

complaint

Mrs L complains Active Financial Partners Limited (AFP) wrongly advised her to put her money into potentially unsuitable investments and then recommended she switch the money into clearly unsuitable investments including the advisor's own businesses.

background

In September 2011 Mrs L had over £220,000 in her current account, mainly as a result of an insurance pay-out after her husband's death. AFP recommended various investments. This included £11,125 in a stocks and shares ISA (which she cashed in on 23 August 2013); £49,375 in a Skandia bond (with three partial withdrawals in 2012 and a full encashment in February 2013) and £100,000 in a MetLife bond (all withdrawals being from 2013 on).

Mrs L said the advisor recommended making a number of withdrawals from the Skandia and MetLife bonds to invest elsewhere including £5,000 in Voltz shares and £4,500 in Charles Stanley 'shares'. She said he wrongly told her the withdrawals were solely the reinvestment of profits and that these didn't affect her capital.

In making these new 'investments', she said he persuaded her to fill in signed cheques with the recipient's name left blank, saying he would fill these in later. This meant she never knew where the money was going. He didn't provide her with any paperwork and when she received any from the product providers he took these away and shredded them. She said that between 2011 and 2015 he persuaded her to withdraw all her money (from the bonds and her bank accounts) to invest in unregulated products which turned out to be mainly related to companies he was involved with.

She said AFP failed to tell her when this advisor left its employment or, later on, that he'd been declared bankrupt. She said she has now lost her entire life savings and feels AFP didn't undertake sufficient checks on what its advisors were doing.

AFP rejected her complaint, saying:

- It was satisfied the advisor's 2011 recommendations were suitable for her risk appetite, objectives and investment horizon
- He was only employed by it, and regulated to offer advice, between 13 January 2011 and 30 December 2012, and there's no record of him being employed in a regulated capacity after that date
- His alleged recommendation to take money out of the bonds and invest in Voltz and Charles Stanley weren't regulated activities. As he wasn't authorised to carry out non-regulated activities it isn't responsible for the consequences of this advice
- AFP wasn't required to tell her when an advisor left the company. As he was made bankrupt nearly three years after leaving, this was not something it was aware of
- There was no evidence the advisor had recommended she invest in his own companies during his employment

Mrs L added:

- She told the advisor she wanted her money to be safe as it was crucial to her future; she did not want to risk losing all or some of it. She assumed he was going to invest the money safely with little risk so that she would be guaranteed to receive a monthly income from the profits to pay for any essential expenditure
- She was grieving and vulnerable, had no knowledge of investments and had no reason to question the recommendations at the time
- She now wants to know if these were suitable
- The advisor did not tell her the MetLife bond was a recommended 12 year investment or that she might get no return at the end of this period. She thought she could access her money at any stage
- The advisor never told her he'd stopped working for AFP, and she didn't discover this until the police informed her
- She received a letter from AFP about a proposed review in October 2013 so it should be responsible for any advice until she was contacted by the police

An adjudicator at this service felt Mrs L's complaint should be partially upheld, saying:

- AFP could only be held responsible for the advice given by its advisor during his employment i.e. up to 30 December 2012. This included responsibility for the three withdrawals from the Skandia bond which occurred during this time and any subsequent advice to reinvest this
- While there was no concrete evidence to prove the advisor had recommended the purchase of shares in Voltz or Charles Stanley he felt it was more likely than not he had persuaded Mrs L to do this, particularly given it's now clear the advisor was involved with Voltz
- Mrs L had very little investment knowledge and most likely accepted the advisor's recommendations in the belief that these were legitimate investments
- In this light he felt any later advice (including the withdrawals and reinvestments) was intrinsically linked to his earlier advice to invest in legitimate regulated products. This meant this advice was ancillary to advice about regulated activities. This meant AFP was responsible for the consequences of this ancillary advice

Addressing the merits of the complaint, he said:

