complaint

Mr H's complaint relates to the advice he received from Guy John Shepherd (trading as Granite Financial Services, or "GFS") to invest in a Stirling Mortimer property investment. Mr H says he understood that his investment would be available to him after a two year investment period and he would not have invested in the fund had he known this was not the case. Mr H also considers that the investment had a higher level of associated risk than was suitable for him.

background

In 2008, Mr H transferred the value of a personal pension into a SIPP and made a further cash contribution to the SIPP, leaving him with around £78,000 cash in the SIPP. GFS advised Mr H to invest £40,000 of this into a bond being offered by Sterling Mortimer, and £35,000 into the Stirling Mortimer Coratina fund, which was a protected cell of Stirling Mortimer Global Property Fund PCC Limited. However, the bond offer was withdrawn and, in the event, £75,000 was invested in the Stirling Mortimer Coratina Fund.

The fund went into liquidation in 2013, and Mr H made a complaint to GFS. GFS rejected the complaint, maintaining it had acted appropriately and given suitable advice.

An adjudicator considered the complaint and concluded that it should be upheld. She said, in summary:

- The Stirling Mortimer Coratina fund could only be promoted to "Qualified Investors". GFS asked Mr H to sign a "sophisticated investor" certificate, so it was aware that the fund should not have been promoted to retail investors.

- It did not appear, on the evidence presented, that Mr H met the definition of a "sophisticated investor". So the fund should have been promoted to Mr H.

- GFS's fact find and the suitability letter both stated that Mr H was planning to retire in the next five years. As Mr H was nearly 62 at the time of the advice this was a realistic expectation.

- It was not suitable for a consumer who was within five years of his retirement to invest in a fund – such as the Stirling Mortimer Coratina fund - which might not be liquid at the time that they wished to take benefits from their pension.

- The suitability letter stated that Mr H was willing to take a level of risk equal to "seven out of ten", which was described as "adventurous". However the fact find recorded his attitude to risk as either "four to seven", or "five to seven" (out of ten).

- Whilst Mr H may have been willing to take some risk, she was not persuaded that the risk profile document and his wider circumstances or experience would indicate that he was an adventurous investor.

- Placing the majority of the SIPP funds into one fund (after the bond offer was withdrawn) would have increased the level of risk that Mr H was taking. However this increase in risk was not acknowledged in GFS's second suitability letter.

- The eventual investment of the entirety of the SIPP into this fund represented a higher level of risk than was agreed or indeed suitable for Mr H's objectives and circumstances. The investments were unsuitable and should not have been recommended to him.

GFS said that it did not agree with the adjudicator's opinion. It maintained that Mr H was in a fully informed position when he agreed to make the investments and was, at the time, willing to accept the risk associated with them. It did however say it was willing to make an offer based on the return of the second £40,000 investment. The adjudicator put this offer to Mr H, but he did not wish to accept it.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. Having done so, I have reached the same conclusion as the adjudicator, and for similar reasons.

Like the adjudicator, I consider that there is insufficient evidence to show that the promotion of the investment to Mr H was lawful. Promotion of the investment was restricted. GFS appears to have been aware of this as it attempted to satisfy that restriction by asking Mr H to sign a "sophisticated investor" certificate. But it is not clear how GFS arrived at the conclusion that Mr H was a sophisticated investor – he had no previous experience of complex unregulated investments, and the evidence available shows that he only had limited experience of mainstream regulated collective investments. He should not therefore have ben categorised as being sophisticated by virtue of his experience, and I have seen no other basis on which he could have been considered sophisticated.

However, I think the key consideration is the suitability of the investment for Mr H. And I consider that the investment was not suitable for him.

The fund recommended for investment was unregulated, complex, specialist, and had a limited track record. Its success was dependent on being able to re-sell a "right to buy" certain overseas developments, and its structure involved multiple risk factors. It therefore ought to have been considered a higher risk investment. There was also significant liquidity risk associated with the fund – it was possible that investors might not be able to access any of the invested amount, if they wanted to.

I do not therefore think it was suitable to recommend that Mr H invest his entire SIPP – which represented the majority of his pension provision – into the fund, particularly when he was close to his scheduled retirement date. Doing so meant that Mr H's entire SIPP was at significant risk and dependent on the fortunes of one specialist unregulated investment. It also meant that Mr H might not be able to access his pension funds when he wanted to retire.

Mr H may have been willing to take some risk with some of his SIPP, but I have not seen sufficient evidence to conclude that he was willing to take significant risk with all of it, or that he made the investment on the understanding that is what he was doing.

Like the adjudicator, I also think that GFS's advice will have caused Mr H some upset. The consequences of the advice will have had a significant impact on his retirement plans, and it is clear that the apparent loss of the amounts invested has caused Mr H significant worry. The adjudicator suggested a sum of £350 in compensation for this. However, I think a figure of £500 is fair and reasonable in the circumstances.

fair compensation

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

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

what should GFS do?

To compensate Mr H fairly, GFS must compare the performance of Mr H's investment with that of the benchmark shown below.

The compensation payable is the difference between the *fair value* and the *actual value* of the investment. If the *actual value* is greater than the *fair value*, no compensation is payable.

GFS should also pay any interest, as set out below.

In addition, GFS should pay Mr H £500 for the upset caused by the impact of the investment on his pension.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Stirling Mortimer Coratina fund	still exists but illiquid	for half the investment: FTSE WMA Stock Market Income Total Return Index; for the other half: average rate from fixed rate bonds	date of investment	date of my decision	8% simple p.a. from date of decision (if compensation is not paid within 28 days of the business being notified of acceptance)

actual value

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

My aim is to return Mr H to the position he would have been in but for the unsuitable advice. This is complicated where an investment is illiquid (that is could not be readily sold on the open market) as in this case. It would be difficult to know the *actual value* of the investment. In such a case the *actual value* should be assumed to be nil to arrive at fair compensation. GFS should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the total payable to Mr H and the balance be paid as I set out below.

If GFS is unwilling or unable to purchase the investment the *actual value* should be assumed to be nil for the purposes of the calculation. GFS may wish to require that Mr H provides an

undertaking to pay GFS any amount he may receive from the investment in the 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, GFS should use the monthly average rate for the fixed rate bonds with 12 to 17 months maturity 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.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

how to pay compensation?

If there is a loss, GFS should pay such amount as may be required into Mr H's pension plan, allowing for any available tax relief and/or costs, to increase the pension plan value by the total amount of the compensation and any interest.

If GFS is unable to pay the total amount into Mr H's pension plan, it should pay that amount direct to him. The amount should be reduced to notionally allow for the income tax that would otherwise have been paid.

The notional allowance should be calculated using Mr H's marginal rate of tax at retirement. For example, if Mr H would be a basic rate taxpayer at retirement and that rate would 20%, the *notional* allowance for tax would equate to a 20% reduction in the total amount. At retirement he would have been able to take 25% as a tax-free lump sum but the remaining 75% would have been subject to income tax at his marginal rate of tax. So the *notional* allowance for tax would equate to a 15% reduction in the total amount (20% on 75%).

why is this remedy suitable?

I have decided on this method of compensation because:

- Mr H wanted capital growth with a small risk to his 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 WMA 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 Mr H's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr H into that position. It does not mean that Mr H would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr H could have obtained from investments suited

to his objective and risk attitude.

- Mr H has not yet used his pension plan to purchase an annuity.

my final decision

I uphold the complaint. My decision is that Guy John Shepherd should pay the amount calculated as set out above.

Guy John Shepherd should provide details of its calculation to Mr H in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr H to accept or reject my decision before 9 February 2015.

John Pattinson
ombudsman