

complaint

Mr and Mrs T believe they have suffered a financial loss as a result of receiving inappropriate and misleading advice from an advisor representing Bank of Scotland Plc ("the business").

background

Following meetings held with a representative from the business, Mr and Mrs T invested £6,000 in a guaranteed investment plan (GIP) and £2,600 in a collective investment plan (CIP) in November 2005. In February 2006, Mr and Mrs T decided to invest a further £30,000 in a personal investment plan (PIP) based on further recommendations made by the business.

In 2012, Mr and Mrs T's representative complained to the business on their behalf about the advice Mr and Mrs T had received in 2005 and 2006. It was stated that the three investments had not been suitable based on Mr and Mrs T's objectives and circumstances as had applied at the respective points of sale.

The business agreed that Mr and Mrs T's complaint should be upheld. It explained in its letters of December 2012 and January 2013 why it had concluded that the complaint should be upheld in respect of the sales of all three investments. Its letters also detailed the redress it proposed to pay to Mr and Mrs T, including its method of calculation.

Mr and Mrs T's representative rejected the offer made by the business. It was stated that the proposed redress did not take into account the consequential loss it believed Mr and Mrs T had incurred – namely due to the adviser not recommending that Mr and Mrs T use their available capital to repay the mortgage balance they had outstanding at the time.

Our adjudicator was of the opinion that the business should not be held responsible for any consequential loss incurred by Mr and Mrs T. He was persuaded that the adviser had discussed the repayment of any outstanding mortgage accounts. Had Mr and Mrs T wanted to pay off their outstanding mortgage balance, they could have done so at any time, it was stated, as sufficient surplus capital remained on deposit which could have been used to redeem the amount owed.

The adjudicator did note, however, that the business proposed to use Bank of England base rate plus 1% as part of its redress calculation. He considered it would be more appropriate to use the average rate for fixed rate bonds (as published by the Bank of England) based on the degree of risk he considered Mr and Mrs T would have been prepared, or in a position, to accept in 2005 and 2006.

The business has agreed with the adjudicator's assessment of the complaint, inclusive of the recommended change to the way in which the redress should be calculated.

Mr and Mrs T's representative did not agree with our adjudicator's findings and submitted a written statement from Mr and Mrs T, together with its own further comments. It was stated, in summary, that the suitability letter had not been provided to Mr and Mrs T, and that it in any case contained numerous inaccuracies regarding their income, savings, the outstanding mortgage amount and Mr T's state of health. It was contended that no discussion had been held regarding the repayment of the mortgage and that the information recorded about Mr and Mrs T had been fabricated in order to justify the sale of the investments.

Mr and Mrs T should be compensated for their investments at the rate of their mortgage borrowing up to the level of their borrowings, and above that level, the amounts should be compensated at the level this service would award to cautious clients who were happy to accept some risk but had been sold the wrong investments. This was interpreted as being the use of the APCIMS total return index. If the intention was, however, for a final decision to be issued along the lines of the adjudicator's findings, it was requested that a provisional decision be issued initially as it was hoped that this could be used as a test case for the wider consideration of the business' sales practices.

The business submitted a further response, stating that it was satisfied that the letters of recommendation had been issued to Mr and Mrs T and that the adviser would have been reliant upon the information provided by Mr and Mrs T in preparing their content. If Mr and Mrs T had disagreed with the information recorded, they would have had an opportunity to challenge this at the time.

Given Mr and Mrs T's circumstances and their available capital, the business was of the view that they would have been in a position to make an informed choice as to whether to repay the mortgage or invest/save the funds for the future. As the customers did repay the mortgage shortly after the advice, it was not felt that this supported the position that they were in an uninformed position regarding the potential for mortgage repayment in 2005 or 2006. Rather, their subsequent actions supported the conclusion that they were happy to repay the mortgage at a later date. The later decision to repay the mortgage may have been based on a number of factors, such as the interest rate being charged on the debt, or their long term intentions for their savings. (e.g. holidays/home improvements etc).

As agreement has not been reached on the matter, it has been referred to me for review.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

I note that, in addition to the comments mentioned above, Mr and Mrs T's representative has made substantial submissions regarding what he considers to be the business' processes and their failings. However, the representative will be aware that my remit is to consider the merits of this particular case and that any concerns regarding the wider processes of the business should be referred to the regulator. I also note that both parties have already been provided with the opportunity of making full submissions in this matter to support their case. It would only usually be in circumstances where I am persuaded that the outcome of the case should depart from that recommended by the adjudicator, or where new facts or arguments are being introduced, that I would consider it necessary to issue a provisional decision. For reasons which will become clear, I do not consider such conditions to be present in this case.

Having considered the individual merits of this case, I note that there has been debate regarding the provision of the suitability letters to Mr and Mrs T and the accuracy of their content. It is the representative's position that it is "virtually certain" that the letters were not sent to Mr and Mrs T, as they appear to have never been finalised. The inaccuracy regarding the amount of outstanding mortgage has also been cited as additional evidence that the letters were unreliable in their content.

Much inference also appears to have been made from the details, or perhaps lack thereof, recorded about Mr T's state of health in 2005 and 2006, but whilst some of the records are accepted as being accurate, e.g. that he was receiving state benefits and was unemployed, the ones which it is stated have not, such as Mr T hoping to return to work, have been cited as additional evidence of the inaccuracy of the letters. However, I do note that it is also acknowledged by Mr and Mrs T's representative that Mr T did in fact try to return to work in January 2006, and so the statement regarding his intention to return to work does not in fact appear to have been false.

