Financial Ombudsman Service

summary complaint

This complaint has been brought by a firm of solicitors on behalf of the trustees. It concerns the advice they received from HFM Columbus Partners LLP (the IFA) to invest the trust monies in a Keydata investment. The trustees believe the recommended Keydata investment was unsuitable, particularly in view of the associated risks and the fund being invested in traded life policies.

my provisional decision

I issued my provisional decision on this complaint on 31 October 2013, a copy of which is attached. In summary, I felt that the recommended investment was not suitable for the trust's requirements and circumstances. Furthermore, I was not persuaded that the trustees would have invested had they appreciated the risks.

The redress I felt appropriate was based on the likelihood that the trustees would have invested the trust's capital into another investment suitable for the trust's objectives and circumstances.

In response to my provisional findings, the IFA stated it did not have any further formal submissions to make.

The trustees requested that I make an award for some of the costs that they had incurred in respect of this complaint. They stated that the IFA had opposed both the merits and the jurisdiction aspects of this complaint and therefore it was necessary for them to retain professional advisers throughout.

The trustees said that it was fair that the IFA reimburse them for the costs they have incurred. They requested that a costs award of £6,000 (£5,000, plus Value Added Tax) be made to them. The professional advisers confirmed this amount was not in excess of the sum the trustees are liable to pay them in costs.

The trustees also confirmed that save for the issue of costs, they agreed with my provisional findings.

my findings

I have reconsidered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. As neither party has further substantive comment to make, I am satisfied that my overall findings are fair and reasonable.

I have carefully considered the issue of the trustees being compensated for the costs they have incurred. Having done so, I am not persuaded that it would be fair and reasonable to compensate the trustees for the costs they have incurred in seeking professional advice.

I can understand why the trustees have sought professional advice. However, on balance I do not think it was absolutely necessary. On occasion we do make such awards, but we do so rarely. In this case, although there were some complex issues involving jurisdiction and merits, they were not exceptional and these are matters that we regularly encounter. It follows that I am not persuaded that it would be fair and reasonable for me to make the IFA pay such costs.

Consequently, I can see no reason to depart from the findings in my provisional decision. For the sake of completeness, I have set out again how I consider fair compensation should be calculated in this case. I have also provided some clarification in relation to any distributions received (or that may be received) since the fund defaulted in November 2009, as recently explained by the adjudicator in an email.

my final decision

My final decision is that I uphold this complaint for the reasons set out above and in my provisional decision.

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £100,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £100,000, I may recommend the business to pay the balance.

My aim is to put the trust in the position it would now have been in but for the IFA's unsuitable advice. In deciding how to assess fair compensation I consider it fairest to assume:

- With reasonable advice, the trustees would have had the original capital intact plus a reasonable rate of return.

- The rate of return on the original capital would have been equivalent to 1% more than Bank of England base rate from time to time compounded yearly.

determination and award

I uphold this complaint and consider that fair compensation should be calculated as D, where:

A = the capital invested in the Keydata plan, less any amounts paid out by way of withdrawals, distributions of capital or before-tax income;

B = a return on the amount from time to time of A, by way of a return of the Bank of England base rate plus 1% per annum, compounded annually from the date of investment until 13 November 2009 (when Keydata defaulted and the loss crystallised) or until the date that the last income payment was made if later;

C = the residual value of the investment that the trustees made in the Keydata plan, which I assess to be zero for this purpose.

D = A + B – C.

My final decision is that HFM Columbus Partners LLP should pay the trustees the amount produced by this calculation (that is the amount D) up to a maximum of £100,000. To that sum the IFA should add interest from 13 November 2009 (or from the date that the last income payment was made if later) at the rate of 8% per annum simple until this award is paid.

As it is my understanding that on payment of this compensation the FSCS will require repayment of its compensation to the trustees, no allowance should be made for any sum received from the FSCS in the calculation of the investment loss. However, the trustees have had use of this money since it was paid. Accordingly, although the amount D should not be reduced, the sum used to calculate the interest payment should be reduced by the amount the trustees received from the date of the FSCS payment. The trustees should provide evidence of the date at which the payment was made and the amount received.

