

complaint

Mr O's complaint is about advice he received in 2009 from Insight Financial Associates Limited ('Insight') to transfer personal pensions to a Rowanmoor SIPP. The SIPP was then used to invest in an Unregulated Collective Investment Scheme ('UCIS') to fund the development of a resort in Cape Verde with The Resort Group.

Mr O says Insight's advice was negligent and has caused him a financial loss.

background

In 2009, Mr O was made aware by a third party about an opportunity to invest in the Cape Verde development.

Mr O was then introduced to an adviser at Insight. The adviser then completed a document setting out Mr O's circumstances in August. It said that Mr O had been introduced to Insight *'regarding the potential to use retirement funds to facilitate'* the property purchase. Insight then contacted Mr O's existing pension providers around September 2009.

On 1 December 2009 Mr O completed a number of forms which included:

- a pension funded reservation form which reserved a property for Mr O.
- a payment plan option details form which set out that Mr O had agreed to pay a reservation fee of £1,482. This fee would be returned once the deposit for the property was received. The form also said that Mr O had agreed to pay 45% of the property purchase price as a deposit and the remainder would be paid on completion of the property.
- an application form for a SIPP with Rowanmoor. This form was also signed by Insight and set out that a fee of £495 should be paid to it for the transfer to the SIPP and then £250 a year after this.
- forms to Mr O's existing schemes instructing them to transfer his pension benefits to the SIPP with Rowanmoor.

Insight issued a letter on 14 December 2009 setting out its advice. It recorded that Mr O:

- was aged 54.
- had a personal pension with Scottish Life with a value of around £36,495 and a transfer value of £33,831.
- had a retirement annuity contract with Barclays with a value of around £35,419 and a transfer value of £35,067.
- held benefits in the British Gas defined benefit scheme but no further details were recorded.
- had a medium to high attitude to risk.

- wanted to take tax free cash from the SIPP to support his disabled son.

The suitability letter said that Mr O had already decided to invest in the Cape Verde development and that Insight's role was limited to advising on a suitable provider to accommodate the investment plans.

Insight also highlighted that investing in off plan property carried the risk of the developer becoming insolvent. And that investing in commercial property like Cape Verde would increase the risk level of Mr O's investment due to the illiquid nature of the investment and lack of diversification of his assets.

Nonetheless, Insight's advice was that Mr O transfer his personal pensions to a SIPP with Rowanmoor to fund the Cape Verde investment.

Mr O followed Insight's advice. In January 2010, he started a SIPP with Rowanmoor. In the event, a total of around £75K was transferred to the SIPP. Mr O was then paid 25% of the amount transferred as a tax free lump sum. The deposits for the Cape Verde investments, approximately £45k, were then paid in February 2010.

Insight rejected Mr O's complaint. It also said that this service could not consider it as it had been made outside the time limits in our rules.

Our adjudicator disagreed. He concluded that there was not sufficient persuasive evidence to show Mr O was aware of cause to complain more than three years from when he complained to Insight. He also concluded that the complaint should be upheld on its merits.

Insight reiterated that this complaint should be time barred. In summary, it said that reviews were carried out with Mr O since 2009. It said that *'during the discussions and reviews held with us, his ATR, objectives and the performance of his plan would have been discussed.'* So it said Mr O *'would have had sufficient opportunity to raise his concerns regarding the Rowanmoor Self Invested Pension Plan'*.

It also said the SIPP statements showed that, since the Cape Verde investment was made, payments (either interest or rental income from the investment) had been received into the SIPP. It also said it understood Mr O has consolidated his Cape Verde investment in 2015 but wasn't able to give me any other details.

Insight also referred to correspondence between it and Rowanmoor in 2015 in respect of a request by Mr O to withdraw a sum from his SIPP. Rowanmoor wrote to Mr O on 13 April 2015. However, the email chain which Insight forwarded shows that the email of the 13th had in fact been sent to Mr O's old email address. Rowanmoor then resent the email to Mr O's new address on 30 April.

