DRN-3333569

The complaint

Mr O complains that, in transferring the value of the benefits in his defined benefit pension scheme to a Self-Invested Personal Pension (SIPP), Moore and Smalley LLP (MAS) gave him unsuitable advice with regard to the investment funds then chosen.. He also complains that MAS didn't give him further advice after the value of his SIPP funds fell.

What happened

Mr O is unwell with a serious health condition. As this could shorten his life, he wanted his wife and family to benefit better from his pension. And felt that a transfer away from his defined benefit pension scheme could achieve this.

Mr O lives in Australia. In 2018 he asked MAS for advice on transferring the value of the benefits in his defined benefit pension scheme into an Australian Self-Managed Super Fund (SMSF). He said that the transaction needed to be done in three parts due to Australian restrictions.

During initial discussions in 2018 between MAS and Mr O, they said they told him that they could only provide advice to him in the UK. They said that Mr O flew back to the UK to receive his formal recommendations.

In August 2018, MAS advised Mr O to transfer his pension to a UK-based SIPP. Mr O's eventual aim was to transfer the money in this SIPP into his Australian pension scheme. In order to achieve this aim the money was split into three SIPPs. After assessing Mr O's attitude to risk (ATR) MAS advised Mr O to set up two of the SIPPs with a medium to low ATR and the other one with a medium ATR. They recommended a fund platform provider and funds that they said were in line with Mr O's ATR for the three SIPPs.

As Mr O lived in Australia, MAS said they couldn't advise him except during his visits to the UK. So Mr O couldn't commit to an annual review service with MAS. And MAS said that they would classify him as a "Consultancy" client. This meant that they wouldn't review his pensions on an ongoing basis. They recommended that he found a local ongoing service. But they said that as the fund platform provider needed the SIPPs to have a financial adviser attached to them to deal with ongoing administration, they would provide that service. MAS listed what they would provide for the fees they would charge for such a service.

In March 2020, Mr O first realised that the value of his funds had fallen. So he wanted to transfer them into cash in order to prevent further financial loss. But he then discovered that he couldn't do that directly with the fund platform provider. He first had to remove MAS as his financial advisers.

Mr O complained to MAS. He wanted to know why he'd never been told that he could instruct his fund platform provider directly if he removed MAS as his agent. He said that if he'd been told he had this option he would've converted his SIPPs to cash as soon as his losses had hit 8%. Mr O said he'd expected support from MAS with the reinvestment of his SIPPs. And felt that they'd been happy to take his money for the initial advice, but then seemed to want to offload him. Mr O also said that he'd been told he could only get advice

from MAS if he met them in person. But felt that they'd been able to provide him with advice on how to convert his SIPPs into cash over the phone in March 2020.

MAS replied to Mr O's complaint in their 23 April 2020 final response letter. They didn't uphold the complaint. They said they couldn't have predicted that Mr O would want to act without their advice. And therefore didn't agree that they'd failed to tell him how he could instruct his fund platform provider directly. They said they were waiting to hear from the fund platform provider whether Mr O could give them investment instructions directly. But they didn't agree that the fact that Mr O felt he was now unable to reinvest his cash would've altered his decision to switch to cash when he did. They also noted that Mr O still had the option of appointing an appropriate adviser. They said that it hadn't been possible for them to provide formal advice to him while he was in Australia. And that they'd told Mr O in 2019 that they would need to disengage with him, given it now looked like he might need advice while still in Australia. They said that Mr O had told them that he'd like to retain their services at that time as he was planning another trip to the UK. MAS said that when Mr O told them he wanted to move his SIPPs into cash they'd told him they couldn't action his request without providing advice to him in the UK. But that as a trip to the UK wouldn't be possible in the near future, they spoke to him to try to dissuade him from making a "knee-jerk reaction to market conditions". But that as he'd still wanted to switch to cash, they helped Mr O to find a way to instruct the fund platform provider directly. This required Mr O to remove MAS as his agent. MAS also told Mr O that they don't monitor individual client portfolios on an ongoing basis.

