DRN-3043005

The complaint

Mr C complains that Portal Financial Services LLP (formerly Portafina LLP) wrongly advised him to transfer a Section 32 Buyout Plan (S32) to a Self-Invested Personal Pension (SIPP).

Mr C is being assisted with his complaint by a claims management company. For ease of reading the decision, I'll refer to all representations as being made by Mr C.

What happened

In 2014 Mr C was approaching his 60th birthday and wanted pension advice. He was introduced to Portafina after he'd been in contact with another business, from here on referred to as 'Firm C'. At the time, Firm C was an appointed representative (AR) of a regulated business, 'Firm S'. Firm S was authorised by the Financial Conduct Authority (FCA) to provide investment advice, but neither it, nor Firm C were permitted to provide pension transfer advice.

Firm C completed a fact find which was later passed to Portafina. It confirmed the following about Mr C;

- He was 59 years old, in good health and living with his partner
- He was employed as a test administrator earning £15,000 a year, providing a net income of £1,200 per month. His regular monthly commitments were £300
- He was a home owner and the estimated value of his property was £120K. His outstanding mortgage was between £90K and £100K
- He wanted to retire when he reached age 65
- He had a S32 plan with a current value of approximately £107K. The plan had a guaranteed minimum pension attached.
- His objectives were stated as;
    - *"Wants more flexibility E.g. tax-free cash (TFC) with no income required and/or income drawdown….Opportunity to semi-retire and access tax-free cash but doesn't need to take all the available income yet"*
- He signed the fact find confirming that it was a true and accurate reflection of his personal and financial circumstances at that time

The fact find included a risk profiling questionnaire (RPQ) which included the following responses from Mr C;

- People who know me would describe me as a cautious person. *Agree*
- I feel comfortable about investing in the stock market. *Disagree*
- I generally look for safer investments, even if that means lower returns. *Agree*
- Usually it takes me a long time to make up my mind on investment matters. *Agree*
- I associate the word 'risk' with the idea of 'opportunity'. *Disagree*
- I generally prefer bank deposits to riskier investments. *Agree*
- I find investment matters easy to understand. *Disagree*
- I am willing to take substantial investment risk to earn substantial returns. *Disagree*
- I have little experience of investing in stocks and shares. *Agree*

- I tend to be anxious about the investment decisions I've made. *Disagree*
- I'd rather take my chances with high risk investments than increase the amount I'm saving. *Disagree*
- I'm concerned by the volatility of stockmarket investments. *Strongly Agree*

Mr C signed a letter of authority to allow Portafina to gather information about his S32, which confirmed;

- The plan was invested approximately 30% in a unitized with-profits fund and 70% in a mixed fund
- The transfer value was £114,749.27 which included a final bonus of £8,683.83
- A Guaranteed Minimum Pension (GMP) of £4,158.47 per year was due from age 65 but could be paid earlier if the fund was large enough. It would include a 50% spouses pension, which was defined as; *"your husband, wife or civil partner when you die."*
- A quarter of the GMP would increase in retirement by 3% per year
- The plan normal retirement age was 60
- The cost of meeting the guarantee of the GMP at the transfer date was calculated to be £103,969, which meant only the remaining £10,780 (9%) could be paid as TFC
- The annual management charge (AMC) was 1% per year and there was also a yearly policy fee of £65.16
- There were no other guarantees or protections

A Portafina paraplanner completed a second fact find. It documented the following additional information about Mr C;

- He had been cohabiting with his partner for 16 years
- He had cash savings of £25K
- He was already receiving pension income of approximately £3.5K per year
- Joint net monthly income with his partner was £4K and monthly net disposable income was £2K
- His chosen retirement age was 66
- His objectives included;
    - Control & flexibility of pension plans; *"Want largest TFC available now and deferred income later"*
    - Greater investment fund choice; *"[Mr C] likes the idea of a large fund and asset backed and stock market volatility controlled funds"*
- His income in retirement need in today's terms was £12K per year and he felt he had sufficient income to meet this need
- *The paraplanner noted; "[Mr C] is 19 years older than [his partner] and feels that the extraction of TFC right now is necessary. Secondly he and [his partner] are doing considerable and gradual work to their house and want to continue and add significant further improvements now. He also wants to buy a new car for the first time. [His partner]'s career is likely to continue for about another 20 years. [Mr C] expects to continue his job probably into his 70s and therefore to at least State age 66. [Mr C] is a Record collector with a collection of serious value"*

