

## **complaint**

Mrs H is complaining about Sesame Limited because she says she received unsuitable advice from one of its appointed representatives, Mr R of Echo Financial Planning ("Echo FP"). She's raised the following issues:

- When she was looking to buy a property in the UK and needed a mortgage in 2006, Mr R advised her to put this in her daughter's name. The relationship with her daughter has since broken down and Mrs H took legal action to try and recover the property. She stopped this action because she says she could no longer afford it.
- In 2012 and 2013, she was advised to make unregulated investments into Highfield Developments. In the end, her money wasn't paid back when it should have been and she had to take legal action against Highfield.

## **background**

In 2006, Mrs H was living abroad and looking to purchase a property in the UK. She approached her adviser, Mr R, for assistance. He recommended the mortgage was taken in her daughter's name because she wouldn't qualify in her own right. Mrs H has provided a copy of a deed of trust that appears to confirm her daughter has no interest in the property.

Sadly, Mrs H's relationship with her daughter has since broken down. She started legal proceedings to recover the property, but says she had to stop this process because she couldn't afford to continue.

In 2012, Mrs H had a portfolio of investment funds with Cofunds. She cashed in most of her money and put £100,000 into Highfield Developments. This was an unregulated loan and Highfield, represented by Mr B, promised to return her money with interest within six months.

In 2013, Mrs H cashed the remainder of her Cofunds portfolio and invested a further £6,000 into Highfield.

In the end, Mrs H received her money much later than the envisaged six months and after she'd taken court action.

I previously issued my provisional decision explaining why I thought parts of this complaint should be upheld. An extract is attached.

Sesame didn't accept my provisional decision and made the following key points:

- Mrs H was an experienced investor and was aware of the risks of investing in equities and property. In respect of the Highfield investments, she carried out her own research and was persistent that she wanted this type of investment.
- It accepts the adviser was involved in the encashment of Mrs H's Cofunds investments. But that was because Cofunds' process required him to be involved. This doesn't constitute advice. He was merely following Mrs H's instructions.
- There was no incentive for the adviser to recommend Mrs H do what she did. He didn't receive payment from Highfield, whereas he would have received ongoing commission from Cofunds if those investments had been retained.

- Mrs H hasn't been disadvantaged by the Highfield investments. The amount eventually returned to her is worth more than her Cofunds investments would have been if they'd been retained.
- It doesn't understand why I'm proposing some of Mrs H's legal fees are repaid or some of her other costs.
- It doesn't dispute some award is due for Mrs H's trouble and upset, but thinks the £750 I've proposed is extremely high. In particular, it says a significant part of the trouble she's had results from issues associated with her property dispute that I've said we won't be considering.

Mrs H also didn't accept my provisional decision and made the following key points:

- She wasn't told the Highfield investment was unregulated or exactly what her money was being used for. If she had been, she wouldn't have agreed to invest.
- The adviser knew she needed the return from the Highfield investments to fund her legal costs in the property dispute with her daughter. If she'd been able to afford to see those proceedings through, she would have received a significant award.
- Her problems stem from the adviser's recommendation in 2006 to put the mortgage in her daughter's name. He later admitted it hadn't been necessary to do that.

### **my findings**

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having reconsidered the case, including the responses to my provisional decision, my conclusions haven't changed.

#### *In response to Sesame's additional points*

It seems unlikely the adviser didn't benefit from Mrs H's Highfield investments in some way. But whether he did or not, I think the evidence shows he advised her to make them. In particular, I note his email of December 2014 specifically says he "*suggested*" that approach.

Mrs H may or may not have been an experienced investor, but that doesn't negate the adviser's responsibility to make suitable recommendations. For the reasons I've explained, and which Sesame doesn't appear to be disputing, I don't think the Highfield investments were suitable for Mrs H.

Sesame seems to be suggesting Mrs H was something of an insistent customer, but I've seen no documentation from the time she invested to support that. I've also seen nothing to show the adviser explained why the investment might not be suitable, suggested any alternatives that might have been more appropriate for her needs, or did anything else to make sure she was making a fully informed decision.

