DRN-4388778

The complaint

Mr S complains about the way Redmayne-Bentley LLP (RB) managed his portfolio between March 2020 and February 2021. In particular, he complains about not being able to speak to his investment manager in the early days of the pandemic, and being charged 1% management fee when his portfolio wasn't reinvested during this period.

What happened

Mr S, and his wife Mrs S, (who had a separate portfolio which is the subject of a separate complaint) had a portfolio that was being managed on a discretionary basis by RB. I've referred to both Mr and Mrs S where relevant below as the decisions around their portfolios were made jointly, and mirrored each other.

On 11 March 2020 Mr and Mrs S spoke to RB to convey their concerns about the impact of the coronavirus pandemic on their portfolio and on economic markets more generally. RB explained its view that this was temporary and no action needed to be taken, which Mr and Mrs S appeared to accept.

However, over the next few days Mr and Mrs S's concerns around the pandemic and the amount of money their portfolios were losing intensified, and on 16 March 2020 they called RB again. On this particular day their investment manager was unavailable, so they spoke to someone else. During this conversation it became clear that Mr and Mrs S were deeply concerned about the losses on their portfolios, and had decided to 'pull the plug'. Acting on their instructions, RB disinvested the portfolios and retained the proceeds as cash.

Shortly after this, RB wrote to Mr and Mrs S to explain that it understood their reasons for making this decision, and that this had been a difficult time for a number of investors. It explained that it would continue monitoring the markets and external events, and would be in touch at the appropriate time to discuss reinvesting. This happened in July 2020. RB wrote to Mr and Mrs S to set out a strategy to reinvest 30% of their portfolios, while retaining the remainder as cash in order to accommodate Mr and Mrs S's lower risk tolerance. Shortly after receiving this email, Mr and Mrs S called RB and explained that they needed more time before re-investing.

During the several months that followed Mr and Mrs S continued to be reluctant to re-enter the market, whilst RB continued to charge a management fee by virtue of its role as discretionary manager. In February 2021, Mr and Mrs S spoke to RB and the decision was made that their continued reluctance to reinvest meant that the arrangement was no longer tenable.

They agreed to revert their accounts execution only, in such a way as to stop the levying of RB's management fees while giving Mr and Mrs S the time they needed to decide when to re-enter the market.

I issued a provisional decision in September 2023. In it I said the following:

'In my view, the key issues are Mr S's original decision to encash the portfolio in March 2020

– and subsequently, RB's lack of investment while still taking its management fee. I'll deal with each issue in turn.

The decision to liquidate the portfolios

I've considered this aspect of Mr S's complaint very carefully. March 2020 was a difficult time for many investors all over the world, and the decision to stay invested at such an uncertain time or disinvest at what was potentially the lowest point in the market, was a difficult one to take.

Taking all of Mr S's submissions into account, including the contact he had with his investment manager and with RB between 11 March 2020 and 16 March 2020, I'm not persuaded there's anything that RB did wrong.

Mr S had entrusted his investment manager to manage his portfolio, and had spoken to him about the pandemic and what was happening. I'm not persuaded that the advice he received in that initial call was unsuitable, nor that it was inherently wrong for his portfolio to remain invested. Whilst there was risk in remaining invested, there was also risk in crystallising the losses sustained at that point and missing out on a rebound in the market.

I can also understand why Mr S had second thoughts, and called back on 16 March 2020 having looked at the matter himself. But looking at the transcript of that call, it's very clear to me that Mr S was determined to 'pull the plug on it now before it goes any worse'.

He had already been told by his investment manager to hold steady – but he had decided that this isn't what he wanted to do. Whilst there was nothing wrong with this approach at the time, and clearly Mr S was entitled to instruct RB as he pleased, I don't agree this is something RB can be held responsible for. And I'm not persuaded the absence of his specific investment manager, on that particular day, made any difference.

I say this because Mr S already knew his investment manager's views on what actions to take, and the notes of the call suggest that Mr S had already made his decision.
Once that decision had been taken, the issue then became when to reinvest the money.

