DRN-4716627

The complaint

Mr and Mrs H complain Fogwill & Jones Asset Management Ltd ("Fogwill") is at fault for how it managed their portfolio and how it presented and sold its services to them.

What happened

Mr and Mrs H say Fogwill told them its service was provided by award winning investment managers which they say exaggerated the depth of the investment team. They say they wouldn't have invested had they known the true position including the relative importance of a single individual who lived abroad.

They also say the management of their portfolio and its pattern of trading over the course of 12 to 15 months was totally out of line with their agreed investment strategy of medium risk (six on their scale of one to ten) and a five to ten year investment horizon. In particular they say Fogwill moved a very large part of the portfolio into and then out of cash at least three times between March 2022 and April 2023, which they say was more in line with day trading. They say Fogwill managed their portfolio negligently.

They say these are faults and the root cause of a reduction in their combined portfolio values of 30% which equates to £445,000. They say at most a 12% loss can be attributed to market conditions but at least half their losses were caused by faults of which they complain, so they would like half their losses repaid. They say the money was their children's inheritance.
Mrs H invested with Fogwill in 2014 on a medium risk basis. Initially this was with funds she inherited which had previously been part of her relative's Fogwill portfolio. Fogwill has referred to the 2014 definition and description of 'medium' risk, and I note an August 2014 report set out risk descriptions including the following:

"A Balanced Investor is looking for a balance of risk and reward, and whilst seeking higher returns than might be obtained from a deposit account, recognises that this brings with it a higher level of risk (i.e. more exposure to overseas markets) and that the value of their investment may fluctuate in the short term. They would feel uncomfortable if the overall value of their investments were to fall significantly over a short period and would not be happy to see their capital eroded over the medium term. (Medium – risk level 4.5 to 6.5)".

On 26 August 2020 Fogwill noted Mr H was potentially interested in moving his portfolio to Fogwill. Notes made by Fogwill on 4 September 2020 about Mr H's existing portfolio said 19% was in UK fixed income and the rest in an 'unfettered fund of funds' in absolute return funds and commodities. As regards its assets, Fogwill said 'overall it is OK for balanced'. It later noted it couldn't identify precisely the holdings in the absolute return growth fund.

Mr H confirmed he would be proceeding with Fogwill on 10 September 2020. Mr and Mrs H completed risk questionnaires on 18 September. Mrs H's answers rated her as medium risk with a score of 37 where scores of 36 to 44 were medium risk and 28 to 35 were cautious risk. Mr H scored 39. When asked to choose between investments that were low risk with guaranteed lower returns or high-risk with potentially high returns or a mix of rates of return and risk, Mr and Mrs H both chose the mixture option.

A 29 September 2020 note of a risk appetite discussion, of the kind designed to take place after a risk profile assessment, said: *"[Mr H] confirmed that they are both happy to adopt a Medium risk investment strategy with their combined discretionary managed investments, understanding and accepting that this means that they will have a high degree of exposure to global equities with associated investment volatility".* A note that day said Mr and Mrs H completed risk questionnaires and scored as medium risk with a high capacity for loss.

Meeting notes also say: *"Both clients are looking for medium to longer term tax efficient capital growth potential. They have no specific targeted objective or time horizon. They would prefer to take any natural income that is derived from the non-ISA element of any investment solution, simply to spend this rather than just accumulate. They want to make use of each of their ISA allowances each tax year."*

Fogwill's review notes say: *"Investment risk tolerance discussed – ATRQs for both clients score Medium. [Mr H] says that this is accurate for both of them. [Capacity for loss] is high. [Mr H's existing] portfolio appears to be described as balanced but is also shown to be 4 on a scale of 1 to 5. [Mr H] has read the category descriptions."*

The notes also say Mr H wanted all of the non-ISA value to be combined as a joint arrangement – regardless of the tax consequences – and feeding their individual ISAs annually. The notes say it was all to be managed to their agreed medium risk tolerance.

On 6 October 2020 Fogwill called Mr H to discuss investment risk. According to Fogwill's note, Fogwill suggested to Mr H that he consider *"broadening the scope of his investment risk tolerance to enable wider diversification, given the size of investment".* It said Mr H agreed and *"is open to suggestion and clearly not averse to investment risk and asked if [Fogwill] could suggest a potential scenario"* – so he wanted to see what this looked like in practice. It said Fogwill would get back to him on this.

Another internal note said: *"As you [another Fogwill staff member] suggested… I have also discussed with [Mr H] the diversification and risk strategy of his proposed new portfolio with us. He agrees that the idea of extending the portfolio beyond medium makes a lot of sense and would value your input/suggestions."*

Fogwill noted Mr H as saying that Mrs H's existing portfolio with Fogwill *"should remain medium"* but should also be included and taken into account as part of the overall risk strategy when making suggestions for Mr H's portfolio.

