Financial Ombudsman Service

complaint

Mr R says Helm Godfrey Partners Ltd (HGP) gave him unsuitable advice about his pension investments and arrangements which has resulted in financial detriment.

Mr R is represented in his case by Mac Fin Consulting Ltd.

background

Mr R had been a client of HGP since 2006, when he received pension transfer advice. He brought three separate complaints against HGP in 2017. It decided to deal with these as one case with a single final response.

In summary, Mr R complained that HGP was responsible for unsuitable advice and pension arrangements between 2008 and 2016. In particular, his complaint letters focussed on:

- In 2008, incorrect risk profiling which led to an unsuitable recommendation for him to invest in the Romanian Dynamic Property Fund (RDP), an unregulated collective investment scheme (UCIS).
- In 2010, inappropriate classification of him as an Elective Professional Client (EPC) and the unsuitable advice for him to invest in the specialist Seneca US Oil and Gas Opportunities Fund (Seneca) – another UCIS.
- In 2012, unsuitable recommendations related to planning around the Lifetime Allowance (LTA) regime, leading to the switch of his pension provision into an AXA SunTrust plan and putting in place a discretionary fund management (DFM) arrangement. There's also a complaint point about taking his tax-free cash (TFC).

To keep things as simple as possible and to avoid unnecessary paperwork and further delays, I'll deal with two of Mr R's complaints together in this single decision - those relating to his RDP and Seneca investments. His complaint about the advice he received concerning the AXA SunTrust, the DFM arrangement and associated matters will be dealt with separately.

I Issued my provisional decision last month, I said that I was expecting to uphold Mr R's complaint in relation to the Seneca investment. HGP disagreed with my findings and provided a detailed response. I've carefully considered all the points it raised and have addressed its key arguments as part of this final decision.

HGP said Mr R's complaints about the RDP and Seneca investments were out of our jurisdiction because they'd been brought too late. So, this is where I must begin my consideration.

Our jurisdiction to consider Mr R's complaints

The rules about complaining to the ombudsman set out when we can – and can't – look into complaints. The Dispute Resolution rules ('DISP') which determine which complaints can be considered by this Service are in the regulator's handbook. The rules include time limits by which complaints must be made. The relevant rule in this case is DISP 2.8.2. It says:

The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

(2) more than:

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;…unless:

(3) in the view of the Ombudsman, the failure to comply with the time limits…was the result of exceptional circumstances"

I note an ombudsman has already investigated whether we have jurisdiction for Mr R's complaints concerning his RDP and Seneca investments. He concluded that we didn't have authority to review the former, but that we could consider the later.

I agree with the ombudsman's conclusions for broadly the same reasons. I'm not going to rehearse all the arguments again – instead I'll summarise the main points.

RDP

Mr R was advised to invest in the RDP in May 2008. He says the fund wasn't appropriate for his risk appetite. His complaint to HGP in August 2017 was more than six years after the transaction. But I also need to think about whether he was aware, or *ought reasonably to have been aware*, he had cause for complaint more than three years before he did.

In September 2012, Emergo Investment issued a report on the RDP fund. This explained it would require a minimum sum of £1,455,000 to meet various commitments. It also referred to a legal action against the fund, which was described as frivolous, but which was adversely affecting the prospect of obtaining a loan.

The report said that the fund was in negotiations with developer seeking a mutually acceptable solution. It also referred to a new structure for the fund. But it said this was likely to generate a significant loss of capital to the fund's investors, which was estimated at between 50% and 100%.

I think Mr R ought reasonably to have understood the fund was facing severe problems which could lead to a large loss of capital. Indeed, there's a record of a meeting between him and HGP in March 2013. This contains a note that indicates a discussion about the litigation and cash flow problems referred to in the September 2012 report.

Mr R decided to invest a further £30,000 in RDP in July 2014, this time in the form of loan notes. This appears to have been in response to a fund circular issued in April 2014 seeking additional monies to stave off collapse. His representative suggested this showed Mr R didn't have cause for complaint about his original investment. Rather, I think it evidences what was clear to him - the precarious state of the fund.

