DRN-4454237

The complaint

Ms W, Mr M, Mr F, and an Independent Financial Adviser ('*IFA*') as executors complain on behalf of the estate of Mr B about Charles Street Securities Europe LLP ('*CSS*').

In summary, they say:

- Mr B was mis-sold investments.
- He had insufficient investment knowledge.
- He had a lower attitude to risk.
- He was incapable of making appropriate investment decisions due to his poor health.

The executors are being represented by the IFA.

What happened

One of our investigators considered the complaint and thought it was in jurisdiction however, she didn't think it should be upheld. In summary, she made the following key points:

- The executors complained in 2006 and 2007, within three years of when they knew or ought reasonably to have known they had cause for complaint.
- The initial letter dated 26 December 2006 appears to be an inquiry seeking information, however, the letter dated 19 January 2007 clearly expresses dissatisfaction. It made clear that the advice was unsuitable due to the risk level and Mr B's health – CSS hasn't provided a response to this point.
- Mr B suffered from a rare disease which he was diagnosed with in 1996. Medication he was prescribed could lead to fatigue and occasional impaired concentration.
- By the date of his investment, in March 2004, he'd returned to work, albeit on reduced hours and was dealing with his daily affairs.
- Although it's suggested that Mr B was vulnerable to cold callers, his driver's license hadn't been revoked or suspended because of unfitness. And his job would suggest that he still had thinking skills when he invested with CSS.
- The 2003 medical report commented on Mr B's managed return to work and reasonable level of fitness. This along with his ability to manage his day to day living demonstrate his capabilities.
- At the point of investment, it was recorded that Mr B held a portfolio in shares and ISAs – presumably with various levels of risk - worth over £300,000.
- Even if he started off as a cautious investor, it doesn't mean that he couldn't go on to take higher risk as he became more experienced.
- Despite what the executors say about Mr B being targeted by a series of financial institutions – in the stye of a boiler room fraud – she can't say that Mr Bs' approach wasn't to invest in higher risk products and that he was likely to have approached the various financial institutions.
- Despite what the executors say, there's no evidence that CSS didn't have follow up meetings with Mr B or didn't complete appropriate fact finds. Mr B handled his own financial affairs without consulting anyone, so it's not unsurprising that the executors have no knowledge of these affairs.

- In this instance CSS took account of Mr B's overall finances. He had substantial assets: a house, investment portfolio, income from work and a sizable pension, so she can't say it did anything wrong.
- She's seen nothing to say that Mr B's investment was rated higher than his risk appetite. Just because other complaints, in relation to other investments, have been successful doesn't mean the advice was unsuitable for him.
- Mr B was able to make investment decisions and invest just before he passed away. He had knowledge and experience of trading on the market.
- Given the passage of time it's difficult to know what was and wasn't discussed with Mr B. There's no evidence that he was wrongly advised based on his investment experience, health, and attitude to risk.
- The evidence points to Mr B being able to make his own financial decisions, and understand information disclosed. Although Mr B's investments carried a higher level of risk than most of his other investments, she can't say this wasn't part of a well-informed decision.

The executors disagreed with the investigator's view. The IFA made the following key points:

