DRN-3490177

## The complaint

Ms M complains that BLG Wealth Limited ('BLG') wrongly advised her to transfer her SIPP to a new provider and make two investments into Best Car Parks - a scheme investing in the leasehold of car parking spaces in buildings in Dubai.

## What happened

In February 2009 Ms M says she was receiving advice from a Mr L1 of Barton Lyle Ltd. This was, and still is, a trading style of a different firm to BLG. It appears that this advice led her to suffer a £100,000 loss and she dismissed Mr L1 as her adviser. During 2011-12 she says one of Mr L1's colleagues, Mr L2, agreed with Ms M to take over as adviser on her Aegon, L&G and Sanlam pensions. From what I can see, Mr L2 was not actually authorised by the Financial Services Authority (FSA) to give advice to clients at that time.

According to BLG's file notes, Ms M had then received advice, without charge, in May 2012 from "Barton Lyle Wealth" to transfer her pensions to a James Hay SIPP. Barton Lyle Wealth was, and still is, a trading style of a further different firm to BLG. This advice involved an increase in Ms M's recorded attitude to risk from 6 to 8 on a scale of 1-10. Her investment strategy had been most recently reviewed in July 2012 and involved placing part of the SIPP in a L&G structured product and 'self-select' funds for the remainder.

I gather that BLG's sole director used to work for 'Barton Lyle Ltd' and 'Barton Lyle Wealth' when these were trading styles of other firms, and there are other similarities in staff carrying out controlled functions at both firms. This doesn't include Mr L2, as he wasn't officially linked to BLG at the time. And there is no discussion about a further SIPP transfer from the James Hay SIPP, or subsequent investments which form the basis of this complaint, in the Barton Lyle Wealth / Barton Lyle Ltd documents.

On 15 November 2012 Ms M issued BLG, the firm that is the subject of this complaint, with an an execution only instruction to transfer her SIPP from James Hay to Westerby Trustees (including the structured product 'in specie'). At that time she was aged 47. She provided a handwritten note, mentioning in part: *'I confirm that I have not sought advice from you and just wish you to carry out my instructions'.* Ms M has told us that she believes Mr L2 would have dictated what she should put in the letter.

I gather that BLG verified Ms M's identity on that same day. A couple of weeks later at the end of November 2012 Ms M signed new terms of business with BLG and an application form to transfer her SIPP. A relevant option was **not** struck out in the part of the terms of business which read (with my emphasis): *'With regard to investments which we have arranged for you, these **will be/will not be** kept under review.'*

BLG's sole director was recorded as her 'financial adviser' on the application form. The form is completed to say no initial or renewal commission is being taken on the transfer, although it appears that 0.5% had originally been written for the renewal commission - and subsequently overwritten as zero.

BLG then sent Ms M a headed 'execution only letter' on 3 December 2012, explaining that it would usually send a suitability letter after making a recommendation – but in this case

advice had neither been sought nor given. It said BLG had offered Ms M full advice, which she had declined and therefore:

> *'You understand that when buying a contract under these terms, you will not benefit from some of the regulatory protection provided when authorised advice is given, and you may have no right to redress should the contract turn out to be unsuitable.'*

The funds totalling £159,200 were transferred between February and April 2013, including £72,349 retained in specie in the structured product. Of the remainder, £78,000 was then invested into an unregulated investment – Best Car Parks (operated by Best International Group in Dubai). A further £78,000 was put into Best Car Parks when the structured product matured in January 2014.

BLG's files state that an unregulated firm, Pearson Bryce (with whom Mr L2 was associated) arranged both car park investments - but that *'*[Ms M] *signed a declaration with Pearson Bryce which confirmed not regulated and that PB do not provide advice and not covered by FSCS* [Financial Services Compensation Scheme]*'.* It hasn't provided us with a copy of this.

The second, January 2014 Best Car Parks application form doesn't name BLG but rather Pearson Bryce. And it was Mr L2 who wrote to Westerby at that time enclosing the application. Although he didn't similarly put his details on the May 2013 Best Car Parks application form, he did send it to Westerby under cover of Pearson Bryce correspondence (including a 'non-standard investment questionnaire' which Westerby required).

