

complaint

Mr A had a discretionary management arrangement with Kleinwort Benson Bank Ltd. Mr A's complaint is that Kleinwort Benson converted his investments – both pension and non-pension - to 'cash' holdings without his consent and without informing him before doing so. He considers that Kleinwort Benson's actions have caused him financial loss, expense and inconvenience.

background

Mr A started his relationship with Kleinwort Benson in 2009. The relationship covered pension and non-pension investments. Mr A was recorded as having a *'Moderate to low risk'* attitude to risk. This was defined as:

"Mostly fixed income investments – seeks to maximise wealth preservation whilst retaining some exposure to movements in the equity markets. Likely to generate good income returns...10-30% equities."

Things did not go smoothly. There were a number of reorganisations and a number of different private bankers allocated to Mr A over a fairly short period of time.

In 2012 a new private banker was appointed. A meeting was arranged. Mr A said one of the issues he wanted to discuss was:

"Ensuring that the investment strategy adopted reflects my attitude to risk. In this regard, I am particularly mindful of 2 things. First, the frequent changes in personnel and second that I am benefiting appropriately by the volatility in the market, commensurate with my cautious attitude to risk."

The meeting took place in August 2012. One of the things discussed was Mr A's attitude to risk. It is accepted that Mr A was asked about whether he would be prepared to accept losses over a six month period. It is also accepted that Mr A said he would not.

It is at about this point that the two parties start to disagree. Kleinwort Benson says that this was a significant answer and it meant that Mr A's tolerance of investment risk was lower than had previously been recorded. It also meant that there was a mismatch between the existing holdings and Mr A's attitude to risk.

Mr A says his attitude to risk had not changed – that it had been at the same level throughout the relationship with Kleinwort Benson and from the outset he had, for example, been interested in an absolute return strategy in which upside potential was reduced to provide downside protection.

It seems to be accepted that the subject of cash as a safe investment was discussed to some degree at the meeting. Mr A says he said he was not interested. Kleinwort Benson says it agreed to give some thought to rebalancing the portfolio to bring it more into line with Mr A's desired risk level.

Nothing substantive seems to have happened for about a month when Kleinwort Benson wrote to Mr A. This was in mid-September. That letter made a number of points including the following:

- *“In our recent meeting you advised us that you are not prepared to take market risk which would put your capital at risk, in any six month period. With that in mind this letter looks at the issues this raises, and the options available to you.”*
- *“In our recent meeting, you advised us that your personal investment strategy is to target no losses over a 6 month period. You also mentioned that your understanding of an absolute return strategy is that it participates in the upside of markets but protects the downside with no losses. As discussed, this is not an investment outcome that we, or anyone else, can guarantee.”*
- *“The only strategy currently available that will give you near to no risk of any loss of your capital would be to hold cash.”*
- *“Given your wish to have no loss in a 6 month period, we can only recommend investing in cash deposits and suggest your investment profile be ‘Bespoke – cash’.”*
- *“The most appropriate service for you is our cash advisory service. This service allows you to access several different depositors whilst opening just one account with us. You then decide which deposits you want to make, ie which depositor and for what period. This is not a discretionary service and you would be responsible for the final decision on which depositors terms to choose.”*

The letter also enclosed details of the cash advisory service.

Mr A accepts he received the letter. It is not clear that he made any response to it.

At the end of October Kleinwort Benson wrote to Mr A further to the September letter. It said:

“...we are writing to remind you of our concerns regarding the investment risk that you are exposed to within your portfolio. As you are aware, we do not believe that the portfolios that you have with us are appropriate for your personal risk appetite (ie no exposure to market risk resulting in loss of capital over a 6 month period as then advised) and we strongly recommended in the September Letter that you liquidate your portfolio as soon as possible...”

In order to assist you in the orderly transition, we offered to provide a bespoke cash advisory service...

As you know, currently we run your portfolios on a discretionary mandate but, given our concerns over the discrepancy between your portfolio and risk appetite as raised above and in the September Letter, we are afraid we do not consider that continuing to operate under such a mandate is compatible. In addition we have not heard from you regarding your thoughts on any of the matters as set out in the September Letter and despite attempts to set up a call, we are afraid that we feel that we have no choice but to terminate the discretionary service we provide to you whilst your portfolio remains invested as is, and we are therefore hereby writing to give notice of such termination which shall take place on 30 November 2012.”

Kleinwort Benson wrote again in mid-November to say that it looked forward to Mr A's response.

Mr A said in a letter to this service

"By this stage I had had enough and had decided to replace them as my advisers."

