

complaint

Mr P's representatives complain that Sebastian & St James International Financial Advisers Limited ("Sebastian") has failed to exercise reasonable skill and care in the performance of its duties, which has led to a significant reduction in the value of Mr P's pension.

background

In October 2011, Mr P met an IFA and was advised to transfer his pension funds into a self invested personal pension ("SIPP") with Standard Life and enter into income drawdown. As part of that initial advice, Mr P was advised to invest £20,000 in New Earth Solutions recycling fund and £20,000 in UK Secured Finance fund. Both funds were unregulated collective investment schemes ("UCIS"). This means that the funds weren't regulated by the Financial Conduct Authority.

In January 2013, there was a bulk novation of business from the original IFA to Sebastian.

Mr P's representatives complained to Sebastian & St James in 2016. They said that Mr P had invested over £105,000 in the plan up to that date, but it was worth only approximately £30,000. And they said it was an implied term of the retainer between Sebastian and Mr P that it would exercise reasonable skill and care in the performance of its duties pursuant to the retainer and/or that it owed a duty of care to Mr P.

Sebastian didn't respond to Mr P's complaint, and so it was referred to this service.

In response to our request for information, Sebastian said that it was only a servicing agent and that the plan hadn't been written by it. So it said the complaint shouldn't be recorded against it.

Our adjudicator felt that Mr P's complaint should be upheld. He said, in summary:

- He accepted that the original IFA gave Mr P the advice to transfer his existing pensions to Standard Life and about how the funds should be initially invested. But he felt it was clear that Sebastian wasn't just a servicing agent for Mr P's SIPP. In particular, Standard Life had provided evidence that Sebastian gave Mr P advice from at least August 2015;
- Having considered the evidence currently available (without the benefit of Sebastian's file, as Sebastian had failed to supply it), he felt it was reasonable to say that Sebastian was under a duty to give Mr P ongoing advice soon after January 2013. The original IFA was taking 1% trail commission, which is consistent with an agreement to provide ongoing advice. And the advice letter from the original IFA said that an annual review would be offered. But the novation letter from Sebastian said that the existing commission terms would be transferred and there would be an ongoing service in exchange for the payment of commission. So the adjudicator felt that this meant that Sebastian was also obliged to provide annual reviews for Mr P;
- He appreciated that, following the novation of business, Sebastian would have needed some time before it was in a position to arrange a review with Mr P. But he felt a review could reasonably have been arranged by the start of April 2013;
- On carrying out the review, Sebastian would have become aware that Mr P had significant holdings in two funds that were UCIS. The review would also have made Sebastian aware that Mr P was near to state pension age. This meant he had a relatively short amount of time to make up losses to his retirement savings and might

need to access the money soon. Even taking account of his other pension savings, the £40,000 invested in the two UCIS represented a significant proportion of Mr P's retirement savings.

- On this basis, he felt Sebastian should have concluded that the holdings in the UCIS funds were unsuitable for Mr P and should have advised him to switch out of them. As Sebastian didn't carry out the review and didn't advise Mr P to switch, he felt it should pay him compensation for this. His understanding was that the funds were still liquid at the time, so Mr P could have switched away;
- He felt it was reasonable to allow a few weeks for the switches to have taken place following the review. So he felt that using a date of 1 May 2013 to calculate the compensation was reasonable;
- He felt that Mr P's other holdings were reasonably suitable for him, so he didn't think Sebastian should have advised Mr P to change these if it had carried out the review. And he felt that advice Sebastian gave Mr P in 2015 about a lump sum contribution was reasonable.

Sebastian doesn't agree with our adjudicator's view. It says that the advice to invest in the UCIS was given by the original IFA and that it can't be held liable for that advice.

my findings

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

Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in light of the available evidence and the wider circumstances.

It is unfortunate that Sebastian has chosen not to supply this service with its business file. In the circumstances, I have had to reach my decision on the basis of the information supplied by Mr P and Standard Life.

I agree that Sebastian wasn't responsible for the original advice to invest in the UCIS funds. But, having reviewed all the evidence available to me, I am persuaded, on balance, that Sebastian wasn't just the servicing agent for Mr P's SIPP. And I think it should have carried out a review of his investments following the novation of business, and it should have advised him to transfer out of the UCIS. I've reached this conclusion for the same reasons as the adjudicator. I'll explain why.

