

The complaint

The complaint relates Braemar Wealth Management (NW) Limited's involvement in a transfer of part of Mr G's personal pension fund to a SIPP (self invested personal pension) to invest £18,000 in Ethical Forestry Limited.

What happened

Mr G consulted Braemar Wealth Management (NW) Limited (BWM) in 2012.

The documents I've seen include a fact find, an attitude to risk assessment and BWM's letter, headed, '*Record of Suitability – Retirement Planning*', dated 18 June 2012. The fact find shows Mr G was 51, married and employed. He'd been a member of his employer's final salary pension scheme since 2001 and he was also paying the maximum AVCs (additional voluntary contributions). He only wanted to discuss his personal pension which had a fund value of about £48,000. He'd seen a newspaper advertisement about Ethical Forestry and he wanted advice about investing, using the gains he'd made on a previous investment in an emerging markets fund.

BWM's letter of 18 June 2012 set out Mr G's aims and objectives as:

- To consider an investment of £18,000 (about one third of the value of his personal pension) in Ethical Forestry using part of his existing personal pension fund.
- To consider how that investment will be held in a SIPP.
- To research Ethical Forestry and ensure the investment proposition is bona fide.

The letter went on to say that Mr G had been assessed as being a medium to high risk investor. But he'd previously self selected investments for his personal pension and had invested in funds which were higher risk. He'd made significant gains from one and wanted to use that gain (about £18,000) to invest in something '*out of the box*' and not necessarily linked to the stock market.

The adviser had undertaken research into investing in timber – which he described as a fairly niche market and an alternative investment class. From what he'd read, the outlook for timber was '*especially strong*'. Ethical Forestry was an unregulated collective investment scheme (UCIS). It offered three investment options. The first was a twelve year investment, with each unit having 200 trees and costing £6,000 so Mr G was considering three units at a total cost of £18,000. The letter stressed that the investment was very high risk. It also said the anticipated returns should be viewed with caution.

The letter said Mr G's suitability for this type of investment had been assessed. He had the security of his final salary pension and his AVCs and a separate consolidated personal pension. He was comfortable with the risks. To invest he'd need to transfer part of his personal pension fund into a SIPP. He'd transfer £20,000 with the additional £2,000 to cover fees and costs. There was a list of risk warnings at the end of the letter.

Mr G went ahead with the transfer to the SIPP and the investment of £18,000 in Ethical Forestry.

In December 2015 liquidators were appointed to Ethical Forestry Limited. Mr G's annual SIPP statement issued in June 2016 showed a fund value of £1,053.97.

Mr G's representative wrote to BWM on 25 March 2019 making a data subject access request (DSAR). BWM treated the DSAR as a complaint about Mr G's Ethical Forestry investment.

BWM sent a final response letter to Mr G on 4 June 2019. BWM didn't uphold the complaint. Amongst other things it said it hadn't given investment advice or made a specific investment recommendation – Mr G had approached it about investing in Ethical Forestry. BWM said it had stressed the investment was very high risk and illiquid, but Mr G was a medium to high risk investor and comfortable with the risks. The investment was a small part of his overall pension provision and he was only investing the gains he'd made on another investment. Losing £18,000 wouldn't affect his overall retirement plans.

BWM also said the complaint was time barred. The investment had been made over six years earlier, in June 2012. It had collapsed in December 2015 and liquidators were appointed. That was more than three years before Mr G's complaint had been made.

The investigator thought the complaint hadn't been made too late. BWM didn't accept that and so the complaint was referred to me to decide if we could consider it.

I've issued two provisional jurisdiction decisions (15 June 2021 and 15 September 2021) and a jurisdiction decision (6 October 2021). For the reasons I explained, I thought the complaint had been made in time. Essentially a complaint has to be made within six years of the event complained of or, if later, within three years of when the complainant became aware (or ought reasonably to have become aware) he had cause for complaint. I said the DSAR and the accompanying letter of authority did amount to a complaint as defined. Mr G's complaint was made on 25 March 2019. I maintained he'd complained within three years of when he became aware or reasonably ought to have become aware he had cause for complaint.

