Financial Ombudsman Service

The complaint

Mr H says he invested £50,000 into a BriceAmery Capital Ltd ('BCL') fund in 2014 which BCL was supposed to manage, report (to him) on and arrange his exit from after five years. He says he paid BCL £5,000 separately for its services in these respects but it delivered none of them and, instead, it tried to extract from him another £5,000 payment in 2020 to arrange exit from the fund.

BCL says Mr H's investment in a particular company (the 'company') was arranged by a third-party representative of that company, that BCL's involvement was limited to its agreement with the third-party (only) to help secure UK based funding and that it had no ongoing management, reporting or exit arrangement obligations towards Mr H.

What happened

One of our investigators looked into the complaint and initially considered that it should not be upheld.

She referred to the terms and engagement between BCL and the third-party, and the absence of any provisions in those terms for it to monitor and review investments. Instead, she said, the document limited BCL's role to the initial funding arrangements. She also referred to a copy of the agreement for Mr H's investment and said there was a section that suggested an investment management service but it is not clear it applied to his investment, and there are other conflicting sections. The investigator also noted BCL's evidence that a management service existed only if agreed and paid for separately and Mr H did not opt for that.

Mr H disagreed with this outcome. He mainly said as follows – he applied, and paid, to invest in a BCL venture capital fund; his investment had nothing to do with the third-party or the company and he has no knowledge of either; BCL was obliged to provide him with the management service he paid for; and BCL's response shows it invested all his money in one company, contrary to what the investment terms he agreed led him to expect.

The investigator reviewed the case and revised her opinion. She concluded that the complaint should be upheld. She said:

- There is no evidence that the scenario BCL presently describes is what Mr H went through in 2014.
- There is content in the application form he completed for the BCL fund that led him to expect a management service for the £5,000 he had paid.
- BCL says the £5,000 payment was made by Mr H in order for it (BCL) to support the company. His payment for support to the company, but not him, cannot be right.
- BCL also refers to Mr H's investment being made on terms he agreed with the third-party, but there is no evidence of such terms. The agreement that is available is between him and BCL.
- The agreement provided that BCL would provide statements to Mr H twice a year. It is not disputed that it never issued any statements to him throughout the investment.
- BCL also appears to have failed to conduct an appropriateness assessment for Mr H,

as it had a regulatory obligation to do.

- The terms of the investment in the Product Brochure ('PB') for the fund do not match the terms that BCL presently describe. Mr H made the investment based on the PB.
- Mr H appears to have been led to expect a return of, and on, his investment after its term, hence his approach to BCL in 2020 – only to find no such returns because the company and his investment no longer exist.
- He should be compensated for his financial loss, refunded the £5,000 fee payment (with interest) and paid £250 for the trouble and upset the matter has caused him.

BCL disputed this outcome, considered the investigator's findings unfair and asked for an Ombudsman's decision. It retained its core position (as summarised above) and it mainly said:

- There is no evidence it agreed management, reporting or ongoing support for Mr H or his investment.
- Its first ever contact with him was in March 2020, when he sought exit from the investment. Its role in the matter was limited only to holding client money prior to allocating it for funding of the company.
- The third-party also served as Mr H's agent, with whom he discussed the investment and who instructed BCL on his behalf. There is a clause in its terms of service which confirms its approach in dealing with agents.
- Mr H was expected to have understood the risks of the investment as required by the product summary. The summary also states that not all the investment's risks were covered in its contents.
- There is no evidence that the investment term was six years, and it is odd that Mr H waited for six years to complain about not receiving any biannual statements.
- The terms also confirmed to Mr H that it was his responsibility to take advice on suitability of his investment, that BCL gave no such advice, that it held no responsibility for suitability of the investment and that it held no responsibility for any losses from the investment.
- The redress benchmark proposed by the investigator is inappropriate, because its profile mismatches that of Mr H's investment in the company and its basis is unexplained. The 8% level of interest proposed for the £5,000 refund is unfair, given that interest rates over the past six years have been around 1%.

The case was referred to an Ombudsman.

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 taken on board all submissions by both parties, most of which conflict with each-other. However, helpfully, there is available undisputable documentary evidence that illustrates the basis upon which Mr H's investment was made.