Mr R's representative said there were exceptional circumstances why he didn't make his complaint about RDP in time. For example, it made arguments about misleading information he received about the valuation of his investment. Given the other reports he was receiving about the fund I think this ought to have served to confirm that something odd was going on that he needed to get to the bottom of. I'm satisfied exceptional circumstances don't apply to this specific complaint.

Mr R's complaint about his RDP is brought out of time.

Seneca

Mr R was advised to invest in the Seneca fund in July 2010. His complaint to HGP in August 2017 was more than six years after this. So, again the issue for me to consider is whether he was aware, or ought reasonably to have been aware, he had cause for complaint more than three years before he brought his case.

HGP says Mr R's complaint is essentially about him being wrongly classified as an EPC. And because the classification took place in 2010, at the same time as the advice was given, he should've been aware he had cause for complaint at that time.

HGP categorised Mr R as an EPC. At the material time, COBS 3.5.3 stated the following:

A firm may treat a client as an elective professional client if it complies with (1) and (3)…

(1) the firm undertakes an adequate assessment of the expertise, experience and knowledge of the client that gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved (the "qualitative test");…

(3) the following procedure is followed:

(a) the client must state in writing to the firm that it wishes to be treated as a professional client either generally or in respect of a particular service or transaction or type of transaction or product;

(b) the firm must give the client a clear written warning of the protections and investor compensation rights the client may lose; and

(c) the client must state in writing, in a separate document from the contract, that it is aware of the consequences of losing such protections.

As I'll go on to explain, I've concluded HGP fell short of what was required under the rules regarding the categorisation of Mr R as an EPC.

Mr R says he was wrongly classified. So, for his complaint to be out of time, he ought to have been aware more than three years before he complained in 2017. I agree with the last ombudsman to consider this point. I don't think it's reasonable for him to have known the regulator's rules regarding how consumers should be classified by financial businesses.

So, although he was aware in 2010 he'd been classified as an EPC, I don't think he was in a position to know whether or not this was correct. And I've not seen evidence he gained such knowledge more than three years before he complained.

More broadly, considering Mr R's complaint about the Seneca fund, in its final response to him, HGP said that by 2012 the value of his fund had fallen by around 20% and this should've alerted him of a cause for complaint.

In responding to my provisional decision, HGP broadened its argument stating that the fund hadn't recovered its value between 2012 and August 2014. It says it understands the fund actually fell further in value. And so, it says this performance couldn't conceivably be described as fluctuations over the short run.

I've reviewed the portfolio and fund valuations for Mr R's Seneca fund that are on file, taken at various points in the financial year, for the period in question. These are as follows:

- 2011/12 £103,000
- 2012/13 £ 83,430
- 2013/14 £ 80,340
- 2014/15 £ 97,850
- 2015/16 £ 97,850

I don' find the further erosion of Mr R's fund value between 2012/13 and 2013/14 to be significant, given the scale of his investment. And while he complained the Seneca fund had exposed his capital to too much risk, he hasn't said he wasn't prepared to take any risk. Rather, he thought his risk profile was increased beyond what he was comfortable with.

I accept that a fall of around 20% would probably be unwelcome to most investors. But, as someone who was prepared to take some risk, it's likely Mr R would've understood the value of the fund could go up or down from time to time. And as we can see, the information he was given suggested that by 2014/15 the fund had bounced back significantly.

I don't think the apparent reduction in value was of such a degree that it would've prompted Mr R to question the advice he'd been given. As HGP has noted, it made clear to him the investment was designed to run for the full five-year term.

HGP hasn't done enough to satisfy me Mr R was, or ought reasonably to have been, aware he had cause for complaint before he brought his case forward.

