Financial Ombudsman Service

complaint

Mr Q is complaining about advice he received from Opes Financial Planning Ltd (Opes) – formerly known as Money Advice Partnership Ltd (MAP). The advice was to transfer his existing pension plans to a SIPP. Mr Q says that he had no investment experience and relied on the advice of the adviser.

background

Opes told us that Mr Q was introduced to them in November 2011 by an agent for Map International Properties who were introducers to MAP at the time. Opes says that MAP did not own Map International Properties. An independent financial adviser was also involved.

Opes recorded details of Mr Q's circumstances. Those details have been set out in previous correspondence and do not need to be repeated here. In summary, Mr Q was working and had a number of personal pension plans. He had a stocks and shares ISA worth £6,000, but no other investments. He wanted to investigate a transfer of his personal pensions to invest in Store First. MAP was not offering any advice on his investment choices.

MAP wrote to Mr Q on 4 April 2012. It enclosed a suitability report which said Mr Q did not require investment advice. He only required it to recommend a suitable SIPP that would facilitate his investment decisions. He was happy to remain in his employer's Group Personal Pension. He felt that this would diversify his portfolio as he would continue to contribute to it alongside the new SIPP. Three of the plans had a guaranteed annuity rate (GAR). The loss of the GARs was dealt with and a comparison of the charges was made.

Mr Q's attitude to risk could realistically be described as Capital Growth. This was from a choice of Cautious, Balanced, Capital Growth and Aggressive. The description was: *'The Capital growth Investor was willing to accept high risk and chance of loss in order to achieve higher returns on his or her investment. Significant losses over an extended period may prompt the Capital Growth Investor to shift to a less risky investment. The following criteria may help to ensure that such investors have the best chance of achieving these goals: The portfolio should have at least an approximately 80 percent chance, of achieving a nonnegative return over a six-to nine-year holding period.'*

Under the heading liquidity it said that it could take many months for the SIPP investment to be sold and that Mr Q was comfortable with this.

Mr Q is being represented. In the letter of complaint the representative asked about the connection MAP had with Map International Properties. The advice was not suitable as it didn't consider the investment. Mr Q didn't have the relevant knowledge or experience for these investments and it was a large part of his pension provision.

Opes issued its final response letter rejecting the complaint. It said:

- Mr Q was introduced to it by Map International Properties. MAP has no ownership of Map International Properties. They acted as an introducer to MAP at the time. MAP understands that a payment was made to the introducer for the Store First Investment.
- They understood that a regulated adviser would be giving advice about investments. He was a member of a network. The network wouldn't allow him to advise on the SIPP.
- Mr Q had been made aware of the Store First investment before being referred to MAP. The advice was suitable given his attitude to risk and experience.

- The effect of fees and charges were discussed.
- The risks were discussed in the suitability report. Mr Q was made aware of the loss of GARs.
- They were not aware that Mr Q intended to invest in the Merco Bond.
- Mr Q did not respond to requests for annual reviews. He has not been charged for any ongoing service.

One of our adjudicators wrote to the representative. He explained why he thought that the complaint should not be upheld.

Mr Q's representative disagreed with the adjudicator. It failed to see how MAP complied with various COB rules and Principles. In addition, the FCA alerts were not new regulations to the industry, but merely reminders in 2013 and 2014. They also asked how much MAP paid the introducers for the lead. And if no payment was made how it thought the introducer was going to be paid for the introduction?

The SIPP provider told us that £45,000 was invested in the Store First investment on 30 April 2012. And £27,350 was invested in the Merco Bond investment on 8 June 2012. The IFA involved was MAP. Commission was paid on 16 April 2012 of £3,077.85. The SIPP provider has told us that MAP submitted the application forms and received any commission payments for the SIPP that were made.

We have been provided with details of the Merco Bond. This is an unregulated collective investment scheme (UCIS). It is a corporate Bond set up to invest in South American agriculture. It offered returns of 15% a year and up to 110% return on capital. This was for a three year term.

I issued a provisional decision. I thought the complaint should be upheld. In summary, I said:

- Opes was required to give suitable advice. The relevant rules meant that Opes had to act in Mr Q's best interests. To do this the advice had to consider the investments to be made.
- I thought that some changes to answers given on a questionnaire assessing Mr Q's attitude to investment risk should be treated with caution. The investment to be made in Store First was high risk. Mr Q was investing a large part of his pension in Store First. He did not have the capacity to accept the loss of those funds. The charges on the SIPP meant the investment would have to perform well to overcome the effect of those charges.
- The Merco Bond was not mentioned when the SIPP was set up. But, some of the money in the SIPP was not invested. The investment could not have been made if the SIPP had not been set up. There was no evidence that another adviser had been involved in the sale of the Merco Bond. I thought Opes should pay compensation for the loss by investing in the Merco Bond.
- I thought suitable advice should have been to keep Mr Q's existing pension plans. Opes should calculate the loss and pay £250 for the distress caused by the loss of Mr Q's pension funds.