Ms M is very clear in her submissions that Mr L2 and her (now) ex-husband were the parties who were advising her in respect of the Best Car Parks investment. She doesn't recall meeting the sole BLG director who arranged the SIPP transfer, whereas she says Mr L2 met her in a room in BLG's offices when she visited – although the actual advice on Best Car Parks was given in Ms M's own company's offices. She thinks that she would probably have signed whatever her ex-husband or Mr L2 placed in front of her at that time, as she relied on her ex-husband in pension matters.

Ms M has also demonstrated that Mr L2 was using an email address '...@blgwealth.com' in 2016, and spoke on behalf of BLG at a conference in 2017. She believes that Mr L2 was the de facto 'boss' of BLG.

For its part, BLG says *"With regard to Best Car Park involvement, BLG Wealth was not involved at all other than to deal with a request from Westerby to transfer paperwork to Best Car Parks."* It says Mr L2 worked in his own capacity and didn't represent BLG; only providing services as a motivational speaker and business adviser to its clients after these investments were made, from 2015 onwards. As this was a non-regulated service, he was allowed to use a BLG email address. It accepts Mr L2 might also have been in its offices in 2012, but he has never submitted any SIPP or investment business through BLG.

It appears the investments initially went on to produce income of 9%pa on a quarterly basis. But in 2017 they ran into difficulties. After transferring out the liquid funds in her SIPP to Scottish Widows, Ms M complained to BLG in March 2018 about advice she said Mr L2 had provided. On her annotated copy of BLG's complaint response, where it asserts that it hadn't advised her on the investment, Ms M has written 'Barton Lyle did'.

Ms M informed this service that when the car park investment was first mentioned she commented it 'sounds dodgy' because it was in Dubai. However, she was very occupied by trying to sell her business at the time – and left the arrangements to her ex-husband, and now wonders whether he might have been involved in the deceit she considers Mr L2 perpetrated.

One of our adjudicators investigated the complaint and wrote to Mr L2 to request his recollections of events, but he didn't reply. This service cannot compel Mr L2 to co-operate with our investigation, although it appears he has continued to be in contact with BLG and it may be able to obtain comment from him.

Based on the evidence the adjudicator had, he didn't think BLG was responsible for Ms M's decision to invest in Best Car Parks – rather Pearson Bryce was – and he didn't think her request to make an execution-only SIPP transfer was one that would have aroused suspicion at the time. Ms M didn't initially respond to the adjudicator's view, and that complaint was closed in May 2019.

In March 2020 a claims management company (CMC) got in touch with us on Ms M's behalf, saying it had found evidence to suggest BLG was in control of the activities the adjudicator attributed to Pearson Bryce. The CMC said:

- Between January and March 2013, BLG chased Westerby for confirmation of the transfer – and asked Westerby to disregard transferring the structured product in specie to speed things up.
- On 23 May BLG's director informed Westerby that she was having a meeting with Ms M that day and she needed a blank BACS form for an investment.
- On 28 May Ms M was handed reservation forms for the Best Car Park investment.
- On 30 May Mr L2 sent all of this documentation back to Westerby.
- On 18 June BLG's director emailed Westerby asking it to send the Best Car Park agreements *'to myself under Pearson Bryce'* if any clients' signatures were required, and she'd sort them out.

(Where I refer to BLG's director sending correspondence or having discussions in this decision, I mean that BLG's company name was used - unless otherwise stated.)

A new adjudicator looked into the further submissions made on Ms M's behalf. He established from Westerby that at the time of the original SIPP transfer, it had been contacted by a representative of 'Global Forestry' – and Westerby had queried with BLG Ms M's intentions of making that investment. It appeared that at that time BLG's director was acting as the go-between Ms M and Global Forestry. Westerby was chasing BLG for the necessary documentation to make that investment. On 23 April 2013 BLG finally asked Westerby to confirm to Global Forestry that application forms were *not* being completed. I do however note that Ms M's husband *did* invest £99,000 in Global Forestry (and went on to invest £52,000 in Best Car Parks also).

Westerby had recorded BLG as Ms M's financial adviser at the time. And it noted that although it thought advice had been given on the transaction, no copy of a suitability letter had been received for its records. By June 2013 Westerby was aware that the intended investment had changed to a Best Car Parks holding of £78,000. On its 'non-standard investment questionnaire' (which Ms M had signed on 27 May) neither the 'advised' nor 'non-advised' option had been ticked to describe BLG's involvement.

