DRN-3353897

The complaint

Mr T complains that Martin Aitken Financial Services Limited ('MAFS') recommended he transfer the benefits he held in three personal pensions and a group personal pension to a self-invested personal pension ('SIPP'). The funds were subsequently invested in high-risk investments which Mr T says weren't suitable for him.

What happened

Mr T was introduced to MAFS through an unregulated introducer, Mr B, in 2015 for pension advice. Mr T says Mr B continued to be involved in the discussions he had with the MAFS's adviser, Mr M, and facilitated the completion of paperwork.

In January 2016 Mr M produced a retirement planning report in which he recommended Mr T transfer the benefits held in his existing pension plans to a SIPP. Mr M recommended that the funds should be invested with a discretionary fund manager ('DFM') – which I'll refer to as 'B' – to access its model portfolio service. He said his funds would be invested based on his attitude to risk, which had been assessed as 5/10 or 'medium'.

The report said MAFS would be responsible for providing ongoing advice, for which it would take an annual fee of 0.5% of the plan value.

Mr T accepted the recommendations and a total of £286,784.07 was transferred to the SIPP in February and March 2016. MAFS took a fee of 2% of the total transfer value – £5,735.68. On 15 March 2016, £177,637.22 of Mr T's funds were invested with B, and £100,000 was invested with another DFM, which I'll refer to as 'S'. In October 2016 the majority of the funds invested with B were reinvested with S. A total of £250,000 was invested in Optima bonds through S, with the remainder invested across an adventurous and conservative fund.

In late 2016 MAFS started looking into pension advice provided where Mr B had acted as the introducer. And Mr M was dismissed as a result of regulatory breaches MAFS uncovered through its investigation. On 26 January 2017 Mr T was sent a letter explaining Mr M's departure. On the same day, Mr T sent MAFS a text in which he expressed some concern with the service provided by MAFS and the situation with Mr M.

On 23 March 2017 MAFS issued a final response letter ('FRL') to Mr T. It said the service provided to him had followed the right process. It also said the pension transfer advice and initial investment advice had been suitable for him. MAFS explained the investments with S had come about due to instructions from Mr B and 'execution only' letters Mr T had sent to S. However, MAFS said that it had uncovered irregularities in the dealings of B and S and proposed to assist Mr T with complaints about these businesses.

In 2020 Mr T complained to MAFS through a representative after finding out that he had lost the majority of his pension funds through the investments with B and S. He complained that the pension transfer advice and investments were not suitable for him.

MAFS responded saying that Mr T had already complained in 2017 about the advice it had given him about his pension. MAFS said it had sent Mr T an FRL and noted he hadn't referred the complaint to our service within the six month time limit set out in that letter.

Mr T referred his complaint to our service. His representative said Mr T didn't recall receiving MAFS's FRL in 2017 and in any event, he hadn't complained about the advice at the time. Our investigator thought Mr T had brought the same complaint to our service in 2020 as was addressed in MAFS's FRL in March 2017. As Mr T hadn't referred his complaint to our service within six months of that letter, he thought the complaint had been referred to us too late under the regulator's rules.

Mr T asked an ombudsman to consider the matter. I explained my provisional thoughts to MAFS, saying that I didn't think its letter of 23 March 2017 was a valid FRL under the regulator's rules. This was because I thought it was arguable as to whether the text constituted a complaint and I also didn't think it responded to the complaint Mr T had actually raised.

MAFS didn't agree, saying the wider context of the events at the time had to be considered. It said Mr T was aware of the problems with the advice given by Mr M. So, it thought it was reasonable to interpret the text as a complaint about the advice Mr T had received from him.

I ultimately decided that Mr T's complaint had been made in time. This was because I didn't think Mr T had complained about any advice or unsuitability of the recommendations MAFS gave him in 2016 until March 2020. As the 23 March 2017 FRL pre-dated this, I decided Mr T's complaint was made in time.

The case was returned to our investigator to consider the merits of the complaint. The investigator upheld it as he wasn't persuaded that the advice to switch Mr T's existing pensions to a SIPP was suitable for him. He thought the new arrangement was expensive and there were no real reasons to justify Mr T taking on the extra costs. The investigator noted that Mr T had a number of pensions and so consolidation was not an unreasonable aim, but he thought that could've been achieved by switching the pensions into one of Mr T's existing plans which had lower charges. He also wasn't persuaded that flexibility was required either.

