

complaint

Mr B, through his representative, complains that the ARCK LLP investment that was recommended to him by Thompson Prior LLP was unsuitable for him. In particular, Mr B's representative says Mr B was unaware that the investment was unregulated and high risk, and that the investment was not lawfully promoted to him.

background

In 2007 Mr B was introduced to ARCK Marketing Ltd by Thompson Prior. Mr B subsequently attended a seminar hosted by ARCK. Following the seminar Mr B met with Thompson Prior, and transferred part of his pension funds to a SIPP, to enable him to make an investment in an ARCK LLP Closed Ended Property Portfolio (CEPP). Thompson Prior wrote to Mr B on 5 May 2007 and provided detail about the transfer to the SIPP and the investment in the ARCK CEPP.

Mr B made his complaint to Thompson Prior after the ARCK CEPP investment failed, in 2012. Thompson Prior rejected Mr B's complaint. Its position was that it only provided advice on the SIPP, and Mr B chose to invest in the ARCK CEPP himself, after attending the seminar. An adjudicator considered the complaint and concluded that it should be upheld. He said, in summary:

- Thompson Prior asked Mr B to attend the ARCK seminar.
- Asking Mr B to attend the seminar constituted an invitation, as defined in the Financial Conduct Authority (FCA) handbook.
- The invitation was a significant step in Mr B engaging in a regulated activity (investing in the ARCK fund).
- When arranging the SIPP the advisor had a responsibility to ensure that investments held within the SIPP were suitable for Mr B.
- Thompson Prior did not take sufficient steps to ensure the CEPP was suitable for Mr B.
- The CEPP was of a complex nature and involved significant risks.
- He had not seen sufficient evidence to conclude that the CEPP was suitable for Mr B.
- The product brochure stated the CEPP was only available to investment professionals and sophisticated investors.
- The CEPP should not have been promoted to Mr B.

Thompson Prior did not accept the adjudicator's view. It maintained it was not responsible for the CEPP investment. It added that the CEPP was, in any event, suitable. In its view Mr B's wife had significant pension provisions, so Mr B could therefore be more adventurous. His objective was to "*play pension catch up*".

Thompson Prior also provided a copy of an email from Mr B. The email said that Mr B wanted to meet with Thompson Prior, following the ARCK seminar, which he said he had found interesting and been impressed by. Thompson Prior says this supports its position that Mr B made up his own mind about the investment.

In December 2014 I issued a provisional decision on this complaint. Firstly, I considered what level of involvement Thompson Prior had with Mr B when making the CEPP investment. On this matter I said:

- Thompson Prior introduced the idea of making an ARCK investment to Mr B, and encouraged him to attend the seminar. Then, after Mr B declared his interest, Thompson Prior helped him arrange the CEPP investment. So I was satisfied that it promoted the investment to Mr B.
- Thompson Prior also advised on and arranged a SIPP to facilitate the investment.
- Thompson Prior discussed Mr B's objectives and attitude to risk and gave details of the CEPP, including its merits and risks. It also said how much Mr B should invest in the CEPP.
- The regulator issued an alert in 2013, making it clear that advisors should have been considering the suitability of the overall proposition when advising on the use of a SIPP as a wrapper.

I considered that Thompson Prior had an obligation to ensure that promotion of the CEPP to Mr B was appropriate. My provisional findings in relation to this were as follows:

- The available information about the ARCK LLP CEPP was limited. However I thought it might be best described as a non-mainstream pooled investment, rather than an Unregulated Collective Investment Scheme (UCIS).
- The brochure about the investment was prepared on the basis that it benefitted from an exemption in the Financial Promotion Order and which restricted the recipients to whom the communication could be made or directed.
- Article 50 of the Financial Promotion Order applies to, amongst others, sophisticated investors. Article 50(1)(b) sets out the wording of the statement to be signed by certified sophisticated investors.
- No statement relating to promotion had been produced and nothing I had seen would indicate that Mr B qualified as a sophisticated investor. So I considered that the promotion of the CEPP was unlawful.
- It seemed that Thompson Prior was under the (mistaken) impression that, because the investment was unregulated, its advice was unregulated too. That was not the position. An investment may be unregulated because it is not subject to the same restrictions as a regulated investment as to investment powers and how it is run. But if the investment falls within the definition of a designated investment – and I was satisfied that the CEPP did fall within this definition - then any advice given in relation to it is regulated.

