DRN-3060089

The complaint

Mr S complains about the advice he received from Future Wealth Management (FWM) when he transferred two existing personal pensions to a Self-Invested Personal Pension (SIPP).

His funds were subsequently invested in high-risk investments and he lost the majority of his pension funds. Mr S said he wasn't a high-risk taker. He said he had paid for poor advice and his interests had not been looked after. He said he felt mis-led and taken advantage of.

At the time FWM was an appointed representative of Pi Financial Ltd (Pi), so they are responsible for FWM's actions and for this complaint. For ease of reading I'll refer to Pi throughout this decision.

What happened

Several firms will be mentioned in this decision. These are:

Alexander Money (AM) -unregulated introducer
Pi Financial Ltd (trading as FWM) - regulated financial adviser
Horizon Stockbroking Ltd (HS) – regulated discretionary investment manager-in liquidation
James Hay (JH)-SIPP provider

Mr S said he was contacted by AM in April 2015 who told him he could achieve better returns from his two personal pensions by transferring them to a different plan. AM subsequently introduced Mr S to Pi.

Mr S signed a letter dated 14 April 2015 to PI saying:

'I would like to transfer my existing pension plan… into a new Self Invested Personal Pension Plan, in order to allow me access a wider range of investments.

Could you please recommend a suitable SIPP provider for me and arrange the transfer accordingly.

I am using a separate investment manager for the funds within the SIPP so do not require any advice regarding this.

I hope that you would be able to assist me and look forward to hearing from you.'

On 16 April 2015 the adviser from PI replied saying:

'Thank you for the letter of the 14th April 2015 in which you instructed me to transfer your current …. Plans into a new Self Invested Personal Pension (SIPP). I confirm I am happy to carry out your request and, as discussed, I will research the whole of the market to find the most appropriate SIPP for your requirements.

I have made you aware that, under normal circumstances, I would carry out a full review of your personal and financial circumstances and assess them in relation to the suitability of the

SIPP. However you have specifically requested this particular vehicle and did not want me to look into alternative options for you.

I have no input in the investment strategy for your SIPP funds, as you are using a separate investment adviser for this, and therefore I will only be responsible for arranging, and transferring your funds into the SIPP.'

Mr S signed a client agreement and a service agreement with Pi on 20 April 2015. The service agreement indicated the service level was 'limited advice service only'.

On the same day two Pension Replacement Contract Forms were also completed. They included information about Mr S' existing pensions and the new SIPP, including charges and whether the existing plans held any guarantees. The risk category for the SIPP was recorded as balanced, with an asset allocation being described as 'managed'. This matched what was recorded for the existing plans.

The *Reasons for Switching* section had ticks next to the headings:

No longer suitable for clients' investment objectives
Consolidation of investments
Lack of features/flexibility

A section on the form headed *Alternatives Considered* asked whether moving funds within the existing contracts was an option. This was ticked as yes. And a note recorded this option was discounted because:

'Client Wishes To Set Up A SIPP To Choose Own Funds.'

Pi sent a letter (undated) to Mr S enclosing a copy of a Suitability Report, a Defacto Report - which set out information about James Hay as the recommended SIPP provider -and the SIPP application form. The letter said:

'Could I ask that on the suitability report you go to the final page and on the James Hay Application you go to the final page where I would be grateful if you would sign and return both these pages in the stamped addressed envelope. The rest of the reports are for your information.'

The suitability report was dated 30 April 2015 and headed "*Personal Pension To SIPP Transfer."* This said, amongst other things:

'My advice is based on the details you provided at our meeting.'

'You instructed me to specifically limit my advice to Pension Planning and setting up a Self Invested Personal Pension (SIPP) with no advice received on the Investment of the SIPP and I have acted accordingly. I have, therefore, only obtained the necessary information from you to advise on the above area. You should be aware that my recommendations may have differed if I had undertaken a full review of your financial circumstances.'

'You wish to invest in and choose your own Investment to invest your SIPP monies. I will have no input in where you wish to invest your monies of your SIPP and will set up the SIPP with a provider on your behalf. You have intimated that you may wish to invest directly in shares within your SIPP funds. I have given no advice on where you should invest your SIPP funds and have only set up your SIPP investment with the appropriate provider.'
…

Objectives

You wanted me to recommend an appropriate SIPP into which you can transfer your ..Personal Pension Plans."
…

Your Risk Profile

Ordinarily I would complete a 'risk profiling' questionnaire, however as you wished to carry out your own investments you felt this was not required."

And there was a section titled *Replacement Business* which said:

"In reviewing your objectives, I have recommended that you surrender/discontinue the contracts outlined in the Replacement Policy Form.

The rationale for this is also outlined in the Replacement Policy Form, which we completed during our last meeting and a copy of which is attached to this letter."

The adviser outlined the points to consider for a transfer including charges (albeit said the annual management charge for the existing plan hadn't been supplied for comparison purposes), exit penalties (none); guaranteed annuity rates (none) and investment selection. It also said the effect of the charges would depend on the investment chosen within the SIPP.

The recommendation section said:

'After doing my research on the most appropriate provider and plan to meet your needs, I have recommended a *James Hay SIPP. James Hay was chosen over the other providers on the original research due to their low annual management charge, low set up fee and quality of service.*

It is worthwhile outlining the product features of the contract recommended to demonstrate why it is suitable to your current circumstances and stated objectives, which I outlined earlier.'

