

The complaint

A representative complains on behalf of Mr B that Clear Capital Markets Limited (CCM) inappropriately invested a £5,856 dealing account within his SIPP in a small number of Alternative Investment Market (AIM) shares which were too volatile and lacked diversification. It says CCM should have recommended a *“low-risk, well diversified portfolio within his SIPP”*, and that the value of the shares has since fallen significantly.

What happened

Mr B’s representative says that in 2018 he was a Warehouse Manager aged 48 and earning around £18,000. He had no significant savings - I note CCM recorded £13,000 in cash savings on its fact find, however that appears to include the value of his SIPP. The representative also says he had no investment experience, whereas CCM recorded that he had experience of trading in mainstream and small capitalisation / AIM shares of up to £5,000, up to 3 times a month. However, CCM also recorded that Mr B had limited understanding of general financial and economic affairs. CCM says its information was consistently recorded in fact finds that Mr B signed both in December 2018 and June 2020.

It appears that earlier in 2016, Mr B had originally been recommended to transfer his existing personal pensions worth £45,000 into a SIPP by an independent financial adviser (IFA). The SIPP was used to trade in what appear to be high risk AIM shares. Mr B was then encouraged to move to what became known as Hartley SIPP in 2017 and for a while made trades in Contracts for Difference using a different firm known at that time as Central Markets (London), now Sequant Capital – in liquidation. As a result of this high risk activity by 2018, Mr B seems to have only had £6,000 in his trading account.

CCM provided a large number of phone calls with Mr B, which were not timestamped (according to how they appear on our case-handling system). However I’ve begun by reviewing what it calls the “onboarding” calls and in particular one call that seems to be the first made to Mr B from one of CCM’s directors in 2018.

The director was aware that Sequant had written to Mr B a day earlier to say it was no longer able to offer dealing services in his SIPP. He reiterated what the letter seems to have already said, that CCM had entered into an arrangement to take over the management of clients’ accounts should they so desire. Sequant’s letter had enclosed a power of attorney for Mr B to complete for CCM to manage his account instead. The call referred to putting more beneficial arrangements in place for Mr B, suggesting (which is a point I’ll come back to) that CCM was aware Mr B had lost money when dealing with Sequant.

From the other ‘onboarding’ calls I’ve listened to, it appears CCM ultimately abandoned the possibility of trading through the Saxo account in the Hartley SIPP due to poor engagement it was getting with Hartley. During several calls it explained to Mr B that things would likely go more smoothly by making a transfer to an Intelligent Money SIPP and using the SVS Securities platform. Mr B indicated in the calls he was happy to make these changes.

In October 2018 Mr B completed a Power of Attorney over an investment account with SVS Capital, and transferred £5,857 over to that platform in late November/early December. CCM

disagrees that the power of attorney was necessary because this was an advisory account (meaning it would make recommendations to Mr B which he then accepted), and it disputes that it was ever provided with this document.

CCM's own application form had crosses against all three of the services it might provide (execution only, advisory and discretionary). It noted that Mr B owned his own home worth £350,000 with no outstanding mortgage. Following a risk mapping exercise, it concluded he could afford to risk 5% of the total value of his home and cash savings, coming to £18,150.

'Medium' was selected for his attitude to risk, meaning that (in CCM's view) up to 50% of that £18,150 'risk capital' could be invested in high risk products. The form also specified that Mr B was willing to invest over anything from one day to the long-term, and in many types of alternative markets (other than Contracts for Difference, Indices or Options). The form went through a range of risk warnings which were acknowledged before the form was signed by Mr B on 7 December 2018. The following trades were then made on the account:

Jubilee Metals - £5,500 of shares bought on 24 December 2018, 90% of which were then progressively sold up to 11 January 2019 - realising £243 profit (after commission) on the sold portion.

Altitude Group – Up to £961 worth of shares bought and resold in two trades in January and February 2019. Total profit realised after commission of £196.

Prospex Oil & Gas - £5,400 of shares bought on 18 March 2019, of which 13% was sold on 30 April 2019, realising £33 profit (after commission) on the sold portion.

SVS Securities subsequently went into FSCS default, and the remaining £817 cash balance was transferred to a newly appointed platform (ITI Capital) in June 2020.

