DRN-4214011

Financial Ombudsman Service

The complaint

Mr H complains that the investment strategy recommended by MONEY ADVICE PARTNERSHIP LTD (trading as FML Wealth) was unsuitable.

What happened

I issued my provisional decision on this complaint on 14 June 2023. The background and circumstances to the complaint and the reasons why I was provisionally minded to uphold it were set out in that decision. I've re-produced the relevant parts of it below and it forms part of this final decision.

Mr H's complaint was considered by one of our investigators. She sent her assessment of the complaint to both parties in February 2023. The background and circumstances to the complaint were set out in her assessment. However in summary, she said Mr H had been advised by another firm to transfer deferred benefits he had in an occupational pension scheme to a SIPP (Self Invested Personal Pension). That firm's authorisation ceased shortly after the transfer. The funds transferred were held in cash in the SIPP, and FML Wealth was engaged to provide financial advice about how to invest it.

In January 2018 FML Wealth recommended Mr H invest £40,000 through a Discretionary Fund Manager. Its report covering letter said, amongst other things:

"The fund manager concerned is [Name of DFM]. Our review of the underlying investments which make up their portfolios and the way in which those portfolios are structured across the various asset classes gives me confidence that their risk rated model portfolios provide the correct balance of risk and reward. I am also delighted to advise that we have negotiated a significant discount on their normal charges, bringing them down to highly competitive levels."

Mr H had transferred £43,866 from his OPS on 10 May 2017. The previous adviser had taken fees of £1,425. Following FML Wealth's advice £40,000 was transferred to the investment portfolio with the DFM in March 2018. The SIPP annual reports showed a fund value of £35,840 as at 24 March 2019, £32,625 in the report dated 31 March 2021 and £29,390 as at 31 March 2022.

Mr H, though a representative, subsequently complained to FML Wealth about the advice he'd been given. The complaint referred to both the advice to transfer and invest through the DFM. FML Wealth responded to say that it hadn't advised on the transfer and wasn't responsible for it. It also said:

- *Based on the outcomes of the fact-find, and risk and capacity for loss assessments undertaken, the introduction to the DFM to provide a suitable portfolio was both appropriate and in line with their investment process.*

- *The DFM as part of its direct agreement with Mr H and its signing on process undertook its own risk assessment and capacity for loss review on Mr H. It was the DFM's responsibility to identify an appropriate diversified portfolio to match that* *profile.*

- *Mr H may have a claim against the DFM if the assets it acquired didn't match his risk profile.*

Our investigator didn't recommend that Mr H's complaint should be upheld. She said there had been some discussions about the appropriate level of risk for Mr H. Although he'd initially been assessed with a risk profile of 7 (out of 10), it was subsequently decided, after FML Wealth reviewed some inconsistencies in his responses to an ATR questionnaire, that he was 6 - High Medium Risk. The investigator thought FML Wealth had been thorough and ensured it had the correct attitude to risk rating for Mr H.

The investigator said she understood the charges for the DFM were a dealing charge of 0.5%, and annual product charge of 0.75%. FML Wealth didn't charge an initial fee, but received 0.75% of the fund value per annum to provide ongoing advice.

The investigator noted that FML Wealth had said it had recommended a DFM over an advisory service as Mr H had little investment experience, and it thought an actively managed model portfolio run within an agreed set of parameters by a dedicated investment team was suitable.

The investigator thought given the documentation that was provided to Mr H by FML Wealth and the DFM, he would have understood the nature of a DFM and what the DFM Agreement was asking him to confirm he was happy with.

FML Wealth had also provided a copy of the Due Diligence questionnaire it went through with the DFM. The questionnaire covered topics including Investment Services and Processes, Client Administration and Service Providers. It was also noted that FML Wealth had had discussions with the DFM about its charges and this resulted in the DFM "…reducing their ongoing charge to 0.75% which compared favourably with general market rates."

