

### The complaint

Mr S complains that Bespoke Independent Financial Advisers Limited (Bespoke) recommended he invest into a complex, non-standard investment within his Self-Invested Personal Pension (SIPP). Having now lost all his money in the scheme, Mr S believes the advice was unsuitable and would like to be put back in the same position as if the investment had not taken place.

Mr S is being represented by a third party, but for ease, I'll refer to all representations as being made by Mr S.

### What happened

Mr S states that he first had a meeting with Bespoke in June 2014 about his retirement planning needs.

Following that, in October 2014, Bespoke issued a Suitability Report (SR) to Mr S that discussed the possibility of moving part of the funds he held in his existing SIPP with London & Colonial to a Rowanmoor SIPP. The SR suggested Mr S had already made up his mind about the investment he wanted. A new SIPP was needed as, according to the SR, his existing SIPP with London & Colonial was not able to hold the new investment being proposed.

The Rowanmoor SIPP was subsequently set up and in December 2014, £80,000 was moved across to that plan from Mr S's London & Colonial SIPP.

In January 2015, he invested £75,000 into an unregulated collective investment scheme (UCIS) opportunity with Dolphin, also known as the German Property Group. £5,000 was held back in the pension to cover SIPP fees. The £75,000 represented around 12% of Mr S's total pension portfolio.

In June 2019, Rowanmoor received correspondence from Dolphin that suggested they were having problems honouring the redemptions on some customer's plans. That information was passed on to Mr S who says four months later he had a meeting with Bespoke to discuss the situation at Dolphin.

In January 2020, further information was released and, there was a suggestion Dolphin were still struggling financially and were looking to restructure their debts. In October 2020, Dolphin entered preliminary bankruptcy proceedings. It's understood from the latest published FCA commentary on the issue, investors are unlikely to get back all their original investments.

Mr S initially complained to Bespoke in December 2020 and then again in September 2021. He told them, in summary, the original advice to transfer to the SIPP and invest in Dolphin was unsuitable. He felt that Bespoke misrepresented the UCIS investments. He went on to state that as an unsophisticated investor, he was unaware of the potential for total loss, and the advice was inappropriate for someone of his investment background. He also said that it

was Bespoke who put forward the idea to invest in Dolphin. He said that had Bespoke told him it was high risk, he would never have invested. Mr S said that a third party was also involved in the advice process, an Adviser from a previous firm (Person X) who used to give him financial advice that had since been de-authorised by Regulator.

Mr S says it was Person X who initially introduced him to Bespoke and then raised the possibility of investing in Dolphin with him.

Bespoke rejected Mr S's complaint. They said, in summary:

- Whilst they had an introducer agreement in place with Person X who Mr S claims provided advice to him, the agreement stated Person X would not give any advice to Bespoke's customers. They felt they weren't responsible for policing what that individual did with his time and trusted him to abide by their agreement.
- They believe the Dolphin investment was promoted to Mr S by Person X. Their only involvement was providing a SIPP that would be capable of accepting the Dolphin investment.
- Bespoke weren't paid to recommend an investment in Dolphin, they were only paid to recommend and arrange a SIPP. The SIPP advice fee, which was disclosed in the Suitability Report (SR) was paid for by Person X.
- Bespoke said in the SR they issued to Mr S, they'd stated they were not recommending he invest in Dolphin. They pointed to the many risk warnings they'd issued to him.
- They felt the Dolphin investment, when taken in consideration of his other assets and income, didn't look unreasonable.

Mr S was unhappy with Bespoke's response. He complained to this service setting out the same concerns.

The complaint was then considered by one of our Investigators. She concluded that Bespoke hadn't treated Mr S unfairly. She also said, in summary:

- That she was satisfied Bespoke had carefully considered the investment which Mr S was considering, and they provided clear and accurate information on the Dolphin investment allowing Mr S to make an educated and informed decision on whether to invest in the scheme.
- The report that was sent to Mr S stated that Bespoke hadn't recommended the Dolphin investment or that he open a new SIPP to facilitate it and, included risk warnings that he could suffer a total loss.
- She also felt that Mr S had been correctly classified as a sophisticated investor with a large capacity for loss.
- She also thought that even if Bespoke hadn't assisted Mr S with the investment, he would've found a way to make the investment without the help of Bespoke.

