

complaint

Mr H's complaint is about an investment which he says Legacy Wealth Limited (which used to be called C J Higgins Limited) recommended. Legacy Wealth Limited says it didn't advise Mr H about the investment – which was an unregulated collective investment scheme (UCIS). It says that, if Mr H has lost money, that isn't Legacy Wealth's fault.

background

Legacy Wealth had been Mr H's financial adviser for several years. Mr H had a meeting with his Legacy Wealth adviser in August 2005. Mr H was then aged 48 and earning £70,000 a year as the chief executive of a non profit organisation. He was married and he and his wife had no dependants, mortgage or other debts. They had significant disposable income and substantial assets. Mr H had total pension funds of £340,000. He wanted to retire at age 55 but 65 at the latest. His attitude to risk was nine out of ten (where ten was the highest).

Mr H emailed Legacy Wealth in August 2005 saying:

"Mike thanks for taking the time to meet with me. You ask me to get details of two Equitable Investments that I was asking your advice about. I assume the attachments will give you all the information you need. I have been thinking carefully about some of the suggestion you made and have already researched some property investment options. I will revert to you in due course. Meantime any advice you can give me about the attached policies would be appreciated."

In his email in May 2006 to Legacy Wealth Mr H said that he was thinking of setting up a SIPP and 'funnelling' a significant percentage of his salary into it to reduce his higher rate or tax generally on his earnings. He said he wanted an execution only SIPP and that he would set up a self trade account for dealing – the same as he already had for investments and ISAs.

The adviser agreed it would be a good idea to reduce tax by increasing pension contributions. And that it would be worth getting together to discuss exactly what Mr H wanted the SIPP to do.

Mr H met with the adviser in June 2006. The note of the meeting records that there was some discussion about why Mr H wanted a SIPP and/or a property investment. Salary sacrifice was also discussed. The note says that Mr H was interested in property investment and that the adviser would pass on details from his contacts.

Mr H met with Legacy Wealth again in October 2006. Legacy Wealth's meeting note lists what was discussed, including the need to 'diversify into other assets to reduce risk'. It also notes that Mr H's 'existing investments [were] very high risk 100% equity. Above 10 out of 10'. And that Mr H was a member of a bank's 'frequent traders club'.

The investment about which Mr H has complained was also discussed. About it the note says:

*'Approx 4 million investment
Approx. 50% borrowing – increases return and risk
NO ADVISE – not property experts (Higgins Financial Services)
Independent information decision to invest is yours*

Phase 1 and 2.

Group of high net worth individuals and/or direct property investment experience'

The note records that Mr H was interested in the investment and that details were to be sent to him. It also said:

*'Confirmed with [Mr H] he is high net worth and no advise no come back in relation to direct property investment
Investment via pension more tax efficient*

The adviser emailed Mr H details of the investment. When the prospectus later became available a copy was sent to Mr H. The proposal was to raise about £2.2 million from investors to purchase a commercial property for about £4 million (the balance to be financed by bank borrowing) which would be let. The rental income would be used to repay the bank borrowing and meet expenses. The property would be sold in five to seven years. Capital growth in the property of 2.5% a year would give an annual return of about 9% for investors.

Mr H replied that he was interested and asked a number of questions. There were some more email exchanges between Mr H and Legacy Wealth. Mr H was particularly concerned about how the property had been valued.

I have seen a copy of a form signed by Mr H in March 2007. The form is headed '*Execution Only Transaction*' and says:

'We hereby instruct C J Higgins Financial Services Ltd to arrange the following insurance policies (please list)'

The name of the investment was shown. Underneath and above where Mr H signed it said:

We confirm that we do not require and have not received any investment advice in relation to the above named contracts.

Mr H signed the application form for the investment on in May 2007. He invested £100,000. The application form gave the adviser's details as the introducer.

I have also seen a copy of an undated letter signed by the adviser which I think was sent with the application form. The letter confirmed that Mr H, for the purposes of section 21 of the Financial Services and Markets Act 2000 (FSMA), was a sophisticated or high net worth investor. The letter added that Mr H was aware that any investment carried a financial risk and that he should consult an authorised investment adviser before proceeding with the investment.

