DRN-4039480

The complaint

The member trustees of the P Limited Small Self-Administered Scheme (the P Limited SSAS) (to be referred to as AD, DD, MD & PD) complained that Vobis Limited made changes to the portfolios underlying the SSAS without their explicit consent, and that this caused them losses. They would like to be compensated for the losses they have incurred as a result.

What happened

In 2017 the four Directors of P Ltd set up a pension scheme to manage their retirement funds and receive contributions. They appointed Vobis Limited to "offer advice, make recommendations and arrange investments where appropriate after we have assessed your needs."

The SSAS deed was signed individually by all four member trustees and also by AD on behalf of the company. An application was completed for a platform account to manage the investments. This recorded AD as the 'main contact' with the other three member trustees also authorised to give instructions.

In 2019 Vobis proposed some changes to the underlying portfolios. In order to allow these changes to proceed, all four members were required to sign and return a switch report detailing the changes, which they did.

On 1 April 2020 Vobis proposed further changes to the portfolio in response to the extraordinary circumstances of the Covid 19 pandemic. A switch report was produced to show the changes to the underlying funds, but with the same risk score as before (moderate, 49/150). The switch report had a signature page which said "Please be aware that we will not be able to make these changes without your express written confirmation that you wish to proceed."

There was some discussion over the recommended changes, particularly the allocation to gilts. Vobis explained that this was to help preserve capital, but the member trustees were concerned about the low potential returns.

A zoom meeting was held on 16 April between two members of the SSAS (AD & MD), a friend of theirs who had some professional financial experience (BF) and the adviser and investment manager from Vobis. Gilts were discussed again, as well as potential alternatives (including NS&I and a structured deposit). The Vobis meeting note did not record whether agreement was reached on a way forward.

Subsequently further emails were exchanged regarding potentially reducing the overall level of risk of the portfolio (from Moderate to Conservative). The adviser thought it might be a good time to do so given strong recent returns.

The Vobis adviser called AD on 20 April, but there is disagreement over what was said in the phone call. On 21 April the adviser sent an email internally instructing the change to go ahead (to a Conservative risk profile) and copying in AD and MD. He also asked for the

switch reports to be redone, but unfortunately these were not sent to the clients at the time. There is some disagreement between the parties about what exactly the member trustees knew about the portfolio changes and when.

Discussions continued, including a meeting on 4 June discussing portfolio performance, reporting and gilts. AD & MD also wanted to see transaction statements.

In July there was further communication with AD about investing cash in the scheme bank account. Vobis suggested that this should be added to the "Thematic Conservative portfolio" and the email also made clear that the suggestion was to "add to your current portfolio."

Discussions continued over the positioning of the portfolio and on some reporting issues. In September, BF emailed AD to say that about half of the portfolio was in gilts and that now was the time to consider something more risky. BF also said that Vobis had been "riding to your instructions" and Vobis responded, referring to the "conservative risk mandate."

MD & AD say that it was in September that they became aware that the switches had not been what they thought they had agreed to.

Another virtual meeting was held on 19 October between MD, AD, BF, and the adviser from Vobis. MD & AD were still trying to get clarity over performance and fees paid. Queries were also raised about a property fund that had been held in the portfolio and why another investment (outside of the pension scheme) had been suggested by Vobis for consideration.

MD & AD complained to Vobis, the core point of which was that the portfolio had been changed without their agreement. Vobis denied this aspect of the complaint but did accept that they had miscalculated fees and offered to refund the overpayment.

Since they did not agree with Vobis' response to their complaint the members brought their complaint to this service.

Our investigator thought that Vobis had not acted fairly and should seek to put the member trustees back to the position they would likely have been in if not for Vobis' actions. Vobis did not agree so the complaint was brought to me for a final decision.

My provisional decision

I issued my provisional decision on 9 March. It said:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

In deciding what's fair and reasonable in all the circumstances of a complaint, I'm required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to be good industry practice at the time.

This complaint concerns the changes to the portfolio carried out on 22 April 2020, from Moderate to Conservative. The scheme members say that they did not agree to the changes and they were not aware of the detail until much later. Vobis' position is that written permission was not required, and verbal permission was given by AD in the 20 April phone call. While there were other matters raised in the complaint, and responded to by Vobis, this is the issue on which disagreement remains, and which is also the potential cause of any losses. So for that reason this is the issue I have focused on.

