

## **The complaint**

Mr D is complaining about advice given to him by True Bearing Ltd in 2010 in connection with his self invested personal pension (SIPP).

## **What happened**

Mr D was advised in June 2010 to switch his existing personal pensions to a SIPP. The suitability report said Mr D's main objective was achieving financial independence by age 55. It was anticipated this would be achieved through the sale of his business within the next five years. The report said that Mr D had been unhappy with the volatility and performance of his existing pension plans and wanted to have more control over investment decisions. Mr D was described as having a cautious attitude to investment risk, although at later points of advice he'd been assessed as having a 6 or 7 out of 10 (medium - high) attitude to investment risk.

The investments recommended for Mr D's SIPP included unregulated collective investment schemes (UCIS). £25,000 was invested in the Brandeaux Student Accommodation Fund and £20,000 in the New Earth Solutions Recycling Fund.

In April 2011 a True Bearing UCIS client review was completed. It detailed that Mr D had approximately 25% of his SIPP portfolio in UCIS and under 15% of his overall investible wealth in UCIS. On the same day Mr D signed self certified sophisticated investor and high net worth individual statements.

Over the following years, several recommendations were provided for Mr D's SIPP. Further funds were also added to the pension over time.

The New Earth Fund failed and the SIPP provider also entered administration. Those issues triggered Mr D's complaints about the advice he'd been given and what he considered were poor returns.

True Bearing didn't uphold Mr D's complaint. And it said that some parts of the complaint had been made too late – more than six years after the advice had been given.

Our investigator didn't agree. He said we could consider all of Mr D's complaint. Mr D was complaining about advice given in 2010. He'd complained in June 2019, more than six years later. But the investigator thought Mr D had complained within three years of when he ought reasonably to have become aware he had cause for complaint.

The complaint was referred to me to decide if we could investigate it. I issued a provisional jurisdiction decision on 17 August 2021 and a jurisdiction decision on 6 October 2021. For the reasons I set out I thought we could consider all aspects of Mr D's complaint.

The investigator issued his view about the merits of the complaint on 12 November 2021. He upheld the complaint. In summary he said:

- A SIPP wasn't unsuitable for Mr D. He had a preference for structured products and he wanted a pension that provided the flexibility to incorporate such investments in his pension portfolio.
- The issue was whether the investment recommendations were suitable. We'd look at the suitability of the overall portfolio rather than focusing on individual funds.
- Mr D's SIPP held more UCIS than we'd expect to see. Especially if he was a cautious investor. But even if his attitude to risk was on the higher side of medium, that wouldn't justify a recommendation to include up to a quarter of his SIPP portfolio in UCIS.
- The meeting in 2011 was a retrospective assessment, including the completion of the two statements. That should have been dealt with before the advice was given and not a year later.
- The SIPP portfolio overall was adventurous or high risk. It wasn't suitable for Mr D's circumstances.
- There was an expectation that Mr D would realise a substantial sum from the sale of his business in around five years' time. But there was uncertainty and risk and until the sale had been realised Mr D hadn't got that money. The sale might be derailed. Given the inherent risks in selling a private business, it wasn't appropriate to take a high level of risk with Mr D's pension fund as well.
- The investment recommendation, particularly given the high concentration of UCIS, was unsuitable. Although the value of Mr D's pension fund increased over time, that didn't rectify the unsuitability of the original recommendation which included high risk and illiquid UCIS – including the New Earth Fund which had failed.
- The investigator set out how True Bearing should calculate if Mr D had suffered any loss and, if so, pay redress. In addition True Bearing should pay Mr D £300 for the upset he'd been caused by the unsuitable investment advice.

True Bearing didn't agree with the investigator's findings. It asked for an ombudsman's decision. It didn't make any further comments but it referred to its previous submissions and, in particular to what it had said on 4 November 2021.

