Financial Ombudsman Service

complaint

The late Mr E complained about the advice he was given by Stuart Binns & Associates in relation to his self-invested personal pension (SIPP). He said he was advised to invest a large part of his pension in a high risk and highly-geared commercial property portfolio.

Prior to his death, Mr E's son was acting as a representative for his father in this matter. His son now continues the complaint on behalf of his father and his mother, who is the sole beneficiary of the SIPP.

Stuart Binns has at times been represented in the complaint by a third party. For ease of reading the decision I'll refer to all representations as having been made by Stuart Binns.

background

I issued my provisional decision on this complaint in January 2020. A copy is attached and forms part of this final decision. In summary I said I was minded to conclude that:

- There was evidence to show that Mr E initially raised concerns about the advice he received in 2010, within three years of the ACE fund being suspended. I was therefore satisfied that the complaint had been referred within time under our rules and so the merits of the complaint against Stuart Binns could be considered.

- A substantial proportion of Mr E's SIPP had been invested in three UCIS funds, all investing in commercial property. I didn't think that Stuart Binns should've recommended these investments to Mr E, and should instead have advised him to invest his pension differently.

- I didn't think the new Independent Financial Adviser (IFA), that Mr E appointed in early 2007, ever truly took over responsibility for advising him on his SIPP. And it seems it was what Mr E saw as the lack of activity on the IFA's part that caused him to revert back to Stuart Binns. As such, I didn't think liability for any loss caused by Stuart Binns' advice should cease when Mr E corresponded with the new IFA.

- I'd considered the delay in the funds being transferred and whether Stuart Binns' responsibility should be capped to reflect that, had it not been for this delay, Firm S would've had custody of the ACE fund from some time in November 2007. However, in the circumstances, I thought that it was fair to make an award for the whole loss against Stuart Binns. I said this because Stuart Binns was still Mr E's financial adviser and it arranged the sale of the HLP fund at the end of October 2007, while the transfer was going through. This indicated to me that Stuart Binns was still advising Mr E on his investments. And as it was able to arrange the sale of the HLP fund, it could've also arranged the sale of the ACE fund, but it didn't do so.

- Even if there hadn't been a delay and the assets had initially been registered correctly, I didn't think that Firm S had any discretion over this investment. Any changes to investments within a managed-out portfolio could only be made by Mr E or his authorised representative, which was Stuart Binns. So, this still left little time for a meeting to be arranged between Mr E, Stuart Binns and Firm S to discuss whether the ACE fund should be retained. Ultimately Firm S lost the opportunity to review the ACE fund and assess its suitability for Mr E before it was suspended. So I didn't think it was fair to say that Firm S should be responsible for loss Mr E suffered.

- With this in mind – and recognising also that Mr E wouldn't have lost out at all but for Stuart Binns' failings, and that Stuart Binns benefitted financially from advising on this unsuitable transaction – I thought that it was fair that the liability for any loss suffered by Mr E remained with Stuart Binns.

Mr E's son responded to say that his mother accepts my provisional findings.

Stuart Binns responded to confirm that it doesn't accept my findings. It's provided substantial submissions, some of which had already been provided and taken into consideration before I issued my provisional decision. In summary, Stuart Binns' main reasons for not agreeing with my provisional findings are:

Jurisdiction

- This service wrongly accepted jurisdiction when the complaint was first referred. Mr E had failed to comply with the time limits set out in our rules.

- Stuart Binns sent a letter to Mr E's solicitor in October 2013. It wrote again in November 2013 to confirm that as it hadn't heard anything further, it presumed the matter was closed. The additional correspondence provided shows that Mr E's solicitor had notified Mr E of his right to refer the matter to our service. However, when the Financial Ombudsman Service initially contacted Stuart Binns about the complaint, we incorrectly stated that a final response hadn't been issued. So it was missed that Mr E had failed to comply with the relevant time limits for referring his complaint to this service.

- Mr E sought advice from another Independent Financial Advisor (IFA) in early 2007. A detailed letter was issued by the new IFA in June 2007, which explained what the firm had been doing on Mr E's behalf. So Mr E ought to have known before June 2007 at the latest, that he had cause for complaint. Even if the verbal concerns raised in October 2010 could be considered to be a complaint, this was more than three years after Mr E was first aware and so was too late under the rules that apply.

Suitability of the advice

- Mr E was a high net worth individual and experienced investor and so fell within one of the categories that UCIS could be promoted to. His bank account and the fact that he signed numerous documents certifying himself as such supported this.

- All the warnings and information given to Mr E at the time of advice had been ignored during the assessment of the complaint. Mr E had signed to say that he'd read and understood the stringent warnings given to him.

- The ombudsman was wrong to suggest that Stuart Binns had failed in its duty to assess Mr E's needs, make a tailored recommendation and form its own view about the suitability and risks involved with the investment. Stuart Binns sent a letter to

Mr E clarifying exactly what he wished for from his pension fund, namely maximum tax-free withdrawal of funds and maximum return on his investment. He'd wanted to invest in commercial property, which was his field of expertise, and had wanted a much smaller exposure to the risks of investing in equities.

- The suitability of the investment had never been a complaint raised by Mr E, or his brother, prior to 2013. The primary concerns raised in October 2010 had been about the performance of the ACE fund; not its suitability.

- The ombudsman has failed to acknowledge the volatility of the equity market in 2002. The FT index had dropped from 6500 in August 2000 to 4000 in July 2002. Thus an investment in shares might have been criticised.

The role of Firm S

- Investment outsourcing to Firm S occurred on 9 August 2007, when Firm S "*initiated the transfer of assets to our custody*", as confirmed in Firm S's letter to Mr E dated 9 March 2017.

- Firm S had explained in October 2013 to Stuart Binns that upon taking responsibility for clients, on the discretionary side, it had a responsibility to make sure the client was invested in suitable funds. Firm S received a letter from Firm A on 23 August 2007 confirming the ACE investment but at no point did it advise Mr E that the ACE fund was unsuitable for him. Firm S's contract is clear in that it would advise the client if the in-specie asset being transferred was unsuitable. Firm S didn't advise Mr E that what he transferred in August 2007 was unsuitable.

- Firm S had also confirmed to Stuart Binns - when it had queried compliance with FCA regulations - that it had on file fact finds for all Stuart Binns' clients. So when Firm S assumed responsibility for Mr E's portfolio, it clearly carried out its duty of conducting a fact find to assess the risk which Mr E was prepared to accept. Firm S had full knowledge of the assets, some £553,000, from Stuart Binns' adviser's handwritten note to Firm S on the letter dated 25 July 2007.

- Firm S and Firm A controlled the transfer of the asset. And Firm S was contracted to provide Mr E with investment advice from 9 August 2007.

- A previous decision by another ombudsman stated that the adviser should have reviewed the existing portfolio. In the case of Mr E, the adviser is Firm S.

- COBS 2.4.4 means that, from the time it assumed responsibility for Mr E's portfolio on 9 August 2007, Firm S was responsible for:

    - the completeness and accuracy of any information about Mr E transmitted by it to Stuart Binns; and

    - the suitability for Mr E of any advice or recommendations provided to him.

- COBS 2.4.5 is pertinent as Firm S was required under that rule to perform a suitability assessment and appropriateness assessment when Mr E became its client on 9 August 2007. A previous ombudsman's decision had stated that "*the adviser should have reviewed the existing portfolio*".

As a result of Stuart Binns' comments, a request for information was submitted to Firm S for copies of any fact finds completed for Mr E. And details of, and confirmation as to when, a thorough assessment of Mr E's investment holdings was carried out.

