

## The complaint

Mr C complains that Apollo Pension and Investment Advisers (Apollo) recommended he invest into a number of complex, non-standard investments within his Self-Invested Personal Pension (SIPP). He subsequently invested further monies into a similar scheme outside his SIPP resulting in him losing all of his money. Mr C believes the advice was unsuitable and would like to be put back in the same position as if the investments had not taken place.

Mr C is being represented by a third party, but for ease, I'll refer to all representations as being made by Mr C.

## What happened

In November 2012, Apollo advised Mr C to move his SIPP and Group Personal Pension to a Rowanmoor SIPP. The Adviser believed it would give Mr C the opportunity to invest in alternative investments that were not available in his existing plans.

In 2013 and 2014, following advice from an unregulated firm, New Alternative Investments Ltd (NAI Ltd), Mr C invested into three unregulated collective investment scheme (UCIS) opportunities, Lomaxfind Ltd, Whitefind Ltd and Dolphin Loan Notes. He invested £30,000, £20,000 and £133,000 respectively into each. Whilst he made a profit on the Dolphin Loan notes of £124,757, he lost all his funds on the other two, resulting in a net profit of £74,754.

Mr C subsequently signed an application form to invest a further £300,000 into the Dolphin scheme in January 2019, however, this was done so outside of his SIPP which at this point, had ceased accepting UCIS investments.

In January 2020, there was a suggestion Dolphin were struggling financially and were looking to restructure their debts. In October 2020, Dolphin entered preliminary bankruptcy proceedings. It's understood from the latest published FCA commentary on the issue, investors are unlikely to get back all their original investments; Mr C's representatives have stated they envisage a total loss of his capital.

Mr C complained to Apollo in August 2020. He told them, in summary, the original advice to transfer to the SIPP was motivated by the ultimate aim of investing in a UCIS. He felt that Apollo misrepresented the UCIS investments as being safe and secure. He went on to state that as an unsophisticated investor, he was unaware of the potential for total loss, and the advice was unsuitable for someone of his investment background.

Apollo initially rejected the complaint. They said:

- As part of Mr C's risk appetite, he diversified part of his investments into non-regulated plans.
- Mr C was fully aware of the high-risk nature of the investments. He signed documentation to confirm he understood the risks associated with the investments.

- They didn't believe it was their fault the various UCIS investments had failed. They provided an explanation into each beforehand and stated they couldn't be held accountable for the deliberate failings of others.
- It was Mr C's own decision to invest in January 2019 into the Dolphin scheme. Apollo said by this point Mr C was experienced and met the Regulator's High Net Worth (HNW) requirements.
- Apollo have said Mr C invested directly via NAI Ltd, a non-regulated business and not themselves. He was given ample time to consider the investment.

Mr C was unhappy with Apollo's response. He complained to this service setting out the same concerns.

The complaint was then considered by one of our investigators. He concluded that Apollo had not treated Mr C fairly. He also said, in summary:

- Whilst Apollo may claim the investments into the SIPP were the responsibility of NAI Ltd, the Regulator's view is very different. That is to say, it's down to Apollo to make certain the investments were suitable.
- As the initial three investments had ultimately resulted in a profit, he didn't believe any redress was due in respect of that transaction.
- However, he felt the later £300,000 transaction was driven by Apollo and as such, they should compensate him for that loss.

Apollo however, disagreed with our investigator's findings. In summary, they said the investigator had not fully understood the chain of events that took place. They also said the following:

- Any investor, especially one investing for a second time, could not fail to understand the risk involved, especially where the client meets the high net worth threshold. Apollo felt Mr C understood fully what he was getting in to and it wasn't right to classify him as an unsophisticated investor, particularly where he'd invested in the same product over the last 5 years. Apollo felt that was adequate time for Mr C to become familiar with the Dolphin plan.
- The subsequent investment Mr C made into the Dolphin investment was done so without any advice from Apollo. Apollo also explained that it was made outside of Mr C's SIPP and funded from savings. They didn't think they should be held accountable for that transaction.
- Apollo said that having read the investigator's initial view around the original non-standard investments within the SIPP and the losses netting themselves off, they felt there was 'little point in debating this further'.