CCM's risk mapping exercise was repeated in June 2020, resulting in Mr B being willing to risk 10% of his (now-reduced) house value of £325,000 and cash assets said to be worth £45,000. But he now had a low attitude to risk – meaning that (in CCM's view) he could only invest 25% of that £36,800 'risk capital' in high-risk products. Somewhat illogically, he was now prepared to invest in Contracts For Difference, Indices and Options too. On this occasion the documentation confirmed Mr B would only be receiving an advisory service.

The following further trades were then made (these may not take into account commission which is less clear on the ITI platform):

Jubilee Metals – the remaining 10% of shares were sold for £3,216 in January 2021, realising a further profit on that portion of £2,638.

Prospex Oil & Gas - all remaining shares were then sold for £2,033 in January 2021, realising a loss on that portion of £2,901.

'Xtrt Reso' – £180 profit was made buying and selling the same number of shares on 4 February 2021.

Mast Energy – £5,916 of shares were purchased on 19 April 2021, leaving £304 of cash in the account. 20% of these were sold for £288 on 17 October 2022 in order to meet SIPP fees. At their April 2023 prices, the remaining shares are worth about £430 and there is about £30 in cash. Mast Energy is still trading.

The representative complained to CCM in November 2021. CCM responded that it had never acted for Mr B on a discretionary basis, and these shares were traded precisely because it advised Mr B to, and he agreed to, make them. It has provided a copy of its email to Mr B on 4 December 2018 confirming that it had opened his account on an advisory basis.

Our investigator spoke to Mr B and his representative in July 2022. They confirmed that Mr B had already claimed to the Financial Services Compensation Scheme (FSCS) about the IFA who had originally transferred Mr B's personal pensions into the first the SIPP (Quantum International). Mr B has received compensation that is capped at the point he switched SIPPs in 2017. So, it doesn't relate to the period CCM was involved. Mr B said he was unhappy that he wasn't given an option to stop this form of trading when CCM took over from Sequant, and he doesn't understand what has happened to his account.

Our investigator thought that CCM should never have opened an account for Mr B. In summary, they said:

- CCM went through risk warnings and used a lot of jargon around AIM, IPO's, and other types of investment in its fact-finding calls, but nowhere on the calls was Mr B's understanding of what he was signing up for assessed.
- When it initially asked Mr B how much of his net wealth he could afford to lose, Mr B clarified if CCM meant how much of his SIPP - which was a more relevant question. But instead CCM focused on all his wealth, even though most of that was in his main residence and he only had £13,000 in savings.
- When Mr B said he could only afford to lose 1% (£3,630), CCM said it may not be able to make recommendations on that basis. Mr B then asked what was the lowest figure, and CCM saying it *"can't put words in your mouth but the lowest is 5%"*.
- The questions in the fact-finding call were devised to ensure customers didn't take out products that weren't suitable, yet CCM led Mr B into doing precisely that. Mr B was also led into responding to the question *"are you a medium risk investor"* without being given explanations of what the other available risk levels were.
- The revised 5% figure would potentially wipe out all of Mr B's pension and cash savings. It also potentially meant that an amount equivalent to Mr B's entire pension could be invested in the high-risk 50% of the overall medium classification. This was not treating Mr B fairly or acting in his best interests.
- The first three recommendations traded were all AIM shares in a way which exceeded Mr B's true attitude to, and capacity for risk. Mr B never called CCM to make a trade and wouldn't have ever sought CCM out if it hadn't contacted him.

CCM didn't agree with the investigator. It said:

- Mr B was already invested and trading in the stock market, giving him trading experience, and CCM provided him with a platform for him to continue if he so chose.
- Mr B shows his understanding of what CCM told him at multiple points during the call recordings and confirmed that he would read the literature CCM would send him.
- It had no reason to believe Mr B's answers were incorrect during the calls, and hadn't 'put words into his mouth'.
- The investigator had misunderstood its risk model for assessing suitability. This didn't mean Mr B would need to remortgage his house in order to proceed with the advice.
- Mr B had agreed to continue with CCM after the first year, even though his positions were slightly down. His complaint seemed to have been prompted by the representative.
- The amount Mr B had lost at the time of the complaint fell well within what he said he could afford to. CCM had only put 31% of his assessed risk capital into the markets.
- The fact that the funds Mr B had lost were held within a pension plan was irrelevant.
- If he wasn't able to trade with CCM, it believed Mr B would likely have opened an account with another broker and continued to trade.