Before I address the above, I consider it equally helpful to note the following – there is no evidence, in the circumstances of this case, of the alleged agency relationship between Mr H and the third-party. There is also no evidence of the third-party instructing, or engaging in any way with, BCL on his behalf. Therefore, there is no cause to further consider BCL's allegations in these respects. Those allegations have not been established, so I do not find that the third-party is relevant to anything done by Mr H in this case.

On 7 March Mr H wrote to BCL and enquired into exiting the investment. It addressed the

enquiry on 19 March and referred to receiving his transfer of £55,000 in 2014, using £50,000 to provide funding to "*a company*" and then using £5,000 for its "*transaction and associated support*" fees. It also asked whether (or not) Mr H had contacted the company. He replied on 25 March and said he had no cause to contact any companies BCL had invested in because his investment was with BCL and was under its management. He asked for statements that had not been sent to him over time and asked to exit and recover his money from the investment. BCL replied on the same day and said it was not obliged to provide statements for the investment or to arrange exit and recovery from it, it set out its fee rates for management and offered to send Mr H an engagement letter. Thereafter, each party disputed the other's position – eventually resulting in referral of the matter to this service.

With specific regard to Mr H and his investment payment, there is evidence of the following –

- As stated above, BCL received the payment of £55,000 directly from Mr H in 2014, it used £5,000 for its fees and it passed on £50,000 to the company. These facts are not in dispute.

- A copy of the relevant "*BriceAmery Entrepreneur Fund Application Pack*" (the 'pack') from 2014 has been shared with us. As stated on its cover page, the pack contains the fund's *procedure, application form and investor agreement*.

- In the main, the procedure confirmed the minimum £50,000 investment requirement and payment arrangement (payment to BCL, with details of its bank account and office address). The application form's leading statement is a strong recommendation that the applicant read and consider the PB, FAQs, procedure and investor agreement. The form is completed with Mr H's details. Sections within it say he was applying to invest £50,000 "… *in the BriceAmery Entrepreneur Fund on the terms set out in the Investor Agreement …*"; that he appointed the "… *Investment Manager on the terms of the Investor Agreement*"; that he had made payment; that he had read the PB and agreed to be bound by the investor agreement; and that he was applying on his own behalf. The form is signed by him and dated 15 April 2014.

- The investor agreement document confirms that the agreement was directly between BCL and Mr H. At section 1 it says – "*The Agreement constitutes the contract between you and us appointing us to constitute and direct your investments in accordance with the Product Brochure*". At section 5 it categorised Mr H as a retail client, and at section 6 it set out BCL's "*Investment Management Service*". This section confirmed that the fund was a *"discretionary investment service*" in which BCL, at its discretion, selected and managed qualifying investments which matched the principles and objectives stated in the PB. There is a reminder that the investor is responsible for taking advice on suitability (because BCL provided no such advice), and there is notice that unless the PB says otherwise there will be no restriction on the capital that can be put into one investment, type of investment or market. Section 7 repeated that BCL gave no advice and section 12 confirmed its obligation to issue biannual statements. In section 16 – under "*Our Liability*" – BCL said it "… *will act in good faith and with due diligence in managing your investment in accordance with this agreement*". [my emphasis] It also accepted responsibility for loss arising from its negligence. Section 17 confirmed BCL's service to requests for withdrawals from the "investment account" it managed and section 18 addressed the terms for liquidation (and remittance of proceeds) of investments in the account and closure of the account.

- BCL also shared with us what amounted to the PB in 2014. I consider it a copy of the same document (or information) that was presented to Mr H at the time. The fund's

objective was stated as – "… *to provide investors with medium term capital growth primarily through investments in a portfolio of small / medium sized companies (SMEs) in the UK* …". The document's summary further states that the fund's coverage was qualifying businesses within the UK and its investment strategy section confirms that the fund was focused on the UK's private equity market. No single fixed term is mentioned in the document, instead the investment period is stated as one to three years or longer.