It went on to set out the benefits of a SIPP. The report was signed to confirm that Mr S had received and understood it on 3 June 2015.

An application for the SIPP was completed which recorded Mr S' employment and income details. It noted that his retirement date was in 2018 – about three years away.

The form recorded details of HS as the selected discretionary investment manager Mr S intended to use. It showed Pi as the financial adviser and the initial adviser charges for transfers was 3% of each pension transfer received.

The form was signed by Mr S on 3 June 2015. And PI has confirmed that it submitted the application form to JH on or around that date. I understand the plan start date was 23 June 2015 and that a total of £57,580 was transferred to the SIPP. £55,458 was available for investment after £2,100 was deducted in fees and charges.

Pi sent Mr S a letter dated 5 June 2015. This said:

"Please find enclosed the necessary paperwork to open a Horizon account to manage your pension. If you would sign where I have indicated and send them back to me I can get this opened for you."

The Horizon Account Opening Form was signed by Mr S on 29 July 2015. A *Knowledge and Experience* section which asked if a customer had ever traded in a number of more complex investments including CFDs, Options, Derivatives, Commodities or Spread Betting was left blank.

The form recorded that Mr S' annual income was £40,000. Under *Current Investments* it recorded that he had £70,000 in bank/building society accounts, £8,000 in bonds, and £66,000 in pension funds.

The form had a section entitled *Investment Risk and Objectives* which said:

"Please indicate below your tolerance to short term fluctuations in capital or income by ticking one of the following options:"

The section *High* was ticked which said, in brief, that the portfolio could be subject to increased risk and the possibility of significant fluctuation of capital value. There was the risk of substantial loss; potentially in excess of the initial deposit. It said the managed CFD account carried a high risk of loss compared to many traditional investments.

A box was ticked as *Yes* to indicate that Mr S was willing to invest through a managed CFD account and that he was only investing money that he could afford to lose. It said:
'I understand that this is a high-risk speculative product, and that I might lose some or all of the funds invested."

A further form signed by Mr S on 29 July 2015 provided further risk warnings about appointing HS to manage his trading account. It included:

"The member also acknowledges that they have been made aware that:

- *The investment is high risk because of the nature of derivative based instruments, including the risk that they could lose more than the amount invested*
- *They should not deal in these products unless they understand their nature and the extent of their SIPP's exposure to risk."*

Mr S became concerned about the advice he'd been given when the value of his SIPP had reduced significantly by April 2017. He complained to Pi who didn't uphold his complaint and so it was referred to this service.

One of our adjudicator's investigated it. He recommended that it should be upheld. He said it had been wrong for the adviser not to take into account Mr S' investment strategy when recommending the sale and transfer of his existing pension benefits to a SIPP. He thought a very high risk CFD account was unsuitable for Mr S. There was no evidence Mr S had experience or knowledge of CFD trading. And the adjudicator didn't think taking such substantial risks with the majority of his pension was suitable for Mr S in his particular circumstances.

Pi disagreed and the complaint was referred for an ombudsman's decision. Their position in summary is that:

- Mr S instructed Pi to recommend an appropriate SIPP provider. It only provided Mr S with a limited advice service on these specific instructions. Given the limited nature of

the retainer the firm took reasonable steps to ensure that its recommendation was suitable in full compliance with COBS 9.2.1 and 9.2.2. Any liability could only be in regard to whether a SIPP was appropriate for Mr S.

- Pi didn't provide Mr S with advice on the switch from his personal pension plans to a SIPP or on the investment through HS. Mr S had already decided what he wanted to do before he approached Pi. And the HS forms made it clear the intended investments were high risk. They doubt additional information by Pi would have changed Mr S's course of action.

- Mr S had confirmed that he would be using a separate investment manager. Pi established that manager was an authorised and regulated firm and appropriately qualified. They did compliance checks and there were no red flags which should have caused them to refuse to arrange the transfer for Mr S.

- The investment strategy for the SIPP was the responsibility of HS who was also a regulated party. HS is responsible for Mr S's losses and not Pi who only played a very limited role here. The fact that HS is now in liquidation doesn't change this.

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.

Provisional findings

I previously issued a provisional decision in which I set out the following:

relevant considerations

In deciding what's fair and reasonable in all the circumstances of a complaint, I'm required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to be good industry practice at the time.

The FCA's Principles for Businesses (PRIN) apply to all authorised firms including Pi. Of particular relevance to this complaint is:

PRIN 2: *A* firm *must conduct its business with due skill, care and diligence.*

PRIN 6*: "A firm must pay due regard to the interests of its customers and treat them fairly"*

PRIN 9: *"A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment".*

In addition, where regulated investment advice is given, the more detailed Conduct of Business Sourcebook (COBS) rules apply. Of particular relevance to this complaint are:

COBS 9 which applies where a firm makes a personal recommendation in relation to designated investment.

COBS 9.2.1(1): 'A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client'.

COBS 9.2.1 (2) says that when making a personal recommendation, a firm "must obtain the necessary information regarding the client's:

(a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;
(b) financial situation; and
(c) investment objectives;

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

COBS 9.2.2 provides:

(1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:

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

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

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

I am also mindful of the general legal position including: the law relating to causation, foreseeability and remoteness of losses.

