complaint

Ms B complained that The Citimark Partnership Limited (Citimark) advised her to make unsuitable investments in unregulated collective-investment schemes (UCIS) in her pension. She says they were too high risk for her as a medium risk investor.

background

In 2006 Ms B was advised to transfer her personal pension to a self-invested personal pension (SIPP). Its value was about £43,000. She was also advised to make regular payments to it of £1,500 per month. And later make a single lump sum contribution of between £30,000 and £40,000.

Ms B invested £9,500 from her SIPP in the Premier Diversified Property Fund (Exempt Trust). And shortly after she invested £30,000 from her SIPP into the Premier Property Options Future Inns Hotel sub fund. Ms B had signed a risk statement for each investment that confirmed it was a UCIS. The advice to invest was confirmed in suitability letters dated 10 April 2007.

In June 2008 Ms B invested £30,000 from her SIPP in the Premier Investment Opportunities New Earth Solutions sub fund. Ms B signed a risk statement that said the fund was a UCIS. She also signed a 'sophisticated investor declaration'.

One of our adjudicators investigated Ms B's complaint. His view was that it should be upheld. He said:

- The Promotion of UCIS was restricted by law. A UCIS couldn't be promoted to the general public unless a relevant exemption was available. These were under the FSMA Promotion of Collective Investment Schemes (Exemptions) Order 2001 (the PCIS Order). Or the Conduct of Business (COB/COBS) rules.
- The basis of the relevant exemptions relied on were not established at the time of the first two investments. However, he noted that Ms B could have been considered a high net worth individual.
- In 2008 he didn't think Ms B should have been classed as a 'sophisticated investor'. Her profession didn't give her the experience or knowledge to understand the risks of investing in unregulated schemes.
- Although all three UCISs appeared not to have been promoted lawfully, the adjudicator thought that Ms B fell within some of the relevant categories and so they could have been. So he didn't think the losses were caused by the unlawful promotion.
- Following the advice to invest in the first two funds the SIPP had about 47% exposure to UCISs. He said only a small proportion of an investor's portfolio should be invested in UCISs. And he said this view was supported by the regulator's Good and Poor Practice report of July 2010.
- After buying into the Premier Investment Opportunities New Earth Solutions sub fund more than half of Ms B's SIPP was invested in UCISs. This was significantly above the level he thought was appropriate.
- Ms B's attitude to risk had been loosely recorded as medium. But this wasn't confirmed in the suitability letters - albeit Citimark had appeared to accept that it was medium.
- In his view the overall portfolio held within the SIPP didn't represent a medium degree of risk.

- There was an over concentration of property as a single asset class within the SIPP. This went against the usual principles of diversification.
- He thought the advice was unsuitable. It had exposed Ms B to a higher degree of risk than she was prepared to take.

Citimark didn't agree with the adjudicator's view. It said, in summary, that:

- Ms B had an interest in commercial property as an asset class. She wasn't interested in equity diversification as her father had lost money on the stock market.
- Given the overall strategy to maximum fund the pension the adviser had identified a commercial property fund which met Ms B's investment objectives.
- Although the fund was a UCIS the firm carried out appropriate due diligence on each and every property. It checked the lease conditions, strength of the tenant covenant and overall loan to value of the fund. In 2005 commercial property was considered to be a low to medium risk investment and the fund was achieving a 10% net return.
- As part of the diversification process Ms B was introduced to a mid-range hotel investment which she again found attractive.
- The third UCIS was a waste to energy investment which achieved a c80% return since launch. It said that it was worth noting Ms B hadn't complained about this investment.
- When Ms B's business got into difficulties she wanted to reverse her owner occupied commercial property into her pension. This turned out not to be possible, albeit the idea was resurrected at later dates.
- The evidence suggested that Ms B would have bought this single commercial property if it had been possible with maximum allowable lending. She had been determined to do so. But this didn't reconcile with the adjudicator's view about the asset content of the fund's lacking diversification.
- It thought it inequitable that the adjudicator had referred to the FSA's practice statement from July 2010 when the advice had been given in 2007/08.
- Although Ms B did hold UCISs the properties held within the Premier Diversified Property fund had sensible yields. Gearing didn't exceed 60%. And it was likely to provide a return. However other non-UCIS property related funds had performed extremely poorly - some providing 95% losses and little chance of a return.
- Asset class risk could vary significantly over time. Commercial property moved from a low to medium risk in 2007 when it was consistently outperforming equities to a situation today where it was considered to be a higher risk investment.

my findings

I have considered all of the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. Having done so I have come to the same conclusions as the adjudicator, and largely for the same reasons.

Although Ms B specifically referred to the Premier Diversified Property fund and Premier Property Options fund in making her complaint, this appears to be because she suffered high losses from those funds. But she also referred to the 'appropriateness' of having three UCIS investments (of £69,000) in her total investment of £125,000. We have an inquisitorial remit. And I think the suitability, or otherwise, of the Premier Investment Opportunities fund is integral to assessing whether the overall advice given was suitable. It's also reasonable to take into account any gains made from it (if any) in deciding on redress.

The promotion of UCIS is prohibited to the general public. It's restricted to only those persons who fall within certain exemptions. Before a business can promote a UCIS the adviser needs to ensure that the investor comes within one of the PCIS or COB(S) exemptions so that the promotion is lawful; that it's not in breach of section 238 of FSMA. The firm described all three investments as UCISs. Whilst it's not entirely clear to me whether this was the case (some may have been "Qualifying Investor" type schemes), I don't think this is material to deciding the outcome of the complaint. "Qualifying Investor" type schemes could also only be promoted to certain investors in a specified way.