On 8 October 2020 internal notes from Fogwill suggest Fogwill thought Mr H's new portfolio, as it would've been without variation, would've lacked exposure to certain sectors or themes. A discussion took place within Fogwill so Mr H's direct adviser would understand Fogwill's proposal to fix this. According to the note of that discussion, Fogwill *"explained that we have "medium plus" models that are medium/bottom end of moderately adventurous" which "would facilitate investment into the areas identified"* by Fogwill as potentially otherwise lacking in the portfolio. It said Fogwill would call Mr H to discuss and seek his agreement.

Another internal note from Fogwill says: *"Hi… I've just spoken with [Mr H] and explained the suggestion of a Medium Plus strategy. I also explained the 6 areas/opportunities for diversification that you mention in your email. He is very happy to go with all of that."*

On 12 October 2020 Fogwill noted internally that Mr and Mrs H "will be creating one joint GIA that feeds into their respective ISAs and that the investments currently in [Mrs H's] existing portfolio with us are to continue with their existing medium investment strategy."

The following asset allocation was proposed (the categorisations are mine) for Mr H and the joint portfolio that was to be created:

- 34% general equity funds
- 21% emerging markets equity funds (including China 4% and India 4%)
- 15% global technologies equity funds (including biotech 4% and artificial intelligence 7%)
- 11% single company UK shares
- 11% smaller company equity funds (including European smaller companies 4%)
- 4% equity funds, very small UK companies (UK 'microcap')
- 4% specialist global water fund with emerging market exposure

The proposed portfolio apparently used funds that would've been used for a medium risk portfolio but then altered the weightings and made way for six new funds *"for diversification".* These new funds were the European smaller companies fund (4%), the UK micro-cap fund (4%), the biotech and AI funds (11%) and the China and India funds (8%).

Fogwill commented: *"Although the new funds make up only 27% of the portfolio and [Mr H] said up to a 1/3rd, it should be seen that the 2 lower risk funds [the infrastructure investment company and the property trust] have had their allocations reduced by 3 & 2%, which increase the risk a little so I have added this to the score and it takes it to 32% (or 1/3rd)." It also noted: "China only has 4% as [the Asia fund] has 40%... in China."*

The Fogwill adviser wrote to Mr and Mrs H on 14 October 2020 with *"a broad overview"* of recent discussions, including the following:

"We have discussed investment risk and you confirmed that you both consider Medium to be an accurate reflection of your overall risk tolerance. More specifically though it was decided that you would be happy to invest in a strategy that would be described as Medium to Moderately Adventurous to facilitate broader market sector and geographical diversification."

A suitability report dated 15 December 2020 recommended Mr H's existing ISA funds of around £526,000 be sold and the proceeds invested in line with the asset allocation I've set out above. The funds to be used and the sums invested in them were all set out in the report with a risk score for each fund and a total risk score of 6.405 shown at the end. The non-ISA holdings, to be held jointly, of which £462,000 was from Mr H's previous provider, would be invested in the same funds but Fogwill explained it wouldn't sell all the existing holdings at first, to limit the capital gains tax payable. Some existing funds would be sold because they couldn't be held on the platform Fogwill used.

The suitability report made no mention of the risk profile this target portfolio would have but said under the heading "Your tolerance of Investment Risk": *"You completed our Attitude to Risk Questionnaire on the 29th September 2020 and from this we concluded that your attitude to risk could realistically be described as Medium (Please refer to pages 4 to 5 of the enclosed Supplementary Information for more details.)".*

The supplementary report had a list of risk profiles of which it gave details (without saying which applied to Mr and Mrs H or their portfolio). The *"Medium investor Risk level 5 - 6"* profile (following on from *"Cautious Investor Risk level 4 - 5"*) was described as follows:

“Looking for a balance of risk and reward, and whilst seeking higher returns than might be obtained from a deposit account, recognises that this brings with it a higher level of risk. This is obtained by investing in up to 85% equities, with more exposure to overseas markets currently in the range 40% - 60% and also by investing up to 10% in specialist funds e.g. commodities, technology. Their investment may also be diversified by investing in alternative assets such as Infrastructure and Renewable Energy equities. They realise that the value of their investment may fluctuate in the short term. They would feel uncomfortable if the overall value of their investments were to fall significantly over a short period and would not be happy to see their capital eroded over the medium term.”

