

complaint

Mrs L's complaint is about an appointed representative of Openwork Limited. She says she was badly advised. The complaint covers a number of matters relating to advice that led to an investment in a Growth Investment Fund held in two bonds.

Mrs L's complaint is made by her son, Mr L.

background

The advice was in 2011. Mrs L was assessed as a "*cautious*" risk investor and wanted a monthly income of £1,000.

The adviser recommended Mrs L invest around £200,000 split between two bonds, with each of her two children being secondary holders of the bonds. The bonds have a capital protection feature if held for ten years. If Mrs L died during the term, the bonds would then be passed to the secondary holders, who could then benefit from the capital protection offered by the bond.

Mr L complained to us that the advice provided was poor in a number of ways including:

- The adviser recommended that she settle a complaint with a previous adviser too cheaply.
- The adviser didn't accurately assess Mrs L's income and living and care expenses. The second assessment of her financial circumstances contradicted the first. And the differences weren't explained.
- The adviser recommended an equity release scheme. This is something that should only be used as a last resort.
- The adviser did not find out whether the investment would affect Mrs L's entitlement to payments from the local authority towards her care costs. Mrs L could not afford to lose that payment.
- The Fund wasn't suitable. The set up and ongoing charges weren't drawn to her attention.
- The adviser didn't leave enough funds in easy access cash deposit accounts for Mrs L's short-term needs.
- The adviser didn't recommend that she use her ISA allowance.

I considered this complaint and issued a provisional decision in December 2015.

In summary, I said:

- Advising someone about the level of compensation they should or shouldn't accept in a dispute about investment advice is not a regulated activity. So I can't consider that part of the complaint.

- It wasn't reasonable for the adviser only to say that the local authority money was important and that Mrs L should check she would continue to qualify for it. His plan would only work if she continued to qualify and so he should have made sure of that point before the plan went ahead.
- The local authority has continued to pay Mrs L and so that possible disaster hasn't happened. However, Mrs L still had the considerable worry on that point before it eventually became clear that the payment would continue.
- I agreed that the analysis of Mrs L's current financial position, her needs and objectives is not very clear or consistent. There was also some uncertainty at the time about the level of her routine expenditure as she had just moved house.
- Mr L accepts that Mrs L's reasonably predicted expenses meant she had an income shortfall so something needed to be done. The adviser arranged for another business to give advice about equity release. As there was an income short fall and as the advice about the equity release seems to have been given by someone else, I couldn't say that Openwork was at fault on this point.
- The money for the new investment came from down-sizing and equity release and from two existing bonds. There is no suggestion that the funds used in the existing bonds were too high risk – only that they had performed disappointingly. But in the period up to 2011 many funds had been disappointing. They were very difficult times.
- The existing investments (on which set up costs were incurred) weren't obviously unsuitable and were surrendered and replaced with another investment with a second set of charges.
- The justification of the new investment doesn't seem strong. It was not very different and I expect that fund switching would have been available for the existing Bonds.
- The new Fund includes a capital guarantee which does have an attraction. This comes with the condition that the bond has to be held for ten years. It is appropriate to consider whether Mrs L was likely to benefit from that capital protection when taking into account her age and ill-health.
- The charges on the bond, especially in respect of early withdrawals, are high. Mrs L's financial position was not completely settled so some flexibility would have been a good thing.
- I couldn't see that there was enough to justify the investment that was made. I can't see that it was suitable or that its advantages outweighed its disadvantages in this case.
- The unsuitable investment advice caused Mrs L, a vulnerable person, considerable trouble and upset – particularly in relation to the worry caused by the uncertainty over the local authority payments. I propose to award Mrs L £750 for the distress and inconvenience she has suffered.
- And any financial loss caused by the advice should be calculated by comparing the bonds to an average rate for fixed rate bonds.

Openwork didn't accept my provisional conclusions. It says:

- The adviser arranged for both of Mrs L's children to be present at the first meeting so there could be no confusion or misunderstanding.
- Mrs L didn't ask about elderly care planning and he didn't offer any advice in relation to this area as he was not qualified to do so.
- Mr L didn't know how much mobility she would recover following a stroke so wanted to keep her finances flexible.
- At a later meeting Mrs L explained she now hoped to get some assistance from the local authority. She predicted that her cash reserves would run out shortly and said she planned to sell her house. The adviser expressed concern but said he was not qualified in this area so Mrs L would have to clarify with the local authority what their approach to financial assistance in her case would be.
- He explained that Mrs L needed to carefully discuss with the local authority how they would treat capital, including equity released from the property and withdrawals from investment bonds. He stressed that they could not move forward until Mrs L had clarified this.
- Mrs L confirmed to him on the phone in February 2011 that she had checked the position with the local authority. She later confirmed that she had been granted some financial assistance.
- He said he addressed in great detail Mrs L's income and needs, and what funds she needed to set aside to adapt her new home and replenish emergency funds.
- He discussed the option of maintaining the Sterling Bonds, adding to them and switching funds. As well as the alternative of changing them to the smoothing process of the new Fund and the option of guarantees.
- He explained the two bonds recommended in detail. Mr L felt the benefits of the smoothing mechanism and diversified investment approach outweighed the tax advantages of an ISA.
- He did not recommend the equity release scheme.
- Mrs L invested in bonds with encashment penalties because this meant she could avoid an initial charge.
- He acted in Mrs L's best interest at all times – the commission payable was fully disclosed and agreed and he provided a very high level of support and commitment. He designed a strategy that has served her very well and worked with her to help her establish about £57,000 in redress from her previous financial adviser.