If the IFA considers it is legally obliged to deduct income tax from the interest (ie the amount to be added to part D only) it must provide the trustees with a tax deduction certificate so they can reclaim any overpaid tax from HM Revenue and Customs if they are eligible to do so.

For clarification, A and B above should work as follows. Any sum paid into the investment should be added to the calculation from the point in time when it was actually paid in so it accrues the 'reasonable rate of return' within the calculation from that point on.
Any reduction to the investment (excluding the final encashment payment) should be deducted from the calculation at the point in time when it was actually deducted so it ceases to accrue the 'reasonable rate of return' within the calculation from that point on.

I understand that in some cases, consumers have received income payments after Keydata defaulted. It is only fair that such payments are taken into account in my award and I have allowed for this possibility in the award formula. It should be noted that the income payments do not include any distributions made following the Bondholder Notice dated February 2013 which is discussed further below.

In relation to C, I understand that the fund cannot be encashed. For that reason, as set out above, for the purpose of C the investment should be treated as having a nil value. However, that is provided the trustees agree to the IFA taking ownership of the investment if it wishes to. The IFA would then be able to obtain any value of the investment as and when that value can be realised plus any distributions made from it.

I am aware that a Bondholder Notice dated February 2013 (and some later notices) indicate that there may be further distributions to bondholders. I consider that as part of any arrangement to pay the award and to take ownership of the investment it would be reasonable for the IFA to make appropriate provision for it to receive any distributions if it is entitled to, taking account of the redress calculation and any assignment rights.
This would cover a situation where the trustees receive the distribution before the award has been paid and/or before transfer of ownership to the IFA has been completed. It would also cover a situation where the distribution is incorrectly paid directly to the trustees even though ownership has been transferred. I would ask the trustees to note that carefully. They will need to co-operate with the IFA to enable it to make the necessary calculations and in order for it to take ownership of the investment if it wants to.

In the event that the full compensatable sum exceeds our limit and the IFA only pays up to that limit, then any distributions would be paid in accordance with the approach set out in the recommendation section of this decision. So in short, if the business decides to limit its payment to the financial limit, any value including any distributions that have or will be paid shall be retained or paid to the trustees until the amount received (excluding any interest payment) has reached the full compensatable loss due. Then any further distributions/value in excess of this sum can be taken by the IFA.

Similar to the situation with the FSCS payment, in the event that the trustees have already received any distribution payments, but these were paid after 13 November 2009, they should not be deducted from the amount D. Rather the sum used to calculate the interest payment should be reduced by the amount the trustees have received from the date of the distribution payments. Again, the trustees should provide evidence of the date at which any payment was made and the amount received.

recommendation

If the ‘compensatable loss’ (figure D in the above calculation) exceeds £100,000, I recommend that the IFA pays the trustees the balance. This recommendation is not part of my determination or award. It does not bind the IFA. Whether the trustees can accept my decision and go to court to ask for the balance is uncertain. The trustees may want to consider getting independent legal advice before deciding whether to accept this decision. And in the circumstances, I have given the trustees a longer time (three months) to notify me whether they accept or reject my decision.

If the compensatable loss exceeds £100,000 and the IFA does not agree to pay this in full, any reassignment of ownership referred to above should only concern itself with any amounts which are in excess of the full compensatable loss. To identify this amount, the IFA should deduct £100,000 from the compensatable loss. The resulting figure is the amount the trustees are entitled to retain by way of any future value and/or distributions. Any value or distributions that might be made over and above this amount may be assigned to the IFA, if the IFA decides to take a transfer of those rights.

If the compensatable loss exceeds £100,000 and the IFA decides to pay the entire amount, the IFA is entitled to take an assignment of the rights to all future value of the investment if it wishes. and also any distributions (whenever paid)

Simon Rawle
ombudsman

PROVISIONAL DECISION

summary of complaint

This complaint has been brought by a firm of solicitors on behalf of the trustees. It concerns the advice they received from HFM Columbus Partners LLP (the IFA) to invest the trust monies in a Keydata investment. The trustees believe the recommended Keydata investment was unsuitable, particularly in view of the associated risks and the fund being invested in traded life policies.

background to complaint

In early 2008, the trustees sought investment advice from the IFA in relation to the investment of monies placed under trust. Acting on the advice of the IFA, the trustees invested £150,000 of the trust monies in the Keydata Defined Income Plan (DIP) (issue 1).

