DRN-4513009

Financial Ombudsman Service

The complaint

Mr M complains that Ingenious Capital Management Limited ("Ingenious") didn't provide the information it should have done about the two Enterprise Investment Schemes (EISs) he invested in and if it had it wouldn't have invested in them.

What happened

Mr M invested in Shelley Media 9 (SM 9) in or around January 2014 and Shelley Media March 2015/2016 (SM 2015/2016) in or around March 2016. He says he did so in reliance on information in the brochures for the schemes and discussions with Ms G, an employee of Ingenious. He complained, together with another investor (Mr P), whose complaint has also been referred to our service but is being considered separately.

One of our investigators considered the complaint and thought it should be upheld. In short he made the following key findings:

- The information provided made it clear enough that returns weren't guaranteed.
- The information provided made clear the minimum period the investment would need to be held for was three years with no end date mentioned and there is nothing to suggest Mr M wasn't aware the period of investment could be lengthy.
- In 2013 there was a significant change in how Ingenious was going to manage EIS investments going forwards. This led to it informing current investors in Shelley Media 6 of the change but not potential investors for subsequent EIS funds.
- The change in strategy meant that not all production costs were secured by pre-sales which was an additional risk which wasn't communicated to Mr M.
- The failure to provide information about the change in strategy and the risk resulting from that meant Ingenious didn't comply with Principle 2 of the FCA's Principles or with rules set out in the Conduct of Business Sourcebook (COBS) – specifically COBS 2.2.A3R and COBS 4.5A.3R.
- The failure to provide the information it should have done to Mr M meant that Ingenious prevented him from making an informed decision.
- Mr M would have invested in alternative EIS investments if he had been provided with the information he should've been.
- It is not possible to say what alternative EIS Mr M would have invested in and as they are generally very high risk, volatile and speculative investments with a high failure rate it is not possible to say he would have been in a better position so the investigator couldn't recommend Ingenious make any payment to Mr M.

Ingenious didn't agree with the investigator's finding that there was a significant change in the strategy and risk when it came to the investments the subject of the complaint. It made the following points:

- It strongly believes it did adequately disclose the risks of investing in SM 9 and SM 2015/2016 to Mr M.

- The letter it wrote to investors in Shelley Media 6 was because the Investor Agreement required it to notify investors of changes to the terms and as the terms incorporated parts of the brochure it was prudent to notify investors of the change in strategy.

- Mr M didn’t invest in any previous Shelley funds using the previous trading strategy so comparing the brochure for the investments he did make with previous brochures isn’t appropriate.,

- Mr M has referred to discussions in which he was informed the strategy had changed, so he was aware of this and also that the terms of the brochure and Investor agreement are very relevant.

- In signing the Investor Agreements for the investments Mr M acknowledged and agreed he didn’t rely on any statements or representations outside the brochure.

- The discussions could only have supplemented the brochures, not replace them and the brochures make clear that the investment is high risk and an investor could lose all their money.

- The brochures didn’t guarantee the amount of pre-sales and tax incentives.

Mr M noted the investigator agreed with his view that the risks of the investments hadn’t been adequately disclosed. He didn’t agree with the investigator’s decision not to award redress. He provided his detailed response along with further evidence in support of his complaint. In short he made the following points:

- The reports from Allenbridge Research an independent consultancy - for SM 7, SM Spring 2015 and SM October 2017 he has attached show the evolving gap risk.

- The report for SM 7 highlights a minimum of 85% of the production budget is covered by presales and tax incentives whereas the report for SM Spring 2015 shows this has reduced to 75% - so the gap risk increased from 15% to 25%.

- The report for SM October 2017 has detailed analysis including the risks of the investments, which is the first time the true risks of the strategy has been made clear.

- The report for SM October 2017 report refers to investors being able to cash out after three years and this being a nice feature to allow investors a timely exit but SM 9 is over eight years old and he is still being charged fees.

- He doesn’t agree that all EIS investments are very risky as the investigator stated. Some are, but others are more like high yield bonds. The expected return of between 90 -114p for every £1 invested indicated the Shelley Media products were of this latter kind of EIS.