Notes made by Fogwill on 18 September 2020 included the above definition on page 11 of 38. It isn’t clear when or how this was shared with Mr and Mrs H, but the definition there had the following added: *“On a risk scale of 1-10 this would be risk level of mainly 5 to 6.5.”*

The supplementary report defined “Moderately Adventurous Investor Risk level 6 – 8”, as follows: *“Market aware and understands and is willing to accept a higher level of risk. This is obtained by investing up to 100% in equities, including an exposure to overseas markets of up to 85%, Commodity Funds and Exchange Traded Funds (ETF’s) in return for the potential for higher returns in the longer term. They recognise that this may result in the value of their portfolio fluctuating, possibly significantly, in the short term.”*

The report gave risk scores for major financial investments. It described investments at level 4.5 (including funds with 60% in shares) as: *“Medium risk with prospects for capital growth. Where income is being taken, there may be capital depletion.”* For level 5 (including funds with 85% in equities) it said: *“Medium risk with prospects for capital growth over the medium and longer term.”* For level 5.5 and 6.5 it said: *“Medium to Moderately Adventurous. Medium risk when part of a balanced portfolio where funds selected to provide good diversification.”* For level 7 it said: *“Moderately Adventurous As part of a diversified portfolio these funds can help to provide balance.”* For level 8 (including China funds, emerging markets fund, biotechnology funds and technology funds) it said: *“Adventurous Risk. These funds can help to give good global asset allocation features.”*

Mr and Mrs H signed a discretionary management agreement on 21 December 2020 which said their objective was growth and their agreed risk profile was *“Medium”*. There was no mention of ‘medium to moderately adventurous’ or of ‘medium plus’.

Fogwill says the return on Mrs H’s portfolio was 5.38% per year after fees and charges, which it says it feels is acceptable *“for her stated attitude of investment risk of Low Medium.”* It says Mr H’s portfolio started in February 2021 with £539,000 and overall suffered falls of £140,000, of which £122,000 was while it was fully invested in the markets.

The joint portfolio started with £646,000 but £40,000 went out to fund the ISA allowances in May 2021. Another £40,000 went out for the 2022 ISA allowances and Mr and Mrs H took out £50,000 in November 2022 too. Fogwill says the value on May 2023 was £375,214 making an investment loss of £116,700 (in addition to which there were charges of £24,000) which Fogwill says, as for Mr H’s portfolio above, mostly took place while the portfolio was fully invested. Fogwill says Mr and Mrs H moved elsewhere and it is unfair to judge returns over the two years Fogwill had the portfolio when the investment term was supposed to be five to ten years. It says the root of the issue is poor market returns in 2022 rather than fault by Fogwill.

Our investigator considered Mr and Mrs H’s complaint. He didn’t find anything wrong with the depth of Fogwill’s investment team and noted accurate details of the team were given on Fogwill’s website. But he did consider the complaint should be upheld in other respects –

mainly because of the asset allocation used. He said, in brief summary:

- Mr and Mrs H were assessed on risk questionnaires as 'medium' risk investors. The risk profile definition said such an investor was looking for higher returns than a deposit account and a balance of risk and reward. A fair balance of lower and higher risk assets should've been used. As well as equity exposure there should've been a reasonable weighting of lower risk assets like government and corporate bonds to balance the risks.

- The asset allocation (proposed for the new funds in 2020) had an uncomfortably high level of exposure to funds invested in overseas markets, emerging markets, smaller sized company funds, or specialist industries. Something like 68% was in global equities, overseas and emerging markets, smaller companies and specialist sector equity funds.

- The portfolio was a discretionary managed, allowing Fogwill to make the investment decisions. Mr and Mrs H had a reasonably high capacity for loss. Mr H in particular was an experienced investor and his investment history showed him willing to take a fair degree of risk. The risk definition and suitability reports had told them the portfolio would have a fairly high exposure to equities and had some specialist funds. Fogwill describe its investment strategy as having an equity focus and detailed to Mr and Mrs H the fund and asset allocation. But this didn't make this asset allocation suitable for Mr and Mrs H. It wasn't in keeping with their assessed medium risk profile or the definition of that profile when described to them in the suitability report. It was too high risk. The resulting losses and volatility, of which Mr and Mrs H complained, was consequently not surprising.

- Fogwill's rotation of the portfolios from equity to cash and back again had benefited Mrs H in the covid period. Mr H would've been to some extent aware Fogwill might take this approach and knew enough to know attempts to time the market wouldn't always work. But 65% of the portfolio was switched in and out of cash six times in nine months in 2022 which was extreme. Two switches were completely reversed within a week or so. This management was inappropriate and another reason to uphold the complaint. If the risk profile and asset allocation had been appropriate there would've been little need to make such portfolio shifts.

