DRN-4144935

The complaint

Mr S complains that in 2012, Insight Financial Associates Limited gave unsuitable advice to transfer from his existing section-32 (s32) buyout plan to a self-invested personal pension (SIPP) in order to make various investments in property developments. He is represented in this complaint by a Claims Management Company (CMC).

What happened

Mr S says that his existing mortgage broker, who worked for a connected company to Insight, introduced him to the Insight adviser. He was aged 47 and married, with no financial dependants. He worked for a manufacturing company. The adviser assessed Mr S's attitude to risk as 8 on a scale from 1 to 10 (medium to high risk – defined as *"You are prepared to invest your capital in more volatile markets, with the potential for higher than average returns"*. He also noted Mr S wasn't a particularly experienced investor. No details of any other assets were recorded, but both Mr S and his wife were members of their current employers' pension schemes.

Mr S's s32 plan had been set up in 2008. It didn't have any guaranteed annuity rates or exit penalties. Less commonly for such a plan, it didn't have a Guaranteed Minimum Pension (GMP) either, but there was a range of about 165 funds to choose from (internally and externally managed). All the policy was invested in the provider's Consensus Index fund.

Insight calculated that the maximum tax-free cash based on the value of the policy when the old tax regime ended (5 April 2006) was 27.5%. This would have dropped to 25.6% based on the value of the plan in 2012 (but retained a link with the increases in the Lifetime Allowance rather than the value of the policy, which could fall in adverse investment conditions). The adviser recommended Mr S transfer this plan into a London & Colonial (L&C) SIPP. Mr S has told this service via his CMC that *"he remembers being overwhelmed by the adviser and not really being given time to think"*, but he followed the advice believing it to be in his best interests.

Insight's suitability report recommended Mr S invest £30,000 into hotel property in Cape Verde being developed by The Resort Group (TRG), and a further £10,000 into another land investment. It said *"Although I am not advising you on that element (the alternative investments) of your pension provision, I will however be making a recommendation on the retirement vehicle that will allow you to facilitate alternative investments and also the remainder of your pension value"*. The adviser did give a full recommendation to invest most of the remainder in a Gilliat structured product.

The advantages for transferring were said to include maximising the potential for taking a lump sum, as well as higher remaining benefits at retirement, and flexibility to draw benefits as and when he chose. It was assumed Mr S wouldn't access his pension benefits before age 65, but he would like the ability to do so from age 55 if required. Insight stated that the disadvantages were the possibility of underperformance of the underlying investments, and there were new initial and ongoing charges. However, these *"were not significantly more expensive"* than the s32 plan; and *"charges were not a major consideration to you, more the ability to access the funds and solutions that you are looking for"*.

On 22 August 2012 £66,386 was transferred from the s32 plan into the SIPP. The following investments were then made:

- 11 September 2012: £10,000 in unquoted shares in a company, "S", which invested in land and was owned by the mortgage broker.
- 24 October 2012: £26,500 fractional investment in property in TRG's Llana Beach resort.
- 21 November 2012: £22,000 in the Gilliat multi-asset deposit structured product.

Interest payments in respect of the TRG investment then began on 14 December at the rate of 3%pa. These were however insufficient to meet the annual maintenance fee of £564 and the annual fee of £326 payable to the adviser. These interest payments were only due to last three years and rental returns on the investment were not forthcoming after that point.

The Gilliat Multi-Asset Deposit aimed to pay a lump sum interest payment at the end of a six-year term, but this was dependent on the performance of an underlying multi-asset index and a 'lock-in' event prompting payment to be made by the counterparty, a major UK bank. The index was based on "*UK and emerging market equities, UK gilts and corporate bonds, and certain commodities, including gold".*

Mr S and the adviser had a review meeting in March 2017, which included discussion about the rental income from TRG. Mr S was told that the Llana Beach complex had now opened and the rental income should commence at the end of quarter two. This then did happen and the rental income, although variable, was similar on average to the interest payments Mr S's SIPP had previously been receiving. Mr S recalls being told that a travel operator had been found as a tenant for the hotel complex.

A further review meeting took place on 16 October 2018. Insight noted that Mr S was *"happy to take higher level of risk"*, but some elements of his portfolio weren't on track with his financial objectives, as follows:

> *"Gilliat – matures Dec 2018*
> *Land – still expected to get planning within next 12-18 months which will then realise return*
> *Cape Verde – value – ability to sell & income level (most concern)"*

The Gilliat investment was paid back to the SIPP at its original purchase price on 7 January 2019, as the conditions for a higher payout linked to stock market performance weren't met. The SIPP received its last quarterly rental payment from TRG on 7 June 2019. At this point £23,564 remained in the SIPP bank account.

