

complaint

Mrs H, through her representative, complains advice from Kelly Financial Management to invest in the EEA Life Settlement fund was unsuitable.

background

KFM advised Mrs H to invest in the EEA Life Settlement fund (EEA) in September 2009 and May 2010. The EEA was an unregulated collective investment scheme (UCIS), and the fund was suspended in November 2011.

Mrs H's representative says KFM's advice wasn't suitable for her. Mrs H couldn't access the EEA money when she needed it, and had to borrow from family members to buy the retirement property she now lives in.

Our adjudicator upheld the complaint. He didn't find that Mrs H was a sophisticated investor, so he didn't think KFM should have promoted the EEA to her. He also found that Mrs H's attitude to investment risk was low. The adjudicator concluded that the EEA carried a higher level of risk than Mrs H was prepared to take. So overall, he didn't think KFM's recommendation was suitable for Mrs H.

KFM didn't agree with the adjudicator's conclusions, so the complaint has been passed to me.

my findings

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

KFM provided a comprehensive response to the adjudicator's conclusions. I'd like to reassure it that I've considered everything it's said, including its views on the EEA's risk profile and liquidity, and the reasons for the fund's suspension.

The EEA is a UCIS, so there were restrictions on its promotion. But in my view, the key consideration here is the suitability of the advice given, not whether the fund could or should have been promoted to Mrs H.

KFM's records show Mrs H's attitude to investment risk was low. KFM has explained in detail why it considers the EEA was a low risk investment.

Despite what KFM says, I think it should reasonably have concluded that the EEA was a high risk investment. Its regulation was limited, and it didn't provide the regulatory protections normally offered to retail clients. This ought to have been an overriding consideration.

The fund also aimed to provide a very high return. Risk and reward are inextricably linked. In my view an investment offering such a high return (a benchmark net return of 8% a year) at a time when the base rate was 0.5% can't reasonably be assumed to be a low risk investment. The Financial Conduct Authority has also described this type of investment as being high risk.

KFM argues that rather than being illiquid, the EEA has been restructured to make sure investors get their money back. It also considers the fund's current position is a direct result of Financial Conduct Authority comments. I note what KFM says, but I think there was a foreseeable risk that the fund might run into liquidity problems.

KFM was giving advice in this case. It was the expert. So it was reasonable for Mrs H to rely on the advice and suitability of the recommendation from KFM. My overall finding is that the advice was unsuitable, so Mrs H should be compensated for this.

KFM says the recommended compensation isn't appropriate. Periodic payments are being made from the EEA, so it considers it's too soon to say whether there has been any loss. KFM takes the view that Mrs H's investment shouldn't be moved until the EEA 'run off' process is complete.

I can see why it might take that view. However, KFM gave advice that wasn't suitable and I'm satisfied that Mrs H should be compensated for that. Mrs H's lack of access to her money is a consequence of the unsuitable advice she received. So I don't think it's reasonable to expect her to wait several years to find out whether she's suffered a loss.

The adjudicator said Mrs H should be put into the position she would've been in if she'd invested in line with her investment objective and attitude to risk. As her attitude to risk was low, KFM says it's unfair to measure half her investment against an equity based benchmark.

But the adjudicator recommended the other half of Mrs H's investment should be measured against the average return from fixed rate bonds. He considered the mix of benchmarks was a reasonable compromise that reflected the sort of return Mrs H could have obtained from investments suited to her objective and attitude to risk.

I agree with the adjudicator and am satisfied that the suggested compensation is reasonable.

fair compensation

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

I take the view that Mrs H would have invested differently. It is not possible to say *precisely* what she would have done differently. But I am satisfied that what I have set out below is fair and reasonable given Mrs H's circumstances and objectives when she invested.

what should KFM do?

To compensate Mrs H fairly, KFM must:

- Compare the performance of Mrs H'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.

KFM should also pay interest as set out below.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
EEA Life Settlement fund	still exists	for half the investment: FTSE WMA Stock Market Income Total Return Index; for the other half: average rate from fixed rate bonds	date of investment	date of my decision	8% simple per year from date of decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)

actual value

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

If at the end date the investment is illiquid (meaning it could not be readily sold on the open market), it may be difficult to work out what the actual value is. In such a case the actual value should be assumed to be zero. This is provided Mrs H agrees to KFM taking ownership of the investment, if it wishes to. If it is not possible for KFM to take ownership, then it may request an undertaking from Mrs H that she repays to KFM any amount she may receive from the investment in future.

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

why is this remedy suitable?

I have decided on this method of compensation because:

- Mrs H 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 WMA index is a mix 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.
- I consider that Mrs H'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 H into that position. It does not mean that Mrs H would have 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 H could have obtained from investments suited to her objective and risk attitude.

my final decision

I uphold the complaint. My decision is that Kelly Financial Management should pay the amount calculated as set out above.

Kelly Financial Management should provide details of its calculation to Mrs H in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I am required to ask Mrs H's representative, on behalf of Mrs H, either to accept or reject my decision before 19 February 2016.

Caroline Stirling
ombudsman