The investigator noted that Mr T's loss had been magnified by the investments placed via S, but he thought Mr M was aware of Mr B's involvement throughout and the plan to invest via S. He thought MAFS could have prevented this and the associated losses. The investigator concluded MAFS was responsible for Mr T's loss.

MAFS didn't accept this. It maintained that the advice was suitable and said Mr T wanted to consolidate his pensions as three of them were inflexible and didn't offer income drawdown. MAFS added that it had no involvement in the investments placed via S and was not aware of them. It said it would have otherwise advised Mr T against these investments. MAFS added that Mr T was aware Mr B was unregulated and was not employed by MAFS. So, it didn't think it should be held responsible for Mr T's decision to follow Mr B's advice. It asked for the complaint to be referred to an ombudsman to decide.

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.

Having done so, I'm upholding it. I'll explain why.

Necessity of the switch and consolidation of existing plans to a SIPP

According to the Retirement Planning Report dated 22 January 2016, MAFS noted that Mr T's objectives were consolidation of his existing pensions for ease of administration and flexibility to allow the full range of retirement options. However, it also noted that the arrangements should be competitively priced.

In 2009 the regulator, the Financial Services Authority, (now the Financial Conduct Authority – 'FCA') published a report and checklist for pension switching, which applied at the time the advice was given by MAFS (and is still applicable now). The checklist identified four main areas where consumers had lost out:

- They had been switched to a pension that was more expensive than their existing one(s) or a stakeholder pension (because of exit penalties and/or initial costs and ongoing costs) without good reason.

- They had lost benefits in the pension switch without good reason, such as the loss of ongoing contributions from an employer, a guaranteed annuity rate or the right to take benefits at an earlier than normal retirement age.

- They had switched into a pension that did not match their recorded attitude to risk or personal circumstances.

- They had switched into a pension where there was a need for ongoing investment reviews but this was not explained, offered or put in place.

I've considered Mr T's existing pension plans and whether a switch to a SIPP was necessary to meet his objectives, bearing in mind the regulator's guidance above.

Mr T had four existing pensions with the following features:

<u>Personal pension ('PP') with 'A' worth £190,160</u>

- Ability to take 25% tax-free cash ('TFC') and switch investment funds;
- no income drawdown facility;
- retirement age of 63;
- charges of 0.92%.

<u>Group personal pension ('GPP') with 'S' worth £81,090</u>

- Ability to take 25% TFC and switch investment funds;
- no income drawdown facility;
- retirement age of 60;
- charges 0.512%.

<u>Flexible retirement plan ('FRP') with S worth £888</u>

- Ability to take 25% TFC and switch investment funds;
- income drawdown facility;
- retirement age of 65;
- charges 0.70%.

<u>PP with 'SW' worth £7,492</u>

- Ability to take 25% TFC and switch investment funds;
- no income drawdown facility;
- retirement age of 65;
- charges 1%.

All of the pensions Mr T held were competitively priced, and the GPP and FRP in particular would've been cheaper than the new arrangement recommended by MAFS. The adviser, Mr M, recognised this in the retirement planning report, where he said:

"Looking at the charges alone, I would not recommend a transfer of these plans. However, upon transfer, you will be accessing a bespoke portfolio, benefitting from our regular review process, and you will be able to apply a single cohesive investment strategy across all of your pension funds. You will also benefit from flexible retirement options and ease of administration."

It is clear that Mr T was being advised to switch to a more expensive arrangement. So, I've considered whether there was a good reason for it. The quote above suggests that the additional charges were worth it because Mr T would be able to access MAFS's investment strategy through a model portfolio, have flexibility and ease of administration.

But I'm not persuaded that MAFS established a genuine need for flexibility – the fact-find it carried out in December 2015 by Mr M was quite basic. Although it established that Mr T was debt-free and had minimal income needs at the time, it didn't establish when Mr T intended to retire, how much income he required in retirement, or whether he needed or wanted to take TFC. And I note that when Mr T's funds were transferred, he didn't take any TFC despite being able to, which also brings into question whether having flexibility was important to him.

