complaint

Mr T complains about the transfer of a personal pension plan (PPP) and a self-invested personal pension (SIPP) to a new SIPP with a different provider. The bulk of the transferred money was invested in carbon credits. Mr T says the transfers and the investment weren't suitable and he's suffered financial loss as a result.

Mr T dealt with Smith Osborne Associates Ltd (SOA). At the time SOA was an appointed representative of The On-Line Partnership Limited (OLP). I've just referred below to OLP as it's responsible for SOA.

background

I issued a provisional decision on 25 May 2018. I set out in detail the background leading up to Mr T's complaint, the documents we'd seen and how our investigation had progressed (including what OLP and Mr T's representative had said about what had happened). I don't repeat all that here as I don't think there's much dispute. I also explained why I intended to uphold the complaint. I've recapped that here.

my provisional findings

OLP wasn't the only business involved. There was the unregulated introducer and the SIPP provider, who is regulated. We don't have any jurisdiction over the introducer who is, I understand, now being wound up. OLP's also mentioned a second regulated advisory firm. But, like the adjudicator, I haven't seen anything to show that firm was involved. All I'm considering here is OLP's part in the matter. But I recognise what other parties did (or didn't do) may have impacted on what happened and should be taken into account in deciding what responsibility, if any, OLP has for Mr T's losses.

It seems the unregulated introducer had some sort of arrangement with OLP's adviser for him to carry out the regulated part of the transaction (the transfer to the new SIPP). I haven't seen any written agreement between the unregulated introducer and OLP. But it looks like – given other clients were referred to OLP – there was an informal arrangement at least.

I don't know how much business OLP's adviser accepted from the unregulated introducer. Or how many consumers the adviser may have advised against transferring who took that advice and decided against switching their pension funds and investing in unregulated investments. But from what I've seen OLP's adviser accepted referrals from a number of consumers all of whom were apparently keen - and without wanting further time to reflect on OLP's advice that what was proposed wasn't suitable - to go ahead.

I would have thought that should have rung some alarm bells. And made OLP's adviser think about what the unregulated introducer may have said about the investment. And which was apparently enough to make them prepared to disregard regulated advice not to proceed. All that should have made OLP's adviser ensure that his advice was clear and unambiguous if he thought the transaction and investment wasn't suitable. I think it was up to OLP, knowing that an unregulated entity (which wasn't supposed to give financial advice and which wasn't bound by the regulator's rules when it came to discussing the investment and possible performance) to introduce an element of balance.

I don't think OLP's adviser did enough. I share the adjudicator's concern as to the apparent ease – and with no period for reflection – with which Mr T was able to sidestep advice not to *go ahead. I'd also agree with the adjudicator that indicating that some investment in carbon credits (up to 20%) might be appropriate was confusing and unsuitable in any event for an investor such as Mr T.*

I've noted what OLP says about Mr T's knowledge and understanding, based on what Mr T's more recently said. But I don't think his role as a company director is particularly relevant. The fact find records he had no investment experience, apart from in connection with two pension plans, both held with insured providers (one invested in the provider's with profits fund). He had no experience of unregulated investments. In any event, OLP advised Mr T against investing his entire pension fund in carbon credits. So I don't think OLP can argue now that the investment wasn't unsuitable for Mr T because he'd have understood what he was doing.

The basis on which OLP was acting was also confusing and unclear. The recommendation letter said it had been agreed that the transaction would proceed on a non-advised, information only basis. But that isn't consistent with what else the letter said. And it's clear OLP did give Mr T advice - OLP said it couldn't recommend the transaction. OLP also said the investment - carbon credits - was unsuitable for Mr T's given level of risk. The letter also said Mr T had decided to reject OLP's advice. So it's clear OLP did give advice.

The fact find also records that the transfer could only be arranged following completion of the full advice process. And that OLP didn't consider carbon credits was a suitable investment for Mr T's entire pension fund – he didn't have any other retirement provision and he wasn't a high net worth or experienced investor. Because Mr T still wanted to proceed it would be on a non-advised/information only basis.

