complaint

Mr C's complaint is that Taylor Frost Wealth Management Limited (TF) recommended unsuitable investments to him, one in 2011 and another in 2012. He also suggests that TF engaged in *churning* for these investments. Mr C is represented by his solicitors.

background

Mr C and, it appears, his wife had been clients of TF since 2008. It also appears that they were clients of the principals of TF since 2003, when those principals worked as financial advisers in a previous firm(s). Mr C was 68 years old in 2011, he was married without dependents and both he and his wife were retired. Evidence about his profile leading up to this point can be summarised as follows:

- Mr C's profile was mainly considered as the joint profile he held with his wife and, in some or many respects, TF approached its service to him in this context.
- Assessments between 2008 and 2009 suggest that he and his wife had full equity (and no mortgages) in the £900,000 approximate value of their home and in the £350,000 approximate value of two buy to let properties they owned. Mr C had a balanced attitude to risk (ATR).
- In 2010 his total (joint) wealth was around £2 million, including pension investments, around £110,000 in privately held investments, around £50,000 in his Individual Savings Account (ISA) and around £10,000 in Venture Capital Trust (VCT) investments. Mr C's wife also inherited around £250,000 around this time.
- Between 2009 and 2010 they appointed a third party firm, Brewin Dolphin (BD), to manage their individual Self-Invested Personal Pensions (SIPPs). Around the middle of 2010 Mr C's SIPP was worth around £523,000 and this reflected a growth of around £100,000 from when BD was appointed to manage the SIPP. His SIPP was based on a balanced benchmark. His wife also had a SIPP.

Around May 2011 Mr C was advised by TF to instruct BD to liquidate sufficient assets in his SIPP to generate £50,000 that would be reinvested into preference shares (with a 4% "early bird" uplift in the quantity of the shares) for the Ignition Parameters Brazil Social and Affordable Housing Fund, No.3 (the Ignition fund). As reflected in its name, the fund related to a social housing project in Brazil. By June 2011 this reinvestment happened as planned. The Ignition fund is the investment in 2011 that Mr C says was unsuitable.

Around January 2012 Mr C invested £25,000 into the Alpine Hotel Investment (No.2) Limited Partnership (the Alpine fund). This fund related to a ski resort/hotel development. Mr C says he was advised, by TF, to invest in the Alpine Fund but TF says the event did not quite involve its express recommendation to invest – it says it considered the fund "*generally suitable*" and it gave Mr C the opportunity and option to invest in it, which he did. Money for the Alpine fund appears to have come from outside Mr C's SIPP and the Alpine fund investment was also held outside of the SIPP. The Alpine fund is the investment in 2012 that Mr C says was unsuitable.

The Ignition fund went into liquidation in May 2014 and Mr C's capital investment in the Alpine fund was returned to him in February 2017. In December 2016, prior to his knowledge about the Alpine fund capital recoupment, his solicitors submitted his complaint to TF about both investments. In general, his solicitors' main points were:

- High risk investments were unsuitable for someone of his age and of his retirement status, whereby he had no employment earnings potential to use as a means to replace losses from the investments.
- Both investments mismatched Mr C's balanced ATR and, due to their complexities, mismatched his level of understanding – to the extent that he "… *was not able to appreciate the level of risk he was, in fact, taking*."
- In the context of making unsuitable recommendations to Mr C, TF breached the regulator's client's best interests rule. It also breached the regulator's guidance on financial promotions.

In terms of the Ignition fund, Mr C's solicitors mainly said:

- TF claimed, and misrepresented to Mr C, that the fund had the regulator's approval, that his SIPP needed further diversification (and that the Ignition fund was suitable in this respect) and that the Ignition fund was a medium risk investment.
- In doing the above, TF breached the regulators Conduct of Business (COBS) rules under COBS 2.1.1 – the requirement to act honestly, fairly and professionally – and under COBS 4.2.1 – the requirement to communicate in a way that is clear, fair and not misleading.
- A comparable decision from this service exists against TF in which it was found to have wrongly classified the fund as a medium risk fund when it was a high risk fund.

In terms of the Alpine fund, Mr C's solicitors mainly said:

- TF claimed, and misrepresented to Mr C, that the investment was short term for a few months with guaranteed returns. This was not the case and Mr C was given no warning that the underlying ski resort project might not have enough money to be completed.
- TF was committed, based on other investors it had sold the fund to, to achieve sufficient funding for the Alpine fund. That priority (funding the Alpine project) created a conflict against the best interests of its clients.