The investigator said Mr H was a direct client of the DFM and as part of their agreement, it was stated:

"Management of your account will accordingly be based on the information that you provide to us in your Client Information Form and Investment Profiling Questionnaire."

Taking everything into account, the investigator didn't think FML Wealth was responsible for the actions of the DFM based on the information that Mr H provided to it. She didn't think FML Wealth's recommendation to opt for a portfolio with the DFM was unsuitable.

Mr H's representative didn't agree with the investigator's findings. It said, in summary, that although Mr H had made some alternative investments they had performed poorly, which would indicate that he was an inexperienced investor rather than that he was experienced. It also thought the shortcomings of the attitude to risk assessment was that an inexperienced investor may not understand the importance or relevance of some of the questions being asked of them.

What I've provisionally 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.

Mr H had a fairly modest amount to invest through his SIPP – around £40,000. As explained *by the investigator, the charges for the DFM were an initial 0.5% dealing charge, and an ongoing charge of 0.75%. FML Wealth didn't make an initial charge, but received a 0.75% a year charge for its ongoing management service – which including providing ongoing advice.*

Use of a DFM is usually associated with higher value portfolios. That doesn't necessarily mean a DFM isn't suitable for portfolios of this size. However I think there would need to be a good reason to incur the higher costs associated with a DFM given FML Wealth were also charging Mr H 0.75% a year to 'monitor' his portfolio. Mr H could have invested directly in funds recommended by FML Wealth aligned to his attitude to risk and at lower cost, with FML Wealth monitoring the funds selected to ensure they remained appropriate. The use of the DFM added another layer of unnecessary costs.

FML Wealth has provided copies of information that it obtained from the DFM for its due diligence. This explained, amongst other things, that the DFM was relatively newly formed, and had only started business activities a few months before. It had no performance track record.

FML Wealth's recommendation was to invest in the DFM's Growth Portfolio 5. The Model Portfolios document provided by the DFM for FML Wealth said, amongst other things:

Notes

The approach taken uses the experience since the end of 1999 within the various asset classes to construct portfolios that are defined by the maximum losses that may have been suffered. Thus, the client should have some expectation of the 'worst possible scenario' for their portfolio.

The document said the maximum loss for Risk Level 5 was 30%. The maximum loss for Risk Level 4 20%, and Level 3 15%.

FML Wealth has said it discussed risk with Mr H and as his ultimately agreed level of risk (6) remained at odds with the capacity for loss position indicated by his circumstances, the choice of Level 5 was an attempt to find an appropriate compromise between the risk profile and the capacity for loss.

However the suitability report specifically recorded Mr H's "…standard of living is somewhat sensitive to fluctuations in the value of your investments and you cannot afford for their value to fall by more than 20%." This was consistent with the suitability report which said that Mr H had some other savings and investments that he could call on in an emergency but that his only other pension was an occupational pension scheme that was due to pay just over £1,900 per annum.

The Financial Conduct Authority's Conduct of Business Rules required that FML had to have a reasonable basis for believing that Mr H was able to financially bear the investment risks associated with transaction. In my opinion the recommendation to invest in the Level 5 Portfolio was inconsistent with Mr H's capacity for loss - it presented a greater degree of risk than FML itself had established he was able to accept.

FML's Confidential Client Agreement outlining its terms of business with Mr H included:

Financial Services Act 2000

Independent Financial Advisers are required to have proper regard for a client's best interests in any advice given. They must therefore do their utmost to ensure that they are aware of your personal and financial circumstances so that their advice is the most suitable *for your needs.*

On-going Services

Depending on the size and complexity of your portfolio once in place, you may or may not require on-going management services. It is important to be aware that in the absence of a specific agreement to provide you with on-going services, your portfolio will not be monitored unless you contact us to ask for a specific service.