Mr S's representatives however, disagreed with our Investigator's findings. In summary, they said that as Bespoke had recommended the SIPP transfer, they were also responsible for making sure the underlying investments were appropriate. They also said the following:

- The advice was provided by an unregulated individual who promoted the Dolphin

investment. They felt that Bespoke were negligent in allowing someone without the proper authorisation, give advice to their clients.

Our Investigator was not persuaded to change her view as she did not believe Mr S had presented any new arguments she'd not already considered or responded to already.

Mr S asked the Investigator to pass the case to an Ombudsman to review that outcome.

### **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.

Before I explain my decision, I think it's important to point out that where there's conflicting information about what happened and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what's most likely to have happened. Further, I've not provided a detailed response to all the points raised in this case. Instead, I've concentrated my findings on what I think is relevant and at the heart of this complaint. After thinking very carefully about what's happened, I'm unable to uphold this complaint and whilst I accept Mr S is likely to be disappointed with my decision, I'll explain why below;

The first thing I've considered is the extensive regulation around transactions such as that performed by Bespoke for Mr S. The FCA Handbook contains eleven Principles for businesses, which it says are fundamental obligations firms must adhere to (PRIN 1.1.2G in the FCA Handbook). These include: -

- *Principle 2, which requires a firm to conduct its business with due skill, care and diligence.*
- *Principle 3, which requires a firm to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.*
- *Principle 6, which requires a firm to pay due regard to the interests of its customers.*
- *Principle 7, which requires a firm to pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

So, the Principles are relevant and form part of the regulatory framework that existed at the relevant time. They must always be complied with by regulated firms like Bespoke. As such, I need to have regard to them in deciding Mr S's complaint.

Further, The Conduct of Business sourcebook ('COBS') requires a firm to act honestly, fairly and professionally in accordance with the best interests of its clients, in relation to designated investment business carried on for a retail client (COBS 2.1.1R). The definition of "designated investment business" includes "arranging (bringing about) deals in investments".

COBS 9.2.1R sets out the obligations on firms in assessing the suitability of investments. They are the same things that I look at when reaching a decision about whether the advice was suitable. In summary, the business must obtain the necessary information regarding: the consumer's knowledge and experience in the investment field relevant to the advice; their financial situation; and their investment objectives.

When I consider a case where someone has switched their pension funds, I look at their circumstances at the time. Why were they interested in switching? Were those wants or needs reasonable? And so, should the adviser have recommended the switch? Each case is different, but I'd expect the switch to be in Mr S's best interests to make the advice suitable. And in this regard, I'd expect to see a comparison was made between his former pensions and the recommended new arrangement.

There's a number of issues at the heart of this complaint that I believe are particularly relevant; the original decision to transfer monies from the London & Colonial SIPP, the decision to arrange the Dolphin investment and finally, whether the actual Dolphin investment was suitable for Mr S.

Bespoke are saying they advised Mr S against moving his SIPP and investing in Dolphin. But as he wanted to proceed, they simply facilitated the arrangement and therefore shouldn't be held accountable for his losses. They've said they only arranged for a new SIPP to be set up that was capable of accepting the Dolphin investment. They've also said, the Dolphin investment was arranged by Person X, an introducer who didn't work for their firm.