The product provider, Keydata Investment Services Limited ('Keydata'), acted as the trustees' agent and purchased the plan. The issuer of the plan was Lifemark S.A., which was a Luxembourg based 'special purpose vehicle'. The plan was invested for a term of five years. Keydata went into administration on 8 June 2009 and defaulted on 13 November 2009. The trust consequently experienced a significant loss.

The trustees previously submitted a claim to the Financial Services Compensation Scheme (FSCS). The FSCS accepted the claim and paid compensation. As this did not fully compensate the trust for its losses, the trustees opted to continue pursuing their complaint against the IFA. The FSCS subsequently reassigned the rights of the policy back to the trustees. As a result, we were able to consider the complaint.

The adjudicator who investigated the complaint was of the view that the complaint should be upheld. Briefly, she concluded that the plan was not a suitable recommendation.

The IFA did not accept the adjudicator's conclusions. Firstly, it raised a jurisdiction query. As outlined above I have previously found that the complaint does fall within our jurisdiction.

In response to the adjudicator's opinion on the merits of this complaint, the IFA made a number of points including:

- The recommended product was suitable for the trustees' objectives of investing in assets for the benefit of all beneficiaries.
- The trust's income requirement was not achievable without the trustees taking a degree of investment risk.
- The letter of January 2008, addressed to the trustees, stated that they wished to adopt a 'below average' attitude to risk, although they were prepared to accept a limited degree of fluctuation in the value of their investments with the aim of achieving greater medium to long-term returns. As the trustees did not query the contents of the letter, the IFA had no reason to believe that the trustees were only prepared to invest where capital was not at risk of erosion.
- It reasonably considered that the inherent risks of investing in life settlements were effectively mitigated by the investment parameters and structure of the plan, making it a lower risk investment suitable for the trustees.

- It is widely accepted that life settlements offer investors the potential for returns which are almost entirely uncorrelated to other investment markets.

- It reasonably considered the Keydata plan to be a lower risk investment in 2008. It considers that this Service's assessment that it was not suitable has been subject to hindsight and is not in line with the regulator's assessment. Furthermore, the FSCS found nothing to suggest that the product entailed higher risk than corporate bond funds or equities.

- Regardless of its view of the complexity of the product, the regulator at the time, the Financial Services Authority (FSA), did not consider the risks to consumers to be significant. Despite raising other extreme concerns in October 2007, the FSA raised no concern about the low risk categorisation being attributed to the investment or about the population to which it was being sold. Moreover, during an audit in 2009, the FSA concluded that the sale of this product was suitable for low risk investors.

- Additionally, the trustees had been made aware that capital was not guaranteed and might not be returned in full if the actuarial model failed to perform as predicted.

- The prospect of an insured living longer than anticipated was likely to result in reduced returns and not capital loss, assuming that premiums were maintained.

- The IFA detailed the reasons why it took the view that the associated risks such as carrier risk, lapse risk, longevity risk and counterparty risk were not significant and that the overall risk of the bond had been mitigated.

- At the time of advice, there was nothing generally being said in the public domain raising any industry or regulatory concern about life settlements as an asset class, the Keydata life settlement backed products or Keydata itself.

- The IFA could not have discovered the inaccuracies stated in Keydata's marketing material and it would not have recommended the product to the trustees if the true facts were materially different from those actually represented by Keydata.

- It would be unfair and unreasonable for the IFA to be found to have given unsuitable advice based on misrepresented facts when it firmly believed the information given to it by Keydata was reliable.

- Keydata was a regular recipient of industry awards and provided third party administration services to Blue Chip companies. There was nothing to indicate any potential problem with Keydata life settlement backed products. On the contrary, the strength of the secondary life settlement market was increasing on a yearly basis whilst credit continued to be freely available within the market.