Mr S's CMC says that Mr S sent a complaint letter dated 19 August 2021 to Insight, but Insight says it didn't receive it. The letter refers to Mr S's SIPP being high risk and therefore unsuitable for him. In the absence of a response, the CMC referred the complaint to our service on 9 February 2022. Insight responded that Mr S had already made the decision to invest in TRG prior to being referred to its adviser. Furthermore, it thought that Mr S ought to have known from his annual statements that the TRG income had dried up.

Our investigator asked what had prompted Mr S to complain. The CMC responded that Mr S had previously thought the pension *"seemed to be doing OK",* but as he approached age 55 in October 2019 he realised that it *"seemed impossible"* to take his tax-free cash out. He found there were *"problems"* with his L&C SIPP. The CMC first contacted Insight with a Subject Access Request that same month.

The investigator didn't find evidence that the capital values of the three investments Mr S made were at markedly different levels to their book cost. So, he didn't think Mr S should have been prompted to complain sooner. He concluded that even if Insight didn't receive any complaint from Mr S until he notified this service of his complaint in February 2022, he'd still complained within the three years he had from the point he ought reasonably to have become aware of his cause for complaint under our rules.

On the merits of the complaint, the investigator noted that the fund projections from the newly proposed SIPP were significantly lower than the existing s32 plan because of the impact of high fixed costs and also the 0.5% ongoing commission. He also considered some irrelevant reasons had been given for the transfer, including taking control of the pension away from Mr S's ex-employer: that had happened when Mr S set the s32 plan up in 2008.

There didn't seem to be any dispute that Mr S's mortgage broker – as a director of the company developing the land Mr S partly invested in – was the reason for Mr S's initial interest in the two property investments that necessitated him investing in the SIPP. TRG also had the characteristics of an unregulated collective investment scheme (UCIS). So, the investigator thought that should have made Insight's adviser concerned about why the mortgage broker had highlighted this investment to Mr S in the first place, as he wasn't a sophisticated or high net worth investor.

The investigator doubted the credibility of Insight's assessment that Mr S was medium to high risk. And he wasn't satisfied that the inclusion of the Gilliat investment (which contained more downside protection than the other two) resulted in a sufficiently balanced portfolio overall. In conclusion, he said that Insight should compare the performance of the SIPP with how Mr S's s32 policy would have performed, had it remained in place – and pay the difference to Mr S as compensation, plus £300 to recognise the stress and anxiety its actions had caused.

Insight didn't agree with the investigator, maintaining that Mr S was now too late to bring his complaint. It said the comments I've quoted above from its notes of the review meeting with Mr S in October 2018 show that he had significant concerns about the TRG investment at the time. The adviser was also telling him in this meeting that he wasn't on track to achieve his retirement objectives. And this showed Mr S ought reasonably to have been aware of his cause for complaint before February 2019, which was even three years before he registered the complaint with our service.

As agreement couldn't be reached, the complaint was passed to me for a 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.

Time limits

The rule at DISP 2.8.2R(2) in the Financial Conduct Authority (FCA)'s handbook says that I can't consider a complaint if the complainant refers it to the Financial Ombudsman Service more than:

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received"

In this case, I agree with Insight that Mr S or his CMC do not have such an acknowledgment or record of the 19 August 2021 complaint letter. I'm being asked to accept that it took the CMC nearly two years from October 2019 (when it first made its SAR) to send this letter, which apparently then wasn't chased at all until the referral to this service.

Mr S was already outside the six-year time limit set out above, because he was advised to transfer his pension in 2012. If the CMC wasn't satisfied with how Insight responded to its SAR, the concerns Mr S refers to having in October 2019 were already grounds for a complaint. So, I would have expected it to expedite matters sooner, as it didn't know what evidence might emerge regarding the three-year time limit. The CMC's lack of action in these circumstances is surprising, and I conclude on the balance of probabilities that Insight didn't receive any complaint from Mr S at all until this service received one in February 2022.

That would mean the complaint was only brought in time if Mr S didn't know or oughtn't reasonably to have known of his cause for complaint more than three years before (*ie* February 2019). Mr S clearly did know of his cause for complaint in October 2019: he instructed the CMC at that point. So a key question I have to ask is, what didn't Mr S know in February 2019 that he did know eight months later?