One of our investigators then looked into the merits of the complaint. He thought it should be upheld. In summary he said:

- It wasn't disputed that Mr G had approached BWM.
- The investment in Ethical Forestry was a UCIS. In July 2010 the then regulator, the Financial Services Authority, issued a UCIS Good and Poor Practice report. An example of good practice was limiting, if UCIS investment was appropriate at all, a customer's portfolio to holding 3 - 5% in UCIS.
- Whilst BWM had reiterated that they hadn't promoted the UCIS to Mr G, the regulator's factsheet on UCIS clarified that, when recommending a UCIS (which is what happened here), the Conduct of Business Sourcebook (COBS) 9 rule, about suitability, applied. BWM had to gather information about the client to establish if the UCIS was suitable for him.
- The question was, taking into account Mr G's circumstances, if it was suitable to advise him to switch £20,000 from his existing personal pension to a SIPP to invest in Ethical Forestry.
- The adviser had said the investment was very high risk and more than Mr G's assessed attitude to investment risk.

- Mr G had been a member of his employer's pension scheme for just over ten years. But an investment of £18,000 wasn't an insignificant sum of money. He had short term borrowing and a mortgage. He was saving through his employer's share scheme but he didn't appear to have substantial cash reserves. Even if his attitude to investment risk was medium – high, his capacity for loss didn't mirror that.
- The recommendation increased the administration costs of his pension plans, took risks which were too high for Mr G and concentrated a large amount of his pension savings in a niche, unregulated, illiquid and high risk fund. If the regulator's good practice example is taken into account, which had by then been published, too much was recommended to be invested in a UCIS.
- Suitable advice ought to have been to advise Mr G against investing in Ethical Forestry.

The investigator went on to consider, if suitable advice had been given, whether Mr G would've insisted on investing. On balance, the investigator thought Mr G would've accepted a recommendation not to invest in Ethical Forestry. The investigator set out how Mr G should be redressed – on the basis that he'd have retained the money in his existing personal pension, but taking into account that adventurous funds weren't appropriate for him and how he'd have invested, after June 2012, with suitable pension investment advice.

BWM didn't agree with the investigator. It said that, during meetings (and as recorded in the letter dated 18 June 2012), Mr G had said he was '*happy to take a punt on this*'. He wanted to invest and could've been treated as an insistent client. The adviser had documented and highlighted that it was a very high risk investment and hadn't specifically recommended it – Mr G had chosen it himself. The adviser researched which SIPP operators would accept the investment, which the adviser just facilitated.

BWM referred to the fact find which noted Mr G's attitude to life as '*see it, spend it*'. Mr G was fully aware of the risks, he understood the investment and was just using the profit he'd made on the emerging markets fund, an investment he'd again chosen himself. He was more adventurous than his assessed attitude to risk would suggest. The investment matched his attitude to risk and life. The percentage invested isn't material to Mr G's retirement income or pension provision and would easily have fallen within the 3% to 5% referred to by the investigator. It wasn't a substantial part of Mr G's pension savings – he had a final salary pension with his employer and he was making the maximum (15%) AVCs. He had capacity for loss, as evidenced by his attitude and his comments.

The investigator considered BWM's comments. He agreed that Mr G had approached BWM after seeing a promotion about the investment and a substantial rise in the commodity investment fund he'd held prior to the advice. So Mr G was likely receptive to the opportunity of the investment.

Whilst it was stated to be a high risk investment, positive possible outcomes were noted. The investment wasn't made on an execution only basis. Therefore, BWM was required to provide suitable advice. The advice wasn't suitable for Mr G's circumstances. £18,000 wasn't a small sum. Mr G did have other pension assets. But with only ten years' service in his employer's scheme, it didn't seem he'd have had a pension portfolio of around £400,000 to £600,000 as a starting point to consider the advice.

The regulator's factsheet about UCIS said, before recommending a UCIS, a firm will need to gather information about the client to establish whether the UCIS is suitable for that person and, if a UCIS is recommended, meet all suitability obligations. Including obtaining the

necessary information regarding the client's knowledge and experience in relation to UCIS and their financial situation and investment objectives. The UCIS was promoted to Mr G (not by BWM) but the requirement for suitable advice would've been to recommend not switching part of his personal pension to access the high risk investment.

