

complaint

Mr C has complained about the suitability of the advice provided by Kevin Neal Associates Limited regarding the investment of his pension fund. He said that he had told Kevin Neal Associates Limited that he wanted to take his retirement income in the short term but some of the investments recommended cannot be easily liquidated.

background

In 2010, Kevin Neal Associates Limited recommended that Mr C invest £180,000 of his pension fund in a portfolio of which 75% was invested in three unregulated collective investment schemes (UCIS), 20% in a high income investment fund and 5% in cash. At that time, Mr C had a pension fund of around £193,000 in an income drawdown arrangement from which he was taking the maximum permitted income of around £11,000 gross a year, having taken the tax-free cash in April 2009.

Kevin Neal Associates Limited recorded that Mr C had a substantial income from royalties and personal assets worth around £500,000 as well as a property worth £1.5 million, which was subject to a mortgage of £500,000.

Mr C was then aged 51. Kevin Neal Associates Limited said that the portfolio it recommended was overall in line with Mr C's attitude to risk, which it had identified as balanced/risk aware.

Mr C signed a declaration, stating that he was an experienced investor.

Mr C later sold some of the investments, although trading in one of the unregulated collective investment schemes is currently suspended. He complained to Kevin Neal Associates Limited in December 2011, saying that he had not been given any explanation as to why the various investments were considered suitable, how they corresponded with his attitude to risk or his desire to be able to access his pension funds.

One of our adjudicators investigated this complaint. He wrote to both sides in May 2013 setting out the reasons why he considered the complaint should succeed. Briefly, he concluded that Mr C had not expressed any intention to take his retirement income in the short term. The adjudicator noted that Mr C was already taking the maximum permitted income.

The adjudicator took the view that Mr C would have been reliant on the expert advice of Kevin Neal Associates Ltd. He said that placing 75% of the pension fund in the unregulated collective investment schemes and 20% in the high-income fund exposed Mr C to more risk than he should have been advised, or was willing, to take.

Given that Mr C had a balanced attitude to risk, the adjudicator considered that the APCIMS Income index provided a suitable way of identifying the sort of return Mr C could have obtained. He calculated that Mr C had suffered a loss of £4,348 on the investments that have been sold and that the unsold investment of £47,700 on 4 January 2011 could have been worth £57,432 as at 23 December 2013.

Mr C agreed with the adjudicator; Kevin Neal Associates Limited did not. It said that it had recommended investment funds for the medium to long term. Kevin Neal Associates Limited also said that Mr C had caused it to believe the investments would be held for a minimum of

five years. It added that the current liquidity issue with the remaining investment was not significant because it could become saleable within the timescale originally anticipated.

Kevin Neal Associates Limited did not consider it appropriate for it to purchase from Mr C's pension the remaining investment because he had agreed to that investment on the basis that it would be held for the medium to long term. Kevin Neal Associates Limited also said that purchasing the remaining investment might give rise to tax consequences for Mr C.

Kevin Neal Associates Limited said that it considered the investment portfolio it had recommended was in line with Mr C's attitude to risk and that whilst £180,000 was a significant sum it was a represented a relatively small proportion of Mr C's overall wealth.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

It is important to note first that Section 238 of the Financial Services Markets Act (FSMA) prohibits the promotion of unregulated collective investment schemes to the general public unless the investor falls within certain exemptions. Those exemptions are set out in the FSMA (Promotion of Collective Investment Schemes (Exemptions) Order 2001 (the PCIS Order) or in the FCA's Conduct of Business Sourcebook (COBS) rule 4.12.

Before promoting an unregulated collective investment scheme an adviser therefore needs to ensure that the investor comes within one of the PCIS or COBS exemptions such that the promotion of the relevant scheme to that individual is lawful and not in breach of section 238 of FSMA.

The main PCIS exemptions are certified high net worth individuals and certified and self-certified sophisticated investors. I have seen no evidence to suggest that Kevin Neal Associates Limited was able to rely on the PCIS exemptions, which require the investor to have signed specifically worded statements accompanied by prescribed information.

COBS 4.12 sets out eight categories of investor to whom an unregulated collective investment scheme may be promoted without breaching section 238 of FSMA. The only category that I can see might have applied is category 2, being a person for whom the firm has taken reasonable steps to ensure that investment in the collective investment scheme is suitable.

A firm seeking to rely on that exemption should be able to demonstrate what steps it took and why it concluded that investment in an unregulated collective investment scheme was suitable.

