

## **The complaint**

Mr B complains that WR Simon Ashley Silver Independent Financial Advisor Limited mis-advised him to switch the investments in his Self-Invested Personal Pension (SIPP) to cash in March 2020.

He is also unhappy about the length of time it took to complete the sale of the investments.

## **What happened**

I issued my provisional decision on this complaint on 3 November 2022. The background and circumstances to the complaint and the reasons why I was provisionally minded to uphold it were set out in that decision. I've copied the relevant parts of it below, and it forms part of this final decision.

## **Copy of provisional decision**

### ***What happened***

*Mr B's complaint was considered by one of our investigators. She set out the background and circumstances to the complaint in her assessment, a copy of which was sent to both parties.*

*There doesn't appear to be a dispute about the circumstances of the complaint. But in brief, during February and March 2020, near the start of the Covid pandemic, Mr B had several exchanges with WR Simon Ashley Silver Independent Financial Advisor Limited (which I will refer to as WR), about what to do with the investments in his pension given their falling value.*

*WR was initially advising Mr B to remain invested. Mr B became increasingly concerned about the falling value, and on 20 March 2020 WR sent him an e-mail recommending selling the investments. The investments were sold and switched to cash. The value of the investments had fallen by around £78,000 at that point.*

*The markets went on to recover, as did the value of the investments that Mr B had sold. Mr B questioned the decision to sell the investments as it had effectively crystallised a significant loss. Mr B subsequently transferred his SIPP to another pension provider on 3 July 2020, and terminated his relationship with WR. I understand the value transferred was £252,110.*

*Mr B complained to WR, and subsequently referred the matter to us. One of our investigators considered the complaint. She initially didn't think that it should be upheld. She said she didn't think the time taken to act on the instructions to sell the investments had been unreasonable (5/6 hours). And given the concerns expressed by Mr B about the falling value of his investments, and in the context of the market volatility and extreme uncertainty at that time, she was satisfied the adviser had acted in Mr B's best interests and given him suitable advice to switch to cash.*

Mr B didn't accept the investigator's findings, and asked for the case to be passed to an ombudsman. The investigator asked WR for information it had recorded about Mr B's attitude to risk. It provided copies of Personal Fact Finds that had been completed for Mr B.

The investigator subsequently sent a second assessment of the complaint. She said, on reflection, she didn't think the funds that Mr B had been invested in were suitable for his cautious attitude to risk. She said prior to the switch to cash Mr B had been invested as follows

Holding	Structure	Asset Class
3I Infrastructure	Investment Trust	Equity**
Bluefield Solar	Investment Trust	Commodity/Energy
GCP Infrastructure	Investment Trust	Corporate Bond*
Greencoat UK Wind	Investment Trust	Commodity/Energy
The Renewables INF	Investment Trust	Commodity/Energy

\*Underlying industry – energy (renewable)

\*\* Underlying industry

The investigator said the portfolio was invested in a small number of holdings which were highly concentrated and focussed on growth industries such as renewable energy and IT infrastructure. She said she didn't think the investments were suitable for Mr B's cautious attitude to risk.

The investigator said she was satisfied that Mr B wanted advice about what to do with his SIPP in March 2020. She said he was a cautious investor, and was clearly troubled by the fluctuating value of his fund. She said she didn't think Mr B should have been advised to switch to cash in March 2020, but instead should have been advised to stay invested but move to more cautious funds in line with his attitude to risk. So she didn't think the advice to switch to cash had been suitable in that context, and that she now thought the complaint should be upheld.

WR didn't agree with the investigator's revised findings. It said, in summary, that the investigator had issued an adjudication unequivocally dismissing both complaints, saying that for a cautious investor the advice to sell was correct at the time. But she had subsequently come to the opposite conclusion. It said it didn't accept that the 'infrastructure' investments held prior to the switch were inappropriate, or so risky that they fell outside of Mr B's appetite for risk.

WR said it had provided full written prospectuses to Mr B prior to the acquisition of the investments so that he could make an informed choice about them. It said Mr B had said, after selling the investments and despite the fall in their value, that he'd made a 6% profit on them, net of all charges. So it questioned where there was a loss?

It said although Mr B had said he was a cautious investor, he'd subsequently invested in individual shares which were high risk and volatile. It said given in March 2020 Mr B was seeking to avoid any further falls in the value of his investments, it seemed very unlikely (on the balance of probability) he would have agreed to move to lower risk holdings which were

*still exposed to risk and potential further losses. It said in the context of the high volatility, low inflationary environment, cash was the ultimate cautionary strategy for a period of time.*

*Mr B said that throughout the entire time he'd spent as a client of WR he'd made it very clear that his view on investments should always be cautious. He said he thought his investments after his time with WR "...followed what I thought was a cautious path."*

*WR said regardless of exactly how Mr B subsequently invested his funds, it was clear that he'd made his own decisions and did not base them on any advice it had provided. It said once Mr B terminated the relationship with WR, it had no ongoing responsibility for any investment decisions that he made.*