Opes did not agree with my provisional decision. They are legally represented. They and their advisers made the following points:

- They agreed with the conclusions reached by our adjudicator.
- They agreed that Opes did know Mr Q intended to invest in Store First. Opes didn't know that Mr Q intended to invest in the Merco Bond.

- Opes did comply with the relevant COBS rules. Mr Q approached Opes as he wanted to take a more active role in his investments. A separate regulated investment adviser was to provide Mr Q with investment advice.
- Mr Q did not challenge Opes's understanding of the service to be provided. He should take responsibility for his actions. If he disagreed with the approach that Opes was taking then he should take responsibility.
- Simplified advice was allowed under the regulations. The Financial Services Authority (FSA) published guidance on simplified advice. That allowed advisers to limit the advice so that it focused on one or more specific needs.
- The current regulator the Financial Conduct Authority (FCA) and formerly the FSA have made it clear that the pension transfers and ultimate destination of the investment should be considered. Opes did consider the investment to be made. The suitability letter referred to the Store First investment. It also explained about investment risk and how Mr Q could lose all or part of his investment.
- COBS 9 does not force some sort of positive action on Opes to second-guess the advice of another independent financial adviser. This cannot be what the regulatory regime intended.
- The investment was suitable for Mr Q. He presented himself as a high-risk experienced investor.
- Opes did not agree the Store First investment was high risk and speculative. An investment that guarantees a full refund of the money meets any requirement about capacity for loss.
- Opes was not involved in the sale of the Merco Bond. That investment was processed without the involvement of MAP. Opes cannot be liable for the losses flowing from the sale of that Bond.
- Even if my conclusion that the advice was unsuitable is correct, this did not cause the loss. Mr Q would have invested in Store First even if Opes had not arranged the SIPP. This is demonstrated by his actions in arranging the Merco Bond without advice.
- The promotion of Merco Bond was made by a separate legal entity. This was an intervening act. Any losses from the Merco Bond cannot be attributed to Opes.

my findings

I've re-considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I still think that Opes should pay Mr Q compensation for the reasons given in my provisional decision. I have dealt with any additional points below.

What did Opes do?

It is agreed that Opes gave advice to Mr Q. This was to review his existing pension plans. The advice was to transfer to a SIPP. The intention was to invest in unregulated investments. Opes did not give advice about the investments. It accepts that it knew Mr Q was going to invest in Store First. But it says that it didn't know about the investment in the Merco Bond.

What was Opes required to do?

COBS 2.1.1R required Opes to act *"honestly, fairly and professionally in accordance with the best interests of its client."* This is an independent duty on the firm. It cannot simply say that the customer had already decided what he wanted to do, so it simply carried out his wishes regardless of whether it was in Mr Q's best interests. I'm also mindful of the principles for business and in particular principles 1 (*integrity*), 2 (*due skill, care and diligence*), 6 (*customers interests*) and 9 (*reasonable care)*.

Mr Q had been referred to Opes for advice on the transfer. It still had an obligation to consider whether it was in his best interests and had an independent duty to give suitable advice.

COBS 9.2.1 required Opes to obtain the necessary information about the client's knowledge and experience relevant to the specific type of investment and the investment objectives. Having done so, COBS 9.2.2 required Opes to consider whether the transfer from the personal pension to the SIPP met Mr Q's investment objectives, he could bear the risks involved and that he understood the risks.

To be able to advise in accordance with the rules, Opes had to understand the risks associated with the investments. Without this information it could not say whether the transfer was suitable or not.

GEN 2.2.1 says "*every provision in the Handbook must be interpreted in the light of its purpose."* The purpose of COBS 9 is to ensure consumers receive advice that's suitable in their circumstances. To interpret COBS 9.2 in a narrow way so that Opes did not consider the purpose of the SIPP avoided looking at all of the factors that the rule (and the rest of Chapter 9) says are necessary to ensure suitability.

Opes provided advice about the SIPP. Opes says another regulated financial adviser was involved. However that adviser could not advise on the SIPP. This is not a case where Opes could give simplified or focused advice. The transfer to the SIPP meant that the funds would be invested. The advice to transfer to the SIPP could only properly be considered if some thought was given to the investments to be made. Even if another regulated adviser gave advice about his investments I remain of the view that Opes had to consider where the investments were to be made as part of its advice.