- A previous medical report (from January 2003) predating contact with SCC (in March 2004) confirmed that Mr B's condition was 'life threatening' and the treatment was 'life long'. It also confirmed that he required a 'fearful' amount of regular medication which resulted in fatigue and impaired concentration. There was no suggestion that this could be suppressed with medication.
- The 2004 medical report showed that his health had deteriorated since 2003. Including a period in hospital where he was reported as being confused and disorientated on admission. Between November 2004 and March 2006 he was admitted to hospital on several other occasions.
- By 2004, Mr B had retired on medical grounds – he ceased office working. He only received the occasional phone call.
- Following his deterioration in August 2004, Mr B ceased to drive.
- A Power of Attorney (POA) had been drawn up but not used. It was only after his death the executors discovered that Mr B had been the targeted by boiler room fraudsters.
- In terms of his previous experience Mr B had a portfolio managed by discretionary fund managers and advisers in lower and medium risk investments, predominantly invested in discretionary listed funds managed by Fidelity. A smaller part of the portfolio was in blue chip stocks held for the long term and purchases were infrequent.
- Mr B wasn't an experienced investor but trusted professional third-parties.
- He was a medium risk investor and all of his investments held were lower risk.
- He had no experience of investing in unlisted shares.
- From 2004, Mr B was targeted by boiler room fraudsters. He didn't approach separate businesses himself, and they deliberately mis-represented the levels of risk.
- Put differently, Mr B was mis-old all other high-risk investments by businesses that were subsequently found guilty of defrauding all their investors either in the UK or abroad. The Financial Services Compensation Scheme (FSCS) upheld one of their complaints against one such business. Its likely Mr B's details were sold on by the first business to the subsequent businesses.
- CSS was the third business that targeted Mr B which offered him advice about purchasing shares in private companies. In its letter of 26 February 2007, it confirmed that his portfolio was worth £300,000 and that he invested a total of £57,000 in high risk – which is all of his investments with CSS. CSS made no response when the executors said that actually Mr B had 60% in high risk.
- Mr B found it difficult to make his own decisions, he wasn't an experienced investor –

decisions were made on his behalf. He was trusting of fraudsters and that's why he became a victim. The evidence suggests that he was targeted by no less than four boiler rooms, in addition to CSS.

The investigator having considered the additional points wasn't persuaded to change her mind. The executors disagreed with the investigator's subsequent view and asked for an ombudsman's decision. There's been much correspondence between them, CSS, and the investigator but in summary the IFA made the following key points:

- The executors first raised concerns on 29 December 2006 about the 'illiquid nature' of the portfolio. They wanted a copy of the terms and conditions, and any instructions Mr B may have sent. CSS replied on 17 January 2007.
- In a letter dated 19 January 2007, the executors expressed concern that Mr B's instructions – which they say had been to only invest 20% of his capital in high risk - had instead invested everything in high risk.
- They also expressed concern about the illiquid and speculative nature of all the investments. CSS was made aware that Mr B was ill and on heavy medication.
- In a letter dated 21 February 2007, the executors reiterated their concerns which CSS acknowledged. It acknowledged that all of its investment were high risk, but it complied with his written instructions in that less than 20% of his [total] portfolio was in high risk.
- Based on the relevant definitions under Art 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001/544 ('the RAO') and the Perimeter (PERG) guidance manual – it would appear that Mr B was given advice by CSS.
- The way the form was filled out suggests he was given advice. And the client agreement would also suggest that he agreed to an advisory service.
- CSS made clear that all investments were made through it by phone and not post. According to CSS it can call Mr B anytime without being invited to do so to discuss investments, as well as receive promotional materials.
- Mr B relied on the telephone conversations to make up his mind. He would've been given risk warning but no effort to make sure that he understood them.
- Even after issues were raised, Mr B was called up and further investments were made.
- In all, Mr B made the following investments:
    - 2004 – Newscanner Plc - £5,000
    - 2005 – Safe Europe Plc - £10,000
    - 2005 – Morria Biopharmaceuticals Plc - £9,000
    - 2005 – LX Mobile - £2,250
    - 2005 – Greenkote Plc - £8,750
    - 2005 – Sepal Pharma Plc -£13,000
    - 2006 – Nonox - £5,400
- It's unlikely that Mr B would've only relied on the information in the brochures but rather the advice provided, but the advice wasn't suitable because it didn't match his attitude to risk and capacity for loss. CSS didn't act in his best interests.
- By 2004, Mr B's health had deteriorated sharply. He'd become 'increasingly confused and disorientated', he was unable to drive and was receiving daily care. It would've been clear to anyone that he had impaired speech, slow response, and confused manner.
- Mr B tended to invest in lower risk investments, so he was likely to be a medium risk investor in broader terms.
- The recent investment experience he had was through firms that had failed to explain higher risks.
- Mr B invested in the types of investments he made through CSS because he may have been happy to invest in 'unlisted companies' when promised high returns and

