DRN-4286112

The complaint

Mr V is represented. He says Solutions Financial Services ('SFS') gave him unsuitable advice in 2011 to move two Personal Pensions ('PPs') into a Self-Invested Personal Pension ('SIPP') and to invest the SIPP in The Resort Group ('TRG') Unregulated Collective Investment Scheme ('UCIS').

What happened

One of our investigators looked into the case and concluded that it should be upheld. He mainly found as follows:

- The combined value of both PPs was around £36,000. However, due to exit charges of around £5,000 the value actually transferred into the SIPP was significantly less.

- Both parties met in August 2011. SFS says Mr V was unimpressed with the conventional PPs and the fund options available in one of them; that he considered having his own SIPP and access to other assets; that he wanted to increase his regular monthly contributions from £200 to £400; that he wanted to invest his pensions in commercial property; and that he wanted to consolidate his pensions.

- SFS' notes summarised his profile at the time. Other than the PPs and his home, he had £20,000 in cash and investment in property (mortgaged, buy-to-let). He had no other asset backed investments.

- SFS' suitability letter said the following about him – "*You are very keen to invest your pension fund into alternative investments, namely property and are prepared to invest 50% into this investment category, Low/Med and 50% into Med/high risk funds. We have agreed to review this on a 6 monthly basis*".

- The switch to the SIPP happened in October 2011 and later that month the SIPP invested £26,240 in the TRG UCIS. To date, adding Mr V's contributions since then, the SIPP has paid a total of £52,660 into the TRG UCIS.

- The pension switch was unsuitable for Mr V. There was a regulatory expectation upon SFS to avoid recommending an unsuitable switch that resulted in higher costs (without good reasons). That is what SFS recommended. The suitability letter said there was a lack of detailed information to conduct a comprehensive comparison between the PPs and the SIPP, but it acknowledged that the SIPP charges were higher. In addition, he stood to incur a 13.5% total charge in exit penalties (from the PPs) and there was a 2% initial charge (and 1% per year ongoing charge) from SFS. The SIPP had to return at least 15.5% just to match the PPs' pre-switch value.

- The reasons given for the recommendation did not justify such higher costs. There is no evidence that Mr V wanted or needed a SIPP. It was not enough for SFS to say the SIPP could potentially outperform the PPs, because it could also have potentially underperformed the PPs. Access to tax-free cash was another reason given, but that was not a feature exclusive to SIPPs, it applied to any personal pension.

- The UCIS investment was also unsuitable for Mr V. There is nothing to suggest that he was the sophisticated investor described in the suitability letter and it was tenuous to say his buy-to-let property investment experience matched the recommendation of an unregulated overseas commercial property pension funded investment. The latter was a different proposition to the former. In addition, the majority of the initial SIPP value and then the subsequent contributions – a total of 87% of the overall fund – were all put into the TRG UCIS. This shows a lack of investment diversification. This exposed him to more risk than he had capacity to bear and it failed the regulator's good practice expectation, at the time, that unregulated investments should be limited to between 3% and 5% of a portfolio.

- Mr V should receive redress from SFS for financial loss from the unsuitable pension switch and investment, and he should receive £300 compensation for the trouble caused to him because SFS' unsuitable advice disrupted his retirement plans.

SFS neither accepted nor rejected this outcome, but it said it needed additional time to obtain a full valuation of the SIPP's investment. The investigator appears to have allowed a month, then the complaint was referred to an Ombudsman.

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 have reached the same conclusion as the investigator's.

Primarily, the pension switch was unsuitable for Mr V. The main damage was caused at the point(s) the switch was recommended and executed. There is evidence to suggest that he was looking into pension investment ideas at the time, so it is possible that even if the unsuitable pension switch did not happen he would still have considered pension investment advice. Such advice had to be suitable. In this context, I have considered the TRG UCIS investment recommendation and I have found that, on balance, it too was unsuitable for Mr V.

