

The complaint

Mr N and Mrs B complain that Brown Shipley & Co Limited (“BS”) failed to invest their money in line with the mandate for their investment portfolio. They also complain that no annual reviews were conducted.

What happened

In March 2019, Mr N and Mrs B met with BS as they were looking to invest funds realised from a recent sale of a company. BS went through Mr N and Mrs B’s personal circumstances and advised them to invest in a portfolio using BS’s growth mandate which had an above medium risk to capital. BS explained the portfolio would be invested primarily in equities (UK and international) and could include a limited exposure to fixed income investments, alternative assets and cash. BS provided a discretionary service, in which BS would make investment decisions on their behalf.

In May 2019, Mr N and Mrs B invested, in total, approximately £1,250,000 into the portfolio. Mr N and Mrs B remained invested in the portfolio until it was closed in October 2021. Mr N and Mrs B raised a complaint with BS in February 2021 as they felt BS hadn’t invested in line with the agreed mandate for the portfolio. They also felt that regular reviews didn’t take place as expected. BS initially didn’t uphold their complaint but then issued a final response in May 2021 upholding it. In summary, it said:

- The portfolio comprised of too much money between 16 December 2019 to 19 March 2020 and between 20 March 2020 to 9 November 2020.
- It did a comparison of how the portfolio performed during these periods against the benchmark for the portfolio. For the period of 16 December 2019 to 19 March 2020 the performance was -14.53% against a benchmark of - 20.23%. So BS said there was no financial loss as a result of the portfolio comprising of more cash than mandated.
- On 20 March 2020, the cash position moved to 39.54%. From this date, BS had three months to bring the portfolio back in line with the standard asset allocation. Three months on from 20 March 2020 was 19 June 2020. At this time, the portfolio had a cash allocation of 35% - some 15% above the maximum permitted cash position of 20%.
- The portfolio valuation between 19 June 2020 and 8 November 2020 showed growth of 3.34% compared to the benchmark of 2.21%. So BS applied the 3.34% growth rate to the excess cash figure held in the portfolio of £188,028 which resulted in an investment loss of £6,280.
- BS reviewed the trades made across the full period of investment and found that there was only one trade made between 20 March 2020 and 17 September 2020, where there was one trade and so it offered to refund all advisor fees for the charging quarters of March and June 2020 – totalling £5,356.71.
- BS also offered £200 for the inconvenience caused by providing an incorrect initial response to their complaint.

Mr N and Mrs B didn't accept BS's response and so they referred their complaint to this service for an independent review.

One of our investigators considered the complaint but felt BS's offer to put things right was fair. In summary, they said:

- The policy terms for the portfolio allow BS more time to rebalance the portfolio at the outset as the initial invested funds needs to be invested.
- The terms also confirm that, for the remaining period, where the portfolio is not being invested according to the agreed mandate, BS has three months to bring it in line with the agreed asset allocation.
- They were satisfied BS's comparisons for the two periods were fair. They were satisfied there was a lack of trading activity between March to September 2020 and felt the offer to refund management fees for this period was also fair.
- They noted there was also a lack of trading activity in 2021. However, as the portfolio was invested appropriately for the agreed mandate in 2021, this doesn't indicate a need for trades to be made.
- The policy terms state reviews should take place at least annually and they'd seen notes confirming a meeting took place on 11 December 2020. The next review would have been expected to take place at the end of 2021 but as Mr N and Mrs B had closed their portfolio by then, no meeting took place. So they felt the appropriate reviews had taken place.
- They felt BS's offer of £200 for any distress and inconvenience caused was fair considering BS didn't fully address their concerns at the outset.

Mr N and Mrs B didn't accept the investigator's findings. In summary, they said:

- At the time of investing, they were deciding how to split their investment funds between BS and another provider and so the calculation for investment loss should take this into account.
- They queried how the investigator had found the equity content for the period 1 January 2020 to 31 December 2020 to be calculated at 70% when for instance it was at 46% for the period of 1 January 2020 to 30 September 2020.