Furthermore, Mr T's FRP did have an income drawdown facility – if Mr T genuinely required flexibility, I think it would've been far more cost effective to switch the funds in the other plans to the FRP. This had a low charge of 0.7% and Mr T could switch funds within it, in line with his attitude to risk. So, I don't think Mr T needed to switch to a SIPP to have flexibility in retirement. This also would have met his objective of having ease of administration.

MAFS appears to have discounted switching the funds to the FRP because it didn't have access to its recommended investment strategy. But I haven't seen any evidence to substantiate why Mr T required access to bespoke portfolio management. He wasn't an experienced investor, so I don't think he would've had the necessary knowledge to understand the transactions that would be taken on his behalf. Furthermore, this came with increased costs which cannot be justified in the circumstances.

Although MAFS didn't establish when Mr T intended to retire, this was likely to be in under 10 years. And Mr T's income requirements look to be minimal given he was debt-free, so Mr T wouldn't have needed to take any unnecessary risks with his pension. It seems to me that modest growth would have been sufficient to meet his ongoing needs.

So overall, I don't think that the recommendation to switch all of Mr T's existing pensions to a SIPP and invest his funds with B was suitable for him. I'm satisfied that Mr T's objectives could've been achieved by switching his existing pensions to the FRP, which had low costs, and would've given him flexibility (if in fact it was required) and ease of administration. And had this advice been provided, Mr T wouldn't have been vulnerable to the unsuitable investments that were later made on his behalf.

So, for this reason alone, I would find MAFS responsible for Mr T's losses as he could not have invested as he did if MAFS hadn't recommended he switch his pensions to the SIPP.

Investments made through S

MAFS has argued in any event that Mr T didn't suffer any loss until his funds were disinvested from B and invested in an account with S, through which the Optima bonds were purchased. MAFS says its adviser had no involvement in this – the investments were instead arranged by Mr B, the unregulated introducer, and Mr T. It points to letters signed by Mr T which confirmed the account with S had been set up on an 'execution only' basis.

However, I think MAFS misrepresented Mr B's status as the 'introducing Adviser' to Mr T in the January 2016 retirement planning report. And I think this has had a significant impact here.

The FCA states in its Conduct of Business Sourcebook ('COBS') that MAFS's adviser, Mr M, had a duty to act honestly, fairly and professionally in accordance with the best interests of Mr T (COBS 2.1.1R). And I think this would include making it clear to him that Mr B wasn't regulated in any capacity to carry out investment activities, which Mr M was well aware of. I think Mr T should've been warned that if he chose to engage with Mr B further, he wouldn't be protected by any of the regulatory bodies nor would any of the 'recommendations' made by Mr B be endorsed by MAFS.

It is clear to me that Mr M allowed Mr B to continue to be involved with arranging the investments long after the introduction had been made, and Mr T has told us he mostly dealt with Mr B and didn't appreciate he wasn't regulated. If Mr T had been made aware of Mr B's status as an unregulated introducer, and that he had no connection to MAFS or any other regulated firm, I don't think he would've signed any documents provided by Mr B or engaged with him any further after his introduction to MAFS. So, I think it's very unlikely Mr T would've invested with S but for Mr B's involvement and Mr T's cooperation with him.

Notwithstanding the above, I've also seen clear evidence demonstrating that MAFS was aware that an account with S had been set up before any investments were made and that it facilitated the investments. I've seen a copy of an email from the MAFS's adviser, Mr M, on 3 March 2016 in response to an email from the SIPP provider about Mr T and another client stating, *"Please set up a [S] account for both clients."* I've also seen an email from MAFS's administrator, Ms M, on 8 March 2016 stating, *"Please could you send £100,000 to [S], and the balance to [B]..."*

So, I think the above evidence demonstrates the account with S was set up on MAFS's instruction. This was a significant deviation from the advice given to Mr T by MAFS, which recommended the entirety of the funds should be invested with B in its model portfolio. Mr T had agreed to pay for advice on an ongoing basis, so I would've expected to see some kind of audit trail to explain the deviation from the advice or indeed whether the advice had changed. The above evidence shows that in addition to arranging the account with S to be opened, MAFS then arranged for £100,000 to be transferred to the account with S on 8 March 2016. The first £100,000 was invested in Optima bonds on 15 March 2016.

