

## The complaint

Mr N complains about unsuitable advice from Tier One Capital Ltd to invest in a construction project, which was a private funding circle (PFC) investment. He says when he wanted his money returned he was told this wasn't possible.

## What happened

Mr N became a Tier One client in 2015. Mr N's circumstances at that time were noted as follows:

- he was aged 44, married and had two children;
- he was a company director, receiving a yearly salary of £12,000 and dividends of £60,000;
- he owned his home worth £400,000, and had savings of almost £150,000;
- he had experience of commercial/buy-to-let property, but no other significant investment experience.

An attitude to risk questionnaire was completed, which recorded Mr N's attitude to risk as 'highest medium'.

In April 2015, he was advised to invest £25,000 into the WA project. This was to be part of a syndicated loan of up to £2.75 million, which would be used to support the construction of new build homes. It was a two-year loan paying quarterly interest at 10% per year.

This investment was successfully redeemed. Then in February 2018, Tier One recommended that Mr N reinvest the £25,000 into the project, which he agreed to. This was again part of a syndicated loan, this time up to £5 million.

In January 2020, Mr N complained to Tier One. He said his original investment contract was for two years, he'd asked for his funds to be returned, and it wasn't acceptable that he was told he had to keep extending the loan.

By this point the project had begun to experience difficulties, which affected interest payments on the loan and ultimately the return of his investment to Mr N.

Tier One issued a final response letter in August 2020. It acknowledged there had been gaps in the sales process with regard to record keeping. Tier One suggested delaying the resolution of the complaint until the project had finished, so there would be a clearer picture of what losses had been incurred. Alternatively, Tier One said it could work on the basis of an assumed loss of 40% - taking account of the interest already been paid, it said this equated to a loss of around £286. Tier One offered to pay this, together with £1,000 as a gesture of goodwill.

Mr N wasn't satisfied with the response and referred his complaint to this service. When replying to our service, Tier One said the advice given to Mr N had been suitable but our investigator thought the complaint should be upheld. He said:

- This was an unregulated investment. This type of investment could be recommended to high net worth individuals and self-certified sophisticated investors but Mr N didn't

appear to meet the criteria for either of these.

- The regulator advised that unregulated investments should not make up more than a very small part of an investor's portfolio, and Tier One's own guidelines didn't recommend investments such as this to amount to more than 30% of the total invested, but Mr N had other funds in unregulated investments and this investment would take him well above these guidelines.
- So Tier One should not have recommended this investment.

The investigator recommended that Tier One carry out a calculation to compare the performance of the 2018 investment with a benchmark to see if Mr N had suffered a loss and, if he had, to compensate him for that.

Tier One didn't agree with the investigator's view. I won't set out its comments in full, but in summary they included:

- The risks were all explained to Mr N and he accepted them, both when he made the initial investment in 2015 and again in 2018 when he decided to reinvest the funds after the initial investment had been successful.
- The summary of Mr N's circumstances wasn't accurate; he had assets of £1.14m and investable assets of over £740,000, so he was both a high net worth and sophisticated investor. The investment amounted to 2.2% of Mr N's total assets and 3.3% of his investable assets – well within the regulator's guidelines.
- It's likely Mr N's loss will amount to about 10% of his investment of £25,000, equivalent to 0.17% of his total assets.
- Mr N made various investments both personally and in his business capacity, and was a frequent investor in unlisted companies, including at least one such investment in 2015, before he signed the high net worth and sophisticated investor certificate confirming he met the criteria for these. It complied with all regulatory requirements about categorising him in this way.

The investigator considered Tier's One's comments but still thought the complaint should be upheld. He said:

- His figures were based on the client asset summary, which included Mr N's holdings in 2015 and 2018.
- The assets Tier One had referred to included Mr N's home, which wouldn't be regarded as 'investable' – and nor would an investment property, which was referred to as Mr N's parents' house, or the shares in Mr N's business which couldn't easily be sold without any impact on his business.
- Based on the client asset summary document and review letter, Mr N's investable assets were around £524,000 and the amount held in private funding circle investments was £175,000 – or 33%. With that level of exposure to this type of investment, further investments of this type were not suitable.
- Although by 2018 Mr N could be regarded as a high net worth or sophisticated investor, the advice was nevertheless unsuitable.

