

complaint

Mrs H complains she was given unsuitable investment advice by a financial adviser working for an appointed representative of Personal Touch Financial Services Ltd ("PTFS").

background

The background to the complaint was set out in my provisional decision of December 2017, an excerpt of which is attached and forms part of this final decision.

In it, I explained why I was satisfied that PTFS was responsible for the investment advice Mrs H received in 2012. I also explained why I thought the advice – to invest £40,000 into a 'Merco Bond' – carried too much risk and so was unsuitable for Mrs H. I said PTFS should therefore compensate her by way of a comparison with a more suitable benchmark.

Mrs H's representative responded to say that Mrs H accepted my view. PTFS requested an extension of the deadline to respond but didn't then provide any further submissions.

my findings

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

Mrs H has indicated her satisfaction with my provisional decision and PTFS hasn't provided any additional information or argument. So I see no reason to depart from my initial conclusions, which I continue to believe are fair and reasonable in all the circumstances. I remain of the view that the complaint should be upheld and compensation paid to Mrs H.

fair compensation

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

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

what should PTFS do?

To compensate Mrs H fairly, PTFS must:

- 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.

PTFS should also pay interest as set out below.

- Pay Mrs H £300 for the trouble, upset and worry caused by the mis-sale.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Merco Bond	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 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.

If at the end date the investment is illiquid (meaning it could not be readily sold on the open market), it may be difficult to work out what the *actual value* is. In such a case the *actual value* should be assumed to be zero. This is provided Mrs H agrees to PTFS taking ownership of the investment, if it wishes to. If it is not possible for PTFS to take ownership, then it may request an undertaking from Mrs H that she repays to PTFS any amount she may receive from the investment in 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, PTFS 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 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 PTFS 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:

- Mrs H wanted capital growth with a small risk to her 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 her 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 Mrs H's risk profile was in between, in the sense that she was prepared to take a small level of risk to attain her investment objectives. So, the 50/50 combination would reasonably put Mrs H into that position. It does not mean that Mrs H would have invested 50% of her money in a fixed rate bond and 50% in some kind of index tracker fund. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mrs H could have obtained from investments suited to her objective and risk attitude.

my final decision

For the reasons given in the attached provisional decision, my final decision is that I uphold the complaint. I direct Personal Touch Financial Services Ltd to pay compensation to Mrs H as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 15 February 2018.

James Harris
ombudsman

EXCERPT OF PROVISIONAL DECISION

background

In March 2012, following discussions with Mr L, Mrs H invested £41,000 into a 'Merco Bond'. The investment was intended to pay annual interest of 15% with the original capital returned in full at the end of a three year term, in April 2015.

When the return of capital failed to materialise Mrs H began to question the advice. Her representative complained on her behalf, first to Mr L directly and then to PTFS.

PTFS was of the view that neither it nor FSS were responsible for the advice, or the subsequent problems Mrs H had experienced, so we couldn't look at the complaint. In brief, it felt the advice had been conducted by the adviser outside of his association with FSS and/or PTFS. It highlighted that both companies had been entirely unaware of Mrs H's investment and had received no commission or other remuneration in relation to it.

The complaint was then referred to this service. Our adjudicator disagreed with PTFS' view and explained why he thought we *could* consider the complaint.

In brief, he considered two questions in order to determine whether the complaint was within our jurisdiction. Firstly, were the acts Mrs H complained about done in the carrying on of a regulated activity, or an ancillary activity carried on in connection with a regulated activity? And secondly, were those acts ones for which PTFS was responsible?

The adjudicator noted that Mr L appeared to have been involved in advising Mrs H to surrender an existing Zurich investment in order to generate the funds then invested in the Merco Bond. He was of the view that both these acts (disinvestment and investment) were regulated activities. So it seemed apparent that the acts complained about were done in the carrying on of a regulated activity.