BWM had said it could've treated Mr G as an insistent customer. But there's no evidence he had a history of acting against the advice of financial advisers. In the investigator's opinion, most customers accept the advice of professionals. Mr G had gone to BWM for advice and was relying upon it. On the balance of probability, he'd have accepted suitable advice not to invest in Ethical Forestry.

In reply BWM said Mr G hadn't taken any responsibility for his actions. He'd made his own investment decision after all the risks had been explained to him. The investigator's view wasn't substantiated by any facts or evidence but was just his opinion. We should ask Mr G for a full list of all his pension assets.

BWM also highlighted why Mr G had contacted it and his specific objectives/aims agreed as a priority and as documented in the fact find and suitability letter. The adviser had met the three objectives set out in the letter which didn't include providing investment advice or recommending Ethical Forestry but seeing if the investment was bona fide. If it hadn't been, the adviser would have mentioned that to Mr G and he wouldn't have invested. But at the time there was no evidence to suggest it wasn't bona fide. It was being accepted by a number of SIPP operators which reassured the adviser and Mr G. The research undertaken included an article from Money Management in June 2011, a copy of which was provided and which had been shared with Mr G at the time.

As agreement couldn't be reached the complaint has been referred to me to decide.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've first considered jurisdiction again. Although, as I've said above, I've thought about it before, we're required to keep jurisdiction under review throughout our consideration of a complaint up to and until we issue a final decision. I've done that and I maintain Mr G's complaint has been made in time – within three years of when he became aware (or ought reasonably to have become aware) he had cause for complaint.

I've gone on to consider the merits of the complaint. I've paid particular attention to what BWM has said. I understand why BWM feels strongly that the complaint shouldn't be upheld and that Mr G is responsible for the losses he's incurred. But I agree with the investigator that the complaint should be upheld and for the reasons he gave.

BWM says the investigator failed to take into account all the material facts in reaching his conclusions. The investigator (and the same is true of an ombudsman) will take into account all the information and evidence that's been provided although they won't necessarily refer to everything when a view or decision is issued. Instead they'll concentrate on what they see as the key issues. Where the evidence is incomplete or inconclusive, we reach our conclusions on the balance of probabilities, that is what we consider is likely to have happened.

I've asked myself the same questions as the investigator: did BWM provide advice to Mr G; if so, was that advice suitable; if not, what would suitable advice have been; and what would Mr G have done if he'd been given suitable advice. I've considered each of those questions below.

Did BWM advise Mr G?

It's not disputed that Mr G knew about Ethical Forestry before he approached BWM. I accept he was very interested in investing - the fact find records that he was 'keen' (BWM's underlining) to invest. I further accept that he'd sourced his own investments in the past. I don't have all the details of how much he invested in the emerging markets fund that's been mentioned. But it seems it generated a very healthy profit. Taking on a high degree of risk had paid off for Mr G. The success of that investment may have made him more comfortable with taking a high degree of risk and confident in his own ability to pick an investment that could do well despite the risks involved.

But I don't think all that meant he'd made a firm decision to invest. He went to BWM for advice. I don't think BWM's involvement was confined to seeking if the investment was bona fide and facilitating it. I say that taking into account:

- The fact find records that Mr G '*specifically wanted pension advice and how to use part of his [personal pension fund] to invest in Ethical Forestry*'. It also says Mr G is 'considering' a very high risk investment – Ethical Forestry – via his pension. That fits in with what I've said about him not having made a firm decision to invest, even though he was clearly thinking about investing.
- The heading to BWM's letter of 18 June 2012 suggests that it's about suitability. And the letter opens by saying it details the adviser's professional recommendations appropriate to Mr G's circumstances. It refers to him having made an initial enquiry which again is consistent with Mr G having expressed interest in investing in Ethical Forestry but not having finally decided.
- The first objective set out is 'to consider' an £18,000 investment in Ethical Forestry. 'Consider' means to think about carefully and is consistent with giving advice. It's separate to and wider than the third objective. I don't agree that BWM's involvement was limited to researching Ethical Forestry and ensuring the investment proposition was bona fide.
- BWM's letter may stop short of expressly stating that the adviser is recommending the proposed investment in Ethical Forestry. But there are positive comments – for example, that the outlook for timber is especially strong and it may be a good long term hedge against inflation. There's specific reference to the twelve year investment option being appropriate for Mr G.
- The letter goes on to say that the adviser has assessed Mr G's suitability for UCIS investment, including how his retirement fund might be affected. Mr G's other pension arrangements are mentioned and the clear inference is that he can afford to take a high degree of risk with this particular money. So suitability has been addressed which is consistent with advice having been given. The letter goes on to set out how the investment can be achieved, via a SIPP.

