DRN-3150710

The complaint

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

His funds were subsequently invested through two different discretionary fund managers (DFM), one of which was recommended by Pi. The funds managed by the other DFM were invested in high risk products. Mr R said he wasn't an experienced investor and didn't have the capacity for high risk investments.

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:

The Legal Partnership (LP) -unregulated introducer
Pi Financial Ltd (trading as FWM) - regulated financial adviser
Horizon Stockbroking Ltd (HS) – regulated discretionary investment manager-in liquidation
TAM Asset Management (TAM) – regulated discretionary investment manager
James Hay (JH)-SIPP provider

Mr R says he recalls being contacted over the phone by LP with an offer to review his pensions for him. LP subsequently introduced Mr R to Pi.

Mr R signed a letter dated 1 August 2014 to Pi saying:

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

Could you please recommend a suitable SIPP provider and a Discretionary Fund Manager to manage 50% of the investment held within the SIPP, and arrange the transfer accordingly.

Please note I would like to manage the remaining 50% of my funds so do not require any advice on this as I have a separate investment advisor.

I hope that you will be able to assist me and look forward to hearing from you regarding this request.'

On 4 August 2014 the adviser from Pi replied saying:

'Thank you for the letter of 1st August 2014 in which you instructed me to transfer your current …. Pension 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 will 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.'

A fact find was completed on 7 August 2014. It noted that Mr R was 50 years old, on a salary of £11,000, with an intended retirement age of 65. He had £5,000 in business assets, his existing pensions worth around £61,000 and a second property worth £87,000. He had a mortgage of £65,000 on his home. He had no other savings or investments.

Mr R signed a service agreement and fee schedule with Pi on 7 August 2014. This agreement indicated the service level was for 'limited advice'.

Two Pension Replacement Contract Forms were completed on the same day. They included information about Mr R '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 medium, 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
Lack of features/flexibility
Other

A section on the form headed *Alternatives Considered* asked whether moving funds within the existing contracts was an option. This was ticked as no. And a note recorded this option was discounted because:

"Client setting up SIPP to invest with DFM & also self invest a part of the portfolio himself."

Pi sent a suitability report dated 17 September 2014 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) 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.'

…

<u>Objectives</u>

At the present time, your prime objective is to review your existing personal pension contract & set up a SIPP to provide you with greater investment choice and flexibility. In particular you would like to investigate a transfer which would provide you greater fund choices and the ability to manage a part of the portfolio in line with your agreed risk profile.

We have not discussed providing you with a target income in retirement or compared your existing providers projections. You have simply asked that I find a suitable Investment fund for 50% of your existing pension plan and via your SIPP you will self-Invest the rest in line with your agreed risk profile.."

…

Your Risk Profile

We established that your risk profile would lead you to be a balanced medium risk investor."

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, 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 SIPP recommendation section said:

'We discussed the various ways you could achieve your present objective as outlined above. I recommend that you consider a *Self Invested Personal Pension (SIPP) Plan offered by James Hay Partnership. James Hay Partnership 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.'

<u>Discretionary Fund Manager Recommendation</u>

The provider I am recommending is TAM Asset Management'

It went on to set out the benefits of a SIPP and the reason TAM had been recommended as the DFM.

The report was signed to confirm that Mr R had received and understood it on 5 October 2014.

An application for the SIPP was completed and signed by Mr R on the same day. It showed Pi as the financial adviser and the initial adviser charges for transfers was 3% of each pension transfer received.

The SIPP was opened in November 2014. Funds totalling around £62,000 were transferred from the ceding schemes in November 2014 and February 2015.

Mr R signed an Account Opening Form with HS on 21 January 2015. It names Pi as the independent financial adviser. This confirmed Mr R wished to invest £30,000 with HS and appointed them to provide a discretionary service. His attitude to risk was recorded as Medium and High. He confirmed he was willing to invest through a managed CFD (contract for differences) account and understood it was a high risk, speculative product.

The 'Understanding & Experience' section of the form shows that he hadn't made any trades in high risk investments, such as equities and CFDs in the previous three years.