This fact find included an uncompleted RPQ. The paraplanner noted; *"Please note that [Mr C] was really uncertain about how to answer the ATR questions that were previously asked and wasn't expecting such incisive questions with no preliminary explanations as to their relevance"*

On 18 November 2014 Portafina produced a suitability report (SR) setting out it's advice. In summary the report said:

- Mr C's *"Stated Objectives"* were;
    - To make home improvements
    - To purchase a car
- It set out the features of the S32 including that it included a GMP. It explained that; *"A Critical Yield of 3.1% applies to this plan. If you go ahead with this transfer you will be giving up access to a pension of £5,384 per annum upon reaching 65.".* The Report later went on to explain that this Critical Yield was the investment growth required each year to at least match the income he could have received from his S32 if Mr C used income drawdown in his SIPP.
- The total transfer value of the S32 was £114,749 and it explained that if he transferred to the SIPP; *"This will provide you with a Tax Free Lump Sum of £28.687, that you have stated you will use to make home improvements and purchase a car."*
- Alternative ways to generate a cash lump sum were set out, which included via a loan, remortgage, disposable income or existing assets, but Mr C did not wish to use any of these options.
- Mr C's risk profile suggested he was an *"Adventurous investor". This was defined as;*
    - *"Adventurous investors typically have high levels of financial knowledge and keep up to date on financial issues. They will usually be experienced investors, who have used a range on investment products in the past, and who may take an active approach to managing their investments.*
    - *In general, Adventurous investors are happy to take on investment risk and understand that this is crucial in terms of generating long-term return. They are willing to take risk with most of their available assets.*
    - *Adventurous investors will readily take gambles where they see the potential rewards as being attractive. They will usually be able to make up their minds on financial matters quickly. While they can suffer from regret when their decisions turn out badly, they are able to accept that occasional poor outcomes are a necessary part of long-term investment."*
- It concluded that Mr C had sufficient capacity for loss for the recommendation.
- Mr C was recommended to transfer his S32 to a SIPP for the possibility that the benefits available to him at retirement in the SIPP would exceed those that would have been available through his S32. The transfer would meet his stated objectives and would enable him to take 25% of his fund as TFC.
- The transfer would initially be invested 100% in cash deposits until Firm C made its investment recommendations.
- The initial advice fee would be 5% of the total transfer value, of which 2% would be paid to Firm C as part of an introducer agreement. The annual management charge for the new SIPP would be 0.5% a year plus a further £75 a year for funds in drawdown. Firm C would also charge a yearly ongoing advice fee of 0.5%.
- The fund charges in the illustration enclosed with the SR [which this service has not seen] were specific to the funds selected.

The SR enclosed a declaration which Mr C signed and returned. It included the following statements;

- *"I wish to proceed on this basis as my main priority is to release the tax free cash to make home improvements and purchase a car (ahead of retirement planning).*
- *I fully understand what the Critical Yield is and I am aware that it is unlikely that my recommended scheme is going to achieve a growth rate of 3.1% to match the guaranteed benefits held with Aegon.*
- *I am aware that I will lose the Guaranteed Pension of £5,384 pa payable from age 65 by transferring my benefits to an alternative pension arrangement, and understand that I will be worse off in retirement.*
- *I understand the loss of benefits to my pension funds by making this transfer, but still*

wish to proceed with the transfer to the Novia Platform."

On 21 November 2014 Mr C signed the necessary papers to set up the SIPP, complete the transfer and immediately transfer the agency of the SIPP to Firm C. The SIPP application confirmed the ongoing advisor charge of 0.5% per year, and that Mr C would immediately take the maximum allowed TFC of 25%. His partner was nominated as sole beneficiary in the event of his death.

The SIPP was established in December 2014 and the transfer completed. The transfer value was £115,874.04. The following day Mr C withdrew £28,928.51 as TFC, being his full entitlement of 25%, which was used to purchase a new car and fund home improvements. The remaining fund went into drawdown.

An initial advisor charge of £5,793.76, this being 5% of the full fund transfer value, was also deducted.