In terms of redress, Mr C's solicitors said:

- Mr C should be put into the position he would be in if neither investments had taken place.
- The £50,000 invested in the Ignition fund would have remained in his SIPP. His SIPP had grown by 48.75% between the time of the Ignition fund investment and the complaint in December 2016, so this should be the benchmark for compensation in this respect.
- The £25,000 invested in the Alpine fund would have been used for Mr C's ISA allowances. His ISA had grown by 62.78% between the time of the Alpine fund investment and the complaint in December 2016, so this should be the benchmark for compensation in this respect.

TF did not uphold the complaint. In the main, it said:

- Mr C's balanced ATR was misunderstood by his solicitors. The "balanced" ATR/profile was defined by TF as an investor that was "*prepared to accept a higher level of investment risk and volatility for the potential of higher returns*" and the profile's investment approach was "… *by way of a balance between low, medium and higher risk assets*." This meant that Mr C (and his wife) would be "… *invested into an overall portfolio that would include a mix of low risk, medium risk and higher risk assets*."
- Evidence of assessments between 2009 and 2015 shows that Mr C's ATR steadily became more progressive and speculative.
- The Ignition fund matched Mr C's balanced ATR, as defined, and it was something that he showed an interest in – not something he was coerced into. It was suitable in the context of his overall wealth and circumstances, accounting for less than 7% of his and his wife's SIPPs and less than 5% of their investable assets. His SIPP had only 2.6% exposure to emerging markets and the fund was a suitable way to address what it viewed as a need to diversify further into such markets (especially in Brazil). It did not misrepresent the regulator's approval, evidence from the fund's director and solicitors confirmed that the information memorandum (IM) for the fund was approved by the regulator and, in its advice to Mr C, it warned that despite this any investment in the fund would not be covered by the Financial Services Compensation Scheme (FSCS). It did not misrepresent the fund's risk profile, it was the fund that described itself as *medium risk* in the *question and answer* section of the IM and that description also gave notice that in the wider context "*many analysts automatically designate any investment in emerging markets as high risk*." Mr C was fully informed about the balance of views in this respect and was fully informed of the comprehensive details he was given about the fund, its characteristics and its risks.
- At the time of its response the Alpine fund was due to return Mr C's £25,000 capital to him, he had the option to retain his investment for the prospect of future gain but chose to forgo that. As such, he has lost no capital and he has "… *voluntarily given up any expectation of gain*." The fund was brought to his attention in the context of his pre-existing interest in property investments. No returns were ever guaranteed, it matched his balanced ATR and it was viewed as generally suitable for a high net worth (HNW) investor like him – a classification he reinforced by completing an HNW certification as part of the application for the fund. The fund's details were sent to him and he was invited to consider if it was of interest to him. Upon his second consideration, he decided to invest in it. Prior to investment he was expressly told about the seven years investment term, was given information from TF's due diligence on the fund (and underlying project) and was given caveats and warnings about the unregulated nature of the fund and reference to risk factors to consider. TF's principal and its adviser both invested personally in the fund, it had no conflict of interests as alleged and these personal investments showed that its interests were in support of its clients.

The matter remained unresolved and was referred to this service. One of our adjudicators considered it and she set out her conclusions in a very comprehensive view letter that addressed all of the main issues. In summary and in the main, she concluded that:

- For the sake of clarity, even though investments prior to the two funds were mentioned in the complaint/referral those investments hold no relevance to the issues in the complaint. It also appears that any complaint Mr C might or might not wish to make about those investments would be too late.

- She was not persuaded that either of the two funds was mis-sold to Mr C. The terms of and details within both funds were known to him based on the IMs for both funds – those terms were not misrepresented. Based on his wealth, pension income and circumstances at the time the recommendations were not unsuitable and he had the capacity to cope with potential losses from the investments. The risk of complete loss of capital was one that was brought to his attention before he committed to the investments – as were the other risks related to the investments. He wilfully undertook those risks.
- Mr C was eligible to receive promotions about unregulated investments and there is evidence of his self-certification as an HNW investor.
- In terms of considering the matter of (un)suitability of the investment(s), the suggestion of a potential conflict of interest related to TF's investment in the Alpine fund did not appear to be relevant.