Firm S responded to the request for information and confirmed that having searched its archives, it hasn't been able to locate any further information, other than what had already been sent to this service under the complaint that had previously been set up for Mr E against Firm S.

As Firm S has been unable to provide copies of fact finds for Mr E, Stuart Binns believes this demonstrates that it failed to carry out its statutory duty under COBS rule 2.4.5.

my findings

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I remain of the view that Stuart Binns provided unsuitable advice to Mr E. And that it is therefore liable for losses suffered as a result of this advice. I've explained why below.

Stuart Binns has made considerable submissions and I've read and considered everything it's sent in. But I don't intend to respond in similar detail. My provisional decision sets out in full my reasons for upholding the complaint and those reasons still remain. So, I'll focus on what I consider to be the new points. If I don't mention a particular point or piece of evidence, it isn't because I haven't seen it or thought about it. Instead, it's just that I don't feel the need to reference it in order to explain my decision. This isn't intended as a discourtesy – it's just a reflection of the informal nature of our service.

jurisdiction to consider the complaint

I explained in my provisional decision that I'm satisfied this complaint falls within the jurisdiction of this service. And I clarified the reasons for this in a subsequent letter to Stuart Binns. However, Stuart Binns maintains that this service doesn't have jurisdiction to consider this matter. So I've set out in detail why I'm satisfied this is a complaint I can consider.

The rules by which this service is bound are set out in the FCA's handbook under the DISP section. DISP 2.8 2R states that:

> "*The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*
>
> *more than six months after the date on which the respondent sent the complainant its final response, redress determination or summary resolution communication; or*
>
> *more than:*
>
> *(a) six years after the event complained of; or (if later)*
>
> *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint*"

<u>was the complaint referred within six months of Stuart Binns' final response letter?</u>

Our rules state that, unless the business consents, I'm not allowed to consider a complaint which is referred to us more than six months after the date the final response letter is sent.

A final response is defined in the FCA handbook as a written response from the firm which:

> *"(a) accepts the complaint, and, where appropriate, offers redress, or*
>
> *(b) offers redress without accepting the complaint: or*
>
> *(c) rejects the complaint and gives reasons for doing so:*
>
> ***and which informs the complainant that, if he remains dissatisfied with the firm's response, he may now refer his complaint to the Financial Ombudsman Service and must do so within six months [*my emphasis*]"***

The guidance under DISP 2.8.3 states:

> *"The six-month time limit is only triggered by a response which is a final response. A final response must tell the complainant about the six-month time limit that the complainant has to refer a complaint to the Financial Ombudsman Service."*

I've carefully considered the letters Stuart Binns issued in response to Mr E's complaints but none of them met the above criteria of a final response.

In November 2010, Stuart Binns issued a letter in response to the concerns Mr E had raised the month before at a social function. Although this letter addressed some of the concerns, it didn't provide referral rights to this service. And so didn't start the six month referral period mentioned in the above rule.

Mr E complained again in 2013, via a representative. Stuart Binns responded in its letters of 13 April and 8 July 2013. It confirmed that it was rejecting the complaint and gave details as to why it didn't think it had done anything wrong. However, again neither of these letters included referral rights to our service. So, they didn't meet the criteria of a final response.

I acknowledge that Mr E's representative confirmed the intention to refer the matter to this service in its letter dated 21 October 2013. So Mr E may well have been aware of our service. But I don't have discretion when it comes to our jurisdiction to consider a complaint; I must apply the rules as they are set out. And without having been correctly informed of the time limit in which to make a referral to this service, the complaint responses can't be deemed final responses under our rules and so the six month time limit doesn't apply.

I acknowledge that Stuart Binns considered the matter closed after it wrote to Mr E's solicitor in November 2013 and didn't hear anything back. But this doesn't have a bearing on our jurisdiction to consider the complaint.

<u>was the complaint referred within time under the six and three year part of our rules?</u>

I'm satisfied that Mr E complained within time under part two of the above rule. For completeness I'll explain why I think this is the case.

Mr E complained that he was advised to invest in funds that were too high risk. That advice was provided in 2002. So, under the this part of the above rule, he had six years to complain. It's not in dispute that Mr E didn't complain within six years. But the complaint can still be considered if I'm satisfied he complained within three years of when he was first aware, or ought reasonably to have been aware, of the cause for complaint.

There's two things I've considered here. Firstly, when did Mr E become aware, or ought reasonably to have been aware, of the cause for complaint? And secondly, when did he first raise concerns about the advice?

Mr E initially received advice to invest £400,000, split across the following funds:

- £100,000 in the Healthcare and Leisure Property Fund (HLP);
- £100,000 in the Capital Appreciation Trust (CAT);
- £200,000 in the Active Commercial Estates Trust (ACE).

I'm satisfied Mr E was prepared to take some degree of risk so I don't think small fluctuations in his fund values would have alerted him to the cause for complaint. Having looked at how the funds performed, I can see that prior to October 2007, two of the funds had made a gain on the initial investment. The HLP fund had made a loss of a little over 10% of the initial investment. But as Mr E was prepared to take a degree of risk, I don't think this was enough to have alerted him to the possibility that he may have been advised to invest in funds that were too high risk for him.

It wasn't until January 2008, at the earliest - when the ACE fund was suspended - that I think Mr E ought to been aware that he was invested in funds that were too high risk. So, Mr E had three years from this point to raise his concerns.

I've thought about the fact that Mr E sought advice from another IFA in 2007. But I've not seen anything to support this being as a result of concerns he had over the initial advice he'd received. In fact, letters to Stuart Binns imply that this was driven by Mr E's wish to deal with a larger IFA. There's nothing to suggest that the new IFA made Mr E aware of any concerns about the investments within Mr E's SIPP. And I'm conscious that Mr E subsequently re-employed the services of Stuart Binns, which again suggests that he was unaware at that point that he may have been given unsuitable advice.

So having considered everything, I'm satisfied that it was January 2008, at the earliest, when Mr E ought to have first been aware of the cause for complaint.

I've gone on to consider when Mr E first complained. I think it's important to explain that a complaint is defined within the DISP rules as *'any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service or redress determination, which:*

Alleges that the complainant has suffered (or may suffer) a financial loss, material distress or material inconvenience…'

The rules also say the time limits will have been complied with if the complainant made their complaint to the business or the ombudsman within that period and has written acknowledgment or some other record of the complaint having been received.

Having considered the correspondence on file, I'm satisfied Mr E made a complaint about the advice he received in October 2010 at a social function. In response to this oral complaint, Stuart Binns issued an acknowledgement letter in October 2010. And then addressed the concerns in its letter of 3 November 2010.

I appreciate Stuart Binns considers it wasn't until 2013 that Mr E raised concerns about the suitability of the advice he received. But the November 2010 letter confirms that Mr E had raised concerns about the value of his ACE investment and had said that Stuart Binns had "erred" by recommending it in 2002. This is clear evidence that he raised concerns orally to Stuart Binns about the initial recommendation within three years of when he first became aware of the cause for complaint. Mr E may not have then followed this matter up through his solicitor until a few years later. But as explained above, the letter Stuart Binns issued in response to the complaint, wasn't a valid final response. And so the six month referral period to our service doesn't apply.

Stuart Binns believes that this service was wrong initially to accept jurisdiction. It says it should've been asked at the start of the process if it consented to us considering the complaint. It's said this because it considers it wasn't until 2013 that Mr E first made a claim. However, as I've explained above, I'm satisfied the concerns were first raised in 2010. The initial adjudicator that considered the complaint reviewed the events and letters referenced above. She explained to Stuart Binns early on in our process that she was satisfied this service has jurisdiction, for the same reasons I've explained. So, Stuart Binns' consent wasn't required as the complaint was referred within time.

