

complaint

Mr C's complaint concerns the advice he received from Actuarial & Investment Services ("the business") in April 2000 to invest £500,000 in an off shore With-Profits bond. Mr C has stated that the advice did not reflect his requirements and therefore was unsuitable.

background

I issued my provisional decision on this complaint in February 2014, a copy of which is attached. In that provisional decision I concluded that the complaint should not be upheld, for reasons which are set out in detail in that decision.

The business responded by confirming its acceptance of the provisional decision. Mr C's representative responded, stating that Mr C was disappointed with the seeming reversal of the outcome from that expressed by the adjudicator and confirmed that Mr C would like to make his own further submissions.

The representative did also state that, although I had concluded that Mr C would have been prepared to accept the risks represented by the With-Profits investment, this was not the case. Mr C had not wanted to invest in stock market linked investments and, had he known this was the case, he would not have invested, instead preferring property based investments with which he was more familiar.

It was further stated that the original meeting to discuss the investment had been arranged by Mr C's accountant as he considered that it would have been prudent for Mr C to diversify his mainly property-based investments. Mr C had been clear that he did not wish to invest in equities, but trusted the advice given to him as it had been a referral through his accountant.

Additionally, Mr C had not been given any point of sale documentation by his accountant, and it was the accountant's address which had been given to the product provider for the issue of documentation. Following the sale, Mr C had very little contact with the adviser either. Mr C was not the type of investor who would have been prepared to take the risk involved with the With-Profits investment, it was reiterated. He had no experience of bonds or pension plans and had bought some shares for largely sentimental reasons. It was this type of investment background which should be taken into account when deciding the outcome of the case, it was contended.

Mr C then left a voicemail message for the adjudicator, in which he informed us of his investment and employment history and corroborated the background to the meeting with the adviser as set out by his representative.

Mr C said that he was informed by the adviser that he could almost guarantee a return of double his investment and that he tried to persuade him to invest the whole available sum of £1.5m. He did not really understand what the investment was and his experience of stocks and shares was restricted to new issues from high profile UK companies which had always performed well.

The investment portfolio as recorded in the fact find document was not accurate, Mr C stated, as he did not have millions of pounds in property and £100,000 of shares. Mr C had also not been informed about Market Value Adjustments (MVAs) and the first he knew about these was at the end of the investment's term, when the bond provider revealed the information. Mr C also stated that he had been unaware of the family connection between the adviser and his accountant and that, had he been, he probably would not have invested.

Mr C wished to emphasise that he was not a large scale or sophisticated investor and, whilst he acknowledged that he should have taken more care with this particular investment, he was nevertheless misled as he only wished to take minimal risk with assets such as government bonds. There was no mention that the stock market would be the dominant factor in the investment, Mr C stated.

In conclusion, Mr C remained of the conviction that the investment had been mis-sold as he would not have bought a product which would produce such poor returns. He also stated that he wished his statement to be taken as an honest and sincere account of events.

my findings

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

I would firstly state that I am mindful of Mr C's conviction in this matter and that he is genuinely of the view that he was misled and that the investment was unsuitable for him. I further have no reason to doubt that Mr C's recollection of what has happened is both honest and sincere.

A point I would wish to emphasise is that, as stated in the provisional decision, I am of the view that the information which was provided to Mr C directly within the letter of recommendation could have been better and the product features set out in more comprehensive detail. But this does not mean that the investment was necessarily unsuitable for Mr C.

The main thrust of my provisional findings was that, in Mr C's position - with his objectives of a lower risk investment which would not result in a loss produced by the stock market – a With-Profits bond with a ten year guarantee would not be obviously unsuitable. I have noted the comments relating to the recommendation from Mr C's accountant that he diversify his portfolio and I would not consider this to have been an unwise proposition, especially if Mr C was predominantly experienced or weighted in property.

The With-Profits bond provided the opportunity for growth over and above that which would be obtained from deposit accounts – and so in line with Mr C's lower risk attitude – but with a guarantee that the investment would not sustain a capital loss after ten years. One of the key points I made in the provisional decision was the lack of plausible alternatives which might fulfil Mr C's requirements and whilst I have noted the reference to government bonds, this type of asset is not in itself entirely risk free (dependent upon the type of individual bond or bond fund invested in) and would offer no diversification. Mr C will also himself be aware of the cyclical nature of the property market and so there would have been no guarantee that an alternative property investment would have produced a higher return. The With-Profits fund offered a level of investment diversification combined with the smoothing of returns and a ten year guarantee which cannot be found in other types of products.

