DRN-4592252

The complaint

Ms L complains she was given unsuitable investment advice by Black Swan Capital Ltd ('BSC').

In summary, she says:

- She was given unsuitable investment advice to invest in a Collective Investment Bond ('the bond') written into a Discounted Gift Trust ('the trust). However, the bond provider withdrew the estimated discount following underwriting.
- She's unhappy about the performance of the investment – it started to lose value immediately after it was set up. She doesn't think the adviser used due skill and care.
- She ended up invested in a scheme that she didn't want or need.
- She was advised to invest in underlying funds which were in the wrong assets.
- She was pressured into making decisions.

To put things right, she'd like a refund of losses claimed.

She is being assisted by her son-in-law, Mr M.

What happened

In June 2021, Ms L sold her home and a few months later bought a new flat. She retained approximately £400,000 of the sales proceeds in cash. She had a significant estate and a potential inheritance tax (IHT) liability. As result she sought advice from BSC as she wished to avoid paying IHT by gifting assets to her daughter.

In October 2021, her adviser (Mr A) recommended that she gift one third of her new flat to her daughter. In addition, he recommended that Ms L invest in the bond written into the trust, set up to pay Ms L an income so that she could pay her daughter rent (on the one third of the property). These gifts were arranged so that they would be outside of Ms L's estate for IHT purposes, in seven years.

The trust was arranged to provide an estimated discount of 41.2%. In other words, 41.2% of the investment would be excluded from the estate for IHT purposes. However, in January 2022 the bond provider withdrew the discount following underwriting. This meant that the full amount invested in the trust would only be excluded from the estate after seven years. This along with the performance of the bond caused Ms L to grow concerned about the suitability of the advice she received from Mr A.

On 7 August 2023, Ms L complained to BSC. In a final response letter (FRL) dated 5 October 2023 BSC rejected the complaint. In short it said that the overall advice was suitable and came with tax advantages. It also said that Ms L's attitude to risk (ATR) was in-line with the recommendation made. However, as a gesture of goodwill it offered to refund the fees charged (in the sum of £3,568.14) in full and final settlement of the complaint.

Unhappy with BSC's response, Ms L referred the complaint to our service.

One of our investigators considered the complaint but didn't think it should be upheld. In summary, he made the following findings:

Investment performance

- Investment performance isn't something that BSC can control. There are so many influencing factors and there's always an element of risk. So, it's not something that our service would consider in isolation.
- In terms of the timing of the investment, without the benefit of hindsight, it's difficult to say the timing was wrong. The adviser was unlikely to know how the markets would perform going forwards.

Suitability of the advice received

- BSC fulfilled its obligations under the Conduct of Business Sourcebook (COBS).
  - Under COBS 9.2.1 BSC took reasonable steps to ensure that the recommendations were suitable.
  - Under COBS 9.2.2 BSC obtained information necessary for it to understand the essential facts about Ms L's circumstances and form a reasonable basis for believing that its recommendation met her objectives and that she was financially able afford the investment.
- In reference to the September 2021 fact find, Ms L's income, expenditure, assets, and liabilities were adequately assessed in order to establish affordability.
- In reference to the risk profile questionnaire dated October 2021, and the suitability letter also dated October 2021, BSC considered her capacity for loss when selecting the underlying funds that were recommended.
  - Reference was made to her £3,000 cash reserve, which was sufficient as an emergency fund.
  - In addition, she had around £400,000 in cash, of which £325,000 was to be invested.
  - Overall, she had capacity for loss.
- Her ATR was assessed as '*moderate*', which was described as follows:
  - *"As a moderate investor you are prepared to take a moderate amount of investment risk in order to increase the chance of achieving a positive return. Capital protection is less important to you than achieving a better return on the investment. A typical moderate investor will usually invest in a variety of assets to obtain diversification. There would be a substantially higher proportion of equities and property compared to fixed interest and cash. The range of asset types helps reduce the overall risks as well as increasing the chance of better returns."*
- Ms L was told that there was no guarantee as to the level of return and past performance should only be viewed as a guide. She was also informed that the value of the investment could go down as well as up.
- Ms L's capacity for loss and ATR was adequately assessed and details were appropriately disclosed. Furthermore, the asset allocation of the funds recommended were in line with her agreed risk profile.
- Ms L was given enough information that made clear the nature and operation of the bond and the risks associated with it.
- She was also given information about why the bond was suitable for her. He's seen nothing to suggest that the recommendation was unsuitable.
- Whilst Ms L would've been frustrated that the discount was withdrawn by the provider following underwriting, the discount estimator tool (shared with her) made clear the following:
  - *"This calculator is designed to provide an estimate of the discount based on*

your client's age, along with the amount and frequency of regular withdrawals. It does not take into account the health of your client, and is therefore, only an estimate. Please note that the discount may differ following underwriting, and it could be we are unable to offer a discount."

- Despite what Ms L says about not being made aware she might not receive the discount, the scenario wasn't unforeseeable – as it was decided by the bond provider's underwriters prior to setting up the trust. Therefore, this isn't something he can blame BSC for.
- He's seen no evidence Ms L was pressured into making a decision.
- Although he's not upholding the complaint, BSC's offer to refund all fees – albeit on a goodwill basis – seems to be a fair outcome.

