

The complaint

Mr P complains that Ingenious Capital Management Limited (“Ingenious”) didn’t provide the information it should have done about five Enterprise Investment Schemes (funds) he invested in which led him to invest in the funds when he wouldn’t otherwise have done so.

What happened

Mr P invested in seven Shelley Media (SM) funds (SM 3, SM 5, SM 7, SM 9, SM Autumn 2014, SM Dec 2015/2016, and SM October 2016/2017). He doesn’t take any issue with SM 3 and SM 5 but complains that he wasn’t given the information he should have been as to the remaining five funds. In short he says he wasn’t provided with the information he should have been through the brochures for the funds and was misled by statements made by an Ingenious employee (Ms G). He complained jointly with another investor, Mr M, whose complaint has been considered separately.

One of our investigators considered the complaint and thought it should be upheld but didn’t award any redress. 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. However, as he had not made any award of redress it didn’t initially contest his opinion. Mr P noted the investigator agreed with his view that the risks of the investments hadn’t been adequately disclosed. He provided his detailed response along with further evidence in support of his complaint. Mr P then provided evidence as to alternative investments he would have made to support his argument that he had suffered a loss as result of what Ingenious had done wrong. Ingenious then also provided a response to the investigator’s opinion setting out why it didn’t agree with his findings.

The investigator subsequently provided a further opinion in which he changed his view as to Ingenious paying redress. He said Ingenious should pay Mr P the capital he invested less the tax relief he had received. Mr P agreed with the revised opinion save he thought an award of interest should also be made.

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 7, following communication of the strategy to investors in Shelley Media 6. Mr P also provided final comments in respect of the investigator’s revised opinion.

Ingenious made a couple of additional points. It said that as well as the brochures being reviewed by lawyers and due diligence providers they were approved by the regulator and in its view this must mean the risk disclosures were adequate.

Ingenious pointed out that reports from Allenbridge Research that Mr P has referred to were available for each of the funds he invested in and from other due diligence firms. It said a professional investor such as Mr P would have been aware of such reports and has access to them and that he should have reviewed such reports before investing.

It also said that it didn’t accept that Mr P wouldn’t have invested in any event, given that the

tax relief of 30% was higher than the gap risk and there was a real chance of significant upside.

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 the findings from which are set out below.

"My role is to determine Mr P'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.

I am dealing only with Mr P's complaint in this provisional decision but he made the complaint jointly with Mr M and there is some crossover in the evidence between the two complaints so I will be making reference to Mr M in my findings where appropriate.

In determining whether Ingenious did anything wrong when providing information to Mr P 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 P 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, although similar rules were in force at the time as set out below.

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.

I have considered the information that was provided to Mr P, before he subscribed to the EIS funds that Ingenious managed on a discretionary basis and are the subject of his complaint, with the above rules in mind.

I note Mr P has referred to himself as a professional investor, although I have seen no evidence he was categorised by Ingenious as an elective professional client. In any event, regardless of client status the information provided to him by Ingenious had to be clear, fair, and not misleading and such that he could make an informed decision as to investing.

The issues Mr P has raised about the information provided to him

The main document that provided information about the funds Mr P invested in was the brochure for each fund. In his complaint letter – made jointly with Mr M - Mr P refers to the ‘paucity’ of detail within the brochures and investor agreements but nevertheless says he relied on information within the brochures and takes issue with various statements they make. I summarise the main points he has made below.

- 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 it's 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.*
- *The brochures and executive summaries provide no information in terms of the risk profile of the strategy.*

Mr P made clear that because of the lack of detail in the brochure he placed significant reliance on statements he says were made by Ms G in response to three issues 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 than 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 P's key complaint is in relation to what has been referred to as 'equity risk' or 'gap risk'. I am going to refer to 'gap risk' throughout, by which I mean, in simple terms, the gap between the production costs of a project undertaken by an investee company 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 Ingenious has said it didn't really feature in those earlier funds and it seems clear that there was a change in its approach at the beginning of 2013 wherein gap risk became a feature 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 - after subscription but before it proceeded to invest any of their money in investee companies. The letter 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 from 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 a discretionary manager to implement the new strategy anyway. However, I think there was certainly a risk clients might be unhappy if they became aware Ingenious had implemented a change in strategy between subscription and investment. It couldn't know if clients had discussed the original strategy with a client manager before subscribing and therefore argue they had been misled if they became aware of the change after investment. It seems to me that if Ingenious didn't think there was potential for clients to complain and for it to be in breach of its regulatory obligations it wouldn't have offered to let clients cancel their subscription if they weren't happy with the change.