Suitability of the investment advice in 2002

Following advice from Stuart Binns, Mr E transferred several personal pensions with a combined value of just over £763,202 to a SIPP. He immediately took tax free cash of £189,000. Of the remaining funds, Mr E was advised to invest £400,000 in three UCIS with Close Property Investments. This represented 70% of his remaining pension fund.

I explained in my provisional decision that I was minded to conclude that Mr E was given unsuitable advice. One of the reasons for reaching this conclusion was that Mr E didn't meet any of the exclusions that allowed UCIS to be promoted to him. The relevant provisions are set out in my provisional decision. Essentially, I wasn't satisfied that Mr E was a certified high net worth individual or certified sophisticated investor.

I've reconsidered this point but remain of the view that Mr E didn't meet the criteria to allow the promotion of UCIS. The rules regarding the promotion of unregulated funds to retail clients are quite exact. They require specific forms to be completed and signed by the investor, certifying that they are either a high net worth individual or sophisticated invested. It was a pre-requisite of investing in UCIS that Mr E met one of these classifications.

FSMA 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, which was relevant legislation at the time of advice, defined a certified sophisticated investor as an individual who had signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

> 'Sophisticated investors

> *"I make this statement so that I can receive promotions which are exempt from the restriction on promotion of unregulated schemes in the Financial Services and Markets Act 2000. The exemption relates to certified sophisticated investors and I declare that I qualify as such. I accept that the schemes to which the promotions will relate are not authorised or recognised for the purposes of that Act. I am aware that it is open to me to seek advice from an authorised person who specialises in advising on this kind of investment"*

Further guidance provided that the statement was accompanied by an indication:

> *'(a) that it is exempt from the scheme promotion restriction (in section 238 of the Financial Services and Markets Act 2000) on the communication of invitations or inducements to participate in unregulated schemes on the grounds that it is made to a certified sophisticated investor;*
>
> *(b) of the requirements that must be met for a person to qualify as a certified sophisticated investor;*
>
> *(c) that buying the units to which the communication relates may expose the individual to a significant risk of losing all of the property invested;*
>
> *(d) that any individual who is in any doubt about the investment to which the invitation or inducement relates should consult an authorised person specialising in advising on investments of the kind in question.'*

Mr E didn't sign a sophisticated investor statement that would've permitted the promotion of UCIS. Despite this, Stuart Binns maintains that Mr E was both a sophisticated investor and a high net worth individual. The main reasons being that his former occupation gave him the requisite knowledge and understanding of the property market. And it says the bank account he held demonstrated that he was a high net worth individual. Stuart Binns is also satisfied that Mr E signed numerous times confirming that he understood the risks involved.

I acknowledge that Mr E's former occupation as a solicitor may have given him an understanding of the commercial property field. And I accept that he was someone who should be able to understand the documentation given to him. But that doesn't mean he had a detailed understanding of these types of investments or would fully comprehend the significance of some of the risks involved in investing in UCIS. Presumably Mr E sought advice, like most consumers generally do, because he didn't have enough knowledge or experience to make investment decisions unaided.

In terms of whether Mr E was a high net worth investor, Stuart Binns failed to take the necessary steps to verify this. FSMA 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 defined a certified high net worth individual as someone who, in the preceding financial year, had an annual income of more than £100,000 or had net assets valued at £250,000. This needed to be verified by the individual's accountant or employer.

In determining an individual's "net assets", no account was to be taken of:

(a) the property which is his primary residence or of any loan secured on that residence;

(b) any rights of his under a qualifying contract of insurance; or

(c) any benefits (in the form of pensions or otherwise) which are payable on the termination of his service or on his death or retirement and to which he is (or his dependents are), or may be, entitled.

As with the certified sophisticated investor, the rules also required that a specific statement was signed. Mr E didn't sign this statement and without the necessary steps being taken, he couldn't be classed as a high net worth investor. I appreciate what Stuart Binns has said about the bank account Mr E held. But I remain of the view that Mr E didn't fall into either of the categories that allowed UCIS to be promoted to him.

I've also reconsidered the risk warnings Mr E signed. They did little to highlight the inherent risks. In particular they failed to mention that they exposed Mr E to a significant risk of losing all he'd invested.

Details of how the schemes were funded, the levels of borrowing and the fact that they weren't regulated was detailed in the brochures. But providing product literature explaining the features and risks of an investment didn't mean that Stuart Binns could recommend investments that were clearly unsuitable for Mr E's circumstances.

I would've expected these risks to have been specifically drawn to Mr E's attention. Close Property Investment's letter does explain the funding of the schemes to some extent. But there is no mention that the schemes aren't regulated and so don't provide the usual consumer protection available through the Financial Services Compensation Scheme. And I can't see that Stuart Binns drew Mr E's attention to this either.

This wasn't a case where Stuart Binns was acting on a non-advised basis. It wasn't merely promoting these schemes to Mr E. It advised him to invest a substantial proportion of his portfolio in them. That is significant. So irrespective of his former occupation (which wasn't in financial services), and ability to understand the risks involved, Stuart Binns had a duty to provide suitable advice.

I acknowledge that Stuart Binns sent a letter to Mr E clarifying exactly what he wished for from his pension fund, that being maximum tax-free cash and maximum return on his investment. And the letter confirmed that Mr E had wished to invest in commercial property.

It's right that when making a recommendation, Stuart Binns needed to take account of Mr E's investment objectives. But it also needed to consider Mr E's capacity for loss and overall circumstances.

Mr E was already retired and was drawing income from his pension. So he had little time to make up any losses that he may suffer. Stuart Binns has said that it carried out its own assessment of the investments. And that it considered them to be lower risk than investing in equities, given the volatility in the equities market at the time.

I acknowledge what Stuart Binns has said about the advice being given at a time when the investment market was volatile. It was also before the financial crisis so the effect of this on the commercial property market was unknown at that time. But these property funds weren't regulated. As a result, they inherently carried greater risk that all Mr E's capital could be lost. And I think that advising Mr E to invest 70% of his remaining pension funds in such high risk investments was unsuitable. There needed to be a balance with other things that had a lower degree of risk so that the combined risk was right for Mr E's circumstances.

When considering what's fair and reasonable in the circumstances, I need to take into account not only relevant law and regulations, but also regulators' guidance and standards, codes of practice and (where appropriate) what I consider to have been good industry practice at the time.

In July 2010 the Financial Services Authority (as it was) issued a good and poor practice report in relation to promoting and providing investment advice on UCIS. A highlighted example of good practice was a firm establishing a maximum portfolio proportion for UCIS investments within their client's portfolio of between 3 – 5%.

While this report was issued in 2010, several years after Mr E received advice, I think this reinforces my conclusion that recommending Mr E invest 70% of his portfolio in three UCIS simply wasn't suitable.

When did Firm S assume responsibility for Mr E's investments?

I said in my provisional decision that I was minded to conclude that Firm S didn't have authority to make any changes to the SIPP until the transfer finalised on 28 December 2007. Dealing in the ACE fund was suspended in mid-January 2008 and I didn't think it was realistic to expect Firm S to have made significant changes to the SIPP or to have assessed the suitability of the ACE fund, in what was a fairly short period, before the fund was suspended.

Stuart Binns continues to argue that investment outsourcing to Firm S occurred on 9 August 2007, when it says the transfer of assets was initiated. In particular, it has referenced rules within the regulator's handbook in support of its argument. But having reconsidered everything on file, I remain of the view that Stuart Binns is responsible for the losses Mr E suffered as a result of the ACE fund being suspended.

Stuart Binns has highlighted COBS 2.4 set out in the FCA's handbook, in particular 2.4.4 and 2.4.5. I've carefully considered these rules but they don't change my decision.