As no agreement was reached, the complaint was passed to me to determine. I issued a provisional decision in which I agreed that the complaint should be upheld, but with a slightly different remedy. I set out my reasoning as follows:

*Tier One gave Mr N advice about his investment. To do this, it needed to gather enough information about his circumstances to be able to advise, and ensure its recommendations were suitable for him.*

*Mr N completed a questionnaire in 2015. This recorded his attitude to risk as 'highest medium'. His answers to the questions indicated he was prepared to take some risk in order to achieve investment gains. But he said he could only stand to lose a very small amount of the investment – recorded as "None or very limited (0-5%)".*

*Mr N's total assets were over £1m. but that included his home and other assets that were not liquid and couldn't easily be sold, including for example shares in his company. The assets that were investable amounted to around £525,000. I agree that by 2018 he could be considered a high net worth investor, and he did have a range of investments including other unregulated investments. I also agree the information provided to him included warnings about the risks involved. But providing risk warnings doesn't mean an unsuitable investment becomes suitable.*

*Unregulated investments don't provide the same protection as regulated investments, such as the cover given by the Financial Services Compensation Scheme. And the nature of such investments means they are likely to be more volatile or have liquidity issues. The suitability report for this project highlighted some of the risks, including that the borrower might fail in its obligatory payments, the underlying property investments were subject to changes in market value and, as there was no secondary market, the investment couldn't be traded easily.*

*The regulator has said unregulated collective investment schemes ('UCIS') are rarely suitable for more than a small share of an investor's portfolio. Even if this project didn't meet the definition of a UCIS it was unregulated and shared some of the risks of a UCIS, so I think the same principles apply. Mr N had other unregulated investments. The level of these taken together was much higher than the regulator's guidelines and higher than Tier One's own guideline of 30%.*

*I appreciate Mr N had business experience and that by 2018 he had a range of investments through Tier One. But these investments were based on the advice given to him. He had an investment property but this appears to have come from his family. And I note he specifically referred to the fact this investment was property based and had the security of a charge in place. He seemed to think this gave him personally some security for the loan. He made various references to the investment being asset backed. I think he found the idea of having land or properties acting as a security reassuring. But this was a syndicated loan, so Mr N had no priority over any other investors. I don't think Mr N would have understood the full risks of PFC in general. And the fact he had a portfolio of direct lending investments by 2018 actually exposed him to more risk.*

*Mr N was prepared to take some risk. Tier One says he prefers to avoid investing in stocks and shares and is more comfortable with direct lending due to its asset-backed nature. It also says Mr N fully understood how the security was held. But as I've said, he thought this investment gave him some personal security when that wasn't the case. From the outset, this was a higher risk, non-standard and unregulated investment. Taking into account his circumstances and the level of exposure he had to high risk unregulated investments, I don't consider it was suitable for him. And I don't think he would have invested in this if he hadn't been advised to do so. This includes the investment in 2015 and 2018.*

*I think it's fair that any gains and interest payments from the initial £25,000 investment in April 2015 are taken into account when calculating redress as they are linked, and my award allows for this.*

*I set out in detail the directions I intended to make for Tier One to carry out a calculation of loss. I said Mr N's first investment in 2015 was successful and he received interest payments – it was the investment in February 2018 which may cause losses. But the calculation should include all his gains and losses from the WA investments as they all need to be taken into account; with suitable advice he wouldn't have earned any interest from the WA investments.*

I said to compensate Mr N, Tier One should compare the value of Mr N's investment in the project with a benchmark, and pay the difference between the fair value and the actual value of the investment.

### Replies to the provisional decision

Mr N has replied to confirm he accepts the provisional decision.

