

## The complaint

Mrs M complains, through her representative, about First Equity Limited. She's unhappy with the losses she's suffered on her portfolio and thinks that she's been given unsuitable advice and hasn't been treated fairly.

## What happened

Mrs M became an advisory client of First Equity in 2018. She'd followed her adviser there after he joined from another firm (Firm A). She complained to First Equity in 2020 and said, in summary, that the adviser hadn't correctly assessed her attitude to risk (ATR), hadn't kept her updated, had invested in unsuitable shares and traded excessively in order to earn higher commission. First Equity didn't uphold the complaint, so Mrs M asked us to look into the matter.

The complaint was considered by one of our investigators who upheld it. He noted that Mrs M had disputed most of the information the adviser had noted in the know your client (KYC) documents. He thought that she wasn't in a position to take the level of risk that the adviser had recorded and pointed to a previous fact find stating she was a low-risk investor.

He didn't think her circumstances at the time - not many liquid assets outside of her portfolio and wanting to retire in a few years - left her much time to recoup any major losses. He noted that her husband dealt with communicating with the adviser about any trades on her behalf and didn't think he'd been given a chance to fully consider the risks associated with each trade.

First Equity didn't agree with his findings and said, in summary:

- If there had been a switch from lower risk investments to higher risk investments, then this happened before Mrs M before their client and referred to the lack of information about what her ATR was in 2017 just before she became their client.
- Mrs M had argued that the information in the KYCs was inaccurate. However, the risk profile had been completed in person and was signed by Mrs M as being accurate. They'd had regular calls, meetings and emails with Mrs M and her husband to keep them up to date which would have given ample opportunity for Mrs M to consider her position and ask for the risk levels to be corrected. However, she did not raise any issues regarding her risk profile at any point.
- They didn't agree that the recommendations were unsuitable for Mrs M. They thought it was likely that her liabilities were lower than stated in the 2018 Fact Find as they would have been shared with her husband. And they also highlighted that the section of the Fact Find where she answered 'no' when asked if she would face financial hardship if she lost the money she invested.
- They thought that Mrs M understood what was being dealt with across her accounts. She'd dealt in the stock market for over 25 years and was a reasonably experienced investor. The KYC report she'd completed stated (regarding trades per month) that

she had "dealt daily if appropriate", and therefore she would have known that the investments being proposed were not low risk investments.

- Mrs M had access to an online system which would have confirmed the value of her investments, in addition to receiving statements twice yearly.
- They had regular calls with Mrs M and her husband, some of which were quite long in duration, where matters were discussed at length and showed that the adviser gave options when presenting trades.
- Mr and Mrs M had brought a large portfolio when they became clients of First Equity which included a sizeable equity portfolio, not just investment/unit trusts and other lower risk investments. Mrs M's portfolio continued to be dealt with in a consistent manner which did not indicate any change to her overall risk profile. If she was unhappy with the portfolio and the information provided in the KYCs, then any concerns or queries should have been raised at the time but they were not.
- KYCs were completed in 2018 and 2019 and Mrs M signed to say that they were an accurate record of her financial situation, investment objectives and attitude to risk.
- They'd developed the KYC in accordance with COBS 9 – Suitability, and in doing so they'd paid due consideration to Mrs M's knowledge and experience of the designated investments and/or services to be provided, her financial situation and investments objectives and attitude to risk. They were entitled to rely on the information and the KYCs stated that Mrs M understood that the quality of their advice may be affected if she did not provide complete information. Therefore, it was reasonable for First Equity to rely on the KYC's contents.
- Their position was that Mrs M's trading was suitable and in line with her risk profile. Any decision otherwise would not be fair or reasonable as all of the contemporaneous documentation indicated that Mrs M classified herself as a high risk investor, or at the very least knew that she'd been so classified, and yet despite this (and despite being aware that the adviser was recommending higher risk investments) she didn't raise any concerns.
- If, despite their submissions, the complaint was still upheld, it would not be fair and reasonable for them to be held responsible for redress in respect of investments that were taken out on Firm A's advice. As such, they should only have to pay redress in respect of investments taken out by Mrs M on their advice. Further, if Mrs M really was a lower risk investor, at most redress should be based on a 50/50 split of the Income Total Return Index and the one-year fixed rate bond index.

### **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.

I'd firstly think it may be helpful to point out that this decision doesn't address any of the concerns raised about the adviser's actions while he was employed by Firm A - it solely relates to his actions while at First Equity.

At the heart of this complaint is the issue of whether or not Mrs M should have been advised to embark upon the adviser's chosen strategy. In order to determine this, I must consider her circumstances at the time. In addition to Mrs M's testimony, I've also reviewed the documentation that was completed when she became a client of First Equity.

The KYC that Mrs M completed said that she was aged 57, in full time employment with a monthly disposable income of £3,500 and was looking to retire in seven years' time. She jointly owned properties valued at around £1,300,000 with an outstanding mortgage of £151,000. She had 25 years investment experience and typically completed 20 trades per month with an average trade size of £5,000.