Our investigator was not persuaded to change his view as Apollo did not present any new arguments he'd not already considered or responded to already.

Apollo asked the investigator to pass the case to an Ombudsman to review that outcome.

After carefully considering the complaint, I issued a provisional decision explaining that I planned to uphold Mr C's complaint. My decision was broadly along similar lines to the initial

view provided by the investigator although I added wider perspective and revised the redress.

### My provisional decision

I think there's two important elements at the heart of this complaint, whether it was right for Apollo to invest Mr C's SIPP fund into the non-standard investments originally and, whether they should be held accountable for his subsequent, follow-up investment into the Dolphin product, that was made outside his SIPP, which then became illiquid.

### Investments in 2013

Apollo will be aware that in June 2013 the FCA published an alert notifying firms it was to ban the promotion of UCIS to the vast majority of retail investors in the UK. The alert stated that the promotion of these riskier and complex fund structures would generally be restricted to sophisticated investors and high net worth individuals, for whom those products were more likely to be suitable.

And on 28 April 2014, the FCA published another alert which stated it believed:

*'...pension transfers or switches to SIPP's intended to hold non-mainstream propositions are unlikely to be suitable options for the vast majority of retail customers. Firms operating in this market need to be particularly careful to ensure their advice is suitable.'*

*"In the cases we have seen, customers' existing arrangements were invariably traditional pension plans invested in mainstream funds or final salary schemes, with the customer generally having no experience of non-mainstream propositions and many having very limited experience of standard investments."*

*"The new arrangements firms proposed were to transfer or switch the customers' pension funds to a SIPP, with a view to investment in non-mainstream propositions, which were typically unregulated, high risk and highly illiquid investments. Some examples of these investments are overseas property developments, store pods and forestry. Such transfers or switches are unlikely to be suitable for the vast majority of retail customers."*

This I believe, made the Regulator's view very clear that UCIS recommendations would only be appropriate for a select few individuals.

Apollo have said whilst they managed the SIPP for Mr C, the non-regulated investments were facilitated by NAI Ltd, a firm not authorised or regulated by the FCA. Both Apollo and NAI Ltd are owned by the same individual.

Whilst I don't intend to focus too much on the original pension transfer advice and initial UCIS investments as Apollo have stated there's 'little point in debating this further', I think it's important to make a number of observations that are of particular relevance to the complaint.

The Regulator has been clear that where a pension transfer is being undertaken, it can't be done in isolation from the underlying investments. They've stated Advisers must fully satisfy themselves any investments meet the customers stated aims and objectives. That's even when the investments are being arranged by someone else, as is the case in this instance, via NAI Ltd. Having read the original suitability letter from November 2012, the primary justification for moving from Mr C's existing SIPP with AJ Bell to Rowanmoor, was to allow Mr C to invest in non-stock market investments. Investments into the three UCIS's then shortly followed thereafter.

Apollo was required to know its client and give suitable advice. It was also under a duty to act in the best interests of Mr C. The Apollo adviser recommending the SIPP was also the agent for NAI Ltd. I think the adviser must have known that the investment was to be made in the three UCIS plans. The Financial Services Authority (FSA) issued an alert in January 2013 and said: *"It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating"*. Although this alert was issued after the advice was given to Mr C, I think it represents the FSA's view of how the adviser should have assessed the suitability of any advice given. I don't think the adviser could give suitable advice to recommend a SIPP without considering the investments that would be made into it. In this case I think the adviser was aware that the recommendation he made whilst working for Apollo would allow Mr C to invest in the three UCIS plans. The three UCIS products were high risk unregulated funds.

The funds are not subject to regulation in the same way as more mainstream funds would be. These types of funds are typically only suitable for very experienced and sophisticated consumers. I've seen nothing to persuade me that Mr C should have been categorised as sophisticated. Despite issuing a suitability letter recommending the SIPP transfer, Apollo never actually confirmed Mr C's attitude to risk or capacity for loss within it.

In their communications with this service, Apollo have made much emphasis of Mr C's wealth and experience in demonstrating the suitability of the underlying investments. Apollo have said that any investor, especially one investing for a second time, could not fail to understand the risk involved, especially where the client meets the high net worth threshold. At this point, it's worth noting that just because a consumer meets the Regulator's definition of a high net worth client, it doesn't remove the adviser's obligation to still demonstrate what they're arranging is suitable and meets their stated needs. It also doesn't by default enable them to be categorised as experienced.