Having said that I am not satisfied this means Ingenious necessarily needed to inform investors in subsequent Shelley Media funds of a change in strategy. It had no reason to think that there was a risk clients might have been misled about the strategy when subscribing to later funds.

The brochure for SM 7 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:

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- "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 addition, each Investee Company will be required to obtain relevant insurance policies and Completion Bonds (where appropriate) in order to protect it from exposure to normal industry risks”

In Part 6 heading ‘Risk Factors’

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

“This section contains the material risk factors that Ingenious Investments and the Manager believe to be associated with an investment in the Fund. If any of the following events or circumstances arise, the financial position and/or results of the Fund 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 Ingenious Investments and the Manager consider reasonable.

And:

“The level of return to investors will be a function of the quantum and economic performance of the Entertainment Projects produced by each Investee Company, the value of the sales generated by the Entertainment Projects and the receipt of the benefit of anticipated applicable film, television or video games tax incentives.”

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”

The brochures for Shelley Media funds after SM 7 which Mr P invested in contained broadly similar information and as such I don’t think it is necessary to provide excerpts from those brochures.

The brochures made clear the high-risk nature of the fund and whilst they made clear that pre-sales and tax incentives were an important part of risk management for the funds there was nothing in them that suggested that production costs would be fully covered by these (or other revenue streams) so the brochures weren’t misleading as regards the funding of projects.

Moreover, although Mr P has at times suggested he didn’t become aware of the gap risk until the conference call with Ingenious in June 2017 other evidence provided doesn’t support this. In an email to him of 6 March 2014 Ms G specifically stated “It may be worth

pointing out that the target returns for Shelley 1 – Shelley 5 (the old model) ranged from 1.01 – 1.03. From Shelley 6 onwards the target range of returns is 90p to 1.15p because of the enhanced equity position that we have taken.”

The reference to the old model in relation to earlier funds and to the increase in target returns because of the ‘enhanced equity position’ I think made it reasonably clear that there was an increased risk as a result of gap risk with the funds Mr P subsequently invested in. I acknowledge he had already invested in SM 7 at this time but he took no issue with what Ms G said, which I think indicates he was probably already aware of the risk. This is supported by what he stated to Ingenious in the course of the complaint, as he (along with Mr M) stated:

“We are not contending the assertion that we knew the new iterations were taking a small portion of equity risk. We reassert we were misled and hence unaware of how much actual equity risk a manager could take.”

In the circumstances I think it is more likely than not that Mr P was aware that Shelley Media funds that he invested in were taking gap risk from the outset and his complaint is really about being misled about the extent of the risk.

There was nothing in the brochures which indicated the proportion of production costs that would be covered by pre-sales and tax incentives, as I have already said. So there wasn’t anything misleading in the brochures about the extent of the gap risk and Mr P hasn’t suggested there was.

Rather he argues that because of the ‘paucity of detail’ in the brochures and the fact they didn’t provide a risk profile for the new strategy it was reasonable for him to rely on what he was told by Ms G about the new strategy having a ‘slightly increased’ risk – which I take to be by reference to previous Shelley Media funds he had invested in that didn’t use the new strategy.

However, Mr P has indicated that this statement wasn’t made to him until June 2015, by way of an email from Ms G. I haven’t seen any email to Mr P that refers to the new strategy involving slightly more risk but even if Ms G did make this statement to Mr P in June 2015 it can have had no bearing on his investments into SM 7, SM 9, or SM Autumn 2014. In other words, on his own evidence he was aware there was a gap risk and his investment in those funds cannot have been the result of being misled by Ms G as to the extent of that risk.