Mr O asked MAS some additional questions regarding commission payments. They confirmed that they hadn't received a commission for recommending the platform provider or the funds they'd advised.

Unhappy, Mr O brought his complaint to this service. He felt that MAS had caused issues which had led to a financial loss. And wanted them to put this right. He felt that the funds he'd been recommended were too high risk. He also felt it was unfair that MAS required him to travel to the UK to receive financial advice. And felt that he should've been given further advice when his pension funds started to fall in value. Mr O also felt that it was unfair that the SIPPs had been set up so that only MAS, as financial advisers, had authority to instruct the fund platform provider to trade.

Our investigator felt that the complaint should be upheld. He felt that MAS had incorrectly invested two of Mr O's SIPPs in a medium risk fund, when they should've been invested in a cautious risk fund. He also felt that MAS should have instructed the fund platform provider to invest Mr O's funds into cash on 18 March 2020, when Mr O had contacted them about the transfer. Our investigator felt that Mr O had suffered a significant amount of stress and inconvenience due to these issues. So he felt that MAS should pay Mr O £500 compensation for the trouble and upset caused. To put things right, he felt that MAS should aim to put Mr O as close as possible back in the position he would've been in if the money that was invested in the incorrect fund was invested in a lower risk fund. He also felt that MAS should identify any potential loss caused by Mr O having to instruct the fund platform provider to convert his funds to cash directly. Our investigator also felt that MAS should pay interest on the loss they calculated using the same benchmark he'd recommended they use for the loss assessment.

In response, MAS acknowledged that they should've recommended a low to medium risk fund, but that they had in fact recommended a medium to low fund. Although this seems quite similar, MAS acknowledged that they'd recommended a fund that was slightly riskier than it should've been. They explained what fund they would have recommended if the ATR they'd assessed had been correctly used for the research and in the Suitability Report. MAS offered to pay Mr O compensation for being invested in a medium to low risk fund rather

than a low to medium risk one. And also agreed to pay the £500 our investigator had recommended for stress and inconvenience.

But MAS didn't agree that they should've instructed the fund platform provider to invest Mr O's funds into cash when Mr O had contacted them about the transfer. They said they'd been clear from the start that they couldn't advise Mr O when he was outside the UK. And noted that they'd helped Mr O to take action directly, and without their involvement, as soon as he'd told them what he wanted to do. MAS also didn't agree that they should pay interest on the loss calculated as they felt that Mr O had held the funds in cash, which didn't attract any interest with the fund platform provider.

Our investigator shared MAS's offer with Mr O. But Mr O didn't accept it. As agreement couldn't be reached, his complaint came to me for a review.

I issued my provisional decision on 11 March 2022. It said:

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

Having done so, I intend to uphold it. But I don't consider that MAS should've instructed the fund platform provider to switch Mr O's funds to cash on 18 March 2020. And I don't agree with our investigator's proposed method for putting things right in respect of the incorrect fund recommendation. I'll explain why.

I'll first consider if MAS were responsible for a delay in Mr O moving his funds to cash.

Access to the fund platform provider

Mr O said that when he wanted to move his SIPPs into cash MAS told him they couldn't action his request without providing advice to him in the UK. But that as a trip to the UK wouldn't be possible in the near future, they spoke to him on the phone to try to discourage him from moving into cash at that time. When Mr O had continued to want to switch to cash, MAS explained that Mr O first needed to remove them as his agent. He could then instruct his fund platform provider to make the switch to cash directly.

Mr O said that MAS caused a delay in him being able to switch the monies invested in SIPPs through his fund platform provider. He said they'd never told him that he could instruct his fund platform provider directly if he removed MAS as his agent. And that if they had, he would've converted his SIPPs to cash as soon as his losses had hit 8%.

MAS said that they couldn't have predicted that Mr O would want to act without their advice. And therefore they had no reason to tell him how he could instruct his fund platform provider directly.

