

The complaint

Mr W complains that he was mis-sold investments by Charles Street Securities Europe LLP (Charles Street) on several occasions between 2005 and 2012.

Mr W is being represented with this complaint. But for ease, I will refer to all actions and comments as those being of Mr W.

What happened

Mr W became a client of Charles Street in 2005. He says they advised him on, and arranged the investing of, several stocks between this date and 2012.

Mr W says he complained on several occasions between 2012 and 2014, regarding the suitability of the advice he had been given. He says this was following considerable losses. Charles Street say they dealt with Mr W's concerns in 2012 over the phone and as such, didn't need to provide a written response or referral rights to our service.

Mr W brought a complaint to our Service, through his representative in 2022. He said:

- They were unsuitable for his attitude to risk.
- He didn't have the necessary knowledge and experience to understand the risks.
- That Charles Street had downplayed the risks involved and had told him they had invested themselves.
- He was mis-led about how simple it would be to sell the shares.

Charles Street maintained that the complaint had not been brought in time. However, an ombudsman reviewed the matter and determined that the earliest Mr W had cause for complaint was 2012 and that as he complained that year, it was brought in time. She then passed the complaint back to the investigator to review its merits.

Charles Street provided further information at this point, that more investments had been made, over a longer period of time. The investigator wrote to both parties and explained that this didn't change the decision that the ombudsman had reached, that the complaint had been brought in time.

The investigator also felt that some of the investment advice Mr W had been given was unsuitable. He said that investments recommended after 2 June 2009 exceeded Mr W's capacity for loss. He therefore upheld the complaint in part. Mr W didn't respond to this assessment. Charles Street maintain they don't accept it is within our jurisdiction. They also responded to say why they felt they weren't advising Mr W, but giving him information to make his own informed investment decisions. They also said that the investments made were suitable for Mr W's circumstances and needs at the time.

I issued my provisional findings on 30 March 2024. An extract of which, forms part of my decision below.

Jurisdiction

The jurisdiction of this complaint has already been decided on by an Ombudsman, in August 2023. They determined that Mr W had cause for complaint in 2012 and that he had logged a complaint that same year. Meaning he had brought his complaint in time. This was determined through the call notes we have from that time.

Charles Street have provided evidence of further investments that were made, over a longer period of time. As the jurisdiction of a complaint remains live until a final decision is issued, I wanted to clarify why I am satisfied this further evidence doesn't change our position on the jurisdiction of the complaint.

An ombudsman at this service has already concluded that whilst Charles Street were able to address Mr W's complaint in 2012 without issuing a final response letter. As no written response with referral rights was given, Charles Street cannot now time bar the complaint on that basis.

There is also a further jurisdiction consideration. I don't have a free hand to decide complaints. I must act within my powers which are set out by the Financial Services and Markets Act 2000 along with the Financial Conduct Authority's (FCA) Dispute Resolution ('DISP') Rules. These can be found on the FCA's website.

The relevant rule for this complaint is DISP 2.8. It says that where a business doesn't consent (as Charles Street doesn't here), I can't consider a complaint if it's made (to the business or our service) more than:

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought to have become aware) that he had cause for complaint.

Mr W complains about advice he received to invest in shares, between May 2005 and November 2012. He first complained in June 2012, six years prior to this was June 2006. So, any advice received after that point (Charles Street say this was the latter nine investments), is within our jurisdiction under the six-year part of the rule.

However, the three-year part of the rule extends Mr W's time to complain, from when he became aware he had cause for complaint. This was June 2012, when Mr W first raised concerns with Charles Street. I am satisfied this started the three-year part of the rule for Mr W, extending his time to complain until June 2015. This means that the complaint regarding the latter nine investments, can be considered under the three-year part of the rule.

So, I am satisfied that I am able to go on to consider the merits of this complaint.

Was advice given?

Charles Street have denied that they advised Mr W to take these investments out. They say they only gave him the information regarding the companies, and it was his decision on whether to proceed with the investments.