Based on the above evidence, neither the company nor the third-party was involved at the point of Mr H's investment in 2014. This reinforces my earlier finding about the third-party. He contracted directly and only with BCL and it contracted with it for the purpose of arranging and managing his investment account and investment in *the BriceAmery Entrepreneur Fund*.

For the sake of clarity, the management element has not been confused with 'fund management' obligations. BCL was also the fund provider and the PB sets out those obligations differently and in terms that distinctly relate to fund management. The application form and investor agreement separately confirms an investment/portfolio management service dedicated to Mr H – as stated above, the existence and management of his *investment account* and service to the account in terms of withdrawals, investment liquidations and closure; and then references to custody and client money related services to his "*portfolio*" in sections 10 and 11. As such, it is not the case that one form of management has been mistaken for the other.

Mr H's fee payment was for BCL's work in arranging his investment in his investment account and in the *BriceAmery Entrepreneur Fund*, and for its ongoing management service. On balance, and based on available evidence, I find that BCL delivered neither of these services.

By its own admissions, it did not manage Mr H's investment and did not provide the biannual statements owed to him; and it used the payment mainly to cover its work in supporting the company. As the investigator said, this could not possibly be right. It cannot be right that without prior notice to, and agreement with, him Mr H's fee payment would be used mainly for the undisclosed purpose of supporting the operations of a company he was unaware of. There is no evidence of such prior notice, agreement or disclosure.

It has not been established, from available evidence and especially from BCL's submissions in the case, that Mr H's capital was ever invested in the account or in *the BriceAmery Entrepreneur Fund*. BCL has repeatedly said it had nothing to do with the matter besides holding his money and then passing it to the company. The implication is that it, the BCL investment account and *the BriceAmery Entrepreneur Fund* were all remote to the use of his money.

There is also a lack of evidence of that the company was an underlying investment destination within the fund and a lack of evidence that his capital was placed into the fund. Furthermore, I note that despite being paid into his investment account in April 2014, Mr H's capital remained unused until it was passed to the company almost a year later in March 2015. This too suggests his money never made it into the fund and that there was no attempt to invest it in any other way.

Overall and on balance, all the above findings and evidence support the conclusions that Mr H's £50,000 capital was not invested and managed as agreed; BCL did not arrange the investment he paid it to arrange; and it did not discharge the ongoing reporting obligation it owed him.

The above conclusions serve as a basis for Mr H to receive a refund of the fees he paid BCL. In addition, the absences of investment in the fund (or any other investment in his investment account) and of ongoing management in his case are tantamount to mismanagement by BCL of his capital and his investment account. This serves as a basis to compensate him for any loss arising from that mismanagement – and it also comes under its liability for loss arising from negligence, which BCL confirmed in section 16 of the investor agreement.

I also agree with the investigator's finding that he should receive £250 from BCL for the trouble and upset the case has caused him. I set out my orders below.

Putting things right

In deciding what is fair, my aim is to put Mr H as close as I can to the position he would probably now be in if his fee payment had not been misused by BCL and if his capital had not been mismanaged by BCL. With regards to the former, and given that he did not receive the services the fee payment was made for (as I addressed above), I will order BCL to refund him the £5,000 fee payment with interest.

I understand BCL's point about the interest rate used by the investigator. I use the same rate below because it is this service's considered approach to do so. This is explained within our website. However, for BCL's convenience I quote the website explanation as follows –

"*In most cases, we think a rate of 8% simple per year is appropriate to reflect the cost of being deprived of money in the past. We wouldn't normally use the current rates paid on deposit accounts as a benchmark. This is because the rates of interest customers have to pay in order to borrow are usually much higher.*

8% is also the same interest rate that the courts would normally award. This rate takes into account that:

- *the rate is gross before tax is deducted*
- *it often applies to losses at times when different base rates applied*
- *current interest rates charged on overdrafts and loans may not have reduced in line with the base rate*"

I will also order BCL to pay Mr H £250 for the trouble, upset and inconvenience the case has caused him. This is a fair amount to address the overall distress that has been caused to him in finding out his capital and fee payments have not been used as intended and agreed, and then having to pursue the matter up to the present point.