- According to the advisor's report Mrs L was happy to take a 'balanced' risk approach with the £60,000 being invested in the Skandia bond and ISA but a 'cautious' risk with the £100,000 going into the MetLife bond
- Overall, he felt both the MetLife and Skandia bonds were suitable for her recorded attitude to risk and circumstances at the time

- Voltz was an unlisted investment and there was no evidence as to what the Charles Stanley 'shares' might be but neither of these were likely to be suitable investments
- He was satisfied the advisor was responsible for the withdrawals Mrs L made – during the regulated period – and that he then, in effect, misappropriated this money
- AFP was responsible for its advisor's behaviour given its regulatory obligations to control and monitor his activities while under its employ. It could have taken out indemnity insurance or insisted on an indemnity clause covering fraudulent acts in its agreement with him but chose not to do this
- Mrs L, in good faith, accepted the recommendations of its advisor
- So AFP should compensate Mrs L for the losses she suffered from the withdrawals from the MetLife and Skandia bonds made between 1 December 2011 and 31 October 2012 to reinvest in various unsuitable products
- Her withdrawals during this period totalled £34,000 whereas she appeared to have written cheques totalling £40,500 for the new 'investments'. Compensation should be based on the £40,500 Mrs L paid the advisor rather than simply the withdrawals
- AFP should use the cautious risk compensation formula (known as 50/50) when calculating Mrs L's likely losses up the date of the advisor's departure. It should assume all these new 'investments' had no current value
- It should also pay Mrs L £500 in lieu of the poor advice which has resulted in very significant trouble and upset as a result of her serious financial plight

AFP did not accept the adjudicator's view, and said:

- Its file contains no record of recommendations to withdraw money from the bonds or to invest in unregulated or unlisted shares and companies
- The adjudicator's only 'evidence' consists of unsigned cheque stubs provided by the police; they do not indicate that the advisor was acting on behalf of AFP or that he was involved in the raising of these cheques
- The Crown Prosecution Service is currently reviewing whether to press charges against the advisor yet the adjudicator has decided that AFP is liable, even though any underlying investigation is as yet unconfirmed. The CPS may conclude that there is insufficient evidence to support any charges of fraud or wrongdoing
- The advisor recently told it that Mrs L entered into a business relationship and purchased shares directly from his company without any advice from AFP or him; the adjudicator's view is solely based on Mrs L's comments
- It does not accept these 'investments' meets the 'ancillary activities' definition contained in the relevant rules
- There is no connection between the advisor offering regulated, documented and suitable advice to invest in two bonds and allegedly convincing Mrs L to surrender

monies via blank cheques and make entirely separate transactions for which she received no records

- The cheque stubs refer to various unregulated products including loan notes and share purchases for which there is no recorded advice. It cannot accept Mrs L would consider it normal that, having received documented advice about regulated investments, it would then be part of the same process to be asked to write blank cheques for transactions with no records
- Its terms of business state that all transactions would be confirmed in writing. Mrs L should therefore provide evidence of these records if she claims she thought the advisor was acting on its behalf. As she signed these terms, agreeing she'd read and understood them, it is not acceptable for her to claim these were not in her mind when talking with the advisor

Oral Hearing request

AFP subsequently requested an oral hearing.

I rejected this request and outlined my reasons. As this included a consideration of some of AFP's further arguments concerning jurisdiction and the merits of this complaint, I have included this response below as it forms part of my consideration and judgment about these issues.

My Oral Hearing response:

"I'm writing to let you know that I'm satisfied the information we have on file fully covers all of the issues I'll need to consider to make a fair decision.

Firstly, you explained why you wanted more time to obtain further information from your former advisor Mr A. This is not, in itself, an argument in favour of an oral hearing and does not, in my view, justify one.

Mrs L first complained to your business on 4 October 2016. After she brought her complaint to this service we requested all available documentation from you on 25 February 2017. This included any agency agreement setting out possible restrictions on Mr A's employment/advice and any correspondence between him and Mrs L, particularly concerning advice about the disputed withdrawals.