Moreover, if he was willing to invest in those three funds knowing there was a gap risk and based on the information Ingenious provided through the brochures - as appears to be the case on his evidence - there is no reason to think that he wouldn’t still have invested in subsequent Shelley Media funds after SM Autumn 2014 regardless of whether Ms G stated there was only a slightly increased risk. In other words, if he was already willing to accept the gap risk up to that point without making any enquiries as to the extent of the risk there isn’t any reason to think anything Ms G said to him had any bearing on subsequent decisions he made to invest in Shelley Media funds.

I have considered what Mr P has said about Ms G informing Mr M about the slightly increased risk of the strategy in his first meeting with her in January 2014. It isn’t clear from what Mr P has said whether he is suggesting he was aware of what Ms G said to Mr M at the time – he has made clear that he and Mr M worked in the same office and would discuss matters. However, if that is what he is suggesting then I am not satisfied he can reasonably argue that he was misled by a verbal statement that wasn’t made to him or in his presence.

I also think the lack of an email or other written communication referring to this statement

isn't supportive of the importance Mr P said he placed on what Ms G said. I have noted what he has said about the need for an element of trust between professionals but I don't accept that he would have invested millions of pounds in various Shelley Media funds in reliance on a one-line oral statement from Ms G about there being a slightly increased risk.

Moreover, it is Mr P's case that it was reasonable for him to rely on what Ms G said because of the 'paucity of details' in the brochures. If he had actually asked her to provide some details then I think there would be some merit to him saying he relied on what she said, but he didn't. On his case he simply relied on her assessment that the enhanced strategy carried 'slightly more' risk without anything more.

It is an important part of Mr P's case that if he had been aware of the extent of the gap risk he wouldn't have invested in any of the funds. He has referred to the gap risk taken with individual projects, for example 42% gap risk taken by one of the SM 7 investee companies. I don't think it is reasonable to have expected Ingenious to have specified within the brochures the gap risk that might be taken in individual projects undertaken by investee companies, or that because it didn't do so it didn't then provide clear, fair, and not misleading information.

However, it seems to me there was no reason the minimum level of pre-sales and tax incentives a fund was expected to have couldn't have been included within the information within the brochures. This information was provided by Ingenious to Allenbridge Research and was set out in the reports that company provided for each fund. So there doesn't appear to be any reason this information couldn't also have been included within the brochures – it wouldn't have made them unnecessarily detailed or confusing.

Having said that I don't think it was necessary for Ingenious to include the same amount of detail set out in the reports within the brochures. I don't therefore accept that the detail provided through the report for SM 2017/2018 provides evidence of wrongdoing because this detail wasn't provided earlier to Mr P though the brochures or otherwise – as Mr P has argued.

However, as I have already indicated, there seems no good reason the minimum level of pre-sales etc that a fund was expected to have couldn't have been provided within the brochures. For SM 7 the report states that the directors of investee companies will sanction projects only when they meet certain criteria, the first of which is:

"Minimum of 85% of the budget is covered by broadcaster commissions, pre-sale contracts or commitments from buyers and/or other acceptable forms of quantifiable revenue (the uncovered element will depend on sales, once production commences)"

The reports for subsequent funds have similar statements but specify a figure of 75% of the budget being covered by pre-sales etc.

However, regardless of whether this information should have been included in the brochures or not, I am not satisfied that if it had been this would have led to Mr P deciding not to invest. His argument that he wouldn't have invested if this information had been provided in the brochures is based on hindsight - with the benefit of knowing how the funds have actually performed. I am not persuaded that at the time he invested he would have considered the funds were too risky if the brochures had included information about the potential extent of the gap risk.

On his own evidence he was aware of the gap risk and if he felt he needed further information about what proportion of production costs wouldn't be covered by pre-sales or tax incentives he could have asked Ingenious about this but didn't do so. I have already

rejected his argument that he relied on a statement made by Ms G about there being 'slightly' more risk but it isn't clear that the gap risk introduced into the strategy meant there was a fundamental difference in risk between the old and new funds.