- He has provided evidence of other EIS providers that disproves the assumption that all EIS lose money and the positive returns in the examples referred to stands in stark contrast to the returns from later funds of the Shelley Media EIS.

- In terms of redress, it is impossible to say what he would have done if he hadn't invested in the two Shelley Media EISs although it may have been very likely he would have invested in another EIS and there were several such schemes he might have considered at the time.

- Even if he had invested some of his money in alternative EIS he is likely to have invested in more generic investments as well.

- The two other main investments he made after 2013 were into Brighton housing market and West One Loans.

The investigator subsequently changed his opinion as to Ingenious paying redress. He said Ingenious should pay Mr M the capital he invested less the tax relief he had received. Mr M agreed with the revised opinion save he thought an award of interest should also be made, calculating that without interest the redress amounted to £4,741 which he called derisory. Ingenious thereafter also provided a more detailed response in which it made the following key points.

Ingenious also provided a further response specifically addressing what it considered to be the key issue - which it said was about how the enhanced investment strategy was disclosed in the brochure for Shelley Media 9, following communication of the strategy to investors in Shelley Media 6. It made the following key points about the information in the brochure.

- The purpose of any investment brochure is to highlight general and key commercial risks, especially so where the identity of companies in which investment will be made are unknown.

- The purpose of the brochure isn't to disclose the exact commercial terms which may or may not be agreed in the future on investment into any one investee company or the commercial terms such companies may agree on each commercial opportunity they undertake.

- For sound reasons, disclosure of commercial risks was therefore kept at an appropriate level and was consistent with the COBS requirements and the investment brochures were checked by its legal, compliance and commercial teams as well as an external law firm to ensure they complied with regulatory requirements.

- The more appropriate way to consider this matter is firstly to determine whether the investee companies followed the strategy set out in detail in the brochure - which they did - and secondly determine if the key commercial risks of the strategy were appropriately disclosed – which they were.

- The disclosure of the enhanced investment strategy to investors in Shelley Media 6 wasn't something it was required to do, as the investment brochure provided it with the ability to implement a range of commercial strategies.

- The purpose of that disclosure was because it was considered it would be helpful at that time as it coincided with HMRC adjusting how they expected companies to qualify for EIS relief going forwards.

- The enhanced strategy was seen as a positive development as it meant access to a wider pool of possible investment opportunities, allowing for possible higher returns for a slight increase in risk.

- This was the basis of the positive feedback given to Mr M at the time and it had good reason to expect better performance and could not have predicted the multi-year impact of Covid-19.

- Between 9% and 14% of film costs were supported by sales estimates and this accounts for a maximum of only 5.9% of the lower investment value with the balance of the reduction being down to factors equally prevalent in the earlier Shelley Media services.

- Mr M refers to incurring a large loss but is not projected to suffer any loss and instead should make a profit of £31,000 - after taking account of distributions already made, upfront EIS tax relief, the current value of his investment and further tax relief available.

As the parties didn't agree with the investigator's opinion, the matter was referred to me for a decision. I issued a provisional decision as my findings differed form those of the investigator and I didn't think the complaint should be upheld. The findings from my provisional decision are set out below.

"*My role is to determine Mr M's complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case based on the information provided by the parties and taking into account relevant: law and regulations; regulator's rules, guidance and standards; codes of practice; good industry practice at the time - where I consider it appropriate to do so. My findings of fact are made on a balance of probabilities – what is more likely than not – and it is for me to decide how much weight to give to evidence provided by the parties.*

In determining whether Ingenious did anything wrong when providing information to Mr M I have first considered its regulatory obligations as set out in the Principles and COBS.

Principle 7 'Communications with clients' states:

"A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading."

In terms of the relevant COBS rules, it is those that were in force at the time Mr M was provided with information that I need to consider. In this regard I note the reference in the investigator's opinion to COBS 2.2A.1R and COBS 4.5A.3R but these came into force in January 2018, so aren't rules that apply to this complaint.