Advice was defined in art 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001/544 ('the RAO') as:

"53. Advising on investments

Advising a person is a specified kind of activity if the advice is—

- (a) given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and
- (b) advice on the merits of his doing any of the following (whether as principal or agent)—
 - (i) buying, selling, subscribing for or underwriting a particular investment which is a security or a [relevant investment] , or
 - (ii) exercising any right conferred by such an investment to buy, sell, subscribe for or underwrite such an investment."

The perimeter guidance (PERG) in the FSA Handbook also said the following about the meaning of 'advising on investments':

"Giving a person generic advice about specified investments (for example, invest in Japan rather than Europe) is not a regulated activity nor is giving information as opposed to advice (for example, listings or company news). However, the context in which something is communicated may affect its character; for example, if a person gives information on share price against the background that, when he does so, that will be a good time to sell, then this will constitute advising on investments."

With regard to the definition and guidance of 'advising on investments', I have gone on to consider the evidence provided with the complaint. The Private Client Agreement ("the agreement") terms Charles Street within the definition section as the 'Client Adviser'. With several references to terms like 'advisory', 'investment advice', 'financial adviser' and 'recommend'. Mr W completed the agreement with such information as his financial experience, assets, objectives and risk tolerance.

We haven't been provided with a copy of the call recordings between Mr W and Charles Street at the time of the investments. However, we do have diary notes. One of these state, "April 2005: Checked suitability". Charles Street have said this was a typing error and should have said checked appropriateness.

The others state, "January 2006: 'Wimax is an EIS qualifying company that has cutting edge technology for wireless broadband technology... Send/post research report C.B Friday'." And "July 2006: 'Greenkotes plant in Germany is now open + they have their first contract with a German steel component part maker. Told client the contract is worth €800,000 a year. "No Nox" told client listing will be Q1 next year and probably at a higher price.'"

Considering the context as the handbook tells us to, this suggests more than information and advising a good time to invest. I have also considered the context of when the investments were made. These were during calls with Charles Street and following the provision of the information like the brochures. Making investment decisions during the calls, specifically in some cases the amount to invest, suggests to me that advice was being given.

Mr W has been consistent that he thought he was being advised and his complaint was that they had been mis-sold to him. In responding to Mr W's complaint, Charles Street maintained they still believed in the shares. Suggesting, they had given an opinion on the suitability of the shares for Mr W.

Charles Street have pointed to the wording in the application form of, "I/we have taken appropriate professional advice before submitting this application form". They state that this shows they were not giving advice. However, I agree with the investigator that Mr W thought this was reference to advice from Charles Street and doesn't support that they made clear they weren't advising him.

On a balance of probabilities, I am satisfied that Charles Street advised Mr W in regard to these investments. This is based on the client agreement, the notes from the time, the context of when the investments were made and the language Charles Street used in responding to the complaint.

Was the advice suitable?

At the time of the initial advice, Mr W was recorded in the client agreement as being retired with an income of £30,000 a year. It also said he was an experienced FTSE and AIM investor and trader.

After bringing the complaint, Mr W has disputed this information or that he ever said those things. He says he was 56 years old, with an annual income of less than £40,000. He was planning for retirement. He had savings of £40,000 and a pension pot of approximately £200,000 in lower risk investments. He says he had an objective of capital growth and has disclosed that he had approximately £260,000 invested across quoted shares, commodities, liquid savings and ISAs. With a further £18,000 invested in unquoted shares. Mr W also said that he had been misled into buying other unquoted shares and unlisted stocks from other unregulated firms, and had received FSCS compensation.

I agree with the investigator that I haven't seen evidence to conclude that Mr W was given incorrect information from Charles Street. I believe he was aware of the high-risk nature of the investments and how they worked and wanted to invest in this way. From the information he has provided, I can't conclude that the initial advice was unsuitable.

However, I note as the investigator did, that Mr W stated at application, "I am prepared to accept a high level of risk in respect of 20% of my investments in terms of the acquisition costs of such investments". Charles Street say this was intended to be in regard to Mr W's whole portfolio and so how many investments they should offer to Mr W.

Did the advice continue to be suitable?

When advising Mr W, as well as considering his attitude to risk and objectives, Charles Street also needed to ensure he had sufficient capacity for loss. They needed to stop recommending investments when this point had been met and Mr W wouldn't be able to bear the losses should the investments fail.

