

The complaint

Mr R complains that WR Simon Ashley Silver Independent Financial Advisor Limited (WRSAS) sold all the investments within his self-invested personal pension (SIPP) in line with its recommendation but without his explicit consent – and this prevented him from later selling a specific share he'd bought shortly before that recommendation at a profit.

What happened

2020

4 February: Mr R told WRSAS that he'd had a tip on some shares in a company I'll call "F". He asked the adviser to purchase using the funds in cash in his and his wife's SIPPs.

11 February: The adviser confirms he is not making recommendations on F and that as Mr and Mrs R were cautious investors, there could be liquidity problems with this investment. However, Mr R clarifies that his interest is because his employer has already made an investment in F and so he knew something about the company. (At the same time the adviser is making other recommendations, which Mr R also accepts, for other cash in the SIPPs to be invested in infrastructure, solar, wind and renewable investments.)

13 February: Mr R asks for £5,000 of the remaining £54,000 cash in his SIPP to be invested in F, when the price was ~24p per share.

2 March: Mr R asks for a further £20,000 from his SIPP to be invested in F providing it was trading at 21.95p per share or less. He logs into his account the next day and is unhappy that the second half had to be dealt on the phone and attracted a higher price of 23.48p. WRSAS says that this was caused by the SIPP provider's limits and speculates that the demand shown for shares by his first purchase may have affected the price for the second.

16 March: Mr R is considering investing another £10,000 in F but the adviser warns him that markets are likely to fall further. Mr R takes on board this advice and says he'd prefer to invest back into UK FTSE stocks *'when you think the timing is right'*.

20 March: The adviser sends a stand-alone email, apparently standardised for all clients. Amongst other things this said (with my emphasis): *'...an article on...19th March... suggested that the UK economy may contract by 30% between April and June 2020 indicated for the first time the full extent of this crisis... The outcome of those kind of contractions to the economy even in the short term is likely to cause a crisis the likes of which we have never seen before. In many ways I of course hope that I am overstating the problems but I think in the immediate term it is now much more prudent to sell all assets and hold in cash.... I await your permission to encash all funds by return.'* Mr R agrees he received this email but it's evident that he did not respond directly to it. Coincidentally this marked the low point of F shares at 14.5p per share.

23 March: The adviser responds to Mr R's 16 March email: *'At the time of writing the Stock Markets have lost all sense of perspective and the fear index is showing one of its highest ever readings...I remain slightly concerned that this pattern of fall may have more in common with the 2000 to 2003 and the 2007 to 2009 corrections where it took two to three years for markets to reach a bottom.'*

I look forward to updating you with my further observations in the near future in confirmation if this market correction looks more like 1987 then re-investing funds in the near but not immediate future.'

Mr R says – in direct response to this email chain rather than that of 20 March: *'Happy to follow your recommendations'*. WRSAS argues that the fact this is in the plural is significant.

According to Mr R's submissions, from Mr R's SIPP WRSAS then sold £25,462 of shares in financial services companies, £117,055 of shares in property and infrastructure companies, and the shares in F which were by then worth £15,632. The total holdings sold were £158,149.

25 March: The adviser sends another standardised email saying he has sold to cash *'for those who requested it'*. The email doesn't make clear if Mr R is one of those who have so requested, however it provides reassurance to readers that the SIPP provider will split cash between seven banks to mitigate the risk. It adds, *'At the time of writing the markets have posted their largest ever daily gain... One or two clients have already suggested to me that that means we have either been too hasty or it is time to get back in the market, but I must stress that firstly this has terrifying similarities with the 1929 Stock Market crash... [when] to reassure investors a number of key industrialists made investments in the Stock Market around six weeks after the initial wave of selling occurred... At this time, I believe that any investment in the Stock Market is pure speculation in the extreme.'*

3 April: WRSAS has a note of a phone conversation with Mr R in which they discuss the state of the markets. The adviser's notes say that Mr R asked him whether the investments had been sold and the adviser confirmed they had been. Mr R then requested valuations.

Mr R says he doesn't recall this conversation, but he can't see why he would have asked for valuations (which the adviser went on to provide) if everything was sitting in cash. He also said that he had always trusted the adviser's judgement except that with the shares in F, he would never have wanted to sell them so soon after buying them. However he was also aware that in times of uncertainty it was best to 'sit tight' as he was investing for the longer term. So although he would have looked into the adviser's recommendation to sell the portfolio generally, he would also have looked for opinions elsewhere and doesn't think he would ultimately have agreed to do so.