The rules that did apply and I think are relevant considerations in this complaint are as follows:

COBS 2.2.1R

"(1) A firm must provide appropriate information in a comprehensible form to a client about:

(a) the firm and its services;

(b) designated investments and proposed investment strategies; including appropriate guidance on and warnings of the risks associated with investments in those designated investments or in respect of particular investment strategies;

(c) execution venues; and

(d) costs and associated charges;

so that the client is reasonably able to understand the nature and risks of the service and of the specific type of designated investment that is being offered and, consequently, to take investment decisions on an informed basis.

That information may be provided in a standardised format.

*[**Note:** article 19(3) of MiFID]"*

COBS 4.2.1R

(1) A firm must ensure that a communication or a financial promotion is fair, clear and not misleading.

(2) This rule applies in relation to:

(a) a communication by the firm to a client in relation to designated investment business other than a third party prospectus;

(b) a financial promotion communicated by the firm that is not:

(i) an excluded communication;

(ii) a non-retail communication;

(iii) a third party prospectus; and

(c) a financial promotion approved by the firm.

*[**Note:** article 19(2) of MiFID, recital 52 to the MiFID implementing Directive and article 77 of the UCITS Directive]*

COBS 4.2.2G

(1) The fair, clear and not misleading rule applies in a way that is appropriate and proportionate taking into account the means of communication and the information the communication is intended to convey. So a communication addressed to a professional client may not need to include the same information, or be presented in the same way, as a communication addressed to a retail client.

(2) COBS 4.2.1R(2)(b) does not limit the application of the fair, clear and not misleading rule under COBS 4.2.1R (2)(a). So, for example, a communication in relation to designated investment business that is both a communication to a professional client and a financial promotion, will still be subject to the fair, clear and not misleading rule.

It is with the above rules in mind that I have considered the information that was provided to Mr M before he entered into the discretionary management agreement with Ingenious and was invested in the two EISs.

There is no question Mr M was a very experienced investor and note the reference to him being a professional investor – although I take this to be a reference to his job rather than client status, as I haven't seen any evidence he was categorised by Ingenious as an elective professional client. In any event, regardless of his client categorisation, the information provided to him had to be clear, fair, and not misleading and such that it allowed him to make an informed decision as to investing.

The issues raised by Mr M about the information provided to him

In his complaint letter – made jointly with Mr P - Mr M refers to the 'paucity' of detail within the brochures which led to him seeking information from Ms G. However, he still refers to relying on information in the brochures which information he says was misleading. In summary he raised the following key issues about the information in the brochures.

- *The brochures refer to 'targeted tax-free returns between 8-18% pa' based on the investment strategy, historic performance, and other assumptions. The only historic performance related to funds using the previous trading strategy and the only basis for relying on their performance was if the later funds were similar in risk profile, which isn't the case.*

- *The brochures refer to Ingenious having an excellent record of delivering target returns on EIS investments and an excellent track record of delivering anticipated returns with the 90.5 -115p return scenario referred to as delivered, targeted, and anticipated. The translation of what is stated is that returns have been delivered consistently with notably above average frequency and reasonable to expect they will be achieved again. That is not consistent with what can be seen when looking at the returns for the various funds.*

- *The major determinant of any yield return is the time horizon for which the investment is held and the brochures refer to the investment as medium term. What Ms G said in the meeting and the illustration in the brochure being calculated over a period of 3.5-years reassured him. However, the various funds of the scheme using the new strategy are almost all well over that period.*

- *There is a knock-on effect to the return if the time horizon is longer than stated – it reduces the expected return significantly, by around 40% based on current calculations – and a further knock-on effect in relation to an increase in fees.*

It is central to Mr M's complaint that his decision to invest was made in reliance on statements made by Ms G in response to three issues he raised with her, namely:

- *Whether the investment horizon referred to in the brochure of 3-3.5 years was realistic;*

- *What the enhanced trading strategy entailed in funds subsequent to Shelley Media EIS 5;*

- *How the new trading strategy was faring in comparison to the old strategy that did not take any equity risk in film production.*

