DRN-3208744

The complaint

Mrs R and the estate of Mr R complain that J. Edward Sellars & Partners Limited (ESPL) gave them unsuitable investment advice. They say the risk of the investments which were bought on their behalf was mis-represented, and as a result they ended up with more risk in their portfolio than they wanted or expected.

What happened

Mr and Mrs R met with ESPL in January 2018 to discuss investing some of their available cash. They were also looking for advice on potentially consolidating their pensions – but that advice is not the subject of this complaint.

ESPL offered them a discretionary portfolio service. In the application form which Mr and Mrs R initially signed, ESPL explained that it was a 'traditional investment manager' but that it had a 'plain English ethos' – based around an 'individual service' and 'clear and personal communication, on a regular basis'. Mr and Mrs R agreed with ESPL's terms and chose the 'Discretionary Managed' service which ESPL offered. This involved Mr and Mrs R delegating the day to day management of their portfolio to one of ESPL's investment specialists. In this same application form, Mr and Mrs R ticked a box to say they had 'very little investment knowledge'.

During their meeting with ESPL, Mr and Mrs R gave information about their limited investment knowledge and experience, their objectives and their attitude to risk, in the form of answers to multiple choice questions (strongly disagree to strongly agree):

- They 'agreed' that they were comfortable with the value of their investments fluctuating in the shorter term;
- They did not have sound financial experience that would help them make investment decisions.
- They were in between when considering whether they'd be comfortable accepting shorter-term losses in order to pursue longer-term growth.
- But they were prepared to take a 'higher' risk in order to gain higher returns.
- They described their investment approach as 'a balance between risk and reward'.
- They agreed they'd do nothing and sit tight should the stock-market decline by 20%.
- They were looking to take a medium risk for potential return.
- They were more focused on potential gain than risk.

As a result of the answers they gave, they were given a score which placed them in the 'equity focussed' category – the second highest.

ESPL defined an equity focussed investor in the following way:

'As an Equity Focussed investor your focus is on potential gain rather than risk. You understand that the level of potential return on your investments should increase as a result of taking greater risk. Equity Focussed investors are typically more comfortable with short term fluctuations in the value of their investments; you desire to invest in a broad spread of quality individual securities and are comfortable with your portfolio being invested in FTSE 350 companies, as well as some exposure to smaller and less liquid companies traded on the FTSE All share and AIM market'.

ESPL therefore went ahead and began building a portfolio that it considered was in line with the information Mr and Mrs R had provided to it. For the sake of simplicity, the following figures have been rounded.

Mr and Mrs R had two separate portfolios – and they were invested in different holdings. In Mr R's case, he transferred around £74,542 from an existing cash ISA which was used to purchase the following investments:

- Six companies listed on the London Stock Exchange, representing around 47% of the portfolio.
- 3 all equity funds representing around 33% of the portfolio.
    - A fund investing virtually entirely in companies listed on the Japanese stock exchange;
    - A European fund which invested over 80% in European companies in 'special situations', all caps.
    - A European multi-cap fund, which invested in a minimum of 80% European equities, of which 90% smaller companies
- The remainder in cash.

He then transferred in about £8,200 he held in a UK Equity Fund (minimum 70% shares) from a stocks and shares ISA he held with another provider. This represented around 9.9% of his entire portfolio worth around £82,808.

Mrs R's portfolio was larger and contained more holdings. She transferred just under £57,484 in from an existing cash ISA , injected an additional £20,000 and transferred in £27,092 held in an existing stocks and shares ISA.

ESPL invested Mrs R's cash contribution of £77,484 as follows:

- Shares in five companies amounting to around 44.4% of the portfolio.
- Units in a Latin American fund which was predominantly invested in equities listed in Latin America, representing around 8.8% of the portfolio.
- Units in a Global Emerging Markets Fund, which specialised in equities in emerging markets worldwide, representing around 8.8% of the portfolio.
- Units in a fund that invested over 90% in global companies in the mining sector, representing 8.7% of the portfolio.

