Complaint

Mr and Mrs S were both members and Trustees of "the SSAS" (a small self administered scheme - a pension). Their complaint is that in November 2007 Davies Financial Limited (Davies Financial) advised them to invest in the Stirling Mortimer Cape Verde No 4 Fund which they believe was unsuitable for them.

Background

Mr and Mrs S were running their own business. They were members of "the SSAS". Mr and Mrs S had been advised by Davies Financial for several years. They met with Davies Financial in November 2007 and were advised to invest some of their pension in the Stirling Mortimer Cape Verde No 4 Fund. They became concerned that the advice they'd been given was unsuitable and Mrs S complained to the firm on 25 February 2015. Mr and Mrs S subsequently referred their complaint to us.

I issued a provisional decision on the complaint on **20 June 2019**. In the provisional decision I set out the background to the complaint in full and explained why I believed this complaint would fall within my jurisdiction. I also set out why I believed the complaint should be upheld and how I thought Davies Financial should calculate and pay compensation. A copy is attached and forms part of this final decision.

I asked both parties to provide any further evidence or arguments that they wanted me to consider before I made my final decision.

Davies Financial, through its legal representative, didn't agree with my provisional decision. It provided a further submission dated **26 June 2019.**

This complaint is very similar to another complaint made at the same time about advice Davies Financial gave to Mr and Mrs S at an earlier date to invest part of their SSAS in the Stirling Mortimer Majestic Village No 1 Fund (our complaint reference 16771856).

The submission dated 26 June 2019 focussed largely on the complaint about the advice given in relation to the Majestic Village investment, but said it should be read in conjunction with the complaint about the advice given to invest in the Cape Verde Fund. The issues, particularly about the Ombudsman's Service's jurisdiction to consider the complaints, are interrelated. I have therefore considered what's been said about the Majestic Village complaint in this complaint where appropriate to do so.

Davies Financial's 26 June 2019 submission said, in summary:

Jurisdiction- time limits

The key question was at what point Mr and Mrs S ought to have realised that they had been too heavily invested in speculative investments and that this could have a negative impact on them, such that they would be justified in at least looking into the advice that they had received (as per *Haward v Fawcetts*).

Davies Financial thought the complaint was time barred under DISP 2.8.2R. It said the findings that had been reached previously on jurisdiction were that Mr and Mrs S didn't appreciate how speculative the investments were and that they would have been reassured about problems with the Stirling Mortimer investments when they arose. However, it said that

my provisional decision now acknowledged that Mr and Mrs S were prepared to take significant risks and that my findings were based on the assertion that too high a proportion of Mr and Mrs S' wealth was invested in high-risk investments, rather than the investment simply being too speculative.

Davies Financial said Mr and Mrs S would have appreciated the extent of their speculative investment exposure and its potential impact by at least 2009/10 because at that point:

- They knew that the value of their pension pot was around £630,000.
- They knew that they had 4 UCIS investments.
- They knew that their investments in the UCISs had been in excess of £280,000 and therefore comprised around 44% of their total SSAS.
- In 2009 they suffered the total loss of two of the UCISs. This meant over £100,000 or 16% of their SSAS had been lost in a short space of time. On 29 June 2009 Davies Financial alerted them to the loss of one of the UCISs and e-mailed them about the loss of the other in October 2009. That e-mail was instructive, as it clearly showed that (not even including the loss of the first UCIS), the second failure had all but wiped out the entirety of any growth in Mr and Mrs S' more mainstream pension investments.
- In the 2010 annual review Mr and Mrs S were told that, in a climate of significant gains (their small investment portfolio grew by 42%), the loss of the two UCISs had actually caused an overall loss on their pension for the same period. The impact of the UCIS investments was clear.

Therefore, Davies Financial claimed it was evident to Mr and Mrs S that they had a concentration in UCIS products and that this could (and did) cause significant detriment to their pension provision. It said that was the reasoning behind my provisional finding to uphold the complaint, but it said this fact was known to Mr and Mrs S in 2009/10. Even discounting the further problematic delays with the Stirling Mortimer projects in the period up to the limitation cut-off date of 26 February 2012, it said Mr and Mrs S had the requisite knowledge of the issues well before 2012. Therefore, the complaint was time barred.

suitability of advice

- Davies Financial said, in its response to my provisional decision, that at heart, the issue was whether or not Mr and Mrs S understood that they were taking a higher risk with the result that they could suffer significant losses (or make significant gains). It said that as Mr and Mrs S were experienced business people they would have understood this - it didn't think this was *"rocket science".*
- Davies Financial considered this was borne out by Mr and Mrs S' original complaint. It said at no point had they complained that *"…this was a speculative investment and we didn't appreciate that we could suffer a significant loss which might impact our plans."* The actual complaint was that they hadn't appreciated the investment was not regulated (which it had showed wasn't the case). This proved that they understood it was a risky investment (like their previous UCIS investments - some had performed extremely well and some extremely badly) and that they might suffer a significant loss.

proportion of assets to be invested "speculatively"

- Davies Financial said, in response to my provisional decision, as long as an investor understood the concept of putting their assets at higher risk for potentially higher reward (which Mr and Mrs S did), the starting point was that it was up to an investor how much risk they wanted to take and what proportion of their assets they wished to invest speculatively.

- Davies Financial said the 2010 FSA report on UCISs post-dated the advice given. The suitability of the advice couldn't, therefore, be judged against guidance that wasn't in place at the relevant time. The provisional decision referenced the 3% and 5% figures in the report. This was referred to as being an "implication" of what good practice was prior to 2010. Such "implication" was wholly unsupportable. It was clear from any proper review of the report that the regulator hadn't and wasn't seeking to suggest that firms should limit UCIS exposure in every case to this sort of level.

- It further said in response that, if the provisional decision relied on the 2010 report it was misplaced. Mr and Mrs S understood the degree of exposure to high risk investments and were willing to have that exposure.

- Davies Financial believed that the UCIS percentage of 37% quoted in the decision wasn't relevant (this was in relation to the Majestic Village investment). It didn't take into account the value of Mr and Mrs S' total assets earmarked for their retirement (including their business).

assessment of Mr and Mrs S' financial position

- Davies Financial submitted that my provisional decision appeared contradictory in that on the one hand it said *"…it was reasonable for the firm to take into account the business and future planning in assessing the suitability of its recommendations"* but on the other said *"I don't agree it's reasonable to assess the amount invested speculatively in 2006 against Mr S's potential assets at retirement date"* (this was in relation to the Majestic Village investment). It said if it was reasonable to look at matters going forward when giving suitable advice, it couldn't have been unreasonable for Davies Financial to look at Mr and Mrs S' plans when considering their potential investment.

- It didn't understand my comment about a starting position being "*materially too high*". It said the intention to dilute the UCIS percentage going forward wasn't *"the be all and end all"* but it was a valid factor for them to take into account in assessing the suitability of the investment.

- Davies Financial questioned what was *"appropriate weight"* when taking the value of the business into account. It had no information as to the later value of, or any sale of, the business. It thought Davies Financial had given the business valuation *"appropriate weight".* It had been informed that the business was worth £400,000 (in the fact find) but that the intention was ultimately to sell it for somewhere approaching £1 million. The franchise had renewed previously and there were no indications it would not do so again. The assertion in my provisional decision that *"its value reduced over the term of the 5 year franchise"* wasn't accepted and not relevant. The

nature of their business meant that even without the franchise name they could have continued successfully.

- Even if the value of the business was subject to fluctuations, in the years Davies Financial had been advising the clients, the profits of the business continued on an upward trajectory. The business value and profitability were not inextricably linked. It was from the profits (from a turnover in excess of £1 million) that further pension contributions were anticipated to be made.

- Although the anticipated additional contributions and increased business value would have reduced the percentage of UCIS, the advice was not dependent on all contributions being made and/or the business being sold for £1 million, i.e. future dilution to 6.9% was not a pre-requisite for the advice to be suitable.

impact of loss on Mr and Mrs S' retirement

- In terms of Mr and Mrs S' capacity for loss, Davies Financial had analysed the figures and provided a summary and cash-flow reports which showed that even if there was no value in the business and all the UCIS investments failed, Mr and Mrs S would have had more than sufficient retirement income. When the business was included (even just taking the £400,000 valuation) there was an even greater surplus. The inference in the provisional decision that Mr and Mrs S couldn't afford to take the risk of making the investment was wholly inaccurate.

- A telephone log of a call with Mr S in July 2014 said Mr and Mrs S were:

  "…seriously considering retiring and he wanted an indication of what income they could receive from their pensions and business proceeds if they sell It for £300k. I estimate approximately £44,000pa net assuming BRT and accounting for his State pension, and excluding the Stirling Mortimer investments. He was pleased with that as he still has money from his mother's estate plus the Swiss savings, also they could use phased drawdown to maximise the tax efficiency of their incomes by using the TFC each year. My calcs were based on a 4% income and would rely on taking a moderate degree of risk.

- It said the contemporaneous reaction of Mr S showed that, even allowing for a discounted sale and the loss of the UCIS investments, he was happy with the resulting retirement income.

what would Mr and Mrs S have done if recommended a cautious investment?

- Davies Financial didn't think there was any evidence to support the view in my provisional decision that if it had recommended that Mr and Mrs S invest cautiously they would have done so. They had an appetite for risk and were prepared to invest part of their wealth in speculative investments. Even when they complained they accepted they wanted a speculative investment.

- There had been discussions with Mr and Mrs S about how much they were investing in speculative investments and the point at which they should change tack and invest more cautiously. It was never Mr and Mrs S' intention to cash in their investments and buy annuities. So, they needed to maintain a diversified portfolio with an overall moderate degree of investment risk.

- At the point of making the investment in Majestic Village No 1 Mr and Mrs S had two UCIS investments - in the PFB Gold 7 and Gold 9 funds. Davies Financial said there were no problems with those investments, and they looked as if they were on track to produce extremely good returns; they subsequently matured returning around 70% and 120% respectively.

- Mr and Mrs S were happy to speculate further on such investments. After investing in Majestic Village No 1 they had invested in three further UCISs. These were made following discussions about the number and amount of speculative investments they wanted to make. It was only at the point of the Cape Verde investment that Mr and Mrs S (knowing full well what they were invested in) were prepared to agree that they should move to more cautious investing thereafter. This was clearly set out in the Suitability Report for Cape Verde which said, *" You agreed that this was to be the last investment of this nature with any future pension contributions to be invested in lower risk investments…If for any reason you now disagree with this please inform me immediately..".* Mr and Mrs S took no issue with the above.

- There was nothing in the documentation that supported the assumption that if Davies Financial had provided more information to Mr and Mrs S and recommended a cautious investment they would have sacrificed the potential for higher returns and agreed to invest in that manner. The contemporaneous facts and documents positively disproved this. And they had previously wanted to invest directly into the overseas property in Spain on an off-plan basis. Even if they had been advised to invest more cautiously it was more likely than not that Mr and Mrs S would have decided they still wished to proceed and make the same investment in Cape Verde (and Majestic Village).

redress

- There had been lengthy delays in our handling of the complaint. It didn't think that Davies Financial should be penalised by it having to pay additional redress up to the date of the decision because of these delays. It didn't think this could be considered a "fair outcome".

I sent a letter to Davies Financial Limited dated **10 September 2019** in order to outline my views on some of the points they'd made in response to my provisional decision and to provide both parties with a further opportunity to comment (a copy was sent to Mr and Mrs S). In summary, I said:

Jurisdiction - time limits

I referred back to the broad reasons given in the earlier jurisdiction decisions and my provisional decision. I said I thought it was material that Mr and Mrs S had agreed to take significant risks with these investments. I didn't think an investor, in that context, would expect a smooth ride and would expect some ups and downs. And I didn't think deferrals of the redemption date ought to have alerted them they had cause for complaint. They'd been told there were certain guarantees that applied. And some uncertainty wouldn't be unexpected for an investment presenting appreciable risk.

I accepted that the basis behind my provisional decision to uphold the complaint had changed from those issued earlier by another ombudsman.

I therefore went on to consider whether Mr and Mrs S were aware (or ought reasonably to have become aware) that they were too heavily invested in speculative investments (which could have a negative impact on them) more than three years before the complaint was made.

Davies Financial had set out Mr and Mrs S' financial position. I found that by 2009/2010 Mr and Mrs S had got a significant amount of money invested in UCISs. They'd had the experience of two of their UCISs failing completely. But they'd also made money from other UCIS investments.

I didn't think Mr and Mrs S were aware or ought reasonably to have become aware that they had cause for complaint more than three years before the complaint was made.

In the circumstances, I didn't think there'd been a trigger for Mr and Mrs S to have taken a step back and analysed their overall position in the way that Davies Financial had suggested. And I thought it was their total exposure in the context of their overall circumstances that was key – the risks in that overall context and its associated implications. I said a willingness to take risks wasn't the same as having the capacity to accept those risks. And I didn't think assessing that contextual degree of exposure to risk was straightforward for a layman.

I said that part of the skill of an adviser was in evaluating all the relevant circumstances and different pieces of information they were given to apply appropriate weight to each and provide suitable advice that reflected their client's financial situation. This was an acquired skill gained through training and experience over time.

I didn't think Mr and Mrs S were sufficiently knowledgeable to have realised they were over exposed to risk in terms of their capacity for loss. And even if I accepted that merely calculating their exposure to UCISs would have given them a reasonable belief they might have a problem and start further investigations (which I didn't – they had both made and lost money from UCISs, so I didn't think they would have thought UCISs in themselves were a problem), I hadn't seen a reason that would or ought to have triggered them to do so.

