

## **complaint**

Mr P complains about the advice he says he was given by an appointed representative (AR) of The On-Line Partnership Limited to switch his personal pensions to a SIPP and then invest in Green Oil Plantations Limited, The Resort Group and Store First. He says he was given this advice by Bragagnini Associates Financial Solutions Limited (BAFSL). He says this advice was unsuitable for him and he was not informed of the risks of these investments. He says the investments were Unregulated Collective Investment Schemes (UCIS) which were unsuitable for him as he was not a sophisticated, professional or high net worth investor. He believes the investments are now worthless.

## **background**

On-Line did not uphold the complaint. It said that when Mr P approached BAFSL he had already been persuaded to switch his pension to invest in UCIS by another party - Bragagnini Associates Mortgage Solutions Limited (BAMSL). So although BAFSL proceeded on an advised basis and made a personal recommendation to him, the transaction should be viewed as 'execution only' and 'non-advised'. It also said that even if BAFSL had advised Mr P not to proceed, he would have gone ahead anyway.

Mr P referred his complaint to this service and it was considered by an investigator. She thought the complaint should be upheld. She believed that On-Line had a duty to make a suitable recommendation to Mr P and that included the intended investments he was to make. That was even if another party had given advice on the investments. She did not believe the investments were suitable for Mr P; they were of a higher level of risk than was suitable for him and resulted in a lack of diversification. She did not believe this transaction could be termed execution only or non-advised. She recommended that a compensation calculation be performed.

On-Line did not agree with the investigator's assessment. It said Mr P was an accountant and it would expect him to have a good understanding of investing and the risks of doing so. He also had an existing pension and received initial and ongoing advice. This would have equipped him with sufficient knowledge of the risks of investing.

It said that the risk profiling exercise had assessed Mr P as someone willing to accept a high degree of risk and that his previous pension had been invested 80% in equities – which also presented a high degree of risk.

It said Mr P did not agree to ongoing advice and this supports its view that Mr P wanted to make his own investment decisions and didn't want any advice on the suitability of his investments. It also said that it didn't think a fair comparison for redress was a comparison with his previous pension as that was also high risk – and the investigator had said that Mr P didn't have the capacity to take a high degree of risk.

The investigator was not persuaded to change her view and so On-Line asked for the case to be referred to an ombudsman.

## **my findings**

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

A 'fact find' (a document to record Mr P's financial circumstances) dated 3 February 2012 was completed by BAFSL for Mr P. This recorded very little detail. It set out that Mr P was an accountant, but his income/expenditure was marked as 'not applicable'. It did record that he had an existing personal pension worth £78,000, £7,000 in a bank account and £3,000 in an ISA. It was noted that, *"Full details not given as (Mr P) did not think it needed to be as only looking to do pension transfer"*.

A risk assessment was also undertaken. This asked various questions which sought to identify Mr P's tolerance to taking investment risk. In the main these answers suggested Mr P would take some risk – one question asked how comfortable Mr P would be with taking financial risk – to which he replied 'comfortable'. Another asked, *"overall, how would you place yourself on the following (risk) scale"* to which Mr P answered, *"a moderate risk taker"*. It should be noted that these answers did not place him at the top of the risk scale.

This resulted in an overall risk description of '8' on a scale of '1 to 10', described as 'high risk'.

A 'financial planning recommendations report' dated 3 February 2012 was completed for Mr P. This described Mr P's priority as increasing his retirement income. It set out that his attitude to risk was 'high'. This was described as:

*"Your priority is likely to be making higher returns on your investments but you are still probably concerned about losing money due to rises and falls"*.