From the beginning of January 2015 Firm C begun to receive its ongoing advisor charge and the following investments were made:

- **Unregulated collective investment schemes (UCIS)**
    - Biomass Investments - £8,100
    - Brisa Investments – £11,300
    - Strategic Residential Dev - £11,300
    - Lakeview UK Invest - £8,100
    - Real Estate Invest USA - £8,100

- **Regulated investments**
    - Ifunds Abs Rtn Orange - £8,100.89
    - Marlborough ETF Gbl Gth - £21,869.11

In June 2018, Mr C complained to Portafina about the advice he received to transfer.

Portafina considered Mr C's complaint and concluded that it had provided suitable advice (in line with his circumstances, needs and objectives at the time) and acted in his best interests. It said it only provided the advice to transfer Mr C's existing plan to facilitate increasing his TFC and had provided enough information for Mr C to make an informed decision. Portafina said it hadn't provided specific investment advice as this was given by Firm C.

Portafina said it had conducted appropriate due diligence on Firm C, which itself was also regulated by the FCA. Because Firm S and Firm C were in liquidation, Portafina had forwarded Mr C's investment concerns to the liquidators as a claim should be made to the Financial Services Compensation Scheme (FSCS).

Unhappy with Portafina's response to his complaint, Mr C referred the matter to our service. An adjudicator considered the matter and concluded that Mr C's complaint should be partly upheld. She found the transfer advice to be suitable but found the investment advice to be unsuitable. She also thought that Portafina were responsible for Mr C's losses because it was responsible for the transfer transaction as a whole, including the investment advice.

Portafina broadly agreed with the findings that the transfer advice was suitable but disagreed that they were responsible for losses from the investment advice.

Mr C agreed with the findings about the investment advice but disagreed that the transfer advice was suitable because the regulator had issued an alert that said that suitable transfer advice needed to consider the transaction as a whole, including the investment advice.

As no agreement could be reached the case was referred for a final decision. Prior to the complaint being allocated to me, Mr C's complaint was reconsidered, and a second view was issued on 22 March 2021. Reasoning was provided for why it was felt the complaint should be upheld in full, which included why Portafina was considered to be responsible for all of Mr C's losses as a result of the transfer and what the appropriate redress method should be.

Mr C accepted the findings of the second view and also raised concerns about how Portafina were valuing UCIS investments. Portafina requested that Mr C's case be put on hold pending the outcome of another complaint being considered here at the service. This request was considered but it was ultimately decided that it wouldn't be appropriate to delay matters, as each case is decided on its own merits and particular circumstances. Portafina didn't provide any further submissions regarding the merits of Mr C's complaint.

The case has now been passed to me for a final decision.

What I've decided – and why

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

In reaching my decision, I've taken into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice and what I consider to have been good industry practice at the relevant time. Having done so. I'm upholding the complaint. I'll explain why.

Portafina advised Mr C to transfer his S32 but says it didn't provide any recommendation regarding the investments held within the SIPP as Firm C was meant to provide this. Although the intention was for another regulated firm to advise on and arrange Mr C's underlying SIPP investments, I don't think that meant Portafina's responsibilities ended once the SIPP was set up, the funds transferred, and the money then made available for investment. I believe that as Mr C's financial adviser, Portafina still had a duty to ensure the overall transaction was suitable, notwithstanding that another regulated firm was going to be involved.

Suitable advice couldn't, in my view, be given without thinking about the intended investment.

The regulator's position

Having thought carefully about what happened here, I don't think Portafina's advice to transfer was suitable. And I don't think it was right to try to limit its advice in the way it sought to. At the time of the advice the regulator had made its view clear that it considered in order to suitably advise on pension transfers, a firm needed to consider the suitability of the underlying investments to be held in it.

The regulator's position was evident in its 2013 alert where it said:

"Financial advisers (…) are under the mistaken impression (…) they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.

The [regulator's] view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is *a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating (…) 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 regulator's 2014 alert added:

"Where a financial adviser recommends a SIPP knowing that the customer will (…) transfer (…) to release funds to invest through a SIPP, then the suitability of the underlying investment must form part of the advice given to the customer. If the underlying investment is not suitable (…), then the overall advice is not suitable.

If a firm does not fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer (…) at all as it will not be able to assess suitability of the transaction as a whole."

Portafina appears to have been under the impression that, as it told Mr C it wasn't providing any advice on the underlying investments, this enabled it to provide advice on a restricted basis. But this wasn't right. It couldn't separate out the two elements. Its advice on the suitability of the transfer had to include the suitability of the underlying investments.

