

complaint

Mr P complains about advice he was given by an appointed representative of Sesame Limited. He says he was advised to invest in a product that posed more risk than he was willing to accept.

background

I set out the background to the complaint in my provisional decision issued in June 2017 (copy attached). I also explained why I thought Sesame was responsible for answering the complaint, and why it should be upheld.

Sesame didn't agree with my conclusions. Sesame thought it had adequately shown in the documents it had provided that it never authorised its appointed representatives to advise on unregulated investments. So it shouldn't be held accountable for actions that are beyond the permissions of its appointed representatives.

It's also clear Moneywise knew this, as it ensured that commission was received by an entity which had no connection with Sesame. So it doesn't agree that who received the commission isn't determinative of who gave the advice. It says the commission was paid through an unregulated adviser as this business couldn't be put through Sesame and the adviser was aware of this. It asked for the complaint to be reassessed in light of these points.

Mr P also made some comments. He said the Cape Verde fund hadn't provided him with any income and it's been difficult finding out what's happening with the fund. He also asked what happens next, if he's not happy with Sesame's offer. He asked if the ombudsman would review the offer before he receives it.

my findings

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

I've carefully considered the further points Sesame has made. The advice to transfer Mr P's pension benefits into a SIPP was permitted by the Core Compliance Manual. As I've explained, how the pension would then be invested was inextricably linked to this advice. As such, Sesame is responsible for the advice as a whole.

Sesame has also referred to the payment of commission. It thinks the fact this was paid to an unregulated business shows that Sesame shouldn't be held responsible for the advice.

While I understand this point, I don't agree. I appreciate the commission was paid to a company the adviser was connected with, but which wasn't an appointed representative of Sesame. But arrangements relating to commission – such as the amount, how it is paid and to which party – are a matter between the adviser and the product provider. This is separate from any *advice* that was given. From the evidence I've seen, the adviser gave Mr P advice to transfer his pensions into the SIPP when acting on behalf of Sesame. He did so as its appointed representative. So Sesame is responsible for answering Mr P's complaint about the suitability of the advice.

I would add that the commission was paid by the SIPP provider in relation to the transfer monies it had received. It wasn't conditional on, or related to, the particular fund in which the SIPP was then invested.

I've also noted Mr P's comments. I should explain that if he accepts this decision, it will become binding on him and Sesame. So Sesame will be required to pay Mr P compensation on the basis I've set out. This is payment of my award, not an offer Sesame is making. Sesame should also send Mr P an explanation how it's calculated the loss. Any queries Mr P has about this he should refer to Sesame in the first instance. If he has any remaining concerns, he can ask us for clarification. We can look to see if the calculation has been carried out correctly, but cannot change anything within the decision.

fair compensation

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

I think Mr P would have invested differently. It is not possible to say *precisely* what he would have done, but I am satisfied that what I have set out below is fair and reasonable given Mr P's circumstances and objectives when he invested.

what should Sesame do?

To compensate Mr P fairly, Sesame must:

- Compare the performance of Mr P's investment 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.

Sesame should also pay interest as set out below.

If there is a loss, Sesame should pay such amount as may be required into Mr P'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 Sesame is unable to pay the total amount into Mr P'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 P's marginal rate of tax at retirement.

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

- Pay Mr P £450 for the trouble and upset he's suffered as a result of the financial advice, and how Sesame dealt with his complaint.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Self-invested personal pension	still exists	for half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	date of investment	date of my decision	8% simple per year from date of this decision to date of settlement (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 P to the position he would have been in but for the unsuitable advice. This is complicated where an investment is illiquid (meaning it could not be readily sold on the open market) as I understand is case here. 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. Sesame 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 P and the balance be paid as I set out above.

If Sesame is unwilling or unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. Sesame may wish to require that Mr P provides an undertaking to pay Sesame 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, Sesame 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 P 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 Sesame totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

I have chosen this method of compensation because:

- Mr P wanted capital 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 FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return 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 P's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr P into that position. It does not mean that Mr P 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 P could have obtained from investments suited to his objective and risk attitude.
- Mr P has not yet used his pension plan to purchase an annuity.

my final decision

I uphold the complaint. My decision is that Sesame Limited should pay the amount calculated as set out above.

Sesame Limited should provide details of its calculation to Mr P in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 4 September 2017.

Doug Mansell
ombudsman

COPY PROVISIONAL DECISION

complaint

Mr P complains about advice he was given by an appointed representative of Sesame Limited. He says he was advised to invest in a product that posed more risk than he was willing to accept.

background

In February 2012, Mr P was advised to transfer his pension benefits from a number of policies and pension schemes into a self-invested personal pension (SIPP). The total pension fund was then invested in an unregulated collective investment scheme (UCIS).

Mr P complained to Sesame in July 2014. But Sesame said it wasn't responsible for the advice, as this wasn't given by one of its appointed representatives. Mr P then referred his complaint to us.

Our adjudicator thought Sesame was responsible. She said the advice to transfer Mr P's pension to the SIPP was given by Moneywise Mortgage & Financial Planning Limited (Moneywise), which was an appointed representative of Sesame. The advice was a regulated activity, and so it was a complaint we could look at.

Sesame didn't agree. While it accepted it was responsible for the SIPP advice, it said the subsequent investment into a UCIS wasn't permitted under the scope of permissions for the appointed representative. This was confirmed in the Core Compliance Manual it had provided.