- Investment losses resulted from well-intended but ill-judged intervention which disrupted the proper management of the fund, as opposed to any failing in the product or the advice provided by the IFA.

- It would be unfair and unreasonable for the Financial Ombudsman Service to decide that the IFA should pay financial redress to the trustees if his financial detriment was caused by the wrongdoing of Keydata and its directors.

- The fund was regularly reported as performing as expected until the onset of the credit crunch, a phenomenon the IFA could not have reasonably foreseen. The credit crunch placed possible liquidity pressure on a fund that was already facing greater pressure than the IFA had otherwise understood because of high levels of undisclosed fees paid to connected parties, and apparent mis-management outside of represented parameters.

- Additionally, the liquidity issues were compounded by subsequent regulatory action, which again the IFA could not have foreseen.

- No losses have yet been crystallised. The Lifemark portfolio continues to have significant value and has every potential for returning full capital to investors in due course.

I must decide this case on its individual merits. However we have considered complaints about Keydata bonds before and published a decision which sets out our general approach to such complaints on our website. The decision is in the *investment* section of our *online technical resource* which can be found by clicking the *publications* tab.

my provisional findings

I have read and considered all the evidence and arguments available to me from the outset, in order to decide what is fair and reasonable in all the circumstances of this complaint. Furthermore, I should perhaps point out that whilst the recommendations made to the trustees also included two other separate investments. I have only assessed the suitability of the Keydata recommendation.

When considering what is fair and reasonable, I am required to take into account relevant: law and regulations; regulator's rules, guidance and standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

I am therefore mindful of the general legal position including: the law relating to negligence, misrepresentation and contract (including the express or implied duty on professional IFAs to give advice with reasonable skill, care and diligence); and the law relating to causation and foreseeability.

There appears to be no dispute that this was an advised sale of an investment product where the IFA assessed the suitability of the product for the trust. As the IFA gave advice about regulated investments, I have taken account of the regulatory regime that applied at the time which includes the relevant FSA principles and rules on how a business should conduct itself.

Taking the relevant considerations into account, it seems to me that the overarching question I need to consider in this case is whether the recommendation of the Keydata product was suitable for the trusts' needs and objectives.

The suitability report completed by the adviser in early 2008 recorded:

- The trust was set up following the death of the wife of a trustee.

- The beneficiaries of the trust were that trustee and his two children – the trustee was entitled to the income generated from the invested trust monies for the remainder of his life whilst his adult children were entitled to the capital and growth.

- That trustee was past retirement age and his children were in their late thirties and early forties respectively;

- £480,000 was available for investment under the trust.

- The trustees wanted to invest in areas that would provide potential for capital growth and income.

- Access to the funds was not required in the short term and the trustees were happy to consider a term of five years or more.

It was further recorded that the trustees wanted the investment to achieve a balance between providing income and capital growth. However, the trustees were keen for the investments to be made based on the merits of the individual funds and to build a balanced portfolio rather than including or excluding funds purely on the income they would generate.

The suitability report also recorded that the trustees' overall attitude to investment risk was *'below average'*. The report stated this meant the trustees preferred the security of lower risk investments, although they were prepared to accept a limited degree of fluctuation in the value of their investments in the hope of achieving greater medium to long-term returns. It was further recorded that the trustees were prepared to invest in some higher risk investments as a means of diversifying their portfolio in order to mitigate risk.

The suitability report stated whilst the trustees were happy to invest in protected capital investments, they did not want the trust to invest in equities or commercial property at that particular time. They wanted the funds to be held in an investment vehicle which could be switched out of cash and into suitable equity funds at short notice. The trust was aiming for an approximate 60/40 split between income and growth.

The adviser recommended the trust to make the following investments:

- £150,000 in the Keydata Secure Income Plan (issue 15)
- £50,000 in the Skandia Protected Portfolio Fund
- £280,000 in the Skandia MultiFUND

With regard to the Keydata plan, the adviser recommended a five year option for a fixed annual income of 7.5% gross on the basis it provided an attractive rate of income for a lower risk investment.