Mr A emailed Kleinwort Benson the following week, on 19 November. His points included:

- *"You have referred in your ... September letter to my attitude to risk as though this had changed which is simply not the case. I am not, nor have I ever been prepared to gamble with my money and I am a very cautious investor. This was my position when I first met with [you]."*
- *"Your ... October letter suggests an almost fresh approach to my investments by liquidating my portfolio as soon as possible. In light of the above, can you please explain why this is necessary?"*
- *"I have also noticed that part of my cash balance is held in US Dollars. It was my understanding that you would hold cash (or equivalent) precisely because of my cautious attitude to risk. Doesn't holding another currency introduce something of a currency gamble? I would be grateful for your comments on this together with an indication as to any losses or gains resulting from this."*
- *"I have tried to arrange follow up meetings to discuss these matters but without success..."*
- *"In view of the notice of termination given in your ...October letters, it seems to me I have no option other than to look elsewhere for investment advice, something which I find wholly unacceptable. In view of this, can we please arrange to meet as a matter of some urgency, noting your period of notice expires on 30 November."*

Kleinwort Benson replied saying it would provide a full response by the end of the week.

Mr A unexpectedly found himself available to meet on 21 November and emailed Kleinwort Benson to suggest a meeting that day. It was unable to arrange a meeting and suggested a discussion on the phone on Friday 23 November.

On Friday Mr A spoke with Kleinwort Benson. He discovered that Kleinwort Benson had decided to transfer all of the investments to cash and had arranged this the day before. Mr A was extremely annoyed about this. He felt Kleinwort Benson was wrong to act as it had, that it was contrary to his wishes and that it was a great discourtesy to have done so without informing him first. Mr A was also annoyed the encashment had caused tax liabilities to be incurred.

Kleinwort Benson's position is that it had power to act as it did under the discretionary mandate and it was justified in making the change because Mr A remained exposed to market risk while the change was not made. The risk involved was larger than the tax liability incurred.

Mr A made a complaint to Kleinwort Benson which it did not uphold.

Mr A complained to the Financial Ombudsman Service. The adjudicator thought the compliant should not be upheld because:

- Kleinwort Benson had not acted outside the terms of its discretionary mandate.
- Kleinwort Benson had reasonably concluded Mr A's attitude to risk had changed to 'very cautious' and that his investments should be moved into cash.
- In writing to Mr A two months before it moved his investments, Kleinwort Benson had given Mr A sufficient opportunity to remove the discretionary mandate if he had wished to do so.

Mr A disagreed with the adjudicator. He asked for his complaints to be passed to an ombudsman to review. Mr A said made a number of points including the following:

- His attitude to risk had not changed.
- Kleinwort Benson was aware that he did not want to move into cash. This fact and the contents of his e-mail of 19 November meant that Kleinwort Benson did not have unlimited discretion.
- The move to cash is also contrary to the earlier seeking of direct instructions for the move to the cash management service.
- Kleinwort Benson had given no indication in the weeks leading up to the liquidation it was intending to act in that way despite there being communications between the parties in that period.
- Kleinwort Benson should not have changed his investments while discussions were on-going.
- He wanted to manage his affairs as tax efficiently as possible. Kleinwort Benson knew this. Its act was contrary to that desire.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

did Mr A's attitude to risk change?

Mr A is adamant his attitude to risk has not changed. That may be so but I consider that it was reasonable for Kleinwort Benson's perception of Mr A's attitude to risk to change.

The attitude to risk recorded for Mr A at the outset was "*Moderate to low risk*" the definition of which I have quoted above. Mr A, in effect says, that it is obvious he does not want to suffer losses and so the answer to the question about suffering loss within a six month period was obvious and nothing new. While I understand the point it is very clear Kleinwort Benson took his answer to be more than mere disappointment if a loss was suffered in a six month period. It took it as a firm objective. It made this clear to Mr A and he did not, initially at least, contradict it.

He also referred to himself in terms that reasonably seemed to place him at an even more risk averse point on a risk spectrum than "*Moderate to low risk*". Mr A said:

"I am not, nor have I ever been prepared to gamble my money and am a very cautious investor."

I therefore consider it was reasonable for Kleinwort Benson to both form the view that Mr A's attitude to risk had changed, and want to do something about the portfolio as a result.

Kleinwort Benson's discretionary powers

Kleinwort Benson had discretion to manage Mr A's investments. That means it could buy or sell investments without first asking his permission.

the end of the discretionary powers?

Having identified an issue Kleinwort Benson did not rush to exercise its powers. Rather it recommended that Mr A consider a different service – the Cash Advisory Service - as it did not consider that the existing arrangement was the best way forward. This was not unreasonable. Mr A did not really need a discretionary manager to manage cash investments and did not need to incur the level of fee that would involve.

The recommendation of the Cash Advisory Service would therefore seem to have been a reasonable step in this case. It is unfortunate that Mr A did not respond effectively to that proposal, either to agree with it or to get to the bottom of what he considers to be a misunderstanding in relation to his attitude to risk.

I do not however consider the suggestion of an alternative to the existing discretionary arrangement brought that existing arrangement to an end. Kleinwort Benson therefore continued to have discretionary powers until it formally gave them up. It gave notice to give up those powers with effect from 30 November. Kleinwort Benson therefore had discretionary powers at the time it liquidated the investments.

the extent of the discretionary powers

The discretion was limited to acting reasonably and managing Mr A's investments in accordance with his attitude to risk and objectives.