Reinvestment and levying fees

Mr S's portfolio was supposed to be managed on a discretionary basis, and had a bespoke fee arrangement of 1% plus vat, and no other charges for buying or selling investments. The evidence I've seen shows that Mr S accepted this arrangement, in part because of a significant restructuring of his portfolio at the start.

Mr S's complaint is that RB didn't manage his portfolio in that way between March 2020 and February 2021, and it was therefore unfair for it to be taking that fee. But I don't agree that's entirely correct.

I say this because the fee was not just about decisions to buy and sell investments on Mr S's behalf, as those decisions don't happen in isolation. They require assessments of the market, individual investments and the portfolio itself.
In Mr S's case they also involved a careful consideration of when to re-enter a particularly volatile market in unprecedented circumstances. It's clear to me therefore that there was a period of time when RB continued to manage the portfolio, albeit in cash, with a view to re-entering the market at a suitable time for Mr S. It was fair and reasonable that it continue receiving its fee for this service.

And I can see that RB did proactively try to do this between July 2020 and November 2020,

when I can see evidence of emails and phone calls between Mr S and his investment manager. During this time it's evident to me that Mr S did not want to re-enter the market – and so many of his complaint points around this I'm not persuaded have any merit. I don't think it would be fair to criticise RB for not going ahead with an investment that their clients were insistent they didn't want, and at the same time it's also clear to me that Mr S was not ready to terminate the relationship – or else that's something he could've done at any point. During this time he was aware of the fees that were being charged, because that was the subject of his letter on 19 October 2020 and which RB (I think correctly under the relevant regulations) interpreted as a complaint. And he was clearly aware that no investment had been carried out, because he had told RB on separate occasions that he was not ready.

The key issue for me, however, is that from November 2020 onwards it must have been evident to RB that after 8 months, Mr and Mrs S were no longer benefiting from a discretionary service. In my view, continuing to wait for Mr and Mrs S to make a decision that they were evidently finding hard to make was not fair and, crucially, wasn't in their best interests.

The Financial Conduct Authority (FCA) published the Principles, which set out its broad expectations of firms. Particularly relevant in this complaint is Prin 6 – Customers' Interests. This says:

A firm must pay due regard to the interests of its customers and treat them fairly.

The FCA also published Conduct of Business rules (COBS) which set out the rules it expected firms to adhere to when carrying on regulated activities. COBS 2.1 is, in my view, particularly relevant here. At the time it said:

(1) A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).

(2) This rule applies:

a. In relation to designated investment business carried on for a retail client;

b. In relation to MiFID, equivalent third country or optional exemption business for any client; and

c. For a management company, this rule applies in relation to any UCITS scheme or EEA UCITS scheme the firm manages.

Taking everything into account, I'm satisfied that by 1 November 2020 at the latest RB ought to have realised that the arrangement it had with Mr S was no longer in his interest – and that given his particular circumstances, it was no longer appropriate for it to continue charging him a management fee for the discretionary service it was supposed to be providing.

I say this firstly because it ought to have been obvious to RB that part of the reason Mr S was reluctant to end the relationship was because of his mistaken impression that he would have to forego the ISA status of his money if RB were to 'return it to him' – when in reality RB could've transferred that cash to a cash ISA of his choosing at any point. This would've retained the ISA status of his money, ended his relationship with RB and allowed his money to earn some interest, albeit minimal at the time, without paying any fees.

I've seen no evidence that this was ever really explained to Mr S, and I can see no reason

why it wasn't. Particularly after Mr S's letter in November 2020, it was very clear that the prospect of having the cash 'returned' was something he was worried about in terms of losing the ISA wrapper.

But most importantly, by November 2020 it was abundantly clear that RB was no longer really able to manage Mr S's portfolio. It was unable to invest on his behalf because of his clear instructions that he did not want to do so. And it had been in this position for many months – during which time Mr S's portfolio was being reduced by the fees that it was continuing to charge, for a service it was not entirely providing.