Westerby then continued to liaise with BLG's director about placing the Best Car Parks investment, which is when (as mentioned above) the director requested Westerby send any agreements for signature '*to myself under Pearson Bryce'*. The agreements were subsequently addressed to her at Pearson Bryce in July 2013. Both Best International (who already held Ms M's funds), and in turn Westerby, were still regularly chasing BLG's director to return these documents – and these were finally provided in mid-October 2013.

The adjudicator also established that on 13 September 2013, BLG's director emailed Ms M stating her intention of researching the market and making a suitable recommendation for reinvestment of the structured product proceeds. In early January 2014 Westerby provided a

BACS authority to make a new investment at BLG's director's request. But again, this paperwork then reached Mr L2 of Pearson Bryce who supplied it to Westerby later that month for Ms M to make her second investment.

It was only in June 2015 that Ms M entered into a remuneration agreement for BLG to collect initial and ongoing fees from her SIPP – and only in respect of the funds other than the car park investments. A BLG report of that month carries out an appraisal of Best Car Parks – saying (with my emphasis) that the entry price had been '*23% below marked value with a 5 year guaranteed income supplied by certain operators. There is an exit strategy in place, allowing owners to sell their car park space at any time, providing* ***complete security in your investment'***. It went on to describe the return as 'consistent'. But it repeats that BLG had not given Ms M any advice on that investment.

I note that BLG also appears to have been involved in a transfer of another very small money purchase occupational pension for Ms M to Standard Life somewhat earlier, in December 2014. BLG's fact find and reports at this time (which again are not the subject of the complaint) indicate it thought she was a cautious investor. In fact, when she signed a risk assessment questionnaire in April 2015 Ms M said she was upset by changes in the value of her investments, didn't like risk, had left all financial planning to her husband previously and had never transacted in unregulated investments or on an execution-only basis.

As no final decision had been issued on Ms M's original complaint, and significant further evidence had been provided calling the original conclusions into doubt, we let BLG know that an ombudsman would now be issuing a provisional decision to consider the further evidence. My provisional decision of 10 December 2021 upheld the complaint on the basis that BLG had a conflict of interest in accepting an execution-only instruction which it knew had been solicited by a connected unregulated firm. I considered it should have ensured it gave Ms M advice on the car park investments, which should have been not to invest. I'll revisit my reasoning for making that decision in full below.

Ms M's CMC accepted my provisional decision. BLG requested a number of extensions to the timescale in order to consult its PI insurer. In a partial response on 27 January 2022 its director asserted that the CMC had a vested interest in obtaining a settlement and had encouraged Ms M to use emotive language and statements in her complaint. She questioned Ms M's claim to be ignorant in financial matters given that she was a sucessful businesswoman; Ms M's lack of recollection of meeting her; her failure to question BLG's statements that it was not giving her advice; and the likelihood that she would always have invested based on her husband's inclination to do so.

In response, I agreed to supply BLG with copies of the submissions the CMC had provided us in full. In my reply I highlighted that it was my role to weigh up whether the arguments being made were plausible and persuasive, and I wasn't of the view that I was being influenced by 'emotive language'. I also didn't think being a successful businesswoman necessarily went hand in hand with being 'clued up' on pensions. It was for me to consider, on the basis of the evidence in front of me, the extent to which Ms M understood the arrangements she was entering into.

Although BLG indicated it was in further discussion with its PI insurer, it responded again on 22 February to say that it would now not be providing anything further.

**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.

According to the Financial Conduct Authority (FCA) register the company that Ms M believes

gave the advice (Barton Lyle Ltd) was only ever authorised as an appointed representative of other firms – and only until December 2007, when any record of Mr L2's controlled functions on that register also ends. However and confusingly (given that it still exists as a limited company) 'Barton Lyle Ltd' has also been a trading style of a second regulated firm from November 2007 to present – including in 2009, where Ms M has evidence of advice from that firm on a transfer between two personal pensions. It had traded from the same address that BLG subsequently began trading from in 2014.

That second regulated firm went into administration in 2011 - around the same time as BLG was established. And also from the same address, 'Barton Lyle Wealth' has been in use as a trading style of a third regulated firm from November 2011 to present. There is evidence of a fact find and letter from 'Barton Lyle Wealth' regarding a proposed transfer from Ms M's other occupational pension in February 2012: it seems this was the transfer which didn't proceed at that time but was subsequently carried out by BLG.