What I have to decide is whether Vobis acted fairly and reasonably when they made the changes to the SSAS portfolio in April 2022. I have considered three key questions:

- *Did the members give their consent to the changes?*
- *If so, did they know what they were agreeing to?*
- *If not, when could they have become aware that the portfolio was not what they thought they had agreed to?*

The Client and Fee Agreements are silent on the need to indicate acceptance (or not) of advice, but communication could be by "whatever means are convenient to you and us." The SSAS deed says that the Trustees can "authorise any one or more Trustees to sign any document on their behalf." The application for the investment platform account holding the portfolios shows AD as the "main contact" but also says that the other three members are "authorised to give instructions."

So, contractually I think it would be possible for instructions to be given by just one of the four trustees/scheme members and by any form of communication. So AD could have theoretically given his consent to the changes in the phone call of the 20 April.

I also acknowledge that there is some evidence that AD, and to a lesser extent MD were the main contacts, with DD & PD taking a less active role. Since DD & PD were the wives of AD & MD I am not sure that this is much of a cause for concern. I think it's likely the trustees were on the same page when it came to how they wanted to invest. But historically, when making portfolio changes, all four members had provided written consent. If they had decided to delegate this authority to one of them, I think it would be reasonable to expect Vobis to keep a record of it for their own protection, but there is no such record. I can see no reason why Vobis would suddenly change their practice and now accept verbal acceptance of advice from one trustee. For their own protection and in line with their own statements to AD & MD I think they should have insisted on something in writing or by email.

Not doing this has left Vobis exposed as it's become unclear and untransparent what was agreed.

On 1 April 2020, Vobis said in an email "without your permission to trade you will NOT move into the portfolio that reflects today's circumstances;" and on 7 April Vobis mentioned "getting your confirmation to proceed."

Since there was a virtual meeting held on 16 April to discuss the proposals I think it is reasonable to conclude that neither party thought permission for a switch had been given by then. Vobis have provided a note of that meeting and AD& MD have also provided their recollections. Both sides agree that there was debate (with the members supported by BF) over the merits of holding gilts, and over alternatives. The members wanted to use a structured deposit as an alternative to gilts.

From what I have seen the meeting ended with no concrete agreement on the way forward. The adviser was looking more into the structured deposit proposal and how FSCS limits would be applied.

On 20 April the adviser wrote to them and said with regards to the structured deposit:

I suggest we start with an 85k SSAS investment and reduce the gilt exposure in the portfolios and replace with this structured deposit.

Just two and a half hours later on the same day the adviser emailed AD only, saying that he felt it was a good time to reduce risk and that he would call him at lunchtime.

The adviser says that during that phone call AD gave the go ahead to reduce the overall level of risk in all four portfolios. AD says that he cannot recall what was discussed. But the following morning the Vobis adviser sent an email internally instructing the switch to the lower risk profile, and copying in AD & MD. The instruction was to "Please trade P Limited's accounts to conservative before 10.30 thanks. Redo the switch reports."

Unfortunately there is no recording of this phone call so I cannot say for certain what was discussed and what was agreed with AD. However, it is clear that the trustees wanted to reduce the exposure to gilts and use structured deposits instead. And the earlier email from the adviser on 20 April suggests this is what he is looking to do for them. However, instead the gilt exposure significantly increased. So on balance I'm not persuaded that AD would have agreed to this in particular if this had been proposed on the call.

But the changes were instructed by Vobis to happen, and both AD & MD were copied in to the email giving that instruction. It is clear from the file that both AD & MD were engaged with the management of their portfolio, so I think it is reasonable to assume that they read the email, which mentioned the change to conservative. So I think that at this stage AD & MD knew the portfolio had changed. But they had not seen the switch report, so I can't see how they would have known exactly what they were agreeing to. Indeed, given the concerns they had previously expressed about gilts, I think on balance they might reasonably have expected the gilt content of their portfolio not to increase significantly, in the absence of anything in writing to show the new portfolios. I think they most likely thought the changes would have been in line with what was discussed previously, i.e. reduction in gilts, rather than a change quite different to the switches proposed less than three weeks prior.

Vobis have offered no other evidence that they showed the members the makeup of the new portfolio in advance of carrying out the transaction.

I think that in the absence of any agreement to the contrary, Vobis should have continued to insist on confirmation from all four members for any changes. And even if they did get valid authority from AD to proceed in the way they did, which for the reasons set out above I think is unlikely, there is no evidence that they gave enough information for him to make an informed decision, or time to confer with the other members.