Whether or not the adviser actually recommended Mrs H cash her Cofunds investments is not necessarily relevant here. Simply making arrangements for another person to buy or sell or subscribe for a security or relevant investment is a regulated activity. Whatever Cofunds' procedures were, the evidence shows the adviser facilitated the encashments. I think the

evidence also shows the encashments were done for the purpose of funding the Highfield investments. As such, the adviser's involvement in the Highfield investments was ancillary to the encashments and Sesame, as principal, is responsible for any losses arising from the entire transaction.

The aim of any compensation I award is to put Mrs H back into the position she'd be in but for the inappropriate actions of the adviser for which Sesame is responsible.

I note Sesame says Mrs H ultimately received more from the Highfield investments than she would have done if she'd left her money with Cofunds. But I don't think that's a relevant consideration in this case. As I've said, I think the evidence shows Mrs H wasn't happy with the returns she was receiving on her Cofunds investments and would have done something else with her money even if she didn't invest in Highfield. I've set out what I think is a reasonable benchmark for assessing what she might have got elsewhere and that's the approach to be used in assessing whether she's lost out.

In terms of the court costs Mrs H incurred in trying to recover money from Highfield, these are costs she wouldn't have incurred if she hadn't been advised to make the investments in the first place. So I think it's appropriate that Sesame should have to refund these as part of the process of putting her back in the correct financial position.

Mrs H also mentioned other costs, including travel and hotels, associated with her legal proceedings, although it seems these mainly relate to the case involving the property for which I'm not making any award. But if she did incur any additional and otherwise unnecessary costs purely in relation to the Highfield proceedings, Sesame should cover these in full as well. Again these are costs she wouldn't have incurred if she hadn't been advised to make the Highfield investments.

I agree with Sesame that Mrs H should provide satisfactory evidence of all costs being claimed before any payment is made. This would include evidence of each payment, what that cost actually covered, and that it was associated with the Highfield proceedings rather than any other actions she was involved in. I hope Sesame and Mrs H will be able to resolve these issues between them, but they can contact us in the event of any dispute.

In terms of the award for Mrs H's trouble and upset, I appreciate the property dispute with her daughter would have been the cause of a significant part of the problems she's had. But even in isolation, I think the unsuitable advice to make an unregulated investment and the subsequent problems she had in recovering her money would have caused Mrs H substantial trouble and upset. And the impact of this would have been particularly felt given what else was going on in her life at the time. Taking everything into account, I still think £750 is appropriate in this case.

*In response to Mrs H's additional points*

I agree the advice to make the Highfield investments wasn't appropriate and that's the reason I'm upholding this complaint. I understand why Mrs H feels the different aspects of her complaint are closely related, but there are good reasons why I don't think it's appropriate for me to comment on the mortgage and property parts of her complaint. In short, I don't think our process will enable me to properly investigate what's gone on or reach a reasonable conclusion about who's responsible.

I also don't think it's possible for me to say with any certainty that it was solely because the Highfield investments didn't do what was expected that meant Mrs H couldn't pursue her legal proceedings in the property dispute. Even if I could, I certainly don't think I'm in a position to say what the court would ultimately have decided if the case hadn't been withdrawn. In saying that, I have taken account of Mrs H's views about what the outcome would have been.

### **my final decision**

My final decision is that I uphold parts of this complaint. I'm dismissing Mrs H's complaint about the arrangement of her mortgage in 2006 without considering the merits. But I'm upholding her complaint about the Highfield investments.

If Mrs H accepts my decision, Sesame Limited must pay her compensation calculated using the method set out in my provisional decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 1 September 2017.

Jim Biles  
**ombudsman**

## **extract from provisional decision:**

### **my provisional findings**

Both parties have made detailed submissions in this case and I haven't tried to address every point raised in this decision. Instead, I've concentrated on what I think are the key issues. I've dealt with the property/mortgage and investment aspects of the complaint separately, but I do appreciate Mrs H's view that they are closely linked.

Throughout my decision, I've referred to the rules I must follow in assessing all aspects of this complaint. These are set out in the Dispute Resolution (DISP) rules, published as part of the Financial Conduct Authority's (FCA's) Handbook.