The letter about the proposed transfer in February 2012 was signed as 'Operations Director' for Barton Lyle Wealth by the person who is now the director of BLG. The reasonable conclusion here is that BLG acquired Ms M as a client as a result of Barton Lyle's businesses transitioning from being a trading style of these two other regulated firms, to being authorised in its own right. The February 2012 advice was given under the other regulated firm because the newly-established BLG didn't gain its FCA permissions until August 2012. And I can see that some of the employees and/or individuals carrying out controlled functions at all three firms (although not Mr L2) have remained the same.

BLG's position is that Ms M gave it execution-only instructions to carry out a SIPP transfer and that it can rely on the handwritten execution-only declaration that Ms M wrote. I'm not inclined to rely on this sort of declaration at face value without a clear understanding of how the consumer reached their decision. Such a statement is more persuasive if it's plausible that they would not reasonably have needed to rely on advice when deciding to invest.

It's also relevant to take into account the knowledge and experience of someone signing such a statement. In this case, I'm not persuaded Ms M was an experienced or knowledgeable investor and was, through her own admission, reliant to some degree on her husband's input into investment decisions. I also need to consider where the information Ms M got to make her decision came from – and what that says about the likelihood that BLG knew she was getting advice from individuals connected to it.

The most plausible reason for Ms M to switch her SIPP provider – given that no fee or commission was apparently taken for the switching part of the advice – was that Westerby permitted the proposed investment in (initially) Global Forestry and it was believed James Hay would not. Ms M was also an existing client of a previous incarnation of Barton Lyle's business. So taking all of these things into account, I think this is unlikely to be a case where she (or her ex-husband) had found the investment themselves, unassisted, and then approached a new advising firm out of the blue to issue an execution-only instruction.

Whilst I have taken into account the possibility that Ms M might have heard of the Global Forestry investment idea from her husband, the question still arises as to how he first heard of it. From what I understand, he was also an existing client of the previous Barton Lyle incarnation. And he actually went on to invest in Global Forestry – the originally intended investment at the time of Ms M's SIPP transfer – although Ms M didn't.

I haven't seen whether Ms M's ex-husband's investment was also processed by BLG on an execution-only basis. But if it was, I think there would equally be a concern as to whether he would plausibly have been an execution-only investor, or he was prompted into investing by BLG or those connected to it. He wasn't, as far as I am aware, working in the financial services industry – he was a director of the same company as his wife (in a completely

different industry sector).

Global Forestry was a specialist investment that wouldn't typically be marketed directly to the general public. It would be much more likely in my view that Ms M and her ex-husband were introduced to the idea of investing in Global Forestry by Mr L2 and/or BLG's director – potentially in both of these individuals' capacity working for Pearson Bryce. So, as I'm inclined to proceed on the basis that Pearson Bryce likely promoted and/or recommended the Global Forestry investment to Mr and Ms M in the first instance, I find Ms M's testimony plausible that Mr L2 instructed her what to write in her execution-only instruction addressed to BLG. So what does that mean for BLG's role in this transaction?

BLG's director denies that she acted in any capacity for Pearson Bryce – seemingly against clear evidence running to the contrary, including her name appearing on its letterhead. Instead, she says that *'I established BLG Wealth as my own firm and approached* [Ms M] *to establish a relationship with BLG Wealth*'. I acknowledge here that there are some conflicts here with Ms M's testimony, as she doesn't have a recollection of BLG's director coming to her office (although Ms M seems to accept she may be mistaken). But in any event, I would also question what BLG maintains it was 'approaching' Ms M about – if Pearson Bryce gave the advice, and BLG then received an execution-only instruction.

BLG maintains Ms M signed a declaration with Pearson Bryce which confirmed Pearson Bryce wasn't regulated, didn't provide advice and wasn't covered by FSCS. However and despite the apparent connection between the two businesses – it's clear Mr L2 was still in contact with BLG at the time of this complaint – BLG has been unable to provide a copy of this document. That calls into question whether Ms M reasonably understood at the time that people she believed were associated with BLG were actually carrying out business for her as Pearson Bryce.

Given that it's likely Pearson Bryce already knew which SIPP provider would accept this type of investment, why did BLG need to be involved in processing the switch of provider at all? On 29 March 2019 BLG told us, *'*[Mr L2] *was not involved in* [Ms M's] *transfer of pension provider as this was regulated* ***advice'*** (my emphasis). When so much of the evidence is in conflict here, I think that is a rather glaring admission.