It is clear from the evidence I've seen that the original IFA was taking 1% trail commission. Its advice letter to Mr P said that it would offer an annual review. So I agree that the original IFA had agreed to provide annual reviews.

The original IFA and Sebastian then wrote to Standard Life in January 2013 to tell it that the business was being novated to Sebastian. The letter from Sebastian to Standard Life says:

"Please accept this letter as confirmation that Sebastian & St James International Advisors will firstly accept liability for any outstanding indemnity commission, the clients have been informed of the transfer of servicing company and that the existing commission terms are to be transferred and there will be an ongoing service in exchange for the payment of commission."

I agree with the adjudicator that, as Sebastian began receiving the commission that had been paid to the original IFA, then Sebastian was also obliged to provide annual reviews to Mr P. And I think it should have done so shortly after the transfer of business.

The original suitability report provided to Mr P in 2011 recorded his attitude to risk as medium/balanced. I have no reason to believe that his attitude would have changed by early 2013, after the business was transferred to Sebastian. But UCIS are generally high risk investments. I'm persuaded that, if Sebastian had carried out a review of Mr P's pension in early 2013, it should have advised him that those investments were not suitable for him, and advised him to transfer out. And I'm persuaded that Mr P would have followed this advice.

I agree with the adjudicator that it would have been reasonable for Sebastian to have carried out a review of Mr P's SIPP in April 2013, and for the switch to have been carried out by 1 May 2013. So I agree it is reasonable to use the valuations from the 2013 statement in calculating whether Mr P has suffered a loss.

For the avoidance of doubt, I should say that I also agree with the adjudicator that Mr P's other holdings were reasonably suitable for him, so I don't think Sebastian should have advised him to transfer them if it had carried out the review.

fair compensation

My aim is that Mr P should be put as closely as possible into the position he would probably now be in if he had been given suitable advice.

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

Sebastian should take the value of Mr P's holdings at 1 May 2013 as £24,882.75 for the New Earth Solutions Recycling Fund and £24,271 for the UK Secured Finance Fund.

what should Sebastian do?

To compensate Mr P fairly, Sebastian must:

- Compare the performance of each of Mr P's investments with that of the benchmark shown below.

A separate calculation should be carried out for each investment. The losses should be combined and the total is the amount of compensation payable.

Sebastian should add interest as set out below.

If there is a loss, Sebastian should pay into Mr P's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief.

Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

If Sebastian 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 actual or expected marginal rate of tax at his selected retirement age.

For example, if Mr P is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr P would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

- Pay to Mr P £400 for his trouble and upset.

Income tax may be payable on any interest paid. If Sebastian deducts income tax from the interest it should tell Mr P how much has been taken off. Sebastian should give Mr P a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
New Earth Solutions Recycling Fund	still exists	FTSE UK Private Investors Income Total Return Index	1 May 2013	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)
UK Secured Finance Fund	still exists	FTSE UK Private Investors Income Total Return Index	1 May 2013	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)

for each investment:

actual value

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

It may be difficult to find the *actual value* of the investment. So, the *actual value* should be assumed to be nil to arrive at fair compensation. Sebastian should take ownership of the

illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the compensation and the balance paid as I set out above.

If Sebastian is unable to purchase the investment, the *actual value* should be assumed to be nil for the purpose of calculation. Sebastian may require that Mr P provides an undertaking to pay Sebastian any amount he may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Sebastian will need to meet any costs in drawing up the undertaking.

fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Any withdrawal, income or other distribution 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 is a large number of regular payments, to keep calculations simpler, I'll accept if Sebastian totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

I've decided on this method of compensation because:

- Mr P wanted capital growth and was willing to accept some investment risk.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with 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 P's circumstances and risk attitude.

my final decision

My decision is that I uphold this complaint. I order Sebastian & St James International Financial Advisers Limited to pay Mr P fair compensation as set out above.

Sebastian & St James International Financial Advisers 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 20 April 2018.

Alison Cribbs
ombudsman