Comment has also been made regarding the adviser's record of a "repayment vehicle" for Mr and Mrs T's mortgage, but it appears that it was a capital repayment mortgage. There was, therefore, a means of mortgage repayment, which I would consider to be the important issue upon which to focus. Had there not been such repayment provision in place, this is an issue which I would expect to have been addressed in more detail at the time of the advice.

However, notwithstanding the disparity between the versions of Mr and Mrs T's circumstances at the time, it nevertheless remains the case that the business has in any event deemed the advice to have been unsuitable and has offered redress accordingly. The matter which remains unresolved is that of whether Mr and Mrs T would have repaid their mortgage if recommended to do so instead of investing. The suitability letters indicate that a conversation was held regarding this, but that Mr and Mrs T were content with the repayment method in place for their mortgage.

However, both the content of the letters and the prospect of the letters being received are disputed by Mr and Mrs T's representative. It would appear that the suitability letter may not have been an entirely accurate representation of Mr and Mrs T's circumstances, although I also acknowledge the point made by the business that an adviser would typically only be able to record what they have been told. Therefore, given the ongoing dispute regarding the suitability letters, I consider it reasonable to determine the matter of any discussion about mortgage repayment on a balance of probability, i.e. what I consider is more likely than not to have been the case.

Working on the basis of Mr and Mrs T having both capital available to invest and an outstanding mortgage amount, I consider it reasonable that it would have occurred to them that repayment of the debt was in fact a possibility. For whatever reason – either the failure of the adviser to recommend this, or by their own volition – and also notwithstanding the application of any early repayment penalties which may have been in place, this did not happen in 2005 or 2006. However, I also note that, a short time later, Mr and Mrs T did repay the mortgage. This has not, however, been described as being on the advice of a third party, but rather a decision reached by Mr and Mrs T in view of their circumstances at the time.

Mr and Mrs T would therefore appear to have been able to reach the conclusion that, at a certain point, the repayment of their mortgage was prudent, but it is also worth noting that it would have been possible to do so at least in part, even taking into account the investments made, from remaining capital. The issue I must consider, then, is why Mr and Mrs T would not have been in a position to make the same decision at an earlier point. To reiterate, even if the adviser had failed to proactively recommend the repayment of the mortgage, Mr and Mrs T did so, seemingly without third party prompting, a short time later. If Mr and Mrs T were able to reach this conclusion in 2007 on the basis that their financial circumstances allowed for this at the time, I would question as to why it would not have occurred to them in 2005 or 2006 on similar grounds.

I therefore consider it to be difficult to reasonably or safely conclude that a conversation regarding mortgage repayment would not in fact have taken place and that, for whatever reason – and there may be several quite valid reasons – Mr and Mrs T concluded that this was not necessary at that particular point. As such, I am not of the view that the redress should take account of interest which was payable on the outstanding mortgage amount.

In terms of the actual manner of calculating redress, I note that Mr and Mrs T's representative has asserted that this should be determined using our benchmark for investors who were prepared to take a medium or balanced risk approach, but I consider this to be inappropriate if the actual reasoning for upholding the claim in terms of unsuitability is taken into account. On the basis of Mr and Mrs T's circumstances at the time, I am of the view that they should have been advised to take either very little or no risk with their investments and so I am satisfied that the adjudicator's recommendation is appropriate.

my final decision

My final decision is that the offer of redress, as updated by the adjudicator's recommendation and agreed by Bank of Scotland Plc, would constitute appropriate resolution to this matter.

fair compensation

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

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

To compensate Mr and Mrs T fairly, Bank of Scotland Plc must compare

- the performance of Mr and Mrs T's investments

with

- the position they would now be in if the investments had produced a return matching the average rate for fixed rate bonds with 12 to 17 months maturity as published by the Bank of England

If there is a loss, Bank of Scotland Plc should pay this to Mr and Mrs T.

I have decided on this method of compensation because Mr and Mrs T wanted to achieve a reasonable return without risking any of their capital. Mr and Mrs T were prepared to invest for a longer period of time – but with some flexibility.

The average rate would be a fair measure given Mr and Mrs T's circumstances and objectives. It does not mean that they 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 the capital. I

consider that it is sufficiently close to assist me in putting Mr and Mrs T into the position they would have been in had they not received inappropriate advice.

how to calculate the compensation?

The compensation payable to Mr and Mrs T is the difference between the *fair value* and the *actual value* of their investment. If the *actual value* is greater than the *fair value*, no compensation is payable.

The *actual value* is the amount Mr and Mrs T received at the date surrendered.

The *fair value* is what the investment would have been worth if it had obtained a return using the method of compensation set out above.

To arrive at the *fair value*, Bank of Scotland Plc should find out the monthly average rate for fixed rate bonds for each month from the date of investment to the date surrendered and apply those rates to the investment, on an annually compounded basis.

Any additional sum that Mr and Mrs T paid into the investment should be added to the *fair value* calculation from the point it was actually paid in.

Any withdrawal or income payment that Mr and Mrs T received from 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 Bank of Scotland Plc totals all such payments and deducts that figure at the end instead of periodically deducting them.

If there is compensation to pay, simple interest should be added to the compensation amount at 8% each year from the date surrendered to the date of settlement. Income tax may be payable on this interest.

Philip Miller
ombudsman