It noted that she had medium risk investments valued at £90,000, £50,000 with First Equity and the balance elsewhere. She had a medium risk portfolio with an asset allocation of 70% medium risk and 30% high risk. Regarding her attitude to risk and goals, it was noted that she:

- Wanted the best long-term returns she could get and expected periods where the value of the investments might suffer extended falls
- Wasn't concerned by falls in value and would expect to recover any falls by the time she sold her investments
- Wouldn't suffer severe financial hardship if she were to lose the money she'd invested

I note what Mrs M has said regarding how the KYCs were completed. She's said, in summary, that she has never traded and the forms were completed by the adviser when she met him with her husband in a pub at short notice. The adviser filled in all the information whilst coaching the answers and had no interest in having an in-depth conversation about her financial plans or her true financial position.

I have no reason to doubt what she's said but I must also give weight to the written evidence. Mrs M signed the KYC document to confirm, amongst other things, that the information was an accurate record of her circumstances and that the quality of the advice may be affected if she hadn't provided complete information.

That being said, I have taken into account the fact find her husband completed with Firm A in 2017. I appreciate that it was completed about her husband but I think it's relevant given that all the subsequent fact finds/KYCs show that they have a similar ATR and investment objective. That fact find recorded that his ATR was low, and I think it's more likely than not that her circumstances would have been similar.

The 2018 KYC completed by First Equity said that her existing ATR was medium but didn't state which risk profile would be applied to her account. The 2019 KYC said her existing ATR was high risk/medium and stated that a high risk profile would be applied to her account.

An adviser has certain obligations under the regulator's Conduct of Business Rules (COBS) rules and Principles for Businesses (PRIN). Some of the key rules I've considered in determining if the advice was suitable are:

COBS 9.2.1: which says, in summary, that a *firm must ensure that a recommendation, or a decision to trade, is suitable for its client. And when doing so, they must obtain sufficient information about the client's knowledge, experience, financial situation and objectives*

COBS 9.2.2: which broadly says, among other things, that a *firm needs to get enough information from the customer to be able to make sure the recommendation meets their objectives, they're able to bear any related investment risk and they understand the risks involved.*

COBS 9.3.1: 1) *A transaction may be unsuitable for a client because of the risks of the designated investments involved, the type of transaction, the characteristics of the order or the frequency of the trading.*

COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client.*

PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*

PRIN 7: *A firm must 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.*

The strategy that the adviser recommended was to invest her entire portfolio with First Equity in company shares, some of which were traded on the Alternative Investment Market (AIM). This had the impact of exposing Mrs M's portfolio to a high level of volatility with the potential to make large losses very quickly. I don't think this was appropriate for her circumstances at the time, despite what was recorded in the KYCs completed by First Equity. She clearly had some investment experience but had previously been a low risk investor so the strategy represented a significant increase in risk and I haven't seen where she was made aware of its potential impact.

I've also taken into consideration the impact of the charges generated by frequency of the adviser's trading activity - in 2019 alone there were around 70 trades resulting in charges which equated to around a third of the value of her original portfolio. I haven't seen where the adviser made Mrs M aware of the impact of his chosen strategy, which meant that there was potential for loss if the growth on the portfolio didn't exceed the cost of the charges.

Taking everything into account, I'm not persuaded that Mrs M was in a fully informed position and I think the adviser's strategy exposed her to too much risk. I think she could have taken some risk but exposing her entire First Equity portfolio to the risks created by direct equity trading - including AIM shares - wasn't suitable for her circumstances at the time and therefore First Equity must do something to put things right.

I note the points First Equity have made regarding any potential redress. But I don't see any reason to depart from the redress methodology the investigator proposed. I think it's fair to compare the return on Mrs M's portfolio with a medium risk benchmark to try and fairly determine the return she would have received if she'd been suitably advised.

## **Putting things right**

### **Fair compensation**

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

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

### **What must First Equity do?**

To compensate Mrs M fairly, First Equity must:

- Compare the performance of Mrs M's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investments. If the *actual value* is greater than the *fair value*, no compensation is payable.
- First Equity should also add any interest set out below to the compensation payable.

Income tax may be payable on any interest awarded.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Mrs M First Equity Portfolio	No longer in force	FTSE UK Private Investors Income Total Return Index	Date transferred in	Date transferred out	8% simple per year on any loss from the end date to the date of settlement

### ***Actual value***

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

### ***Fair value***

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

### **Why is this remedy suitable?**

I have decided on this method of compensation because:

- Mrs 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 a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.
- 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 Mrs M's circumstances and risk attitude.

### **My final decision**

I uphold the complaint. My decision is that First Equity Limited should pay the amount calculated as set out above. First Equity Limited should provide details of its calculation to Mrs M in a clear, simple format.

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

Marc Purnell

**Ombudsman**