And

*"Your preferred investment portfolio is likely to contain mostly higher risk investments such as shares with a few lower risk investments such as bonds."*

Under 'Recommendations' it was recorded:

*"You are looking to transfer your pension ....., to allow you to self invest as you have been looking into some other forms of investment which you can't do via your current personal pension, you are dealing with Bragagnini Mortgage Solutions for your other forms of investment and you are not requesting any advice or help from us. You fully understand that what you are looking at is unregulated.*

*I have recommended that you transfer these funds to a self invested pension as you wish to use this pension for self investment which you are doing and have not had any advice from me with regard to this matter and all proceeds are going into the cash fund to await instructions. The plan is to be written to age 75, although benefits at present can be taken at any time from age 55 to 75"*.

There then follows a recommendation of a SIPP provider so that Mr P can switch his personal pension and then invest.

I have also noted a BAFSL file record that records that a personal recommendation had been made to Mr P. And an adviser fee agreement on the SIPP application which records BAFSL as the adviser and that the fee payment is in respect of, *"advice in relation to under noted SIPP"*. The SIPP application was sent by BAFSL to the SIPP provider.

### ***the scope of the advice***

On-Line has said that advice was not provided as to the investments, only the SIPP. But its AR - BAFSL - did know the intention was to invest into unregulated investments as it is mentioned in its suitability report.

On-Line had a duty under the relevant rules, in particular COBS 2 and COBS 9, set out previously by the FSA and now Financial Conduct Authority (FCA), to act in Mr P's best interests, know its client and give suitable advice. In my view it could not do so without taking account of the investments which the SIPP was put into place to facilitate. The only reason for the creation of the SIPP and the pension switch was to enable the investments to take place – the BAFSL adviser knew this and has made statements to that effect in his report about the advice he gave.

On-Line said it was Bragagnini Associates Mortgage Solutions Limited (BAMSL) that was giving investment advice but On-Line also had a duty to assess the overall suitability of the SIPP and investments that it was put into place to facilitate.

I'm also mindful that in January 2013, the FSA issued an alert:

*"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investment proposed to be held within the new pension. In particular, we have seen advisers moving customer's retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes)..."*

*The cases we have seen tend to operate under a similar advice model. An introducer will pass customer details to an unregulated firm, which markets an unregulated investment (e.g. an overseas property development). When the customer expresses an interest in the unregulated investment, the customer is introduced to a regulated financial adviser to provide advice on a SIPP capable of holding the unregulated investment. The financial adviser does not give advice on the unregulated investment, and says it is only providing advice on a SIPP capable of holding the unregulated investment. Sometimes the regulated financial adviser also assists the customer to unlock monies held in other investments... so that the customer is able to invest in the unregulated investment...*

*... where a financial adviser recommends a SIPP knowing that the customer will transfer out of a current pension arrangement to release funds to invest in an overseas property investment under a SIPP, then the suitability of the overseas property investment must form part of the advice about whether the customer should transfer into the SIPP. If, taking into account the individual circumstances of the customer, the original pension product, including its underlying holdings, is more suitable for the customer than the SIPP is not suitable.*

*This is because if you give regulated advice and the recommendation will enable investment in unregulated items you cannot separate out the unregulated elements from the regulated elements.*

*... The FSA asks regulated firms, in particular financial adviser and SIPP Operators to report those FSA firms that are carrying on these activities in breach of the FSA requirements..."*

This alert didn't make any changes to the regulations, it was not new regulation that had not applied previously. It simply re-stated the principles that already applied, and which were in place in 2012 when the advice was given.

My view is not dependent on comments made by the industry regulator as to the type of process On-Line carried out to facilitate the investment. I take an independent view based on the circumstances of the complaint and take into account the rules, law and good practice in place at the time to arrive at decision that is fair and reasonable in all the circumstances. But my view is consistent with general comments from the regulator about this type of process – that consideration should be given when advice is given to transfer a SIPP, to the suitability of the overall proposition – both SIPP and investment to be taken out.

The regulator's comments refer directly to the situation here – where advice is being given about a SIPP to invest in unregulated investments. It said that where an adviser recommends a SIPP knowing that the customer will sell current investments to fund such investments then the suitability of those investments must be taken into account.

