

complaint

Mr B's complaint is about the role Howard Taylor Associates ("HTA") played in the transfer of two of his pensions into a self-invested personal pension ("SIPP") in 2012. His pension was subsequently invested in an illiquid and speculative UK land scheme. Mr B says he was badly advised by HTA.

background

Mr B was introduced to the land venture by Falcon International Estates Ltd ("Falcon"). It completed a fact find (which was signed by Mr B on 27 January 2012) and a questionnaire (most likely an attitude-to-risk questionnaire) with Mr B. These were then forwarded on to HTA on 21 February in order for HTA to facilitate Mr B using his pensions to invest in the land venture. Mr B had two pensions; one a final salary occupational scheme, the other a personal pension.

On 21 February, HTA signed a declaration to say it was satisfied Mr B could be treated as an elective professional client. Further information about Mr B's pensions was forwarded on to HTA by Falcon on 30 March. HTA wrote to Mr B on 17 April 2012 to say he was acting on an execution-only basis. It asked him to sign a declaration to say he had received no advice, which he did on 4 May 2012. On the same day, he also signed application forms to open his SIPP and transfer his pensions.

Mr B's occupational scheme benefits were valued at £14,954. His personal pension was valued at £5,179. The SIPP was opened, the pensions transferred and £15,000 was invested in the land venture.

In 2016, Mr B's SIPP provider wrote to him to say it would no longer be acting as the SIPP's administrator. It gave Mr B two options – to transfer to the 'default' option of a Mattioli Woods SIPP or to transfer to a different SIPP. Mr B's SIPP transferred to the Mattioli Woods SIPP.

In 2017, Mr B's representative requested information and documents from the business about the transaction. In response HTA said Howard Taylor Associates Limited (the business Mr B's representative had requested information from but which is a separate legal entity to HTA) had never dealt with Mr B. Mr B referred his complaint to us. He says he was badly advised to transfer his pensions and invest in the land venture. In its submissions to us, HTA said that it hadn't previously responded to Mr B's information request because it had been made to a legal entity that had never dealt with Mr B. It went on to say that it hadn't done anything wrong because it hadn't advised Mr B and that it had facilitated the transaction on an execution-only basis.

Our adjudicator upheld Mr B's complaint. He said, in brief, that HTA had advised Mr B and that its advice was unsuitable. And he held HTA responsible for all the losses Mr B may have suffered. HTA asked for an ombudsman to decide on the complaint.

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'm upholding Mr B's complaint. I explain why below.

Was Mr B a professional client?

HTA categorised Mr B as an elective professional client. This is important here because professional clients can lose some protections, including the right to bring complaints to the Financial Ombudsman Service. However, in my view, HTA has fallen short of what was required under the rules regarding the categorisation of professional clients.

COBS 3.5.3 states the following:

A firm may treat a client as an elective professional client if it complies with (1) and (3) and, where applicable, (2):

- (1) The firm undertakes an adequate assessment of the expertise, experience and knowledge of the client that gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved (the "qualitative test");*
- (2) in relation to MiFID or equivalent third country business in the course of that assessment, at least two of the following criteria are satisfied:*
 - (a) the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters;*
 - (b) the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments, exceeds EUR 500,000;*
 - (c) the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged;*
- (the "quantitative test"); and*
- (3) The following procedure is followed:*
 - (a) The client must state in writing to the firm that it wishes to be treated as a professional client either generally or in respect of a particular service or transaction or type of transaction or product;*
 - (b) The firm must give the client a clear written warning of the protections and investor compensation rights the client may lose; and*
 - (c) The client must state in writing, in a separate document from the contract, that it is aware of the consequences of losing such protections."*

HTA completed an assessment of Mr B's investment holdings and experience and concluded from this that he could be classified as an elective professional client. I have some doubts about this assessment. I'm not convinced Mr B's investment in gold and collection of old bank notes – both of which were relatively modest – and his unspecified number of shares in his former employer purchased through a share incentive scheme necessarily gave him the experience required of a professional client. Similarly, I don't think the fact that he had applied for planning permission to extend his home necessarily conferred on him expertise of the type of land venture he was intending to buy into. And

whilst I note that Mr B apparently said he was an experienced investor in the fact-find and in telephone calls, there is little corroborating evidence to support this.

However, even if I assume Mr B did have the requisite experience, knowledge and track record to pass the qualitative and quantitative tests, HTA would have still fallen short of its regulatory requirements because there's no evidence of Mr B ever having written to HTA to confirm he wanted to be treated as a professional client or of HTA having warned Mr B of the potential consequences of being categorised in this way or of Mr B having confirmed his understanding of those consequences.

As HTA fell short – in several areas – of the requirements of COBS 3.5.3, I will treat Mr B as a retail client.

Was the transaction on an execution-only basis?

HTA says it facilitated the transaction on an execution-only basis. It says Mr B signed declarations to confirm this and when it wrote to Mr B on 17 April 2012, the letter began with the following paragraph:

"Thank you for your instructions to arrange a...sipp which we have accepted on the clear understanding that we are acting at your explicit request and have not made any recommendation as to the suitability of the contract for your particular needs."

