

complaint

The executor of the late Mrs B complains about advice from Buckland Harvester Limited to invest in the Connaught Income Fund series 1 (the "CIF", previously the Guaranteed Low Risk Income fund) and Stirling Mortimer No.8 UK Land fund ("SM8").

The complaint concerns the suitability of the advice, in terms of the risk of the funds for a 'low' risk investor. Concern has also been raised about the amount of capital invested, given Mrs B's age and health at the time of the advice.

background

The late Mrs B met with Buckland Harvester's adviser in 2009 to discuss investing £300,000 made available by downsizing her home. She was advised to make a number of investments. These included £150,000 in SM8 and £50,000 in the CIF.

Our adjudicator concluded that the complaint should be upheld. In summary, she said:

- Both investments are unregulated collective investment schemes (UCIS).
- She hadn't seen anything to suggest that Mrs B was prepared to accept anything more than a low level of risk.
- Buckland Harvester warned Mrs B of some of the risks, including that the SM8 was closed ended. But it didn't say what SM8's risk level was. Our adjudicator didn't think it was low risk. So it wasn't suitable.
- The CIF was represented as being low risk. And the adviser said it was suitable for Mrs B.
- The CIF wasn't low risk, for a number of reasons. So it wasn't suitable either.
- The two UCIS accounted for around 66% of Mrs B's available funds. This was too high a proportion to place in funds with no fewer regulatory protections.

Buckland Harvester's representatives replied and made the following points:

- Our adjudicator hadn't explained exactly what risks SM8 had which weren't disclosed to Mrs B.
- They disagreed with our adjudicator's comments on the risks of CIF. It wasn't complex and a narrow focus didn't necessarily increase the risk.
- The specialist partner had been operating for four years. Loan to value requirements provided a cushion against falls in value.
- An 8% return wasn't disproportionately high against the backdrop of 4.5% base rate in October 2008 and standard terms for secured lending of base rate + 3%.
- The specialist partner was regulated by the Financial Services Authority (FSA – now FCA) and there was no reason to think it wouldn't comply with its guarantee.
- Mrs B had been told clearly that she wouldn't have the protection of the Financial Services Protection Scheme.
- If the CIF had performed as it said it would, then it would quite properly be described as a low risk fund.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I'm going to uphold it. I explain why below.

UCIS is a term for a broad group of investments that aren't subject to the same restrictions as a FCA-regulated collective scheme. The regulator has generally regarded UCIS as being characterised by a high degree of volatility, illiquidity or both. They are therefore usually speculative investments and, in practice, rarely regarded as suitable for more than a small part of a portfolio.

In this case, Buckland Harvester advised Mrs B to put two thirds of the funds being discussed into two UCIS. It advised her to put £150,000 (half the sum being discussed) into one extremely narrowly focused UCIS (I'll say more on this point later).

I realise that Mrs B had other investments in ISAs and investment bonds, following earlier advice from Buckland Harvester. I haven't seen details of these, but according to the 2008 fact find, they amounted to around £160,000, meaning that SM8 accounted for around a third of Mrs B's total investable assets and the two UCIS around 46%. I think this was too high a proportion. In my view, this represented enough of a concentration risk to make the advice unsuitable.

Stirling Mortimer No.8 UK Land fund

I agree with our adjudicator that this fund wasn't low risk. I note that Buckland Harvester didn't mention any risk level in its recommendation letter. But the letter did say in its opening section "*I understand that you require a lower risk arrangement for all investments apart from a 2009/10 ISA*". As Buckland Harvester was recommending SM8, Mrs B was entitled to assume that it met her requirements. So I think it's reasonable to say that SM8 was recommended as low risk.

The executor has complained that this fund was unsuitable because of its illiquid nature, given that Mrs B's age and medical condition meant there was a foreseeable need for long term care. Buckland Harvester has argued that its adviser was fully aware of Mrs B's situation, but she had other liquid assets and it was agreed to make this investment on a five to ten year basis. I note that in the 2008 fact find, Mrs B said she didn't need the money for five years. And she did have other more liquid investments. So I don't think it was unsuitable purely on the basis of its illiquidity.

However, notwithstanding the lack of liquidity, I think the SM8 was a higher risk investment than Mrs B was willing to accept. It planned to use gearing, and its focus was extremely narrow – buying land from distressed sellers with outline planning permission. So its performance was dependent on identifying and successfully acquiring suitable sites, doing so at an attractive discount and then being able to find buyers for them. There is clearly risk at all stages of this process. And the risk was going to be concentrated on the sites bought.

