

## The complaint

Mr A's complaint about Capital Professional Limited trading as Ascot Lloyd ('AL') was jointly submitted alongside his wife's. Both complaints are about their respective pensions and Individual Savings Accounts ('ISAs'). They share the same complaint basis and allegations. However, their complaints have been separated and this decision addresses only Mr A's.

Until 2023, and since around 2011, Mr A had an ongoing advisory relationship with a financial adviser ('the FA') who, it appears, traded independently until September 2022, when his firm was taken over by AL. The FA continued to advise Mr A, under AL, after the takeover and his advice extended to assets beyond the pension and ISA featured in this complaint – but the complaint is focused on the pension and ISA.

Mr A's pension and ISA were both serviced and advised by the FA up to 2023. His complaint relates to their portfolios' performance and, in the main, he says there was an agreed annual performance target of 4% net growth, that in discussions and reviews with the FA he was always led to believe this was being met or exceeded (and his reasonable trust in and reliance on the FA meant he did not question this), and that he learnt around 2023 that the target was not being met as he was led to believe. In response, and around May/June 2023, he transferred-out his pension and ISA accounts to another firm.

Mr A says the FA breached the arrangement between them, and his professional/regulated obligations, by failing to inform him that the 4% net annual performance target was not being met and by seemingly misleading him to believe the opposite, and he says had he been aware of the underperformance in the pension and ISA he could and would have considered steps with or without the FA to address that.

## What happened

AL disputes the complaint. In its responses to Mr A and to this service, and mainly based on representations directly from the FA, its position is mainly as follows –

- As of May 2023, Mr A's pension and ISA were both on the Fundment platform and they were both invested in the Affinity Passive 5 ('AP5') fund.
- Overall, his assets had previously been held on the Transact and Fusion platforms.
- Over time, Mr A changed portfolios, with each portfolio having different levels of underlying costs that have affected net performance – underlying costs which, for each portfolio, have also changed over time due to portfolio rebalances. The different platform charges, from the different platform providers, have had the same effect on net performance over time.
- Ongoing contributions have been made in various amounts and at various times, so not all the capital has been invested over the same period.
- Furthermore, there have sometimes been movements of capital between wrappers with different tax treatments.
- These factors (the 'variables') have made it difficult to identify a simple annualised return rate for the holdings in Mr A's pension and ISA. An alternative that offers a broad assessment of returns is one in which the average annualised performances of the model funds he was invested in between 2009 and 2023 (the overall period in

which he has invested in different funds) minus the assumption of a 1% per year deduction for costs (roughly comparable to the ongoing and changing annual costs in his case) is calculated.

- On this basis, the AP5 shows average annualised returns of -3.50% (-2.50% gross); this applies between January 2022 and June 2023 as Mr A's portfolios began to hold this fund in January 2022. For previous holdings in his portfolios of the Affinity Active 5 ('AA5') and Affinity Global Growth ('AGG') funds since April 2009 the AA5 fund shows average annualised returns of 4.54% (5.54% gross) and the AGG fund shows average annualised returns of 10.50% (11.50% gross).
- The *actual* returns for Mr A's portfolios have of course changed over time, because of the variables, but this analysis helps to show that the model funds he was invested in up to the change in 2022 had performance (with or without allowance for costs) that met and exceeded the target.
- The 2022 move to the AP5 happened alongside the move to the Fundment platform. The reinvestment in the AP5 meant the previous holdings were liquidated and their growth up to the date of liquidation was locked into the liquidation value/proceeds. Therefore, performance for the pension and ISA were reset at this time, and they both retained the past performance/growth (in the AA5 and AGG fund holdings) to the date of liquidation.
- 4% annualised net returns was a long-term assumption for modelling purposes, it was never guaranteed.
- In terms of visibility to Mr A, statements to clients were issued by and accessible through the Fusion platform quarterly; he also had log-in details for the platform, where he could find performance data; he also had log-in details for the cash-flow modelling application used for his financial planning, and valuation information was available here too; the FA's administrator provided him with regular, manually prepared, valuations; after AL took over the firm, an AL portal was set up for him, in which he had access to performance data and contributions history.

