

complaint

Mr C has complained that Portafina LLP mis-advised him to invest his pension in unregulated collective investment schemes (UCIS).

background

I issued a provisional decision on this complaint on 17 January 2018. The background and circumstances to the complaint, and the reasons for my provisional finding which was to uphold the complaint were set out in that decision. A copy is attached and it forms part of this final decision.

I asked both parties to provide any further evidence or arguments that they wanted me to consider before I made my final decision.

Portafina said it had nothing further to add.

Mr C said that he didn't have another pension plan and only his state pension plus a small income that he paid basic rate tax on. He hoped Portafina would pay him compensation direct.

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've seen no reason to depart from the conclusions I reached in my provisional decision.

my final decision

Accordingly, for the reasons outlined in my provisional decision attached, my final decision is that I uphold this complaint.

I order Portafina LLP to calculate and pay any compensation due to Mr C in accordance with the methodology I outlined in that provisional decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 19 March 2018.

David Ashley
ombudsman

Copy of provisional decision

complaint

Mr C has complained that Portafina LLP mis-advised him to invest his pension in unregulated collective investment schemes (UCIS).

background

In August 2012 Portafina advised Mr C to transfer the benefits he held in his existing pension plans to a self-invested personal pension (SIPP). After taking the maximum tax free cash the amount left for investment was just over £60,000. Portafina recommended the following funds for the SIPP portfolio:

- Raithwaites Hypa Fund (45%)
- Cool Blue Fractional Plus Fund (also known as the Cool Blue Samui Fund) (15%)
- Venture Oil International (20%)
- EOS solar Energy (7.5%)
- Cash (12.5%)

At the time Mr C was in his early sixties and he was self-employed with earnings of about £15,000 annually. Mr C lived at his own property which had no mortgage. He had savings of about £12,000, mainly in premium bonds and ISA's. His intended retirement age was noted as 65.

After completing a risk attitude profiling questionnaire, Mr C's attitude to risk was recorded as '*moderately adventurous*'.

In June 2016 Mr C complained to the firm about the advice and service he had received. He wanted to start drawing his pension but was unable to because the funds it was invested in were illiquid. Mr C subsequently referred his complaint to us. One of our adjudicator's investigated it and she thought it should be upheld. In summary she said:

- Mr C had said he needed the tax free cash in 2012 but didn't want to take income until 2016. The previous plans he was invested in wouldn't have allowed him to take his tax free cash and leave the remainder invested. And there appeared to be a real need for it. So the transfer to the SIPP appeared suitable.
- UCIS investments shouldn't have been recommended to Mr C as he didn't fall within the category of investors to whom UCIS could lawfully be promoted.
- Mr C's attitude to risk was determined by his responses to the risk profiling questionnaire. But his answers to the questions were inconsistent.
- Mr C didn't fit the descriptions Portafina attributed to a '*moderately adventurous*' investor.
- Mr C was only a few years away from retirement so he didn't have the capacity to invest in high risk illiquid investments.
- Over 85% of Mr C's pension was invested in UCISs and this amount was too high. Overall, she didn't think the investments recommended were suitable for Mr C's circumstances.

Portafina didn't agree and in summary said:

- Mr C fell under an exemption within COBS 4.12 – which is that he was a person for whom Portafina took reasonable steps to ensure that investment in the collective investment scheme was suitable.

- The UCISs were asset backed. There was sufficient security in place to guarantee all client investments.
- Mr C completed an attitude to risk questionnaire and his answers indicated he didn't want to invest in the stock market. And he was willing to be exposed to some risk.
- Mr C held Premium Bonds and had other savings – this shows he had an understanding of financial matters. He didn't have any outstanding debts and owned his property – he was in a stable financial position.
- The funds were assessed as low to medium risk so Portafina was of the belief that Mr C was exposed to low to medium risk.
- The adjudicator says Mr C's investments were high risk but they were not high risk -they were simply currently illiquid and Mr C hadn't made a financial loss.
- There had been progress in attempts being made by the fund managers to return capital to investors.
- Portafina had made its recommendation to Mr C based on the information it held at the time. This information accounted for his attitude to risk, financial situation and retirement provisions. Portafina recommended to transfer the pension as this was the most appropriate option at that time. The advice was given in the best interests of the client, underpinned by extensive due diligence.

my provisional findings

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

The promotion of UCISs is restricted to certain individuals. The pension release report explained this and said that Mr C didn't ordinarily fall into one of the categories of investors that such funds could usually be promoted to. However it went onto say Mr C was a person for whom it could advise on UCIS investments as it had taken reasonable steps to ensure that particular collective investment scheme(s) was suitable following a full Know Your Customer Investigation and Attitude to Risk Assessment. So this therefore provided an exemption under Conduct of Business regulations 4.12.