Mr L said he felt Mrs L had received very poor advice from both Openwork and her previous financial adviser. Her previous financial adviser should have recommended that she moved to a smaller house.

Openwork should have pursued the outcome in the compensation case against Mrs L's previous adviser.

Mrs L surrendered the bonds because she had lost all trust in her adviser at Openwork. Mr L said she lost £16,000. He also added that they spent around £900, on two separate advisors at the time they started to feel unsure about the adviser at Openwork.

Mrs L and Mr L have suffered stress and financial difficulty because of the poor advice Openwork provided. It was not acting in Mrs L's best interests.

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 not been persuaded to depart from my provisional conclusions.

As I said before I cannot deal with the complaint about help from Openwork with the earlier complaint.

I remain of the view that the right to continue to receive the local authority support was vital. The adviser should have obtained as clear and certain confirmation of this point as possible. Ideally he should have found out for himself. I note that this is not the advisers specialist area and that he is not authorised to give advice about long term care. This means that it is questionable that he should have given any advice at all rather than rely on his client to check such an important point.

I note that Openwork says Mrs L did confirm that the local authority payment would continue. However when the complaint was made it was still the case that there was uncertainty on the point. So it does seem to be the case that whatever happened clear confirmation was not obtained as it should have been.

I do note that Openwork involved Mrs L's adult children in the advice process – but they are not investment experts. Openwork was under an obligation to give Mrs L suitable advice and it should not have recommended the surrender of existing investments and the replacement with new similar investments without good reason. I am not persuaded that disappointment with existing investment performance and the ten year capital guarantee were sufficiently good reasons in the case of an elderly consumer who needed full time nursing care.

As the advice was unsuitable, Mrs L's position now – that is the current value of her investments and the income she has received, should be compared to the position she would now be in if she had invested in a way that produced the benchmark performance. If this shows she has suffered a loss, Openwork should compensate Mrs L.

Putting things right in this way will take into account any surrender charges and will be based on the gross sum originally paid over by Mrs L ie before any commission is deducted. This should therefore help to cover any costs of advice on how the recovered money could be invested. (If however the fees incurred with other IFAs related to whether or not a complaint should be made, this is not something we normally award compensation for. This is because we are in informal process that can normally be used without any expert advice or assistance.)

The unsuitable investment advice has caused Mrs L, a vulnerable person, considerable trouble and upset – particularly in relation to the worry caused by the uncertainty over the local authority payments. This will have been very upsetting for her. I also think that Mrs L will have been distressed by the worry and concern this has caused her children. I therefore award Mrs L £750 for the distress and inconvenience she has suffered

fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mrs L as close to the position she would probably now be in if she had not been given unsuitable advice.

I think Mrs L would have invested differently. It is not possible to say *precisely* what she would have done, but I am satisfied that what I have set out below is fair and reasonable given Mrs L's circumstances and objectives when she invested.

what should Openwork Limited do?

To compensate Mrs L fairly, Openwork Limited must:

- Compare the performance of Mrs L'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.

Openwork Limited should also pay interest as set out below.

- Pay Mrs L £750 for the considerable trouble and upset caused by the unsuitable investment advice.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Growth Fund	surrendered	average rate from fixed rate bonds	date of investment	date of surrender	8% simple per year from the end date to the date of settlement

actual value

This means the surrender value payable from the investment at the end date.

fair value

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

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Openwork Limited should use the monthly average rate for the fixed rate bonds with 12 to 17 months maturity as published by the Bank of England. The rate for each month is that shown as at

the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any additional sum that Mrs L paid into the investment should be added to the *fair value* calculation at the point it was actually paid in.

Any withdrawal, income or other payment out of the investment should be deducted from the *fair value* calculation 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 Openwork Limited totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

I have chosen this method of compensation because:

- Mrs L wanted to achieve a reasonable return without risking any of her capital.
- The average rate for the fixed rate bonds would be a fair measure given Mrs L's circumstances and objectives. It does not mean that Mrs L would have invested only in a fixed rate bond. It is the sort of investment return a consumer could have obtained with little risk to their capital.

my final decision

For the reasons given above, my final decision is to uphold this complaint and order Openwork Limited to pay the amount calculated as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs L to accept or reject my decision before 15 February 2016.

Philip Roberts
ombudsman