Mr S told us that he'd been looking at taking some benefits in October 2019 and it was at this stage that he found the difficulty in accessing his tax-free cash. I've asked the investigator to clarify this comment with Mr S, because I noted that the amounts he invested in S and TRG were both still being valued at their book cost in his SIPP statements. Combined with the £22,000 that had been returned from Gilliat, he therefore had a valuation of nearly £60,000 – so there were sufficient proceeds from Gilliat alone to pay the 25% tax-free cash component (£15,000).

I've also asked the investigator to ask Mr S for his recollection of the original expectations for the investments he made, and his reaction to Insight's review documents of March 2017 and October 2018. Mr S responded that the rental income from TRG was expected to be higher than the 3%pa interest he'd got at the outset, but he was told Brexit was the reason for the lower than expected amounts, and he'd need to wait for this to settle down. There wasn't an expected income or return level from the investments in Gilliat or S, but he'd been told that these were once in a lifetime opportunities which the adviser had invested in too, so he believed he was making the right decision.

Regarding his tax-free cash requirements in 2019, Mr S explained that he was looking to take his family on holiday for his 55th birthday, and as he'd mentioned this to the adviser he'd been waiting for the adviser to contact him. When he didn't hear from the adviser he realised his investments weren't performing and he should leave the money in the pension until he really needed it. The realisation that he should complain came about through a chance discovery that one of his wife's colleagues had also invested in a Cape Verde property and had received compensation.

I've taken into account both Mr S's comments and Insight's view of the significance of the review documents. Mr S agrees that he did have a review with the adviser every year, but that his recollections of these two meetings in particular (2017 and 2018) were of the adviser telling him *"the investments were doing fine"*.
The 2017 notes (which discuss the hiatus in TRG income) go on to say *"will only know whether align to achieving objective when return achieved".* However, they also include a wider discussion giving a positive outlook for Mr S's investments. They reiterate that the SIPP forms a *"small element of overall pensions", "potential to offer higher returns"* and although they were *"fairly illiquid – returns will become by way of maturing investments"*. In

respect of the investment in S, they say *"looking at 2018 strong* [illegible] *now involved so should push forward".*

The second review document Insight has provided in October 2018 begins with a tick in the box saying *"My portfolio is on track…"* before the adviser asterisked this to make the notes on specific investments I've summarised above. These include that the return from Cape Verde (TRG) was of the most concern. However, I also have to take into account that this investment had resumed paying rental income by that point.

My assessment of the notes was that Insight was tempering Mr S's expectations of what he might get from the investments, but not in such a way that ought reasonably to have made him aware he had cause for complaint. He had been told these were medium-high risk investments and that he could afford to take those risks. I find Mr S's remarks plausible about Brexit resulting in the depressed level of rental income. And it's clear from the notes that the adviser was leading Mr S to expect further developments from the investment in S in particular.

As the investigator said, all the investments were still being reported on L&C statements at fairly close to their book value. We don't have a 2019 statement, but the August 2018 one used a March 2017 value of £22,743 for TRG versus the £26,500 Mr S had paid in. That looks within the range of outcomes for what Mr S was told was a medium-high risk investment. And his later November 2020 statement suggests that L&C didn't update the values beyond December 2017 (when it had mostly recovered to £25,105).

The amount of these fluctuations is even less significant when viewing the total value of the SIPP, which it would have been reasonable for Mr S to do. While he may have been disappointed that the income from TRG wasn't higher, or there was no return on the Gilliat investment, I can see that Mr S had some understanding that investment conditions were difficult. Given this I'm not persuaded that disappointment with his investments necessarily meant he ought reasonably to have known that he'd been given unsuitable advice.

It's instructive that two things had happened by October 2019 which hadn't in February 2019. Mr S was now closer to his 55th birthday compared with his last review with the adviser, and it's understandable that he would have looked at what he *could* access from his pension around then. But I also think it's likely the failure of the scheduled TRG income payments from September 2019 played its part here.

Mr S says that he began to have concerns about the TRG investment and, having foregone income for a period between 2015 and 2017 I can appreciate that he could ill afford to do so again. It had been the only investment in his portfolio returning an income. And despite Mr S's initial reference to tax-free cash, I'm satisfied that he didn't have a pressing need for such sums at that time. He was still working and the 2017 review recorded that his mortgage wasn't due for repayment for another seven years. I note that even in the original advice the ability to take sums from age 55 was 'if required', rather than a concrete aim.