In response to the investigator's view, Mr D said he'd transferred £175,000 to the SIPP and a total of £486,000 was paid in over an eight year period. As at February 2019 his SIPP fund was worth £543,000, a gain of £57,000. Based on yields achieved by his new adviser over that period, Mr D had calculated that his fund would've been worth £828,000, a gain of £342,000. Taking into account the gain of £57,000 he'd lost out by £285,000. Mr D said he understood that wasn't central to our process but he'd wanted to share just how badly his SIPP fund had performed and how he felt he'd been let down by True Bearing's adviser.

The investigator explained that he'd set out in his view a methodology for carrying out a loss assessment. He didn't know what the result of the calculation would be. If an ombudsman upheld the complaint there were limits on how much the ombudsman could award. If a final decision was issued upholding the complaint and if fair compensation was more than we have power to award, it would be up to the business whether or not it paid anything over that amount.

### **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.

As I've said above, I've considered jurisdiction before. But we're required to keep jurisdiction under review throughout our consideration of a complaint, up to and until we issue a final

decision. I note that True Bearing in its letter of 4 November 2011 said it continued to disagree with my conclusion that the complaint had been referred in time.

I've looked again at what I said in my jurisdiction decision. But I don't see any reason to depart from the views I've expressed previously. I'd correct a typing error I made in my jurisdiction decision dated 6 October 2021. I said (in the penultimate paragraph on page 7) that, if Mr D's complaint about the New Earth Fund was made in March 2016, the June 2016 update was irrelevant for the purposes of deciding if Mr D's complaint had been made within three years of when he became (or reasonably ought to have become) aware he had cause for complaint. The March 2016 date should've read March 2019.

I've gone on to consider the merits of the complaint. Having done so, I agree with the views expressed by the investigator and the reasons he gave as to why Mr D's complaint should be upheld.

In reaching my decision, I've considered very carefully all True Bearing has said, including the points it made in its letter of 4 November 2021.

True Bearing noted that Mr D had said, about the New Earth Fund, that it was unsuitable because it was an unregulated investment, which he hadn't understood at the time. I've seen that, having recommended the New Earth Fund in 2010, True Bearing took steps the following year to draw to Mr D's attention that it was a UCIS and what that meant. And Mr D signed self certified sophisticated investor and high net worth individual statements.

I agree with the investigator that those steps should've been taken in 2010 and so True Bearing could be sure, before recommending the New Earth Fund (and the other UCIS) to Mr D, that he was an investor to whom UCIS could lawfully be promoted. But, and regardless of what Mr D knew about the Fund, including the risks, it was still up to True Bearing to ensure that its recommendations were suitable for him.

I think, in considering suitability, the approach taken by the investigator – to consider the SIPP portfolio as a whole – is correct. And it's consistent with what True Bearing said in its recommendation letter – that there might be times when an individual fund or funds had a higher risk rating than Mr D's overall stated attitude to risk. But the overall risk rating applied to all of the combined funds being recommended was still designed to meet the stated tolerance. So I agree that the recommendation to invest in the New Earth Fund has to be looked at in the context of the overall portfolio and not in isolation. True Bearing says the overall portfolio was suitable.

Mr D had apparently been assessed as having a cautious attitude to risk in respect of his pension funds, although later advice indicates that his attitude to risk was somewhat higher.

In 2010 about £164,000 (after the SIPP set up fee and the charge for True Bearing's advice had been taken) was to be transferred to the SIPP. True Bearing says that Mr D was happy for the New Earth Fund to be included as one relatively modest aspect of his portfolio.

£20,000 was invested in the New Earth Fund. I think that was a significant amount – about 12% of Mr D's SIPP fund. And it wasn't the only UCIS. The original recommendation was that £20,000 was invested in the Brandeaux Student Accommodation Fund. But that was later revised to £25,000 with a further £20,000 in the New Earth Fund, another UCIS. I don't think investing that much of Mr D's SIPP fund in UCIS was suitable.

Regardless of any indication Mr D may have given about being comfortable with the weighting of the UCIS investments in his SIPP portfolio, and even if True Bearing had given risk warnings, it was still up to True Bearing to give Mr D suitable advice.