This means Active Financial have had nearly 10 months to ask Mr A for the information you now wish to obtain from him. Crucially, the adjudicator asked you to provide detailed reasons as to why you did not feel you should be held responsible for the alleged advice. All the extra information you are now seeking is covered by these requests.

The adjudicator then issued a detailed view in June 2017, upholding Mrs L's complaint in which he rejected Active Financial's arguments as to why it should not be held responsible for the alleged advice – along with a consideration of all the other issues at dispute. So Active Financial has had six months from this date to provide any further information which might challenge the merits of his view - including contacting Mr A and seeking his assistance in this matter.

Given this, I do not feel it would be fair or reasonable to delay the resolution of this complaint any longer than is necessary. I am satisfied Active Financial has been given a fair and reasonable amount of time to obtain and present whatever evidence it feels is necessary, and do not believe a further delay would be appropriate. It therefore needs to submit any new evidence or arguments by 22 December 2017 after which I will seek to reach a decision about this case.

Secondly, I do not believe it is appropriate to release Mrs L's evidence to Mr A, a third party. This is confidential and is not something this service would normally consider.

Crucially, Active Financial has a copy of the adjudication and is not prevented from sharing this with its former advisor. This document sets out in detail the key elements of Mrs L's evidence, and the extent to which the adjudicator accepted and/or relied on it in reaching his judgment. This, in my view, should be sufficient to allow the advisor to respond to the central issues in contention.

In this case I do not believe it is necessary in order to reach a fair and reasonable conclusion to this complaint. I am satisfied that Active Financial is aware of the key elements of Mrs L's testimony/evidence and is therefore able to make Mr A aware of what is being alleged in order for him to provide it with any evidence it wishes to submit.

If the police request any information or evidence from this service we would normally cooperate fully, and I can see no reason why we would not do so in this case. This again is not, in my view, an argument to justify an oral hearing.

I note your request for me to 'question' Mrs L about various aspects of her evidence. I am happy to confirm that I will assess your points on this issue and undertake any further investigation I feel is required, including speaking to Mrs L if I feel this is necessary.

I do not believe any of the points above indicate an oral hearing is appropriate in this case. I also do not believe it is appropriate, given the way this service operates, for Active Financial to be given the opportunity to question Mrs L in an oral hearing.

We are an alternative to the court system. Our aim is to resolve disputes as quickly, cost effectively and informally as we can. We do not have the power to compel the attendance of witnesses, take evidence on oath or test evidence by cross-examination.

We are satisfied that our approach to oral hearings complies with human rights requirements, and a judgment from the European Court of Human Rights – Heather Moor & Edgecombe v the United Kingdom, application no. 1550/09 – concluded that the relevant issues of fact and law could be adequately addressed in, and decided on the basis of, written submissions.

In this context, an ombudsman will generally only agree to a request for an oral hearing if s/he believes the case cannot be fairly decided on the basis of the evidence and material the two parties have provided in writing or orally (for example, by phone).

I have also considered your arguments under the headings Betterment and Judicial Review. I will consider these before reaching a decision on the merits of this complaint but I do not believe they materially advance the case for an oral hearing.

For these reasons, I don't think a hearing is necessary. I understand that you'll be disappointed. But it's extremely rare that a complaint can't be fairly decided without a hearing. We have the power to carry out our own investigation – unlike a court, which relies on the parties involved to prove their own case. If particular information is needed to decide a complaint fairly, there are very few cases where we can't request it from either side or a third party."

AFP's response

AFP said it had contacted its former advisor, Mr A, but he was not prepared to provide any further information at this stage but he would be offering further comments (he did not do so).

It also wished to reiterate that it did not believe this service could or should proceed with this case given the lack of evidence about AFP's involvement. It said the DISP rule 3.3.4 (9) allows for an ombudsman to place cases on hold when it may be more appropriate for the court to handle the case; it strongly believes this is appropriate in this case.

