complaint

Mr H is unhappy about advice he received from Apollo Pension & Investment Advisers. He says:

- the way in which his attitude to risk has been assessed and the recommendations for the investments within his Self- Invested Personal Pension (SIPP) was wrong.
- he was advised by Apollo Pension & Investment Advisers to invest too much in a structured product.
- he was given advice to invest in an unregulated and high risk fund by the adviser when was not authorised to do this.
- it was not made clear to him that there was a distinction between the authorised and non-authorised company.

background

In January 2012 Mr H received advice from Apollo to set up a SIPP and transfer his existing pension benefits into the SIPP. Apollo also advised him to invest in a structured product which went ahead in March 2012.

Mr H also received advice from a non-regulated company to invest some of his SIPP in a 'Green Oil' fund.

Mr H complained about the advice he had received in November 2013, and referred his complaint to the Financial Ombudsman Service.

The adjudicator wrote to Mr H and explained that she was unable to uphold his complaint. Mr H did not agree and the complaint was referred to me to review. I issued a provisional decision which can be summarised as follows:

- Mr H received advice from Apollo to start a SIPP and the investment within the structured product. Within the same time period he also made the investment into the Green Oil fund.
- Over a number of years Mr H had agreed to increase the risk he was prepared to take with his pension funds. Mr H was initially invested in fairly standard investments that I would describe as medium risk. Over the time he was advised by Apollo his recorded attitude to risk increased so that he was classified as prepared to accept a high level of risk.
- I do not accept that Mr H should have been treated as an investor for whom high risk investments were suitable. Clearly, he was informed about the risks and wanted to retire early. However, he was a client of Apollo and was receiving advice. That advice was required to be suitable for his circumstances.
- The investments in the pension fund were the only assets recorded for Mr H other than his home. In my view, he was not in a position to accept a high level of risk with his investments. In my judgement the earlier assessment that Mr H was prepared to accept a medium to high level of risk is the most that I would say was suitable for him.
- The adviser employed by Apollo recommended the SIPP and was also the agent for the Green Oil investment. It must be true that the adviser knew that the investment was to be made in Green Oil.

- The Financial Services Authority (FSA) issued an alert in January 2013, although the alert was issued after the advice was given to Mr H it represents the FSA's view about how the adviser should assess suitability of any advice given.
- The suitability letter of 25 January 2012 was written in full knowledge that a proposed investment was being made into the Green Oil fund.
- In my view the adviser was fully aware that the pension funds were being invested into a high risk fund. Following the recommendation for the structured product Mr H would have £195,000 invested in two products/funds from his SIPP fund of £200,000. In my view, it was not possible for the adviser to give suitable advice to recommend the SIPP without considering the investments that would be made in the SIPP.
- The Green Oil fund was a high risk unregulated fund and the amount that Mr H invested into the fund represented 60% of his fund. This type of fund is typically only suitable for experienced and sophisticated consumers and there was insufficient evidence on the file to demonstrate that Mr H could have been categorised as this.
- The structured product also exposed the investment to significant risk. It provided returns linked to the FTSE 100. The returns were limited to a maximum of 60% of the investment, but there were positive returns in a falling market. There was the possibility of the total loss of the investment if the guarantor of the securities failed.
- The adviser explained that he would not normally recommend more than 25% of the total investment in structured products and no more than 10% in a single product. This is clear evidence that the advice to invest 40% in one product was unsuitable.
- The combination of investing 40% of the investment in the structured product and 60% in the unregulated Green Oil investment represented a very high risk strategy. There was very little diversification and this was nearly all of Mr H's retirement provision. In my view, the advice to transfer to the SIPP and invest in the two different investments was unsuitable.

Apollo responded in January 2015 and their letter contained the following points:

- It is implied or stated that the SIPP was established solely for the inclusion of a non-regulated product. This was not the case. Before the SIPP was established Apollo had considered other providers. One of the attractions for Mr H of a full SIPP was the access to a wide range of possible investments.
- The particular structured product was not launched until 26 January 2012. The SIPP proposal form was completed on 25 January 2012. It could not have been known at the time of signing the proposal form that a structured product, would be considered, or even discussed as part of Mr H's possible investment portfolio.
- The structured product was a six year plan which aimed to provide a 60% return net of all costs and charges. The plan could be sold before the expiry of the six years. An investor could exit the plan if the current value was attractive enough.
- Mr H's preference was to invest in the structured product. The adviser pointed out the high percentage was not recommended.
- In the adviser's opinion, Mr H understood all of the risks and decided to place a large sum into this structured product. He was informed about the guidelines when investing into such plans and he replied *'It's my money, I can do what I want'.*
- It was extremely unfair for the structured product to be considered unsuitable in this case. No adviser would encourage an investor to commit such a high a proportion of his funds to these types of plans. Mr H insisted that he be allowed to invest as much as he wanted to.
- Mr H completed a Dynamic Planner and confirmed several things including that he was a high risk investor with a capacity to accept losses. The Dynamic Profiler

confirms that Mr H's tolerance and acceptance of 'high risk' categorised/investments has been consistent since March 2006.