It doesn't necessarily amount to an admission that BLG also advised Ms M (or her husband) to invest in what was initially Global Forestry, and then became Best Car Parks. But I do think it shows BLG was aware that a transfer between two SIPP providers being carried out by an independent financial adviser will typically involve advice – and that would be the expectation of the providers receiving the request.

In response to a query the adjudicator asked it, Westerby said:

> *'We did not require a financial adviser to advise on the establishment of a SIPP, or any investments within it. However our policy was (and remains) that any investments into higher-risk, "non-standard" assets would only be permitted where we understood that a regulated financial adviser was providing advice, or where the client met the FCA's definition of a high net worth and/or sophisticated investor.'*

However, in the internal Westerby Investment Risk Assessment form, there is a section at the end which says:

> *'Post agreement instructions to admin:*
> - *Ensure an investment disclaimer is issued.*
> - *If no IFA is involved ensure an execution only letter is issued.*
> - *Ensure any other requirements laid down are received in full.'*

The 'other requirements' aren't specified here. So whilst the picture here as to Westerby's

*actual* requirements at the time seems rather confused, it's reasonable to conclude in my view that Pearson Bryce and BLG did proceed based on a *belief* they had at the time that a regulated IFA would need to be associated with Ms M's new SIPP, to prevent problems arising when it received instructions to invest in non-standard assets. Yet at the same time, it seems to me that BLG didn't want to be associated with the advice that was likely being given by Pearson Bryce to actually make these investments.

I don't think this was an appropriate way for a regulated firm to behave when it is bound by the 'client's best interest rule' (COBS 2.1.1R) in making the arrangements for Ms M's SIPP. For a start, BLG should have been aware that any role Pearson Bryce had, as an unregulated firm, in arranging for SIPP funds to be placed in these investments – let alone advising on them – was in breach of the Financial Services and Markets Act 2000 (FSMA). A SIPP is a specified investment for the purposes of that Act. It should have appreciated that it was being used as a conduit to legitimise the placing of these investments within the SIPP.

I can see why Ms M's investment instructions weren't queried by Westerby: its own internal documentation recorded BLG as the "IFA"; that Ms M wasn't a professional investor; *but* that she had sought advice on this transaction [from BLG]. Westerby didn't ask to see a suitability letter, so it didn't evidently realise that its understanding was incorrect and BLG had actually acted on an execution-only basis. But BLG in my view knowingly allowed the impression that Ms M was its advisory client to be created, in order to eliminate the possibility that the investments (from which Pearson Bryce would then benefit) would not go ahead.

The regulatory difficulty created for BLG by these arrangements is perhaps best summarised in the actions of its PI insurer. A note on BLG's file says the insurer had asked BLG to *'…revisit the questions on our renewal as one of the questions asked had we given advice on a SIPP whereby we did not know what a client would be investing in – to which I had answered no. They want me to now confirm whether this was accurate or not in view of* [Ms M's] *complaint and that we did not give her the advice in relation to Best Car Parks…*
*I have not yet responded to this – I do not feel from the information we have on* [Ms M]*'s file that this is a problem - as the notes suggested that she wanted to self-invest into funds.'*

This seems to me to be an intentional misreading of what was actually going on at the time, and an artificial separation of the roles the same individuals played for both Pearson Bryce and BLG. On the facts of this case, BLG did know what Ms M wanted to invest into – having likely had these investments promoted to her by Pearson Bryce. First it was Global Forestry and this then changed to Best Car Parks before Ms M invested.

BLG's director displayed a familiarity with the car park investment in the later report she issued to Ms M (as BLG), suggesting that it had been attractively priced, with guaranteed income, liquidity at 'any time' and 'complete security'. If that gives some indication of how the investment had originally been described to Ms M by Pearson Bryce (whether or not by the same individual), it should have prompted any regulated firm to carefully consider whether it was acting in Ms M's best interests by facilitating the SIPP transfer.

'Self-investment' gives the impression that Ms M knew what she was doing, when it should have been apparent that she was not an experienced investor. Whether or not her husband was inclined to make similar investments, Ms M was a client of BLG in her own right. It should have appreciated the importance of her taking advice based on her own circumstances rather than her husband's. And the advice up to that point had likely been given in breach of FSMA by the unregulated business for whom BLG's director also worked.