Mr R told us he contacted his current representative after listening to a radio programme about issues with pension investments in June 2017. His initial focus was on what had happened to his RDP investment. In that regard I've already concluded, he ought reasonably to have been aware of his cause to complain earlier than he did. But this seems likely to have been the point at which he was put on the road to discovery about problems with his Seneca fund.

Mr R's complaints about his RDP and Seneca investments have resulted in different outcomes as far as the application of our time limits are concerned. That's because the circumstances and events relating to each were different.

Mr R's complaint about his Seneca investment has been brought in time. I'll now review the merits of that case.

my findings

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this case. Where there's conflicting information about what happened and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what's most likely to have happened.

Both parties have provided information and argument concerning the events complained about. I've not given a detailed response to all the points raised. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. While I've taken into account and considered all submissions, I've concentrated my findings on what I think is relevant and at the heart of this complaint.

In my provisional decision I indicated I expected to uphold Mr R's complaint about the Seneca fund investment. HGP disagreed, so I'll cover its key arguments as part of this final decision.

I'll begin by addressing one of HGP's main concerns. It said that I shouldn't undertake my own subjective reassessment of the advice given to Mr R in 2010; rather I'm required by DISP 3.6.4 to take into account the relevant law.

HGP was also concerned that my provisional decision represented a highly subjective reassessment of the advice given to Mr R which was potentially influenced by "*currently prevailing attitudes to UCIS and UCIS advice*".

It's reasonable for HGP to raise challenges like this. I'll set some of these matters out more fully to explain my approach.

Section 228 of the Financial Services and Markets Act 2000 provides for how an ombudsman should arrive at a decision. This approach is set out in the regulators' handbook, DISP 3.6.1 says:

The Ombudsman will determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case.

In doing this, DISP 3.6.4 says I must also take into account the relevant law, regulations, regulators' rules, guidance and standards, codes of practice and where appropriate what I consider to be good industry practice.

I'm satisfied that I've worked within and according to the rules governing how I should operate and arrive at my determination in this case.

At this point it's helpful to consider some of the extensive regulation around transactions like those performed by HGP for Mr R. For example, the FCA Handbook contains eleven Principles for businesses, which it says are fundamental obligations firms must adhere to (PRIN 1.1.2 G in the FCA Handbook). These include:

- Principle 2, which requires a firm to conduct its business with due skill, care and diligence.
- Principle 3, which requires a firm to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
- Principle 6, which requires a firm to pay due regard to the interests of its customers.

In *British Bankers Association v The Financial Services Authority & Anor* [2011] EWHC 999 (Admin), Ouseley J said [at paragraph 162]:

"The Principles are best understood as the ever-present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate..."

And at paragraph 77:

"Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high-level principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."

So, the Principles are relevant and form part of the regulatory framework that existed at the relevant time. They must always be complied with by regulated firms like HGP. As such, I need to have regard to them in deciding Mr R's complaint.

The Seneca UCIS

The Seneca fund was described by HGP as follows:

"This fund will provide project finance to established production companies through the purchase of equity stakes in oil and gas extraction projects…The majority of investment will be in oil extraction projects, rather than higher risk exploration ventures, using enhanced oil recovery techniques;…The fund is structured to cater for investors seeking higher rates of return via capital appreciation with units expected to achieve a target return of 23.5% per annum payable at the end of the funds life [after 5 years]."

The following extract is taken from a presentation about the investment opportunity (bolding is my emphasis):

"This presentation is not available to the general public in the United Kingdom ("UK"), may be issued by Stratus Capital LLP which is authorised and regulated in the UK by the Financial Services Authority ("The FSA"), on a confidential basis ***, to a limited number of potential sophisticated investors and to other persons authorised pursuant to the Financial Services and Markets Act 2000 (the "FSMA")*** *for the sole purpose of providing information about a potential investment in the Scheme.* ***The Scheme referred to in this summary constitutes an "[UCIS]"*** *for the purposes of the restriction on the promotion of unregulated schemes under section 238 of the FSMA and, accordingly* ***, the Scheme cannot be marketed in the UK to the general public*** *by any FSA authorised person."*

The publication went on to emphasise that the Seneca UCIS was only suitable for sophisticated or professional investors. HGP promoted the opportunity to Mr R. For investing in the fund, he would receive a 3% enhancement of the value of his share of units. And HGP would receive a 4 % commission.

