

The complaint

Miss C complains about the failure of Independently East Ltd (IEL) to provide information about and to return funds transferred to it for investment.

What happened

In June 2015 Miss C transferred £4,000 to IEL to be invested on her behalf. Miss C says she hasn't been provided with any paperwork about the investment, she hasn't received any returns and despite requests, funds have not been returned to her. Miss C seeks return of the transferred funds plus the return she believed ought to have accrued.

IEL say that Miss C was never an FCA client and did not complete any forms. Further, IEL did not keep records beyond 6 or 7 years. Further, Mr E acting on behalf of IEL said,

“ . .it should not be deemed as wrong to offer or suggest simple best guess guidance to a contact, friend or colleague on a purely private basis.

Such private conversation between two consensual individuals cannot in any way be deemed as giving full or any, FCA regulated advice – especially without the absence of any written contract with signatures . . .”

Our investigator considered the complaint, having considered the context of the relationship with Miss C's husband and IEL, the above payment trail in combination with Miss C's recollection of events balanced against the limited information from IEL, he thought a regulated activity was being undertaken by Mr E acting in his professional capacity for IEL, namely the activity of “arranging/bringing about deals in investments.” Considering all the information provided, our investigator was not persuaded that this was a “private matter.”

Given the absence of any information about the investments allegedly made and the failure to return funds, our investigator concluded that the complaint should be upheld and recommended return of the funds plus a return in line with a 50/05 benchmark plus £250 for the distress and inconvenience caused by IEL's ongoing failure to engage with Miss C about the funds.

As the parties do not agree, the matter has come to me for a final decision.

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.

On balance, I consider that it is more likely than not that Miss C was introduced to Mr E, adviser acting on behalf of IEL, through her husband as he had received investment advice from IEL. A copy of Miss C's bank statement shows that £4000 was transferred to IEL's account on 1 June 2015, which is consistent with Miss C's recollection of events that IEL was to invest the funds on her behalf.

The information provided by Miss C and her husband shows that the same correspondence email and contact number were used throughout by Mr E acting on behalf of IEL and the same bank account number and sort code. In absence of any evidence from the IEL, I am satisfied that it is more likely than not that the adviser held himself out as acting in his professional capacity when Miss C transferred funds for investment in 2015. I find that it is more likely than not that Miss C was a customer of IEL for the purposes of the events complained of.

The adviser was still in contact with Miss C and her husband as at July 2022, in response to an email asking about the whereabouts of the funds, Mr E replied asking to organise a call and stating that he had looked after the account for 7 years or 11 years according to Miss C. He went on to say,

“Other than not knowing that [Miss C] had changed her bank account – that she has now confirmed she had not told me – I am not aware that I have done anything else.

You are welcome to move to another broker and I will not ask for a ‘second chance’ but we do need to speak about the direct return of your funds.”

I find that it is more likely than not that IEL considered there was a relationship with Miss C. This email is wholly at odds with IEL’s assertion that there was simply a private relationship or no relationship. I do not consider the adviser’s account to be credible or reliable.

Mr E ran his business independently under a limited company, I’m satisfied that he was an employee of IEL and appears to have been sole director. For the avoidance of doubt, as detailed above and as found by our investigator, I’m satisfied that it is more likely than not that at all times Mr E held himself out as acting in his capacity as an adviser for IEL and the activities he was undertaking, namely arranging (bringing about) deals in investments for Miss C may fairly and properly be regarded as being done by IEL.

No alternative explanation has been advanced as to what likely happened at the time or since. I am satisfied that reasonable time and opportunity has been provided for IEL to provide further information, in the absence of any such information and noting the totality of all the information provided including consistency of Miss C’s account over time, supported by contemporaneous information addressed above, I find that it is more likely than not that IEL was arranging (brining about) deals in in investments. Whilst I’ve noted Miss C has said a recommendation was given to her, I haven’t seen sufficient evidence to show IEL was advising Miss C on investments. That IEL has failed to provide any documents to evidence a relationship does not detract from the weight of information which I have reviewed and I’m not persuaded that Mr E has given a reliable account for the reasons already addressed.

