Financial Ombudsman Service

complaint

Mr I complains that he was mis-sold his pension plan by BlackStar Wealth Management Ltd ('BlackStar'). As a result, he has suffered a financial loss.

background'

In 2014, Mr I was told of an 'investment opportunity' by an 'introducer' for BlackStar.

At the time, Mr I had three plans:

1. A Section 32 Buy Out Bond; the Guaranteed Minimum Payment provision was not met;

2. A defined contribution scheme via his employers, from which Mr I took tax-free cash in 2005, and was receiving payments of £420 per month;

3. A Transact pension with a value of approximately £40,000.

Mr I was advised to transfer his Transact pension to a Self-Invested Personal Pension ('SIPP'). The SIPP was then used to invest in 'Store First'. This was an unregulated investment in commercial property providing self-storage units.

Mr I was 59 years of age at the time. He had £500 in his current account, no savings, and credit card debt of £2,500. He had a mortgage of £157,000 and owned a second property valued at £250,000. He had Parkinson's Disease. He would be dependent on his pension for an income when retired. He aimed to retire at age 65.

Our adjudicator upheld Mr I's complaint. He said:

- The investment that Mr I was advised to make was high risk. But this did not seem to fit with Mr I's risk tolerance.

- Mr I's responses on the risk questionnaire pointed to him as being someone prepared to take the utmost risk with his finances. But these responses were at odds with Mr I's actual profile.

- Based on his finances and the investments he had made to date, Mr I seemed to be someone with a low to medium appetite for risk. That he had a serious health condition suggested financial prudence would be in his best interest.

- BlackStar accepted that it would usually issue the risk assessment form directly to a customer. But on this occasion, Mr I had completed the form in the presence of the introducer who submitted the form on Mr I's behalf. This did not seem best practice. It cast doubt on the reliability of the risk assessment.

- BlackStar's contention that Mr I's other pension arrangements mitigated the risks of this investment did not mean that advice to invest £40,000 of his pension in this way was suitable.

BlackStar disagreed. It said that as well as the three pensions listed by the adjudicator, Mr I had a pension with his current employer. He would also have a State Pension.

It said the bulk of Mr I's retirement income would be met by his other arrangements. The pension transferred was the smallest. It was not a significant asset.

So BlackStar stood by its advice to Mr I. It said it had discussed the relevant risks with him at the time of the sale. Mr I had capacity to absorb any losses. Illiquidity would not be an issue, as Mr I was not dependent on this part of his pension arrangements. He was managing his illness and able to hold down a senior position at his place of work.

But the adjudicator still felt that the advice to invest in this product was unsuitable for Mr I.

Agreement was not reached. So the matter has been referred to me.

my findings

I have carefully considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

I have noted that in its response to the adjudicator's assessment, BlackStar refer to matters of fact where it disagrees with the adjudicator.

In normal circumstances, this would cause me concern. It would usually either influence my final decision or cause me to seek, if possible, further clarification.

But in this case, I am persuaded that any such disagreement pales into insignificance when set against facts that are *not* disputed. So I do not intend addressing those disagreements. Even if consensus was reached, I am not persuaded they would influence my decision.

It is not disputed that Mr I, at the time of advice, was aged fifty nine and wanted to retire at sixty five, some six years later. He was an engineer with an income of around £35,000 per annum. He had £500 on deposit and had credit card debts. He had Parkinson's Disease.

Nor is it disputed that in preparing its suitability report, BlackStar relied on the Attitude to Risk ('ATR') questionnaire submitted by its introducer. It did not meet Mr I before preparing its suitability report. It had a telephone conversation with him. It sent him a client agreement form which set out that it would be providing him with pension advice for which he would pay £1250 plus 1% of the value of his fund annually.

In my view, the ATR was not credible. I agree with the adjudicator that the answers Mr I apparently gave were completely at odds with his circumstances and experience. He said he was prepared to take *'extremely high risk'* with his investments; that he had taken '*very large risks'* with past financial decisions; that in the future he wanted to take '*a very large amount of risk'*; that he would '*not be at all upset'* if the value of his investments fell by 50% or more in one year; and that he had the capacity to tolerate '*very large losses'*.

In my view, given what BlackStar knew of Mr I's circumstances, the ATR should have prompted it to take steps to establish that Mr I understood the answers he apparently gave on the ATR; that he actually understood what the ATR was and its purpose; to have challenged Mr I to provide further evidence of past investment experience; to have verified his claimed capacity for loss; and to have analysed his financial situation such that the advice it gave Mr I was suitable for him.

