

complaint

Mr J complained that Embark Services Limited (previously The Hornbuckle Mitchell Group Limited) gave him unsuitable advice. That was to invest some of his self invested personal pension (SIPP) funds in three unregulated collective investment schemes (UCIS).

background

Hornbuckle accepts that it was advising Mr J about his SIPP. I haven't seen any documentation about the advice given in 2006. It is accepted that he was advised to invest in the following three funds:

- £10,500 in the British Real Estate fund.
- £10,500 in the Glanmore property fund.
- £12,500 in the Urbanshare fund.

I don't have any details about Mr J's circumstances in 2006. A document was completed in 2007 and recorded some information about his situation. He was working in the property sector. He owned his own home, which was mortgaged. And he had an investment property valued at about £250,000. His other investments were worth about £30,000.

The advice given by Hornbuckle was about investments in Mr J's SIPP. I've seen a valuation produced in April 2007 showing a total value of just over £128,000. I think it's likely that value had increased since 2006. That increase would have been due to investment growth and additional contributions made by Mr J. I think it's also accepted that Mr J was prepared to take a reasonably high level of risk of about 7 or 8 on a scale of one to 10.

The British Real Estate and Glanmore Property funds ran into difficulties. These were discussed at a meeting between the adviser and Mr J in 2009. Information from Glanmore was provided to Mr J. After the meeting he invested more money in the fund. These were in "B" shares.

Mr J complained in July 2013. That was after the British Real Estate fund had become insolvent. Hornbuckle did not uphold the complaint. They said Mr J was prepared to take a high level of risk. He had considerable experience of investing in property and wanted to invest 30% in property. They referred to notes of the advice and that Mr J was keen to invest more into the Urbanshare fund than the minimum.

Hornbuckle objected to us considering the complaint, as it was out of time. I issued a decision that we could only look at two of the investments. Those were the Glanmore Property Fund and the Urbanshare Fund. But a complaint about the other UCIS, the British Real Estate Fund, had been made too late.

An adjudicator investigated the complaint. He upheld it. He made the following points:

- The investments were UCIS. Restrictions applied prohibiting the promotion of UCIS to the general public unless the investor fell within certain exemptions. Hornbuckle hadn't shown that it had taken steps to show Mr J was exempt from the restrictions.
- The UCIS were all property related. It wasn't suitable to recommend 30% of Mr J's SIPP be invested in property via UCIS. Only a small amount of an investor's portfolio should be invested in UCIS.

- Mr J already had direct individual property investments and knowledge of property because of his profession. But that didn't mean that he knew enough about unregulated investments so that UCIS funds were suitable for him.
- Mr J had a large part of his overall wealth already invested in property. Further investment via his pension lacked diversification.
- Hornbuckle didn't advise Mr J to invest in the Glanmore B shares. But, he wouldn't have invested in these if he hadn't been advised to invest in Glanmore. Hornbuckle should therefore compensate for the loss on these shares.

Hornbuckle didn't agree. Its representative replied. In summary:

- Mr J knew or ought to have known by February 2011 that he had cause for complaint.
- It was reasonable to recommend property funds to Mr J because of his experience of property investments and professional knowledge of property.
- Investing 30% of his SIPP into property funds would typically be considered to be within Mr J's attitude to risk rating of 7-8 out of 10.
- There was little difference between the growth in the Urbanshare fund when compared with the growth of the FTSE WMA Stock Market Total Return Income index. Therefore no compensation should be due.

The adjudicator was not persuaded to change his view of the case. He replied:

- It was not unreasonable to recommend property funds to Mr J. But, Mr J's professional knowledge of property, or his own investments would not have given him knowledge of UCIS.
- It was not suitable to advise Mr J to invest 30% of his SIPP in UCIS. He considered that proportion was too high despite Mr J's attitude to risk.
- A comparison of the unsuitable investments should be made with the FTSE WMA Stock Market Growth Index, not the Income Index. If the result of the comparison resulted in Mr J not having made a loss no compensation would be due.

There has been some correspondence about the Glanmore B shares. The point was made that Hornbuckle didn't give advice about the shares. The adjudicator confirmed his view that Hornbuckle should compensate for the loss on these shares. That was because Mr J wouldn't have bought those shares, but for the advice to buy the Glanmore shares.

my findings

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

I've considered what's been said about whether Mr J's complaint has been too late. What's been said more recently is much the same as the issues that I dealt with in my decision on jurisdiction. I remain of the view that the information Mr J had in 2009 did not give him cause for complaint. That's for the reasons given in my decision on jurisdiction.