It doesn't appear that Citimark met the relevant requirements to lawfully promote the first two funds. And although Ms B signed a sophisticated investor certificate in 2008 I don't think her investment experience or occupation would likely have given her the level of knowledge of these investments to reasonably classify her as a 'Sophisticated Investor.'

I cannot see that the firm took the necessary steps to ensure that the investments could be lawfully promoted to Ms B. But even if I accepted they did, ultimately what was material was whether the advice given was suitable in the circumstances.

It doesn't appear to be in dispute that Ms B was willing to accept a medium degree of risk. However the SIPP was soon invested with about 47% exposure to unregulated funds. And following the further contribution of £30,000 into the Premier Investment Opportunities fund this increased the unregulated funds to over 50% of Ms B's pension.

I appreciate that Ms B had expressed an interest in property. And she was interested in investing her funds solely and directly in her commercial property. However Ms B was using and paying the firm for its professional expertise in this area. It was in the best position to assess all of Ms B's circumstances and objectives and provide suitable advice. This would include alerting Ms B that such a strategy would present material risks. And above the medium degree of risk that she had said she was willing to accept.

Citimark has said that the risks attached to different asset classes change over time. Whilst I accept that the perceived risks can change over time the principle of diversification as a risk management tool is well known. So even where actual values of a single asset class change (not just the general perception of them) it's possible to limit the extent of any losses.

In my view the advice failed to provide suitable diversification. Any falls in the value of property would have a disproportionate effect on the overall value of the SIPP. This in itself increased the degree of risk presented.

And unregulated investments carry higher risk in themselves. They don't benefit from regulatory protections. And they had fewer restrictions on their range of investment powers. These funds were all highly specialised. They contained unusual assets and invested in single sectors in themselves; largely related to a single asset class - property. They had a limited market for re-sale; some had gearing; and they presented significant investment and illiquidity risks.

I note the firm's concern about the adjudicator's reference to the FSA report of 2010. This was published after the advice here. However it looked back on previous advice given. Whilst I accept this report would have put firms on a higher alert about the regulator's views about UCIS after its publication, I think its general principles about suitable advice would have applied in 2007/08. Ms B ultimately had over 50% of her pension invested in these unregulated funds which, as I have said above, presented significant investment and illiquidity risks. I think this would have been considered unsuitable in 2007/08.

So overall, I'm not persuaded that the advice to invest in these funds was suitable in the particular circumstances of the case. In my view they presented a higher degree of risk than Ms B had agreed to take.

my final decision

My final decision is that I uphold Ms B's complaint.

I order that The Citimark Partnership Limited should calculate whether Ms B has suffered a financial loss and if so pay compensation to her as set out below.

fair compensation

In assessing what would be fair compensation I consider that my aim should be to put Ms B as close to the position she would probably now be in if she had not been given unsuitable advice.

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

what should Citimark do?

To compensate Ms B fairly, Citimark must:

- Compare the performance of Ms B's investments with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investments. If the *actual value* is greater than the *fair value*, no compensation is payable.

  A separate calculation should be carried out for each investment. The resultant figures should then be added up (including accounting for any gains).

Citimark should also pay interest as set out below. Income tax may be payable on any interest awarded.

If there is a loss, Citimark should pay such amount as may be required into Ms B's pension plan, allowing for any available tax relief and/or costs, to increase the pension plan value by the total amount of the compensation and any interest.

If Citimark is unable to pay the total amount into Ms B's pension plan, it should pay that amount direct to her. 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 Ms B's likely marginal rate of tax at retirement.

For example, if Ms B 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 Ms B 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 Ms B £250 for the worry and concern she has endured over the potential losses to her pension.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Premier Diversified Property fund	still exists	FTSE WMA Stock Market Income Total Return Index	date of investment	date of my decision	8% simple per year from date of decision (if compensation is not paid within 28 days of the business being notified of acceptance)
Premier Property Options Future Inns Hotel fund	still exists	FTSE WMA Stock Market Income Total Return Index	date of investment	date of my decision	8% simple per year from date of decision (if compensation is not paid within 28 days of the business being notified of acceptance)
Premier Investment Opportunities New Earth Solutions fund	transferred	FTSE WMA Stock Market Income Total Return Index	date of investment	date transferred	Growth at the rate of the FTSE WMA Stock Market Income Total Return Index from the 'end date' to date of decision. Then 8% simple per year from date of decision (if compensation is not paid within 28 days of the business being notified of acceptance)

for each investment:

actual value

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

My aim is to return Ms B to the position she 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 such a case the *actual value* should be assumed to be nil to arrive at fair compensation. Citimark 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 Ms B and the balance be paid as I set out above.

If Citimark is unwilling or unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. Citimark may wish to require that Ms B provides an undertaking to pay Citimark any amount she may receive from the investment in the future.

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 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 will accept if Citimark 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:

- Ms B wanted capital growth and was willing to accept some investment risk.
- The WMA index is made up 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.
- The firm has said that Ms B didn’t want to invest in equites. However I note that she did have some equity investments in her SIPP. So it seems that she wasn’t entirely against them. I don’t think it’s unreasonable to assume Ms B wouldn’t have agreed to a suitable proportion invested in equities if the risks (including diversification) were limited overall.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Ms B’s circumstances and risk attitude.
- Ms B has not yet used her pension plan to purchase an annuity.

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

Under the rules of the Financial Ombudsman Service, I am required to ask Ms B either to accept or reject my decision before 5 November 2015.

David Ashley
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