I would reiterate that I do not agree that simply because the regulators 'alerts' were given after On-Line gave its advice that they are irrelevant – all the alerts did was highlight the existing obligations (which applied at the time this advice was given) when giving advice such as this. It was not setting out new standards for businesses to follow.

So my view is that On-Line did have to take into account and advise on the specific suitability of the investment as well as the overall arrangement of SIPP and investment.

### ***suitability***

As discussed, On-Line could not give suitable advice on the combined SIPP and investment without taking into account the investment itself. However I have not seen any evidence that it did provide advice as to the investments.

As discussed, the On-Line fact find, which was used to obtain background detail of Mr P's circumstances, did not contain much detail. It recorded he was employed but not his salary and there is no detail about outgoings. Savings were limited to £7,000 in a bank account and £3,000 in an ISA. This would indicate a very limited experience of investments and none in respect of the esoteric, high risk and unregulated type that were subsequently taken out through the SIPP. Mr P did hold the pension(s) that were transferred and it has said that the fund holdings were high risk. However, the investment funds those pensions held were mainstream, retail regulated collective funds – themselves investing across a wide spread of shares and assets. They are of a very different nature than the unregulated investments Mr P made here – which are generally only deemed suitable for sophisticated or professional investors. As I will discuss, the investments Mr P made presented an entirely different level of risk.

Mr P was an accountant earning about £38,000 a year. He did not have any experience of unregulated speculative investments.

The storage pod (Store First) investment into which Mr P invested took the form of one or more self storage units, which were part of a larger storage facility in a UK location. Investors bought one or more units in the facility and they could either receive whatever income the unit(s) provided or sell them (assuming there was a market for them).

Store First was the subject of a winding up petition issued by the Business Secretary in 2017. Action relating to that is ongoing, and investors have recently been offered the opportunity to transfer their investment to a newly-created freehold company, for nil consideration. I understand the investment has no realisable value.

The Green Oil investment was an agricultural investment hoping to make returns from producing biofuel. The Resort Group investment was an investment in an overseas holiday resort.

All the investments were unregulated and speculative. They were very high risk and the investor faced the real possibility of losing all their money. Because they were unregulated Mr P did not benefit from the protection afforded by the Financial Services Compensation Scheme – such as applied to his pension before it was switched. The majority of Mr P's pension savings were invested in these three investments.

Mr P's circumstances do not indicate that he was prepared to lose all his money in the pension scheme or that he could do so. They also do not indicate that he was suited to the risks this investment presented.

The risk grading itself, which may or may not be accurate, is very much out of line with Mr P's circumstances and experience. But in any event the risk grading does not suggest that these unregulated investments were suitable. As I have discussed, Mr P's attitude to risk was described as:

*“Your priority is likely to be making higher returns on your investments but you are still probably concerned about losing money due to rises and falls”.*

And

*“Your preferred investment portfolio is likely to contain mostly higher risk investments such as shares with a few lower risk investments such as bonds.”*

Mr P's apparent concern about losing money and balancing the risk he would take does not accord with making three single investments in speculative high risk unregulated ventures. These investments brought the risk of total capital loss. They could be difficult to sell as there is no established market for them – such as is the case with retail regulated collective investment funds. The risks are much higher than investing in retail collective share based funds as he did in his previous pension.

Mr P's investment experience was very limited. He was an accountant but he was not an experienced investor who could appreciate all the risks of what he was doing or would not be reliant on On-Line to give him suitable advice or consider his best interests. I have not seen that On-Line gave Mr P any material advice or guidance about the investments, such as I have discussed.

The value of Mr P's pension funds was modest at about £78,000. The material issue is that the majority of that money was designated for investing in store pods, Green Oil, and the Resort group. That put most of his pension savings at risk of total loss.

As discussed, On-Line knew that Mr P was intending to invest his pension funds in unregulated investments. It obtained very little detail about Mr P his financial situation and did not provide any advice as to the suitability of the investments.