Our investigator felt that MAS should've instructed the fund platform provider as soon as he told them he wanted to switch to cash on 18 March 2020. He recommended that MAS identified any potential loss that had been caused due to Mr O having to instruct his fund platform provider directly.

MAS didn't agree with our investigator. They said they'd been clear from the start that they had to give their advice in the UK. And that their relationship with Mr O didn't include ongoing advice or reviews. They said they'd previously suggested that Mr O disengaged with them, so that he could engage a local adviser. They'd even provided Mr O with the name of a specific adviser in Australia. This could've prevented any delay in actioning urgent requests like this. But Mr O hadn't wanted to move away from them despite this.

MAS said they did everything they could to find a workaround for Mr O. And that he gave his instruction to his fund platform provider within 24 hours of his request to them. Therefore they didn't agree that they'd caused any real delay.

I note that Mr O first contacted MAS on 18 March 2020 to ask them how he could switch to cash. And that he called his fund platform provider on 19 March 2020 to instruct the switch to cash, after speaking to MAS and finding out what he had to do. Mr O also told me that he thinks the switches took place within 48 hours of his request.

I've carefully considered what both Mr O and MAS have said on this part of the complaint. I've also asked Mr O further questions. He told me that he checked the value of his SIPPs on or around the 19th of each month. He said he'd believed that the funds he was invested in were fairly secure. He confirmed that he first contacted MAS about his desire to switch his funds into cash on 18 March 2020.

From what I've seen, MAS were clear from the start that they couldn't provide Mr O with advice while he was in Australia. They tried to encourage him to access suitable advice in Australia. They don't provide any of their clients with a service where they monitor investment portfolios on an ongoing basis. And they'd been clear with Mr O that they weren't providing him with ongoing financial advice. So it wouldn't be fair or reasonable for me to conclude that they should've been monitoring Mr O's fund performance or contacting him in the event of a market downturn.

I acknowledge that Mr O was paying a fee to MAS which did cover some ongoing administration. But MAS have explained that, as a firm, they don't conduct "execution-only" business – that is, facilitating transactions without giving advice. And that they would've deemed passing on Mr O's instructions to be execution-only business. So I can see why they didn't consider passing on the switch instructions from Mr O to the fund platform provider themselves.

When Mr O originally complained to this service, he said he'd lost over £85,000 since 19 February 2020. When he complained to MAS, he said he was seeking £50,000 redress. He explained this amount allowed for him reaching the point at which his risk tolerance would've led to his switch to cash. But Mr O also told this service that he only checks his funds monthly. And I've already said that I consider that MAS had been clear that they weren't providing a service where they would be monitoring his fund performance or contacting him in the event of a market downturn. So it wouldn't be fair or reasonable for me to hold MAS responsible for losses before Mr O first contacted them on 18 March 2020.

Mr O was able to instruct the switch to cash a day after asking MAS how he could achieve the switch. Overall, I don't consider that MAS should've instructed the switch on Mr O's behalf. And I also don't consider that in not doing so, MAS caused a material delay to the process. Therefore I don't intend to uphold this part of the complaint.

I'll now look at Mr O's complaint about investment advice.

Investment advice

Mr O said that MAS should've given him advice when his pension funds started to fall in value. He also said that they should've helped him to reinvest the money after his switch to cash. Mr O told this service that he'd not reinvested the money. He said he was "too scared to do anything and had no idea what to invest in".

In their final response letter, MAS said that they couldn't provide formal advice to Mr O while he was in Australia. And that they'd been clear about this from the start. They also noted that

Mr O still had the option of appointing an appropriate adviser who could provide the advice he needed. Separately, and as I've said above, MAS have also confirmed that they don't monitor individual client portfolios on an ongoing basis. And therefore even if they had been able to provide advice to Mr O in Australia, there was no expectation of intervention in such circumstances.

