

The complaint

Mr M has complained about the way his portfolio has been managed by SI Capital Ltd ('SI'). He says shares were traded without his consent, the trades were higher in value than agreed for his account and any investments should have been for the medium term but were traded at a loss within a short period. Mr M says the portfolio wasn't being managed for his benefit and he was asked to provide incorrect information in order for him to have been eligible to trade in the shares he held. He has suffered losses on his account which he wants to be compensated. Mr M's account has been suspended.

What happened

When Mr M's adviser changed employer to SI in 2019 Mr M's account went with him. Since then, Mr M has said his portfolio has been switched from low risk to high-risk investments and numerous and large trades have taken place.

Mr M raised his concerns with SI in April 2023. In its response, SI said;

- It assessed Mr M's investment objectives, attitude to risk and the suitability of the advice.
- Mr M had self-certified as a high net worth individual and as a sophisticated investor.
- Mr M had continued to specify his investment objective to be speculative.
- The net loss Mr M was suffering – around £20,000 – was because of market conditions and was the risk associated with investing rather than the investments not being suitable for him.
- It didn't offer any redress or uphold Mr M's complaint.

Mr M wasn't satisfied with the outcome to his complaint and brought it to the Financial Ombudsman Service. Our investigator who considered the complaint thought it should be upheld. She said;

- Mr M had signed SI's terms of business, statement for certified high net worth individuals and statement for self-certified sophisticated investor documents in May 2020. But a fact find wasn't completed until February 2021 so the investigator couldn't see how the suitability of the trades carried out had been assessed.
- Despite a fact find being completed there was no evidence of a suitability letter as required by the regulations or discussion about Mr M's attitude to risk or capacity for loss.
- Mr M had said he was encouraged by his adviser to provide incorrect information in the fact find and it wasn't a true reflection of his circumstances, attitude to risk or investment experience. He provided evidence of the messages between him and his adviser, and which SI hadn't responded to leaving the investigator without any reason to doubt Mr M's comments.
- The investigator wasn't convinced Mr M's attitude to risk was correctly assessed. A conversation would be needed before an agreement on a risk strategy, and other

evidence suggested that Mr M wanted low to moderate risk investment.

- Initially the adviser had sought consent from Mr M before trading but stopped doing so after a while. Mr M's account was an advisory one whereas the adviser was providing a discretionary service.
- Mr M had also raised concerns about an investment not being Shariah compliant which was dismissed by SI and more of the shares were bought.
- To put the matter right the investigator said the performance of Mr M's portfolio should be compared to the FTSE UK Private Investor Income Total Return Index and he should be paid any difference.

SI responded to say it didn't agree with the investigator, so the complaint has been passed to me for a decision in my role as ombudsman. Despite being given the opportunity to do so, SI hasn't provided anything further for my consideration.

Mr M provided further details, and in particular what had happened to his account, the losses suffered and lack of contact from SI.

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.

After doing so, I've reached the same conclusion to the complaint as the investigator and broadly for the same reasons. I'll explain why.

I can assure both parties I've read and considered all of the submissions they've presented to date. But I'll be using my discretion as an ombudsman to confine my decision to addressing only what I see are the key facts in this dispute. This is in keeping with this service's role as an informal alternative to the courts. So, if I decline to address a particular point, it's not because I have ignored it, it's because in my opinion, it doesn't impact my overall view of what is fair and reasonable in all of the circumstances of this complaint.

I can see that Mr M signed the request to transfer his account from his existing broker to SI in December 2019. The account statement provided by SI shows trading started on Mr M's account in March 2020. Mr M didn't sign his agreement to SI's advisory Terms of Business until two months later on 17 May 2020.

I haven't been given anything by SI to show that Mr M's circumstances, attitude to risk, investment objectives, capacity for loss etc were assessed any sooner than the February 2021 fact find which was completed nearly a year after trading started on his account. When giving investment advice SI had regulatory obligations to assess the suitability for Mr M. The regulator, the Financial Conduct Authority ('FCA') and the Conduct of Business Sourcebook provides detail of the information that a business should consider before giving investment advice;

'Assessing suitability: the obligations

COBS 9.2.1R (1) A firm must:

- (a) take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client; and

(b) ensure that any life policy proposed is consistent with the client's insurance demands and needs.

(2) When making the personal recommendation or managing the investments, the firm must obtain the necessary information regarding the client's:

(a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;

(b) financial situation; and

(c) investment objectives;

so as to enable the firm to make the recommendation, or take the decision, which is suitable for the client and for a life policy, to propose a contract that is consistent with the client's insurance demands and needs.'