The regulator's Principles for Businesses, at Principle 6, requires a firm to pay due regard to the interests of its customers and treat them fairly. This is partly echoed in the regulator's Conduct of Business ('COBS') rules, at COBS 2.1.1R, which requires a firm to act honestly, fairly and professionally in accordance with the best interests of its clients and in relation to designated investment business carried on for a retail client.

These regulatory provisions are directly relevant to a firm's responsibility for considering and advising on the suitability of its recommendations.

In 2009, the regulator produced a checklist for pension switching, which highlighted four key issues that advising firms were/are expected to consider. These four considerations fed into the comparisons that firms were (and are) expected to conduct in their pension switching advice – that is, comparisons between the client's existing pension and any proposed new pension. There is evidence, which I will quote below, that SFS was mindful of this during its service to Mr V in 2011. The checklist considerations include the matter of *charges*. In this respect firms were essentially expected to assess and suitably advise on the following – is the consumer being switched to a pension that is more expensive than the existing one(s) without good reason?

The sequence of key events, in 2011, related to Mr V's pension switch can be summarised as follows – the suitability report says he first met with SFS on 18 August (then they later met again on 12 September); the SIPP application form is dated 9 September; a letter from the SIPP administrator to SFS, dated 14 September, confirms that the SIPP was established as of this date; and SFS' suitability report was then issued to Mr V on 16 September.

The above shows that the arrangements for establishing the SIPP happened after the parties' first meeting but before Mr V had the opportunity to consider SFS' written advice (or suitability report) to him. The report's introduction stressed how important it was for him to read and understand the report's contents. Parts of those contents refer to some aspects of SFS' assessments and advice having previously been discussed with him. However, the report ought to have been his opportunity to thereafter make a considered and fully informed decision about SFS' recommendation. I find that purpose to have been somewhat defeated, given that the SIPP establishment part of the overall pension switch (including the SIPP provider's confirmation that contact had been made with the two ceding PP providers) had already been executed.

The above finding is particularly relevant to the basis on which SFS recommended the switch. The suitability report says it did so on the grounds that Mr V was *insistent* on conducting the switch and investing in commercial property thereafter. It acknowledged the aforementioned regulatory expectation about conducting comparisons and it said as follows –

"… *we have discussed in detail the lack of detailed information and projections for both pensions, this information is needed to make a comprehensive comparison of the existing pensions with the proposed new SIPP. However, you are adamant that you wish to consolidate your pension fund into one pot and have specifically requested a SIPP as you are again adamant that you wish to invest in property within your pension fund. You have already invested in two buy to let properties and understand this market and you would like your funds within your pension to do the same. I have to stress that based on the limited projection figures and taking the charges into account, I would not recommend moving pension until all this information is available and a more detailed comparison can be made. However you wish to go ahead based on the limited information we do have and are fully aware of the associated charges in doing so with both contracts.*"

SFS then said, in the report, that in the above context it was recommending the pension switch, and that the benefits of doing so were – tax efficiency; control and flexibility over asset choices and the taking of benefits; better range of funds and potentially better fund performances in the SIPP than in the PPs; and achieving sought-after pension consolidation. The report warned about the risks of performance not matching expectations and of illiquidity in commercial property-based assets. It then said the following about the SIPP's costs –

"*The Rowanmoor SIPP is more expensive than you* [sic] *existing pension products, but you feel that the benefits that it offers are worth the cost because:*

1. *The SIPP has the potential to outperform your existing personal pensions*
2. *To outperform your current pension plans because of the wider investment choice*
3. *You are keen to become more involved in the decision making investment strategy of your pensions fund*
4. *The quality of customer service and Company financial strength are also very important to you.*
5. *Tax free cash is now available to you through the new SIPP from age 55 onwards.*"

On balance, I am not persuaded that Mr V presented himself as an insistent client.

The report is clear on the fact that he sought advice from SFS, yet the quote directly above could be read as though he was advising himself on the pension switch. There is no evidence that he had the knowledge, experience or circumstances to be in, or to support, a position whereby he could insist on a pension switch regardless of advice to the contrary.

