

complaint

Mr J complains that Matrix Wealth Consultancy Ltd, an appointed representative of Caerus Financial Limited, gave him unsuitable investment advice in early 2012.

background

I set out the background to this complaint, and my provisional findings, in the provisional decision I issued in February 2018 (copy attached).

Mr J responded and wished to make a number of points:

- He wished to make it clear it was Mr C who instigated the meetings to discuss his pension, and who told him the funds he was invested in were underperforming.
- He was advised to sell most of his existing funds and invest instead in the Axiom fund. This was described as a safe investment, which has proved to be anything but true.
- Caerus has painted him as being a sophisticated investor. But he'd previously mostly invested in cautious funds.
- The advice has proved to be a disaster. His SIPP provider has confirmed that his pension would now be worth over £300,000 more than it is today had he not been advised to invest in Axiom.
- When he made his original complaint he thought he should be compensated on the basis that he'd remained invested in the original funds. He was prepared to do this even though there was a risk the funds may have fallen in value, as he thought this was a fair way of calculating compensation.

Caerus made no further comments.

my findings

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

As Caerus has not provided any further comments, I have no reason to depart from the findings in my provisional decision in relation to its liability for the advice Mr J was given, nor from my view of the suitability of the advice. So I will focus on the further points Mr J has made.

I appreciate what Mr J has said about Mr C instigating the advice process. Because of the lack of documentary evidence, it's not possible for me to know how things came about. But in the end I don't think this is material to the outcome of the complaint.

On the whole, I think Mr J did want to reassess his pension provision. This is not least because there'd recently been a significant change in his personal circumstances, with his wife becoming gravely ill. It seems Mr J wanted to take a lower degree of risk with his pension at that time. As Mr J has noted, the Axiom fund was recommended to him as being a low risk investment. So I think this reflects the approach he wanted to take. I've explained in my provisional decision why I don't think the advice to invest in the fund was suitable.

In light of this, I've also considered Mr J's comments about the loss to his pension fund and how he should be compensated.

Mr J suggests the total loss to his pension fund comes to a little over £300,000. I've noted the information he's received from the SIPP provider. But it's not clear how this figure has been derived. And as I understand it, this includes the loss for the advice he was given in 2011 which I'm not considering as part of this complaint.

But I should make it clear I am only looking to compensate Mr J for the loss he's suffered from being advised to invest in the Axiom fund in 2012. He was advised to switch £50,000 from some existing funds to Axiom. So this is the investment sum that should be used to assess his loss.

When considering the question of compensation, the aim is generally to place the consumer back as closely as possible in the position they should have been in. I note Mr J suggests his pension should be put back into the funds he sold in order to invest in Axiom. But while I understand his view, I'm not convinced that's the right outcome.

As I've noted above, it seems Mr J wanted to reduce the degree of risk he was taking with his pension fund. And although he says he'd invested previously mostly in cautious funds, I don't agree. In saying this I'm mindful that among the funds he sold in 2012 were investments in China and natural resources.

On balance, I think the method of compensation I proposed in my provisional decision provides a fair and reasonable means of resolving the complaint. It assumes that instead of investing in the Axiom fund, the capital would have been invested in low risk areas, but without knowing precisely where it would have been invested.

fair compensation

My aim is that Mr J 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 J 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 J's circumstances and objectives when he invested.

what should Caerus do?

To compensate Mr J fairly, Caerus must:

- Compare the performance of Mr J's investment with that of the benchmark shown below. If the *fair value* is greater than the *actual value* there is a loss and compensation is payable. If the *actual value* is greater than the *fair value*, no compensation is payable.

Caerus should add interest as set out below.

If there is a loss, Caerus should pay into Mr J'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 Caerus is unable to pay the total amount into Mr J'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 J's actual or expected marginal rate of tax at his selected retirement age.

For example, if Mr J 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 J would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

- Pay Mr J £250 for the trouble and upset he's been caused as a result of the unsuitable advice.

Income tax may be payable on any interest paid. If Caerus deducts income tax from the interest it should tell Mr J how much has been taken off. Caerus should give Mr J 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
Axiom fund	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.