I noted the 2010 annual review the representative had referred to said, amongst other things:

"Your overall SSAS value has fallen in value due to the failure of the two Pinder Fry & Benjamin unit trusts; however good growth on your other pension investments since February 2009 has helped soften the blow, resulting in your overall SSAS value falling from £633,163 I February 2009 to £617,254 presently; representing a loss of approximately 2.5%."

I found that Davies Financial had been advising Mr and Mrs S for a number of years. I thought they'd have a reasonable belief that the advice they'd been given over that period was suitable for them – until something caused them to think otherwise. The report didn't refer to the two Pinder Fry investments as UCISs. So, I didn't think the report would have caused them to have suspicions about UCISs generally. And the overall value of the SSAS had only reduced by about 2.5%. Given they were willing to accept risks, I didn't think this would have prompted a reasonable belief that the advice they'd been given was flawed or ought to have alerted them they had cause for complaint.

I went onto consider other specific points raised by Mr and Mrs S in making their complaints. These included:

- the level of commission not being disclosed. I said on the face of it Mr and Mrs S had been alerted to the charges/commission payable. But in any event, the compensation I'd proposed in my provisional decision to uphold the complaint would effectively compensate Mr and Mrs S for any commission/ charges paid. So I didn't think I needed to consider that part of the complaint further.

- Mr S had said that he didn't think the firm had examined the costs v benefits of the two pension schemes and there'd been no discussion of the differences between the two contracts. I noted the firm had addressed this point in its response to the complaint and Mr and Mrs S hadn't specifically referred to that part of their complaint on our complaint form or their accompanying letters. I said I didn't think that part of the complaint had been referred to us and we hadn't specifically considered it.

In terms of jurisdiction, I said that I thought what was key wasn't just when Mr and Mrs S discovered they hadn't been told about the two issues, but rather when they became aware of the implications of those omissions and had a reasonable belief that it had caused them detriment. I noted Mr and Mrs S had said they weren't aware that they had cause to complain until another adviser alerted them to it at the end of 2014. And I hadn't seen any persuasive evidence or reason why they were or ought reasonably to have become aware of the omissions and the associated implications any earlier. I thought what they had said was credible, and overall I was satisfied that the complaints had been made within the relevant timeframes.

impact of loss on Mr and Mrs S's retirement/cash flow analysis

I noted that the regulator had said 'capacity for loss' referred to an investor's ability to absorb falls in the value of their investments. If any loss of capital would have a materially detrimental effect on an investor's standard of living, this should be taken into account in assessing the risk that they were able to take.

I'd explained in my provisional decision that it was in the context of Mr and Mrs S' overall circumstances that I didn't think they had the capacity to accept the risks presented – including their exposure to other assets invested at significant risk such as equities.

I wasn't persuaded that the cash-flow forecasts provided by Davies Financial showed that Mr and Mrs S had the capacity to accept the losses it claimed. I thought the calculations were useful to show the position in the event that things went well. However, in assessing capacity for loss, I thought consideration also needed to be given to a situation where things didn't turn out favourably.

The cash-flow forecast provided had assumed investment returns that mirrored those for cautious managed funds starting from 1990. I said I thought reasonable expectations for investment returns had lowered since that time, particularly in light of the changes in the wider economic environment. And that this was reflected in the regulator lowering the rates of return it prescribed for illustrations of potential future returns for tax exempt investments.

I also said that the forecasting assumed Mr and Mrs S' income would continue along the same lines (until retirement) and that they were able to fund the pension to the same level. I said the business' ongoing success wasn't guaranteed (which was a foreseeable risk and

did actually have an impact on future contributions), and there was also the risk of the equity holding falling in value early in the period in question (sequencing risk).

Overall, I concluded the veracity of the cash-flow forecast depended on the validity of the underlying assumptions used in it. My view was that the assumptions showed the position in favourable circumstances and didn't show Mr and Mrs S had the capacity to accept the risks of having £155,000 in UCIS and £170,000 in equities (which was in relation to the position after the investment inn Majestic Village – they had even higher amounts in speculative investments after the investment in Cape Verde).

what would Mr and Mrs S have done if recommended a cautious investment?

I referred back to my provisional decision where I'd said I was satisfied that if the firm had explained all the risks presented by the different assets Mr and Mrs S held, and that they already had an appropriate proportion of speculative investments, they would more likely than not have accepted advice to invest more cautiously. This was advice from the firm they'd engaged professionally.

Davies Financial was the expert in the matter. And Mr and Mrs S had followed its recommendations on other occasions. Although they'd subsequently invested in other speculative investments this was again following advice from Davies Financial to do so. I said I thought the index I'd proposed to calculate compensation in my provisional decision was appropriate in the circumstances. And in the context of Mr and Mrs S' capacity for risk. I said that if either party wished to suggest an alternative for consideration they should do so in response to my letter of 10 September 2019.

Mr and Mrs S said they accepted my findings. But they said some of Davies Financials' statements of fact didn't match their recollection of events. They said they'd always made it clear that as franchise holders they didn't own any goodwill in the business, so the valuation of their business was dramatically overstated.

I asked for any further evidence or arguments that either party wanted me to consider before I made my final decision.

Davies Financial's representative provided a further submission dated **24 September 2019.** In summary it said:

Jurisdiction - time limits

- The ombudsman's comments under jurisdiction were generic and didn't hold up to scrutiny. Its 26 June 2019 letter had set out why Mr and Mrs S would have understood the degree to which they were invested in the higher risk investments and that these investments could suffer a total loss which would materially impact their investment portfolio. They had been told they had entirely lost their £100,000 PFB investments in 2009. This had wiped out more than 100% of what would otherwise have been significant gains.

- Davies Financial said they had met with Mr and Mrs S in February 2010 and explained this very fact to them. They followed it up with the 19 April 2010 letter which reiterated the PFB losses. It provided valuation information showing that, of their (reduced) £617,000 pension pot, they still had two of the higher risk investments. This clearly exposed them to the same losses, accounting for £182,000

or 30% of the pension pot. It said there couldn't be any argument that Mr and Mrs S understood in 2010 that they had this exposure. On any reading, it would show any investor that they were exposed, had suffered a big loss and might therefore suffer more.

- It said my suggestion that *"I don't think assessing that contextual degree of exposure to risk is straightforward for a layman"* was wholly misguided. It said this wasn't some technical portfolio analysis exercise – it was simply understanding that a big chunk of their savings had been lost and another big chunk was similarly exposed. It said Mr and Mrs S knew this and so any claim/decision that had this issue as its basis had to be time-barred.

It said the law on limitation required there to be something that might cause an investor to be justified in looking at the advice received. It said it was difficult to see how much more of a trigger was required than the total loss in quick succession of two higher risk / UCIS investments comprising a sizeable chunk of Mr and Mrs S' pension pot, with them still being exposed to two similar investments. It said whether or not the 2010 annual review referred to the PFB investments as UCISs was irrelevant. It didn't agree they wouldn't have realised there was a problem earlier.

impact of Loss

Davies Financial said that my provisional decision had assumed, with no analysis whatsoever, that Mr and Mrs S couldn't afford to lose the relevant investments. Davies Financial had produced properly worked cash-flow forecasts which were effectively being dismissed as being *"too favourable".*

They said that the cash-flow forecasts were perfectly valid and in accordance with the forecasts that could legitimately have been run in 2006 (this is from the time of the Majestic Village investment). The index as from 1990 included losses in 9 out of 29 years. This compared to 3 out of 12 years when run from 2006 (i.e. a greater percentage of years suffered losses). The growth rates were not unreasonable to be applied in 2006. It was reasonable to allow for further contributions being made (the regulator's rules allowed for this). It said the fact Mr and Mrs S actually reduced or stopped contributions wasn't relevant and applied hindsight. The reference to sequencing risk wasn't understood given that Mr and Mrs S were invested and not taking an income from the pension pot.

Davies Financial said if advice in the context of such investments had to be given on the assumption that a customer's business went downhill; that their income significantly reduced and that their other investments crashed, then no customer would ever have sufficient capacity for loss and no sensible investment advice could ever be given.

It didn't agree with the assumption that anything related to "equities" meant high risk. It said Mr and Mrs S had a core portfolio which was invested on an appropriate balanced basis, including the equities. Separately, Mr and Mrs S chose to invest additional sums on a higher risk basis (which they understood) in the hope of generating a higher return. They had a mainstream core and a separate higher risk part, which was affordable. Nothing in those arrangements was unsuitable.

Davies Financial said that I had ignored the call log evidence (set out earlier) it had referred to in its 26 June 2019 letter. It said Mr S' contemporaneous reaction as described *"… puts paid to any notion that they were not in a position to speculate with a decent part of their*

pension funds and still live the lifestyle in retirement that they wanted. They were and they did."

recommendation of cautious investments

Davies Financial said that I had failed to give reasons why Mr and Mrs S would have accepted advice to invest more cautiously. Davies Financial had various discussions with them about how much risk they were taking and how much exposure they wanted to higher risk investments. It was evident (and the adviser's clear recollection) that he flagged up the extent of their higher risk investment exposure on numerous occasions, in the context of considering reducing that exposure. This was clear from the suitability report for the Cape Verde investment. This highlighted how the speculative nature of such investments had been discussed "*in detail*", resulting in the conclusion:

"*You agreed that this was to be the last investment of this nature with any future pension contributions to be invested in lower risk investments..*"

It said the contemporaneous evidence was that these issues were flagged up by the adviser to Mr and Mrs S. But that they wished to proceed nonetheless with the higher risk investments. There was contemporaneous evidence of discussions taking place and of Mr and Mrs S wanting to make the higher risk investments "*come what may*". And there was no contemporaneous evidence suggesting that Mr and Mrs S would have been minded to change their approach.

It said Mr and Mrs S would have made the same decision to invest even if Davies Financial had given advice in line with my suggestion. So, there was no causative link between the advice given and the losses claimed by Mr and Mrs S.

redress

As Mr and Mrs S had said they were seeking redress equivalent to what they would have received had they been invested in a high interest cash fund, then if any redress was due, Davies Financial said it should be calculated on that basis.

Davies Financial and its representative provided a further submission dated **8 October 2019** in response to my request for information on Mr and Mrs S' overall attitude to risk. In summary they said:

- There was no "overall" attitude to risk established for Mr and Mrs S. It said this wasn't uncommon in 2007. It said Mr and Mrs S had different attitudes to risk depending on the purpose of each different investment. This included a conservative attitude to risk (ATR) (1/5) for a £50,000 investment. A balanced ATR (3/5) for a further £50,000 investment. A cautious / balanced ATR (2/5 to 3/5) for certain pension contributions. And a speculative ATR (5/5) for certain pension funds which ended up being invested in the Majestic Village Investment.

- The 2007 Fact Find also clearly recorded the desire of Mr and Mrs S to make a further investment with a speculative ATR (5/5). The notes recorded how keen they were to make this further investment. It was clear that suggesting a lower risk investment would have made no difference whatsoever to the outcome. Such advice would not have been taken given Mr and Mrs S' strong wish to seek a higher return on a small part of their wealth.

- Although I had said the investment returns used in the cash-flow reports from 1990-2019 weren't indicative of the financial environment from 2006, the average annualised return net of all fees was only 4.7%. The return was the same using a shortened time horizon of the last 10 years.

- Davies Financial provided further cash-flow forecasts. These were to show that from Mr and Mrs S' financial position in 2015 (when they moved advisers), they had sufficient pensions and savings to see them comfortably through their retirement. It said the reports showed it was impossible *"…to justify upholding any complaint on the basis of lack of capacity to sustain losses, when we have proved that the advice given at the time and the investment returns achieved from 2006/7 up to 2015 and beyond, were at minimum in line with the original expectations, and in fact possibly exceeded those, given the actual returns were far higher than anticipated."* It said Mr and Mrs S hadn't been *"…disadvantaged and should be in a position to provide for their retirement needs in line with the original goals."*

- It said Mr and Mrs S were able to understand the investment. They had the capacity to sustain full losses with the aim of higher returns in return for the risks taken. Full explanations were given about the investment which had all been evidenced in the telephone logs, emails reports and literature it had provided.

- It said *"Giving financial advice isn't about selling products - it's about getting to know your clients as best you can (assuming they tell you everything) and then using your best judgement to help them achieve their goals. Sometimes this means protecting them from themselves by advising restrictions - as I did for these clients, as when I feel even though they may have the appetite for more risk, it's also my job to help them understand why being too greedy can go against them."*

- They'd got to know the clients over a long period of time, both from a personal and financial perspective. Davies Financial had used their best judgement to help Mr and Mrs S achieve their goals. However, they believed I had ignored the contemporaneous evidence to simply say I felt Mr and Mrs S would have done something differently.

- They provided details of where Mr and Mrs S had withheld information from 'the authorities' which they said showed they would do so where it suited them financially. This showed their evidence was unreliable whereas everything it had said had been backed up by documentation that was irrefutable.

I sent a further letter to both parties dated **12 March 2020**. I said that in reviewing all the evidence and arguments I thought there were further issues that needed to be considered before I could make a final decision.

Jurisdiction - Eligible Complainant

When the complaint was first made Davies Financial said it thought the correct complainant should be Mr and Mrs S' business and not Mr and Mrs S. And it didn't think the business was an eligible complainant. It noted that an eligible complainant could be a micro enterprise. But that the definition of micro enterprise was an enterprise which:

- *Employs fewer than 10 persons; and*

- *Has a turnover or annual balance sheet that does not exceed 2 million euros.*

It said although it didn't know the turnover of Mr and Mrs S' business, it certainly employed in excess of '10 persons'. Davies Financial said it was clear that Mr and Mrs S were concerned about a significant corporation tax liability. And they wanted to ascertain ways in which they could minimise their business' tax exposure whilst also accessing ways to maximise the growth potential on capital. It said the investments in the schemes were undertaken for the benefit of the company.

