

The complaint

Mr A complains that MOYES Financial Planning Limited gave him unsuitable advice to transfer his pension in 2012.

What happened

Mr A's complaint was considered by one of our investigators. He sent his assessment of the complaint to both parties in August 2022. The background and circumstances to the complaint were set out in that assessment. However to recap, Mr A originally held two personal pensions with two different pension providers. In 2012 one had a transfer value of £12,892, and the other £7,044.

Mr A was interested in alternative investments to bolster his pension savings, and he explored an investment in an overseas property development - Harmony Bay, in Turkey.

Mr A met with MOYES in April 2012 and discussed his financial needs and requirements. It completed a fact-find which established that Mr A:

- Was in his early 40's, married and had two financial dependents
- Was self-employed
- Was considering buying a commercial property abroad, and he wanted to establish what UK pension providers would allow him to potentially fund the purchase and allow the commercial property to be held within a pension
- Was recorded as having an attitude to risk (ATR) as Moderately Adventurous to Adventurous.

MOYES sent its recommendations to Mr A by letter dated 5 November 2012. In the letter:

- MOYES recommended that Mr A transfer his two-personal pensions to a Self - Invested Personal Pension (SIPP). The transferred funds would be held in cash
- MOYES said it wasn't liable for the ongoing commercial property purchase. It said that was between Mr A and the firm he intended to buy the property from
- MOYES said it would receive 4% of the transfer value (£797) for its advice.

Mr A agreed to the transfer and subsequently invested £14,250 into Harmony Bay.

In September 2021 Mr A, through a representative, complained about the advice he'd been given. The complaint was, in summary, that MOYES' advice to transfer was unsuitable.

MOYES responded to say that it didn't think its advice had been unsuitable. It said Mr A had a recorded ATR of moderate to adventurous. So he wasn't risk averse. Mr A had approached MOYES for advice on the best way to hold the investment as he had already

made the decision to buy it. It said MOYES' advice was limited accordingly, and it hadn't promoted or provided advice on the suitability of the Harmony Bay investment.

Mr A subsequently referred his complaint to us. Having considered all the circumstances of the complaint, our investigator recommended that it should be upheld.

The investigator said he accepted that MOYES hadn't promoted or recommend the Harmony Bay investment to Mr A.

The investigator said the objectives recorded in MOYES' letter dated 5 November 2012 said:

"You currently have your main pension provisions with [the two pension providers], and you are looking to buy a commercial property abroad. You enquired as to whether you were able to use your pensions to buy a commercial property abroad. You had heard about a (SIPP) and you also asked if any SIPPs in the UK would accept this type of transaction."

Mr A had confirmed this to the investigator, and said that the SIPP provider had handled all the paperwork in the purchase of Harmony Bay.

The investigator also accepted that Mr A's ATR had been recorded as moderately adventurous to adventurous. He said this was noted in the fact find which was signed and dated by Mr A as correct on 2 April 2012.

The investigator said he accepted Mr A approached MOYES about how to finance his intended investment into overseas property potentially through his pension. And that MOYES had sourced a suitable SIPP. But the investigator said MOYES had also helped facilitate Mr A's purchase of Harmony Bay. Without a SIPP in place, the investigator didn't think Mr A would've been able to use his pension savings to make the purchase. MOYES' advice had facilitated the purchase of Harmony Bay.

The investigator said his role was to determine if the advice given in 2012 was suitable by taking into account relevant law, regulators' rules, guidance and standards; codes of practice and, where appropriate, what he considered was good industry practice at the relevant time.

The investigator said MOYES' role wasn't simply to facilitate something that Mr A might've thought he wanted or needed. It was to objectively consider all of the relevant information about his circumstances, goals and the options available, and then provide him with robust, suitable financial advice, which was in his best interests.

The investigator referred to the regulator's industry alert from 2014 which said:

"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."

The investigator said although the advice was given in 2012, and so was given before these alerts, the regulator was highlighting firms' obligations and reinforcing understanding of the rules already in place. He said a financial adviser had to consider the wider picture when advising on pension products.

The investigator said the fact find completed showed that Mr A didn't have any significant savings to make the purchase outside of his pension. And it looked like Mr A had substantial debts of £50,000, and may have been in debt management. The investigator said he didn't

think it was likely that Mr A was able to fund any further pensions, and he had no other retirement savings or significant savings apart from his state pension. He said Mr A couldn't afford to lose these pensions.