Both alerts specifically referred to the regulator's overarching Principles for Businesses (PRIN) and Conduct of Business Rules (COBS), which Portafina was subject to. And with reference to PRIN and COBS the alerts said a firm would fall short of its obligations under these precepts if it didn't familiarise itself with the intended investment strategy and that it wouldn't be able to recommend a new product, like a SIPP, without doing so.

Under COBS 2.1.2 Portafina also couldn't seek to exclude or restrict its duty or liability to Mr C under the regulatory system. So, saying it was operating under a limited retainer didn't absolve it of its duty of care to ensure the advice it was providing was suitable – again, this had to include consideration of how Mr C's funds would be invested.

COBS 9.2 required Portafina to take reasonable steps to make sure its recommendation was suitable for Mr C. To achieve this, COBS 9.2.2R said Portafina had to obtain enough information from Mr C to ensure its recommendation met his objectives, that he could bear the related investment risks consistent with these objectives and that he had the necessary experience and knowledge to understand the risks involved in the transaction. COBS 9.2.2R included the following wording:

"(…) 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."

So as part of the fact-finding process Portafina had to understand Mr C's objectives and assess the related risks. It wasn't free to ignore how Mr C's funds were going to be invested irrespective of Firm C's involvement. I consider the underlying investments in the SIPP to be inextricably linked to the risks relating to the SIPP, so assessing the risk and suitability of a transfer without knowing what Mr C would invest in within the wrapper, doesn't in my mind seem reasonably possible.

Like COBS, PRIN formed part of the regulatory framework that existed at the time of Portafina's advice and had to be complied with. Principles 1 (conducting business with integrity); 2 (exercising due skill, care and diligence); 6 (having regard for customers' interests and treating them fairly); 7 (communicating information in a clear, fair and not misleading way) and 9 (ensuring the suitability of advice for a customer entitled to rely on the firm's judgement) are of particular relevance to this case. In addition to what I've outlined above, I've considered Portafina's advice with these in mind.

I accept that as a result of its appointed representative agreement with Firm S, Firm C was required to give suitable advice. However, I don't agree that this negated Portafina's duty to do the same. As Mr C's appointed financial adviser, it had a significant responsibility to provide suitable advice and act in Mr C's best interests. And as I've said, this had to include an awareness of where Mr C's funds would be invested.

I recognise that the FCA allows for two advisers to work together to provide suitable advice to their mutual client. However, the alerts make it clear that a firm that is asked to advise on a pension transfer needs to be aware of the intended investments *before* it advises on the transfer, in order to provide suitable advice. Portafina should've requested this information from Firm C before providing advice. And, as confirmed in the 2014 alert, if it didn't *'fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer or switch at all…'. So,* in the absence of Portafina knowing the investment strategy Firm C intended for Mr C, it couldn't provide him with suitable advice to transfer his pension.

I haven't seen anything to suggest that Portafina, at any point, checked to see how Firm C broadly proposed to invest Mr C's funds. I believe it should've given the unavoidable connection this had to the transfer it was proposing.

Portafina needed to do more to satisfy itself that its recommendation was based on the expected investment proposition that Firm C intended for Mr C. It needed at the very least, to ask Firm C for an outline of that proposition. It appears that Portafina failed to do that and as a result, a significant part of Mr C's pension fund was invested in high risk, illiquid funds. I would expect Firm C to have given a clear and honest outline of Mr C's investment proposition when asked to do so by Portafina. On receipt of that, I would further expect Portafina to have told Mr C that it couldn't recommend the transfer.

I accept, of course, that there is a possibility that Firm C may not have been entirely forthcoming to Portafina about its plans to spread a significant portion of Mr C's portfolio over unregulated investments. Had Portafina requested this information and it had been advised that Firm C intended to invest Mr C in these unsuitable funds, then it could've questioned this. And in the event that Portafina had been misled by Firm C as to the proposed investments, then it's likely Mr C would've realised that the investments Firm C went on to arrange differed to those Portafina had based its suitability assessment on. And Mr C could've taken action accordingly.