One of our ombudsmen, Louise Wilson, noted these concerns in her provisional jurisdiction decision of 19 January 2016. She said Davies Financial had originally argued that Mr and Mrs S weren't eligible complainants, but that it hadn't pursued this argument in its further correspondence. She said she did think they were eligible should there be any continuing concerns.

The relevant parts of DISP Rule 2.7.3 at the time provided, in summary, that:

An eligible complainant must be a person that is:

- *A consumer*
- *A micro enterprise*
- *A trustee of a trust which has a net asset value of less than £1 million at the time the complainant refers the complaint to the respondent.*

And the relevant parts of DISP Rule 2.7.6 at the time provided:

To be an eligible complainant a person must also have a complaint which arises from matters relevant to one or more of the following relationships with the respondent:

- *the complainant is (or was) a customer, payment service user or electronic money holder of the respondent;*

Based on the facts my view was that Mr and Mrs S were the Directors of their business, the Trustees of the SSAS and they were consumers.

The complaint letters to the firm were from Mr and Mrs S. And our complaint form was also signed and completed by Mr and Mrs S. Having looked through the documentation from the time I noted that:

Cape Verde

The Confidential Financial Planner that recorded meetings prior to the Cape Verde investment on 24 October, 14 November and 16 November 2007 recorded Client 1 as [Mr S] and Client 2 as [Mrs S].

Under Notes in relation to the Cape Verde investment it said:

"[Mr and Mrs S] *are keen to invest in this fund and in view of the tax benefits of investing through a pension fund, I have recommended investing the £100,000 pension contribution into this investment fund."*

The letter dated 23 November 2007 was addressed to Mr and Mrs S. It said:

"Dear [Mr and Mrs S]

I am writing following our recent meetings where we discussed your investment requirements.

Please find enclosed my Suitability Report, detailing my advice relating to the recommended contract…"

The Suitability report dated 23 November 2007 was "Prepared for" Mr and Mrs S. It included:

"As an existing client we review your financial status on an ongoing basis and this report covers the addition of further pension contributions.

Your company made a net profit last year of £124,029, which caused a tax liability in the region of £30,000. You do not wish this to occur again and as your company has significant cash reserves it is in a position to distribute funds out to each of you by way of bonuses. Bonuses have therefore been offered of £50,000 each.

Your pension provision is as documented in my policy summary produced on 16th November 2007 and includes a Small Self Administered Scheme (SSAS) with [name of Trustees].

Objectives

- *to accumulate the maximum pension funding possible*
- *You both wish to maximise investment growth over the next 3-4 years and you are always keen to take advantage of an investment opportunity if you feel the risk is warranted.*

Recommendations

Addendum 1

[Mr and Mrs S]
Stirling Mortimer Limited Cape Verde Fund SSAS Investment

Recommendation

We discussed the various ways you could achieve your present objectives as outlined in the main report and I have recommended that you invest your £50,000 each into the new Cape Verde fund offered by Stirling Mortimer via your SSAS with [name of Trustees].

….You have chosen to have your pension contribution paid directly from your company bank account rather than by way of a personal contribution.

The Application form for Cape Verde was signed by the Independent Trustee. And signed by Mr and Mrs S as the second and third authorised signatory's in their capacity of 'Trustee'.

I accepted that the contribution was made by the employer. However, once it was paid into the SSAS that money was no longer 'owned' by the business, and it was Mr and Mrs S'

decision (as Trustees) on how to invest it. Whilst I accepted that there was some overlap and Mr and Mrs S were being advised both in the role as directors, members and Trustees, I was satisfied the advice about investing in Cape Verde was given to them in their capacity as members/Trustees. And again, given the Trustees were the true owners of the SSAS, I thought it was the Trustees that were the customers of the firm.

So I was satisfied that the advice was given to Mr and Mrs S (in their capacity as Trustees). And again, I was also satisfied that the complaint arose from matters relevant to the Trustees (Mr and Mrs S) being the firm's customer.

Mr and Mrs S were both members and Trustees of the SSAS. I thought the complaints should be set up in the name of the Trustees of "the SSAS".

I went on to consider whether a complaint made by the Trustees at that stage had a material impact on our jurisdiction to consider the complaint. The value of the SSAS wasn't above the relevant £1 million net asset value at the time the complaint was made to Davies Financial. And the advice was given to Mr and Mrs S as the customers and I think they had a dual role – as members and Trustees. I was satisfied the Trustees were eligible complainants.

Jurisdiction-time limits

In my letter of 12 March 2020 I went on to consider whether the complaints made by Mr and Mrs S as Trustees would have any other implications on our jurisdiction to consider the complaint/and or its merits. In particular, should the fact that Mr and Mrs S were Trustees have given them knowledge that they should or ought to have had over and above what would be expected of members (and ordinary retail investors).

Section 247 of the Pensions Act 2004 set out the "Requirement for knowledge and understanding" for individual trustees of occupational pension schemes.

I thought of particular relevance was that it required individuals to whom the section applied to have knowledge and understanding of the law relating to pensions and trusts, and the principles relating to the investment of the assets of the scheme.

However, The Occupational Pension Schemes (Trustees' Knowledge and Understanding) Regulations 2006 provided exceptions for Trustees of small schemes. Part 2 provided that the requirements imposed by sections 247(3) and (4) of the 2004 Act didn't apply to Trustees of schemes with fewer than twelve members where all the members were Trustees of the scheme and where:

(a) the provisions of the scheme provide that any decision made by the trustees is made by the unanimous agreement of the trustees who are members of the scheme…

The Trustees' Duties Discretions and Powers were set out on page 12 of the Trust deed dated 19 September 2003. Section b of Part 6, headed The Trustees Duties Discretions and Powers provided:

All decisions made by the Trustees must be unanimous and they may by unanimous decision delegate any or all of their powers (with the exception of their powers relating to the winding up of the Scheme which powers must be exercised unanimously) under the Scheme to one of several of their number or such other person or body as may

unanimously be agreed from time to time by the Trustees on terms and conditions decided by them at their discretion.

So, I didn't think Mr and Mrs S (in their role of Trustees) were obliged to meet the requirements as outlined in Section 247 of the Pensions Act 2004.

One of the primary responsibilities for Mr and Mrs S, acting in their role as Trustees of the SSAS, was to exercise reasonable skill and care and to take advice from an appropriately qualified person before making an investment decision. This is what they did when seeking advice from Davies Financial. I was satisfied that it was reasonable for them to rely on the advice that Davies Financial had given them and that the advice would be suitable for their circumstances.

I also considered whether this was a new complaint (as made by the Trustees) and therefore, had been referred to us outside of the relevant time limits. The DISP Rules didn't require that a complainant state the capacity in which they were making their complaint when making the complaint to the firm or referring it to the ombudsman service.

I said it wasn't in dispute that Mr and Mrs S complained to the firm and referred the matter to the ombudsman service (albeit the firm believed the complaint hadn't been made within the relevant time limits for the reasons it had already given at length). Mr and Mrs S were both members and Trustees of the SSAS. So, I thought when Mrs S (and Mr S) made their complaints to the firm in February 2015 it stopped time for Mr and Mrs S both as members and Trustees.

The Trustees were eligible complainants. The complaint made to the firm by letter dated 25 February 2015 and subsequently referred to the ombudsman service was made by Mr and Mrs S as both members and Trustees. There was no material impact on our jurisdiction to consider the complaint.

In my letter dated 10 September 2019 I referred to Mr S' original complaint letter in which he said (in relation to the Majestic Village advice):

"I do not believe that you have examined the costs and benefits of the two pension schemes. There is no discussion of the differences between the two contracts in your suitability letter."

I noted that the firm had addressed this point in its response to the complaint and Mr and Mrs S hadn't specifically referred to that part of their complaint on our complaint form or their accompanying letters. I said that although that didn't preclude us from considering it, my understanding was that this part of the complaint hadn't been referred to us. And I hadn't specifically considered it.

I went on to consider whether that specific part of the complaint about the EPP would have had an impact on our jurisdiction to consider Mr and Mrs S' central complaint about the suitability of the advice to invest in Majestic Village (which could then impact on Cape Verde by association). And I set out the reasons I didn't think it had an impact.

In my letter of 12 March 2020, I said I'd given this issue some further thought. In particular, although Mr and Mrs S only referred to the costs and benefits of the two pension schemes not being examined and there was no discussion about the differences, this might reasonably have been interpreted as a complaint about the suitability of the advice to

disinvest from the EPP itself. Mr S' original complaint letter in the complaint about Majestic Village said '*Please find attached a copy of my original letter of complaint to Davies Financial*.' And as I have noted above, their complaint letter did refer to the EPP.

I said I thought I needed to consider whether, by limiting the scope of the complaint and not considering the suitability of the advice to disinvest from the EPP, I could properly decide on the overall suitability of the advice to invest in Majestic Village. The advice to disinvest from the EPP was intrinsically linked to the advice about Majestic Village; it provided the funding for the investment.

I thought this was relevant because:

- I needed to consider whether the encashment of the EPP (which brought about the failed investment) may have at some point led to Mr and Mrs S gaining a reasonable belief that the advice they'd been given was flawed at an earlier date than I had previously identified

I said I'd seen no persuasive evidence that the advice to disinvest from the EPP caused any loss to Mr and Mrs S in itself; the EPP didn't appear to have any particular features or benefits that were lost on disinvestment.

I'd also seen no persuasive evidence that Mr and Mrs S were aware or ought reasonably to have become aware that they had cause for complaint about the advice they were given to invest in Majestic Village (or Cape Verde) earlier, because of the disinvestment from the EPP in itself. I'd not seen any evidence of a trigger (in terms of disinvesting from the EPP) that would have alerted them they had cause for complaint about it.

Redress

Given that the complaints were made by the Trustees, it was my view that any redress should therefore be payable to the Trustees of "the SSAS". In my letter of 12 March 2020, I went on to set out how redress should be paid.

I said if there was a loss, Davies Financial Limited should pay such amount as may be required into "the SSAS" so as to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief.

However, I said compensation shouldn't be paid into the SSAS if it conflicted with any existing law, protection or allowance. It may also not be possible to pay the compensation into the SSAS. If that was the case, I said it should pay that amount direct to Mr and Mrs S as the Trustees. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid by Mr and Mrs S (as ultimately they were the members and benefits from the SSAS would have been paid to them and taxable in their hands). Mrs S was likely to be a basic rate taxpayer in retirement (as was Mr S), so the reduction should equal the current basic rate of tax, applied to 75% of the compensation given that 25% would have been payable as tax free cash.

The representative had also said that Davies Financial shouldn't be penalised by having to pay additional redress up to the date of a decision because of our delays. I said there have been delays for which I apologised to both parties. However, whilst Davies Financial was

clearly entitled to wait for the outcome of our investigation it could also have settled the matter when Mr and Mrs S complained to it or any time after. It was, in my opinion, Davies Financial that provided the unsuitable advice and caused the losses that flowed from that advice. The redress would reflect the returns provided by the index and these could rise or fall over the period depending on market conditions, putting Mr and Mrs S back into the position they would otherwise have been in but for the firm's unsuitable advice. I thought it was fair and reasonable in all the circumstances that the comparison was carried out as at the date of my final decision.

Overall, therefore, I didn't think the issues I'd identified changed the findings outlined in my provisional decision. I was satisfied the complaint could be made by the Trustees of "the SSAS". That they were eligible complainants and had made their complaints in time (for the same reasons that I thought Mr and Mrs S' complaints had been made in time). And any compensation should be awarded to the Trustees.

Davies Financial's representative provided a further submission dated **31 March 2020**. It said, in summary:

Jurisdiction - eligible complainant

- Mr and Mrs S had brought their complaints in a personal capacity – namely as beneficiaries of the SSAS. The complaints, however, had to be made by them as Trustees of the SSAS.

- The capacity in which a complaint was brought to the Ombudsman Service was relevant. Two Trustees (Mr and Mrs S) had brought complaints not as Trustees, but as members/beneficiaries of the SSAS.

I was referred to the Statement of Grounds in a judicial review challenge to an ombudsman's decision in a broadly similar complaint back in 2017. Quoting from the Statement of Grounds drafted by Counsel in that previous case it was submitted that:

(1) The issue is whether or not the term *"eligible complainant"*, properly construed, requires not only that a complainant be capable of bringing a claim in the correct capacity, but does in fact bring it in that capacity.

(2) The meaning of *"eligible complainant"* is a matter of jurisdiction (s.226(2)(a) and (6); DISP 2.2.1(3), 2.7.1). It is an issue of law which is for the Court, not the Ombudsman, to determine: *R (Chancery (UK) LLP) v Financial Ombudsman Service* [2015] EWHC 407 (Admin) per Ouseley J at 66.

(3) The conclusion that it did not *"matter what capacity the trustees thought they were bringing the complaint"* was an error of law. The capacity in which a complainant brought a complaint was plainly relevant to whether or not the complainant was *"eligible"*, because:

- It was contrary to the natural and ordinary meaning of the word "eligible" for it to be used to refer to a person acting in a capacity in which, because they were not clients, they had no legal right to bring a complaint against a firm.

- A logical consequence of a single beneficiary-trustee being "eligible" to make a complaint, even where the Trustees more generally hadn't permitted it, would

run contrary to the likely terms of any trust with multiple Trustees who are likely to require either unanimity or a majority vote in order to be able to act. In this case unanimity was required as provided in Clause 10.7.2 of the Trust Deed.