All in all I think the letter was as its heading suggested – a suitability report. Mr G would've understood from the letter that BWM was recommending that he invest in Ethical Forestry. If BWM's view was that Mr G shouldn't invest, the letter should've made that clear.

Was investing £18,000 in Ethical Forestry suitable for Mr G?

BWM may not have promoted the investment, a UCIS, to Mr G. But I've found that BWM did advise Mr G. As the investigator pointed out, BWM's recommendation had to be suitable for Mr G. I agree with the investigator that the investment wasn't suitable for him.

BWM had stressed that the investment was very high risk. Mr G had been assessed as a medium to high risk investor. But the Ethical Forestry investment carried a higher degree of risk. And I can't see that Mr G had the capacity for loss that sort of investment might (and did) bring about. He did have other pension provision. But the money he invested in Ethical Forestry represented about a third of his personal pension. I think it was a substantial amount. I don't think his other pension provision meant he could afford to take a very high degree of risk with that money.

BWM only obtained limited information about Mr G's overall pension provision and his other assets. I can't see that BWM could reasonably have formed the view that he had sufficient capacity for loss to invest £18,000 in Ethical Forestry. Mr G may have been investing the profit he'd made on a previous high risk investment. But I don't think that meant he could afford to lose that money.

BWM may have told Mr G, more than once, that the investment was very high risk and set out the risk factors. But just making an investor aware of the risks isn't enough. And Mr G may have said he was prepared to take a risk on the investment. But that doesn't mean he should've been advised to take that level of risk with that amount of money.

BWM says that Mr G must accept some responsibility for his investment decision. But the point is that he'd gone to BWM for advice as to whether he should invest. BWM had to consider suitability. If the recommendation was unsuitable then BWM is primarily responsible for the losses Mr G has suffered in consequence of acting on that unsuitable advice.

As the investigator noted, the recommendation increased the administration costs of Mr G's pension plans, took risks which were too high for Mr G and concentrated a large amount of his pension savings in a niche, unregulated, illiquid and high risk fund. It was unsuitable for Mr G.

What would suitable advice have been?

If BWM had given suitable advice BWM should've told Mr G that he shouldn't invest £18,000 in Ethical Forestry.

What would Mr G have done if BWM had advised him not to invest in Ethical Forestry?

It's often not possible to say with certainty and without the benefit of hindsight what someone would've done if things had been dealt with differently. In that sort of situation we have to reach a decision based on what we think is likely to have happened. We'll take into account such evidence as there is as well as the wider circumstances.

On the one hand I can see why BWM says Mr G would've gone ahead anyway. I've accepted that he was keen to invest in Ethical Forestry. And that he may well have been fairly confident in his own ability to select more esoteric investments whose performance wasn't necessarily correlated with established markets. BWM has also drawn attention to the '*see it, spend it*' note on the fact find. And the letter dated 18 June 2012 records Mr G as saying he was '*happy to take a punt*'.

But Mr G had gone to BWM for professional financial advice. He was relying on that advice to decide whether or not to go ahead with the investment. I'd expect, in most cases, and despite how interested they might have been in the particular product or investment initially,

a client to take seriously advice from a qualified financial professional. I see limited point in seeking advice just to then disregard it. And I haven't seen anything to suggest Mr G had a history of acting against professional advice.

Here his investment in Ethical Forestry was made with BWM's support and endorsement – BWM didn't tell Mr G not to invest and BWM facilitated the setting up of the SIPP and the investment in Ethical Forestry. I think clear advice from BWM that it couldn't recommend the investment and why is likely to have given Mr G pause for thought.