As a result of the investments which she transferred in, Mrs R's portfolio was also invested in:

- 2.74% in a bond fund, that invested predominantly in high yielding, investment grade or government bonds, around two thirds of it abroad.
- 2.75% in a UK Equity Income fund, invested almost entirely in UK companies.
- 2.74% in a UK Equity fund, invested entirely in UK companies with 'growth potential'.
- 14.9% in a fund that invested predominantly in UK shares and fixed interest securities.
- 2.75% in a fund that invested in European equities (eurozone and outside the eurozone).
- 3.3% in cash.

In July 2019, Mr and Mrs R complained. In short, they complained there was a lack of clarity, accuracy and explanation provided in respect of the risk profile of their portfolios. They said they had been clear with their adviser that their objective was a long-term investment that provided a safe and steady return, with a 'small' element of risk. They said that they didn't expect large fluctuations in their portfolio, and given their lack of knowledge, they expected their portfolios to be invested in low risk investments. When they received their first statement in May 2018, they were reassured because the investments were labelled 'low' and 'ultra-low' risk.

They complained about the lack of documentation they received in relation to their investments, as well as a proper explanation of the investments which had been bought on their behalf. They said they were also unsure about the fees they had been paying and were shocked to see the extent of these. Overall, they said that they believed their 'requirements had been misinterpreted, information [had] been lacking, misleading and inaccurate'. They complained that as a result, they had been 'mis-sold financial products that [did not] represent [their] attitude to risk', which meant their money had been 'invested at higher risk than expected and stated in [the] annual valuation reports'.

ESPL investigated their concerns but didn't think it had done anything wrong. In short, it concluded that the adviser had appropriately established their attitude to risk and discussed it with them. Their portfolio was constructed in line with that and was clearly affordable given their overall liquid assets. It said that it felt the adviser had appropriately discussed all relevant issues with them at the time, and they could've sought clarification as necessary.

I issued a provisional decision in November 2021. In it I said:

The applicable rules in force at the time – COBS 9

When deciding what investments to make on Mr and Mrs R's behalf, ESPL needed to ensure that it only invested in securities which were suitable for Mr and Mrs R – based on what it knew about them through the fact find it carried out. COBS 9 sets out how ESPL needed to do this:

COBS 9.2 Assessing suitability

COBS 9.2.1: Assessing suitability: the obligations

(1) A *firm* must take reasonable steps to ensure that a *personal recommendation*, or a decision to trade, is suitable for its *client*.
(2) When making the *personal recommendation* or *managing* his *investments*, the *firm* must obtain the necessary information regarding the *client's*:
    (a) knowledge and experience in the investment field relevant to the specific type of *designated investment* or service;
    (b) financial situation; and
    (c) investment objectives;

so as to enable the *firm* to make the recommendation, or take the decision, which is suitable for him.

COBS 9.2.2

(1) A *firm* must obtain from the *client* such information as is necessary for the *firm* to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided,

that the specific transaction to be recommended, or entered into in the course of managing:

   (a) meets his investment objectives;
   (b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and
   (c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.

(2) The information regarding the investment objectives of a *client* must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.

(3) The information regarding the financial situation of a *client* must include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.

COBS 9.2.3

The information regarding a *client's* knowledge and experience in the investment field includes, to the extent appropriate to the nature of the *client*, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, information on:

(1) the types of service, transaction and *designated investment* with which the *client* is familiar;
(2) the nature, volume, frequency of the *client's* transactions in *designated investments* and the period over which they have been carried out;
(3) the level of education, profession or relevant former profession of the *client*.

Were Mr and Mrs R's portfolios suitable for them?

I'm not persuaded the heart of this complaint is to do with whether advice to invest the sums they did was affordable for Mr and Mrs R. I'm satisfied, based on the evidence available to me, that Mr and Mrs R were looking for equity investments – and I'm satisfied their overall financial circumstances meant that it was suitable for them to invest the sums they did.