From what I've seen, I consider that MAS were clear that they could only give Mr O formal advice face-to-face in the UK. They also proposed that Mr O try to access local advice. But he was happy with their service and thought that he'd be visiting the UK again soon at that time. So he decided not to move to a local adviser. When Mr O realised his funds had fallen in value, MAS said they explained why the pandemic had caused a downturn in the markets. And attempted to explain that a knee-jerk reaction may not be in his best interests. But Mr O still wanted to switch into cash. So MAS helped him to find a way to instruct the fund platform provider directly. This required Mr O to remove MAS as his agent. Unfortunately, once he'd done that, MAS were no longer able to access his information from the fund platform provider.

I've carefully considered everything both Mr O and MAS have said. I'm sorry Mr O faced such a difficult situation. But I've not seen any evidence that MAS should've acted differently. They were clear that they could only provide formal investment advice in the UK. And encouraged Mr O to seek more local assistance. I can understand why Mr O didn't think he needed to access this. But it wouldn't be fair or reasonable for me to hold MAS responsible for not monitoring the value of Mr O's funds. As they'd never agreed to provide that service. Nor can I hold them responsible for not helping Mr O to reinvest the money after his switch to cash. From what I understand, MAS are no longer Mr O's agent. And, in any event, he hasn't returned to the UK. And therefore, unfortunately wouldn't have been able to access any investment advice from them.

I'll now look at Mr O's complaint that the funds he'd been recommended were too high risk.

Were the recommended investments suitable?

The 14 July 2018 fact find MAS carried out noted that Mr O expected to move two parts of his pension to the Australian SMSF over the next five years. These two parts were to be invested on a low to medium risk basis. The other part would be moved later than the first two and could be invested on a medium risk basis.

The medium risk part of Mr O's transfer was invested in the Premier Multi-Asset Growth and Income Fund. The Key Investor Information for this fund showed that it was a medium risk fund. That document recorded the level of risk as a 4 (from a range between 1 and 7). And noted that: "it has experienced medium rises and falls in value over the past five years".

I agree with our investigator that as Mr O intended to keep this fund for more than five years while waiting for the other parts of his pension fund to be transferred to the Australian SMSF, this fund was suitable for him.

For the two parts of Mr O's transfer which were to be invested in a low to medium risk fund, the recommended fund was the Quilter Investors Cirilium Balanced Portfolio fund. The Key Investor Information for this fund showed that it was also a medium risk fund, rather than a low to medium risk fund. That document also recorded the level of risk as a 4 (from a range between 1 and 7). And noted that: "Funds in category 4 have in the past shown moderate volatility. With a fund of category 4, you have a moderate risk of losing money but your chance for gains is also moderate". This therefore doesn't appear to match the level of risk (low to medium) that MAS assessed in the fact find.

The Suitability Report dated August 2018 stated on page 5:

"We have completed a fact find, which we use to help us identify your attitude to risk. The fact find outlines six risk levels ranging from low risk, cash only investors to high to medium risk, 100% equity investors. From this range, we have identified that a medium to low attitude to risk would be appropriate for 2/3rd's of your pension savings with a medium attitude to risk being suitable for the remaining 1/3rd of your pension savings".

So this shows that MAS had made an error in recording Mr O's ATR for two of the SIPPS. They'd recorded the ATR as slightly higher than they should have.

Our investigator proposed that in order to correct this error, MAS should put Mr O as closely as possible in the position he would've been in if the funds that were invested in the Quilter Investors Cirilium Balanced Portfolio were invested in lower risk funds. He specified the funds he felt should be used instead. These were:

- *50% fixed rate bonds*
- *50% FTSE UK Private Investors Income total return index*

Our investigator also recommended that once the loss calculation had been carried out, MAS should also pay interest on the amount of that loss using the same benchmark as the loss assessment from the date Mr O had transferred into cash to the date of settlement.

MAS didn't agree with our investigator. But they acknowledged that they'd recommended a higher risk fund than they should have. They said if they'd correctly recorded Mr O's ATR as low to medium when recommending the fund, they would've recommended a fund in the IMA Mixed (0-35% Shares) Sector. They said this fund would've been selected using their internal investment process, laid out by their Investment Committee.