The recommended plan was the Secure Income Plan (issue 15). However, it would appear that prior to the trust monies being invested, this plan reached its maximum capacity of £1 billion and Keydata subsequently launched its successor, the Defined Income Plan (issue 1). It seems the trust monies were therefore invested in the latter plan which comprised the same underlying assets as the Secure Income Plan.

In assessing whether the advice provided to the trustees was suitable, the key issue I must decide is whether the Keydata plan presented a higher risk than the trustees were willing to accept. In considering this issue, I have carefully considered the documentation relating to the plan, along with any information the IFA had access to before making the recommendation.

It is helpful to set out a description of the investment. I note the FSA imposed a financial penalty on Norwich and Peterborough Building Society for failing to give its customers suitable advice in relation to the sale of Keydata life settlement products. The FSA's final notice in respect of Norwich and Peterborough Building Society dated April 2011 provides a helpful summary in slightly more accessible terms of this type of plan:

> *The Keydata Products were based on investments in corporate bonds. On behalf of investors, Keydata purchased bonds which were issued by special purpose vehicles incorporated in Luxembourg. The first Keydata Product offered by N&P was the Secure Income Bond ("SIB") Issue 3, for an investment in a bond issued by SLS Capital SA ("SLS"). N&P offered a further 22 Keydata Products which were investments in bonds issued by Lifemark SA ("Lifemark") . . . The funds raised through the issue of the bonds (i.e. the amount invested by retail customers in the products through Keydata) were then invested in a portfolio of US life insurance policies and cash. The Keydata product materials stated that the investment mix was intended to be . . . 60% policies/40% cash for the bonds issued by SLS, and 70% policies/30% cash for the bonds issued by Lifemark. SLS and Lifemark each purchased life insurance policies from elderly US citizens, paid the premiums due on those policies, and collected the maturity payment due under the policy when the individual died.*

The potential problems with these types of investments are now well known. So it is important to avoid the benefit of hindsight in the assessment of these matters today. That said, in my view, it was clear from the description and the other information reasonably available to the IFA at the relevant time that the plan was not a secure investment and presented some considerable risk to capital.

Investors could lose money if the insurance companies issuing the insurance contracts defaulted on their obligations, or if the issuer of the bond went into liquidation, or if factors changed which affected the rate at which insurance contracts mature. There was also the possibility that investors could lose money if the traded insurance contracts fell in value, or if certain assets did not mature in a way predicted by the financial model.

The FSA found that the product material revealed a number of significant distinctive features to the bond, including the following:

- Although the Keydata products were intended to return capital in full at the end of the investment period, they offered no capital guarantee, and put all capital invested at potential risk.

- The successful performance of the Keydata products depended on the accuracy of actuarial models used by Keydata. There was a risk that significant technological or pharmaceutical development could impact on the accuracy of the models and when insurance policies were likely to mature.

- The bonds had a fixed term of five or seven years. This meant that Keydata undertook to return funds to investors on the date when the bond matured, even if, at that point in time, it had insufficient funds because the insured individuals were living longer than anticipated.

- The underlying insurance policy assets were not traded on an exchange in the way that stocks and shares are. The resale market for these assets also created a risk that, if it became necessary to sell an insurance policy to make funds available, this might take longer than anticipated, and might only be possible at a reduced value, reducing the value of the portfolio.

- The Keydata products involved investment in a single specialist asset class (US senior life insurance policies) through a single issuer (at first SLS, then Lifemark). Although a percentage of the investment was to be held in cash, this was not held as a separate investment, but was intended to be used to pay the insurance premiums, income payments and operational costs associated with the investment.

- The Keydata products had a significant international dimension: the underlying assets were US life insurance policies, and the issuers of the bonds were based in Luxembourg.

These concerns were apparent (or should have been) to a financial professional at the time and should have been taken carefully into account in assessing the suitability of the Keydata plans. Accordingly in my view, to a professional IFA, these investments would not and should not have been considered suitable for investors, such as the trustees unwilling to accept a significant degree of risk.