Mr H had opted for the ongoing management service and as I've said he was paying 0.75% of the fund's value a year for it. It's not in dispute that FML didn't provide any subsequent reviews of Mr H's portfolio. It's said that this was due to the lack of information from the DFM regarding the valuation and make-up of the portfolio despite its repeated requests for it. It said it later transpired that the DFM didn't use the model portfolios that had been provided to FML Wealth. It said "…the investments within the portfolio bore no resemblance to the model portfolios agreed with" the DFM. And it said it included a number of investments which subsequently failed.

FML Wealth has said it wasn't responsible for the failure of the portfolio given Mr H had his own separate agreement with the DFM; the DFM completed its own risk profiling exercise and the DFM had responsibility for its own investment decisions. It also said the DFM didn't invest Mr H in line with the portfolio model it had indicated.

However Mr H only ended up investing with the DFM because of FML's recommendation for it. FML helped arrange for Mr H to invest through the DFM – its role was pivotal. As I've said above, given FML Wealth were providing and charging Mr H for an ongoing service to monitor his portfolio, and given the circumstances, I'm not persuaded that the additional costs were justified or provided good value. In particular given that it was a newly formed DFM and with no track record, which might have given an indication of the capabilities of the investment managers' discretionary decision making and suggested its performance (whilst not guaranteed) had a good chance of offsetting the additional costs.

FML Wealth has said the DFM didn't provide it with information about the initial asset allocation and subsequently didn't provide information despite its requests.

I don't know how the funds were initially invested. However in my opinion the portfolio did at some stage became unsuitable as evidenced by the later statements showing the portfolio content in 2021. The January 2021 statement shows a significant proportion of the portfolio invested in some form of bonds/loan notes. £9,000 was invested in Via Developments Plc (which appears to have gone into liquidation). And another £6,000 in Sustainable Capital Plc. These presented significant risks, and in my opinion the overall portfolio wasn't aligned to the degree of risk that was suitable for Mr H. It presented a greater degree of risk.

FML Wealth has said that it wasn't until the 31 December 2021 valuation that it started to become clear that something was wrong. And that it instructed the cessation of all ongoing fees due. It's not clear to me when FML Wealth first asked for information from the DFM. But given its monitoring obligations, I think this should have been sometime within a few months after the initial investment was made. So it should have discovered the asset make-up of the portfolio at that point. If FML Wealth had asked for information within a few months of the start of the portfolio but it wasn't receiving a response, I think this should have caused some concern. Particularly as it was a new DFM. In my view it should have taken action if it wasn't receiving any information from the DFM, rather than let things drift until 2021. Mr H could have withdrawn his authority from the DFM or attempted to move his funds elsewhere. I don't know if FML Wealth made attempts to obtain information from the DFM from the off, but I don't think it was reasonable for it to, as I understand, do nothing. It should provide *evidence of its attempts to contact the DFM when responding to this provisional decision.*

If FML had provided the ongoing monitoring service it was obliged to provide it may have had an opportunity to mitigate Mr H's position. It's difficult to say to what extent given we haven't got a history of the investments. However my understanding is that FML Wealth was charging Mr H for the ongoing service but not actually providing that service at all.

So in summary, on the one hand:

- *In my opinion the recommendation to use a DFM was unsuitable in the circumstances. Given the portfolios modest value and that FML was charging Mr H to provide an ongoing monitoring service, I don't think it was worthwhile incurring the additional charges associated with the DFM or that it provided good value.*

- *The DFM was also new and had no track record which might have given an indication that there was a good chance its performance would more than make up for the charges.*

- *FML recommended a portfolio with the DFM that wasn't aligned to Mr H's circumstances. It presented a higher degree of risk.*

- *FML failed to provide the monitoring service that it had contracted to provide. If it had done so it may have been able to mitigate the losses suffered by Mr H.*

On the other:

- *Mr H had a direct agreement with the DFM.*

- *And it appears that, at some point at least, the DFM moved away from investing in line with the model portfolio that it had provided to FML Wealth.*

FML Wealth was bound by the FCA's Principles for Business. These included PRIN 2, 6 and 9.:

PRIN 2 Skill, care and diligence - A firm must conduct its business with due skill, care and Diligence

PRIN 6 Customers' interests - A firm must pay due regard to the interests of its customers and treat them fairly.