Turning then to the second question, concerning PTFS' potential responsibility, the adjudicator highlighted Section 39(3) of the Financial Services and Markets Act 2000 (FSMA), which 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 (i.e. the principal) has accepted responsibility."

The adjudicator noted that PTFS' agreement with FSS did place some limitations on what it accepted responsibility for – limitations that may have meant that PTFS' authorisation didn't extend to a recommendation of the Merco Bond in isolation. For instance, if the Merco Bond was an unregulated collective Investment scheme (UCIS) – which the adjudicator thought it most likely was - it would've been excluded from the scope of PTFS' authorisation.

But the agreement didn't place any such limitations in respect of advice to *surrender* investments. So, as the adjudicator felt the surrender of Mrs H's Zurich bond was intrinsically linked to the recommendation of the Merco Bond, in his view PTFS had accepted responsibility for the advice as a whole.

Having found the complaint to be within our jurisdiction the adjudicator went on to consider its merits. He looked at the suitability of the advice and said:

- Mrs H was an inexperienced investor having previously held only the Zurich investment bond.
- That bond was invested in a low risk fund featuring a guarantee that its value wouldn't fall more than 20% below its highest price. So Mrs H's only previous experience was of low risk investments.
- The advisor had a responsibility to make sure the investment matched Mrs H's risk profile. Mrs H was, as noted, an inexperienced investor who was very close to retirement.

- The Merco Bond invested in agricultural land in Uruguay intended to be used for the production of crops. The high risks associated with this type of investment weren't suitable for someone committing such a high proportion of their savings close to their retirement.

The adjudicator felt that Mrs H should be compensated by way of a comparison with the return available from fixed rate bonds.

PTFS responded in disagreement with the adjudicator's view about our jurisdiction. It didn't accept that the complaint was one we could look at. It said:

- It didn't consider Mr L was representing or purporting to represent FSS or PTFS in his dealings with Mrs H.
- There was no written advice to surrender the Zurich bond. None of the usual documentation associated with advising on a surrender had been completed.
- Until recently neither FSS nor PTFS had any knowledge of Mrs H's Zurich bond or of Mr L's potential involvement in the Merco bond.
- Poor performance meant it seemed likely Mrs H had formed her own view to surrender the Zurich bond.
- Had Mrs H decided to invest her bond proceeds into another unregulated investment, such as commercial property, and then experienced problems with falling property values and/or accessing her money, would it be reasonable and appropriate to apportion responsibility to the business which recommended the surrender of the bond?
- The one document associated with the advice that featured FSS' name was not, as the adjudicator had suggested, the Merco Bond application form. Rather it was a generic 'CV1' confirmation of identity form, which Mr L shouldn't have used.
- In response to the complaint Mr L had confirmed in a text message to Mrs H's representative that he had been acting in a personal capacity rather than on behalf of his 'financial advice firm'.
- Neither FSS nor PTFS had benefitted financially from the disinvestment from the Zurich bond or the investment in the Merco Bond.
- It seemed Mr L may have in fact been acting as an introducer for another business. His legal representatives confirmed this and also that he was paid a commission for the introduction.
- In all the documentation supplied by Mrs H's representative there was only one reference to PTFS – in the final response letter – and no references to FSS. There was no evidence of Mr L confirming his status as working for an appointed representative of PTFS.

In summary, PTFS was of the view that neither it nor FSS was responsible for the advice as Mr L had acted on his own behalf. So Mrs H's complaint wasn't one that we could look at.

PTFS made no comments in respect of the merits of the complaint and the adjudicator's finding that it should be upheld on the grounds of unsuitability.

As no agreement could be reached the matter's been referred to me to review.

my provisional findings

I've considered all the information provided by both parties to decide whether this complaint is one we can consider. Having done so, I think we *can* consider it and I've explained why below. I've then also gone on to consider all the available evidence and arguments to decide the merits of the complaint – what's fair and reasonable in all the circumstances.

jurisdiction

1. Were the acts that Mrs H has complained about done in the carrying on of a regulated activity, or an ancillary activity carried on in connection with a regulated activity?

