DRN-4300049

The complaint

Mr L complained because he felt National Westminster Bank Plc ("NatWest") gave him unsuitable advice to set up a self-invested personal pension ("SIPP") and to then invest in a commercial property.

What happened

In November 2006 Mr L met with one of NatWest's advisors. Notes from the meeting said he wanted to discuss pension contributions for his retirement and to use the pension to buy a commercial property. Two *Fact Find* documents were completed which, amongst other things, recorded that:

- Mr L felt there was a shortfall in his existing pension arrangements
- his main aims were to ensure a good standard of living at age 55 and to buy a commercial property using his pension funds
- his company's future plans included the purchase of commercial premises in two to four years
- his company would pay £10,000 into the pension initially and then £1,000 per month
- he wanted to hold the pension funds as cash so as to not be subject to market volatility.

On 21 November 2006 the advisor wrote to Mr L outlining the recommendation. Her letter outlined various points, including:

- Mr L didn't think it was in his best interests to re-start an existing personal pension he held as he couldn't invest in commercial property within that pension
- he'd discussed a plan with his accountant for his company to contribute to a pension, for the pension to buy a new business premises for roughly £150,000 using the accumulated funds in the pension, and for the premises to then be let to his company at a commercial rate
- Mr L's immediate objective was to accumulate funds in the pension.

The advisor recommended that Mr L set up a SIPP and for the contributions made by his company to be placed in interest paying accounts.

In February 2008 the advisor wrote to Mr L – in part, as an addendum to the 2006 recommendation letter. She said:

- she'd discussed with Mr L the possibility of contributions being paid into his existing pension and using a cash fund to accumulate funds until the property purchase proceeded, and the fund could then be transferred to a SIPP to facilitate the property purchase
- she'd pointed out that this might be a less expensive option
- Mr L had understood her rationale but he wanted to start the SIPP so he'd be ready to proceed when a property was found
- Mr L had received no service from his existing pension provider and he didn't want to consider contributing to the existing pension as an option.

In early 2008 Mr L started the process for the SIPP to buy a commercial property. The completed forms show:

- the property was one Mr L personally owned
- the purchase price was £24,000, with the money coming from funds held within the SIPP
- the SIPP would lease the property to Mr L's company, with the annual rent being £2,400
- Mr L's company would use the property to store tools and equipment.

On 1 October 2008 the advisor wrote to Mr L (having spoken to him the previous day) to outline her recommendation. The letter said sufficient funds were now in Mr L's pension for the property purchase and that the purpose of the conversation was to discuss the excess funds in the pension over and above the purchase price of the property. The advisor recommended that Mr L:

- leave £25,000 in the cash fund so that he could complete the purchase of the property
- invest the remainder in various funds.

The SIPP bought the property from Mr L and leased it to Mr L's company. Mr L later bought the property back from the SIPP.

In June 2021 Mr L complained to NatWest as he felt he'd received negligent advice. He said the advisor told him that moving the property into the SIPP would make him more money as he could pay himself rent and build up funds in a tax-free environment. However, he felt he would have been better off if the amount paid in rent had been invested into a personal pension instead.

NatWest investigated the matter but felt the advice given was suitable for Mr L's needs and circumstances at the time. Mr L remained unhappy, so he referred his complaint to us.

What I provisionally decided – and why

I issued a provisional decision which explained why I felt the complaint should be upheld. The relevant parts of my provisional decision are outlined below and they form part of this final decision.

- I thought it was clear that in 2006 one of Mr L's longer term aims was to use a pension to buy premises for his company to operate from. This was evidenced by the notes from the meeting and by the information included in the Fact Finds. The advisor's recommendation letter also specifically referred to the commercial premises. But I didn't think buying premises was Mr L's immediate aim. That was because he didn't have £150,000 in a pension to use for this purpose. His immediate aim in my view was to build up funds within a pension – by way of the contributions – until such time as there was enough to buy a commercial property.

- I also thought it was clear that Mr L didn't want to take any risk with the contributions that were going to be paid into his pension. This was evidenced by the supplementary Fact Find – which recorded that Mr L wanted to hold the pension funds as cash in order to avoid market volatility [of other investments]. The recommendation letter also said that in respect of this particular transaction Mr L's risk attitude was category one, which was described as him not being prepared to take any risk with his capital.