MAFS hasn't provided any evidence to show that Mr T instructed MAFS to open the account with S or transfer funds to it. MAFS also denies that Mr M advised Mr T to do this. So, in the absence of another explanation, it seems likely to me that MAFS was acting on the instructions of Mr B at this point. Although I haven't seen evidence in relation to Mr T, I understand it was not unusual practice for Mr B to provide investment instructions directly to MAFS for customers he'd introduced to it. Given the investment via S went against MAFS's earlier advice, and Mr T says Mr B continued to be involved, I think this is the most likely explanation here.

Mr B should not have had any say or influence over where Mr T's funds were invested. MAFS was aware that Mr B was not regulated to give any investment advice, and moreover, Mr T was MAFS's client – he was paying for ongoing advice and oversight of his pension. So, MAFS should not have acted on any instruction from the introducer about where Mr T's money should be sent. And at the very least, MAFS ought to have questioned why Mr T was suddenly investing his funds elsewhere, against the very recent advice he'd received from Mr M.

I know that a number of letters were sent to S, signed by Mr T, which gave instructions to purchase the Optima bonds in February 2016 and September 2016. But the only way this could've actually happened was by MAFS facilitating it. As I've shown above, MAFS instructed the SIPP provider to open the account with S in the first place, and then instructed it to send £100,000 to the account. So, but for MAFS's involvement, the purchase of the bonds wouldn't have gone ahead. And as Mr T's adviser, MAFS ought to have taken a view on whether the intended investments were suitable for Mr T.

I also would've expected MAFS to have contacted Mr T to establish what, if anything, he knew about these transactions. I have significant reason to doubt that Mr T wrote the letters, or that he saw the text before signing the pages. This is because the letters are more or less identical (same format and font) to those sent to S by, or on behalf of, other clients of MAFS who also had dealings with Mr B. Had MAFS, as Mr T's adviser, contacted Mr T about the instructions to open an account with S and send a significant amount of money to it, I think it's likely MAFS would've discovered Mr T was possibly acting under Mr B's influence, or that the letters sent to the S may have been written and sent without his knowledge.

The investment in the Optima bonds through S (an illiquid corporate bond) wasn't suitable for Mr T – MAFS accepts this and said it would not have recommended he invest in them. And despite the influence of Mr B here, I think if MAFS had warned Mr T against any investment via S, Mr T would've most likely followed that advice. I say this because he had a medium attitude to risk and no real capacity for loss, and the Optima bonds were highly speculative. I think MAFS's recommendation would've carried significant weight and could, I believe, have dissuaded Mr T from proceeding with the switch and subsequent investments.

Overall, if MAFS had acted in Mr T's best interests and given him suitable advice throughout, I don't think the account with S would've been opened and I don't think Mr T would've invested as he did. On balance, I think he would've instead consolidated his pensions in the FRP and invested in funds in line with his medium attitude to risk.

DFM involvement

I recognise that MAFS has said that B and S's actions may have also separately caused some of Mr T's loss. So, I have considered whether I should apportion only part of the responsibility for compensating the loss to MAFS. In the circumstances, though, I think it fair to make an award for the whole loss against MAFS.

I think MAFS advised with complete disregard for Mr T's interests given it facilitated the opening of the account with S and did not question or give any advice as to the suitability of the investments to be made through it. MAFS also continued to take fees from the investment that it should have been monitoring. So, anything that B or S might also have done wrong doesn't make it reasonable in the circumstances of this case for MAFS to avoid compensating for the losses they may have gone on to cause. So, I think holding MAFS fully responsible for the whole of Mr T's loss represents fair compensation in this case.

I’m aware Mr T may be able to take his claims about B and S to the Financial Services Compensation Scheme (‘FSCS’).