I also considered that Thompson Prior had an obligation to ensure the CEPP was suitable for Mr B. In my provisional findings on this matter, I said:

- There may have been some merit in consolidating Mr B's existing pension plans, so long as that did not expose him to significantly higher charges or mean that he lost valuable benefits or incurred penalties.
- Not all SIPP providers would be willing to facilitate the CEPP investment. The recommended SIPP could and I thought that was the reason why it was selected.
- The investment was complex - for the investor it involved purchasing unlisted shares in UK companies and lending money secured by non interest bearing loan notes. The investment itself involved buying overseas land off plan, developing it and then securing a lease back contract.
- The key features document used terms such as 'gearing' and 'non-recourse debt' which I did not think most investors would be familiar with. In my opinion, it would have been very difficult for an investor such as Mr B to understand how the investment worked and the risks it posed.
- The investment was also subject to multiple and complex risk factors including, but not limited to:
 - It was unregulated - it did not provide all of the regulatory protections usually available to retail clients.
 - ARCK LLP had very limited operating history - the lack of any track record would make it difficult to assess the likely viability and profitability of the investment.
 - Property based risks such as down turns in the property market in the country in which the investment was made, over concentration of developments and competition from other developers (and which might impact on land and development values, ability to find suitable tenants and occupancy levels of the finished hotels).
 - Liquidity risks – the lack of any established market would mean that disposing of the holding could be difficult.
 - Overseas investment and development risks – the development was in a foreign territory and subject to political, economic, social and market risks of that country.
 - Exchange rate and currency risks.
 - Infrastructure risks – the development was in an emerging, underdeveloped tourism area and so dependent on adequate transport links and other services and facilities being developed.
 - Management risks (particularly relevant in view of the charges now faced by two individuals associated with ARCK LLP).
 - No explicit warning was given that the whole amount invested could be lost.
 - It was an unusual and complex unregulated venture. As such, Thompson Prior should have recognised and concluded that the risks were considerably higher than an investor such as Mr B should have been advised to accept.
 - Thompson Prior categorised Mr B as "*fairly adventurous*", defining this as "*You are prepared to take a higher risk attitude*". I do not think Mr B ought to have been considered a higher risk investor. He had limited investment experience and limited assets.

- Mr B was concerned that his pension funds were insufficient, so it seems to me unlikely that he wanted to take an amount of risk that could result in him losing the funds entirely.
- Mr B's wife was in her thirties, and so a long way from retirement. So I do not think that it was reasonable for Mr B to take significant risks with his pension solely on the basis that his wife may have a large pension.

I also provisionally concluded that Thompson Prior should make good Mr B's losses arising from the investment in the ARCK LLP CEPP. In summary, I said:

- The Serious Fraud Office (SFO) had brought charges against two individuals associated with ARCK LLP. The outcome of the proceedings issued by the SFO was not yet known and may be some way off. I was not in a position to make any judgment about the conduct of those involved in the management of ARCK LLP and its investments. But where there may have been fraud in connection with the running of a fund then this might mean there has been a break in the 'chain of causation'. Therefore, it might not be fair to say that all of the losses suffered by a consumer flowed from the unsuitable advice.
- No liability will arise for an adviser who has given suitable advice even if the investment is later fraudulently managed. But the position is different where the consumer would not have been in the investment in the first place had it not been for the unsuitable advice. In that situation it may be fair to assess compensation on our usual basis – aiming to put the consumer in the position he would have been in but for the unsuitable advice. If Thompson Prior considers that other parties are responsible for some or all of Mr B's losses then it can pursue those parties.

I also found that Mr B had suffered upset and worry as a result of Thompson Prior's unsuitable advice. The amount invested in the ARCK LLP CEPP was not insignificant and currently has no realisable value. I thought this would have caused Mr B upset and worry and that he should be compensated accordingly.

Mr B's representative on behalf of Mr B accepted my provisional findings.