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. Caerus 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 Caerus is unable to purchase the investment, the *actual value* should be assumed to be nil for the purpose of calculation. Caerus may require that Mr J provides an undertaking to pay Caerus 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. Caerus 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.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Caerus 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 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 Caerus 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 J 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 made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.
- I consider that Mr J'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 J into that position. It does not mean that Mr J 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 J could have obtained from investments suited to his objective and risk attitude.

my final decision

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

Caerus Financial Limited should provide details of its calculation to Mr J in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 2 August 2018.

Doug Mansell
ombudsman

COPY PROVISIONAL DECISION

complaint

Mr J complains that Matrix Wealth Consultancy Ltd, an appointed representative of Caerus Financial Limited, gave him unsuitable investment advice in early 2012.

background

During 2011 Mr J had a series of meetings with Mr C of Matrix to discuss making changes to investments held in his self-invested personal pension (SIPP). He wanted to move away from a focus on property and reduce the overall level of risk. And as his wife was ill, he also wanted to make the arrangements easier to manage.

Mr C recommended selling a number of funds in the SIPP and placing the proceeds into the Axiom Legal Financing Fund; an unregulated collective investment scheme (UCIS). Mr J made an initial investment on this basis in October 2011. At that time, Mr C was an appointed representative of a different business. So that earlier advice is the subject of a separate complaint.

But in 2012 Mr J sold several more funds he held in his SIPP and made a second Axiom investment of £50,000. By this time Mr C, through Matrix Wealth Consultancy, had become an appointed representative of Caerus. So it's this second investment that's the subject of this complaint.

In October 2012, the Axiom fund was terminated and during the following month administrators were appointed. Mr J says it's at this point he realised that investment in the Axiom fund wasn't as low risk as he'd been led to believe by Mr C. So he complained about the advice.

Caerus didn't think Mr J's complaint was one that we could look at. It said that Matrix, as its appointed representative, wasn't permitted to give advice on UCIS such as the Axiom fund. And so Mr C had acted outside his agreement with Caerus. In short, it hadn't accepted responsibility for Matrix carrying on this type of business.

Our adjudicator thought that we couldn't look at Mr J's complaint, for broadly the same reasons as those given by Caerus.

Mr J didn't accept this, so the matter has 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, unlike the adjudicator, 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 – can we consider Mr J's complaint?

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

Specifically, the Financial Conduct Authority (FCA) Handbook DISP rules say at 2.3.1 that:

The Ombudsman can consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on one or more of the following activities:

(1) Regulated activities...

Or any ancillary activities, including advice, carried on by the firm in connection with them

And the guidance at DISP 2.3.3 says:

Complaints about acts or omissions include those in respect of activities for which the firm... is responsible (including business of any appointed representative or agent for which the firm... has accepted responsibility).

Further, section 39(3) of the Financial Services Markets Act (FSMA) 2000 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."

This means there are two questions to be considered for me to decide whether Mr J's complaint can be considered under our compulsory jurisdiction. These are:

1. Were the acts about which Mr J complains done in the carrying on of a regulated activity, or an ancillary activity carried on in connection with a regulated activity?
2. Were those acts ones for which Caerus was responsible?

The rules and guidance I've set out above mean that before we can begin to look at a complaint we need to establish whether it relates to an act or omission which occurred when Matrix was carrying on a regulated activity, or an ancillary activity carried on in connection with a regulated activity.

Regulated activities are specified in Part II of the FSMA 2000 (Regulated Activities) Order 2001 ("the RAO") and include advising on the merits of buying or selling a particular investment which is a security or a relevant investment (article 53 RAO), and making arrangements for another person to buy or sell or subscribe for a security or relevant investment (article 25 RAO).

So, if Matrix gave advice to Mr J to buy or sell an investment which is specified in the RAO, or made arrangements for Mr J to buy one of those investments, or did something in connection with those things, I need to go on and consider the second question about Caerus's responsibility.

There's very little documentation evidence relating to Mr J's second Axiom investment. But Mr C has confirmed his involvement in the process, saying:

"I pointed out to (Mr J) that if he wanted more invested we would need to liquidate further monies from the Zurich TIP within the SIPP."

"Mr J and I simply went through the individual funds and highlighted those that we felt we could sell/switch/dispose of..."

"He specifically asked me to make the arrangements and handle it all plus I had the authority...to conduct business on his behalf"

So, I'm satisfied Matrix was directly involved in at least making arrangements for the second disinvestment from Mr J's SIPP and the further investment in the Axiom fund.