Whilst I don't think the outcome of the complaint turns on whether UCISs should have been promoted or not, I don't think Mr C was an individual who was suited to these types of funds. He had a modest income and modest amount of savings and I've seen no evidence to suggest he was a particularly experienced investor. I don't think savings in premiums bonds and an ISA would put him in that bracket. However, what's key here in any event is whether the recommendations provided by Portafina were suitable given Mr C's objectives and circumstances at the time.

Mr C completed a risk attitude profiling questionnaire in order to help determine his attitude to investment risk. Although I accept that the risk profiling tool was a useful aid to help assess Mr C's willingness to accept risk, it forms only one part of a wider discussion. Mr C provided several responses to the risk questionnaire that weren't consistent with someone who was classed as a *moderately adventurous investor*.

This was described as someone who had moderate to high levels of financial knowledge and a fairly experienced investor; who has used a range of investment products in the past; is willing to take on investment risk; is willing to take risk with a substantial proportion of their available assets; will usually take gambles where they see the potential rewards as being attractive; is usually able to accept that occasional poor outcomes were a necessary part of long-term investment.

However in the risk questionnaire he completed Mr C indicated that he:

- Agreed that he generally looked for safer investments even if that meant lower returns
- Agreed that he preferred bank deposits to riskier investments
- Disagreed that he was willing to take substantial risks to earn substantial returns.

Whilst I accept that the answers to the questions should be considered in the whole and some of Mr C's responses were consistent with a risk taker, these answers were clearly inconsistent with the firm's own understanding of someone who was a moderately adventurous investor. I don't think the answers overall suggested he was willing to accept the nature and degree of risk presented by the funds recommended.

His responses also needed to be considered in the context of his overall circumstances. A willingness to accept risk isn't the only factor for an adviser to consider in providing suitable advice. The degree of risk a client is *able* to take is also material – their capacity to accept losses in the context of their overall circumstances is a key consideration.

It appears that Mr C did have a real need for the tax free cash and so transferring to access that cash wasn't unreasonable. However he was advised to invest about 85% of the transfer money into the UCIS investments at a time when he was only a few years from his selected retirement age. Documents from the time recorded that Mr C's intended retirement age was 65 - albeit Mr C has subsequently said he intended to take an income from age 66. Either way, this provided for only a relatively short investment term.

Mr C was in his early sixties and only had a relatively modest amount of savings in premium bonds and an ISA. He had no other significant savings or investments to provide flexibility if he couldn't access his pension. Given his circumstance, he had very little capacity for investment/illiquidity risk.

The Raithwaite Hypia Fund was described as a "specialist investment". It invested in a hotel development and was designed to yield 8% per annum. It was described as being low to medium risk and was designed to run for an approximate 7 year period but would provide an income stream in 2013. It said it would provide an average compound return of 11% once capital growth and income were taken into account.

The Cool Blue Fractional Plus fund was described as investing in 'Off-Plan' Villas and Hotel rooms which are re-sold at a higher price once the building was complete. The fund was described as being medium to high risk, because of the currency risks involved. But that its inclusion in the portfolio was balanced by the other low risk investment.

The Venture Oil Investments Ltd fund was described as pre-purchasing crude oil at an agreed set price which was then sold on the open market. Portafina said that oil was at that time selling for over \$100 per barrel and the overall return was expected to be about 18% per annum. It said it had conducted due diligence on the oil producers and it was believed that over the investment period, the price of crude oil was likely to increase.

The EOS Solar Energy fund was described as investing in a solar thermal power development in Cyprus. The fund had contracted to sell electricity at a fixed price over a 25 year period to the Cypriot government. It was designed to yield 8% per annum for three years and 10% per annum thereafter. It was denominated in Euros.