6 April: The adviser emailed Mr R updated valuations for the SIPPs at his request, which Mr R acknowledged the same day. As the valuations were password protected, WRSAS provided the password at Mr R's request on 13 April. For Mr R's SIPP, the statement shows a total of £191,314 in 'cash' and nothing in 'other assets'. Meanwhile, by 9 April the price of F shares moved back above what Mr R had originally paid for both his tranches.

14 April: Mr R confirmed receipt of the password and discussion moved on to another query about whether money could be transferred to his wife's SIPP.

21 August: The adviser emailed an updated statement to Mr R for his quarterly review. The statement shows a total of £195,762 in 'cash' and nothing in 'other assets'. In the email itself the adviser confirmed *'...all your funds remain held in cash at this time'*.

The adviser attached a copy of an earlier message which he wondered Mr R may not have received, regarding reinvesting the cash into gilts. After again requesting the password to view the attachments (which was provided), Mr R responded on the same day confirming that he wanted to proceed with the recommendation. He's told us that he didn't think anything was untoward here, as his SIPP receives substantial monthly contributions and always had some funds sitting in cash.

4 September: WRSAS emailed a new statement to Mr R showing there was now a value of £38,935 in 'other assets'. Page 3 of the statement shows a breakdown of these showing that they are gilt holdings and there are no shares in F.

2021

26 January: Mr R asks WRSAS to sell all of his and Mrs R's SIPP holdings in F, at the same time as he sold his personal shares in that company. The adviser reminds him the same day that the whole portfolio had been liquidated in March 2020. His notes of this conversation and a subsequent one on 1 February suggest Mr R was aware that the portfolio had been sold in March 2020 but he didn't realise this included the shares in F, and he hadn't regularly checked the status of the portfolio. Further, that the adviser acknowledged that there was some confusion and an ex gratia payment of £5,000 was offered.

5 February: Mr R calculates the loss he is claiming for his SIPP alone to be £86,587 including the original infrastructure, property and financial services shares as well as F.

12 February: WRSAS responds that it '*stretches all credulity*' that Mr R would not have queried the sale of the shares for 11 months, if that wasn't what he intended. It says that if he does not accept its offer of £5,000 then this combined with the wider market uncertainty affecting the company means that they will petition to wind it up.

Mr R was taken aback by WRSAS' response. He said he was not in the habit of using his online access for the SIPP provider and in any event he was not expecting to receive contract notes for shares he hadn't asked to be sold. As WRSAS would not increase its offer he referred the complaint to the Financial Ombudsman Service.

Our investigator asked Mr R about his recollections of events and where relevant I've included these above. They also asked the SIPP provider for details of when Mr R successfully logged in after the sell-down in March 2020. The dates were:

For the adviser-led account:

13 April 2020 (unsuccessful) 1 February 2021 (successful)

For the client-led account (successful logins only):

3, 14 & 27 July 2020	2, 14 & 22 September 2020	2, 5, 7 & 21 October 2020
11 November 2020	22 December 2020	4 January 2021

The investigator's view of the complaint contains a factual error. It says that both the standardised 'all clients' email (recommending everything be sold to cash), and the specific one which Mr R replied to (recommending they delay making further investments) were sent on the same day. In fact the former was sent on 20 March 2020 and the latter 23 March.

Nevertheless, in summary the investigator reached the following view:

- Mr R did not give a clear instruction to sell all his funds on 23 March given that he didn't reply to the 'all clients' email directly. His use of the plural 'recommendations' was typical of when he replied to the adviser - and didn't suggest he was accepting the recommendations in each email individually.
- In the circumstances, WRSAS should have checked what email Mr R was responding to before proceeding to sell his funds. And if it turned out Mr R didn't want to sell them, it's likely the adviser would have pushed the point further with him because he was concerned about the impact of COVID on investments.
- He was satisfied that Mr R would not have agreed to sell the shares in F specifically because through his own research, he thought there was going to be an upturn.
- However Mr R had told the investigator he usually trusted the adviser's judgement, and he did agree on 23 March 2020 with the recommendation to delay investment

because market conditions weren't right. So the investigator considered that meant he would likely have accepted the advice to sell the *rest of* the portfolio.

- Whilst Mr R might not have checked his account online if he wasn't expecting any sales, he missed key opportunities when the adviser sent him statements and confirmed all his funds were in cash on 21 August 2020. Mr R could then have considered whether to re-purchase the shares in F at that time.
- Redress was therefore proposed only in respect of the change of value in F between 25 March and 21 August 2020, plus £100 for the distress and inconvenience caused.

