DRN-3940077

The complaint

Mrs T complained via her representative that she was advised by Mitchell Prockter Financial Services Limited (MPFS) to transfer her defined benefit (DB) pension scheme to a Self-Invested Personal Pension (SIPP). She would like to reclaim losses incurred including fees.

What happened

Mrs T sought advice from MPFS in August 2016. At the time she was aged 48. She had a DB pension relating to previous employment from 1989 to 2009.

Mrs T and her husband completed a fact find on 11 August. A risk questionnaire and transfer analysis were also carried out following which the adviser prepared a report dated 22 September.

Mrs T had previously explored transferring via another adviser, who advised her to remain in the scheme, but the transfer value had increased since then. Her recorded objective for the transfer was to be able to partially retire at age 55 and work part time, accessing the scheme flexibly to top up her income before fully retiring at age 65.

The transferred scheme was projected to pay £12,673 a year at age 55 or £28,445 a year at age 65. Her husband was about to retire from the police with a pension of £25,000 a year (plus lump sum) and she was also an active member of her current employer's DB scheme with an accrued pension of £18,000 a year at 65. They had a total of about £400,000 in cash and investments including £100,000 in Dolphin Loan Notes, an unregulated offshore investment.

She was assessed as having a Medium-High risk profile.

MPFS advised her to transfer her DB scheme to a SIPP. They recommended a discretionary fund manager who would select a portfolio of mainstream investment funds.

Mrs T was given the option of signing to accept the advice to transfer, the advice on which SIPP to transfer to, and on what funds to invest in, separately. She signed to accept the advice to transfer, and the advice on the receiving SIPP, but not the investment recommendation. A handwritten note says that she was thinking about other options.

The transfer completed on 27 October 2016 but the transfer value of £340,000 remained in cash. On 9 March 2017 £334,000 was transferred out to a Small Self-Administered Scheme (SSAS), a small occupational pension scheme which had been set up on 26 October 2016 with Mr and Mrs T as members (and to which the provider says Mr T had also contributed). Between March and July 2017 £328,000 was invested in Dolphin Loan Notes.

On 8 October 2020 a joint statement was published by the Financial Conduct Authority, Financial Services Compensation Scheme and the Financial Ombudsman Service as a number of companies linked to Dolphin had entered bankruptcy proceedings in Germany.

Mrs T complained to MPFS via her representatives on 14 October. The business rejected

her complaint on the basis that she had sufficient appetite for risk and capacity for loss to consider the transfer, she had some knowledge and experience of investing and in any case the adviser had not recommended the unregulated investments.

Mrs T did not accept this so referred her case to this service.

MPFS told us that they now thought they had been used unwittingly by a third party to process the DB transfer to the SIPP from where the money would be moved into the SSAS with a view to investing in Dolphin (which could not apparently be held in the SIPP).

Mrs T told us, via her representative, that MPFS had known about the Dolphin investment all along. She had been introduced to MPFS by Mr D, to whom she had been introduced in turn by a mutual friend and former work colleague of her husband. Mr D referred her to MPFS for the (regulated) DB transfer advice. Mr D was promoting the Dolphin investment and made the MPFS adviser aware that it was the intention to invest in Dolphin via a SSAS.

Mrs T's representatives also provided us with an email from the adviser at MPFS to Mr D and another financial adviser (who appeared not to be directly connected to this case). I've already sent MPFS a copy of this email. It referred to a recent update from the Financial Conduct Authority (FCA) about the regulated adviser's (MPFS) responsibility to ensure investments were suitable when clients were referred from non-regulated introducers. The adviser discussed advice he had received from compliance consultants where "we recommend a Sipp and investment profile which is then declined in favour of other assets." This advice was that MPFS would find it difficult to defend their actions as "there is knowledge that the funds would be moved to a SSAS or invested into an offshore unregulated product."

Our investigator issued their view on 5 November 2021. Although the investigator had some concerns about the advice process and resulting recommendation, no redress was awarded because the investigator felt that Mrs T would have gone ahead with the transfer even if the recommendation had been not to transfer.

Mrs T did not accept this view so the case was referred to me for a final decision.