However, the letter went on to say:

"From what we know about the product, and from the amount that we know about your personal circumstances, there is nothing that would make us attempt to dissuade you from proceeding with this transaction as it appears to be appropriate to your experience and knowledge of the risks involved."

Given this, I fail to see how the letter can be seen as anything other than a recommendation to transfer. It says HTA had taken into consideration the product and Mr B's circumstances – information that it had to hand through the fact-find. It then concluded that there was "nothing" that would make HTA "attempt to dissuade" Mr B from proceeding. I'm satisfied Mr B would have read this as a recommendation to transfer and invest in the land venture.

In certain situations, a firm is required to assess the appropriateness of a product or service for a client even in an execution-only transaction. So it could be argued that this is what HTA was doing – checking the execution-only transaction was appropriate for Mr B rather than assessing the transaction's suitability. However, for similar reasons as given previously, I don't think Mr B's knowledge and experience would have made the transaction appropriate. And even if it had been, the rules would have still required HTA to have steered clear of making a personal recommendation which, for the reasons given above, I'm satisfied it didn't do here.

I recognise Mr B signed declarations to say he hadn't received advice and that parts of the 17 April letter said much the same thing. But I think all this is undermined because Mr B only signed to say no advice had been given after HTA had told him it saw no reason to dissuade Mr B from continuing. It strikes me that HTA is trying to have the best of both worlds here in encouraging the transaction whilst simultaneously saying it wasn't offering advice. HTA isn't allowed to blur the boundaries between advice and execution-only in this way.

Furthermore, in Mr B's application form to invest in the land venture, HTA confirmed that it had given advice when it signed the following declaration:

"I/We have reviewed this application for a land purchase and confirm that the investment is suitable for the applicant's circumstances and attitude to risk"

In short, I'm satisfied Mr B was advised to transfer. HTA therefore had a duty to ensure its advice was suitable.

Was the advice suitable?

The transfer from Mr B's occupational scheme

A high proportion of Mr B's transferred funds were from his final salary occupational pension scheme. I see no reason why giving up the valuable guarantees from this scheme in favour of a SIPP would have been suitable for Mr B. He wasn't recorded as being in ill health and didn't appear to have had a need for the flexibility in taking benefits – both reasons why transferring to a SIPP *may* have been suitable. And the fixed costs that typically apply in SIPPs often make them uneconomic for smaller transfer values such as the one here.

The only potential real reason I can see for why the transfer could have been suitable would have been if the proposed underlying investment had been suitable. But that doesn't apply here either. Mr B's pension funds were being transferred to an investment that exposed him to significant risk – risk I don't think he would have been comfortable taking on. By its very nature, land investments aren't readily realisable. The value of the land in this case was highly dependent on planning permission that hadn't yet been granted. And the investment was too long term for Mr B's needs as he was looking to retire approximately 14 years from the date of the transaction but the timescale of the investment was "15-20 years" according to the investment memorandum. He was also 52 at the time, so he didn't have a particularly long time, or the means, to make good the potential losses from the investment.

Mr B also had little in the way of other savings or investments either (approximately £17,000 outside of his house and pensions, plus an unquantified number of shares in his old employer). So he was putting just under half of his financial assets, and three-quarters of his pension assets, into a single illiquid, speculative, investment. This doesn't strike me as being a satisfactorily diversified portfolio.

I also note that HTA didn't complete some of the steps that it should have done given it was advising Mr B on transferring benefits from a final salary occupational pension scheme. In some ways, this is understandable. HTA was, after all, under the impression that this was an execution-only, rather than advised, transaction. However, for the reasons given above, this wasn't the case. HTA had strayed into giving advice to Mr B and, as such, I have to view the transaction, and HTA's obligations, in that light. Some of those missing steps – for instance calculating the returns Mr B would have needed in order to replicate the benefits he was giving up – may well have provided further reasons for why the transfer was unsuitable.

Given all the above, I'm satisfied the advice to transfer wasn't suitable. I've not seen any persuasive reason why Mr B would have gone ahead with the transaction if he had been advised along these lines. As such, if HTA had given suitable advice, I'm satisfied Mr B would not have transferred his pension, would not have ended up in a SIPP and would not have invested in the land venture.

Finally on this, I note that Mr B's attitude-to-risk was recorded as being "very adventurous". However, I have doubts about how this rating came about. I can see it followed a questionnaire. But it was a very short questionnaire – just 12 questions. It only required a tick in the various boxes rather than recording Mr B's own thoughts on the matter. And Mr B didn't sign to confirm his answers or his understanding of its results. So I have doubts about how robust this exercise was and how much Mr B was asked to engage with it. The outcome of the attitude-to-risk exercise is also at odds with Mr B's behaviour up to that point given his personal pension was previously invested in a relatively cautious way (in a with-profits fund). As such, Mr B's recorded attitude to risk isn't enough to make me think the transfer was suitable, especially given all the other available evidence – outlined above – to the contrary.