- The shifts arose in part from the risky asset holdings, in that Fogwill was motivated to protect the portfolio from market fluctuation due to the high exposure to risky assets within the portfolios and falls in value suffered due to this previously. (Fogwill's complaint reply said Mr H's ISA capital while fully invested between February 2021 and February 2022 fell 15.58% and the joint account fell 12.59% by then since May 2021 due to market falls).

Mr and Mrs H accepted our investigator's view. Fogwill disagreed and said, in summary:

- The assessment had gone beyond the complaint made and introduced an issue around the suitability of the investments. The ombudsman service's remit allows it to look at additional points but in doing so here the assessment ignored the views of the parties as Fogwill and Mr and Mrs H were agreed that the investments were appropriate. In looking at additional points the ombudsman service shouldn't simply dismiss the views of the parties to the complaint. Mr H even reiterated when he spoke to the investigator that he took no issue with the asset allocation of the portfolios. So the ombudsman service has erred in widening this complaint to be one about suitability of the investment and not simply the complaint made by Mr and Mrs H about suitability of trading activity.

- The starting point for investment suitability is to look at the risk attitude of the clients. The assessment contained a fundamental misconception about Mr and Mrs H's risk profile which suggested all documents provided hadn't been considered. The assessment found the investments unsuitable based on Mr and Mrs H as medium risk investors. While their overall risk attitude was medium (a risk level of around 4.5 to 6.5 out of ten, as in Fogwill's 2014 Suitability Report), Mr and Mrs H agreed they were prepared to take a higher level of risk for these investments. There was no issue with this as they clearly understood the concept of risk and had significant overall assets, so their capacity for loss could easily support a higher level of risk for these limited investments.

- Fogwill's 14 October 2020 letter to Mr and Mrs H specifically confirms the increase in risk attitude, as follows: "it was decided that you would be happy to invest in a strategy that would be described as Medium to Moderately Adventurous to facilitate broader market sector and geographical diversification". So their risk level at the relevant times was medium to moderately adventurous, a risk level of around 5.5 to 7.5 out of ten.

- It is important the portfolio isn't looked at with the benefit of hindsight. Mr and Mrs H are clearly still content with the asset allocation in the portfolios. The breakdown was clearly set out in the relevant Suitability Reports and included details of the specific investments and their level of risk. The level of risk was set out by reference to a *"Investor Attitude to Risk"* document. The 2019 document in force at the time of the 2020 advice clearly sets out the relevant descriptions of risk and what each might mean from the perspective of the overall portfolio risk rating out of ten. It sets out the *"Risk Profile of Major Financial Investments".* This explains the approximate risk rating of certain investments. Fogwill applied this to Mr and Mrs H's risk profiles. The outcomes were set out in the relevant Suitability Reports as follows:

    - Mrs H's 2014 ISA Portfolio – overall risk level = 4.871

    - Mr H's 2020 ISA Portfolio – overall risk level = 6.405

    - Mr and Mrs H's 2020 joint Portfolio (non-ISA) – overall risk level = 6.405

- Therefore each of the above portfolios was put together in line with the accepted risk level of Mr and/or Mrs H at the relevant time – and, indeed, there was some headroom with reference to the risk level parameters of a medium (4.5-6.5/10) or medium to moderately adventurous (5.5-7.5/10) investor. The investments were therefore suitable. Applying the correct risk profiles for Mr and Mrs H there is therefore no basis to take the view that the investment advice given to them was unsuitable.

- Fogwill's trading wasn't done in an 'aggressive manner'. Fogwill was paid a discretionary management fee and switching of investments wouldn't generate extra commissions. It is important not to judge matters with hindsight. The relevant markets were suffering very significant volatility. One approach to this may have been simply to 'sit tight' and hope for the best. But Fogwill knew this wasn't something Mr and Mrs H wished to do, as it had had a similar situation in 2020 and had taken decisive action to move funds into cash for a period to reduce volatility in the portfolios. This had worked well and was an approach favoured by Mr and Mrs H. It was about protecting the portfolio from short-term volatility.

- Also it is incorrect to suggest the switch into cash and back into funds occurred six times in 2022. This is incorrect. The portfolio was switched in such a manner in February 2022, May to June 2022 and October 2022 – 3 occasions. The trades that resulted in large cash holdings for a short period in January and February 2023 were as a result of a normal remodelling and re-balancing of the portfolios. Due to the settlement timings of fund sales and purchases, holding cash cannot be avoided.

- All funds used (except the real estate and infrastructure investment trusts) are single priced clean unit classes. So the bid/offer price is the same. There are no entry costs on any of the funds used, as the platform provider negotiated favourable terms with the funds. There are no foreign exchange costs involved. The platform doesn't charge for trades. Two funds used do have 5% initial charges, but the platform provider negotiated this to zero. The only charges would've been the spreads on the investment trusts plus stamp duty reserve tax of 0.5%.