As agreement couldn't be reached, the matter has been passed to me for a 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.

Whilst Sequant does appear to have written to Mr B outlining CCM's services beforehand, it's clear to me that the client relationship here was initiated by CCM then calling Mr B, rather than the other way around. Whether this was technically a 'cold call' or not is somewhat moot. I still need to consider whether CCM should have assessed the trading account as being suitable for Mr B. And if not, what Mr B would likely have done instead.

Having listened to the first fact finding call which took place with Mr B in 2018 (after the onboarding calls), I agree he had a friendly rapport with CCM's representative. But at most points he showed little interest in talking around the subjects being discussed and the risk warnings given, other than to confirm his answers with 'yep'. Mr B later took the opportunity to ask for the key information to be sent to him in writing rather than continuing to have it read out to him. And having listened to his discussions with our investigator I think this is because Mr B's knowledge of what was being discussed was limited. He didn't have any involvement in the financial industry and was educated to GCSE level.

CCM did note that was the case at the time – the 'experience' it recorded of him investing, as such, was essentially of somebody else doing that for him. He told the representative in the call that someone from Sequant had rung him with suggestions 3-4 times a month. I note that the reason the execution-only and discretionary management options were ticked was to keep these potentially open for the future. The representative explained that some of the trades CCM would be making were settled on a T20 basis – meaning that Mr B could acquire the shares now but wouldn't have to pay for 20 days. Again, I'm not sure Mr B would have appreciated the benefits (and risks) of doing this for himself.

I said I would return to the fact that CCM had some knowledge that Mr B had previously suffered losses with Sequant. He told the representative that his SIPP value (believed to be £8,000) *"was a lot more but someone lost a lot of money in it"* – to which the representative immediately responded *"was it with Sequant Capital...I've heard a few of those"*. When filling in the fact find in this call, CCM also seems to have amalgamated the SIPP's value with Mr B's £5,000 savings to arrive at the £13,000 figure for what he held in "cash".

In my view, the observations the investigator made about Mr B being led here into agreeing to accept losses of up to 5% of his net wealth, and to having a medium risk profile, are accurate. Whilst it's natural that Mr B would ask what the lowest amount CCM would accept was, after it said that 1% was too low, I don't think CCM was treating Mr B fairly by then proceeding on the assumption that 5% was then acceptable. Mr B's SIPP had been left in 'limbo' by the departure of the previous broker, and Mr B wasn't being offered any alternatives.

The fact remains that Mr B had initially expressed more caution in only being willing to risk 1% or £3,630. That's consistent with the fact he had seen his SIPP's value fall from £45,000 to around £8,000. And I think CCM persuaded Mr B agree to risk 5% with comments such as *"...make sure you're comfortable with this before I say it, 5%, that goes to £18,150, you can't even lose that with us anyway because you haven't got that on account...If you lost £18,000 could you still survive?"*.

Whilst Mr B then said 'yep' to this, an overall risk assessment isn't just about how much someone (on heavy encouragement it has to be said here) says they can afford to lose. I think CCM's assessment of his attitude to risk was equally flawed. I agree with the

investigator that Mr B was prompted into accepting the medium risk category without being offered any alternatives. Nor was he given enough information to understand that CCM's definition of medium risk – bearing in mind that it would be recommending single shares on AIM markets – was somewhat different to the wider spread of investments that would generally be considered suitable for a medium risk profile.

I don't think that conventionally, investing almost an entire portfolio (nearly £6,000) in directly-held shares, even 'blue-chip' shares, would be considered a medium risk strategy. I say this as I also don't agree that the SIPP should have just been amalgamated with all of Mr B's other wealth (most of which was tied up in his home). The pension is for a discrete purpose – providing benefits in retirement. Had CCM asked Mr B for more information about what he had recently lost in his pension – of which it had already learnt a little – it would know he was originally some way towards having meaningful benefits with £45,000. But this had been decimated by the actions of previous advisers and managers. So he could ill afford to lose any more by making similar high risk investments to those he'd done previously.

