DRN-5427475

The complaint

Ms U was an inexperienced first-time investor in 2020 when she began meetings with Fogwill & Jones Asset Management Ltd ('Fogwill') to consider investment of an inheritance (of around £155,000). She became Fogwill's client in February 2021 and was onboarded in that respect (including assessment of her profile). Its suitability report was issued to her on 12 March 2021, recommending investment of £135,600 in its in-house Discretionary Fund Manager ('DFM') portfolio – the majority in a General Investment Account ('GIA') and a minority amount in an Individual Savings Account ('ISA'), with an associated Ongoing Advice Service ('OAS'). By the end of March 2021, the portfolio was invested.

Ms U terminated Fogwill's service around July 2023 and transferred her portfolio to a new firm.

She mainly says Fogwill – conducted a highly inappropriate trading pattern, particularly in 2022, in her portfolio; recommended an unsuitable portfolio at the outset (mismatching her inexperienced, cautious investor profile); and caused a loss to her portfolio of around 30%, for which she seeks redress. Fogwill disputes these allegations. It mainly says its trading approach in 2022 was in her portfolio's best interest, was reasonable in the context of the challenging state of the markets in 2022 and was devoid of any conflict of interests to the firm, as no trading fees applied; and that the DFM portfolio recommendation at the outset was suitable.

What happened

The fact find document completed on 9 September 2020 recorded Ms U's profile at the time, and it included the following – her personal details (in summary, she was single, in her late 30s, without dependents, owned her mortgage free home, had no liabilities, had disposable income in addition to savings of around £30,000, and had the inheritance capital); and confirmation of her cautious risk profile, but a high capacity for loss (with reasons).

It also included the following comments on her risk and capacity for loss profile –

"[Ms U] *is a cautious first time investor and the subject of capital risk was discussed at length … explained that the value of any asset-backed investment WILL go down in value as well as up and encouraged* [Ms U] *to consider how she would feel if the value of any new investment were to fall in value, particularly in the short term. The importance of taking a long term view was reiterated.* [Ms U] *confirmed her understanding of capital risk. She would prefer not to experience a high degree of investment volatility - hence the decision to take a cautious approach*."

"[Ms U] *confirmed that she is happy to adopt a Cautious risk strategy with any new investment arrangement. She fully understands that this means that she will have a considerable degree of exposure to global equities (up to 60%) and the associated volatility of stock market investment. She feels that this is a suitable approach to take to achieve her objectives*."

"[Ms U's] *CFL score is high. She does not expect to use the invested funds at all in the short* *term and will not be reliant on any investment for capital or income. She has a comfortable surplus of income over expenditure and maintains healthy balances of over £30,000 in accessible cash deposits. Any sharp fall in the value of investment would not have any immediate detrimental effect on* [her] *lifestyle*."

The *portfolio objectives* schedule completed and signed by both parties in March 2021 also confirmed her cautious risk profile. The same risk profile was stated in Fogwill's suitability report, which also recorded that Ms U's goal was to invest the inheritance (outside and within her pension arrangement, and with flexibility for withdrawals from her non-pension portfolio). The report sets out the basis for Fogwill's recommendation of the DFM portfolio, and a recommendation for using a minority portion of the inheritance for her pension arrangement, but the pension is not part of the complaint.

In a nutshell, Fogwill explained that the recommended DFM portfolio would be tailored to match her risk profile and that it met her desire to have her investments professionally managed/monitored; it noted the tax benefits of the ISA, flexibility in the GIA, use of the GIA as an annual feeder to the ISA (also for tax benefits), and the value of a DFM service (and, in particular, of its in-house DFM service); in the report's appendices, it gave information on the costs and charges associated with its recommendations; and it set out the contents of the portfolio it was recommending. Those contents were in the following allocations and asset classes – 11% UK Gilts, 69% UK and International Equities, and 20% UK property. The report's appendix stated that, overall, the portfolio had a risk profile score of 4.985 out of 10.

Ms U says she lost around £45,000 between her portfolio's opening value and its value when she transferred it, and she blames Fogwill's DFM portfolio recommendation, which she considers to have been unsuitable and to have mismatched her cautious profile.

She also says "*I submit that moving large amounts of my investments in and out of cash on multiple occasions within very short periods is not only highly unusual in the industry but completely incompatible with our agreed low risk and long-term strategy. Dec 2021 liquidated 22% of my portfolio Jan 2022 repurchased same stock Feb. 2022 liquidated 51% of my portfolio March 2022 bought back the same stocks 10 days later Aug/Sept 2022 liquidated 68% of my portfolio 4 Oct. 2022 reinvested 60% into the same companies 10 Oct. 2022 liquidated 38% of my portfolio being the stocks bought just 6 days prior. Nov. 2022 reinvested everything 7-9 Feb. 2023 liquidated 43% of the portfolio 13-14 Feb 2023 reinvested*."