"Reliance on other investment firms: MiFID and equivalent business

COBS 2.4.4R

*(1) This rule applies if a firm (F1), in the course of performing MiFID or equivalent third country business, **receives an instruction to perform an investment or ancillary service on behalf of a client (C) through another firm (F2) [my emphasis]**, if F2 is:*

(d) an investment firm that is:

(i) a firm or authorised in another EEA State; and
(ii) subject to equivalent relevant requirements.

(3) F2 will remain responsible for:

(a) the completeness and accuracy of any information about C transmitted by it to F1; and

(b) the appropriateness for C of any advice or recommendations provided to C."

I agree with Stuart Binns that under the above rule, Stuart Binns would be F1, Firm S would be F2 and Mr E would be C. But as can be seen from my emphasis of the above rule, it only applies when F2 provides an instruction to F1. I've not seen any evidence that Firm S gave Stuart Binns any instructions to perform an investment or ancillary service on Mr E's behalf.

I don't dispute that Firm S was aware by the end of August 2007 of the investments Mr E held in his SIPP. I've seen a letter from Firm A notifying Firm S that the SIPP held both the HLP and ACE funds at that time. But Stuart Binns arranged for the sale of the HLP fund in October 2007. I've not seen anything to suggest this was done on the instruction of Firm S. So it seems Stuart Binns was still advising Mr E on his investments as late as October 2007. And so, could also have arranged for the ACE fund to be sold at this time, had it wished to do so.

I also explained that Firm S was entitled to accept in-specie transfers into its managed-out portfolio before assessing their suitability. I know that Firm S advised Stuart Binns that upon taking responsibility for clients, on the discretionary side, it had a responsibility to make sure the client was invested in suitable funds. I agree that this is the case. But Firm S had no discretion over the ACE fund; it was transferred over to a managed-out portfolio and didn't form part of the discretionary account that Firm S was managing for Mr E.

Investments within the managed-out portfolio were managed by the client or their authorised representative, which in this case was Mr E and Stuart Binns.
I accept that Firm S had a duty to advise Mr E if it considered any investments in his managed-out portfolio were unsuitable. But as the ACE fund didn't transfer into Firm S's custody until 28 December 2007, there was insufficient time prior to the fund being suspended, for it to assess its suitability and arrange a meeting with Mr E and Stuart Binns to discuss whether it should be retained.

Stuart Binns suggests that Firm S took responsibility for Mr E's investment advice on 9 August 2007. But I think Firms S's letter, dated 7 August 2007, makes it clear that it's only once the funds have been transferred to the new SIPP and it's appointed as the DFM, that it's responsible. Stuart Binns forwarded a copy of this letter to Mr E on 9 August 2007. Firm A confirmed that the funds weren't transferred to the new SIPP provider until 9 November 2007, so this is the earliest date it could be said that Firm S was responsible. However, as I've said above, it was not until 28 December 2007 that the ACE fund was transferred to Firm S's custody.

Stuart Binns has highlighted a decision by an ombudsman here at the service on another complaint. It says this is an example of when it was decided that the new advising firm should've reviewed the existing portfolio. As Stuart Binns will be aware, each case is decided on its own merit. There are instances where similar circumstances mean that the same approach will apply. However, the case Stuart Binns has referenced differs substantially from that of Mr E. In that case the new advisers recommended further investment into the existing investment, presumably after it had assessed it and considered it was suitable for that particular client.

Stuart Binns is concerned that Firm S has been unable to provide copies of any fact-finds it completed for Mr E. But I don't think this necessarily means that it failed to carry out its statutory duties. And as this service is unable to consider a complaint for Mr E against Firm S, it's not appropriate to comment further regarding this particular aspect. In any event, whether Firm S carried out its statutory duties has no bearing on the outcome of this complaint. I've already explained that I'm satisfied there was insufficient time for Firm S to assess the suitability of the ACE fund and to arrange a meeting with Mr E and Stuart Binns, before the fund was suspended.

I appreciate that it was Stuart Binns' intention that going forward responsibility for investment advice would be provided by Firm S. But the delay in the transfer completing meant that it took longer than anticipated for this to happen. I explained previously that Stuart Binns is free to pursue independent action outside of our service if it considers any of the other parties involved are also responsible for the loss Mr E suffered.

But in this case, I conclude that holding Stuart Binns responsible for the whole of the loss is appropriate in all the circumstances, and for the reasons I've set out both here and in my provisional decision.

Mr E's SIPP provider has told us that the ACE fund has been written off and is no longer part of the SIPP. As such, the fund should be treated as having a nil value for the purposes of calculating Mr E's financial loss.

Fair compensation

My aim is that Mrs E should be put as closely as possible into the position she'd probably now be in if Mr E had been given suitable advice.

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

What should Stuart Binns do?

To compensate Mr E fairly, Stuart Binns must:

- Compare the performance of each of Mr E's investments with that of the benchmark shown below.

  A separate calculation should be carried out for each investment. If the *fair value* is greater than the *actual value*, there is a loss. If the *actual value* is greater than the *fair value,* there is a gain. Losses and gains should then be combined. If there is an overall loss, that is the amount of compensation payable.

  Stuart Binns should add interest as set out below.

  If there is a loss, Stuart Binns should pay such amount as may be required allowing for any available tax relief and/or costs, to be the total amount of the compensation and any interest.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Healthcare and Leisure	surrendered	FTSE UK Private	date of investment	date surrendered	8% simple per year on any

Property Fund		Investors Income Total Return Index			loss from the end date to the date of settlement
Capital Appreciation Trust	surrendered	FTSE UK Private Investors Income Total Return Index	date of investment	date surrendered	8% simple per year on any loss from the end date to the date of settlement
Active Commercial Estates Trust	still exists	FTSE UK Private Investors Income Total Return Index	date of investment	date of my decision	8% simple per year from date of decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)

For each investment:

Actual value

This means the actual amount paid or 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 that Mr E paid into the investment should be added to the *fair value* calculation at the point it was actually paid in.

Any withdrawal, income or other distribution out of 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'll accept if Stuart Binns totals all those payments and deducts that figure at the end instead of deducting periodically.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Mr E 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 made up of a range of indices with 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 E's circumstances and risk attitude.

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

My final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend the business to pay the balance.

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Stuart Binns & Associates should pay Mrs E the amount produced by that calculation – up to a maximum of £150,000 plus any interest set out above.

Stuart Binns & Associates should provide details of its calculation to Mrs E in a clear, simple format.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Stuart Binns & Associates pays Mrs E the balance plus any interest on the balance as set out above.

This recommendation is not part of my determination or award. It does not bind Stuart Binns & Associates. It is unlikely that Mrs E can accept my decision and go to court to ask for the balance. Mrs E may want to consider getting independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I am required to ask Mrs E either to accept or reject my decision before 1 August 2020.

Lorna Goulding
Ombudsman

Provisional decision – 31 January 2020

complaint

The late Mr E complained about the advice he was given by Stuart Binns & Associates in relation to his self-invested personal pension (SIPP). He said he was advised to invest a large part of his pension in a high risk and highly-geared commercial property portfolio.

Prior to his death, Mr E's son was acting as a representative for his father in this matter. His son now continues the complaint on behalf of his father and his mother, who is the sole beneficiary of the SIPP.

Stuart Binns is being represented in the complaint by a third party but for ease of reading the decision I'll refer to all representations as having been made by Stuart Binns.

background

In 2002, Mr E held personal pension plans with four different providers. As a result of advice from Stuart Binns, he transferred these into a SIPP with a provider that I'll refer to as Firm A. The SIPP was set up with Mr E acting a trustee. After taking his tax-free cash, Mr E was advised by Stuart Binns to invest the remaining money held in the SIPP in three funds operated by Close Property Investment:

- £100,000 in the Healthcare and Leisure Property Fund (HLP);
- £100,000 in the Capital Appreciation Trust (CAT);
- £200,000 in the Active Commercial Estates Trust (ACE).

