a person in their capacity as an investor or potential investor or in their capacity as agent for an investor or a potential investor;
(b) which constitutes a recommendation to them to do any of the following (whether

as principal or agent):
(i) buy, sell. subscribe for. exchange, redeem. hold or underwrite a particular investment which is a security, a structured deposit or a relevant investment (that is. any designated investment (other than a P2P agreement). funeral plan contract. pure protection contract. general insurance contract. right to or interests in a funeral plan contract or structured deposit); or
(ii) exercise or not exercise any right conferred by such a relevant investment to buy, sell subscribe for exchange or redeem such an investment;
(c) that is:
(i) *presented as suitable for the person to whom it is made; or*
(ii) *based on a consideration of the circumstances of that person; and*
(d) that is not issued exclusively to the public."

So, the investigator went on to consider the available evidence in light of the definition provided by the regulator.

He found that as Mr H had been told his exiting pension plan wasn't performing well and a transfer into this investment would provide a guaranteed rate of return, it seemed a comparison had taken place between the proposed investment and the existing one. The investigator felt this evidenced a recommendation had been made and tailored to Mr H's personal circumstances and so met the definition of a recommendation.

He then went on to consider if it was a suitable recommendation. The investigator didn't agree it was. Mr H said he was a 'low risk' investor client with little capacity for loss. Looking at Mr H's circumstances he thought some moderate risk might have been appropriate. But this investment he found to be completely unsuitable. It shifted Mr H's assets into a single company whereas most pension funds are diversified across dozens of companies in different industries and sectors, but the success of this investment was dependant on just one.

The investigator considered Alexander David might make the case that it did not make a personal recommendation. It could say that St Pauls Marketing arranged an investment into a non-readily realisable security by way of direct offer, rather than following an advice process. But he still didn't find this would have been appropriate. The regulator, in its Code of Business Sourcebook (COBS), specifically 10.2.1 says that were a direct offer is made, an appropriateness test should be carried out. The investigator had not been provided with any confirmation such a test had been completed. He also said there was no evidence to suggest that Mr H would've insisted to proceed with the transaction against suitable advice to retain his current pension., he concluded Mr H shouldn't have transferred his pension from his ceding scheme. He upheld Mr H's complaint and suggested how Alexander David should put things right.

The investigator sent his assessment of the complaint to Alexander David on 5 October 2020. But it didn't provide a response. The investigator wrote to both parties on 3 November 2020 explaining that the complaint would be passed to an ombudsman for review and to make a final decision. No further evidence or arguments were provided.

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 have looked at all the available information provided afresh. Having done so, I have reached the same conclusion as the investigator. I'll explain why.

Alexander David didn't respond to Mr H's original complaint or to the investigator's requests for information. It didn't provide any further evidence or arguments in response to the investigators' assessment. So, there's only very limited evidence available to establish what happened at the time of the transfer and investment.

Where the evidence is incomplete, inconclusive or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

I've carefully considered the evidence that is available including Mr H's recollections of events and third-party evidence from Gaudi, the EasySIPP administrators. Alexander David/St Pauls Marketing hasn't disputed what Mr H said in his complaint to it, or what the investigator said in his assessment.

I'm also mindful, that this is one of a number of complaints this service has received against St Pauls Marketing Limited; all of a similar nature, involving seemingly similar circumstances and the same investments. I consider each complaint on its own merits. But I've noted that what Mr H has said about St Pauls' role is consistent with what other complainants have described. His testimony has also been confirmed by Gaudi. It wrote to this service on 2 October 2020 to confirm Mr H was introduced by to Easy SIPP by St Pauls. So, I think what he has said is plausible. And taking everything into account, I have found it credible.

Mr H representative completed a complaint form for us, a copy of which was sent to Alexander David. In the complaint form, Mr H has said that St Pauls Marketing made unsolicited phone calls advising him to transfer his pension for improved returns. His representatives say he had no investment experience and was heavily reliant on those advising him. By definition, his representatives say he is a low risk investor due to his lack of experience. His representatives say he shouldn't have been exposed to such a high-risk investment which was unsuitable for him and his objectives.

Mr H's testimony and that of Gaudi shows St Pauls Marketing were involved from the outset. Mr H subsequently transferred his pensions to the SIPP and invested in the debentures. In my experience, I find it most unusual for someone of Mr H's background and experience to want to transfer an existing pension in order to invest in this type of investment without prompting.

I'm persuaded St Pauls Marketing initiated the investment in the debenture. The investigator reached the view, based on Mr H's testimony that he was advised to do so and the third-party evidence from the SIPP administrator, that it was more likely than not the case. The firm hasn't disputed this or provided any evidence to the contrary. St Pauls Marketing was the promoter for the debenture, but I'm satisfied, on the limited evidence available, that it went beyond just promoting it and was involved in arranging the investment (as well as recommending it).
These debentures were a non-readily realisable security. I have noted Mr H signed a document to confirm he understood the risks involved in such an investment but from what I've seen I find that highly unlikely.