Mr R didn't agree with the proposed outcome. In short, he said that if the investigator had concluded no instruction was given to sell any holdings, the compensation for the time period stated should be based on the value of all those holdings, not just the shares in F. He emphasized that he had a background in credit and risk, and understood that the only point when you lose in a market downturn is if and when you cash out. He reiterated that he and his wife were low risk investors and had plenty of time to wait until retirement.

WRSAS also didn't agree. It said it had been instructed to include the F shares in the overall SIPP portfolios. So when the adviser recommended clients should exit the market there was no logical reason for treating the F shares differently. It added that the 6 April 2020 email enclosing statements was more reliable corroboration of the disputed call note in which WRSAS confirmed the sale took place, than Mr R's later attempts to recall that conversation.

The investigator didn't accept this point in view of the fact that the file evidence showed Mr R having difficulty accessing the password-protected attachments to the 6 April 2020 email. And relying on the access log for the 'adviser led' account only, it didn't appear Mr R had gone online at all.

I've issued a provisional decision on 19 August 2022, in which I concluded that it would be more appropriate for WRSAS' original offer of £5,000 to Mr and Mrs R jointly to be reinstated, with the payment of £5,000 apportioned between the two of them. I'll revisit the reasons for that provisional decision in the final decision below.

Mr R responded to say he was unhappy with the change of outcome. He noted I had acknowledged that the adviser was specific in stating they would await his 'permission to encash all funds by return' - permission which he did not in fact give.

WRSAS said it was disposed to accept the provisional decision, and was willing to pay a total of £5,000 to Mr and Mrs R in full and final settlement in whatever proportions suited them. We relayed this offer to Mr R who said that neither he nor his wife would accept it without me making a final decision on the complaints. He asked that I reconsider reverting to the compensation methodology set out in the investigator's original view, as he believed he had made clear that they would not have agreed to the selling of the shares in F due to his particular interest in that company. As such, he considered that to be a fairer outcome.

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 agree with the investigator that Mr R didn't give an unequivocal instruction that he was accepting WRSAS' recommendation to delay further investment into the market (the email he replied directly to) - *as well as* its recommendation to sell all holdings (the 'all clients' email he *didn't* reply directly to). But crucially, I don't think the investigator has taken into account that Mr R, and not just WRSAS, should have appreciated that there was some ambiguity in his instruction.

Mr R and the adviser had been talking about uncertainty in the markets – that was the reason why the adviser recommended against further investment in F and delaying investing in FTSE stocks. It's evident that despite showing earlier keenness in F, Mr R concurred with the adviser on this occasion. Although the timing was unfortunate, because the adviser was responding on 23 March to an email Mr R sent on 16 March – so, either side of the 'all clients' email – it's clear that the 'all clients' email was borne out of the same concerns.

I've also taken into account that the 20 March 'all clients' email requested a response from Mr R which, in the circumstances, I think it would have been reasonable for him to provide – to prevent the confusion that would otherwise arise given that he was accepting the recommendation to defer investment in the 23 March email. As Mr R has said, it was a serious matter for him to consider whether or not to exit the market entirely. So I find it unusual that he would not want to ensure that there was no potential for confusion in the response he gave to one, but not the other, email.

Mr R has referred to his background in credit and risk and I note he was a director of a number of companies. So, I consider he would have appreciated the importance of giving clear instructions and the ambiguity that might result by him not confirming directly in response to the 'all clients' email that he *did not* want to sell the existing holdings. I therefore think *both* WRSAS and Mr R missed opportunities to ensure that his instructions as to what recommendation he was accepting were clear and understood.

WRSAS hasn't made an audio recording of the 3 April 2020 phone call (and it was under no obligation to do so). So I've also considered what, on the balance of probabilities, is likely to have been discussed in that call. I think WRSAS' point that the length of time Mr R has left it to question these events – compounded by the opportunities he missed later to identify that he was in cash – is a fair one. I think this weakens Mr R's assertions as against the contemporaneous note made by WRSAS of what was discussed in this call.

Both parties made time for this discussion at short notice, and I'm satisfied from the available evidence that they both had concerns about potential market movements. I accept that those concerns could have existed whether Mr R knew he was fully in cash, or wrongly believed he continued to hold some assets (but was nonetheless keen to invest in further stocks at the most opportune time).

I've considered Mr R's point that he wouldn't have asked for a SIPP statement if he was fully in cash, but again I think this cuts both ways. It's plausible that he may have asked for the statement to see where he ended up, as sales had been made quickly in a falling market. It can be seen from the F shares in particular that losses had been crystallised.