My considerations here are:

- Did Pi give Mr S investment advice including a personal recommendation?
- If so, was the advice suitable?
- If the advice was unsuitable I need to consider whether:
    - Mr S would have relied on the advice or whether he would have acted the same way he did irrespective of Pi's advice and
    - If Mr S did rely on Pi's advice, how fair compensation should be calculated in the specific circumstances of this case.

advising on investments

I have firstly considered whether, based on the facts of the complaint, Pi provided Mr S with regulated investment advice.

Regulated activities specified for the purposes of section 22 of the Financial Services and Markets Act 2000 (FSMA) were set out in the Regulated Activities Order (RAO) and included:

Advising on investments

53. *Advising a person is a specified kind of activity if the advice is—*

(a) given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and

(b) advice on the merits of his doing any of the following (whether as principal or agent)—

(i) buying, selling, subscribing for or underwriting a particular investment which is a security or a relevant investment, or

(ii) exercising any right conferred by such an investment to buy, sell, subscribe for or underwrite such an investment.

Part III of the RAO listed the kinds of investment which are specified for the purposes of section 22 of FSMA. This included:

Article 82, "Rights under a pension scheme" which at the time read.

(1) Rights under a stakeholder pension scheme.
(2) Rights under a personal pension scheme.

As far as I can see Pi agrees that they recommended a particular SIPP with a particular SIPP provider to Mr S. This is also clearly evidenced in the following documents:

- The research report which was issued on 30 April 2015 and prepared by Pi's adviser and which -after comparing several SIPPs and providers- recommended the James Hay Modular iSIPP for Mr S.

- The suitability report dated 30 April 2015 headed *Personal Pension To SIPP Transfer* which said amongst other things:

*'**My advice** is based on the details you provided at our meeting….*

*…You instructed me to specifically limit **my advice** to Pension Planning and setting up a Self Invested Personal Pension. (SIPP) with no advice received on the Investment of the SIPP and I have acted accordingly."*

Under Objectives it said *"You wanted me **to recommend** an appropriate SIPP into which you can transfer your …Personal Pension Plans."*

The report then went onto outline the points to consider. It said *"In undertaking this transfer I would like to draw your attention to the following."* It went on to list, amongst other things, the charges for the SIPP Pi was recommending, and confirmed there were no exit penalties from the original arrangement and that it didn't provide guaranteed annuity rates.

Pi went onto make a specific recommendation *'After doing my research on the most appropriate provider and plan I **have recommended** a James Hay SIPP. James Hay was chosen over the other providers on the original research due to their low annual management charge, low set up fee and quality of service.*

*It is worthwhile outlining the product features of the contract recommended to demonstrate **why it is suitable to your current circumstances and stated objectives** [my emphasis], which I outlined earlier.*

***'**Having undertaken appropriate research on your behalf I believe that James Hay Partnership will offer **the most suitable contract** given your stated objectives.*

*'A copy of the research undertaken …. accompanies this letter for your consideration which outlines in greater detail the reasons **for the recommendation** of the chosen provider." [my emphasis]*

I think it's clear from the documents that Pi recommended a particular SIPP with a particular provider which they said was suitable for Mr S. I'm satisfied that recommending a suitable SIPP provider can be considered to be "advising" under Article 53 RAO.

I am satisfied that Pi were giving regulated advice on investments and provided a personal recommendation to Mr S when they advised on the SIPP. Therefore the obligations in COBS 9 were engaged.

was PI entitled to rely on their 'limited retainer'?

Pi has said it provided a limited advice service in accordance with Mr S' instructions. Mr S had specifically asked for them to recommend a SIPP product and he told them he didn't require investment advice. Pi says they didn't provide advice on the switch from Mr S' personal pension to the SIPP or where it would be invested.

The issue to determine is whether Pi was entitled to restrict their advice to the recommendation of the SIPP product only. Having considered this carefully I don't think it was fair and reasonable for them to do so.

The purpose of Pi's regulatory duties under FSMA (and COBS) is to provide consumer protection taking into account the differing risks involved in different kinds of investments, the differing degrees of experience and expertise consumers have and the needs consumers may have for the timely provision of information and advice that is accurate and fit for purpose (Section 1B FSMA).

When recommending the SIPP, Pi needed to have a reasonable basis for believing that their recommendation would meet Mr S' objectives and that he was able to bear *any related investment risks.* Mr S' recorded objective for transferring to the SIPP was the access to a wider range of investments and Pi was aware that more specifically he intended to invest through HS and a CFD account.

I consider the risks of Mr S transferring his existing pensions and the risks of his intended investments through the SIPP with these monies were related to the establishment of the SIPP itself. Applying COBS 9.2.2, I'm satisfied Pi couldn't simply ignore the context of why Mr S wanted a recommendation for a SIPP and what Mr S was intending to do once the SIPP was established. I consider that in order to advise on the merits of setting up a specific SIPP product, Pi needed to have regard to Mr S' wider circumstances including how his funds were currently invested and what the intended investment strategy would be.

Assessing the suitability of a SIPP in isolation without considering the whole transaction is not reasonably possible.

The FSA published an alert in 2013 when they became concerned that regulated financial advisers were misinterpreting the rules. The alert focussed on unregulated investments which were introduced by unregulated introducers as these held particular risks for customers, however I consider the principles here still apply where regulated investments are concerned. The alert said:

'The FSA'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.'