The transfer from Mr B's personal pension

The transfer of Mr B's personal pension wouldn't have been suitable on a standalone basis – not least because it's unlikely the transfer value would have been sufficient to make the costs of the SIPP worthwhile and it wouldn't have been sufficient to allow investment in the land venture either. As such, the transfer of the personal pension only really makes sense when considered in conjunction with the transfer of the occupational scheme. But, as outlined earlier, this was unsuitable too. It follows from this that compensation should take into consideration the transfer of Mr B's personal pension as well as the transfer of his occupational scheme benefits.

The role of other parties

HTA is disappointed that it is being held responsible for what happened given the involvement and (in its view) culpability of other parties.

I recognise HTA wasn't responsible for Mr B's initial interest in the investment. It was Falcon that prompted him down this path. I also recognise Falcon undertook some of the activities often done by an adviser – for example, the completion of the fact-find. However, HTA was the regulated entity here, not Falcon. And, for the reasons given above, HTA did advise Mr B so it's responsible for the consequences of that advice. And, ultimately, it's unlikely the transfer and subsequent investment would have happened but for HTA's involvement. So, all things considered, I think it's fair and reasonable for HTA to be entirely responsible for any compensation Mr B is due.

Fair compensation

The transfer from Mr B's occupational pension scheme

A fair and reasonable outcome would be for the business to put Mr B, as far as possible, into the position he would now be in but for its unsuitable advice. I consider Mr B would have remained in the occupational scheme. HTA must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in October 2017.

This calculation should be carried out as at the date of my final decision, and using the most recent financial assumptions at the date of that decision. The entire value of what remains in Mr B's SIPP originating from the occupational and personal pension transfers should be used as the comparison with the occupational scheme for this part of the calculation. In accordance with the regulator's expectations, this should be undertaken or submitted to an

appropriate provider promptly following receipt of notification of Mr B's acceptance of the decision.

HTA may wish to contact the Department for Work and Pensions (DWP) to obtain Mr B's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr B's SERPS/S2P entitlement.

The transfer from Mr B's personal pension

I don't think Mr B would have transferred his personal pension to the SIPP if it hadn't been for HTA's actions, so I think it fair to include this transfer in my considerations of compensation.

It's not possible to say precisely what Mr B would have done differently with his personal pension. But I take the view that he wouldn't have transferred to the SIPP but would, instead, have retained his personal pension plan and the funds it held prior to the transfer. With this in mind, and taking everything into consideration, I'm satisfied what I've set out below is a fair and reasonable approach to this part of Mr B's compensation.

To compensate Mr B fairly, HTA must calculate a *fair value* for Mr B's personal pension according to the benchmark shown below, to determine the further compensation payable. This is to be added to the compensation calculated.

investment name	status	benchmark	from ("start date")	to ("end date")
Personal Pension	Transferred out	the fund(s) Mr B's personal pension was previously invested in	date of transfer	date of my final decision

fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark. This means HTA will need to contact Mr B's original pension provider to obtain this value.

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 HTA totals all those payments and deducts that figure at the end when determining the fair value instead of deducting periodically.

Treatment of the value of the land investment

My aim is to return Mr B to the position he would have been in but for the actions of HTA. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. That appears to be the case here.

To calculate the compensation, HTA should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs, and take ownership of the investment. The value of the SIPP used in the calculations should include anything HTA has paid into the SIPP.

If HTA is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation. In return for this, HTA may ask Mr B to provide an undertaking to account to it for the net amount of any payment he may receive from the investment. That undertaking should allow for the effect of any tax and charges on what he receives. HTA will need to meet any costs in drawing up the undertaking. If HTA asks Mr B to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

SIPP fees

Any outstanding charges yet to be applied to the SIPP should also be deducted before it is valued. In addition, the SIPP only exists because of the illiquid investment. In order for the SIPP to be closed and further SIPP fees to be prevented, the investment needs to be removed from the SIPP. I've set out above how this might be achieved by HTA taking over the investment, or this is something that Mr B can discuss with the SIPP provider directly. But I don't know how long that will take.

Third parties are involved and we don't have the power to tell them what to do. To provide certainty to all parties, if HTA isn't buying the investment from the SIPP I think it's fair that it pays Mr B an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

How to determine and pay the overall compensation amount

The fair value determined for Mr B's personal pension should be added to the result of this redress calculation according to the pension review guidance. If this demonstrates an overall loss, the compensation should, if possible, be paid into Mr B's SIPP. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the SIPP if it would conflict with any existing protection or allowance.

If a payment into the SIPP isn't possible or has protection or allowance implications, it should be paid directly to Mr B as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr B's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The payment resulting from all the steps above is the 'compensation amount'. The compensation amount must where possible be paid to Mr B within 90 days of the date HTA

receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes HTA to pay Mr B.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from the DWP may be added to the 90 day period in which interest won't apply.

Income tax may be payable on any interest awarded.

Distress and inconvenience

Given the disruption to his retirement plans, I'm satisfied Mr B suffered distress and inconvenience as a result of HTA's actions. HTA should therefore pay Mr B a further £150 to reflect this.

my final decision

For the reasons given above, I'm upholding Mr B's complaint. Howard Taylor Associates must pay Mr B compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 5 February 2021.

Christian Wood
ombudsman