Pi asked JH In April 2015 to transfer £34,400 from the cash account to HS. £25,000 was invested through TAM around the same time.

Mr R took his benefits from the SIPP and closed the account on 26 March 2020.

Mr R complained to Pi that he was given unsuitable advice. They didn't uphold his complaint and so it was referred to this service.

One of our investigators considered the complaint. He recommended Mr R's complaint should be upheld. He didn't believe that Mr R's modest pension funds, his attitude to risk and his limited investment experience justified switching his pensions to a SIPP and DFM. He said that Pi needed to ensure the investments which he intended to make within his SIPP were suitable for him before recommending the switch.

Pi disagreed and the complaint was passed to me for an ombudsman's 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.

Pi has submitted detailed submissions which I considered in full. I've also taken into account their more recent submissions on a similar case which is relevant to this complaint. However, I'll focus in this decision on what I consider to be the key material issues in deciding the fair outcome of this complaint.

Pi's position in summary is that:

- Mr R instructed Pi to recommend an appropriate SIPP provider and Discretionary Fund Manager (DFM) for 50% of his pension. It only provided Mr R 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 2.4.4.

- Pi didn't provide Mr R with advice on the switch from his existing pension plans to a SIPP or on the investment through HS. Mr R had already decided what he wanted to do before he approached Pi. And the HS forms would have made it clear the intended investments were high risk. The client was fully aware they were following a high-risk strategy.

- Mr R had confirmed that he would be using a separate investment manager for 50% of his investments. HS was an authorised and regulated firm and appropriately qualified. Pi did due diligence both on TAM and HS to ensure funds wouldn't be invested in non-mainstream propositions.

- The investment strategy for the SIPP was the responsibility of HS who was also a regulated party. HS is responsible for Mr R'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.

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 R investment advice including a personal recommendation?
- If so, was the advice suitable?
- If the advice was unsuitable I need to consider whether:
  - Mr R would have relied on the advice or whether he would have acted the same way he did irrespective of Pi's advice <u>and</u>
  - If Mr R did follow 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 R 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 R. This is also clearly evidenced in the following documents:

- The research report which was issued on 17 September 2014 and prepared by Pi's adviser and which -after comparing several SIPPs and DFMs- recommended the James Hay Modular iSIPP and TAM as the DFM.

- The suitability report also dated 17 September 2014 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 and I have acted accordingly."*

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 arrangements and that they didn't provide guaranteed annuity rates.

Pi went onto make a specific recommendation *'We discussed the various ways you could achieve your present objective as outlined above. **I recommend** that you consider establishing a Self Invested Personal Pension (SIPP) Plan offered by James Hay Partnership. James Hay Partnership 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]*

When considering a DFM to recommend for Mr R's pension, Pi stated 'In order to determine the most appropriate offering available I have undertaken research via an independent agency…'

*'The provider I am **recommending** is TAM Asset Management'*

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 R as well as a DFM. I'm satisfied that their recommendations 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 R 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 R's instructions. Mr R had specifically asked for them to recommend a SIPP product and he told them he didn't require investment advice for 50% of his pension. Pi says they didn't provide advice on the switch from Mr R's existing pensions to the SIPP or where 50% of it would be invested.

The issue to determine is whether Pi was entitled to restrict their advice to the recommendation of the SIPP product and a DFM for half of Mr R's investments 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 R's objectives and that he was able to bear *any related investment risks.* Mr R's recorded objective for transferring to the SIPP was the access to a wider range of investments through a SIPP and DFMs.

I consider the risks of Mr R 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 R wanted a recommendation for a SIPP and what Mr R 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 R'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 also still apply where regulated investments are concerned. The alert 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..'*

'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'

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****.* '

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 strongly disagree with Pi that the alerts are not relevant in Mr R's case. I want to be clear, however, 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 R's wider circumstances and the suitability of the whole transaction, i.e. the switch 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 R to only consider the SIPP wrapper and 50% of his investments in isolation.