Regulated activities are specified in Part II of FSMA (Regulated Activities) Order 2001 ("RAO"). Included in this list are advising on the merits of buying or selling a particular investment which is a security or a relevant investment (article 53 RAO), and making arrangement for another person to buy or sell or subscribe for a security or relevant investment (article 25 RAO).

There's very little documentary evidence associated with Mrs H's investment. But her representative has said that she approached Mr L 'in his professional capacity' to obtain advice on how she might improve upon the disappointing performance of her Zurich bond, which represented the majority of her money.

There doesn't actually seem to be any dispute that Mr L was involved in the subsequent surrender of the bond. He has acknowledged as much in his initial responses to the complaint. It seems that prompted by Mrs H he reviewed the investment and agreed with her concerns. And it was only after this review that the bond was actually surrendered.

So while Mrs H may already have been giving consideration to making changes I think it's more likely than not that it was Mr L's view – his advice, given as far as Mrs H was concerned 'in his professional capacity' – that ultimately prompted her to disinvest from the Zurich Bond.

I note that Mr L has said in his response to the complaint that because Mrs H declined a full review of her finances he told her wouldn't be able to act as her financial adviser. But he then goes on to describe the discussions with Mrs H about her investment objectives and understanding of risk. On balance I think it's more likely than not that Mrs H would've assumed that she was being 'advised' by Mr L in his professional capacity.

As noted, there's some uncertainty as to whether the Merco Bond was an unregulated collective investment scheme (UCIS). In my view its characteristics are more akin to a corporate bond or debenture. But in any event, I'm satisfied that it, along with the Zurich bond, was a security or a relevant investment. So in advising on or making arrangements to buy and sell Mr L was carrying on a regulated activity or an ancillary activity carried on in connection with a regulated activity.

But were those acts ones for which PTFS was responsible?

PTFS has said that Mr L wasn't acting for FSS when he dealt with Mrs H; rather, he was acting in his own right, as a private individual. To an extent, this view is supported by Mr L's own submissions made in response to the complaint and as noted above. And PTFS has pointed out that neither it nor FSS had any knowledge of Mrs H's investments – it saw no paperwork related to the matter and received no commission, so it can't be held responsible for his actions.

But I think that when Mrs H approached Mr L for advice 'in his professional capacity' she would've reasonably assumed that he would be doing so as an adviser employed by FSS. I appreciate that Mr L has said in response to the complaint that he made clear to Mrs H this wasn't the case.

But there's no evidence from the time of the advice to support this distinction being made clear to Mrs H. Conversely, the very limited documentation indicates that Mr L believed he was acting for FSS. Why else when completing the Confirmation of Verification of Identity form for the Merco Bond would he have opted to write '*Financial Services Scotland Ltd*' where the form asked for the '*details of introducing firm (or sole trader)*'? Surely if he had made clear to Mrs H that the advice was being provided as a private individual, not as a financial adviser, this was the one place where this status could've been confirmed.

So, if I'm satisfied that a regulated activity took place and it was carried out by FFS, can I further conclude by way of the appointed representative agreement between the two parties that PTFS accepted responsibility for that activity?

PTFS hasn't been able to provide a copy of the appointed representative agreement that was in place at the time of the advice. But the current version shows that restrictions are placed on the advising and arranging a number of different investments.

Because, as noted, it's not entirely clear what category of investment the Merco Bond fell into, it's difficult to determine whether advising on it fell within the scope of the PTFS' authorisation. If, for instance, it was a UCIS, it wouldn't have been within the scope of authorisation and PTFS wouldn't have accepted responsibility for advice given about it.

But in any event, regardless of whether the agreement did place any limitation of the purchase of the Merco bond, there was no such limitation placed on advising on the surrender of the Zurich bond.