COBS 9.4 of the FCA's handbook applies when a regulated firm is giving investment advice, which is the case here. It says:

COBS 9.4.1R:

"A firm must provide a suitability report to a retail client if the firm makes a personal recommendation to the client and the client:

(1) acquires a holding in, or sells all or part of a holding in:

(a) a regulated collective investment scheme"

And COBS 9.4.7R:

"The suitability report must, at least:

(1) specify, on the basis of the information obtained from the client, the client's demands and needs;(2)

(2) explain why the firm has concluded that the recommended transaction is suitable for the client having regard to the information provided by the client;

(3) explain any possible disadvantages of the transaction for the client"

Although this point has been made to them before by this service, Vobis have offered no evidence that such a report was issued. Without a suitability report, the member trustees would not have been able to make an informed decision about the advice to change the risk profile of their portfolio. Even if AD had the authority to, and did give permission by telephone to change the risk profile of all four portfolios, he was not in a position to make an informed decision because of Vobis' lack of written advice.

So I find that Vobis did not act fairly in relation to their advice to switch the portfolio from Moderate to Conservative on 22 April 2020. Vobis acted on verbal instructions without having provided full details of the recommendation.

The changes were made in April, and no objection was raised until later (September/October). Vobis have made the point that if they were unhappy with the changes, why did they not raise their concerns until later? This would have allowed Vobis to change the portfolio back, or at least to limit any possible damage caused by any misunderstanding.

So I have looked at the correspondence and other evidence in the months after the switch to determine when the members could reasonably have known the detail of their new portfolio.

The earliest evidence I have seen, and so the earliest date we can be certain that AD & MD were aware of the level of gilts was BF's email which said "aprox (sic) £250,000 in gilts" and "1/2 of your portfolio" to which the Vobis investment manager replied on 21 September 2020. From around this time AD & MD were certainly discussing their concerns over the switch with Vobis, so I can't see that they delayed raising their concerns unnecessarily once they were fully aware.

Later, Vobis accepted that the error in not sending the switch report meant that the members would not have known that the change of profile meant an increase to the gilts, but Vobis maintain that they did know the risk profile was changing. I agree. I think that AD & MD were or ought to have been aware that the portfolio had changed from Moderate to Conservative, but there is no evidence that they knew what the new portfolio held.

To summarise, while the contractual arrangements allowed in theory for instructions to come from a single member, there was no formal agreement in place to do so. AD& MD knew, or ought to have known that the portfolio had changed but I cannot see that they were properly informed of the makeup of the new portfolio. It was only later, in September, that I think they knew the level of gilts held in the new portfolio.

Vobis have made the point that they feel that they should not be held responsible for what happened after they terminated the client relationship. I understand that they would not have any control over what happened after that and the trustees were responsible in my view to change their investments if they wanted to. I've taken this account in the redress proposed.

Response to my provisional decision

Both parties have responded to my provisional decision.

Vobis accepted the provisional decision and raised no further points. The member trustees of the P Limited SSAS raised some points about the redress calculation which I have now considered. I've focused on what I consider to be the key arguments.

They say that they would have invested in the Moderate portfolio, as per the 7 April switch, but with Gilts replaced by £340,000 in the structured deposit. They did not agree with our use of the FTSE Private Investor Income Total Return index because they said it has a UK focus and is not as diversified as what they would have invested in. They also say they wouldn't have invested in the bonds which form part of the benchmark.

Finally they wanted clarification on what I meant by bringing losses up to date.
I still don't think it is clear that the P Limited SSAS would have invested £340,000 in the structured deposit. There was certainly evidence of discussion on the issue. But the evidence does not clearly show that they would have invested £340,000 in the structured deposit rather than the £85,000 they actually did (in AD's account). Nor is there evidence that the SSAS members thought the higher investment had been made, or that they continued to pursue the higher amount with Vobis. So it is not clear exactly how the SSAS would have invested, which is why the use of a benchmark is appropriate in my view.

I would reiterate that I do not think that the SSAS would have invested in the benchmark (which is not possible in any case), only that this benchmark would provide a return broadly

in line with what the scheme would have likely achieved if invested in a way that allowed for capital growth with some risk.

The suggested benchmark, the FTSE UK Private Investors Income Total Return index, is a globally diversified portfolio of assets. It is not the FTSE-100 index of London-listed companies (on which the returns of the structured deposit depended). In my provisional decision I said that I think the SSAS wanted to achieve capital growth with a small risk to their capital, so this benchmark, based on a diversified portfolio, with the addition of one year fixed rate bonds is appropriate.