In October 2006 Stuart Binns wrote to Mr E to update him on his Close Property Investments. This letter stated that the ACE fund should be retained. It explained that the HLP fund was slow to perform so it recommended Mr E switched to a Close Property Investment Portfolio fund. It also explained that the Board of the CAT fund had decided to sell and that the funds would be available for reinvestment shortly. The CAT funds were disinvested in December 2006.

In early 2007 Mr E sought advice from another independent financial adviser (IFA). He explained to Stuart Binns at the time that this was solely due to him wishing to have his pension dealt with by a larger company. However, the new IFA to Mr E's correspondence so he reappointed Stuart Binns in June 2007.

At this point Stuart Binns wrote to Mr E and explained that it no longer considered it the role of an IFA to handle the process of risk management and asset allocation. So it recommended that he have his SIPP managed by a discretionary fund manager (DFM), from here on referred to as Firm S.

Mr E and Stuart Binns met with Firm S, after which Firm S issued a letter, dated 9 August 2007, setting out its investment objectives for Mr E. Mr E agreed to proceed with Firm S acting as his DFM.

It had also been agreed that Mr E would transfer to a new SIPP provider with lower costs and this process started in August 2007. The HLP fund was encashed on 26 October 2007. The ACE assets were re-registered to the new SIPP provider in November 2007 but it was subsequently discovered that they had been re-registered incorrectly. So Firm S didn't receive the assets until December 2007 and on 15 January 2008 the ACE fund was suspended.

Mr E initially raised concerns in 2010 when he met the adviser from Stuart Binns at a social function. Stuart Binns responded to his concerns at that time. Mr E subsequently submitted a written complaint to Stuart Binns in February 2013.

Stuart Binns didn't uphold the complaint. It said Mr E had rejected advice to invest in a trustee portfolio bond, and instead chose to invest in three property funds, including the ACE fund. At the time these funds were cautious investments.

Mr E referred his complaint against Stuart Binns to the Financial Ombudsman Service in March 2015. He also asked us to consider a complaint against Firm S. However, the complaint against Firm S was deemed to have been made too late under our rules and so couldn't be considered.

Initially Stuart Binns objected to the complaint being considered as it thought that it had also been made too late under our rules. However, this was investigated and the adjudicator concluded that the complaint to Stuart Binns had been made in time and so the merits could be considered.

Having reviewed the available information, our adjudicator thought the complaint should succeed. She didn't think it was suitable advice for a large part of Mr E's pension to have been invested in the property funds as this wasn't in line with the cautious approach he wanted to take. She understood these were all unregulated investments, and the ACE fund would borrow around 60% of the value of the underlying properties. She also didn't think Stuart Binns was permitted to promote such funds to Mr E, as the latter wasn't a high net worth individual or a sophisticated investor.

Stuart Binns didn't accept the adjudicator's view. In response, it said:

- Mr E was retired solicitor, and so was someone used to reading and understanding detailed information. He was also advised by his brother, an accountant.
- The adviser reviewed the market for an impaired life annuity. But as Mr E's wife was younger than him and healthy, this wasn't appropriate. Also, Mr E's original objective was to keep control of his pension monies through a SIPP.
- Mr E confirmed in the application for the investments that he'd read the risk factors in the prospectus. He didn't question Stuart Binns over any part of the prospectus.
- Mr E attended a meeting with its adviser and a director of Close Property Investment to discuss the funds.
- While he may not have been experienced in the equity market, he was an experienced commercial solicitor. Stuart Binns didn't agree that it wasn't allowed to promote or recommend the investments to Mr E. Also, his wife had an investment portfolio in excess of £300,000.

- The way Mr E's attitude to risk was assessed was different in 2002 than it would be today.
- The fact that the investments showed a handsome and safe return up to the 2008 banking crisis shows they were suitable for Mr E.
- As a trustee of his SIPP Mr E wasn't considered a retail investor. It believes that the regulator decided in 2007 that financial advisers should consider the trustee as a client.
- Mr E dispensed with Stuart Binns' services in 2007, and sought advice from a new IFA. He then re-appointed Stuart Binns to act on his behalf shortly afterwards. It's reasonable to assume the new IFA assessed Mr E's investments, and approved of them. If not, it would have advised Mr E to change the investments.
- Mr E later decided to seek advice from Firm S, which would also act as a DFM. The investments were transferred to Firm S "in specie". At that point, the ACE fund was showing a profit and could be sold.
- Stuart Binns didn't participate in giving Mr E any advice after this. This evidence is critical, as it concerns which party should be responsible for Mr E's subsequent loss.
- All this time Mr E continued to receive a substantial income from his property investments. The gearing on the ACE fund gave Mr E a high income return and a substantial capital gain.

The adjudicator considered the points Stuart Binns had made, but explained that these didn't change her opinion. She didn't think the fact Mr E was a trustee of his own SIPP meant he didn't have to be treated as a retail customer. And it remained her view that he wasn't someone to whom UCIS investments should have been promoted. She noted that Mr E had engaged Firm S to act as DFM for his SIPP. But she didn't think this business had sufficient time to advise Mr E to dispose of his holding in the ACE fund before dealing in the fund was suspended. So she didn't think liability for the loss Mr E has sustained in relation to the ACE fund should fall to Firm S.

Stuart Binns maintained that the complaint shouldn't be upheld. In addition to reiterating many of the point previously made, it also raised some further points:

- Mr E was a high net worth individual and a sophisticated investor. He confirmed this when applying for the investments.
- Mr E wanted the highest level of income, which demonstrates he wasn't looking for a low risk investment. He was a senior partner of his legal practice with a multi-million pound turnover. And he had good knowledge of the property market, which would have enabled him to understand the risks involved in the ACE fund.
- It wasn't until the ACE fund was suspended that Mr E had any concerns about the advice he'd received from Stuart Binns.
- The consensus of experts prior to the 2007 global financial crisis was that this type of investment wasn't subject to stock market volatility. As such, it was suitable for Mr E. And he was already intent on investing in property before he was given any advice. So it can't be said he relied on the advice.
- The adjudicator was wrong to say that shares in the ACE fund were highly illiquid. The shares will normally be sold back to the issuer. The two other property funds were realised and the proceeds retained in Mr E's SIPP.

- Stuart Binns had advised Mr E in 2006 that he should have a complete review of the asset allocation. It suggested management of the fund by a DFM and it recommended Firm S, having earlier advised Mr E that it was no longer the job of an IFA to manage client investments; this should fall to a DFM. There was no ongoing investment contract arrangement with Stuart Binns after Mr E instructed Firm S in August 2007.
- Legal responsibility for investments in the SIPP passed to Firm S towards the end of 2007. The evidence indicates that Firm S had all the information it needed to advise before the end of 2007. But in the case of the Close investments it was in July 2007. Firm S's contract with Mr E clearly indicated it would advise him of problems concerning any of the funds being placed in its care. It follows that before the end of 2007 if Stuart Binns had any duty to foresee the possible collapse of the ACE fund and to advise accordingly, that duty ended in August 2007.
- The Financial Ombudsman Service should disclose material relating to its consideration of the complaint against Firm S as there's a likelihood that it was based on flawed information.

The matter has now been passed to me for consideration.

my provisional 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'm minded to uphold the complaint.