Pi and Mr R 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 R'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 R.

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 R'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 R on the suitability of the James Hay SIPP, Pi had to consider the suitability of the whole intended transaction including the pension switch and where Mr R intended to invest all his funds after the transfer.

did Pi provide suitable advice?

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

As part of the advice process in recommending a suitable DFM for 50% of Mr R's pension, Pi established the client had a balanced attitude to risk. Given his limited experience and term to retirement of 15 years, I think this is reasonable.

The application forms for HS show Mr R intended to in CFDs, which are high risk investments and unsuitable for a balanced investor. Pi has previously confirmed to this service that they agree CFDs are unsuitable for retails investors, so this isn't really in dispute. Given that Mr R was intending to invest half of his entire pension provisions this way, in my view he also didn't have the required capacity for loss for this investment.

Pi were mentioned as the advisers on the HS forms and asked JH to transfer monies to HS. They also said they did due diligence on them. So I'm satisfied Pi knew that the other DFM Mr R was intending to use was HS.

It's unclear whether Pi knew at the time they gave advice that Mr R's HS portfolio would contain CFDs. However, by the time the application form was completed they would have known this was the case. Pi confirmed that, during their due diligence enquiries, HS confirmed to them that *'at present all our SIPP clients' have a portfolio containing ETFs and CFDs.'* So if they knew Mr R was intending to invest through Horizon, they ought to have known HS's investment strategy for their SIPP clients was too high risk for Mr R.

Even if I assume Pi originally didn't know what Mr R wanted to invest in, they should have found out before they gave their advice. As stated before, Pi needed to consider the transaction as a whole and without knowing what Mr R was planning to do and achieve, they couldn't reasonably conclude whether the transfer to a SIPP was suitable. Pi ought to have found out how HS intended to manage the portfolio and couldn't make a suitable recommendation without this information.

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

Given Mr R had no real investment experience, Pi should have also considered whether a switch to a SIPP and DFM in general was suitable. The existing pensions he had were invested in line with his attitude to risk and I can't see that there was any pressing need to change his provisions, particularly as the DFM would have also added to the charges Mr R was paying. I can't see that any proper comparison was done to see whether a SIPP or DFM could in fact provide a better outcome for Mr R than his existing pensions. Pi knew that an unregulated introducer was involved and should have realised based on the information they had that Mr R wasn't an experienced investor, so the fact Mr R wanted to suddenly actively manage his investments should have been queried.

In my view Pi were in breach of the Principles and COBS when they recommended the SIPP without knowing the ultimate destination of all the funds. They didn't pay due regard to Mr R's interests and did not take reasonable steps to ensure that their personal recommendation was suitable for Mr R as per their regulatory obligations. Therefore I do not consider that Pi's actions in their dealings with Mr R were fair or reasonable in the circumstances.

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

Pi say that the paperwork Mr R received from HS would have clearly set out that the product was high risk. So Mr R would have known the risks and agreed, Pi presumes, because he was hoping for high returns. Pi said it was 'highly likely' that even if they had provided Mr R with risk warnings or refused to recommend the SIPP, Mr R would have gone ahead with the transfer and found another adviser.

I carefully considered Pi's argument, however on balance I think Mr R 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 R has said he was contacted over the phone by LP for a pension review. They referred him to Pi as LP couldn't give pension advice. Although Mr R may have signed the initial instruction letter, I think it should be considered in the context that the transaction was initiated by LP. There was no longstanding relationship between Mr R and LP and it seems unlikely to me that Mr R would have had plans to move his pension onto a SIPP platform, or invest in high risk propositions, such as CFDs, when he had no significant investment experience.