It is of course fair to say that the equity content was not insignificant, but this was alluded to within the letter of recommendation and would in any case typically be the main generator of the types of return Mr C was hoping for. Additionally, although I have also noted the comments relating the scale and type of Mr C's direct equity investment and experience, it is nevertheless corroborative of some experience and willingness to invest in that type of asset.

Mr C's comment regarding the doubling of his investment is also noted, but it must beg the question as to how Mr C envisaged this being achieved if the investment was to be made in line with what he has described as being his understanding of a minimal level of risk. I am satisfied, therefore, that Mr C would have been aware that the actual level of *returns* would be reliant upon the performance of risk based assets, but that the guarantee after ten years was an appealing mitigator of the risk involved and indeed a facility upon which Mr C ultimately capitalised.

I further acknowledge the comments relating to the lack of sales documentation which was provided to Mr C and that this was passed directly to his accountant. If Mr C did not receive this information, this is a matter which might be better addressed directly with his accountant, but it would nevertheless not in any case be an unreasonable expectation that an individual who was investing a third of their available capital – in itself a substantial sum of £500,000 – would seek some form of written confirmation of the investment they had entered into.

Overall, I am mindful of, and sympathetic to Mr C's disappointment with the returns he obtained from his investment. The issue I have had to determine is not, however, whether the returns have met Mr C's expectations, but rather whether the advice itself was unsuitable for him based upon his circumstances and objectives. On the basis of the available evidence, I cannot safely conclude that this was in fact the case.

my final decision

For the reasons given, and although I appreciate that Mr C will be disappointed with the outcome, my final decision is that I do not uphold the complaint.

Philip Miller
ombudsman

PROVISIONAL DECISION

complaint

Mr C's complaint concerns the advice he received from Actuarial & Investment Services ("the business") in April 2000 to invest £500,000 in an off shore With-Profits bond. Mr C has stated that the advice did not reflect his requirements and therefore was unsuitable.

background

In brief, Mr C met with the advisor seeking advice to invest some of his available capital. After discussions, the advisor wrote to Mr C in April 2000 recommending that he invest £500,000 in the bond. Mr C accepted the advice and the investment proceeded.

In November 2011, Mr C raised a complaint with this service regarding that advice. In his complaint form, Mr C commented on a partial withdraw from the bond and the charge he had incurred, which he considered was the fault of the business. In the attached continuation sheet, Mr C also commented that the recommendation had been unsuitable as it had not reflected his requirements and had therefore not been appropriate in the first place.

The business stated that the initial part of the complaint regarding the partial withdrawal should be time barred as Mr C had referred the matter to this service more than six months after the business had responded to that issue and provided the required referral rights.

An ombudsman reviewed the issue and concluded that the element of the complaint regarding the partial withdrawal was out of jurisdiction for the reasons given by the business. However the ombudsman made no determination on the matter relating to the overall suitability of the investment for Mr C, noting that the business itself had seemingly dealt with this separately and had issued a separate response and referral rights to this service.

Our adjudicator then investigated the merits of the complaint and issued his initial opinion in November 2012. The adjudicator concluded that the complaint should succeed as he did not consider that Mr C had been correctly warned as to the risks associated with the investment and that, due to the relatively high level of equities within the fund, it was not suitable for Mr C's requirements or attitude to risk. Furthermore, the adjudicator was not of the view that the information provided had enabled Mr C to make an informed judgement as to the suitability of the recommendation.

The business responded, stating that it did not accept the adjudicator's opinion, and in particular that the assessment had taken a much broader approach than the actual specifics of the complaint. The business stated that Mr C, despite his personal wealth, had required an income from the investment but this had not been properly addressed. Rather, it was stated, the adjudicator had focused on the suitability of the recommendation, which the business contended should be time barred. The business did not consider that the adjudicator had actually answered the question of suitability, but had instead concluded that the information which had been provided had been misleading, which the business disputed.