The client agreement which Mr T signed on 3 March 2012 said OLP would advise and make a recommendation after assessing Mr T's needs. And OLP did give advice – that Mr T shouldn't do what he planned.

Mr T signed another client agreement on 18 April 2012. That one said that OLP wouldn't give advice or make a recommendation. OLP might ask some questions to narrow down the selection of products, details of which would be provided. Mr T would then need to make his own choice about how to proceed.

So it seems that OLP sought to change the basis on which it was acting - from advisory to 'non advised/information' basis. And Mr T signed the second client agreement to reflect that. I think that would have been confusing for Mr T. It would also have downplayed the significance of acting against OLP's advice – by making it seem that it wasn't unusual for a consumer to decide to proceed contrary to advice and providing an instant way of doing so.

Having given advice, I don't think it was open to OLP to try to ignore that and treat Mr T instead as a non-advised client. If, as the recommendation letter recorded, Mr T wanted to act against OLP's advice, then OLP could have either declined to act or treated Mr T as an insistent client - that is one who wanted to act against the advice given. OLP didn't say it wouldn't transact the business for Mr T. So, in effect, it treated him as an insistent client.

I also agree with the adjudicator that OLP didn't deal properly with Mr T as an insistent client. Most firms will have a process in place to deal with insistent clients. It will usually involve asking the client to sign documentation recording that they are proceeding against the advice given. Such clients may be asked to explain why they are prepared to act contrary to the adviser's advice. Because Mr T wasn't treated as an insistent client, he wasn't asked to *complete that sort of documentation. But, in any event, we'd still look beyond anything the consumer signed to decide if he was really prepared to disregard the advice given and understood the implications of that. So, even though Mr T wasn't identified as an insistent client, similar considerations apply.*

The regulator's handbook (which contains the Conduct of Business rules that firms must follow) doesn't refer specifically to insistent clients. But the regulator issued a factsheet fairly recently (on 18 February 2016) following the pension reforms introduced in 2015). Although the factsheet postdates Mr T's complaint it simply restated the existing position and didn't reflect any change in the regulator's rules. So by referring to the factsheet I'm not judging OLP with the benefit of hindsight – the factsheet represents the position as it was when OLP acted for Mr T.

As far back as 1994 a former regulator (FIMBRA) published guidance (about pension transfers and opt outs) which included the following:

'The investor's decision to override the adviser's recommendation should also be credibly evidenced. Disclaimer forms and pre-printed letters using stock phrases should not be used since they cast doubt upon the genuineness of the process. A note from the customer in his own words is best.

Compliance officers will be expected to record the number of cases in which the investor overrides the advice of financial advisers within the organisation and to investigate thoroughly those cases where there may be doubts about the credibility of the actions taken by the investor.'

So the regulator's focus on ensuring that insistent client business is properly recorded and credibly evidenced as such isn't new.

The (more recent) factsheet says there are three key steps when advising an insistent client:

- *The adviser must provide advice that is suitable for the individual client, and this advice must be clear to the client - that is the normal advice process.*
- *It should be clear to the client that their actions are against the adviser's advice.*
- *The adviser should be clear with the client what the risks of the alternative course of action are.*

There's no rule to prevent an adviser from transacting business against advice if the client insists. And, as it's up to firms to decide what services they wish to offer, a firm can give advice but decline to carry out the transaction.

I've considered each of the three points mentioned, starting with the advice given.

<u>did OLP provide suitable advice?</u>

The regulator has issued alerts in respect of the advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP. One was published on 18 January 2013 and a further one published on 28 April 2014. The regulator has made its position clear when it said the following in the alert issued in 2013:

'The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or when advice is given on a product which is a

vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes, it should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating'.

OLP's adviser correctly understood the COBS rules (and the guidance from the regulator) which meant that as part of any recommendation to transfer, the suitability of the underlying investment to be held in the SIPP (in this case carbon credits) had to be considered. The adviser did that.