'Financial advisers using this advice model are under the mistaken impression that this process means 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.'

'For example, 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, then the SIPP is not suitable'

I appreciate that the alert focussed on particular situations and it didn't mention explicitly situations where a second regulated party was involved to give investment advice. Pi says the alert was to provide guidance where there was an "advice gap" and the adviser was the only regulated party in the transaction. And this wasn't the case here.

However, I think applying a narrow reading of the alert to only specific circumstances is misguided. The essence of the alert, in my view, was to remind advisers that they couldn't just advise on a SIPP in isolation, but that to comply with their regulatory obligations they needed to consider the consumer's wider circumstances and whether what they were intending to do was suitable and in their best interest. I want to be clear that I consider Pi's obligations in this regard stem from COBS 9 and the Principles. The alert just provides clarification and sets out expectations from the regulator and good industry practice. The requirements of COBS 9.2.2 don't fall away when another regulated party is involved.

It follows that in order to give suitable advice on the SIPP Pi needed to consider Mr S's wider circumstances and the suitability of the whole transaction, i.e. the switch from a personal pension to a SIPP, the suitability of a particular SIPP product and provider and the underlying investment strategy.

I also point to COBS 2.1.2R which sets out clearly that a firm must not seek to exclude or restrict; or rely on any exclusion or restriction of any duty or liability it may have to the client under the regulatory system. So Pi couldn't limit their obligation in COBS 9 by taking instructions from Mr S to only consider the SIPP wrapper in isolation.

Pi and Mr S were in an advisory relationship where Pi was the expert and they had a duty to meet their regulatory obligations. As explained above COBS 9 required Pi do consider the wider suitability of Mr S's intended transactions when recommending a SIPP-whether he

requested this or not. They failed to do this and therefore I consider they did not act fairly or reasonably when providing their advice to Mr S.

Pi Financial referred to the court case Denning v Greenhalgh Financial Services which it said considered the scope of duty of advisers. And the High Court decision - Adams v Carey Pension UK LLP, where it noted the court had considered the duty of a party performing a limited service and said the decision was relevant to Mr S' case.

With respect to the *Adams v Carey Pension UK LLP* High Court decision, that case was about an execution-only contract. The parties were a SIPP administrator and an investor. It was clear on the facts of the case that the SIPP administrator didn't act in an advisory role and it told the investor to seek independent advice elsewhere. The judge held that COBS 2.1.1 would have to therefore be construed in light of the nature of the contractual relationship which was not advisory. I think the circumstances in this complaint are significantly different. Pi didn't act on an execution-only basis. They were giving advice on the SIPP, so the regulatory obligations of COBS 9 did apply. And as explained above part of the suitability assessment of the SIPP would have included the suitability of the pension switch and the underlying investment strategy.

I have also considered *Denning v Greenlagh*, but it doesn't change my findings either. For the reasons I have explained, I'm satisfied that Pi gave regulated advice on the suitability of the particular SIPP. They had to comply with their regulatory obligations under COBS 9 and, in that sense, I don't think *Denning* is of value to that determination.

In summary, I consider that when advising Mr S on the suitability of the James Hay Modular iSIPP, Pi had to consider the suitability of the whole intended transaction including the pension switch and where Mr S intended to invest after the transfer.

did Pi provide suitable advice?

COBS 9 required Pi to take reasonable steps to provide Mr S with a suitable recommendation, so I considered whether they met this requirement.

Mr S was 62, married, and had an annual income of £40,000. He had £70,000 in savings, £8,000 in bonds and his personal pension was invested in a balanced portfolio. He didn't have any significant investment experience and this was his only pension provision.

It doesn't appear that a fact find was completed to establish Mr S's knowledge and experience when it came to investments and to obtain details about his financial situation. Pi also didn't establish Mr S's attitude to risk or to what extent he could bear financial risk (often referred to as capacity for loss). The suitability report suggests Mr S felt a risk profile wasn't required. However, it didn't matter what Mr S might have considered necessary or not in this regard. Pi was required to meet their regulatory obligations and COBS 9 required Pi to obtain this information about Mr S before making their recommendation. They failed to do this.

Even though Pi didn't complete a written fact find as far as I can see, the evidence suggests they did have some information about Mr S. Pi was aware that Mr S was intending to transfer his existing personal pensions which were invested in balanced, managed funds to a SIPP in order to choose his own funds. They knew from the application form he was intending to use HS as his discretionary investment manager. Pi was arranging the paperwork for the HS account and so they knew that Mr S agreed to invest in CFDs which were very high-risk investments. Pi also confirmed that during their due diligence enquiries with HS, they confirmed to Pi that *"at present all our SIPP clients' have a portfolio containing*

ETFs and CFDs. This is consistent with the client's attitude to risk completed on the application form".

The assets recorded on the application form and the blank section on knowledge and experience also should have given them an indication that Mr S didn't really have any significant investment experience. The suitability report says Pi discussed Mr S's experience and knowledge and said they established he had reasonable experience as he had previously received advice on different products and had invested in a range of pensions and investments before. However, I can't see evidence that Mr S had previously invested into particularly high-risk investments or was otherwise particularly knowledgeable when it came to investments. His personal pension for example was invested in a balanced managed portfolio. Even if Mr S had suddenly wanted to invest into high risk investments, I think it's highly unlikely he had the knowledge and experience to understand the risks involved in CFDs.