I think our investigator was correct in considering the three UCIS investments as one transaction when determining if Mr C had lost out on the initial SIPP investments. Calculations show that whilst Mr C lost his all of his investment on two of the UCIS investments, the third resulted in an overall net profit. I'm therefore satisfied in respect of that part of the complaint, he's not suffered a financial detriment.

#### Dolphin investment in 2019

Turning to the subsequent Dolphin investment funded from savings that was made outside the SIPP in January 2019; I need to consider whether Mr received advice, and if so, which firm was responsible for that advice. And whether Mr C ought to have been aware there were high risks linked to this nature of investment. This last point is particularly relevant given the original funds he invested in, Lomaxfind Ltd and Whitefind Ltd, lost all of their value. I suspect Mr C may have in part, been blinded by those risks given he doubled his original investment in Dolphin and that was more than likely, one of the motivators for him wishing to invest further.

Apollo have said that as Mr C was investing for a second time into a UCIS, he could not fail to understand the risk involved, especially as he'd invested in the same product over the last 5 years. Apollo felt that was adequate time for Mr C to become familiar with the Dolphin plan. However, I'm not wholly convinced it's as simple as that and I'll explain why.

Whilst there's no doubt Mr C was provided with generic documentation that highlighted the risks of the Dolphin investment, it's important to acknowledge it's incumbent on consumers to read that literature so they're clear about what they're entering in to. However, it's also

important to acknowledge wider information that may have helped shape the consumer's decision making.

On 13 January 2019, Apollo sent Mr C an email about Dolphin. It states, (text in bold is my emphasis):

*"I met with Dolphin on Friday as part of my regular meetings to keep in touch and updated as to how the group is performing. When we last spoke, I was under the impression that the current rates for new business would only be available to the end of December. They would be reduced to as low as 7%. **This is a reflection that they are in a strong financial position and do not need to pay high rates to attract investment business**".*

*"**So, what we have is a short window of literally 'buy while stock last'**. The current rates are 11% pa for two year investments and 12% per annum for five year investments. It is very hard to place Dolphin investments with SIPP firms now; there is only one provider who accepts them as many have changed their criteria. **We do place most investments now directly outside of a pension. The process is very simple and easy.** Your original loan note paid an average of 13.8% per annum but back then they had no track record and were new to the UK. **Now they are very sound and established**".*

*"When we spoke last, you did mention you were very liquid and was considering some kind of foreign exchange transaction. I do not know if you proceeded with this or held back for a while. How, **I would suggest that an investment outside of a SIPP would be a good idea given that you are familiar with Dolphin and the current rates are still highly attractive.** There are fees or charges to pay and the return is clean, ie no cost. **Given that the markets seem to be entering a volatile bear market, the high proven return Dolphin pays is attractive and has no volatility at all.** As I mentioned, they can issue loan notes in Euros and USD and your funds will be converted on the day of receipt. You could keep your funds in your chosen currency upon maturity and switch back to sterling when it suited you".*

*"If you were minded to proceed with an investment, all that needs to be completed is a signed reservation form (expression of interest) and for this to be received by 31<sup>st</sup> January. The actual funds do not need to be sent until the end of March at the latest".*

*"Please let me know if you might wish to consider this, or you wish to discuss this in a little more detail".*

It's my view that by stating Dolphin are in a *strong financial position, very sound and established and have no volatility*, significantly dilutes the high-risk nature of the investment. I think despite having lost all his money in Lomaxfind Ltd and Whitefind Ltd, Mr C had no reason to believe having received such a warranty from Apollo, that his supplementary Dolphin investment would be nothing but a repeat of its original success. Mr C's representatives have said it's their understanding Dolphin had defaulted on a number of their debt's even before his monies were eventually invested so, the financial warranties that Apollo provided were inaccurate and misleading.

Allied to this, Apollo created urgency in the need to act now and invest, by using the term *'buy whilst stocks last'*. Such a term creates a 'fear of missing out' mentality and typically prompts consumers to make decisions faster without having due regard to all the necessary risks beforehand. The email provides no balance, downplays risk, and overstates potential returns. It doesn't specifically explain that Mr C could lose all of his money. I'm of the view it's potentially misleading in nature.

