

## complaint

Mr M complained the he was mis-advised by True Bearing Ltd to transfer his pension benefits into a Self-Invested Personal Pension ("SIPP"). The funds were then invested in "Green Oil Plantation".

## background

True Bearing advised Mr M to transfer pension benefits out of his personal pension plan which he held with another provider into a SIPP.

A "fact find" was completed on 14 January 2010. A Financial Planning Report was completed on 14 May 2010 by Mr M's adviser. It recorded the following:

- Mr M was age 38 and was self-employed.
- He had eight financial dependants.
- His total net annual income was around £36,000 and he had a property portfolio worth around £5.9 million. His mortgage liabilities were around £4.3 million.
- His knowledge of pensions and investments was reasonable.
- He aimed to retire between age 40 and 55. But he was told the earliest retirement age at the time was 55.
- Mr M had one personal pension worth around £20,000. It was invested in the European Equity Fund and Balanced Managed Fund and allowed a fund switch without charge.
- He paid £32.05 gross per month into his pension and his only other investment was an ISA.
- His attitude to risk was 'balanced'.

True Bearing recommended Mr M transfer his whole pension into the SIPP. It recommended he invest £10,000 in unquoted shares, £5,000 into the Pennine Dynamic Fund and the remaining £5,000 in the CF Absolute Return Cautious Multi Asset Fund.

In December 2010 the SIPP was set up. £16,000 was invested into Green Oil.

Before the SIPP was set up, various events took place. Much of the following chronology reflects that already set out by the adjudicator in her assessment. But as it's important to my consideration of the case, it warrants repetition here:

23 December 2009 – Mr M was sent a Green Oil brochure from True Bearing trading (then trading as Keswick IFA)

The email said the following:

*"please find information on the Alternative Sustainable Investments that I was talking to you about...I have been working with ... (third party firm) for some time and I know he shares my ethos in dealing with clients & goes to enormous amounts of due diligence on all the investments that are offered. Many of the investments may also entice clients, like yourself, who would normally have bought Buy to Let properties as some offerings such as the Land Leases present a viable alternative/ compliment to portfolios as there are immediate annual returns... if you'd like to look at this [in] more detail with us both at some point in the New Year when you're not so busy, then perhaps we could arrange to meet up".*

The email was sent from an email address with a "keswickifa.co.uk" suffix. The email said "Keswick IFA is a trading name of True Bearing Limited"- True Bearing's legal disclaimer and its registered address were at the foot of the email.

14 January 2010 – Mr M signed the terms of business letter

25 February 2010 – Aviva told True Bearing the transfer value of Mr M's personal pension

7 March 2010 – the adviser sent Mr M's solicitors an email from [\(advisername\)@truebearingkeswick.co.uk](mailto:(advisername)@truebearingkeswick.co.uk) saying Keswick IFA had rebranded to become True Bearing (Keswick).

8 March 2010 – Mr M and his adviser signed the fact find and the pension replacement contract form which said the following:

*"client wishes to trf funds asap to be able to use pension funds to invest in an unquoted company. Will have to be a SIPP"*

*"ability to invest in an unquoted company"*

*"unquoted shares for half pension funds is considered very high risk in order to invest in a company".*

25 March 2010 – Mr M's adviser sent him an invoice of £750 for services including Mr M's SIPP application (completed using the pension replacement contract)

14 May 2010 – Financial Planning report, which said:

*"Further to our initial meeting of 14<sup>th</sup> January 2010 and subsequent meetings, I am now writing to confirm the outcome of our discussions"*

*"You have requested to have the option of using your pension funds into unquoted shares within a friends company. This has been taken into account on the recommendations I am proposing."*

*"You wish to have the ability to invest into unquoted shares via your pension. This will enable you to use your monies within your retirement provision to invest into a friends business. This cannot be done through your existing contract."*

*"I must stress that this is a risky choice of investment and is considered to be above your risk profile. You are solely relying on the success of your friends business and realise that you can lose all of your capital. Under normal circumstances I would not recommend this however you are insistent that this is what you wish to do."*

6 July 2010 – the adviser sent Mr M various documents and said the following:

*"Here's Green Oil details I was telling you about. Times are a bit sceptical but then what they fail to mention is that the company have in fact approached the FSA & divulged all the info for their inspection. GOP are also working to sort out a regulated & compensated fund, but costs will be higher so returns will I would imagine not be so*

*good, I have loads more info but anything offering stable returns of 17% per annum looks good."*

17 October 2010 – the adviser sent Mr M details of Green Oil and the Australian Biofuel investment. She said *"Australia is one of the strongest economies in the World in the current climate, so it's a good place to have any investments."*

The documents included a Green Oil booklet, along with an income calculator for Green Oil based on a 10 year lease and £16,000 investment.

17 October 2010 – the adviser sent Mr M correspondence concerning Green Oil. She said *"I've had quite a few clients investing in this project."*

30 October 2010 – the adviser told Mr M the GOP investment papers had been sent in by the SIPP provider and were ready to be signed.