It does not believe it would be fair or reasonable to proceed given that a criminal investigation could be weeks or months away, particularly as successful prosecution could result in the recovery of funds such that Mrs L received double compensation.

my findings

I've initially considered all the arguments and evidence in order to decide the extent to which the advisor's alleged recommendations, can be considered by this service i.e. what aspects of his alleged advice are within our jurisdiction.

I agree that we can only consider the alleged recommendations made while the advisor was employed by AFP. This means I can only consider the alleged advice to withdraw/reinvest money up to the end of 2012 when the advisor stopped working for AFP.

I understand and sympathise with Mrs L's points about this issue. She was originally advised to invest around £160,500 by this advisor at the time he was employed and regulated via AFP. According to her evidence she subsequently acted on his recommendations for the next four years, never knowing he'd stopped working for AFP by the end of 2012. I therefore fully understand why she feels AFP should be liable for what appears to have been the loss of all her money.

But AFP cannot reasonably be held responsible for advice given by a former employee after he left it and was no longer registered to offer financial advice via its business. I have seen no persuasive evidence that it became aware of its advisor's alleged activities while he worked for it, and cannot therefore conclude it should have 'warned' Mrs L about him before he left the business.

From what I've read, it seems most likely it first became aware of potential problems around the same time as Mrs L herself.

The jurisdiction issue

I am satisfied the advisor's recommendations made during his employment as one of AFP's regulated advisors are, in principle, within our remit. I have therefore considered whether

each of the specific recommendations, or alleged recommendations, constitutes a regulated activity.

Whether he did make these recommendations is not a jurisdiction consideration but something to be assessed on the merits of the evidence and arguments – and on the balance of probabilities.

In this respect I agree broadly with the adjudicator's detailed reasoning about the key considerations re the jurisdiction issue.

AFP employed and authorised the advisor in question to give financial advice and he was registered via it to do this. The fact that he gave investment advice to Mrs L is documented and undisputed. As part of his role AFP would've permitted him to give ongoing advice to Mrs L about the suitability of her investments, including the surrendering and reinvesting of regulated products.

I am therefore satisfied that his alleged advice to part surrender the Skandia bond was a regulated activity and the alleged advice to reinvest these monies in seemingly unregulated products was 'ancillary' to this – and therefore also a regulated activity.

I don't, however, agree with the adjudicator that his other alleged advice to put additional money into unregulated products falls within the definition of being ancillary to a regulated activity.

From what I've read, Mrs L claims the advisor encouraged her to take money from bank accounts (or other cash sources) to 'invest' in these unregulated products. This appears to be supported by the discrepancy between the sums taken from the bond and the total amount put into new 'investments' according to the relevant cheque stubs during this period.

Leaving aside the strength of this evidence, I've seen no evidence to suggest the advisor recommended Mrs L put this money into these bank accounts in the first place so any advice to remove it/reinvest it in unregulated products did not flow from a regulated activity.

I've also considered AFP's other jurisdiction objections. Firstly, I'm satisfied Mrs L sought financial advice from its advisor as an AFP employee and that he provided her with recorded recommendations. There's no evidence to suggest she knew or had received advice from this individual previously.

I've also seen no persuasive evidence to suggest the advisor was acting in a personal capacity during the time he was working for AFP or that he implied this was the case. His relationship with Mrs L, and the advice he offered during his time at AFP seems most likely to have directly stemmed from his employment by AFP as one of its approved and regulated advisors.

I've also seen no evidence to suggest Mrs L had any contact with a different advisor or financial business and might have made these apparent 'investment' decisions as a result of a different advisor.

the merits of this complaint

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

I have some concern with the advisor's assessment of Mrs L's willingness to take a risk with this proportion of her money and his claim that she was happy to take a 'balanced risk' with this amount of money. But, on the balance of probabilities, I don't think there is sufficient evidence to safely conclude that the two bonds were unsuitable for Mrs L's objectives or that she was advised to invest too much in them. From what I've read Mrs L was probably prepared to take a small (or cautious) risk with this money and these bonds were broadly compatible with this risk profile.

