DRN-3785038

The complaint

Mr N complains about the advice given to him by Tier One Capital Ltd to invest funds in his self-invested personal pension ("SIPP") in a property-backed lending trust.

What happened

Mr N was a client of Tier One. He had meetings with advisers from the firm, providing details of his financial assets, and completed an attitude to risk assessment. In October 2015, Mr N applied to join the PSG Aspire SIPP.

In February 2016, Tier One wrote to Mr N through the trustees of his SIPP. It recommended that he invest £25,000 into a private funding circle. This was to be held in his SIPP, and was classed by Tier One as a moderate risk investment.

In November 2016, Tier One wrote about a new investment opportunity – an investment trust (now known as 'Develop North'). Some of the key points from this letter are summarised below:

- Develop North would be listed on the London Stock Exchange and would be a UK authorised investment trust.
- The investment trust would provide loans to proposed borrowers, who could be a private client, company or other entities such as a trust.
- The stated risks were credit risk, market risk, inflation risk and liquidity risk.
- Tier One classed this as a moderate risk investment, saying the balance of risk and reward in this investment trust was an attractive opportunity for a suitable allocation within Mr N's investment portfolio, and that as long as the overall balance of investments sat within the defined risk rating agreed at the outset, there was no disadvantage to holding investments with higher or lower individual risk ratings.

Tier One recommended that Mr N switch his existing Tier One direct lending investments into the equivalent value of new shares in Develop North and look to use any existing tax efficient wrappers available so that the dividend would be received in a tax efficient manner.

Tier One also sent other documents including an offer letter and Key Information Document ('KID'). The offer was accepted in December 2016, and the investment switch took place in January 2017.

During a review meeting in March 2018, Mr N said he wanted to make a further investment in Develop North. The meeting notes show he expressed concern at a recent investment he'd made into a project. It said he wasn't aware of the fees charged by his SIPP, and he wanted to cancel the investment and replace it with a further investment in Develop North.

In June 2018 Mr N made a further investment of £61,000 in Develop North, which brought his total investment in the investment trust to £86,500.

Mr N received dividend payments on a quarterly basis. But in early 2020, he expressed concerns about the investment and said he wanted to withdraw funds. He says his discussions with Tier One led him to believe that he couldn't access his money as soon as he wanted. Tier One says it advised Mr N he could sell his shares but the price at that point was 75 pence per share.

Mr N complained to Tier One, saying he believed the Develop North investment had been mis-sold. He also complained at the same time about other investments held outside of his SIPP.

The share price fell but Mr N said he would sell the shares if they could be sold at 75p. In June 2020 they were sold at that price

Tier One sent a final response to Mr N’s complaint in August 2020. The response mainly addressed other issues on the basis Mr N said the sale of the shares resolved this issue.

Our investigator thought the complaint should be upheld. He said Mr N had only invested on the basis of the advice from Tier One in 2016, and he didn’t think that advice was suitable. The investigator recommended that Tier One carry out a calculation to see whether Mr N had suffered a loss by comparing the performance of his investment in Develop North with a benchmark.

Tier One doesn’t agree and has requested an ombudsman’s decision. It says:

- the initial investment in 2016 was in line with Mr N’s attitude to risk and was suitable;
- it didn’t give any advice on the second investment in 2018;
- Mr N continued to make further investments until January 2020;
- the poor performance in early 2020 was in line with the market generally at the time, due to the impact of the covid pandemic; and
- Mr N could have retained the shares and waited for the price to increase.

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.

Tier One gave advice to Mr N and said the investment in Develop North was suitable. When giving this advice, Tier One had to ensure it obtained the information needed about Mr N’s circumstances to be able to advise him, and ensure that its advice was suitable for him, taking into account his circumstances.

Tier One says its advice was suitable. Amongst other things, it has made the following points:

- The documents set out all the relevant risks.
- The investment was in line with Mr N’s risk profile and investment objectives.
- The advice was given to the SIPP and approved by the pension fund trustees on behalf of Mr N; any concerns should have been raised with them.
- Mr N made the investment of £25,000 in January 2017. The investment performed as anticipated and paid a quarterly dividend, which Mr N reinvested in more shares each time.

Despite what Tier One has said about the pension trustees, it’s clear that the client was Mr N, not the pension trustees – they have confirmed that they had no say in investment decisions. The advice was given to Mr N about how he should invest his money and he was entitled to any return on the investment. So the complaint was rightly made to Tier One.

Mr N’s attitude to risk was assessed as being ‘highest medium’ and the investment was said to be moderate risk. Tier One lays particular emphasis on the KID. It says this document was prepared by the provider, in accordance with the Regulator’s requirements, and it’s not for this service to substitute its own view of the risk involved.

I appreciate Tier's One view that the risk involved in the investment was said to be moderate and of course I've taken into account what the KID says. But I have to consider what's fair and reasonable taking into account all the circumstances of the case – not just the contents of one document.