Lastly, Insight highlighted that Mr O approached it in 2017 about transferring his benefits in the British Gas defined benefit scheme. Insight said that after discussions with Mr O, it understood he used another firm to carry out the transfer. It questioned if this transfer was in his best interests given Mr O's statements that he had no previous investment experience, a low attitude to risk and a low capacity for loss.

Our adjudicator also asked Rowanmoor for information. It provided statements that were sent to Mr O. These show that the value of Mr O's SIPP in February 2010 following the

investment into Cape Verde was around £55K. By December 2014 (the last value before April 2015), the value of Mr O's SIPP was shown to be around £52K.

The documents from Rowanmoor also showed that in January 2015, Mr O signed documents amending his original contract with the Resort Group. This said that under the terms of the original contract, Mr O's SIPP had paid £46,868.56 as a deposit for a property and the remainder was due to be paid upon completion of that property. In 2015, it was agreed that Mr O would no longer have to pay any more money. Instead, the amounts he'd already paid would be used towards acquiring 33% of a company that would own a unit in the development.

The adjudicator was not persuaded to change his view either in respect of our jurisdiction to consider this complaint and that the complaint should be upheld on its merits.

Insight responded and reiterated that it did not believe this complaint had been made within the time limits in our rules.

I therefore issued a Jurisdiction decision which concluded that the merits of this complaint can be considered by this service. Our adjudicator asked Insight to provide any further evidence it wished to submit for me to consider when determining the merits of this complaint.

Insight responded and said that:

- *there is reference on Page 3 to the fact find that in January 2015 Mr O signed documents amending his original contract, presumably this related to the fact that insufficient funds were held within the SIPP to purchase the original property he signed up for in 2009?*
- *When The Resort Group contacted investors for payment of the remaining balance, if there were insufficient funds within the SIPP, they gave the investor the opportunity to sell the original property and reinvest in a smaller property or a part ownership of a property.*
- *At this point in time (January 2015) Mr O would have needed to complete a new range of documentation, including a full range of legal documents to sell and purchase the old and new property respectfully.*
- *Given the need for a full range of documents, including legal ones and the need to change the investment from one property to part ownership of another property, this would have given him cause to question what was happening and to ask questions. The Resort Group would have told him what was happening, the reasons for the change from full ownership of one property to part ownership of another, and this should have made him aware that he needed to contact us and indeed this should have made him aware that he had cause for complaint.*
- *Mr O certainly did not contact us as the time the property investment was consolidated.*
- *We have received a number of decisions on cases where 'consolidation' of the properties has taken place where you have not upheld the decision for this reason, we would trust that a consistent approach will be taken.'*

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 reached the same conclusions as our adjudicator and for the same reasons. My reasoning here then is commensurately similar to that set out in the adjudicator's assessment.

In respect of Insight's points above in response to our adjudicator, I make the following comments.

I agree that insufficient funds were held in Mr O's SIPP at the time of the investment. In my view, this exacerbated the risk of the investment. For reasons explained below, I am persuaded Insight failed to give Mr O suitable advice. Had it done so, I would have expected it to have highlighted the risk of not having sufficient funds to complete the investment.

The further four points are relevant to jurisdiction. They refer to events significantly later than the initial transfer and investment. The crux of my decision here though is concerned with the initial transfer and investment in 2009 rather than events in January 2015. I have already explained in my Jurisdiction decision my reasoning in respect of these points.

Finally, in terms of consistency, I cannot comment on other decisions reached by this service. But I would point out that each case is considered on its individual merits and circumstances. That is what I have done in this case.

should Insight have advised on the Cape Verde investment?

Insight knew this was the intended investment following Mr O's proposed transfer to a SIPP.

Insight has said that it was only offering advice to Mr O on the suitability of a SIPP. But Insight had a greater responsibility than this.

