complaint

Mr G transferred his existing personal pension to a self-invested personal pension (SIPP). He says that was on the advice of DeMontfort Wealth Management Ltd. The transfer was in order to invest into a 'green oil' investment. This was operated by Sustainable AgroEnergy PLC part of the Sustainable Growth Group (SGG).

Mr G says that DeMontfort failed to assess the risks associated with the investment. The investment was unsuitable for his risk profile.

background

Mr G told us he was looking to improve his pension and came across an investment website. The firm running that website wasn't regulated to carry on investment business. Mr G received information about the production of green oil. He then completed a form to reserve an investment using a SIPP. The firm then introduced Mr G to DeMontfort. The information it provided indicates that it had gone to some lengths to find an independent financial adviser qualified to set up SIPPs.

DeMontfort provided a document headed 'focused advice cost of services fee agreement'. This set out the service that DeMontfort would provide. That was to recommend a suitable SIPP product. The document made it clear that no advice would be provided about the suitability of the SIPP or any investments made in that SIPP.

Mr G also signed another document headed 'terms of engagement'. In that document he indicated that he required full advice. DeMontfort has explained that this document was completed in error. Mr G says that he ticked the full review option, as he was concerned about the decision he was making.

DeMontfort says that its adviser called Mr G and explained the risks involved with the transaction. And that Mr G confirmed that he was an experienced investor. Mr G told us that he does not remember this call being made.

I issued my provisional decision on 24 March 2015. In summary, I concluded that:

- The investment with SGG was unregulated. It offered high rewards in a relatively new area of investment. On any reading it was a high risk investment.
- Mr G was referred to DeMontfort to set up the SIPP to use his existing pension to invest in the SGG product.
- DeMontfort limited its role to finding a suitable SIPP. But, DeMontfort was required to know its client and give suitable advice. It was difficult to see how advice to start a SIPP could suitably be made without considering the investment.
- I concluded that DeMontfort had not met its regulatory obligations. I thought that the SIPP was more expensive. And that the investment was too risky for Mr G.
- I explained that I thought Mr G would have transferred his pension and was prepared to accept some risk. I set out the method to calculate his loss. And I intended to award £300 for the distress and inconvenience caused to Mr G.

Mr G's representatives replied and in summary said:

- It asked whether the compensation included fees paid for the advice from DeMontfort and the set up and administration fees for the SIPP.

- It was uncertain whether the compensation was for the amount invested in SGG, or the total transferred to the SIPP. It thought that it should be the total transferred to the SIPP, as I had said that the SIPP was unsuitable.

DeMontfort's representative replied and in summary said:

- The provisional decision begins with a factual error. DeMontfort did not give advice to Mr G to invest in SGG.

- Mr G conducted his own internet research. He completed a reservation form for the investment. In October 2009 he completed an application to make the Green Oil investment via a SIPP. He was then referred to DeMontfort.

- The unregulated firm wrote to Mr G and described DeMontfort as an authorised firm able to assist Mr G with his investment. DeMontfort had no knowledge or part in the drafting of that letter.

- The brochure quoted from in the provisional decision was printed in 2008 and makes no reference to DeMontfort. There were no dealings between DeMontfort and the unregulated firm in 2008. DeMontfort did not pay or receive any form of referral or introduction fee.

- Mr G's first contact with DeMontfort was in November 2009 after he had already:

    - Been advised to invest in the Green Oil fund.
    - Completed an application form for his Green Oil investment.
    - Completed an application to invest in the Green Oil fund through a SIPP.

- DeMontfort only gave advice to Mr G by recommending a suitable SIPP provider.

- DeMontfort has said that Mr G was informed in a telephone call that the chosen investment was both high risk and unregulated. Mr G says he has no recollection of such a telephone call. It follows that Mr G has not made out a case that he was advised by telephone. It is noted that no face to face meeting ever took place.

- A suitability report was provided to Mr G in November 2009 by DeMontfort. This was restricted to recommending and explaining the features of the SIPP. It set out the restricted nature of the advice provided. Mr G had already made up his mind to invest in Green Oil and did not require advice on whether this was appropriate. A warning was also given to seek advice on any pension transfer to a SIPP and the suitability of any investments to be held within a SIPP.

- Mr G has said that he did not receive the suitability report. It would follow that Mr G alleges he received no written advice from DeMontfort.

- Mr G has said that the adviser told him he was thinking of investing in the Green Oil fund. However he asserts he cannot recall a conversation with the named DeMontfort adviser. The adviser has confirmed that he has not invested in Green Oil or any similar fund. It therefore seems likely that Mr G has confused the adviser with a representative of the unregulated firm. It was noted that the brochure of 2008 said that its' Directors were investing their own monies in the fund.