the risks were downplayed.
- The recommendations became unsuitable when they exceeded his attitude to risk and capacity for loss.
- CSS should've included 80% in non high-risk investments but it didn't. It went against the original client agreement.
- Even if Mr B was persuaded to take a high risk, he was only offered investments that the business offered.
- It might be that some of the investments Mr B made through the business was suitable given his attitude to risk. CSS failed to have regard for his capacity for loss and failed to stop recommending high risk investments because Mr B couldn't bear the loss should the investments fail.
- Less than two years after investing, Mr B suffered a chronic lack of cash.
- CSS didn't fully consider his circumstances, such as his outgoings and other investments. Put differently it couldn't reasonably assume his capacity for loss – was a max of 20% - without more information. The recommendations exceeded this limit.
- If CSS had stopped recommending these investments, he might have continued to invest in high-risk products either with CSS or elsewhere, but this is unlikely. Instead, if advised properly, he would've invested in lower risk products.

The investigator having considered the additional points wasn't persuaded to change her mind.

As no agreement has been reached the matter has been passed to me for review.

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 agree with the investigator's conclusion. I think this is a complaint that we can consider, however, I'm not persuaded that it should be upheld.

Jurisdiction

I'm satisfied that the (follow up) letter dated 21 February 2007 represents an expression of the executors' dissatisfaction about the advice that Mr B received. I can't safely say that CSS received and or replied to the previous letter dated 19 January 2007, so I'm discounting that letter.

I note that the February 2007 letter (unlike the January 2007 letter) was also acknowledged by CSS but not dealt with as a complaint. A final response letter (with referral rights) also wasn't given but should've been – in other words it wasn't dealt with appropriately – which is why I think the executors are entitled to bring their complaint now.

And, by complaining in 2007, I'm satisfied that the complaint was made in time. I note the investigator relied on the complaint having been made within three years of when the executors knew, or ought reasonably to have known they had cause for complaint after going through Mr B's documentation. However, it is actually the six year time limit that applies here, in that as the complaint in 2007 was made within six years of the event complained about – being the advice in 2004 – it has been made in time under the time limit rules.

CSS to date hasn't provided a response. However, as it is clear that a complaint was made in time which it didn't provide a final response to this is a complaint that our service can consider.

Merits

For the reasons set out above, I don't uphold this complaint. On the face of the evidence, and on balance, I'm unable to safely say that CSS behaved in such a way that this complaint should be upheld.

In other words, I can't safely say that CSS behaved unreasonably by advising Mr B to take a higher risk in the circumstances.

Before I explain why this is the case, I think it's important for me to note I very much recognise the executors' strength of feeling about this matter. The IFA has provided submissions to support the complaint, which I've read and considered carefully. However, I hope they won't take the fact my findings focus on what I consider to be the central issues, and not in as much detail, as a discourtesy.

The purpose of my decision isn't to address every single point raised by the parties under a separate subject heading, it's not what I'm required to do in order to reach a decision in this case. My role is to consider the evidence presented by the IFA, and CSS, and reach what I think is an independent, fair, and reasonable decision based on the facts of the case. I don't need any further evidence to make my decision.

I don't uphold this compliant, in brief, for the following reasons:

- I'm aware that Mr B was diagnosed in 1996 with a rare and serious condition. Although his health deteriorated towards the end of his life, he had time to adjust to his situation since diagnosis. It's also likely that medication was likely to have had an impact on him, but I haven't seen evidence this stopped him living his life or making his own decisions.
- Put differently, it looks like his health may have gone up and down, but life didn't stop, with Mr B only retiring in 2004.
- Based on the 2004 medical report, it would seem he became progressively ill since August 2004 – roughly five months after his initial investment with CSS – and eventually required hospitalisation on several occasions between 2004 and 2006.
- I appreciate the executors say he wasn't driving (in 2004) but whilst this may have been a choice on his part and despite his diagnosis and health, his licence wasn't revoked.
- I also note that based on what the executors say, he had a POA drawn up, but it wasn't signed/registered and as such provides no evidence that Mr B couldn't still make up his mind.
- I understand that separate complaints made by the executors in respect of other businesses were upheld, but this doesn't mean that this complaint should be too. I'm aware that there was some criminality/illegal activity involved in those other complaints but there's no evidence of CSS doing the same.
- I understand that the initial investments were made in line with Mr B's written instructions, namely that he wanted to invest 20% of his (overall) portfolio in high risk, so I don't think there's any issue with CSS doing what Mr B wanted.
- I also don't think that 20% of the overall portfolio in higher risks is unreasonable or any more risk than Mr B could tolerate at the time.