Ms L disagreed with the investigator's view and asked for an ombudsman's decision. She provided a detailed response in terms of her unhappiness with Mr A, why she feels she was taken advantage of and why Mr A didn't have her interests at heart. She says she shouldn't have been put in a risk-based investment and simply didn't have enough time to decide if she wanted to go ahead with the investment. She explained that she was exhausted and had a lot going in her life and feels that she might've been taken advantage of.

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

At my request, the investigator sought clarification regarding the ATR recorded on the risk profile and the ATR recorded on the suitability letter. In a response dated 16 July 2024 BSC provided the following response:

- The risk profile on file from October 2021 stated a risk of five – which is a low end of moderate – but was at the top end of the scale, scoring 48.
- A score of 49 would've been a moderate profile of six out of ten.
- It has additional details on file where Ms L scored six out of ten on several occasions.
- The funds chosen for the investment are risk rated for profile five and six. They're appropriate for an investor who was investing for the long term, and risk profiled at the very top end of five and into six.
- Risk profile six was clearly documented in the suitability report along with a statement in bold asking the investor to contact the business if there was anything it disagreed with.
- Overall, the investment was suitable.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I agree with the investigator's conclusion for much the same reasons. I'm not going to uphold this complaint.

On the face of the evidence, and on balance, despite what Ms L says, I'm unable to safely say that she was given unsuitable investment advice.

I'm satisfied that Ms L was prepared to take a risk with her investment to achieve better returns, and she was content to proceed with IHT advice and strategy.

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

The purpose of my decision isn't to address every single point raised under a separate subject heading, it's not what I'm required to do in order to reach a decision in this case. In other words, I don't have to comment upon every single point made. My role is to consider the evidence presented by Ms L and BSC, and reach what I think is an independent, fair and reasonable decision based on the facts of the case.

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

<u>Investment bond and trust</u>

- I'm satisfied that a potential IHT liability was a concern for Ms L – she didn't have any cover in place at the time – therefore I can't say that the advice in relation to IHT mitigation wasn't needed. I note IHT was in part the reason why Ms L sought advice in the first place.
- I'm aware that Ms L had a daughter – who was in effect the sole beneficiary of her estate – and Ms L would rather leave her estate to her daughter without a huge IHT bill.
- I note an option was to gift money to her daughter (and her husband) and watch them enjoy the money whilst she was still alive, but this option was subject to her surviving another seven years from the point of the gift in order for the gift not to incur an IHT liability.
- In the circumstances, and on balance, despite what Ms L says, I'm satisfied that she instead chose to invest in the bond – set up in trust – which was likely to have some tax benefits, especially given the way it was all set up so that Ms L could pay her daughter rent on her daughter's share of the flat. I don't think there was anything inherently wrong with this approach.
- I note the IHT discount was withdrawn, I'm unable to say that there was anything wrong with this but I've considered this issue in more detail in a separate section below.
- I note that Ms L was overall assessed to be a moderate risk investor – the equivalent of six out of ten rating – and that there's no evidence to suggest that this was incorrect.
- Based on what BSC says, I note that in response to the risk-based questionnaire (dated October 2021) Ms L scored 48 – which would technically place her at the top end of 'low end of moderate' – which is a level five out of ten (with a range between 43-48). But I also note that some of her answers to questions also indicated a level six response, so a moderate risk in this instance isn't unreasonable.
- I note the scoring from a May 2017 risk questionnaire shows a score of 55 which put her at the very top end for a moderate risk investor (given it had a range of between 49 and 55).
- By way of a snapshot to some of her answers to the risk questionnaire, I note Ms L strongly agreed with the statement that she would enjoy exploring investment opportunities for her money. I note she answered 'medium' in response to the question about risk she's taken in the past. She also answered 'in between' in response to the statement 'when I consider investments that have an element of risk, I feel quite anxious.'
- It's arguable that this risk was needed in order to try and achieve her objective for growth and income, and that's what BSC advised based on her answers to the risk questionnaire.
- Like the investigator, I'm satisfied that Ms L was invested in funds that were overall in

line with her moderate risk ATR.

- Put in a different way, I think it's fair to say that certain questions were asked of Ms L to arrive at the conclusion that she was a moderate risk investor. I'm mindful she wanted to invest money for growth, which I think she was unlikely to achieve without taking some risk with her money.
- I've seen nothing to suggest that she wasn't willing to take some risk with her money, or that she was risk averse. I'm satisfied that there were discussions surrounding the funds and that changes may have even been made to better reflect Ms L's ATR.
- I should make clear from the outset that I'm not specifically looking at whether Ms L was a moderate risk investor, or whether the recommendation was moderate risk. I'm considering if the recommendation was generally suitable for her and based on what I've said above I'm satisfied that it was.
- Whilst it's also not for me to specifically risk rate the funds as such, I note the four recommended funds also had medium to long term and long-term objectives - for income and growth – and contained a mix of active and passive investments that was reasonably diversified.
- In the circumstances it wasn't out of the ordinary that there might be some volatility in the early days given the investment horizon.
- Based on the above, under the relevant sections of COBS, I'm satisfied that BSC took reasonable steps to ensure it fulfilled its obligations.
- Under COBS 9.2.1 and 9.2.2 I'm satisfied the recommendation was suitable for Ms L and that BSC took reasonable steps to ensure that it obtained the necessary information regarding her knowledge, experience, and investment objective. In the circumstances, I'm not persuaded that the recommendation was made without reasonably considering her circumstances and objectives.
- Like the investigator, I'm satisfied that overall Ms L was in a good position to invest, had capacity for loss and had a reasonable amount of money set aside for emergencies.

