

The complaint

Ms M complains about the suitability of the advice provided by Deep Blue Financial Limited ("Deep Blue") to switch the value of her personal pension plans to a new self-invested personal pension ("SIPP"). She says that the switch was unsuitable because it led to higher charges and investment in two Unregulated Collective Investment Scheme ("UCIS") funds which exposed her money to more risk than she understood or was able to tolerate.

Deep Blue is represented in this complaint by a law firm (the "Representative").

What happened

Jurisdiction

The Representative previously stated that Ms M had complained too late. One of our ombudsmen considered the Representative's position but disagreed. On 4 July 2022, he issued his decision confirming his opinion this complaint had been made in time and that this service was therefore able to consider the merits.

Merits

On 27 July 2022, one of our investigators issued his assessment on the merits of this complaint. I don't intend to repeat here what our investigator stated but will instead provide a summary about the events that led to Ms M making this complaint.

In 2008, Ms M approached Deep Blue for advice on her retirement planning. At that time, she had two personal pension plans with Scottish Equitable and Prudential, the combined value of which was about £78,500. Those plans were invested in with-profits and equity tracker lifestyle funds. She was 46, divorced, in good health and had two financially dependent children aged 13 and 19. She worked in sales earning between £40,000 to £49,000 per year. She had limited knowledge and experience of investments. Deep Blue went on to provide three written recommendations to Ms M, summarised as follows:

- February 2008 – to switch the value of her two personal pension plans to a new SIPP and invest its value in a range of funds including 24% in a UCIS fund called the '*Stirling Mortimer Global Property Fund (No 5)*'. The switch to the SIPP was completed. The money earmarked for the UCIS fund was held in the cash account within the SIPP wrapper awaiting investment. But investment in that specific UCIS fund didn't go ahead due to the investment deadline being missed. The SIPP provider later confirmed that it would accept investment in an alternative UCIS fund, the '*Stirling Mortimer Land Fund (No 8)*';
- July 2009 – to invest £20,000 of the SIPP value, which had been held in cash, in the alternative UCIS fund, the '*Stirling Mortimer Land Fund (No 8)*'. The investment term was stated as seven years and one month. Deep Blue recorded that Ms M had a "*realistic to aggressive*" risk profile in connection with the investment; and
- May 2011 – to disinvest £25,000 of other holdings in the SIPP and invest the

proceeds into another UCIS fund, the '*Sycamore V Exempt Property Unit Trust*'. The investment term was stated as seven years plus a two-year disposal period. Deep Blue recorded that Ms M had a "*speculative*" risk profile in connection with the investment.

Due to liquidity issues, investment in the UCIS funds went beyond the stated terms. This meant that the total capital of £45,000 invested in those funds wasn't returned to Ms M, as she had expected.

This complaint

Ms M complained to Deep Blue about the suitability of its advice to invest in the '*Stirling Mortimer Land Fund (No 8)*' and '*Sycamore V Exempt Property Unit Trust*' UCIS funds. She stated, in summary, the following:

- Deep Blue incorrectly recorded that she wanted to retire sometime between 65 and 75. But she was unsure when she would retire;
- Deep Blue inappropriately advised her to invest a large proportion of her pension savings in two high-risk UCIS funds which have since become illiquid. As a result, she's currently unable to retire because she cannot access most of her pension savings;
- Deep Blue failed to make her adequately aware that investment in the UCIS funds could go beyond the stated investment terms or that the capital invested might not be returned;
- She had limited other savings or investments and very little knowledge or understanding of investments. So she was heavily reliant on Deep Blue to act in her best interests and provide expert advice, which it had failed to do;
- She wasn't a sophisticated or high net worth investor and so shouldn't have been advised by Deep Blue to invest in the two UCIS funds;
- While she was interested in investing in property, she didn't have any specific investments or funds in mind when she first met Deep Blue. She said that it was Deep Blue that introduced and recommended investment in the two UCIS funds; and
- Deep Blue failed to make her aware of the costs and charges associated with investment in the SIPP and two UCIS funds. She has since found out that Deep Blue had been paid between 5% and 8% initial commission for recommending the UCIS funds, plus 2% trail commission. In her opinion, the level of commission paid was the reason why Deep Blue recommended the UCIS funds instead of mainstream investment funds which paid less commission.