As Mr N and Mrs B remained unhappy, the complaint was passed to me to decide.

I issued my provisional decision in June 2024 explaining why I felt the complaint should be upheld. I include a copy below:

What I've provisionally decided – and why

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

I hope Mr N and Mrs B won't take it as a discourtesy that I won't be responding to each submission or every point they've raised. The purpose of my decision isn't to do that, but rather to explain my findings on the key issues. I consider the key issues to be whether BS has managed Mr N and Mrs B's investment portfolio in line with the mandate it provided and if not, whether BS's offer fairly compensates them.

Mr N and Mrs B complain that BS hasn't maintained the asset allocation of their portfolio as initially agreed, so the starting point is to consider how BS described the growth portfolio would be managed. BS has provided a copy of the investment policy terms which shows the

asset allocation for the growth portfolio to be as follows:

- *Equities: between 60 and 85%*
- *Fixed income: between 0 and 25%*
- *Alternatives: between 0 and 25%*
- *Cash: between 0 and 20%*

BS has also provided snapshots of Mr N and Mrs B's asset allocation from each quarter period they were invested. And having reviewed these, I'm satisfied the portfolio wasn't managed in line with the agreed mandate from the outset.

The terms initially allow BS some time in order to get the correct balance for the portfolio, which I think is fair considering it can take time to invest the deposited funds accordingly. Especially considering Mr N and Mrs B had a bespoke portfolio, as opposed to an "off the shelf" portfolio where the underlying assets are predetermined. However, I think it's reasonable to assume that by one month's time, BS ought to have invested Mr N and Mrs B's funds in line with agreed mandate, or at least as close to what was agreed as possible. Looking at the snapshot provided for July 2019 to September 2019, the portfolio had growth of 0.68% for this period, below the benchmark of 2.47%. The cash balance was much higher than the mandated maximum of 20% at 53% and the equities balance was much lower than the mandated minimum of 60% at 31% (including private equities). As such, I'm persuaded that BS has failed to manage the portfolio in line with the agreed mandate from the start and failed to bring it in line after four months having received the funds.

I appreciate that by December 2019, BS had built up the portfolio to be much closer to the agreed mandate, with 24% held in cash and 58% in equities (including private equities). However, it should have done so much quicker and, furthermore, looking at the snapshot for the period of December 2019 to March 2020, it would appear that the portfolio had still not been brought fully in line with the mandate. The cash balance had increased to 29% and the exposure to equities had dropped to 53% (including private equities).

A similar story continued through the period between January and November 2020, where by the latter date equities had increased to 56% (including private equities) and the cash had reduced slightly to 28%.

I appreciate BS's argument that Mr N and Mrs B's portfolio, at times, performed better than its benchmark. I've also thought carefully about BS's offer to compensate Mr N and Mrs B by comparing how the portfolio would have performed had it been managed in line with the mandate and BS's internal benchmark. However, I don't think it would be fair to use BS's internal benchmark when considering the redress. I say this as I don't think Mr N and Mrs B would have gone ahead with their investment with BS had they known it wouldn't manage the portfolio in line with the agreed mandate. As such, it follows that the appropriate redress would be to look at how their investment would have performed had they invested elsewhere in a portfolio with a similar asset allocation to that which they mandated for.

Putting things right

To compensate the estate of Mr N and Mrs B fairly, BS must:

- *Compare the performance of Mr N and Mrs B's investment with that of the benchmark shown below (FTSE UK Private Investors Income Total Return Index) 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.*
- *BS should also add any interest set out below to the compensation payable.*

- *BS must provide me with a copy of their calculation in response to my provisional decision as I'm conscious that Mr N and Mrs B have also complained about lack of reviews taking place. This is because if the calculation results in a 'no loss' scenario I don't think it would be fair for BS to have still charged for a service they didn't provide. And in this scenario, I may need to include in my final decision a provision for the fees to be refunded first so as to not include the fees.*

Responses to my provisional decision

BS accepted the findings. It provided its calculation which suggested, when comparing the return (taking into including several transfers and withdrawals Mr N and Mrs B had made from the portfolio) of their portfolio with the benchmark suggested, Mr N and Mrs B hadn't lost out financially as result of BS not managing the portfolio in line with the agreed mandate.