- The DISP rules themselves defined "eligible complainant" by reference to capacity. DISP 2.7.6 expressly states that *"to be an eligible complainant a person must also have a complaint which arises from matters relevant to one or more of the following relationships with the respondent."* A key defining characteristic of the following matters included the capacity of the complainant:

  (4) the complainant is a beneficiary of, or has a beneficial interest in, a personal pension scheme or stakeholder pension scheme;
  (13) the complainant is a beneficiary under a trust or estate of which the respondent is trustee or personal representative;

- There could be no clearer indication that capacity was relevant to the eligibility of a complainant.

- The irrelevance of capacity argument would face difficulties where a complaint was made by a party in a capacity where the firm didn't owe them any contractual, tortious or statutory duty of care. The firm could reject the complaint on the grounds it owed the complainant no duty. However, the complainant could bring another complaint to the ombudsman service changing their capacity to trustee, even though the firm had acted reasonably in responding that it had no duty. The firm wouldn't have had the chance to properly respond contrary to the complaint resolution rules and may have arguably breached some of the rules.

- Such an interpretation would be contrary to the aim of resolving complaints in the Internal Complaints Process and minimizing the number of complaints referred to the ombudsman, and lead to unfair results.

- If it was said that the complainant would be redirected back to the firm to complain in the correct capacity the relevant time limits would apply, with the complaint being made as at the relevant date it was made in the correct capacity. Otherwise the protection offered to respondents by the time limits would be lost.

- It was clear that Mr and Mrs S were bringing their complaint in their personal capacities as beneficiaries of the SSAS. They did not complain as Trustees or about losses to the SSAS. It referred to several documents to support this conclusion. It said our complaint form was very clear saying *"if you're complaining on behalf of a business, charity or trust please fill in these details."* This would have been completed if they were complaining on behalf of the Trust.

- There was no evidence that Mr and Mrs S had any authority to bring a complaint as Trustees. In the absence of provisions in the Trust Deed any decisions by the Trustees had to be on a unanimous basis. If they did not have all the Trustees' agreement that would leave no doubt the complaint was brought as beneficiaries and they weren't eligible complainants.

As they did not bring their complaint as Trustees any complaint now brought as Trustees would be time barred.

In summary, Davies Financial said that the correct interpretation of *"eligible complainant"* was that the complainant could only be eligible if and when they brought the complaint in the correct capacity. If they subsequently re-stated the capacity in which the complaint was brought the relevant date for the time limit rules in DISP 2.8.2 was the date on which the complaint was made in the correct capacity, and so became an *"eligible complainant"*, not before.

I sent another letter to both parties dated **23 October 2020**. In response to the further points raised about eligibility I referred back to the relevant DISP Rules.

Jurisdiction- eligible complainant

DISP 2.7 (at the time) provided:

"*DISP 2.7.1R A complaint may only be dealt with under the Financial Ombudsman Service if it is brought by or on behalf of an eligible complainant.*

DISP 2.7.2R A complaint may be brought on behalf of an eligible complainant (or a deceased person who would have been an eligible complainant) by a person authorised by the eligible complainant or authorised by law. It is immaterial whether the person authorised to act on behalf of an eligible complainant is himself an eligible complainant.

DISP2.7.3R An eligible complainant must be a person that is:

… (4) a trustee of a trust which has a net asset value of less than £1 million at the time the complainant refers the complaint to the respondent…

DISP 2.7.6R To be an eligible complainant a person must also have a complaint which arises from matters relevant to one or more of the following relationships with the respondent:

the complainant is (or was) a customer… of the respondent…".

I said I agreed that the question of whether or not a person was an "eligible complainant" within the meaning of DISP 2.7 was a question of law: R (Chancery (UK) LLP) v FOS [2015] EWHC 407 (Admin) at [64]-[72]; R (Bluefin Insurance Services Ltd) v FOS [2014] EWHC 3413 (Admin), [2015] Bus LR 656, [2015] Lloyd's Rep IR 457 at [72].

I said the question of eligibility was to be determined objectively therefore, and not by reference to the capacity in which a complainant thought, said or failed to say in what capacity he or she was making a complaint.

In R (Bluefin Insurance Services Ltd) v FOS [2014] EWHC 3413 (Admin), [2015] Bus LR 656, [2015] Lloyd's Rep IR 457, the Court had to consider whether the complainant was a "consumer", and thus an "eligible complainant", within the meaning of DISP 2.7.3R(1). A "consumer" was defined in the FCA Handbook Glossary as "any natural person acting for purposes outside his trade, business or profession". Wilkie J at [124]-[125] concluded that the complainant had been acting for the purposes of his trade, business or profession, notwithstanding that he had made his complaint in a personal capacity:

"*124. In my judgment, looking at the purposes for which Mr Lochner was acting in making*

his complaint to FOS, there is no proper basis on which FOS could have concluded that his purposes were outside his trade, business, or profession. On the contrary, the subject matter of his complaint was wholly concerned with the potential loss arising from lack of insurance cover in respect of a liability which he had incurred in the course of his trade, business, or profession.

125*. In that context, the fact that, under the D&O policy, he was a beneficiary in respect of his personal loss and that he, therefore, made his complaint to FOS in his personal capacity in respect of that personal loss, could not be considered to be sufficient to cause him to fall within the definition of a consumer: "a person acting for purposes outside his trade, business or profession". In my judgment, his complaint to FOS was inextricably linked with his trade, business, or profession, in respect of which he was potentially personally liable for alleged wrongful acts."*

The objective jurisdictional criteria in DISP 2 relevant here were:

- There must have been a complaint. It wasn't in dispute that the complaints received by Davies Financial dated 25 February 2015 were "complaints".

- At the time of making the complaint, the complainant must have been a person falling within one of the categories specified in DISP 2.7.3R. Category 4 was a trustee of a trust which had a net asset value of less than £1 million at the time the complainant referred the complaint to the respondent. Mr and Mrs S were both Trustees of the SSAS. Its net asset value was less than £1 million.

- The complaint must have arisen from matters relevant to one or more of the relationships set out in DISP 2.7.6R. One of the relationships was *the complainant is (or was) a customer….of the respondent.* The complaint arose from the advice given to Mr and Mrs S. They were customers of Davies Financial. Mr and Mrs S were both members and Trustees of the SSAS. However, in making investment decisions they were acting in their capacity as Trustees and had the necessary relationship.

- The complaint must also have been referred to the respondent within the relevant time limits. The firm disputed that the complaint made in February 2015 was in time – irrespective of what capacity the complaint was brought. I was satisfied that the complaint was made in time for the reasons I had outlined in detail previously.

The suitability reports were headed Mr and Mrs S. The application forms were signed by them in their capacity as Trustees. It was ultimately Mr and Mrs S' decision (as Trustees) as to how to invest (with Davies Financial's advice). Whilst I accepted that there was some overlap and Mr and Mrs S were being advised as directors, members and Trustees, I was satisfied the advice about investing in Cape Verde was given to them as both members and Trustees. And that their complaint arose from matters relevant to the Trustees (Mr and Mrs S) being the firm's customer.

I said there was no implied requirement in DISP 2.7 that the complainant must have correctly identified or stated that he or she brought the complaint in a capacity that fell within DISP 2.7.3R/2.7.6R:

- There was no reference at all to "capacity" within DISP 2.7.

- There was no basis for reading an implied requirement regarding capacity into the definition of “eligible complainant”, in circumstances where DISP 2.7 defined “eligible complainant” in detail. It could have included a reference to capacity if it had been intended, but it didn't do so.

- Such an implied requirement would be contrary to DISP 2.7 which set out objective jurisdictional criteria. An implied requirement of the type contended would produce unfairness for complainants.

- DISP 2.7.6R (4) and (13) did not define eligible complainant “by reference to capacity”, nor did they require complainants to identify or state the capacity in which they were complaining. The sub-paragraphs set out objective criteria that were either satisfied or not satisfied.

- A requirement to state in what capacity a complaint was being made was inconsistent with the statutory intention and policy behind the ombudsman scheme. It was designed to be relatively informal and to allow complainants to seek redress with the minimum of complexity and without necessarily needing legal advice or representation. There would be obvious potential unfairness to complainants if DISP were found to contain additional, implied requirements. An ordinary member of the public who wasn’t legally qualified or represented might well not appreciate (for example) the distinction between the capacities of Trustees and members/beneficiaries of a SSAS.

- There was potential for unfairness to complainants if such a requirement existed. Conversely, the lack of any unfairness to Davies Financial underlined the fact that there was no practical need or requirement of fairness to imply such a requirement.

- I didn’t agree with the “difficulties” alleged in relation to the complaint resolution rules in DISP 1.

Dismissal

I said any perceived unfairness to a firm created by a complainant bringing a second complaint about the same matter could be resolved through the application of DISP 3.3.4R. This provided (at the relevant time):

> *The Ombudsman may dismiss a complaint without considering its merits if he considers that:”* and it goes onto list a number of grounds for dismissal including:
>
> *(2) the complaint is frivolous or vexatious; or*
>
> *(6) the subject matter of the complaint has previously been considered or excluded under the Financial Ombudsman Service, or a former scheme (unless material new evidence which the Ombudsman considers likely to affect the outcome has subsequently become available to the complainant);*
>
> *(16) it is a complaint which:*
>
> *(a) involves (or might involve) more than one eligible complainant; and*
> *(b) has been referred without the consent of the other complainant or complainants;*

and the Ombudsman considers that it would be inappropriate to deal with the complaint without that consent;

(17) There are other compelling reasons why it is inappropriate for the complaint to be dealt with under the Financial Ombudsman Service.

These were only some of the grounds for dismissal. However, they demonstrated the ombudsman had a wide discretion to dismiss a complaint where he considered it appropriate to do so. DISP provided a mechanism to avoid any potentially perverse outcomes from applying the strict eligibility criteria outlined in DISP Rules 2.7.3 and 2.7.6 - they were rules and not guidance.

DISP 2.7.9R also provided a list of "exceptions" who weren't eligible complainants. Mr and Mrs S as Trustees weren't on that list.

In its letter of 31 March 2020, Davies Financial's representative had also questioned whether Mr and Mrs S had the authority to make a complaint as Trustees in February 2015.

I said DISP provided clear rules about the requirements for eligible complainants. Nowhere in the rules did it say that a complainant had to state in what capacity they were complaining when they made a complaint. And the rules also did not expressly provide for an investigation of a trustee's eligibility to make their complaint in accordance with the Trust's rules. I was satisfied that Mr and Mrs S satisfied the DISP eligibility rules whether or not the other Trustees agreed or joined in.

I said whether the other Trustee (the firm of Independent Trustees who were Trustees at the time the complaints were made) had specifically given their agreement to the complaint wasn't relevant in determining Mr and Mrs S' eligibility to complain as Trustees. However, it was relevant in deciding whether it was appropriate to dismiss the complaint without considering its merits.

I said there could be many reasons why it may or may not be appropriate to dismiss a complaint where all the eligible complainants weren't all joined in. In the case of a trust, it may not be appropriate to consider a complaint made by an otherwise eligible trustee where there may be a dispute between the Trustees. It may be impractical or inappropriate to make a decision on a complaint that materially affected all the Trustees including those who didn't agree to it being made. It would depend on the particular facts and circumstances of the complaint.

When Mr and Mrs S first referred their complaints to the Ombudsman Service we contacted the firm of Independent Trustees (12 May 2015) for information about the SSAS. They were sent a copy of the complaint form that Mr and Mrs S had completed and so were clearly alerted the complaint was being made. They didn't raise any queries about the complaint or lodge any objection to it.

We asked the firm of Independent Trustees (in April 2020) to confirm they were aware that the complaints were made in February 2015. They said they couldn't confirm whether they were aware of the complaint in 2015 without looking through their archive files, and given the COVID-19 situation this wasn't possible. They said they:

"…cannot join this complaint. As the independent trustee [they were] *not party to any member Trustee decisions to appoint an adviser. The rules may state that all Trustees must*

agree an investment, however, [the independent Trustees] *will only follow the instruction of the member Trustees provided the investment is allowable within a pension scheme and this investment was."*

And

"As stated in the SSAS's terms & conditions all investment decisions must be made unanimously by all the Trustees of the SSAS. Once the decision has been made by the member Trustees, [the independent trustees] *will also agree provided that it is within the scheme rules and pensions legislation.*

*Mr and Mrs S did not have the authority to make the investment themselves, as all investment decisions must be unanimous. As the previous adviser gave the advice to all the Trustees, any of them are free to complain against the advice they received as trustees. [*The Independent Trustees] *will not comment on or join the complaint but we do not object to it either."*

I said my understanding was that Mr and Mrs S were eligible to complain as Trustees when they did so in 2015. Whilst we couldn't confirm whether there was a unanimous agreement between Mr and Mrs S and the Independent Trustees to make the complaint in February 2015, it was clear the Independent Trustees were aware of the complaint, at least by May 2015 at the latest when we contacted them. They didn't object to the complaint being made.

I said this wasn't relevant to Mr and Mrs S being eligible to bring the complaint as Trustees. But it was relevant in deciding whether the complaint should be dismissed. The Trustees had said although they didn't wish to join in with the complaint they didn't object to it being made. In the circumstances, I'd seen no persuasive reason to dismiss the complaint without considering its merits. I didn't think there were any issues that made it inequitable to consider the complaints made on 25 February 2015 as being by Mr and Mrs S as Trustees (in terms of dismissal).

