

The complaint

Mr S complained, in his capacity as the appointed executor of the estate of Mrs S, about the service provided by Janus Henderson Fund Management UK Limited trading as Janus Henderson Investors ('JH') in connection with the sale of a holding held within the estate and also about investment loss suffered by the estate.

To put things right, Mr S wanted JH to pay the estate compensation for financial loss.

What happened

Mrs S died in 2022 and Mr S is one of her appointed executors, with authority to bring a complaint on behalf of the estate.

Grant of probate was issued on 5 September 2022.

On 22 September 2022, solicitors acting on behalf of Mr S wrote to JH enclosing the grant of probate along with a 'form of renunciation', signed by Mr S and dated 17 August 2022 instructing the sale of Mrs S's holding. The covering letter included the following wording:

'Please arrange to sell the investments and send us a cheque for the sale proceeds made payable to (*the solicitors*) as soon as possible.

Prior to proceeding with the instruction to encash, we would be grateful if you could telephone the writer to confirm on the number below. Please DO NOT PROCEED without first obtaining confirmation by telephone from the writer'

JH received this letter on 26 September 2022.

The sale of Mrs S's holding completed on 27 September 2022.

JH said it had acted on Mr S's instructions and completed the sale in line with its terms and conditions. JH said it hadn't been able to discuss the transaction or accept any decision from the solicitor on whether the transaction should go ahead as the solicitor didn't hold any authority on the account.

Our investigator was sympathetic but concluded that JH didn't need to do anything further to resolve the complaint as his view was, in summary that:

- we can't punish a financial business or tell it how to operate
- investment loss couldn't be established
- although JH could have done things better, we cannot award compensation for distress and inconvenience to an estate.

Mr S felt this was an unfair outcome, saying in summary:

- he had hoped to sell the holding sooner, when he thought a good sale price was achievable, but said '*JH refused until grant of probate was issued.*'

- JH was issued with instructions via his solicitor '*not to sell the holding automatically*' once grant of probate was issued and to contact either the estate or his solicitor before any sale.
- JH '*took it off their own backs to sell the holding...*' There is no evidence provided to show what efforts it made to contact him.
- JH made no attempt to contact Mr S's solicitor, despite the fact the grant of probate had been issued and his solicitors were acting as estate administrators.
- The market falls were dramatic and widely reported – Mr S put things this way: '*even the most junior office clerk at JH would have recognised that caution in dealing was needed.*'
- JH's failure to follow simple instructions caused considerable loss due to market conditions at the point of sale.

The complaint came to me to decide. I issued a provisional decision.

What I said in my first provisional decision

'I've carried out an independent review and having done so, I've reached the same conclusion as our investigator. I'll explain my approach and how I've reached my decision.

I sympathise with Mr S and I understand that what's happened has been upsetting and frustrating for him. Mr S put things this way: '*...the business sold a significant shareholding without consulting the estate hence crystalising a loss. May I also add that they had been clearly instructed by my probate solicitors, a matter to which they have admitted, not to sell anything without said consultation and still took it on themselves to do so, On the day when the market had dropped by around 8%.*'

It seems to me that the main issue I have to decide is whether JH made an error or acted in a way that wasn't fair and reasonable and this resulted in the estate losing out financially.

I must take into account the relevant law, regulatory requirements and best industry practice when deciding if JH did anything wrong.

The relevant terms and conditions that applied to Mrs S's holding include the following:

'What happens to my investment on death?

Investments form part of your estate on death and on production of the Death Certificate and the Sealed Grant of Probate or Letters of Administration, may be sold or re-registered in the names of the Executors or Administrators of the Estate or a Beneficiary.'

JH wasn't able to accept instructions to sell Mrs S's holding until Mr S had the authority conferred by the grant of probate to act as personal representative and give instructions on behalf of the estate. So I can't uphold Mr S's complaint on the basis that JH made any error when it didn't sell before it received the grant of probate.

Once Mr S's solicitor provided the grant of probate and the completed form of renunciation signed by Mr S, enabling JH to carry out Mr S's selling instructions, the onus was on JH to proceed with the sale. Under the terms and conditions it was required to sell at the next available valuation point – essentially, this meant a sale should happen at the first opportunity.

In his solicitor's letter dated 22 September 2022, this appeared to be what Mr S had said he wanted to happen: '*Please arrange to sell the investments ... as soon as possible.*'

I appreciate that Mr S says the later wording meant this was, in effect, a conditional instruction and JH should have phoned the solicitor before placing a trade and had regard to the simple instruction 'NOT TO PROCEED' until his solicitor had given JH specific instructions to do so. But JH has said the solicitor wasn't the executor on the account and so JH had no process for contacting Mr S's solicitors.