- Mr G has provided a copy of a letter to him from the unregulated firm dated January 2010. This letter should not be taken as any form of investment advice from DeMontfort on which Mr G has relied. It is dated after Mr G's investment reservation and after DeMontfort's advice on the most suitable SIPP.

- Mr G signed DeMontfort's 'Focused Advice Cost of Services Fee Agreement' in November 2009. It specifies that the service was only to recommend a suitable SIPP and not the suitability of any investments to be held in the SIPP. It is unreasonable to suggest that DeMontfort had any part in recommending Mr G's investment.

- Mr G signed the above fee agreement and indicated he accepted the terms. This was clearly only the recommendation of a suitable SIPP provider.

- The report to Mr G was consistent with the scope of the terms of business which had been agreed.

- The provisional decision raised a new point. This was that the size of the transferred fund was not large enough to overcome the effect of the charges without significant risk. I had therefore concluded that the SIPP was unsuitable. It has not been suggested that another SIPP provider had lower charges or was more suitable for any reason.

- The signed terms of business, on the focused advice offered, was clear. No advice was offered on:

    - The suitability of the SIPP.
    - The level of contributions.
    - Whether to transfer in other pension funds.
    - The suitability of any investments to be held in the SIPP.

- It was recommended that advice be sought on these areas but it was declined.

- The losses which Mr G says he has suffered do not fall within the scope of any duty owed under COBS 9.2.1 or 9.2.2. Those losses were not caused by any alleged breach of those rules. The only personal recommendation made by DeMontfort was as to the identity of a SIPP provider. The focused advice cost of services fee agreement made it clear that DeMontfort would not advise on the suitability of the SIPP or any investments.

- My conclusion that the SIPP provider was not suitable because of the charging structure is a false point. It assumes that the advice was being given on the suitability of a SIPP. And also that the initial contribution with the only funding ever made to the SIPP. There was no reason to think more contributions would not be made in future.

- The COBS rules are specific about the information that had to be gathered. They depend on the nature and extent of the service provided. My provisional decision therefore relied on a misapplication of the COBS rules. In any event those losses were not caused by any alleged breach of those rules.

- It noted that I had relied on the FSA alert issued in January 2013. That alert was issued four years after the events being complained about. It is important to identify that the alert related expressly to financial advisers giving advice on pension transfers. DeMontfort did not give and was not asked to give advice on a pension transfer. The alert has to be read in conjunction with the COBS rules.

- The scenario in the provisional decision entails DeMontfort doing exactly that which it had agreed it would not do. That is to advise on a pension transfer and how best to invest the sums transferred.

- No reason has been given for the increase in the distress and inconvenience award from £100 to £300.

my findings

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

DeMontfort says that it didn't give advice to Mr G. But, it accepts that it gave advice to Mr G for a SIPP to meet his investment objectives. It argues that its advice was limited by the agreement it made with Mr G. In my view, this shows that advice was being given. I therefore need to consider the correct application of the relevant rules set out by the regulator.

I accept that the focused advice cost of services fee agreement did limit the service to recommending a suitable SIPP. But, I don't think DeMontfort could use such an agreement to avoid having to comply with the regulator's rules.

The FSA was the regulator at the time Mr G started his SIPP. The rules required firms to act honestly, fairly and professionally in accordance with the best interests of its client. In my view, DeMontfort couldn't comply with that rule by relying on advice that had been given by a third party.

I have particularly considered COBS 9.2.1 and 9.2.2. Those rules required a firm to give suitable advice. To do that the firm had to obtain enough information about the client's relevant knowledge and experience; and their financial situation. The firm also had to obtain information about the client's investment objectives and their personal circumstances. This included information about the length of time the investment was to be held; their attitude to risk and the purpose of the investment. Details of the client's income and assets also had to be obtained, where relevant.

DeMontfort says that it made a personal recommendation for a SIPP. And that SIPP was suitable for Mr G's objectives. The agreement about the service provided limited the scope of the advice. DeMontfort referred to a number of legal cases to support its position.

I don't agree with DeMontfort's argument. Before giving advice it was required to obtain sufficient information from the client about his investment objectives; that he was able to bear any related investment risks and understood the risks. DeMontfort said in its suitability report that Mr G was familiar with the risks associated with pensions and unregulated investments. It isn't clear to me how DeMontfort reached that conclusion. I'm satisfied from the evidence that I've seen that Mr G did not have that investment experience.

I cannot see how DeMontfort could give suitable advice on the SIPP without considering the investments to be made in the SIPP. Although it tried to limit its obligations by the agreement it made with Mr G, I don't think it could do that and comply with the rules referred to above. There is a clear difference between this case and the legal cases cited by DeMontfort, as the advice in this case had to comply with the regulator's rules.