The Financial Services Authority (now Financial Conduct Authority) issued an alert in January 2013. It described situations such as this where a third party is involved in the sale, and where advice is provided for a consumer about a SIPP but not the intended investment. Typically, the consumer will be seeking to invest heavily in an unregulated and highly illiquid fund. Though the alert post-dates Mr O's arrangements, the regulator was clear that a model whereby a financial adviser does not consider the unregulated investment as part of the advice to invest in a SIPP was incorrect under existing regulations.

The SIPP was a vehicle for the investment in commercial property and Insight knew this. In my opinion, separating advice about a SIPP from the intended investment for which it was to be used was not consistent with Insight's regulatory obligations to Mr O. The SIPP was being considered because of the property investment. So advice about the SIPP ought to have addressed the underlying investment. Consequently, Insight was required to assess if the Cape Verde investment was suitable for Mr O when advising on the transfer to the SIPP.

I note Insight set out some information about the Cape Verde investment in its advice letter, including that it was illiquid and Mr O could lose all his money. But, it was Insight's responsibility to assess the risks according to Mr O's circumstances and advise accordingly. Simply providing Mr O with information was not consistent with what was required by the regulator.

was the Cape Verde investment suitable?

I have concluded Insight should have advised Mr O on the suitability of the Cape Verde investment. The question then is whether the investment was suitable for Mr O's circumstances.

I note that the value of Mr O's British Gas scheme benefits were not recorded at the time of the transactions. Similarly, I have not seen details of his total earnings (although I note that he was a basic rate tax payer).

From the evidence I have seen, I think a reasonable assumption is that the £75K in his personal pensions would have represented a significant proportion of Mr O's retirement savings.

Insight said in its advice letter that Cape Verde was a high risk investment. In particular, it exposed Mr O to significant risks, including liquidity and exchange rate risk.

Mr O was also age 54 and so had a relatively limited time before retirement to make up any losses that he might suffer.

Given Mr O's circumstances, Mr O was not in a position to expose a likely significant part of his retirement savings to the risks that the Cape Verde investment exposed him to. So, Insight should have advised him against investing in Cape Verde.

what would Mr O have likely done if given suitable advice?

I think that, on balance, if Insight had advised Mr O against the Cape Verde investment, he would have followed this advice. This is because I think it's reasonable to say that in most instances a client follows the advice of their professional adviser. And in this case, I have not seen evidence to persuade me that Mr O was an experienced investor.

I note Mr O was also dealing with a person not regulated to give pension advice. Insight was the firm involved with this transaction and was regulated to give such advice. I am persuaded that suitable advice should have been not to proceed with the Cape Verde investment.

I also note that Mr O had already signed the property reservation forms and agreed to pay a reservation fee. I'm not sure if Mr O actually paid the reservation fee, but if he did I note not proceeding with the Cape Verde investment might have led him to lose the reservation fee. But despite this, I think that if Insight had advised Mr O against the Cape Verde investment, it's more likely than not that he would have followed its advice.

However, I note that Mr O wanted to access his tax free cash to support his disabled son. And it seems he had no need for an income from his pension at that point. So I think in these particular circumstances that it would've been reasonable for Mr O to transfer to a SIPP so he could access a lump sum and keep the remainder invested. But to be

clear, Insight should've advised Mr O against the Cape Verde investment and I think Mr O would've followed this advice.

I cannot say for certain what investments Mr O would have invested in if he'd been given suitable advice by Insight. But I accept from the submissions of his representatives about his attitude to risk that he would have wanted small risk to his capital.

fair compensation

My aim is to put Mr O in the position he would be in now but for Insight's actions. I consider it reasonable to assume that he would have transferred to the Rowanmoor SIPP and taken the tax free lump sum when he did. However I think he would not have subsequently invested in Cape Verde if suitably advised by Insight.

I think Mr O would have invested differently. 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 Mr O's circumstances and objectives when he invested.

what must Insight Financial Associates Limited do?