A Charles Street note from 22 November 2005 stated that, “client may not be liquid”. I think this will have put them on notice that there was a limit to his capacity for loss. However, there is a lack of information from the file to determine what this was. Due to the circumstances of the sales and a reluctance from Mr W to provide further information at the time.

I am satisfied that on balance, the 20% figure that Mr W had given for his willingness to invest in a high level of risk, was a reasonable position for Mr W's capacity for loss. At this point, Charles Street should have stopped their recommendations and warned against further exposure. I believe if they had have done, Mr W would have ceased making investments such as these at this point. An anonymised extract from the Investigators view is set out below.

“I think it would've been clear to Mr W that Charles Street weren't providing advice on his overall financial situation and could only consider information they had. He was advised by Charles Street to provide as much information about his financial situation as possible and I think in these circumstances it's reasonable for Charles Street to only consider the information they were provided by Mr W and apply his capacity for loss limits to these values.

Before recommending an investment, I think Charles Street should have referred to the current portfolio size on their existing client and suitability report (amount set out under 'Total') and worked out whether this next investment would take Mr W's Charles Street portfolio above his 20% capacity for loss – which I've calculated as £56,000, being 20% of £280,000. With reference to list of Mr W's investments he made with Charles Street, I note he invested a total amount of £87,312.86 between 24 May 2005 and 23 November 2012.

I consider that the last suitable investment recommended to Mr W was the investment of £6,000 into LX mobile systems Plc on 2 June 2009, which brought the total amount he invested with Charles Street to £51,900. So it follows that every investment after this date exceeded Mr W's 20% capacity for loss limit of £56,000, and so were unsuitable investments that shouldn't have been recommended. It follows the unsuitable investment amount is £35,412.86.

I understand two of Mr W's holdings were EIS qualifying companies – namely, Urban Wimax Plc, Albannach Brands Plc. With this in mind, if Mr W has received income tax relief and loss relief in relation to these investments, it would be fair for Charles Street to deduct any such tax relief benefits Mr W has received by holding these investments because it wouldn't have been something available to him had he invested differently.”

The Investigator set out his analysis of the situation, a significant part of which is set out above. I consider the Investigator set out matters clearly, usefully illustrating how Charles Street should have done more and advised Mr W he had met his capacity for loss. Had they done so, Mr W would not have carried on investing with them in such high-risk investments, at that point. I therefore uphold this complaint in part and Charles Street should put matters right by following the below.

Mr W, through his representative didn't provide any considerations further to my provisional decision.

Charles Street responded in full. Amongst their response points, they said:

- Stated that the decision should be reached on its own merits, and not in regard to any other previous decision.
- Maintained that the case was out of our jurisdiction. Disputing that they cannot time-bar a complaint for not responding in writing, when they weren't required to.
- There is no evidence in their records of any continued dissatisfaction from Mr W, following their response to the complaint in 2012.
- Questioned whether a diary entry from November 2010 which discussed the financial difficulty of one investment might have been the date of Mr W's cause for complaint.
- Maintained that advice wasn't given and that phrase used in their client agreement form, contradicted what was happening and were based on the suggestions of compliance consultants.
- Disputed the examples given in the PD as evidence of advice. Stating this was just providing information and that the time it took Mr W to invest after this, shows it was information only. They say the fact Mr W declined several other potential investments, shows also that it was information only being given.
- Whilst they disputed they had advised Mr W, they also didn't agree that any lack of liquidity showed there was a reduced capacity for loss.
- They disputed that the 20% capacity for loss figure was accurate. Stating it was a rough guideline.
- Mr W made further investments in 2016, 2020 and 2021 and sometimes without any interaction with Charles Street.
- Mr W's portfolio was £280,000 plus investments made through Charles Street. They said these were additional and so he remained in line with the 20% rough guideline.

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.

Charles Street have provided a full and thorough response to my provisional decision. I've focused on what I consider to be the pertinent points. That isn't meant as a discourtesy, it simply reflects the informal nature of our Service. I've set out the key issues I think are important here. And I've answered them below in turn.