In my view, at the heart of this complaint is the issue of risk – both in the way ESPL described it to Mr and Mrs R, and in the way the portfolios were eventually constructed. But the issue of risk in this case and in my view is, fundamentally, about understanding. This isn't about complex trend analysis, algorithms or volatility scores – nor do I think I need to opine on any of these concepts when deciding whether it was fair and reasonable for ESPL to conclude that it was suitable to make the trades that it did on behalf of Mr and Mrs R.
In my view, the concept of risk as Mr and Mrs R understood it at the time, based on their experience of investing and their conversations with the adviser, was simply the extent to which their money was, theoretically, exposed to capital losses – and the higher the risk, the higher the prospect of those losses being significant.

Mr and Mrs R's attitude to risk

I agree with ESPL that it's important to consider the totality of the answers which Mr and Mrs R gave during their meeting with their investment manager. And it isn't my role to decide whether ESPL's method for categorising or defining different ways of approaching risk is reasonable or not. The key issue for me to decide when establishing what is fair and reasonable is whether ESPL built a portfolio that was suitable for Mr and Mrs R based on their attitude to risk – this involves not just an assessment of their 'preferences' in relation to risk taking but also whether they had the 'necessary experience and knowledge in order to understand the risks involved […] in the management of [their] portfolio[s]'.

When considering all of the answers they gave, as well as their overall circumstances, I'm satisfied the fact find demonstrates that Mr and Mrs R accepted they needed to invest a proportion of their assets in equities in order to have the potential to achieve better than average growth. I don't agree with the investigator or Mr and Mrs R that at the time they only wanted to take a small amount of risk – that is what they were already exposed to. Both Mr and Mrs R had significant cash-based assets, and some UK equity funds. Mrs R also had a bond fund. Overall, the assets they had were already exposed to a minimal amount of risk.

Furthermore, I consider their decision to appoint a discretionary manager supports the fact that they understood they needed a more active, and therefore potentially riskier, approach to a portion of their liquid assets – in order to generate the higher rewards I'm persuaded they were seeking.

I say this also based on the individual answers they gave to the questions around their approach to losses. I'm not persuaded Mr and Mrs R would've indicated they'd accept a degree of losses and do nothing, nor that they were focused on gains rather than losses, if all they were after were low risk investments. I appreciate Mr and Mrs R might disagree with this assessment – but I've taken it without the benefit of hindsight. Mr and Mrs R didn't know at the time how their investments would perform – they knew they wanted higher rewards, and I don't agree it was misleading for the adviser to have suggested they needed to take more risks in order to achieve that objective.

But I do accept that their relative inexperience in investing in the stock market meant they also harboured some reservations around significant capital losses. I think some of the questions do show that they very much wanted a balanced approached to the construction of their portfolio – a spread of investments that would both limit the potential capital losses they might incur, while at the time expose them to the sort of growth that was likely only going to be possible with exposure to equities.

This means that I don't think the definition 'equity focussed' is inherently wrong. I don't think there is much difference between the definition of 'equity focussed' and 'moderate' according to ESPL's definitions.

A 'moderate' investor, according to ESPL, was defined as follows:

Your focus is generally on achieving a higher rate of return versus a balanced investor. As a moderate investor you accept that there will be some level of volatility in the value of your investments. You wish to take on slightly more risk when compared to a balanced portfolio because typically capital appreciation and longer term growth is a more important factor for you. Therefore in order to try and generate a satisfactory level of return from the portfolio, we will recommend a larger proportion of your portfolio is invested in individual stocks and shares within the FTSE 350 (when compared to balanced investors).