In principle therefore Kleinwort Benson had the power to move the investments to cash if it thought it appropriate in the circumstances.

Mr A suggests that the powers were restricted by his instructions such as the requirement not to incur tax, and the effect of the discussions generally and the email of 19 November specifically.

restrictions - tax

Mr A wanted his affairs to be managed tax efficiently. This is not unreasonable. There was not however any absolute bar on incurring tax liabilities in the management of the investments. It is a factor to take into account but not the only one. A transaction would not therefore automatically be wrong just because it led to a tax liability. Tax issues were not therefore a restriction on Kleinwort Benson's discretion.

restrictions – the discussions

Mr A feels that once discussions had started about his attitude to risk and the move to cash, Kleinwort Benson no longer had discretion to move to cash – because it was in effect asking his permission to liquidate, and that permission he had not given.

In my view the September letter was not asking Mr A's permission to liquidate – it was asking if he wanted to move from a discretionary managed service to a different kind of service for the management of cash. The letter was not asking Mr A to approve a move to cash as such.

The September letter did not remove Kleinwort Benson's discretionary power to liquidate if it thought it appropriate.

Similarly Mr A did not respond to the September letter to give a new instruction or impose a new restriction on moving to cash. Indeed Mr A did not really respond to that letter.

When Mr A did set out his view it was in his email of 19 November 2012. It has to be accepted that that letter did not contain an express instruction not to move to cash as such. However it is also plain from the letter that Mr A did not yet agree with the proposed move to the Cash Advisory Service – or even the move to cash. This is not however the same as forbidding the move to cash. A discretionary manager does have the power to act in a way that a client does not like – although it does perhaps take a brave investment manager to do so.

was it reasonable to use the discretionary powers to move to cash?

It is clear to me that there was a breakdown in effective communications between the parties in this case. Kleinwort Benson knew Mr A was disappointed with the service he had received. A meeting was held. As a result Kleinwort Benson reasonably thought that Mr A was more risk averse than it had previously thought. It reasonably thought something should be done about it. And it made a, reasonable in the circumstances, suggestion for a way forward in the September letter. Mr A did not respond.

Kleinwort Benson was concerned about this and wrote again in October to give notice to end the discretionary part of the relationship.

Kleinwort Benson could have, if it had thought it necessary, moved to cash at that stage or told Mr A it was about to do so. It did not do either. It seems it was waiting to see how Mr A would react.

When Mr A did react it was to send his email of 19 November. It is clear that Mr A was not happy. Kleinwort Benson may have thought a complaint or a legal claim from Mr A was likely. He mentioned the poor service he had received, questioned the need to move to cash – while maintaining his attitude to risk had not changed and was a “*very cautious investor*”. And he questioned the use of foreign currency deposits and asked about any losses or gains.

The letter seems to have prompted Kleinwort Benson to take action. The legal and/or compliance department was consulted and things culminated in the decision to transfer to cash. This was days before the discretionary powers were about to end, and when their client had made it clear that he was not keen on a move to cash and was talking about going elsewhere.

But on the other hand Mr A was, in Kleinwort Benson's view inappropriately exposed to market risk. He was also proving difficult to communicate effectively with and seemed to be moving to a more confrontational position.

It is my view that some investment managers in the same position would not have moved to cash at that point. They would have made it clear that in the circumstances they were leaving things as they were, at Mr A's request and at his risk, pending his move to a new investment manager. I do not however accept this was a situation where there was one, and only one, reasonable course to take.

Clearly Kleinwort Benson could have handled the situation differently and could have communicated more effectively with Mr A – particularly in relation to the final decision to move to cash.

The question is whether it was wrong, or unreasonable, for Kleinwort Benson to act as it did rather than in some other way? It is my view that this was a robust stance but not so harsh as to be unreasonable. From its point of view, Kleinwort Benson still had discretionary powers, and the client was incorrectly exposed to market risk. It is difficult for me to say that it was wrong for Kleinwort Benson to take decisive action in such circumstances even if that action has, understandably, caused annoyance to the client. Kleinwort Benson took the action it considered to be in Mr A's interests in the circumstances. That was action it had the power to take. And was consistent with the purpose for which the discretion had been granted – the management of Mr A's investments in a way that was consistent with his attitude to risk .

redress

I can only award redress, and that includes compensation for distress and inconvenience, when I make a finding against a financial business. In this case I can see that Kleinwort Benson's actions have caused Mr A trouble and upset. However I have not made a finding of fault on the part of Kleinwort Benson and so it is not appropriate to award any compensation payment in this case.

my final decision

In all the circumstances I do not uphold Mr A's complaint against Kleinwort Benson Bank Ltd.

Philip Roberts
ombudsman