The argument Mr P has made to the contrary is based on performance of the funds. He has provided performance data and graphs for the funds which show a significant and ongoing drop in value in the funds with gap risk which contrasts with the performance of the two funds he invested in before the change in strategy - which funds suffered an initial drop in value but then substantially recovered.

I haven't carried out my own analysis of performance but will accept for the purposes of this provisional decision that the performance data Mr P has provided is accurate and that funds using the new strategy have performed significantly worse than funds that didn't use the new strategy.

It is Mr P's case that this difference in performance is evidence of the significantly increased risk taken by the later funds as a result of the gap risk. However, whilst the performance data could indicate that introduction of gap risk into the strategy significantly impacted performance of the funds, there are other risks associated with film production that can also impact performance of a fund - as Ingenious has pointed out. Its case is that only around 4% or so of the drop in value of Mr P's investments is due to the gap risk, with the balance being the result of risks present in all Shelley Media funds.

It hasn't provided evidence to support this figure but I am unable to say that the performance data provides persuasive evidence that the main cause of the funds performing poorly is the gap risk. In short, just because Shelley Media funds that included gap risk performed below expectations, and worse than earlier funds that didn't include gap risk, isn't evidence of itself that the gap risk was the main cause.

In any event, I am not persuaded that if Mr P had been given further information about the gap risk before he invested, in line with what is shown in the Allenbridge reports he has referred to and relies on, he would have been put off investing in the funds. His argument in simple terms is that the risk to the funds he invested in presented by the gap risk was such that he would have been put off investing but he makes that argument with the benefit of hindsight, knowing the funds have underperformed.

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 and furthermore Ingenious heavily discounted the sales estimates. I am not persuaded that Mr P would have thought that this presented such a significant risk at the time he invested he would have been put off investing. He had no reason to question Ingenious' expertise when it came to investing in film productions or to doubt that the conservative sales estimates were achievable.

Mr P has argued that the Allenbridge Report for SM 2017/2018 is the first time the risks of the strategy were made clear, and I have already commented on this. However, given he has referred to this I think it is worth noting the way the report refers to the approach taken by Ingenious. It refers to the combination of conservative sales estimates, pre-sales, and tax incentives helping to mitigate the manageable risks associated with film and television production and providing substantial downside protection. I am not persuaded that Mr P would have been unwilling to invest in such a fund if he had been provided with further information about the gap risk.

There is one final point I would make about the gap risk. Ingenious said to Mr P in the course of the complaint that there was no legal limit to the amount of gap risk that could be taken

with a project or overall fund, meaning that it could take 100% gap risk.

Insofar as its reference to legal limit is to it not being in breach of its regulatory obligations if it took such a risk, then I don't agree. If it had taken such a risk with a project or fund I am not satisfied this would have been in accordance with the strategy set out in the brochures and it would have been in breach of its regulatory obligations in taking such a risk. I have seen no evidence that it ever took such a risk so I don't think I need to comment further on this.

The time horizon

One of the other issues Mr P has raised is about the information provided about the time horizon of the various Shelley Media funds. The brochures refer to the schemes as a medium-term investment. I am not aware of any definitive definition of 'medium term' and have seen this referred to as a period of up to three or 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 P wasn't in any event misled by the contents of the brochures as to how long the investment could continue for.

I am not persuaded that it was unreasonable for Ingenious to use the same time horizon for Shelley Media funds using gap risk as for earlier funds that didn't. 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.

I acknowledge the point Mr P has made that the expectation was that investee companies would reinvest the proceeds from one production into subsequent productions. He argues this meant the timescale of three to three and a half years was not likely to be achieved.

However the brochures refers to the majority of entertainment projects being completed within nine to fifteen months and to investee companies only producing one or two projects over each 12-month period. In the circumstances a timescale of three to three and half years doesn't appear unreasonable to me just because investee companies could reinvest.

Mr P has also said he relied on the statement Ms G about the investment horizon – namely that it was highly unlikely that investors wouldn't be repaid within a four-year period. There is no evidence that supports that Ms G made this statement to Mr P or if she did when it was made. In any event it isn't clear why Mr P would have thought that Ms G could provide any greater assurance than the brochures in terms of the investment horizon such that he had reason to place any great reliance on what she said.