OLP's adviser said the investment – at least for Mr T's entire pension fund – wasn't suitable. I think that's right. Mr T wasn't a high net worth or sophisticated investor. He didn't have any previous experience of investing in unregulated funds. This was his only pension provision. He didn't have the capacity for loss that could result. He was apparently prepared to take a high degree of risk. But I don't think the assessment of his attitude to risk was credible. And, in any event, even if Mr T was prepared to take a high degree of risk I don't think he had the capacity to take any significant risk with his only pension provision.

<u>*did OLP make it clear to Mr T that what he was proposing to do was against OLP's advice?*</u>

The adviser didn't identify Mr T as an insistent client (that is one who wished to proceed despite advice to the contrary). So Mr T didn't sign anything expressly acknowledging that he understood that what he was proposing to do was against OLP's advice.

And I don't think the investment information form that Mr T signed was clear. It said he was happy to proceed with the transfer to a SIPP on a non advised basis. I think it would have been preferable if that had instead said he was happy to proceed against OLP's advice.

In the suitability letter dated 30 March 2012 OLP's adviser said he did not 'feel investing 100% of [Mr T's] pension funds would be suitable' for Mr T. Later the adviser said he did 'not believe that purchasing carbon credits is a suitable investment option for your pension funds, based on the fact that investments of this nature are only considered suitable for experienced investors.'

And, more significantly, the 'Your Decision' section of the letter did expressly say Mr T had decided to reject the adviser's advice.

So on the one hand, I think Mr T would (or ought to have) known that if he went ahead, he did so contrary to OLP's advice. But I don't think OLP made that as clear to Mr T as it could have done.

OLP said that unregulated investments would only normally be considered suitable for 20% of a client's overall investable assets. I wouldn't necessarily agree – at least not for a client who wasn't high net worth and/or sophisticated and who didn't have the capacity to suffer a total loss of that portion of his wealth. I think that was misleading and downplayed the risks presented by this type of investment.

The factsheet gives an example of poor practice where communications with an insistent client did not contain sufficiently strong warnings about the risks of transferring against professional advice. That sort of explicit warning doesn't appear to have been given.

In my view - and in some ways this is similar to the next example of poor practice given on the factsheet - the language used was ambiguous. Mr T was left to decide between various options. The adviser, after saying his advice was that Mr T shouldn't go ahead with investing his entire fund, then gave him the option of proceeding on what he termed a 'non advised/information only' basis. I think instead he should have told Mr T, in clear and unambiguous terms, that, if he proceeded, he did so against his advice. I don't think it's enough that Mr T would or should have known that. The point is that it was up to OLP to make that very clear to him. OLP 'muddied the waters' by not identifying Mr T as an insistent client and treating him as such.

The examples of good practice include discussing (and separately documenting) with the client their reasons (for not accepting the advice) and the possible outcome. And capturing the rationale for insistence in the client's own words.

That didn't happen here. The suitability letter records some discussions around why Mr T wanted to transfer and invest in carbon credits. Essentially it appears he believed the investment offered the potential for very high returns. He apparently understood that the investment was highly speculative and he could lose all the money he'd invested. But he felt the risk was worth taking due to the potential returns.

But that's not from the perspective that Mr T wanted to go ahead despite the adviser's view that he shouldn't. Mr T may have indicated he wanted to invest in carbon credits because of the potential returns. And OLP's adviser may have explained to him that was a high risk strategy. But that's not the same as a conversation about why, despite OLP saying he shouldn't invest, Mr T still wanted to go ahead. I haven't seen anything to show that sort of discussion took place. There's nothing to indicate Mr T's reasons for not accepting the advice were explored in full and recorded.

That's consistent with the adviser thinking he could proceed on a non-advised/information only basis. And so that sort of conversation wasn't necessary. But as I've said, having given advice, it wasn't open to the adviser to ignore that. In my view, if OLP was prepared to transact the business for Mr T despite advising against it, then the only route open to OLP was to treat Mr T as an insistent client. And that gave rise to certain obligations on OLP's part - including a duty to act honestly, fairly and professionally in the best interests of its client - aimed at ensuring Mr T fully understood what he was doing and the possible consequences.