Mr C and his solicitors disagreed with this outcome. His solicitors responded and repeated some of the points previously made in the complaint. In addition and in the main, they said:

- TF's approach towards its recommendation of the Ignition fund was to give the investment a positive spin and to downplay the risks – it breached COBS 4.5.2 in this respect. It was not enough for TF to provide Mr C with risk related information without advising on those risks. TF should have also advised that it was a high risk fund – not medium risk.
- TF appears to have been motivated to churn the investment(s) for the primary or sole purpose of generating commission for itself – not for Mr C's best interests.
- TF made statements about the Alpine fund that were designed to encourage Mr C's investment and those statements also gave the investment a positive spin and downplayed the risks. Investment in this fund did not achieve a "balanced" portfolio for Mr C – based on TF's own definition of a balanced portfolio. Over 20% of the portfolio was in high risk funds with the remainder in a medium risk equity fund – not a mix of low and medium risk investments.
- The comparator complaint against TF that was upheld by this service adds weight to the merits of Mr C's complaint.

In response to these comments TF retained its previous position. It too repeated some of its previous points. In addition and in the main, it said that its advice balanced the positive and risk related aspects of the Ignition fund – with detailed information about risks given to Mr C; that the same applied to the Alpine fund opportunity it presented to him – with the risk warnings in the fund's IM being reinforced by risk warnings it gave in its correspondence to and telephone conversation with Mr C; and that it was not motivated by the prospect of generating commission but by its belief that the Ignition fund was suitable and that the Alpine fund was worth considering.

Mr C's solicitors responded to elaborate on some of their previous points and to make an additional point to support their allegation about churning. They referred to evidence about TF's business accounts for the years between 2010 and 2012 that, they asserted, showed it was a firm in decline before commission from Mr C's investments appeared to aid its recovery. The suggestion was that this explained TF's alleged need to churn for commission. Later, they also presented this service with information about ongoing commission payments received by one of the previous principals of TF (who had left TF but had retained his role in his other investments) up to December 2017 despite Mr C terminating this person's role (and entitlement to commission) in March 2017. The issue about what appears to have been erroneous payments to this person was resolved in January 2018. However, the solicitors say the matter is relevant to the context of TF allegedly being in need of commission income – supposedly to the extent of its former principal taking such income he was not entitled to.

Mr C's complaint was referred to an ombudsman.

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 have reached the same conclusion as the adjudicator's for broadly the same reasons. I consider that the adjudicator's view on the complaint was competently and comprehensively presented to both parties and I am not persuaded that there will be added value in repeating the details she presented. Having said this, my decision must still be reasoned. I address the main issues, arising from the complaint as submitted and from the comments that have been made by the parties after the adjudicator's view.

Mr C's Investor Profile in 2011 and 2012

Available evidence supports the conclusion, on balance, that Mr C was an HNW investor with adequate (and surplus) income from his professional pension and investments and with a net worth (jointly held with his wife) of around £2 million; just under half of this net worth was in the value of his home and the rest was invested – with regards to the latter, he had around eight years' worth of investment experience (starting from his investments relationship with TF's principals around 2003); there appears to be no dispute that he had a balanced ATR and evidence suggests that this ATR classification was based on TF's assessments between around 2008 and 2011/12.

Promotion of the Ignition and Alpine funds in 2011 and 2012

Mr C was self-certificated as an HNW investor with a net worth as stated above, he was a highly educated retired professional and he had around eight years' worth of investment experience that included investments that were potentially suitable for different ATR profiles – from his cash deposits to his ISA to his equity holdings to his buy to let properties to his VCTs. In this context it was not inappropriate for him to receive promotions about investments that matched the variety of his investment experience. He also had a level of education that coupled this investment experience and that suggests he had a reasonably good understanding of how investments worked. The variety of his experience by 2011 also suggests that, on balance, he had reasonable knowledge of how complex or potentially complex and potentially high risk investments, like his VCTs, worked – I have noted that the 2009 advice given to him about the VCTs described them as high risk investments suitable for HNW investors and he wilfully invested in them on this basis. Overall, I do not consider that the regulator's rules about promotions in COBS 10, as of 2011 and 2012, were breached in the promotion of the Ignition and Alpine funds to Mr C.

The general points

I am not persuaded by the suggestion that a generic conclusion of unsuitability should be applied to high risk investments recommended to investors of a certain elderly age who are retired. This appears to be what Mr C's solicitors have suggested in some of their general comments. They will know that the regulator's rules on assessing suitability, in COBS 9, says that such an assessment must be a subjective (not generic) exercise based on each investor's overall circumstances.

Mr C's solicitors also made general points about promotions and about his level of understanding of complex investments – both of which I have addressed above. They made a general point about Mr C's ATR being mismatched by the funds (and breach of his best interests in this respect and in the context of unsuitability) which I will address below.

The Ignition fund

Correspondence between both parties from 2008 to 2011 included sufficient notice, to Mr C, of how TF defined his balanced ATR. The suitability report for this fund included the same definition. It is reasonable to conclude that he agreed with it, otherwise he would have objected to it and I have not seen evidence of such objection.