There is also no evidence of advice from SFS dedicated to meaningfully setting out reasonably detailed reasons why a pension switch was unsuitable for him, in his circumstances at the time. There is enough in the report to show that SFS was aware of such reasons, but as is evident in the earlier quote above it skimmed over them within the report. It did not present advice to Mr V with the clearly reasoned and sole recommendation that he should not switch his pensions. Instead, the report briefly says SFS would not recommend the switch, then it goes on to recommend the switch. In the absence of such dedicated advice, there is also no evidence of Mr V expressly dismissing or disagreeing with it and insisting that he wanted the pension switch regardless of the advice he had received against it.

It is also noteworthy that the report was issued to Mr V *after* the SIPP had been established, so this arguably devalues any argument that it warned him against the pension switch. The switch was active and on course to its conclusion by the time the report was issued.

The investigator appears to have referred to the PP's fund values in her considerations. I considered the same, but I have also noted their *transfer* values.

The total transfer value of the PPs was relatively modest. The report says it was around £31,000 in September 2011. A total of around £5,000 was to be incurred in exit penalties. This alone reduced the total *transfer* value by around 16%. In addition, and as the report conceded, the SIPP's charges were to be more expensive than those of the PPs. On a costs basis alone, the idea of a pension switch in Mr V's case was evidently unsuitable at the time. Adding the other fees that the investigator mentioned to the more expensive SIPP fees meant the new SIPP probably had a post-transfer loss (from fees/charges alone) of around 20% to recover from, before pursuing any chance of gains – gains which depended on a high-risk underlying investment, which were not guaranteed and which the report acknowledged could mismatch expectations.

This prospective/foreseeable scenario was inherently unsuitable for Mr V, especially given that at its core was his only pension arrangement. In other words, his only arrangement at the time for his future retirement. It was a serious matter and it created the need for very clear, non-conflicting and firm advice – from SFS to Mr V – against the pension switch. SFS did not give such advice. Ultimately it recommended the switch. That was not in his best interests, and it was not the sort of advice it was expected to give upon applying the pension switch checklist to his circumstances.

For all the above reasons, I consider that SFS is responsible for recommending an unsuitable pension switch to Mr V and is responsible for the TRG UCIS investment that flowed directly from and that followed the executed switch and establishment of the SIPP. That investment was also inherently unsuitable for him. SFS appears to have presented the same alleged *insistent* basis for its advice in this respect, but for the same reasons given above I am not persuaded by it.

The lack of diversification is enough, on its own, to illustrate how unsuitable the investment was. As the investigator noted, almost 90% of his overall SIPP fund was invested in the TRG UCIS. No attempt appears to have been made at the time to properly address this serious lack of diversification. As the advising firm, SFS was/is responsible for this omission.

In real terms, the SIPP depended wholly on the high-risk UCIS. Mr V had been moved, to the UCIS, from PPs with mixed low to medium risk profile portfolios – as the report says. Therefore, aside from the failure to have investment diversification in the SIPP portfolio there also appears to have been a mismatch between his low to medium risk profile – or, at least, the risk profile of his previous pension investments – and the high-risk profile of the UCIS.

There is no evidence of him having a background that gave reason to consider the UCIS to be suitable. I agree with the investigator that it is an unconvincing argument to say his domestic buy-to-let property investment experience was comparable or complementary to an unregulated high-risk overseas commercial property collective investment scheme (as was the TRG investment).

Overall, on balance and for the above reasons, I find that SFS' recommendations of the pension switch and of the TRG UCIS investment were both unsuitable.

Putting things right

Fair compensation

My aim is that Mr V should be put as closely as possible into the position he would probably now be in if he had been given suitable advice.

I take the view that he would have invested differently. It's not possible to say *precisely* what he would have done differently. But I'm satisfied that what I've set out below is fair and reasonable given Mr V's circumstances and objectives when he invested.

What must SFS do?

To compensate Mr V fairly, SFS must:

- Compare the performance of Mr V's investment 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.

- SFS should also add any interest set out below to the compensation payable.