I've then considered whether it's more likely than not that the advisor advised Mrs L to make the withdrawals from the bonds in 2012. If so, whether there's sufficient evidence to conclude - on the balance of probabilities – that he recommended she reinvest these sums in various unregulated products.

In assessing these issues it is important to note that Mrs L was a self-employed homeworker and was, most likely, entirely reliant on the advisor to offer appropriate advice. I've seen no evidence to suggest she had any significant prior investment experience or knowledge. Also, she does not appear to have questioned or challenged the advisor's recommendations to invest £160,500 in the two bonds but simply accepted his advice in full. In this respect, there appears to have been scant consideration or discussion concerning such a large proportion of her savings.

Given all this, it seems to me unlikely that she'd have chosen to unilaterally withdraw large sums from these bonds fairly soon after she'd invested in them without seeking expert advice about this.

If she'd suddenly had an urgent or unexpected need to access this money, it's plausible that she might have done something like this but there's no evidence to indicate this was the motivation for her withdrawals. In fact the evidence strongly suggests she quickly 'reinvested' this money in other 'investments', strongly suggesting this was the motivation for the withdrawals.

And, to reiterate, I've seen no evidence to suggest Mrs L had contact with a different financial advisor or made these withdrawals on the suggestion of someone other than AFP's advisor. AFP has not alleged this.

I have also considered the advisor's evidence that Mrs L made these withdrawals/reinvestments without any advice from him. Given her overall circumstances and her evidence (which I found detailed and persuasive) I am not persuaded by his comments on this issue.

For the reasons outlined by the adjudicator, I do not believe the advisor's subsequent recommendation to withdraw money from these bonds and reinvest it in a variety of unregulated products, funds or companies represented good advice. From what I've read none of these 'products' offered regulatory protection or could reasonably be described as low risk. All of them appeared to expose Mrs L's money to far greater risk than she was likely to have wanted.

I have also considered AFP's arguments about Mrs L's responsibilities and whether she should have questioned any recommendations made without accompanying paperwork or agreed to sign, in effect, blank cheques. I accept the advisor's alleged behaviour was highly unorthodox and seemingly at odds with how he dealt with the original recommendations.

But given Mrs L had no investment experience, I don't believe she had sufficient reason to question the honesty or trustworthiness of the advisor. Meetings at her home were not, in themselves, necessarily a cause for suspicion.

Overall, having read her evidence about the advisor's behaviour, I think it's understandable that she accepted his reassurances and assumed he was acting reasonably on her behalf. He was employed by a reputable business and licensed to provide financial advice. I do not think she ought necessarily to have questioned his actions. So I don't believe she should be held responsible for his poor advice. Nor do I think her apparent naivety is a reason why AFP should not be responsible for the consequences of its advisor's actions.

Finally, I've considered AFP's view that this complaint should be placed on hold pending any potential prosecution. The DISP rule says an ombudsman may dismiss a complaint without considering its merits if the complaint is the subject of current court proceedings.

I don't believe this would be appropriate. I've seen no persuasive evidence that Mrs L's complaint is 'the subject of current criminal proceedings'. Mrs L brought this complaint to AFP 15 months ago, and I think this service is responsible for assessing and delivering a fair and reasonable outcome for her complaint. In this respect I don't believe it would be fair or reasonable to put this case on hold pending possible future court proceedings.

I've also considered the new DISP rule 3.3.4 (5) concerning matters which would be better dealt with in court, and I don't believe this would be so in this case. The aspect of Mrs L's complaint which I have deemed within our jurisdiction solely concerns whether AFP/the advisor's wrongly advised her to part surrender a regulated investment and put the money in unregulated products. This, I believe, is best dealt with at the current time by this service.