*WR said it didn't agree it should have advised Mr B to move to lower risk funds, nor that given his concerns at the time, he would have followed such advice. His concern was to avoid any further fall in the value of his holdings.*

### ***What I've provisionally 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.*

*WR has provided copies of Personal Fact Finds completed over a period of time. Mr B is consistently recorded as "Cautious" for pensions. Within that category he is rated as 2 or 3 on a scale of 1-5, with 1 being the highest risk. So Mr B was not only cautious, he was broadly in the middle of that category.*

*I've looked at the investments that Mr B's pension was invested in at the time that he switched to cash. All the investments currently appear to be traded on the FTSE 250, and their own literature describes their risks as being at least average, and some slightly above average. As the investigator said, they were invested in a small number of holdings with a narrow focus. In my view they were clearly not aligned to the cautious degree of risk that Mr B had said he was willing to take; they presented a greater degree of risk and weren't suitable.*

*So I don't think it's surprising that Mr B was worried about the significant falls in the value of the investments during the early part of 2020. I accept that there was significant market volatility across the broad spectrum of asset classes. Even funds/assets considered to be at the safer end of the risk spectrum suffered falling values. But not to the same degree as those exposed to greater degrees of risk.*

*So I think what's key is to consider the matter in that context; effectively that Mr B was exposed to a greater degree of risk than he'd agreed to accept. If he'd been invested in assets exposed to a cautious degree of risk they would still have fallen in value. But not to the same degree as the mix of funds he was invested into. I think Mr B would still have been concerned. But the value of his SIPP wouldn't have fallen by the same amount as when WR advised the switch to cash.*

*Mr B has complained about WR's actions during the period January to March 2020. I understand Mr B had a meeting with the firm on 30 January 2020 where his investments were discussed in the context of the potential impact of Covid. So I think WR had the opportunity at that point to review the degree of risk that the funds presented in relation to the degree of risk that Mr B was willing to take. Had it done so, it should have identified there was a mismatch between Mr B's cautious risk profile and the degree of risk presented by the funds he was invested into.*

*However Mr B had already been invested in these funds (or similar type) for several years by January 2020. As I said above, WR has supplied copies of a number of Personal Fact Finds completed over a number of years showing Mr B was a cautious investor. So WR had had a number of opportunities to identify that the funds weren't suitable.*

*It seems to me that WR's failing here, that came to light during the period of volatility in 2020, was to advise Mr B to invest in the mix of funds it recommended in the first place (in 2015/16). In my view Mr B, with suitable advice, should have been invested in cautious funds all along.*

*At the time that the original advice was given the Financial Conduct Authority's Conduct of Business Sourcebook rules (COBS) required WR to provide suitable advice.*

*COBS 9.2.1 provided, when a firm was assessing suitability:*

*(1) A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client.*

*(2) When making the personal recommendation or managing his investments, the firm must obtain the necessary information regarding the client's:*

*(a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;*

*(b) financial situation; and*

*(c) investment objectives;*

*so as to enable the firm to make the recommendation, or take the decision, which is suitable for him.*

*And COBS 9.2.2 provided:*

*(1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:*

*(a) meets his investment objectives;*

*(b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and*

*(c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.*

*(2) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.*

*(3) The information regarding the financial situation of a client must include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.*

*Therefore in order to provide suitable advice, WR needed to have a reasonable basis for believing that its recommendation met Mr B's investment objectives – which included his preferences regarding risk.*

*My understanding is that Mr B was originally invested in the following four infrastructure funds.*

- *HICL Infrastructure Company*
- *3i Infrastructure Plc*
- *GCP Infrastructure Investments*
- *John Laing Infrastructure*

*The key features documents for each of the first three funds give a risk rating of 4 or 5 out of 7 – so all above average risk. The objective for the John Laing investment said:*

*The Company invests predominantly in the equity and subordinated debt issued with respect to infrastructure projects that are predominantly PPP projects. The Company predominantly invests in projects that have completed construction and that are in their operational phase. Investment capital in projects that are under construction will be limited to 30% of the Total Asset of the Fund.*

*Again this fund presented material risks. I appreciate that the risks presented by funds can change over time. And if WR has evidence showing the risks were lower in 2016 they can present that evidence for consideration. But in my view the overall degree of risk presented by the four funds in 2016 was clearly greater than the cautious degree of risk that Mr B had agreed to take.*

*I don't know what the value of Mr B's pension would have been through the relevant period from January 2020 to when he transferred to another provider had he been invested in a cautious manner from the off (2016). But I think the logical starting point is the fact that Mr B shouldn't have been invested in a mix of funds presenting a greater degree of risk than he'd agreed to take in the first place. And any subsequent 'losses' flow from that original unsuitable advice.*

*Accordingly, like the investigator, I think Mr B's complaint should succeed. However I think fair compensation should be calculated using the original investment date as the starting point. I understand the first investments were settled on 15 January 2016. So I think this is the appropriate 'start date'. Mr B decided to switch his SIPP to another provider which I understand was completed on 3 July 2020. From this point he was making his own investment decisions, and not relying on any advice from WR. I think this is the appropriate 'end date' for the calculation of any 'losses', particularly given the context outlined below.*