PRIN 9 Customers: relationships of trust - A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.

For the reasons outlined above, I don't think the recommendation to invest through the DFM in its Growth Portfolio 5 was suitable in the circumstances. So I don't think FML Wealth met its obligations under PRIN 9.

I also don't think it paid due regard to Mr H's interests or conducted its business with due skill, care and diligence. It was charging Mr H to monitor his portfolio. It clearly didn't. As I have said above, it's not clear to me when FML Wealth first requested information from the DFM. But as I have said, even if it was requesting information from the off and the DFM wasn't responding, I don't think it was sufficient to do nothing. It could have alerted Mr H that it had no oversight over his portfolio and that he should end his agreement with the DFM.

So taking all the above into account, I don't think FML Wealth met its regulatory obligations to Mr H, and therefore I currently think his complaint should succeed.

I recognise that it can be argued the DFM's actions may have also separately caused some of Mr H's loss. So I've considered whether I should apportion only part of the responsibility for compensating the loss to MONEY ADVICE PARTNERSHIP LTD. However as I have said FML Wealth played a pivotal role in Mr H investing with the DFM. Mr H wouldn't have been invested with the DFM in the first place if FML Wealth had given suitable advice. It also then didn't meet its obligations to monitor the portfolio and if it had done so it may have been in a position to ensure that Mr H's funds were invested appropriately. My understanding is that it continued to take fees, but didn't provide any oversight.

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So, I think Mr H's losses flow from FML Wealth's failures that I've identified above. Therefore I think holding MONEY ADVICE PARTNERSHIP LTD fully responsible for the whole of the Mr H's loss is fair in this case.

My provisional decision

My provisional decision is to uphold Mr H's complaint.

I went on to set out how I thought MONEY ADVICE PARTNERSHIP LTD should calculate and pay compensation to Mr H.

I asked Mr H and MONEY ADVICE PARTNERSHIP LTD (FML Wealth) to let me have any further evidence or arguments that they wanted me to consider before I made my final decision.

MONEY ADVICE PARTNERSHIP LTD (FML Wealth) didn't agree with my provisional findings. It said, in summary, that it didn't think the selection of a model portfolio run by a DFM was unsuitable in this case.

It said Mr H had moved his pension to a SIPP with a previous adviser with the intention of investing in unregulated products, which clearly indicated a high capacity for risk. In determining what investment strategy to recommend to him FML Wealth undertook a detailed review with him including discussion on his answers to the risk questionnaire. Mr H fully understood what his risk profile was. It said the investment strategy was discussed with Mr H and the report was provided to him and he agreed to it in full knowledge of the facts.

The firm said the main reason for the losses incurred was the actions of the DFM not following the agreed investment strategy and in covering that fact by not providing the six-monthly valuations stipulated in its client agreement. It said it was too late to do anything about the failed investments by that time. It said this was evidenced by the 31 January 2021 valuation of Via Developments plc (the first such valuation received) still being shown as £3,458. But the company had appointed liquidators on 7 July 2020 who indicated no funds were available to creditors.

Money Advice said a basic back test of the Model 5 Portfolio (on an appropriate basis) showed it would have risen very slightly in value to around £40,500. Had the DFM undertaken proper active management within the parameters of the Portfolio it would be expected that this figure would be higher. It said comparing that to the Benchmark suggested in the provisional ruling would have resulted in a portfolio valued at just under £46,000 after charges. Money advice said this showed the performance of the strategy Recommended wasn't the reason for the losses incurred; that those losses were due to the actions of the DFM. It said it therefore found it hard to understand why the DFM wasn't being held responsible. It said the DFM may have ceased trading but the company has not been struck off.

Money Advice said it questioned the comment that a new DFM with no track record was relevant. It said the individuals behind the DFM had a combined 50 years of experience in the stockbroking, investment management and corporate finance world, as was evidenced during the due diligence review undertaken by FML Wealth.