- On 27 September 2013 they were notified of a possible pension transfer in to Mr H's SIPP. He had contacted the SIPP provider directly to arrange a transfer-in of another employer's pension scheme. Mr H confirmed he had not taken any advice but he still wished to transfer his plan *'for a better return'*
- Mr H has generally been more ambitious and decisive and held strong convictions about what he wished to do. Occasionally an investor can tend to resent guidelines given to them as they see it as an infringement of their personal choices.
- Apollo did not introduce the Green Oil investment to Mr H. The introduction was made by a third party. Apollo understood that Mr H received the Green Oil brochure sometime in November 2011. He had plenty of opportunity to read this carefully and study the information and make an assessment whether this might be suitable for him. The brochure did explain that it was an unregulated opportunity.
- When the SIPP was established Mr H had no firm intention of buying the Green Oil fund. Any final decision to proceed was dependent upon a field trip by the adviser in his capacity as Director of the unregulated firm. Mr H was aware of this trip and full details were shared with him on the adviser's return. It was inconceivable that he did not know much about the risks of the Green Oil fund at the time, or how very different this was when compared to regulated products.
- Mr H had been issued with a three page 'Conflicts of Interest' letter by Apollo which clearly set out the distinction between Apollo and the non-regulated business.
- Mr H deferred any decision to await the feedback about the trip to see the plantations. Apollo believes that the decision to defer his application to Green Oil to await the feedback shows Mr H's fullest understanding about the project.
- The non-regulated company stationery was totally different to Apollo's.
- The adviser has 35 years of providing face to face advice. His complaint record is excellent. He is good at explaining the risks and assessing suitability of investments for his clients. If that were not the case he would have had many more complaints upheld.
- Mr H has not previously identified any issues about understanding products or information given to him by the adviser.
- The provisional decision clearly relies upon an alert from the FSA issued after the advice. It adopts the reasoning from that alert and must be retrospective decision making.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

It is common ground that a third party, who was also a client of Apollo, introduced the investment to Mr H. The advice from Apollo to Mr H to establish his SIPP was given in January 2012. I have explained that I consider this advice to be contrary to the FSA alert that was issued in January 2013. Apollo have stated that this alert cannot be applied to advice that was given prior to January 2013.

The FSA issued an alert in January 2013 about transactions similar those in this complaint. The FSA noted that advisers appeared to be under the mistaken impression that they could consider the suitability of a SIPP in the abstract. Although the alert was issued after the advice was provided by Apollo, the alert echoed the duty placed on firms in the FSA

handbook under rule COBS 9. In my view, of particular relevance to this complaint is COBS 9.2.1:

1. *A firm must take reasonable steps to ensure that a personal recommendation, or decision to trade, is suitable for its client.*

2. *When making the personal recommendation or managing his investments, the firm must obtain the necessary information regarding the client's:*

    a. *Knowledge and experience in the investment field relevant to the specific type of designated investment or service;*

    b. *Financial situation; and*

    c. *Investment objectives;*

So as to enable the firm to make the recommendation, or take the decision, which is suitable for him.

This should be read in conjunction with COBS 9.2.2:

1. *A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:*

    a. *Meets his investment objectives;*

    b. *Is such that he is able to financially to bear any related investment risks consistent with his investment objectives; and*

    c. *Is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or into the management of his portfolio.*

It is difficult to see how a recommendation to start a SIPP can suitably be made without considering the proposed underlying investment. I consider Apollo was aware of Mr H's circumstances. Apollo confirmed that Mr H was in possession of a Green Oil brochure prior to the advice to establish the SIPP. As the adviser was the same person at Apollo and the non-regulated firm it would be inconceivable that he was not aware of the intended investment.

In my view Mr H was not an experienced or sophisticated investor, and only had experience of investing within his pension. I consider that he was relying on the adviser to make a suitable recommendation. As I said in the provisional decision I consider that the level of risk previously recorded of medium to high for Mr H was the most that he should have been suitably advised to take.

I have noted the comments made by Apollo about the structured product. The amount invested in the product was not suitable for Mr H as there was a lack of diversification. It is accepted that the maximum invested in the product should not be more than 25% of the portfolio, but Mr H invested 40% of his SIPP.