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 R's overall financial position. Mr R 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 R 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 LP had continued to influence him, he would have faced a choice between taking the advice of the unregulated introducer or the authorised firm who he had been told by LP were the pension adviser. I'm not persuaded the evidence suggests Mr R 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 R would more likely than not have remained with his existing pension arrangements 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 R. Pi doesn't accept that there was a regulatory obligation for them to assess the investment in detail and certainly not to the extent than it 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 R would be invested in and they either knew or should have known Mr R's intended investments would include CFDs. Pi agreed that *'[CFDs] are not suitable for retail clients…'*

So in any event, even if COBS 2.4.4. applied, I can't see how Pi could reasonably rely on HS providing Mr R with a suitable investment, when they knew or ought to have known that his investments would include CFDs which Pi considered unsuitable for retail clients like Mr R.

fair compensation

I have found that Pi gave Mr R unsuitable advice and if it wasn't for their advice, Mr R more likely than not would not have proceeded with the switch to a SIPP and subsequent investment through HS. Having considered all the evidence and arguments, I consider it fair that Pi compensates Mr R 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 R'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 without establishing how Mr R's full pension funds would be invested. For the reasons I have given earlier in the decision, I think Mr R would have likely not switched his pensions and wouldn't have ended up in the SIPP and HS account but for Pi's failings and if they had met their obligations under COBS and PRIN. And consequently he wouldn't have suffered the investment losses he did. I therefore consider the losses Mr R 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 R and it was their investment strategy that ultimately caused Mr R'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 R 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 R'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 R's losses were unforeseeable. Pi knew or ought to have known this was a high-risk and speculative investment product and they agreed in their submissions that they didn't consider this suitable for Mr R. So I'm satisfied the real risk of Mr R 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, as I said above, Pi's suitable advice would have more likely than not prevented all losses. Pi knew of the high risks and significant losses Mr R could suffer by investing his pension funds through HS in a CFD account. If Pi had given Mr R suitable advice these losses would have been prevented.

In my view Mr R'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 R for the losses he suffered by transferring his pension into a SIPP and from there into high risk investments.

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 R as far as possible in the financial position he would be in but for Pi's unsuitable advice. Mr R would likely have stayed in his existing pensions. He therefore wouldn't have lost out at all but for Pi's failings to take reasonable steps to ensure their advice was suitable. Pi also 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 R. I think holding Pi responsible for the whole of the loss represents fair compensation in this case.

putting things right

In awarding fair compensation for Mr R's losses my aim is to put Mr R as close as possible to the position he would probably now be in if he had been given suitable advice by Pi. I think on balance Mr R would have remained in his existing pension plans until he took his benefits in March 2020.

Pi should request notional values from Mr R's previous pension providers. They should then calculate compensation by comparing the value of what his pensions would have been valued at on 26 March 2020 when he took his full benefits from the SIPP (Value A) with the value of his JH SIPP (Value B) on the same date.

If Value A is higher than B, then the difference between A and B is the loss.

If Pi can show evidence that one or both of Mr R's previous pension providers aren't able to provide notional values, Pi can apply a benchmark for Value A instead. I think given that Mr R's existing pensions were recorded to be invested in balanced funds, I think using the FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index) is fair and reasonable in the circumstances.

When calculating Value A, 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. Any additional sum paid into the SIPP should be added to the Value A calculation from the point in time when it was actually paid in.

Mr R took his pension and closed the SIPP, so compensation should be paid to Mr R directly as a lump sum after making a notional reduction to allow for income tax that would otherwise have been paid. 25% of the loss would be tax-free and 75% would have been taxed according to his likely income tax rate in retirement –presumed to be 20%. So making a notional reduction of 15% overall from the loss adequately reflects this.

If Mr R has suffered a loss, then 8% simple interest should be added to that figure to compensate Mr R for being deprived of the use of these funds in retirement. The 8% should be calculated from the date he took his pension benefits on 26 March 2020 up until settlement.

Pi Financial Ltd should also pay Mr R £300 for the distress suffered when he realised he had lost significant parts 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 this decision if it's not paid to Mr R within 28 days of us notifying Pi Financial Ltd that Mr R 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 R how much it's taken off. It should also give Mr R a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Details of the calculations should be provided to Mr R in a clear and simple format.

My final decision

I uphold Mr R's complaint and require Pi Financial Ltd to calculate and pay him compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 15 March 2022.

Nina Walter
Ombudsman