I have borne this in mind throughout my decision.

As already mentioned, a fact find document wasn't completed until 26 February 2021. It recorded that Mr M was 42 years of age and was married with three dependent children. His annual salary was £140,000 and he earned £30,000 from investment income. His home was valued at £340,000 and had an outstanding mortgage of £70,000. Mr M's current investments were recorded as being;

Cash (including ISAs)	£250,000
FTSE 100/250 shares	£125,000
Collective investments	£100,000
AIM	<u>£225,000</u>
	<u>£700,000</u>

Its recorded Mr M also held £6,000 in Crypto. Regarding his investment experience Mr M traded regularly (more than ten times a quarter) in equities and small cap/AIM stocks. Relative to his investment experience it said;

'[Mr M] started out investing himself via [broker name] and started exploring Fund Investment. [Mr M] now invests primarily in AIM shares with [the adviser] looking at mining, and alternative industries.'

And Mr M's understanding of 'the main risks associated with AIM investments' was recorded as being;

'[Mr M] understands that AIM shares can be more volatile and less liquid than other main market investments and that AIM investing in general should be considered higher risk.'

His investment objective and attitude to risk was;

'SPECULATIVE (capital growth) Investing in direct equities across the market as a whole to include AIM. Investment horizon may be short or long term'

I've considered how the completion of the fact find came about and in particular in light of the screen shots of messages between Mr M and his adviser that have been provided by Mr M. In advance of the completion of the fact find, which I assume was carried out over the phone as Mr M was resident overseas, Mr M's adviser messaged him to say;

'When they [the SI representative] go through it with you – you need to say lots of cash – at least £250k
And your risk appetite is high for these placings and smaller companies
Otherwise they're going to deem you "unsuitable" for the good stuff
You need to demonstrate you are a man of serious means
You like risk
And you like placings'

Mr M responded to ask what placings were and the adviser gave examples of two stocks that had already been invested into and says;

'Placing = Fundraise for company
You get a slight discount'

None of the above shows there was any meaningful discussion about the suitability of the investments for Mr M. By this time investments had taken place in such stocks via placings which would imply a high level of risk to the investor. So, I think it's most likely the adviser was guiding Mr M about how to complete the fact find in order no concerns were raised about the suitability of the investment advice he had already been given during the year. Clearly this isn't the way in which a business should go about assessing a client's suitability and is fundamentally flawed.

That being said, Mr M was aware the investments had been carried out and the screen shots of the messages between him and his adviser evidence awareness that he wasn't happy with investments made. I note that in September/October 2019 – which I appreciate was prior to Mr M's relationship with SI – he messaged his adviser to say;

'I am hoping to invest about £6000 per year in low to moderate risk shariah compliant investments...'

And there's nothing to indicate that Mr M had subsequently decided not to invest into Shariah compliant shares so I would have expected his adviser to have been aware of the restriction. But I note on 28 January 2021 Mr M messaged his adviser to say that one of the stocks bought was showing as non-compliant on his Shariah compliant stock screening app and that he couldn't see it on 'Islamic Investor'. The adviser responded to say he would investigate and come back to him and while I understand Mr M also had phone conversations and face to face meetings with his adviser there's no record of the outcome. And Mr M has complained the adviser went on to buy more shares in the same company later in the year.

I think this highlights two points – first, that although the adviser was aware that Mr M wanted only to invest in Shariah compliant shares he hadn't taken the care of screening prospective investments to comply with that, and second, that if a meaningful fact find had taken place when Mr M moved his account to SI, then the Shariah restriction should have been evident to SI who could have acted accordingly.

However, I do note even when the fact find was completed the restriction wasn't recorded. That being said, it's clear after Mr M was aware non-Shariah compliant shares had been purchased, he continued with the relationship and added funds to his account as evidenced by 'payment received' on his account statements. This makes me consider whether some of his complaint points are being made with the benefit of hindsight because if Mr M had been concerned, I would have expected him to have stopped trading, raise a complaint or similar.

But ultimately, it was for SI to appropriately advise Mr M about the type of investments that might be suitable for him after genuinely engaging with him by assessing his investment knowledge and experience, his financial situation and investment objectives etc. In my opinion, being coached by his adviser as to how to respond to the fact find questions in order for Mr M's suitability assessment to comply with the investments already made, is clearly wrong and SI failed in its duty to Mr M.