<u>did OLP make it clear to Mr T the risks of the alternative course (not following OLP's advice)?</u>

OLP did set out some of the risks. OLP said (more than once) that Mr T could lose his entire investment. And he wouldn't have recourse to the Financial Services Compensation Scheme (FSCS) or this service. But it's unclear the extent to which all that was explored with Mr T to ensure he really understood what he was doing and what he was signing. Setting out the risks isn't the same as testing Mr T's understanding of what could happen if he went ahead. OLP should have made it very clear to Mr T that what he was planning to do was against its advice. And, explored why, given Mr T's lack of investment experience, he was apparently prepared to take a very high level of risk with his only and modest pension provision.

Any discussions weren't focused on why Mr T was prepared to act contrary to OLP's advice.

He didn't sign anything which explicitly acknowledged that he was acting against OLP's advice. Or, much less, which explained, in his own words, why he was prepared to do that.

OLP knew an unregulated entity was the driver for the transfer and investment. But, as the regulated adviser, it was up to OLP to introduce an element of balance. OLP could have done that by making it clearer that its view was that Mr T shouldn't go ahead and, if he did want to proceed, it would be against OLP's advice. OLP could have explored, discussed and recorded Mr T's rationale for being prepared to disregard the advice given.

If OLP had remained unhappy, having explored things more carefully with Mr T, OLP could have declined to transact the business. Instead Mr T was able, very easily, to proceed against OLP's advice. OLP should have made very sure Mr T really understood that what he was planning to do was against OLP's advice and very risky.

I'd note here what the regulator said about carbon credit trading in a consumer warning issued on 3 August 2011 (the year before OLP's dealings with Mr T).

'Whilst not all carbon credit trading schemes are a scam, it is often not made clear to investors that trading on these markets requires skill and experience. You may lose money on your investment by not being able to sell, or at least get a competitive rate, when trading a small volume of carbon credits.'

All in all I think there were serious shortcomings in what OLP did. OLP should have taken more care to ensure that its advice was clear and unambiguous. That would have counterbalanced any overly positive view expressed by the unregulated introducer and meant that any decision by Mr T to go ahead – despite OLP's clear view that he shouldn't - would have been a properly informed decision. And, as things were, Mr T had no time for reflection.

I'd also mention OLP's fees. Its adviser wasn't paid for the introduction or any advice. His initial fee was 3% of the transfer value (with a minimum of £1,500). So he'd only get paid if he went on to arrange the transaction he'd advised against. I think that meant he had a potential conflict of interest.

I've thought carefully about what Mr T would have done if OLP had given clear and unequivocal advice. As the adjudicator said, judging what Mr T would have done if OLP had acted as it should is difficult.

I think any incentive payment is relevant here. I can understand why OLP says it's likely Mr T did get one – especially as we know, in other cases, that payments were made. But that doesn't mean Mr T must have got one.

He says he doesn't think he did. He could be mistaken - OLP's pointed out that Mr T didn't recall getting the suitability letter but he'd signed a copy so it appears he did see it. But I think that's a bit different. It's relatively easy to overlook receiving a particular document (even one that's important, such as the recommendation letter). But I'd have thought Mr T would have been likely to recall if he'd got a payment in return for investing.

And we have investigated, as far as we can, if there's anything to indicate an incentive payment was received. We've looked into Mr T's bank accounts. We haven't seen anything to suggest he did receive an incentive payment.

I can also understand why OLP says Mr T would have had a bank account in his own name. But Mr T has explained the position and our enquiries haven't revealed another account. It's difficult to see what other enquiries we can make to be certain that Mr T didn't have any other accounts.

So, based on what I've seen so far, I don't think it's unreasonable to proceed on the basis that Mr T didn't get an incentive payment.