- SFS should pay into Mr V's pension plan 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 SFS is unable to pay the total amount into Mr V'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 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 is not a payment of tax to HMRC, so Mr V would not be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Mr V's actual or expected marginal rate of tax at his selected retirement age.

- It is reasonable to assume that Mr V is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr V 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 to Mr V £300 for the trouble caused to him by SFS' recommendations disrupting his retirement planning. I consider this amount to be fair compensation for his experience in this respect.

- Provide Mr V with the details of its redress calculation in a clear and simple format.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Rowanmoor SIPP	Some liquid/some illiquid	FTSE UK Private Investors Income Total Return Index	Date of investment	Date of settlement	Not applicable

Actual value

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

It may be difficult to find the *actual value* of the portfolio. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case. SFS should take ownership of any illiquid assets by paying a commercial value acceptable to the pension provider. The amount SFS pays should be included in the actual value before compensation is calculated.

If SFS is unable to purchase illiquid assets, their value should be assumed to be nil for the purpose of calculating the *actual value*. SFS may require that Mr V provides an undertaking to pay SFS any amount he may receive from the illiquid assets in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. SFS 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.

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 Rowanmoor SIPP 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 will accept if SFS totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

The Rowanmoor SIPP only exists because of illiquid assets. In order for the Rowanmoor SIPP to be closed and further fees that are charged to be prevented, those assets need to be removed. I have set out above how this might be achieved by SFS taking over the illiquid assets, or this is something that Mr V can discuss with the provider directly. But I do not know how long that will take.

Third parties are involved and we do not have the power to tell them what to do. If SFS is unable to purchase the illiquid assets, to provide certainty to all parties I think it is fair that it pays Mr V an upfront lump sum equivalent to five years' worth of wrapper fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the Rowanmoor SIPP to be closed.

Why is this remedy suitable?

- Mr V wanted Capital growth and was willing to accept some investment risk.

- The FTSE UK Private Investors Income ***Total Return*** index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.

- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr V's circumstances and risk attitude.

Compensation limit: Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, £160,000, £350,000, £355,000, £375,000 or £415,000 (depending on when the complaint event occurred and when the complaint was referred to us) plus any interest that I consider appropriate. If fair compensation exceeds the compensation limit the respondent firm may be asked to pay the balance. Payment of such balance is not part of my determination or award. It is not binding on the respondent firm and it is unlikely that a complainant can accept my decision and go to court to ask for such balance. A complainant may therefore want to consider getting independent legal advice in this respect before deciding whether to accept the decision.

In Mr V's case, the complaint event occurred before 1 April 2019 and the complaint was referred to us after 1 April 2022 so the applicable compensation limit would be £170,000.

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Solutions Financial Services should pay Mr V the amount produced by that calculation – up to a maximum of £170,000 (including distress or inconvenience but excluding costs) plus any interest on the amount set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £170,000, I recommend that Solutions Financial Services pays Mr V the balance plus any interest on the amount as set out above. This recommendation is not part of my determination or award. It does not bind Solutions Financial Services. It is unlikely that Mr V can accept my decision and go to court to ask for the balance. Mr V may want to consider getting independent legal advice before deciding whether to accept this decision.

If Solutions Financial Services does not pay the recommended amount, then any portfolio currently illiquid should be retained by Mr V. This is until any future benefit that he may receive from the portfolio together with the compensation paid by Solutions Financial Services (excluding any interest) equates to the full fair compensation as set out above.

Solutions Financial Services may request an undertaking from Mr V that either he repays to Solutions Financial Services any amount Mr V may receive from the portfolio thereafter or if possible, transfers the portfolio to SFS at that point.

Mr V should be aware that any such amount would be paid into his pension plan so he may have to realise other assets in order to meet the undertaking.

My final decision

For the reasons given above, I uphold Mr V's complaint and I order Solutions Financial Services to calculate and pay him redress (and compensation for the trouble he has been caused) as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr V to accept or reject my decision before 25 October 2023.

Roy Kuku
Ombudsman