Legacy Wealth wrote to Mr H in February 2010 about the investment. The letter started off by saying that the past two years had been a difficult time for property investors. The value of the property had fallen by about 5%, several tenants had been lost and another had asked for a rent reduction. It also mentioned negotiations with two new prospective tenants and planned minor improvements to part of the property. The interest rate on some of the borrowing was to be capped, to reduce the risk of interest rates rising significantly. There was also a possibility that a garage could be sold which would take care of cash flow requirements for the next 12 months and cover the cost of the improvements.

At some stage Mr H transferred a further £13,000 to the investment. I think that was in response to the letter and to go towards the cost of the renovations mentioned.

In 2013 Mr H complained to Legacy Wealth. He said he had been mis-sold the investment, he was unaware of the risks involved and the property had been mis-managed.

Legacy Wealth didn't uphold the complaint. It said:

- No advice was given or sought – Mr H had signed an execution only transaction form confirming this. No suitability letter had been issued.
- In August 2005 Mr H had confirmed that he was researching various property investments. Because of his interest in such investments and his signed agreement (on 19 August 2005) that he could be contacted about promotions that might be of interest, details of the investment were sent to him.
- It was satisfied that Mr H met the necessary criteria and could be told about the investment. He was an experienced high net worth investor. He had substantial investable assets, excluding his main residence, including direct equity investments. He had said, in conversations dating back to 2002, that he was interested in property investment. He had also personally documented his involvement in property development dating back some 20 years.
- He told Legacy Wealth in 2006 that he wanted an execution only SIPP. His existing personal pension provider had facilitated the transfer of his personal pension fund to the SIPP. At the time this was less than 10% of his overall investable assets.
- Mr H's attitude to risk of nine out of ten had been established using a risk profiling questionnaire.
- After expressing his interest in the investment Mr H had sought reassurance, asking questions which Legacy Wealth had answered. He was given a copy of investment promotion document. It was very detailed and explained the structure of the investment, costs and tax consequences. It highlighted the risk warnings and so Mr H was fully informed and aware of the risks of the investment. Mr H was meticulous in his research and questioning. He understood property investment and the '*intricacies*' of rental properties.

Mr H remained unhappy and referred his complaint to us. He also said that Legacy Wealth mis-managed the investment – for example, in finding tenants for the property.

Legacy Wealth said that we couldn't consider the complaint as it hadn't been made in time. It pointed to the February 2010 letter which said that the property had lost four tenants and the fifth tenant had asked for a rent reduction. The letter also said that an interest rate cap was intended at 5% with the cost added to the capital. If Mr H had wanted to retire in three to four years' time he should have realised that there was a problem. And the letter had said that a further capital injection (£70,000) was needed if tenants couldn't be found.

Our adjudicator didn't agree. She said that the letter made positive statements about the property's future success. On this basis she didn't think that, from the letter, Mr H ought to have realised that there was a problem.

But the adjudicator didn't uphold the complaint. She explained that Mr H's concerns about the management and administration of the property wasn't something which we were able to consider.

The adjudicator also said she couldn't look at the suitability of the investment because Mr H had signed a document confirming that he had not received any advice about the investment. The adjudicator thought that Mr H would have been aware of the implications of signing the document. She said that if he thought that he'd been given advice he could have raised that at the time, but he hadn't. The adjudicator also referred to Legacy Wealth's file note which said that Mr H had been made aware that he had '*no come back*'. And, before he agreed to invest, Mr H had told Legacy Wealth that he had researched property investment.

The adjudicator then looked at whether the investment (a UCIS) had been promoted to Mr H lawfully. Section 238 of the Financial Services Markets Act (FSMA) prohibited the promotion of UCIS to the general public, unless the investor fell within certain exemptions – 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.

The main PCIS Order exemptions are certified high net worth individuals and certified and self certified sophisticated investors. The adjudicator said that she hadn't seen anything to show that Legacy Wealth was able to rely on the PCIS Order exemptions – which required the investor to have signed specifically worded statements accompanied by prescribed information.