Apollo have stated they act in a dual capacity for Mr C, both as investment and pension advisers (through Apollo) and, as a facilitator/ introducer of unregulated investment business

opportunities through NAI Ltd. Both Apollo and NAI Ltd are owned by the same individual. Apollo have explained it was NAI Ltd who were responsible for helping Mr C facilitate the subsequent Dolphin transaction rather than themselves. In suggesting NAI Ltd are responsible for the transaction, ultimately means this service does not have the jurisdiction to issue a decision on that part of Mr C's complaint.

However, I fail to be convinced that NAI Ltd were responsible for the subsequent Dolphin investment. The 13 January 2019 email was sent from the mailbox of Apollo rather than NAI Ltd. There is evidence on the file I have seen that shows when NAI Ltd have previously communicated with Mr C, they did so on their own headed paper. In addition, I have seen emails to different sources from an NAI Ltd email address. Whilst I think it's important to acknowledge the paperwork that was sent to Dolphin makes no reference to Apollo, I'm of the view it's Apollo that have driven the recommendation to invest in Dolphin.

Clearly where the same individual runs both businesses, it will always present a conflict of interest challenge but, sufficient controls must be in place to ensure that customers are clear whom they're receiving direction from. In this instance, I think it's reasonable for Mr C to conclude it's Apollo. Had the guidance been coming from NAI Ltd, I would have expected to have seen that clearly communicated to the customer. And I note that subsequent emails setting out what was required of Mr C if he wanted to go ahead with the investment were also sent from an Apollo email address with an Apollo footer.

At this point, I think it's also important to be clear about the Regulator's position on the difference between providing information, and going beyond that stage at which point, it becomes advice.

The FCA set out in its Perimeter Guidance manual (PERG) some guidance as to what could amount to advice. I think the following provisions are relevant:

#### PERG 8.2.1(G)

“In the FCA's view, advice requires an element of opinion on the part of the adviser. In effect it is a recommendation as to a course of action. Information, on the other hand, involves statements of facts or figures.”

#### PERG 8.28.2(G)

“(1) In general terms, simply giving information without making any comment or value judgment on its relevance to decisions which an investor may make is not advice.

(2) The provision of purely factual information does not become regulated advice merely because it feeds into the customer's own decision-making process and is taken into account by them.

(3) Regulated advice includes any communication with the customer which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the customer's decision whether or not to buy or sell.

(4) A key to the giving of advice is that the information:

(a) is either accompanied by comment or value judgment on the relevance of that information to the customer's investment decision; or

(b) is itself the product of a process of selection involving a value judgment so that the information will tend to influence the decision.”

PERG 8.28.5(G)

“A key question is whether an impartial observer, having due regard to the regulatory regime and guidance, context, timing and what passed between the parties, would conclude that what the adviser says could reasonably have been understood by the customer as being advice.”

PERG 8.28.6(G)

“An explicit recommendation to buy or sell is likely to be advice. However something falling short of an explicit recommendation can be advice too. Any significant element of evaluation, value judgment or persuasion is likely to mean that advice is being given.”

In my view the guidance makes clear that there doesn't need to be a specific recommendation and that advice can be given without saying or implying categorically that it's advice and that the client should invest.

The statements within the email:

*I would suggest that an investment outside of a SIPP would be a good idea given that you are familiar with Dolphin and the current rates are still highly attractive.*

*We do place most investments now directly outside of a pension. The process is very simple and easy.*

Combined with the fact they've then proposed an alternative way of investing, as it's become challenging to invest in a UCIS within a SIPP, go beyond the mere provision of information and in my view, meet the FCAs threshold of giving advice. The message provides a value judgment on the Dolphin investment and to conclude, I'm not persuaded by Apollo's argument that NAI Ltd are responsible for that transaction. Mr C has told this service, the email influenced his decision to proceed. In summary, I can well understand how that communication led him to take the action he did by investing in Dolphin again.