Tier One does not agree with the findings. It has referred to all the points it has made previously and provided some further comments, which I will summarise as follows:

- Mr N has another complaint and some of the comments in the provisional decision seem to be confused with that complaint.
- The provisional decision says the remedy is different from that proposed by the investigator. For completeness it would like an explanation of the differences and the reason for issuing a provisional decision.
- The provisional decision says that by 2018 Mr N had a range of investments through Tier One, based on the advice given to him. But he already held an investment portfolio before he came to Tier One for advice.
- The WA project concluded in July 2022 and Mr N received a total return of £23,237.64, creating a loss of £2,762.36. The remedy Mr N was seeking was to “*repay my investment*”. Any remedy should be based on this loss.
- It contests the proposed benchmark, which is not appropriate – it hasn’t been able to find any investment product that gives exposure to the performance of the FTSE UK Private Investors Income Total Return Index. It would like an explanation of why the redress is based on an index that it’s not possible for investors to gain exposure to when others are available, with investment products whose objective is to track the performance of these indices.

### 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’ve considered Tier One’s further comments but they don’t lead me to change my provisional decision. My view remains as set out in the provisional decision but I’ll make some additional comments as follows:

- Tier One says some of the comments in the provisional decision seem to be confused with another complaint Mr N has referred to this service - in particular the reference to Mr N saying, “*when he wanted his money returned he was told this wasn’t possible*.” Tier One says this isn’t in line with its complaint record for this matter. Mr N told us he wanted to have his funds returned “*when my initial two years was up in December 2017*” and was promised that as soon as funds were available, he would be repaid, but that kept getting pushed back and dragged on into 2020. These are comments he made about this investment.
- The investigator’s view was that the remedy should be based on the investment made in 2018. That may be the investment that causes a loss but I don’t think Mr N would have invested at all without the advice given to him. So any remedy needs to take into account the investment in 2015 and include any gains as well as losses for the whole period – as set out in the provisional decision. As this is different from what the investigator proposed, I issued a provisional decision to give both parties the chance to comment.

- Tier One has referred to a specific figure for the loss but as I've said, there needs to be a calculation for the whole period.
- The benchmark is a way of providing for a calculation of loss. It's not something investors can invest in, rather a benchmark that allows a comparison of investment performance. The index is a set of calculations that demonstrates performance of various asset classes. In using this, I'm not saying Mr N would have invested in a stock market tracker fund – simply that this is the sort of return he would have got with some risk to his money.

For these reasons, and the reasons set out in my provisional decision above, I consider the advice given to Mr N was unsuitable. I appreciate Mr N had some investments before he came to Tier One for advice. But the note made of his circumstances at the time said he didn't have significant investment experience. In any event, the overall level of unregulated investments taken together was much higher than the regulator's guidelines and higher than Tier One's own guideline.

The fact that he had other investments exposed Mr N to more risk. And without the advice from Tier One I don't think he would have increased his exposure to risk by making the investments in 2015 or 2018.

### Putting things right

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

With suitable advice I think Mr N would have invested £25,000 differently in April 2015 and would not have reinvested this sum in 2018. I don't know exactly where Mr N would have invested his money instead but I'm satisfied that what I have set out below is fair and reasonable given Mr N's circumstances and objectives when he invested.

As I understand it, Mr N's first investment in 2015 was successful and he received interest payments. It's the investment in February 2018 which may cause losses. His gains and losses from the WA investments all need to be taken into account, as with suitable advice he also wouldn't have made these investments or earned any interest from them.

To compensate Mr N fairly, Tier One must:

- Compare the final value of Mr N's investment in the project 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.
- Pay interest as set out below.

Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
WA investment	Still exists but illiquid	FTSE UK Private Investors Income Total Return Index	April 2015	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)
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### **Actual value**

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

If at the end date any asset 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 N agrees to Tier One taking ownership of the illiquid assets, if it wishes to.

If it is not possible for Tier One to take ownership, then it may request an undertaking from Mr N that he repays to Tier One 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.

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 distribution paid out of the investments 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 to determine the fair value instead of deducting periodically.

If any distributions or income were automatically paid out into a portfolio and left uninvested, they must be deducted at the end to determine the fair value, and not periodically.

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

I have decided on this method of compensation because:

- Mr N wanted Capital growth and was willing to accept some investment risk.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is 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 N's circumstances and risk attitude.

**My final decision**

I uphold the complaint and direct Tier One Capital Ltd to pay the amount calculated as set out above.

Tier One Capital Ltd should provide details of its 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 3 March 2023.

Peter Whiteley  
**Ombudsman**