Charles Street have also raised several questions of me in their response. However, it isn't my role to answer each of them. Again, that isn't meant as a discourtesy, but it is my role to review Mr W's concerns and reach findings on the matter.

Jurisdiction

This was decided on by another ombudsman in a previous decision, and expanded on in my provisional decision. Following further information from Charles Street. There appears to remain confusion, so I will reiterate the position.

DISP 2.8.2 says I cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

“(1) more than six months after the date on which the respondent sent the complainant its final response, redress determination or summary resolution communication; or

(2) more than:

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;”

Charles Street say this complaint was brought too late under (1) above, as it was more than 6 months after they responded to the complaint. However, the response was done under the guidance of DISP 1.5.3 at the time, which said that if a complaint is resolved by a respondent by the end of the following business day of its receipt, and if the complainant accepts that outcome, then neither the response nor the acceptance needed to be in writing.

No “*final response, redress determination or summary resolution communication*” was therefore issued. Charles Street were entitled to do this, however it is my decision that without a response in that format, the complaint cannot be time-barred under (1) above.

Under (2) above, I have also determined that the complaint was brought in time. Mr W first complained in June 2012, all investments made within six years prior to this (2a) are therefore complained about within time.

I believe Mr W’s complaint about the latter nine investments was also brought in time, under (2b). I am satisfied Mr W’s awareness of his cause for complaint also began in June 2012, giving three years from then to complain. Mr W did this.

Charles Street has suggested in their response to me that Mr W’s awareness of his cause for complaint was actually sooner. They have pointed at one of Mr W’s investments being dissolved in January 2011, and a diary entry from November 2010 where Mr W seemed to be aware of the risk of this happening.

I still maintain that Mr’s W cause for complaint started when he complained in June 2012, when he was first recording as saying Charles Street might have been wrong to have sold these investments to him. Whilst Mr W had concerns about one of the investments before this point, I haven’t seen enough to conclude that he yet thought this meant Charles Street had done anything wrong. However, even if I was to conclude that Mr W ought reasonably to have been aware he has cause for complaint in November 2010, that starts the three-year period for him to bring a complaint, and he did so, in June 2012.

Was advice given? And was the advice suitable?

Charles Street also provided further submissions in response to my provisional decision, as to why the complaint shouldn’t be upheld. Maintaining that they hadn’t advised Mr W.

I set out the definition of advice from the time of these investments, from Article 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001/544 (‘the RAO’) and the FCA handbook, in my provisional decision.

As I explained, I am satisfied from the evidence provided that:

- The terms of business referred to the '*Client Adviser*', '*advisory*', '*investment advice*', '*financial adviser*' and '*recommend*'. Mr W also completed the agreement with such information as his financial experience, assets, objectives and risk tolerance.
- A Charles Street diary note also said they had, "*checked suitability*".
- A call note suggested a good time to buy a stock, with the price likely to increase the following year.
- Charles Street also responded to Mr W's complaint, that they still believed in the shares.

I remain satisfied that this meets the definition of giving advice (included above). Charles Street has said the terminology used wasn't correct or a true reflection of what happened. However, it is supported by the diary entries and what Mr W said happened. He has been consistent throughout that he felt he was being advised.

Charles Street have said they were only providing Mr W with investment information. I have explained above why I believe their actions were advisory and more than information only. They have further pointed to Mr W's decision to decline potential investments on occasions with them. This doesn't persuade me he wasn't being advised. It only shows that he was aware he didn't have to go ahead with the advice he was given.

Charles Street also strongly disagreed with my provisional conclusion that suitable advice after 2 June 2009, would have been to have warned Mr W against further exposure to such high-risk investments. And that had they done so, I am satisfied Mr W would not have made the further investments.

I settled on this point in time, in agreement with the investigator, as it was at this point that Mr W's high-risk exposure went above the 20% of his portfolio. This was the percentage level of high-risk investment that Mr W said at inception he was willing to take. Charles Street's comment that the 20% figure was just a "rough guideline", hasn't changed my mind on this. It was a tolerance level stated by Mr W and I haven't seen anything to contradict this, suggest it was wrong or that it had changed by June 2009.

