

The complaint

Mr M has complained that Apollo Pension & Investment Advisers advised him to move his pension to a new Self-Invested Personal Pension (SIPP) and that the unregulated investments he invested in as a result have caused him to lose money. He would like to be put back into the position he would have been in if not for this advice.

What happened

Mr M has been a client of Apollo for many years. He met his Apollo adviser in September 2013 to discuss his pension. At the time, he was aged 47 and had an Aegon pension with about £93,000 in a cash fund and a further £126,000 in a structured product. He also had a pension with his current employer receiving regular contributions and another from a former employer which had been valued at £67,000 in 2011 with projections of around £167,000 at age 65. Mr M considered the Aegon scheme to be his main pension at that time. The fact find recorded his risk profile as “Medium-High Volatility” which was described as investing mainly in equities.

Although the part of the Aegon pension that held the structured investment was a SIPP, it did not allow the full range of investments permitted by legislation. Apollo advised him to transfer to a new SIPP, with Rowanmoor, which would allow him to invest in unregulated investments.

He invested £40,000 each into Dolphin Trust (German property) and Whitefind Limited (student accommodation). The rest of the pension stayed in the structured product for the time being but ended up invested in mainstream funds.

By 2 May 2017 Mr M had received a letter from Rowanmoor informing him that Whitefind Limited would be entering administration. Both investments were due to mature and return capital in 2019, but neither did.

On 4 April 2020, Mr M complained to Apollo. The substance of his complaint was that he believed the unregulated investments were mis-sold and that he had been given misleading information about how they might perform.

The business did not uphold the complaint, giving their final response on 21 June 2020. Normally, Mr M would have had six months from the date of Apollo’s final response to bring his dispute to this service, but given the ongoing issues with both investments, including a complaint against solicitors involved in Whitefind, Apollo said that they would allow Mr M an extra six months, until 21 June 2021.

Mr M brought his complaint to us on 20 December 2020. Following further information gathering and correspondence, in June 2021 Apollo said that they did not give consent for this service to consider the complaint as it was too long ago.

Another ombudsman issued a decision that the complaint could be considered by this service. Our investigator then considered the merits of the complaint and issued their opinion, upholding the complaint.

Since Apollo did not accept our investigator's opinion, the case has been referred to me for a final decision.

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.

What I have to decide is whether the advice to move the Aegon pension plan to the Rowanmoor SIPP was suitable based on the information available at the time.

Before I consider the advice, I just want to say that I agree with the previous ombudsman that this is a case we can consider, and for the same reasons. Although the advice was more than six years before the complaint, for much of this time he had no cause for concern, and indeed was reassured by Apollo. He was informed on 2 May 2017 that one of the investments was entering administration, which was the first time when he could have known that he would have had reason to complain. He complained within three years of that date, on 4 April 2020. Furthermore, he brought his complaint to this service within six months of Apollo's final response. So I agree that this case can be considered.

For the sake of clarity I think it is worth noting some of the regulatory requirements and guidance in place at the time of advice. COBS 9 applies where a firm makes a personal recommendation in relation to a designated investment. Key sections are:

COBS 9.2.1R (1): 'A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client'.

COBS 9.2.1R (2): 'When making a personal recommendation, a firm must obtain the necessary information regarding the client's:

- (a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;*
- (b) financial situation; and*
- (c) investment objectives;*

so as to enable the firm to make the recommendation, or take the decision, which is suitable for him.'

COBS 9.2.2R: '(1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:

- (a) meets his investment objectives;*
- (b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and*
- (c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.*

(2) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.

(3) The information regarding the financial situation of a client must include, where relevant, information on the source and extent of his regular income, his assets, including liquid

assets, investments and real property, and his regular financial commitments.'

In January 2013, the Financial Services Authority (FSA, regulator of pensions advice at the time), issued an alert for advisers reminding them of their obligations when recommending that clients changed pension providers with a view to investing in unregulated investments. It said:

'It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension.'

'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 SIPP's and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes.'

'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.'

'For example, where a financial adviser recommends a SIPP knowing that the customer will transfer out of a current pension arrangement to release funds to invest in an overseas property investment under a SIPP, then the suitability of the overseas property investment must form part of the advice about whether the customer should transfer into the SIPP. If, taking into account the individual circumstances of the customer, the original pension product, including its underlying holdings, is more suitable for the customer, then the SIPP is not suitable.'

Apollo have said that they did not advise Mr M to invest in the unregulated investments. Mr M's adviser said that the unregulated investments were promoted by another business, NAI Limited, which provided information only. NAI limited was represented by Mr M's adviser, who was also the principal of Apollo, and NAI and Apollo operated from the same address. Mr M's adviser disclosed the conflict of interest, in that he would derive an income from the activities of NAI Limited, but Mr M remains confused to this day about the distinction between Apollo and NAI.