- So, in my view, in 2006 the immediate aim to build up the pension fund and Mr L's very low attitude to risk should have been the main considerations in determining what was suitable. In that regard, it seemed to me that fundamentally there were two potential options – for the contributions to be paid into Mr L's existing pension, or for a new pension to be started and the contributions paid into that.

- The first option seemed to have been deemed unsuitable because of Mr L's reluctance for contributions to be paid into his existing pension. But the advisor's overall obligation was to treat Mr L fairly and to act in his best interests – in essence, to give him suitable advice. It wasn't to give advice based on what Mr L thought was the best course of action or to simply recommend something that aligned with his objectives. That was because Mr L's views and objectives might have been unrealistic and/or unsuitable for him.

- Another reason the advisor recommended the SIPP rather than the existing pension was because the existing pension couldn't hold a commercial property as an investment. But there wasn't a commercial property that was going to be immediately held within the pension – Mr L's immediate aim was simply to build up his pension funds. I wasn't therefore persuaded that in 2006 he needed a pension that could hold a commercial property.

- Mr L didn't want to take any risk with the money being invested in his pension. I hadn't seen details of his existing pension; however, I thought it very unlikely that contributions into that pension couldn't have been held in cash or invested in a very low risk fund. So I wasn't persuaded that Mr L needed a pension (such as the SIPP) where contributions could be placed in a large variety of investment funds.

- Finally, the advisor recognised, and said in her February 2008 letter, that the costs of Mr L's existing pension were likely to be lower than those charged for the SIPP.

- Given the above, I concluded that the advice to take out the SIPP was unsuitable. In the circumstances I thought suitable advice was for the contributions to be made to Mr L's existing pension. Further advice could then be given if/when Mr L was in a position to use his pension funds to buy a property. My conclusion was based on:

    - Mr L's immediate aim being to accumulate funds within a pension – so he didn't need a pension that could hold a commercial property as an investment
    - Mr L needing a pension that could hold his funds in cash or in a low risk fund (which his existing pension most likely could have done) – so he didn't need a pension offering varied investment opportunities
    - Mr L's reluctance to contribute to the existing pension didn't make that option unsuitable
    - the existing pension was most likely cheaper than the SIPP.

- There was an argument that Mr L would have ignored advice to contribute to the existing pension and proceeded to set up the SIPP anyway. This was because he viewed the SIPP as his best course of action, because of the service he'd received from the pension provider, and because he'd be ready to proceed when a property was found. The counter argument was that Mr L would have followed the advisor's recommendation and contributed to the existing pension. I thought the counter argument was the more persuasive. That was because Mr L was paying NatWest for expert advice; and I thought he – like most relatively inexperienced consumers – would more likely value and trust the advice given to him by an expert rather than his own view.

- So if the advisor had advised Mr L in 2006 that his best option was for the contributions to be paid into the existing pension I thought it was most likely that he would have followed that advice.

- I then looked at what I thought most likely would have happened had Mr L's pension contributions been paid into his existing pension from 2006.

- The property the SIPP bought in 2008 wasn't the same property that was discussed in 2006. That was because the 2006 documents referred to the pension buying a property for around £150,000 that Mr L's company would operate from; but the property bought by the SIPP in 2008 cost £24,000 and was used to store tools and equipment.

- Mr L told our investigator the smaller property was part of the discussions he had with the advisor, and that it was the advisor's idea to put this property into the SIPP. I couldn't rule out the possibility of a discussion about this property taking place prior to 2008. But the first documented reference I'd seen regarding the purchase of this property was in early 2008. It was only the larger property that was mentioned in the earlier documents. So based on the documentary evidence I'd seen, I concluded it was most likely that the original SIPP advice was given based on the intention to buy the larger property.

- Had Mr L not started the SIPP it was most likely that he would have approached the advisor in 2008 for further advice about investing his pension funds in the commercial property. And it was most likely that the advice would have mirrored the advice the advisor gave in 2006 ie to start a SIPP as the commercial property couldn't be held within the existing pension. I said that because there was no plausible reason why the advisor's theoretical advice in 2008 would have been any different to the actual advice in 2006.