It has been suggested by the IFA that the trustees were prepared to take a degree of risk.
I do not doubt that to be true. However, to my mind that does not justify the IFA recommending an unsuitable investment.

Further, it is not sufficient in my view for the IFA to simply assert it relied on the headline description of the investment when making its assessment of suitability. Similarly, it would not be fair and reasonable for an IFA to rely on warnings within the plan's marketing material. Rather the IFA should be exercising professional judgement about the inherent nature of the investment and its suitability for a client's particular investment needs. The IFA should have identified the significant risks inherent in this product and taken them into consideration when recommending the investment to the trustees.

Having reviewed the plan literature, I consider that a professional IFA should have appreciated that the trust's capital would be placed at significant risk – and exposed to a far greater degree of risk than the trustees were willing to accept.

I appreciate it is recorded that the trustees were prepared to invest in some higher risk investments. However, I am also mindful this was to diversify their portfolio in order to mitigate risk. I am not persuaded that the trustees were willing to invest such a large amount of their capital into an investment with the risk characteristics I have set out above.

Having carefully considered the available evidence, I find on balance that the IFA's recommendation to invest in the Keydata plan was entirely at odds with the trust's requirements.

I appreciate that the life settlement products offer investors the potential for returns and are likely to be composed of a different asset type compared to other investments markets. However, these factors do not justify the IFA recommending an unsuitable investment where the risks are greater than the trustees would have wanted to take with this part of their capital.

I also note the IFA's comments that the trustees did not query the contents of the suitability report. However, that does not mean that the IFA should not be held responsible for providing unsuitable advice. It should be remembered that the trustees went to the IFA for professional advice. It is entirely reasonable for them to rely on that advice. I am not persuaded that the fact that the trustees did not query the report can justify the IFA providing unsuitable advice, nor mitigate the fact that it did.

Similarly, the IFA has also highlighted that the investment would not be complex for one of the trustees who was a solicitor. However, I do not consider that the fact that one of the trustees was a solicitor in any way justifies giving unsuitable advice to the trust. It is entirely understandable in my view that the trustees acted upon the recommendation of a professional adviser and were entitled to rely on that advice. The adviser had an obligation to ensure that the recommendation was suitable for the trust's needs and objectives. To my mind the fact that a trustee was a solicitor does not diminish the obligation to provide suitable advice.

The IFA has highlighted that this service seems to be reaching a different view on the funds to that of the regulator and the FSCS. However, I am not persuaded that I am reaching a view that is inconsistent with these organisations. Certainly, they have not reached any view on this particular case. Needless to say, I am required to undertake my own independent and impartial assessment of the complaint, based on its individual merits. That is what I have done and that is the basis on which I have determined whether or not the advice given by the IFA was suitable or not.

I have carefully considered the IFA's view on the risks associated with the funds, but on balance I am not persuaded that they were suitable for the trust. Moreover, I do not consider that the warnings and descriptions of the fund were sufficiently clear to suggest to the trustees that they should act otherwise than on the advice of the IFA.

I am of the opinion that the IFA should have carefully considered the impact of all the risks in their entirety prior to recommending the product to the trustees. Further, I consider that the risks inherent in the investment were foreseeable and these should have been carefully considered by the IFA before any recommendation was made to invest.

This is not a view reached with hindsight. I have based my findings on the product's suitability for the trustees based on what the IFA knew or could be expected to find out about the investment at the time the advice was given and based on a reasonable expectation of how the bond would operate.

In all the circumstances of this case, I cannot lightly ignore the fact that the trust would not have been exposed to these risks had the IFA carried out its responsibilities properly. I note the IFA has said that at the time of the sale there was nothing to undermine the perceived low risk nature of the investment from the information publicly available. However, it is my view that the investment contained a significant risk, and that should have been apparent to the IFA.

Furthermore, the IFA has highlighted that the plan had the involvement of highly respected household names. Nevertheless, for the reasons I have explained above, I remain of the view that the recommendation was unsuitable for the trust. The involvement of household names does not alter that fact, nor justify an unsuitable recommendation to invest.