Also, it was clear from the information Pi had that Mr S was only three years from retirement and he was investing a significant amount of his pension provisions. So I think it should have been clear to Pi that Mr S likely didn't have the capacity for loss to invest this way, in general and particularly so close to retirement.

Based on the information I have, I'm satisfied the intended investment into CFDs was unsuitable for Mr S. If Pi wasn't able to identify this with the information they had, then at the very least I think this would have been evident if they had asked Mr S more questions about his circumstances-like they ought to have done. In any event, I note Pi have already agreed that CFD investments wouldn't have been suitable for a retail customer like Mr S. So I don't think this issue is really in dispute.

Pi knew-or ought to have known- that Mr S's intended investments through HS were unsuitable as they were too high risk. Despite this, they recommended a SIPP and arranged the paperwork for the HS account.

In summary, I think Pi should not have recommended a SIPP to Mr S. They should have explained that his intended investments were too high risk and that given his limited assets, he couldn't financially bear the risks with his retirement funds.

In my view Pi were in breach of the Principles and COBS when they recommended the SIPP and helped him arrange the paperwork for investments which were clearly not suitable for him. They didn't pay due regard to Mr S's interests and did not take reasonable steps to ensure that their personal recommendation was suitable for Mr S as per their regulatory obligations. Therefore I do not consider that Pi's actions in their dealings with Mr S were fair or reasonable in the circumstances.

would Mr S have transferred his pension to a SIPP and invested through HS anyway?

Pi say that the paperwork Mr S received from HS clearly set out that the product was high risk and that he could lose his money. So Mr S would have known the risks and agreed, PI presumes, in the expectation of higher returns. Mr S had said AM had pushed for the transfer, so arguably AM would have continued to do this even if Pi had refused to help. Pi doubted that even if they had provided Mr S with risk warnings or refused to recommend the SIPP, Mr S would have acted any differently.

I carefully considered Pi's argument, however on balance I think Mr S would have listened to Pi if they had clearly told him they wouldn't recommend a SIPP and that they considered the intended investments through HS to be unsuitable for him.

Mr S has said his first contact with AM was when their adviser knocked on his door unannounced. He said he was going around houses looking for business, and asked Mr S if he had a pension. Mr S said his existing pensions were ticking over; he was making money on it and he was happy with the money that was in it. But AM said he could get a better return elsewhere.

Although Mr S may have signed the initial instruction letter, I think it needs to be considered in the context that the transaction was initiated by AM. There was no longstanding relationship between Mr S and AM and it seems to me that before being approached Mr S hadn't planned to change his pension.

It's true that the risk of the underlying investment was highlighted in the CFD account opening process/forms. The account opening form was sent to Mr S through the post, and Mr S says it was already filled in when he signed it. I think his testimony is supported by the fact that when Pi sent Mr S the forms, they just asked him to sign and return the forms which suggest they were already completed.

Mr S has said that in his earlier meeting the unregulated introducer tried to pressure him into signing documents without having had chance to read them; but he insisted on reading them first. So I think it's likely that he would have read the warnings about the risks associated with the CFD account before signing the account opening forms.

However, I think explicit advice from Pi acting as a professional firm would have carried significantly more weight than the wording in the application forms warning the investment was high risk. The consequences of the loss of the pension were of great significance to Mr S' overall financial position. Mr S didn't have the capacity to bear significant losses to his pension, which was a real possibility with the investment in the CFD account.

So I think on balance if Pi, as a regulated adviser and independent third party, had told Mr S they couldn't recommend the SIPP as the intended investments were not suitable for his circumstances, the transaction wasn't in his best interest and he couldn't afford to risk his pension in this way, I think he would have decided not to proceed.

If AM had continued to pressure him, he would have faced a choice between taking the advice of the unregulated introducer or the authorised firm. I'm not persuaded the evidence suggests Mr S was so strongly motivated to make the transaction that he would have decided to press ahead with it against professional expert advice. For the reasons I have given above, I'm satisfied that Mr S would more likely than not have remained with his existing pension arrangement if Pi had explained the position in full and recommended against the SIPP and investment with HS.

reliance on another regulated party: COBS 2.4.4

Pi also said COBS 2.4.4 should be considered. They say they were entitled to rely on HS providing a suitable recommendation for Mr S. Pi doesn't accept that there was a regulatory obligation for them to assess the investment in detail and certainly not to the extent that would be expected from someone who recommended the investment.

Firstly, I don't consider that COBS 2.4.4. applies here. The rule broadly says where a firm (F1) receives an instruction from another regulated firm (F2) to carry out a regulated activity on behalf of a client, F1 can rely on assessments or information provided to it by F2. Pi suggests in these particular circumstances they were F1 and HS were F2. However, Pi didn't receive any instructions here from HS.