Since it was the Apollo adviser who promoted the investments, he knew that the investment strategy in the new SIPP included the unregulated investments.

Apollo advised Mr M to switch to the SIPP, and in order for that advice to be suitable it had to take into account how the switched funds would be invested and whether these investments were suitable for him. The SIPP advice cannot reasonably be separated from the intention to invest in the unregulated investments as explained by the regulator back in 2013.

Mr M may have been eligible to receive promotions of unregulated investments due to his income and/or assets. But that does not change Apollo's responsibility to provide suitable advice.

Apollo needed to ensure that the advice to switch into a new SIPP and the underlying investments there were suitable for Mr M.

Was Apollo's advice suitable?

In order for Apollo's advice to be suitable, Mr M had to be willing and able to take the risks involved in that advice. He also had to have the knowledge and experience to understand those risks.

The evidence on Mr M's attitude to risk is conflicting. The Fact Find recorded it as 'medium-high volatility' but later, Mr M told us that it had always been 'cautious – low to medium.' There is a risk questionnaire on file, and although it is undated it shows an assessment of 'Medium' risk.

As well as these descriptions, we can also consider the investments Mr M actually made with his pension fund. In 2011, because of stockmarket volatility, he switched his pension investments into cash, which shows that he was somewhat uncomfortable with risk. But he also invested a large proportion of his pension fund into a structured product. Although structured products can offer capital protection in some circumstances, they are generally considered to be higher risk investments because of the risk of loss if markets perform badly or if the bank fails.

When Mr M was advised to switch his pension to the Rowanmoor SIPP, it held roughly 40% in cash (lower risk) and 60% in the structured product (higher risk). I think this split broadly reflects a Medium risk profile, which also matches the output from the risk questionnaire. So I think on balance that Mr M was willing to take a medium level of risk with his pension investments.

But he was advised to switch to the SIPP so that he could invest in unregulated investments. With the £80,000 that he invested in the unregulated investments, and the £126,000 in the structured investment, he then had 94% of the fund in higher risk investments, where there was the potential for large losses. I do not think that Mr M was willing to take this level of risk with his pension fund.

Apollo also had to consider whether Mr M was able to bear the level of risk involved in the recommendation. I have already explained that the recommendation had to take into account how the money would be invested in the new scheme, and that Mr M's adviser knew this since he promoted the investments to Mr M. Following the advice, almost all of the pension fund would be held in higher risk investments.

Although Mr M was earning a good salary and would generate significant pension savings if he remained in that job, that was in the future and at the time of the advice this was his main pension provision. He was investing almost all of it where there was a risk of large losses. I don't think he could afford to lose that much, so I don't think he was able to bear the risks of the recommendation.

Apollo also had to consider Mr M's knowledge and experience relevant to the investments being considered. At the time of advice Mr M had built up around £300,000 in pensions and the fact find notes that he had previously invested in conventional stock market funds, so I can accept that he might have had experience of that type of investment, including presumably some experience of the value of his investments rising and falling. Although it's quite possible he invested previously after receiving advice. Aside from this, he had his structured investment, which had not yet reached maturity. As I have already said this was a higher risk investment, but the returns were nevertheless market-based, and although there was no FSCS protection if the bank failed, the product was issued by a regulated bank. So I don't think his experience of this is directly relevant to unregulated property investments.

Professionally, although he worked for a bank at a relatively senior level, there is no evidence of any involvement in investments or property in any way.

Taking all of this into consideration, I think that Mr M possibly had reasonable knowledge and experience of mainstream investments. But I can find no evidence that he had direct experience of unregulated property investments, or other knowledge that would allow him to make an informed decision without relying on advice.

It was recorded that Mr M wanted a review of his Aegon pension for wider investment access. However, the money he was looking to invest was held in cash and he already held a SIPP which offered a wide range of investments. Given his attitude to risk I can't see that there was any persuasive reason why Mr M needed to invest into unregulated investments.

As a business offering regulated advice, it was Apollo's responsibility to advise him whether that was suitable or not and Mr M was entitled to rely on that advice.

If Apollo had told him the intended investments were unsuitable for him I do not think that Mr M would have invested in this way. Even if Mr M was attracted to access this type of investment (likely after it had been promoted to him by the adviser acting for NAI), Apollo still had to give suitable advice, which meant assessing whether he was willing and able to withstand the risks, and whether he understood them.

In summary, I find that Apollo's advice to switch to the Rowanmoor SIPP was not suitable because Mr M was neither willing or able to take the level of risk involved, nor did he have the relevant knowledge and experience to make an informed decision without relying on advice.