Portafina says that its advisers carried out extensive due diligence on Firm C, including background checks on the company directors, accounts and information about previous complaints. It hasn't provided us with evidence of the due diligence it carried out on Firm C in connection with this complaint. But even if Portafina had carried the general due diligence checks it has mentioned, I don't think that negated the need to check the specific investment Firm C envisaged for Mr C.

I also haven't seen any evidence that further checks were made by Portafina to satisfy itself that the pension transfer advice it was giving to clients was aligned with the investment advice they were receiving from Firm C. The need to do so was a necessary part of the suitability assessment carried out by Portafina for individual clients. But I think it was also a reasonable due diligence requirement brought about by the ongoing relationship it had with Firm C. This would've highlighted any patterns of unsuitable or unaligned advice, which could be identified and addressed.

In any event, although I acknowledge that Portafina doesn't agree, I'm satisfied that it as was clearly set out in the regulator's alerts in both 2013 and 2014, Portafina couldn't restrict its advice merely to the transfer; it had to consider the proposed investments for Mr C, which it didn't do.

Overall, I think Portafina needed to satisfy itself that its recommendation was based on the investment proposition that Firm C intended for Mr C. It should've asked Firm C for the specifics of this. Had it done so, and Firm C had given it a clear framework of the proposition, then I would've expected Portafina to have advised Mr C that it couldn't recommend he transfer away from his S32 in those circumstances. If Portafina had warned Mr C against investing in line with Firm C's proposal, I think he would've listened to it and not gone ahead with the transfer.

In my view, the fact that Portafina didn't take sufficient steps to consider the investment proposal for Mr C when assessing the suitability of the proposed transfer meant that it couldn't reasonably conclude the course of action it recommended as a solution to Mr C's needs was being made on a sound basis. And as a result of these shortcomings, it seems to me that Firm C was in effect given the freedom and opportunity to do as it wished with how Mr C's SIPP was invested.

Notwithstanding what I've said above, I don't think the suitability of Portafina's advice turns solely on where Mr C's funds were invested. Portafina's recommendation that Mr C transfer to a SIPP in the first place is an important consideration. And were it not for the transfer and Portafina's incomplete and, in my view, flawed advice regarding this, I'm not persuaded Mr C would've ultimately gone on to invest as he did.

The advice to transfer

I have also considered whether the advice to transfer was suitable. In other words, if the investment advice had been suitable, would the advice to transfer have also been suitable? I don't think it would have been, and I will explain why.

The S32 was funded from a transfer of a defined benefit occupational pension scheme (OPS) and retained a significant part of the defined benefit 'guarantee' in the form of the GMP. Giving up this guarantee and subjecting future pension income to the risks associated with unpredictable investment returns should only be done where it can be shown that it was clearly in the best interests of the consumer. The COBS guidance (COBS19.1.6G) at the time of the advice, stated:

"When advising a <u>retail client</u> who is, or is eligible to be, a member of a <u>defined benefits occupational pension scheme</u> whether to transfer, convert or opt-out, a <u>firm</u> should start by assuming that a transfer or opt-out will not be suitable. A <u>firm</u> should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the <u>client's</u> best interests."

This guidance also applies to the S32 because of the defined benefit 'guarantee' it retained from the OPS.

Given what the regulator says, my starting point is that a transfer won't usually be suitable. There'll need to be good reasons why a transfer will be in the consumer's best interests. And generally, a transfer will only be in the consumer's best interests if there's a reasonable prospect that the new arrangement will provide better retirement benefits. The transfer will also need to be suitable, taking into account the individual's particular circumstances.

It is clear to me from Mr C's background and circumstances that he satisfied the FCA definition of a Retail Client i.e. he was neither a professional client or an eligible counterparty. So, he was entitled to rights and protections afforded to Retail Clients and I think he was reliant on the advice given to him.

An essential requirement when assessing the suitability of a DB transfer was the use of a Transfer Value Analysis System (TVAS) to produce a Critical Yield. The regulator has updated its guidance about this over the years but guidance of particular relevance when Portafina advised Mr C was COBS 19.1.7AG from November 2007, which expected a business to explain the loss of the guarantees and the transfer of risk from the DB scheme to the client, and the extent to which benefits may fall short of replicating the DB pension.