HGP's categorisation of Mr R in the transaction as an EPC

It's appropriate to consider the regulations as they related to Mr R's status in this transaction. HGP categorised him as an EPC. At the material time, COBS 3.5.3 stated the following:

A firm may treat a client as an elective professional client if it complies with (1) and (3)…

(1) the firm undertakes an adequate assessment of the expertise, experience and knowledge of the client that gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved (the "qualitative test");…

(3) the following procedure is followed:

(a) the client must state in writing to the firm that it wishes to be treated as a professional client either generally or in respect of a particular service or transaction or type of transaction or product;

(b) the firm must give the client a clear written warning of the protections and investor compensation rights the client may lose; and

(c) the client must state in writing, in a separate document from the contract, that it is aware of the consequences of losing such protections.

I've reviewed the documentation associated with HGP's assessment with regard to the qualitative test it was required to conduct under 3.5.3. In respect of Mr R's expertise in the transactions, investment types and services engaged, it's recorded:

"[Mr R] has previously invested in limited partnerships and closed ended investments, and the client has vast experience in shipping and freight forwarding and an understanding of oil costs and price changes."

In respect of Mr R's experience of the transactions, investment types and services engaged, it's recorded:

"The client was on the Board of one of the largest transport operations."

In respect of Mr R's *knowledge of the transactions, investment types and services engaged, HGP recorded:*

"as above."

The suitability letter HGP produced for him said:

"You have been in the haulage business for a long period of time and fully understand how oil and gas prices can fluctuate. You confirmed that you understand the risks involved by investing in the Seneca Fund and confirmed that you would like to be classified as an [EPC] for the investment".

HGP says it identified support for the statement concerning Mr R's experience as a printout taken from his company website described him as follows:

"…coming from a shipping and freight forwarding background" and that he *"became involved in the burgeoning computer/electronic business in the late seventies and was soon invited to join the main board of one of the largest specialist transport operators that had expanded with the growth of this industry".*

HGP says it was entitled to rely on this and the specific comments and instructions Mr R provided at the May 2010 meeting when his EPC status was discussed and agreed.

I understand the points HGP has made but it's not added anything new to the arguments it's made throughout. And on balance, I'm not satisfied what it set out constitutes an adequate qualitative assessment of Mr R for EPC purposes, sufficient to give it reasonable assurance, in light of the nature of the Seneca proposition. It follows then, I also disagree with the conclusion reached by the adjudicator in this regard.

I don't think Mr R's background in shipping and freight forwarding was wholly relevant to the investment proposition. While I think he would've been aware of matters such as the price of oil and the implication of fluctuations, it's somewhat of a leap to infer he had knowledge sufficient to understand the particular risks associated with a niche element of the US oil extraction industry. Certainly, I've seen nothing on the case file and HGP hasn't demonstrated otherwise.

There's no evidence Mr R had expertise in the particular operating environment the Seneca proposal was seeking to exploit. For example, I can't see from the case file, and HGP hasn't demonstrated, he would've been aware of the competitiveness of the market, the potential effect of new entrants and new technologies, the power of customers and suppliers in the sector, nor the impact of the regulatory landscape. It's an appreciation of these matters which ultimately would determine the attractiveness of a market and investment prospects.

I note that two years earlier Mr R had invested £200,000 in another UCIS, so there's an argument he had experience of the type of investment he was making through the Seneca fund. But actually, the latter proposal wasn't substantively similar in terms of risk profile or its underlying property.

The information provided by Mr R and derived by HGP during the advice process, about his knowledge, experience and expertise as it related to the Seneca proposition couldn't be safely regarded by it as sufficient to gain assurance that he understood what he was getting into. Rather it should've been the starting point for HGP's probing, exploration and assessment of how suitable the fund was for him. This doesn't seem to have happened.

