DRN-5520851

The complaint

Mr S has complained about investment advice received from Sesame Limited ('Sesame') for a trust I shall refer to as 'The BS Children's Trust'. He has also complained about non-disclosure of fees, holding client money and churning of the investments held. To put the matter right Mr S wants all switch fees plus the loss of growth on those fees to be repaid to the trust.

Mr S is the Protector of the trust as well as beneficiary and is the executor of the late Mr S who was the settlor of the trust. The trustees of the trust have agreed to Mr S bringing the complaint. Mr S is represented in bringing the complaint but for ease of reading I will refer to 'Mr S' throughout my decision.

What happened

In 2004, the late Mr S was advised to invest £495,000 into a Capital Redemption Bond which allowed withdrawals of £25,000 per year. It was assigned into The BS Childrens Trust in April 2005. In October 2008 a Skandia Selestia Investment Solutions Collective Investment ('SSISCI') was to be held within the Bond wrapper. Mr S is happy with the advice to invest into the Capital Redemption Bond and making use of a trust but is dissatisfied with other issues such as the initial information given around the charges as these weren't disclosed so Sesame shouldn't have received the initial or ongoing commission.

Mr S also says there was no explanation as to the adviser – who I shall refer to a 'Mr R' – being appointed as Protector while he was in the role of adviser, and which meant he was holding client money in breach of regulatory permissions. There was no need for the creation of the SSISCI as there was no benefit for it be held in trust, no advice was given nor costs of 3% switch commission disclosed. Mr S raised his concerns with Sesame.

Sesame responded to the complaint on 8 August 2023. It said;

- The policy provider of the Collective Redemption Bond had directly sent to the late Mr S documentation which detailed the aims, commitments and risks attached to the investment and the commission payable.
- The investment was in line with the late Mr S' risk profile and he gave authority for the adviser to make switches and was informed of the 3% commission rate.
- It accepted its file may not be as robust as it should have been, but its notes showed the adviser had discussion with the late Mr S on the investment amounts and as he was an experienced and knowledgeable investor, he would have had a good understanding of the route he was about to take. He also signed the switch form so was aware of the commission payable.

Mr S wasn't satisfied and thought Sesame was in breach of the rules regarding the commission disclosure as there was no mention in the 21 March 2009 letter of the 3% commission charged on switches nor did the adviser have authority to act as discretionary investment manager. He reiterated there was no justification for the fund to have been moved within a collective investment within the offshore bond. There was no review of the

fund changes made within the SSISCI and most of the trades lost money as gains were reduced because of the commissions.

Unhappy with the outcome Mr S brought the complaint to the Financial Ombudsman Service. Our investigator who considered the complaint thought it should be upheld. She said;

- She outlined the principles and rules that applied.
- The amount to be invested had changed further to the original discussions and she thought it likely Mr S' objectives changed and discussions about the amount investment took place. As Mr S didn't have any further concerns about the advice to invest into the Capital Redemption Bond she didn't comment further on the suitability of the initial advice.
- There was no reason why the SSISCI had been set up within the Capital Redemption Bond, but Mr S accepted the reason owing to the tax advantages.
- No reason was given for the actions taken by the adviser, and it appeared he churned the portfolio for personal gain and was managing the portfolio on a discretionary basis when he was only to carry out instructions given by Mr S. He took advantage of Mr S' trust. Sesame hadn't addressed this point.
- Other than the letter of 21 March 2009 there was nothing to support Mr S' understanding of the level of commission. And the payment of commission had been done in a way that was unsuitable for the Trust, so she recommended redress be paid for the undisclosed commission between November 2008 and April 2012 when compared to a benchmark.

Clarity was sought about the level of funds and what redress would look like, so the investigator wrote to the parties again and amended the redress for the period from 1 December 2008 and 3 March 2009 (the dates of investment) to the date Sesame ceased to be the servicing agent for the Trust.

Neither party agreed with the redress methodology. Sesame didn't agree the adviser fees should be repaid in addition to a fair value calculation compared to a benchmark. Mr S didn't agree as there had to be time related interest from the date of the loss to the date of settlement.