The SR explained the Critical Yield in the following terms; *"A Critical Yield of 3.1% applies to this plan. If you go ahead with this transfer you will be giving up access to a pension of £5,384 per annum upon reaching 65.".* It later went on to explain that this Critical Yield was the investment growth required each year to at least match the income Mr C could have received from his S32 if he used income drawdown in his SIPP. But this was the extent of its explanation of the Critical Yield, which I don't think went far enough, as it simply did not explain what it was in practical terms or provide any context to how it related to the loss of guarantees.

It is also evident from the SR that the critical yield quoted was based on Mr C using income drawdown, which is typically lower than a critical yield based on purchasing an annuity. But I don't think this assumption was valid because Mr C was not intending to retire for a further six years. And not only was there no expectation of him taking drawdown income for six years, this was also too far away to know with any confidence that drawdown would still be a suitable option.

The SR said the transfer was recommended due to the possibility that benefits available at retirement via the SIPP would exceed benefits available under the S32. However, Portafina had Mr C sign a declaration stating that he understood it was unlikely the recommended scheme would achieve the growth rate required to match the guaranteed benefits under his S32, let alone exceed them. The declaration also had Mr C agreeing to accept that by transferring he'd be worse off in retirement. It's not clear what the point of the disclaimer was, but either away, it doesn't suggest Portafina was acting in Mr C's best interests when recommending the transfer.

Given the above, it is clear to me that Mr C was not in an informed position because I don't think the drawdown Critical Yield was valid, the SR lacked sufficient detail and the information provided in the SR and Disclaimer was inconsistent.

Mr C disputes that his attitude to risk was adventurous and argues that it was at most medium. I have reviewed his answers from the RPQ that was completed by Firm C, which in summary point to a lack of investment experience and knowledge, and an aversion to risk. Portafina should have completed their own RPQ but didn't, they simply commented about Mr C's observations regarding the questions asked by Firm C. His S32 was invested in unitized with profits but this seems to have been a policy condition as part of Aegon's obligation to honor the guarantee of the GMP. The remainder was invested in a 'mix fund', which seems to have been a diversified managed fund. Portafina failed to accurately establish Mr C's attitude to risk, and I have seen nothing from his background and circumstances or from the answers to the Firm C RPQ or from the nature of the existing S32 investments that would suggest he had an adventurous attitude to risk. I think a medium attitude to risk was an appropriate assessment for Mr C.

Portafina also needed to consider Mr C's capacity for loss. He was already receiving some pension income; his employment situation was stable and he had surplus income; but he also had a large outstanding mortgage. He was approaching 60 with only six years until he intended to retire, so his time horizon for making up losses if things went wrong or accruing additional pension provision was limited. So, I don't think he had the capacity for a level of risk higher than medium.

To give suitable advice Portafina should have established his income needs in retirement and how these could be met, including making up any shortfall. But instead they merely concentrated on advising on how the transfer would meet his immediate perceived objectives. His desired income in retirement was recorded as being £12K per year and although he was already receiving pension income of £3.5K per year, there remained a sizeable shortfall. He may have had a State Pension which could have been sufficient to meet this shortfall but Portafina didn't check this.

Because Portafina didn't fully assess what Mr C's income needs in retirement were likely to be it couldn't reach a reasonable conclusion about whether transferring to the SIPP would meet his long-term retirement needs. Even if I accept that Mr C's retirement income need was in fact £12K per year, the guaranteed income from his S32 of £4,158 per year from age 65 would have gone a long way to meeting this income shortfall when combined with his existing pension income of £3.5K per year. By transferring, he lost this guaranteed income.

I have thought about how the transfer recommendation addressed Mr C's stated objectives.

Transferring to access a greater level of TFC wasn't an objective Portafina appeared to interrogate or explore in any great detail with Mr C. Merely meeting this objective in the short-term didn't make the transfer suitable. Portafina's role wasn't to simply justify and make a transfer happen based on his objectives, unless it could be clearly demonstrated to be in his best interests. I can't see that Portafina did this.

Although Mr C was able to access more TFC following the transfer, and he used this to make home improvements and purchase a new car, there's nothing to suggest these things were essential at the time, such that taking on the risks associated with the transfer were necessary. Even if they were essential, and the evidence does not prove this to be the case, he had £25,000 in savings which could, in the short-term, have arguably been more appropriately used for this purpose instead. But again, Portafina failed to explore this alternative in any depth, beyond simply stating that Mr C did not wish to pursue this option. Portafina should have established why this was not a preferred option; it should have set out the advantages and disadvantages of each of the options that could be used to meet Mr C's objectives but it didn't.