So, I'm not persuaded by the qualitative test which was conducted by HGP. It didn't demonstrate due diligence nor was it treating Mr R fairly. Given my finding here, I don't need to explore whether it met the other requirements of EPC categorisation.

I note that one of the outcomes of taking Mr R through the EPC route could've been to erode certain protections he would've had as a retail client. To be fair to HGP, these implications were set out clearly on the forms he signed. For example, that he wouldn't be able to complain to this Service about the transaction and it wouldn't be obliged to provide certain information or disclosures.

I might be mistaken, but I detected an inference in some of HGP's earlier submissions that as a result of Mr R being an EPC, the transaction here was beyond the ambit of our Service. I just wanted to make sure it understood the position fully in this regard.

As I'm not satisfied Mr R was correctly categorised as an EPC, I'm not bound to consider him as one for the purposes of DISP 2.7. However, for the sake of completeness, I want to make clear I'm also content those rules wouldn't have inhibited his complaint even if I'd concluded HGP had followed proper process in categorising him as an EPC. I'll explain why.

DISP 2.7.1 says:

"A complaint may only be dealt with under the Financial Ombudsman Service if it is brought by or on behalf of an eligible complainant".

DISP 2.7.3 goes on to say an eligible complainant must be:

"(1) a consumer;…"

Mr R meets the definition of a consumer as defined by the regulator’s glossary:

“…an individual acting for purposes which are wholly or mainly outside that individual’s trade, business, craft or profession.”

However, DISP 2.7.9 gives several exceptions to the list of eligible complainants. One of these is for professional clients. Just to be clear, this doesn’t apply to Mr R because an amendment to the rules came into effect on 9 July 2015. DISP 2.7.9A says:

“DISP 2.7.9 R (1) and DISP 2.7.9 R (2) do not apply to a complainant who is a consumer in relation to the activity to which the complaint relates.”

In other words, from 9 July 2015 Mr R, as a consumer, was no longer subject to the professional client exception meaning he would’ve been an eligible complainant.

Was the advice, recommendation and arrangements made by HGP for Mr R to invest £100,000 of his Self-invested Personal Pension (SIPP) into the Seneca UCIS suitable?

In any event, HGP said it was unconvinced that much should turn on its assessment of Mr R as an EPC. It said he hadn’t suffered any loss as a consequence of that categorisation. It said it was permitted to recommend an investment in the Seneca fund to him as an established client provided it took reasonable steps to satisfy itself that the investment was suitable for him. It said the obligations it was under were materially the same as those provided for under COBS 9.2.1.

This part of the FCA handbook sets out the obligations on firms in assessing the suitability of investments recommended. They are the same things that I look at when reaching a decision about whether the advice was suitable. In summary, the business must obtain the necessary information regarding: the consumer’s knowledge and experience in the investment field relevant to the advice; their financial situation; and their investment objectives.

I’ve reviewed fact-finds and suitability reports on file to try and understand Mr R’s circumstances and objectives around the time of his investment into the Seneca UCIS. I note the fact-finds we have for May 2009 and May 2010 were each 1 page long and lacking in detail. There are a few more details in the July 2010 suitability report HGP produced to support the investment. And there’s a fuller fact-find from November 2010 (although that is after the transaction).

I’m satisfied the following details provide a broad indication of Mr R’s circumstances at the time of the Seneca investment advice. Mr R was married with three children (one dependent). He was 59 and was planning on retiring when he was 65. He was managing director and sole shareholder of a business which had a turnover of around £1.75m. A recent offer on the business for £500,000 was under consideration although he believed this under-valued its worth.

Mr R was taking around £60,000 a year from his business in income and dividends of around £50,000. His buy-to-let properties were generating income of around £15,000 per year. Outgoings were indicated as around £500 per month, although there was little detail provided. Nevertheless, his disposable income would’ve been ample.