As the complaint remained unresolved, it was passed to me for a decision. I reached the same conclusion as the investigator and broadly for the same reasons but wanted to clarify how the matter should be put right. So, I issued a provisional decision to allow the parties to provide me with any further information or evidence they wanted me to consider before I issued my final decision. Here's what I said;

> 'When considering what is fair and reasonable, I'm required to take into account: relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider having been good industry practice at the relevant time.
>
> I'm aware I've set out the background to this complaint in less detail than the parties and I've done so using my own words. The Financial Ombudsman Service was set up to be a quick and informal alternative to the courts. And the purpose of this decision is to explain what I think is fair and reasonable in the circumstances, not to offer a point-by-point response to everything the parties to the complaint have said. So, I will not refer to every submission, comment, or relevant consideration. Instead, my decision sets out what I think are the most important points and the crux of the

complaint to explain my decision in a way that is intended to be clear and easy to understand.

The relevant regulations for a regulated business such as Sesame are provided by the Financial Conduct Authority ('FCA') in both the Principles for Business ('PRIN') and the Conduct of Business Sourcebook ('COBS'). Sesame has a regulatory obligation to abide by those rules.

> PRIN 2.1.1R (2);
>
> 'A firm must conduct its business with due skill, care and diligence.'
>
> PRIN 2.1.1R (6);
>
> 'A firm must pay due regard to the interests of its customers and treat them fairly.
>
> COBS 2.1.1R (1);
>
> 'A firm must act honestly, fairly and professionally in accordance with the best interests of its client.'

In reaching my decision I have relied on the evidence and information presented to me. This includes the illustrations, suitability letters as well as the information given around the commission payments, the schedule of transactions carried out, information gathered by Sesame about the late Mr S and his requirements, the Confidential Financial Review of 9 March 2004 and the 2005 Bond application. There are other forms on file referring to other investments and investment choices but it's not clear to me what these relate to.

Mr S hasn't complained about the advice to invest into the Capital Redemption Bond as an investment vehicle or making use of a trust for tax planning but it's the later advice and actions of Mr R that are the subject of this complaint. That being the setting up of a collective investment vehicle – the SSISCI within the Bond.

It's my understanding that Sesame provided an advisory rather than discretionary service to Mr S. That would mean it was to provide advice to Mr S and act upon any resulting transactions.

Discussions between the late Mr S and his adviser began at the end of 2003/early 2004 and continued throughout the year. After those earlier discussions an updated illustration of the investment – the key features document – was issued on 19 July 2004 – and further suitability letters were issued on 25 August 2004 and 11 May 2006.

The Confidential Financial Review document of 9 March 2004, the 'fact find', recorded that the late Mr S had over £6m of assets and 'got wealth from 'Big Bang' in the city, in the 80's, he was a major shareholder & partner of company.' He wanted to invest £500,000 over a term of ten to 15 years in an offshore bond. He was a sophisticated investor who understood 'the stock market and was able to make investment decisions on his own risk/reward criteria.'

The suitability letter of 25 August 2004 referred to Mr S' objective of finalising his financial arrangements with his ex-wife in paying income. Mr S was looking for medium term growth and security. There is no other reference to the investment

objectives or level of risk that was to be taken. The Collective Redemption Bond was recommended as it would allow for annual withdrawals for the income payments. It detailed the Bond's Policy Management Charges of 1.2% and 0.5% per annum plus the administration charge of £45 per quarter.

Further to the above, the adviser sent an additional suitability letter on the 11 May 2006. It explained the rationale behind the recommendation in that it would provide the required income needed for Mr S' ex-wife, that Mr S didn't want to risk an adverse performance and the fund would be of a 'far lower risk fund than you would normally expect me to recommend for you…'

Neither of the above suitability letters include any detail about the commission that would be payable to Sesame.

On 29 October 2008 the SSISCI application to be held within the Capital Redemption Bond was made with £340,000 to be invested into the Blackrock Cash fund. Sesame hasn't been able to provide any assessment of why the Selestia vehicle was recommended over and above the Capital Redemption Bond itself. There's also no reference to any advice being given or of any benefit for the trust.

It's noted on the application form that no trail commission was to be paid but initial commission was 4.5% and under switch commission it said;

> 'If your client agrees to pay you an amount each time they switch funds within the investment, please enter the percentage amount here. You may select between 0-3%, using multiples of 0.10% or 0.25%'.