At first sight, the idea of an investor who is prepared to be "… *invested into an overall portfolio that would include a mix of low risk, medium risk and higher risk assets*" – seems somewhat elastic. It suggests that *any* recommendation to Mr C of a low, medium or *higher* (which I consider to be *high*, in the simple context of a risk level *higher* than medium being *high*) risk investment would have been suitable. This part of the definition should not be read in isolation. The other, and perhaps primary, part of it refers to an investor that is *"prepared to accept a higher level of investment risk and volatility for the potential of higher returns*." The balanced ATR that applied to Mr C was covered by these two descriptions.

It was enough for the suitability report to quote the fund's self-description as a medium (or balanced) risk fund and to quote the fund's acceptance that others would view it as a high risk fund. Mr C's solicitors have criticised TF for not adding its own commentary to this but I am not persuaded that such commentary would have made a difference in this case. The report captured both the wider objective view about risks in the fund and the fund's subjective view about those risks. Both views were not alike, but given the uncertainties inherent in investments it is arguable that at the time of investment and without the benefit of hindsight both views were credible – meaning, perhaps the fund would behave like how other emerging market funds were viewed as behaving or perhaps what the fund considered to be its special characteristics (as reflected in the IM and the suitability report), such as the involvement of the Brazilian central bank, would make it behave differently. The question that arises is whether these views about risks in the fund made it suitable (or not) for Mr C.

I consider that the balance between the high risk and medium risk views about the fund fell within Mr C's profile as an investor who was *prepared to accept a higher level of risk and volatility for the potential of higher returns* and one that was prepared to consider *high risk assets* in the context of his *overall portfolio*. The potential return was around 45% over three years and, on balance, I am persuaded he was prepared to take a chance between both risk views for the prospect of such a return. His financial capacity was conducive for such a venture, as was his investment experience (as described above).

Mr C's solicitors dispute TF's claim about diversifying Mr C's portfolio further into emerging markets and especially Brazil. Evidence suggests that his SIPP portfolio was the focus of this pursuit. I am satisfied that this was the objective agreed with Mr C. The suitability report says "*the aim is to keep the money within the SIPP but to gain additional diversification of risk by investing into a separate fund targeting capital growth*" – "*the money*" was the £50,000 liquidated within the SIPP to reinvest in the Ignition fund.

At the time the SIPP appears to have had around 3% exposure to emerging markets and no exposure to Brazil. I have not seen evidence to conclude that Brazil was an unsuitable emerging market in the context of other emerging markets. I am not persuaded that increasing Mr C's and his wife's SIPPs' combined exposure to emerging markets to around 7% was unsuitable in the context of his SIPP being the majority factor – it was around four fifths (or around 80%) of the combined total. His wife's ATR profile appears to have been slightly more cautious than his. However, his overall profile (ATR, financial capacity, investment experience and objective) was as I have addressed above and it did not mismatch the idea of a SIPP with between 3 and 7% exposure to emerging markets – his solicitors appear to accept that the remainder was invested in what could be considered medium risk assets.

Evidence does not support the conclusion that the positive potentials of the fund were overstated at the expense of its risks – the IM and related documents for the fund (which were detailed) and the suitability report all combined to present both sides of the fund. They included risk warnings and sufficient investment factors to be aware of. Notice was given to Mr C that investment in the fund did not fall under the scope of the FSCS and evidence suggests that the IM for the fund was approved by the regulator – which matched TF's representation in the suitability letter that "… *the Fund Prospectus has been approved by the FSA*." [my emphasis]

There appears to have been no misrepresentation with regards to TF's reference to the regulator, no misrepresentation with regards to TF's view on diversification and with regards to its view on the suitability of the Ignition fund for that purpose, and no breaches of the COBS rules that have been mentioned in these respects.

The Alpine fund

I note TF's assertion that this fund was promoted to Mr C and not exactly recommended to him. However, the distinction between promotion and recommendation can sometimes be blurred by a firm. Guidance from the regulator – at PERG 8.28.4 (as it was in 2012) – says this can happen when the circumstances in which a firm presents (or perhaps promotes) investment information to an investor gives the presentation (or perhaps promotion) "*the force of a recommendation*". I consider that such circumstances were in place in relation to the Alpine fund investment. Mr C's solicitors have referred to input from TF at the time about the investment that *sold* it to him and I agree this is a fair interpretation. On balance, I consider that the fund was recommended to Mr C.