Mr C’s other stated objectives were control and flexibility and greater investment fund choice. But beyond simply stating these objectives in the SR, Portafina again failed to substantiate why either of these objectives were important to Mr C, and I can draw no inference from his background and circumstances that suggest to me why these objectives were of such importance to justify the risks of transfer.

I also don’t think Portafina adequately considered the suitability of drawdown for Mr C. Saying it was suitable because he could take full TFC and reinvest the residual amount wasn’t enough. As I have already stated, six years was too long to be confident that this would be Mr C’s preferred and suitable option when he retired.

Mr C’s partner was 19 years younger than he, which meant that the 50% spouses pension was of potentially significant value because this benefit was not conditional on the age of his spouse. I accept that the spouse’s pension was conditional on them being married or in a Civil Partnership, which they weren’t. But the point was that this benefit and the conditions attaching to it should have been considered; the advantages and disadvantages should have been set out so that Mr C was in an informed position and could take action if necessary.

In terms of costs associated with its recommendation, Portafina only partly set out what these were. It included only the adviser and SIPP charges in its SR and the fund charges in the illustration it provided were specific to the funds selected i.e. cash, which would have no charge. By not taking into account the impact of the costs of the intended investment strategy, Portafina failed to take appropriate steps to ensure the complete suitability of its recommendation.

Although Portafina said the strategy it was recommending might cost more than Mr C’s existing arrangement, it needed to justify any potential costs as a result of the transfer in light of Mr C’s needs, and present this in a way Mr C was likely to understand. The cost of the transfer along with SIPP and investment charges would all play a role in determining what Mr C’s investment returns would ultimately be. So, weighing up all the costs associated with its recommendation was a crucial part of Portafina’s consideration of the suitability of its advice. Any additional costs needed to be acceptable in terms of the specific benefit Mr C needed. I can’t see that Portafina made any meaningful attempt to do this.

Overall I don’t believe the recommendation to transfer was suitable to Mr C’s circumstances, or that Portafina collected or presented sufficient information to demonstrate it could properly advise him on the suitability of its recommendation to ensure it was in his best interests.

Would Mr C have gone ahead with the transfer in any event?

I’ve thought about whether, if he’d been correctly advised by Portafina not to transfer, Mr C would have gone ahead with the transfer anyway. Having carefully considered all the circumstances in this case, I don’t believe he would have. I think if Mr C had been given correct advice he wouldn’t have transferred and would’ve stayed in his S32 and not taken benefits until his intended retirement. I can see no compelling reason why he really needed to take his TFC at age 60 or that potentially increasing his overall TFC entitlement outweighed the loss of guarantees by transferring.

Overall, I think Portafina needed to satisfy itself that its recommendation was based on the investment proposition that Firm C intended for Mr C. It should’ve asked Firm C for the specifics of this or, as a minimum, an outline of the proposition. Had it done so, and Firm C had given it a clear framework of the proposition, then I would’ve expected Portafina to have advised Mr C that it couldn’t recommend he transfer in those circumstances.

If Portafina had warned Mr C against investing in line with Firm C's proposal, I think it's more likely than not that Mr C would've listened to it and not gone ahead with the transfer. Alternatively, had Mr C proceeded against such advice, Portafina could've discharged its professional responsibility to him appropriately. For example, it could've treated him as an insistent client. However, there's nothing to indicate Mr C was acting against the advice he'd been given.

In my view, the fact that Portafina didn't take sufficient steps to consider the investment proposal for Mr C when assessing the suitability of the proposed transfer meant that it couldn't reasonably conclude the course of action it recommended as a solution to Mr C's needs was being made on a sound basis. And as a result of these shortcomings, it seems to me that Firm C was in effect given the freedom and opportunity to do as it wished with how Mr C's SIPP was invested.

I think it was clear from the outset that Mr C was seeking to rely on the advice he reasonably expected to obtain from Portafina. And I think Portafina's failings in appropriately assessing the overall suitability of the transaction it was recommending played a pivotal role in Mr C's decision to transfer.

Overall, I consider that the losses suffered by Mr C are as a result of the inappropriate advice provided by Portafina. And had it not been for this unsuitable advice, I don't believe he would have gone ahead with the transfer of his S32 or the subsequent UCIS investments.