I'm therefore not persuaded that Mr S ought reasonably to have been aware of his cause for complaint that Insight had wrongly advised him to transfer his pension any sooner than he admits actual knowledge of this in October 2019, and his complaint has been brought within the time limits for me to consider it.

The merits of the complaint

I've reached a very similar view to the investigator on this issue, so I'm not going to rehearse everything that's already been said to the parties before. Notably, Insight offered no further evidence or argument other than on the time limits which I've considered above.

The transfer to the SIPP looks to have been unnecessary when viewed on financial grounds. As the investigator mentioned, the s32 plan had an average fund charge of 0.2%pa, and the SIPP incurred at least a £564 annual maintenance charge (0.85% of the transferred amount) and 0.5%pa ongoing advice charge. There was also a £935 initial adviser charge and further initial investment charges (together totalling about 1.75% of the transfer). Spreading the initial costs over the term to age 65 would give a total reduction in yield of roughly 1.45%pa. Insight said at the time that the SIPP wasn't 'significantly' more expensive than the existing s32 plan, but I think these figures show that it was – and more than 1% of additional charges made it harder for the new pension to outperform his existing one.

The former regulator, the Financial Services Authority (FSA) issued a thematic report on the quality of advice on pension switching in December 2008. This highlighted pensions that incurred unnecessary product costs for options that weren't required as an example of poor practice. The existing s32 plan had a wide enough range of funds for an unsophisticated investor such as Mr S, who wouldn't necessarily require ongoing advice if his investments were adequately diversified at the outset (such as in the fund he was already invested in). So I don't think he would have been suitably advised to transfer to the SIPP unless there was an overriding need for this product to make the non-standard investments he was interested in making.

In order to provide suitable advice in line with COBS 9 in the FCA handbook, Insight was under a duty to assess the suitability of the proposed investments; not just the SIPP in isolation. This included assessing whether Mr S could afford to take the risks involved in the investments in TRG and S in particular. Insight says Mr S had already decided to make these investments before he saw its adviser, but I think it should have been mindful that Mr S was doing that on encouragement from his mortgage broker, who wasn't authorised to financial advice – and worked for a company connected to Insight.

Like the investigator, I can't see that Mr S, as an unsophisticated investor, would have been in a position to seek out these investments had it not been for the mortgage broker's involvement. And I don't think his medium to high attitude to risk can be substantiated: it's higher than his existing fund choice with no apparent explanation for why Mr S had the capacity to take that risk, other than that this wasn't his only pension.

In my view it was Mr S's lack of understanding or experience of these types of unregulated investments that combined to mean he could ill afford to take the risks involved. TRG was an investment in off-plan property, with multiple risks including planning and legal risks, the default of the developer, market sentiment, currency conversion and so on. Cape Verde wasn't at that time a well-enough established holiday destination to predictably sustain the expansion in developments such as TRG's, and a lack of demand for the property would likely exacerbate the liquidity risk.

The investment in S attracted some risks that were similar. It was a highly specialised investment that lacked the diversification of, say, an insured property fund. The company had been incorporated about a year before Mr S invested. With both investments there was no reliable secondary market if they didn't prove to be profitable and Mr S wanted to encash them. And the lack of diversification was made worse by both investments focusing on the same sector (property). Investing in an offshore scheme that had the characteristics of UCIS, or in unquoted shares in a small UK start up company, can only reasonably be seen as high risk and appropriate only for experienced or sophisticated investors. Mr S was none of these.

Whilst the investment in Gilliat may have been an attempt to 'even out' the risk, I agree with the investigator that this wasn't the answer to the problem of the other two investments exceeding Mr S's capacity to take risk in the first place. It resulted in an unbalanced and inadequately diversified portfolio that went outside Mr S’s tolerance for risk. It also wasn’t an approach that was likely to produce a better outcome for Mr S’s risk appetite than staying in his existing Consensus fund which offered a broader spread of investments at a lower cost.

As the investigator has already argued, financial planning isn’t simply about taking orders from clients. Where a SIPP is being recommended the proposed investments are part of the adviser’s recommendation. If an advising business, following the regulator’s rules at COBS 9, can only reasonably conclude that the proposed investments are unsuitable for their client, they should say that to the client. Insight was qualified to provide this advice, whereas Mr S’s mortgage broker was not – as evidenced by the fact Mr S was referred to Insight in the first place. In this case I consider Insight should have recommended Mr S remain invested in his s32 plan, and I haven’t seen anything to persuade me that Mr S wouldn’t have followed that advice.