The adjudicator then considered COBS 4.12. That sets out eight categories of investor to whom a UCIS could be promoted without breaching Section 238 of FSMA. The only category that she could see applied in this case was category 2 – that is a person for whom the business had taken reasonable steps to ensure that investment in the UCIS was suitable. The adjudicator concluded that Legacy Wealth was able to rely on that exemption.

Mr H didn't agree with the adjudicator's findings. He said, in summary:

- Legacy Wealth had identified and acquired the property. It had then advised Mr H that he needed to diversify his pension investments and that a property investment should be included. It was an unsolicited approach specifically targeting him. It was a '*hard sell*' and the adviser came back to see him several times.
- He was nervous but the adviser presented detailed figures on property values. The adviser had been personally involved in acquiring the property and had researched the local property market. He emphasised Legacy Wealth's expertise and due diligence and said that it was a fantastic opportunity which Mr H shouldn't miss. It was all tied together as part of his retirement package even down to the time the property would be sold. The adviser specifically focused on the need to diversify and recommended the percentage of Mr H's retirement funds that should be invested.
- He had to sign many documents which apparently included the execution only form. This needs to be tested using the '*reasonable person test*', which is a basic concept of common law. It is clear that Legacy Wealth gave him advice from start to finish. Legacy Wealth shouldn't be allowed to argue that just because he signed a form it didn't offer him advice. That is simply not true and if accepted would be a blatant misrepresentation of what happened.
- He didn't accept that Legacy Wealth's meeting notes accurately reflected what was discussed. Nor did he agree with the statement that he '*had personally documented his involvement in property investment dating back 20 years*'. He didn't know where that had come from. As he has never made any property investments it wasn't true.

- The attitude to risk assessment doesn't show anything. Although he doesn't recall the details he didn't think it referred to property investments. And there appeared to be a contradiction as Legacy Wealth's advice was based on him needing to invest some of his pension in property.
- He didn't agree that he understood rental property investment. And he queried why he should, as he'd not invested in that before. As an intelligent person he understood the risks and rewards of property – it had been a big news topic so anyone who watches TV or reads newspapers would fall into that category. But he had no personal experience.
- He reiterated that it was clear that he'd received advice throughout. And that the adviser had asked him to sign lots of documents. And he recalled the adviser having complained about having to jump through '*bureaucratic hoops*' which really meant nothing.
- He explained what his work involved and that it didn't include knowing about commercial property.
- As he couldn't recall the documents he'd signed he asked me to confirm that I had actually seen the waiver which said he wasn't getting advice.

Mr H later added that a contact of his had invested the same amount in a similar scheme, also a UCIS. He had complained to us. His complaint had been upheld and his investment repaid. He was a more sophisticated and experienced investor so it made no sense for that complaint to be upheld but not his.

my findings

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

Legacy Wealth didn't respond to the adjudicator's view. So I have assumed that Legacy Wealth doesn't disagree with the adjudicator's conclusion that Mr H's complaint has been made in time.

I also agree with the adjudicator that some of the issues raised by Mr H about the management of the property can't be considered by this service as they are not regulated activities.

Mr H's main complaint is that Legacy Wealth recommended the investment and that it was unsuitable. I can only consider if the advice was suitable or not if Legacy Wealth did in fact advise Mr H to make the investment.

In deciding that I've considered everything very carefully, including:

- All Mr H says about what happened - including Legacy Wealth's involvement in the investment, how Mr H came to make the investment and what was discussed during Mr H's various meetings with Legacy Wealth.
- Mr H's circumstances, including his investment and business experience and his attitude to risk.

- The email exchanges between Mr H and the Legacy Wealth adviser.
- What Legacy Wealth says about the matter.
- The relevant documents – in particular, the execution only transaction form signed by Mr H, the investment application and the investment prospectus.

It's clear that Legacy Wealth was involved in the investment. And that it did give Mr H information about the investment and discussed it with him. It's impossible now to be sure exactly what was said. Some of what was said may have amounted to advice. I also note that Legacy Wealth had been Mr H's adviser for some time and so it is perhaps unlikely that he would have made the investment without advice. But, on the other hand, he may have been sufficiently confident in Legacy Wealth's association with the investment to go ahead, without any recommendation having been made.