Even if Ms G did make that statement, I am not satisfied this was unreasonable or misleading. I have already made clear that I am not satisfied there was reason for Ingenious to think the new strategy would result in a longer time horizon than previous funds and there is no basis for thinking that Ms G had reason to view things differently.

Moreover, Ms G made clear – as did the brochures – that there could be no guarantee. It

seems to me that Mr P can't reasonably complain he was misled because the investments he made continued for longer than four years when it was always made clear, both through the brochures and in what Ms G said (on his case) that this was a possibility.

The information about returns

Mr P has referred to the reference in the brochures to targeted tax-free returns of between 8-18% 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 risk indicating that it isn't clear the funds did have a significantly different risk profile.

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. In this regard I note that the Allenbridge Report for SM 2017/2018 – which Mr P points out is independent – said that a high case of £1.14 would have to have everything go right but never suggested that there was no prospect of achieving this.

Other issues

Mr P has raised another issue about the information provided by Ms G, in an email sent in 2015 in which she said that "later services are tending to do better and should offer returns over £1.00." This statement is hard to marry with performance figures Mr P has provided which don't suggest that later services were doing better as at the date of her email.

Ingenious don't appear to dispute this because when Mr P raised this in the course of his complaint it didn't seek to support what Ms G had said but instead said that the potential return she referred to was only expressed in the 'most tentative of terms'.

I accept that what she said wasn't definitive but I don't agree that stating later services 'should offer' (my emphasis) returns over £1.00 could be reasonably seen to be a tentative statement and Ingenious has provided no evidence that explains the basis on which Ms G could have come to that conclusion even if it was considered tentative.

In the circumstances and based on the evidence I have been provided with I think the statement was misleading. However, I am not persuaded that this was instrumental in any subsequent decisions Mr P will have made to invest in Shelley Media funds. He will have been receiving statements for the funds he had already invested at the time, so will have known what was happening in terms of those investments."

I gave both parties the opportunity of responding and providing further information they wanted me to consider. Ingenious had nothing further to add but Mr P responded setting out why he didn't agree with my findings. In summary he made the following points.

- He is not a professional investor he is classified as a retail investor for the purposes

of his investment in Shelley Media funds.

- He received the Allenbridge reports in 2023 and wasn't aware of these previously and I shouldn't assume he had any understanding of gap risk up until the call on 1 June 2017. It is clear from the call that his colleague is astounded by the true extent of the risks taken and the concept of gap risk.
- He didn't know before 2017 that equity risk and gap risk were interchangeable constructs.
- The brochure for SM 7 doesn't refer to gap risk or equity risk and the risks of this weren't adequately disclosed and it can't be concluded they were when there is no reference to these.
- The fact that the brochures didn't state that production costs would be fully covered isn't adequate risk disclosure and it should have been explicitly stated that production costs wouldn't be fully covered. It is not for the investor to guess or infer and it is very misleading.
- If it was appropriate for the change in strategy to be notified to investors in SM 6 it was appropriate for it to be notified to investors in subsequent Shelley Media funds.
- The crux of the case is that the brochures don't refer to gap risk.
- HMRC has deemed the older Shelley Media funds as very low risk, which is why he invested in them as they had bond-like returns.
- The illustrations in the brochures never changed with later iterations with the same target range of 90p-115p despite Ingenious knowing the new funds were underperforming.
- His current loss is £289,536 and current valuations suggest Ingenious will only be returning 60% of the funds he directly invested and his money is missing without any explanation which isn't fair and reasonable.
- The earlier Shelley Media funds took no gap risk and were at the low risk end of the spectrum and it is wrong for me to conclude they were also high risk, especially as HMRC, Ingenious and he disagree on this point.
- The old funds and the new funds are in no way similar high risk investments given that up to 42% gap risk could be taken by an investee company.
- Ms G referred to the entrepreneurial strategy as a reason for the change – old model safe, new model high risk – so the notion of no difference between old and new models is undermined by Ingenious itself.
- Where is the evidence that only 4% of the reduction in value of the funds was due to gap risk?
- The brochures for the new funds didn't make any reference to targeting companies using a conservative business model but this didn't disclose they weren't targeting this and Ingenious should have made clear the distinction with the old models.
- There is voice evidence that contrary to what it stated Ingenious did believe there was significant change in risk between the old and new strategies.

