DRN-3587929

The complaint

Mrs E has complained that Martin Aitken Financial Services Limited ('MAFS') recommended she transfer benefits held in two occupational defined-benefit ('DB') pension schemes to a self-invested personal pension ('SIPP'). The funds were subsequently invested in high-risk investments which Mrs E says weren't suitable for her.

What happened

Mrs E was introduced to MAFS through an unregulated introducer, 'Mr B', in 2015. Mrs E was interested in accessing her pensions so she could take the maximum tax-free cash ('TFC') to help with her husband's business and so she could retire immediately.

In December 2015 Mr M produced a pension transfer report in which he recommended Mrs E transfer the cash equivalent transfer value of both of her DB schemes to a SIPP with a business I'll refer to as 'L'. Mr M set out what he thought a suitable asset allocation for Mrs E would be, based on her 'medium' attitude to risk. He then recommended that the funds be invested with a discretionary fund manager ('DFM') who I'll refer to as 'B', using their model portfolio service. Mr M suggested Mrs E use one of two portfolios but said it would not be responsible for the investment management and would have no involvement in the fund selection.

Mrs E accepted the recommendations. On 12 January 2016, £128,948.42 was transferred to the SIPP, followed by £132,865.00 on 26 May 2016. Mrs E took total TFC of £65,453.36. MAFS took a fee of 3% of the transfer values and would take 0.5% of the pension value in return for ongoing advice.

£92,184.06 was transferred to B on 10 February 2016 and Mrs E's funds started to be invested with B on 16 February 2016. Another £95,482.80 was invested with B on 2 June 2016.

Mrs E started taking a pension income of £1,500 per month from 1 June 2016.

In early 2017 MAFS started looking into pension advice provided where Mr B had acted as the introducer. Mrs E found she had lost significant funds through high risk investments with B. MAFS initiated a complaint on her behalf against B, but B went into administration. Mrs E subsequently made a complaint to the FSCS and received £50,000 to compensate her for her investment loss. Mrs E then complained about MAFS as she didn't think it had assessed her attitude to risk correctly and this had led to higher risk investments being placed. She thought MAFS had deflected responsibility for the advice.

MAFS didn't uphold the complaint. It said the pension advice was suitable and it was B's responsibility to make suitable investments.

Mrs E referred her complaint to our service, clarifying that she wasn't complaining about the advice to transfer her DB schemes – she was just unhappy about the investment advice.

Our investigator upheld the complaint. He didn't think MAFS had met the regulator's requirements when making the recommendation as he couldn't see any communication between Mr M and B in respect of the investments envisaged for Mrs E. He didn't think suitable advice could be given without understanding how B intended to invest Mrs E's funds. Instead, he noted B had invested in higher risk assets from the outset and believed that with appropriate enquiries and oversight from MAFS this wouldn't have happened. The investigator recommended Mrs E should be compensated by comparing the performance of her SIPP with a benchmark in line with her attitude to risk. He also awarded compensation of £300 for the upset caused.

MAFS didn't agree and asked for a final decision. It said it had met the regulator's requirements by setting out what it considered a reasonable asset allocation would be for Mrs E. It maintained that B was responsible for making suitable investment recommendations and it had clearly told Mrs E that it wasn't responsible for the investment decisions. It also thought that Mrs E would benefit twice if MAFS was required to compensate her for her full loss, given she'd already received compensation from the FSCS.

The investigator confirmed to MAFS that as a condition of accepting compensation from the FSCS she was obliged to return it if she recovered the same loss from a third party.

The complaint was referred to me to make a final decision on the matter.

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 for largely the same reasons as the investigator.

For clarity, I should first say that Mrs E has not complained about the advice to transfer either of her DB schemes. She has instead complained about the investments recommended by MAFS and the lack of oversight of B.

Whilst I haven't considered the suitability of the advice to transfer the DB schemes on its own, I do have to consider the suitability of the investment recommendations given to Mrs E which formed part of the overall pension transfer advice.

As MAFS will no doubt know, at the time of the advice the regulator had made its view clear that in order to suitably advise on transferring DB schemes to a SIPP, a firm needed to consider the suitability of the underlying investments to be held in it. An alert from the regulator in 2014 stated:

"Where a financial adviser recommends a SIPP knowing that the customer will transfer or switch from a current pension arrangement to release funds to invest through a SIPP, then the suitability of the underlying investment must form part of the advice given to the customer. If the underlying investment is not suitable for the customer, then the overall advice is not suitable.

If a firm does not fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer or switch at all as it will not be able to assess suitability of the transaction as a whole."

So, I think MAFS' adviser, Mr M, had a duty to consider the suitability of the investments intended to be held within Mrs E's SIPP and understand them fully. MAFS has said that B was responsible for making suitable investments for Mrs E and that it would not be responsible for investment decisions. I agree that B also had a duty to ensure the investments it made were suitable for Mrs E, but I don't think that absolved MAFS of doing the same, at least when it gave its pension transfer advice at the outset.

