complaint

Mr B has complained that AKFP Ltd (trading as Aiken Kennedy Financial Planning) gave him unsuitable advice to transfer his existing pension policies to a self-invested personal pension (SIPP) in 2001. Mr B has also complained regarding subsequent advice to invest in several unregulated collective investment schemes (UCIS) and general poor management of his pension matters.

background

In November 2001 both Mr B and the adviser signed a 'fact find' document. This did not record details of any existing non-pension assets or liabilities for Mr B. It only noted one (and the 'highest') priority for Mr B as being the following:

> *'To amalgamate all policies into a SIPP & consider potential commercial property contracts for the transferred funds.'*

Mr B's investment preference was recorded as 25% 'slight risk' (such as guaranteed bonds, with-profits funds) and 75% 'speculative' (such as Venture Capital Trusts, Smaller Emerging Markets – to which the adviser had appended 'including property'). There is no further evidence of how his attitude to risk was assessed other than a *question 'Are you aware of the fluctuating nature of equity based investments?'* – to which AKFP recorded 'Yes'.

Mr B was advised to transfer his five existing pension policies, the majority of which are said to have already been in with-profits funds, to a new SIPP. Although no documentation has been provided by AKFP regarding the existing policies, Mr B has himself identified that there were transfer penalties amounting to at least £6,000 on a total transfer of about £114,000.

In July 2002, AKFP wrote to Mr B to recommend the Matrix Portfolio No.1 Limited Partnership, which it has said was a UCIS. The same letter confirms that AKFP had given instructions to the SIPP administrator to transfer the monies for the investment.

In October 2004 AKFP recommended that Mr B invest £25,000 into the Jones Lang LaSalle Development Partnership No.1. Included with the letter was the information memorandum which indicated that the partnership was a UCIS.

A further investment of £25,000 was recommended in November 2004. This was to invest in the Sixth Special Opportunities Fund from Close Brothers Investment Limited. The prospectus for this fund confirms that it was a UCIS.

Mr B complained to AKFP in February 2013. Although he believed the initial SIPP recommendation was unsuitable, as transfer penalties had not been properly considered, he went on to specifically mention the suitability of the two later UCIS investments as part of his complaint.

As a result AKFP's response to the complaint relied in part on its belief that the promotion of the two UCIS in question under the regulator's Conduct of Business rules was suitable for him, because he had previously invested in a similar type of scheme. It also argued that no advice was given, but rather information was provided to allow Mr B to make his own investment decision being aware of the risks involved.

Our adjudicator investigated the complaint and issued an opinion that it should be upheld. He reached this view on the following grounds:

- For a person to be eligible to receive a promotion for an unregulated collective investment they must be previously identified as falling within the ‘exemption’ categories set out in either of the following:

    - the Financial Services and Markets Act (Promotion of Collective Investment Schemes (Exemptions) Order 2001, as amended (the ‘PCIS Order’), or
    - the Conduct of Business rules under COBS 4.12 (previously COB 3 annex 5).

- The grounds of Mr B already having invested in a similar scheme was an available exemption. However the investment in question (Matrix Portfolio No.1) was recommended by AKFP and was itself unlawfully promoted to Mr B. He was not a ‘sophisticated’ or ‘high net worth’ investor in 2002, nor did he fall into any of the categories in COB 3 annex 5. AKFP had not carried out any assessment to make sure the promotion was lawful. Therefore as the promotion of the Matrix fund was unlawful, the subsequent promotion of the other funds was also unlawful.

- Considering Mr B’s background and previous pension investments, it was the adjudicator’s opinion that such a high allocation to speculative assets was not consistent with what he would expect Mr B’s attitude to risk to be. The assessment of Mr B’s attitude to risk was not consistent with his past investment decisions which included with-profits funds within his pensions. It did not seem that the attitude to risk assessment was properly explained to Mr B.

- No documentation had been supplied to show that AKFP had discussed the transfer penalties with Mr B. As no suitability report had been supplied for the original transfer, the adjudicator considered Mr B had not been presented with the relevant information on which to base his decision. As a result he concluded both the advice to transfer to a SIPP, and then invest in UCIS, was in any event unsuitable.

AKFP did not agree with the adjudicator’s opinion. In summary, it said:

- Mr B had not complained about the sale of the Matrix Portfolio No.1 in 2002.
- It was satisfied that Mr B *did* want to invest 75% of his funds speculatively, whereas in reality AKFP invested less than this proportion into speculative investments.
- The events affecting the performance of the recommended funds from 2007 onwards were not foreseeable and so the losses not recoverable from AKFP.
- It legitimately acted according to the regulatory exemptions allowed for UCIS, and it had few clients other than Mr B for whom it assessed UCIS as suitable. To uphold the complaint would prevent it achieving the desired outcome for those clients.
- Consolidation of Mr B’s pensions into one SIPP was favourable over the long term due to a saving in overall charges.
- The adjudicator had not acknowledged that Mr B received all the risk warnings.