In response, Fogwill says it is satisfied that the DFM recommendation was suitable for her and that the portfolio matched her cautious profile (as defined in the risk profile assessment she agreed), and it considers that her complaint is motivated solely by her disappointment with the portfolio's performance (which, it says, does not automatically amount to unsuitability). It also says the loss percentage she has referred to is wrong, and that it was around 22% (after charges) or around 25% (before charges).

With regards to its trading within the account it referred to widespread difficulties in the markets between 2021 and 2022, partly associated with the aftermath of the pandemic, and to the reasonableness of adopting an active in and out investment strategy in response. It also noted that – there were no fund selling and repurchasing costs; there were no entry, trading or foreign exchange costs on any of the funds traded; and "*The only charges would have been the spreads on Investment Trusts plus a PTM* [Panel on Takeovers and Mergers] *levy of £1 if the trades were over £10,000 and SDRT* [Stamp Duty Reserve Tax] *of 0.5%*". On this basis, it submits that Fogwill did not benefit from the trading activity and that, instead, it was conducted in the portfolio's best interest.

One of our investigators looked into the matter and concluded that the complaint about unsuitability should be upheld. She agreed with Fogwill's assertions that its trading approach was not unusual, that it was not uncommon, in the circumstances, for it to have adopted the trading strategy that Ms U has complained about, and that it had discretion under the DFM service to do so. However, she agreed with Ms U's claim about unsuitability of the initial recommendation. She mainly found, with reasons, that the recommendation had exposed too much of Ms U's inheritance capital to too much risk, and that the level of risk in the recommended portfolio mismatched her cautious profile. The investigator then set out how redress for the unsuitable recommendation should be approached.

Fogwill disagreed with this outcome and asked for an Ombudsman's decision.

Beyond its core complaint response, it added the following assertions –

- Ms U had disposable income, no liabilities and no mortgage on her home, her emergency cash reserve of around £30,000 was two and half to five times the usual cash reserve recommendation and, in any event, her portfolio was fully accessible (if ever she needed to access it) within 10 working days (because there were no fixed terms for the investments).
- The money invested in the portfolio was surplus to her requirements, which (alongside her financial profile) contributed to the assessment of her high capacity for loss.
- Her risk profile was reviewed annually under the OAS; the early 2023 review showed it had fallen from cautious to 'low/defensive' and it would have acted upon this further at a meeting planned for June 2023, but the meeting did not take place due to her service cancellation.
- The contents of her initial invested portfolio (on 14 April 2021) had the following allocations and asset classes – just under 11% in UK Gilts, just under 10% in an infrastructure fund, just under 20% in UK Property, 0.69% in cash, and the rest (just under 60%) in UK and International Equities. At the time of the 2022 review – around 12% in UK Gilts, around 10% in an infrastructure fund, around 22% in UK Property, and around 56% in UK and Internation Equities. At the time of the 2023 review – around 11% in UK Gilts, around 20% in a Sterling Corporate Bond, around 6% in an infrastructure fund, around 7% in UK Property, around 15% in an Absolute Return fund, around 36% in UK and Overseas Equities and around 4% in Cash/Money Market. None of these were outside the mandate for the portfolio and, contrary to Ms U's allegation, none amounted to over exposure to equities.

The matter 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.

I will address suitability of the DFM portfolio recommendation first. Overall, on balance and for the reasons I give below, I agree with the investigator that the recommendation was unsuitable. Mainly because I consider that it mismatched Ms U's investor profile. This means it should not have been recommended to her.

It follows that the events after the recommendation, including the trading approach she has complained about, would not have happened if the portfolio had not been recommended. I am satisfied that Ms U sought advice on investing her inheritance and therefore intended to invest it in any event. This does not appear to be in dispute and there is evidence that shows this was the case. As such, there would have been a recommendation in any case and there probably would have been events in the management of the recommended investment(s) thereafter. However, the point is that the specific trading pattern that she complains about resulted directly from the portfolio she was recommended, so her complaint about it falls away on the findings, as set out below, that the portfolio was unsuitable, it should not have been recommended and she is due redress for its unsuitability throughout the time it was in place (which also captures all the trading during that period).

For the above reasons, I do not need to address the allegation about inappropriate trading.

The regulator's Principles for Businesses, at Principle 6, requires a firm to pay due regard to the interests of its customers and treat them fairly. This is partly echoed in the regulator's Conduct of Business ('COBS') rules, at COBS 2.1.1R, which requires a firm to act honestly, fairly and professionally in accordance with the best interests of its clients. These regulatory provisions are directly relevant to a firm's responsibility for the suitability of its recommendations.