In their correspondence with the investigator, Apollo referred to a different complaint that had been submitted to this service that was of a similar nature to that of Mr C's case. In that complaint, the investigator that considered the case didn't think Apollo was involved in arranging the investment. She did not think they had done anything more than forward information about Dolphin on to that customer. Firstly, I think it's important to highlight here that this complaint was resolved following an investigator's opinion being issued; not a final decision as Apollo has suggested. And crucially, when this service looks at a complaint, each case is considered on its own merits.

In the case of Mr C, I'm satisfied Apollo went beyond the mere provision of information in that email communication with him.

Having decided that Apollo's adviser gave advice, under the Regulator's COBS rules, Apollo had a duty to demonstrate the investment was suitable for Mr C which, I'm not satisfied they did.

I've carefully considered Mr C's experience and appetite for these types of investments, one of which had gone well for him in the past. I'm not sure I agree with Mr C's submissions to

this service that he's an inexperienced investor. I can't say with any certainty he had the capacity to take risks at the level he did because Apollo didn't complete a fact-find in 2019. However, it seems to me like he was interested in taking higher risks for higher reward. He'd previously invested in two UCIS investments which had failed in the past along with his original investment in Dolphin that had gone well, so, he wasn't 'green' when it came to investments of this nature. However, I should balance that by recognising the original pension transfer advice was provided more than six years earlier. And, in the SR they sent to Mr C at the time, the risks of investing in unregulated investments weren't set out so, I can't even be certain he was ever told about the original risks. I'm inclined to believe he wasn't as that formed the basis of his complaint about the pension switch. In addition, as I've already mentioned, in their note to him in January 2019, Apollo did not cover any of the risks of this new investment. Apollo went as far to say, "...the high proven return Dolphin pays is attractive and has no volatility at all". This to me, makes the Dolphin investment sound like a low to no-risk option.

I'm unclear of how the Dolphin investment tied in with his wider wealth or, whether Mr C even qualified as High Net Worth Investor, that's despite the fact a HNW form was completed. Whilst I can't say conclusively, I have to weigh up all the factors in this case and I'm of the view, it's more likely than not, he wouldn't have invested had Apollo not put the idea forward to him and provided him with all the facts. I say that because within the email Apollo sent him in January 2019, it was clear at the time, Mr C was considering investments elsewhere, in foreign currency, it was Apollo that promoted the concept of investing in Dolphin. He wasn't presented with all the key information necessary to make a balanced judgement on whether the investment was right for him. Based on the information I have, I don't believe the subsequent Dolphin investment was suitable for Mr C.

#### Responses to my provisional decision

After reviewing my provisional decision, Mr C contacted this service to confirm he accepted the decision and had no further comment to make.

Apollo replied and stated they didn't agree with my provisional decision. They said, in summary:

- It wasn't until January 2014 that the FCA introduced the category of non-mainstream pooled investments. Apollo said there is no definition of what a sophisticated investor is and therefore, it has little true meaning and provides no guidance to anyone. Apollo repeated their point that Mr C was not a first-time investor into Dolphin and therefore should've had an appreciation of the risks involved.
- Apollo questioned why Mr C chose to invest £300,000 as they say, 'no-one put a gun to his head'. They said given he was interested in investing in foreign currency, he was an experienced, sophisticated investor.
- Apollo said the two loan notes that originally failed, had done so due to a lack of ethics by the promoters and operators of the schemes.
- They went on to say, the email system of NAI Ltd wasn't working properly at the time Mr C took out the subsequent Dolphin investment, so messages were sent from the Apollo email system. They didn't agree their messages provided any warranty to Mr C. Apollo pointed to the terms that Mr C signed in 2013 along with the conflicts of interest letter he was provided with.
- Apollo have said that if redress is payable to Mr C in respect of the subsequent 2019 investment, the profit he made on earlier investments should offset any loss liability on

the later £300,000 investment.

- They went on to say, they didn't feel the provisional decision took enough account of the documentation showing Mr C's long term relationship with NAI Ltd and it wasn't themselves who put the idea to Mr C of investing, but rather the other way around. They said Apollo had only ever acted for Mr C in a retirement advice setting.

### **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.

In doing this, I've taken into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice and what I consider to have been good industry practice at the relevant time.