The matter has now been passed to me for consideration.

my provisional findings

I've considered all of the information provided by both parties in order to decide whether the complaint is one we can look at. I've also considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I'm aware that in May 2012 Mr P was advised to transfer part of his pension fund from the SIPP into a new arrangement. But that is being dealt with as a separate complaint. So in this decision I will only be considering the advice Mr P was given by Moneywise in February 2012. My decision falls into two parts. I will firstly consider if Sesame is responsible for all the advice he was given in February 2012, including investing in a UCIS. I think it is, as I will explain below. Therefore I will go on to consider the merits of Mr P's complaint.

jurisdiction

We can consider a complaint under our compulsory jurisdiction if it relates to an act or omission by a firm in the carrying out of one or more listed activities, including regulated activities, or any ancillary activities carried on by the firm in connection with those activities (DISP2.3.1).

Complaints about acts or omissions by a firm include complaints about acts or omissions in respect of activities for which the firm is responsible, including the business of any appointed representative for which the firm has accepted responsibility (DISP2.3.3G).

So there are two questions to be considered before I can decide whether this complaint falls within the compulsory jurisdiction of this service:

1. Were the acts about which Mr P complains done in carrying out a regulated activity, or an ancillary activity carried out in connection with a regulated activity?

2. Were those acts the acts of the principal firm, Sesame?

As I understand it, Sesame accepts it's responsible for the advice Moneywise gave Mr P to transfer funds from his existing pension arrangements into a SIPP. But for the sake of clarity, I also find it was responsible for this advice.

Section 39(3) of the Financial Services and Markets Act 2000 (FSMA) says:

“the principal [here, Sesame] of an appointed representative [here, MFP] is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility”.

So, if what the appointed representative did (recommend a transfer to a SIPP) was something Sesame accepted responsibility for, then it is something we can consider as a complaint against Sesame. In this case, I am satisfied the appointed representative was authorised by Sesame to recommend the transfer to a SIPP.

But Sesame says it didn't authorise Moneywise to advise on UCIS, and in fact such advice was prohibited. So it says it's not responsible for this element of Mr P's complaint.

I understand Sesame's point, and have considered the Core Compliance Manual it's referred to. But the appointed representative was required to follow the relevant rules set out by the regulator. It had an overall duty to act in Mr P's best interests and was required to know its client and to give suitable advice. The appointed representative couldn't have given suitable advice to Mr P on the pension transfer without also considering the investment to be made. The SIPP was simply a wrapper to hold investments, and the sole reason for opening the SIPP was to make the investment in the UCIS.

The letter the adviser sent the SIPP provider in March 2012 for the transfer noted that it was to fund a property purchase with the Resort Group. It's clear from this the adviser was fully aware this investment would be held within the SIPP.

In all, I think the SIPP transfer advice can't be separated from the underlying investment. So, if Sesame is responsible for the SIPP, it is responsible for the investment made in it too.

the merits of Mr P's complaint

As noted above, at the time of the advice Mr P's pension benefits were contained in a number of different arrangements. These included two company pension schemes, in which I believe he had preserved benefits. He also held four personal pension plans. These were all transferred into the SIPP. Part of the pension was then invested in the Resort Group Cape Verde fund.

Unfortunately, there's little or no evidence relating to the advice Mr P was given. For instance, I've not seen a copy of a factfind containing details of Mr P's circumstances. Nor have I seen a suitability letter explaining the adviser's reasoning for the advice.

But regardless of this, from the evidence available to me I don't think the advice was suitable. According to the rules at the time, UCIS investments could only be recommended to certain categories of customer. It's not clear the adviser ensured that Mr P was an investor to whom such an investment could be recommended.

Also, this was an investment in an off-plan property development in Cape Verde. I think it represented a considerable degree of risk to Mr P's pension fund. I've not seen evidence the adviser established that Mr P was prepared to take the risks involved, or made him aware of those risks.

I'm also mindful that a major portion of Mr P's pension fund was concentrated in this one investment. So Mr P's future pension benefits would be largely dependent on the fortunes of the investment.

For these reasons, I don't think the advice was suitable.

putting things right

I note in his letter of complaint to Sesame Mr P referred to the penalties imposed on the transfer and the charges involved in the SIPP.

But while I understand these points, from a practical aspect it would be difficult to put Mr P back into the position as if he hadn't transferred out of his existing pension arrangements. There are a number of different providers involved, and also different types of pension. The position is further complicated by the subsequent partial transfer to another SIPP provider.

I'm also conscious that a key part of Mr P's complaint is the underlying investment in the UCIS, the risks this posed and the losses he feels he's suffered from the investment.

In the circumstances, I'm minded to take a pragmatic approach to compensating Mr P, but which is also fair and reasonable. I intend to require that Sesame uses the benchmark I've set out below as a way of assessing Mr P's investment loss. It's not clear how much risk he was prepared to take, as there's no evidence this was discussed. Mr P says he was led to believe the investment was safe and would boost his pension fund considerably. He's also said his existing pension was invested in deposits. On balance, while I don't think it's likely Mr P was told he was investing in a way that didn't involve any risk, I also think it's unlikely he wanted to take a high level of risk with his pension fund. So Mr P should be compensated accordingly.

I note Sesame offered to pay Mr P £200 for the way it handled his complaint. I think this is fair and reasonable. But I also think he will have suffered some trouble and upset because of the advice he was given. So he should also be paid £250 to reflect this – making a total amount of £450.

fair compensation

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

I think Mr P would have invested differently. It is not possible to say *precisely* what he would have done, but I am satisfied that what I have set out below is fair and reasonable given Mr P's circumstances and objectives when he invested.

what should Sesame do?

To compensate Mr P fairly, Sesame must:

- Compare the performance of Mr P's investment 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.

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accept if Sesame totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

I have chosen this method of compensation because:

- Mr P wanted capital 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 FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return 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.
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- Mr P has not yet used his pension plan to purchase an annuity.

my provisional decision

I'm satisfied Sesame Limited is responsible for the advice Mr P was given, and I uphold his complaint. My provisional decision is that Sesame Limited should pay the amount calculated as set out above.

Doug Mansell
ombudsman