The documentation refers to the investment as:

"...*High Risk and/or Speculative, may be illiquid and/or difficult to value or sell which may impact on my ability to take my pension benefits and take a pension income...*"

There is no available evidence to suggest Mr H had the financial wherewithal to understand what such an investment would entail. In my view switching a pension can be a complex transaction with several different factors to weigh up and consider. Mr H was an ordinary retail investor. He doesn't appear to have had any experience or knowledge of this type of transaction or the complex and higher risk investments he was invested into. I think Mr H was entitled to rely on the firm providing advice that was suitable to his circumstances. It was acting in its professional capacity and was obliged to take reasonable care to ensure the suitability of its advice and to act in Mr H's interests.

Mr H's representative has said he was a low risk investor. I haven't seen anything to the contrary, and I find Mr H had very limited capacity for loss. I think it was clear that the debentures weren't suitable or appropriate for Mr H and this should have been clear to St Pauls Marketing.

Overall, I'm satisfied that if St Pauls Marketing hadn't advised Mr H to transfer and invest in the debentures or if it had told him it wasn't appropriate or suitable for him, he wouldn't have transferred and invested in them. I find this failure caused he losses Mrs H has claimed.

Putting things right

My aim in awarding fair compensation is to put Mr H back into the position he would likely have been in, had it not been for Alexander David's error. Any loss Mr H has suffered should be determined by obtaining the notional value of the pension from Phoenix on the basis that it had stayed where it would be and subtracting the current value of the pension from this notional value. If the answer is negative, there's a gain and no redress is payable.

The compensation amount should if possible be paid into Mr H's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

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

If Mr H hasn't yet taken any tax-free cash from their plan, 25% of the loss would be tax-free and 75% would have been taxed according to their likely income tax rate in retirement – presumed to be 20%**.** So, making a notional reduction of 15% overall from the loss adequately reflects this.

In addition, Alexander Davis should pay Mr £250 for the disruption to his retirement plans. I consider the notional value outlined above is the fairest way of resolving this complaint. But, if Phoenix can't calculate a notional value, my aim is to put Mr H as close to the position he would probably now be in if they had they remained in an appropriate fund.

It's not possible to say precisely where Mr H would've invested. But I think what I've set out below is fair and reasonable given Mr H's circumstances and objectives when his pension was transferred.

Fair compensation

In assessing what would be fair compensation, my aim is to put Mr H as close as possible to the position he would probably now be in if he had been given suitable advice. I think Mr H would have invested differently. It is not possible to say *precisely* what he would have done, but I am satisfied that what I have set out below is fair and reasonable given Mr H's circumstances and objectives when he invested.

What should Alexander David do

To compensate Mr H fairly it should compare the performance of Mr H’s investment with that of the benchmark shown below. If the fair value is greater than the actual value, there is a loss and compensation is payable. If the actual value is greater than the fair value, no compensation is payable.

Alexander David Securities Ltd should also pay any interest as set out below. If there is a loss, Alexander David Securities Ltd should pay into Mr H’s pension plan to increase its value by the amount of the compensation and any interest. The payment should allow for the effect of charges and any available tax relief. Alexander David Securities Ltd shouldn’t pay the compensation into the pension plan if it would conflict with any existing protection or allowance.

If Alexander David Securities Ltd are unable to pay the compensation into Mr H’s pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. So, the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid. The *notional* allowance should be calculated using Mr H’s actual or expected marginal rate of tax at his selected retirement age.

For example, if Mr H is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr H would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

investment name	status	benchmark	from (start date)	to (end date)	additional interest
SIPP	still exists	Original personal pension	Date of transfer	Date of decision	8% simple a year from date of decision to date of settlement if settlement isn’t made within 28 days of Alexander David being notified of Mr H’s acceptance of this decision

In addition, Alexander David Securities Ltd should

pay Mr H £250 for the disruption to his retirement plans.

provide the details of the calculation to Mr H in a clear, simple format.

Income tax may be payable on any interest paid. If Alexander David considers its required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr H how much it's taken off. It should also give Mr H a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate. Investment.

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

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark. Any withdrawal, income or other distribution out of the investment should be deducted from the *fair value* at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if it totals all those payments and deducts that figure at the end instead of deducting periodically.

Why is this remedy suitable?

I've chosen this method of compensation because:

Mr H has said he was a low to medium risk investor. His existing pension was invested in assets that were suitable to his risk profile. In all the circumstances, I don't think Mr H would have transferred with suitable advice. So, I think the comparison should be against his original pension arrangement.

My final decision

For the reasons I have given, I uphold this complaint and direct Alexander David Securities Limited to compensate Mr H as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 23 February 2021.

Wendy Steele
Ombudsman