Is Portafina wholly responsible for Mr C's losses?

I've considered whether I should apportion only part of the responsibility for compensating the loss to Portafina. In the circumstances, though, I think apportioning responsibility to Portafina for the whole of the loss represents fair compensation. I don't accept that anything Firm C did was an intervening act which absolves Portafina of its responsibility for Mr C's losses.

I think it's important to emphasise that Firm C and Portafina were in a business relationship in which each firm agreed to provide services that were designed to bring about a single outcome for clients – pension switch advice and investment. Portafina advised Mr C to transfer to a SIPP, it set up the SIPP and arranged for his existing pension benefits to be switched over.

I acknowledge that Firm C advised Mr C to invest a significant share of his SIPP funds in unsuitable funds. But I think it is fair to hold Portafina fully responsible for Mr C's loss.

Ultimately Portafina recommended Mr C should transfer his S32 benefits to the SIPP, without ensuring the subsequent investments he would go on to make, through Firm C were suitable for him. So, in my view, the entirety of Mr C's loss stems from Portafina's unsuitable advice to transfer away from his S32 where he had a GMP. Portafina's understanding that it could reasonably limit its advice to just the switch and the SIPP was wrong; it needed to consider the proposed investments too, even if Firm C was advising Mr C on the investments. It was only as a result of Portafina's involvement that Mr C transferred his S32 plan to the SIPP. Portafina's role was pivotal, since the eventual investments were fully reliant on the funds being switched over first; if that hadn't happened, he couldn't have invested as he did.

In terms of the FSCS, I am aware that, as a fund of last resort, the FSCS won't pay out on claims where it is aware that another firm was involved in the transaction, and it considers that firm might also be responsible for a consumer's losses. In Mr C's case, he's confirmed that he hasn't complained about Firm C or Firm S and in light of their liquidation, there would be little point in him doing so. He has complained about Portafina and because of what I have said, it is, in my view, fair and reasonable that Portafina should account to him for the full extent of his losses.

I think it's important to point out that I'm not saying Portafina is wholly responsible for the losses simply because Firm S and Firm C are now in liquidation. My starting point as to causation is that Portafina gave unsuitable advice and it is responsible for the losses Mr C suffered in switching his S32 to the SIPP and investing as he did. That isn't, to my mind, wrong in law or irrational but reflects the facts of the case and my view of the fair and reasonable position. So, overall, I think apportioning responsibility to Portafina for the whole of the loss represents fair compensation in this case.

Putting things right

My conclusion is that a fair outcome would be for Portafina to put Mr C, as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have remained in the S32. Portafina should therefore undertake a redress calculation in line with the regulator's pension review guidance, as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

This calculation should be carried out using the most recent financial assumptions at the date of the actual calculation. Portafina must contact the Department for Work and Pensions (DWP) to obtain Mr C's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P).

These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr C's SERPS/S2P entitlement.

If this demonstrates a loss, the compensation amount should if possible be paid into Mr C's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr C 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 Mr C's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

In addition, Portafina should pay Mr C £200 for the trouble and upset this has caused him.

Treatment of the illiquid assets held within the SIPP

My aim is to return Mr C to the position he would have been in but for the actions of Portafina. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. That appears to be the case here.

To calculate the compensation, Portafina 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. If Portafina is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything Portafina has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, Portafina may ask Mr C 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. Portafina will need to meet any costs in drawing up the undertaking. If Portafina asks Mr C to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

Future SIPP fees

If Portafina had given suitable advice Mr C wouldn't have the SIPP. The SIPP only exists because of the investments. In order for the SIPP to be closed (should Mr C wish to move his investment portfolio) and further SIPP fees to be prevented, the investments need to be removed from the SIPP. I've set out above how this might be achieved by Portafina taking over the investments, or this is something that Mr C can discuss with his SIPP provider directly. But I don't know how long that will take.

Third parties are involved, and we don't have the power to tell them what to do. If any investment can't be removed, to provide certainty to all parties, I think it's fair that Portafina pay Mr C an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

My final decision

For the reasons explained above, I uphold the complaint. My decision is that Portafina Financial Services LLP should pay the amount calculated as set out above. Portafina Financial Services LLP should provide details of its calculation to Mr C in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 13 October 2021.
Lorna Goulding
Ombudsman