So, in summary, I was satisfied that Mr and Mrs S didn't have to say explicitly in what capacity they were making their complaints when they did so in February 2015; I'm satisfied they were eligible complainants and made the complaint as Trustees – this wasn't a 'new' complaint. And I wasn't persuaded that the complaint should be dismissed without considering its merits.

Compensation

The Independent Trustees had said that it would be possible to pay any compensation into the SSAS. However, I said if for any reason it couldn't be paid into the SSAS it should be paid directly to Mr and Mrs S, less an appropriate deduction for income tax as I described in my 12 March 2020 letter.

Davies Financial's representative provided a further submission dated **17 November 2020.** It submitted, in summary:

- The key issue was that Mr and Mrs S had clearly brought their complaint *de facto* as beneficiaries of "the SSAS". It hadn't suggested they needed to state the capacity in which they were bringing the claim.

- The question to be considered was whether, viewed objectively, Mr and Mrs S were complaining in their personal capacities as beneficiaries, or in their formal capacities as Trustees of the Scheme. If there was evidence indicating that they were complaining in their personal capacities, they could not, at the relevant time, have been "eligible complainants". It said this was a question of law, and so my comments about fairness were irrelevant.

- It went onto outline the evidence it considered illustrated Mr and Mr S were complaining in their personal capacities and not as Trustees. It said this insurmountable weight of evidence showed that this was a complaint by Mr and Mrs S personally. Whether they said it was a personal complaint, a Trustee complaining or something else wasn't relevant.

- Mr and Mrs S took no action to involve the Independent Trustee in the decision to claim against Davies Financial and therefore had no legal authority to do so as Trustees on behalf of the Scheme. The Independent Trustee's agreement was required to make a complaint as Trustees on behalf of the Scheme. A complaint on any other basis would be *ultra vires* – and the representative assumed we did not seek to support illegal Trustee actions.

- The view that, effectively, it didn't matter in what capacity a complainant complained, particularly as the word "capacity" wasn't used in DISP 2.7, didn't stand up to scrutiny. It was evident from DISP 2.7 that the nature of the person (for which read capacity) complaining was relevant as only certain categories of person could complain. The question "what is the nature of the person complaining" (i.e. in what capacity is the complaint being made) therefore needed to be asked. It said this was supported by a simple reading of the wording of DISP 2.7, which stated:

  "*an eligible complainant must be a person that is:*
  ..
  (4) a trustee of a trust which has a net asset value of less than £1 million at the time the complainant refers the complaint to the respondent". It said this could only mean that same eligible complainant – it clearly couldn't be someone else.

The representative said DISP 2.7 was stating that a Trustee of a relevant Trust could be an eligible complainant, so long as the Trust met the relevant criteria when the Trustee referred the complaint to the firm. Here, the Trustee(s) didn't refer the complaint to the firm. Mr and Mrs S complained separately as beneficiaries of the Trust. It said even if I thought that evidence of the capacity in which a complainant was complaining wasn't strictly required, it didn't mean I could ignore evidence about capacity when it was there.

It said I had ignored two other cases it had referenced where I/we had recognised the relevance of the Trustee / beneficiary distinction, requiring the complaint to be brought by Trustees, not beneficiaries.

The representative also said I hadn't addressed the comments it had made about redress in its letter dated 31 March 2020.

My findings

I thank the parties for all the submissions that have been made.

As I am required to do, I have kept the matter of jurisdiction under constant review and have considered in detail all the further submissions that have been made since my provisional decision and letter of 10 September 2019.

In deciding the merits of this complaint I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of the complaint.

Jurisdiction - eligible complainant

Davies Financial's representative raised a number of further points about eligibility following my letter of 23 October 2020. I've carefully considered the points made, however they haven't changed my view. As I set out in my letter of 23 October 2020, DISP 2.7 (as it was at the time) defines "eligible complainant" in detail. I don't agree there is any basis for reading implied requirements regarding capacity into the definition of "eligible complainant" – it's an objective test as set out in the DISP Rules.

I accept that the 'nature' or 'capacity' of a person complaining is relevant, in as far as only certain categories of person can refer complaints to us. However, whether they have the relevant nature/capacity, or in other words are eligible complainants, is determined objectively by application of the facts to the relevant DISP Rules. As I said in my letter, these are rules and not guidance. They set out the requirements for an eligible complainant. The complainant is either eligible or not eligible.

The representative said the key issue was that Mr and Mrs S had clearly brought their complaint *de facto* as beneficiaries of "the SSAS". However, I don't agree. In my view the key issue is whether Mr and Mrs S were eligible complainants as provided for in the DISP Rules, giving the Ombudsman Service powers to consider their complaint. It's a matter of fact that they were Trustees, and I'm satisfied they were eligible complainants under the rules.

The representative said Mr and Mrs S didn't seek agreement from the Independent Trustees and without it they were acting *ultra vires*. As I said in my letter of 23 October 2020 and above, DISP provides rules about the requirements for eligible complainants and I'm satisfied Mr and Mrs S met the criteria. I considered the fact the other Trustees hadn't all joined in with the complaint in considering whether it should be dismissed without considering its merits – and for the reasons I set out, I didn't think it should be dismissed.

The representative's submission of 31 March 2020 said my interpretation of the jurisdiction rules could lead to "unfair results". In my 23 October 2020 letter I referred to any perceived unfairness to a firm in addressing the points the representative made and the reasons for my interpretation of the rules.

Jurisdiction - time limits

It's not in dispute that the complaint was made more than six years after the event complained of. So as Mrs S complained to Davies Financial on 25 February 2015 under DISP 2.8.2R (as it was at the relevant time) they needed to be aware (or ought reasonably to have become aware) that they had cause for complaint more than three years before that date to be out of time.

In summary, prior to 25 February 2012 Mr and Mrs S:

- Had been advised by a professional firm that the investment in Cape Verde (and Majestic Village No 1) was suitable for them;

- Had agreed to take a speculative risk with a proportion of their portfolio and would have reasonably understood at the time of the advice that the amounts they'd been recommended to invest were suitable;

- Could reasonably have expected significant fluctuations in the value of their investments given they were speculative;

- Had made significant profits on two of the speculative investments. But had also lost two other investments completely;

- Were alerted there had been deferrals to the redemption date for the Majestic Village fund. But its value was around the same as had originally been invested.

- Had been advised there were certain guarantees that applied if all the properties weren't sold;

- Had been told the value of their overall portfolio had fallen by 2.5% following the complete loss of the two UCIS investments.

Given the loss of two other speculative investments, and given the actual position as I have set out above, ought Mr and Mrs S to have become aware that they were over exposed to speculative risk, and that this was a result of a failing in Davies Financial's advice?

Mr and Mrs S have said they wouldn't have invested if they had realised there was a risk of complete loss. And as I've said, I think Mr and Mrs S were aware that Cape Verde was a speculative investment. I recognise there is an argument that as two speculative investments had failed, this ought to have prompted Mr and Mrs S to look into their remaining speculative investments in more detail. I've thought about this carefully.

In my experience, ordinary investors place great weight on their investments' current value, and historic performance relative to the amount initially invested. It's often a fall in the value of an investment that is the trigger for a retail investor to think they might have a problem.

Mr and Mrs S were aware the redemption date for another of their speculative investment's (Majestic Village) had been pushed back. But the headline value it was being given didn't change materially prior to the relevant date for limitation of 25 February 2012. Cape Verde (and Majestic Village) also appeared to provide some guarantees. As I've said before, as speculative investors Mr and Mrs S could expect some ups and downs. Although the value of Cape Verde fell slightly prior to 25 February 2012, it wasn't to such a degree that would be unexpected for a speculative investor.

In the circumstances and given Mr and Mrs S had agreed to this money being invested in a speculative investment, I don't think they ought to have realised that the Cape Verde investment was inappropriate for them in itself, more than three years before the complaint was made – even in the context of the two other speculative investments failing.

Davies Financial has said that given the amount Mr and Mrs S had invested in UCISs there couldn't be any argument that their degree of exposure to speculative risk would have been clear to them.

However, Mr and Mrs S would reasonably have understood the amounts they were being recommended to invest in Cape Verde (and previously Majestic Village) and the degree of risk they presented were suitable to their circumstances at that time.

The suitability letter for the investment in Cape Verde shows that there were discussions about investing future contributions in lower risk assets going forward, to equalise the overall risk profile. But the firm had effectively advised that the further speculative investment in Cape Verde was suitable. So I don't think it follows that Mr and Mrs S ought reasonably to have become aware they were over exposed to risk overall, against that background. Although Mr and Mrs S had suffered the complete loss of two investments, the overall portfolio had only dropped by about 2.5%. As I've said, judging what proportion isn't appropriate in more detail isn't straightforward for a layman. In this context, I don't think Mr and Mrs S had the knowledge and experience to have realised that they were over exposed to risk.

Taking all the facts into account, I don't think it would have been apparent that Mr and Mrs S had been inappropriately advised to invest in Cape Verde (or Majestic Village) and that this had caused them loss, or that they had been inappropriately advised in terms of their overall exposure.

Based on the facts as I've understood them and outlined, and for the reasons given previously and above, I'm not persuaded Mr and Mrs S were aware or ought reasonably to have become aware that they had cause for complaint about Cape Verde before the key dates set out above. And therefore I'm satisfied this is a complaint that I can consider.

Suitability of advice

The representative has said the heart of the issue is whether or not Mr and Mrs S understood that they were taking a higher risk with the result that they could suffer significant losses. And as long as they understood this concept the starting point was that it was up to them how much risk they wanted to take.

However, in my view this is the wrong "starting point". As I said in my provisional decision, the "starting point" is that Davies Financial was obliged to provide suitable advice. As Davies Financial has said itself, if clients say they have an appetite for more risk than is suitable for their circumstances*, "Sometimes this means protecting them from themselves by advising restrictions".* It's the adviser's role to advise that taking such risks isn't suitable if they aren't in a position to absorb the losses potentially flowing from those risks. Mr and Mrs S were retail investors. They may have run a successful business but they'd employed Davies Financial for its professional expertise and I'm satisfied they were entitled to rely on its advice.

The adviser was required to take into account all the circumstances and assets of a client. Mr and Mrs S may have agreed to accept a speculative risk with a particular investment, and I think they understood it was a speculative fund. However, the degree of risk presented by Cape Verde shouldn't have been considered in isolation. It needed to be considered in the context of Mr and Mrs S' overall circumstances.

Ultimately, following the investment in Cape Verde Mr and Mrs S had about £265,000 invested in UCIS, about £170,000 in equities; £80,000 in property related funds and £170,000 in gilts/fixed interest and cash.

Davies Financial has said the proportion in UCISs should be considered against all of Mr and Mr S's assets, including their business. And they have provided a cash-flow analysis showing Mr and Mrs S had the capacity to accept the risks of their speculative investments failing entirely.

It's well known that cash-flow forecasts are very sensitive to the underlying assumptions behind them. For the reasons I outlined in my letter dated 10 September 2019, I think the assumptions used were optimistic and the forecasts can't be relied upon to show Mr and Mrs S had the capacity to accept the risks they were exposed to following the firm's advice.

However, as I said in that letter, although they were based on favourable assumptions I didn't think it was unreasonable to show how things might turn out in those circumstances. But the forecasts were provided as evidence to show Mr and Mrs S' capacity *for loss.* In assessing capacity for loss Davies Financial should have shown what the position would have been in different circumstances and in a scenario where events didn't work out favourably; in effect stress testing to show the impact of less favourable future scenarios and more than one potential outcome.

I think "sensible investment advice" would include an assessment of all the risks that Mr and Mrs S were exposed to and consideration of the differing levels of risk presented by the different assets classes they were invested into. A consideration of their position where things didn't go well would include looking at scenarios where equities didn't perform well. Recent history shows that equities do present significant risks, and so this should have been taken into account in assessing Mr and Mrs S' overall capacity for loss.

Davies Financial has said the call log from July 2014 shows that Mr and Mrs S had indicated they were happy with a £44,000 net of tax income in 2014. It's said this shows they were in a position to speculate with a decent part of their pension funds and still live the lifestyle in retirement that they wanted.

After the investment in Cape Verde Mr and Mrs S had about £265,000 invested in UCIS, about £170,000 in equities; £80,000 in property related funds and £170,000 in gilts/fixed interest and cash. I accept that it was likely that some additional pension contributions would be made, and that the business would provide further funds on its eventual sale. But as I've said, what level was uncertain for both, and dependent on the future success of the business.

What's key here is whether Mr and Mrs S had the capacity to accept the risks presented given their circumstances in 2007. Putting such a large proportion of their pension provision in unregulated investments and equities presented significant risks to Mr and Mrs S being able to secure this level of income in retirement – irrespective of the position in 2014. I don't agree the 2014 note illustrates that Mr and Mrs S had the capacity to take significant risks with the majority of their pension and investments in 2007.

The representative has said the reference to sequencing risk wasn't understood. However, as the index selected had very good growth in the first few years it led to a sizeable fund by the time that withdrawals were taken and which were included in the forecast.

Davies Financial has provided cash-flow forecasts from 2015 showing that Mr and Mrs S would have sufficient income through retirement. However, what I'm considering here is their

capacity for loss given their circumstances in 2007; the advice needs to be considered in the context of the circumstances at the time.

The representative has said that if advice had to be given on the assumption that a customer's business went downhill, that their income significantly reduced and that their other investments crashed, then no customer would ever have sufficient capacity for loss and no sensible investment advice could ever be given.

As I've said, in my opinion a firm should consider different scenarios with varying outcomes in order that their client gets an understanding of the potential implications of the advice given. But in assessing capacity for loss, I think this should include considering the position where their other risk based investments don't increase in value or fall.