Deep Blue didn't uphold this complaint. It stated, in summary, the following:

- It didn't introduce the UCIS funds ('*Stirling Mortimer Land Fund (No 8)*' and '*Sycamore V Exempt Property Unit Trust*') to Ms M. Rather, it was Ms M that had first suggested investment in these specific UCIS funds because she wanted to invest in property. It said its role in the transactions was simply to facilitate investment in the UCIS funds in line with Ms M's objective;
- Given the nature of the UCIS funds, it undertook additional steps to ensure that Ms M

understood the risks involved;

- All the documentation provided to Ms M confirmed the unregulated status, investment timelines, illiquid nature, and access restrictions of both UCIS funds, which could impact her ability to withdraw benefits from the SIPP. She had therefore been placed into an informed position before making the decision to invest;
- She signed all the relevant disclaimers confirming that she understood and accepted the risks involved in investing in the UCIS funds. She then went on and made a positive decision to invest;
- The investment time horizon for the UCIS funds was about nine years allowing for an orderly disposal. This timeframe was appropriate for Ms M because she had an investment time horizon of at least 18 years to 65;
- She had been invested in the UCIS funds for over 11 years before she complained and so it thought she would've complained sooner had she not understood and accepted the risks at the outset; and
- It was satisfied that it had acted in Ms M's best interests and provided her with the correct level of service.

Our investigator recommended that this complaint should be upheld. In his assessment he stated, in summary, that:

- Deep Blue had advised Ms M to start the SIPP and invest in the UCIS funds, and was therefore responsible for the suitability of these;
- Deep Blue had advised Ms M to start a new SIPP specifically to facilitate investment in the UCIS funds;
- Following the 2011 recommendation, around 77% of Ms M's SIPP was invested in high-risk investments – he considered that Ms M's SIPP was unduly weighted in high-risk investments, lacked diversification and exposed a large proportion of her pension savings to more risk than she understood or was able to tolerate; and
- Deep Blue should've instead advised Ms M to maintain her Scottish Equitable and Prudential personal pension plans because these had lower charges compared to the SIPP and UCIS funds and offered a range of suitable, lower-risk investment funds that met her needs.

To put things right, our investigator recommended that Deep Blue calculate and pay compensation to Ms M on the basis that she maintained her Scottish Equitable and Prudential personal pension plans. He also recommended that Deep Blue pay Ms M £250 to compensate her for the trouble and upset caused by discovering that a large proportion of her pension savings were inaccessible because of its unsuitable advice.

While Ms M accepted our investigator's recommendations, the Representative didn't. In its response, on behalf of Deep Blue, it expressed its view that this complaint shouldn't be upheld on its merits and explained why. It acknowledged that the UCIS funds complained about were high-risk and speculative but, in its opinion, they aligned with Ms M's recorded risk profiles in 2009 and 2011. It said it was Ms M who had first suggested to Deep Blue that she should invest in the UCIS funds. And that she was fully aware of and accepted the risks. Therefore, it considered that Deep Blue's advice to invest in the UCIS funds was suitable in

meeting Ms M's needs. Notwithstanding its view on the merits, the Representative stated that Deep Blue was prepared to make a cash sum offer of £45,000 to Ms M to settle this complaint in full and final settlement without admission of liability. The figure of £45,000 represented the total capital sum Ms M had invested in the two UCIS funds.

Ms M didn't accept Deep Blue's offer. She said that she wanted to be put into the financial position she would've been in had Deep Blue provided suitable advice at the outset in 2008.

Since agreement couldn't be reached, this complaint has been referred to me for review.

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.