I also think Mr R might reasonably have appreciated the ambiguity that existed given he'd failed to confirm if he wanted to sell existing holdings to cash – and the message he got from WRSAS on 25 March that it had sold all holdings 'for those who had agreed to do so'. The further reassurance in the email appears to be given on the basis that the recipient *has* switched. So again, I think it would have been reasonable for Mr R to check his statement to make sure WRSAS hadn't believed he was one of the people 'who had agreed to do so'.

The investigator didn't consider Mr R could reasonably have acted on the information in the April 2020 statement because he didn't have the password to read it, but I don't agree with this. Mr R asked WRSAS for the password which it provided on 13 April. I conclude from this that Mr R evidently did want to view this statement. And as Mr R didn't then notify WRSAS of any further difficulty in viewing it, I'm satisfied on balance that he saw the contents of the statement on or around 13 April 2020.

On reading the statement I don't think Mr R could have been left in any doubt that all of his holdings, *including the shares in F*, had been sold. So it concerns me here how Mr R could

not have noticed this, as he has gone on to further claim when another statement was provided in August 2020, accompanied by specific narrative from WRSAS that he was invested in cash.

This leads me to the conclusion that on the balance of probabilities, Mr R did come to understand that WRSAS *had* switched him fully into cash – whether or not he had originally made his mind up on whether to do this by 23 March. I do understand his point that it would not have made sense for him to sell the F shares so soon after buying them, but by late March 2020 they had just taken a fall from around 22p to 14.5p. Whereas clearly, Mr R had bought them expecting them to go up in value.

Even though they had recovered that loss by mid-April, it's entirely possible in my view that Mr R had reflected that he'd mis-timed the purchase the previous month. With the market impacts of COVID worsening, he may then not have been as confident that further gains would materialise. (With hindsight we know there was then a steeper rise from about 28p to 42p between August 2020 and January 2021, which I note is when Mr R asked to sell the F shares.)

I won't go through all other shares Mr R held in detail, but suffice it to say that the FTSE-100 index was also very volatile during the rest of 2020 and did not perform as well subsequently as the F shares. As WRSAS noted in its follow-up 'all clients' email, the FTSE-100 did rebound sharply during April and May - recovering up to half of its previous losses - but then fell back towards its previous trough by October 2020 before recovering again. It's possible to see that there were opportunities to go back into the market and mitigate some of the losses Mr R crystallised in March 2020, but this is much easier to see with hindsight that neither he nor the adviser possessed at the time.

In my view the lack of immediate action Mr R took in response to learning of the sales to cash constituted an acceptance of the position – for better or worse – that he had ended up in. That does not excuse WRSAS' own failings to ensure that it had taken clear, unequivocal, instructions from Mr R. But it does pose a problem for Mr R to recover the losses caused by WRSAS' failings, because he was then in a position to react to the situation that he considers WRSAS wrongly put him in, but did not do so. Had the markets continued to fall – and fallen further than they did in October 2020 – Mr R might then have benefited from the sale to cash. So I have to be mindful of the possibility that this was why he accepted the position as it was at the time.

The actions Mr R could have taken instead of accepting that position – which would have strengthened his complaint now – might have included attempting to repurchase those assets he hadn't wanted to be sold. Or, if he was unhappy that he would be repurchasing them at a loss, complaining to WRSAS promptly that it was responsible for that loss.

I'm also not sure why the investigator focused on logins to the 'adviser led' account to show that Mr R didn't use his online access between March 2020 and February 2021. We asked the SIPP provider for evidence of when he (rather than an adviser) accessed the account and it gave us details of the 'client led' account as well as the 'adviser led' one. These show there were a further three logins to the 'client led' account in July 2020 alone, all of which pre-date when WRSAS specifically reminded Mr R in the 21 August email that he was fully invested in cash. And there appear to be many more logins after that point, as well as the September 2020 statement - which shows the gilt holdings, and still no holdings in F.

When corresponding with the adviser on 3 March 2020 Mr R said that he had logged into his account. So I take from this that he knew how to do so – and a belief that he was still invested at a time when there plainly were concerns at the state of the markets, gave him a basis for logging in. So I think Mr R likely did go online, but even if I'm wrong on that I'm satisfied that he knew as a result of WRSAS emailing him statements as early as April 2020

that he was fully invested in cash - and didn't act on that information.

I'm also not persuaded that Mr R's comment that he and his wife were low risk investors assists their case. Whilst I accept volatility is not the same thing as risk, attitude to risk is often measured in terms of how an investor reacts to shorter-term fluctuations. For example if a low risk investor experiences a fall of over 20% in their investment, they may want to (reluctantly) sell to cash rather than risk a further fall. Whilst clearly not an ideal scenario it is a question of whether they have the appetite to accept a 40% or 50% fall, before hopefully the assets recover in the medium to longer term – and some low risk investors would not.

