

The complaint

Mr B's complaint concerns an investment he made into property bonds. Mr B is represented by a solicitor – who complains on his behalf that Craig Mitchell provided unsuitable investment advice. It says the recommendation made by Craig Mitchell exposed Mr B to significant risk, didn't follow regulatory requirements and therefore the investment was mis-sold.

What happened

In January 2017, Mr B says he was advised to make an investment into property bonds. He says he was told he would get a good return on the investment, so invested £20,000. Mr B expected to receive a return after 12 months.

In March 2019, Mr B raised a complaint through a solicitor to Craig Mitchell. The basis of the complaint was that Craig Mitchell was responsible for advice Mr B received to invest in the bonds – and that advice was unsuitable. Craig Mitchell didn't reply to the complaint. As no response was received, Mr B referred his complaint to our service.

After contact from our service, Craig Mitchell's principle responded to say he had never had any form of communication with Mr B or given any form of advice to him.

One of our investigators looked into the complaint. He accepted there was limited evidence from the time but found that it was likely Craig Mitchell provided Mr B with advice. In terms of suitability, the investigator considered the bonds unsuitable for Mr B. He said, given the information Mr B's provided about his circumstances, a product that was a particularly high-risk investment and suitable for a sophisticated investor wasn't right for him. Craig Mitchell's principal disagreed with this outcome and maintained he didn't advise Mr B to invest, so the complaint has been passed to me to reach a decision.

In December 2020, I issued a provisional decision on the complaint. In summary, I said that the evidence provided wasn't sufficient for me to say the complaint involves a regulated activity which our service can consider. I also said that I wasn't currently persuaded Mr B has shown he had a customer relationship with Craig Mitchell. So, based on what had been provided so far, I thought the complaint fell outside of our remit. But I did invite Mr B to provide any other evidence he had of receiving advice in response to my provisional findings.

Mr B responded to the provisional decision and provided further evidence. He provided a copy of the full application form completed when he made his investment. This document confirms Mr B's personal details, signature, the amount of investment (£20,000), bank payment information and the date 16 January 2017. It also has a section for his adviser's details which consists of Craig Mitchell's principal's name, Craig Mitchell's details (including FCA number) as the "Authorised Adviser", its principal's signature and the same date of 16 January 2017.

This information was sent to Craig Mitchell and we explained having considered this, the ombudsman now finds the complaint is within our jurisdiction. This was because there is

evidence of regulated advice and of a customer relationship between Mr B and Craig Mitchell – making him an eligible complainant – for the same reasons as given by the investigator's earlier assessment. We informed the parties, as the ombudsman now accepts the complaint is within our jurisdiction, he will now consider the merits of the complaint – specifically the suitability of the advice.

Craig Mitchell was asked to provide any further comments or evidence it had in response to the new evidence and anything it would like the ombudsman to consider about the jurisdiction merits of the case before a final decision is issued.

Craig Mitchell didn't respond, so the complaint has been passed back to me to reach a final decision on the complaint.

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.

Firstly, I'll address the issue of whether Craig Mitchell provided advice. Craig Mitchell says it never met with Mr B and didn't advise him in respect of this investment. It says it was asked to confirm Mr B's identity and address by a third party and doesn't hold any records relating to advice being given to Mr B.

I've looked at the available evidence to decide whether there is evidence of advice. The submissions from both Mr B and Craig Mitchell indicate they never met. The testimony from both parties also suggests that a third-party intermediary could have played an introducing role between them – albeit without Mr B actually meeting Craig Mitchell. When reviewing the application, it is apparent there are sections that have been signed and dated by both Mr B and Craig Mitchell's principal. So this leads me to conclude that the application must have passed between Mr B and Craig Mitchell. Based on what I've seen, it is reasonable to conclude that a third-party intermediary facilitated this.

The section in the application form signed by Craig Mitchell says:

"I/we can confirm that I/we have complied with the suitability rules in COBS 9 of the Financial Conduct Authority's Handbook of Rules and Guidance and have assessed this investment as suitable for the above named client."

Having considered this statement, I don't think it's possible to support Craig Mitchell's claim that it was unaware of the purpose of the statement, and it thought it was only verifying Mr B's identity. The above declaration makes it clear that the investment had been assessed as suitable for Mr B (who was 'the above named client' in the application) by Craig Mitchell.