When considering what's fair and reasonable, and in accordance with the Financial Services and Markets Act 2000 and the Dispute Resolution section in the FCA's handbook, I need to take into account relevant: law and regulations; regulators' rules, guidance and standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

I'd like to clarify that the purpose of this final decision isn't to repeat or address every single point raised by Ms M, Deep Blue or the Representative. If I haven't commented on any specific point, it's because I don't believe it's affected what I think is the right outcome. I've considered all the evidence afresh. Having done so, I've reached the same conclusion as our investigator for the following reasons:

- The Representative said that it was Ms M and not Deep Blue who first suggested investment in UCIS. And that Deep Blue's role in the transactions was simply to facilitate investment in the UCIS funds in line with Ms M's objective. Ms M disputes this and said that Deep Blue promoted the UCIS funds to her. I cannot be certain which party first mentioned investment in UCIS. But I don't think it matters. This is because Deep Blue had a fundamental regulatory responsibility, under COBS 2.1.1R, to act in Ms M's best interests. Based on the evidence available, it's my view that Ms M had limited knowledge and experience of investments. So I don't think she was qualified to form an expert view on the merits or otherwise of transferring to a SIPP and investing in the UCIS funds at the centre of this complaint. This should've been obvious to Deep Blue. She had appointed and was relying on Deep Blue to provide expert, independent advice and to act in her best interests. Deep Blue was the professional party in the transaction and so was required to provide a suitable recommendation to Ms M, regardless of how the concept of UCIS investments first arose.
- Before 1 January 2014, UCIS were only allowed to be promoted to eight categories of investor set out in COBS 4.12. In addition, the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 set out other exemptions that weren't specifically set out in COBS, but they still applied. These included '*Certified high net worth individuals*', '*Certified sophisticated investors*' and '*Self-certified sophisticated investors*'. I haven't seen any contemporaneous evidence that shows which exemption in COBS 4.12 Deep Blue relied upon to promote the '*Stirling Mortimer Land Fund (No 8)*' and '*Sycamore V Exempt Property Unit Trust*' funds to Ms M or that it correctly categorised her as a high net worth individual or sophisticated investor in connection with the investments. Therefore, it's my view that the UCIS funds complained about shouldn't have been promoted to Ms M.

- Because of the lack of regulation and the type of assets they invest in, UCIS can be complex and high risk. The regulator has generally regarded UCIS as having a high degree of volatility, illiquidity or both. They are therefore usually speculative investments and, in practice, rarely regarded as suitable for more than a small part of an investment portfolio.
- In Ms M's case, Deep Blue recommended in 2009 that she invest £20,000 (or about 24%) of the then SIPP value in the '*Stirling Mortimer Land Fund (No 8)*' UCIS fund. Then in 2011 it recommended that she invest a further £25,000 (or about 35%) of the then SIPP value in the '*Sycamore V Exempt Property Unit Trust*'. Therefore, I think it's fair to say that a large proportion of Ms M's SIPP was invested in UCIS funds from 2009, which increased significantly in 2011.
- It's my view that investment in the UCIS funds unduly exposed a significant proportion of Ms M's pension savings to a high level of capital risk – a level of risk which, based on the available evidence, I don't think she understood or had the capacity to tolerate. I note that before she was advised by Deep Blue, Ms M's existing personal pension plans were invested in lower risk investment funds. I'm not persuaded that she was a speculative investor, as recorded by Deep Blue. The evidence relating to her investment knowledge and experience simply doesn't support this or convince me that it was appropriate for her to adopt a speculative, high-risk investment approach with a significant proportion of her pension savings. Therefore, I think Deep Blue's advice in 2009 and 2011 to invest in the two UCIS funds was unsuitable in the circumstances.
- Notwithstanding the above, I also have concerns about the suitability of Deep Blue's advice in 2008 to switch the value of Ms M's Scottish Equitable and Prudential personal pension plans to a new SIPP. The recommendation for the SIPP was required to facilitate investment in UCIS. In its 2008 suitability report, Deep Blue stated that it didn't carry out any cost or fund comparison between the personal pension plans and SIPP. Therefore, I think it's fair to say that Ms M wasn't provided adequate comparative information to understand if switching was in her best interests. The switch to the SIPP and subsequent investment in the UCIS funds led to Ms M incurring higher costs and charges compared to her personal pension plans. I think that Deep Blue failed to adequately demonstrate that Ms M incurred those higher costs and charges with good reason.
- I think Ms M's retirement planning objectives could've been met through her existing personal pension plans. I'm not persuaded that switching to the SIPP and subsequent investment in the UCIS funds was suitable for her. So I think it's fair and reasonable to uphold this complaint and direct Deep Blue to carry a loss assessment and pay any redress due to Ms M.