I've thought carefully about the further points Apollo made in response to my provisional decision and I've also looked closely at the paperwork they sent through. But I'm of the view that the fair and reasonable outcome is that the complaint should be upheld so I see no reason to depart from my provisional findings. I'll explain why.

Before I do, I should explain that I have summarised this complaint in far less detail than the parties and I've done so using my own words. I am not going to respond to every single point made by all the parties involved. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here. Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts. If there's something I've not mentioned, it isn't because I've ignored it. I haven't. I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome.

I appreciate Apollo disagrees with the 2013 investments being classed as UCIS and I note what they've said about why the two loan notes failed. But I don't intend to comment further on these points as I've determined that Mr C hasn't suffered a financial loss as a result of the advice provided in 2013. Instead I've focused on the main arguments Apollo have raised in response to my provisional findings regarding the investment in 2019.

Apollo say no authority has ever established what the definition of an unsophisticated investor is. However, this is a term Mr C has used to describe himself; it isn't a regulatory term. The FCA does provide a definition of a certified sophisticated investor and a self-certified sophisticated investor, in COBS 4.12.7 and 4.12.8. I don't intend to set these definitions out in full here as they can be found on the FCA website but I'm satisfied that Mr C didn't complete the necessary certificates and so can't be considered a Sophisticated Investor. As mentioned in my provisional findings, Mr C completed a High Net Worth Investor form. However, given the lack of information obtained in 2019 regarding Mr C's circumstances, I remain unsure as to whether he actually qualified as a High Net Worth Investor. But even if he did, I don't think that means the Dolphin Investment was suitable for him.

Mr C signed an application form to invest a further £300,000 into the Dolphin scheme in January 2019; that was after the guidance from the FCA around UCIS investments in 2014 was issued. However, as I've already said in my provisional decision, just because a consumer may meet a particular regulatory definition, it doesn't by default mean a product is suitable for them. That's up to the adviser to ensure it meets the customer's current and ongoing needs.

In July 2010 the FCA issued guidance about unregulated investments in a 'Good and Poor Practice report'. This contained examples of good practice in relation to unregulated investments, for example where a firm had robust controls in place and limited client exposure to 3% to 5% of their portfolios, where those clients had been assessed as being suitable for unregulated investments. An example of bad practice given by the FCA was where up to 100% of a client's holdings were invested in a single UCIS. It therefore follows that I think it should've been clear to Apollo in 2019, the regulator's view on having such a large concentration of a customer's monies in a limited number of UCIS funds.

Apollo have questioned why Mr C chose to invest £300,000. They said given he was interested in investing in foreign currency, he was an experienced, sophisticated investor. It seems to me there's a big difference investing in foreign currency which, whilst it's exposed to exchange rate risks is in effect, deposit based and easier to understand than an unregulated collective investment scheme. Mr C went to Apollo to take advice. For the reasons I've already explained in my provisional decision, it's my view they're responsible for the transactions that followed. The correspondence I've referred to in my provisional findings makes it clear they promoted the subsequent UCIS investment to him. I'm not convinced he would've gone ahead with the UCIS investment had Apollo not promoted it to him.

Apollo didn't agree their messages in 2019 provided any warranty to Mr C. And it pointed to the terms that Mr C signed in 2013 along with the conflicts of interest letter he was provided with. Whilst I accept Mr C was subsequently sent further correspondence in 2019 about the Dolphin investment, I think given the conflicts of interest warnings he received were 6 years earlier, that's unlikely to have been very clear to him at the time of the subsequent transaction. But, as I've already explained, I think Apollo's email from January 2019 to Mr C was misleading and diluted the risks he was taking on anyway. Apollo has also said that this email was only sent from Apollo because NAI Ltd's email system was down at that time. However, there was nothing in the email to explain this and the email wasn't just sent using the Apollo email address, it also included the full signature for Apollo, including its regulatory details. So I'm satisfied that it was Apollo that provided the recommendation to invest in 2019.