With regards to BCL's mismanagement of his capital, a simple refund of that capital would not be fair. Evidence shows that Mr H wanted, and took steps, to invest that capital, and it is true that BCL gave him no advice in the matter so the decision to invest appears to have been his idea. In these circumstances, the assumption is that he would probably have invested the capital in any case.

The balance of available evidence is that BCL did not invest Mr H's money in *the BriceAmery Entrepreneur Fund,* despite undertaking to do that; and it did not invest his investment account as the investor agreement required. Had he known this would happen he would probably have invested differently on 15 April 2014. It is not possible to say *precisely* what alternative he would have invested in, but I consider that the benchmark-based redress ordered below is fair and reasonable considering the facts. The benchmark is

the same proposed by the investigator. I am mindful of BCL's criticism of it, and I address that further below.

what must BCL do?

To compensate Mr H fairly, BCL must:

- Compare the performance of the investment made in the company (with his £50,000 capital) with that of the benchmark shown below and pay him the difference between the *fair value* and the *actual value* (as both have been defined below). If the *actual value* exceeds the *fair value*, no compensation is payable.

- Refund the £5,000 fee payment to Mr H. Pay interest on this refund at the rate of 8% simple per year from the date the payment was made and up to the date of settlement. Income tax may be payable on any interest awarded.

- Pay Mr H £250 for the trouble, upset and inconvenience the matter has caused him.

- Provide Mr H with the calculations of all payments in a clear and simple format.

Investment	status	Benchmark	from ("start date")	to ("end date")	additional interest
Mr H's £50,000 in the company (Panasia Property Management)	BCL says the company has been dissolved	The FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index)	15 April 2014	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 (or any part(s) of it) is illiquid the *actual value* of the investment (or its illiquid part(s)) should be assumed to be zero. This is provided Mr H agrees to BCL taking ownership of the investment (or its illiquid part(s)) if it wishes to. If that is not possible then BCL may request an undertaking from Mr H – to be drawn up at BCL's expense – that he repays to BCL any amount he may receive from the investment (or its illiquid part(s)) in the future.

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?

In this section, I address BCL's criticism of the benchmark.

The FTSE UK Private Investors Income Total Return Index is a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be

a fair measure for someone who was prepared to be exposed to some risks in order to get a higher return.

BCL has questioned why we have used this index without evidence of an assessment of Mr H's risk profile and given that the fund he pursued was/is not comparable to the index.

Use of the index does not mean Mr H would have invested in a fund or investment account based upon or linked to it. Instead, it serves as a measure of the sort of return he could have obtained from an alternative investment account. Evidence about suitability is not relevant to this because, in the present case, I am not determining what would have been a *suitable* alternative investment account. Instead, I have only found that he would have invested in an alternative one.

The index broadly presents a medium risk profile. Evidence of the fund and of the terms for constituting Mr H's BCL investment account shows that the risk profile that was applied was not below medium and was perhaps closer to the higher end of medium. Given his readiness to invest in the fund and account, a reasonable assumption is that any alternative he pursued at the time would probably have had a broadly medium risk profile. On balance and in the circumstances, I consider the index to be a fair benchmark for the calculation of redress in his case.

compensation limit

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, £160,000, £350,000, £355,000 or £375,000 (depending on when the complaint event occurred and when the complaint was referred to us) plus any interest that I consider appropriate. If fair compensation exceeds the compensation limit the respondent firm may be asked to pay the balance. Payment of such balance is not part of my determination or award. It is not binding on the respondent firm and it is unlikely that a complainant can accept my decision and go to court to ask for such balance. A complainant may therefore want to consider getting independent legal advice in this respect before deciding whether to accept the decision.

In Mr H's case, the complaint event occurred before 1 April 2019 (it began in 2014) and the complaint was referred to us after 1 April 2019 (it was first referred to us in March 2020 and then the complaint form was submitted in July 2020), so the applicable compensation limit would be £160,000.

My final decision

For the reasons given above, I uphold Mr H's complaint and I order BriceAmery Capital Ltd to calculate and pay him the redress, the refund and the trouble and upset award set out above. I also order it to provide him with calculations of all payments in a clear and simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 24 April 2023.

Roy Kuku
Ombudsman