As Fogwill will be aware, there are also specific provisions under the COBS rules (at COBS 9 and 9A) on a firm's responsibilities in assessing suitability of its recommendations. I do not find reason in this complaint to set them out in detail. Instead, I will address the aspects relevant to the recommendation it gave Ms U. However, a key message to note in both COBS 9 and COBS 9A is that the responsibility for suitability of a recommendation belongs to the advising firm. The firm is the expert in the relationship and its clients are entitled to rely upon recommendations as having been properly assessed, by the firm, as being suitable for them. In this respect, I briefly observe that in some parts of Fogwill's submissions, it has referred to Ms U agreeing with her risk profile assessment and with her capacity for loss assessment. It should be noted that any such agreements in Fogwill's suitability assessment process do not alter or dilute the fact that it remained responsible for ensuring the process properly resulted in a recommendation that was suitable for her.

There are a number of key elements to consider in terms of suitability of a recommended investment. The investor's profile at the time of the recommendation is one of the most important of these elements, alongside the task of matching the recommendation to the profile. This mainly relates to the investor's personal and financial circumstances, objective(s), attitude to risk (or risk profile) and affordability status (including capacity for loss), and investment knowledge/experience.

Ms U was a first-time investor with no prior investment experience. Her inheritance was a significant amount, but discounting that, evidence shows that she had relatively modest savings of around £30,000. The same body of evidence shows that she also had relatively modest earnings. As the investigator noted, there are a number of indicators about her reluctance towards taking risk. I do not suggest that she was completely risk averse, to the extent that she was not prepared to take any risks, but there is enough to show that she was not comfortable in taking risks and did not wish to expose her non-pension portfolio to anything above a low/lower level of risks.

Fogwill acknowledged some of this in its assessments. As quoted above, it noted in its factfinding that – "*She would prefer not to experience a high degree of investment volatility - hence the decision to take a cautious approach*". In the fact find document, her responses to risk profiling questions were recorded. Her answers show she had a "*Very Cautious*" attitude when making important financial decisions and "… *would be conscious about losses*"; she had a "*Careful*" attitude towards taking risks; she had taken a "*Small*" amount of risk in her past financial decisions; she preferred a lower risk portfolio even if it meant lower growth; and she preferred her money "… *to have a greater degree of protection from downside risk/losses even if it means lower returns*".

Her answers also confirmed that she could allocate 21-40% of her money to an investment "*… with possible high returns but an equal element of risk*"; that she could invest in a "*Mix of High/Low Returns & Risk*" products; that she would not need her investment for emergency funds; and that the effect on her standard of living, if income from the investment fell, would not be much because she had alternative means to sustain her lifestyle.

However, I am persuaded to consider these answers in the context that they came from someone with no previous investment experience. Unlike the questions about attitude towards risk, in response to which Ms U could quite easily rely on, and present, her personal feelings about taking risks, she was not equipped to give meaningful answers to questions about investment approach. She had not invested before. Therefore, and as I have done, Fogwill should have attached less weight to these answers about investment approach.

The questions about emergency funds and standard of living related to her capacity for loss. However, there appears to have been an oversight by Fogwill in this respect. In many cases a client's risk profile is, or can reasonably be, directly relevant to her/his capacity for loss. It is possible, if not probable, that a novice investor like Ms U considered both to be broadly the same thing, whereby she did not like to take risks because she did not like to lose money. This appears to have been depicted in her answer to the following question –

"*If you had picked an investment with the potential for large gains but also the risk of large losses how would you feel?*"

Her response was – "*I would be quite uneasy*".

On balance, I am not persuaded by the approach Fogwill took to determine that she had a 'high' capacity for loss simply because the inheritance was money surplus to her pre-existing savings, she had disposable income and she had no need, at the time, for use of the inheritance money. The fact was that Ms U presented a distinct hesitance towards taking risks and reluctance towards incurring losses. I accept that 'capacity' for loss, in an isolated and strict sense, might be viewed as no more than what an investor can afford to lose, but in real terms and in the present case there were grounds to take a view beyond that – because she was a novice investor who presented what I mentioned above (in this paragraph). Furthermore, the mere existence of a surplus amount of capital does not, on its own, automatically mean an investor is prepared, or can afford, to lose most or all of it, or that she/he has a high capacity to do so.

For the above reasons, I do not find that Ms U had a high capacity for loss. Instead, the balance of evidence establishes that she sought a low level of exposure to risks (even if that meant low returns) and, overall, she had a low capacity towards experiencing losses in her portfolio.