Doing as Mr R says and 'riding out the storm' is not without risk. It can be seen in this case that the FTSE-100 took about two years to return to its 2020 peak. And as the fate of investments was generally seen as being intertwined with the COVID pandemic, which was an unprecedented situation, it would have been difficult to predict at that time how long that might take. So, what Mr R says of his attitude to risk does not make it unlikely in my view that he would have agreed to switch to cash – or come to accept that it might have been the right call for the adviser to have done so, given what he knew at that time (in April 2020).

By not raising this issue with WRSAS as soon as he ought reasonably to have been aware of it, Mr R in my view knowingly remained out of the markets. It's not fair or reasonable in my view for him to then expect WRSAS to underwrite, through this complaint, the investment risks he was not himself prepared to take. But as I said earlier in these findings, this does not excuse WRSAS' shortcomings in not ensuring it had a clear, unequivocal instruction from Mr R. I've taken this into account in what I consider fair compensation should be in this complaint.

Putting things right

WRSAS already made an offer of £5,000 to Mr and Mrs R jointly which it then said was withdrawn. I appreciate it is now willing to extend that offer to them again in agreement with my provisional decision.

For completeness I should say that this service does not automatically require all offers made prior to our involvement to be reinstated, but there are some situations where I think the circumstances of the case justify this – and I've already said in my provisional decision that I think this is one of those cases. In essence, I think WRSAS' proposal for resolving the complaint was fair and reasonable in all of the circumstances, and did not need to be replaced with the investigator's proposal.

I also appreciate that Mr R would prefer the investigator's proposal – which he previously rejected – to be put back on the table. I understand his point that WRSAS said it would await his permission *before* selling all the shares - so as it did not explicitly gain that permission, the further passage of time should not prevent him from recovering those losses. Particularly in respect of the shares in F which he is most concerned about. Indeed, the investigator's view provided for Mr R not benefiting from the delay by limiting compensation to the period up to August 2020 when Mr R was told (in my view, reminded) that he was in cash. So in view of Mr R's concerns I have again considered whether a formulaic approach to compensation could be used to provide fair redress in this case.

As will be clear from my findings above, I consider the date of 21 August 2020 that the investigator used was the wrong date in any event – as Mr R ought to have seen that he was now invested in cash when he asked for the correct password to check his statement on or around 13 April 2020. The investigator's view also acknowledged the uncertainty around whether Mr R would have been willing to retain *all* of his shares – against WRSAS' advice – rather than just the shares in F. He gave Mr R the benefit of the doubt just on the F shares on the basis that he had only recently purchased them.

The rapidly changing market situation at that time, prompted by the COVID pandemic, means in my view that there was some very real doubt here as to what Mr R would have wanted to do – and that was reflected in WRSAS' offer which was based on a nominal sum rather than a formulaic award. Having reflected on this, I still have concerns that it would be fair and reasonable to hold WRSAS to the performance of the investments - even if that was taken only to 13 April 2020, and on the shares in F alone.

I'm persuaded that WRSAS had already made a fair and reasonable offer to Mr and Mrs R based on the particular circumstances of this complaint. These include that the adviser was the professional in this transaction and should have acted more diligently, but I can see to some extent how WRSAS misunderstood Mr R's partial acceptance and partial silence in response to its advice. And I think some reliance has to be placed on Mr R's responsibility to check his statements after contributing towards that confusion.

Whilst the evidence on balance suggests Mr R accepted the cash position he and his wife ended up in at the time, I think they might have been left with the feeling that WRSAS had 'jumped the gun' on making the switch before they had time to properly consider (or had finished considering) it. That would have left them in an upsetting position and made it harder to then move forward with deciding when to re-enter the market. I think that position is adequately taken into account in the size of the offer WRSAS made.

Each SIPP is individually held, so Mr and Mrs R's complaints have been registered individually with this service. WRSAS has said it is willing to split the £5,000 into whatever proportions suited them, and I've had nothing further from Mr R in this regard. So, in order to issue two decisions that are capable of being accepted by Mr and Mrs R individually I will divide the £5,000 up in proportion to the value of assets WRSAS sold to cash for each of them on 23 March 2020. That produces a sum of £3,800 to be paid by WRSAS to Mr R.

My final decision

I uphold Mr R's complaint in part, and require WR Simon Ashley Silver Independent Financial Advisor Limited to pay him compensation of £3,800 in full and final settlement of this complaint, if he accepts my final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 25 October 2022.

Gideon Moore
Ombudsman