

complaint

Mr N has complained about advice given by Dominic James Barry T/A BlueInfinitas (DJB) about investing his self invested personal pension (SIPP).

background

Mr N came into contact with DJB in 2013. Mr N was happy to receive retirement planning advice from DJB. Mr N was still working and didn't need any income from his personal pension arrangements. But he did have a specific need for the tax free cash he could take.

DJB recommended that Mr N transfer to a SIPP. Mr N could then take tax free cash and invest the remaining fund for the medium to long term. Mr N's attitude to investment risk was assessed as 'balanced'. However DJB also recorded that Mr N was prepared to take a greater level of risk than balanced. This led to DJB recommending that 70% of Mr N's residual pension fund (after the tax free cash had been paid) was put in an unregulated property investment called Windermere Hydro Hotel (Windermere) and the other 30% in "*standard investments*".

About £64,000 was transferred to a new SIPP with Provider G in January 2014. Mr N took some £15,500 as tax free cash and £33,000 was invested in Windermere. After some initial costs, such as DJB's fee, this left almost £14,000 in the cash account of Mr N's SIPP, earning 0.1% gross interest per annum.

Mr N complained to DJB in July 2014. He was concerned about so much of his SIPP being invested in one single higher risk investment (ie Windermere). He felt he should be invested in regulated, diversified funds.

DJB didn't uphold Mr N's complaint on the basis that he appeared happy with the recommendation at the time of the sale. Mr N referred his complaint to this service.

One of our adjudicators investigated the complaint and concluded that it should be upheld. He wrote to DJB to explain why. I've summarised the adjudicator's findings as follows:

- Mr N had no other pension savings to rely on in retirement. He had a relatively modest income of less than £20,000 per annum and was still servicing a mortgage on his own home. This mortgage liability was over £50,000. Mr N did have a second property interest worth some £60,000 but other than that had only about £3,000 in cash held jointly with his wife. This was against a background of Mr N being 57 years old and only eight years from expected retirement.
- Mr N was an inexperienced investor. He didn't understand significant aspects about his existing pension policies – for example, the guaranteed annuity rate (GAR) option in one of these policies. But because Mr N told the adjudicator that he was happy to take tax free cash, and after having better knowledge of the lost GAR option, the investigation of the complaint was limited to how the SIPP became invested.
- Windermere wasn't suitable for Mr N in view of his financial circumstances and lack of investment experience. Mr N didn't have the capacity for significant loss which the inherently risky Windermere holding could result in.

- The adjudicator was also satisfied that Mr N was not willing to accept the risk that the Windermere holding presented. His attitude to risk was recorded as one thing yet he was recommended something much more risky.
- It was unsuitable for the remainder of the SIPP to be left in cash earning 0.1% per annum. It was clear this wasn't Mr N's intention. And DJB had said in its recommendation letter that the remainder of the SIPP would be in standard investments.
- There was also some question as to whether Mr N received the recommendation letter at the time of the sale Mr N disputes having received the letter and it was clear that DJB initially submitted the application to Provider G on the basis that investment would be in Residential Regeneration II – which was from the same group of investment options as Windermere. It might appear that DJB's sole purpose was to invest its clients in one or more specific unregulated investments.

In its response to the adjudicator's assessment, DJB said that it hadn't been intended that Mr N's remaining SIPP funds would be held in cash. DJB said it tried to communicate with Mr N about investing the cash but to no avail. DJB also said that it experienced difficulties with Provider G.

As DJB didn't accept the adjudicator's findings, the complaint was progressed for a final decision. The adjudicator said to DJB that it hadn't addressed the main point about the suitability of Windermere. The adjudicator also invited DJB to provide evidence of what it had said about attempting to invest the remainder of Mr N's SIPP funds – but nothing was provided.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I've reached the same conclusions as the adjudicator and largely for the same reasons.

The prospectus for Windermere explains that the investor may be exposed to a significant risk of total loss. Windermere was above average risk – the risks included liquidity issues, the lack of operating history, business risk, occupancy level risk and property risk. The investment might also be difficult to value.

In short Windermere was a higher risk unregulated investment with little or no consumer protection. That level of risk wasn't what Mr N was prepared to accept or could afford to take. He had no other risk-based investments – before he was advised to invest in Windermere his relatively modest pension funds were invested in mainstream assets such as with-profits.

I accept that Mr N wanted his pension, after taking tax free cash, to remain invested but he was looking for no more than a balanced or medium level of risk.

The attitude to risk questions posed by DJB at the time of advice show that. For example, it was recorded that Mr N strongly disagreed that he was "*comfortable with investments that may frequently experience large losses in value if there is a potential for higher returns*". I don't think that Windermere was suitable for Mr N. DJB shouldn't have recommended it.

I also agree with what the adjudicator said about the SIPP monies being held in cash. DJB's recommendation letter indicated that the balance (after the Windermere investment) would be invested in 'standard investments'. It remained in cash and so Mr N lost out on investment growth. DJB has said that it wasn't invested because Mr N didn't contact DJB. But I've not seen anything to support that. So the redress I've awarded below includes the money which was held in cash.

fair compensation

In assessing what would be fair compensation my aim is to put Mr N as close to the position he would probably now be in if he hadn't been given unsuitable advice.

I take the view that Mr N would have invested differently. It is not possible to say *precisely* what he would have done differently. But I am satisfied that what I have set out below is fair and reasonable given Mr N's circumstances and objectives when he invested.

what should DJB do?

To compensate Mr N fairly, DJB must:

- Compare the performance of Mr N's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investment. If the *actual value* is greater than the *fair value*, no compensation is payable.

DJB should also pay interest as set out below.

If there is a loss, DJB should pay such amount as may be required into Mr N's pension plan, allowing for any available tax relief and/or costs, to increase the pension plan value by the total amount of the compensation and any interest.

If DJB is unable to pay the total amount into Mr N's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mr N's marginal rate of tax at retirement.

For example, if Mr N is likely to be a basic rate taxpayer in retirement, the *notional* allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mr N would have been able to take a tax free lump sum, the *notional* allowance should be applied to 75% of the total amount.

- Pay to Mr N £350 for the trouble and upset the unsuitable advice has caused him.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Greyfriars SIPP	Still exists – mix of	FTSE WMA Stock Market	15 January 2014	date of my decision	8% simple per year from date

	'liquid' cash and 'illiquid' investment	Income Total Return Index			of decision (if compensation is not paid within 28 days of the business being notified of acceptance)
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actual value

This means the actual amount payable from the investment at the end date.

My aim is to return Mr N to the position he would have been in but for the unsuitable advice. This is complicated where an investment is illiquid (meaning it could not be readily sold on the open market) as in this case. It would be difficult to know the *actual value* of the investment. In such a case the *actual value* should be assumed to be nil to arrive at fair compensation. DJB should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the total payable to Mr N and the balance be paid as I set out above.

If DJB is unwilling or unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. DJB may wish to require that Mr N provides an undertaking to pay DJB any amount he may receive from the investment in the future.

fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Any withdrawal, income or other payment out of the investment should be deducted from the *fair value* at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I will accept if DJB totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

I have decided on this method of compensation because:

- Mr N wanted capital growth and was willing to accept some investment risk.
- The WMA index is made up of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr N's circumstances and risk attitude.
- Mr N has not yet used his pension plan to purchase an annuity.

my final decision

I uphold the complaint. My decision is that Dominic James Barry T/A BlueInfinitas should pay the amount calculated as set out above.

Dominic James Barry should provide details of its calculation to Mr N in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr N either to accept or reject my decision before 5 February 2016.

Lesley Stead
ombudsman