He said that Ms G has answered as follows in respect of those questions:

- *No guarantees could be given as to investment horizon but it was highly unlikely investors wouldn't be repaid within a four-year period.*

- *The enhanced trading strategy involved slightly more risk that the funds prior to Shelley Media 6.*

- *That the enhanced trading strategies were tending to do better than the old strategy and should offer returns over £1.00, irrespective of the 30% EIS tax relief.*

The information about risk

Mr M's key complaint is in relation to what has been referred to as both equity risk and gap *risk (I will refer to the latter throughout) that was a feature of the two Shelley Media funds he invested in. In simple terms this refers to the gap between the production costs and the funding obtained through pre-sales and tax incentives.*

I note that Ingenious has said that earlier Shelley Media funds weren't precluded from taking gap risk. However, from what it has said gap risk didn't feature in those earlier funds and it seems clear that there was a change in its approach at the beginning of 2013 wherein the gap risk became a significant part of its strategy when it hadn't been previously. This is shown by a letter Ingenious sent to investors in Shelley Media 6 in January 2013 before it proceeded to invest any of their money, which stated:

"Under the previous trading strategy, where a good deal of the distribution rights in an entertainment project have been sold in advance of production, the potential for upside form future performance is bound to be reduced. The Fund therefore proposes to invest in companies that do not sell such a great proportion of their distribution rights in advance, as a result of which there will be more potential for upside and a broader range of possible investment outcomes.

Typically these companies will still look to make substantial distributor pre-sales and secure the benefit of production incentives. However, we will be prepared to greenlight a project if, in addition to contracted pre-sales and production incentives, a reputable and reliable international sales agent, with a proven track record of delivering sales in line with its estimates, is also on board and our recoupment depends in part on estimates it has given for the project. We will of course take a conservative view on the value of those sales estimates in any case."

Ingenious has said it didn't have to inform investors in Shelley Media 6 about the change in strategy because it was within its remit as discretionary manager to implement the new strategy anyway. I accept that the brochure for Shelley Media 6 didn't state that investment would only be made into companies where pre-sales and tax incentives fully covered production costs.

However, I think there was certainly a risk clients could argue they had been misled if they became aware that Ingenious had changed its approach between subscription and investment – for example on the basis they had discussed the strategy with an Ingenious employee before subscribing and been informed that production costs would be fully covered. I think the fact that Ingenious offered to let clients cancel their subscription if they weren't happy with the change suggests the change was one that clients should be informed about.

That doesn't mean there was a need to explain that there had been a change in strategy within brochures for subsequent Shelley Media funds that used the new strategy referred to in the letter from the outset. There was no reason for Ingenious to think that the information provided to investors about those funds, through those brochures or by its employees, would lead them to think the manager was limited to investing only in investee companies whose production costs were fully covered by pre-sales and tax incentives.

The brochure for SM 9 included the following information.

In Part 1, headed 'Overview' sub-heading 'Investment Opportunity':

"Investment will focus on production companies producing strong commercial content with the benefit of distributor/publisher presales, applicable tax incentives and other revenue streams"

In Part 2 headed 'Investment Opportunity' sub-heading 'Investment Strategy':

" The business model of each Investee Company should be designed to:

- *……*
- *"manage the risk on the production expenditure it incurs on each Entertainment Project by negotiating an entitlement to pre-sale receipts, the benefit of applicable, film, television or video games tax incentives and/or other available revenue streams"*

In Part 6 heading 'Risk Factors':

"An investment in the service involves a high degree of risk and may not be suitable for all investors."

"This section contains the material risk factors that the Promoter and the Manager believe to be associated with an investment in the Service. If any of the following events or circumstances arise, the financial position and/or results of the Service could be materially and adversely affected; as could the availability of tax reliefs to investors. In such circumstances, investors may lose all or part of their investment."

Seven specific risk factors are then set out the first one being 'Risks Relating to Returns'. This included the following information:

"The value of the Qualifying Shares may go up or down. An investor may not get back the full amount invested and may, therefore, lose some or all of their investment. Therefore, assumptions, projections, intentions, illustrations, or targets included within this Brochure cannot and do not constitute a definitive forecast of how the investments will perform but have been prepared upon assumptions which the Promoter and the Manager consider reasonable."