The adjudicator replied saying that the arguments raised did not change his opinion. He also confirmed that the redress in his opinion letter had allowed for the possibility that there had been guaranteed annuity rates (GARs) within the policies transferred which Mr B had also lost – and that several of the providers had now confirmed that there were GARs in their policies.

As agreement could not be reached, the matter was referred to me for a final decision. I sent both parties a letter dated 19 August 2014, in which I noted Mr B’s representative had explained to this service that he intended to retire in March 2014, but had not yet been able

to draw benefits from his SIPP because of the illiquidity or low valuation of some of the investments. I therefore proposed to make a specific award of £300 to Mr B recognising that this inability to access all of his SIPP funds has added to the distress he had already experienced on discovering that he was given inappropriate advice.

As a result of further information received by the Financial Ombudsman Service about the retirement ages and benefits payable from Mr B's previous providers, I also set out a revised formula for calculating Mr B's financial loss as a result of the advice, to cater for the likelihood that he would have retired in March 2014. This is set out again later in this decision.

AKFP was given a further two-week extension of time to respond to my letter upon its request, but no reply was received within this extended timescale. Mr B's representative also did not make any further comments about the outcome of the complaint.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. Having done so, I am in agreement with the adjudicator on the essential point that the original transfer to a SIPP to consolidate Mr B's pension arrangements was unsuitable.

I appreciate that AKFP believes it would always have sent a suitability report, and so the absence of one in this case may only be because it has not kept a record. However Mr B also does not have such a report. Without sight of it I can only attempt to recreate what suitable advice would have been for Mr B in 2002. Mr B has complained that the SIPP itself was unsuitable for him, which therefore encompasses what he subsequently went on to do with the SIPP – in the main, invest in the three funds mentioned above. Therefore I am not persuaded AKFP's observation that Mr B did not specifically complain about the Matrix Portfolio No.1 should affect the outcome of the complaint.

There is nothing in Mr B's background or investment history upon which I can safely base the conclusion that he would suddenly want to invest 75% of his only pension fund in speculative assets in 2002 – or that he would have understood the implications of doing so without these being properly explained to him. AKFP has referred to the risk warnings Mr B was given, but I am not persuaded that these alone would exonerate AKFP from providing him with suitable advice. Nor do I consider that a lower than 75% - but still substantial - weighting in UCIS-type investments makes a material difference to that conclusion.

As a self-employed individual, Mr B would be even more reliant on his private pension provision for future income, and therefore I consider a suitable recommendation should have taken this into account. It was unlikely he would have access to further sources of pension income from employers' schemes, or an earnings-related part of the state pension for instance.

I consider that AKFP's reliance on the fact that Mr B had invested in the Matrix fund in 2002, to exempt him from the promotion rules for the later investments, is flawed. On weighing up the available evidence, I am not satisfied that Mr B was anything other than a typical retail investor. He did not meet the requirements of being a sophisticated or high net worth individual. This in my view would make the promotion of any UCIS to Mr B in 2002 unlawful – so the subsequent promotions of other UCIS funds could not successfully rely on the original promotion.

In any event for the avoidance of doubt, I am not persuaded that Mr B's circumstances changed in the later years such that he ever became a high net worth or sophisticated investor, or these types of investment became suitable for him. The very nature of the three funds recommended to Mr B was that they were non-mainstream investments, designed for more experienced investors who could tolerate risks which included borrowing or 'gearing' to maximise the potential returns – but also increase the risk that they might lose a significant part (if not all) of their investment.

Investments which were not regulated also did not allow Mr B access to the Financial Services Compensation Scheme (FSCS) in the event that they failed. Such risks would tend to make it very unlikely, in my view, that these investments would have been suitable for someone with Mr B's circumstances and objectives. I note AKFP's claim that the subsequent failure of the investments was unforeseeable. However I take the view that significant market corrections are an inherent risk in investing in funds of this nature – particularly when Mr B would not have recourse to the FSCS. I do not think it fair to conclude that AKFP was not aware of this inherent risk when providing Mr B with advice.