As there is no provision for the steps to be taken retrospectively, ideally the firm should be able to point to evidence to indicate that an assessment was undertaken at the time. Likewise that the assessment was properly carried out and that it was reasonable to conclude that investment in the unregulated collective investment scheme was suitable.

I have seen nothing so far to show that Kevin Neal Associates Limited undertook such an assessment or that it was aware of the need to do so. I am not convinced that it is able to rely on an exemption (whether under PCIS or COBS) so that the promotion of the unregulated collective investment schemes to Mr C was not in breach of section 238.

But, all that said, I have gone on to consider whether, even if category 2 is relied on by Kevin Neal Associates Ltd, the investments were suitable for Mr C.

Kevin Neal Associates Limited said that Mr C has a balanced/risk aware attitude to risk. I accept that it would have understood that Mr C was prepared to accept an above average degree of risk. I am not persuaded that he was an experienced investor, despite signing a declaration to that effect.

Kevin Neal Associates Limited described one of the unregulated collective schemes as being of significant risk. It gave no risk rating on another and described the scheme that is currently suspended as having a low degree of risk. I consider that Kevin Neal Associates Limited misrepresented the degree of risk associated with the scheme that it said was low risk. I take the view that, by their very nature, each of the unregulated collective investment schemes exposed Mr C to more risk than he had indicated he was willing to take.

The high-income fund invested predominately in equities. That investment would have been vulnerable to adverse movement in equity markets and would not have mitigated the risk associated with the unregulated collective investment schemes.

Altogether, Kevin Neal Associates Limited advised Mr C to invest £180,000 from his pension fund of £193,000. It should have known that Mr C was drawing around £11,000 a year in income from his pension but it appears to have failed to consider this when it recommended that he invest for the medium to long term. I consider that it should have been clear that Mr C would have needed to start liquidating his investments just over a year later in order to have the funds available to maintain his income stream. This would have increased the vulnerability to short-term adverse movements in values.

As a portfolio for his pension fund, I conclude that the advice to invest 75% in the unregulated collective investment schemes and 20% in the high-income fund was unsuitable for an investor willing to accept a balanced/risk aware degree of risk.

Kevin Neal Associates Limited has said that the amount invested, £180,000, represented only a small proportion of Mr C's overall wealth. While Mr C had wealth outside of his pension fund, Kevin Neal Associates Limited provided advice on the investment of his pension fund only rather than providing any holistic planning. It gave no indication in its report that it would take into account the risk profile of any other assets. Indeed, Kevin Neal Associates Limited said that its advice was restricted to the investment of the pension fund in the SIPP.

I am not persuaded that Kevin Neal Associates Limited can now argue that the risk to which it exposed the pension fund was intentionally higher than Mr C was willing to accept because of his other assets.

I am satisfied that Mr C was seeking advice on the investment of his pension fund in a portfolio that could have an above average degree of risk overall. I consider that Kevin Neal Associates Limited should have taken into account the income being drawn. Had it done so, it would have appreciated that investments that could not be liquidated readily were wholly unsuitable. I take the view that it should have recommended insured funds and/or a good spread of direct equity investment in leading shares.

I consider that the movement of the FTSE APCIMS Stock Market Income portfolio on a total return basis would provide a suitable measure of the sort of return that Mr C could have obtained had he received suitable advice.

I have revised the calculation for the loss in the unrealised investment, taking into account the additional time that has elapsed. Using the movement in the APCIMS Income index, I calculate that the investment of £47,700 on 4 January 2011 could now be worth £57,432.

my final decision

My final decision is that this complaint should be upheld.

I direct Kevin Neal Associates Limited to buy the investment in Quadris Environmental at a price calculated using the last published net asset value figure. It should meet any costs that might be incurred in that purchase.

If the purchase price excluding costs is less than £57,432, Kevin Neal Associates Limited should also pay the difference into the SIPP as a member contribution allowing for income tax at Mr C's highest marginal rate and any costs incurred.

If Kevin Neal Associates Limited is not able to buy the investment in Quadris Environmental, it should pay £57,432 direct to Mr C less income tax at his highest marginal rate. Kevin Neal Associates Limited may require Mr C to enter into an irrevocable undertaking to pay to it such amounts as are realised or become realisable in respect of the Quadris Environmental investment. Mr C will not be able to withdraw the full amounts that may be received from his pension fund and he will have to provide for any payment to Kevin Neal Associates Limited from other sources.

I also direct Kevin Neal Associates Limited to pay £4,348 direct to Mr C, again less income tax at his highest marginal rate in respect of the investments that were sold.

Adrian Hudson
Ombudsman