I also agree with what the adjudicator said about why the complaint should be upheld.

The promotion of UCIS is restricted by legislation. I haven't seen any evidence about the way Hornbuckle promoted these investments to Mr J. It appears to have relied on the rule that it had taken reasonable steps to ensure that the investments were suitable. I think the outcome of this complaint turns on whether the investments were suitable for Mr J.

UCIS are often invested in unusual, illiquid assets with a limited or no market for re-sale. They usually offer a higher risk to the investor because of the lack of regulation and their complexity. I think that applies in this case with gearing or borrowing within the fund.

I agree with the adjudicator that only a small proportion of an exempt investor's portfolio should be invested in UCIS. The regulator's report of 2010 cited an example of good practice as between 3% and 5% of an investor's portfolio.

That report was issued after the advice Hornbuckle gave Mr J. But, I consider it reflected the regulator's expectations of firms when the recommendation was made. The promotion of UCIS to the general public was restricted by legislation. I think that's because such schemes are typically complex and expose investors to significant risks. In my view, they are therefore not suitable for more than a small part of a portfolio; even when they are promoted correctly.

Mr J already had investments in property outside of his pension. His profession gave him some knowledge of property, which made that asset class an attractive option for him. But, Hornbuckle had a duty to give suitable advice. I think that the advice was to invest too much in UCIS; and also in a single asset class.

There has been some correspondence about the Glanmore B shares. I made a finding that Hornbuckle did not give Mr J advice to invest in the shares. I still think that's right. I accept that Mr J says that he did receive advice, and that's what he was paying Hornbuckle for. But, the evidence from the file notes made by the adviser indicates that he simply passed on the information. I think that Mr J was left to make his own decision about whether to invest.

Mr J bought the Glanmore B shares after a meeting with Hornbuckle's adviser. Mr J was left with some literature produced by Glanmore. In my view that was very positive about the future for the fund. But, I think it is clear that Mr J would not have received that information if he had not been advised to buy the Glanmore shares. I'm not satisfied that the adviser did anything to dissuade Mr J from buying the Glanmore B shares. I think the original advice to buy the Glanmore shares caused the loss on the Glanmore B shares.

In summary, I do not consider the promotion of UCIS to Mr J is the key issue. In my view, the advice was unsuitable. That's because it exposed Mr J's pension to a level of investment risk that was too high by investing 30% of it in UCIS.

fair compensation

My aim is to put Mr J as close to the position he would probably now be in if he had been given suitable advice.

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

what should Hornbuckle do?

To compensate Mr J fairly, Hornbuckle must:

- Compare the performance of Mr J's investments with that of the benchmark shown below. If the *actual value* is greater than the *fair value*, no compensation is payable. Hornbuckle should also pay interest as set out below.

A separate calculation should be carried out for each investment. The Glanmore B shares should be included as an addition to the Glanmore fund.

If there is a loss, Hornbuckle should pay an amount into Mr J's pension plan to increase the pension plan's value by the total amount of the compensation and any interest. That should allow for any available tax relief and/or costs.

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

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

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

- Pay to Mr J £250 for the distress caused by the losses to his pension.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Glanmore Property fund	still exists	FTSE WMA Stock Market Growth Index	date of investment	date of my decision	8% simple a year from date of decision to date of payment
Urbanshare fund	still exists	FTSE WMA Stock Market Growth Index	date of investment	date servicing agency was changed	8% simple a year from end date to payment

for each investment:

actual value

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

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

If Hornbuckle is unable to buy the investment the *actual value* should be assumed to be nil for the purpose of calculation. Hornbuckle may wish to require that Mr J provides an undertaking to pay Hornbuckle any amount he may receive from the investment in the future. That should allow for the effect of tax and charges.

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 from the point in time when it was actually paid in.

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

why is this remedy suitable?

I have decided on this method of compensation because:

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

my final decision

I uphold the complaint. My decision is that Embark Services Limited should pay the amount calculated as set out above.

Embark should provide details of its calculation to Mr J in a clear, simple format.

Under our rules, I'm required to ask Mr J either to accept or reject my decision before 7 April 2016.

Roy Milne
ombudsman