Mr T's told us, if he'd understood the degree of risk involved by transferring and investing in carbon credits, he wouldn't have agreed to the transfer and investment. And, if he didn't get any incentive payment – and I've concluded, on balance, that he didn't – that wasn't a potential driver. I don't think it's unreasonable to assume that most consumers, if faced with clear advice against from a regulated professional adviser, would think again and decide not to proceed. The problem here is that OLP failed to make the position – and its advice – clear to Mr T. So it's difficult to say that, if OLP had done things properly, Mr T would still have gone ahead. On balance I'm prepared to accept that he wouldn't.

So I think it's fair that OLP should redress Mr T on the basis broadly suggested by the adjudicator. OLP can, if it redresses Mr T in full, take an assignment of any rights Mr T has against any other party involved.'

I gave both parties an opportunity to comment on my provisional decision. Mr T's representative didn't have anything further to say. OLP asked for more time to consider its response. But we haven't heard further from OLP and the extended period we gave for it to reply has expired.

my findings

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

Although OLP hasn't commented on my provisional decision in this case it did comment in response to other provisional decisions I'd issued. OLP said, amongst other things: there was no arrangement between OLP's adviser and the unregulated introducer; the basis on which OLP had acted was clear as was the advice – that what was proposed was unsuitable; several risk warnings were given and the consumer knew he was acting against OLP's advice. OLP also suggested I'd wrongly relied on historic FIMBRA guidance and a fact sheet that post dated events.

OLP also stressed the significance of the incentive payments that some investors received – although, as I explained in my provisional decision, our investigations didn't reveal that Mr T had received any payment.

In reaching my final decision I've taken into account those points. But I haven't changed my mind. I still think Mr T's complaint should be upheld for the reasons I set out in my provisional decision.

fair compensation

My aim is to put Mr T in the position he'd be in now if OLP had acted as it should. I think he'd have kept his existing pension plans and not transferred to the new SIPP or invested in carbon credits. So OLP should compensate him on the basis he'd have remained invested in his existing pension plans. OLP can, if it redresses Mr T in full, take an assignment of any rights Mr T has against any other party involved.

what should OLP do?

1. Obtain the notional transfer values of Mr T's previous pension plans had they not been transferred to the new SIPP. That should be the value at the date of the final decision. But if there are difficulties then the FTSE UK Private Investors Income Total Return Index (formerly the FTSE WMA Stock Market Income Total Return Index) should be used. That's a reasonable proxy for the type of return that could have been achieved over the period in question.
2. For the purposes of this calculation it is to be assumed that any contributions or withdrawals that have been made into the new SIPP would still have occurred and on the same date(s).
3. Obtain the transfer value of Mr T's SIPP (which, as it's closed, might well be zero), including any outstanding charges. That should be the value as at the date of the final decision.
4. Deduct the sum arrived at in step 3 from the sum in step 1.
5. Pay a commercial value to buy Mr T's carbon credits investment. If that's not possible then a nil value should be assumed for the purposes of the calculation. OLP may ask Mr T to provide an undertaking to account to it for the net amount of any payment that might be received in the future from the investment. The undertaking should allow for the effect of any tax and charges on the amount Mr T may receive from the investment and any eventual sums he would be able to access from the SIPP. OLP will need to meet any costs in drawing up the undertaking.
6. Pay an amount into a suitable pension arrangement for Mr T so that the transfer value is increased by the sum arrived at in step 4.
7. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into a pension plan if it would conflict with any existing protection or allowance.
8. If the payment into a suitable pension arrangement isn't possible or has protection or allowance implications, it should be paid directly to Mr T as a lump sum after making a deduction of 15%. The payment would otherwise have been used to provide pension benefits, 25% of which would be tax free and the rest would have been taxed according to Mr T's likely tax paying status in retirement – presumed to be 20%. And so the 15% deduction adequately reflects this.
9. Interest at 8% simple should be added from the date of the final decision to the date of settlement (if redress isn't paid within 28 days of OLP being notified that Mr T has accepted the final decision.
10. Pay Mr T £250 for the distress and inconvenience he's suffered.

my final decision

I uphold Mr T's complaint.

The On-Line Partnership Limited should redress Mr T as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 26 August 2018.

Lesley Stead
ombudsman