### ***the property and mortgage arranged in 2006***

This is a difficult situation. Our rules say we can only normally consider a complaint from a *customer* of the financial services business involved. Mrs H wasn't technically a customer in the mortgage arrangement as it was set up in her daughter's name and this does impact on her ability to complain. Although it is arguable she could be considered a customer at least during her discussions with the adviser before the mortgage was arranged.

Even if it could be shown Mrs H was a customer for any part of the mortgage arrangement, making her an eligible complainant, and that regulated activities were carried out during that time, I also need to consider whether this aspect of the complaint is something we should look at. DISP 3.3.4 permits me to dismiss a complaint without considering its merits and sets out the circumstances where this might be appropriate, including where:

*dealing with such a type of complaint would otherwise seriously impair the effective operation of the Financial Ombudsman Service.*

The rules give examples of complaints that could seriously impair our operation and these include those where:

*it would be more suitable for the complaint to be dealt with by a court.*

The ombudsman service is designed to be an informal alternative to court proceedings. Our process doesn't work in the same way as that of a court and we don't have the same powers. For example, we're not able to cross-examine parties to the dispute and we're not able to compel third parties to give evidence.

In considering the circumstances of the dispute involving the property, I'm conscious the actions of people other than the adviser and Mrs H are very likely to be very important to the outcome. For example, it wouldn't necessarily be unreasonable to conclude all or part of any loss is due to the actions of Mrs H's daughter following the breakdown of their relationship, rather than the actions of the adviser that proposed the arrangement in the first place. Without the power to compel Mrs H's daughter to give evidence or test the evidence by cross-examination, I don't think we could properly investigate what's gone on or reach a reasonable conclusion about who is responsible for the situation Mrs H now finds herself in.

It's for this reason I don't think this aspect of Mrs H's complaint is something we should look at. Even if it could be shown some part of the process of arranging the mortgage falls within our jurisdiction, I think I would have to conclude this aspect of the complaint should be dismissed without considering of its merits on the grounds it's better dealt with in court.

***the Highfield investments – 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 Mrs H 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?

***the Highfield investments – were the acts done in carrying out a regulated activity, or an ancillary activity carried out in connection with a regulated activity?***

I think the available evidence shows Mrs H's investments were funded following the sale of units in her existing Cofunds portfolio. In 2012, Mrs H requested the sale of units worth £100,000 on 31 May. By June 12, transfers totalling £100,000 to Highfield began and Mr B confirmed receipt of the full amount a few days later. In 2013, the remaining units Mrs H held with Cofunds, valued at around £7,000, were sold on 24 May. Very shortly after, she transferred £6,000 to Highfield.

I also think email correspondence between Mrs H and Mr R show it was always her intention to use the proceeds from Cofunds to fund the Highfield investment and that Mr R knew about, and was involved in and facilitated, all aspects of this process. In an email dated 10 December 2014, he said:

*The background to the matter is that you asked me to suggest a suitable investment for you which was likely to yield a greater return than the 3%/4% p.a. that you were receiving from Co-Funds Limited.*

*I did as I was asked and I suggested that you invest your money in Highfield Developments (Swanage) Limited.*

*I made this suggestion as a result of positive feedback from other previous investors and based upon the track record of Highfield Developments Group.*

*It is unfortunate but the project at Swanage has not been well managed and that the expected returns will not be realised.*

*I have tried my best to act as linkman between yourself and the company so that you are provided with information about the project and the company's intentions as its creditors.*

From 2012, Cofunds has also provided a copy of Mrs H's hand-written withdrawal instruction along with a covering note showing this was forwarded by Echo FP. The note appears to have been signed by Mr R.

From 2013, Mrs H has provided an email from Mr R dated 23 May in which he said:

*I will arrange for monies to be withdrawn and will send on letter for your signature and onward to Cofunds.*

The following day, Mr R emailed Mrs H again and said:

*. . . you need to post direct to Cofunds please, sorry they will only accept originals for security purposes.*

Advising on the merits of buying or selling a particular investment which is a security or a relevant investment, and making arrangements for another person to buy or sell or subscribe for a security or relevant investment are both regulated activities. I'm satisfied Mrs H's Cofunds investments were relevant investments. And that by advising Mrs H on the sale of these in 2012 and 2013 and/or arranging those sales, the adviser was carrying out regulated activities. The subsequent investments with Highfield, into which it was always intended (and Mr R knew) the proceeds would go, were ancillary to this regulated activity and therefore covered by our compulsory jurisdiction.