There was no need for Pi to assess the investment in encompassing detail. But they needed to have sufficient understanding of what Mr S would be invested in and based on the information they had they knew it was high risk and investments would include CFDs. In response to the adjudicator's view Pi agreed that '*[CFDs] are not suitable for retail clients and were entirely unsuitable for Mr S'.*

So in any event, even if COBS 2.4.4. applied, I can't see how Pi could reasonably rely on HS providing Mr S with a suitable investment, when they could see from the information provided that Mr S' account would include CFDs which Pi considered unsuitable.

oral hearing

I note that Pi thought an oral hearing was required to establish what Mr S would have done if he had been given suitable advice. However, I'm satisfied I can make a reasonable finding based on the circumstances of the complaint and the information provided by both parties including what Mr S told us about how the contact between him and AM was established.

I can't know for certain if Mr S would have acted differently if Pi had not recommended a SIPP and told him that the investment was too high risk. I can only make a finding on what I think would have happened on the balance of probabilities. And I'm satisfied I can make this a fair and reasonable finding based on the information I have and I don't think an oral hearing will assist me further.

fair compensation

I have found that Pi gave Mr S unsuitable advice and if it wasn't for their advice, Mr S more likely than not would have remained in his personal pension. Having considered all the evidence and arguments, I consider it fair that Pi compensates Mr S for any losses he suffered by transferring into the SIPP and investing into high risk investments through HS.

Pi says it can't be required to pay compensation which is outside of its legal scope of responsibility and which is too remote to be recoverable as a matter of law. It referred to SAAMCO v York Montague Ltd [1997] and BPE Solicitors v Hughes-Holland [2018].

Pi's scope of duty was to take reasonable steps to give a suitable recommendation. This included understanding Mr S' knowledge and experience, objectives and financial situation. Part of this duty was the consideration of the pension switch and the underlying investment in the SIPP as explained above.

Pi breached their regulatory duties when they recommended a SIPP although the intended investments in CFDs were evidently unsuitable for Mr S. For the reasons I have given earlier in the decision, I think Mr S would have likely remained in his existing pensions but for Pi's failings. So Mr S wouldn't have been in the SIPP or CFD account at all if Pi had met its obligations under COBS and PRIN. And consequently he wouldn't have suffered the investment losses he did. I therefore consider the losses Mr S suffered from the high-risk investment are related to Pi's unsuitable advice.

Pi say HS, who was also a regulated firm, had their own obligations towards Mr S and it was their investment strategy that ultimately caused Mr S' losses. Pi pointed to other decisions at this service were findings were made that HS had caused losses by excessive trades. Based on this, Pi say it seems likely that the losses suffered by Mr S are down to similarly excessive trade volumes by HS and a failure to keep the proportion of CFDs within portfolios to an acceptable level. They say these were not issues that could have been foreseen by Pi and the losses incurred are therefore too remote.

I recognise that HS also had regulatory obligations and it's possible that their actions may have also separately caused some of Mr S's loss. And I've taken into consideration that, in principle, if HS acted negligently or fraudulently, such actions might represent a break in the chain of causation.

In these particular circumstances, however, I don't think Mr S' losses were unforeseeable. Pi have confirmed they were aware of the investment strategy which involved a CFD account. They knew this was a high-risk and speculative investment product and they agreed in their submissions that they didn't consider this suitable for Mr S. So I'm satisfied the real risk of Mr S suffering substantial losses and even the risk of total loss of to his pension would or should have been foreseeable to Pi.

It's *possible* that HS did excessive trades and Pi might have not foreseen the scale of the losses. However, Pi knew of the high risks and significant losses Mr S could suffer by investing his pension funds through HS in a CFD account. If Pi had given Mr S suitable advice these losses would have been prevented.

I can't consider a complaint against HS as they are in default. In the circumstances of this case I think it's reasonable to award fair compensation against Pi notwithstanding any potential break of chain of causation.

This is because I'm putting Mr S as far as possible in the financial position he would be in but for Pi's unsuitable advice. Mr S wouldn't have lost out at all but for Pi's failings to take reasonable steps to ensure their advice was suitable and Pi benefitted financially [in their role as independent financial advisors] from advising on this unsuitable transaction. So I consider it fair that Pi should compensate Mr S. I think apportioning responsibility to Pi for the whole of the loss represents fair compensation in this case.

In my view Mr S's losses flowed from PI's failures in regard to COBS and PRIN as I have described. I don't think the losses are too remote or that I am departing from the law. In all the circumstances, I'm satisfied it's fair compensation that Pi compensates Mr S for the losses he suffered by transferring his pension into a SIPP and from there into high-risk investments.

Putting things right

In awarding fair compensation for Mr S' losses my aim is to put Mr S as close as possible to the position he would probably now be in if he had been given suitable advice by Pi.

In my view, for the reasons given above, Mr S would more likely than not have stayed in his existing arrangements if Pi had followed their regulatory duties and not recommended the SIPP.

Mr S has confirmed that he has taken benefits from his SIPP as a lump sum in 2018. He has said the value of the pension was £10,038, and he received £6,993 net of tax on 7 September 2018.

I'm intending to ask Pi to calculate compensation by comparing the value that Mr S' pensions would have been at 7 September 2018 assuming he had remained in them and he hadn't switched (Value A), with the value of Mr S' SIPP when he took benefits at that same date (Value B).

If Value A is higher than B, then the difference between A and B is the loss. Interest at the rate of 8% simple per annum should be added from 7 September 2018 to the date of my

final decision to compensate for the fact that Mr S was deprived of using this additional money in retirement.