A financial business is entitled to set its own terms of business and operating processes, so this isn't a reason for me to uphold this complaint. And I think it's fair for JH to say that the solicitors didn't have authority in any event to place (or countermand) Mr S's selling instructions, as he was the executor.

Whilst I can see there was some ambiguity in the solicitor's letter sent on 22 September, I am not persuaded that JH made a mistake when it proceeded to carry out Mr S's selling instructions in these circumstances. JH had a clear selling instruction from Mr S that it was required to follow once he'd provided all the necessary paperwork. That instruction was confirmed in the solicitor's letter, which asked for this to be carried out '*as soon as possible*'. So I don't find that JH did anything wrong when it didn't first contact Mr S's solicitor before proceeding with the sale.

Nonetheless, although I find JH acted in line with its terms and conditions, it still needed to act in a fair and reasonable way overall, and I've thought about this carefully.

Given the way things were set out in the solicitor's 22 September letter, I think this did put some onus on JH to try and contact Mr S to check he understood that JH was under instructions to sell at the next valuation point. JH has told me that it attempted to contact Mr S by phone. Mr S has questioned this, but I have no reason to doubt what it says about trying to reach him and I haven't been provided with evidence, from Mr S's phone records for instance, to show that what JH says about this isn't correct. I also think it's fair to say that as the solicitor's letter arrived on 26 September and the next valuation point was the following day, opportunities to contact Mr S were limited.

So JH needed to make a decision about whether to press ahead with the sale of Mrs S's holding in these circumstances. It would've needed to weigh up the risks of not selling at the next valuation point as required by its terms and conditions and the fact that delay potentially risked investment loss against the fact it already held valid sale instructions – and the most recent correspondence gave JH no reason to think those instructions had been rescinded (indeed, the solicitor's letter can be taken to suggest there might be some urgency to sell). I've also kept in mind that if Mr S hadn't wanted to sell immediately, the terms and conditions gave him an option to re-register the investments held within the estate. He had a choice about whether to sell or not when he provided his sale instructions.

All in all, I don't find that JH's decision to carry on with the sale was unfair or unreasonable.

This means I must conclude that there are no grounds upon which to uphold Mr S's complaint. So I cannot award the redress he seeks.

In coming to my decision, I've taken into account everything Mr S has said, including his comments made in response to the investigator's view. But this doesn't affect the outcome. JH provided an execution only service here and it was required to implement instructions properly given – there was no obligation on JH to assess market conditions before carrying out a transaction and it didn't have any discretion to impose its own judgement on whether or not to sell. I can't fairly say that JH made a unilateral decision to sell Mrs S's holding as it was acting on instructions from Mr S when it did this. I think it's reasonable to assume that if

Mr S had changed his mind and didn't want to sell, he could have contacted JH to stop the sale going ahead.

I acknowledge that Mr S feels very strongly about his complaint. If I have not referred to each point he's raised it's because I have nothing further I can usefully add to what our investigator has said already. I have concentrated on what I consider to be the main points that affect the outcome of his complaint. I appreciate that my decision will be disappointing for Mr S but I hope that setting things out as I've done helps to explain how I've reached my conclusions.'

When I said in my original provisional decision that there was an onus on JH to contact Mr S to verify his instructions before proceeding, I misinterpreted what JH had said about this. When it became clear that JH did not attempt to contact Mr S directly when it wasn't able to speak to the solicitors, I issued a second provisional decision.

What I said in my second provisional decision

'To my mind, there was a clear indication from the solicitor's cover letter that there was a request not to proceed with selling until the executor or his representative had been consulted.

JH had already accepted Mr S's signed request that came with the cover letter from the solicitors, and it could see these were the solicitors that had obtained probate, so JH was well aware that these solicitors were already involved. Even if JH is correct on the question of the solicitor's authority, looking at the bigger picture and considering its customer's interests, I still think that JH ought to have tried to speak to Mr S first.

Alternatively, JH could have phoned the solicitors to say it would require formal authority to be able to act on their instruction or that it would need to have direct contact with Mr S, in order to give effect to the solicitor's request not to proceed without further discussion. The fact alone that the solicitors weren't recorded on JH's records as the executor shouldn't have been an obstacle to JH doing this.

This leads me to conclude that it wasn't fair or reasonable for JH to just go ahead with the sale of the fund when there was enough to indicate that this wasn't what Mr S wanted to happen. So it should have verified this first.

In coming to this conclusion, I've kept in mind that there is an argument for saying that had JH delayed selling and the markets had gone the other way, JH would potentially be open to a successful complaint that it ought to have acted promptly on the instruction it had received. But that wasn't the situation here (as I think JH would have known, as stockmarket falls were dramatic and widely publicised at the time) and this consideration isn't enough to persuade me that it would be fairer not to uphold this complaint.

So I am now planning on upholding this complaint.

This brings me to the question of redress.