In my view investing 85% of Mr C's SIPP into the four UCISs presented significant risks both in terms of capital erosion and illiquidity.

It's the regulator's view that:

'UCIS are generally regarded as being characterised by a high degree of volatility, illiquidity or both — and therefore are usually regarded as speculative investments. This means that in practice they are rarely regarded as suitable for more than a small share of an investor's portfolio.'

It was known at outset that the investment term was likely to be limited. And I'm not persuaded that Mr C had the capacity to accept material risks to his pension fund. In my view the combination of funds presented significant risks, and a higher degree of risk than was suitable for Mr C's particular circumstances at the time.

my provisional decision

Accordingly, my provisional decision is that I uphold Mr C's complaint.

I intend to order that Portafina LLP calculates loss and pays compensation to Mr C if a loss is found in the following manner.

fair compensation

In assessing what would be fair compensation, my aim is to put Mr C as close to the position he would probably now be in if he had not been given unsuitable advice. I think Mr C would have invested differently. It's not possible to say precisely what he would have done, but I'm satisfied that what I have set out below is fair and reasonable given Mr C's circumstances and objectives when he invested.

what should Portafina do?

To compensate Mr C fairly Portafina LLP should:

Compare the performance of Mr C's investment with that of the benchmark shown below and pay the difference between the fair value and the actual value of the investment. If the actual value is greater than the fair value, no compensation is payable.

Portafina should also pay any interest, as set out below.

If there is a loss, Portafina LLP should pay such amount as may be required into Mr C's pension plan, allowing for any available tax relief and/or costs, to increase the pension plan value by the total amount of the compensation and any interest.

If Portafina is unable to pay the total amount into Mr C's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid. I'm satisfied that Mr C will likely be a basic rate taxpayer in retirement and therefore the notional allowance should be calculated assuming a basic rate of tax.

In addition, Portafina should pay Mr C £500 for the distress and inconvenience caused by Mr C being unable to access his pension.

Portafina should provide details of the calculation to Mr C in a clear, simple format.

Income tax may be payable on any interest awarded.

investment name	status	Benchmark	from ("start date")	("end date")	additional interest
The SIPP	still exists	for half the investment: (FTSE UK Private Investors Income total return index – formerly known as FTSE WMA Stock Market Income Total Return Index); for the other half: average rate from fixed rate bonds	date of investment	date of decision	8% simple per year from date of decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)

My aim is to return Mr C to the position he would have been in but for the unsuitable advice. This is complicated where an investment is illiquid (meaning it can't be readily sold on the open market) as could be in this case. It would be difficult to know the actual value of the investment. In such a case the actual value should be assumed to be nil to arrive at fair compensation. Portafina LLP should take ownership of the illiquid investment(s) by paying a commercial value acceptable to the pension provider. This amount should be deducted from the total payable to Mr C and the balance be paid as I set out above.

If Portafina is unwilling or unable to buy the investments the actual value should be assumed to be nil for the purpose of calculation. Portafina may wish to require that Mr C provides an undertaking to pay it any amount he may receive from the investment in the future.

Mr C has said he wants to take the benefits from his pension. However he is unable to because of the fund's illiquidity. So it would not be fair if Mr C continued to have to pay annual SIPP fees if there are illiquid holdings preventing the SIPP from being closed. Ideally, Portafina would take over any illiquid holdings, thus allowing the SIPP to be closed. But third parties are involved and I can't tell them what to do.

So if there are illiquid holdings and Portafina is unable to buy them all from the SIPP, then it is fair that Portafina pay Mr C an upfront lump sum equivalent to five years of SIPP fees (calculated using the previous year's fees). This gives a reasonable period to arrange for the SIPP to be closed.

fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

why is this remedy suitable?

I have chosen this method of compensation because:

- Mr C was willing to accept some risk to his capital. However he had limited capacity for risk. So I think he was only able to take limited risks with his pension fund.
- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix of diversified indices representing

different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.

- I consider that Mr C's risk profile was in between, in the sense that it was suitable to take a small level of risk to attain his investment objectives. So the 50/50 combination would reasonably put Mr C into that position. It doesn't mean that Mr C would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr C could have obtained from investments suited to his objective and risk attitude.
- Mr C hasn't yet used his pension plan to buy an annuity.

David Ashley
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