In carrying out the above, any additional sum paid into the SIPP should be added to the calculations from the point in time when they were paid in.

Any withdrawal, income or other distribution out of the SIPP should be deducted from the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I'll accept if they are totalled and all those payments deducted at the end instead of deducting periodically.

Usually I would ask Pi to pay compensation to Mr S's pension. However, as Mr S closed his SIPP, Pi should pay any compensation amount to Mr S directly. If the compensation was paid into the pension, the income from it would have been subject to income tax.

Therefore the compensation paid to Mr S directly should be reduced to *notionally* allow for any income tax that would otherwise have been paid if compensation had been paid to is pension. I assume Mr S is a basic rate taxpayer, and so any reduction should equal the current basic rate of tax. However, if Mr S would have been able to take a tax-free lump sum, the reduction should only be applied to 75% of the compensation.

In addition, Pi Financial Ltd should pay Mr S £400 for the distress Mr S suffered when he realised he had lost the majority of his pension.

Pi Financial Ltd should pay interest at the rate of 8% simple per annum on the compensation calculated as at the date of decision if it's not paid to Mr S within 28 days of us notifying Pi Financial Ltd that Mr S has accepted my final decision.

Income tax may be payable on any interest paid. If Pi Financial considers it's required by HM Revenue & Customs to deduct income tax from the interest, it should tell Mr S how much it's taken off. It should also give Mr S a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Responses to my provisional findings

Mr S didn't have any further comments. Pi disagreed with my decision. In summary they said:

Limited retainer

- It's not fair and reasonable to hold Pi responsible for Mr S' investment losses when he specifically requested and received a limited service and didn't look to Pi for investment advice.

- COBS 9.2.2 provides that (emphasis added):

  A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, ***giving due consideration to the nature and extent of the service provided****, that the specific transaction to be recommended, or entered into in the course of managing:*

  (a) meets his investment objectives;

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

The ombudsman disregards that the nature and extent of the service provided in this case was solely the advice on a SIPP provider and did not extend to assessing the investments (which was categorically excluded). So holding Pi responsible for an alleged failure to assess the investments is contrary to COBS.

- COBS 9.2.2 provides that the recommended transaction must meet the customer's objectives. It doesn't provide that a similar exercise needs to be completed for transactions connected to the transaction in question. Such a duty is not imposed by COBS. So Pi only needed to ensure the SIPP was suitable.

- The alert by the regulator in 2013 was aimed at advisers recommending pension transfers and has no relevance to advisers whose retainer is limited to recommending a SIPP provider. The only reasonable way is to apply the alert only to the circumstances it was designed to address. The regulator did not envisage that the alert was applicable outside of cases involving pension transfer advice. They didn't introduce similar requirements on cases involving pension switches. The Financial Ombudsman Service can't apply principles from any alert to any transaction

- Pi didn't provide an execution service but conclusions from the Carey judgement are still relevant. Including: The scope of duty has to be considered through the agreement reached by the parties - which in this case was the agreement that no investment advice would be given by Pi. There's nothing to indicate COBS should take precedence over the contractual terms agreed by the parties. And the duty to act fairly and honestly does not mean the contract terms should not be overlooked. Consumers should take responsibility for their decisions.

Suitability of advice

- Pi was only required to advise on a suitable SIPP. The level of information Pi was required to obtain had to be viewed in context of the nature of the retainer and the service provided.

- There is no evidence that Mr S didn't have the knowledge and experience to understand the investments made in the SIPP. Such conclusions should be tested in an oral hearing. In any case, Pi wasn't responsible for the investments and could take comfort from the fact another regulated party (HS) would be advising on these.

- Pi did extensive due diligence on HS. There was nothing to indicate HS would do anything other than act in Mr S' best interest. There's nothing inherently wrong with a client adopting a high degree of risk in order to obtain high returns.

- The SIPP itself was suitable and not causative of the losses suffered.

Would Mr S completed the transaction if Pi had recommended against it?

- Mr S agreed to transfer his pension after a cold call from an unregulated introducer. This clearly demonstrates he gave no consideration to an adviser's regulated status. He knowingly made high risk investments and there's no basis to conclude the involvement from Pi as a regulated adviser would have made him reconsider his

decision and not switch his pensions. The introducer would have pushed the investments regardless of what Pi would have advised.

- The ombudsman speculates what Mr S would or would not have done. Conclusions should be properly tested in an oral hearing.

Departure from legal principles

- It's not been made clear whether the ombudsman has chosen to impose more demanding duties than civil law and if so, no reasons were given for doing so.

- The decision requires Pi to pay compensation where the losses fall outside their legal duty.

The ombudsman did not address that HS was churning trades in order to generate commission and that the bulk of the losses suffered probably comes as a result of the fees and charges levied by HS. HS's conduct was not foreseeable and broke the chain of causation. Pi can have no liability in these circumstances.

My findings

I can assure Pi that I have considered in full all their detailed submissions including their letters of 17 January 2019 and 3 November 2020 -which they referred to again in their latest response. However, I as explained in my provisional decision, I have focussed on what I consider the key material issues here.

Having re-considered Pi's arguments, I remain satisfied that the decision I have reached is fair and reasonable in the circumstances. My conclusions in the provisional decision have no changed.