Under COBS 2.1.2 MAFS couldn't seek to exclude or restrict its duty or liability to Mrs E under the regulatory system. So, saying it wasn't responsible for the investments didn't absolve it of its duty of care to ensure the advice it was providing was suitable - again, this had to include consideration of how Mrs E's funds would be invested. So, MAFS couldn't separate out the two elements. Its advice on the suitability of the pension transfers had to include the suitability of the underlying investments. I don't think there was any ambiguity regarding the regulator's position on the matter.

Furthermore, in the copy of Mrs E's SIPP application that MAFS sent to the SIPP provider, under "Professional Adviser Details", Mr M stated "yes" to the following statement:

"Advice given at point of sale to client that takes account of the intended underlying investment strategy."

So, I think Mr M understood his obligations in that regard. However, based on what I've seen, the advice fell short of the regulator's expectations.

MAFS says the advice met the regulator's requirement because in the suitability report Mr M set out what he believed a suitable asset allocation would be for Mrs E and he recommended she invest her funds in B's model portfolio service. MAFS says it was then B's responsibility to ensure the investments selected met Mrs E's attitude to risk. But MAFS remained Mrs E's financial adviser and so had overall responsibility and oversight in ensuring that B was broadly implementing the approach that would reasonably be expected for Mrs E's attitude to risk.

In the suitability report the asset allocation for Mrs E was set out as follows:

UK Equity – 17%
Property – 20%
Overseas Equity – 31%
UK Fixed Interest – 32%

Overall, I don't consider that to be an unreasonable asset allocation for a customer with a medium attitude to risk. However, providing an outline of an asset allocation alone doesn't, in my view, constitute an investment strategy.

The report then said, *"The recommended Investment Manager will analyse the results of your risk profile questionnaire and recommend a suitable portfolio for you."*

In the section entitled 'Discretionary Fund Manager' the report said that Mr M recommended Mrs E use B to access their model portfolio service. But Mr M then said:

"In keeping with your 'medium' attitude to risk assessment…I would suggest that you might wish to consider the [B] Strategic Income Model and the Total Return Model Low Medium Risk Portfolios. The Fact Sheets for these portfolios are enclosed with the report."

I don't think that this 'suggestion' met the regulators requirement of advising on the investments and fully understanding the investment proposition to be held in the SIPP.

Despite Mr M confirming in the SIPP application form that the advice had taken account of the underlying investment strategy, he didn't make a recommendation. Instead, he left it to B to decide how to invest Mrs E's funds. And I can't see that Mr M did any investigation into the assets the suggested portfolios were invested in or that he engaged with B at all before making his recommendation to Mrs E to understand how her funds would be invested. It also doesn't appear that Mr M passed on Mrs E's attitude to risk assessment to B until April 2016, by which time all of the funds transferred at that time had been invested in a number of high-risk corporate bonds. This approach continued to be taken when the remainder of Mrs E's funds were transferred to B.

Had Mr M engaged with B at the outset to understand the investments it was going to make on Mrs E's behalf, I think her losses could've been avoided as MAFS would've identified that the investments weren't suitable for her. It's possible that B wouldn't have been transparent with MAFS about how it intended to invest Mrs E's funds – but MAFS failed to carry out any of that research before it advised her to transfer, so I think this is a moot point.

Furthermore, as MAFS was providing an ongoing advised service to Mrs E, for which it was being paid ongoing fees, I think it should have been in a position to ensure that Mrs E's funds were invested appropriately. It is evident that there wasn't any oversight from Mr M in respect of the investment choices made, and I think it is this approach, along with the failings when the initial advice was given that led to Mrs E's losses with B. By failing to make a clear recommendation in line with Mrs E's attitude to risk, and by failing to communicate with B to make sure that the recommendations were implemented, I think B was essentially given a free hand to invest Mrs E's funds as it pleased.

DFM involvement

I appreciate MAFS' argument that B's actions may have also separately caused some of Mrs E'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 Mrs E's interests (given the lack of steps it took to establish how the portfolio with B was invested and whether the investments B intended to make on her behalf were suitable for her). MAFS also continued to take fees from the investment that it should have been monitoring. So, anything that B might also have done wrong doesn't make it reasonable in the circumstances of this case for MAFS to avoid compensating Mrs E for the losses they may have gone on to cause. So, I think holding MAFS fully responsible for the whole of the Mrs E's loss represents fair compensation in this case.