Thompson Prior did not accept my provisional findings. In summary, it said:

- It disputes it introduced the idea of making an ARCK investment to Mr B and encouraged him to attend the seminar. The adviser said he 'might like to attend' and then 'make up their own minds'. Mr B then came back to the adviser and said he wanted to invest.
- The adviser could not be responsible for a presentation that he did not attend.
- An alert from the regulator in 2013 cannot be relevant to advice given in 2007.
- The ombudsman is wrong to discount Mrs B's involvement in Mr B's decision to invest in the CEPP. Mrs B was doing very well at work there was no indication that she would not continue to do so. Mrs B had a final salary pension scheme. Therefore the funds invested by Mr B were considered 'toy money' which they were happy to 'gamble' with.

- The investment was in Fernie, Canada which is a 'first world' country. A number of well-known businesses were associated with the project. As such, the CEPP was deemed to be less speculative than other non-mainstream pooled investments.
- Mr B was more than capable of reading and understanding the literature provided.
- Two individuals involved with ARCK LLP have pleaded guilty to fraud.
- They would like the ombudsman to reconsider his position in relation to the third party compensation scheme.

my findings

I have reconsidered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. Having done so, I have not been persuaded to depart from my provisional findings.

Thompson Prior says it only suggested the idea of Mr B attending a seminar being run by ARCK. In response to this, there is little I can add to what I said in my provisional findings.

Thompson Prior instigated Mr B's attendance of ARCK's seminar. It then arranged a specific investment in an ARCK product for him, and the SIPP to facilitate it. When doing so, it commented on the merits of, and risk associated with, the specific ARCK investment being made by Mr B. I remain of the view that, in these circumstances, Thompson Prior was responsible for the promotion of the ARCK investment and ensuring its suitability of it for Mr B.

In relation to the suitability point, Thompson Prior has questioned my reliance on the regulatory alert issued in 2013. But this alert did not introduce any new rules – it sought to remind advisors of their existing responsibilities and to correct a “*mistaken impression*” that they did not need to consider the suitability of an unregulated investment when arranging SIPPs to facilitate them. In 2007 Thompson Prior ought to have considered the suitability of the CEPP (of which it knew the full details) when arranging the SIPP to facilitate investment in it. Thompson Prior was in a position to know whether or not the investment was suitable for Mr B.

Thompson Prior says that Mr B's personal pensions were ‘toy money’ which he was prepared to ‘gamble’ with. But I have seen no evidence to support this, or to suggest that the CEPP investment was made on that basis.

It was recorded that Mr B was looking was looking to grow his pension provisions. The suitability report stated, “*You were made redundant last year and are concerned that your retirement planning is insufficient and falling behind. You are keen to invest in growth areas where you can play catch up. The markets are not good at the moment so you are willing to look at more adventurous investment areas*”.

Thompson Prior categorised Mr B as “*fairly adventurous*”, defining this as “*You are prepared to take a higher risk attitude. You are prepared to invest in equity backed investments. Your income requirements are relatively low and you can afford to take a longer term view. In this risk area there is the potential for higher than average gains or losses.*”

This is not in my view consistent with someone who viewed their pension as ‘toy money’ or was willing to ‘gamble’ with it. And, for the reasons given in my provisional decision, summarised above, I do not think the CEPP was consistent with Mr B’s “fairly adventurous” risk profile. Thompson Prior has referred to the involvement of well-known businesses with the development to which the CEPP was linked. But the CEPP was a complex arrangement with multiple risk factors and its success was ultimately dependent on ARCK, an unregulated company with little track record.

I do not doubt that Mr B is intelligent and well-read, as Thompson Prior contends. But he had very limited investment experience at the time the CEPP investment was made, and I am not persuaded that he would have been able to make a full assessment of the risk associated with it for himself. It was, in any event, for Thompson Prior to ensure the suitability of the investment, not for Mr B to ascertain it for himself.

I have also reconsidered the issue of fraud. I am aware that two of the directors of ARCK have now pleaded guilty to charges brought against them by the Serious Fraud Office (SFO). However, I remain satisfied that it is fair to assess compensation on our usual basis – by putting Mr B in the position he would be had he not been unsuitably advised. Mr B would not have invested in the CEPP had it not been for Thompson Prior’s unsuitable advice.

I also remain of the view that Mr B has suffered upset and worry as a result of Thompson Prior’s unsuitable advice. The amount invested in the ARCK LLP CEPP was not insignificant and currently has no realisable value. I think this will have caused Mr B upset and worry and so I have included below an award for distress and inconvenience.