Money Advice said the agreement with the DFM was that it would provide six monthly valuations and the ongoing service by FML Wealth was an annual review. It therefore disagreed that FML Wealth should have obtained details of the investments made shortly after the funds were invested by the DFM; there was no reason to suspect that the DFM would not follow the agreed Model Portfolio parameters.

Money Advice said it accepted there was a deficiency in the ongoing services provided and that perhaps more could have been done to obtain information from the DFM. However, it said in the real world, where information was withheld, there were limited options available to force this to be supplied in a timely manner. It said it thought that FML Wealth should compensate Mr H for that deficiency by either refunding all fees charged with interest or compensating for the difference between how the model portfolio would have performed and the benchmark suggested in the provisional ruling. It said FML Wealth should not be held responsible for the actions of the DFM over which it had no control.

Mr H, through his representative said he was happy with the provisional 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.

Having done so, I've seen no reason to depart from my provisional decision to uphold Mr H's complaint.

FML Wealth did its own assessment of Mr H's attitude and capacity for risk for this particular investment. It identified that Mr H's *"…standard of living is somewhat sensitive to fluctuations in the value of your investments and you cannot afford for their value to fall by more than 20%."* However the portfolio it recommended said the maximum loss for Risk Level 5 was 30%, when other portfolios said the maximum losses were 20% for Level 4 and Level 3 15%. These would appear to me more appropriately aligned. So irrespective of how the actual portfolio was managed by the DFM, I'm not persuaded the portfolio recommended by FML Wealth itself was suitable.

As I said in my provisional decision, Mr H had a relatively modest amount to invest. And I think given the extra layer of charges associated with the DFM there needed to be a good reason to incur the higher costs as FML Wealth were also charging Mr H 0.75% a year to 'monitor' his portfolio. Mr H could have invested directly in funds recommended by FML Wealth aligned to his attitude to risk and at lower cost, with FML Wealth monitoring the funds selected to ensure they remained appropriate. So I don't think the extra costs were justified.

Money Advice said the individuals behind the DFM had a combined 50 years of experience in the stockbroking, investment management and corporate finance world. However it's not just the experience behind the individuals that is material but also their track records and how the business itself operates, including the checks and balances in place. In my opinion the fact it was a new company added a degree of uncertainty and risk.

Money Advice said the agreement with the DFM was that it would provide six monthly valuations and the ongoing service by FML Wealth was an annual review. That's not consistent with the suitability report which said that *"We agreed I will contact you to review your financial affairs twice a year."*

However I think irrespective of whether it was after a few months or towards the end of the first year, FML Wealth should have identified there was a cause for concern earlier if the DFM wasn't replying to its requests for information - again in particular given it was a new business. I acknowledge that *"…in the real world, where information is withheld there are limited options available to force this to be supplied in a timely manner."* However there may have been options available, *f*or example withdrawing Mr H's authority from the DFM or exploring options though the SIPP provider. It's not now known what the make-up of the portfolio was initially and to what degree FML Wealth could have changed its make up if authority had been withdrawn. But I think the point is FML Wealth failed to provide any oversight over time, and so again failed to conduct its business with due skill, care and diligence or pay due regard to Mr H's interests.

As I've said, I recognise that it can be argued the DFM's actions may have also separately caused some of Mr H's loss and I'd considered whether I should apportion only part of the responsibility for compensating the loss to MONEY ADVICE PARTNERSHIP LTD given the role of the DFM. I've thought about what FML Wealth has suggested as alternative compensation in its response to my provisional decision.

I am bound to consider the complaint referred to our Service which is before me and is against FML Wealth and not the DFM. So I'm bound to consider whether FML Wealth met its obligations. As I said in my provisional decision, FML Wealth played a pivotal role in Mr H investing with the DFM and Mr H wouldn't have been invested with it in the first place if FML Wealth had given suitable advice. And then it failed to provide any oversight and didn't meet its obligations to monitor the portfolio. If it had done so it may have been in a position to ensure that Mr H's funds were invested appropriately going forward. So I think FML Wealth failed on both counts, it didn't meet its obligations as I set out, and I think Mr H' losses flow from those failings.