At the time of the transaction, Mr S was 58 years old and working offshore in the oil and gas industry as an engineer, he was planning to retire at age 65. He had a salary of £167,594 and pension assets of £609,000 across five defined contribution schemes. His attitude to risk was classed as an 8 out of 10. His capacity for loss was noted as "*...in relation to retirement planning, my specific investment of up to £100k would not materially affect welfare in retirement if it were to be lost – this is circa 17% of total pension resource.*"

Mr S's existing London & Colonial SIPP wouldn't accept Dolphin as an underlying investment so, to allow him the ability to invest, he needed to arrange a new SIPP wrapper with an alternate provider. When Mr S needed help on which SIPP provider would accept the Dolphin investment, Bespoke provided research and analysis and put forward three suggestions, Rowanmoor, Greyfriers and Westerby & Guiness Mahon.

The Regulator has been clear that where pension switch and transfer advice is being undertaken, it can't be done in isolation from the underlying investments. They've stated Advisers must fully satisfy themselves any investments meet the customers stated aims and objectives. That's even when the investments are being arranged by someone else, as is the case that Bespoke are suggesting in this instance. Having read the original suitability letter from October 2014, the primary justification for moving funds from Mr S's existing SIPP with London & Colonial to Rowanmoor, was to allow Mr S to invest in non-stock market investments.

Bespoke was required to know its client and give suitable advice. It was also under a duty to act in the best interests of Mr S. I think it's sufficiently clear the adviser knew the investment was to be made into Dolphin. The Financial Services Authority (FSA) issued an alert in January 2013 and said: "*It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating*". I think it represents the Regulator's view of how the adviser should have assessed the suitability of any advice given. I don't think the adviser could give suitable advice to recommend a SIPP without considering the investments that would be made into it.

By their own admission, Bespoke have stated in their complaint resolution letter to Mr S of 20 October 2021, they provided regulated pension advice to him. Their letter said, "*Bespoke WAS PAID to research, recommend and arrange a SIPP – i.e. a regulated product*". Typically, Bespoke would then usually be responsible for the investments that then followed

into that wrapper. However, in this instance, I don't think it's as clear cut as that. I say that because within the SR they issued to Mr S, Bespoke stated they weren't recommending that he make the investment.

Mr S has told this service, he only invested in Dolphin because he was advised to do so by Bespoke and Person X. Within the supplemental 'Suitability Questionnaire' Mr S completed in November 2014, when asked about his knowledge and experience, he ticked the box "*I prefer to take advice before making investment decisions*". Mr S has said the idea of investing in Dolphin was suggested to him on one of the many phone calls he had with Bespoke whilst working overseas. Given Mr S's occupation as an Oil and Gas Engineer working long periods offshore, coming back to the UK on limited occasion, I remain to be convinced that it was his idea to approach Bespoke with the wish to invest in Dolphin. The fact that he also ticked the box that confirmed he always takes advice before investing is at odds with the suggestion he acted under his own enterprise. However, Mr S has told us he had a long-standing relationship with Person X even before his relationship with Bespoke began. So, I suspect what's most likely to have happened is that Person X, who was accredited to promote Dolphin, highlighted the opportunity to him and Mr S took his guidance.

Bespoke have conceded they gave advice to Mr S so, that's in no doubt. But I have a number of concerns about the SR issued to Mr S. The letter Bespoke issued to him was just four pages in length. The first three pages concentrate on the background to the investment and the SIPP itself. On the final page, it states in a section entitled, 'Other comments',

*"Whilst understanding your desire to invest in Dolphin Capital because it is not in conflict with your investor profile and overall pension planning, I am not recommending that you make the investment or incur the additional costs of a further SIPP".*

I think given the significance of the statement, it was wholly inadequate for it to have such little prominence in the SR. In addition, the statement is neutral. It doesn't specifically say whether Bespoke believe the switch and investment is or is not, in his best interests.

The latter comment in the paragraph, suggests the adviser knew the extra cost was a significant disadvantage. The costs of setting up the new SIPP to accept the Dolphin investment were higher than his existing arrangement. This meant there would be a drag on investment performance requiring the remaining investments needing to perform better to make up for the impact of those costs. But I don't think the statement above, that Bespoke did not recommend Mr S should set up a new SIPP and invest in Dolphin, was clear enough in this regard. I say that because the Adviser only stated so in the second to last paragraph of the SR, without explaining why. And the prominence of it was diluted by all the other information they'd provided.