I do not accept that Opes could give suitable advice without considering the investments. The transfer to the SIPP involved the loss of GARs and additional charges. So the advice had to consider where the funds were to be invested to justify the reasons to transfer.

What should Opes have done?

Opes used a questionnaire to assess Mr Q's attitude to investment risk. This asked a series of questions to which he answered yes or no. Two answers were updated from a previous assessment. These were:

- *"I wish to achieve high returns on my investments. I am willing to accept high risk and chance of loss."*

- *'I understand that investments can have occasional negative annual returns. However, I have a higher chance of reaching my investment goals if I stick with my portfolio over the long term. I would not make changes.'*

The answers to these two questions were updated from the previous assessment from no to yes. It isn't clear to me why those answers were changed. Mr Q was aged 53 at the time of the advice. He had twelve years until he intended to retire. Although he also had the group personal pension the policies being transferred were a large part of his overall wealth. I think the reasons for the change in answers to the questions about risk need to be treated with caution.

It's clear that Opes knew Mr Q would invest in Store First when the SIPP was set up. I have seen the prospectus for this investment. It was unregulated. It was also a new investment with developments being built and marketed to investors. Store First paid a rental return of 8% for the first two years. After that there was no guarantee of occupancy or rate of return. There was no guarantee that a tenant would be found. In that case the investor would have to use other funds to cover the ongoing fees. There was no ready market for this type of investment. The investment had a buy back guarantee. However there is little to back up this guarantee apart from the word of the company. Opes argued that this was not a high risk investment. I disagree. In my view, the Store First investment was high risk and speculative.

Mr Q transferred most of his pension provision. There's no evidence he had any previous experience of such investments. The fact find indicated that he had limited capacity for loss. The rules required Opes to consider Mr Q's financial situation. It also required Opes to be satisfied that he was able to bear the investment risks. It failed to do this. Mr Q didn't have the capacity for loss required for such a high risk investment. The charges alone were likely to be detrimental to Mr Q's pension fund. I think on any view, Opes should have advised Mr Q that the transfer of pension funds to the SIPP to invest in Store First was not suitable.

Opes argued that my reasoning would mean that no-one could ever make a speculative investment. I think the important point here is that Mr Q was not in a position to accept the risk with Store First. This was a large part of his pension. Simply put, he could not afford to lose his pension fund. I remain of the view that he should have been advised not to transfer to the SIPP.

The Merco Bond was not mentioned when the SIPP was set up. But, some of the funds in the SIPP were left in cash and not invested. We have made some enquiries about who sold the Merco Bond. The SIPP application makes it clear that MAP were the introducing adviser and received commission for the sale of the SIPP. I haven't seen evidence that they knew the investment in the Merco Bond would be made. It's possible that the other IFA was involved or the unregulated introducer. I haven't seen any documentary evidence that the other IFA was involved. But, the investment could not have been made unless Mr Q had the SIPP.

There is no evidence to support Opes's statements that another regulated adviser was involved in the sale of the Merco Bond. It appears to me that the cash left in the SIPP after Opes gave advice was invested after an unregulated introducer sold the Merco Bond. Opes knew that Mr Q intended to invest in unregulated investments. And they knew that unregulated introducers were involved. I think it was foreseeable that Mr Q would make other unregulated investments. I think Opes should pay compensation for the losses suffered by investing in the Merco Bond.

What should suitable advice have been?

I think the advice should have considered the investments to be made. Store First and the Merco Bond were unregulated and exposed Mr Q to a number of risks. Mr Q was not in a position to accept much risk with his pension funds. The SIPP was more expensive and was unsuitable. Mr Q was prepared to accept some risk. But I don't think he needed a SIPP to invest in the years before his retirement. On balance, I think that his existing plans were suitable. In particular some of the plans had GARs. These were valuable and I think the advice should have been to keep these policies.

What would Mr Q have done if he had been given suitable advice?

Mr Q had been told about the investments by the unregulated firm. The other IFA involved could not recommend a SIPP. I think that if Mr Q had been given suitable advice by a regulated financial adviser that he would have followed that advice. I don't think there are any reasons for investing in Store First and the Merco Bond other than he thought the investments would perform well. I think MAP should have advised him that these investments were risky and unsuitable for him.

Did the unsuitable advice cause the loss?

Opes knew that the investment was to be made in Store First. The investment was made following advice from Opes and I'm satisfied that investment wouldn't have made if Opes had given suitable advice. I therefore think that the unsuitable advice did cause the loss.