Moreover, although certain documentation included mention of household names any assurance provided by their involvement was largely illusory. Their roles were strictly limited and provided no real assurance about the controls over or quality of the investments or fund management arrangements.

Similarly, I have carefully considered whether the intervention of the regulator should have a bearing on whether or not the IFA should be held responsible for the unsuitable advice it gave to the trustees. In relation to the action of the FSA, I make no comment other than to note that any action taken – or not taken - does not alter my view that the investment was unsuitable for the trustees for the reasons I have already given. Moreover, the risks inherent in the investment were in my view foreseeable and these should have been carefully considered by the IFA before any recommendation was made to invest. As a result, I am not persuaded that the actions of the regulator (or for that matter any other party) should mean that the IFA is not held responsible for any loss that flows from the unsuitable advice it has given.

Having reached the view that the recommended investment was unsuitable, I now need to consider what the trustees would have done ‘but for’ the advice they received.

I have not seen anything which suggests to me (and I find it highly unlikely) that the trustees would have invested in the plan, if it had not been recommended to them. Nor am I persuaded that the trustees would have invested in the plan if things had happened as they should. The investment was not suitable for the trust’s requirements and circumstances, and I do not think the trustees would have invested had they appreciated the risks.

Given that finding I do not believe it is unreasonable to require the IFA to compensate the trust for any investment loss and so it is now necessary to consider how to calculate fair compensation.

Overall I think it most likely that the trustees would have invested the trust’s capital into another investment suitable for the trust’s objectives and circumstances. On balance, I consider that a fair benchmark to indicate the investment return on the trust’s investments is 1% more than the Bank of England base rate compounded yearly from the date of investment until the date the loss crystallised when Keydata defaulted in November 2009 or until the date that the last income payment was made if later.

I have also considered what award I should make in respect of interest on the crystallised loss. Our normal approach is to use an 8% simple interest figure from the date the loss crystallised until the date of settlement.

This is not intended to be an interest rate in the way that a bank deposit account pays interest. Rather it is a rate which I consider to be a fair yardstick for compensating consumers for a wide range of possible losses and lost opportunities they may have incurred. For example, the may have:

- Borrowed money, or continued to borrow money, at credit card or loan rate which they would not have done if the money had been available to them.

- Saved or invested the money in some way producing a variety or possible returns.

- Spent the money on holidays, home improvements, or any number of goods which might have given them an unquantifiable return.

- Or any combination of these things.

The 8% simple interest rate is gross and is subject to tax – and is a rate often (but not always) used by the courts in not dissimilar situations.

Bearing this all in mind and taking account of the particular circumstances – I consider that the 8% simple rate is fair and reasonable.

my provisional decision

For the reasons set out above, my provisional decision is that I currently intend to uphold this complaint.

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £100,000, plus any interest and/or costs that I consider appropriate.
If I consider that fair compensation exceeds £100,000, I may recommend the business to pay the balance.

My aim is to put the trust in the position it would now have been in but for IFA's unsuitable advice. In deciding how to assess fair compensation I consider it fairest to assume:

- With reasonable advice, the trustees would have had the original capital intact plus a reasonable rate of return.

- The rate of return on the original capital would have been equivalent to 1% more than Bank of England base rate from time to time compounded yearly.

determination and award

I currently intend to uphold this complaint. I consider that fair compensation should be calculated as D, where:

- A = the capital invested in the Keydata plan, less any amounts paid out by way of withdrawals, distributions of capital or before-tax income;

- B = a return on the amount from time to time of A, by way of a return of the Bank of England base rate plus 1% per annum, compounded annually from the date of investment until 13 November 2009 (when Keydata defaulted and the loss crystallised) or until the date that the last income payment was made if later;

- C = the residual value of the investment that the trustees made in the Keydata plan, which I assess to be zero for this purpose.

- D = A + B – C.