An 'equity focussed' investor was defined as follows:

As an Equity Focussed investor your focus is on potential gain rather than risk. You understand that the level of potential return on your investments should increase as a result of taking greater risk. Equity Focussed investors are typically more comfortable with short *term fluctuations in the value of their investments; you desire to invest in a broad spread of quality individual securities and are comfortable with your portfolio being invested in FTSE 350 companies, as well as some exposure to smaller and less liquid companies traded on the FTSE All share and AIM market.*

For context, a 'balanced' investor was defined as:

You tend to focus on risk and gain equally, as a balanced investor you accept that there will be some level of volatility in the value of your investments and also acknowledge that to achieve a greater growth profile when compared to a defensive investor, you may need to take on a little more risk. Therefore in order to try and generate a satisfactory level of return from the portfolio, we will recommend a small proportion of your portfolio is invested in individual stocks and shares within the FTSE 350.

As above, I don't agree that capital preservation was the main objective Mr and Mrs R were after – there's no evidence that this is something they highlighted, and the answers they gave indicate, I think persuasively, that gain was at least as important, if not more important, than capital preservation. To my mind, this means that Mr and Mrs R could probably have fit either balanced, moderate or equity focussed. The reason I say this is because none of these categories actually go into detail about the spread of securities within the portfolios. For example, an equity focussed investor might still require or desire a portion of that portfolio to be invested in fixed interest securities, precisely because of the risk of short-term fluctuations. That portion might be lower (even significant lower) than the moderate or balanced categories – but neither of those categories talk about fixed interest securities either.

I don't think these omissions are necessarily significant – ultimately Mr and Mrs R did not expect to be placed in a specific category with no regard to their individual circumstances, and that is clearly not what COBS 9 expected ESPL to do. And as an indicator of the type of equities ESPL might decide to invest in, the definitions did an adequate, if not comprehensive, job.

The key issue is in fact how ESPL decided to invest on Mr and Mrs R's behalf in light of what I've said above about their objectives and their risk preferences. And it's in this regard that I consider ESPL didn't treat Mr and Mrs R fairly, because I'm persuaded both portfolios were ultimately unsuitable for them.

How did ESPL manage Mr and Mr R's portfolios?

As constructed, both portfolios were overwhelmingly invested in equities.

In Mr R's case, six individual companies made up around half the portfolio, while a third of the portfolio was made up of 3 equity funds. In my view, even if the definition of 'equity focussed' meant that he accepted there'd be some individual securities within his portfolio, I don't agree that six companies gave him the 'broad spread' that he might have expected. In any event, I've seen insufficient evidence that this was discussed in any detail prior ESPL making these decisions. I think this would've been relevant information for Mr R to have been given – and the risks associated with taking this course of action ought to have been explained in detail given his relative inexperience.

I acknowledge that the individual companies themselves operated in slightly separate areas but with the exception of one large cap company, the others were either medium cap or small cap – in other words, these were companies which represented a significant portion of Mr R's portfolio, and carried a higher risk of significant volatility in the short term. In addition, at least two of the companies operated in commodities – mining and iron ore. So in my view, this portion of the portfolio already exposed Mr R to a significant risk of short term fluctuations and, potentially, losses to his capital.

And yet the remainder of his portfolio didn't, by and large, mitigate this risk. The three funds which represented a third of his portfolio were all equity funds – and furthermore, they specialised in overseas equities, not the UK. In addition, they didn't predominantly invest in large cap or even medium cap overseas equities – the Japanese equity fund had no limits, whilst the two European funds either invested in undervalued companies in special situations, or in smaller companies. In other words, these three funds were also exposing Mr R's portfolio to a significant risk of short term fluctuations and capital loss – but importantly, they exposed Mr R's money to markets he had no knowledge of and to risks, such as currency risks, which he likely would not have appreciated.

The remainder of Mr R's portfolio was broadly split between a small amount of cash, and a UK equity fund which invested a maximum of 70% in shares listed in the UK. Whilst I agree these two elements combined represented a lower risk than the rest of the portfolio, I don't think they did so sufficiently to reduce the overall risk that ESPL had decided to take with Mr R's money.