Provisional findings

I issued my provisional decision on 9 December 2022. It said:

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

I am providing this provisional decision as, based on everything I have seen thus far, I intend to depart from the investigator's view.

The first thing I need to decide is whether MPFS acted fairly and reasonably in their transfer advice to Mrs T.

The regulator has made clear for a long time that advisers should start by assuming that a transfer is unsuitable and should only be considered if the adviser can clearly demonstrate that it is in the client's best interests (COBS 19.1.6G). Advisers are also required, among other things, to take reasonable steps to ensure their advice is suitable (COBS 9.2.1R) and to obtain enough information so that they have a reasonable basis for believing that their advice meets the client's objectives, and that the client is able financially to bear the risks associated with that advice (COBS 9.2.2R).

According to the fact find and report Mrs T's main reason for considering the transfer was to facilitate partial retirement at age 55. Transferring would allow her to draw funds as required, to top up her reduced income, rather than the fixed pension available from the scheme.

While this is potentially a valid reason to consider a transfer, I agree with our investigator that there are material failings in the advice provided by MPFS. For example:

- *Reasons for the transfer included control over the fund and the benefits and the flexibility to take early or partial retirement at age 55. But Mrs T could take benefits from the scheme at age 55. MPFS did not consider whether these benefits, together with other savings and investments and her husband's pension, could meet her early retirement objective without the need to transfer.*

- *MPFS did not explain why it was suitable to transfer to provide Mrs T with control over the investment of the fund. Indeed they recommended a discretionary management service over which her control would be indirect at best.*

- *At the time of advice Mrs T was aged 48 and may not have had a clear idea of what her expenditure in retirement and level of part-time earnings might be seven years later. If that was the case, then MPFS did not have the information they were required to obtain by the FCA rules in COBS 9. The FCA rules also say that, where the adviser is not able to obtain the necessary information, then they must not give a recommendation (COBS 9.2.6R).*

- *Even if it had been possible to show that transferring for flexible access was suitable, MPFS did not explain why it was right to do so at that time, seven years away from when Mrs T could access the funds, exposing her to unnecessary risk of loss over that period of time.*

Mrs T was assessed as having a medium-high attitude to risk, which seems reasonable based on her responses to the risk questionnaire.

MPFS prepared a transfer analysis (TVAS) which gave a critical yield of 7.4% to match the scheme benefits at age 55. The report compared this to the 8% which is the highest rate of return allowed in pension projections and concluded that, even taking into account her attitude to risk, it was still likely that benefits would be lower after a transfer, particularly on early retirement. I agree with this analysis. It was unlikely that the transfer would produce higher benefits if Mrs T was intending to buy a guaranteed lifetime income.

But it seemed unlikely that this was what Mrs T would do, if she transferred because of the stated need for flexibility. Because MPFS had not established the level of income the transferred fund might be required to produce, or for how long, they were unable to determine what the required level of return might be under a drawdown plan and therefore I'm unable to comment on whether that would have been achievable at Mrs T's attitude to risk. In addition, by not comparing the required income with the available assets to see whether that income need was best met by the existing scheme or a transfer, MPFS did not take reasonable steps to ensure their advice was suitable as required by COBS 9.2.1R.

So even if Mrs T had accepted the investment advice, I find that that MPFS did not demonstrate that the transfer was in her best interests, and therefore did not act fairly or in line with regulations and/or guidance in force at the time of advice.

But we know that Mrs T did not accept the investment advice and ended up investing in the Dolphin investments. MPFS denies any responsibility for this, saying that they did not advise her to invest in the Dolphin investments.

Knowing that Mrs T did not accept their investment recommendation, MPFS says it went on to process the transfer anyway, with the investments ostensibly to be decided at a later stage.

In January 2013 the Financial Services Authority made it clear that firms advising on pension transfers should not do so without assessing the advantages and disadvantages of the investments to be held following the transfer. In relation to a pension transfer, the underlying investments dictate whether it is likely that the fund will produce the returns needed to meet the client's objectives.

