

complaint

Mr N's complaint, in summary, is that the recommendation given by Greystone Financial Services Limited in 2008 and subsequently, to invest in the ARM Assured Income Plan was not suitable for him.

background

On Greystone's advice, Mr N invested about £150,000 in the ARM plan in March 2008 and further sums in November 2008 and November 2009.

In 2013, Mr N complained to Greystone about the advice. It did not uphold the complaint.

In October 2014 I issued a provisional decision concluding that the complaint should be upheld.

Greystone responded to my provisional decision and said, in summary:

- It is disappointed with my conclusions and in particular the lack of weight given to the expert report and the view that it would not be suitable for Mr N's portfolio to hold any proportion in ARM however small.
- The proposed redress formula is inappropriate in this case. It is inconsistent to state on the one hand that Mr N was seeking lower risk investment but on the other to award redress based on stock market performance.
- It agrees that the investment should be assigned to it as part of the settlement. However, if the redress formula produced a figure above the maximum award it would not pay an amount above the maximum. In that event it agrees for an undertaking as proposed in my provisional decision.

Mr N also responded to my provisional decision and provided a letter from his accountant. The points Mr N and his accountant raised were, in summary:

- It is not appropriate to make a reduction from the 'gross' compensation to notionally allow for a future tax. Mr N is unlikely to suffer the tax in the future.
- As it appears that the compensation could not be paid into the SIPP, any future tax benefit the compensation amount would have received within SIPP is lost. So an allowance should be made for this loss.
- An allowance should also be made for the possibility (however remote) of capital gains tax liability arising on the compensation.
- The accountant's costs should be the subject of reimbursement by Greystone. It is unreasonable to expect a layman to have a full understanding of tax law and the financial impact of payment of compensation directly to them rather than into his or her SIPP. These costs would not have been incurred if Greystone had provided appropriate advice.

my findings

I have reconsidered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. Having done so, I have not been persuaded to depart from my provisional conclusions.

- I have noted Greystone's suggestion that the complaint be dismissed or delayed until it is known whether Mr N could obtain redress via the FSCS by bringing a complaint about Catalyst. But this service cannot tell Mr N who he should bring his complaint against. Greystone provided Mr N with investment advice and the consumer is eligible to complain about it, so it is appropriate that we consider the complaint. Further, Mr N has made it clear that his complaint is about Greystone, not Catalyst. So I cannot agree I should dismiss the case or delay it further.
- At the time of advice in 2008, Mr N was aged about 63 and retired. He was looking to achieve growth and income on funds within his pension, which were primarily held in deposit based funds. At the subsequent times of advice, Mr N was advised in respect of maturing deposit based funds within his SIPP for reinvestment.

The documents completed at the time of advice indicate that Mr N was only willing to take a lower level of risk. His attitude to risk was defined as '*balanced*'. But Mr N clearly had a preference for capital preservation as he had wanted to maintain a large percentage of funds on deposit.

Mr N has repeatedly told us that the ARM plan was recommended to him as low risk alternative and that his adviser would confirm that it was the case.

I note that just prior to the investment in early 2008 the business initially recommended that Mr N reduce the cash holdings and invest more money into equities and hedge funds. However, following a meeting with Mr N it was agreed '*in the light of market conditions*' that Mr N would '*hold fire*' on equity investment and hedge funds. Instead the recommendation focussed on ARM plan and permanent interest bearing shares. In his letter of March 2008 the adviser stated that the ARM plan was designed to '*repay the capital in full*' and '*maintain the level of income stated at the outset*'.

Mr N was looking to withdraw considerable income from the SIPP plan and the adviser stated that by taking the ARM plan Mr N could secure 26% of his income needs by using only 7% of the portfolio and that it allows the '*(other) invested part of the SIPP to potentially produce greater returns*'. The letter referred to the recommendations to '*bond like strategy*'.

The subsequent recommendation in November 2008 referred to the ARM plan as capable of producing guaranteed income.

Taking all of the above into account I accept Mr N's contention that the ARM investments were intended as a lower risk element of the pension portfolio.

Greystone recommended that Mr N invest £250,000 in total in the ARM plan, which was expected to give him a return of about 10% per annum. This was twice the Bank of England base rate at the time of 5% and is indicative to me of a higher risk approach.

The recommendation report said that the plan invested in cash, near cash and American life policies. The report included positive information about American life assurance products and referred to other steps ARM had taken to protect investors' assets "*at all times*".

Greystone has pointed to the appendix to its report in 2008 which gave more detailed information about the risks of investing in ARM. However, given the substantial risks involved I consider that these should have been highlighted in the main suitability report. The main report did not alert Mr N to ARM as being a Special Purpose Vehicle and unregulated. Mr N should not have to search for such important information.