The calculation I have asked Vobis to carry out assumes that the SSAS would have earned this rate of return on the full value of the portfolio from 22 April 2020 until the SSAS was no longer advised by Vobis. If this produces a loss, then Vobis must assume the benchmark return on that loss from when they stopped advising the SSAS until the date of my final decision, because any loss would have been invested and generated a return.

This is how any losses are brought up to date, but also takes account of the end of Vobis' relationship with the P Limited SSAS. So I think this is a fair outcome.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I have carefully considered the response to my provisional decision, and for the reasons already given I remain of the view I set out in my provisional decision and explained further above.

Putting things right

My aim is that the P Limited SSAS should be put as closely as possible into the position it would probably now be in if it had been given suitable advice.

I think the P Limited SSAS would have invested differently. It's not possible to say precisely what they would have done, but I'm satisfied that what I've set out below is fair and reasonable given their circumstances and objectives when they invested.

I don't think that it would be fair to say that the P Limited SSAS would have accepted the switch recommendations (to Conservative) because they had suggested alternatives to the gilts, and had already expressed concerns over this asset class. Equally we cannot say with any certainty that they would have invested more than £85,000 in the structured deposits, or how much, because although it was under active consideration, it did not proceed, and there was ample opportunity to do so. I also think that we need to be very careful about allowing hindsight to influence what we think might have happened. So I'm satisfied that what I've set out below is fair and reasonable given the member trustees' circumstances and objectives when they invested.

What must Vobis do?

To compensate the member trustees fairly, Vobis must:

- Compare the performance of the P Limited SSAS with that of the benchmark shown below. If the actual value is greater than the fair value, no compensation is payable.

  If the fair value is greater than the actual value there is a loss and compensation is payable.

- Vobis should also add any interest set out below to the compensation payable.
- Vobis should pay into The P Limited SSAS to increase its value by the total amount of the compensation and any interest. The amount paid 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 Vobis is unable to pay the compensation into the P Limited SSAS, it should pay that amount direct to the member trustees in proportion to their rights under the scheme. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount 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 the member trustees won't be able to reclaim any of the reduction after compensation is paid.
- The notional allowance should be calculated using the member trustees' actual or expected marginal rate of tax at their selected retirement age.
- It's reasonable to assume that the member trustees are likely to be basic rate taxpayers at the selected retirement age, so the reduction would equal 20%. However, if they 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%.
- If either Vobis or the member trustees dispute that this is a reasonable assumption, they must let us know as soon as possible so that the assumption can be clarified and the members receive appropriate compensation. It won't be possible for us to amend this assumption once any final decision has been issued on the complaint.
- Provide the details of the calculation in a clear, simple format

Income tax may be payable on any interest paid. If Vobis deducts income tax from the interest it should tell the member trustees how much has been taken off. Vobis should give the member trustees a tax deduction certificate in respect of interest if they ask for one, so they can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	losses brought up to date
P Limited SSAS	Still exists and liquid	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	22 April 2020	date the adviser relationship with Vobis ended	Any losses should be brought up to date by applying the same benchmark to the loss sum from the end date until the date of my final 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, Vobis 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. Those rates should be applied to the investment on an annually compounded basis.

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 from the SSAS portfolio 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 Vobis totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

Why is this remedy suitable?

I've decided on this method of compensation because:

- The P Ltd SSAS wanted capital growth with a small risk to their 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 their 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 the P Limited SSAS's risk profile was in between, in the sense that they were prepared to take a small level of risk to attain their investment objectives. So, the 50/50 combination would reasonably put the P Limited SSAS into that position. It does not mean that the SSAS would have invested 50% of their 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 the P Limited SSAS could have obtained from investments suited to their objective and risk attitude.

Calculations should be provided to the trustees in a clear and simple format.

Vobis should pay interest at the rate of 8% simple per annum on the compensation calculated from the date of my final decision until settlement if it's not paid within 28 days of us notifying them that the trustees have accepted my final decision.

My final decision

For the reasons given above, I uphold this complaint. I require Vobis Limited to take the actions detailed in the "Putting things right" section above and provide the member trustees with their calculations in a clear and simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask P and P to accept or reject my decision before 19 April 2023.

Martin Catherwood
Ombudsman