11 November 2010 – Mr M signed the Green Oil forms based on a 10 year lease and £16,000 investment.

2 December 2010 – invoice from the SIPP provider to Mr M for the Green Oil investment

May 2011 – the adviser ceased to be authorised by True Bearing.

True Bearing said the recommendation was based on Mr M investing in unquoted shares in a friend's garage business and not Green Oil. It said it didn't transact any of the underlying investments within the SIPP. It also said it didn't know about Green Oil until 20 December 2010 – when it received the invoice. Mr M said the adviser's recommendation had always been Green Oil.

True Bearing also said the 23 December email wasn't sent from True Bearing's authorised email account. And later post-recommendation emails were sent from a different address.

The complaint was investigated by one of our adjudicators and was upheld. She said the following:

- The evidence suggested True Bearing was aware of Green Oil before 20 December 2010. Emails about Green Oil were sent before the recommendation letter. And the December 2009 email indicated that Green Oil was actively promoted.
- The December 2009 email was directly associated with True Bearing.
- The Green Oil investment was more likely than not discussed in the January 2010 meeting. Especially as the adviser said in her December 2009 email (which was specifically about Green Oil) that a meeting could be arranged in the new year if Mr M wanted to look more into this.
- If Mr M always wanted to invest in his friend's garage business the adjudicator would have expected the March 2010 application to have said this. But it only said investing in an unquoted company, not specifically a friend's garage business.
- Investing in Green Oil would be equivalent to investing in an unquoted company. The uncertainty about the specific investment may have obscured the actual intention to invest in the Green Oil investment.
- If Mr M intended to invest in a friend's garage business she would have expected previous documented conversations to that effect. And some documentation before the application forms were signed. But there was no evidence of this.

- If Mr M intended to invest in a friend's garage business the SIPP provider would have needed to see whether that investment could have been held in the SIPP. She thought the provider would need to ensure the proposed investment was "SIPP-able". The adviser would have needed to explain this before the SIPP was recommended.
- Transferring into a SIPP to invest in a friend's garage business was first documented in May 2010. Mr M didn't sign the report.
- The invoice for financial advice was issued in March 2010 on the basis of investing in an unquoted company. But this description would also have matched the Green Oil investment.
- The May 2010 report said the investment isn't one the adviser would normally recommend. But it continued on the basis that Mr M was an insistent client.
- The adjudicator didn't think Mr M was an insistent client on the following grounds:
  - There wasn't any documentation to that effect. The May 2010 report was the only place the insistent client aspect was mentioned.
  - The FSA (at the time) Handbook didn't set any specific insistent client rules. This service wouldn't seek to apply current regulation standards to previous events. But there was regulation in force at the time around this.
  - PIA Regulatory Update 33 (1997) said that to define an investor as an insistent client there would need to be clear and credible evidence to that effect.
  - For the definition to be credible, the adjudicator expected that Mr M would have been advised against the investment, and to have been recommended a suitable alternative. She also would have expected Mr M to have confirmed his understanding that continuing with the investment was against the advice he received.
  - The evidence didn't support this, however. And the documentation relating to the investment was only issued after the transfer happened.
  - The evidence also didn't support the position that Mr M really wanted to invest in a friend's garage business. In any case, starting a SIPP and then investing in a completely different investment seven months later didn't seem to the adjudicator to be the actions of a client who was insistent upon a particular investment.
- If True Bearing didn't have any involvement in the Green Oil transaction, its details wouldn't have appeared on the Green Oil application form. It was acknowledged that the True Bearing stamp wasn't on the application form – but its name was.
- The adviser introduced the idea of investing in Green Oil to Mr M in December 2009. It took Mr M's circumstances into account when doing so (including the fact that he was a client with Buy to Let properties).
- The amount transferred to Green Oil was the same as that proposed by the adviser on 2 December 2010 (£16,000).
- The adviser should have considered the suitability of the SIPP and the proposed investment - be it Green Oil or unquoted shares in a friend's garage business.
- Mr M's attitude to risk was recorded as balanced. But the recommended investment represented a higher risk.
- There didn't appear to be evidence of discussions between Mr M and the adviser for the adviser to have credibly considered Mr M as having a reasonable knowledge of pensions and investments. Mr M only had one personal pension which he didn't actively manage. He just paid contributions to it.
- Mr M's circumstances and investment experience didn't reflect those of a sophisticated investor who'd be familiar with investments in this area.
- Mr M's Buy to Let experience didn't mean he was a sophisticated investor.

Overall, the adjudicator didn't think that Mr M was provided with suitable advice. She considered the level of risk associated with the investment exceeded that of a balanced risk investor. If True Bearing had taken Mr M's circumstances into account it shouldn't have recommended the SIPP transfer or the Green Oil investment. The adjudicator also noted that Mr M could have switched funds under his existing personal pension at no cost.