To compensate Mr O fairly it must:

- Compare the performance of Mr O's investment with that of the benchmark shown below. If the *fair value* is greater than the *actual value*, there is a loss and compensation is payable. If the *actual value* is greater than the *fair value*, no compensation is payable.

It must also pay any interest set out below.

If there is a loss, it should pay into Mr O's pension plan, to increase its value by the amount of the compensation and any interest. This payment should allow for the effect of charges and any available tax relief. It should not pay the compensation into the pension plan if it would conflict with any existing protection or allowances.

If unable to pay the compensation into Mr O'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 compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mr O's actual or expected marginal rate of tax at his selected retirement age.

For example, if Mr O is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr O would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

- In addition, it must pay Mr O £500 for the trouble and upset caused.
- Provide the details of the calculation to Mr O in a clear, simple format.

Income tax may be payable on any interest paid. If Insight considers that it is required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr O how

much it has taken off. It should also give Mr O a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

| investment name | status | Benchmark | from ("start date") | to ("end date") | additional interest |
|-----------------|--------------|--|---------------------|---------------------|---|
| Cape Verde | still exists | for half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds | date of investment | date of my decision | 8% simple annually from decision date to settlement (if not paid within 28 days) of acceptance notification |

The monies to be allowed for as part of the Cape Verde investment in the benchmark notional calculation are to include all monies from the SIPP that were applied in making the Cape Verde investment. This includes not only the sum actually invested but also any monies paid for fees, charges or commissions which were ancillary to the Cape Verde investment.

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 cannot be readily sold on the open market), it may be difficult to find the *actual value* of the investment. So, the *actual value* should be assumed to be nil to arrive at fair compensation. Insight Financial Associates Limited should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the compensation and the balance paid as I set out above.

If Insight is unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. It may require that Mr O provides an undertaking to pay it any amount he may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Insight will need to meet any costs in drawing up the undertaking.

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* when using the fixed rate bonds as the benchmark, Insight Financial Associates Limited 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 shown as at the end of the previous month and apply those rates to the investment on an annually compounded basis.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Any withdrawal, income or other distribution 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 Insight totals all those payments and deduct that figure at the end instead of deducting periodically.

If Mr O had paid a deposit for the Cape Verde investment prior to Insight having proffered any advice, and if such a deposit was only then refundable if the investment in Cape Verde was actually made, then a notional deduction may also be made for a sum equivalent to that deposit on the basis that this sum would have been forfeited had suitable advice been given as the investment in Cape Verde would not then have gone ahead.

why is this remedy suitable?

I have chosen this method of compensation because:

- Mr O wanted capital growth with a small risk to his capital.
- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.
- 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's a fair measure for someone who was prepared to take some risk to get a higher return.
- I consider that Mr O's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr O into that position. It does not mean that Mr O would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr O could have obtained from investments suited to his objective 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 Insight Financial Associates Limited must pay Mr O 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 Insight Financial Associates Limited does not pay the recommended amount, then any investment currently illiquid should be retained by Mr O. This is until any future benefit that he may receive from the investment together with the compensation paid by Insight Financial Associates Limited (excluding any interest) equates to the full fair compensation as set out above.

Insight Financial Associates Limited may request an undertaking from Mr O that either he repays to Insight Financial Associates Limited any amount Mr O may receive from the investment thereafter or if possible, transfers the investment at that point.

Mr O should be aware that any such amount would be paid into his pension plan so he may have to realise other assets in order to meet the undertaking.

Insight Financial Associates Limited should provide details of its calculation to Mr O in a clear, simple format.

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Insight Financial Associates Limited pay Mr O 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 Insight Financial Associates Limited. It is unlikely that Mr O can accept my decision and go to court to ask for the balance. Mr O 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 Mr O either to accept or reject my decision before 24 February 2020.

Terry Connor
ombudsman