I have taken on board Fogwill's references to the numerical risk scores allocated to Ms U's profile, to the portfolio it recommended and to the portfolio following reviews. In another case, depending on the circumstances and the relevance of the scores, I could be persuaded to attach due weight to such scores. In this case, I am not persuaded to do that. The risk profile score allocated to her was a 4 to 5 out of 10. This suggests a position between the border of a medium risk profile and a medium risk profile itself. This is not what she presented herself as. She was a low-risk investor.

With regards to the recommended portfolio, its contents at the point of recommendation, at the point of investment and at the points of reviews are as I summarised in the previous section. Ms U was initially recommended a portfolio with around 69% equities contents, then Fogwill says this dropped to around 60% at the point of initial investment. These were UK and international/overseas equities. On balance, I do not regard either level of exposure in a portfolio – in addition to the point I address next/below – to be a match for a low-risk investor like Ms U. This meant around two thirds of her portfolio was exposed to equities, which can commonly be considered to bear medium and/or, depending on the types, higher risks.

I consider the above finding compounded by the 20% exposure to UK property. Property funds can bear liquidity risks in addition to development and performance risks, with regards to which they too can commonly be considered to bear medium and/or, depending on the types, higher risks.

The effect was that around 80% of Ms U's portfolio, at the outset, was exposed to, at least, a medium level of risks. This was unsuitable for her low risk profile. I accept that the portfolio was under an active DFM service, so the story did not end at the point of the initial recommendation and implementation. However, the initial recommendation and implementation set the stage for, and influenced, all the rebalancing that happened thereafter. It is clear to see that the portfolio's overall profile was broadly the same (or at least similar) in 2022. There was some improvement, in terms of suitability for Ms U, in 2023 with the reduction of the equities and property contents and the inclusion of the corporate bonds, but the fact remains that the portfolio's unsuitability at the outset affected it thereafter. Furthermore, it appears that the portfolio was terminated and transferred a few months after the 2023 review.

For the above reasons, I find that Fogwill's DFM portfolio recommendation to Ms U in 2021 was unsuitable.

Putting things right

fair compensation

My aim is that Ms U should be put as closely as possible into the position she would probably now be in if she had been given suitable advice for her investment portfolio.

I consider that she would have invested differently. It is not possible to say *precisely* what she would have done differently, but I am satisfied that what I have set out below is fair and reasonable given her profile at the time of advice.

what must Fogwill do?

To compensate Ms U fairly, Fogwill must:

- Compare the performance of the investment in the table below with that of the benchmark in the table below. If the actual value is greater than the fair value, no compensation is payable. If the fair value is greater than the actual value, there is a loss and the difference is the compensation payable to Ms U.

- Add a payment for interest as set out in the table below.

- Provide the details of the calculation to Ms U in a clear and simple format.

Income tax may be payable on any interest paid.

Investment	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
The Fogwill/James	No longer	For half the investment – FTSE	Date of investment	Date ceased to be held	8% simple per

Brearley & Sons DFM portfolio	exists	UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index); for the other half – the Bank of England average return from fixed rate bonds.			year on any loss from the end date to the date of settlement

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.

To arrive at the fair value when using the fixed rate bonds as the benchmark, Fogwill should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Fogwill should apply those rates to the investment on an annually compounded basis.

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 investment 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 will 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?

- Ms U had a low risk profile.
- The FTSE UK Private Investors Income Total Return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.
- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to capital.
- I consider that Ms U was in between these benchmarks, in the sense that she was prepared to take a small level of risk to attain her investment objective. The 50/50 combination above would reasonably put her into a position that broadly reflects the sort of return she could have obtained from a portfolio suited to her profile.

- The additional interest is to compensate her for the loss of returns on the redress amount from the end date to the date of settlement.

compensation limit

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, £160,000, £170,000, £190,000, £195,000, £350,000, £355,000, £375,000, £415,000 or £430,000 (depending on when the complaint event occurred and when the complaint was referred to us) plus any interest that I consider appropriate. If fair compensation exceeds the compensation limit the respondent firm may be asked to pay the balance. Payment of such balance is not part of my determination or award. It is not binding on the respondent firm and it is unlikely that a complainant can accept my decision and go to court to ask for such balance. A complainant may therefore want to consider getting independent legal advice in this respect before deciding whether to accept the decision.

In Ms U’s case, the complaint event occurred after 1 April 2019 and the complaint was referred to us after 1 April 2023 but before 1 April 2024, so the applicable compensation limit would be £415,000.

My final decision

For the reasons given above, I uphold Ms U’s complaint. I order Fogwill & Jones Asset Management Ltd to calculate and pay her redress as set out above, and to provide her with a copy of the calculation in a clear and simple format.

Under the rules of the Financial Ombudsman Service, I’m required to ask Ms U to accept or reject my decision before 24 April 2025.

Roy Kuku
Ombudsman