And, if he'd still wanted to invest, BWM would've needed to have treated him as an insistent client – that is one who wanted to proceed despite advice to the contrary. I think the process that would've needed to have been followed if BWM had treated Mr G as an insistent client would've concentrated his mind on whether he really wanted to invest when he'd been advised against.

At the time (2012) the COBS rules didn't make specific provision for insistent clients. COBS 9.5A now contains additional guidance for firms with insistent clients. Including the information that must be communicated to an insistent client (COBS 9.5A.3G) and what acknowledgement is required from the client (COBS 9.5A.4G).

Prior to that firms which were prepared to transact insistent client business would've had a process in place to deal with such clients. It's likely to have been similar to what COBS 9.5A now says. I'd expect it to involve asking the client to sign documentation recording that they are proceeding against the advice given. And to explain why they are prepared to act contrary to the adviser's advice. The conversations around that – including why a recommendation to invest can't be made - are likely to concentrate a client's mind as to the advisability of proceeding against professional advice.

On balance, I think Mr G would've accepted a recommendation not to invest in Ethical Forestry and would've retained that money in his personal pension.

Putting things right – fair compensation

In assessing what would be fair compensation, my aim is to put Mr G as close as possible to the position he'd probably now be in if he'd been given suitable advice.

I agree with the redress suggested by the investigator, so I've adopted it and set it out again.

I think Mr G would've have invested differently. It is not possible to say *precisely* what he would've done, but I'm satisfied that what I've set out below is fair and reasonable given his circumstances and objectives when he invested.

To compensate Mr G fairly Braemar Wealth Management (NW) Limited must:

- Compare the performance of Mr G's investment with that of the benchmark shown below. If the *fair value* is greater than the *actual value*, there's a loss and compensation is payable. If the *actual value* is greater than the *fair value*, no compensation is payable.

Braemar Wealth Management (NW) Limited must also pay any interest as set out below.

If there's a loss, Braemar Wealth Management (NW) Limited should pay into Mr G'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. Compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If Braemar Wealth Management (NW) Limited is unable to pay the compensation into Mr G'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. Therefore 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 G's actual or expected marginal rate of tax at his selected retirement age. I think Mr G is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal the current basic rate of tax. However, if Mr G would've been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

In addition, Braemar Wealth Management (NW) Limited should pay Mr G £300 for the unsuitable advice to set up a SIPP and invest in Ethical Forestry. This has caused a substantial loss which had caused upset to Mr G.

Details of the calculation should be provided to Mr G in a clear, simple format.

Income tax may be payable on any interest paid. If Braemar Wealth Management (NW) Limited considers it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr G how much has been take off and give him a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

investment name	status	Benchmark	from ("start date")	to ("end date")	additional interest
Intelligent Money SIPP	still exists	FTSE UK Private Investors Income Total Return Index	date of transfer	date of settlement	not applicable

Actual value

This means the actual amount payable from the investment at the end date. If, at the end date, the investment is illiquid (meaning it cannot be readily sold on the open market), it may be difficult to find the *actual value* of the investment. So, the *actual value* should be assumed to be nil to arrive at fair compensation. Braemar Wealth Management (NW) Limited should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the compensation and the balance paid as above.

If Braemar Wealth Management (NW) Limited is unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. Braemar Wealth Management (NW) Limited may wish to require that Mr G provides an undertaking to pay it any amount he may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Braemar Wealth Management (NW) Limited will need to meet any costs in drawing up the undertaking.

Fair value

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

using the benchmark.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr G wanted capital growth and was willing to accept some investment risk.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr G's circumstances and risk attitude.

SIPP fees

The SIPP exists because of the unregulated and illiquid investment Ethical Forestry investment. In order for the SIPP to be closed and further SIPP fees avoided, the investment needs to be removed. But if Braemar Wealth Management (NW) Limited can't buy it, and the SIPP provider won't write it off so that the SIPP can be closed, Mr G will be faced with future SIPP fees. I think it's fair to assume five years of future SIPP fees. So Braemar Wealth Management (NW) Limited should pay Mr G an amount equal to five years of SIPP fees based on the current tariff. This is in addition to the compensation calculated using a nil value for the investment.

My final decision

I uphold the complaint. Braemar Wealth Management (NW) Limited must redress Mr G as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 23 March 2022.

Lesley Stead
Ombudsman