Mr A has questioned the model portfolio performances in relation to the state of his pension and ISA as of May 2023. In the main, he has asked why application of the AA5 fund's annual performance rate (for example) to his portfolio's value from 2018 to 2023 (for example) results in an amount notably above the portfolio's actual 2023 value. He considers that either the model performance rates are wrong or, if they are correct, then performance in his portfolio has been significantly eroded by charges/costs, hence the difference.

He has also responded to AL's claims about visibility. He mainly says – with regards to the quarterly Fusion platform statements and log-in access to the platform (and the information within it), since moving away from that platform at the end of 2021 he has received nothing in writing about the values and performance of his portfolios; in terms of valuation information from the cash-flow modelling application the issue for him is not about valuation (which reflects what a portfolio is worth at a given time), instead it is about performance, which shows the rate of investment *growth* in the portfolio; the same point applies to the information provided by the FA's administrator, it was valuation information and the FA avoided meeting his requests for performance information by claiming it was too complex to put together; the transfer of his accounts to the AL portal did not happen until around March 2023, he had access to it but he does not recall whether (or not) it had been fully populated with his accounts at the time.

The investigator who looked into the case concluded that it should not be upheld.

He was not persuaded that the FA had done anything wrong in being unable to routinely provide the type of performance information sought by Mr A, in the manner required for comparison with the 4% target, given the variables and reasons he (the FA) cited. The

investigator considered it reasonable that such information had to be manually put together upon request.

He was persuaded by the average annualised returns analysis presented by the FA, and he considered that it showed, up to 2022, growth in Mr A's portfolios which was meeting his expectations. With regards to the period thereafter and the switch to the AP5 fund, the investigator said the fund had only begun in 2021 and Mr A invested in it in 2022, so the performance time span was short, and even if the decreased performance in this period was incorporated into an analysis of the ISA and pension portfolios' overall performance from inception, the drop below 4% annual returns was no more than a very recent occurrence.

Another investigator reviewed the case and reached broadly the same overall conclusion.

Mr A disagreed with these outcomes.

He mainly said – he has never claimed that the 4% target was guaranteed; his complaint is that the FA did not inform him that the target was not being met; this was a minimum requirement from the FA, given that he was overseeing and advising on his ISA and pension portfolios and given that he alone was in a position to do this (with access to all the information required to do so and with the professional expertise, and responsibility, to do so); had he (Mr A) been informed about the portfolio's true performance he could have addressed the matter, with or without the FA, and considered/applied alternative options; the FA's failure to keep him informed on performance (against the 4% target) deprived him of this opportunity.

The case was referred to an Ombudsman.

### **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.

The regulator's *Handbook* includes Principles for Businesses that the FA would/should have been familiar with in the course of his dealings with, and services to, Mr A (and to his ISA and pension accounts). These Principles applied to his work under the previous firm(s) and his work under AL.

Principles 2, 3 and 6 require, in broad terms, firms to conduct their services with due skill, care and diligence, to make reasonable efforts to manage and control their affairs responsibly and effectively, and to uphold their customers' interests and treat them fairly.

Case law – Ouseley J, in R (British Bankers Association) v Financial Services Authority [2011] EWHC 999 (Admin) – also confirms that The Principles are ever present requirements that firms must comply with.

Furthermore, the Conduct of Business Sourcebook ('COBS') section of the Handbook contains, at COBS 2.1.1R, the *client's best interests rule* which, as the title suggests, requires firms to uphold their clients' best interests at all relevant times in the discharge of their services. There are reporting provisions in COBS 16 and 16A for firms who undertake investment/portfolio management services for their clients. In the present case, the arrangement between Mr A and the FA appears to have been one of ongoing advice, which is not quite the same as portfolio management, so I do not suggest that these provisions directly apply. However, they and their contents could be viewed as a reflection of the regulator's wider expectation that retail clients should be meaningfully *informed* about their investments.