Firstly, I'd like to clarify the situation in relation to the complaint against Firm S. I appreciate that Stuart Binns feels this service should disclose material relating to its consideration of the complaint against Firm S. However, as I've mentioned above, the complaint was deemed by the adjudicator to have been made out of time under our rules because Mr E didn't complain to Firm S until 2017. A business can consent to us considering a complaint that is brought too late, but Firm S didn't consent.

This matter was resolved informally by the adjudicator without the need for a decision from an ombudsman. It was determined that this service was unable to consider the merits of the complaint against Firm S.

This is contrary to the situation with Stuart Binns where there is evidence to show that Mr E initially raised concerns in 2010, within three years of the ACE fund being suspended. I'm therefore satisfied that the complaint has been referred within time under our rules and so the merits of the complaint against Stuart Binns can be considered.

When considering what's fair and reasonable in the circumstances of this complaint, I am required to take into account relevant law and regulations; regulator's rules, guidance and codes of practice; and what I consider to have been good industry practice at the time.

what did Stuart Binns do?

In April 2002, Stuart Binns met with Mr E to discuss his pension provision. Mr E held personal pension plans with four different providers.

There's little documentary evidence of what was discussed at the time. I've seen some handwritten notes of a meeting that took place in April 2002 between Mr E and Stuart Binns. But these are fairly brief and don't provide much insight into what was discussed. It seems the possibility of Mr E taking an annuity was considered. But ultimately his pensions were transferred into a SIPP with Firm B in May 2002. The SIPP was set up with Mr E as a trustee.

There appears to have been a further meeting with Mr E and his brother in July 2002 to discuss the options for the SIPP. Stuart Binns has said that Mr E favoured investing in commercial property. But I've not seen a documentary record of this meeting.

Stuart Binns then wrote to Mr E in August 2002 to set out how the SIPP might be invested. The adviser noted that Mr E felt it was necessary to receive the maximum income within the Inland Revenue rules and to provide protection for his wife if he should die before her. The letter included the following paragraph:

"*A cautious approach to investing is recommended although I accept your wish to enter the equity market to take advantage of its rise to the previous peak – assuming it does repeat what has happened over many decades. You are aware that markets rise and fall and that capital values and income from investments are not guaranteed unless specified. Rather than buying individual shares (where you would need to hold between 70-80 to provide an acceptable level of diversification for spreading investment risk, it is suggested that you consider using collective investments where the management is handled by institutions. In effect you would be taking deposit monies and reinvesting in investments similar to the various pension accounts from which the deposits came.*"

The adviser also said that in trying to reduce volatility on capital values it would be prudent to allocate a proportion of the fund to property.

A meeting then took place in August 2002 between Stuart Binns and Mr E, which was also attended by a director of Close Property Investment. There doesn't seem to be a record of what was discussed, but a few days later the director wrote to Stuart Binns. This noted that Mr E had been interested in developing a property-based portfolio orientated towards high income. The letter contained examples of how Mr E's capital could be invested across three property funds. The director said he believed Mr E had already seen the investment literature for the funds, but also summarised the activities of the three funds.

The Stuart Binns' adviser wrote to Mr E a couple of days later saying he'd left a message to suggest a meeting to progress the investment of Mr E's fund. Since then he'd received the letter from the director of Close Property Investment, which he enclosed. The adviser said he'd be happy to discuss this with Mr E. It's not clear what further discussion, if any, took place.

On 22 October 2002, Mr E sent a letter to the SIPP provider confirming that he wished to invest £400,000 in Close Property Investment, split between the funds as noted above.

what should Stuart Binns have done?

At the relevant time, the rules were set out in the regulator's handbook. Of particular relevance were of the Conduct of Business rules (dated July 2002). Under these rules Stuart Binns had an obligation to comply with the regulations, which included COB 5.2 – to know its client, COB 5.3 – to give suitable advice and COB 5.4 – to act in its client's best interest.

These rules applied to firms that gave personal recommendations concerning designated investments to private customers. Private customers were defined in the rules at that time as:

"a client who is not a market counterparty or an intermediate customer, including:

(a) an individual who is not a firm;"

Mr E wasn't a market counter party and he could only be classified as an intermediate customer if Stuart Binns had determined that he had sufficient experience and understanding to be classified as such. And under the rules for intermediate customer, Stuart Binns also had to:

"4.1.9 (1) A firm may classify a client who would otherwise be a private customer as an intermediate customer if:

(a) the firm has taken reasonable care to determine that the client has sufficient experience and understanding to be classified as an intermediate customer; and

(b) the firm:

(i) has given a written warning to the client of the protections under the regulatory system that he will lose;

(ii) has given the client sufficient time to consider the implications of being classified as an intermediate customer; and

(iii) has obtained the client's written consent, or is otherwise able to demonstrate that informed consent has been given.

I've noted the points Stuart Binns has made about Mr E being a trustee of his SIPP. But having considered the rules from the time, I don't agree this meant he shouldn't have been treated as a 'private customer'. If Stuart Binns intended to act differently, Mr E should've been provided with the appropriate terms of business or client agreement. I've not seen evidence that this was provided, or that Mr E was given any warning about any protections that he would lose under the regulatory system. And in any event, I don't think Mr E's previous occupation as a solicitor meant that he should be treated differently to other 'private customers'.

Stuart Binns therefore had a duty to provide Mr E with suitable advice. As noted above, Stuart Binns obtained some information about Mr E's circumstances during a meeting in April 2002. But this wasn't very extensive. Stuart Binns doesn't appear to have carried out a thorough fact-finding exercise. While this wasn't a regulatory requirement, I think this would be normal business practice to ensure it knew its customer, particularly when considering something as important as Mr E's future pension provision.

It also doesn't appear that Stuart Binns undertook a formal assessment of Mr E's tolerance and capacity for risk in relation to his pension. I note it says the way risk was assessed was different in 2002 to how it's done now. But while there may be different methods a financial business can now use, making such an assessment has always been a key factor when giving financial advice. I accept some form of discussion on the subject of risk did take place. The adviser's letter to Mr E in August 2002 suggests that a cautious approach to investing was recommended, but Mr E wanted to take advantage of the equity market.

I've not seen evidence Mr E was sent a suitability letter in which Stuart Binns set out the reasoning behind him transferring his pension plans into a SIPP and how the SIPP should be invested.

I appreciate Mr E attended a meeting where a director of Close Property Investment was present, and that the various funds would've been discussed at this point. But I don't think this would've allowed Mr E to have a full understanding of the risks involved. It's likely the director would, unsurprisingly, have given a positive view of the funds offered by his company. As such, I'm not convinced Mr E would've received a full or impartial description of the risks.

I'm also conscious that Stuart Binns seems to have simply passed on the letter it received from the director to Mr E without comment. So, I think it would've been reasonable for Mr E to assume that investing along the lines suggested in the director's letter was being endorsed by his adviser. There was nothing in the letter, and there seems to have been no further communication between the adviser and Mr E, in which the suitability of these investments and the risks they posed were discussed.

As the adjudicator noted, all three of the property funds were unregulated collective investment schemes (UCIS). There were rules in place at the time restricting to whom such investments could be promoted or recommended. Essentially, s238 of the Financial Services and Markets Act 2000 (FSMA) prohibited authorised firms from promoting UCIS except where:

(i) An exemption in the FSMA 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 ("the Order") applies; or
(ii) An exemption under COB 3 in the FCA Handbook (then FSA Handbook) applies.

'Promoting', in this context, means the communication, in the course of business, of an invitation or inducement to engage in investment activity in relation to UCIS.

