

complaint

Mr S has complained about the advice he received from S4 Financial Ltd (S4) over a period of time to invest in a number of property schemes which he considers were inappropriate for his circumstances. This complaint concerns the advice to invest £38,000 in the Pinder Fry & Benjamin Data Centre fund ('PFB') which he considers to have been unsuitable.

background

On advice from S4, Mr S made pension transfers totalling around £270,000 to a Self-Invested Personal Pension (SIPP), commencing in 2005. He also started making large quarterly contributions.

In the same year but at different times Mr S invested large sums in a number of unregulated collective investment schemes (UCIS). In 2007, he made two further large UCIS investments from his SIPP.

In 2008, Mr S made an investment of £38,000 in PFB. This was also a UCIS. It planned to invest in the development of data centres. This would be heavily funded by bank borrowing.

The value of the investment in PFB later suffered significant falls in value.

Mr S complained in mid-2013 about the fall in value of his investment in the PFB fund. S4 responded, saying that it had been able to promote the scheme to him, and that it had been suitable. It said that he had been recorded as an aggressive investor, and that he had understood the nature of the scheme. It also said that he had a reasonable to high capacity for loss.

An adjudicator assessed the complaint and concluded that it should be upheld because:

- The Financial Services and Markets Act 2000 (FSMA) prohibited promotion of UCIS to the general public. S4 hadn't checked that UCIS funds could be sold to Mr S. But Mr S had earned enough income to be classed as high net worth. He would probably have signed a high net worth statement. A compliant promotion *could* have been made.
- The documents said that Mr S's attitude to risk had been balanced. In 2005 he intended to retire at 60 in 2010. In 2007 it is noted that Mr S wanted to retire and draw an income when he reached age 65 in 2015. Mr S did not have enough capacity for loss. A lot of his savings were held in his pension. He would have expected to rely on his pension for income in retirement. There was a clear risk that a big loss would have an impact on his income.
- The scheme was high risk. The documents had stated that it exposed investors to significant risk of total loss. They also explained that it could be difficult to sell the investment if Mr S needed to do so at short notice.
- The investment should be considered proportionally to the pension, not all Mr S's assets. The purpose of the pension was to provide income in retirement, which was expected to be soon. It was distinct from his other assets. The adviser had also followed a target asset allocation in respect of the SIPP. That allocation was intended to be consistent with Mr S's attitude to risk. He had not seen any evidence that the adviser was following a particular asset allocation across all Mr S's assets.

- Around 56% of the pension had been invested in UCIS which was inappropriate for an investor such as Mr S.
- Around 46% had been invested in property. He felt that the asset allocation was not suitable for a balanced investor. He also said that it was not suitable for Mr S, as he planned to retire in between 5 and 10 years' time.

S4 did not agree. It made the following main points:

- Mr S was a balanced aggressive investor. He was willing to take more risk for greater returns as he wished to retire as soon as possible. It had been S4 who said that he should take a balanced approach.
- Mr S's original intention to retire at 60 had been dependent on sale of share options. The future value of the share options was unknown, but was expected to be significant. Mr S did ultimately gain significant value from the options. The pension became a small part of his overall assets.
- It had been expected that Mr S would draw an income rather than buy an annuity. It had also been expected that he would spend his non-pension savings first. This would keep the pension death benefits tax-free. The investment period was expected to be longer than seven years (i.e. to age 65).
- Mr S intended to make large pension contributions. Mr S was also intending to make large investments outside his pension.
- Asset allocation had originally been based on the pension alone. But this was because Mr S's divorce had left him with most of his assets held in his pension plans. The pension should be seen as a proportion of total assets.
- The UCIS fund invested in several sites. Gearing was not expected to be employed until contracts and tenancies had been agreed. This reduced the risks. The effects of the financial crisis were not reasonably foreseeable.
- Certain other UCIS funds that Mr S had invested in were very different. They could not be compared to the property scheme.
- Based on the entire investment portfolio, the allocation to the PFB scheme had been less than 6%.

The adjudicator considered these points but his view didn't change. He made the following main points:

- The suitability report stated that Mr S's attitude to risk was balanced. And his view wouldn't have changed if he agreed Mr S's attitude was balanced aggressive.
- Mr S had said that he intended to rely on his pension in retirement. The documents indicated that he intended to draw an income from age 65. He had not seen any mention of Mr S planning to leave the plan untouched until 75. He did not believe that the non-pension savings could reasonably have been expected to support Mr S for that long. The report had also stated that exercising options would allow for an injection into the plan.
- Most of Mr S's savings were in his pension plan, and he intended to make large contributions from his income. The adjudicator could not see how Mr S could have expected not to rely on his pension until 75. He still felt that Mr S had expected to draw an income from age 65. Therefore, he felt investing large sums in risky, unregulated, potentially illiquid arrangements had been unsuitable.
- Mr S intended to make large contributions in the future. However, those could not be taken into account when considering whether the proposed asset allocation was suitable at the point an investment was made.