<u>The loss of discount</u>

- I understand that the discount was refused by the provider after underwriting. I can't blame BSC for this. Ultimately, it's a matter for the provider and outside of BSC's control.
- Whilst I don't think Mr A gave any guarantees as to the likelihood of the discount being granted, there was no reason for him to think that it wouldn't be.
- This might explain why Mr A advised Ms L on the basis that the trust – with its benefits – was likely to go ahead as envisaged.
- The adviser asking Ms L to provide further details including in relation to her health, indicated that the discount wasn't a 'done deal'.
- The discount estimator tool – which I understand was shared with Ms L – also made clear that the discount was dependent on a number of factors, and that as such there was no guarantee the discount would be agreed once the provider completed its assessments.

<u>Investment Performance</u>

- Investment performance seems to be what's at the heart of this complaint. But this isn't something that our service can consider in isolation.
- Investment performance also isn't something that Mr A could predict or control – because its dependent on how the markets perform – so it isn't something he or BSC is responsible for where the advice was suitable – as I have found it was.

<u>Time</u>

- I appreciate Ms L says that she felt pressured into accepting the recommendations by the Mr A, and that she didn't have enough time to go through the advice/documentation.
- But I also note that Ms L, over several email exchanges (and phone calls), asked a series of reasonably detailed questions relating to the advice and charges, before going ahead and continuing with the recommendation.
- Whilst this may not have been as much time as she would've liked, I'm not persuaded that she didn't, on balance, have time to consider what she wanted to do.
- I'm aware that general discussions with the adviser were happening from before Ms L even sold her property. I also note the discussions became more focused around her options with money left after the purchase of a new flat. This doesn't really suggest that things happened quickly and/or that Ms L was made to do something against her will.
- I note after the sale of Ms L's property, and before the purchase of her new flat, there was a stage when she (potentially) wanted to invest her money and was quite rightly advised not to do so given the short-term nature such investment would have been limited to and the costs involved. Incidentally, this also doesn't suggest that she didn't want to take any risk with her money.
- I'm aware that Ms L is unhappy about losing her discount. I note she had the option not to go ahead with the recommendation – because it wasn't what she wanted – but she still chose to do so. On the face of the evidence, and on balance, despite what she says I'm not persuaded that she was forced to do something she didn't want to do.
- I also note the investment, in the early days, didn't perform as well as Ms L would've liked and hoped, but this doesn't mean that she was given unsuitable advice or made to take greater risk than she was comfortable with.
- It's arguable that Ms L still wanted to go ahead with the recommendation because at the time she saw benefit in pursuing the investment – written in trust – because at the end of it her daughter could enjoy the gifts without any tax encumbrances, albeit only after seven years.

I note BSC has offered to refund all fees as a gesture of goodwill. This is a matter for the business and not something I can ask BSC to do, given I'm not upholding the compliant.

I've considered the latest submissions from Ms L – furnished by Mr M – relating to the trust, but for the reasons set out above, this doesn't change my decision. I note the form was signed, and dated 11 November 2021, and although Ms L says it was dated by the adviser, I note the cheque for payment was dated 13 November 2021, two days later. I also note it was ticked that Ms L didn't want to see the report before it was sent to the provider.

Even if there was an issue to do with the date, I can't say that this was the reason why the discount relating to the trust was refused.

I note by way of additional submissions, Ms L says she was told she'd have to pay £152 tax but she was notified that she paid tax of £598. This doesn't seem to be a point that BSC has had an opportunity to consider and therefore wouldn't be fair of me to comment on this. In any case, I don't think Mr A would've been in a position to predict precisely the amount of tax that would be due.

I note Ms L places responsibility on the adviser to draw her attention to anything that she ought to know, but Ms L also had a responsibility to ask the adviser about matters that she was unsure about and/or didn't understand. If she felt bombarded with documents, she could have asked for time to go through them. I'm mindful that Ms L is a retired professional.

I appreciate Ms L will be unhappy I've reached the same conclusion as the investigator. Furthermore, I realise my decision isn't what she wants to hear. Whilst I appreciate her frustration, I'm not persuaded BSC needs to do anything more.

On the face of the available evidence, I'm unable to uphold this complaint and give her what she wants.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms L to accept or reject my decision before 22 August 2024.

Dara Islam
Ombudsman