Both the existing funds and the Axiom fund were securities or relevant investments as specified in the RAO. The advice to sell the existing SIPP investments and the advice to then buy into the Axiom fund were both regulated activities. So, I'm satisfied the acts about which Mr J complains were done in the carrying on of a regulated activity, or an ancillary activity carried on in connection with a regulated activity.

This means I need to consider the second question – were those acts ones for which Caerus was responsible?

As mentioned, section 39(3) of the Financial Services Markets Act (FSMA) 2000 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.”

So, for us to be able to look at the merits of the complaint I also have to be satisfied that the activity was carried out by Matrix and, if it was, that it was one for which Caerus accepted responsibility.

There appears to be no dispute that Matrix was an appointed representative of Caerus during the period in question. I've seen an agreement between the two parties dated 5 August 2011, a few months before the investment took place. And from the evidence I've seen Matrix did at the very least arrange for changes to the investments within Mr J's SIPP. I therefore need to consider whether what Matrix did was done with the actual authority of Caerus.

Caerus's view is that Matrix was not permitted to advise on UCIS such as the Axiom fund. It has referenced sections from its Compliance Manual, which specifically state that Matrix wasn't permitted to recommend unregulated investments.

But it nevertheless seems clear that Caerus *did* authorise Matrix to advise clients on selling investments. Caerus has provided us with a copy of its 'appointed representative agreement' where, at paragraph 5, it explains that Caerus;

“... accepts full responsibility for anything said or done or omitted by the Representative in carrying on the Relevant Activities, but not for any other activities conducted by the Representative.”

'Relevant activities' are defined, in part, as;

“Arranging (bringing about) deals in investments (article 25(1) RAO)”

“Advising on investments (article 53 RAO)”

So it seems clear to me that Caerus authorised Matrix to advise clients on selling investments.

And Matrix's advice to *sell* investments wasn't affected by any limitations placed on the provision of advice to buy the Axiom fund, or anything else. The advice to buy the Axiom investment was intrinsically linked to the advice to sell some of Mr J's existing investments. I don't think the activities can't be looked at in isolation. They must be looked at in the context of the advice Mr J received as a *whole* – the advice he received to surrender existing investments, the arranging of the surrender of that investment and reinvesting the proceeds in the Axiom fund.

Therefore there was a chain of activities that included regulated activities and activities carried out in connection with those regulated activities. All of these activities come within our jurisdiction under DISP R2.3.1R. So in my view both activities fall within Caerus' actual authority, even if the Axiom fund was not a type of investment that Matrix was authorised to recommend.

In summary, I'm satisfied Mr J's complaint relates to a regulated activity or an ancillary activity carried out in connection with a regulated activity. Caerus is responsible as the sell was within actual authority. And it is also responsible for the subsequent buy of the new investment by virtue of it being linked to the sell. So Mr J's complaint is within our jurisdiction and one we can look at.

It's also worth noting that in the case of *Martin v Britannia Life [2000]* the High Court considered that the concept of investment advice will include all investment advice given to a prospective 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 approach I've taken in determining jurisdiction in this complaint. Namely, that the regulated activity of advising on investments includes both the advice to surrender a regulated investment and advice on any linked transaction to invest the proceeds of the surrender.

My approach 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.

merits – was the advice suitable?

As it's my view that this is a complaint I can consider, I've gone on to give consideration to its merits.

The Axiom fund into which Mr J was advised to invest the proceeds of his various surrenders was set up to provide short-term fixed interest loans to UK law firms working on a no-win, no-fee basis, so they could pursue claims for the mis-selling of financial service products.

Technically speaking, the fund was a Segregated Portfolio of JP SPC 1, a segregated portfolio company incorporated in the Cayman Islands with limited liability. It wasn't authorised or regulated under FSMA. So it shouldn't have been promoted or sold in the UK, other than under specific exemptions permitted by the Act, in particular, FSMA (Participation of Collective Investment Schemes) (Exemptions) Order 2001.

I've seen no evidence that Matrix completed the necessary procedures to determine if Mr J fell into one of the exemption categories. But in any event those exemptions were largely based upon considerations of suitability – for instance, whether the potential investor was sufficiently experienced to appreciate how the fund operated. And in my view, it's suitability that's the key consideration in Mr J's complaint. So I've focused on whether the Axiom fund was suitable for Mr J. In short, I don't think it was.

