

complaint

Mr O transferred his personal pension to the London Quantum Retirement Benefits Scheme (LQRBS). The benefits have now been frozen. He complained to Gerard Associates Limited. He said that the advice he had been given was not in his best interests.

background

I issued my provisional decision for this complaint on 9 August 2018. The background to the complaint was set out in that document. I don't need to set out the detail again, but have summarised the key points.

Mr O was referred to Gerard Associates by an unregulated business. Gerard Associates is a firm that is regulated in the UK by the Financial Conduct Authority (FCA).

Mr O signed a document that he was a self-certified investor for the purposes of the promotion of non-mainstream investments. It also said that Gerard Associates were only giving information and guidance, not a recommendation.

Gerard Associates issued a pension report. This explained that Mr O wanted to consider a pension fund investment strategy to deliver the highest possible returns but that also means the highest investment risk.

The report gave information about Mr O's existing pension plan and the charges. Mr O's pension plan was invested in the Managed fund and the UK Equity fund. It included waiver of premium. The LQRBS's charges were a £400 set fee and a further £400 ongoing fee payable in advance plus investment management charges.

The transfer proceeded and £44,756.14 was paid into the scheme. The transfer application showed that the LQRBS contact was employed by Gerard Associates.

Mr O found out in 2015 that the LQRBS assets were frozen and The Pensions Regulator had appointed another trustee (Dalriada Trustees) as the regulator had concerns about the scheme investments.

He complained to Gerard Associates who rejected the complaint saying:

- They had accepted referrals from the employer – London Quantum Investment Management Solutions.
- They had provided information only as confirmed in the Client Agreement & Fee Agreement.
- He had confirmed that he was a sophisticated investor.
- They had acted in an appropriate, clear and fair manner.

As Mr O was not happy with this response, he referred his complaint to this Service.

One of our adjudicators investigated the complaint. She spoke to Mr O and he told her that he was employed with earnings of £40,000 a year and married. He and his wife owned their home worth £400,000 with a repayment mortgage of around £100,000. He had about £10,000 to £15,000 in cash and had no other investments. He had never owned stocks and shares. He believes that he is a cautious person.

The adjudicator thought the complaint should be upheld. She set out how Gerard Associates should compensate Mr O for his losses.

Gerard Associates didn't agree with the adjudicator. They said in summary:

- Neither Gerard Associates nor any of its employees telephoned or visited Mr O.
- The adjudicator concluded that Mr O was a cautious investor. But the notes in their letter of 12 June 2014 refer to highest risk on a number of occasions.
- Mr O received a number of documents about investment risk strategy and who could sign a sophisticated investor declaration. They did not agree with the adjudicator that Mr O was not a sophisticated investor. They issued accurate guidelines statements and declarations which were all signed by Mr O and contained appropriate warnings. Mr O confirmed in writing that he wished to proceed after receiving these documents.
- If Gerard Associates were to assess appropriateness then they could not rely upon the Sophisticated Investor Declaration. Mr O had been referred to them as a sophisticated investor and had signed several documents confirming this. If an assessment of appropriateness took place, this would have been deemed as giving advice.
- Gerard Associates hadn't been invited to reply to The Pension Regulator's (TPR) notice and there was no right to do so. They unequivocally denied that any scheme members were unaware of the nature of the investments.
- The TPR had said that the Sophisticated Investor Declaration had not been properly executed. Again Gerard Associates had no right of reply to this. They contested that they had given more information than was the basic requirement. Mr O had signed declarations that he had read and understood the information.
- The FCA guidance about unregulated introducers had been issued after Gerard Associates had sent Mr O the report.
- There had been a court case which found that members of a personal pension scheme had a statutory right to transfer out. Also, the case found that a member was an 'earner' even if the source of earnings was not from the sponsoring employer of the receiving scheme. Gerard Associates should not have and could not have refused to arrange the transfer.

Gerard Associates has not replied to my provisional decision.

my findings

I've re-considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, there is no reason to change my provisional findings which are repeated below.

I am required to take into account the law; regulator's rules and guidance; codes of conduct and what I consider to have been industry good practice at the time.

