

## **complaint**

Mr B says Portafina LLP ('Portafina') is responsible for the transfer of his pension in 2011 from a Stakeholder Pension ('SP') to a Self-Invested Personal Pension ('SIPP') and for the unsuitable investment of the SIPP that followed.

## **background**

One of our investigators looked into the matter and concluded that the complaint should be upheld. In the main, she noted as follows:

- Mr B was contacted by an unregulated introducer and was thereafter referred to Portafina. This related to the prospect of land and oil investments. The transfer was done in order to facilitate the investments. The SP was worth around £28,000 at the time. Mr B says the advice he received from Portafina took place over the phone, that it was unsuitable because the investments were too risky for him; because he did not have the capacity to lose his only pension provision; because he was a novice investor; and because he had no other savings at the time. Portafina says it did not advise Mr B and it provided him with an execution only service for the transfer.
- At the time of the transfer Mr B's profile was as follows – he was 54 years old and planned to retire at age 65; he was employed with an annual salary of £25,000 and had been previously self-employed; he had an outstanding mortgage of £60,000 and other outstanding debts; and he had an objective for steady growth and the avoidance of expensive charges.
- Mr B did not have a large amount of investment experience, he would not have been able to embark on the complex investment transactions without advice and there appears to be no reason, other than the introduction, why he pursued the transfer and investment.
- The execution only declaration that has been shared by Portafina is unreliable as it is not on headed paper, it is not signed, and it is not dated.
- Overall, Mr B does not appear to have been a genuine execution only client and Portafina ought to have advised him on the underlying investments – but did not.
- Unfortunately the ceding SP provider was unable to provide details about the SP, but based on available information it is unlikely he was a high or medium risk investor and he was probably a low risk investor; the SP was unlikely to have held high risk investments; there is no evidence that his objective could not have been achieved within the SP at no extra charge; that stood in contrast to the transfer fees, annual fees, ongoing management fees and fund fees which would likely have been associated with the SIPP transfer.
- The regulator required that firms advising on transfers into SIPPs could not separate that from advising on the suitability of the underlying investment. The land and oil investments were unconventional and high risk, they were unsuitable for Mr B, his low risk profile and his circumstances. If Portafina had advised him against the transfer and underlying investment he is likely to have followed such advice – there does not appear to be evidence to the contrary. Mr B should be compensated in his complaint.

Mr B accepted this outcome, but Portafina disputed it. Portafina mainly said:

- Its execution only service to Mr B was genuine, the investigator's conclusion to the contrary is wrong. It also conflicts with another adjudication from this service in a comparable case involving Portafina – where the conclusion was that its execution

only service was genuine. Portafina neither promoted nor advised the land and oil investments in Mr B's case.

- The unsigned and undated execution only document should be viewed in the context of the SIPP application form Mr B signed and dated. The form confirmed that he was aware of his responsibility for the decision to invest in the underlying investments and for their management.
- Given that Mr B was an execution only client responsibility for the suitability of the transfer and underlying investments did not apply to Portafina. The regulator's rules, at COBS 10, support this position.
- For the above reasons, Portafina disputes the complaint and the investigator's findings, and it rejects any liability for the redress proposed by the investigator.

The investigator's view did not change, she retained her findings and she addressed Portafina's points as follows:

- Its reference to the SIPP application form does not provide evidence on whether (or not) the alleged execution only service was genuine; it would have been completed regardless of whether the transfer was advised or not.
- It has not explained why its execution only declaration was not signed by Mr B or the absence of any instruction(s) from him on which the alleged execution only service would have needed to be based.
- The adjudication with which it has compared Mr B's complaint bears differences and the notion that it conducted execution only transactions for other clients does not automatically mean it did so for Mr B.

One of our case reviewers subsequently highlighted fact-finding documentation completed by Portafina at the time of the transfer. He concluded that this supports the finding that the execution only service was not genuine, as fact finding would not usually be required for such a service. Portafina disagreed and said the fact finding was a routine exercise, but the service remained an execution only one. The case reviewer also revised the redress benchmark that had initially been proposed, he noted evidence received from the SP provider showing that the SP had been invested in a profile higher than the low risk profile the investigator had considered, but lower than the high-risk profile of the land and oil investments.

### **my findings**

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. Having done so, I too have concluded that the complaint should be upheld – and I uphold it. I endorse and incorporate into this decision the investigator's substantive findings on the unsuitability of the transfer and of the underlying land and oil investments; I do the same with regards to the case reviewer's revision to the benchmark for redress.