I also can't say that Mr B would reasonably have appreciated that CCM then gained a mandate to make single investments of up to £5,000 in AIM shares by combining his willingness to put up to £18,000 at risk (even though he didn't have £18,000 to invest), with the fact that 50% – in its view – could be invested in high risk assets under a medium risk profile. There wasn't adequate explanation in the phone call where Mr B agreed to a medium risk that this was going to be the case, and the risk category was not defined at this time.

Having considered what transpired during these calls, I think CCM should have appreciated that whilst Mr B had been a customer of Sequant, that didn't automatically mean he was an appropriate fit for the services CCM was going to offer, for all the reasons I've given above. And to add to this, his funds were now so low in size that the fixed SIPP annual account fee – which CCM has told us was £195 – would make operating a portfolio of this size much less competitive. It amounted to a hurdle rate of 3.25% on a portfolio of, say, £6,000 to achieve any growth – and that was before the additional commissions CCM would take.

I'm also satisfied that the only reason CCM was able to get him through its risk scoring process was by encouraging or leading him into answering questions differently to his natural inclination. That meant that it wasn't acting in Mr B's best interests (COBS 2.1.1R). Nor was it conducting its business with due skill, care and diligence (Principle 2), or paying due regard to its customer's interests or information needs (Principles 6 and 7).

Whilst my findings could therefore stop at that point – because in my view Mr B should not have been trading in AIM and similar stocks through CCM at all – I've needed to further consider causation. That is, whether (as CCM has argued) Mr B would likely have gone on to trade in some other way. To do this I've listened to other calls Mr B had with CCM including the advisory trading calls.

These calls are characterised by a lot of talking from CCM and only brief words of agreement from Mr B. He rarely made qualitative comments on the explanations he was getting about the prospects CCM saw in the proposed investments, only very occasionally adding that they sounded like good investments or were something he had heard of (e.g. the market in renewable energy for the Mast Energy trade). Mr B's main vocal contributions were to the pleasantries exchanged at the beginning of most calls. He never questioned or challenged any of CCM's recommendations, because it's clear to me that he didn't have the knowledge or expertise to do so. On the basis of this I find it highly unlikely that Mr B would have proceeded to trade, had it not been for CCM's inappropriate encouragement to do so.

I do accept that if, strictly, CCM had refused to get involved with Mr B at all, a question might arise as to how he would have exited the holdings he was in under Sequant (which CCM

helped him to close down), in order to invest more appropriately. However in my view that's the wrong starting point. It wouldn't have been consistent with CCM's regulatory obligations – noting those under COBS and PRIN I've mentioned above – for CCM to abandon Mr B, having identified that he was invested in high-risk alternative stocks that didn't fit with his attitude to and capacity for risk. It had already undertaken (with his agreement) to look into what sort of investments would be suitable for him.

There was nothing preventing CCM from making more conventional investments (such as a mixture of bonds and larger capitalisation shares, or indeed managed funds that further spread the risk). But if that was not a line of business it was prepared to get involved in, then having established that Mr B was invested inappropriately I consider there would have been an obligation on CCM to refer him to another adviser or recommend he got advice or guidance himself, perhaps from a government body such as the Pensions Advisory Service. Had CCM done any of these things, I think that would have set Mr B on the path to investing more appropriately, in line with his attitude to risk.

Putting things right

My aim in awarding fair compensation is to put Mr B back into the position he would most likely have been in, had CCM not encouraged him to make large trades in AIM and other similar shares within his pension. There isn't a single identifiable investment or investments Mr B would have made instead of CCM's portfolio. The investigator proposed that Mr B would most likely have achieved a return in line with the FTSE Private Investors Income Total Return Index.

I think that is a reasonable proposal as it reflects the typical mixture of assets someone who was willing to take some risk (but not the high risks involved in CCM's proposals) would have made. I've had regard for Mr B's age (48) and length of time to retirement, meaning that he could afford to take more risk within his pension than (say) his low amount of other cash assets. It doesn't mean Mr B would have invested exactly in line with this index, which is a composite of about 60% in shares and 40% in bonds. But I'm satisfied that it's a reasonable benchmark to use as a proxy for the range of investments he might have made had it not been for CCM's advice.