The amount chosen was 3% and the late Mr S signed the document.

Also on 29 October 2008 Mr S signed a 'delegated investment instructions' form which allowed his investment adviser – Mr R – to 'submit your switch instructions' for the Collective Redemption Bond. It went on to say;

> 'Your Intermediary must have either the necessary permission from the regulator to manage investments on a discretionary basis or he or she must obtain your switch instruction on each occasion a switch is carried out…'

As mentioned above, it's my understanding the account was an advisory one and I've not seen any evidence to show that Mr R was to have discretionary control over the account. The Terms of Business support this under Term '4. HOW WE ACT FOR YOU' says;

> 'We prefer our clients to give us instructions to avoid possible dispute. We will, however accept oral instructions providing they are subsequently confirmed in writing. Any advice we give you will normally be in writing, but if given orally will be recorded on your file…'

Bearing that in mind then Mr S' adviser – as per the above – was to seek his instruction any time a switch was carried out, but I haven't seen any evidence of this. I say this because while many years have passed since 2008, and I accept documents held by Sesame from that time might be limited, but I haven't seen any evidence of discussion or agreement with or from Mr S about the investment switches made between January 2008 and May 2009. And the speed at which those switches were made after the first tranche of money was invested would suggest that for those to have taken place, the late Mr S would have been actively involved in the

decision making. And for any new investment or switch I would have expected Sesame to have notes from phone calls or meetings or suitability letters. Sesame has been able to provide other documentary evidence from as far back as 2003 so it strikes me as odd that it doesn't have any correspondence from around the time of the various switches if the late Mr S' permission had been sought and agreement reached.

So, I haven't been given any evidence to show that Mr S agreed to the switches in advance of them being made or was aware of them when they were carried out. Below is a table of the investments and switches made within SSISCI which itself was held within the offshore bond. £340,000 was moved into the offshore bond on 1 December 2008 and a further £200,000 on 3 March 2009. For any switches made, the financial adviser received 3% commission, in all but one case where the commission charge was 2.5%;

Date invested	**Amount**	**Fund**	Date sold	Proceeds
01.12.08	£339,975	BlackRock Cash Fund	08.12.08 (total sale)	£340,012
09.12.08	£340,012	M&G Global Macro Bond	16.01.09 (partial sale)	£172,056
01.01.09	£103	M&G Global Macro Bond		
19.01.09	£172,056	BlackRock Government Securities	22.01.09 (total sale)	£165,187
23.01.09	£165,284	M&G Global Macro Bond	19.02.09 (total sale)	£325,980
20.02.09	£325,890	M&G Strategic Corporate Bond		
06.03.09	£200,000 (new money)	M&G Corporate Bond	25.03.09 (total sale)	£189,277
26.03.09	£189,277	M&G Strategic Corporate Bond		
03 – 04.09	£2,873	M&G Strategic Corporate Bond	21.05.09 (total sale)	£192,500
22.05.09	£192,500	M&G European High Yield Bond		

So, the above makes clear, the length of time any of the investments were held was short – from a minimum of three days up to 56 days. In particular I note there was a partial sale of the M&G Global Macro Bond on 16 January 2009, and which was reinvested into on 23 January and then sold again on 19 February 2019. In the meantime, the initial sale proceeds from the M&G Macro Bond had been reinvested into the BlackRock Government Securities fund which was only held for three days before it was sold again. I can't see there could be any justification for such switches. And during this time the commission paid of around £41,000 to the financial adviser for those switches was in addition to the ongoing fund-based charges of 1.2% and 0.5% per annum plus dealings costs. Clearly those commissions had a detrimental impact on any profit – if it was made – and any ongoing growth on the reduced amounts of funds post the switches.

As the above switches were made without any reference to Mr S, and within short periods of time for no apparent reason, no assessment of their suitability for Mr S or whether they matched his objectives, it leads me to conclude they were being carried out for the sole benefit of the financial adviser rather than Mr S. By doing so, the adviser was creating commission fees for himself only, rather than carrying out

trades for the benefit of Mr S. It follows that I'm not satisfied Sesame was acting in Mr S' best interests which it had a regulatory obligation to do.

