

complaint

Mr C was advised by Financial Aims Limited (FA) to invest about half of his pension in the Opus Propertybourse Performance Fund in 2010. He says it was inappropriate for his low attitude to risk, as it was an unregulated fund. The fund has lost its value.

background

One of our adjudicators thought that Mr C's complaint should succeed. In summary, she said:

- FA hadn't given Mr C a formal report of its advice. But there was no dispute that it had recommended the fund to Mr C.
- It says it wasn't aware that the fund was an unregulated collective investment scheme (UCIS). Had it done so, it said it wouldn't have recommended it.
- But FA ought to have been aware this wasn't a mainstream fund, even if it wasn't certain of its regulatory status. And that, in itself, should have made it look into the fund further.
- The limited information Mr C was given by FA was incomplete and gave an overly positive image of the fund.
- It was a 'fund of funds' type of investment. But the underlying funds it invested in were themselves specialist in nature, and were likely to have been unregulated.
- The funds used high levels of borrowing to buy properties.
- There was no track record to assist with assessing the risk of the fund, or its potential performance.
- As a result, the advice had been given with a complete disregard for Mr C's likely risk profile and investment objectives.
- This meant that, notwithstanding FA's concerns about the way the fund had been operated, its advice had ultimately caused Mr C's loss.

FA first responded saying that Mr C was more aware of the facts than had been made out. He was aware of the underlying investments and had commented about property markets as a result of his business travel and experience. It said Mr C did discuss the fund with FA, and made his choice to invest after this. It added that Mr C viewed his overall pension position jointly with that of his wife. So the proportion of their *overall* pension provision being invested was lower than the adjudicator had suggested.

FA said it would be providing further comment. We didn't hear further from FA, so both sides were told the case would be passed to an ombudsman. Mr C sent in details of an £1,600 adviser fee that was collected at around the same time as he invested. This has also had an impact on the value of his plan.

Our adjudicator wrote to both parties in October 2015 to explain that an ombudsman may take the additional deduction of this fee into account, when calculating Mr C's loss. It wouldn't be right for FA to keep a fee it had charged for unsuitable advice, when Mr C would likely have to pay again for further advice to put the matter right. She confirmed that the £1,600 fee was likely to be refunded as part of the settlement.

We had a further response from FA in November 2015:

- It acknowledged that the outcome of the complaint turned on the suitability of the advice it gave to Mr C.

- However the adviser was sure that in all his dealings with Propertybourse, its unregulated status was never disclosed to him. The promotional material referred to FSA authorisation. Comparisons were made with mainstream property funds.
- So the adviser felt '*as cheated as [Mr C] must*'. He agreed that '*as an unregulated investment it was unsuitable for [Mr C]*'.
- Having previously worked in Germany, Mr C had expressed his own knowledge of that market and the strength of the property rental sector, which was involved in this fund.
- In FA's view Mr C did have more knowledge than the adjudicator had implied. His line of work didn't involve taking things only at their face value. He has always examined facts and asked pertinent questions.
- The fund was portrayed as and intended to be less volatile than equities, that were experiencing far greater volatility at that time. It was not intended to be high risk.
- As portrayed, the fund was appropriate for long term investment; which it was in Mr C's case, because he wouldn't be drawing a pension for some time. He'd only taken tax free cash out before the government increased the retirement age.
- The £1,600 fee wasn't for the Propertybourse fund. It was calculated as 2% of the transfer-in Mr C's pension received from one of his former pension plans.
- FA's Professional Indemnity insurers declined to cover Mr C's claim, and FA was unable to meet the cost itself. It suspected that the matter would pass to the Financial Services Compensation Scheme (FSCS). It wanted to discuss that further with them.