True Bearing disagreed with the adjudicator's assessment. In brief, it said the following:

- The appropriateness of the SIPP should be considered in the context of the full recommendation. The regulated funds recommended in the suitability letter weren't available within the Aviva pension. And as Mr M wanted a 'self-invested' element (regardless of whether the adjudicator believed this was for a friend's garage or Green Oil investment) a SIPP was the only suitable recommendation.
- Mr M had expressed interest in using his pension in the future for his commercial properties; again something only permissible through a SIPP.
- Given Mr M's property business, it was plausible that he intended buying shares in a commercial garage unit as this is the industry he knew well.
- Mr M intended using his SIPP for property purposes at the time of the recommendation. It was only after the SIPP was established that he changed his mind and chose the Green Oil investment. This is evidenced by all except one of the emails, dating between two to six months after the SIPP recommendation took place for the combination of regulated and unquoted investments.
- The adjudicator assumed that because the application only said "unquoted shares", it must have been referring to Green Oil. But this equally applied to the unquoted shares of the garage business referred to in the suitability report.

Mr M also made the following points in summary:

- He never had any intention of buying any property or any shares in a garage within a SIPP.
- He'd been an investor for over 20 years and had purchased commercial and residential property, along with land, through his own personal finance.
- Prior to True Bearing's advice, he wasn't aware a product such as a SIPP existed.
- He was paying regularly into his pension until the adviser from True Bearing advised him to invest into other businesses via the SIPP.
- The adviser recommended he invest into a different type of business, as he already had a large and successful portfolio of properties.

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

### **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 come to the same overall conclusions as the adjudicator and for broadly similar reasons.

That rationale is very clearly set out above and I'm not persuaded by the business' subsequent comments that the outcome should be different. In particular, I'd make the following observations:

The available evidence doesn't support the position that Mr M was an insistent client who was acting against the recommendation of True Bearing. I haven't seen sufficient information in the file which would satisfy the requirements for categorising Mr M as such a client.

Furthermore, irrespective of whether Mr M had invested in Green Oil or a friend's garage, this would still bear some considerable risk – and likely more than Mr M, as a balanced risk investor who had no experience of investing other than Buy to Let, would be willing to take. It's therefore not so much the actual investment (i.e. Green Oil or a friend's commercial enterprise) into which Mr M was placed within the SIPP which is the fundamental concern. It's that following the involvement of the adviser, Mr M transferred away from what could reasonably be described as a balanced risk personal pension environment – and so one which was suitable for his circumstances and risk rating - into an investment which elevated that risk considerably.

It's fair to say that Mr M had significant other assets, although the total value of the properties flattered the underlying net position after mortgages had been taken into account. I also note that the higher risk of unquoted share ownership was noted. But this wouldn't mean that Mr M was in a position to take such risks with what was fairly modest pension provision. Neither am I satisfied that this is in fact what he wanted to do or is likely to have properly understood.

It's also entirely conceivable that Mr M might have been interested in investing his pension funds in commercial property – it was after all a familiar environment for him. But this wasn't what he ultimately did. And I don't think that, but for the introduction of the Green Oil investment into discussions by the adviser – and the evidence set out above suggests that this was the origin of the proposal - Mr M would by himself have chosen this route. There's no evidence that this was conceived by Mr M himself or that he had insisted that this be the ultimate investment vehicle.

Overall, therefore, for the reasons set out, my view is that the Green Oil investment wasn't suitable for Mr M and that he should be compensated accordingly.

### **my final decision**

My final decision is that I uphold the complaint. In assessing what would be fair compensation, my aim is to put Mr M as close to the position he would now be in if he hadn't made the unsuitable investment.

It seems likely that Mr M wouldn't have transferred his existing pension into the SIPP. Even if Mr M had been interested in investing in commercial property at a later stage, he could have made the transfer when that decision was made. Until that point, there was no reason for him to leave his existing arrangement.

The redress calculation should therefore compare the current value of his SIPP to the value of his previously held pension, had it remained with the same provider in the same funds.

I acknowledge that a current valuation of the Green Oil investment may be difficult. But I consider that Mr M should nevertheless be compensated now. For the purposes of calculating compensation a value should be agreed with the SIPP provider as a commercial value. True Bearing Ltd should then pay the sum agreed and take ownership of the investment if possible. If no value can be attributed to the investment, it should be assumed

to be nil.

Therefore, True Bearing Ltd should:

1. Pay a commercial value (nil if as set out above) and take ownership or assignment of Mr M's Green Oil investment (if possible).
2. Obtain the notional transfer value of Mr M's pension plan if he had not been advised to transfer to the SIPP.
3. Deduct the value of (1) from (2).
4. If the result is positive, then there is a loss.

The value of the SIPP should then be enhanced so that it is equal to the loss calculated in (3). This should take account of any available tax relief available to Mr M. If it's not possible to pay the compensation into the SIPP, it should be paid to Mr M as a cash sum.

As Mr M should be able to pay the compensation into a pension plan himself before he retires, it should be reduced by 20% - assuming that he could obtain tax relief at the basic rate of 20%.

If the investment cannot be sold or reassigned and it has a nil value, True Bearing Ltd may wish to ask Mr M to enter an agreement that any future distributions from the investment be paid to it.

True Bearing Ltd should also pay to Mr M £300 for the distress and inconvenience caused to him by the losses on his pension funds.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 8 April 2016.

Philip Miller  
**ombudsman**