I accept that overall, there is limited documentation around this investment sale, so it is difficult to be sure of the exact process. But I'm aware from other cases involving the same investment that confirmation of independent financial advice was a pre-requisite to investing in the bonds, hence the need for the 'authorised adviser' undertaking within the application document. So, based on what is available on this complaint – Craig Mitchell gave that undertaking and therefore made Mr B's investment possible.

Overall, on balance and for the reasons given above, I am satisfied that Craig Mitchell undertook responsibility for advising Mr B that his investment in the bond was suitable for him. Even if I accept Craig Mitchell's ascertain that it didn't assess Mr B's circumstances, that would mean the undertaking it signed about assessing suitability was false. But if it was a false undertaking, then I still think it was likely to be relied upon by Mr B. I'm persuaded

that Mr B attached weight to Craig Mitchell's undertaking in terms of making his investment decision for the bond. In which case, I find Craig Mitchell responsible for misleading Mr B in this respect.

I will now go on to decide whether I find the investment suitable for Mr B.

From other comparable cases this service has reviewed, my understanding is that the bonds were used by the issuer to raise capital which would then be issued as loans to third-party firms for the business of property acquisition, development and sale. It appears that the proceeds of the property sales were to be used to service the loans, which then provided funds to be used in paying the coupons on the bonds (and to redeem the bonds). So there does seem to be a number of layers of risk involved where things could go wrong.

Investments in property carry inherent risks – including the difficulty determining a reliable value of the underlying assets and in terms of liquidity of the underlying assets. There is no evidence of Mr B previously having experience in this type of investment. Indeed, Mr B says he had limited funds available and not much experience of risk-based investment. He says the £20,000 he invested came from an encashed endowment policy he held at the time. He also explained he had only recently become self-employed and was building his new business. From what I've seen, Mr B didn't have much in the way of capacity for loss. The idea of placing the majority of his savings in a high-risk unregulated investment doesn't fit his apparent capacity for loss.

I've not seen evidence that Mr B was a high-risk investor with investment experience that made it possible for him to understand the risks involved with this investment. In the absence of evidence to the contrary, I accept what he has told us about his circumstances. Overall and at the time of the investment, Mr B's profile did not fit that of an investor seeking a high-risk and sophisticated investment. Overall, on balance and for the reasons given above, I don't think the bonds were suitable for Mr B.

Fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mr B as close to the position he would probably now be in if he had not been given unsuitable advice.

I take the view that Mr B would have invested differently. It is not possible to say *precisely* what he would have done differently. But I am satisfied that what I have set out below is fair and reasonable given Mr B's circumstances and objectives when he invested.

What must Craig Mitchell do?

To compensate Mr B fairly, Craig Mitchell must:

- Compare the performance of Mr B's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investments. If the *actual value* is greater than the *fair value*, no compensation is payable.
- Craig Mitchell should also pay interest as set out below.

Income tax may be payable on any interest awarded.

Portfolio	Status	Benchmark	From ("start	To ("end	Additional
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name			date")	date")	interest
Property Bond	Still exists but illiquid	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

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

If at the end date any asset is illiquid (meaning it could not be readily sold on the open market), it may be difficult to work out what the *actual value* is. In such a case the *actual value* should be assumed to be zero. This is provided Mr B agrees to Craig Mitchell taking ownership of the illiquid assets, if it wishes to. If it is not possible to take ownership, then it may request an undertaking from Mr B that he repays to Craig Mitchell any amount he may receive from the portfolio in future.

Fair value

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

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Craig Mitchell should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any withdrawal from the Craig Mitchell should be deducted from the fair value calculation 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 Craig Mitchell totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

Why is this remedy suitable?

I have decided on this method of compensation because:

- Mr B's precise objectives in 2017 are not clear but based on the limited information available I'm satisfied he wanted capital growth with a small risk to his capital.
- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market 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 take some risk to get a higher return.

- I consider that Mr B's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr B into that position. It does not mean that Mr B would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker fund. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr B could have obtained from investments suited to his objective and risk attitude.

My final decision

I uphold the complaint. My decision is that Craig Mitchell should pay the amount calculated as set out above.

Craig Mitchell should provide details of its calculation to Mr B in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 11 March 2022.

Daniel Little
Ombudsman