Mr M signed SI's advisory Terms of Business. With reference to the 'Advisory Service' those terms say;

'5.1 This service is designed for those clients who wish to receive advice on their investments whilst retaining control over all investment decisions. We will give advice as and when requested by you and on occasions we may recommend transactions to you. In this connection, you consent to us or any of our representatives or employees from time to time making unsolicited financial promotions to you

5.2 We will only arrange to buy and sell investments on your behalf after we have received your instructions for each transaction.

...'

The screenshot messages show that the account started out on an advised basis. Mr M has said that his adviser then started carrying out transactions and trading on his account without referring to him. I can see that on 4 March 2020 the adviser messaged Mr M with two investment proposals – a global small/mid-cap equity investment trust and a FTSE 250 retailer, so not AIM stocks – and sought his confirmation before execution. It's recorded that those investments were for the longer term unless something drastically changed, or a good return was made over a short period.

However, on 26 March 2020 the adviser messaged Mr M to say;

'Funds received
£6.7k I'm going to invest in [stock name]
This is another conviction buy
Just trust me
By the end of the year
Your portfolio is going to look healthy'

Which suggests to me that the adviser was making the decision to invest on Mr M's account without referring to him first. I can see a message from Mr M on 8 February 2021;

'Bro how come you sold the [shareholding]?

The adviser responds to say;

'Will call you in a bit'

Which indicates that the decision to sell hadn't been agreed in advice as Mr M has questioned it. And on another occasion Mr M has said that after selling a profitable holding towards the end of February 2021 he had agreed with his adviser that a particular stock should be reinvested into but on 28 February the adviser went ahead and invested just over £76,000 into a different holding without Mr M's permission. I can see that purchase on the statement of account.

On 27 August 2021 Mr M messaged his adviser to question him selling a holding which he thought was 'meant to be similar [to another holding] medium term?' The adviser responded to say;

'Yes – it was the only stock that we're up in & and we did a capital raise'

And that the stock reinvested into wasn't a 'bad replacement' which further suggests that the adviser was trading without seeking permission from Mr M in advance.

Again, while its clear that Mr M was aware his adviser was trading on his account without referring first, and so this complaint point may be made with the benefit of hindsight in that the investments may not have been successful, I remain of the view that it was SI's responsibility to ensure that the account was managed as it should have been. Mr M signed his agreement to an advisory relationship and was entitled to expect to continue to be asked for his confirmation to proceed before any investments were carried out, but this didn't happen.

In conclusion, SI has provided a poor service to Mr M. It hasn't treated Mr M fairly or reasonably and has failed in its regulatory obligations. So, I think the matter needs to be put right. It's difficult to be sure how Mr M wanted to invest. His fact find records that he was a speculative investor for growth who was experienced in equity and small cap/AIM investing.

But I think its most likely that wasn't a true reflection of Mr M's investment experience or objectives. As referred to above Mr M did send a message to his adviser from before he was a client of SI's stating a preference for low-risk funds, but I can't be sure that request would also apply to his account with SI. Mr M has told us he was looking for house building stocks and I can see that a housebuilder was discussed in October 2019 – again before he was a client of SI's – and which was recorded as a 'Blue-chip Stock'. And the two holdings recommended in March 2021 weren't higher risk investments. And I can see that Mr M messaged his adviser on 21 May 2020 asking;

'Are we traders of [or] in it for dividend and long term? Or both lol'

The adviser responds;

'...Our intention is always long term
Sometimes if there is a big price action then we will exit.'

So, on balance, I think it's more likely that Mr M was looking to invest, but for the medium to longer term – and not short-term trading – and with a lower than high risk investment profile.

Overall, though, my role isn't to retrospectively say what the suitable advice would have been and for the reasons given, it's difficult to be sure about Mr M's investment objectives and attitude to risk. There were many ways Mr M could have invested and it's not possible for me to now say precisely what he would have done. So, in line with our long-standing approach, I think it's more appropriate to use a benchmark to assess the type of return Mr M would have been able to achieve with suitable advice over the medium to long term and from a lower than high risk investment profile.

Putting things right

To compensate Mr M fairly, SI must:

- Compare the performance of Mr M's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the

investments. If the *actual value* is greater than the *fair value*, no compensation is payable.

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

Income tax may be payable on any interest awarded.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
portfolio	Still exists and liquid	FTSE UK Private Investors Income Total Return Index	Date of investment	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.

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 from the SI 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 SI 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:

- I think its likely Mr M 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 M's circumstances and risk attitude.

My final decision

For the reasons given, I uphold the complaint. My decision is that SI Capital Ltd should pay the amount calculated as set out above.

SI Capital Ltd should provide details of its calculation to Mr M in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 13 December 2024.

Catherine Langley
Ombudsman