I'm also not persuaded the wording and emphasis of the SR Mr S was given was fair to him or in his best interest. The letter placed too much focus on the upsides of the transaction and not enough prominence on the risks Mr S was entering into. Whilst I should acknowledge Bespoke's letter does confirm there was a potential he could suffer a total loss, I don't think the letter overall was balanced. It provided value judgements and framed the Dolphin investment as being well established, as well as continuing to attract substantial investment, enjoying the support of its banks and offering very attractive yields. I don't doubt that made the investment sound very attractive to Mr S.

I should point out that, if after assessing the customer's financial background, an Adviser believes a course of action isn't the most appropriate, a consumer can, in certain circumstances, still proceed with a solution. That's referred to as an insistent client process. At the time of this advice, there was no regulatory advice or guidance in place in respect of

insistent clients. But there were COBS rules in the regulator's Handbook which required Bespoke to 'act honestly, fairly and professionally in accordance with the best interests of its client'. In addition, COBS required Bespoke to provide information that was clear, fair and not misleading. So, Bespoke's recommendation had to be clear and Mr S had to have understood the consequences of going against the recommendation.

As I've said above, I don't think Bespoke's recommendation was particularly clear – whilst Mr S may have understood Bespoke wasn't recommending he proceed with the investment, I don't think he would've understood why. And while Mr S was given generic warnings that he could lose his entire investment, I don't think the risk warnings were sufficiently prominent, particularly when compared with the potential benefits highlighted to him by Bespoke.

I'm also of the view the documents Mr S was sent, made it very easy for him to proceed with the pension switch and subsequent investment. I say that because whilst Bespoke did not recommend he proceed with the investment, they didn't clearly warn him he should not. There didn't appear to be any follow-up letters to him re-emphasising that he should carefully consider the course of action he was taking and, he wasn't asked to either submit anything in his own handwriting or sign anything to declare he understood this wasn't a course of action Bespoke were advocating. It seems to me he was left to decide for himself with little help from Bespoke. For all of these reasons, I don't think the insistent client process Bespoke followed was fair to Mr S.

Nevertheless, I've considered what Mr S would most likely have done had he been given suitable advice and Bespoke had treated him fairly. I appreciate Mr S has recently said he wouldn't have transferred his SIPP in light of the collapse of Dolphin. But I need to consider this against the other evidence I have. I cannot be sure what would have happened, and it is impossible to know for certain what he would have done at that time had suitable advice been given. However, where evidence is incomplete or conflicting, my role is to decide, on the balance of probabilities, what I think is most likely.

I've thought about whether a clear explanation of the benefits and risks, and discussions about alternative options, might have persuaded Mr S against this course of action. However, I'm not persuaded that it would have.

The FF completed at the time of the advice suggests Mr S held a Venture Capital Trust (VCT) amounting to £15,000, presumably arranged to offset his income tax and, individual shares totalling £1,000. VCT's are typically considered high risk investments. The FF also stated he owned shares in his employer, BG but it was unclear what the balance of those were. He also had NS&I deposits of £10,000. Allied to this he also held a number of defined contribution pension pots worth in total £609,000. Whilst I haven't been provided with a breakdown of the underlying investments within those, I would typically expect them to contain pooled investments.

The file also confirms that Mr S had previously invested in loan note type investments in the past with 1<sup>st</sup> Stop and In-Circle; he'd also suffered a total loss of another investment in Portugal. When assessing Mr S's attitude to risk, Bespoke categorised him at the higher end of their risk scale, as an 8 out of 10. Their definition of an 8, or Growth investor, is as follows:

*"In general, Growth Investors are happy to take on investment risk and understand that this is crucial in terms of generating long-term return. They are willing to take risks with most of their available assets. Growth investors will readily take gambles where they see the potential rewards as being attractive. They will usually be able to make up their minds on financial matters quite quickly. While they can suffer from regret when their decisions turn out badly, they are usually able to accept that occasional poor outcomes are a necessary*

*part of long-term investment. Growth Investors will usually be experienced investors, who have used a range of Investment products in the past.”*

I'm satisfied that Mr S was an experienced investor and understood the inherent risks of investing having seen both a total loss on his investment in one opportunity as well as returns on others. Whilst I don't believe he could be classed as a sophisticated investor, I do think he certainly appears to have the experience and appetite for these types of investments which on the face of it, appear to have gone well for him in the past.