In my view BLG's actions here also conflict with what BLG must do under the FCA's Principles for Businesses (PRIN), including:

Principle 1 - conduct its business with integrity;

Principle 6 - pay due regard to the interests of its customers and treat them fairly;
Principle 7 - pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading;
Principle 8 - manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.

BLG had a clear conflict of interest given its parallel staff involvement in Pearson Bryce. I consider there were only two viable ways for it to proceed in dealing with Ms M's pension transfer whilst also managing that conflict of interest. These were either to:

- Decline to get involved in the transfer at all; *or*
- Address the conflict by not accepting Ms M's business on an execution-only basis. And instead agree to give her regulated advice on the suitability of transferring to a SIPP, *taking into account* the intended investment she would make with that SIPP.

The letter BLG wrote to Ms M at the time says that it had offered her full advice, which she had refused. The extent to which that was a genuine offer and BLG had explained the extra protection she was foregoing by not taking it is far from clear – particularly as even a letter from Pearson Bryce on a similar point has not surfaced. Given the lack of persuasive evidence here, I'm not satisfied Ms M would have appreciated the benefit of regulated versus unregulated advice for herself.

More importantly I don't think BLG should have proceeded on this basis of this letter – it should still have declined to get involved *unless* it was able to give advice. As proceeded to act on the transfer without giving advice, it's therefore fair and reasonable in my view to hold it to the standard of the advice it *should have* given. And crucially, it's well-established that the suitability of transferring to a SIPP can't be viewed in isolation.

COBS 9.2.2R in the FCA handbook required a firm giving advice to have a reasonable basis for believing that the transaction meets the client's investment objectives; is such that they are able financially to bear any related investment risks consistent with their investment objectives; and is such that they have the necessary experience and knowledge in order to understand the risks involved in the transaction.

Ms M's objectives at the time of transferring to the SIPP can't in my view be separated from the investments her SIPP was going to make. I note this was also a view shared by the regulator in January 2013 when it issued an alert about this advice model, saying that:

> *'Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.'*
>
> *'The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating.'*
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> *'…if you give regulated advice and the recommendation will enable investment in unregulated items you cannot separate out the unregulated elements from the regulated elements.'*

As an inexperienced investor I can't see that it could ever be arguable that it would be suitable advice for Ms M to invest initially 50%, which later increased to nearly 100%, of her SIPP into unregulated investments. I say this in particular considering that when it has conducted thematic reviews into the sale of unregulated collective investment schemes

(UCIS)[11], the regulator gave an example it found of good practice as being a firm which limited exposure to these investments to 3-5% of a portfolio. Proportions as high as those involved in this case were heavily criticised in such reports. Given that in 2015 BLG thought Ms M was a cautious investor, I think it unlikely *any* exposure to this type of investment would have been appropriate for her at all.

At the time of the switch to Westerby, Ms M already held a James Hay SIPP which would have allowed her to continue to hold the structured product which BLG itself had not advised her on, and the range of 'self-select' funds which BLG mentioned she had at the time. I consider these would adequately have met her needs – and a SIPP transfer was not necessary to access unregulated investments that did not meet her needs. And had BLG undertaken to give Ms M suitable advice I'm satisfied that she would have followed that advice. Not least, because in order to adequately address its conflict of interest I think BLG would have needed to point out – in a way it currently is unable to demonstrate it did – that it was the regulated firm and Pearson Bryce was not.

Had Ms M remained in the James Hay SIPP, having had the benefit of regulated and suitable advice from BLG, I see no reason to conclude that she would have made the second investment into Best Car Parks (or anything similar to it) when her structured product later matured. Indeed there's reason to think James Hay would not have permitted such an investment. I think it most likely that Ms M would have continued to reinvest the proceeds of her structured product in a range of self-select funds, appropriate to her attitude to risk.

I've considered everything BLG has said in response to my provisional decision. Notwithstanding the gaps in Ms M's recollections of dealing with BLG, I have significant concerns in this case as to how she has been treated as BLG's client. I'm not satisfied that BLG has appreciated the regulatory requirements and expectations around giving suitable, regulated advice on investments held within a SIPP.

I would expect to find a particularly compelling reason for a client, who should have been given suitable advice but was not, to then not follow the suitable advice once given. BLG suggests that Ms M would always have invested in the car parks because of her husband's involvement, but her own testimony suggests she did have some reservations about the investment. I think those would have been compounded when BLG gave her suitable advice that this was not an appropriate investment for her to be making. On the balance of probabilities, I don't consider Ms M would have gone ahead with the investments if appropriately advised.