Therefore I think holding MONEY ADVICE PARTNERSHIP LTD fully responsible for the whole of the Mr H's loss is fair in this particular case.

Putting things right

fair compensation

In assessing what would be fair compensation, my aim is to put Mr H as close as possible to the position he would probably now be in if FML Wealth had given him suitable advice. I don't think he would have invested through a DFM.

If it had done so I think Mr H 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 H's circumstances and objectives when he invested.

what should MONEY ADVICE PARTNERSHIP LTD do?

To compensate Mr H fairly MONEY ADVICE PARTNERSHIP Ltd should:

- Compare the performance of Mr H's investments with that of the benchmark shown below. If the fair value is greater than the actual value, there is a loss and compensation is payable. If the actual value is greater than the fair value, no compensation is payable.

- It should also pay any interest set out below.

- If there is a loss, MONEY ADVICE PARTNERSHIP LTD should pay into Mr H's pension plan, to increase its value by the amount of the compensation and any interest. The payment should allow for the effect of charges and any available tax relief. MONEY ADVICE PARTNERSHIP LTD shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.

- If MONEY ADVICE PARTNERSHIP LTD is unable to pay the compensation into Mr H'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 H won't be able to reclaim any of the reduction after compensation is paid.

- The notional allowance should be calculated using Mr H's actual or expected marginal rate of tax at his selected retirement age. I think Mr H is likely to be a basic rate taxpayer in retirement, so the reduction would equal the current basic rate of tax. However, if Mr H would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

investment	Benchmark	from ("start date")	to ("end date")	additional interest
Value invested with the DFM – (the £40,000) .	FTSE UK Private Investors Income Total Return Index	2 March 2018 (date funds sent to DFM)	Date of final decision	8% simple a year from date of a final decision to date of settlement if settlement isn't made within 28 days of MONEY ADVICE PARTNERSHIP LTD being notified of Mr H's acceptance of a final decision

In addition MONEY ADVICE PARTNERSHIP LTD should:

- Pay Mr H £300 for the distress and inconvenience caused by the ongoing concerns over his pension funds.

- Income tax may be payable on any interest paid. If MONEY ADVICE PARTNERSHIP LTD deducts income tax from the interest it should tell Mr H how much has been taken off. MONEY ADVICE PARTNERSHIP LTD should give Mr H a tax deduction certificate in respect of interest if Mr H asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

actual value

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

If, at the end date, the investments or parts of it are illiquid (meaning it cannot be readily sold on the open (market), it may be difficult to find the actual value of the investment. So, the actual value of any illiquid assets should be assumed to be nil to arrive at fair compensation. MONEY ADVICE PARTNERSHIP LTD should take ownership of the illiquid investment(s) by paying a commercial value acceptable to the pension provider.

This amount should be deducted from the compensation and the balance paid as above.
If MONEY ADVICE PARTNERSHIP LTD is unable to purchase the illiquid investment(s) the actual value should be assumed to be nil for the purpose of calculation. MONEY ADVICE PARTNERSHIP LTD may wish to require that Mr H provides an undertaking to pay it any amount he may receive from the illiquid investments in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. MONEY ADVICE PARTNERSHIP LTD will need to meet any costs in drawing up the undertaking.

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 don’t know exactly how Mr H would have invested. But I think the index I have outlined above is an appropriate benchmark and is a reasonable proxy for the degree of risk that was suitable for Mr H’s circumstances and objectives at the time.

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.

My final decision

My final decision is that I uphold Mr H’s complaint.

I order MONEY ADVICE PARTNERSHIP LTD trading as FML Wealth to calculate and pay compensation to Mr H as I have set out above under “putting things right”.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr H to accept or reject my decision before 28 July 2023.

David Ashley
Ombudsman