At this stage, RB ought to have realised that a discretionary service was no longer in Mr S's best interests, because his capital was being eroded by fees for no benefit – and this was the very risk that Mr S was unwilling to take by re-entering the market. In my view by this point, it ought to have proactively explained to Mr S that it was unable to discharge the mandate it had agreed with him. And it ought to have reassured Mr S that the money could either be kept with RB in an execution only capacity and earn no interest, or it could be transferred to a cash ISA of his choosing in such a way as to earn some interest while retaining the ISA status.

For these reasons, I'm satisfied that Mr S was not treated fairly by RB, and I consider that some compensation ought to be paid.'

I recommended compensation and a payment for the trouble and upset Mr S experienced.

RB didn't reply to my provisional decision, but Mr S did. He and his wife provided detailed comments. In summary:

- They outlined the legal relationship which they believe applied to their arrangement with RB.
- Their losses have been exacerbated by being out of the market since they first made the complaint, when the market has gone up by 50%.
- They have been denied natural justice by virtue of only having a transcript of the call I refer to in my provisional decision, and not the actual call.
- Whether or not they had already made up their mind to liquidate on 16 March wasn't relevant, because it wasn't their fault that their investment manager was absent on that day.
- My provisional decision confirmed that the arrangement continued after 16 March and therefore, according to Mr and Mrs S, RB was contractually obliged to manage their investments, and was liable for failure to do so.
- They disagreed that their complaint was about claiming fees – their complaint was about the failure to RB's failure to discharge its obligations under the contract.
- They said that if RB had reinvested the portfolio after 16 March 2020 they would've been 'happy clients' and there would've been no complaint from them.
- They reiterated that they had no role in the investment process and that the contract required RB to invest on their behalf – and crucially, it wasn't their fault that RB did not do so.
- They also said that they wanted any FOS award to be paid into their ISA, in order to maintain its tax exempt status. They said this meant they had no alternative to leave our ISAs with RB, which they claimed resulted in 'horrendous losses'. They said the markets had gone up 50%.
- They concluded by saying they would not accept my proposed remedy and would seek redress via the courts.

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.

I'm sorry to see that Mr S disagrees with my provisional conclusions. I understand his comments and the reasons why he continues to believe that RB ought to be liable for its failure to invest his portfolio after 16 March 2020 when he instructed it to sell his holdings down to cash.

Whilst I've read and considered his comments very carefully, I'm not persuaded to change my provisional conclusions – and therefore I confirm those provisional findings as final.

There's no doubt that Mr and Mrs S had an agreement with RB which remained in place post 16 March 2020. But this agreement was more than just investing without recourse to Mr and Mrs S. I'm not persuaded that this is all the regulator expected from RB, and therefore Mr and Mrs S's interpretation of RB's obligations is in my view not accurate. In order to discharge its regulatory obligations, RB couldn't simply reinvest the money without reference to Mr and Mrs S's circumstances, attitude to risk or objectives.

And whilst Mr and Mrs S have said that they would've been 'happy customers' had RB proceeded to reinvest their portfolios after 16 March, that is only because with the benefit of hindsight, they now know their investments would've grown in value. But in 2020 when this issue arose, no-one knew precisely how the markets would react in the short term, or when the right to reinvest was.

Mr and Mrs S had already been told before the 16 March 2020 that there was no need to sell their investments – and RB kept to that. It was only upon their specific instruction that RB agreed to sell their holdings on 16 March. For reasons I've already explained, the absence of their investment manager on that specific day in my view had no impact – and further, I don't agree it's unreasonable that there may be occasions when a specific individual is unavailable. Mr and Mrs S had already been told what their investment manager's view of the market was, and why he didn't consider selling their investments was necessary. Given the circumstances, it's plain that Mr and Mrs S were not comfortable with that decision and, more importantly, the risks of that decision. Whilst this was an entirely reasonable position to take at the time, it is not something I can blame or hold RB liable for.

In essence, after this date, it's clear to me that Mr and Mrs S's attitude to risk had changed. Mindful of the volatility in the market, and the uncertainties around the pandemic, it's very clear to me that they were reluctant to have their money reinvested. In my view, RB was duty bound to take Mr and Mrs S's new circumstances into account. It could not simply ignore their views by virtue of the agreement they had in place.

