

The complaint

Ms A complains that she received unsuitable advice from Craig Mitchell to invest in a property bond. She says Craig Mitchell was the advisor who signed off the investment as suitable for her, but she never received the promised interest and has lost the capital she invested.

What happened

In January 2017, Ms A says she filled out an application to invest into property bonds. She says the application was passed to Craig Mitchell to sign off that she was suitable for the investment. She was expecting to get a good return on the investment over 12 months, so invested £30,000.

When Ms A didn't receive the interest payments she was expecting, she contacted Craig Mitchell and raised a complaint. Ms A received a response from Craig Mitchell in February 2020 informing her that it holds no information in relation to her or the investment. It also said it didn't provide her with any advice.

So, Ms A referred her complaint to us and asked us to investigate. We contacted Craig Mitchell and asked it to provide its file, but it said that it didn't provide any advice to Ms A, so had nothing it could send.

Ms A provided a copy of her application, which is signed by her. It also contains a page that is a signed undertaking by Craig Mitchell about the suitability of the investment for her. She also provided details of her circumstances at the time she took out the investment.

One of our investigators assessed the complaint based on the information available. He accepted there was limited evidence from the time but found that it was likely Craig Mitchell provided Ms A with advice. He referred to regulatory guidance in the FCA's Handbook (in the Perimeter Guidance Manual ('PERG')) on what constitutes 'advice' and considered what Ms A said happened. He considered that the contents of Ms A's application for the bonds. He thought Craig Mitchell was the adviser responsible for the investment and that its assessment of the bonds' suitability influenced Ms A's decision to invest.

In terms of suitability, the investigator considered the bonds unsuitable for Ms A. He said, given the information Ms A's provided about her circumstances, a product that was a particularly high-risk investment and suitable for a sophisticated investor wasn't right for her.

Craig Mitchell's principal disagreed with this outcome and maintained he didn't advise Ms A to invest. In summary he said:

- The firm was not authorised to give advice on any investment products at the time Ms A invested her money.
- Ms A says she was first introduced to this product by a different financial adviser, so it was this person who advised her to invest her money.
- He has never been introduced to Ms A, so she is mistaken in her recollections.
- He rejects the allegation that Craig Mitchell was asked to assess the suitability of the

investment for Ms A nor did it confirm the investment was suitable.

As no agreement could be reached, Ms A's complaint has been passed to me to reach a decision.

What I've decided – and why

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

Firstly, I'll address the issue of whether Craig Mitchell provided advice. Craig Mitchell says it wasn't authorised to give investment advice, never met with Ms A and doesn't hold any records relating to advice being given to her. The evidence available from the time is limited but Ms A has provided a copy of the application form that was completed.

I've looked at the submissions from both parties to decide whether there is evidence of advice. The submissions from both Ms A and Craig Mitchell indicate they never met. The testimony from Ms A suggests that a third-party intermediary could have played an introducing role between them – albeit without Ms A actually meeting Craig Mitchell. When reviewing the application, it is apparent there are sections that have been signed and dated by both Ms A and Craig Mitchell's principal (on the same day). Ms A says the application was passed to Craig Mitchell to sign off her suitability for the investment. On balance, I conclude that the application must have passed between Ms A and Craig Mitchell. Based on what I've seen, it is reasonable to conclude that a third-party intermediary facilitated this.

I've reviewed the section of the application which shows the authorised advisor. The application Ms A has provided gives her adviser's details which, in a different handwriting, consists of Craig Mitchell's principal's name, the principal's details (including FCA number) as the "Authorised Adviser", and its principal's signature. I acknowledge that Ms A has mentioned that a third party was involved in introducing her to the investment opportunity. While it does appear this individual was involved in the facilitation of the investment, the balance of evidence doesn't support that this was the authorised advisor who assessed the suitability of the investment, and rather this was Craig Mitchell. The section in the application form signed by Craig Mitchell says:

"I/we can confirm that I/we have complied with the suitability rules in COBS 9 of the Financial Conduct Authority's Handbook of Rules and Guidance and have assessed this investment as suitable for the above named client."

I've considered this statement, taking into account the guidance within PERG 8.28. One of the key aspects of this is the need to establish that a value judgement, about the merits of an investment, was conveyed by the adviser to an investor, which influenced the latter's investment decision. The above declaration makes it clear that the investment had been assessed as suitable for Ms A (who was 'the above named client' in the application) by Craig Mitchell. Ms A says she understood this to be a sign off for the suitability of the investment.

I accept that overall, there is limited documentation around this investment sale, so it is difficult to be sure of the exact process. But I'm aware from other cases involving the same investment that confirmation of independent financial advice was a pre-requisite to investing in the bonds, hence the need for the 'authorised adviser' undertaking within the application document. So, based on what is available on this complaint – Craig Mitchell gave that undertaking and therefore made Ms A's investment possible.