The FSA was the regulator at the time Mr G started his SIPP. It issued an alert in January 2013 about the type of business model used by DeMontfort. Although DeMontfort says that relates to pension transfers, I don't agree. I think that the FSA was making it clear that limiting the advice to the choice of SIPP was not enough to give suitable advice. I think that shows the regulator's approach to the interpretation of the rules. The alert was issued after the advice given to Mr G. But, it was the FSA's view about how the rules should have been interpreted.

If DeMontfort had asked Mr G for information about his circumstances, they would have found out that:

- He was earning about £20,000 a year.
- He had an existing personal pension that was not performing very well; and he had stopped paying into it in 2009. He didn't have any other pensions. He had an endowment mortgage and some premium bonds. His only other investment experience was buying some bank shares in 2008.

Mr G transferred an amount of £13,669.90 to the SIPP. The charges in the first year were £750 which represented 5.48% of the total value. The on-going charge of £450 represented 3.30% of the fund value.

I think that the fund value transferred into the SIPP wasn't large enough to overcome the effects of the charges without significant risk. There was no attempt to find out if any more payments would be made to the SIPP. It seems to me that Mr G wasn't going to make any more contributions to the SIPP.

It's clear to me from these facts that the SIPP wasn't suitable for Mr G. The fund value transferred wasn't big enough to overcome the effects of the charges without significant risk. This was all of Mr G's pension provision. I don't accept that he had relevant investment experience. I think that if Mr G had received suitable advice he would not have started the SIPP. It follows that he wouldn't have made the investment in green oil.

I think it must have been worrying for Mr G to lose all of his pension fund. I think that a payment of £300 is fair in this case.

fair compensation

To compensate Mr G fairly, DeMontfort should put him as close to the position he would now be in, if he had been given suitable advice.

did the unsuitable advice cause the loss?

DeMontfort knew that the money transferred into the SIPP would be invested in the green oil fund. If DeMontfort had made relevant enquiries, as required by the rules at the time, it should have realised that the investment was unsuitable. It exposed Mr G's pension fund to significant risk.

How a fund is managed is an inherent and foreseeable risk. But where there may have been fraud in connection with the running of a fund then this might mean there has been a break in the 'chain of causation'. This break might mean that it's not fair to say that all of the losses suffered by a consumer flow from the unsuitable advice.

In my view, there is no doubt that Mr G would not have been in the Green Oil investment if DeMontfort had given suitable advice. There is enough evidence here for me to conclude that DeMontfort was not acting in its client's best interest. I think that fair redress means that it should compensate Mr G for the loss of his pension fund. That includes the investment loss that could not have happened, but for its advice.

I think Mr G would have invested differently. It isn't possible to say *precisely* what he would have done. But, I think that he was looking for better returns from his pension. I'm satisfied that what I've set out below is fair and reasonable given Mr G's circumstances and objectives when he invested.

what should DeMontfort do?

- Compare the actual performance of Mr G'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.
- DeMontfort should also pay any interest, as set out below.
- DeMontfort should also pay Mr G £300 for the distress caused by the loss of his pension fund.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Green Oil	still exists	FTSE WMA Stock Market Income Total Return Index	date of investment	date of my decision	8% simple p.a. from date of decision

actual value

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

My aim is to return Mr G to the position he would now be in if he had received suitable 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 is difficult to know the *actual value* of the investment. The *actual value* should be assumed to be nil to arrive at fair compensation. DeMontfort should buy the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the total payable to Mr G and the balance be paid as I set out below.

If DeMontfort is unable to buy the investment the *actual value* should be assumed to be nil for the purpose of calculation. DeMontfort may require that Mr G provides an undertaking to pay DeMontfort any amount he may receive from the investment in the future.

If DeMontfort is unable to pay the total amount into Mr G'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.

The *notional* allowance should be calculated using Mr G's marginal rate of tax in retirement.

For example, if Mr G is likely to be a basic rate taxpayer in retirement, the *notional* allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mr G would have been able to take a tax free lump sum, the *notional* allowance should be applied to 75% of the total amount.

fair value

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

how to pay compensation?

If there is a loss, DeMontfort should pay an amount into Mr G’s pension plan to increase the pension plan value by the total amount of the loss. That should allow for any available tax relief and/or costs.

why is this remedy suitable?

I have chosen this method of compensation because:

- Mr G wanted capital growth and was willing to accept some investment risk.
- The WMA index is made up of diversified indices representing different asset classes, mainly UK equities and government bonds.
- Mr G was prepared to take some risk to get a higher return.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr G’s circumstances and risk attitude.
- Mr G has not yet used his pension plan to buy an annuity.

my final decision

I uphold the complaint. My final decision is that DeMontfort Wealth Management Ltd should pay:

- The amount calculated as set out above.
- £300 for the distress caused to Mr G by the loss of his pension fund.

Under our rules, I'm required to ask Mr G to accept or reject my decision before 14 December 2015.

Roy Milne
ombudsman