But I have not seen evidence it did any of this. Instead, it simply took Mr I's responses at face value notwithstanding that on any reasonable basis, they should have given it cause for concern about Mr I's understanding of his situation. In my view, a competent adviser, having fully investigated Mr I's circumstances, would have concluded that he was in no position to enter into the proposed transfer and subsequent commercial property investment.

BlackStar was Mr I's adviser. He was paying it for advice. He was entitled to rely on it to give him suitable advice. Irrespective of Mr I's circumstances, I am not persuaded BlackStar could suitably advise *any* client (and meet its overarching regulatory obligation to act in the clients best interests) on the basis of documents supplied to it by an unregulated introducer, one telephone call with the client and no further enquiry about the client's circumstances.

In my view, BlackStar failed to meet its regulatory obligation to 'know your client'; failed to properly establish Mr I's capacity for loss and risk; inappropriately relied on an unregulated introducer to absolve itself of any regulatory duty of care to Mr I; unsuitably advised him to buy a high risk investment, in a single asset class, when he had no prior experience of such investments or that asset class; and failed to provide any credible rationale for its advice.

It follows that I have concluded Mr I was not treated fairly or reasonably.

my final decision

I uphold this complaint.

BlackStar Wealth Management Ltd (‘BlackStar’) must redress Mr I as I have set out below.

fair redress

My aim is to put Mr I into the position he would now be in, but for unsuitable advice.

Mr I’s funds should have been invested in holdings similar to those he was invested in pre-transfer had suitable advice been given. Mr I’s existing pension provisions at the date of advice were suitable for him.

So BlackStar must redress Mr I as follows:

1. Obtain the notional transfer value as at the date of this decision of Mr I’s Transact pension plan had it not been transferred to the SIPP.

BlackStar must assume that any contributions or withdrawals that have been made would have occurred and on the same date. So, for example, if Mr I has actually taken income from his pension provisions post transfer then a notional allowance should be made in the calculation of the notional transfer value for those income payments and on the date that they were, in fact, made.

2. Obtain the current transfer value of Mr I’s SIPP as at the date of this decision, including any outstanding charges.

3. Pay a commercial value to buy any illiquid holdings in Mr I’s SIPP.

If there are any illiquid holdings in the SIPP then it would be best if they could be removed from the SIPP. Mr I would then be able to close the SIPP. But valuing illiquid holdings may prove difficult. In calculating redress, BlackStar should agree with the SIPP provider a commercial value for any illiquid holdings. It should then pay the sum agreed plus any costs and take ownership of any illiquid holdings.

If there are illiquid holdings and BlackStar is unable to buy them, then it must give them a nil value in 2 above for the purposes of calculating compensation.

BlackStar may ask Mr I to give an undertaking to account to it for the net amount of any payment the SIPP may in future receive from the illiquid holdings. That undertaking should allow for the effect of any tax and charges on the amount Mr I may receive from such investments and any eventual sums he would be able to access from the SIPP. BlackStar must meet any costs in drawing up the undertaking.

BlackStar must also:

4. Pay an amount into Mr I’s SIPP so that the transfer value is increased to equal the value calculated in step one. This payment should take account of any available tax relief and the effect of charges.

If it’s not possible to pay the redress into the SIPP, BlackStar must pay it as a cash sum to Mr I. But had it been possible to pay into the plan, it would have provided a taxable income. So the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid.

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

5. If BlackStar is unable to take ownership of the investment in 'Store First', it pay Mr I an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees).

Had BlackStar done what it ought to have done then there would not be a SIPP. So it would not be fair if Mr I continued to have to pay annual SIPP fees if there are illiquid holdings preventing the SIPP from being closed. Ideally, BlackStar would take over any illiquid holdings, thus allowing the SIPP to be closed. But third parties are involved and I do not have the power to tell them what to do.

So, to give certainty to all parties, if there are illiquid holdings and if BlackStar is unable to buy them from the SIPP, then it is fair that BlackStar pay Mr I an upfront lump sum equivalent to five years of SIPP fees (calculated using the previous year's fees). This gives a reasonable period to arrange for the SIPP to be closed.

If payment is not made within twenty-eight days of the date of my decision, simple interest should be added to the calculated losses at 8% a year from the date of this decision until the date of payment. Tax may be due on this interest.

BlackStar must refund Mr I any fees he paid to it directly rather than from his SIPP. Fees paid from his SIPP are accounted for in the calculations set out above. It should also add simple interest at 8% a year from the date the fee was paid to the date of settlement.

Finally, Mr I has been caused distress and inconvenience by the advice complained of. BlackStar must pay Mr I £300 to compensate for this.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr I to accept or reject my decision before 18 April 2017

Terry Connor
ombudsman