The situation with the Merco Bond is more difficult. I accept that Opes didn't know that this investment was to be made. But the evidence shows that the transfer to the SIPP was intended to allow Mr Q to invest in unregulated investments. There was a cash sum leftover after the Store First investment was made. This was invested in the Merco Bond and I think it follows this was promoted by the unregulated introducer. In my view, this was all foreseeable at the time the transfer to the SIPP was made. I don't accept that anything the unregulated introducer did was an intervening act. In my view, the unsuitable advice to transfer to the SIPP also caused the loss on the Merco Bond. If Mr Q had not been given unsuitable advice to start the SIPP he could not have made the investment in the Merco Bond.

For the reasons set out above, I think that the transfer of Mr Q's pension plan to the SIPP to invest in Store First and the Merco Bond was unsuitable. I don't think Opes gave Mr Q suitable advice and he should be compensated for this. Mr Q should take responsibility for his own actions, but I'm satisfied he transferred to the SIPP on the advice of MAP. It is that advice that has caused his loss.

Mr Q has been caused some distress by the loss to his pension fund as a result of the advice he received. I think he should be paid £250 by Opes to compensate for that distress.

fair compensation

My aim is to put Mr Q back in the position he would now be in if he had been given suitable advice. To do that Opes should B compare the value of Mr Q's pension, if he hadn't transferred, with the current value of his SIPP. In summary:

1. Obtain the notional transfer value of Mr Q's previous pension plans if they had not been transferred to the SIPP. That should be the value at the date of my decision. For the pension plans which had a GAR, the transfer value should be calculated using the methodology set out under the heading **'Policies with a GAR'** (below).

2. Obtain the transfer value as at the date of the decision of Mr Q's SIPP, including any outstanding charges.

3. Pay a commercial value to buy Mr Q's Store First and Merco Bond investments. If these cannot be transferred they should be given a nil value to calculate the compensation.

4. And then pay an amount into Mr Q's SIPP so that the transfer value is increased to equal the value calculated in (1). This payment should take account of any available tax relief and the effect of charges.

   In addition, if either the Store First investment or the Merco Bond cannot be removed from the SIPP, Opes should:

5. Pay five years' worth of future fees owed by Mr Q to the SIPP (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

   Both parties should now try to establish whether the SIPP can be closed.

   Had Opes given suitable advice I don't think there would be a SIPP. It's not fair that Mr Q continues to pay the annual SIPP fees if it can't be closed. There are a number of ways they may want to seek to achieve that. It will also provide Mr Q with some confidence that he will not be subject to further fees.

   In my view, awarding a lump sum for an amount equivalent to five years fees strikes a fair balance. It's possible that the investments could be removed from the SIPP in less than five years. But given the time it has taken to date I think it is possible that it could take a number of years more to resolve all of the issues. So using a figure of five years' worth of fees is an approximate and fair award to resolve the issue now.

6. Pay Mr Q £250 for the distress and inconvenience caused.

If Mr Q does receive any money back from the Store First investment or the Merco Bond after he has been compensated he should pay this to Opes. If Opes wishes to draft an undertaking to this effect at its own cost, it may do so.

policies with a GAR

My aim here is to increase the value of the SIPP so that Mr Q could buy an annuity for the same value if he had used the GAR. The value of the SIPP therefore needs to be increased by the ratio of the GAR divided by the current annuity rate.

A. Obtain a notional current transfer value of each pension policy as at the date of my decision, assuming that the policy had not been transferred.

B. Obtain from the SIPP provider the current actual transfer value of that part of the SIPP that has arisen from the transfer of the pension policies with a GAR.

C. Find out the basis as to how each GAR would have been payable at age 65.

D. Obtain an annuity rate for a male aged 65 on the same basis as the annuity rate in (C).

E. Determine the loss as at the date of calculation as (A)*(C)/ (D) - (B).

If Opes is unable to pay the compensation into Mr Q'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 compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mr Q's actual or expected marginal rate of tax in retirement. Mr Q is likely to be a basic rate taxpayer in retirement. The reduction should equal the current basic rate of tax. However, Mr Q would have been able to take a tax free lump sum; the reduction should be applied to 75% of the compensation.

my final decision

I uphold the complaint. Opes Financial Planning Ltd must calculate the loss and pay compensation as set out above.

Simple interest is to be added to my award at a rate of 8% gross a year from the date of my decision to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr Q to accept or reject my decision before 23 September 2018.

Roy Milne
ombudsman