- Fogwill wasn't reacting to poor performance in 2021, as the assessment appears to suggest. The fact is in 2021 Mr H's ISA grew by approximately 9.3% and the joint account by 9%, so there was not a question of the firm chasing losses or reacting to previous poor performance. It was making considered investment decisions – and ones with which Mr and Mrs H didn't take issue when discussed with them.

- Mr and Mrs H complained they shouldn't have been moved to cash and reinvested a number of times in 2022. Fogwill responded to this complaint and explained the rationale behind the moves. It is accepted that, with hindsight, these gave rise to limited additional losses. But the ombudsman service has effectively turned the complaint on its head by making it about investment suitability and has done so on the back of a misstatement as to Mr and Mrs H's risk attitude. So the ombudsman service should now deal only with the actual complaint against Fogwill – concerning the investment switches – and respect Fogwill's and Mr and Mrs H's view that the portfolio asset allocations were acceptable.

- The complaint is effectively about investment performance. Had the markets not suffered such significant losses, Mr and Mrs H wouldn't be taking issue with the switches, which aren't the cause of the vast majority of their losses. The actions taken by Fogwill in this regard were not improper and were a reasonable response to the very turbulent market conditions being experienced. The complaint should therefore not be upheld.

Our investigator didn't change his overall view but made further comments. In summary:

- In looking at the complaint, which included concerns about large portfolio losses and poor performance, our role requires us to look at all aspects including agreed attitude to risk, investment objectives, trading patterns and suitability of the asset structure. Just because Mr and Mrs H were 'content' with the asset allocation given and set out to them at the review, doesn't mean it was suitable for them or their risk attitude. They were not the investment experts.

I sent my provisional decision on 21 March 2024, setting out my findings as follows:

"Mr and Mrs H complain of what they consider to be excess losses of 30% instead of the 12% they would've expected from the market. They didn't identify unsuitable asset allocation as the cause of this loss – they said they were broadly happy with that aspect and blamed Fogwill's active trading style instead. But the losses they complain of necessarily arise from the assets the portfolios were invested in by Fogwill, so it is relevant to consider whether at the root of the losses they complain of was a fault in asset allocation. Mr and Mrs H's views are something I take into account but aren't definitive - I note they aren't investment experts. I'm not persuaded that what they've said about this means I shouldn't consider the suitability and impact of Fogwill's asset allocation when considering the losses they complain of.

Mrs H's ISA portfolio started in 2014 on a medium risk basis and, from what I've seen, it wasn't invested like the 2020 portfolio recommendations described and considered by our investigator. Fogwill has said Mrs H's portfolio was rated at a risk level of 4.8 - compared to the 6.4 it rated its 2020 recommendations - and Fogwill has referred to Mrs H's *"stated attitude of investment risk of Low Medium."*

I note also that Mr and Mrs H's decision to move more to Fogwill was in part motivated by their experience of Fogwill's management of Mrs H's portfolio. As I understand it, that portfolio continued to be managed in line with its original mandate and wasn't rebalanced into the funds Fogwill outlined for Mr and Mrs H in 2020…

With those points in mind, I don't at present see a grounds for upholding Mr and Mrs H's complaint about Mrs H's ISA on the basis of the suitability of the asset allocation used by Fogwill at the outset or subsequently. Also I've not identified other grounds to uphold it.

In saying this I've considered what Mr and Mrs H have said about the active trading style used by Fogwill – moving large amounts out of and then back into the market three times. Fogwill had apparently been successful with this in the past and Mr and Mrs H may have been aware of that success. That doesn't in itself mean Fogwill was right to do this and nor does Fogwill's point that these moves were only small contributors to Mr and Mrs H's losses. I note in the case of Mrs H's ISA, the contribution it identified was significant at around 4%.

But Fogwill had a discretionary mandate, and how it chose to trade the portfolio was a matter for Fogwill's judgement. The risk that a discretionary manager might produce poor results or take unsuccessful positions, is a risk inherent in using any discretionary manager.

Fogwill's medium risk mandate and medium to long term investment horizon meant it didn't need to react to market falls by disinvesting like it did. But this doesn't mean it wasn't entitled to do this if in its judgement this was the best way to manage the portfolios. It has explained why it made each of the moves it made into and out of the market. I'm satisfied it acted for the reasons it has given. I've seen nothing to suggest it wasn't acting on its genuine view of future market prospects and trying to benefit the portfolios when it carried out its trading.