Putting things right

Deep Blue must pay Ms M £250 to compensate her for the trouble and upset caused by discovering that a large proportion of her pension savings are inaccessible because of its unsuitable advice.

In addition, Deep Blue must carry out a loss assessment to determine if its unsuitable advice led to Ms M suffering a financial loss. My aim in awarding fair compensation is to put Ms M into the position she would likely have been in but for Deep Blue's unsuitable advice. In summary, and for the purposes of assessing redress, I think Deep Blue should've advised

Ms M in 2008 to maintain her Scottish Equitable and Prudential personal pension plans. What I've set out below is in line with what our investigator previously recommended in his assessment of this complaint.

Deep Blue must carry out a loss assessment on the following basis:

- Compare the actual performance of Ms M's SIPP with the notional value of her personal pension plans had they remained with the previous providers. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there's a loss and compensation is payable;
- Pay any interest as set out below;
- If there's a loss, this should be paid to Ms M's SIPP to increase its value by the amount of the compensation and any interest. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid to the SIPP if it would conflict with any existing protection or allowance;
- If compensation cannot be paid to Ms M's SIPP, it should pay that amount direct to her. But had it been possible to pay to the SIPP, it would've provided a taxable income. Therefore, the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so 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. I've decided that it's reasonable to assume she is likely to be a basic rate taxpayer in retirement, so the reduction would equal 20%. However, as Ms M would've been able to take a tax free lump sum from the SIPP, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%;
- Refund to Ms M the adviser fees and commission associated specifically with investment in the '*Stirling Mortimer Land Fund (No 8)*' and '*Sycamore V Exempt Property Unit Trust*' funds together with simple interest at 8% a year from the date the fees were paid to the date of settlement. If the above comparison shows that no compensation is payable, the difference between the *actual value* and the *notional value* can be offset against the fees and commission with interest;
- Provide the details of the calculation to Ms M in a clear, simple format.

Income tax may be payable on any interest paid. If Deep Blue considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Ms M how much it's taken off. It should also give Ms M a tax deduction certificate in respect of interest if she asks for one so that 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	Still exists but some liquid/ illiquid	Notional value from previous personal	Date of investment	Date of this final decision	8% simple per year from date of this final decision to

		pension plan providers			settlement (if not settled within 28 days of Deep Blue receiving Ms M's acceptance of this final decision)
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Actual value

This means the actual amount payable from the SIPP at the end date.

If, at the end date, all or part of the portfolio is illiquid (meaning it cannot be readily sold on the open market), it may be difficult to find the *actual value* of the portfolio. So, the *actual value* of the illiquid investment(s) should be assumed to be nil to arrive at fair compensation. Deep Blue should take ownership of the illiquid investment(s) by paying a commercial value acceptable to the SIPP provider. The amount paid should be included in the actual value before compensation is calculated.

If Deep Blue is unable to purchase the investment(s), the *actual value* should be assumed to be nil for the purpose of calculation. Deep Blue may wish to require that Ms M provides an undertaking to pay it any amount she may receive from the portfolio in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Deep Blue will need to meet any costs in drawing up the undertaking.

Notional Value

This is the value of Ms M's previous personal pension plan had they remained with the providers until the date of this final decision. Deep Blue should request that the previous providers calculate this value.

My final decision

I uphold this complaint. Deep Blue Financial Limited must redress Ms M as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms M to accept or reject my decision before 20 October 2022.

Clint Penfold
Ombudsman