Since MPFS says it did not know what the underlying investments would be, they could not make this assessment. So I find that, once Mrs T declined the investment advice, MPFS were no longer in a position to recommend the transfer as the transfer could not be separated from the underlying investments. MPFS should have revisited their recommendation to transfer, or made it clear to Mrs T that they no longer supported the transfer. There is no evidence that they did so.

But what led to Mrs T complaining was the losses that came from the failure of her Dolphin investments, and MPFS said that they did not recommend those investments. On the other hand Mrs T said that the adviser knew all along that the transfer was going to be invested in Dolphin.

I've considered the argument the investigator made, that if Mrs T accepted the investment advice given by MPFS then her losses would have been much lower because MPFS recommended a diversified mainstream portfolio, and that therefore Mrs T was to some extent responsible for the losses.

I can see no evidence of a formal recommendation from MPFS to invest in Dolphin, so I agree with MPFS in that respect.

Mrs T's representatives have provided us with an email dated 8 February 2017 which shows that MPFS routinely gave transfer advice knowing that the investment advice would be declined and funds eventually invested in a SSAS and/or offshore unregulated products.

Although this email does not specifically refer to Mrs T, I think that it is clear that this is just what happened in this case. So I find that it is more likely than not that Mrs T's adviser knew that his investment recommendation would be declined and that the real destination was likely to be in an unregulated investment.

Whatever its relationship is or was with Mr D, MPFS gave advice as a regulated firm and is responsible for that advice.

Finally I also need to consider carefully whether Mrs T would have proceeded with the transfer even if the advice had been to remain in the DB scheme. I think in this matter the evidence we have on file is conflicting.

On the one hand, Mrs T transferred knowing that the advice in her report did not reflect the true picture, so by her own admission she proceeded against advice to that extent.

On the other hand, MPFS noted that Mrs T was previously advised not to transfer, and didn't, so it seems plausible that if so advised again, she would have done the same. In any event MPFS did advise her to transfer; once MPFS knew that the investment recommendation would not be accepted, they could and should have reconsidered their advice, including whether the transfer was still suitable but they did not do so. I also think that if Mrs T knew at the time of the advice that something was wrong, or that her capital was

being put at material risk, then rationally she would not have proceeded with the transfer.

Mrs T already had money invested in Dolphin and was probably satisfied with it up to that point (otherwise she would not have considered investing more). Knowing that she intended to use the transfer value to make further investment into Dolphin, as I have said, MPFS should have reconsidered their advice, in line with the January 2013 FCA update.

We would expect an adviser firm to look at the risks involved with Dolphin, including illiquidity and the potential for total capital loss, in light of Mrs T's objectives for the transferred fund, and considered whether Mrs T could afford to take these risks (COBS 9.2.R (1) (b)). (Equally, MPFS would not have been able to meet this requirement if they did not know how the transferred fund would be invested, although I have already found that they did know about the unregulated investment.) If MPFS concluded that Mrs T could not afford the risks then it ought to have advised her either not to make the investment, not to invest more than MPFS assessed that she could afford to lose, or indeed advised her not to transfer the DB scheme at all.

But there is no evidence that they changed their advice in any way. And in those circumstances I think that it was reasonable for Mrs T to think that MPFS had no fundamental objection to the Dolphin investment, regardless of whether they technically recommended it or not.

One final point to consider was that, along with her husband, Mrs T set up the SSAS to receive the transfer. There is no evidence of MPFS having direct involvement in this, so it does suggest a willingness on her part to invest in Dolphin. But the recommendation to transfer was dated 22 September and the SSAS was not set up until about a month later. Had MPFS' advice been not to transfer, she would have had plenty of time to consider that advice, and may not have set up the SSAS at all.

So, on balance, I think that it is more likely than not that Mrs T relied on the advice she received from MPFS to transfer – which is understandable as MPFS was the regulated firm, qualified to give that advice, to which she was referred – and that there is not enough evidence to show that she would still have transferred if the advice had been to remain in the scheme.

I therefore find that MPFS did not act fairly or reasonably in relation to the advice to transfer Mrs T's DB scheme, nor did they meet the standards required of them at the time.

Response to my provisional decision

Both parties have responded to my provisional decision.