In any case, Mr N was receiving advice from the business, so he was entitled to rely on that advice and on the adviser's presentation of the suitability of the fund for his needs. Therefore I do not agree that giving product literature absolved the adviser from his responsibility to provide suitable advice to the consumer.

Greystone has provided an expert's report in respect of ARM, traded life policy investments ('TLPIs') and their risks. The expert disagrees with the guidance note the FCA issued in April 2012. He takes the view that TLPIs and the ARM product were no more than 'low to medium' risk products, and that an IFA would not be expected to conclude otherwise at the time of the advice.

I have considered the views and points made in the expert's report, but have also taken into consideration that the ARM brochure warned that participation in the plan could involve substantial risks. Greystone was, or reasonably ought to have been, aware of this when it recommended the product to Mr N.

Greystone has sought this service's view on the risk of the investment, but it is not our role to risk rate products. I am required to determine whether the investment was suitable for Mr N, taking account of his circumstances and attitude to risk. I would however point out that the regulator has issued guidance concluding that generally TLPI products are 'high risk'.

Further, the investment was a Special Purpose Vehicle (SPV), was comparable to other non-mainstream pooled investments such as Unregulated Collective Investment Schemes and should have been treated with similar level of care and caution by the adviser.

The ARM fund itself was subject to a higher level of risk and volatility. The fund was based offshore and not subject to UK regulation. Nor did it have the benefit of an investor's protection fund, namely the FSCS. There were a number of risks associated with this investment. The underlying investments are difficult to value, illiquid with often only a limited secondary market for selling opportunities; there is longevity risk in that due to medical advances and such, the lives assured in the underlying policies live longer than expected; insurance companies may become insolvent and claims on the death of the policyholder cannot be met; the fund was exposed to leverage risk due to borrowings and also to currency fluctuation risk.

Overall, I consider that the investments in ARM were above the level of risk Mr N was prepared to take.

- Greystone says that the ARM plan formed only about 11% of Mr N's pension plan and only 7% of his overall investible assets. However, it was not the case the plan was recommended to Mr N as a small proportion of the higher risk element within the portfolio. It was recommended on the basis that it formed part of the lower risk elements

of the portfolio. Mr N relied on that advice before agreeing to invest and he has said that he would not have done so otherwise.

I have considered Greystone's proposal that Mr N could have invested a smaller proportion of his funds in the plan. But given what I have said above, I cannot conclude that would have been suitable for him.

Greystone suggests that its advice did not lead to Mr N's losses. It refers to there being many actions by third parties including misrepresentation in the product literature that Catalyst distributed and ARM's failure to ensure it had the necessary authorisation by the Luxembourg regulator.

However as I have concluded that Mr N should not have been advised by Greystone to invest in the ARM fund in the first instance I am satisfied that the consumers should be compensated for any loss he incurred as a result.

- As regards the responses received to my provisional decision:

Greystone has told us that if the redress formula produced a fair compensation over and above the maximum that I can award, it would not pay an amount above the maximum. In this instance, it appears that the fair compensation as set out is likely to exceed the maximum award. So, the arguments raised by Mr N requiring higher amount of fair compensation may be viewed as somewhat academic. Nevertheless, I have considered below the points he has raised.

The argument is made that if the redress was to be paid to Mr N's SIPP, he would have no tax liability unless he withdrew larger amounts of money than he currently plans to. It is argued that Mr N will not, at any point in the future, have any need to withdraw increased amounts from his SIPP and so would not have to pay tax. However, we do not know for certain that he will not need to withdraw larger amounts of money from his SIPP, for whatever reason in the future. Further, the money within the SIPP is likely to be taxed at some point and as such the tax liability on the funds within the SIPP is just being deferred.

Mr N's accountant has also said that my provisional decision did not address the loss of tax advantage on the settlement sum because it will be made outside the SIPP. He has based his comparison on investments that would suffer a higher rate tax charge every year. However, this does not take into account that there may be other suitable investments with tax benefits into which the redress can be paid. There may also be suitable investments that would not suffer a higher rate tax charge every year. Further, as I have said, tax payments on the money within the SIPP are just being deferred and will have to be paid on the sum (including any growth) at some point.

It should be recognised that whilst my aim is to put Mr N as close to the position he would probably now be in if he had not been given unsuitable advice, it is difficult to be precise in cases like this given the uncertainties involved. After due consideration, I am satisfied that the redress set out is fair and reasonable overall.

Mr N has requested that any reasonable costs he has incurred in determining the basis of fair compensation be paid by Greystone. However, in my provisional decision I have made it clear that I was not minded to make an additional award for any further tax advice he may wish to seek. I have said that whichever option Mr N chooses (paying into the pension or paid directly as set out below) reasonably compensates him for the

unsuitable advice he received from the business. So I do not see the need to seek specific advice for this purpose.