In the context of what I have summarised above, I do not consider it unreasonable that Mr A expected to be informed about the values and performance of his portfolios as part of the FA's ongoing advisory service – and I take on board his reference to the distinction between information about values and information about performance.

For what it is worth, I believe neither of the two investigators who looked into his case took the view that he was not entitled to meaningful information about his portfolios. Instead, I believe they took the view that the issues faced by the FA (that is, the variables) meant the specific form of reporting sought by Mr A was not straightforward.

In any case, I have considered the complaint independently and drawn my own findings from it. Having done so, I have reached the same overall conclusion that Mr A's complaint is not upheld. My reasons, are as follows:

- The premise for the complaint is that the FA was obliged, but failed, to inform Mr A that his portfolios were underperforming the 4% target. This creates the primary requirement to show that the portfolios were actually underperforming the target. It stands to reason that if they were not, then the FA could not reasonably have been expected to say they were and/or he could not reasonably have been expected to notify him that there was a problem concerning meeting the target. Overall and on balance, I am not satisfied that underperformance against the 4% target has been established.
- In the previous section, I referred to the average annualised performance analysis conducted by the FA for the period between 2022 and 2023 (relevant to investment of Mr A's portfolios in the AP5 fund) and for the period directly before that, starting from 2009 (relevant to investment of Mr A's portfolios in the AA5 and AGG funds).
- I have also considered the factsheets for all three funds, as of 2022. With the exception of the AP5 fund, because its relevance to Mr A's portfolios goes beyond 2022 and into 2023, the performances presented within them are broadly consistent with what the FA referred to in his analysis. There are slight differences whereby the returns figures in the factsheets for the AA5 and AGG funds are slightly higher than those used in the analysis, but this also appears to be because the analysis end date was in 2023, not 2022.
- As I understand it, Mr A's ISA and pension portfolios were invested in the AGG and then the AA5 funds up to 2022, when they were switched into the AP5 fund. For the period beginning in 2009 and up to 2022 the factsheets show that the AGG fund had average annualised performance of 12.12% (the FA's analysis referred to 11.50%/10.50% gross and net) and the AA5 fund had average annualised performance of 5.85% (the FA's analysis referred to 5.54%/4.54% gross and net). All these three performance rates, per fund, exceeded the 4% target.
- Analysis of the AP5 fund's performance between 2022 and 2023 shows it did not meet the 4% target, so Mr A is correct in this respect. However, I do not consider this finding, on the AP5 fund, relevant to the complaint. AL's point about the gains up to the fund switch in 2022 having been locked in prior to the switch is noteworthy, so investment in the AP5 fund can be viewed in isolation. In 2023 Mr A's ISA and pension portfolios were reviewed and he reached the position he presently holds, alleging that past underperformance (against the 4% target) had occurred but had not been disclosed to him. In 2023 the portfolios were in their first year of investment in the AP5 fund, so it follows that notice about its underperformance (against the 4%

target) at the time amounted to disclosure about it.