This trading may have been unusually active at times, but I don't find it was done without reason or involved decisions Fogwill wasn't entitled to take in the way it did. I don't think the actions it took could only have been undertaken by a negligent or incompetent manager…

With all this in mind, my view is Fogwill wasn't at fault for trading the portfolios in the way it did. So I don't intend to uphold Mr and Mrs H's complaint about their losses insofar as it is a complaint that Fogwill's pattern of trading was faulty and caused their losses.

Also I'm satisfied Fogwill had an investment team and won awards. So I reject the idea that it mis-sold its services with such claims. In any event Mr and Mrs H had experience of Fogwill through Mrs H's portfolio before Mr H joined in 2020. I find it likely that personal experience of this kind, and Mr H's own personal experience from his discussions with Fogwill, would've carried much more weight than any marketing claims Mr H has referred to.

But in my view Fogwill's management of Mr H's portfolio and the joint portfolio started with it, wasn't appropriate due to the target asset allocation it proposed and used in 2020 and my view is that this fault led to losses Mr and Mrs H raised with Fogwill in their complaint.

Fogwill says those portfolios had a risk score of 6.4 out of 10 and its medium risk profile covered risk scores up to 6.5. Also it says Mr H in any case agreed a 'medium to moderately adventurous' profile, which would cover risk scores from 5.5 up to 7.5. I've thought about this carefully, but I'm not persuaded by it.

I question the wisdom of assessing Mr and Mrs H's risk appetite and agreeing it was medium - and as it had always been for Mrs H - but then making proposals that weren't in line with this and encouraging Mr and Mrs H to take more risk instead. These proposals didn't arise from Mr and Mrs H's needs or circumstances. They arose, as far as I can see, from Fogwill's own investment preferences. There wasn't anything stopping Fogwill from proposing a portfolio that was sufficiently diversified and also in line with the risk appetite it had identified for Mr and Mrs H. If Fogwill felt exposure was needed to funds carrying more risk, this could've been balanced out by lowering risk elsewhere in the portfolio – although of course the degree to which higher risk funds could be used would necessarily be limited by the limits of Mr and Mrs H's risk appetites. But that is as it should be.

Mr and Mrs H had recently answered questions to explain to Fogwill their preferences and attitudes towards taking risk with their investments. So they will have naturally assumed those answers would shape the advice Fogwill was giving them. They wouldn't have supposed the portfolios Fogwill proposed wouldn't suit someone who answered as they had and would suit instead someone who had given very different answers to their own answers.

Also there was a very significant difference between the medium risk category and the risk category above it. I say this because as one progresses up from medium risk, not only does the weighting of risk elements increase (becoming entirely equity based) but the riskiness of those risk elements also increases. So it is not at all a trivial matter to move from one to the other. Diversification is increasing in that some companies and areas that might not have been represented at all within a mainstream larger cap fund are now represented but that representation may at the same time amount to an overweight position in those sectors or enterprises and to concentrating risk into areas such as smaller enterprises and specific specialist sectors. Fundamentally the risk is increasing and increasing significantly.

I don't think Fogwill went about obtaining Mr and Mrs H's agreement to this extra risk appropriately. Fogwill appears to have suggested that it was proposing altering the approach *"given the size of the investment"*. But I don't see that the size of the investment required Mr and Mrs H to be encouraged to take more risk.

Also Fogwill presented the proposals as being *"to facilitate broader market sector and geographical diversification"*. But increasing diversification would be a measure that would tend to reduce risk rather than increase it. So couching the proposals in those terms in my view underplayed the increased risk being proposed and didn't present it clearly or fairly.

My view in this regard is reinforced by the recommendation report which told Mr and Mrs H they had been assessed as medium risk investors. This report summarised the advice given and what had been resolved as a result of the discussions that had taken place with Fogwill. It made no reference to 'moderately adventurous' and instead directed them to the medium risk definition in the supplementary report. Also the discretionary management agreements signed at the time by Mr and Mrs H - from which Fogwill derived its authority to act for them - stated Fogwill would manage the portfolios in line with an agreed risk profile of medium. So these documents, sent after Fogwill's October 2020 letter, gave no indication Mr and Mrs H had agreed to a real increase in risk over and above medium risk.

I don't overlook the letter sent in October 2020 but I find it noteworthy this wasn't part of any advice report and what it said wasn't reflected in the reports or mandates issued later and signed by Mr and Mrs H. Also… [there was some] ambiguity as to whether it was saying that the portfolios being proposed would still be medium overall – with the medium to moderately adventurous strategy being a specific type of medium risk approach - or whether it was saying, as Fogwill says, that a different approach altogether would be taken allowing a very much higher level of risk.