I note Caerus has suggested that Mr J had a moderate attitude to risk with some speculative leanings. This seems to be based on factfinds completed in 2007. There's no contemporary evidence of Mr J's attitude to risk in 2012. And it seems clear his circumstances had changed considerably during this time. So I'm not convinced he wanted to take the same degree of risk with his SIPP as he may have done in the past.

I've noted what's been said about the fund being described as a cautious, low risk investment. But it was nevertheless an unusual, unregulated fund with little history. Given Mr J's apparent objectives at the time – reducing risk, simplifying arrangements – I can't see that moving money into this type of investment can reasonably be seen as suitable; particularly given the amount involved. Mr J was advised to sell investments to generate the cash for the £50,000 Axiom investment. In doing so, apart from anything else, he lost a high level of diversity, particularly as he was already significantly invested in the fund. So even if it could be argued that it was suitable, which I don't accept, it wouldn't be appropriate to concentrate such a large proportion of Mr J's pension in this one fund.

As I understand it, receivers of the Axiom fund have brought claims against a number of parties it considers to have acted fraudulently and the Serious Fraud Office is also carrying out its own and separate investigation. I appreciate Matrix couldn't have foreseen any fraudulent acts. But Mr J's complaint isn't about the management of the Axiom fund. It's about whether the recommendation made to invest in it was suitable. As I've said, I don't think the fund was suitable for Mr J.

Caerus may say that any losses that Mr J has experienced are due to the alleged fraud for which it can't be held responsible and which, as noted, Matrix couldn't have foreseen. I acknowledge a court

might conclude that Mr J's losses don't flow directly from the unsuitable advice. And on this basis, it might not require Caerus to compensate Mr J – notwithstanding the unsuitable advice. But in assessing fair compensation here, I'm not limited to the position a court might take.

If fraud did take place it may be there has been a break in the 'chain of causation'. That might mean it wouldn't be fair to say that all the losses suffered by a consumer flow from the unsuitable advice. That will depend on the particular circumstances of the case. No liability will arise for an adviser who has given suitable advice, even if fraud later takes place.

But the position is different where the consumer wouldn't have been in the investment in the first place had it not been for the unsuitable advice. In that situation it may be fair to assess compensation on our usual basis – aiming to put Mr J in the position he would've been in if he'd received *suitable* advice.

In this case I think it would be fair and reasonable to make an award, given the specific circumstances. This is notwithstanding any arguments about a break in the chain of "causation" and the "remoteness" of the loss from the unsuitable advice given. In short, had it not been for unsuitable advice, Mr J wouldn't have made the investment.

Ultimately, Mr J was advised to put a significant proportion of his assets into an unregulated fund which was unusual, specialist and speculative in nature and which had a limited track record. In all the circumstances, I therefore think it's fair and reasonable to hold Caerus responsible for the whole of the loss suffered by Mr J in relation to the Axiom fund, while making allowance for the possibility of some of his money being returned in the future.

fair compensation

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

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

what should Caerus do?

To compensate Mr J fairly, Caerus must:

- Compare the performance of Mr J'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.

Caerus should also pay interest as set out below.

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

For example, if Mr J 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 J 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 J £250 for the trouble and upset he's been caused as a result of the unsuitable advice.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Axiom fund	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.

My aim is to return Mr J to the position he would've 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 in this case. 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. Caerus 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 J and the balance be paid as I set out above.

If Caerus is unwilling or unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. Caerus may wish to require that Mr J provides an undertaking to pay Caerus any amount he may receive from the investment in the future.

fair value

This is what the investment would've 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, Caerus 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.

why is this remedy suitable?

I've chosen this method of compensation because:

- Mr J 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 J'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 J into that position. It does not mean that Mr J 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 J could have obtained from investments suited to his objective and risk attitude.
- Mr J has not yet used his pension plan to purchase an annuity.

my provisional decision

For the reasons given, my provisional decision is Mr J's complaint is one we are able to look at and that it should be upheld. I'm currently minded to direct Caerus Financial Limited to pay Mr J compensation as set out above.

Doug Mansell
ombudsman