**Putting things right**

My aim is that Ms M should be put as closely as possible into the position she would probably now be in if BLG had treated her fairly.

I think Ms M would have invested differently within her existing James Hay SIPP. It's not possible to say *precisely* what she would have done, but I'm satisfied that what I've set out below is fair and reasonable given Ms M's circumstances and objectives when she invested.

**What must BLG do?**

To compensate Ms M fairly, BLG must:

- Compare the performance of each of Ms M's investments in Best Car Parks with that of the benchmark shown below.
- A separate calculation should be carried out for each investment. If the *fair value* is greater than the *actual value*, there is a loss. If the *actual value* is greater than the *fair*

[1] FSA Unregulated Collective Investment Schemes: Good and poor practice report (July 2010)

*value*, there is a gain. Losses and gains should then be combined. If there is an overall loss, that is the amount of compensation payable.
- BLG should add interest as set out below.
- If there is a loss, BLG should pay into Ms M'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 BLG is unable to pay the compensation into Ms M's pension plan, it should pay that amount direct to her. But had it been possible to pay into the plan, it would have provided a taxable income. So, 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 Ms M won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Ms M's actual or expected marginal rate of tax at her selected retirement age.
- It's reasonable to assume that Ms M is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Ms M 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 Ms M £400 for distress caused by failing to treat her fairly in this pension transfer, leading to the substantial losses she's suffered.

| Investment name | Status | Benchmark | From ("start date") | To ("end date") | Additional interest |
|---|---|---|---|---|---|
| Best Car Parks - first holding | 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 | To be ascertained (follows Pearson Bryce instruction on 30 May 2013) | Date of my final decision | 8% simple per year from final decision to settlement (if not settled within 28 days of BLG receiving Ms M's acceptance) |
| Best Car Parks - second holding | 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 | To be ascertained (follows Pearson Bryce instruction on 8 January 2014) | Date of my final decision | 8% simple per year from final decision to settlement (if not settled within 28 days of BLG receiving Ms M's acceptance) |

**For each investment:**

***Actual value***
This means the actual amount paid or payable from the investment at the end date.
It may be difficult to find the *actual* value of the investment. This is complicated where an investment is illiquid (meaning it could not be readily sold on the open market) as in this case. BLG should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. The amount BLG pays should be included in the actual

value before compensation is calculated.

If BLG is unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. BLG may require that Ms M provides an undertaking to pay BLG any amount she 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. BLG will need to meet any costs in drawing up the undertaking.

What remains of the Westerby SIPP only exists because of the illiquid investments in Best Car Parks. In order for the SIPP to be closed and further SIPP fees to be prevented, the investments need to be removed from the SIPP. I've set out above how this might be achieved by BLG taking over the investments, or this is something that Ms M can discuss with Westerby 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. To provide certainty to all parties, I think it's fair that BLG includes in the loss calculation an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

***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, BLG 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 additional sum that Ms M paid into the investment should be added to the *fair value* calculation at the point it was actually paid in.

Any withdrawal, income or other distributions paid out of the investment 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 BLG totals all those payments and deducts that figure at the end.

**Why is this remedy suitable?**

I've chosen this method of compensation because:

- Ms M wanted capital growth with a small risk to her 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 her 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 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.

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

## My final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend that BLG Wealth Limited pays the balance.

**Determination and award:** I intend to uphold the complaint. I consider that fair compensation should be calculated as set out above. My provisional decision is that BLG Wealth Limited must pay the amount produced by that calculation up to the maximum of £150,000 (including distress or inconvenience), plus any interest on that amount as set out above.

**Recommendation:** If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that BLG Wealth Limited pays Ms M the balance, plus any interest on the balance as set out above.

If BLG Wealth Limited does not pay the recommended amount, then any investments currently illiquid should be retained by Ms M. This is until any future benefit that she may receive from the investments together with the compensation paid by BLG Wealth Limited (excluding any interest) equates to the full fair compensation as set out above.

BLG Wealth Limited may request an undertaking from Ms M that either she repays to BLG Wealth Limited any amount Ms M may receive from the investment thereafter, or if possible transfers the investment to BLG at that point.

Ms M should be aware that any such amount would be paid into her pension plan so she may have to realise other assets in order to meet the undertaking.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms M to accept or reject my decision before 17 June 2022.

Gideon Moore
**Ombudsman**