- The key commercial risks of the strategy weren't disclosed.
- The change in strategy was because of increased competition and took on markedly more risk.
- The indication that underperformance was due to the Covid pandemic is false as the underperformance was drastic three years before this.
- The new strategy coupled with competition and reliance on sales agents and a need to earn fees by elongating the investment lifecycle is a more realistic explanation for the underperformance.
- The brochures may have been approved by the regulator but that is because the actual risks weren't disclosed and Ingenious should be asked if it suspended the product because a complaint was made about this.
- He has not been receiving regular statements as I said as there is normally a nine to twelve month delay from the end of the of the period accounting date. It was only in 2017 that SM 7 collapsed in value which led to the enquiries he made and the discovery of the risk that was being taken. At that time the other funds he had invested in had shown no discrete downturn in valuation.

Mr P also provided email correspondence between him and Ingenious from April 2017 and recordings of the telephone call of 1 June 2017. I asked Mr P to clarify a couple of points he had made and in short he made the following additional points:

- I have referred to an email from Ms G to him dated 6 March 2014 but it is from her colleague whom he has never met and contains lots of data and her throwaway comment at the end was unlikely to get his attention.
- This is very important as I rely heavily on the assertion he knew about the gap risk based on the email when there is no evidence for that belief.
- There has never been explicit or full disclosure of gap risk until 2017 and that is what I should be addressing.
- I haven't respected the facts of the case and gave little weight to Ms G's misrepresentation in June 2015 about later services doing between which gave him the confidence to continue to invest in Shelley Media.
- Ingenious was still using performance data from 2010 in the brochure for SM 2017/2018 rather than performance of more recent funds which is a red flag.
- Gap risk is something I understand from the position of reviewing the case in 2024 but not something I would have been able to understand from the information available to him before 2017.
- It can't be assumed he knew of the gap risk from the brochure and as such it comes back to my reliance on one comment in an email in March 2014 that wasn't from his investment adviser.

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 have considered everything that Mr P has said in response to my provisional decision but am not persuaded I should depart significantly from the findings I made in that decision - which form part of my findings in this final decision unless I have stated to the contrary. He has in large part repeated arguments previously made and has provided no new persuasive evidence in support of his complaint. I am therefore still of the view that this complaint shouldn't be upheld for the reasons set out in my provisional decision and herein.

I note that Mr P has confirmed that he wasn't a professional investor for the purposes of his investment in the various Shelley Media funds and was classified as a retail client. I am grateful for the clarification but so it is clear, I said in my provisional decision that I had been provided with no evidence that he had been categorised as an elective professional client and my findings weren't made on the basis that he had been.

The main issue in this complaint is Mr P's knowledge of the gap risk of the funds he subscribed to. He argues that gap risk isn't referred to in the brochures and that it can't be argued that there is adequate risk disclosure when it hasn't been referred to. He says it is misleading for there to have been no mention of this and argues that the brochures were deliberately opaque about the gap risk, citing the more detailed information provided to Allenbridge Research in support of that. He also argues that if it was appropriate to inform investors in Shelley Media 6 of the gap risk then it was appropriate to inform investors in subsequent Shelley Media funds.

In terms of this last point, as I indicated in my provisional decision, there was good reason for Ingenious to inform investors in Shelley Media 6 of the change in strategy, given this change was implemented between subscription and any investment taking place. The same issues didn't apply to later funds that used the new strategy from the outset and I am still not persuaded that Ingenious needed to provide the same information to subscribers to funds after Shelley Media 6.

In terms of the brochures being deliberately opaque to encourage retail investors I am not satisfied that Ingenious were required to provide the same level of detail as given to Allenbridge Research within the brochures or that not providing that detail was a deliberate decision to encourage retail investors to invest.