In my view On-Line did not meet its requirements under COBS 9 to take reasonable steps to ensure suitability or obtain enough information so as to advise Mr P appropriately. As previously discussed, that would include taking into account what investments the pension switch was facilitating. It could not in my view have assessed whether these investments and the overall arrangement of SIPP and investments were suitable for Mr P given the lack of information it had. It should not have agreed to carry out the arrangement of the SIPP in this situation. If it had carried out appropriate fact finding and assessment of Mr P's situation and the investments then it would have known this transaction and these investments were not suitable for him. It should have set out in detail why the transaction was not appropriate for him, which it did not do.

Clearly, the evidence indicates that Mr P was not the more sophisticated and professional type of investor for which these investments would be suitable; the risks of the investments are far higher than were suitable and Mr P's pension was placed at far too much risk.

Bearing all this background in mind, I do not believe there is any persuasive evidence that it was appropriate for Mr P to take the risks of switching, which put his retirement income and benefits at much greater risk. His circumstances suggest that it was not suitable to take these risks with so large of proportion of his pension benefits. He had no experience of investments of this type and no history of taking the kind of risks this pension switch presented.

Therefore I believe the pension switch was clearly unsuitable.

#### ***insistent client***

On-Line has said that Mr P should be treated as an 'insistent client' and/or that the transaction was execution only. The transaction was clearly not execution only as On-Line gave a recommendation as to the SIPP. I have not seen any plausible evidence that Mr P was insistent that the SIPP and investments had to go ahead.

#### ***did On-Line cause Mr P's loss***

As discussed, On-Line should have advised Mr P against the pension switch it and told him the transaction was not suitable for him. If On-Line *had* advised Mr P of this and the full extent of the risks of the switch and investments then I think it more likely that he would have taken account of that advice and it would have been persuasive, coming from a professional regulated financial adviser. I think it is more likely that he would not have switched his pensions and this advice would have changed his motivation to make the investments.

It follows that he would not have switched, nor needed to have transferred, his pension to the SIPP. So neither the SIPP nor the investments would have taken place but for On-Line's recommendation. Consequently any loss Mr P has suffered through transferring to the SIPP and investing has been caused materially by On-Line.

In this particular case, I conclude that it would be fair and reasonable to make an award, given the specific circumstances. I am satisfied that Mr P would not have transferred or made the investments had it not been for the failings of On-Line. Had On-Line acted correctly in respect of Mr P, the investments would not have been made. As a direct result of the On-Line failings, Mr P invested his pension into specialised, high risk and unregulated investments.

On-Line has said that BAMSL was involved in Mr P making the investments. But that business could not carry out the combined transaction of pension switch and investments and so On-Line took over responsibility of advising on the switch which, as previously discussed, should have included an assessment of the investments. So On-Line is materially responsible for the transaction taking place and any losses caused are fairly attributable to it.

So I think that it's fair and reasonable to hold On-Line responsible for the whole of the loss suffered by Mr P. I am not asking On-Line to account for loss that goes *beyond* the consequences of its failings. I am satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I am not able to determine. However, that fact should not impact on Mr P's right to compensation from On-Line for the full amount of the loss.

### **fair compensation**

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

I think with suitable advice Mr P would have kept his existing pension. But it's unlikely to be possible for On-Line to reinstate Mr P into his previous pension scheme.

There are also a number of possibilities and unknown factors in making an award. While I understand it might be possible for On-Line to take over the investments from Mr P, the involvement of third parties – the SIPP provider and the investment providers – means much of this is beyond this service or the On-Line's control.

All the variables are unknown and each may have an impact on the extent of any award this service may make.

While it's complicated to put Mr P back in the position he would have been in if suitable advice had been given, I think it's fair that Mr P is compensated now. I don't think we should wait and determine each and every possibility before making an award. What is set out below is a fair way of achieving this.