Apollo didn't feel the provisional decision took enough account of the documentation showing Mr C's long-term relationship with NAI Ltd. They said it wasn't themselves who promoted the idea to Mr C of investing, but rather the other way around. They said Apollo had only ever acted for Mr C in a retirement advice setting. I'm still not convinced by Apollo's contention that it was Mr C that drove the subsequent Dolphin investment. As I've already explained, their email from January 2019 suggests it was themselves who promoted the investment. Also, whilst their paperwork from November 2012 shows separate investment advice would follow the original pension switch recommendation, there's no doubt Apollo are responsible for the UCIS investments that Mr C found himself in in 2013. That's because the regulator has long held the view that when completing pension switch business, advisers are ultimately responsible for the suitability of the investments that follow. The regulator confirmed their position in January 2013, that was the same time the original UCIS investments were made. I have also seen nothing new to persuade me that Apollo weren't responsible for the subsequent Dolphin investment in 2019.

Apollo said that if redress is payable to Mr C in respect of the subsequent 2019 investment, the profit he made on earlier investments should offset any loss liability on the later £300,000 investment. The £74,754 profit Mr C made from the original three UCIS investments of 2013 and 2014 came about as a result of the pension advice he was provided. I decided to treat those three transactions as one when calculating the redress because they all related to retirement planning advice and were undertaken broadly at the same time. It therefore followed as he had made a profit, no redress was required in respect of those three pension UCIS investments. However, the subsequent £300,000 in 2019 was transacted outside of

his pension and the monies invested six years later so, I'm not persuaded to treat the later loss redress calculation as a single transaction. Also, the profit Mr C made on the maturing Investec structured product came about from an investment he originally made in 2009. I don't think it's reasonable to attribute the losses of investment made 10 years later to the profits of an entirely unlinked investment a decade earlier.

I've considered the additional points that Apollo have raised. As there is no new information to consider it follows that I have reached the same conclusions for the same reasons as I did in my provisional decision, the details of which I have set out above and I therefore require Apollo Pension and Investment Advisers to put things right in the manner I've set out below.

### Putting things right

In assessing what would be fair compensation, I consider that my aim should be to put Mr C as close to the position he would probably now be in if he had not been given unsuitable advice.

I think Mr C would have invested differently. It is not possible to say *precisely* what he would have done, but I am satisfied that what I have set out below is fair and reasonable given Mr C's circumstances and objectives when he invested.

### What should Apollo do?

To compensate Mr C fairly, Apollo must:

- Compare the performance of Mr C's 2019 investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investment. If the *actual value* is greater than the *fair value*, no compensation is payable.
- Apollo should also pay interest as set out below.

Income tax may be payable on any interest awarded.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Dolphin	Still exists but illiquid	FTSE UK Private Investors Income Total Return Index	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

### **Actual value**

This means the actual amount payable from the investment at the end date.

If at the end date the portfolio is illiquid (meaning it could not be readily sold on the open market), it may be difficult to work out what the *actual value* is. In such a case the *actual value* should be assumed to be zero. This is provided Mr C agrees to Apollo taking ownership of the Investment, if it wishes to. If it is not possible for Apollo to take ownership, then it may request an undertaking from Mr C that he repays to Apollo any amount he may receive from the investment in future.

### ***Fair value***

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

### **Why is this remedy suitable?**

I have chosen this method of compensation because:

- Mr C wanted Income with some 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 a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be 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 C's circumstances and risk attitude.

### **My decision**

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend that Apollo Pension and Investment Advisers pays the balance.

**Determination and award:** I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Apollo Pension and Investment Advisers should pay the amount produced by that calculation up to the maximum of £160,000 plus any interest set out above.

**Recommendation:** If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that Apollo Pension and Investment Advisers pays Mr C the balance plus any interest on that amount as set out above.

If Apollo Pension and Investment Advisers does not pay the full fair compensation, then any portfolio currently illiquid should be retained by Mr C. This is until any future benefit that he may receive from the portfolio together with the compensation paid by Apollo Pension and Investment Advisers (excluding any interest) equates to the full fair compensation as set out above.

Apollo Pension and Investment Advisers may request an undertaking from Mr C that either he repays to Apollo Pension and Investment Advisers any amount Mr C may receive from the portfolio thereafter or if possible, transfers the portfolio at that point.

**My final decision**

I uphold the complaint. My decision is that Apollo Pension and Investment Advisers should pay the amount calculated as set out above. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 15 February 2023.

Simon Fox  
**Ombudsman**