Furthermore, I’m satisfied that the complaint was brought to our service in time. It’s clear that Miss C reasonably believed that the investments had been made on her behalf and was led to believe this over time, Miss C has been clear that IEL reassured her and her husband that everything was in hand. And I’ve seen that IEL was continuing to communicate with Miss C’s husband in or around mid-2017. So, whilst a complaint was raised over six years after the funds were transferred, in my view, Miss C didn’t reasonably have cause for concern until IEL began to be evasive and failed to provide information or return the funds. In the absence of anything to the contrary I don’t think that would have been evident until July 2019 if not later.

Considering the factors in the round, I agree with the view reached by our investigator that this is a complaint our service can consider.

I am satisfied that reasonable time has been given for IEL to engage with this process and to provide information. There is no good reason for IEL not to have provided documentation about the investments it purported to make for Miss C and no good reason for failing to explain where the funds currently are especially in light of the email sent in July 2022, addressed above. Failure to provide this information is a breach of IEL's obligations to Miss C as its client as well as its obligation to co-operate with our service.

In my view, Miss C has provided a consistent account about her relationship with IEL and the funds she provided for investment. I'm satisfied that it is more likely than not that IEL has failed to provide documentation to Miss C about where funds were invested, no information has been provided about increased capital growth (the alleged aim of the investments), no returns have been received from these investments (if made) and the funds have not been returned.

As the funds haven't been returned and as information is still outstanding, IEL hasn't established that it is likely that the investments were made. On balance, I'm not persuaded that IEL provided clear, fair, and not misleading information to Miss C about the investments to allow her to make an informed decision. Miss C was led to believe the funds would be invested to generate higher growth and there's nothing to show any return at all and no explanation about this. Had clear information been provided, I'm not persuaded that Miss C would have transferred her funds.

It's also clear that Miss C has been troubled by not having access to these funds and not having any information as to the funds' whereabouts. She has been put to the trouble of chasing for information which ought reasonably to have been available to her from the outset.

On the basis of the information provided, it is my view that it would be fair and reasonable to uphold this complaint.

Putting things right

In assessing what would be fair and reasonable, I consider that my aim should be to put Miss C as close to the position she would probably be in if the money she transferred to IEL had been invested as agreed.

It's fair and reasonable for IEL to return Miss C's funds of £4000 and its plain from the email of 2022 that IEL recognised this. But as these funds should have been invested, I've addressed below the benchmark return to be calculated from the date of transfer of funds to IEL to date of payment.

In the alternative, if an investment was made, about which no information has been provided, I've made a reasonable assumption that the value of any such investment is zero or its illiquid and its appropriate to treat the value as zero.

It's not possible to say precisely what Miss C would have done. But I am satisfied that what I have set out below is fair and reasonable given Miss C's circumstances and objectives when she invested.

To compensate Miss C fairly, IEL must:

- Compare the performance of Miss C's 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;

- IEL should also pay interest as set out below;
- Pay Miss C £250 for distress and inconvenience, addressed above;
- Provide details of any calculations to Miss C in a clear, simple format.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Unknown	Unknown assumed illiquid	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date of investment	Date of decision	8% simple per year from date of decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)

Actual value

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

If at the end date the investment 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 provided Miss C agrees to IEL taking ownership of the investment. If it is not possible for IEL to take ownership, then it may request an undertaking from Miss C that she repays to IEL any amount she may receive from the investment in the future.

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, IEL 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. Apply those rates to the investment on an annually compounded basis.

If there is a fund existing because of illiquid investments, its likely those funds would need to be removed for the fund to close. I've set out this might be achieved if IEL takes over the investment. As third parties could be involved as we don't have the power to tell them what to do, if IEL is unable to purchase the investment, to provide certainty to the parties, an upfront sum equivalent to five years' worth of wrapper fees (calculated using the fee in the previous year to date), which should provide a reasonable period for the fund to be closed.

Why is this remedy suitable?

I've taken into account that Miss C was said to have a medium risk appetite and I think it's fair to conclude that Miss C was looking for growth on her funds and that's been conceded on her behalf.

So, I've chosen this benchmark for compensation because:

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

My final decision

I am upholding this complaint. I direct Independently East Ltd to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss C to accept or reject my decision before 30 June 2023.

Sarah Tozzi
Ombudsman