Arranging investments is a regulated activity. This includes making arrangements to buy or sell investments. Mr O had a personal pension. Arranging for the investments to be sold and the value transferred to another scheme was a regulated activity.

the relevant rules

The regulator's handbook sets out the rules firms must follow. These start with the high level standards. Those standards include the principles that firms must follow. I think Principles 1 – integrity; 2 – skill, care and diligence; 6 - customers' interests and 8 - conflicts of interest all apply in this case.

The rulebook also sets out the business standards firms must follow. These are set out in the conduct of business sourcebook (COBS). I think COBS 2.1 is particularly relevant. This is known as the client's best interests rule and says:

A firm must act honestly, fairly and professionally in accordance with the best interests of its client.

Mr O invested in non-mainstream pooled investments. COBS 4 is also relevant and should be taken into account.

London Quantum RBS

The Pensions Regulator investigated the London Quantum RBS. It then made an order to remove the existing trustees and appoint new trustees. That was to safeguard the assets in the scheme and ensure the trustees were competent to carry out the duties of a trustee. I think there is relevant information in the final notice issued by The Pensions Regulator on 8 February 2016.

The RBS was established in 2012. From about April 2014 it was open to new members. There is evidence in the final notice that Gerard Associates advised the trustees to appoint a new trustee. And further evidence that Gerard Associates brought a number of introducers on board. I note the panel made no finding on that point.

Gerard Associates was responsible for producing various letters and forms to be sent to new members. This was after they had been introduced to the RBS by an introducer. The forms were then sent on to the trustees of the RBS.

Gerard Associates role was described as "*simply helped the process of people joining the scheme*". It was also noted that Gerard Associates did not provide advice to new members of the scheme. Gerard Associates were paid about £220,000 in fees.

what did Gerard Associates do?

There is some evidence from the final notice of The Pensions Regulator that Gerard Associates was involved in organising the introducers for the RBS. The first evidence I have about Gerard Associates' involvement with Mr O is a letter signed by Mr O on 7 May 2014. This asked Friends Life to provide details of the personal pension to Gerard Associates.

The terms of business signed for Gerard Associates said that no advice was being given. They did not obtain information from Mr O about his personal and financial circumstances.

Gerard Associates sent a report to Mr O about the London Quantum RBS. Gerard Associates charged a fee of £2,100 or 4% of the transfer value, whichever was higher; plus a fee of £195 for the report. But, it said it was providing guidance or information. It was not advising about the transfer.

Forms were signed to transfer the personal pension to the London Quantum RBS. These were dated 27 June 2014.

was Gerard Associates promoting the investments in London Quantum RBS?

There are restrictions about who is able to make a financial promotion to invite or induce others to engage in investment activity. And there are restrictions about the type of person an unregulated investment can be promoted to.

I think it is clear that a financial promotion was made to Mr O. He signed a letter on Gerard Associates headed paper. He confirmed that he had received, read and understood the relevant financial promotion literature for a number of different funds. These funds were not regulated by the FCA and only suitable for sophisticated investors. Mr O wished to receive guidance on the transfer of his pension funds.

I am satisfied that Gerard Associates promoted the funds to Mr O.

I think the final notice from The Pensions Regulator is informative. It shows that there is evidence Gerard Associates was involved in promoting new members to the RBS. There is no doubt in my mind that Mr O was referred to Gerard Associates with the specific intention that his pension benefits would be transferred to the RBS. The report from Gerard Associates explains that the investment strategies Mr O had expressly requested are not regulated by the FCA and are therefore highest risk. However, the funds Mr O invested in were promoted to him by Gerard Associates. It appears that these funds were promoted on the basis Mr O was a sophisticated investor.

should Gerard Associates have promoted the unregulated funds to Mr O?

The rules at the time about promoting unregulated funds to retail clients are quite specific. The regulator's handbook requires a specific form to be completed. Mr O was not a high net worth investor. So for Gerard Associates to promote the funds to Mr O he had to be a sophisticated investor.

I have quoted an extract from COBS 4.12.8R, which is the relevant rule:

A self-certified sophisticated investor is an individual who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

“SELF-CERTIFIED SOPHISTICATED INVESTOR STATEMENT

I declare that I am a self-certified sophisticated investor for the purposes of the restriction on promotion of non-mainstream pooled investments. I understand that this means:

- (i) I can receive promotional communications made by a person who is authorised by the Financial Conduct Authority which relate to investment activity in non-mainstream pooled investments;

- (ii) the investments to which the promotions will relate may expose me to a significant risk of losing all of the property invested.