#### *Execution Only Service*

I have considered Portafina's dispute over the idea that its execution only service to Mr B was not genuine. I too am persuaded by the fact-finding evidence that has been cited by the case reviewer, by the lack of evidence to support Portafina's claim and the lack of evidence to show the instructions on which any such execution only service was based.

There is more evidence to suggest a referral, by the introducer, of Mr B to Portafina; Portafina's completion of its 'introduced investment' fact-finding document for him and for the transfer; and Portafina's service to him thereafter in pursuit of the transfer. The fact-finding document is reasonably detailed – covering Mr B's personal and financial circumstances; his objectives; his capacity for loss; future retirement concerns; and his risk profile.

Irrespective of what Portafina has done in terms of fact-finding for other clients – and its claim that such was done on an execution only basis – in Mr B's case I am not persuaded that the fact-finding was a neutral and non-indicative matter. In the wider circumstances of the case – including the absence of evidence of an agreement (the unsigned undertaking document) between the parties for an execution only service – I consider that it indicated something other than an execution only service. There is even reference within the document to Mr B keeping the underlying investment property for income – which also indicates that the underlying investment(s) was discussed with Portafina.

Overall and on balance, the conclusion that arises is that Portafina's claim about the execution only service has not been established. Instead it appears, on available evidence, to be unlikely and it is more likely (than not) that it advised Mr B on the transfer over the telephone as he has asserted – hence the absence of advice related documentation.

#### *Regulatory Context*

The regulator's industry alert in 2013 included the following:

- It began with this statement – *“It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages or disadvantages of investments proposed to be held within the new pension.”*
- It continued to include – *“The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating.”; and “... if you give regulated advice and the recommendation will enable investment in unregulated items you cannot separate out the unregulated elements from the regulated elements.” [my emphasis]*

The regulator reinforced its views in a 'further alert' in April 2014 and said;

*“We believe pension transfers or switches to SIPPs intended to hold non-mainstream propositions are unlikely to be suitable options for the vast majority of retail customers. Firms operating in this market need to be particularly careful to ensure their advice is suitable.”*

*“Where a financial adviser recommends a SIPP knowing that the customer will transfer or switch from a current pension arrangement to release funds to invest through a SIPP, then the suitability of the underlying investment must form part of the advice given to the*

*customer. If the underlying investment is not suitable for the customer, then the overall advice is not suitable.*

*“If a firm does not fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer or switch at all as it will not be able to assess suitability of the transaction as a whole.”*

The regulator’s “client’s best interests rule” (COBS 2), as it was in 2011 and as it remains to date, required Portafina to act “... *honestly, fairly and professionally in accordance with the best interests of its client*”. Portafina’s fact finding exercise appears to have captured what it needed to know about his overall investor profile and evidence suggests that it was, or ought reasonably to have been, aware of the underlying investment(s) intended for the SIPP after the transfer.

The views expressed by the regulator in 2013 (and then in 2014) post-dated the transfer and investments in Mr B’s case, however the regulator’s views did not create new rules in those years. They reflected pre-existing rules that were in place in 2011, and the implication arising from those pre-existing rules – under COBS 2 and the duty to advise on suitability under COBS 9 – was that Portafina was obliged to do as the 2013 and 2014 alerts reflected. As I concluded above, it is more likely (than not) that Portafina advised Mr B on the transfer. In doing so, it was obliged to advise him on the underlying land and oil investments – but it did not.

Evidence from the fact-find document and from the SP provider shows that Mr B had a broadly medium risk profile; that he had a modest level of income; that he had ongoing mortgage and debt liabilities; that he had only a little experience in stock market and/or property investments; and that he struggled with his savings and had a low capacity for loss. In this context, the non-standard, high risk and unregulated oil and land investments were unsuitable for him. He appears to have invested the only personal pension fund (the SIPP) that he had into these and there is no evidence of any advice to him at the time drawing his attention to the gravity of that step and to the potential risk of losing his pension. In the aftermath, evidence suggests that the oil investment was worth £1 by 2017 and that the land investment is illiquid.

If Portafina had assessed suitability of the underlying investments for the transfer – and had done so properly – it would have concluded that they were unsuitable because they mismatched his investment experience, his capacity for loss and his risk profile. It could not have reasonably ignored this knowledge within the context of acting *honestly, fairly and professionally* in Mr B’s *best interest*. There is also evidence that suggests, on balance, that Mr B’s objectives could have been met in the SP and without cause for a transfer to a SIPP – and the probable associated costs cited by the investigator. In this respect, the transfer itself was also unsuitable.