The prospectus said:

"An investment in the company is only suitable for investors who are capable of evaluating the merits and risks of such an investment and who have sufficient resources to be able to bear any losses (which may be equal to the whole amount invested) which may result from such an investment".

I'm satisfied that Mrs B wasn't in this category. My conclusion is that SM8 wasn't suitable for her. I know Buckland Harvester has said that the risks were discussed and Mrs B had the

prospectus. But their advice still had to be suitable for Mrs B's circumstances and objectives. For the reasons set out above, I don't think it was.

I note that SM8 had a fixed termination date in December 2016. This hasn't been reached yet. So it's not yet clear whether some of Mrs B's capital will be returned, with or without any additional pay-out, at that point. But as I've concluded that the advice was unsuitable, I take the view that Mrs B's money shouldn't have been tied up in this fund. So it's not fair to expect Mrs B's estate to wait until the termination date. Buckland Harvester should therefore compensate Mrs B's estate now, but Buckland Harvester should then benefit from any future payments from the fund.

the Connaught Income Fund series 1

I also don't consider the CIF should have been described as a low risk fund.

Buckland Harvester's representatives have disagreed with the various reasons our adjudicator gave for the CIF being unsuitable for someone who wanted a low risk investment. I accept that being specialised doesn't inherently make risk greater. But in this case, I think the nature of the specialism, bridging finance, meant it did increase the risk. And I don't think four years is a very long track record for a lending business.

I also disagree with Buckland Harvester's point about the return offered by the CIF. They've argued that over 8% wasn't a high return at the time the CIF was launched. They say this because base rate was 4.5% at that time and secured lending was typically at base + 3%. I think the relevant comparison should be with investment returns – and investment returns at the time when Mrs B was advised to invest, not when the CIF was launched. By the time of the advice, base rate was 0.5%. A return of over 8% would have been extremely high compared with any low risk investments. I think this should have indicated to Buckland Harvester that the CIF wasn't in fact low risk.

I will also point out that bridging finance isn't a low risk form of lending. In my view, that's why the mainstream lenders didn't do it – even in 2008. And that's why the CIF Information Memorandum said that the bridging loans would be made at interest rates of between 1.25 and 1.4% *per month*.

Buckland Harvester has said that at the advice meeting, Mrs B's family representatives wanted to put more than £50,000 into the CIF. I don't think this is relevant. Any views they had were on the basis that it was low risk and suitable for Mrs B. Buckland Harvester were the experts and Mrs B and her family were entitled to rely on its advice.

There may have been shortcomings in the management of the CIF. Some of the parties involved have been accused of acting fraudulently. But I'm not in a position to make any comment about the conduct of those involved. No complaint has been brought against any other party – we've only been asked to consider whether the advice given to Mrs B was suitable.

A court might conclude that Mrs B's losses didn't flow directly from the unsuitable advice given by Buckland Harvester. And on this basis, a court might not require Buckland Harvester to compensate her estate - notwithstanding their clearly unsuitable advice. But in assessing fair compensation, I'm not limited to the position a court might take.

If fraud did take place (and, as mentioned, I'm not in a position to say this), it may be there has been a break in the "*chain of causation*". That might mean it would not be fair to say that all of the losses suffered by a consumer flow from the unsuitable advice. That will depend on the particular circumstances of the case. No liability will arise for an adviser who has given suitable advice even if fraud later takes place. But the position is different where the consumer wouldn't have been in the investment in the first place had it not been for the unsuitable advice. In that situation, it may be fair to assess compensation on our usual basis – aiming to put the consumer in the position she would have been in if she'd been given suitable advice.

In this particular case, I conclude that it would be fair and reasonable to make an award, given the specific circumstances. This is notwithstanding arguments about a break in the "*chain of causation*" and the "*remoteness*" of the loss from the (poor) advice given. Had it not been for Buckland Harvester's unsuitable advice, Mrs B wouldn't have made the investment. And I think the advice completely disregarded Mrs B's interests. Buckland Harvester advised Mrs B to invest a significant portion of her funds into two unregulated funds with limited track records. And Buckland Harvester incorrectly assessed and described the risk associated with them. In these circumstances, I think that it's fair and reasonable to hold Buckland Harvester responsible for the whole of the loss suffered by Mrs B. I will, however, make allowance for the possibility of some of her money being returned to her estate in the future.