- If this was a deliberate mis-sale without any regard to Mr B's financial circumstances, I don't think CSS would've bothered to get any undertaking or look into his circumstances.
- Given the passage of time I'm not surprised that there isn't more documentation - even if much of the conversations were over the phone, Mr B was also written to and evidently had some documentation – that's not something I can blame SCC for. Financial businesses aren't required to retain information indefinitely and I note it's been almost 20 years since the advice was given.
- In the circumstances and on balance, I simply don't have the evidence to say that this wasn't what Mr B wanted. Notwithstanding what the executors say, I'm aware that he still had a phone in his room and so could take calls relating to investment opportunities and the occasional calls relating to his business.
- I'm satisfied that Mr B was aware of and capable of understanding risk. He was likely to have received risk warnings and signed documentation confirming this.
- I'm not persuaded that the investments carried more risk than Mr B was willing to take.
- I note that he was in his mid-60's when he invested with CSS. He owned his own home and was retired (with an annual income of around £35,000) having successfully run his own business. He also had a portfolio worth £300,000 from which he had an income.
- I appreciate he had health issues, but I can't safely say that this prevented him from making decisions about his investments.
- There is no evidence CSS was made aware of his health situation and this isn't something I can blame the business for – the obligation would've been on Mr B to provide this information.
- Despite what the executors say, without evidence I can't safely say that Mr B was fatigued, his speech was slurred or that he had impaired concentration when he was on the phone to CSS and /or when dealing with these investment matters.
- The executors argue that Mr B was advised to take too much risk. This would suggest that he was capable of making his own decisions rather than being totally incapable but that he was persuaded to take too much risk. This undermines the executors' argument that he was unwell and incapable of making an informed decision.
- There's no dispute that Mr B's objective was capital growth and in order to achieve this he'd probably have to take more risk than he had.
- Under the section titled 'Investment Objectives' I note it stated: *"Investment objectives are a balanced return from income and from capital growth primarily to maximise capital growth"*.
- I note the executors conceded that Mr B had some understanding of the stock markets and how shares worked, and Mr B himself ticked the box to say he was prepared to take a high risk (in respect of 20% of his investments).
- I'm aware that Mr B had liquid savings, and investments in ISA/managed funds, FTSE 100/blue chip shares and this was an opportunity to take greater risk than he had previously.
- It was clear that Mr B wasn't risk averse and wasn't without experience.
- Whilst I appreciate what the executors say about Mr B being the victim of boiler room fraud, this wasn't evident at the time and to CSS would appear that Mr B was prepared to take a greater risk.
- Put differently, CSS would've been entitled to take into account the recent investments Mr M was making.
- Furthermore, the executors conceded that it's fair to say that Mr B had capacity to take a high level of risk with some of his investments.

- I think it's more likely than not he wanted to take a higher risk with a greater portion of his funds. It's possible if he thought he was unwell he wanted to leave something more for his family.
- I accept that it's impossible to know what he was thinking at the time. But his investments pattern would suggest that he was happy to take a greater risk.
- Despite what the Executors says, on balance I'm satisfied that the 20% was in respect of his overall portfolio rather than the investments made through CSS. Despite what the executors say, this accords with £57,000 invested amounting to no more than 20% of the £300,000 portfolio.
- At the point of sale, there was no way of knowing whether or not investments would work out or whether Mr B would suffer a lack of liquidity. I don't think this is something that CSS could predict or control.

I appreciate that the executors on behalf of the estate of Mr B will be thoroughly unhappy that I've reached the same conclusion as the investigator.

Furthermore, I realise my decision isn't what they want to hear. Whilst I appreciate their frustration, I can't uphold this complaint and give them what they want.

My final decision

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr B to accept or reject my decision before 11 June 2024.

Dara Islam
Ombudsman