I therefore agree with our investigator and find that Apollo should be held responsible for the losses resulting from the advice to take out the Rowanmoor SIPP.

Since the investigator's opinion was issued, Apollo has provided further information to support their position. I would like Apollo to know that I have considered what has been said very carefully so I am going to answer the main points below.

Apollo say that the investments concerned are not "Unregulated Collective Investment Schemes" (UCIS) and as a result our investigator was applying standards that were not in place at the time. Further, Apollo say that the investigator's decision implies that NAI gave advice on the investments. I would point out that UCIS is not a term that has been used in this decision to describe Mr M's investments. It is the nature of the investments and not their classification that is important. The investments were unregulated, non-standard investments which carry high risks. Furthermore, my decision is on the suitability of Apollo's advice to switch to the Rowanmoor SIPP based on COBS rules that have been in place since November 2007, as well as on guidance issued by the regulator in January 2013. So I do not accept Apollo's position on these matters.

Apollo also referred to Mr M's professional position and his intelligence, but as I have already said there is no evidence that he had the knowledge and experience to make an informed decision on these investments without advice from Apollo. In any case whether the investments were chosen or promoted by Rowanmoor, NAI or even Mr M, this does not affect Apollo's responsibility to give suitable advice.

Apollo also referred to a telephone call in March 2020. Their position is that this telephone call provides evidence that Mr M was willing to take high levels of risk with his pension fund, because he was willing to lose 50% of the investment.

I have listened to the recording of the telephone call in March 2020 in its entirety and considered carefully what was said by both parties. Mr M was clearly concerned about the losses he was facing. I would also like to acknowledge in the interest of fairness that the

adviser did not try to evade his responsibilities, and was open about the complaints process available to Mr M. The adviser says that the telephone call shows that Mr M was willing to lose 50% of his investment, and that this means he was comfortable with the risks of the unregulated investments. I disagree with his analysis.

I do not think that what he said meant that he was willing to accept a loss of 50% at the time he made the investment. At this stage in the phone call the discussion was about how to recover losses. What he actually said was that, if he had an offer at that time (when it looked like he had lost all of his investment) of half the sum invested, or of the full sum with no returns on top, then he would be able to enter a negotiation, but that no offer had been made. Earlier in the phone call Mr M said that he understood that there was a risk that the schemes might not pay the 'premium.' I do not agree that it is reasonable to interpret these statements, or anything else in the phone call, as a willingness to accept losses of 50%.

So I have considered carefully the information provided by both parties. Taking it all into account I find that it was not suitable for Apollo to advise Mr M to switch his pension provider to allow him to access unregulated investments, which Apollo needed to consider when making the recommendation. Mr M was neither willing nor able to take the level of risk involved in the unregulated investments. Mr M was entitled to rely on the regulated advice from Apollo, without which he would not have suffered the losses.

For the reasons given above, I am going to uphold Mr M's complaint.

Fair compensation

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

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

What must Apollo do?

To compensate Mr M fairly, Apollo must:

- Compare the performance of Mr M'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.

- Apollo should also add any interest set out below to the compensation payable.
- Apollo should pay into Mr M's pension plan to increase its value by the total 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 Apollo is unable to pay the total amount into Mr M'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 total amount 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 M won't be able to reclaim any of the reduction after compensation is

paid.

- The notional allowance should be calculated using Mr M's actual or expected marginal rate of tax at his selected retirement age.
- It's reasonable to assume that Mr M is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr 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 to Mr M £250 for the impact this complaint has had on him. Mr M has said the complaint has caused him considerable stress, as this pension represents a significant portion of his retirement savings.

Income tax may be payable on any interest paid. If Apollo deducts income tax from the interest it should tell Mr M how much has been taken off. Apollo should give Mr M a tax deduction certificate in respect of interest if Mr M 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 transfer	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. Apollo should take ownership of any illiquid assets by paying a commercial value acceptable to the pension provider. The amount Apollo pays should be included in the actual value before compensation is calculated.

If Apollo is unable to purchase illiquid assets, their value should be assumed to be nil for the purpose of calculating the actual value. Apollo may require that Mr M provides an undertaking to pay Apollo any amount he may receive from the illiquid assets in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Apollo 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 additional sum paid into the investment should be added to the fair value calculation from the point in time when it was actually paid in.

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

Why is this remedy suitable?

I've decided on this method of compensation because:

- Mr M 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 would be 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 M's circumstances and risk attitude.

My final decision

I uphold the complaint. My decision is that Apollo Pension & Investment Advisers should pay the amount calculated as set out above.

Apollo should provide details of its calculation to Mr M in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 23 February 2023.

Martin Catherwood
Ombudsman