As a scheme of last resort, it’s possible the FSCS won’t pay out if a third party could also be held liable. This means an apportionment of only part of the loss to MAFS could risk leaving Mr T out of pocket. But I think it’s important to point out that I’m not saying MAFS is wholly responsible for the losses simply because B and S are now in liquidation. My starting point as to causation is that MAFS gave unsuitable advice and it is responsible for the losses Mr T suffered in switching his existing pensions to the SIPP and investing as he did. That isn’t, to my mind, wrong in law or irrational but reflects the facts of the case and my view of the fair and reasonable position. With this in mind – and recognising also that Mr T wouldn’t have lost out at all but for MAFS’s failings and that MAFS benefitted financially from advising on this transaction – I think MAFS being responsible for the whole of the loss represents fair compensation in this case.

Putting things right

My aim is that Mr T should be put as closely as possible into the position he would probably now be in if he had been given suitable advice.

I think Mr T would have invested differently. On balance, I think suitable advice would have been for Mr T to switch his other pensions to his FRP with S. It’s not possible to say *precisely* how his funds would’ve been invested thereafter, but I’m satisfied that what I’ve set out below is fair and reasonable given Mr T's circumstances and objectives when he invested.

What must MAFS do?

To compensate Mr T fairly, MAFS must:

- Compare the performance of Mr T's investment with that of the benchmark shown below. If the *actual value* is greater than the *fair value*, no compensation is payable. If the *fair value* is greater than the *actual value* there is a loss and compensation is payable.
- MAFS should add interest as set out below.
- If there is a loss, MAFS should pay into Mr T's pension plan to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.
- If MAFS is unable to pay the compensation into Mr T's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn’t a payment of tax to HMRC, so Mr T won’t be able to reclaim any of the reduction after compensation is paid.
- The *notional* allowance should be calculated using Mr T's actual or expected marginal rate of tax at his selected retirement age.
- It’s reasonable to assume that Mr T is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr T would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

- Pay Mr T £500 for the disruption to his retirement planning.

Income tax may be payable on any interest paid. If MAFS deducts income tax from the interest, it should tell Mr T how much has been taken off. MAFS should give Mr T a tax deduction certificate in respect of interest if Mr T asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
SIPP	Some liquid/some illiquid	FTSE UK Private Investors Income Total Return Index	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.

It may be difficult to find the *actual* value of the portfolio. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case.

MAFS should take ownership of the illiquid assets by paying a commercial value acceptable to the pension provider. The amount MAFS pays should be included in the actual value before compensation is calculated.

If MAFS is unable to purchase the portfolio, the *actual value* should be assumed to be nil for the purpose of the calculation. MAFS may require that Mr T provides an undertaking to pay MAFS 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.

MAFS 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 withdrawal from the portfolio 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 MAFS totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

The SIPP only exists because of illiquid assets. In order for the SIPP to be closed and further fees that are charged to be prevented, those investments need to be removed. I've set out above how this might be achieved by MAFS taking over the investment, or this is something that Mr T can discuss with the provider directly. But I don't know how long that will take.

Third parties are involved and we don't have the power to tell them what to do. If MAFS is unable to purchase the investment, to provide certainty to all parties I think it's fair that it pays Mr T an upfront lump sum equivalent to five years' worth of wrapper fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr T 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 T's circumstances and risk attitude.

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend that Martin Aitken Financial Services Limited pays the balance.

My final decision

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above.

My decision is that Martin Aitken Financial Services Limited should pay the amount produced by that calculation up to the maximum of £160,000 (including distress or inconvenience but excluding costs) plus any interest on that amount as set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that Martin Aitken Financial Services Limited pays Mr T the balance plus any interest on the balance as set out above.

If Martin Aitken Financial Services Limited does not pay the recommended amount, then any investment currently illiquid should be retained by Mr T. This is until any future benefit that he may receive from the portfolio together with the compensation paid by Martin Aitken Financial Services Limited (excluding any interest) equates to the full fair compensation as set out above.

Martin Aitken Financial Services Limited may request an undertaking from Mr T that either he repays to Martin Aitken Financial Services Limited any amount Mr T may receive from the portfolio thereafter, or if possible transfers the investment to MAFS at that point.

Mr T should be aware that any such amount would be paid into his pension plan so he may have to realise other assets in order to meet the undertaking.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 28 April 2022.

Hannah Wise
Ombudsman