Mr D may also have had strong views of his own as to how his portfolio should be invested and a wish that it delivered positive returns regardless of stock market conditions. But it was up to True Bearing to make sure that its advice took into account the level of risk Mr D had said he was prepared to take and his capacity for loss. It seems from what True Bearing has said that its adviser refused to recommend further UCIS and/or structured products. But there's still a problem for True Bearing if what it did recommend was unsuitable.

I don't think the portfolio was suitable for Mr D. The overall level of risk was higher than he'd indicated he was prepared to take. That's especially the case if he was a cautious investor. But, even if his attitude to risk was above medium, I think the portfolio still represented too much risk.

I note that the suitability report records that Mr D was on track to reach financial independence by age 55 (he was 52 at the time of the advice) and that he didn't need to take unnecessary risk with his capital. I think True Bearing should've recommended a lower risk portfolio of funds. I don't see any reason to think that Mr D wouldn't have accepted that advice. Particularly if, as it seems, he did accept advice later on from True Bearing as to why further UCIS investment couldn't be recommended.

I also agree with how the investigator said about how True Bearing needs to redress Mr D. It's in line with the approach we'd usually take in a case such as this and where we don't know exactly how Mr D's SIPP portfolio would've been invested instead and had suitable advice been given.

I don't agree that redress should be limited to a comparison of the performance of the New Earth Fund against a suitable benchmark from the date of the initial investment in that Fund to the date of the UCIS review meeting. True Bearing didn't tell Mr D in 2011 that investment (and Mr D's portfolio generally) was too high risk and unsuitable or say that he should sell his holding in the Fund.

I've repeated here the redress suggested by the investigator. It's a formulaic award. We haven't carried out any calculations. I don't know what, if any, loss Mr D has sustained. But in view of what he's suggested his losses might be I've included a recommendation that if his losses exceed the maximum amount of compensation that I can award, True Bearing Ltd should pay the balance. But any recommendation won't be binding on True Bearing.

### **Putting things right – fair compensation**

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

### **What should True Bearing Ltd do?**

To compensate Mr D fairly True Bearing Ltd should:

- Compare the performance of Mr D'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.

True Bearing Limited should also pay any interest set out below.

If there is a loss, True Bearing Ltd should pay into Mr D'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 True Bearing Ltd is unable to pay the compensation into Mr D's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would've 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 D's actual or expected marginal rate of tax at his selected retirement age. For example, if Mr D 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 he would've been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

In addition, True Bearing Ltd should pay Mr D £300 for the upset caused by the unsuitable investment advice.

True Bearing Ltd should also provide the details of the calculation to Mr D in a clear, simple format.

Income tax may be payable on any interest paid. If True Bearing considers that it is required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr D how much it has taken off. It should also give Mr D 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
GPC SIPP	mixed	FTSE UK Private Investors Income Total Return Index	date of investment	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. True Bearing Ltd 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 True Bearing Ltd is unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. True Bearing Ltd may wish to require that Mr D provides an undertaking to pay True Bearing Ltd 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. True Bearing Ltd 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.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

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 True Bearing Limited 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 D 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 D's circumstances and risk attitude.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000 (in a case such as this which concerns an act or omission before 1 April 2019 and the complaint was referred to us on or after 1 April 2019), plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

**Decision and award:** I uphold the complaint. I think that fair compensation should be calculated as I've set out above. My decision is that True Bearing Ltd should pay Mr D the amount produced by that calculation – up to a maximum of £160,000.

**Recommendation:** If the amount produced by the calculation of fair compensation is more than £160,000 I recommend that True Bearing Ltd pays Mr D the balance.

This recommendation is not part of my determination or award. True Bearing Ltd doesn't have to do what I recommend. It's unlikely that Mr D can accept my decision and go to court to ask for the balance. Mr D may want to get independent legal advice before deciding whether to accept this decision.

## **My final decision**

I uphold Mr D's complaint. True Bearing Ltd must redress Mr D as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 5 April 2022.

Lesley Stead

**Ombudsman**