I've reviewed what information was given about the commission charges. I can see the 'application for the Collective Investment Account' for the £340,000 investment has the handwritten note I have referred to above of 3%. And Mr R wrote to Mrs S on 21 March 2009. That letter detailed Mr S had chosen to pay commission rather than the other payment options. It went onto say'

> 'As you are aware, I continually monitor the performance of the funds that I invest in on your behalf, and this strategy has led to some very significant gains over the years that I have been your Financial Adviser. I have your agreement to advise, and make decisions with regard to your fund choice and whilst the funds continue to perform well, we have an agreement that I will be paid commission at the rate of 3% of the invested amount, as confirmed in my letter of November 26th.'

I haven't seen any letter from 'November 26th' which I assume means November 2008 to add anything more here. And I note that the commission was limited to 'whilst the funds continue to perform well' which suggests to me they were liable to change if performance didn't materialise and which in some cases it didn't because of the commission reducing the reinvestment amounts. And with reference to the 3% itself, that was to paid on the 'amount invested' and there's no reference made to commission for switches.

The Collective Redemption Bond Key Features documents of 19 July 2004 and 5 January 2005 – which I appreciate significantly pre-date the above investments – under the 'How Much Will The Advice Cost' section it said 'Your Independent Adviser will give you further details about the cost.' So Mr S wasn't given any information at the point of sale about the commission charges as he should have been. The application was made on the same day.

The advisory letter of 25 August 2004 when the Collective Redemption Bond was recommended has a section about charges and there is only mention of the charges of the product provider including the management and administration charges and an early redemption charge. There's no reference to any commission payable to the adviser. And the later suitability letter of 11 May 2006 only refers to the higher charges for an offshore bond and the tax position.

But over and above the application form and the letter of 21 March 2009 – by which time the majority of the trades had been carried out – I haven't seen any evidence that Mr S' adviser did give him any details about the commissions payable. The suitability letters didn't disclose the commission to be paid. Taking all the above into account, I'm not satisfied the evidence provided shows that Mr S was advised, in a clear and timely manner, of the commission charges that would be incurred.

However, even if I am wrong on that point, I'm not satisfied the switches made were suitable for the Trust or were carried out after seeking agreement from the late Mr S. The evidence suggests the adviser was managing the portfolio on a discretionary rather than advisory basis. And was doing so for his own benefit in commission rather than in the best interests of Mr S as Sesame's customer. So, it wasn't treating Mr S fairly and reasonably.

It follows that I provisionally uphold the complaint.

> The parties aren't happy with how the investigator said the matter should be put right. I agree with Sesame's view here as when comparing the Selestia investments from the date the funds were invested with the performance of a benchmark I wouldn't expect any commissions to be repaid over and above that. The benchmark will reflect a reasonable performance of the funds invested over the period and this would include the amounts taken out of the portfolio in commissions during the switches.
>
> Mr S has said that Sesame's actions led to a loss up to the point it ceased to be adviser – which I understand was 23 September 2009 – and that needs to be put right plus time related interest from the date of the loss to the date of settlement. That is the method of compensation I propose to award. I'm assuming the funds were invested in a reasonable way by measuring the performance of what was actually invested into ie £339,975 was invested on 1 December 2008 and £200,000 in March 2009 when compared to the FTSE UK Private Investors Income Total Return Index. This will ensure that the commission isn't removed from the portfolio and would have remained invested over the period. And on any loss, 8% interest is payable until the date of settlement so time related interest is included.
>
> Sesame has said that the settlor, the late Mr S, was an adventurous investor and questioned whether the index was a fair measure. There is one attitude to risk questionnaire dated 26 November 2008 which records Mr S was prepared to accept a small degree of risk and that he understood he 'may lose some of your money.' And we know the funds that were invested into the Trust were for the benefit of others – his children – so it doesn't seem unreasonable to assume that his usual appetite for risk wouldn't have applied in this instance. In the absence of any evidence of what the Trusts' objectives actually were, I don't find the user of the FTSE UK Private Investors Income Total Return Index to be an unfair or unreasonable proxy.'

To put the matter right I said the performance of both investments into the SSISCI (1 December 2008 and 3 March 2009) should be measured against the FTSE Private Investors Income Total Return Index. Any loss should be paid plus 8% interest from the end date, which was the date Sesame ceased to be the servicing agent, to the date of settlement.