MAS offered to benchmark the performance of the Quilter Investors Cirilium Balanced Portfolio against the fund that they had on record from their Investment Committee as being suitable for a low to medium risk investor at that point in time.

I asked MAS to provide evidence about the fund they would've selected if no error had been made. They did this. And I'm satisfied that if no error had been made the Quilter Cirilium Conservative fund would've been the one that MAS recommended – and this would have been accepted by Mr O.

Mr O didn't accept MAS's offer. But I've considered if it was a fair offer under the circumstances. Having done that, I'm satisfied that if MAS had correctly recorded the level of risk from the fact find when producing their investment recommendations, they would've recommended a fund from the IMA Mixed (0-35% Shares) Sector. I consider that using the actual fund that should've been recommended as the benchmark for redress calculations will put Mr O back to the position he would've been in had the error not been made. Therefore I intend to uphold this part of the complaint. And I intend to require MAS to carry out a loss calculation using the fund that should've been recommended as the benchmark for that calculation.

I'll now consider the interest recommendation our investigator made. MAS didn't agree with the recommendation. They felt that a suitable rate of interest to use would be that payable on cash deposits with the fund platform provider. And noted that this was 0%.

If no error had been made with the investment recommendations, I consider two of Mr O's SIPPs would've been invested in the Quilter Cirilium Conservative fund up to the date of the

switch into cash. I'm satisfied that Mr O wouldn't have made a different decision to switch to cash if he'd been invested in a different fund. Therefore I consider that he would still have switched when he did. So I'm satisfied that Mr O would've been invested in cash from the date of the switch. This was his choice. And it was made against MAS's recommendations at the time.

But I also need to consider where Mr O has invested the money since he switched to cash. He has confirmed that he never reinvested the money. MAS said that as Mr O held the funds in cash, which didn't attract any interest with the fund platform provider, they shouldn't be required to pay interest on the loss calculated.

I know this will disappoint Mr O, but I agree with MAS on this point. I acknowledge that Mr O may not currently be invested in cash through choice, but because he hasn't got access to the support he needs in order to appropriately reinvest it. But, as I stated earlier, I can't hold MAS responsible for that. So I consider that no interest should be payable on the redress calculated. But I do think that any difference in the value of the funds, as and when they were switched into cash, should be applied to the current value of Mr O's funds.

By applying any loss, as at the switch into cash, in percentage terms to the current value of the pension funds, this will reflect whatever has actually happened to Mr O's funds in terms of performance since.

Did Mr O need to be in the UK to get advice?

Our investigator noted that It's up to MAS to set the terms on which they do business. He considered whether Mr O had been made aware of the requirement for him to be in the UK in order to receive financial advice from MAS.

From what I've seen, MAS did make this clear to Mr O. For example, in the 17 July 2018 meeting note they said:

"Of course, I explained to him that it is sensible to review his investments on a regular basis (Mr O said he could do this online from Australia) and should he want to have advice and he was back in the UK, which may be possible depending on health/visiting family, he could engage us on an ad hoc basis".

And in the Suitability Report, they noted:

"It is important to regularly review your pension plan to ensure that the level of risk and policy itself remains suitable for you. Given that you will be unable to meet on an annual basis, we agreed that you will be classified as a 'Consultancy' client moving forward, meaning that we will not review your pensions on an ongoing basis".

And:

"I strongly recommended an ongoing service with this type of pension contract as any changes in your circumstances or the investment performance could result in you receiving less in retirement than quoted within this report. Whilst you understand this, as you live in Australia you are unable to commit to an annual review service. You can engage our services should you return to the UK any time on an ad-hoc basis".

I acknowledge that Mr O doesn't agree that MAS weren't allowed to provide him with advice while in Australia. But MAS said they don't have the necessary permissions from the Financial Conduct Authority (FCA) to give financial advice if their client isn't in the UK. And from what I've seen, they made this position clear to Mr O before he appointed them.