Although the KID said this was a moderate risk, it also noted the company was not regulated or authorised by the Financial Conduct Authority. The documents also show that:

- The portfolio was intended to be diversified by sector and would predominantly be split between regional residential house-building, with a preliminary focus on non-London based property; small to medium commercial property development across the UK; and direct sale and leaseback vehicles.
- The investment trust was able to use gearing, as well as derivatives and hedging.
- The initial portfolio consisted of ten loans. Two of these had a loan to value ('LTV') of over 100%, but the blended LTV was around 65%.

The various documents set out the risks involved. But making Mr N aware of the risks doesn't necessarily mean the advice was suitable. I think the investment involved more risk for Mr N than Tier One suggests. In coming to this view, I've taken into account all the circumstances, including that:

- the investment trust was only recently established and had no operating history;
- there was in fact little diversification, with investments solely in property and the trust made up of 10 loans; and
- it wasn't regulated.

The registration document for the investment trust says the fact that the company was newly-formed and had no trading history was a risk factor. Mr N didn't have the protection that comes with regulated investments, such as that provided by the Financial Services Compensation Scheme ("FSCS"). Investing solely in property meant there was more risk if that sector suffered a downturn; the investments were not spread across different areas or asset classes. Mr N was investing in something new and unregulated. That inherently carries more risk to an investor with for example substantial liquidity, credit and market risks.

Mr N referred to the investments being "asset-backed" and may have felt investing in property gave more security than stocks and shares. But I don't think Tier One made it clear how much risk was really involved; this was a non-standard unregulated investment.

Tier One's view is that it would be reasonable for Mr N to have investments of a higher or lower risk than his attitude to risk, provided his overall investable wealth was within it. The asset summary (from some time before the advice) shows Mr N having £85,000 in his pension, and around £150,000 in cash. Tier One wasn't giving him advice on that cash or acting as investment managers to his SIPP. So Mr N could make other investments however he wished. In those circumstances, it would be reasonable to ensure any individual investment recommended to Mr N was appropriate for his attitude to risk. Otherwise he might be exposed to a high proportion of investments having a higher risk.

Tier Oner says the 2018 investment shouldn't be taken into account, as it didn't give advice on that. However, Mr N had only invested in Develop North because of the advice given previously. The further investment followed on from that and so the two were directly connected – the investment in 2018 wouldn't have happened but for the earlier investment, which was made as a result of Tier One's advice.

Tier One has questioned the relevance of the fact the investment was unregulated. As I've explained, unregulated investments tend to carry more risk and don't provide the protection that comes with regulated investments.

Tier One has also commented that the suggested remedy allows for compensation for poor performance even if the risk had been fully understood and accepted. The key point is not whether the risks were explained and accepted but whether the investment was suitable. I don't think the risks were fully explained but even if they were – and even if the investment seemed attractive to Mr N – that doesn't mean it was suitable for someone in his circumstances.

Finally, Tier One has said the proposed redress is based on an index that it's not possible for an investor to access. The index is not intended to be something Mr N can invest in – it's simply an index that is used as a way of measuring the return he could have achieved, had he invested in a range of suitable investments.

Putting things right

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

I think Mr N would have invested differently, had he not invested in Develop North. It's not possible to say precisely what he would have done, but I'm satisfied that what I have set out below is fair and reasonable in the circumstances.

What should Tier One do?

I understand Mr N did receive some return on his investment. The whole investment needs to be taken into account, since with suitable advice he wouldn't have made the investment or earned any interest.

To compensate Mr N fairly, Tier One should:

- Compare the performance of Mr N's investment in the SIPP 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, Tier One should pay into Mr N's pension plan, 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. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If Tier One is unable to pay the compensation into Mr N's pension plan, it should pay that amount directly 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 N won't be able to reclaim any of the reduction after compensation is paid.

- The notional allowance should be calculated using Mr N's actual or expected marginal rate of tax at his selected retirement age.

- It's reasonable to assume that Mr N is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr N 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%.

Income tax may be payable on any interest paid. If Tier One considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr N how much has been taken off. Tier One should also give Mr N a tax deduction certificate in respect of interest if he asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Develop North holding within the Aspire SIPP - JN	No longer exists	FTSE UK Private Investors Income Total Return Index	Date of investments in 2017 and 2018	Date his Develop North holdings were sold	n/a

If a loss is identified by the above method, Mr N should also be compensated for any lost growth on the sum of that loss, by calculating the growth it would have made had it been invested in line with the above benchmark, from the 'end date' to the date of settlement.

Actual value

This means the actual amount paid 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.

Any additional sum paid into the investment should be added to the fair value calculation from the point in time when it was actually paid in.

Any withdrawal, income or other distributions paid out of the investments to Mr N, should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Tier One totals all those payments and deducts that figure at the end.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr N 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 N's circumstances and risk attitude.

My final decision

I uphold Mr N’s complaint and direct Tier One Capital Ltd to compensate him as set out above.

Tier One Capital Ltd should provide details of the calculation to Mr N in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr N to accept or reject my decision before 14 March 2023.

Peter Whiteley
Ombudsman