This reflects reality. As I've said above, equities do represent significant risks – the potential to make material losses from investment in equities is a known risk. And that's the point of assessing capacity for loss – it wasn't merely the unregulated/qualified funds that were exposed to risk here – the equity investments were also exposed to significant risks. The ultimate outcome will likely lie somewhere in between a poor scenario and a good one. But in assessing capacity for loss the underlying nature and different risks presented by all the different assets held should be taken into account to make an appropriate assessment.

As I said in my provisional decision, I think the 2010 FSA report was an indication of what the regulator thought had been industry good practice prior to its publication in 2010. Clearly Davies Financial couldn't have known about the content of the report in 2007. However, the guidance hadn't changed anything in terms of the requirements on firms to provide suitable advice which applied when Cape Verde was recommended. I don't think the regulator's 2010 report was setting limits for UCIS exposure to *"this sort of level"* for every case. But as I said, diversification is a well know principle of investment risk management and the nature and additional risks presented by these investments mean they are only likely to be suitable for a limited proportion of an investor's portfolio. What's considered a reasonable proportion will depend on an investor's particular circumstances.

There was no "overall" attitude to risk established for Mr and Mrs S. The representative has said this wasn't uncommon in 2007 and they had different attitudes to risk for different investments. It set out the differing levels of risk that Mr and Mrs S had taken – which varied from an ATR of 1/5 for a £50,000 investment to 5/5 for certain pension funds including Majestic Village No 1.

I accept investors may want differing levels of risk with different investments. But following the firm's advice to invest in Cape Verde Mr and Mrs S had about £265,000 invested in speculative UCIS/Qualified Investor funds. This was almost 40% of their entire savings and pension provision. They had about another 25% in equities and 10% in property - again risk based assets.

For the reasons I outlined in my provisional decision my view is that the advice exposed Mr and Mrs S to a greater level of risk than they had the capacity to accept. In my view it was clearly foreseeable that they could lose a significant amount of that provision with limited investments in safer assets to fall back on. I'm not persuaded the advice to invest the £100,000 in the Cape Verde No 4 Fund was suitable in the context of all the circumstances.

For the reasons explained in my provisional decision, I don't think there is any benefit in assessing the amount invested speculatively in 2007 against the potential assets at

retirement date several years away and based on assumed returns. This has no relevance in assessing the degree of risk Mr and Mrs S were exposed to in 2007. Whilst future plans should be taken into account there wasn't anything in place here that materially affected the degree of risk that Mr and Mr S were exposed to in 2007.

The representative questioned what was *"appropriate weight"* when taking the value of the business into account. I think the *"appropriate weight"* given should be considered in the context of the particular circumstances. It was likely to provide some value. But its ultimate value was uncertain and wasn't guaranteed as it was exposed to the usual risks of business. As I said, the business was valued at a significantly lower amount a few years later. And pension contributions were also reduced. These risks were all reasonably foreseeable at the time the advice was given in 2007.

Davies Financial has outlined the reasons it considers that Mr and Mrs S' evidence is unreliable. Whilst I have taken into account what Mr and Mrs S have said, as well as what Davies Financial has said, I have placed most weight on the contemporaneous evidence that is available which clearly records the circumstances from the time. As I've said, I'm satisfied that Mr and Mrs S had agreed to accept significant risk with this particular investment. And that they ought reasonably to have understood it was a speculative investment. However, taking everything into account and for the reasons outlined above, I don't think the advice was suitable in their particular circumstances.

recommendation of cautious investments

For the reasons I have given I think the advice to invest in Cape Verde was unsuitable. And that suitable advice would have been to invest in a more cautious manner given the risks that Mr and Mrs S' other assets were exposed to. I need to decide what Mr and Mrs S would likely have done if Davies Financial had advised them to invest more cautiously from the outset; either accepted and followed that advice or, as Davies Financial says, it's more likely that they would have insisted on investing in Cape Verde.

The representative has said Davies Financial had various discussions about the risks that Mr and Mrs S were taking and how much exposure they wanted to higher risk investments. The representative has referred to the documents from the 2007 advice about Cape Verde as evidence that the adviser had discussions about how much risk Mr and Mrs S were taking overall; how much exposure they wanted to higher risk investments; and that they had a strong wish to seek a higher return on a small part of their wealth.

It's not in dispute that Mr and Mrs S were prepared to accept significant risks with a *proportion* of their money. But in my view they were advised to invest too high a proportion in speculative investments. The firm were effectively advising that the further investment into Cape Verde was suitable. Whilst the 2007 fact find recorded they were *"…keen to invest in this fund"* the discussions need to be considered in that context – that they would have understood it was suitable for them to take the risks presented by a further investment in a speculative fund.

As I've said above, the starting point is Davies Financial should have been providing suitable advice. To do that it needed to look at Mr and Mrs S circumstances in the round – not just focusing on the risks presented by the isolated investments in question. I don't think the evidence shows that Mr and Mrs S would have insisted on investing speculatively if the adviser had initially advised them to invest in a more cautious manner. In my view the evidence referred to by Davies Financial merely illustrates that Mr and Mrs S were willing to

invest a proportion of their money in a speculative manner when the adviser recommended it was suitable for them to do so. I've seen no evidence to suggest that the adviser told them the investment in Cape Verde resulted in too high a degree of exposure to risk overall, but they were insistent on investing in it at all costs.

In my experience most clients follow what their adviser recommends on most occasions – the adviser is the expert in the matter and they generally trust the adviser. As Davies Financial has said, Mr and Mrs S had been willing to take different levels of risk with different investments over time, including very low risk investments. In this context, and given the particular evidence in this case, I'm satisfied its more likely than not that Mr and Mrs S would have invested in a more cautious manner if the adviser had recommended them to do so.

Delays

Davies Financial's representative has said Davies Financial shouldn't be penalised by having to pay additional redress up to the date of a decision because of our delays.

As I've said, there have been delays and I apologised to both parties and I set out why I thought redress should be calculated at decision date. Whilst I've taken account of what Davies Financial has said, I'm satisfied Davies Financial provided unsuitable advice and caused the losses that flowed from that advice. Taking everything into account, I think it's fair in all the circumstances that the comparison is carried out as at the date of my final decision.

My final decision

My final decision is that, in my opinion, it is fair and reasonable in all the circumstances to uphold the complaint.

I order Davis Financial Limited to calculate and pay compensation to the Trustees of "the SSAS" on the following basis.

Fair compensation

My aim is that Mr and Mrs S as the Trustees of "the SSAS" should be put as closely as possible into the position they would probably now be in if they had been given suitable advice.

The representative has said that if redress was payable it should be calculated on the basis suggested by Mr and Mrs S – equivalent to the return from a high interest cash fund.

Whilst I think Mr and Mrs S would have invested differently, I don't think it's likely they would have invested in a high interest cash fund. I think it's more likely than not that they would have invested in the manner recommended by the adviser.

For the reasons I explained above, I think given their existing position, suitable advice would have been to invest more cautiously but in a mix of assets. It's not possible to say *precisely* what they would have done, but I'm satisfied that what I've set out below is fair and reasonable given Mr and Mrs S' circumstances and objectives when they invested.

what should Davies Financial Limited do?

To compensate the complainant fairly, Davies Financial Limited must:

Compare the performance of the investment with that of the benchmark shown below. If the *fair value* is greater than the *actual value*, there is a loss and compensation is payable. If the *actual value* is greater than the *fair value*, no compensation is payable.

Davies Financial Limited should add interest as set out below.

If there is a loss, Davies Financial Limited should pay such an amount into "the SSAS" to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance. The Independent Trustees have said that it will be possible to pay compensation into the SSAS.

However, if Davies Financial Limited is unable to pay the compensation into "the SSAS", it should pay that amount direct to Mr and Mrs S. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mrs S' actual or expected marginal rate of tax at her selected retirement age.

I consider Mrs S (and Mr S) is likely to be a basic rate taxpayer at retirement, so the reduction would equal the current basic rate of tax. If Mrs S would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

Davies Financial must also pay the Trustees of "the SSAS" £300 for the distress and inconvenience I'm satisfied the loss of a substantial proportion of the pension fund will have caused.

Income tax may be payable on any interest paid. If Davies Financial Limited deducts income tax from the interest, it should tell the Trustees of "the SSAS" how much has been taken off. Davies Financial Limited should give the Trustees of "the SSAS" a tax deduction certificate if they ask for one, so they can reclaim the tax from HM Revenue & Customs if appropriate.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Stirling Mortimer Cape Verde No 4 Fund	Now delisted	for half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	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)

actual value

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

It may be difficult to find the *actual* value of the investment. This is complicated where an investment is illiquid (meaning it could not be readily sold on the open market) as in this case. So, the *actual value* should be assumed to be nil to arrive at fair compensation. Davies Financial Limited should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the compensation and the balance paid as I set out above.

If Davies Financial Limited is unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. Davies Financial Limited may require that the Trustees of "the SSAS" provide an undertaking to pay Davies Financial Limited any amount they may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Davies Financial Limited will need to meet any costs in drawing up the undertaking.

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 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 are a large number of regular payments, to keep calculations simpler, I'll accept if Davies Financial Limited 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 and Mrs S as Trustees of "the SSAS" were willing to accept some risk. But I think in their circumstances they only had limited capacity for additional risk.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.

- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.

- I think a suitable level of risk would be somewhere in between. The 50/50 combination is a reasonable proxy for the risks Mr and Mrs S as the Trustees of "the SSAS" should have been suitably advised to take.

- It doesn't mean that they would have invested 50% of their money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return they could have obtained with suitable advice.

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000 (as it was at the time), plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend that Davies Financial Limited pays the balance.

determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My final decision is that Davies Financial Limited 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 set out above.

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Davies Financial Limited pays the Trustees of "the SSAS" the balance plus any interest on the balance as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs S – as Trustees of "SSAS" - to accept or reject my decision before 15 February 2021.

David Ashley
Ombudsman

Copy of provisional decision

complaint

Mr and Mrs S' complaint is that in November 2007 Davies Financial Limited advised them to invest in the Stirling Mortimer Cape Verde No 4 Fund which they believe was unsuitable for them.

background

Mr and Mrs S were running their own business. They had an existing Small Self-Administered Scheme (SSAS). And they had some other pension plans. Mr and Mrs S had been advised by Davies Financial for several years and it was clear that the adviser knew the clients well when they met in 2007.

Davies Financial has said at the time of the advice Mr and Mrs S had, in summary, approximately:

- £310,024 in mainstream pension funds/cash
- £78,282 in Majestic Village (a Qualified Investor fund in the SSAS)
- £53,470 in Pinder Fry & Benjamin Regional Office Fund (an unregulated collective investment scheme – UCIS).
- £34,050 in Pinder Fry & Benjamin Gold 12 (a UCIS).
- £16,549 in mainstream PEP investments
- £37,000 in cash deposits.
- £242,000 in surplus company profits, of which £100,000 was going to be used for investment purposes.

Davies Financial has said Mr and Mrs S were paying around £2,920 per month into their pensions (I note the February 2007 fact find appears to show £2,120 per month was being paid at that point in time; it's not entirely clear to me whether that had increased by November 2007).

A suitability report was given to Mr and Mrs S dated 23 November 2007. This said, amongst other things, that Mr and Mrs S' business had made a net profit for the year of £124,029. So it was going to pay them a bonus of £50,000 each. It said their objective was to accumulate maximum pension funding. And they both wished to maximise investment growth over the following 3-4 years and were keen to take advantage of an investment opportunity if they felt the risk warranted.

The report said Mr S

"…is now considering potentially drawing his pension benefits in approximately 3-4 years' time and you anticipate your company will continue to make good profits at least over that period, you will continue to fund additional large pension contributions from your company to boost the value of your SSAS."

This was consistent with the age at which Mr S said he wanted to retire recorded in the fact find. It also noted Mrs S was intending to retire at about the same time.

In respect of risk it said:

"In this instance you are willing to utilise a significant proportion of your pension funds for the purposes of investing in funds categorised as Speculative.

You have confirmed that in respect of this investment you have a ***Speculative*** *attitude towards investment risk based on the following criteria:*

5 Speculative
High Risk

You understand the relationship exists between risk and reward. Your aim is to maximise your returns over the longer term, and you are therefore prepared to accept significant day-to-day fluctuations in the value of your money and the resulting risk of a possible loss arising at any stage. To achieve the above you will consider investing in the following types of areas:-

Funds that invest in a narrow range of assets, for example shares within particular markets or sectors, which expect to be very volatile in value or individual shares."

Davies Financial recommended that £100,000 (£50,000 each for Mr and Mrs S) was invested in the Stirling Mortimer Cape Verde Nos 4 Fund.

The report gave a summary of the main features of the investment. It said:

"You understand this is a sophisticated and speculative investment and you are willing to expose it to a greater risk in return for the potential for higher growth.

As I have already mentioned this is a specialist fund with an underwritten guarantee, which states that should the builder cease trading, a 15% bonus is returned to the fund for any of the properties, which have yet to be completed. Bearing in mind this fund could be buying the right to purchase contracts on somewhere in the region of 450 properties and allowing for the fact that the fund has already purchased a number of contracts, and will continue to do so until the time the fund closes to new business at the end of January, the likelihood of any of these properties not been completed or sold over a period of approximately 2-3 years is extremely thin.

That said if we work on the basis that none of the properties are sold and the developer ceases trading before that are completed ,the fund receives a 15% bonus on all of the properties, plus return of their original investment, from which would be deducted the annual management charge of 1.5% per annum.