Nevertheless, I consider that it was not an unsuitable recommendation. I draw this conclusion for broadly the same reasons as those I have given in relation to the Ignition fund. The Alpine fund did not mismatch Mr C's overall profile (as address above). The promotional basis for the investment appears to have made the objective less precise than that for the Ignition fund but it is reasonable to conclude, from evidence, that Mr C's interest could have been the extension of his property investments, as asserted by TF. What he expected was, or should have been, defined by the information he was given so in this respect I do not accept that he reasonably expected a short term investment with guaranteed returns – some potential for this was mooted at the time but he knew that the fund's particulars said it was a seven year term investment without guaranteed returns. Like the adjudicator, I do not consider that a case has been made out about a relevant conflict of interest. TF had no ownership interest in the fund and its principal invested in it like any other investor. At best the suggestion would be that TF believed in the fund and sought to convince its clients of the same, but that is already implicit within my conclusion that it recommended the fund to Mr C.

The comparable complaint

This service approaches each complaint on the basis of its own merits and the evidence available. However, I can understand Mr C's solicitors' expectation of consistency in how we address comparable complaints.

Another ombudsman decided the comparable complaint that has been referred to. The decision I have seen did not feature the Ignition or Alpine funds as the subject matter of the complaint. The ombudsman mentioned the Ignition fund as part of her treatment of the complaint because it was a pre-existing asset in the complainants' portfolio. She was concerned that pre-existing assets in the portfolio, including the Ignition fund, had been wrongly classified as having medium risks. She said:

"… *the Ignition Brazil fund, which invests in social housing in Brazil, in my view would be considered a high risk investment.*"

I have not risk profiled the Ignition fund and I do not consider it necessary to do so. As I said above, information available to Mr C defined it as being medium risk and high risk and that was the information he had as part of the recommendation. I consider that the issue is less about the fund's precise profile and more about whether either or both of the profile descriptions were suitable for him, and I have concluded that above. I have not seen anything in the decision for the comparable complaint that should alter my conclusion.

I should also point out that the comparable complaint appears to lend itself to be distinguished from Mr C's. The ombudsman determined that the complainants' portfolio had a 40% exposure to pre-existing high risk investments and an additional 30% of the portfolio held assets that were also high risk but had been mis-described as medium risk. She upheld the complaint in this context. Mr C's SIPP did not have 40-70% exposure to high risk investments, before or after the Ignition and Alpine fund investments. Even his solicitors' claim that 20% of his overall portfolio (beyond but including the SIPP) held high risk assets is not comparable to a portfolio with 40-70% in high risk assets.

Churning

"*COBS 9.3.2*

(1) A series of transactions that are each suitable when viewed in isolation may be unsuitable if the recommendation or the decisions to trade are made with a frequency that is not in the best interests of the client.
(2) A firm should have regard to the client's agreed investment strategy in determining the frequency of transactions. This would include, for example, the need to switch a client within or between packaged products."

The above quote is the regulator's guidance on churning – as it was in 2011 and 2012, and as it is to date. In essence, the focus is on the *frequency* with which a firm carries out transactions for its client and on its client's "best interests". Sometimes, where transactions are advised by a firm or where a firm has discretion to carry out those transactions on its client's behalf, there can be a correlation between the frequency of the transactions and the amount of commission earned by the firm. This, in isolation, does not automatically indicate churning, the idea is to ensure that frequent transactions are not carried out *only* or *mainly* for the purpose of generating commission for the firm – this being in conflict with its client's best interests.

In Mr C's case, the relevant frequency is two funds in two years – the Ignition and Alpine funds. In isolation, and as part of Mr C's portfolio, I have said both funds were suitable. The first involved a switch within his SIPP, liquidations took place in five pre-existing SIPP assets to fund the reinvestment in the Ignition fund. I do not consider this sufficient evidence of churning, especially as the reinvestment was a one-off event and TF did not recommend any further related switches in the SIPP. No SIPP switch and, it appears, no investment switch led to the Alpine fund investment. It had an investment term of seven years and Mr C's interest in it ended when he elected to recover his capital.

Overall, I do not consider that the frequency and elements of these two investments (within two years) suggests that TF was churning Mr C's investments for the primary purpose of earning commission/fees. As they were not unsuitable for him it follows that they were not against his best interests. He and his solicitors are entitled to their suspicions, but evidence does not appear to support them. Not even evidence of TF's financial affairs or of the erroneous fees recovered and seemingly resolved earlier in this year. A pattern of churning behaviour, from TF, has not been established so such evidence loses relevance.

my final decision

For the reasons given above, I do not uphold Mr C's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 14 September 2018.

Roy Kuku
ombudsman