***the Highfield investments – were those acts the acts of the principal firm, Sesame?***

On the subject of appointed representatives, section 39 of the Financial Services and Markets Act (FSMA) says:

*The principal of an appointed representative 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**.*

The words I've emphasised here are particularly important. This means a principal (Sesame in this case) can appoint a representative (Echo FP) but limit the scope of the regulated activities that representative can carry out and that it will be responsible for.

Sesame has provided a copy of its agency agreement with Echo FP. Schedule 3 outlines the activities Echo is permitted to be involved in. These include *"investment advice, with no other permitted activity"* and *"advising on or arranging deals in units in collective investment schemes (regulated or unregulated) and shares in investment trust savings schemes, as an independent adviser"*.

I'm satisfied advising Mrs H on and/or arranging the sale of her Cofunds investments are included in the activities Echo FP and its advisers were permitted by Sesame to carry out. And that Sesame, as principal, is therefore responsible for this regulated activity and other activities carried out in connection with it, including the advice to invest in Highfield.

***the Highfield investments – conclusions on jurisdiction***

For the reasons I've explained above, I'm satisfied the advice Mrs H is complaining about (to invest with Highfield) was ancillary to and carried out in connection with a regulated activity (the sale of her Cofunds investments). I'm also satisfied Sesame, as principal, accepted responsibility for that regulated activity by its representative. As a result, this aspect of Mrs H's complaint falls within our compulsory jurisdiction.

From the information available to me, it appears Sesame is ultimately responsible for both investments into Highfield in 2012 and 2013. According to the FCA register, Echo FP was a representative of Sesame until 2014. And Mr R worked for Echo FP, and was authorised to give advice, throughout that time. Sesame should take this opportunity to correct me if I've misunderstood the situation.

In its defence, Sesame has referred to a previous assessment on this issue by one of our adjudicators on another case. Clearly we must consider each case on its own merits, based on its own particular circumstances and the precise activities and agreements involved. But I have reviewed the adjudicator's conclusions on the other case and I note there's no mention of the investment being funded by cashing another investment. I think that's a crucial difference given it's the advice to cash in Mrs H's Cofunds investments that I'm saying constitutes the regulated activity here.

***the Highfield investments – suitability***

In giving advice, Mr R had a responsibility to make sure any recommendation given to Mrs H was suitable for her circumstances and requirements

Mrs H's money was previously held in regulated investments within a portfolio operated by a large investment management company. She cashed these investments to fund a high-risk, unregulated arrangement with Highfield. The nature of the investments she entered into and the lack of protection available significantly increased the risk to her capital. I've seen nothing to indicate Mr R discussed these additional risks or took steps to assess Mrs H's attitude to risk and satisfy himself investments of this nature was suitable for her. Or that Mrs H would have proceeded with the investments if she'd fully understood the risks involved.

With these points in mind, I think I can only reasonably conclude the Highfield investments were unsuitable for Mrs H. I think it's unlikely Sesame would dispute this aspect of my decision given its comments in a letter to Mrs H dated 29 January 2016, in which it said:

*Due to the very nature of these investments, Sesame Ltd does not give permission to the member adviser firms to sell these types of contracts due to the high risk unregulated nature of the investment.*

***the Highfield investments – putting things right***

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

I'm not proposing compensation be paid according to the returns promised in the agreement with Highfield. That's because I think Mrs H would have invested differently with suitable advice. It's not possible to say *precisely* what she would have done, but I'm satisfied what I've set out below is fair and reasonable given her circumstances and objectives.

To compensate Mrs H fairly, Sesame should compare the performance of Mrs H'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. Income tax may be payable on any interest.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Highfield Developments	ended	FTSE All UK Property Index	date of investment	the date of the final payment to Mrs H from Highfield	8% simple per year on any loss from the end date to the date of settlement

The *actual value* means the actual amount paid from the investment at the end date. The *fair value* is what the investment would have been worth at the end date had it produced a return using the benchmark.

Any additional sum Mrs H paid into the Highfield investment, including the £6,000 paid in 2013, should be added to the *fair value* calculation at the point it was actually paid in.