A lack of clarity about the significance of the proposed extension of the risk level is reflected also in the variety of different ways Fogwill referred to this. As well *"Medium to Moderately Adventurous"* Fogwill referred to the approach as "extending the portfolio beyond medium" or as "medium plus" being "models that are medium/bottom end of moderately adventurous". In this last regard the supplementary report scored medium risk as 5 to 6 and moderately adventurous as 6 to 8 so the bottom of one and top of the other would've been 6 on its face.

In my view all of this points to the conclusion that Mr and Mrs H were given the impression that while other investment elements were going to be incorporated, at its core the approach would still reflect Mr and Mrs H's medium risk appetite. What this meant to Mr and Mrs H had been elaborated by them in their risk questionnaire answers – which I note scored towards the bottom of the range for medium risk. Also they understood Fogwill had managed Mrs H's money on a medium risk basis, and Fogwill has indicated that in doing so it took an approach it has told us was 'low medium' and scored as 4.87, which placed it just above the bottom of medium risk in 2014 and below medium risk in 2020 (given a range of 5 to 6). This was where Mr and Mrs H's understanding of what Fogwill meant by medium risk began.

Fogwill made Mr H and Mrs H aware that with a medium risk approach *"they will have a high degree of exposure to global equities with associated investment volatility".* This exposure was outlined to Mr and Mrs H in the medium risk description as "investing in up to 85% equities" of which 40% to 60% might be overseas and 10% in specialist funds. I note such an approach was most likely riskier than the approach Fogwill had taken for Mrs H and to which Mr and Mrs H initially thought the new capital would be adding. Also it was made clear that they would need *to "realise that the value of their investment may fluctuate in the short term".* But, having said all of that, Fogwill's definition also acknowledged that a medium risk investor *"would feel uncomfortable if the overall value of their investments were to fall significantly over a short period…"*

It follows that this high allocation to equities would need to be achieved while also managing the risk of such significant falls. It's not obvious to me how this would be achieved with such a high allocation to shares, but there would need to be an element of safety achieved within the portfolio somehow. Our investigator thought this implied the inclusion of lower risk assets like fixed interest bonds alongside higher risk elements like shares. I note Mr and Mrs H both said they favoured a portfolio that would have both lower and higher risk elements.

Looking at Fogwill's risk profiles and its own assessment of the risk content of these, in 2014 its balanced risk profile had a risk score range of 4.5 to 6.5 but in 2020 medium risk was described in the supplementary report as being 5 to 6, so no longer as high. Fogwill's note in September 2020 said medium risk on a risk scale of 1 to 10 "would be risk level of mainly 5 to 6.5" but this is absent from the supplementary report and even if this note was brought to Mr and Mrs H's attention – and it isn't obvious to me that it was – what it means isn't clear. It could mean the investments used would mainly have these risk ratings - and if that is so, it wouldn't follow that the combined total should be as high 6.5. Also I note Fogwill rated funds with a 5.5 risk score as "Medium to Moderately Adventurous" – so more than medium risk. On this basis the portfolio for Mr H's ISA and the joint portfolio were both above medium risk in Fogwill's own terms. At 6.4 the risk score for the portfolios was a touch below the level it attributed to industry specific equity funds, or geographical sectors like Asian income funds.

Fogwill was of course free to discuss investment options with Mr H and to explore further his willingness to take risk. But it had to make sure it was clear with Mr H about any additional risk it was proposing – and also ensure that it was appropriate to recommend Mr H that risk. I accept Mr and Mrs H had the capacity to take risk with the invested funds because they didn't need the capital or income to fund their lifestyle as they had excess income from their pensions and other capital too. But this doesn't mean there was no limit to the risk they could be suitably advised to take.

It seems to me that what Fogwill suggested to Mr and Mrs H involved taking significantly more risk. It invested entirely in shares with no lower risk element. It concentrated part of the portfolio within particular sectors. A focus on smaller companies, for example, necessarily involves concentration in companies that represent a relatively small proportion of the overall value of those markets. So it is more concentrated than an investment in funds representing broader indices, larger companies or more general sectors. Some of the equity exposure was also in emerging and to some extent speculative sectors. As a result of all this it was more likely that significant short-term falls might occur and higher losses might be suffered but at the same time significantly higher gains might result. In my view it is in these terms that Fogwill ought to have presented its proposal that Mr and Mrs H take more risk and invest in the target portfolio Fogwill proposed for Mr H's ISA and the joint portfolio. But, as I've outlined above, I'm not persuaded that Fogwill presented its portfolio proposal like this.