- In 2008 the advisor would have had to look at the suitability of the intended investment in order to consider the overall suitability of SIPP. That was because the Conduct of Business rules (COBS 9.2.2R) required the advisor to obtain the information necessary about Mr L to have a reasonable basis for believing her recommendation met his investment objectives, that Mr L was able to bear any related investment risks and that he had the necessary experience and knowledge to understand those risks. That effectively required an understanding of Mr L's objectives and the risks related to them and meant the advisor couldn't ignore Mr L's intention of investing in an unregulated, esoteric or high risk investment. And if the advisor didn't consider the investment to be suitable in Mr L's circumstances, she should have said so rather than presuming that the SIPP was necessary in order for the investment to happen.

- That meant that in theoretically advising Mr L in 2008 to take out a SIPP in order to hold the commercial property as an investment, the advisor would have needed to take account of the investment itself and whether it was suitable for Mr L's circumstances. That would have meant carrying out things like a cost analysis to see if the SIPP and investment would benefit Mr L and determining whether the investment met with Mr L's objectives and attitude to risk.

- The nub of Mr L's argument was one of cost versus benefit ie the cost of holding the investment compared to the potential benefit he would receive made the investment unsuitable. Costs and risks to were two important issues when considering suitability.

- Investing in commercial property is inherently risky – because of things like a tenant defaulting on the rent, the property being unoccupied and the property not easily being convertible to cash if money is needed. So the potential for growth needs to outweigh this risk for a recommendation to be suitable. Further, Mr L's attitude to risk appeared to be fairly low given his reluctance to invest the pension contributions in anything other than cash.

- Mr L's complaint letter to NatWest dated 7 June 2021 referred to a period of 13 years that the garage was held within the SIPP and outlined various costs:

    - £2,043.75 for what he described as the sub fund provider's set-up costs
    - £900 a year for the sub fund provider's annual fees
    - £656.29 (in total over 13 years) for the cost of insuring the property
    - unspecified costs for the setting up of the SIPP and NatWest's initial and ongoing advisor charges.

- Those costs compared to the annual rent being received of £2,400.

- By my calculations, the total rent received over the 13 years would have been £31,200. The known costs outlined above total just over £14,400. That left a 'profit' of around £16,800. The SIPP set up costs and the advisor's charges would further reduce this figure, but I wasn't persuaded they would be much more than around £5,000. So on the face of it there appeared to have been some value in the transaction as overall the income exceeded the charges.

- However, as mentioned above, in making the theoretical recommendation in 2008 the advisor would have needed to carry out a cost analysis to see if the SIPP and investment would benefit Mr L. That should have included consideration of other options available to him. And if the idea was to grow Mr L's pension fund via his company paying to lease the property, as Mr L owned the property personally it seemed to me that an option was for Mr L to lease the property to his company directly. Mr L could then have made personal contributions to his existing pension using the rental payments he received. In my view, that would have saved all the pension fees and would most likely have been a far cheaper option.

- I therefore thought that any theoretical cost analysis done in 2008 would most likely have resulted in the property investment and SIPP being deemed unsuitable given the risks involved. And if Mr L had received such advice I again thought it was most likely that he would have followed it and not proceeded with the transaction.

- What I'd said related to a theoretical position in 2008 rather than what actually happened. But I thought it was necessary to consider that in order to determine the position Mr L would most likely be in now but for the unsuitable advice he received in 2006 to start the SIPP. So, to summarise, I concluded that:

    - the advice Mr L received in 2006 to start the SIPP was unsuitable, and
    - had he been given suitable advice contributions would most likely have been paid into his existing pension and he wouldn't have invested in the commercial property.

Responses to my provisional decision

NatWest accepted my provisional decision in terms of the outcome and redress methodology. However, it questioned whether the comparison of funds for the redress should be amended for the time period approximately a year after the original SIPP was recommended, when Mr L had a more aggressive attitude towards investment risk.

Mr L said he had nothing further to add.

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.

Neither party provided anything further in respect of my conclusions that the advice Mr L received in 2006 to start the SIPP was unsuitable, and that had he been given suitable advice contributions would most likely have been paid into his existing pension and he wouldn't have invested in the commercial property. My conclusions on these issues therefore remain as outlined above, for the same reasons.

The only issue for me to consider is NatWest's point about the comparison for the redress calculations I'd proposed.