In terms of assets and liabilities. It's recorded Mr R's home was worth nearly £1m with an outstanding mortgage of about £200,000. He had properties in the US and UK which were unencumbered and worth somewhere in the region of £750,000. In addition, he had investments worth about £110,000.

In July 2010 HGP noted Mr R's SIPP, which was invested in a portfolio of interests, was valued at around £1.1m. In order to invest in the Seneca UCIS as recommended, he was advised to dis-invest £100,000 from other funds.

One of the arguments made by Mr R's representative is that as soon as he became a client of HGP, his recorded attitude to risk increased substantially. It said this was in HGP's commercial interest but didn't represent his real outlook.

Actually, as I'll set out, Mr R's risk appetite appears reasonably consistent from 2008. And if matters had gone awry, given how many assessments HGP made and suitability reports it produced, I would've expected him to have raised concerns about that. He didn't because I think it's more likely than not the assessments were consistent with his outlook around this time.

It's a matter of record that in 2006 Mr R was assessed by his financial adviser as having a risk attitude that was balanced (5 out of 10). In 2008 his appetite appears to have increased to balanced plus (7 out of 10). I don't find this a major jump given his circumstances and objectives. In 2009 he was again assessed as having a balanced plus risk appetite.

It's of note that when HGP recommended Mr R invest in the RDP UCIS in 2008 it said the following (bolding is my emphasis):

"*You will understand that although the investments I am recommending may be above or below your actual attitude to investment risk, when combined with your other investments the overall effect is that of your true attitude to investment risk."*

"In this instance I would like to advise you that ***the [RDP] fund and the Merchant Securities FTSE 100 Hindsight Note are above your attitude to investment risk."***

There's nothing wrong in principal with balancing risk across a portfolio. But one of the things to guard against would be a self-fulfilling drift to ever increasing risk accumulation which was out of kilter with the clients genuine risk appetite.

When in July 2010 HGP delivered its suitability report for the Seneca UCIS proposal, it again said the following about its assessment of Mr R's risk outlook:

"In terms of your overall attitude to investment risk, we have previously completed a risk profile questionnaire which was developed by Watson Wyatt. This shows that you have a ***balanced plus attitude to investment risk****. This means that any recommended investments are likely to suit an investor that is willing to tolerate a little more risk in order to achieve higher growth over the longer term."*

It's possible HGP was over reliant on the ECP process here, noting the effect on Mr R's protections and the obligations it had to him. I've already set out my findings in relation to how it conducted the ECP process and its failings in that regard.

But in any event, HGP couldn't simply deal with the Seneca transaction in isolation. It was recommending another increase in his exposure and it should've drawn this out for him. The new UCIS investment was for £100,000, just over 9% over his SIPP funds - it was a significant transaction. I've seen no assessment of the impact of the risk he was taking on the balance of his overall pension portfolio.

A few months *after* the Seneca transaction there are other risk assessment documents signed by Mr R. For example, I can see HGP completed a client fact-find on 17 November 2010. This noted no less than three different risk appetite scores for Mr R: "*Adventurous*"; "*Balanced Adventurous*" and using a separate system "*Aggressive*".

A box was ticked to indicate Mr R was experienced in investments – the alternatives were little and average experience. And under the heading "Your objectives" it stated: "*Happy to invest in both higher and adventurous funds dependent on timescale and amount*" and Mr R was said to have confirmed that he fully understood the "*risk/reward trade-off*".

A risk profiling document dated 18 November 2010 seems to paint a slightly different picture of Mr R. Capturing his responses to a questionnaire, Mr R identified his investment experience as:

"Moderate – I've been investing for several years within a broad range of different assets."

There were two other descriptions for those with more experience:

"Good – I've been investing for quite a while and I've lived through at least one market downturn."

"Very Good – I'm an experienced investor and am comfortable with all the ups and downs in the market."