In its response, Thompson Prior has referred to a compensation scheme being offered by a UK bank in relation to some ARCK investments. My understanding is there is no scheme relating to the CEPP investment Mr B made – so I do not think I should delay the progression of this case for that reason.

fair compensation

In assessing what would be fair compensation, my aim is to put Mr B as close to the position he would probably now be in if he had not been given unsuitable advice.

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

what should Thompson Prior do?

Thompson Prior must

compare

- the actual value of Mr B’s SIPP

with

- the return illustrated by the FTSE WMA Stock Market Income Total Return Index (‘WMA income index’) over the same period of time as applied to the total amount transferred to the SIPP.

- Interest should also be paid, as set out below.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
SIPP	illiquid	FTSE WMA Stock Market Income Total Return Index	date of transfer	date of my decision	8% simple pa from date of decision (if compensation is not paid within 28 days of the business being notified of acceptance)

actual value

This means the actual transfer value of the SIPP at the end date. My understanding is that the investment in the ARCK LLP CEPP currently has no realisable value. So for the purposes of the calculation the actual value of that asset at the end date should be assumed to be nil.

The situation is however uncertain and it is possible that in the future investors may receive some return or other payment. So in exchange for the payment of compensation Thompson Prior may require Mr B to given an undertaking that he will pay to Thompson Prior any amounts that he may receive in the future in respect of the investment whether such amounts are income, interim or final distributions, return of capital or any other payment.

fair value

This is what the investment would have been worth at the end date had it performed in line with the WMA income index from the date of investment until the end date.

The investment amount used should be the full value of the total amounts transferred to the SIPP. I think it is fair and reasonable to use the full values transferred as Mr B would not have incurred the charges on the SIPP had it not been for Thompson Prior’s unsuitable advice to transfer to the SIPP and make the ARCK LLP CEPP investment. The start date should be the date each transfer to the SIPP was made or, to simplify the calculation, the date of the first transfer.

My understanding is that once compensation has been paid Mr B will be able to make arrangements to wind up the SIPP and transfer the fund to another pension arrangement. So he will not incur further fees in connection with the SIPP and so it is not necessary for me to make any allowance for such fees in awarding redress.

distress and inconvenience

This matter will have caused Mr B stress and anxiety and so I consider that he should be paid some compensation for the distress and inconvenience suffered. I consider that £250 would be appropriate.

how to pay compensation?

If possible the above compensation (aside from the payment of £250 for distress and inconvenience which should be paid direct to Mr B) should be paid into Mr B's SIPP. If the SIPP provider is able to accept all or part of the compensation as a relievable contribution then Thompson Prior need only pay the net amount.

If the compensation cannot be paid into the SIPP then it should be paid direct to Mr B. The amount payable should be reduced to allow for the (notional) income tax that would otherwise have been payable by Mr B had it been paid out as income.

The rate used to calculate the reduction should, ideally, reflect Mr B's likely marginal rate of tax at retirement. That is however some way off and difficult to predict especially as taxation rates and regimes may change between now and then. But I think it fair and reasonable to assume that Mr B is likely to be a basic rate taxpayer at retirement and to use the current taxation regime for calculation purposes. To that end, a notional allowance for tax would equate to a 20% in the total amount. But at retirement Mr B could take 25% as a tax free lump sum with the remaining 75% subject to tax at his marginal rate. So the overall reduction should be 15% on the total amount (that is 20% on 75%).

I also intend to include an award for interest if compensation is not paid within 28 days of Thompson Prior receiving notification that Mr B has accepted my final decision. That is simple interest at a rate of 8% gross a year added from the date of my final decision to the date of settlement. Income tax may be payable on this interest.

why is this remedy suitable?

- I have decided on this method of compensation because Mr B wanted growth and was prepared to accept some investment risk.
- The WMA income index is a combination of diversified indices of different asset classes, mainly UK equities and government bonds. I consider it to be a fair measure for a consumer who was prepared to take some risk to get a higher return.
- Although the comparison may not be an exact one, I consider that it is sufficiently close to assist me in putting Mr B into the position he would have been in had he not received inappropriate advice from the firm.
- Mr B has not yet taken benefits from his SIPP.

my final decision

I uphold the complaint and direct Thompson Prior LLP to pay redress to Mr B as set out above.

Thompson Prior LLP should provide details of its calculation to Mr B in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr B to accept or reject my decision before 2 March 2015.

John Pattinson
ombudsman