The business stated that the adjudicator had assumed that the letter of April 2000 was a recommendation letter, but this was not the case. The adjudicator had misinterpreted some of the wording in that letter and had also not taken into account all the product literature and information which had also been provided to Mr C, which included all the information he would have needed to know about the product.

The business also questioned the adjudicator's comments that, due to the declining returns on the With-Profits fund in previous years, this should have prompted the adviser to query whether it was a suitable product. The business stated that Mr C had never requested a capital guarantee that the free asset ratio of the bond provider would have allowed continuing payment of reversionary bonuses even if there was a substantial downturn in the value of the underlying assets, and that the investment had a 10 year guarantee which the adjudicator had not commented upon. The business also did not consider any element of the proposed redress was correct or justifiable.

Mr C then responded to both the assessment, which he fully accepted, and the comments made by the business, which he did not. In brief, Mr C stated that he was not an experienced investor and that the business had provided no alternatives to the recommendation, which he maintained had not been suitable for his specific requirements. He said that he had required a completely secure investment with minimal risk and no equity content. Mr C further commented that the adviser had never explained the possible charge implication to rolled up income and that it was not his responsibility to research alternative investments. It was further asserted that his income and personal circumstances had not been properly investigated or recorded. He also stated that he did not recall receiving any other written correspondence apart from the letter of April 2000 and that the investment was intended as a ten year plan as stated by the business.

The adjudicator then reviewed the complaint but was not persuaded to change his assessment. In support of this, the adjudicator stated that there appeared to be no dispute regarding the product literature which Mr C had received, but he considered that Mr C would have been more reliant on the letter of April 2000 which contained misleading and incorrect statements. Furthermore, the adjudicator was of the view that this letter had been a letter of recommendation, despite the business' comments to the contrary.

However, the adjudicator acknowledged that his original proposal for redress had been incorrect as no evidence had been provided that Mr C specifically required capital security. He therefore proposed alternative redress accordingly.

The business then raised the issue of our jurisdiction to consider the matter under DISP rule 3.3.4 (9), (10) and (17). It was stated that the matter may be subject to Court proceedings or would in any case be better dealt with in a Court, although this was subsequently withdrawn. However, the business maintained that DISP 2.8.4 (2b) rule applied, as Mr C should reasonably have been aware he had cause for complaint more than three years before actually bringing the complaint.

The business then responded further, reiterating its objection on the basis of jurisdiction, and also requested an oral hearing. The business stated that the personal information about Mr C had been provided by both Mr C and his accountant and that it was clear that he was an experienced investor who understood equities and equity-based products. Mr C had received annual statements demonstrating the value of the bond, the terminal bonuses applicable, the early surrender charges if he wished to surrender the bond, and explanations of other features of the bond.

It was further stated that the adjudication had been based upon the only documentation which remained available, from more than twelve years ago, and that other documentation which had been sent to Mr C had been destroyed. It was also not known whether the sale had even been advised. The business again stated that the letter of April 2000 was not a suitability letter but a follow up letter to the meeting held on the previous day. Several meetings had been held with Mr C before the bond was established and most of these would

have been followed up with a letter explaining any advice given and summarising the content of discussions.

The business commented that any of the issues raised by the adjudication may well have been covered in that previous correspondence but also stated that, whilst the adjudicator had concluded that Mr C had required the income to be paid and the capital sustained, the evidence did not support the position that this was Mr C's understanding of the situation.

Finally, the business did not consider the amended manner of calculating redress was appropriate or that it took into account the total funds which were available for investment and which Mr C used elsewhere.

Mr C again commented on the further correspondence, reiterating that his only investment experience was in property and *'some shares'*.

In prior correspondence, I have dealt with the matter of our jurisdiction to consider the complaint relating to the suitability of the investment for Mr C. As agreement on the suitability of the investment has not been reached, it has been referred back to me for review.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. However, I would firstly explain that, whilst I have reviewed all of the submissions made by both the business and Mr C, I will not necessarily respond or comment on all of the aspects that have been raised by either party. My remit is to determine whether the recommendation for Mr C to invest £500,000 in the With-Profits bond was suitable for his circumstances and objectives.