This time the assessment indicated an aggressive attitude to risk (5 out of 6 on the scale). This was defined as follows:

"You have a willingness to accept high investment risk This enables you to include wide range of equity assets with good long-term growth prospects. Although asset class diversification will usually be compromised in an effort to achieve higher real returns the Fund Manager can use both UK and overseas equities to react to specific market conditions You should note that these funds are subject to market movements and currency risk."

The highest category was very aggressive and defined as follows:

"You have a very high tolerance to investment risk. This will allow you access to a wide range of funds, which will target specific assets with potential for high growth. These funds can offer a high level of real return in the longer term. As they focus on asset types or specific markets that undergo a high degree of price change, they can, and often do, experience greater than average volatility. Diversification will usually be compromised in an effort to achieve higher real returns and there will be a significant chance that the value of your assets may fall and could take several years to recover their original value..."

I need to be careful about the weight I place on these documents from November 2010 for two reasons. First, they were clearly completed somewhat after the transaction in question. And secondly there appears to be an odd chronology and some dissonance between the results from those exercises.

Nevertheless, even if I were to rely on the later attitude to risk outcome from 18 November 2010, I think the Seneca UCIS more likely than not fits best under *very aggressive* risk category. So, there's already a strong argument it would've been specifically an investment beyond his assessed appetite for risk in November 2018.

Clearly, it's more appropriate to consider the Seneca investment in light of what was recorded at the time of the transaction about Mr R's attitude to risk. As we know, HGP's suitability report noted (bolding is my emphasis):

*"…you have a **balanced plus attitude to investment risk**. This means that any recommended investments are likely to suit **an investor that is willing to tolerate a little more risk** in order to achieve higher growth over the longer term."*

I don't think the Seneca fund can reasonably be characterised as a good fit with his established risk outlook at the time of the transaction. I've still not seen the analysis I would've expected from HGP about the impact of this investment on his overall portfolio. And it's a matter the adjudicator didn't explore adequately in his view.

HGP hasn't engaged effectively on this point and so I see no reason to alter my initial conclusion here. I'm satisfied the Seneca transaction would've had the effect putting Mr R's overall SIPP investments further out of kilter with his risk appetite.

HGP says it provided Mr R with the necessary suitability assessment, information, advice, comparisons and risk warnings. It says it wouldn't be right to conclude that no other financial adviser acting reasonably would've recommended the investment.

But as I've already set out, I've found Mr R didn't have the knowledge, experience or expertise necessary for him to understand the Seneca investment. And I've concluded the fund wasn't an appropriate fit for his risk appetite, both specifically and when taken across his whole SIPP portfolio. It follows that I don't agree with HGP's assertion that other financial advisers acting reasonably would've done the same as it did.

Mr R's Seneca investment meant that at least 37% of his SIPP funds were invested beyond his appetite, perhaps more. HGP hasn't done enough to show how the remainder of his SIPP - which remember was required to fund his income in retirement – effectively rebalanced his overall position.

HGP says its advice should be assessed by reference to the standards set at the time its service was provided. It says there was a more permissive regime in force at the time with regards to UCIS advice. It says it shouldn't be held to the more restrictive regulation and critical approach to UCIS advice which was subsequently adopted by the Financial Services Authority (FSA), and later the Financial Conduct Authority (FCA).

I agree with the general point HGP makes here about being held to account against the standards of the time. I've already noted the obligations on firms like HGP, including adherence to the Principles, which predate the advice in question. For example, it had to conduct its business with due skill, care and diligence. It also had to pay due regard to the interests of its customers.

Turning specifically to UCIS advice, the FCA issued guidance about unregulated investments in a ‘Good and Poor Practice report’ in July 2010. The report contained examples of good practice in relation to UCIS investments, for example where a firm had robust controls in place and limited client exposure to 3% to 5% of their portfolios, where those clients had been assessed as being suitable for unregulated investments. An example of bad practice given by the FCA was where up to 100% of a client’s holdings were in such funds.