The fourth identified risk is 'Risks Relating to Entertainment Production' which included the following:

"Due to the nature of the industry, content production is inherently risky (as it is not generally possible to accurately predict the level of sales income that can be achieved). However, as described herein, each Investee Company will be expected to reduce these risks by negotiating suitable recoupment positions providing an Investee Company with a spread of revenues from various positions in the exploitation chain, all of which will be negotiated prior to committing to production or co-production"

I am not going to set out what the brochure for SM 2015/2016 included as this was broadly the same information as referred to above.

The information in the brochures made clear the high-risk nature of the investments that would be made and whilst investee companies were required to manage the risk on production expenditure - by negotiating an entitlement to pre-sales, tax incentives and/or other available revenue streams - there was nothing in the brochures that indicated that production costs would be fully covered by pre-sales etc.

Moreover, Mr M confirmed in the course of his complaint that he was aware of the gap risk and his argument is about being misled about the extent of the risk. This comes down to what he says he was told by Ms G – namely that the enhanced strategy carried a 'slightly increased' risk. Putting on one side that his memory of a discussion from several years ago is unlikely to be accurate, this statement can only have been by reference to earlier Shelley

Media funds - and as Mr M hadn't previously invested in such funds he had no starting point from which to assess what was meant by a slightly increased risk.

Moreover, Mr M has said he asked Ms G what the enhanced strategy entailed because of the lack of detail in the brochure but on his case was willing to go ahead on the basis of a simple statement from Ms G which provided no detail at all about the enhanced strategy. In the circumstances I don't find his evidence persuasive either as to what Ms G said (this word was missing from the provisional decision sent to Mr M) or his purported reliance on this.

In short, I don't accept Mr M would have based a decision to invest a substantial amount of money in reliance on Ms G's verbal assurance that there was a 'slightly increased' risk or that it was reasonable for him to have done so. He was an experienced investor and I am not persuaded his decision to invest £1 million in SM 9 rested on such a simple statement.

The lack of any record of the statements that Ms G is said to have made also isn't supportive of Mr M's assertion that the statements were key to him investing. I note that he has referred to the need for trust between professionals but I am not persuaded that if these statements were as important as he suggests they were in his decision to invest, that he wouldn't then have confirmed his understanding by way of email or other communication.

Even if I was satisfied that Ms G stated there was slightly increased risk and Mr M relied on this when he decided to invest, I would still need to be satisfied that this statement was misleading. I accept that the fact not all production costs were covered by pre-sales etc meant that the strategy for those funds that included gap risk carried more risk than the previous approach but there is limited evidence to suggest it presented a significantly higher risk.

Mr M relies on a comparison between performance of those funds that included gap risk and the earlier funds to support his case that the funds he invested in were significantly riskier because of the gap risk. He has provided performance graphs and data that shows that those funds with gap risk performed significantly worse than the earlier funds without this. I have not checked the information Mr M has provided about performance but for the purposes of this provisional decision I have accepted what he has provided is accurate.

The poor performance of all funds that included gap risk compared to earlier funds could suggest the gap risk made the funds significantly riskier than earlier funds. However there are various risks associated with film production (or other entertainment projects) undertaken by investee companies, as Ingenious has pointed out. It has also said that only around 4% of the drop in value of Mr M's investments is due to gap risk. I cannot say on the current evidence that the poor performance of those funds with gap risk compared to earlier funds was primarily because those funds carried significantly more risk.

I have also considered the reports that Mr M has provided from Allenbridge Research. He has argued that it was only in the report for SM October 2017 that the true risks of the strategy were made clear. That report provides a level of detail that I am not satisfied it is reasonable to expect Ingenious to have included in the brochures.