As I mentioned above, the definition of an equity focussed investor gave ESPL considerable discretion when deciding what to invest Mr R's portfolio in. But it gave little in the way of information to Mr R about how his portfolio would be invested – he was entirely reliant on what his adviser told him. So it was for ESPL to decide, based on what it knew about Mr R, what sorts of securities to invest in and what proportion. It knew Mr R wanted an equity based portfolio, and it knew Mr R was after better than average gains. But in my view, given the answers Mr R gave, exposing so much of his money to overseas markets and a handful of small or medium cap companies was far outside the level of risk he was willing to take. I'm also persuaded that he lacked the knowledge and experience to fully appreciate these risks, particularly in relation to overseas markets and smaller companies. To make matters worse, I'm not persuaded that this approach was ever discussed or agreed with him. For these reasons, I'm minded to conclude that the portfolio was unsuitable for him.

And, broadly speaking, I've reached the same conclusion when looking at Mrs R's portfolio and for the same reasons.

Although Mrs R's portfolio was larger and contained more holdings, in my view, ESPL adopted the same higher risk approach to the way it was constructed. From her initial investment of £77,484, ESPL invested in five companies and three equity funds.

In Mrs R's case, the five individual companies were FTSE 250 and FTSE 100 companies – so I acknowledge that broadly these were large companies and their value wouldn't, in theory, be expected to fluctuate excessively. And I also acknowledge that these companies didn't operate in the same industry and weren't, therefore, exposed to the same risks.

All that being the case, these five companies still represented over 44% of Mrs R's portfolio – so the overall fortunes of Mrs R's portfolio were bound to the economic performance of these five companies.

But most importantly, I'm not persuaded the rest of the portfolio mitigated any of this risk. Over 26% of the portfolio was invested in funds that invested in Latin America, emerging markets and the mining sector. I'm not persuaded Mrs R understood that she'd have such a significant exposure to overseas markets in her portfolio – and I'm not persuaded that it was in line with the amount of risk she was willing to take to expose three quarters of her portfolio to 5 companies and 3 overseas equity funds. Furthermore, as with Mr R, I'm not persuaded she would've understood or fully appreciated the types of risks overseas markets represented – especially when considering Latin America and emerging markets more generally. As with Mr R, I think Mrs R would not have fully understood the level of potential short-term volatility that her portfolio was exposed to – and in her case too, I'm not persuaded this approach was agreed or discussed with her in sufficient detail.

The remainder of Mrs R's portfolio was made up of securities which Mrs R transferred in from a different stocks and shares ISA – amounting to just over £27,000. But these securities were overwhelmingly equities too (although predominantly in the UK) – with only a limited proportion in cash and fixed interest.

This means that while almost three quarters of the portfolio was already exposed to higher risk securities, the remainder did nothing to mitigate the level of risk already present in the portfolio in such a way as to bring it in line with what I'm persuaded Mrs R was looking for. For all these reasons, I'm currently minded to conclude that Mrs R's portfolio was unsuitable for her too.

Summary of findings

As I've mentioned, I'm persuaded Mr and Mrs R were both after portfolios which would be exposed to a significant amount of equities. I'm persuaded they accepted this level of risk, and I'm satisfied the 'equity focussed' definition highlighted that this is how, broadly speaking, ESPL would go ahead and invest on their behalf. I'm also persuaded that given their overall financial circumstances, investing the amounts they did in actively managed portfolios made sense and was broadly in line with their objectives, capacity for loss and attitude to risk.

But when looking at the detail of how ESP decided to use its discretion, I'm currently minded to conclude that it lost sight of Mr and Mrs R's specific circumstances. In my view, it didn't sufficiently take into account Mr and Mrs R lack of experience – particularly their limited experience with anything beyond some fairly mainstream UK equity funds. In my view, before proceeding to invest so much of their money overseas, detailed discussions ought to have been had with them in order to ensure they understood and appreciated the additional and different risks that such investments would represent. The fact that in both cases almost half the portfolios were invested in just a few companies I think exacerbated the potential for significant losses – and again, I'm not persuaded this was something which Mr and Mrs R were made aware of or fully understood.