Any withdrawal, income or other payment resulting from the Highfield 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.

I've chosen this method of compensation because:



- The evidence suggests Mrs H wasn't happy with the returns on her Cofunds investments and was looking to move her money into something else. Mr R says she was looking for a property-based investment. And in her recent correspondence, Mrs H says she would have used her money to purchase a property to rent out. So it seems likely any return on her money, but for the advice to invest in Highfield, would have been somehow based on the performance of the property sector.
- The FTSE All UK Property Index is designed to track the UK property market and would be a fair measure for someone wanting to invest in this sector.
- The additional interest is for being deprived of the use of any compensation money since the end date.

From the information provided, it seems Mrs H has received all she is going to from the Highfield investment and that no more payments will be made. But if Sesame thinks I may be wrong about that, it should be entitled to require Mrs H to sign over her rights to any and all future payments from Highfield as part of this settlement. I would expect Mrs H to agree to this. It would be for Sesame to pay any costs associated with drawing up an appropriate agreement.

### ***the Highfield investments – additional compensation***

I'm conscious Mrs H had to take legal action to try and recover the money she was due from the Highfield investments because the terms of the original arrangement weren't honoured. If she hadn't been advised to make these investments, she wouldn't have had to incur those costs and I think it's reasonable to require Sesame to cover them.

So, I think Sesame should pay additional compensation equal to the court costs I understand Mrs H had to pay. According to an email from her solicitor to our investigator, Mrs H didn't incur any other costs as her legal fees were paid from another source. But if that's not correct, Sesame should pay any other legal costs Mrs H incurred in pursuing this dispute. Mrs H would need to provide satisfactory evidence of these costs.

I want to make it clear this award only covers the costs associated with the legal proceedings in which Mrs H was trying to recover money due from her Highfield investments. It doesn't include costs associated with any other legal proceedings, including those involving her daughter and the property purchased in 2006.

Mrs H has also mentioned other costs, including travel and hotels, associated with her legal proceedings, although it seems these mainly relates to the case involving the property for which I'm not making any award. But if Mrs H did incur any additional and otherwise unnecessary costs purely in relation to the Highfield proceedings, I think Sesame should cover these in full as well. Again, Mrs H would need to provide satisfactory evidence of these costs.

When reimbursing Mrs H's court costs and any other costs associated with the Highfield proceedings, Sesame should add simple interest at 8% per year from the date the cost was incurred to the date of settlement. This is to compensate Mrs H for not having access to this money.

Finally, I think it's clear Mrs H has been through an extremely difficult time in recent years. And that the problems she's experienced because of the unsuitable Highfield investments have caused her additional trouble and upset at a time when she least needed it. The amount to award a consumer for their trouble and upset can be difficult to assess. But in this case, I think a substantial payment is warranted. I currently propose to tell Sesame to pay Mrs H additional compensation of £750, which I think is fair in all the circumstances of this case.

***other issues***

I've noted Mrs H's comments about the reasons she stopped legal proceedings involving the property and I agree that's a very unfortunate situation. But I don't think it automatically follows that Sesame is liable for any losses she incurred because of this.

Even if it could be shown proceedings were only stopped because the unsuitable Highfield investments meant she couldn't afford to continue, I'd need to be satisfied the court action would have gone on to be successful before making an award. I appreciate Mrs H is confident she would have eventually won in court, but I don't think that's enough on its own.

I appreciate there are links between the different aspects of Mrs H's complaint. But at this stage, I don't think there's enough evidence for me to say Sesame should be held liable for other losses she feels she's suffered beyond those I'm already proposing to compensate her for.

**my provisional decision**

My provisional decision is that I don't currently think we should look at Mrs H's complaint about the arrangement of her mortgage in 2006. But I do intend to uphold her complaint about the Highfield investments. I currently think Sesame Limited should pay Mrs H compensation calculated using the method set out above.

Unless any of the responses received change my view, it's likely my next correspondence will be my final decision – which will be binding on Sesame if Mrs H accepts it. It's therefore important the parties provide any further comments they wish to make on all aspects of the complaint, including jurisdiction, merits and the proposed method of calculating compensation, in response to my provisional decision.