In summary, On-Line should:

1. Obtain the notional transfer value of Mr P's previous pension plans, as date of my final decision, if it had not been transferred to the SIPP.
2. Obtain the transfer value, as date of my final decision, of Mr P's SIPP, including any outstanding charges.
3. And then pay the amount of (1 – 2) into Mr P's SIPP so that the transfer value is increased by the amount calculated. This payment should take account of any available tax relief and the effect of charges.

In addition, On-Line should:

4. If applicable (see '4' below), pay any future fees owed by Mr P to the SIPP, for the next five years.
5. Pay Mr P £300 for the trouble and upset caused.

I have set out each point in further detail below.

- 1. Obtain the notional transfer value of Mr P's previous pension plans if they had not been switched to the SIPP. That should be the value at the date of this decision.*

On-Line should ask Mr P's former pension provider to calculate the notional transfer value that would have applied as at the date of this decision had he not switched his pension but instead remained invested.

If there are any difficulties in obtaining a notional valuation then the FTSE WMA Stock Market Income Total Return Index should be used. That is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

On-Line should assume that any contributions or withdrawals that have been made would still have been made, and on the same dates.

- 2 Obtain the transfer value as at the date of the decision of Mr P's SIPP, including any outstanding charges.*

This should be confirmed by the SIPP operator. If the operator has continued to take charges from the SIPP and there wasn't an adequate cash balance to meet them, it might be a negative figure.

This could be complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. That may well be the case here.

To calculate the compensation, On-Line should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs, and take ownership of the investment(s).

If On Line is unable to buy the investment(s), it should assume a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything On Line has paid into the SIPP.

In return for this, On-Line may ask Mr P to provide an undertaking to account to it for the net amount of any payment he may receive from the investment. That undertaking should allow for the effect of any tax and charges on what he receives. On-Line will need to meet any costs in drawing up the undertaking. If On-Line asks Mr P to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

- 3 Pay an amount into Mr P's SIPP so that the transfer value is increased to equal the amount calculated in (3). This payment should take account of any available tax relief and the effect of charges.*

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr P as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

- 4 Pay any future fees owed to the SIPP for the next five years.*

Had On-Line given suitable advice I don't think there would be a SIPP. It's not fair that Mr P continues to pay the annual SIPP fees if it can't be closed.

Ideally, On-Line should take over the investments to allow the SIPP to be closed. This is the fairest way of putting Mr P back in the position he would have been in. If it can do so then it will not have to pay any future SIPP fees. But if that is not possible, then, to provide certainty to all parties, I think it's fair that On-Line pays Mr P an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees), or undertakes to cover the fees that fall due during the next five years. This should provide a reasonable period for things to be worked out so the SIPP can be closed.

In return for the compensation set out above, On-Line may ask Mr P to provide an undertaking to give it the net amount of any payment he may receive from the investments in that five year period, as well as any other payment he may receive from any party as a result of the investments. That undertaking should allow for the effect of any tax and charges on the amount he may receive. On-Line will need to meet any costs in drawing up this undertaking. If it asks Mr P to provide an undertaking, payment of the compensation awarded by this decision may be dependent upon provision of that undertaking.

If, after five years, On-Line wants to keep the SIPP open, and to maintain an undertaking for any future payments from the investments, it must agree to pay any further future SIPP fees. If On-Line fails to pay the SIPP fees, Mr P should then have the option of trying to cancel the investments to enable the SIPP to be closed.

In addition, On-Line is entitled to take, if it wishes, an assignment from Mr P of any claim Mr P may have against any third parties in relation to this pension switch and investments. If On-Line chooses to take an assignment of rights, it must be affected before payment of compensation is made. On-Line must first provide a draft of the assignment to Mr P for his consideration and agreement.

- 5 Pay Mr P £300 for the trouble and upset caused.*

I believe Mr P will have been caused upset and inconvenience by his pension benefits being significantly affected by the actions of On-Line. I believe this payment is due to recognise that.

**my final decision**

I uphold the complaint and order that The On-Line Partnership Limited carry out the loss calculation detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 2 August 2020.

David Bird  
ombudsman