As the requirement to be in the UK was made clear to Mr O before he received financial advice, it wouldn't be fair or reasonable for me to conclude that MAS did anything wrong when they continued to state they could only provide him with advice on UK soil.

I'll now consider if compensation should be paid for the distress and inconvenience Mr O has suffered.

Distress and inconvenience

Our investigator considered that Mr O had suffered a significant amount of distress and inconvenience due to the issues he's faced. I agree. He recommended that compensation of £500 would be fair under the circumstances.

Based on what happened, I agree that £500 is reasonable in this case. And I can see that MAS have already agreed to pay this amount in respect of the distress and inconvenience Mr O has faced.

Fair compensation

My aim is that Mr O should be put as closely as possible into the position he would probably now be in if the funds that were invested in the Quilter Investors Cirilium Balanced Portfolio had been invested in the correct low to medium risk fund.

I think Mr O would have invested differently. I'm satisfied that Mr O would've invested in the Quilter Cirilium Conservative fund if MAS had correctly used his assessed ATR for two of the three SIPPs.

What should MAS do?

In the event that I uphold this complaint, my current view is that MAS should determine whether Mr O suffered financial loss at the point of switching into cash by having his pension funds incorrectly invested. MAS have said that they will establish whether this was the case by using the Quilter Cirilium Conservative fund as a comparator.

If that determines a loss, MAS should apply that same percentage of loss to Mr O's pension funds as at the date of any final decision along these same lines. So for example, if Mr O's funds at the point of switching into cash were valued at £90,000, but should have been valued at £100,000, there was a 10% loss, and MAS should therefore ensure that the current value of Mr O's pension funds is uplifted by a factor of £100,000/£90,000, ie 1.11.

If it's possible for MAS to do this, given that Mr O is now resident overseas, that uplift should take into account any available tax relief and annual allowance (again, probably unlikely given Mr O's country of residence), along with not conflicting with any protections which might be in place.

If it isn't possible to make a payment into Mr O's plan, then the value of the uplift should be paid directly to Mr O, with a notional deduction for income tax which would be payable by Mr O in retirement at source from the UK – and assuming that tax free cash would be taken. I've assumed the tax rate to be 20%, which means the overall deduction should be 15%. If Mr O wouldn't pay any UK tax on income drawn from the pension funds, but rather tax in Australia, I'd be grateful if he would inform me what that marginal rate would be.

MAS should also pay to Mr O an additional £500 in respect of the distress and inconvenience suffered.

Response to my provisional decision

Mr O agreed with my findings.

MAS accepted my provisional decision, subject to the following:

- They felt it would be problematic trying to make the compensation payment to Mr O's plan. And therefore wanted to pay the value of the uplift directly to him.

- They need the current value of his plan in order to calculate the uplift.

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.

No other new information has come to light to change my opinion. So I remain of the view I set out in my provisional decision.

Putting things right

I require Moore and Smalley LLP to determine whether Mr O suffered financial loss at the point of switching into cash by having his pension funds incorrectly invested. MAS have said that they will establish whether this was the case by using the Quilter Cirilium Conservative fund as a comparator.

If that determines a loss, MAS should apply that same percentage of loss to Mr O's pension funds as at the date of any final decision along these same lines. So for example, if Mr O's funds at the point of switching into cash were valued at £90,000, but should have been valued at £100,000, there was a 10% loss, and MAS should therefore ensure that the current value of Mr O's pension funds is uplifted by a factor of £100,000/£90,000, ie 1.11.

As it would be problematic to make a payment into Mr O's plan, then the value of the uplift should be paid directly to Mr O, with a notional deduction for income tax which would be payable by Mr O in retirement at source from the UK – and assuming that tax free cash would be taken. I've assumed the tax rate to be 20%, which means the overall deduction should be 15%.

MAS should also pay to Mr O an additional £500 in respect of the distress and inconvenience suffered.

My final decision

For the reasons given above, I uphold this complaint. I require Moore and Smalley LLP to take the action detailed in the "Putting things right" section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 24 March 2022.

Jo Occleshaw
Ombudsman