*I recognise that after Mr B transferred away from WR he chose to invest in a small number of single company shares; for example Amazon and Apple. On the one hand, this might indicate that Mr B wasn't actually a cautious investor. Whilst I accept that these are well known brands, investing directly in these types of shares presents significant risks, and well above a cautious risk profile.*

*However on the other, Mr B has said his understanding was that he was investing in a cautious manner after he left WR. WR's recommendation letters record that Mr B had a reasonable understanding of investments. However it appears that he wasn't aware that the funds he was invested in through WR presented a greater than cautious degree of risk. And I think his correspondence with WR following his switch to cash appears to show he wasn't aware that the success or failure of WR's switch to cash could only be seen with the benefit*

*of hindsight; WR (or anybody else) couldn't know for certain how the market was going to move.*

*WR maintains that the funds it recommended for Mr B were aligned to the cautious degree of risk that Mr B was willing to take. I think this shows in itself that assessing risks can't be a straightforward matter for a non-professional. In my view Mr B's evidence that he understood he was investing in a cautious manner after he left WR is credible. I think this is consistent with Mr B being recorded as a cautious investor throughout his relationship with WR. And with Mr B accepting he was invested in a cautious manner when being told that by WR in its correspondence with him.*

*So taking all the above into account, I think Mr B's complaint should succeed.*

*For completeness, I agree with the investigator that WR carried out the switch to cash itself in a timely manner.*

### ***My provisional decision***

*My provisional decision is that I uphold Mr B's complaint.*

I went on to set out how I thought WR Simon Ashley Silver Independent Financial Advisor Limited should calculate and pay any compensation due to Mr B.

I asked Mr B and WR to send me any further evidence or arguments that they wanted me to consider before I made my final decision by 17 November 2022.

Mr B said, in summary, that apart from the severe mental anxiety the situation had caused him, he had nothing further to add.

WR asked for extra time to send in its response. It was given until 1 December 2022. It made further requests for more time, and the response date was extended again to 8 December, and then to 14 December 2022. However no further evidence or arguments have been received to date.

### **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 think WR has had ample opportunity and time to provide its response to my provisional decision. Having considered all the available evidence and arguments presented to date, I've seen no reason to depart from my provisional decision that the complaint should be upheld.

### **Putting things right**

I order that WR Simon Ashley Silver Independent Financial Advisor Limited calculates and pays any compensation due to Mr B on the following basis.

### **Fair compensation**

In assessing what would be fair compensation, my aim is to put Mr B as close as possible to the position he would probably now be in if he'd been suitably invested from 15 January 2016.

I think Mr B would have invested differently. It is 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 given Mr B's circumstances and objectives when he invested.

### **What should WR Simon Ashley Silver Independent Financial Advisor Limited do?**

To compensate Mr B fairly WR should:

- Compare the performance of Mr B's investment 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.
- WR should also pay any interest set out below.
- If there is a loss, WR should pay it into Mr B's pension plan, to increase its value by the amount of the compensation and any interest. WR's payment should allow for the effect of charges and any available tax relief. WR shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.
- If WR 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 actual or expected marginal rate of tax at his selected retirement age. I think Mr B is likely to be a basic rate taxpayer at the selected retirement age, so the reduction should equal 20%. However, if 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%.
- Income tax may be payable on any interest paid. If WR considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr B how much it's taken off. WR 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 interest from HM Revenue & Customs if appropriate.

In addition, WR Simon Ashley Silver Independent Financial Advisor Limited should:

- Pay Mr B £300 for the distress and inconvenience I'm satisfied the significant loss of his pension caused him.
- Provide details of the calculation to Mr B in a clear, simple format.

investment name	status	Benchmark	from ("start date")	to ("end date")	additional interest
SIPP	Transferred to another provider	for half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date first investments were made - 15 January 2016	Date of transfer to new provider – 3 July 2020.	The same benchmark on any loss calculated as at the end date to the date of a final decision. Then 8% simple a year from the date of decision to date of settlement if settlement isn't made within 28 days of WR being notified of Mr B's acceptance of the decision

### Actual value

This means the actual amount 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.

To arrive at the fair value when using the fixed rate bonds as the benchmark, WR should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. It should apply those rates to the investment on an annually compounded basis.

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

Any withdrawal 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 WR total all those payments and deduct that figure at the end to determine the fair value instead of deducting periodically.

### Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr B wanted capital growth with a small risk to his capital.



- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.
- 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.
- I consider that Mr B's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr B into that position. It does not mean that Mr B would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr B could have obtained from investments suited to his objective and risk attitude.

### **My final decision**

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

I order WR Simon Ashley Silver Independent Financial Advisor Limited to calculate and pay any compensation due to Mr B as I have set out above under "Putting things right."

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 17 January 2023.

David Ashley  
**Ombudsman**