The investigator said considering the suitability of the advice in this context, he wasn't persuaded it was suitable. He didn't think a retail client like Mr A should've been recommended or encouraged to invest the entirety of their personal pension savings into one unregulated investment. He said there were multiple significant risk factors associated with it, including a lack of regulation, longevity, potential insolvency, liquidity issues and other factors which could prevent Mr A from accessing his funds.

The investigator said Mr A did have a high recorded ATR. However he said the regulator's good and poor practice report of 2010 sighted an example of good practice which was to restrict investments into unregulated investments to between 3% and 5% of a portfolio with ongoing monitoring. However Mr A had invested 100% of his personal pension savings into it.

The investigator also noted that the new SIPP when including on-going advice charge was more expensive overall at 2.18%, compared to the previous 1% charge.

The investigator said he thought MOYES was required to consider the wider financial implications to Mr A's personal circumstances and his pension planning. He said had this been fully considered, he thought the correct advice would've been for Mr A to stay invested as he was and to not invest all his pension savings into a Turkish holiday resort. Taking all this into account, the investigator thought that the complaint should be upheld.

MOYES didn't agree with the investigator's conclusions. It said, in summary, that MOYES gave detailed warnings to the risks involved and noted the risks involved in the SIPP. It confirmed with Mr A that he accepted the risks involved in the transfer. It didn't believe it was in breach of the COBS (Conduct of Business Sourcebook) requirements.

It said Mr A had selected Harmony Bay prior to meeting MOYES and also knew about the SIPP provider. He'd decided on the investment into Harmony Bay prior to approaching MOYES with relation to the transfer. It said it wasn't paid any fees in relation to the investment.

MOYES said it was entitled to rely on Mr A's property experience and background. Mr A was aware of the risks of investing in property and the risks were made clear to him in the documentation he was provided with. It didn't agree Mr A didn't understand the nature of the Harmony Bay investment and expected MOYES to advise on it. MOYES was clear it was only offering advice on the transfer.

MOYES said it wasn't fair in these circumstances to expect that in order to advise on the transfer MOYES should have had an opinion on the investment. It said there was no reason to treat Mr A as an insistent client as it wasn't providing advice on the investment, and it had made that clear. It said the cause of the loss was the failed business developer in Turkey and nothing to do with MOYES.

The investigator responded to say that he agreed Mr A had been given warnings about the risks and knew about the investment and SIPP provider prior to MOYES' involvement. But that didn't mean that the advice was suitable or negated the requirement for the firm to give best advice. He said he wasn't persuaded that Mr A was a property expert; he was self-employed in an unrelated area of work, on a relatively low income, and with little or no investment experience.

The investigator explained the regulator's rules *did* require financial advisers to consider the 'wider picture' and they shouldn't just facilitate consumers' intentions without consideration of the investment proposition.

MOYES said it thought if the property developer in Turkey had been more diligent in its business management and had delivered an outcome, then Mr A would have been happy. So there wouldn't have been a complaint if the development had been a success, and Mr A would have considered the advice suitable. It said its advice wouldn't have been questioned if the investment had worked out and it said "*high risk is high risk.*"

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've come to the same conclusions as the investigator, and largely for the same reasons.

As the investigator explained, the regulator has made it clear on a number of occasions that where a financial adviser recommends a SIPP knowing that the customer will transfer (technically known as a switch here, but for ease I will refer to transfer) from a current pension arrangement, then the suitability of the underlying investment must form part of the advice given.

I think this is consistent with the nature of the transaction when considered in the whole. The starting position is that Mr A had two personal pensions. In order to transfer to the SIPP recommended by MOYES, Mr A had to sell the rights/investments in his personal pensions to fund the transfer to the SIPP and buy new rights/investments in it. So Moyes needed to weigh up the benefits of the new SIPP and underlying investment in it, against the benefits provided by the personal pensions in order to ensure that the advice to transfer was suitable. The setting up of the SIPP didn't stand alone, and considering the suitability of the underlying investment was all part and parcel of the suitability of the advice to transfer.

MOYES was bound by the Conduct of Business Sourcebook (COBS) rules set out in the regulator's Handbook. COBS 9.2.2 effectively required MOYES to have a reasonable basis for believing the transaction was suitable for Mr A, including that he was able financially to bear any related investment risks consistent with his objectives, and that he had the necessary experience and knowledge in order to understand the risks involved in the transaction.

As explained by the investigator, Mr A had no other retirement provision or significant savings. He had a modest income, had significant debts, and so would have had difficulty building up further pension provision. Like the investigator, I don't think Mr A could afford to lose these pensions. He wasn't able to bear the financial risks presented by investing in Harmony Bay.