It is my conclusion that AKFP failed to appropriately assess Mr B's attitude to risk, given his circumstances and objectives – and then proceeded to recommend a transfer to a SIPP, when other options including utilising his existing policies would have been more suitable. The advice appears to have disregarded the transfer penalties and the existence of GARs which applied to Mr B's existing policies. Although subject to some restrictions – which were not insurmountable as I explained in my recent letter to the parties – I consider that these GARs more than outweighed any saving in charges which has not been quantified by AKFP.

fair compensation

My aim is to put Mr B as close to the position he would be in now, but for AKFP Ltd's unsuitable advice. I consider it reasonable to assume that, with suitable advice, Mr B would have remained in his original pension plans and invested in the same funds. Mr B and AKFP have been informed which providers are referred to below as '1,2,3,4 and 5':

- Provider 1 has provided a maturity value for its policy in March 2014 (close to Mr B's retirement date) of £42,986. This policy did not benefit from GARs.

- Provider 2's policies were unit-linked and are unlikely to have benefited from GARs. Owing to the age of the policies no further information was available, but in my recent letter to the parties I explained why I considered the FTSE WMA Income index (on a total return basis) would give a reasonable approximation of the value these policies might have had at age 65. I confirmed the value of provider 2's policies as at Mr B's 65th birthday was £72,115, and a copy of the calculation was attached to my letter.

- Provider 3 has indicated that it will provide a maturity value for its policies once this is required by my decision. AKFP is therefore to obtain this value as at Mr B's 65th birthday and also check that it does not benefit from GARs. If GARs were available, their value must additionally be taken into account on a similar basis to the directions for the remaining policies below.

Otherwise the total values from providers 1,2 and 3 should be added together and 25% of this total gives the tax free cash sum that would have been available on retirement. The remaining 75% should be converted to an annuity payable from March 2014 onwards using the best market rate at that time on a level, single-life basis with a five year guarantee. I

previously confirmed to both parties from published rates that the best rate available for Mr B at that point on this basis would have been 6.08%.

- Provider 4 has already given a quote for £7,999 tax free cash on Mr B's 60th birthday in 2009 plus a level single-life GAR annuity (payable only from that date) of £2,275pa monthly in arrears, with a 5-year guarantee. I explained in my recent letter to both parties why I considered that Mr B would have been prompted to draw benefits using the GAR when the provider sent him his retirement quotation in 2009, because this would have been significantly more valuable than market rates.

- Provider 5 also had a GAR of 11.11% applying on Mr B's 65th birthday on a single-life, level basis with a 5-year guarantee, payable monthly in advance. It will provide a notional policy value once this is required by my decision. AKFP is therefore to obtain this value from the provider (at Mr B's 65th birthday), assume that the maximum tax free cash is taken and determine the remaining GAR annuity from this quote.

Steps to calculating redress

Should any of the investments contained within the SIPP prove to be illiquid and continue to prevent Mr B from taking his pension benefits, AKFP should purchase Mr B's holdings in these funds by paying into his SIPP the current value of the funds at a price agreeable to the SIPP provider. Ownership of Mr B's holding in these funds will be transferred to AKFP, who will then become the registered owner of the holdings and so entitled to any further distributions or value obtained when the holding can be redeemed. AKFP should also meet any fees incurred in making these arrangements.

If AKFP is unwilling or unable to take ownership of any illiquid investments, their value for the purposes of the calculations below should be assumed to be nil. However AKFP may require Mr B to give an undertaking that he will repay to it the net of tax equivalent of any future distributions he obtains from those investments.

<u>Past loss</u>

1. Accumulate the tax free cash amounts and past instalments of net-of-tax income from the annuities from all five providers (as determined above) from the dates they would originally have begun to the date of settlement. As Mr B has been deprived of these sums, include interest at 8% per year simple on each payment or instalment from the date it was due to the date of settlement.
2. Determine the value of the SIPP available for annuity purchase at the date of settlement after the above re-registrations or assumptions of nil value are made.
3. Deduct 25% of (2) from the answer to (1). This represents Mr B's past loss, which should be paid to him in cash.

<u>Future loss</u>

4. Calculate the gross capital value of securing a continuing pension income from the five providers' annuities (as determined above), from the date of settlement onwards. This should use current annuity rates on a single-life basis for a man of Mr B's age at the date of settlement.
5. Deduct 75% of (2) from the answer to (4). This represents Mr B's gross future loss.
6. Reduce the figure in (5) by Mr B's marginal rate of income tax (which was assumed in my recent letter to be 20% both before and after retirement). This represents Mr B's net future loss, which should be paid to him in cash.

I agree that the inability to access all of his SIPP funds at age 65 has added to the distress Mr B already experienced on discovering that he was given inappropriate advice, and has undoubtedly been inconvenient for him. I make an award for £300 for the distress and inconvenience caused to Mr B.

my final decision

I uphold Mr B's complaint. I require AKFP Ltd to pay redress for Mr B's financial loss and his distress and inconvenience, as set out in the 'fair compensation' section above.

Gideon Moore
ombudsman