Limited retainer

Pi argues that COBS 9.2.2R is caveated by the words '*giving due consideration to the nature and extent of the service provided'.* And I agree that the obligations in COBS 9.2.2 R do only apply to the advice Pi gave which is the SIPP advice in this case. However, as explained in my provisional decision the suitability of a SIPP can't be reasonably considered in isolation without assessing the underlying investments.

So I disagree with Pi's argument that COBS 9.2.2 R itself is limiting their obligations in this respect.

The FSA alert in 2013 related to pension transfers and pension switches. It said:

'It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers ***or pension switches*** *[my emphasis] without assessing the advantages and disadvantages of investments proposed to be held within the new pension..'*

And it specifically referred to cases where advisers were under the false impression they could advise on the suitability of a SIPP in the abstract. In 2014 the FSA issued a further alert in which they reiterated [emphasis added]:

'*Where a financial adviser recommends a SIPP* ***knowing*** *that the customer will transfer or switch from a current pension arrangement 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 for the customer, then the overall advice is not suitable****.'*

*'The initial alert outlined our view that where advice is given on a product (such as a SIPP) which is intended as a wrapper or vehicle for investment in other products, provision of suitable advice generally requires consideration of the overall transaction, that is, the vehicle or wrapper and the expected underlying investments (****whether or not such investments are regulated products)****.*

Despite the initial alert, some firms continue to operate a model where they ***purportedly restrict their advice to the merits of the SIPP wrapper****.* '

Pi knew that the purpose of the SIPP was to invest through HS and they also knew it would be funded through a pension switch. Pi was also aware this was being initiated by an unregulated introducer who had referred a number of clients to Pi with the intention to invest through HS into high risk products. So I think they ought to have been aware that the idea to switch pensions and invest through a SIPP in HS would have come from an unregulated party. They needed to ensure Mr S understood and could bear the risks of his intended actions. I strongly disagree that the regulator's alerts aren't relevant to the circumstances of Mr S's complaint.

I remain satisfied that the circumstances in the Carey case were sufficiently different to this complaint. No advice was given in this case. Pi did provide advice to Mr S and I appreciate that Mr S agreed to limited advice and said he didn't need investment advice. I've taken this into account. However, as explained earlier in the decision, even when only giving limited advice on the suitability of the SIPP, Pi still had to consider the suitability of the whole transaction to meet their regulatory obligations. The fact another regulated party was involved does not change this.

suitability of advice

Pi says they did due diligence on HS which included finding out about their investment strategy and they knew Mr S would be investing in CFDs. These were high risk investments which were unsuitable for Mr S. Based on the information Pi had about Mr S there was no indication he had a high attitude to risk or that he had any relevant experience or knowledge about these kind of specialist investments. His recorded assets also showed he didn't have the necessary capacity for loss. Pi have also previously confirmed that they agree these investments were unsuitable for retail investors like him.

The SIPP was established to facilitate these investments. As the investments were unsuitable, the SIPP shouldn't have been recommended and Pi should have informed Mr S why such a transaction was not in his best interest and that he couldn't afford to take such a risk with his pension.

Would Mr S completed the transaction if Pi had recommended against it?

It's true that Mr S was persuaded by an unregulated introducer to switch his pension. He said he was told he could get better returns. However, as I explained in my provisional decision, I don't think this means that he was so set on doing this that he wouldn't have listened to a regulated adviser telling him this wasn't a good idea and why. Pi said the unregulated introducer would have pushed the investments regardless. Given that Pi should have been aware that there was risk Mr S was being influenced by AM and potentially not given full and clear information about what he was about to do, they should have established what he had been told and correct any potential misconceptions.

If after all of this Mr S still wanted to proceed, Pi could have considered treating him as an insistent client. As this didn't happen, it's impossible to know for certain what Mr S would have done if Pi had recommended against the SIPP. I therefore need to decide what Mr S would have done on the balance of probabilities. And for reasons set out in my provisional decision I still think on balance he would have listened to Pi's advice.

I've come to this conclusion based on the circumstances of this case and what both parties have told us including how Mr S was approached by AM. I remain satisfied that I'm able to reach a fair and reasonable decision in this regard without an oral hearing.

Departure from legal principles

I don't consider I departed from the law here. Pi had a duty to give suitable advice which included considering the suitability of the pension switch and the intended investments in the SIPP. If Pi had given suitable advice and either refused to facilitate the transaction or completed a proper insistent client process with Mr S, they would not be liable for any losses even if Mr S had decided to proceed anyway and suffered investment losses.

If they had given suitable advice I consider that on the balance of probabilities Mr S would have remained in his existing pensions and so any investment losses he suffered could have been avoided. So there is a direct link between Pi's failings and Mr S' losses.

I don't think these losses were unforeseeable by Pi. I acknowledged previously that HS as a regulated firm also had separate obligations and it's possible excessive trades and charges might have contributed to the scale of the losses. But Pi knew Mr S was going into an unsuitable investment which was very high risk and speculative and there was a real risk he could lose a significant portion or even all of his money. They could have prevented these losses by giving suitable advice.

In summary, I remain satisfied that it's fair and reasonable to hold Pi responsible for the losses Mr S suffered.

My final decision

My decision is that I uphold Mr S' complaint. I require Pi Financial Ltd to pay compensation as set out under the *'putting things right'* section in this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 22 October 2021.

Nina Walter
Ombudsman