We've asked the FSCS to comment on the latest information available on FA's finances. It has said that at present, it isn't considering claims against FA. It therefore falls to me to issue a final decision on this complaint. Any compensation I award, if accepted by Mr C, will be legally binding against FA. It will then be a matter for FA to prove, to a court if necessary, its ability (or otherwise) to make payment. FA is free to discuss the matter further with FSCS.

my findings

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

FA has provided very little in the way of evidence with which to assess this complaint. But I've based my findings on what information FA has been able to provide, as well as Mr C's recollections. Having done so, I largely agree with the adjudicator's findings. And I don't think the further comments FA made in response to her view give me any grounds on which I could reach a different conclusion.

FA doesn't dispute that it didn't recognise the Propertybourse fund as being a UCIS. But the adviser considers he, as well as Mr C, was misled about the true nature of the fund. Neither Mr C nor FA have been able to produce any original literature they've kept from the time of the sale. Certainly in FA's case I think that would've been a wise precaution to take. However I've taken the adviser's recollections into account. This service has also considered other complaints about Propertybourse. So the adjudicator was able to send FA a copy of the 'pre-launch booklet'. This referred to its status as a Guernsey-listed fund based in Luxembourg.

The adviser says he was also persuaded by presentations the fund gave to him in person, including favourable comparisons with more typical, regulated property funds. And as he regarded the investment simply as a fund 'switch', he didn't give Mr C a formal letter or report justifying why it was suitable.

But in my view FA had a duty of care to understand the nature of the fund and ensure it was suitable for Mr C; whether it set this out in writing or not. It hasn't given us any details of how it assessed or recorded Mr C's attitude to risk. But the other fund Mr C was investing in under his other plan had an element of capital protection. This seems to be more in keeping with comments FA made in response to the complaint. It said that '[Mrs C]'s funds were more equity based. And yours were intended to be less volatile.'

Mr C claims he had a low attitude to risk. On the basis of what I've seen I can agree he was likely to be lower than medium on the risk scale. I'm not satisfied that this is consistent with investing half his pension (nearly £70,000) in a fund without an established track record. Particularly when the fund was highly specialised, and the sub-funds it invested into were likely to employ borrowing in order to leverage the returns.

The adviser referred to the projected returns from the fund being impressive at the time. He quoted a figure of 11.6% net of fees. But a higher return is usually coupled with a higher risk. I don't think that was then consistent with looking for a less volatile fund for Mr C. By comparison, the industry standard projection rates (which the regulator considered representative of returns more likely to be achieved) ranged from 5-9% per year at that time. So I think FA ought to have questioned whether double-digit returns were likely to be achieved on a sustained basis, without significant risk.

Pensions are individually-held investments. So I'd think it more common for diversification to be achieved within Mr C's own arrangement; rather than relying on his wife's separate plan which wouldn't necessarily have the same objective. And placing half of Mr C's pension in such a specialised fund didn't in my view provide the level of diversification to be consistent with a broadly low-medium risk approach.

Although the fund was not regulated, advice to invest in that fund was. I don't think a competent adviser giving regulated advice would simply accept another company's marketing material without question. I agree with the adjudicator that claims about the fund targeting double-digit returns, the non-mainstream nature of its investments and its domicile overseas, should have prompted FA to enquire further. I don't think it would then have taken much investigation to establish that it was (or was likely to be) a UCIS.

I'm not persuaded that Mr C had direct knowledge or experience of this type of fund; such that he would be willing to take the significant risks involved. Some incidental remarks about property in Germany wouldn't reasonably give FA confidence that Mr C could understand this fund for himself.

I appreciate there may be questions about how the fund lost all its value, and I'm aware there are concerns about whether it's been appropriately run. How an investment scheme is managed is an inherent and foreseeable risk. But if there's been wrongdoing in managing the fund, this *may* in some cases mean there's 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.