At the time, the Order permitted the promotion to certain individuals, including the following:

- Certified high net worth individuals (art 21);
- Certified sophisticated investors (art 23);

The circumstances in which COB 3 permitted the promotion of UCIS included promotion to:

- Category 1: A person who is already, or has been in the last 30 months, a participant in a UCIS;
- Category 2: A person for whom the authorised person has taken reasonable steps to ensure that the scheme is suitable and who is either an established client or a newly accepted client of the authorised person, or of a firm in the same group as the authorised person;
- Category 6: An exempt person, if the promotion relates to a regulated activity in respect of which the person is exempt;
- Category 7: An eligible counterparty or professional client.

Stuart Binns doesn't seem to have undertaken the relevant steps required by the rules to ensure it could promote UCIS to Mr E. It didn't certify him as a high net worth individual. Nor did it certify him as a sophisticated investor.

I've therefore considered the available evidence of Mr E's circumstances in 2002, but I don't think he falls within any of the above categories of investor. He doesn't seem to have had any substantial savings or investments apart from his pension fund. I note Stuart Binns wrote to Mr E in May 2003. While this letter mainly related to his pension, the subject of inheritance tax was also referred to. But this indicated that Mr E's main asset was his home, owned equally with his wife. Stuart Binns says Mr E's wife had a large investment portfolio. But this wasn't relevant to Mr E, and the assessment should've been based purely on his circumstances.

And Mr E doesn't appear to have been a sophisticated investor. I've not seen evidence he'd invested previously in high risk products such as UCIS. And I don't think his former occupation would've given him requisite knowledge to adequately understand the risks associated with investing in unregulated pooled investments. Stuart Binns' adviser seems to have acknowledged in his email to this service on 3 August 2016 that Mr E "*was experienced in financial matters related to commercial property investment. I accept that he may not have been experienced in the equity market*".

I've thought about the fact that Mr E was a trustee of his own SIPP and that he signed the application form for the exempt trust. However, although Mr E has signed to say that he would qualify as an experienced investor, I've seen nothing to support this being the case.

I acknowledge that Mr E's brother was present at many of the meetings and that he was a qualified account. However, this again doesn't mean that Mr E should've been classed as a sophisticated investor. Nor do I think that having his brother present at the meetings absolves Stuart Binns from its responsibility to comply with the regulations in place at the time. Overall, I'm satisfied that Stuart Binns wasn't permitted by the rules to promote UCIS to Mr E in 2002.

Even where it is permitted for an unregulated investment to be recommended to a consumer, it must also be a suitable investment.

I note Stuart Binns says the funds were regarded as low risk in 2002, and it has provided an example of an item from the financial press which supports this. But Stuart Binns was required to form its own view of the risks posed by the investments, and in particular if these were compatible with their client.

All three were UCIS, and so didn't have the protection provided by the Financial Services Compensation Scheme for regulated investments. I've also considered the nature of the funds and the underlying investments within them, based on the information in the Close Property Investment director's letter.

The HLP Fund was being launched that week. It would have an identical strategy to that adopted by Close Brothers Venture Capital Trust (VCT), although the fund wasn't a VCT. It would be investing in budget hotels, specialist nursing homes, leisure centres and small residential housing areas. Investments would be made into these projects through new special purpose vehicle companies funded by a mixture of loan notes and equities. The loan notes would provide the projected income, with capital growth being generated by the disposal of the projects once they were up and running.

The CAT Fund could acquire vacant flats in retirement homes cheaply, owing to the lack of a developed secondary market. The refurbished properties could then be let out on life tenancies to occupants in their mid-70s, which would allow recovery of some 67% of the cost. The fund could expect actuarially to recover possession of the flats in around ten years' time. This would achieve a 300% increase in the value of the property compared with the net investment left in the flat.

The ACE Fund acquired commercial properties (probably mostly offices with some shops) that are multi-let but on extended tenancies. The properties may generate a rental yield of 7% to 8% a year. The fund would borrow around 60% of the purchase prices and could currently obtain funding at around 5.5%. This could greatly increase the income return.

Capital growth comes from active management of either the property itself or the occupant. So, the growth may come from improving the facilities of the property or buying car parking spaces etc. It may also come from rent reviews or lease extensions.

On the whole, I think the funds were fairly speculative in nature. They required a number of factors to be favourable in order to be successful. Also, one of the funds involved a significant degree of borrowing. So, in addition to the fact these were unregulated funds, I think they posed a significant degree of risk.

I've noted the comments by Stuart Binns about the liquidity of these funds. But it's a fairly widely known fact that trading in commercial property funds can become subject to suspension in times of adverse market movements. Realising such investments at short notice can be problematic, and possibly uneconomic. For instance, I note the literature for the ACE Fund confirms that no units will be issued or redeemed during any period when the net asset value is suspended. As such, I think it was fair for the adjudicator to describe the funds as potentially illiquid.

I'm also mindful that something like 70% of Mr E's pension fund was invested in the three funds. The adviser's letter to Mr E in August 2002 refers to providing diversification. But, as a consequence of the investments made in 2002, a significant proportion of the pension fund was concentrated in one investment sector - commercial property. I don't think this was suitable if Mr E did want to take a cautious to medium, or even medium, approach to investing.

In short, a substantial proportion of Mr E's SIPP was invested in three UCIS funds, all investing in commercial property. For the reasons I've explained, Stuart Binns shouldn't have recommended these investments to Mr E, and should instead have advised him to invest his pension differently.

what would Mr E have done?

Stuart Binns says Mr E was already interested in investing in property, before he was given any advice. I've not seen evidence to support this. In fact, according to the adviser's letter in August 2002 Mr E was expressing a preference for equity investments.

But even if I accept that Mr E had shown an interest in investing in property, this didn't take away the obligation placed on Stuart Binns to give him suitable advice, taking account of his circumstances and requirements. Neither did the fact that Mr E signed to say that he understood the risks involved.

Stuart Binns also says Mr E didn't question it over any parts of the investments' prospectus. But I think this indicates he trusted Stuart Binns as his professional financial advisers, to give him advice that was in his best interests. And I think this was a reasonable position for him to take.

On balance, I think Mr E would have followed the advice he was given by Stuart Binns had he been advised to invest differently.

what about the role of the new IFA?

Stuart Binns argues that even if it's found to be responsible for giving unsuitable advice in 2002 – which I appreciate it rejects – its liability for any loss should cease when Mr E engaged other advisers in relation to his SIPP. I've considered this point.

Mr E wrote to Stuart Binns in October 2006. He said he hadn't heard from them for a long time and had decided to take a second opinion on his investments, naming a different firm of advisers. He said at that stage it was only a review and he'd keep Stuart Binns posted.

In February 2007, Mr E wrote again to Stuart Binns. He said that, as they were aware, he'd been considering new advisers for some time as he felt he needed more back up than Stuart Binns could offer. He'd therefore instructed an IFA with another business to take over.

Stuart Binns' adviser replied shortly after. He said that over the last two years he'd been recommending clients have their funds managed by a firm of investment managers. He said he no longer believed it was the role of an IFA, no matter how big or small, to handle the complex process of risk management and asset allocation. This remained his current recommendation. He said he hadn't heard from Mr E's new IFA.

Mr E responded to confirm he hadn't terminated the connection because of any dissatisfaction. He simply wanted to deal with a larger organisation. But I note Mr E wrote to the new IFA in June 2007, saying he'd not received a reply to the letter he'd sent in April.

This was despite him sending a second letter in May expressing his 'alarm' that things weren't progressing at all. He said he wasn't prepared to wait two months for replies to his letters, and detected a lack of interest on the new IFA's part. He'd therefore persuaded Stuart Binns to continue handling his SIPP. Mr E wrote to the SIPP provider the same day confirming he'd decided to re-appoint Stuart Binns as his pension adviser.