Putting things right

In assessing what would be fair compensation, my aim is to put Mr S as close as possible to the position he would probably now be in if he had been given suitable advice.

I think Mr S would have remained with his existing s32 provider, however I cannot be certain that a value will be obtainable for what the previous policy would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given Mr S's circumstances and objectives when he invested.

To compensate Mr S fairly Insight Financial Associates Limited must:

- Compare the performance of Mr S's SIPP with the notional value if his pension had remained with the previous provider. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.
- If there is a loss, pay a sufficient sum into Mr S's pension plan to increase its value by the amount of the compensation and any interest shown below. The payment should allow for the effect of charges and any available tax relief. Insight shouldn’t pay the compensation into the pension plan if it would conflict with any existing protection or allowance.
- If Insight is unable to pay the compensation into Mr S's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn’t a payment of tax to HMRC, so Mr S won’t be able to reclaim any of the reduction after compensation is paid.
- It’s reasonable to assume that Mr S is likely to be a basic rate taxpayer at his selected retirement age, so the reduction would equal 20%. However, as Mr S 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%.
- Pay Mr S £300 for the distress and inconvenience caused by its poor advice, which has led to the likely loss of a substantial part of Mr S’s pension fund.
- Provide the details of the calculation to Mr S in a clear, simple format.

Portfolio name	Status	Benchmark	From (start date)	To (end date)
London and Colonial (L&C) SIPP	Some liquid/some illiquid	Notional value from previous provider	Date of transfer	Date of this final decision

Actual value: This means the actual amount payable from the investment at the end date. If, at the end date, any investment in the portfolio is illiquid (meaning it cannot be readily sold on the open market), it may be difficult to find the actual value of the portfolio. So, Insight should take ownership of any illiquid investments within the portfolio by paying a commercial value acceptable to L&C. This amount Insight pays should be included in the actual value before compensation is calculated.

If Insight is unable to purchase any illiquid investment, the value of that investment should be assumed to be nil when arriving at the actual value of the portfolio. Insight may wish to require that Mr S provides an undertaking to pay it any amount he may receive from that investment in the future. The undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Insight will need to meet any costs in drawing up the undertaking.

Notional Value: This is the value of Mr S's investment had it remained with the previous provider until the end date. Insight should request that the previous provider calculate this value. Any withdrawal of pension or tax-free cash from the London and Colonial SIPP should be deducted from the notional value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on.

If the previous provider is unable to calculate a notional value, Insight will need to determine a fair value for Mr S's investment instead, using this benchmark: FTSE UK Private Investors Income Total Return Index. The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

The L&C SIPP only exists because of illiquid assets. In order for the SIPP to be closed and further fees that are charged to be prevented, those investments need to be removed. I’ve set out above how this might be achieved by Insight taking over the portfolio, or this is something that Mr S can discuss with the provider directly. But I don’t know how long that will take. Third parties are involved and we don’t have the power to tell them what to do.

So, if Insight is unable to purchase the portfolio, to provide certainty to all parties I think it’s fair that it pays Mr S an upfront lump sum equivalent to five years’ worth of SIPP fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

Why is this remedy suitable?
I’ve chosen this method of compensation because:

- Mr S wanted Capital growth and was willing to accept some investment risk.
- If the previous provider is unable to calculate a notional value, then I consider the measure below is appropriate.
- 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.
- Although it’s 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 S's circumstances and risk attitude.

The investigator proposed a further calculation of any additional tax Mr S might pay as a result of losing the protected tax-free cash sum under his s32 plan. As I indicated above, at the time of transfer this protected sum was only tracking at slightly more than the 25% tax-free cash Mr S is still entitled to from his SIPP. And I expect both the growth in the notional value of Mr S’s s32 plan, or the alternative index I’ve specified above, to have outstripped the indexation of this protected sum since 2012.

That will mean that *once the compensation is added to Mr S's SIPP*, he won't be at a disadvantage in terms of the tax-free cash he can take. And if the compensation cannot be paid into the SIPP, the payment to Mr S in cash instead already allows for his ability to take a full 25% tax-free cash sum. Therefore, it won't be necessary for Insight to consider the treatment of tax-free cash separately in its calculations – as it won't result in more compensation.

My final decision

I uphold Mr S's complaint and require Insight Financial Associates Limited to pay him compensation, calculated as set out above. If my award is not paid within 28 days of Insight receiving Mr S's acceptance of this decision, it will attract interest at the rate of 8% per year simple from the date of this decision until it's paid.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 12 September 2023.

Gideon Moore
Ombudsman