There was nothing in the brochures that indicated that production costs would be fully covered by pre-sales etc and they weren't misleading in this respect. Mr P argues that there should have been specific reference to there being a gap risk but even if I accept that, I have found that he was aware of the gap risk regardless of any shortcomings in the information in the brochures. And, given there was no indication in the brochures as to what proportion of production costs were covered by pre-sales etc I am not satisfied that it can be argued that Mr P was misled by the brochures as to the extent of the risk.

In making the above finding I have taken into account what Mr P has said about the reliance I have placed on the email of 6 March 2014 when finding that he was aware of the risk. He points out that the email wasn't from Ms G as I said it was but from a colleague of hers and I apologise for this error. However, it was an email Ms G said she would get her colleague to send as she was travelling that day. And regardless of who sent it I don't accept that he wouldn't have read and taken on board the statement in the email which distinguished the old and new models and referred to the target for Shelley Media 6 and onwards being 90p to 1.15p because of the 'enhanced equity position we have taken'.

Moreover, contrary to what Mr P has argued, my finding that he was aware of the gap risk wasn't just based on this email. I pointed out in my provisional decision that in the course of

the complaint Mr P stated he wasn't contending that he was unaware that the funds were taking 'a small portion of equity risk' and that his argument was he was misled as to the extent of the risk. In the circumstances I have placed reliance on Mr P's own statement as to his knowledge of the risk.

I note he suggests he wasn't aware that the terms 'equity risk' and 'gap risk' were interchangeable constructs but I don't accept this. I have referred to gap risk for ease of reference as I think I made clear in my provisional decision. I could equally have decided to refer to it as equity risk and regardless of how it is referred to what is important is what it denotes – namely the gap between what was covered by pre-sales etc and the overall production costs. I am satisfied on the evidence provided by the parties that Mr P was aware when he subscribed to the various funds that not all production costs were covered by pre-sales etc.

The emails from April 2017 which he has referred to in response to my provisional decision in my view provide further evidence in support of my finding he was aware of this. In an email dated 12 April 2017 Ingenious refers to the gap risk taken by the investee company failing to recoup at the levels in its modelling. In response Mr P stated as follows:

“ As I understood it, much of the money invested in projects would have protection from insurances, from preferential rights to advance sales revenues, from guarantees, from state subsidies etc. Only a limited proportion of equity participation (gap risk) would be involved. Please can you explain in more detail how Get Santa was positioned vis a vis the criteria above...”

So, again, his own words support a finding that he knew when he subscribed that not all production costs were covered by pre-sales etc.

Mr P has noted that the brochures for funds using the new strategy didn't make any reference to targeting companies using a conservative business model and argues that not mentioning something isn't disclosure. He says that what Ingenious should have said is that older iterations did target such businesses but that it no longer pursues the same strategy.

However, I am not satisfied that it was necessary for Ingenious to refer to older Shelley Media funds in brochures for the new funds or reasonable to expect it to do so. In deciding whether to subscribe to any particular fund what Mr P needed to consider was the information in the brochure for that fund. If a brochure didn't make reference to targeting companies using a conservative business model then he had no reasonable basis for thinking that the fund would target such companies.

Even if Ingenious had provided more information in the brochures about the gap risk I am not satisfied this would have led Mr P to think he shouldn't subscribe. I acknowledge he didn't see the reports from Allenbridge Research but its assessment of the funds having had the benefit of further information about the gap risk I think gives an insight into how they should be considered. It referred to there being manageable risks and substantial downside protection and I am not persuaded that Mr P would have been unwilling to invest in funds so described by an independent third party if he had been provided with more information. His assertion to the contrary in my view is with the benefit of knowing how the funds have performed and isn't persuasive. I note that Mr P suggests that the fact he didn't subscribe to Shelley Media after 2017 supports his argument he wouldn't have subscribed if given more information but I don't agree. He knew in 2017 that the funds weren't performing as expected so was in a completely different position.

Mr P refers to HMRC deeming the older versions of Shelley Media as very low risk but I have seen nothing to support this. He refers to discussions about the need for Ingenious to

change the risk of Shelley Media because HMRC weren't prepared to give the same 30% tax breaks unless the risks changed. He questions why HMRC asked for changes if they already thought the Shelley media funds were high risk. I have seen no evidence of these discussions with HMRC but in any event I don't think what HMRC may have thought is relevant to the issues in this complaint.