If Buckland Harvester consider other parties to be wholly or partly responsible for the loss, they are free to pursue them. I appreciate that they may not have the resources to do so. But I don't think that should mean that Mrs B's estate should only be compensated now for part of the losses she has suffered (or not compensated at all). I'm aware that some compensation may be paid to the estate as a result of work currently being carried out by the regulator. It's also possible that the liquidators of the CIF will obtain some return for investors. If Mrs B's estate is going to be compensated in full now, Buckland Harvester should benefit from these payments if they are made. I have therefore made allowance for this in my compensation award below.

It's not in dispute that Mrs B didn't want to invest in shares. She also wanted a better return than her bank account. On this basis, I agree with our adjudicator that an appropriate benchmark for compensation is the return she could have obtained from investing in fixed rate bonds.

fair compensation

In deciding what's fair, I think my aim should be to put Mrs B's estate in as close as I can to the position it would probably now be in if Mrs B hadn't been given unsuitable advice.

I take the view that Mrs 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've set out below is fair given her objectives when she invested.

what should Buckland Harvester do?

To compensate Mrs B's estate fairly, Buckland Harvester must:

- Compare the performance of Mrs 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.

Buckland Harvester should also pay interest as set out below.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
CIF	still exists	average rate from fixed rate bonds	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)
SM8	still exists	average rate from fixed rate bonds	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)

for each investment:

actual value

Both Mrs B's investments currently have no realisable value. So, for the purposes of the calculation above, the actual value of each should be assumed to be zero.

The Financial Conduct Authority (FCA) has said that it is to investigate the operators of the CIF. It's said that it has not reached any conclusion that any wrongdoing has occurred. But that is one of the possible outcomes of its investigation. So it's possible that some compensation might be payable in relation to Mrs B's holding in the CIF. It's also possible that some other return might be paid from the CIF. I therefore think it reasonable to make allowance for this possibility.

In the case of SM8, it's not clear what return Mrs B's estate might get on the termination date (or beyond, if it's extended).

So, in exchange for the compensation payable by the business, the executors should agree to transfer Mrs B's holdings in the funds to it, if possible, to allow Buckland Harvester to benefit from any compensation or other payments that might be made in relation to the holdings. If it's not possible to transfer Mrs B's holdings, the executor should give an undertaking to repay to Buckland Harvester any amount received in relation to the investments in future, whether it is a compensation payment or any other sort of return.

fair value

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

To arrive at the *fair value*, Buckland Harvester should use the monthly average rate for the fixed rate bonds with 12 to 17 months maturity as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Buckland Harvester should deduct any withdrawals, income or other payments out of the investments from the *fair value* at the point actually paid. So they cease 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 Buckland Harvester totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

I've decided on this method of compensation because:

- Mrs B wanted to achieve a better return than deposit accounts, with only a low risk to her capital. She didn't want to invest in the stockmarket.
- The average rate for fixed rate bonds would be a fair measure given Mrs B's circumstances and objectives. It doesn't mean that Mrs B would have invested only in a fixed rate bond. It is the sort of investment return a consumer could have obtained with little risk to their capital.

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 Buckland Harvester Limited should pay Mrs B's estate the amount produced by that calculation – up to a maximum of £150,000 plus any interest set out above.

If Buckland Harvester Limited doesn't pay the full fair compensation, then any investment currently illiquid should be retained by Mrs B's estate. This is until any future benefit that she may receive from the investment together with the compensation paid by Buckland Harvester Limited (excluding any interest) equates to the full fair compensation as set out above.

Buckland Harvester Limited may request an undertaking from Mrs B's executor that either the estate repays to Buckland Harvester Limited any amount it may receive from the investment thereafter or if possible, transfers the investment at that point.

Buckland Harvester Limited should provide details of its calculation to Mrs B's executor in a clear, simple format.

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Buckland Harvester Limited pays Mrs B's estate 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 Buckland Harvester Limited. It is unlikely that Mrs B's estate can accept my decision and go to court to ask for the balance. Mrs B's executor may want to consider getting independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I am required to ask Mrs B's executor either to accept or reject my decision before 12 February 2016.

Louise Bardell
ombudsman