FSCS Compensation

MAFS argues that the amount of any award made against MAFS should be limited by taking the payment Mrs E received from the FSCS in relation to the investments made by B into account. In ordinary circumstances, as the FSCS describes itself as a fund of last resort, it is my understanding that it is unlikely it will pay out on claims where it is aware that another firm was involved in the transaction, and where it considers there is a reasonable prospect of the consumer making a recovery against that firm for the loss suffered.

Nonetheless, whether to postpone payment of compensation (to enable the consumer to recover compensation from a third party) is a matter entirely for the FSCS.

In this case, it seems the FSCS decided to award Mrs E £50,000 before the determination of her complaint with this service. In those circumstances, I'm aware that as a condition of accepting compensation from the FSCS, Mrs E was asked to give to the FSCS an assignment of her rights to make a claim against third parties. This would have enabled the

FSCS to make a claim in recovery of that compensation against those third parties and the PI insurer of B.

It follows that for Mrs E to make a complaint to this service about MAFS, she needed to ask the FSCS for a re-assignment of those rights. Mrs E obtained that reassignment earlier this year which contains, as a condition, the following requirement:

"The Claimant agrees that in respect of the Reassigned Rights the proceeds of the claim shall first be applied to repay an amount equal to the Compensation Sum to FSCS together with interest on the Compensation Sum from the date of receipt of the proceeds by the Claimant to the date of payment by the Claimant to FSCS at a daily rate equivalent to the Bank of England base rate from time to time (subject to a minimum rate of 0.1%), such payment to be made to FSCS within 14 days of receipt. The payment to FSCS shall be made after the deduction from the proceeds of the Claimant's reasonable legal costs incurred in pursuing a claim in respect of the Reassigned Rights."

MAFS may argue that because Mrs E has already recovered £50,000 from the FSCS, it should not have to account to her for that portion of her loss. However, as per the reassignment of rights agreement Mrs E entered into with the FSCS, she has agreed to repay the compensation she received from the FSCS if she receives compensation from a third party relating to the same claim.

From this, I think that:

1. There is no real risk of Mrs E benefiting from double recovery, as she's contractually required to pay back to FSCS the full amount of the compensation it paid to her; and
2. I have seen nothing to suggest Mrs E is unlikely to comply with that requirement in accordance with the deed of reassignment;
3. If I didn't direct MAFS to pay compensation to Mrs E for the full amount of her loss (in circumstances where I have determined it is responsible for 100% of that loss), she would nonetheless still be required to account to FSCS from the compensation she receives from MAFS and would, in turn, be left out of pocket.

All in all, I maintain my view that the fair and reasonable outcome is for MAFS to pay Mrs E compensation for the full amount of her loss.

Putting things right

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

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

What must MAFS do?

To compensate Mrs E fairly, MAFS must:

- Compare the performance of Mrs E'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.

- MAFS should pay into Mrs E'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 MAFS is unable to pay the total amount into Mrs E'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. 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 Mrs E won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Mrs E's actual or expected marginal rate of tax at her selected retirement age.

- For example, if Mrs E is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mrs E would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

- Pay to Mrs E £300 for the trouble and upset caused to her because of the ongoing concerns over her pension funds.

Income tax may be payable on any interest paid. If MAFS deducts income tax from the interest it should tell Mrs E how much has been taken off. MAFS should give Mrs E a tax deduction certificate in respect of interest if Mrs E asks for one, so she 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 any 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 illiquid assets, their value should be assumed to be nil for the purpose of calculating the *actual value*. MAFS may require that Mrs E provides an undertaking to pay MAFS any amount she 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. 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 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 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 assets need to be removed. I've set out above how this might be achieved by MAFS taking over the illiquid assets, or this is something that Mrs E 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 illiquid assets, to provide certainty to all parties I think it's fair that it pays Mrs E 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 decided on this method of compensation because:

- Mrs E wanted income with 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 Mrs E's circumstances 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 £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend the business to pay the balance.

Martin Aitken Financial Services Limited should provide details of its calculation to Mrs E in a clear, simple format.

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 Mrs E the amount produced by that calculation – up to a maximum of £160,000 (including distress or inconvenience but excluding costs) plus any interest on the amount 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 Mrs E the balance plus any interest on the amount as set out above.

This recommendation is not part of my determination or award. It does not bind Martin Aitken Financial Services Limited. It is unlikely that Mrs E can accept my decision and go to court to ask for the balance. Mrs E may want to consider getting independent legal advice before deciding whether to accept this decision.

If Martin Aitken Financial Services Limited does not pay the recommended amount, then any portfolio currently illiquid should be retained by Mrs E. This is until any future benefit that she 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 Mrs E that either she repays to Martin Aitken Financial Services Limited any amount Mrs E may receive from the portfolio thereafter or if possible, transfers the portfolio to MAFS at that point.

Mrs E 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.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs E to accept or reject my decision before 21 September 2022.

Hannah Wise
Ombudsman