I've considered the comments ESPL has made about the conversations it had with Mr and Mrs R, but I'm not persuaded those conversations change what had already happened. Especially because the statements Mr and Mrs R received categorised the above investments as low or ultra-low risk – so in addition to these investments being unsuitable for them, they were also labelled in a way which in my view was misleading.

Regardless of what ESPL thought about the future prospects of a fund investing in Latin America or emerging markets, or their past performance, I'm not persuaded it was accurate to describe these funds as 'low' risk, unless ESPL thoroughly explained what it means by low risk – and yet this is what the statements Mrs R received said.

Both statements seemed to categorise all the above investments as low risk – and in my view, without any additional context or information, given Mr and Mrs R's investment knowledge and experience, they would've understandably been reassured that their portfolios weren't exposed to excessive levels of risk of capital loss. And I'm satisfied that had they understood what their portfolios would be invested in, they would've chosen a different investment proposition.

For all these reasons, I'm satisfied that ESPL did not act fairly and reasonably by investing the way that it did on behalf of Mr and Mrs R and, ultimately, took decisions to trade which were not suitable for them. I'm therefore satisfied it ought to put things right for them as if it had given them suitable advice.

ESPL's response to my provisional decision

Mr R sadly passed away during our investigation. I will therefore refer to him as the late Mr R from here on.

ESPL didn't agree with my provisional decision. It said that it was concerned I had come to my conclusion by looking at each portfolio in isolation, but at the time Mrs R and the late Mr R came to it for advice, it offered couples the option of having the portfolio 'run as one'. This had the benefit of avoiding higher dealing costs whenever a change to the portfolios was required, as they would both have transactions at every change. Mrs R and the late Mr R agreed with this approach at the time. It said that considering one portfolio in isolation gave an unbalanced picture.

ESPL said that when looking at the portfolios together, it matched their risk profile and was in line with their 'World View' at the time of investing. ESPL said that I acknowledged in my provisional decision that Mrs R and the late Mr R were looking for equity investments, and the portfolio it recommended fulfilled that.

It said that according to FE Analytics Scoring (with the exception of the Latin American fund), 'all the other funds were less volatile than the FTSE100'. It said that it didn't think I'd fully appreciated the importance of the analytics it used when recommending specific investments.

It further said:

'This is the basis on which we build our portfolios, using recognised, industry standard technical tools that are used industry wide to measure risk and diversification benefit within them. It was a quirk of our old CRM system that the classification of investment types worked on the basis that the FTSE100 was low risk, FTSE250 medium and anything else higher.

All collectives were low risk based on the fact they were collectives with an underlying spread of risk. This was not ideal as it had the potential to cause confusion. It was however fully explained in detail with the clients at inception and in further detail […] in January 2019.'

ESPL said that due to the 'softening of the clients attitude to risk after the first year of investment', ESPL offered to 'change the makeup of the portfolio at a significantly reduced cost' on the basis that perhaps 'they were invested in the wrong place'. Mrs R and the late Mr R rejected this and 'affirmed their understanding and comfort with what and where they were invested in'.

It said that this was 'not a quick phone call', but a 'lengthy meeting (over two hours) at the clients' home at which [ESPL] took significant efforts to ensure that they both understood fully and were happy with how things had been invested, which they confirmed they were'. It said that it didn't think it could've done more 'to match the client's needs or ensure their understanding'.

It also disagreed with my proposal for putting things right. It said that it was unfair to penalise ESPL past the point when it offered to change the portfolios and for the time it has taken for our service to resolve the case.

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.

Having done so, I've not been persuaded to change my provisional findings – and I confirm them as final.