As noted by the adjudicator, Section 39(3) of the 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 (i.e. the principal) has accepted responsibility."

So, if PTFS effectively accepted responsibility for the disinvestment of Mrs H's Zurich bond, which I think it did as there were no restrictions on the appointed representative in respect of advice on surrenders, it follows that it accepted responsibility for the advice *as a whole* as the advice to invest in the Merco Bond was inextricably linked – ancillary to – the surrender of the Zurich bond.

It's also worth noting that in *Martin v Britannia Life [2000]* the High Court considered that the concept of investment advice will include all investment advice given to a client with a view to or in connection with the purchase, sale or surrender of an investment. This will include advice as to any associated or ancillary transaction notwithstanding that such transactions may not fall within the definition of investment business for the purpose of the Financial Services Act 1986.

In my opinion *Martin* supports the view I've taken in determining jurisdiction here. Namely, that the regulated activity of advising on investments includes both the advice to surrender a regulated investment and advice on any ancillary transaction to invest the proceeds of the surrender.

This is also reflected in DISP 2.3.1R which provides that the Ombudsman can consider a complaint under its compulsory jurisdiction if it relates to an act or omission by a firm in carrying on regulated activities or any ancillary activities, including advice, carried on by the firm in connection with them.

I acknowledge that there was a gap of two months before Mrs H made her investment into the Merco bond. But I don't think this represents such a delay that the two events can be said to be unrelated, particularly given that the Merco investment was for the sum of £41,000, only just short of the amount generated by the disinvestment. I'm satisfied that it was the proceeds of the Zurich surrender that Mrs H invested in the Merco bond.

In respect of Mr L potentially having acted as an introducer to Mrs H on behalf of another business I've seen no evidence of this beyond PTFS' comments in its response to the adjudicator's view. While his legal representatives may have confirmed this to PTFS, in light of the evidence these comments do not persuade me that Mr L wasn't acting as adviser to Mrs H.

In summary, having carefully considered all the available information, I conclude that the acts of the adviser that Mrs H complains about were done in the adviser's capacity as an employee of the appointed representative of PTFS and come within the scope of the business TFS accepted responsibility for. It is on that basis PTFS is responsible and the complaint is within the jurisdiction of this service.

merits

As I've decided Mrs H's complaint is within our jurisdiction I've gone on to look at the suitability of the advice.

As noted, there's very little documentation that can be referred to in determining whether the advice was suitable. No fact find was completed and although there were apparently lengthy discussions about risk, no specific categorisation of Mrs H's attitude was recorded.

She was nearly 70 at the time of the advice and semi-retired, working part-time and planning to retire fully in the near future. The investment in the Merco Bond represented the majority of her money and it seems her only previous investment experience was with the Zurich bond, which was invested in a low risk 'protected' fund that guaranteed the price wouldn't fall more than 20% below its highest price.

I accept Mrs H may have been prepared to increase the level of risk she was prepared to take in order to try and recoup some of the losses she'd experienced with the Zurich bond. But the adviser nevertheless had a responsibility to ensure that any recommended investment was consistent with Mrs H's circumstances.

The Merco Bond was an unusual, sophisticated investment with no track record. It funded the purchase of agricultural land in Uruguay for soy bean production. I don't think the high level of risk associated with this type of investment was likely to have been suitable for someone investing such a high proportion of their savings so close to their retirement.

This being so, I am of the view that Mrs H was misadvised and agree that PTFS should compensate her, although in a slightly different way to that recommended by the adjudicator. His recommended form of redress used our 'no risk' benchmark based on the return available from fixed rate bonds. But I think Mrs H, in looking to make good on the losses she'd experienced with her Zurich bond, would have been prepared to accept a limited degree of risk (which I think is probably what she was led to believe she was taking with the Merco bond). As such, I think the redress due to her should be based on our 'low risk' benchmark, which combines the returns from fixed rate bonds with the return from a stock market index.