And, like the adjudicator, I do think that the document which Mr H signed to say that Legacy Wealth hadn't given him any advice is important. I find it difficult to see that Mr H would have just signed this document without being aware of what it said. It was a straightforward document which clearly recorded that he had not been given any advice by Legacy Wealth about the investment. And I think that Mr H would have understood the significance of acknowledging that he hadn't been advised by Legacy Wealth to invest.

In saying that I think that Mr H would have been aware of what terms such as 'execution only' meant and their significance. I think some consumers might struggle with such terminology but I don't think that Mr H would have done.

Mr H has said that he was given many documents to sign and he just signed what the adviser asked him to. But I don't think that Mr H is likely to have been willing to sign a document which said that he hadn't been given any advice if he thought that Legacy Wealth had advised him.

The note of the meeting in October 2006 records that Mr H was told that Legacy Wealth weren't giving advice about the investment and that the decision whether or not to proceed was his. It also said that if he went ahead there would be '*no come back*'. I know that Mr H has said that Legacy Wealth's meeting notes aren't accurate. But the note is consistent with Legacy Wealth not having given any advice as recorded in the document which Mr H signed.

I have also looked at the email exchanges between Mr H and Legacy Wealth. Although I can see that Legacy Wealth did give Mr H information about the proposed investment I don't think that any advice was given.

Legacy Wealth did (as the application form records) introduce Mr H. Arranging deals in investments is a regulated activity and can include introducing. Mr H might say that the investment didn't turn out as expected and but for Legacy Wealth's involvement he wouldn't have known about the investment and so wouldn't have gone ahead with it.

I can see that argument but I think that Legacy Wealth, if it acted only as an introducer and didn't give any advice about the investment, would only be responsible if it misled Mr H – for example, by saying that Mr H's capital or any return was guaranteed. From what I've seen I don't think that was the case.

Mr H says that the adviser described it as a '*fantastic opportunity*'. I accept that the adviser may have said that he thought that the investment would do well. But I think that was just his

opinion. Mr H had the brochure and so he could see for himself how the investment would work and what the risks were.

The adjudicator also looked at whether the investment had been promoted lawfully to Mr H. Promoting isn't a regulated activity but I think that, in acting as an introducer, Legacy Wealth also promoted the investment to Mr H.

As the adjudicator has explained, the promotion of UCIS to the general public is restricted. There are certain exemptions. The adviser needed to be sure, before promoting the investment to Mr H, that he came within one of the exemptions.

The adjudicator's view was that Mr H probably came within a category 2 exemption under COBS 4.12. That provision didn't come into effect until 1 November 2007. At the time the relevant provision was COB 3 Annex 5 of COB 3.11. But there was a similar category 2 exemption in any event.

But if Legacy Wealth didn't advise Mr H about the investment I find it difficult to see how Legacy Wealth took the necessary reasonable steps to ensure that the investment was suitable for Mr H. So I'm not sure that Legacy Wealth could have properly relied on a category 2 exemption.

But the PCIS Order exemptions for sophisticated/high net worth clients applied throughout. If Legacy Wealth was seeking to rely on a sophisticated/high net worth exemption under the PCIS Order it should have asked Mr H to sign a specially worded statement. I've not seen such a statement. But I think that Mr H would probably have met the high net worth criteria. And that he would have signed a statement had Legacy Wealth asked him to.

So I think, although Legacy Wealth hasn't demonstrated that it complied in full with the requirements of the PCIS Order, that Mr H was someone to whom a UCIS could be promoted without breaching the section 238 restriction. So I don't think that Legacy Wealth acted unlawfully in promoting the investment to him. And as Legacy Wealth as pointed out, Mr H, when he signed the terms of business on 19 August 2005, did agree that Legacy Wealth could contact him by means of an unsolicited promotion with details of any investment or service which it considered Mr H might be interested in. .

I can understand what Mr H says about another, apparently similar, complaint being upheld. But the issue in his case isn't whether the investment was unsuitable. I can only consider suitability if I am satisfied that investment advice was given. So I can't look at Mr H's case on the basis that Legacy Wealth was wrong to advise him to invest – because I can't say that advice was given.

my final decision

For the reasons above, I do not uphold this complaint and make no award.

Lesley Stead
ombudsman