There's information on our website which explains the Financial Ombudsman Service approach to redress. Briefly, I need to decide what I think is likely to have happened if JH had acted in a fair and reasonable way and contacted Mr S before proceeding with the sale and what the impact on the estate has been as a result of JH not doing this.

I asked Mr S to tell me, as far as he could now recall, what he would have told JH to do if he'd been contacted in response to the solicitor's letter and asked to confirm his selling

intentions before JH proceeded to sell. And I invited him to say when he thought it was likely he would have asked JH to proceed with the sale.

Mr S said he had been watching the markets closely and was looking to sell the JH holdings in the estate, but he was also aware of the impact political decisions made at the time were having on market prices. He mentioned a 'mini-budget' around this time having resulted in a market reduction of around 10% and told me that if JH had contacted him, he would've given instructions not to sell and wait and see how the market recovered.

I can appreciate why Mr S might have wanted to hold off realising the estate assets temporarily. On the other hand, he would likely have also considered that as he couldn't say when the market would recover back to pre-budget levels, once there was some improvement, which happened relatively quickly, selling sooner rather than later might be one way he could minimise further losses in a volatile marketplace.

I've also taken into account that Mr S had already demonstrated to JH a clear intention to sell – he had originally wanted to sell much sooner, ahead of the grant of probate, when the market price was more favourable. And I'm mindful that as the acting executor, the onus was on him to deal with probate and realise and distribute the estate assets. So I think it's fair to say that, irrespective of disappointing investment values, there was a real incentive and some pressure on Mr S to press ahead with selling.

Clearly, no-one can say for certain what would have happened so I've taken an approach that I consider to be fair to both parties in these particular circumstances. My intention is to put the estate, as near as possible, into the position it would broadly have been in, had JH checked with Mr S before proceeding to sell the investments held within the estate.

On balance, I think it's likely that Mr S would have postponed selling, possibly for a few weeks. But after that, when the markets appeared to have stabilised to a degree, my own view is that Mr S would likely have decided to proceed with the sale.

Whilst it's difficult to pick specific points in time, I think it's probable that a couple of weeks after the mini budget, by say 7 October 2022, Mr S could have been prompted to sell when there were signs the financial markets might be rallying, in some quarters at least. And by 21 October 2022, I think Mr S would have likely been feeling that his priority had become finalising probate and wrapping up the estate before further upheaval in the financial markets.

So I think a reasonable way to work out fair redress is to take the average price of the fund over this period (I'll call this '*the fair price*') and compare this with the price that JH achieved on sale (I'll call this '*the actual price*') to see whether or not the estate lost out in money terms.

As Mr S brings this complaint in his capacity as executor, I have no power to award redress beyond making up any financial shortfall to the estate.'

What the parties said in response to my second provisional decision

Mr S didn't agree with the 'fictional' sale date I had suggested. He said there was 'absolutely no way I would have sold until the market had recovered' and that he was able to pay the inland revenue and settle all other estate debts and he could 'quite categorically state that I would have held back on the sale of the JH holdings...'

JH provided information showing unit price movements during the period 7 October 2022 to 21 October 2022.

As I have now heard from both parties, I think it's reasonable for me to proceed with my review of this complaint.

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.

I've taken carefully into account everything that's been said in response to my provisional decision. I'd like to assure Mr S that I've thought carefully about everything again before coming to my final decision.

Mr S hasn't provided me with any new information that changes what I think about this case. I'd already considered all the main points mentioned above when thinking about my provisional decision. I appreciate that Mr S takes a different view to me – as of course, he is fully entitled to do. And I don't doubt that he is certain about what he says. But I have an obligation to be fair to both parties. It appears the relevant unit prices around this time showed limited movement only and, despite some recovery, they were consistently below the higher price that JH had achieved on sale. I am not persuaded that Mr S would have had any reason to expect that prices would be likely to recover significantly within any reasonably foreseeable period when the indications were to the contrary. So what Mr S has said isn't enough on its own to persuade me that the way I've suggested redress should be calculated isn't fair and reasonable, for all the reasons I explained more fully in my provisional decision.

Putting things right

JH should work out the average price of the holding held within the estate of Mrs S during the period 7 October 2022 to 21 October 2022 (*the fair price*).

JH should compare this with the price that JH achieved on sale (*the actual price*).

If the actual price exceeds the fair price (so the estate is better off as a result of what happened) then no redress is due. If the fair price exceeds the actual price, then JH should pay the difference to Mr S.

JH should provide the figures showing how it has worked out the above calculation in a clear and simple format to Mr S.

My final decision

I uphold this complaint brought on behalf of the estate of Mrs S and direct Janus Henderson Fund Management UK Limited to take the steps set out above to put things right.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mrs S to accept or reject my decision before 1 November 2023.

Susan Webb
Ombudsman