I am a self-certified sophisticated investor because at least one of the following applies:

- (a) I am a member of a network or syndicate of business angels and have been so for at least the last six months prior to the date below;
- (b) I have made more than one investment in an unlisted company in the two years prior to the date below;
- (c) I am working, or have worked in the two years prior to the date below, in a professional capacity in the private equity sector, or in the provision of finance for small and medium enterprises;
- (d) I am currently, or have been in the two years prior to the date below, a director of a company with an annual turnover of at least £1 million.

I accept that the investments to which the promotions will relate may expose me to a significant risk of losing all of the money or other property invested. I am aware that it is open to me to seek advice from someone who specialises in advising on non-mainstream pooled investments.

Signature:

Date: "

Mr O signed a form without any explanation about why he was a sophisticated investor. The bullet points numbered (a) to (d) above were not included on the form. The evidence I have available shows that Mr O did not meet any of the criteria that should have been on the form. The form completed by Mr O was not in the form prescribed under the rule. He didn't qualify in any of the other categories or exemptions. The rules had been changed in January 2014. This followed a period of consultation because there was widespread concern about the promotion of unregulated funds to retail clients. Gerard Associates should have been well aware of the rules for promoting such funds.

Mr O did not provide information for Gerard Associates to work out whether he was a high net worth or sophisticated investor. But I think they should have asked him to be able to make the promotion. So the funds Gerard Associates promoted to him had not been promoted in accordance with the rules. He should not have invested in the unregulated funds.

I think given the number of cases Gerard Associates processed and the unregulated investments involved it must have been aware that these were unlikely to be suitable for most investors. I am left with the impression that the process Gerard Associates adopted was to try and avoid any responsibility under the rules at the time. It produced a lengthy report, but stopped short of actually providing advice.

what should Gerard Associates have done?

I think Gerard Associates should not have promoted the unregulated funds to Mr O. And Gerard Associates should not have processed the transfer for Mr O. There was no need to transfer into the London Quantum RBS; and the investments in that scheme were clearly unsuitable for him.

what would Mr O have done?

I think Mr O only transferred because he had been told about the scheme by an unregulated introducer. The funds were then promoted to him by Gerard Associates. Mr O has told us that he was having a difficult time in his personal life. If Gerard Associates had acted in his best interests they would have established that he could not afford to take any risk with his pension fund. I don't think Mr O would have transferred the personal pension if Gerard Associates had acted in his best interest.

fair compensation

My aim is to put Mr O as closely as possible into the position he would probably now be in if Gerard Associates had not arranged the transfer to the London Quantum RBS. I think Mr O would have remained invested in the pension with Friends Life, in the same funds.

what should Gerard Associates Limited do?

To compensate Mr O fairly, Gerard Associates must:

- Compare the performance of Mr O's investment with the Friends Life policy if that had remained in force and invested in the same funds. If the *fair value* is greater than the *actual value*, there is a loss and compensation is payable.

Gerard Associates won't be able to pay the compensation into Mr O'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 compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mr O's expected marginal rate of tax in retirement. Mr O is likely to be a basic rate taxpayer in retirement. The reduction should equal the current basic rate of tax. However, Mr O would have been able to take a tax free lump sum; the reduction should be applied to 75% of the compensation.

- Pay Mr O £300 for the distress and inconvenience caused by the loss of his pension fund. This has been very distressing for him.

actual value

This means the actual amount payable from the investment at the calculation date.

It may be difficult to find the *actual* value of the investment. This is complicated where an investment is illiquid (meaning it could not be readily sold on the open market) as in this case. So, the *actual value* should be assumed to be nil to arrive at fair compensation.

Gerard Associates won't be able to buy the investment. So the *actual value* should be assumed to be nil for the purpose of calculation. Gerard Associates may require that Mr O provides an undertaking to pay Gerard Associates 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 the payment from the pension plan. Gerard Associates will need to meet any costs in drawing up the undertaking.

fair value

This is what the Friends Life policy would have been worth if it had remained invested in the same funds.

The calculation should be made at the date of my final decision. Gerard Associates should provide the details of the calculation to Mr O in a clear, simple format.

my final decision

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

Simple interest is to be added to my award at a rate of 8% gross a year from the date of my decision to the date of payment.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 18 October 2018.

Roy Milne
ombudsman