But here, I'm satisfied Mr C wouldn't have been in the Propertybourse fund at all if FA had given suitable advice. There is enough evidence for me to conclude that FA wasn't acting in its client's best interest. I think that fair redress means that it should compensate Mr C for these investment losses, which couldn't have happened, but for its advice. But also, to allow for the possibility that some return might be obtained from Propertybourse in future.

fair compensation

My aim is to put Mr C as close to the position he would probably now be in if he had not been advised to invest in the Propertybourse Performance Fund. It's not possible to say *precisely* where Mr C would've invested. But I think what I've set out below is fair and reasonable given Mr C's circumstances and objectives when he invested.

FA has told us that the £1,600 fee was paid for (I'm assuming) advice on transferring in the other pension plan that was largely used to invest in Propertybourse. Yet the details Mr C's provider has given us indicates that on another related plan (which isn't subject to the complaint), the payment of a fee was timed with FA setting up an actual investment within the plan; not when funds were received into it.

I acknowledge that a transfer into the plan Mr C has complained about did happen shortly before, and was necessary to make, the Propertybourse investment. But I think it's unlikely the £1,600 fee wasn't at least in part for the investment advice. In any case, FA hasn't been able to confirm what the actual agreement was at the time. And if Mr C wasn't being advised to invest in Propertybourse (as I don't think he should've been) this transfer may or may not still have been required.

Either way I expect that Mr C either has, or will now have, to seek further advice as a result of the situation he's left in. Rather than expecting FA to meet the cost of that advice in future, I think it's fair and reasonable for the £1,600 fee he's already incurred to be reimbursed now.

Financial Aims Limited must compare the *actual value* of Mr C's initial investment in Propertybourse (£71,460 including the £1,600 fee) at the *end date* with its *fair value*; represented by the benchmark shown below. The difference between the two is Mr C's loss.

initial investment	benchmark for <i>fair value</i>	from ("start date")	to ("end date")	interest
£71,460	for half the investment: FTSE WMA Stock Market Income Total Return Index; for the other half: average rate from fixed rate bonds	date of investment	date of this decision	8% per year simple from the date of this decision to date of settlement

Compensation is complicated where the fund is illiquid (meaning it can't be readily sold on the open market). In this case the *actual value* should be assumed to be nil in the calculation, and:

- FA must take ownership of the Propertybourse investment by paying a commercial value acceptable to the pension provider. The value FA pays for this should be deducted from the total loss including interest, before compensation is paid. FA will then be entitled to any payments from the fund in future.
- If Propertybourse or the pension provider won't allow FA to take ownership, it may ask Mr C to give an undertaking. He would agree to pay it the net equivalent of any amount (including compensation) he may receive from the fund in the future.
- If it wishes FA may also take an assignment of Mr C's rights to complain about the way the Propertybourse fund has been managed.

A sufficient payment should be made into Mr C's pension plan, allowing for any available tax relief and/or costs, to increase its value by the amount of the loss and the interest above.

Alternatively, if FA is unable to pay the total amount into Mr C's pension plan, it should pay that amount direct to him. If that case, the payment can be reduced to take into account income tax that would otherwise have been paid at Mr C's marginal rate of tax in retirement.

When using fixed rate bonds for part of the benchmark, FA should use the monthly average rate for 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 are applied to the investment on an annually compounded basis.

I've chosen this overall benchmark because I think Mr C wanted capital growth with a small risk to his capital. The average rate for fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital. Whereas the WMA 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 think Mr C's risk profile was in between these scenarios. So, the 50/50 combination would reasonably put him into that position. It doesn't mean he would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker. Rather, I think this a reasonable compromise that broadly reflects the sort of return Mr C could have obtained from investments suited to his objectives and risk attitude.

my final decision

I uphold Mr C's complaint and require Financial Aims Limited to pay him the fair compensation set out above. It must set out the calculations to Mr C in a clear, simple format.

I also consider Financial Aims Limited has caused Mr C significant distress on realising that he'd lost half of his pension fund. Financial Aims Limited must pay Mr C £300 as compensation for the distress it caused.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr C to accept or reject my decision before 22 March 2016.

Gideon Moore
ombudsman