What must Clear Capital Markets Limited do?

To compensate Mr B fairly Clear Capital Markets Limited must:

- Compare the performance of Mr B's investments with that of the benchmark shown below. If the fair value is greater than the actual value, there is a loss and compensation is payable. If the actual value is greater than the fair value, no compensation is payable.
- If there is a loss, it should pay into Mr B's pension plan, to increase its value by the amount of the compensation and any interest. This payment should allow for the effect of charges and any available tax relief. CCM shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.
- If CCM is unable to pay the compensation into Mr B'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 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 Mr B won't be able to reclaim any of the reduction after compensation is paid.

- The notional allowance should be calculated using Mr B's expected marginal rate of tax at his selected retirement age. It's reasonable to assume that Mr B is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. As Mr B 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%.
- Provide the details of the calculation to Mr B in a clear, simple format.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
SVS Securities subsequently ITI Capital	Shares in Mast Energy & residual cash	FTSE Private Investors Income Total Return Index	28 November 2018	Date of my final decision	8% per year simple from the date of my final decision if not settled within 28 days of receipt of Mr B's acceptance

I indicated above that since Mr B invested, the share price of Mast Energy has fallen significantly. But I'm persuaded that Mr B only has these shares as a result of CCM's advice. Indeed, it has recently told us that CCM's objective was to hold this investment for the medium to long term. That has led to the position for Mr B to worsen, as it currently stands.

If the shares cannot readily be sold on the open market, I require CCM to purchase them from the portfolio as part of the compensation and include the amount it pays into the portfolio for the shares as part of its value. If CCM is unable to purchase the shares and they cannot readily be sold on the open market, CCM must treat the shares as having a nil value when valuing the portfolio.

Income tax may be payable on any interest paid. If CCM considers that it's required by HMRC to deduct income tax from that interest, it should tell Mr B how much it has taken off. It should also give Mr B a tax deduction certificate in respect of interest if Mr B asks for one, so he can reclaim the tax on this interest from HMRC if appropriate.

The investigator also proposed that CCM should pay Mr B £200 for the distress caused when he had feared he had lost his pension. In response, CCM has suggested that the complaint was prompted by the representative and not Mr B. It's sent us recordings of phone calls where it discussed the nature of Mr B's complaint with him. I've listened to those calls, which weren't time-stamped - but the content of one of them appears to be between the representative complaining on 5 November 2021 and CCM responding to the complaint on 8 December 2021.

In this call, CCM was reassuring Mr B that his shares in Mast Energy were still worth around the £5,000 he paid for them. From what I can see, over the month mentioned above, the share price fell from 11.625p to 9.1p. This isn't vastly lower than the 12.5p Mr B originally paid for the shares so I can partly see CCM's point. But it seems to have forgotten that 20% of the shares had already been sold to pay ongoing fees. And I think that was one of the main problems with this arrangement.

I'm not questioning CCM's expertise in identifying some shares that performed reasonably well, but after all the charges being taken Mr B wasn't actually seeing much if any growth on his portfolio. And he would likely have achieved more growth in lower-cost insured funds that were more suited to the low value he had in his arrangement. He didn't necessarily need the SIPP with relatively high annual charges at Intelligent Money to invest in those funds.

Mr B did say in this call that his complaint originally was with the adviser who originally recommended this method of investing (in 2016). But that doesn't mean he didn't (on his representative's advice) have a complaint against CCM. CCM rather underlines the contradiction in its position where it comments in the call that Mr B had "*probably got a very strong chance*" of succeeding with a complaint against his previous adviser, due to the amount he had lost from high-risk trading.

However, the trading CCM was carrying out for Mr B was also high-risk – it may not have lost as much money and may have involved different risks to (say) CFDs, but it was in my view still inappropriate for Mr B. And at a time when it could have steered Mr B towards more appropriate investments in 2018, CCM proceeded to make his position somewhat worse. So, I do think it has exacerbated the distress Mr B has suffered – even if other parties originally involved played a greater part in those concerns. And I'm satisfied £200 is an appropriate payment to Mr B to recognise this.

My final decision

I uphold Mr B's complaint and require Clear Capital Markets Limited to pay him compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 7 July 2023.

Gideon Moore
Ombudsman