Mr A said he had no prior financial experience. I've seen no evidence to suggest he had any particular knowledge or experience of investments. In my view he would have relied on the advice provided by MOYES. As I've explained above, MOYES was required to consider the underlying investment. I don't think it's in dispute that the investment in Harmony Bay was high risk. And in my view MOYES should have identified that the transfer presented too great a risk given Mr A's particular circumstances.

MOYES was acting in professional capacity, and I think Mr A would reasonably have relied on its advice. I think if MOYES had advised Mr A to remain in his existing schemes and

explained the reasons for doing so, I think Mr A would more likely than not have accepted that advice. Mr A would have known a professional firm's view was that the transaction wasn't suitable – it wasn't a good idea, and there was a real risk he could lose all his pension.

Moyes had its own obligations as I've described above when advising on the transfer to the SIPP. The transfer of Mr A's pensions to the SIPP and the underlying investment were mutually dependent – the one couldn't have taken place without the other. The investment into Harmony Bay was dependent on Mr A funding it through the transfer to the SIPP.

Taking all this into account, I'm not persuaded that MOYES provided suitable advice to Mr A to transfer. And I'm satisfied that Mr A would more likely than not have remained with his existing pension arrangements if MOYES had explained the position in full and provided suitable advice.

For the reasons outlined above and by the investigator, I'm satisfied Mr A wouldn't have been in the SIPP at all and wouldn't have invested in Harmony Bay if MOYES had met its regulatory obligations.

Putting things right

Fair compensation

In assessing what would be fair compensation, my aim is to put Mr A as close as possible to the position he would probably now be in if he had been given suitable advice.

I think Mr A would have invested differently. It is not possible to say precisely how he would have invested if he'd stayed in his original arrangements. I'm satisfied that what I have set out below is fair and reasonable given Mr A's circumstances and objectives when he invested.

Although, Mr A's ATR was recorded as moderately adventurous to adventurous, I think if he'd been advised to not transfer he would've stayed in his original pension plans. Mr A's representative has said he was 'adverse to high levels' of risk, and on this basis, the investigator recommended using the benchmark set out in the table below for calculating redress purposes. Neither party has provided further comment. And I think it's reasonable in all the circumstances.

What should MOYES Financial Planning Limited do?

To compensate Mr A fairly MOYES Financial Planning Limited should:

- Compare the performance of Mr A's investments with that of the benchmark shown below.
- A separate calculation should be carried out for each investment. If the fair value is greater than the actual value, there is a loss. The losses should be combined and the total is the amount of compensation payable.
- MOYES Financial Planning Limited should also pay any interest set out below.
- If there is a loss, MOYES Financial Planning Limited should pay into Mr A's pension plan, to increase its value by the amount of the compensation and any interest. MOYES Financial Planning Limited should allow for the effect of charges and any

available tax relief. MOYES Financial Planning Limited shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.

- If MOYES Financial Planning Limited is unable to pay the compensation into Mr A'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 A won't be able to reclaim any of the reduction after compensation is paid.
- The notional allowance should be calculated using Mr A's actual or expected marginal rate of tax at his selected retirement age.
- It's reasonable to assume that Mr A is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr A 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 A in a clear, simple format.

Income tax may be payable on any interest paid. If MOYES Financial Planning Limited consider that it's required by HM Revenue & Customs to deduct income tax from that interest, MOYES Financial Planning Limited should tell Mr A how much it's taken off. Moyes should also give Mr A a tax deduction certificate in respect of interest if Mr A asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

For each investment:

Actual value

This means the actual amount paid or payable 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.

Investment	Status	Benchmark	from ("start date")	to ("end date")	additional interest
First original pension plan	No longer exists	FTSE UK Private Investors Income Total Return Index	Date of investment - April 2012	Date of decision	8% simple a year from date of this decision to date of settlement if settlement isn't made within 28 days of Moyes being notified of Mr A's acceptance of this decision
Second original pension plan	No longer exists	FTSE UK Private Investors Income Total Return Index	Date of investment - April 2012	Date of decision	8% simple a year from date of this decision to date of settlement if settlement isn't made within 28 days of Moyes being notified of Mr A's acceptance of this decision

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr A 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's 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 A's circumstances and risk attitude.

- The additional interest is for being deprived of the use of any compensation money since the end date.

My final decision

My final decision is that I uphold Mr A's complaint.

I order MOYES Financial Planning Limited to calculate and pay compensation to Mr A on the basis I have outlined above under "Putting things right".

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 3 April 2023.

David Ashley
Ombudsman