Mr S responded to say that he awaited Sesame's compensation calculations before commenting but the investigator advised that I had set out my proposed method of redress and it was for the parties to provide any additional comment if they wanted. Mr S didn't provide anything further.

Sesame replied. It asked why my provisional decision didn't mention this service's financial cap on awards. It also referred to correspondence with the investigator which confirmed the initial advice to invest was suitable, so the advice fee wasn't to be included in the redress calculations. Therefore, it said the loss calculation would be the investment amounts less the initial commission payments;

01.12.08	£340,000 - £10,203.60	=	£329,976.40
03.03.09	£200,000 - £6,000	=	£194,000.

It asked for its comments to be taken into consideration as part of my final decision.

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.

Sesame has referred to the two investments made into the SSISCI in 2008 and 2009 and said that as the initial advice to invest was suitable then the advice fee/commission should not be included in any redress calculations.

Mr S has no cause for complaint about the initial investment advice to invest into the Collective Redemption Bond in 2004. That hasn't formed part of the complaint. I made clear in my provisional decision that the complaint made relates to 'the later advice and actions of Mr R that are the subject of this complaint. That being the setting up of a collective investment vehicle – the SSISCI with the Bond.' And the complaint about that has been upheld, so I don't agree with Sesame's suggestion that any initial advice fee/commission incurred for any amount invested into the SSISCI should be excluded from the redress calculation.

It can't be known, if the trustees had been given suitable advice, what initial advice fee/commission they would have incurred, if any. So, I think it's fair and reasonable to consider the complaint as it has been presented to me and that includes the charges incurred. As I'm satisfied the advice to invest in the SSISCI wasn't right, it follows that no charges should be made for that advice. To clarify, any initial advice fee/commission incurred in the recommendation to invest into the SSISCI shouldn't be excluded from the amounts invested for redress purposes. This will ensure the redress calculations reflect the performance of the investments as if those charges were never applied and the full amounts invested.

Sesame has also commented on the cap on awards the Financial Ombudsman Service can make. In this case, considering the relevant dates, the maximum I can award as compensation is £190,000, *plus* any interest. For completeness, I include the relevant commentary with fair compensation as detailed below.

As neither party has given me any further information or evidence that has changed my conclusion as to the outcome of this complaint, I confirm the findings in my provisional decision, and I uphold the complaint.

Putting things right

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

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

What should Sesame do?

To compensate the trust fairly, Sesame must:

- Compare the performance of the trust's investments 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.

- Sesame 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
Skandia Selestia Investment Solutions Collective Investment	No longer in force	FTSE UK Private Investors Income Total Return Index	1 December 2008	Date Sesame ceased to be the servicing agent	*8% simple per year on any loss from the end date to the date of settlement

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Skandia Selestia Investment Solutions Collective Investment	No longer in force	FTSE UK Private Investors Income Total Return Index	3 March 2009	Date Sesame ceased to be the servicing agent	*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 dates.

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 the trustees paid into the investment should be added to the *fair value* calculation at the point it was actually paid in.

Any withdrawal from the Skandia Selestia Investment Solutions Collective 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'll accept if Sesame 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:

- The trustees wanted Income with some growth and were 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 the trust's circumstances and risk attitude.

- The additional interest is for being deprived of the use of any compensation money since the end date.

*If Sesame considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell the trustees how much it's taken off. It should also give the trustees a tax deduction certificate if they ask for one, so they can reclaim the tax from HM Revenue & Customs if appropriate.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £190,000, *plus* any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than £190,000, I may recommend that the business pays the balance.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out above. My decision is that Sesame Limited should pay the trustees the amount produced by that calculation – up to a maximum of £190,000.

Recommendation: If the amount produced by the calculation of fair compensation is more than £190,000, I recommend that Sesame Limited pays the trustees the balance.

This recommendation is not part of my determination or award. Sesame Limited doesn't have to do what I recommend. It's unlikely that the trustees can accept my decision and go to court to ask for the balance. The trustees may want to get independent legal advice before deciding whether to accept this decision.

My final decision

For the reasons given, I uphold Mr S's complaint about Sesame Limited and Sesame Limited should put the matter right as outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 28 May 2025.

Catherine Langley
Ombudsman