I acknowledge the points made by Craig Mitchell about the lack of fact find and recommendation letter, and it not being authorised to advise on investments in 2017. But these points aren't sufficient to change my conclusions. There is documentation, in the form of its adviser's undertaking, that Craig Mitchell assessed suitability of the bonds for Ms A considered them suitable for her. If Craig Mitchell didn't have the regulator's authority to give investment advice, then that is a matter between it and the regulator.

Overall, on balance and for the reasons given above, I am satisfied that Craig Mitchell undertook responsibility for advising Ms A that her investment in the bond was suitable for her. Even if I accept Craig Mitchell's ascertain that it didn't assess Ms A's circumstances, that would mean the undertaking it signed about assessing suitability was false. But if it was a false undertaking, then I still think it was likely to be relied upon by Ms A. Indeed, Ms A's testimony indicates she understood that the investment had been "signed off" by Craig Mitchell. I'm persuaded that Ms A attached weight to Craig Mitchell's undertaking in terms of making his investment decision for the bond. In which case, I find Craig Mitchell responsible for misleading Ms A in this respect.

I will now go on to decide whether I find the investment suitable for Ms A's needs and circumstances at the time.

As mentioned above, there is limited information available about the investment. But my understanding of the bonds is that they had a term of 12 months during which interest would be paid and capital returned at maturity. Ms A has confirmed her investment was for 12 months, with an option to renew and was to be invested in residential property developments. This supports my understanding that the bonds would be used to raise capital which it then issued as loans to third-party firms for the business of property acquisition, development and sale. Then the proceeds of the property sales were to be used to service the loans, which then provided funds for capital to be returned to investors at maturity. Investments in property carry inherent risks – including the difficulty determining a reliable value of the underlying assets and in terms of liquidity of the underlying assets. So, there does seem to be a number of layers of risk involved where things could go wrong.

I've looked at the information available about Ms A's circumstances at the time to decide whether the investment was suitable. Ms A says she used her savings to invest with an aim to allow her to retire early and spend more time with her husband. She says she had little in the way of investment experience and most of her money was in bank savings accounts. She says her attitude to risk at the time was low to medium as this was the only extra cash she had available but was still in secure employment. She says she was not aware that this was a high-risk product as she had no previous experience with this type of investment.

I've not seen evidence that Ms A was a high-risk investor with investment experience that made it possible for her to understand the risks involved in the bonds – and to understand that they were different from mainstream investments. She has described herself as a low to medium risk investor, which was mismatched by the high-risk nature of the bonds. The money she invested was for her retirement and doesn't appear to be something she could easily replace. From what I've seen, Ms A didn't have much in the way of capacity for loss. The idea of placing the majority of her savings in a high-risk unregulated investment doesn't fit her apparent capacity for loss. Overall, on balance and for the reasons given above, I don't think the bonds were suitable for Ms A.

Putting things right

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

I take the view that Ms A would have invested differently. It is not possible to say *precisely* what she would have done differently. But I am satisfied that what I have set out below is fair and reasonable given Ms A's circumstances and objectives when she invested.

What must Craig Mitchell do?

To compensate Ms A fairly, Craig Mitchell must:

- Compare the performance of Ms A's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investments. If the *actual value* is greater than the *fair value*, no compensation is payable.
- Craig Mitchell should also pay interest as set out below.

Income tax may be payable on any interest awarded.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Property Bond	Still exists but illiquid	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 final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

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

If at the end date any asset is illiquid (meaning it could not be readily sold on the open market), it may be difficult to work out what the *actual value* is. In such a case the *actual value* should be assumed to be zero. This is provided Ms A agrees to Craig Mitchell taking ownership of the illiquid assets, if it wishes to. If it is not possible to take ownership, then it may request an undertaking from Ms A that she repays to Craig Mitchell any amount she may receive from the bonds in future.

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, Craig Mitchell should use the monthly average rate for one-year fixed-rate bonds 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 have decided on this method of compensation because:

- Ms A's precise objectives in 2017 are not clear but based on the limited information available I'm satisfied she wanted capital growth with a small risk to her 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 Ms A's risk profile was in between, in the sense that she was prepared to take a small level of risk to attain her investment objectives. So, the 50/50 combination would reasonably put Ms A into that position. It does not mean that Ms A would have invested 50% of her money in a fixed rate bond and 50% in some kind of index tracker fund. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Ms A could have obtained from investments suited to her objective and risk attitude.

My final decision

I uphold the complaint. My decision is that Craig Mitchell should pay the amount calculated as set out above.

Craig Mitchell should provide details of its calculation to Ms A in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms A to accept or reject my decision before 24 June 2022.

Daniel Little
Ombudsman