Mr S had a very large salary with significant disposable income and there's evidence on the file he was planning on making large personal pension contributions. I suspect given his disposable income along with his total pension funds of around £609,000, he more likely than not, felt he was able to take the risk with a portion of his pension money at the level he did because he felt he had the capacity to do so. This I suspect was reinforced by Bespoke who concluded in their FF that losing the full investment would not materially affect his welfare in retirement.

Bespoke have made much of the fact that Mr S was high net worth (HNW) client who knew what he was getting in to. A HNW form was completed in November 2014. As set out in COBS 4.12.6, this allowed firms to communicate an invitation to purchase a 'non-mainstream pooled investment' to a retail client. To self-certify as a HNW individual, Mr S had to either have an income of £100,000 or more or hold, throughout the financial year, net assets to the value of £250,000 or more. But the net assets couldn't include Mr S's primary residence or pension benefits. I'm satisfied Mr S met the HNW requirement.

Whilst in their submissions to this service, Bespoke have claimed Mr S was a sophisticated investor, they were unable to categorise Mr S as a 'sophisticated investor' under the Regulators COBS rule 4.12.7. That's because, he didn't meet the requirements to be classified as "sufficiently knowledgeable to understand the risks associated with engaging in investment activity in non-mainstream pooled investments". He did however sign a 'restricted investor statement' confirming he understood the risks and undertook not to invest more than 10% of his net assets in non-readily realisable securities. That then allowed the Dolphin investment to be marketed to him. I don't think there can be any doubt Mr S was not provided with sufficient literature that spelt out the risks of what he was entering into. And overall, I think Mr S's experience with these investments, his desire to achieve higher returns than would otherwise be available through regulated investments, and his perceived capacity for loss influenced his decision to proceed.

I also think the influence of Person X has to be taken into account. Based on what I've seen, I think it's likely Person X introduced the investment to Mr S and that Mr S relied on Person X to tell him the best course of action to take. Given Mr S's reliance on that individual, I do think Bespoke should have paid closer attention to what direction he was being provided with, particularly given it's understood Person X was known to have been sanctioned by the Regulator at the time. However, the file acknowledges Mr S knew at the time that individual was not a financial adviser, so I don't think Bespoke drawing Mr S's attention to this would've made a difference here.

There is also an email on the file from 16 June 2014 in which Person X talks about ways to make the Dolphin investment without having to go through an advice process. They went on to suggest they needed to make the transfer as soon as possible stating; *"the rate of return over the five year period is 12.42% compound. This is changing downwards to a flat 10%pa, hence the need to get in sooner rather than later"*. I suspect this email created an urgency to act for the fear of missing out. It therefore seems to me that even if Bespoke had been clearer with its advice not to transfer, Mr S and Person X would have more likely than not, found another way to invest. I also say this because the initial fees of Mr S's SIPP transfer

were covered by Person X. I think this would've been an additional attractive incentive for Mr S to move his funds as Person X stated in the same email "*the cost of setting up administering can be borne out of the commission hence the whole exercise will cost you nothing*".

For all of these reasons, despite the failings in the advice process that I've identified above, it seems to me, that Mr S's desire to access this investment was such that he would have proceeded with the transaction in any event.

It follows that I do not uphold Mr S's complaint and I do not require Bespoke Independent Financial Advisers Ltd to take any action.

### **My final decision**

I do not uphold the complaint for the reasons set out above

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

Simon Fox  
**Ombudsman**