I've given very careful consideration to the comments ESPL has provided. I'd like to make clear that I considered the portfolios together in light of Mrs R's and the late Mr R's circumstances – and so it isn't the case that I've only looked at each in isolation. But in my view, whether taken together, or individually, the portfolios were not suitable for Mrs R and the late Mr R – and it's for that reason I considered the complaint should be upheld. Below I address ESPL's comments and explain why I've not been persuaded to alter my findings.

The suitability of the portfolios

Whilst I acknowledge what EPSL has said about the lengths it went to in explaining what was in Mrs R's and the late Mr R's portfolios, Mrs R's recollection of that meeting is different. She's told the service that during this meeting the risk of their portfolio wasn't discussed with them in detail, and much of the conversation was beyond their level of understanding. She also explained that neither her nor her late husband thought it necessary to 'de-risk' or change the portfolios, because they weren't aware of the significant losses they'd already incurred – and weren't aware about the level of risk they were in fact exposed to. Furthermore, Mrs R explained that they had told ESPL that they were looking for a steady and safe return on their investment – but ESPL's adviser didn't talk specifically about what their portfolios were invested in, and instead gave them generic information about the markets and the wider economic climate which they didn't understand.

So I've also considered the notes of that meeting – and in my view, these notes don't demonstrate a detailed discussion about Mrs R's and the late Mr R's portfolios. It's clear to me that some discussion was had with them – but given ESPL's view of risk, and the analytics they used, I'm persuaded that the conversation during this meeting would very much have been a reassuring one. It seems to me that the conversation was primarily about being invested in the market – which as I've said in my provisional decision, I'm persuaded is something they both wanted.

However, I'm not persuaded that in this meeting Mrs R and the late Mr R were given the explanations required for them to understand the types of investments that ESPL had bought for them, and the precise nature of the risks that they were taking. As I said in my provisional decision, in my view the various definitions of the type of risk ESPL considered Mrs R and the late Mr R were able and willing to take did not give detailed information about the types of investments which would be bought on their behalf. And the statements didn't help either – because they classified investments in ways which, for the reasons I explained in my provisional decision, would very likely mislead an inexperienced investor.

For example, in the late Mr R's portfolio shares in five companies listed on FTSE350 were categorised as 'low risk', and the same with funds which specialised in developing economies or alternative investments.

I understand ESPL's position that the tools and analytics it uses justified the inclusion of these investments in Mrs R's and the late Mr R's portfolio given their attitude to risk – and whilst I've not verified this, I understand the comments it makes about how these investments compared in terms of volatility to other benchmarks. But I'm satisfied that ESPL was required to recommend investments which were suitable in all the circumstances – and whilst I acknowledge ESPL's use of various analytics, tools and other metrics, these are not going to be determinative in assessing whether, in the round, the investments were suitable for Mrs R and the late Mr R.

In my view, these investments did not carry a low risk of capital loss – and it was misleading to have described them in that way. And I've seen insufficient evidence to persuade me that the conversations ESPL was having with Mrs R and the late Mr R clarified the relative risk of the investments which it had bought for them versus what the statements were describing them as.

Furthermore, I remain of the view that EPSL took insufficient steps to ensure that the types and spread of investments which it had bought for them were fully explained in a way which Mrs R and the late Mr R could understand. In my view, given their age and their lack of experience, as well as their objectives, ESPL needed to ensure that direct investments, or investments in non-UK or non-mainstream markets were fully explained – including the relative risk to the portfolio and its view as to how that would be mitigated. I've seen insufficient evidence that this was done – and given the differing recollections in relation to the meeting that was had in January 2019, I'm not persuaded the notes of that meeting evidence a conversation of this nature.

And whilst not determinative, I consider Mrs R's and the late Mr R's behaviour after this meeting to be evidence that matters hadn't been fully explained to them – because by August 2019 they had already decided to move their portfolios away from ESPL. In my view this is yet further evidence that the level of risk and the types of investments that ESPL bought on behalf of Mrs R and the late Mr R were not in line with what they were expecting or wanted.

