complaint

Mrs T is both the executor of her late husband's estate and the sole beneficiary of his pension. She has complained about Apollo Pension & Investment Advisers. Mr T was advised to transfer his existing self-invested personal pension (SIPP) to another SIPP with a greater choice of investments. The new SIPP was used for Mr T to invest in Green Oil Plantations Ltd (GOP) which Mrs T says was too risky.

Mrs T is represented by a firm of solicitors.

background

In 2007, Mr T was diagnosed with a degenerative neurological condition for which there was no treatment available. By 2012, when the advice was given Mrs T has said that Mr T's condition was rapidly declining. He died in 2015.

Mr and Mrs T were long standing clients of Apollo when the advice was given in 2012 to transfer Mr T's SIPP.

Apollo recommended Mr T move his existing SIPP (worth around £315,000) to a new SIPP with the same provider. Mr T's original SIPP would not allow for a GOP investment. The transfer was made and then Mr T invested £150,000 in GOP. I understand Mr T invested an equal amount in another unregulated fund. No complaint has been made about that investment.

The adviser from Apollo had given him a brochure for GOP.

In 2015, Mr T complained to Apollo about the advice he'd been given to invest in GOP. Before Apollo replied to the complaint, Mr T sadly passed away.

Apollo said that it didn't advise Mr T about the investment. It said a separate, unregulated business had provided information about GOP and Mr T decided to invest of his own accord. The investment was made through the other business.

An adjudicator considered the complaint. She thought the complaint should be upheld and said:

- The separate unregulated business was also owned by the adviser from Apollo;
- The fact find completed by Apollo showed that Mr T was worried about the current volatility of his SIPP investments. Given his condition, he needed to ensure that the investments were suitable long term to provide for Mrs T and their two young children;
- It wasn't possible for the adviser to give suitable advice to recommend the SIPP transfer without considering the investments that would be made in the new SIPP;
- Regardless of whether he was recommending the investments through Apollo or the unregulated business, he knew when recommending the SIPP which investments would be made;
- GOP was a high risk, unregulated fund and Mr T invested a large amount of his pension in it. The adjudicator didn't think Mr T was prepared to take such a high level of ongoing risk with his pension.

Apollo didn't agree. It said Mr T was an experienced businessman and was fully able to understand the investment implications of GOP. It asked for an ombudsman to review the complaint.

Mrs T didn't have anything further to add.

my findings

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

I agree with the adjudicator. I've decided to uphold this complaint and I'll explain why.

Apollo was required to know its client and give suitable advice. It was also under a duty to act in the best interests of Mr T.

The adviser employed by Apollo recommended the SIPP and was also the agent for GOP. I think the adviser must have known that the investment was to be made in GOP.

The Financial Services Authority (FSA) issued an alert in January 2013 and said: *"It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating".* I agree with this. And although this alert was issued after the advice was given to Mr T I think it represents the FSA's view of how the adviser should have assessed the suitability of any advice given. I don't think the adviser could give suitable advice to recommend a SIPP without considering the investments that would be made into it.

In this case I think the adviser was aware that the recommendation he made whilst working for Apollo would allow Mr T to invest in GOP. And he was promoting GOP at another non-regulated company.

GOP was a high risk unregulated fund. As the adjudicator has said, it was an unusual holding that was new and untested. The fund was not subject to regulation in the same way as more mainstream funds would be.

This type of fund is typically only suitable for experienced and sophisticated consumers. And I don't think Mr T should be have been categorised as experienced *and* sophisticated. His existing SIPP had been invested entirely into one fund for a number of years. His attitude to risk was recorded as highly speculative and volatile but I'm not satisfied that this was accurate. Especially given how Mr T's illness was progressing and that he wanted to provide for his wife and daughters after his death.

Even the definition of highly speculative and volatile suggested he may be prepared to invest a small portion of assets in high risk assets but he went on to invest almost half his pension in GOP.

I don't think that Mr T fully understood the risks of GOP. If he had done, I don't think he would have invested in it. I think the GOP investment posed a higher degree of risk than he ought to have been advised to take with this portion of his pension given his circumstances.

my conclusions

For these reasons I uphold the complaint. I think that, with suitable advice Mr T would have diversified his original SIPP rather than transferring to the new one.

Mrs T has transferred the SIPP into another SIPP with a different provider. This SIPP is now in her name.

fair compensation

In assessing what would be fair compensation, my aim is to put Mrs T as close to the position she would probably now be in if Mr T hadn't been given unsuitable advice.

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

what should Apollo do?

To compensate Mrs T fairly, Apollo must:

- Compare the performance of the SIPP with that of the benchmark shown below and pay 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.

  Apollo should also pay interest as set out below.

  If there is a loss, Apollo should pay such amount as may be required into Mrs T's new 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 Apollo is unable to pay the total amount into Mrs T's pension plan, it should pay that amount direct to her. 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 Mrs T's marginal rate of tax at retirement.

  For example, if Mrs T 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 Mrs T would have been able to take a tax free lump sum, the *notional* allowance should be applied to 75% of the total amount.

- Pay to Mrs T £500 for the upset caused when the investment failed.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
SIPP	transferred	FTSE WMA Stock Market Income Total Return Index	date of investment	date transferred	8% simple per year on any loss from the end date to the date of settlement

actual value

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

My aim is to return Mrs T to the position she would have been in but for the unsuitable advice. This is complicated where an investment is illiquid (meaning it couldn't 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. Apollo 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 Mrs T and the balance be paid as I set out above.

If Apollo is unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. Apollo may wish to require that Mrs T provides an undertaking to pay Apollo any amount she 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.

Any withdrawal, income or other payment out of the investment should be deducted from the *fair value* 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 Apollo totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

I have decided on this method of compensation because:

- Mr T wanted income with some 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. It would be a fair measure for someone who 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 T's circumstances and risk attitude.

- The SIPP hasn’t been used to purchase an annuity.
- The additional interest is for being deprived of the use of any compensation money since the end date.

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 decision is that Apollo Pension & Investment Advisers should pay Mrs T the amount produced by that calculation – up to a maximum of £150,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

Apollo Pension & Investment Advisers should provide details of its calculation to Mrs T in a clear, simple format.

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Apollo Pension & Investment Advisers pays Mrs T 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 Apollo Pension & Investment Advisers. It is unlikely that Mrs T can accept my decision and go to court to ask for the balance. Mrs T may want to consider getting independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I am required to ask Mrs T either to accept or reject my decision before 29 July 2016.

Keith Taylor
ombudsman