I would also comment that, although I acknowledge the point relating to the destruction of documentation, I am only able to come to a conclusion based on the information that has been provided. This is not to say that I will not take into account any comments or testimony that has been given by either party, simply that in the absence of all of the relevant documentation, I must use a balance of probabilities to determine what is more likely than not to have been the case.

This is particularly relevant as the business has stated that Mr C had received several letters and product information prior to the bond being established but that these are no longer available. Mr C, on the other hand, has no copies of any such correspondence and has no recollection of any other letters apart from the one from April 2000, a copy of which he has provided.

With particular regard to the information that has been provided, apart from product literature, this appears to consist of: a Client Financial Information form, undated; some hand written notes dated 10 April 2000; an Investment Business advice form dated 12 April 2000; and the subsequent letter dated 13 April 2000.

Having reviewed the documents, I am satisfied that at least one meeting had taken place regarding the provision of investment advice. This is primarily because the documents, including a product illustration, indicated that Mr C sought to invest £1.5m. However, at the meeting on 12 April 2000, the Investment Advice form demonstrates that this had reduced to £1m. This form also confirmed that Mr C was prepared to invest for 10 years as he did not require the funds, *'but he requires regular income'*. The investment considered most appropriate was an *'Off Shore bond with income, medium to low risk, aim to beat holding*

money in Bank or Building Society'.

The adviser then wrote to Mr C on 13 April 2000. Whilst it has been stated that this was not a letter of recommendation, the opening comments were as follows:

'It was a pleasure meeting with you yesterday, thank you for your hospitality. I am now writing to confirm the advice that I gave you at our meeting...what was discussed and the thinking behind my recommendation'.

In my view, this clearly demonstrates that investment advice was provided. Moreover, Mr C would have been entitled to believe that such advice took into account his circumstances and objectives.

Of the £2m available for investment, it was recorded that Mr C was *"looking at investing the balance in a safe investment that will provide you with an income and with a better return than investing in a bank or building society, without exposing your investment to the risk of loss due to any downturn in the world equity markets...As I explained to you, the With-Profit concept is attractive to investors who are seeking a return, which has traditionally been better than deposits in building society or bank but does not have the same risks of a stock market investment'.*

Having reviewed that statement, I would agree with the adjudicator that this would have served to portray the fund as being less influenced by a downturn in equities than was actually the case. The fund, according to bond provider, had 57% invested in equities. Consequently, whilst With-Profits bonds do operate a process of smoothing and do contain other assets including property, bonds and cash, I consider that the comment would have been somewhat misleading. With-Profits product providers will typically adjust the value of the investment if full or partial surrenders over a certain threshold are actioned - by way of a Market Value Adjustment (MVA) - and will also reduce or eliminate ongoing regular and terminal bonuses if necessary.

The business has further commented that the bond provider had a high free asset ratio and so would have been well placed to continue the application of reversionary bonuses even in the event of a sudden downturn in equity markets.

The exact quote from the letter of April 2000 was as follows:

"A company with a high Free Asset Ratio will be able to sustain the Reversionary bonus rate even if there is a sudden downturn in the equity market, and you should expect a steady growth in the value of the investment from these companies, with no sudden surprises."

Notwithstanding the volatility which had been experienced in financial markets between the market high of December 1999 and April 2000, it is unclear whether the "free asset ratio" referred to was that of the company or its With-Profits assets (the two are different). I do, however, consider the message to offer somewhat false reassurances regarding the likelihood of a provider – even one with a relatively high With-Profits free asset ratio - being able to maintain reversionary bonuses in the event of sudden downturns in equity markets. Indeed, by September 2001, the provider was applying an MVA to its With-Profits fund.

With regard to the potential application of an MVA, the adviser stated that *'There are also Market Value Adjusters, which can be applied to the surrender proceeds if a large partial or total surrender was to take place in the first five years'.* Of course, notwithstanding any MVA-free anniversaries or other similar provisions, these may be applied at any time and are not

restricted to the first five years. The business has stated that these comments have been misinterpreted, asserting that Mr C was reminded in the letter of April 2000 that there would be early surrender penalties that would apply to any surrender in the first five years and that an MVA could also apply at the same time.