- The real issue in the complaint therefore appears to be about alleged non-disclosure of past, pre-fund switch, underperformance (against the 4% target) of the AA5 and AGG fund investments within the ISA and pension portfolios. However, as I found above, available evidence does not show such underperformance in these funds. It shows the opposite, over performance (against the 4% target).
- I note and understand the question posed by Mr A, in which he queries why application, to his actual portfolios, of the funds' performance rates results in amounts above his portfolios' actual values in 2023. If, on a like for like comparison, there is such a difference, it seems likely that the variables the FA explained (as summarised in the background section above) could have had their impacts on the actual values, which might explain the difference. Within Mr A's question he also referred to the impact of costs. This too could have had its impact on the actual values, though I note that the FA's analysis included some allowance for costs.
- However, using the same distinction Mr A has drawn between value and performance, if his actual portfolios' values did not reflect the performances of the funds they were invested in, that does not automatically mean he was misinformed about performance. His portfolios were invested in the AA5 and AGG funds and up to 2022 they were performing, on average, above the 4% target. In this context, I do not consider that the FA could reasonably have been expected to highlight a problem related to the target, because it appears there was none. It is not disputed that valuation information was available to Mr A. Therefore, overall and in the absence of a specific and deeper enquiry akin to that which arose in 2023, I can understand why previous reviews did not include notice about a problem. Despite the enquiry in 2023, it still does not seem quite clear that his portfolios underperformed the 4% annual target from inception to 2022.
- Mr A has conceded that, prior to 2023, he did not raise such an enquiry and did not subject the reviews with the FA to questions about actual performance. He says he was assured by the FA that all was going well and he reasonably relied on that. This is understandable and he was indeed entitled to rely on feedback from the FA. However, given the findings above, it is also possible to see how and why the FA would have conveyed the message that all was well in terms of performance of the invested funds – with the implication being that the ISA and pension portfolios invested in those funds were also doing well. If Mr A had probed further earlier and prompted, earlier, the sort of analysis and discussions that took place in 2023, it is possible that the performance reporting could have changed or the approach towards it could have changed, upon his request, to address the variables mentioned in the background section above and to produce a different analysis. The same applies to any costs issues that impacted the values of the portfolios. This is not, in any way, a criticism of Mr A. I do not say or suggest that he should have done anything differently. However, it is an observation about what might have happened if he did.
- Overall, on balance, for the reasons given above and in the circumstances described above, I am not persuaded that the FA failed to keep Mr A informed about the values of his ISA and pension portfolios and, up to 2022, given the performances of the funds they were invested in I am also not persuaded that he had cause to highlight a problem in relation to the 4% target. This target was never guaranteed. Nevertheless, evidence of the performances of the funds invested in up to 2022 shows that it was exceeded.

- A further point that might be worth addressing is about the part of the complaint in which Mr A refers to what could have happened if he learnt that the target was not being met. He says, with or without the FA's assistance, he could have considered and/or applied alternatives for his portfolios. There appears to be no evidence of what, if any, specific alternative(s) could have been considered or applied. There is also no evidence of the likelihood, at the time, of any specific alternative(s) being used or being viable. Overall, there appears to be no evidence to establish, on balance, what the outcome would have been even if Mr A was told at any point that the target was not being met. In the absence of such evidence, it is arguable that he might have changed nothing, and as one of the investigators suggested even if he made changes any alternative could have either worsened or improved performance. Therefore, even if Mr A's complaint were to be upheld there appears to be a lack of grounds on which to establish a claim for financial loss.
- Given the points made by AL and the FA about the extent of visibility – for his ISA and pension accounts on the Fusion platform and on the cash-flow modelling application – available to Mr A, I am satisfied that he was not kept in the dark about his investments. I have noted his point that the level of visibility, and the availability of statements, was different and/or non-existent after his accounts were moved away from the Fusion platform at the end of 2021. However, it still appears to be the case that he had full visibility of his accounts with regards to values, performance and statements prior to that move. Manually produced information on values were shared with him, by the FA/his administrator, thereafter. I have not seen enough evidence about what was available to him on the Fundment platform that his accounts were moved to, so I have not been able to draw a conclusion on what was visible to him on that platform between 2022 and 2023. In any case, annualised performance of the AA5 and AGG funds that his portfolios were invested in continued to exceed 4% in 2022, and this information became available to him around May 2023 during his discussions/correspondence with the FA.

### **My final decision**

For the reasons given above, I do not uphold Mr A's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 16 December 2024.

Roy Kuku  
**Ombudsman**