My provisional decision is that HFM Columbus Partners LLP should pay the trustees the amount produced by this calculation (that is the amount D) up to a maximum of £100,000. To that sum the IFA should add interest from 13 November 2009 (or from the date that the last income payment was made if later) at the rate of 8% per annum simple until this award is paid.

As it is my understanding that on payment of this compensation the FSCS will require repayment of its compensation to the trustees, no allowance should be made for any sum received from the FSCS in the calculation of the investment loss. However, the trustees have had use of this money since it was paid. Accordingly, although the amount D should not be reduced, the sum used to calculate the interest payment should be reduced by the amount the trustees received from the date of the FSCS payment. The trustees should provide evidence of the date at which the payment was made and the amount received.

If the IFA considers it is legally obliged to deduct income tax from the interest (ie the amount to be added to part D only) it must provide the trustees with a tax deduction certificate so they can reclaim any overpaid tax from HM Revenue and Customs if they are eligible to do so.

For clarification, A and B above should work as follows. Any sum paid into the investment should be added to the calculation from the point in time when it was actually paid in so it accrues the ‘reasonable rate of return’ within the calculation from that point on. Any reduction to the investment (excluding the final encashment payment) should be deducted from the calculation at the point in time when it was actually deducted so it ceases to accrue the ‘reasonable rate of return’ within the calculation from that point on.

I understand that in some cases, consumers have received income payments after Keydata defaulted. It is only fair that such payments are taken into account in my award and I have allowed for this possibility in the award formula. It should be noted that the income payments do not include any distributions made following the Bondholder Notice dated February 2013 which is discussed further below.

In relation to C, I understand that the fund cannot be encashed. For that reason, as set out above, for the purpose of C the investment should be treated as having a nil value. However, that is provided the trustees agree to the IFA taking ownership of the investment if it wishes to. The IFA would then be able to obtain any value of the investment as and when that value can be realised plus any distributions made from it.

I am aware that a Bondholder Notice dated February 2013 (and some later notices) indicate that there may be further distributions to bondholders. I consider that as part of any arrangement to pay the award and to take ownership of the investment it would be reasonable for the IFA to make appropriate provision for it to receive any distributions whenever paid.

This would cover a situation where the consumer receives the distribution before the award has been paid and/or before transfer of ownership to the business has been completed. It would also cover a situation where the distribution is incorrectly paid directly to the trustees even though ownership has been transferred. I would ask the trustees to note that carefully. They will need to co-operate with the IFA to enable it to make the necessary calculations and in order for it to take ownership of the investment if it wants to.

Similar to the situation with the FSCS payment, in the event that the trustees have already received any distribution payments, but these were paid after 13 November 2009, they should not be deducted from the amount D. Rather the sum used to calculate the interest payment should be reduced by the amount the trustees have received from the date of the distribution payments. Again, the trustees should provide evidence of the date at which any payment was made and the amount received.

I understand that this case may involve an award that would exceed our limit of £100,000. If so, the amount of any distribution that should be paid to the business will depend on whether the business decides to pay the full award or not and the extent to which any distribution exceeds the amount the consumer is entitled to receive. To cover this situation, I make a recommendation as follows:

recommendation

If the 'compensatable loss' (figure D in the above calculation) exceeds £100,000, I recommend that the IFA pays the trustees the balance. This recommendation is not part of my determination or award. It does not bind the IFA. Whether the trustees can accept my decision and go to court to ask for the balance is uncertain. The trustees may want to consider getting independent legal advice before deciding whether to accept this decision.

If the compensatable loss exceeds £100,000 and the IFA does not agree to pay this in full, any reassignment of ownership referred to above should only concern itself with any amounts which are in excess of the full compensatable loss. To identify this amount, the IFA should deduct £100,000 from the compensatable loss. The resulting figure is the amount the trustees are entitled to retain by way of any future value and/or distributions. Any value or distributions that might be made over and above this amount may be assigned to the IFA, if the IFA decides to take a transfer of those rights.

If the compensatable loss exceeds £100,000 and the IFA decides to pay the entire amount, the IFA is entitled to take an assignment of the rights to all future value and distributions of the investment if it wishes.

Simon Rawle
ombudsman