I should point out this fund's objective is not to return a 15% bonus to the investors, this is just being provided as an added benefit. It is instead aiming to benefit from an opportunity to invest in property development and gain access to the potential rises in the market values in what is tipped to be one of the hot spots for holiday property investment over the next few years. In addition to this the fund is seeking to obtain greater growth by only purchasing the "right to purchase" contracts rather than the properties as a whole, a process, which can further enhance the returns to the investors. By using economies of scale and purchasing a large number of 'right to purchase' contracts through this one fund, the fund managers have also been able to negotiate lower prices for the right to purchase contracts than would normally be available to anyone looking to but the right to purchase them directly from the developer, a factor which will further enhance the potential returns to the investors in this fund."

The investment in Cape Verde went ahead. An application form was signed on 16 November 2007. The amount to be remitted was £100,000. Mr and Mrs S signed a Sophisticated Investor's Certificate on the same date as part of the application process. This said that the adviser *"…being an authorised person for the purposes of the Financial Services and Markets Act 2000"* confirmed Mr and Mrs S were *"…sufficiently knowledgeable to understand the risks associated with the investment."*

Mr and Mrs S subsequently became concerned that they'd been poorly advised and complained to the firm. Davies Financial didn't uphold their complaint. Very briefly, it said Mr and Mrs S wanted speculative investments. And they were already experienced with other high risk investments. It considered its advice was suitable for Mr and Mrs S' particular circumstances.

Mr and Mrs S referred their complaints to us. The background, very briefly, is that an ombudsman sent a decision outlining why she thought the complaints were within our jurisdiction to consider. And she thought this complaint should be considered separately to another complaint made by Mr and Mrs S.

Another ombudsman issued decisions outlining why he thought the complaint should be upheld; essentially because he didn't think the advice given had been suitable. He set out how he thought compensation should be calculated and paid.

Davies Financial didn't agree with the ombudsman's provisional findings. It provided a number of submissions over a period of time setting out its view of the matter. I've considered them all in full, albeit I've only summarised what I think are the key points below. My understanding of the circumstances is outlined above. So I haven't specifically commented further where concerns have been raised about our understanding of the facts; my decision is based on what I've set out in this decision. And both parties have the opportunity to make further representations in response to this provisional decision. So in summary, I said:

- We should reconsider our jurisdiction to consider the complaint and our decision to look at two complaints separately.

- It had never claimed that Mr and Mrs S were 'experts' (nor insistent clients). Its point was that Mr and Mrs S were experienced business people; they clearly understood the investment and the concept of putting their money at considerable risk with the aim of reaping greater reward.

- Davies Financial had been dealing with Mr and Mrs S for a number of years. They'd formed their understanding of their knowledge and experience over this time based on hours of meetings and discussions with them. Davies Financial had a conversation with Mr and Mrs S to ascertain their understanding of the product and its risks.

- Mr and Mrs S met the criteria set out by the regulator to be regarded as 'Sophisticated Investors' for the purposes of considering and agreeing to make the Cape Verde investments. They agreed that they were *"…sufficiently knowledgeable to understand the risks associated with the investments."* It said we couldn't *"…simply allow investors to abrogate all responsibility for documents they see, agree and sign."* It thought Mr and Mrs S had indicated they understood the nature of the investment and we hadn't given this appropriate weight.

- We appeared to accept that it was made clear to Mr and Mrs S that the investments were speculative in nature. And that they risked the loss of their entire capital. There was no suggestion Mr and Mrs S didn't understand this. Although we'd said they may not have understood the risks of gearing this had been clearly set out in the documentation. The firm had also spent considerable time explaining the investment. Mr and Mrs S had confirmed on more than one occasion they had read and understood the documents.

- The investment in Cape Verde was to be one of the last high risk investments made by Mr and Mrs S. They were happy to do this in the context that they intended on making very significant regular pension contributions going forward into lower risk mainstream investments. It was reasonable for Davies Financial to take into account Mr and Mrs S' future intentions as part of its financial planning.

- It wasn't appropriate to put so much weight on the investment presenting too high a percentage of Mr and Mrs S' assets at a point in time. Investing wasn't a rigid process. They were making significant further contributions into their pension (about £35,000 per year). Any notional percentage invested in UCIS would be diluted going forward and so Mr and Mrs S' capacity for loss was assessed in this context. Mr and Mrs S had the capacity to lose the entire investment and this was a relevant factor when taking the suitability of the advice into account.

- If we persisted with a percentage analysis approach then we should consider the value of the investment against Mr and Mrs S' overall position; including their business assets. Their assets totalled around £1,171,375 (including a £400,000 valuation for the business and £242,000 surplus company deposit). So the £100,000 invested in Cape Verde represented

8.5%. And their total UCIS investments of £265,802 at the time represented 22.7%. This was anticipated to reduce over time and it didn't think this was excessive.

- Given reasonable projections, the Cape Verde investment would represent about 4% of Mr and Mrs S' total accumulated retirement assets by the time they reached their intended retirement date in 2015. And around 10% in UCISs overall. It thought this was consistent with the figures the ombudsman previously deemed to be appropriate in accordance with FSA report – a 5% limit for a single UCIS and 15% limit for investments in UCIS overall.

- It didn't agree the 2010 FSA report referred to by the ombudsman provided for such limits in any event. We had said the report was *"…clarifying its position on the issue."* This suggested it had previously given guidance. However the Financial Conduct Authority (FCA) had confirmed this was the first guidance the regulator had published about UCIS investments. And no express view had been given on an appropriate unregulated investment holding. It didn't think IFAs should have been complying with the examples of good practice before then. It also didn't follow that all firms which didn't follow the good practice examples were negligent.

- Its understanding of the regulator's initial concerns about UCIS was that certain investor protections weren't in place; rather than about the degree of risk that they presented. It said it was possible to have a UCIS that was relatively low risk. And that concerns about UCIS becoming riskier didn't arise until around 2011. Even then, this was largely concerns that procedural and regulatory requirements not being followed rather than them being high risk.

- Mr and Mrs S were aware it was a speculative investment that risked its entire loss. The call log dated 9 October 2009 – about the total loss of another UCIS – said Mr S was *"…disappointed but knew the risks to start with."*

- Over the period that Davies Financial was their adviser Mr and Mrs S had taken considerable risks across their various business interests. And not all had been successful.

- The value of Mr and Mrs S' business formed part of their retirement planning. The advice had been given on the basis that the business' value would increase each year and ultimately be sold at the most appropriate point through the five yearly franchise to provide additional retirement funding.

- Mr and Mrs S had been running their business for many years and were experienced in dealing with complex business related issues. They were willing to take higher risks with a proportion of their investments. They were aware the term speculative meant they could lose all their capital. In the adviser's experience business people were normally more speculative as the nature of self-employment required an acceptance of risk. It was grossly unfair to say they didn't understand the nature of the investment.

- It noted that under the Risk Factors section of the Principle Memorandum it warned clients the investment *"…could result in the loss of all or a proportion of a Shareholder's investment in the Preference shares of any Cell. "* Mr and Mrs S had been alerted to the risks of losing their capital in the other UCIS investments. And they were clearly fully aware of the risk of losing their entire capital when investing in Cape Verde.

- Mr S was attracted by the prospect of off plan property investment abroad. They had considered doing so directly but hadn't got the available funds at the time.

- It provided a background from earlier years leading up to its advice to invest in Cape Verde. It said due to the change in legislation Mrs S wasn't able to take her benefits until 2015 at the earliest. Mr and Mrs S changed their minds about their intended retirement date and the fact-find from February 2007 recorded Mr S didn't envisage needing access to his benefits for another 6/7 years. The business was continuing to flourish and the intention was to maximise

pension contributions when possible. Recommendations were also made to put £32,000 into Mr S' EPP *"to help balance out the risk of this new investment"* by investing in a *"diversified holding in cash, gilts and fixed interest, index linked, property and equity high income funds."*

- The fraudulent activity in relation to the lawyers of the fund couldn't have been predicted. This didn't give the ombudsman a reason to determine the investment was unsuitable for Mr and Mrs S' circumstances at the time.

- The decision to take or not take risk was with the individual. It was Mr and Mrs S' prerogative as to how much risk they wanted to take. It was the adviser's role to explain investment risk in such a way as for the clients to understand it and apply it to their own circumstances, and then to agree an appropriate risk strategy.

- UCISs were products and not investments. It was wrong to classify them all as the same investment. Mr and Mrs S had experience of previous UCIS investment and as intelligent individuals they wouldn't have entered into high risk investments of this nature without reading the information they were given.

- It disagreed that the use of the suggested index for calculating compensation was reasonable or fair. It didn't reflect how Mr and Mrs S had invested.

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 when considering its merits.

what is the complaint about?

I've summarised what the complaint is about above. However the complaint letters to the firm dated 25 February 2015 provided more detail. They started:

"I wish to register a complaint about the sale of four investment products you recommended as being suitable for me and which I believe to have been unsuitable."

And

"I wish to register a complaint about the sale of an investment product you recommended as being suitable for me and which I believe to have been unsuitable."

When the complaint was referred to us Mr and Mrs S completed a complaint form. They set out their main concerns which reflected what was said in the complaint letter to the firm. And they attached a copy of the complaint letter.

I'm satisfied that the complaint is about the suitability of the advice to invest in Cape Verde.

has the complaint been referred in time?

One of our ombudsman issued decisions dated 19 January 2016 and 25 February 2016 outlining why she thought two of the complaints had been made in time and two were too late. I agree that this complaint has been made in time, largely for the same reasons.

I think it's also material that Mr and Mrs S had agreed to take significant risks with this investment. I don't think an investor, in that context, would expect a smooth ride. I think it would be reasonable to expect some ups and downs. And I don't think deferrals of the redemption date ought to have alerted them they had cause for complaint. They'd been told there were certain guarantees that applied if all the properties weren't sold. And some uncertainty wouldn't be unexpected for an investment presenting appreciable risk.

how many complaints were made?

In deciding this issue I think what needs to be considered is whether the expression of dissatisfaction on the complaint form is about one complaint or more. Complaint, as referred to in the DISP Rules, is defined in the Glossary of the FCA Handbook 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 a redress determination, which:

(a) alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and

(b) relates to an activity of that respondent, or of any other respondent with whom that respondent has some connection in marketing or providing financial services or products, which comes under the jurisdiction of the Financial Ombudsman Service."

So I think the question is to identify what the "complaints" are about. And whether they relate to one or more provisions of, or failures to provide, a financial service that relates to an activity that we have jurisdiction to consider.

Each case will depend on its own facts. And I don't think there is any single factor that is determinative. But my view is that, in this case, it's appropriate to consider separate complaints because:

- Advice (the provision of a regulated financial service) was given on separate occasions; the advice to invest in Majestic Village in May 2006 and advice to invest in Cape Verde in November 2007.

- On each occasion different products were recommended.

- Separate recommendations were made and individual 'suitability' reports were issued each time. This indicates a new assessment of Mr and Mrs S' circumstances was made on each occasion and new and distinct advice was given.

In the circumstances, I'm satisfied that there are two separate provisions of a financial service, and the issues raised should be considered as two separate complaints.

was the advice to invest in Cape Verde suitable?

Davies Financial has said that Mr and Mrs S were intelligent and well educated clients. It's said they had the ability to absorb and understand technical details; they had experience of dealing with a variety of complex matters in the course of building up and running their business. It thinks Mr and Mrs S understood the investment they were making and the risks it presented. And they were prepared and had the capacity to take those risks. Effectively, in its view the investment in Cape Verde was suitable.

I accept that Mr and Mrs S may have been have been intelligent well educated clients. They had built up a successful business. And they had also built up significant savings and investments. They'd also got some experience of similar types of investment.

However Mr and Mrs S weren't pension/investment experts. The firm has said it's never claimed they were. But the point being made is that they had employed the firm's services to advise them on their pensions and investments because the firm *were* the experts. They were paying the firm for its professional advice. It was the firm's responsibility to ensure its advice was suitable for their

circumstances (as provided for in the Conduct of Business Rules - COB at the time). So this is the starting point.

My understanding is that the Stirling Mortimer No 4 Fund Cape Verde was an unregulated collective investment scheme (UCIS). I note the Supplemental Memorandum dated 26 July 2007 said:

"*Each Cell of the Fund is an unregulated collective investment scheme for the purposes of the Financial Services Markets Act 2000 of the United Kingdom and distributions of this Supplemental Memorandum is restricted by sections 21 and 238 of the FSMA"*

I accept the July 2010 FSA report didn't set any specific limits on what proportion of a portfolio could be invested in UCISs. And the examples of good practice relating to the 3 and 5% figures related to processes and procedures for firms setting up maximum proportions of UCIS in portfolios and ensuring they were monitored. I also agree that there wasn't any guidance that there should be a 15% limit overall.

However although it related to processes, I think the implication of the example citing a 3-5% concentration of UCIS in a portfolio was an indication of what the regulator thought had been industry good practice prior to its publication in 2010. Whilst the regulator has confirmed this was the first 'guidance' given about UCIS in particular, it didn't change anything in terms of the requirements on firms to provide suitable advice which applied when the advice to invest in Cape Verde was given.

Diversification is a well know principle of investment risk management. Although there may not have been any particular guidance about concentration given in 2007, I think the unregulated nature of the investments ought to have alerted firms that there were additional risks over and above those that normally applied to regulated investment funds. So they should be treated with caution, and were only likely be suitable for a limited proportion of an investor's portfolio.

The suitability report recorded that Mr and Mrs S were willing to utilise a significant proportion of their pension for the purposes of investing in a speculative fund. And I think the investment, when considered in isolation, was reasonably aligned to the speculative degree of risk that Mr and Mrs S had agreed to accept.