Even if there was a need to change strategy to satisfy HMRC requirements that doesn't provide evidence that the old funds were 'very low risk' or that the new funds were substantially riskier. Moreover, whatever the views of HMRC about the strategy for the old funds, this provides no evidence Mr P wasn't aware of the risks of the new funds or had been misled about those risks.

Mr P has also said that there is voice evidence that Ingenious believed there was a significant change in risk between the old and new funds contrary to what it has argued. However, the only telephone recordings I have been provided with are from the conference call of 1 June 2017. Having listened to those, I have heard nothing that indicates that Ingenious thought the new funds posed a significantly greater risk than the old funds and Mr P has provided no persuasive evidence that supports what he has said.

Moreover, there is no persuasive evidence that Mr P was informed that the new funds only carried slightly more risk than the old funds before he started subscribing to the new funds or if he was that he relied on this statement when he subscribed.

I note Mr P has asked where the proof is to support the argument made by Ingenious that only 4% of the drop in value of his funds was due to the gap risk. I acknowledged in my provisional decision that Ingenious hadn't provided evidence to support this figure and didn't make a finding as to what amount of the drop in value was the result of the gap risk.

However, equally I wasn't persuaded that the performance figures Mr P relied on provided evidence that the fall in value was due to the gap risk rather than other risks that were present in all Shelley Media funds. As I said in my provisional decision, just because Shelley Media funds that included gap risk performed below expectations, and worse than earlier funds, isn't evidence of itself that the gap risk was the main cause of the underperformance.

Moreover, even if Ingenious' calculations are wrong and the gap risk accounts for more than 4% of the underperformance this still wouldn't provide evidence in support of his complaint in light of my findings that he was aware of the gap risk and he was given no assurance as to the proportion of production costs that would be covered by pre-sales etc or the impact this might have on performance.

Mr P points to Ingenious referring to the new strategy being seen as a positive development because it gave access to a wider pool of possible investment opportunities that allowed for possible higher returns for a slight increase in risk. He says that we now know that the change in strategy was due to competition – although he has also subsequently said that it was because of HMRC requirements, which I have addressed above.

Mr P's seems to be suggesting that what Ingenious has said about competition is contradictory to it referring to having access to a wider pool of investment opportunities but I am not satisfied that it is, as both can be true. In any event, I am not satisfied that the reason for the change in strategy has any bearing on my key findings in this complaint – namely that he knew of the gap risk and subscribed to the funds knowing this risk.

Mr P argues that the suggestion by Ingenious that the Covid 19 pandemic was one of the main reasons for underperformance doesn't stack up. I have no doubt that the pandemic did have an impact on performance of the funds but obviously can only have done so once it

started in early 2020, so it doesn't explain performance before then. However, I don't think I need to address the cause of any underperformance before 2020 given the findings I have already made.

Mr P has suggested that Ingenious should be asked whether it suspended the product due to a complaint being made that the risks of the funds weren't disclosed. I am not satisfied I need to ask Ingenious about this. It has made clear in this complaint that it considers that the brochures provided adequate risk disclosure and I have in any event found that Mr P was aware of the gap risk regardless of whether there were shortcomings in the information in the brochures.

Mr P disagrees with my finding that he didn't rely on the email from Ms G of June 2015 which referred to the new funds tending to do better. I note what he has said about not receiving statements for funds he had already subscribed to until some months after the end of each accounting period and that as such he didn't have information about how the funds were performing.

However, regardless of this I am still of the view that the email didn't have any bearing on his subsequent decisions to invest in two further Shelley Media funds - the first some six months later and the second well over a year after he received the email. In short, I think he would have invested in those funds when he did regardless of whether or not Ms G had said they were tending to do better.

One final point is that Mr P has said he hasn't had any explanation for his missing money. I appreciate he may want further information from Ingenious about performance of the funds but I don't think I need this to make a fair and reasonable decision in this complaint.

My final decision

I don't uphold this complaint for the reasons I have explained.

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

Philip Gibbons
Ombudsman