Mr N and Mrs B didn't accept my findings. In summary, they said the benchmark I'd suggested didn't reflect the amount of risk they were willing to take with their investment. They also said that they would have likely invested their funds into an existing portfolio managed by a separate portfolio manager and so a fairer comparison would be to look at the performance of this portfolio when calculation redress.

As Mr N and Mrs B disagree with my findings on the benchmark used, the complaint 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.

As BS hasn't disputed my findings, I will focus on the comments made by Mr N and Mrs B.

I appreciate they both feel that that the makeup of the assets included in the benchmark I've suggested isn't similar enough to the asset structure of the mandate they agreed to with BS. However, I must stress that our service is informal in nature and it's not our role to determine exactly what assets they would have invested in. Rather the benchmark is intended to provide a similar return to what they would have expected to have received. And I'm satisfied this benchmark fairly reflects this.

I appreciate Mr N and Mrs B say they would have invested with their previous portfolio manager had they not invested with BS and have suggested using the return on this previous investment as a more suitable benchmark. However, I'm not persuaded Mr N and Mrs B would have invested with their existing portfolio manager at the time, as it was clear they were looking for something different, otherwise they wouldn't have chosen to invest through BS.

BS has provided this service with a calculation for the redress, comparing the performance of Mr N and Mrs B's investment with that of the benchmark, which suggests Mr N and Mrs B were not financial worse of through BS's actions. This appears to be because of the level of withdrawals/transfers made from the portfolio. However, the calculation doesn't fully consider the ongoing advice fees BS charged. So I will address this in the putting things right section below. I would add, having looked at the fees taken, it may still be the case that Mr N and Mrs B haven't been financial disadvantaged, but BS must demonstrate this clearly to them.

Putting things right

To compensate the estate of Mr N and Mrs B fairly, BS must:

- My intention is to put Mr N and Mrs B as close as possible, into the position they'd have been but for BS's actions. In this case that means putting Mr N and Mrs B's portfolio into the position it would have been in had the fees not been taken throughout the life of the portfolio. The portfolio would be higher by the value of those fees and any investment returns that those fees would have gone on to benefit from.
- So BS should pay the difference between what it is worth and what it would be worth on the date of settlement, had the fees not been deducted.
- BS should take account of any withdrawals or additions to the portfolio when carrying out these calculations to ensure the values it is using reflect the actual growth the fee would have received, had it not been deducted.
- BS should then compare the performance of Mr N and Mrs B'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.
- BS should also add any interest set out below to the compensation payable.
- BS must provide Mr N and Mrs B with a copy of the calculation in a simple and clear format for them to understand.

Income tax may be payable on any interest awarded.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
The portfolio	Surrendered in October 2021	FTSE UK Private Investors Income Total Return Index	Date of investment	Date surrendered	8% simple per year on any loss from the end date to the date of settlement

Actual value

This means the actual amount paid 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 that Mr N and Mrs B paid into the investment should be added to the fair value calculation at the point it was actually paid in.

Any withdrawal from the portfolio 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 BS 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 chosen this method of compensation because:

- Mr N and Mrs B wanted capital growth and was willing to accept some investment 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 N and Mrs B's circumstances and risk attitude.

My final decision

My final decision is that I uphold this complaint and direct Brown Shipley & Co Limited to do as instructed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B and Mr N to accept or reject my decision before 22 July 2024.

Ben Waites
Ombudsman