However, advice cannot be given in a vacuum. And the firm appears to accept that the advice needs to be considered in the context of Mr and Mrs S' circumstances as a whole.

Mr and Mrs S had built up significant pension provision. The fact find recorded they'd drawn £30,000 each in salaries/dividends from their business. The business also had surplus profits of around £242,000 - £100,000 of which was funding the investment in Cape Verde. So they had good incomes. And they'd built up good levels of savings and investments. But the incomes and pension provisions was between the two of them.

The actual income they could have bought with their fund at the time was a reasonable one – but not exceptional. Their objective was recorded as for retirement in 3-4 years. The firm has said they constantly changed their plans for retirement. I don't think this is unusual, and if their plan at the time the advice was given was for retirement within 3-4 years the firm ought to have tailored its advice to that objective. Even though they were planning to make significant contributions to their pension during that period, they had limited time to build up further provision or recover any losses to investments that were at risk.

I accept that it was reasonable for the firm to take into account the business and future planning in assessing the suitability of its recommendations. However there are no guarantees that a business will continue to be successful. And I think the nature of the business assets and the future uncertainty also needs to be considered so that appropriate weight is attached to those 'assets'. I don't think they'd built up so much wealth by 2007 as to enable them to take significant risks with a large proportion of their provision.

Portfolio construction isn't an exact science. What's considered a reasonable proportion of a portfolio to invest in UCIS (or similar type funds) will depend on the characteristics of the particular investment and the investor's particular circumstances. I don't think it's in dispute that the investment in Cape Verde was speculative. And Mrs and Mrs S already held around £165,800 in similarly speculative funds. So following the investment in Cape Verde Mr and Mrs S had about £265,800 invested in speculative UCIS/Qualified Investor funds.

Davies Financial has said, this apart, Mr and Mrs S had about £310,000 in mainstream pension funds. I think the actual position may have been different because the pension values in the November 2007 'Policy Precis' are the same as those in the February 2007 document. It's not entirely clear but I don't think the values take into account the additional contributions made – including the £32,000 lump sum contribution proposed in February 2007. I note the single premium amount had increased by the associated £32,000 – the only change to the Feb 2007 statement. So I assume that contribution was made.

On this basis, I think Mr S' EPP likely had a higher value in November 2007 - by about £45,000. Mrs S' EPP was also higher – by about £10,000. It's likely the other values were also slightly higher – but I don't think by amounts that would be material to the outcome of the complaint.

Ultimately, my understanding is that as well as the £265,000 invested in UCIS, Mr and Mrs S had about £170,000 in equities; £80,000 in property related funds and £170,000 in gilts/fixed interest and cash.

Davies Financial has said the proportion in UCISs should be considered against all of Mr and Mr S's assets, including their business. They have said this would be about 22.7% in UCISs. And using reasonable assumptions this would fall to around 10% by the time they retired (each would be slightly less on any revised figures).

I don't agree it's reasonable to assess the amount invested speculatively in 2007 against the potential assets at retirement date. What future contributions would actually be and the level of investment returns could not be known. Clearly forecasting and planning are valuable tools. But exposure to risk is during the period of investment. It's reasonable to take future plans into account and it's a well-known strategy to gradually move into lower risk assets as an investor approaches retirement. But that is from a position of being appropriately invested as a starting point. If the degree of risk was *materially* too high in 2007, the fact it would have reduced by retirement date would be of little benefit if the value had plummeted some years before. I don't think a portfolio should be significantly out of alignment with the appropriate level of risk over a material period of time.

Davies Financial has said that Mr and Mrs S signed a sophisticated investor certificate. And this said they agreed they were *"…sufficiently knowledgeable to understand the risks associated with the investments."* However I think the certificate said it was the adviser, being an authorised person, who was confirming they were sufficiently knowledgeable to understand the risks associated with the investments.

But I think in any event the evidence suggests that Mr and Mrs S were willing to take risks with a proportion of their money. And I think it's likely that they understood generally that the investment itself presented significant risks – albeit I don't think the risk of complete loss was made clear. Although the suitability report provided general risk warnings it also went into lengthy detail about the guarantees this particular investment provided. And the adviser said the likelihood of any of these properties not been completed or sold over a period of approximately 2-3 years was *"extremely thin."*

Although risks were explained (and I note the adviser said in the report he had spent considerable time explaining the potential downsides) his personal opinions were all positive. For example he said *"…It is my opinion that this fund has the potential to achieve excellent returns ……I am extremely positive regarding the ability of this fund to make significant potential returns for each investor."* So although Mr and Mrs S may have been alerted to the fund's risks I think the risk of total capital loss would have appeared unlikely.

But I don't think their decision to invest turned on this in any event. As I explained above, I think what's key is that Davies Financial was Mr and Mrs S' advisers. Its role was of primary importance. The firm was obliged to assess all the risks presented by the transaction. It needed to consider whether the degree of risk Mr and Mrs S were taking overall was appropriate to their circumstances. This included the risks that they were already exposed to. And then give suitable advice. I think it's likely Mr and Mrs S would have followed the recommendation given by the firm it had employed to provide expert advice.

Davies Financial has said that the advice should be considered in the context of all Mr and Mrs S' assets. And I don't disagree with its view, and in particular that consideration should be given to all the amounts exposed to risk. But as I've said above, appropriate weight needs to be given to the nature of the different assets held.

The adviser was aware Mr and Mrs S' business was a franchise. And that Mr and Mrs S didn't own their own premises but owned the fixtures and fittings. The value of the business' tangible assets was limited. They've said the franchisor owned the goodwill of the business and its future saleable value depended on how long was left on the franchise when it was sold. So its value reduced over the term of the 5 year franchise.

The firm said the value of the business was about £400,000 at the time the advice was given. It's said the value would increase and Mr and Mrs S intended to time the selling of the business to maximise its value. Clearly I accept this should be taken into account. However the value of the business at retirement date was uncertain, wasn't guaranteed, and was clearly exposed to the usual risks of business. So this should be given appropriate weight. I note the business was valued at a significantly lower amount a few years later. And pension contributions were also reduced. Whilst this is seen with the benefit of hindsight, it was always a known risk, and reasonably foreseeable at the time of advice.

The firm has said the decision to take or not take risk was with Mr and Mrs S. Its role was to explain investment risk in such a way as they could understand it and agree to an appropriate risk strategy.

Whilst I agree that, ultimately, it is up to a client how much risk they want to take, in the first instance the firm is obliged to provide suitable advice. The firm was bound by the regulator's Principles for Business. It had to pay due regard to the interests of its customers and treat them fairly. And it was bound to take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who was entitled to rely upon its judgement.
A willingness to take risk isn't the whole story. It needs to be weighed against a client's capacity to take risks. If a client hasn't got the capacity to accept the risks of an investment suitable advice should be against investing in it. And an investor treated as an insistent customer if they still want to invest despite the firm's advice against doing so.

Mr and Mrs S did have a good income and had built up significant other assets. But their accumulated wealth and income wasn't to such a level that the monies invested at higher risk (in total) were insignificant to them. If they lost them there would likely be a material impact on their lifestyle in retirement.

I think the firm did alert Mr and Mrs S to the speculative nature of the particular investment. However I'm not satisfied it alerted Mr and Mrs S to the overall position – the degree of risk overall resulting from the investment in Cape Verde by having such a large proportion of their wealth in speculative/higher risk investments. And the implications of that risk if things didn't go to plan.

As I've explained above, following the firm's advice Mr and Mrs S had about £265,000 invested in speculative UCIS/Qualified Investor funds. This was almost 40% of their entire savings and pension provision. They had about another 25% in equities and 10% in property - again risk based assets.

The value of their business and the money it had on deposit provided a cushion against risk. But its value at retirement was uncertain. And although they were planning to make further contributions these weren't guaranteed. Even if they were subsequently invested in a cautious manner it would take some time before the degree of risk was reduced materially during which time Mr and Mrs S were exposed to significant risks. So there was a considerable risk that if things went against them they could lose a significant proportion of the pension and savings they'd built up. Whilst I agree that there are no red lines between what is and isn't reasonable, I think the degree of exposure to speculative investment risk here was clearly beyond what Mr and Mrs S should have been recommended to take.

In the circumstances as set out above, I don't think the advice to invest in Cape Verde was suitable. Mr and Mrs S had built up reasonable levels of pensions and savings – again, it was between the two of them. I'm satisfied that Mr and Mrs S had the capacity to accept significant risks with a modest proportion of their money. And that they understood they were taking risks with this investment. But the investment of £100,000 was well beyond a modest amount when considered along with the existing investments in UCIS. It wasn't a small proportion of their wealth – either in the context of their pensions and investments or including that the business would likely provide some value towards retirement provision. And their intended retirement date was only 3-4 years away. So there was limited time to recover losses. Although I note the firm has said they had other mainstream investments they could access, the UCIS property investments made up a significant proportion of their pension fund and so I do think the illiquidity risk was material.

In my view the advice exposed Mr and Mrs S to a greater overall level of risk than they had the capacity to accept. I don't think investing another £100,000 in a speculative manner was suitable given their other speculative investments and in the context of all the circumstances.

Davies Financial has said that the fraudulent activity in relation to the lawyers of the fund couldn't have been predicted. Although there have been allegations of fraud I note that the investigation by the Serious Fraud Office has been dropped. I'm not in a position to make any comment about the conduct of those involved in the management of the fund or any other parties involved with it. No complaint has been brought against any other party – we have been asked to consider the complaint against Davies Financial. And had it not been for the firm's unsuitable advice, Mr and Mrs S wouldn't have been invested in Cape Verde and suffered the losses as a result.

In my view the firm ought to have advised them to invest the £100,000 in a more cautious manner. I've gone onto consider whether it's more likely than not that Mr and Mrs S would have accepted such advice given they were recorded as having a speculative attitude to risk for "*this"* investment. Or whether they would have insisted on investing at a higher risk?

Mr and Mrs S weren't averse to investing different parts of their money at different levels of risk. I'm satisfied that if the firm had explained they already held an appropriate proportion of their pension and investments in speculative unregulated schemes, a proportion in equities and the implications in terms of risks, they would more likely than not have accepted advice from the firm they'd engaged professionally to invest in a combination of cautious to balanced investments.

my provisional decision

Accordingly, my provisional decision is that I uphold the complaint.

I intend to order Davis Financial Limited to calculate and pay compensation to Mr and Mrs S on the following basis.

fair compensation

My aim is that Mr and Mrs S should be put as closely as possible into the position they would probably now be in if they had been given suitable advice.

I think Mr and Mrs S would have invested differently. It's not possible to say *precisely* what they would

have done, but I'm satisfied that what I've set out below is fair and reasonable given Mr and Mrs S' circumstances and objectives when they invested.

what should Davies Financial Limited do?

To compensate Mr and Mrs S fairly, Davies Financial Limited must:

Compare the performance of Mr and Mrs S' investment with that of the benchmark shown below. If the *fair value* is greater than the *actual value*, there is a loss and compensation is payable. If the *actual value* is greater than the *fair value*, no compensation is payable.

Davies Financial Limited should add interest as set out below.

If there is a loss, Davies Financial Limited should pay into Mr and Mrs S' pension plan to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

If Davies Financial Limited is unable to pay the compensation into Mr and Mrs S' pension plan, it should pay that amount direct to them. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mr and Mrs S' actual or expected marginal rate of tax at his selected retirement age.

I consider Mr and Mrs S are likely to be basic rate taxpayers at retirement, so the reduction would equal the current basic rate of tax. If they would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

Pay Mr and Mrs S £300 for the distress and inconvenience I'm satisfied the loss of a substantial proportion of the pension fund will have caused.

Income tax may be payable on any interest paid. If Davies Financial Limited deducts income tax from the interest, it should tell Mr and Mrs S how much has been taken off. Davies Financial Limited should give Mr and Mrs S a tax deduction certificate if they ask for one, so they can reclaim the tax from HM Revenue & Customs if appropriate.

actual value

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

It may be difficult to find the *actual* value of the investment. This is complicated where an investment is illiquid (meaning it could not be readily sold on the open market) as in this case. So, the *actual value* should be assumed to be nil to arrive at fair compensation. Davies Financial Limited should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the compensation and the balance paid as I set out above.

If Davies Financial Limited is unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. Davies Financial Limited may require that Mr and Mrs S provide an undertaking to pay Davies Financial Limited any amount they may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Davies Financial Limited will need to meet any costs in drawing up the undertaking.

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 and Mrs S 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 are a large number of regular payments, to keep calculations simpler, I'll accept if Davies Financial Limited totals all those payments and deducts that figure at the end instead of deducting periodically.

investment name	status	benchmark	from ("start date")	to ("end date")	additionalinterest
Stirling Mortimer Cape Verde No 4 Fund	Now delisted	for half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	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)

why is this remedy suitable?

I've chosen this method of compensation because:

- Mr and Mrs S were willing to accept some risk with their capital. But I think in their circumstances and the period to retirement date, they only had limited capacity for *additional* risk.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.

- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.

- I think a suitable level of risk would be somewhere in between. So the 50/50 combination is a reasonable proxy for the risks Mr and Mrs S should have been suitably advised to take. It doesn't mean that Mr and Mrs S would have invested 50% of their money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return they could have obtained with suitable advice.

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 Davies Financial Limited pays the balance.

determination and award: I provisionally uphold the complaint. I consider that fair compensation should be calculated as set out above. My provisional decision is that Davies Financial Limited 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 set out above.

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Davies Financial Limited pays Mr and Mrs S the balance plus any interest on the balance as set out above.

David Ashley
ombudsman