The FCA was concerned about practice in relation UCIS’s because investors had no access to the Financial Services Compensation Scheme (FSCS). Funds were often illiquid, highly specialised in something out of the ordinary and reliant on third parties. Funds often had little or no track record and there was some uncertainty about how to value the assets and whether valuations were correct.

With the addition of the Seneca fund, Mr R had over a quarter of his SIPP in UCIS funds. Even if I take into account all his other assets, excluding his home but including his business (which had an uncertain value), his exposure was high. I’ve not seen there was a clear strategy set out for Mr R’s involvement with such funds. And they were in excess of his appetite for risk, as acknowledged by HGP at the time.

HGP has advanced other arguments in support of its case. For example, it notes Mr R was a very wealthy person and experienced in matters of business and finance. It says he’d shown considerable interest in getting involved with investments like the Seneca fund.

Mr R had significant capacity for loss compared with many people. But just because he was wealthy doesn’t mean he wanted to take risk beyond his recorded appetite. HGP’s responsibility was to make sure this didn’t happen – but I’ve concluded it failed in this regard.

I’ve no reason to doubt that Mr R was very interested in investing in the Seneca fund – but it wasn’t HGP’s role to facilitate his wants. Rather it should’ve been providing advice that was in his best interests. On this occasion, I don’t think it did this.

So, HGP hasn’t demonstrated due care, skill and diligence in promoting the Seneca fund to Mr R or in the advice it gave him to invest a significant portion of his pension provision in another UCIS. And I don’t think the transaction can be regarded at the material time as in his best interests.

Putting things right

In assessing what would be fair compensation, my aim should be to put Mr R 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 R would’ve invested differently. It’s not possible to say *precisely* what he would’ve done differently. But I’m satisfied that what I have set out below is fair and reasonable given his circumstances and objectives when he invested.

To compensate Mr R fairly, HGP must:

- Compare the performance of Mr R’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.

- HGP should also pay interest as set out below.
- Pay to Mr R £200 for trouble and upset caused.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Seneca Fund	still exists	FTSE UK Private Investors Income Total Return Index	date of investment	date of my decision	8% simple per year from date of decision to date of settlement (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.

If at the end date the investment is illiquid (meaning it could not be readily sold on the open market), it may be difficult to work out what the *actual value* is. In such a case the *actual value* should be assumed to be zero. This is provided Mr R agrees to HGP taking ownership of the investment, if it wishes to. If it's not possible for HGP to take ownership, then it may request an undertaking from Mr R that he repays it any amount he may receive from the investment in future.

Fair value

This is what the investment would've been worth at the end date had it produced a return using the benchmark.

I've decided on this method of compensation because:

- Mr R wanted capital growth and was willing to accept some investment risk.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix 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's 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 R's circumstances and risk attitude.

My final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend the business to pay the balance.

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Helm Godfrey Partners Ltd should pay Mr R the amount produced by that calculation – up to a maximum of £150,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

If Helm Godfrey Partners Ltd does not pay the full fair compensation, then any investment currently illiquid should be retained by Mr R. This is until any future benefit that he may receive from the investment together with the compensation paid by Helm Godfrey Partners Ltd (excluding any interest) equates to the full fair compensation as set out above.

Helm Godfrey Partners Ltd may request an undertaking from Mr R that either he repays to it any amount he may receive from the investment thereafter or if possible, transfers the investment at that point.

Helm Godfrey Partners Ltd should provide details of its calculation to Mr R in a clear, simple format.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Helm Godfrey Partners Ltd pays Mr R the balance plus any interest on the balance as set out above.

This recommendation is not part of my determination or award. It does not bind Helm Godfrey Partners Ltd. It’s unlikely that Mr R can accept my decision and go to court to ask for the balance. He may want to consider getting independent legal advice before deciding whether to accept this decision.

For the reasons I've already set out, I'm upholding Mr R's complaint. And I require Helm Godfrey Partners Ltd to put things right in the way I've indicated.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R either to accept or reject my decision before 17 April 2021.

Kevin Williamson
Ombudsman