Apollo said that Mr H made his own decision to invest such a large amount into one product. At the time the advice was given Mr H was not treated as an 'insistent client' and neither was the transaction recorded anywhere as 'execution only'. In the suitability letter Apollo stated *"You wished to invest £75,000 into this issue as you saw few viable alternatives. If this sum is to be invested this will exceed the standard industry recommended level. However you were firm in your view that the amount you wished to invest was your choice and you were free to exercise this. On this basis we cannot endorse your decision but will accept your instructions to place the sum of £75,000 in this product. I would add that as you continue to make monthly contributions of £1,000 gross, you will progressively dilute the percentage holding as part of your overall plan value as contributions come into the plan."*

Mr H was investing 40% of his pension fund into the structured product. The recommended maximum (according to the suitability letter) was 10%. I would expect to see a recommendation for the appropriate amount (i.e. 10%) and a detailed explanation of the additional risks associated with investing more than the recommended amount. The level of risk was increased significantly because such a large proportion of the SIPP was invested in the structured product.

The loss of a substantial part of his pension fund must have been upsetting for Mr H. I consider that a payment of £500 should be made for the distress caused by the unsuitable advice.

In summary I do not consider that the advice that Mr H was given by Apollo was suitable for him given his circumstances and attitude to risk. The combination of investing 60% of the SIPP in the unregulated green oil investment and 40% in one structured product represented a high risk strategy. I am satisfied that the advice to establish the SIPP was given in the full knowledge that an investment in the Green Oil fund was being made.

fair compensation

In assessing what would be fair compensation, my aim is to put Mr H as close to the position he would probably now be in if he had been given suitable advice.

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

what should Apollo do?

To compensate Mr H fairly, Apollo must compare the performance of Mr H's investments with that of the benchmark shown below.

The compensation payable is 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.

Apollo should also pay any interest, as set out below.

A separate calculation should be carried out for each investment. The resultant figures should then be added up. If the calculation still shows a loss that would be the amount payable to the investment.

In addition, Apollo should pay Mr H £500 for the distress that the loss of a substantial part of

his pension fund has caused him.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Green Oil	still exists	FTSE WMA Stock Market Income Total Return Index	date of investment	date of my decision	8% simple p.a. from date of decision
FTSE Booster Plan 3	surrendered	FTSE WMA Stock Market Balanced Total Return Index	date of investment	date surrendered	8% simple p.a. on any loss from the end date to the date of settlement

for each investment:

actual value

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

My aim is to return Mr H to the position he would have been in but for the unsuitable advice. This is complicated where an investment is illiquid (that is 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. Apollo 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 H and the balance be paid as I set out below.

If Apollo is unwilling or unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. Apollo may wish to require that Mr H provides an undertaking to pay Apollo any amount he may receive from the investment in the future. That should allow for the effect of any tax and charges that Mr H will pay and the limitations on withdrawing funds from the SIPP.

fair value

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

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 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 Apollo totals all those payments and deducts that figure at the end instead of deducting periodically.

how to pay compensation?

If there is a loss, Apollo should pay such amount as may be required into Mr H'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 Apollo is unable to pay the total amount into Mr H's pension plan, it should pay that

amount direct to him. The amount should be reduced to notionally allow for the income tax that would otherwise have been paid.

The notional allowance should be calculated using Mr H's marginal rate of tax at retirement. For example, if Mr H would be a basic rate taxpayer at retirement and that rate would 20%, the *notional* allowance for tax would equate to a 20% reduction in the total amount. At retirement he would have been able to take 25% as a tax-free lump sum but the remaining 75% would have been subject to income tax at his marginal rate of tax. So the *notional* allowance for tax would equate to a 15% reduction in the total amount (20% on 75%).

why is this remedy suitable?

I have decided on this method of compensation because Mr H 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 H's circumstances and risk attitude.

Mr H has not yet used his pension plan to purchase an annuity.

The additional interest is for being deprived of the use of any compensation money since the end date.

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 Apollo Pension & Investment Advisers should pay Mr H 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 Apollo Pension & Investment Advisers does not pay the recommended amount, then any investment currently illiquid should be retained by Mr H. This is until any future benefit that he may receive from the investment together with the compensation paid by Apollo Pension & Investment Advisers (excluding any interest) equates to the full fair compensation as set out above.

Apollo Pension & Investment Advisers may request an undertaking from Mr H that either he repays to it any amount he may receive from the investment thereafter or if possible he transfers the investment at that point.

Mr H 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.

In addition, Apollo Pension & Investment Advisers should pay Mr H £500 for the distress that the loss of a substantial part of his pension fund has caused him.

Apollo Pension & Investment Advisers should provide details of its calculation to Mr H in a clear, simple format.

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Apollo Pension & Investment Advisers pays Mr H 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 Apollo Pension & Investment Advisers. It is unlikely that Mr H can accept my decision and go to court to ask for the balance. Mr H 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 H to accept or reject my decision before 19 March 2015.

Roy Milne
ombudsman