

complaint

Mrs M complains about the advice she was given by Apollo Pension & Investment Advisers in 2012. She was advised to set up a Self Invested Personal Pension (SIPP) and then made an investment in Green Oil Plantations Ltd which she says was too risky for her.

Mrs M is represented by a firm of solicitors.

background

Mrs M began to use Apollo as her financial advisers in 2009. She was in her early fifties and recently divorced. She wanted advice after her divorce was finalised and she had the benefit of a pension sharing order. Up to that time she had little investment experience.

Apollo recommended that she invest her pension into a FTSE tracker fund which grew in value over the next two years. Mrs M then switched the investment into cash to consolidate her gains.

In 2012 Apollo recommended Mrs M move her pension (worth around £300,000) into a SIPP. The transfer was made and then Mrs M invested around £80,000 in Green Oil Plantations Ltd ("GOP"). I understand she invested most of the balance into four funds, two are unregulated investments and two regulated. No complaint has been made about these other investments.

The adviser from Apollo had given her a brochure for GOP along with information about the other unregulated investments.

In 2015 Mrs M complained to Apollo about the advice she'd been given to invest in GOP. Apollo said it didn't advise her. It said a separate, unregulated business had provided information about GOP and Mrs M decided to invest of her own accord. The investment was made through the other business.

An adjudicator considered the complaint. She thought it should be upheld saying that:

- The separate unregulated business was also owned by the adviser from Apollo. He was also an agent for GOP.
- She didn't think it was a coincidence Mrs M was advised to move her pension into a SIPP and then shortly afterwards she invested in GOP – which the same adviser was promoting at the other non-regulated company.
- It wasn't possible for the adviser to give suitable advice to recommend the SIPP without considering the investments that would be made in the SIPP. And she thought the adviser at Apollo knew which investments would be made in Mrs M's SIPP.
- GOP was a high risk, unregulated fund and Mrs M invested a large amount of her pension in it. She didn't think Mrs M was prepared to take such a high level of ongoing risk with her pension.

Apollo didn't agree. It said Mrs M knew the investment was high risk and that she had suggested many speculative investment ideas on her own initiative. It asked that an ombudsman review the complaint.

Mrs M didn't have anything further to add.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I agree with the adjudicator. I've decided to uphold this complaint and I'll explain why.

Apollo was required to know its client and give suitable advice. It was also under a duty to act in the best interests of Mrs M.

The adviser employed by Apollo recommended the SIPP and was also the agent for GOP. I think the adviser must have known that the investment was to be made in GOP.

The Financial Services Authority (FSA) issued an alert in January 2013 and said: *"It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating"*. I agree with this. And although this alert was issued after the advice was given to Mrs M I think it represents the FSA's view of how the adviser should have assessed the suitability of any advice given. I don't think the adviser could give suitable advice to recommend a SIPP without considering the investments that would be made into it.

In this case I think the adviser was aware that the recommendation he made whilst working for Apollo would allow Mrs M to invest in GOP. And he was promoting GOP at another non-regulated company.

The suitability letter of March 2012 said *"There is no point in discussing specific investments at the moment until the funds have arrived. We will need to meet again to discuss them further and I will write to confirm what you have agreed to proceed with."* But I think the adviser knew at the time of writing that letter that an investment into the GOP was going to be made. I say this because Mrs M sent him an e-mail two weeks before the letter where she asked questions about the GOP and referred to literature the adviser had given her about it. I think the specific investments had been discussed.

The GOP was a high risk unregulated fund. As the adjudicator has said, it was an unusual holding that was new and untested. The fund was not subject to regulation in the same way as more mainstream funds would be.

This type of fund is typically only suitable for experienced and sophisticated consumers. And I don't think Mrs M should be have been categorised as experienced and sophisticated. Her attitude to risk was recorded as medium to highly speculative but I'm not satisfied that she fully understood the risks of the GOP. If she had done I don't think she would have invested in it. I think the GOP posed a higher degree of risk than she ought to have been advised to take with this portion of her pension given her circumstances.

So for these reasons I think the complaint should be upheld.

fair compensation

My aim is to put Mrs M as close to the position she would probably now be in if she'd been given suitable advice.

I think Mrs M 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 and reasonable given Mrs M's circumstances and objectives when she invested.

what should Apollo do?

To compensate Mrs M fairly, Apollo must:

- Compare the performance of Mrs M's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investment. If the *actual value* is greater than the *fair value*, no compensation is payable.

Apollo should also pay interest as set out below if compensation is not paid within 28 days of it being told the decision is accepted.

If there is a loss, Apollo should pay such amount as may be required into Mrs M'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 Mrs M's pension plan, it should pay that amount direct to her. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mrs M's marginal rate of tax at retirement.

For example, if Mrs M is likely to be a basic rate taxpayer in retirement, the *notional* allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mrs M would have been able to take a tax free lump sum, the *notional* allowance should be applied to 75% of the total amount.

- Pay Mrs M £200 for the trouble and upset caused by the unsuitable investment.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
GOP	still exists	FTSE WMA Stock Market Income Total Return Index	date of investment	date of my decision	8% simple

actual value

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

My aim is to return Mrs M to the position she would have been in but for the unsuitable advice. This is complicated where an investment is illiquid (meaning it 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 Mrs M and the balance be paid as I set out above.

If Apollo is 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 Mrs M provides an undertaking to pay Apollo any amount she may receive from the investment in the future.

fair value

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

why is this remedy suitable?

I have decided on this method of compensation because:

- Mrs M 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 Mrs M's circumstances and risk attitude.
- Mrs M hasn't used her pension plan to purchase an annuity yet.

my final decision

I uphold the complaint. My decision is that Apollo Pension & Investment Advisers should pay the amount calculated as set out above. It should also pay her £200 for trouble and upset.

Apollo should provide details of its calculation to Mrs M in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I am required to ask Mrs M either to accept or reject my decision before 31 May 2016.

Keith Taylor
ombudsman