Further, Mr N and his accountant would have seen that in my provisional decision I have said that if the fair compensation exceeded £150,000 then I would recommend that Greystone pay him the balance but it is not bound by it. Given the amount invested into the ARM plan, it was highly likely that the fair compensation as per provisional decision could exceed the maximum award. So there was a risk that any further claim for higher compensation may have little impact to the outcome. I consider that this would have been apparent.

So in my opinion it would not be reasonable to ask Greystone to pay the costs incurred in working out this additional compensation, though I acknowledge Mr N's efforts to arrive at what in his opinion should be the right compensation figure.

As regards the response from the Greystone, I have already explained that I have considered the expert's report but why this complaint should be upheld.

I have also considered the points Greystone has raised about the redress formula set out in my provisional decision. I am not aware of the circumstances of the other complaint Greystone has referred to and so I am unable to comment on it. We determine a case on its individual merits and the redress formula may vary dependent on individual circumstances. My conclusion in this case is that Mr N was prepared to take a 'small' or 'lower' level of risk, not that he was completely risk averse. The equity exposure in the proposed benchmark is about 25% with the rest predominantly in cash and fixed interest (Gilts index) which I consider is a reasonable benchmark in the circumstances of this case.

In conclusion, this complaint should be upheld for the reasons set out and redress should be paid to Mr N as below.

fair compensation

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

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

Mr N has explained that he may not be able to pay any compensation into his pension fund as that might affect his enhanced protection. So I have set out below what the business should do if for any reason it would not be possible for the compensation to be paid into Mr N's pension plan.

what should Greystone do?

- Compare the actual performance of Mr N's investment to the return the investment could have obtained using the benchmark set out in the table below.

- The compensation payable is 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
- Greystone should also pay any interest, as set out below.
- In addition, Greystone should pay £300 to Mr N for the distress and inconvenience caused.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
ARM Assured Income Plan	still exists	for half the investment: FTSE WMA Stock Market Income Total Return Index; for the other half: average rate from fixed rate bonds	date of investment	date of my decision	8% simple p.a. from date of decision (if compensation is not paid within 28 days of the business being notified of acceptance)

actual value

This means the actual amount payable from the investment at the end date.

My aim is to return Mr N to the position he would have been in but for the unsuitable advice. This is complicated where an investment is illiquid (that is could not be readily sold on the open market) as 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. Greystone should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the total payable to Mr N and the balance be paid as I set out below.

If Greystone is unwilling or unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. Greystone may wish to require that Mr N provides an undertaking to pay Greystone any amount he may receive from the investment in the future.

fair value

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

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Greystone should use the monthly average rate for the fixed rate bonds with 12 to 17 months maturity as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any additional sum that Mr N paid into the investment should be added to the *fair value*

calculation at the point it was actually paid in.

Any withdrawal, income or other payment out of 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 Greystone totals all those payments and deducts that figure at the end instead of deducting periodically.

how to pay compensation?

If there is a loss, Greystone should pay such amount as may be required into Mr N'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 Greystone is unable to pay the total amount into Mr N's pension plan, it should pay that amount direct to him. The amount should be reduced to notionally allow for the income tax that would otherwise have been paid.

The notional allowance should be calculated using Mr N's marginal rate of tax at retirement. As I understand it, Mr N has already taken tax-free cash sum. So, for example, if Mr N would be a basic rate taxpayer at retirement and that rate would be 20%, the *notional* allowance for tax would equate to a 20% reduction in the total amount.

why is this remedy suitable?

I have chosen this method of compensation because:

- Mr N wanted income with some growth with a small risk to his capital.
- 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 WMA 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 N's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his objectives. So, the 50/50 combination would reasonably put him into that position. It does not mean that he 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 N could have obtained from investments suited to his objective and risk attitude.
- Mr N has not yet used his pension plan to purchase an annuity.

my final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend the business to pay the balance.

determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My final decision is that Greystone Financial Services Limited should pay the amount produced by that calculation up to the maximum of £150,000 (including distress and/or inconvenience but excluding costs) plus any interest on the balance as set out above.

If Greystone does not pay the recommended amount, then any investment currently illiquid should be retained by Mr N. This is until any future benefit that he may receive from the investment together with the compensation paid by Greystone (excluding any interest) equates to the full fair compensation as set out above.

Greystone may request an undertaking from Mr N that either he repays to it any amount he may receive from the investment thereafter, or if possible he transfers the investment at that point.

Mr N should be aware that any such amount would be paid into his pension plan so he may have to realise other assets in order to meet the undertaking.

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Greystone Financial Services Limited pays Mr N the balance plus any interest on the balance as set out above.

This recommendation is not part of my determination or award. It does not bind Greystone Financial Services Limited. It is unlikely that Mr N can accept my decision and go to court to ask for the balance.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr N to accept or reject my decision before 23 January 2015.

Raj Varadarajan
ombudsman