I've also seen a letter to Mr E from the IFA he'd intended to appoint. This accepted that it had failed to keep him informed. There had been a plan to move the investments Mr E held in his SIPP to a new plan, but the necessary documentation was never received from the SIPP provider. The IFA said they truly believed they would've been able to offer the right solution for Mr E had the assets been transferred to the new SIPP.

From the evidence I've seen, I don't think the new IFA Mr E appointed in early 2007 ever truly took over responsibility for advising him on his SIPP. And it seems it was what Mr E saw as the lack of activity on the IFA's part that caused him to revert back to Stuart Binns. As such, I don't think liability for any loss caused by Stuart Binns' advice should cease when Mr E corresponded with the new IFA.

what about the role of Firm S and the delay in the ACE fund being transferred?

In late July 2007, at the recommendation of Stuart Binns, Mr E signed Firm S's account opening forms, appointing Firm S to act as DFM for his SIPP. These forms also authorised Stuart Binns to deal in investments on Mr E's behalf via Firm S's administration system.

Stuart Binns also arranged for Mr E's SIPP to be moved to a new provider around this time.

Firm S wrote to Stuart Binns in August 2007, after a meeting between all three parties. The letter set out Firm S's proposal for managing Mr E's SIPP. Firm S strongly recommended that the core of Mr E's money should be invested in at least a 'balanced' strategy. No reference is made in this letter to the Close Property Investments, but Firms S has since acknowledged that it was aware Mr E held these.

The process of transferring the SIPP started in September 2007. It was agreed that the stock held was to be transferred in-specie. At this time only the ACE and HLP funds were held in the SIPP. However, the HLP fund was sold before the transfer completed so ultimately only the ACE fund was transferred to Firm S.

Stuart Binns argues that Firm S was in control of Mr E's SIPP from August 2007. So it says that it can't be held responsible for any loss Mr E suffered as a result of the ACE fund being suspended. I've thought about this carefully, but I don't agree.

Firm S's terms and conditions - which Mr E agreed to in August 2007 - allowed for managed- out portfolios to be established. Unlike managed portfolios, Firm S had no discretion over investments within a client's managed-out portfolio. And if it didn't consider a particular investment within a managed-out portfolio was suitable for its client, the terms and conditions stated that it would only accept instructions for that investment on an execution only basis.

The ACE fund was transferred to a managed-out portfolio and it wasn't unreasonable for Firm S to accept the transfer in-specie. This didn't mean it was endorsing the investment. But once in its custody, Firm S would have the opportunity to assess whether the investment was suitable and advise Mr E accordingly.

The fund wasn't transferred into Firm S's custody until 28 December 2007. And I don't think Firm S had authority to make any changes until the transfer had been finalised. Dealing in the ACE fund was suspended in mid-January 2008 and it's not realistic to expect Firm S to have made significant changes to the SIPP or to have assessed the suitability of the ACE fund, in what was a fairly short period before the fund was suspended.

Although Firm S didn't gain custody of the ACE fund until the end of December, I'm conscious that there was a delay in it being transferred. This was caused by the fund initially being incorrectly registered in the name of the new SIPP provider, rather than in the name of Firm S's custodian. It's not clear which of the parties involved in processing the transfer - Firm A, Firm S or Close – was responsible for this error. But this mistake led to the transfer being delayed, meaning that overall, it took almost 5 months for it to complete. This is far longer than I would expect, particularly considering the ACE fund was the only investment being transferred.

For this reason, I've considered whether Stuart Binns' responsibility should be capped to reflect that, had it not been for this delay, Firm S would've had custody of the ACE fund from some time in November 2007. However, in the circumstances, I think it's fair to make an award for the whole loss against Stuart Binns.

I appreciate that Stuart Binns' intention going forward was for all investment advice to be provided by Firm S. However, it was still Mr E's financial adviser and I'm mindful that it arranged the sale of the HLP fund at the end of October 2008, while the transfer was going through. This indicates to me that Stuart Binns was still advising Mr E on his investments. And as it was able to arrange the sale of the HLP fund, it could've also arranged the sale of the ACE fund, but it didn't do so.

Even if the assets had initially been registered correctly, Firms S didn't have discretion over this investment. Any changes to investments within a managed-out portfolio could only be made by Mr E or his authorised representative, which in this case was Stuart Binns. So, this still left little time for a meeting to be arranged between Mr E, Stuart Binns and Firm S to discuss whether the ACE fund should be retained. Ultimately Firm S lost the opportunity to review the ACE fund and assess its suitability for Mr E before it was suspended. So it doesn't seem fair to say that Firm S is responsible for loss Mr E has suffered.

With this in mind – and recognising also that Mr E wouldn't have lost out at all but for Stuart Binns' failings, and that Stuart Binns benefitted financially from advising on this unsuitable transaction – I think it's fair that the liability for any loss suffered by Mr E remains with Stuart Binns.

If Stuart Binns feels any of the other parties involved in the transfer are also responsible for any losses suffered, it's free to pursue independent action outside of our service regarding this. But in this case, I feel that holding Stuart Binns responsible for the whole of the loss is appropriate in all the circumstances, and for the reasons I've set out here.

Mr E’s SIPP provider has told us that the ACE fund has been written off and is no longer part of the SIPP. As such, the fund should be treated as having a nil value for the purposes of calculating Mr E’s financial loss.

fair compensation

I think Mr E would have invested differently had he been given suitable advice, and my aim is to award redress that reflects the position as I think it would have been if that had happened. It’s not possible to say *precisely* what he would have done, but I’m satisfied that what I’ve set out below is fair and reasonable given Mr E's circumstances and objectives when he invested.

what should Stuart Binns do?

Stuart Binns must:

- Compare the performance of each of Mr E's investments with that of the benchmark shown below.

  A separate calculation should be carried out for each investment. If the *fair value* is greater than the *actual value*, there is a loss. The losses should be combined and the total is the amount of compensation payable.

  Stuart Binns should add interest as set out below.

  If there is a loss, Stuart Binns should pay such amount as may be required allowing for any available tax relief and/or costs, to be the total amount of the compensation and any interest.

investment name	status	benchmark	from (“start date”)	to (“end date”)	additional interest
Healthcare and Leisure Property Fund	surrendered	FTSE UK Private Investors Income Total Return Index	date of investment	date surrendered	8% simple per year on any loss from the end date to the date of settlement
Capital Appreciation Trust	surrendered	FTSE UK Private Investors Income Total Return Index	date of investment	date surrendered	8% simple per year on any loss from the end date to the date of settlement

Active Commercial Estates Trust	still exists	FTSE UK Private Investors Income Total Return Index	date of investment	date of my decision	8% simple per year from date of decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)

for each investment:

actual value

This means the actual amount paid or 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 that Mr E paid into the investment should be added to the *fair value* calculation at the point it was actually paid in.

Any withdrawal, income or other distribution out of 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'll accept if Stuart Binns totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

I've chosen this method of compensation because:

- Mr E wanted income with some 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 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.
- 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 E's circumstances and risk attitude.

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

my provisional decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend that Stuart Binns & Associates pays the balance.

determination and award: I am provisionally minded to uphold the complaint. I consider that fair compensation should be calculated as set out above. My provisional decision is that Stuart Binns & Associates should pay the amount produced by that calculation up to the maximum of £150,000 (including distress and/or inconvenience but excluding costs) plus any interest on the balance as set out above.

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Stuart Binns & Associates pays Mrs E the balance plus any interest on the balance as set out above.

my provisional decision

I intend to uphold the complaint made by Mr E and now his son. Subject to any further information I receive I intend to tell to Stuart Binns & Associates to:

- Pay redress as set out above

Lorna Goulding
ombudsman