- Mr S's personal and financial circumstances had changed significantly since 2005. But the change in his financial circumstances could not have been foreseen.
- The adjudicator still felt that the investments should be considered proportionally to the pension. That approach was consistent with the approach taken by this service in other similar cases. He also still felt that the scheme was high risk.
- Even if the investments were considered proportionally to Mr S's total portfolio value stated by S4, 34.5% would have been invested in UCIS. The adjudicator said this would be considered unsuitable anyway.

As agreement has not been reached the complaint has been referred to me for a decision.

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 have come to the same conclusions as the adjudicator, for the same reasons.

S4 does not appear to have promoted the scheme lawfully. But I agree with the adjudicator that it probably could have done. Mr S's loss cannot be attributed to its failure to promote the scheme properly.

In 2007 (then aged 57) Mr S expected to retire in around eight years. This still seems to have been his plan in 2008. His pension plans were worth over £400,000. He expected to make large pension contributions prior to his retirement. Although he held share options, their future value was uncertain. Mr S has stated that he expected to rely on his pension in retirement, and the documents support this in my view.

A high earner would normally require a high level of retirement income in order to maintain his or her lifestyle. Mr S appears originally to have intended to draw £60,000. The future performance of the plan was of course uncertain. But it seems to me that this could reasonably have been expected to be a fairly high rate of income withdrawal.

The proposed UCIS was going to use significant levels of bank borrowing in the hope of improving the returns to investors if the underlying assets rose in value. However it also increased the loss to the investors if the value of the underlying assets fell in value. There is a risk that the investment might be difficult to sell. It had no set term. In my opinion the investment was inconsistent with Mr S's retirement plans.

The UCIS documents explained that investors' capital was exposed to a number of significant risks. The documents indicate that Mr S's attitude to risk was balanced. S4 said that Mr S was willing to take more risk in order to be able to retire as soon as possible. I do not think that the potential for significant gains could reasonably justify the significant risks. Substantial losses would have an impact on his income throughout his retirement.

I agree with the adjudicator that the pension was not invested in line with Mr S's attitude to risk and that the advice did not take proper account of his coming retirement. Following S4's advice, Mr S invested around 56% of his pension provision in UCIS funds. I do not consider Mr S had sufficient capacity for loss to commit a substantial proportion of his pension to investments of this type.

I note that in 2010 the regulator said in a speech that:

'UCIS are generally regarded as being characterised by a high degree of volatility, illiquidity or both — and therefore are usually regarded as speculative investments. This means that in practice they are rarely regarded as suitable for more than a small share of an investor's portfolio.'

Whilst this was after the investments had been made on Mr S's behalf in my opinion the message that was being highlighted clearly applies to Mr S. The investments were speculative. Investing a high proportion of Mr S's pension in such investments was unsuitable.

”

In my opinion Mr S should not have been advised to invest in the Pinder Fry & Benjamin Data Centre Fund.

fair compensation

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

I take the view that Mr S 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 S's circumstances and objectives when he invested.

what should S4 do?

To compensate Mr S fairly, S4 must:

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

S4 should also pay interest as set out below.

If there is a loss, S4 should pay such amount as may be required into Mr S'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 S4 is unable to pay the total amount into Mr S'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 S's marginal rate of tax at retirement.

For example, if Mr S 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 Mr S 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 S £100 for distress and inconvenience caused by the unsuitable

recommendation.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Pinder Fry & Benjamin Data Centre 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)

actual value

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

My aim is to return Mr S 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 such a case the *actual value* should be assumed to be nil to arrive at fair compensation. S4 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 S and the balance be paid as I set out above.

If S4 is unwilling or unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. S4 may wish to require that Mr S provides an undertaking to pay S4 any amount he 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 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 S4 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 S 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.

- 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 Mr S's circumstances and risk attitude.
- Mr S has not yet used his pension plan to purchase an annuity.

my final decision

I uphold the complaint. My decision is that S4 Financial Ltd should pay the amount calculated as set out above.

S4 Financial Ltd should provide details of its calculation to Mr S in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr S either to accept or reject my decision before 15 February 2016.

Adrian Hudson
ombudsman