I explained in my provisional decision the opportunities RB had to reinvest Mr and Mrs S's portfolios, and the clear instructions it received not do so. Nothing in Mr and Mrs S's comments has caused me to reconsider those findings.

I remain of the view that RB was right to take into account their customers' objectives and attitude to risk at such a difficult time – and in my view made sufficient attempts to propose a course of action to Mr and Mrs S that would've seen their portfolios reinvested. I note that, for example, RB's proposal in July 2020 amounted to a significantly reduced equity exposure compared to the portfolio pre-pandemic – but this was still not acceptable to Mr and Mrs S.

I also disagree with Mr and Mrs S's view of the contract. In my view, the issue here is that RB ought to have realised that Mr and Mrs S were not comfortable with a discretionary arrangement at that moment in time. It ought to have understood this, and proactively ended the arrangement in order to act in their best interests precisely to avoid them paying a fee for a service that was no longer appropriate for them. I don't agree the remedy here is to hold RB responsible for investment decisions it didn't make, and which Mr and Mrs S had consistently instructed it *not* to make. In my view, for the reasons I gave in my provisional decision and in this final decision, the fair and reasonable remedy in this case is for Mr and Mrs S to be refunded the fees they paid for the management of their portfolio. And so this is what I set out below.

Putting things right

In reaching my decision on how to put things right for Mr S, I've taken into account a number of factors:

- I cannot say, on balance, whether Mr S would've agreed to transfer his money away from RB. He did not do so in February 2021, and it's clear from that phone call that the prospect of signing forms was daunting for him. Unfortunately, in order to transfer his cash to a cash ISA, forms would've been required and these would've needed to be requested from the new ISA provider, not from RB. Therefore I'm not persuaded I can say on balance that Mr S would've taken this course of action.
- I am persuaded, however, that if RB had taken ownership of the issue and proactively explained to Mr S what his options were, and told him that a discretionary mandate was no longer right for him, he would've accepted its advice – much as he did in February 2021.
- Taking into account the correspondence in October 2020, as well as Mr S's phone call on 24 October 2020 with RB, I've decided that this decision would've been taken on or around 1 November 2020. It's evident that there is no way of knowing precisely when this action would've happened – but I'm satisfied that it is fair and reasonable to use this date as the latest point at which fees ought to have been stopped.
- I'm also satisfied that this matter has caused Mr S a degree of distress and upset for which he should be compensated for. His letter of 25 October 2020, as well as all his subsequent correspondence, shows that the matter has taken a considerable toll on him. I accept that some of this impact was caused by the pandemic and its effects on his portfolio. But I'm satisfied that RB also contributed to this upset and for that reason, ought to pay some compensation.

For these reasons, I'm currently minded to make the following award:

- Refund Mr S's fees for the period 1 November 2020 until the account was changed to execution only. I appreciate Mr S is keen for this money to be remitted to his ISA account, but I don't consider that will be possible without using his ISA allowance. Given that his money has remained uninvested and not earning any interest, I'm satisfied this makes no material difference.

- Pay Mr S £250 for the distress and inconvenience RB's actions and inactions have caused him – in particular its failure to proactively advise him at a time when he was clearly not understanding the options available to him.

I note that Mr and Mrs S have continued to keep their portfolios with RB in the belief that this was necessary in the event that this service awarded compensation. Whilst I acknowledge

why they consider this decision has caused them a financial loss, it isn't a loss I can put right – it wasn't caused by anything RB did or didn't do. Furthermore, I don't agree there was any need for them to do this.

My final decision

My final decision is that I uphold Mr S's complaint and award compensation to him as outlined above. If Mr S does not accept this final decision, it will not be legally binding. This means Redmayne Bentley will not be obliged to pay compensation, but he will be free to pursue the matter elsewhere. If Mr S accepts this final decision, it will become legally binding on Redmayne Bentley – however his ability to pursue the matter elsewhere will be extinguished.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 11 November 2023.

Alessandro Pulzone
Ombudsman