I am not, however, persuaded that this is an accurate reflection of the explanation provided. The previous paragraph had already explained the early surrender penalties which would be applied in the first five years. As the paragraph in question was specific to the application of MVAs, I am of the view that Mr C would have been entitled to believe that these were in fact restricted to the first five years.

I note that the business has stated that *“at no time was Mr C expecting the capital value of his bond to be sustained when he took the income from the bond.”* However, I would disagree that this is likely to have been the case. It would, for example, be unusual for an individual to invest in such a bond simply with the aim of swapping capital for income and I am satisfied that there would have been an expectation that the growth would either provide, or at least mitigate the effect of, the income taken.

With regard to the product literature which was provided, I acknowledge that this would have set out the salient features of the investment, but I consider that Mr C would have been more reliant upon and accepting that the advice provided by the adviser was suitable in meeting his requirements, especially in view of the adviser's comments, as outlined above. In any case, the provision of product literature or other documentation would not render an otherwise unsuitable recommendation suitable.

The only written correspondence which is available did not, in my view, adequately warn Mr C of the risks associated with the product, especially when considering the equity content of the fund. Whilst I have noted the speculation regarding other documentation which may have been issued, but which has subsequently been destroyed, I am not necessarily persuaded that this would in any case have corrected the comments which were made regarding the recommended product.

Taking all of the above into account, the overarching issue in my view is whether Mr C – if properly informed as to the nature of the With-Profits fund - would have accepted the recommendation to use that particular fund for investment purposes, or whether he would have taken a different course of action.

In considering this point, it is important to note that Mr C was not recorded as a risk averse investor and With-Profits funds would, in very general terms, not be deemed to be inappropriate for “cautious” risk investors. I also note that the letter of April 2000 stated that there was equity investment in the fund, with the implication also being that this was the predominant asset class. I also consider it entirely likely, as stated in the documentation which does exist, that Mr C was prepared to take some risk with his investment for the prospect of higher returns than may have been obtainable from bank or building society accounts.

In terms of Mr C's investment experience, notwithstanding the debate regarding the record of his £100,000 shareholding, he was seemingly a successful property developer and had accumulated substantial wealth. Having recently sold a property, he was seeking the diversification of some of his capital in order to receive a return better than that obtainable in a bank or building society account. When considering his position, it would not have been unreasonable for him to have been attracted to a tax efficient way of achieving that aim. When considering the amount he was wishing to invest, initially £1.5m but later reduced to

£500,000, some form of investment bond - with the facility to defer higher rate tax - would also not in itself appear unreasonable.

Whilst I have doubts, as previously stated, regarding some of the comments made in the letter of April 2000, it is important to note that it was nevertheless stated that Mr C wished his capital to be protected from the “*risk of loss*” due to any downturn in the world equity markets. This, in my view, is the fundamental significance of the adviser having recommended a With-Profits investment which effectively contained a ten year MVA-free guarantee. This would ensure that Mr C received at that point the full “face value” of the units held, the overall value of which would have increased if investment conditions had allowed and would also reflect the accrued value of reversionary bonuses (in a unitised With-Profits format).

Having reviewed the actual amount Mr C received back from the investment, inclusive of withdrawals, it would appear that Mr C did not in fact suffer a loss on his investment, as ensured by the ten year guarantee. The actual investment returns had meant that the withdrawals had unfortunately depleted capital, but the overall return to Mr C was a gain rather than a loss, and it should also be noted that, whilst the comments within the April 2000 letter were quite favourable on the expectations of returns, these were not guaranteed.

A further relevant question at this juncture would be what type of alternative investment would have been more suitable for Mr C, given his circumstances and objectives. As previously noted, it was recorded that Mr C was seeking higher returns than were available from deposit accounts, and although there would have been relatively low risk options such as gilt or corporate bond funds, these would not have offered the smoothed returns or the very significant ten year guarantee of the With-Profits fund.

Overall, therefore, although I am mindful of the Mr C’s concerns regarding the investment recommendation, for the reasons given I am not currently of the view that Mr C’s complaint should be upheld.

my provisional decision

My provisional decision is that I do not uphold Mr C’s complaint.

Philip Miller
ombudsman