Having said that, I can see no reason why the minimum level of pre-sales and tax incentives of 75% that the report and another report I have seen couldn't have been included in the brochures for the funds. This wouldn't have provided an unnecessary level of detail for prospective investors and would have provided greater clarity as to the strategy – although I acknowledge this doesn't necessarily mean the information provided by Ingenious through the brochures was unclear, unfair, or misleading.

In any event, even if this information had been included in the brochures I am not satisfied it *would have led to Mr M deciding not to invest in the funds he invested in. In effect Mr M's argument is that the gap risk created such a substantial risk he wouldn't have invested if he had been provided with further information about it.*

I think the first point to make about this is that the figure of 75% for pre-sales and tax incentives (so a maximum gap risk of 25%) was a minimum figure and the likelihood was that this minimum figure wouldn't be reached – in other words the gap risk was unlikely to ever reach 25%. The information from Ingenious indicates that no Shelley Media fund that included gap risk came close to that figure.

Moreover, the recovery of production costs that fell within the gap risk weren't dependent on speculative sales but on sales estimates from reputable sales agents. There is no reason that Mr M would have considered these would be unrealistic or unachievable at the time he invested such that he would have been put off from investing because of the gap risk – and the risk was further reduced by Ingenious substantially discounting the estimates. In the circumstances I am not persuaded that if Mr M had been given further information he would have chosen not to invest.

I think it is also worth noting the way that Allenbridge Research referred to the gap risk in relation to SM October 2017 - which I think is applicable to the funds the subject of this complaint which used the same strategy. The report states that the combination of conservative sales estimates, pre-sales, and tax incentives helped mitigate the manageable risks associated with film and television production and provided substantial downside protection. I am not satisfied that Mr M would have thought that a fund with substantial downside protection carried too much risk.

One final issue in relation to the gap risk is that in the course of the complaint in answer to questions put to it Ingenious stated there was no legal limit to the amount of gap risk that could be taken with a project or an overall fund – put another way it could take 100% gap risk if it wanted to

Insofar as it is being suggested by Ingenious that it wouldn't have been in breach of its regulatory obligations if it had taken 100% gap risk in a project or overall fund, then I don't agree. If it had taken such a risk then I don't think this would have been in line with the strategy set out in the brochures. However, I have seen no evidence this did happen and as such I am not going to make any further comment on this.

The time horizon

Mr M has also taken issue with the information in the brochures about the time horizon.

The brochures refer to the schemes as a medium-term investment, as Mr M has pointed out. I am not aware of any definitive definition of 'medium term' and have seen this referred to as a period of up to three, five years and in one case ten years. I am not persuaded that referring to the investment as medium term was misleading.

The brochures refer to an investment horizon of three to three and a half years but that there was no guarantee that all qualifying shares will be realised within that period and that an investment should only be made on the basis that it will remain invested for 'at least 3-3.5 years'.

I am satisfied that this made clear that whilst Ingenious may have been aiming for an investment horizon of 3-3.5 years this wasn't guaranteed. I am satisfied that this wasn't misleading and that Mr M wasn't in any event misled by the contents of the brochure as to how long the investment could continue for.

I am not persuaded that it was unreasonable for Ingenious to refer to the schemes as medium term or a time horizon of 3 – 3.5 years given that at the point the brochures for SM 9 and SM 2015/2016 were produced the holding period for Shelley Media funds that had already returned funds to investors was in line with this.

I am not satisfied that Ingenious had reason to think the change in strategy would significantly extend the investment horizon compared to previous Shelley Media funds when producing the brochures - the brochures for SM 9 and SM March 2015/2016 referred to entertainment projects being completed within nine to fifteen months from commencement of production.

Mr M has said that he also asked Ms G about the investment horizon in the meeting that took place in January 2014. I am not persuaded that Mr M reasonably expected Ms G to be in a position to provide any greater assurance than the brochure as to how long the investment would continue for, or that he placed much reliance on what she said.

I am also mindful that there is no record of that meeting or any documentation that supports what Mr M has said he was told and that he is recalling a meeting from many years ago where his recollection is unlikely to be entirely accurate – as I have previously referred to. In the circumstances I don't place very much weight on his recollection of what Ms G said about the time horizon.