The first redress comparison I outlined in my provisional decision is the preferred/default method of redress. It's essentially a *like-for-like* comparison between the current value of Mr L's SIPP and what the current value of his existing pension would have been (ie the notional value) had the contributions been paid into that pension and everything else being equal. As it's known what happened in respect of the SIPP (eg contributions, withdrawals, investments) I remain of the view that the like-for-like comparison is the appropriate calculation.

The second comparison I outlined will only arise if the preferred/default method of redress can't be calculated because NatWest can't get the notional value of Mr L's existing pension eg because the provider of that pension is unable or unwilling to calculate it. If this happens NatWest will need to calculate a fair value for Mr L's existing pension using the benchmark I proposed (and then compare that to the current value of the SIPP). I chose this benchmark as I felt Mr L wanted to grow his pension without out any, or with very little, risk to his investment.

The documentation NatWest referred to from around 2007/2008 does suggest that Mr L had a more adventurous attitude to risk with respect to some of his pension funds. For example, a review letter in October 2007 refers to a discussion about increasing the contributions and Mr L deciding to invest these contributions in equities in order to get higher potential growth. Another letter in October 2008 refers to the surplus funds over and above the purchase price of the commercial property and investing it in equities. However, my understanding from the content of NatWest's final response to the complaint is that neither actually happened. Reference is made in that letter to Mr L requesting in September 2008 that his contribution be reduced from £1,000 to £200 rather than increased; and to a letter that Mr L needed to sign to authorise the proposed investment changes never being returned.

With the above in mind, because of what actually happened I remain of the view that it's fair for the comparison calculation to be based on Mr L wanting capital growth with no or a very small risk to his capital.

Putting things right

My aim is that Mr L should be put as closely as possible into the position he would probably now be in if he'd been given suitable advice. It's not possible to know precisely what he would have done. However, as above, I think he would most likely have contributed to his existing pension and he wouldn't have invested in the commercial property. I'm satisfied that what I've set out below is fair and reasonable given that.

To compensate Mr L fairly, NatWest must:

- compare the performance of Mr L's SIPP with the notional value of his existing pension if contributions had been made into that pension. 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

- add any interest set out below to the compensation payable

- if there is a loss, NatWest should pay into Mr L's SIPP 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. Compensation shouldn't be paid into the SIPP if it would conflict with any existing protection or allowance

- if NatWest is unable to pay the compensation into Mr L's SIPP, it should pay the amount direct to him. But had it been possible to pay into the SIPP, 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 L won't be able to reclaim any of the reduction after compensation is paid

- the notional allowance should be calculated using Mr L's actual or expected marginal rate of tax at his selected retirement age. It's reasonable to assume that Mr L is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr L 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%

- provide the details of the calculation to Mr L in a clear, simple format.

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

Portfolio name	Status	Benchmark	From ("start date")	To ("end date)	Additional interest
SIPP	Still exists and liquid	Notional value of existing pension	Start date of SIPP	Date of my final decision	8% simple per year from the date of my final decision to settlement (if not settled within 28 days of NatWest receiving Mr L's acceptance)

The 'actual value' is the actual amount payable from the SIPP at the end date. The 'notional value' is the value of Mr L's existing pension had contributions been paid into that until the end date. NatWest should request that the previous provider calculate this value.

Any additional sum that Mr L paid into the investment should be added to the notional value calculation from the point it was actually paid in. Any withdrawal from the 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 there is a large number of regular payments, to keep calculations simpler, I'll accept if NatWest totals all those payments and deducts that figure at the end to determine the notional value instead of deducting periodically.

If the previous provider is unable to calculate a notional value, NatWest will need to determine a fair value for Mr L's existing pension, using this benchmark: average rate from fixed rate bonds. 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.

I've chosen this method of compensation because Mr L wanted capital growth with no or a very small risk to his capital. I consider that Mr L's risk profile was very low, in the sense that he didn't want to take any risk with his contributions. So if the previous provider is unable to calculate a notional value, then I consider using the average rate from fixed rate bonds reasonable because it's a fair measure for someone who wanted to achieve a reasonable return with very little risk to their capital. It doesn't mean that Mr L would have invested only in a fixed rate bond. It's the sort of investment return a consumer could have obtained with little risk to their capital.

My final decision

I uphold Mr L's complaint in part and require National Westminster Bank Plc to pay compensation as outlined in the 'Putting things right' heading above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 18 September 2023.

Paul Daniel
Ombudsman