There is not enough evidence to show that Mr B was insistent upon investing in the land and oil funds. On balance, I am not persuaded that he was. In addition, evidence does not suggest that his position to invest in them was concluded and/or unyielding before Portafina’s involvement. I consider that he would have given considerable notice to advice from Portafina telling him about the mismatch between the investments and his risk profile, his level of investment experience and his capacity for loss. He would also have probably taken notice of advice about the risk of losing all of his pension in such investments. Overall and on balance, I conclude that if Mr B was advised not to proceed with the transfer and the underlying investments he would not have done so.

For the reasons given above, I uphold Mr B’s complaint.

**fair compensation**

My aim is to put Mr B as close as possible to the position he would now be in if he had been given suitable advice. On balance, I consider that Mr B would have behaved differently if he was advised not to proceed with the SIPP transfer and the underlying investments.

It is not possible to say *precisely* what he would have done, but I am satisfied that what I have set out below is fair and reasonable given his circumstances and objectives at the time of advice.

**what must Portafina do?**

- Compare the performance of Mr B’s SIPP with that of the benchmark shown below. If the *fair value* is greater than the *actual value* the difference must be paid to Mr B in compensation. If the *actual value* is greater than the *fair value*, no compensation is payable.
- Pay any interest set out below. Income tax may be payable on any interest paid. If Portafina is required by HM Revenue & Customs to deduct income tax from the interest, it must tell Mr B the deduction amount and give him a tax deduction certificate if he asks for one, for him to reclaim the tax from HM Revenue & Customs if appropriate.
- Pay the compensation into Mr B’s pension plan, to increase its value by the amount of the compensation and any interest. The payment should allow for the effect of charges and any available tax relief. The compensation should not be paid into his pension plan if it would conflict with any existing protection or allowance. If the compensation (and interest) cannot be paid into his pension plan, pay it directly to him. Had it been possible to pay it into the plan, it would have provided a taxable income, so 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 his actual or expected marginal rate of tax at his selected retirement age. For example, if he is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. If he would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.
- Provide the calculation of the compensation to Mr B in a clear and simple format.

investment name	status	Benchmark	from (“start date”)	to (“end date”)	additional interest
Mr B’s Lifetime (or Hartley) SIPP	still exists	FTSE UK Private Investors Income Total Return Index (prior to 1	date of transfer to the Lifetime SIPP	date of settlement	not applicable

		March 2017, the FTSE WMA Stock Market Income Total Return Index)			
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**actual value**

This means the actual amount payable from the investment at the end date. If at the end date the investment (or any part(s) of it) is illiquid the *actual value* of the investment (or its illiquid part(s)) should be assumed to be zero. This is provided Mr B agrees to Portafina taking ownership of the investment (or its illiquid part(s)), if it wishes to. If that is not possible then Portafina may request an undertaking from Mr B that he repay to Portafina any amount he may receive from the investment (or its illiquid part(s)) in 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 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 Portafina totals all those payments and deducts that figure at the end instead of deducting periodically.

**why is this remedy suitable?**

- Mr B appears to have had a balanced/medium investor profile – based on the evidence addressed above – so he would have been prepared to take some risk in order to achieve a higher return.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It is a fair measure for someone who was prepared to take some risk to get a higher return.
- I consider that Mr B’s profile is broadly reflected in this benchmark and that compensation based upon it would reasonably reflect the sort of return he could have obtained, but for the unsuitable advice he received, from suitable investments.

**compensation limit**

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, £160,000, £350,000 or £355,000 (depending on when the complaint event occurred and when the complaint was referred to us) plus any interest that I consider appropriate. If fair compensation exceeds the compensation limit the respondent firm may be asked to pay the balance. Payment of such balance is not part of my determination or award. It is not binding on the respondent firm and it is unlikely that a complainant can accept my decision and go to court to ask for such balance. A complainant

may therefore want to consider getting independent legal advice in this respect before deciding whether to accept the decision.

**my final decision**

For the reasons given above, I uphold Mr B's complaint. I order Portafina LLP to compensate him as set out above and to provide him with the calculation of compensation in a clear and simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 30 January 2021.

Roy Kuku  
**ombudsman**