In my view the results likely to flow from how Mr H's ISA was invested, and how the joint account would in due course be invested too, weren't in line with what Mr and Mrs H would've expected in light of the preferences they expressed and the discussions and interactions with Fogwill I've outlined above. So I think their complaint about the losses that resulted from those portfolios should be upheld. I also think Fogwill should pay £250 for the inconvenience and distress caused by this failing."

My provisional findings, as set out above, concluded that Mr and Mrs H's complaint should be upheld in part - with Mr H's ISA portfolio and Mr and Mrs H's joint non-ISA portfolio that started with it, being compared with an investment benchmark to assess any loss.

Mr and Mrs H accepted my provisional findings. Fogwill replied saying it had no further information to provide in respect of the Provisional Decision. So the matter has been passed back to me to decide.

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, and in the absence of new evidence or arguments from the parties, my conclusions remain those set out in my provisional decision which I've set out above.

So, for the reasons I gave there, I uphold Mr and Mrs H's complaint in part.

Putting things right

Fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mr and Mrs H as close to the position they would probably now be in if they had not been given unsuitable advice.

I think Mr and Mrs H would have agreed to invest Mr H's ISA portfolio and the joint non-ISA portfolio differently if it hadn't been for Fogwill's failings. It isn't possible to say precisely how this would've been done, but I am satisfied that what I have set out below is fair and reasonable given Mr and Mrs H's circumstances and objectives when they invested.

What must Fogwill do?

To compensate Mr and Mrs H fairly, Fogwill must:

- Compare the performance of each of Mr and Mrs H's investments with that of the benchmark shown below.

- A separate calculation should be carried out for each investment. The resultant figures should then be added up. If the calculation still shows a loss, that would be the amount payable to Mr and Mrs H.

- Fogwill should also add any interest set out below to the compensation payable.

- Fogwill must also pay Mr and Mrs H £250 for the inconvenience and distress caused to them by the failings I've identified above.

Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Mr H's ISA portfolio	No longer exists (because it was transferred elsewhere)	50% FTSE UK Private Investors Balanced Total Return Index & 50%	Date of investment	Date ceased to be held (being the date it was transferred elsewhere)	8% simple per year on any loss from the end date to the date of settlement
Mr & Mrs H's joint non-ISA portfolio	No longer exists (for the same reason as above)	FTSE UK Private Investors Income Total Return Index	Date of investment	Date ceased to be held (being the date it was transferred elsewhere)	8% simple per year on any loss from the end date to the date of settlement

For each investment:

Actual value

This means the actual amount paid or payable from the investment at the end date.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Any additional sum paid into the investment should be added to the fair value calculation from the point in time when it was actually paid in.

Any withdrawal, income or other distributions paid out of the investments should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Fogwill totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

Why is this remedy suitable?

I have decided on this method of compensation because:

- Mr and Mrs H wanted growth and were willing to accept some investment risk.

- The FTSE UK Private Balanced and Income Total Return indices are mixtures of diversified indices representing different asset classes, mainly UK equities and government bonds. The Income index has asset allocation levels in line with funds within the second-lowest volatility quartile and the Balanced index is in line with the second-highest volatility quartile. So using 50% of each gives an asset mix based on a middle level of volatility. This is a fair measure for Mr and Mrs H who were willing to accept a level of risk and volatility for a higher return, as I've described above. I reach this view taking into account Mr H's prior portfolio had 19% in UK fixed income.

- The purpose of the comparator index is to represent the sort of fair return that might've been achieved from a portfolio with an appropriate level of risk. The combination of indices I've outlined above is appropriate for that purpose in my view. The ISA funds would allow income to be rolled up without tax. From what I've seen, Mr H wasn't averse to spending income if generated by the joint portfolio.

- The additional interest is for being deprived of the use of any compensation money since the end date.

My final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £415,000, plus any interest and costs I consider appropriate. If I consider that fair compensation exceeds £415,000, I may recommend the business to pay the balance.

Fogwill & Jones Asset Management Ltd should provide details of its calculation to Mr and Mrs H in a clear, simple format.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £415,000, I recommend that Fogwill & Jones Asset Management Ltd pays Mr and Mrs H the balance plus any interest on that amount as set out above.

This recommendation is not part of my determination or award. It does not bind Fogwill & Jones Asset Management Ltd. It is unlikely that Mr and Mrs H can accept my decision and go to court to ask for the balance. Mr and Mrs H may want to consider getting independent legal advice before deciding whether to accept this decision.

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Fogwill & Jones Asset Management Ltd should pay Mr and Mrs H the amount produced by that calculation – up to a maximum of £415,000 (including distress or inconvenience) plus any interest set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H and Mrs H to accept or reject my decision before 28 April 2024.

Richard Sheridan
Ombudsman