In any event, even if Ms G did say it was 'very unlikely' SM 9 wouldn't pay out within four years I am not satisfied this was unreasonable. Moreover, as with the brochure, Ms G made clear there could be no guarantee and in the circumstances Mr M can't reasonably argue he was misled because the investment continued for longer than four years - given that both the brochure and the statement made by Ms G made clear this was always a possibility.

The information about returns

Mr M has referred to the reference in the brochures to targeted tax-free returns of between 8-18% - which equates to a return between and this being based on historic returns. He has said this can only have referred to previous Shelley Media funds and that this was only appropriate if the later funds – by which he means funds using the new strategy – had a similar risk profile, which he says they didn't. I have already made findings as to the risk, indicating that I don't think it is clear the funds that included gap risk did have a significantly different risk profile to earlier funds.

In any event I am not persuaded that the use of a strategy which included a gap risk that earlier funds didn't have means that Ingenious were precluded from taking account of historic performance of previous Shelley Media funds when putting forward its target annual return bracket. Moreover, the historic performance of Shelley Media investments was only one of the factors that was taken into account by Ingenious in putting forward a targeted annual return of between 8 -18%.

I have no basis for thinking that that target return bracket was based on assumptions that were unreasonable at the time the brochures were produced. The upper figure of 18% may have been very ambitious but I have been provided with no persuasive evidence that there was no basis at all for Ingenious to have put forward the figure. It is perhaps worth noting that the Allenbridge Research report for SM 2017/2018 said that a high case of £1.14 would have to have everything go right but it didn't suggest there wasn't any prospect of achieving this."

I gave both parties the opportunity of responding to my provisional decision and providing any further information they wanted me to consider before making my final decision.

Ingenious said it had nothing further to add but wanted the opportunity of commenting on any additional points that Mr M raised. Mr M hasn't provided any response to my 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.

As Mr M hasn't responded to my provisional decision there is no basis for me changing any of the findings I made which, for the avoidance of doubt, form part of my findings in this final decision.

In summary I don't uphold this complaint for the following reasons:

- There was nothing in the brochures Mr M considered before investing in SM 9 and SM 2015/2016 that indicated production costs would be fully covered by pre-sales etc.

- Mr M confirmed in the course of his complaint that he was aware of the gap risk and as such his argument is about being misled as to the extent of that risk.

- This comes down to what he says he was told by Ms G about the enhanced strategy carrying a 'slightly increased' risk.

- The statement about a slightly increased risk can only have been by reference to earlier Shelley Media funds and as Mr M hadn't invested in those funds he had no starting point by which he could assess what was meant by a slightly increased risk.

- Mr M said he relied on what Ms G said because of the lack of detail in the brochure but he didn't ask her for any details and I don't find his evidence is persuasive, either as to what Ms G said or his purported reliance on this.

- I don't accept he would have based a decision to invest a substantial amount of money on Ms G's verbal assurance there was slightly increased risk or that it was reasonable on him to do so.

- I am not persuaded that if the statements made by Ms G were as important as he has said he wouldn't have confirmed his understanding in writing.

- Even if Ms G did refer to a slightly increased risk and Mr M relied on this I would still need to find this statement was misleading. I can't say on the evidence that the poor performance of the funds with gap risk was primarily because those funds carried significantly more risk than earlier funds which didn't include a gap risk.

- I am not persuaded that if Mr M had been provided with further information about the minimum proportion of production costs that would be covered by pre-sales for a fund - and as such the maximum extent of the gap risk - he wouldn't still have invested.

- I am not persuaded it was unreasonable for Ingenious to refer to a fund being medium term or specify a time horizon of 3 – 3.5 years and it was made clear this wasn't guaranteed.

- I have no basis for thinking that the target return figures set out in the brochures were based on wholly unreasonable assumptions. The upper figure of 18% may have been very ambitious but I have seen no persuasive evidence that there was no basis for this at all.

My final decision

I don't uphold this complaint for the reasons set out above and in my provisional decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 7 March 2024.

Philip Gibbons
Ombudsman