So for these reasons, and those I gave in my provisional decision, I remain of the view that the portfolios, whether looked at individually or together, were unsuitable for Mrs R and the late Mr R. And therefore, I consider ESPL must do something to put things right.

Putting things right

In assessing what would be fair compensation, I consider that my aim should be to put Mr and Mrs R as close to the position they would probably now be in if they had not been given unsuitable advice.

I think Mr and Mrs R would have invested differently. It is not possible to say *precisely* what they would have done, but I am satisfied that what I have set out below is fair and reasonable given Mr and Mrs R's circumstances and objectives when they invested.

ESPL has asked that I reconsider the award by changing the end date –

- in particular that the calculation shouldn't run until the portfolios were transferred but earlier, in July 2019, when it said it offered Mrs R and the late Mr R the option of de-risking their portfolio.

- And it has also said that it's unfair that it is also penalised for the time it has taken for the service to have resolved the complaint.

In relation to the first point, I'm not persuaded that the notes of the telephone conversation demonstrate that Mrs R and the late Mr R were told about the nature of their portfolios and that they carried more risk than they had been willing to take.

I say this bearing in mind that ESPL clearly don't (and didn't) agree that this is the case. So without being aware that their portfolios weren't suitable, and without being told about the actual risk of capital loss that their portfolios were exposed to, I don't agree that being offered an alternative is the same as ESPL offering to rebalance their portfolios to make them suitable – and in my view, that's what ESPL ought to have offered Mrs R and the late Mr R.

Instead, the notes from the conversation in July 2019 say:

loss at that point 14%. Charges to date at 6%. Reiterated equity focused. Again suggested de-risking.they realised they were mistaken. Explained defensive and cautious portfolios. Offered free switch. Wanted to stay as they were. Offered fixed fee option.

I'm not persuaded this is sufficient – as I've said in my provisional decision and in this final decision, Mrs R and the late Mr R were looking for equity investments and so likely would not have been attracted to portfolios without an equity element. What they hadn't appreciated was the types of equities and markets, including international markets, they'd be exposed to.

In my view, it wouldn't be fair and reasonable to conclude that on the basis of this telephone conversation, Mrs R and the late Mr R had now understood and accepted the precise nature of the portfolios ESPL had built for them. This means that in my view, the calculation should run until the portfolios were transferred to a different adviser.

In terms of the length of time the service has taken to issue its determination on the matter, whilst I acknowledge the comments ESPL has made, the matter would never have come to this service if it had been properly resolved at the outset, as it should've been.

It therefore wouldn't be fair to exclude this period from the calculation.

What should ESPL do?

To compensate the estate of Mrs R and the late Mr R fairly, ESPL must:

- Compare the performance of the late Mr R's and Mrs R's portfolios with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the portfolios. If the *actual value* is greater than the *fair value*, no compensation is payable.

  A separate calculation should be carried out for each portfolio. ESPL should also pay interest as set out below.

- Pay the estate of Mrs R and the late Mr R £250 each for the trouble and upset which this unsuitable advice caused them - particularly when they realised the risk to their money was far higher than they'd been led to believe.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Mr R's portfolio	transferred	FTSE UK Private Investors Income Total Return Index	date of investment	date transferred	8% simple per year on any loss from the end date to the date of settlement
Mrs R's portfolio	transferred	FTSE UK Private Investors Income Total Return Index	date of investment	date transferred	8% simple per year on any loss from the end date to the date of settlement

My final decision

My final decision is that I uphold this complaint. J. Edward Sellars & Partners Limited must pay the compensation I've outlined above within 28 days of when we tell it Mrs R and the estate of Mr R have accepted this decision.

It must also provide to Mrs R and the estate of Mr R a detailed breakdown of the above calculation at the same time.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R and the estate of Mr R to accept or reject my decision before 7 July 2022.

Alessandro Pulzone
Ombudsman