Charles Street have further said that the 20% tolerance figure was not met in June 2009. The basis for this argument is that each of Mr W's investments into these higher risk products, were new capital investments and not switches from within the portfolio. However, I don't agree, and this is something that was covered off by the investigator prior to the case being allocated to me.

We haven't been provided with evidence that the investments were through new capital and Charles Street have had many months to provide this. Further, Mr W has said that the investments were switches from within his portfolio. He pointed to the statements regarding lack of liquidity to evidence this. I am satisfied this was the case and the 20% level was met in June 2009.

In summary, although I have considered and addressed Charles Street's response, my conclusion remains as I set out in my provisional decision. Charles Street should have done more and advised Mr W he had met his capacity for loss. Had they done so, Mr W would not have carried on investing with them in such high-risk investments, at that point. I therefore uphold this complaint in part and Charles Street should put matters right by following the below.

Putting things right

Fair compensation

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

I think Mr W would have invested differently. It is not possible to say precisely what he would have done, but I am satisfied that what I have set out below is fair and reasonable given Mr W's circumstances and objectives when he invested.

What should Charles Street do?

To compensate Mr W fairly, Charles Street must:

- Compare the performance of Mr W's investment with that of the benchmark shown below and pay the difference between the fair value and the actual value of the investment. If the actual value is greater than the fair value, no compensation is payable.
- Charles Street should also add any interest set out below to the compensation payable.
- Deduct from the compensation due as calculated in 1) above any tax relief benefits Mr W received from his two EIS qualifying investments, Urban Wimax Plc, Albannach Brands Plc.

Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Charles Street Portfolio	Still exists but illiquid	FTSE UK Private Investors Income Total Return Index	Date of each unsuitable investment made (last five investments from Aug 2009 onwards)	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

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

If at the end date the investment is illiquid (meaning it could not be readily sold on the open market), it may be difficult to work out what the actual value is. In such a case the actual value should be assumed to be zero. This is provided Mr W agrees to Charles Street taking ownership of the investment, if it wishes to. If it is not possible for Charles Street to take ownership, then it may request an undertaking from Mr W that he repays to Charles Street any amount he may receive from the investment in future.

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 that Mr W paid into the investment should be added to the fair value calculation at the point 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 Charles Street totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically. If any distributions or income were automatically paid out into a portfolio and left uninvested, they must be deducted at the end to determine the fair value, and not periodically.

The wrapper only exists because of illiquid investments. In order for the wrapper to be closed and further fees that are charged to be prevented, those investments need to be removed. I've set out above how this might be achieved by Charles Street taking over the investment, or this is something that Mr W can discuss with the wrapper provider directly. But I don't know how long that will take.

Third parties are involved and we don't have the power to tell them what to do. If Charles Street is unable to purchase the investment, to provide certainty to all parties I think it's fair that it pays Mr W an upfront lump sum equivalent to five years' worth of wrapper fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the wrapper to be closed.

Why is this remedy suitable?

I have chosen this method of compensation because:

- Mr W wanted capital growth from the investments he purchased through Charles Street and was willing to accept high investment risk in connection with those investments.
- However, Charles Street should not have recommended investments that exceeded Mr W's threshold for capacity for loss of 20% of his wider financial portfolio that was known to Charles Street.
- If Charles Street had explained that threshold for loss to Mr W and stopped recommending high risk investments, Mr W would likely not have invested the level of money he did in high-risk investments of the same type through Charles Street or elsewhere.
- He would still have invested the money that exceeded his 20% threshold for loss and any alternative investments would likely still have a reasonable amount of risk.
- The FTSE UK Private Investors Income Total Return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared

to take some risk to get a higher return.

- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr W's circumstances and risk attitude.
- I'm satisfied that on balance and following the explanation of his capacity for loss, Mr W would not have invested all sums he didn't invest through Charles Street into the same category of high-risk investments elsewhere. So, I think on balance the index used is reasonable in these circumstances.

My final decision

My final decision is that I uphold the complaint and Charles Street Securities Europe LLP should pay Mr W the amount calculated as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 19 August 2024.

Yoni Smith
Ombudsman