I've also considered AFP's argument about 'Betterment' and the theoretical possibility of Mrs L recovering some of her money if there was a prosecution and it was successful, and it concerned this issue. However, this service is required to make decisions based on what is fair and reasonable, and I do not think it would be fair or reasonable to suspend any decision and award of compensation based on these number of theoretical propositions.

In assessing compensation I am satisfied that this should be based on the withdrawals made during 2012, totalling £34,000; and that this money was subsequently reinvested in various unregulated products which now have no value.

In saying this I accept that the evidence about the new 'investments' is somewhat sketchy and probably includes money taken from Mrs L's other sources, notably bank accounts. However, I'm satisfied, on the balance of probabilities, that this £34,000 was put into various unregulated products (some of which may have been described as loans) and that none of these has any ongoing value.

compensation

fair compensation

In assessing what would be fair compensation, my aim is to put Mrs L as close to the position she would probably now be in if she'd not been given unsuitable advice to make three withdrawals from her Skandia bond, totalling £34,000, in 2012 – with this money

most likely being reinvested in unregulated products (most probably including Voltz International, Charles Stanley and Black Phoenix Travel).

I take the view that Mrs L would not have made the withdrawals she did. I think it's likely that she'd have kept this money in the Skandia bond, at least in the short term, but I cannot say whether she would have continued moving money between funds.

Given this, I'm satisfied that what I've set out below is fair and reasonable given the events that have taken place and Mrs L's circumstances and objectives when she invested.

what it should do

To compensate Mrs L fairly AFP should calculate what the three withdrawal sums payments would now be worth, based on the benchmark shown below. Unless there's evidence to the contrary, it should be assumed that the alleged new 'investments' into which this money was most likely placed have no current value. So for the sake of this calculation the *actual value* should be considered zero.

AFP should also pay Mrs L £1,000 in lieu of its very poor and unsuitable advice. In 2011 she was seeking sound professional advice following the recent death of her husband. Instead the advisor took advantage of her situation and lack of financial knowledge. In the guise of providing proper financial advice he appears to have fraudulently obtained the funds paid to Mrs L following her husband's death. Not only has this caused significant distress and upset but has also left Mrs L in a very serious financial position.

AFP should provide the details of the calculation to Mrs L in a clear, simple format.

investment name	Status	benchmark	from ("start date")	to ("end date")	additional interest
The three Skandia bond withdrawals in 2012 of £2,000, £10,000 and £22,000 respectively	Assume no current value	for half of each investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	date of withdrawal	date of settlement	not applicable

fair value

This is what each investment would've 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, it 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. Apply those rates to the investment on an annually compounded basis.

why this remedy is suitable

I've chosen this method of compensation because:

- Mrs L wanted capital growth with a small risk to her 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 her 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 a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It'd be a fair measure for someone who was prepared to take some risk to get a higher return.
- I consider that Mrs L's risk profile was in between, in the sense that she was prepared to take a small level of risk to attain her investment objectives. So, the 50/50 combination would reasonably put Mrs L into that position. It doesn't mean Mrs L would've invested 50% of her money in a fixed rate bond and 50% in some kind of index tracker fund. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mrs L could've obtained from investments suited to her objective and risk attitude.

further information

The information about the average rate can be found in the 'Statistics' section of the Bank of England website under 'Interest and Exchange Rates Data' / 'Quoted household interest rates' / 'Deposit rates' / 'Fixed rate bonds' / '1 Year'.

Some examples of how the calculation should be carried out are available on our website under 'Publications' / 'Online Technical Resource' / 'Investment' / 'Calculating compensation in investment complaints'.

my final decision

I uphold this complaint and instruct Active Financial Partners Limited to pay compensation outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs L to accept or reject my decision before 8 February 2018.

**Tony Moss
ombudsman**