Mrs T responded via her representative, accepting the provisional decision and opting for any redress to be calculated under the regulator's methodology for defined benefit redress calculations under its Final Guidance 17/9.

MPFS also responded, but they didn't agree. Their response included additional arguments which I have considered carefully in drafting my final decision.

MPFS' main points cover three broad areas:

- MPFS did not know about the onward transfer to the SSAS or the intended investment in Dolphin and therefore, if the DB transfer advice was to be found unsuitable this should be reflected in any redress.

- The email referred to in my provisional decision post-dated Mrs T's advice, was not specific to her and therefore has little relevance to this dispute; I relied too heavily on the email in my provisional decision, and MPFS had not had the opportunity to comment on it.

- Mrs T had already invested in Dolphin so she was aware of the risks and made an informed choice to take those risks. This was the second time she had sought advice on transferring the DB scheme, which showed that she was keen to transfer and may have done so regardless of advice.

Before I consider the points MPFS has made, I want to explain why I issued a provisional decision. This was because I disagreed with the opinion that had been issued by our investigator. Therefore MPFS had new information to consider, and it was right that they were given the opportunity to respond.

For my final decision I will respond to the points made by MPFS and in doing so I will clarify some of the thinking behind my decision. I think that it is also useful to consider carefully the FCA principles and rules on which that decision was based, and which applied to MPFS at the time they advised Mrs T.

PRIN 2.1.1R:

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

Principle 3: "A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems."

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

COBS 2.1.1R: (1) "A firm must act honestly, fairly and professionally in accordance with the best interests of its client."

Knowledge of SSAS/Dolphin

MPFS's argument is that they didn't know funds would be transferred on to the SSAS and/or invested in Dolphin. So they do not believe that they are responsible for losses beyond the point at which the money was transferred out of the SIPP.

I explained in my provisional decision that under the regulations and guidance in force at the time, advisers could not consider transfer advice separately from the intended underlying investments but had to consider the transaction as a whole. But Mrs T's suitability report allows her to accept or decline the transfer recommendation independently of the transfer advice. Earlier, the report says "if we arrange this investment on your behalf..." – as if to suggest there was already some doubt about whether MPFS would be doing so.

Mrs T was introduced to MPFS by Mr D, who MPFS knew to be a promoter of unregulated investments. Although it post-dated Mrs T's advice, the email I referred to in my provisional decision (which was addressed to Mr D) discussed pension transfers where MPFS recommended a SIPP and the investment recommendation was declined. MPFS referred to this as 'our arrangement.'

I think this shows that, on the balance of probabilities, MPFS was at least open to the possibility that Mrs T might accept the transfer advice but not the investment advice. And, given the referral from Mr D, I think that MPFS either knew or ought to have known that Mrs

T might have been considering investing in unregulated investments.

MPFS have queried who recommended the SSAS, or who was involved in setting it up. They said that if they had known about the SSAS, logically they would have recommended that instead of the SIPP they did recommend. But I don't think that the type of pension scheme is the key issue in this case. I think that the two key parts to the transaction, as I have said before, are the transfer out of the DB scheme, and the resulting underlying investments. Whether this was facilitated via a SIPP or a SSAS, the outcome would have broadly been the same.

And even if MPFS didn't know about the Dolphin investment, they were still the regulated party giving regulated advice. They were bound by the FCA principles which apply to all regulated firms. MPFS were required to act in Mrs T's best interests. Given that I think they knew, or ought to have known about the unregulated investments, I don't think that they did act in Mrs T's best interests. And by putting a process in place which gave Mrs T a simple way to reject the investment advice and become exposed to the risk of making unregulated investments without MPFS intervening further or her likely being fully aware of the consequences of doing so, they failed to conduct their business effectively, or with due skill, care and diligence, to manage this further risk.

MPFS have pointed to emails where they sought to complete the investment on more than one occasion, unsuccessfully. In their analysis, this shows that they acted in good faith. But we have seen from the later email that MPFS was willing, in principle, to consider an arrangement where they knew in advance that the client was intending to invest differently from the advice that had been given, so I am not sure I agree with their analysis. It is possible that this was not a genuine effort to invest Mrs T's transferred fund. Because of Mr D's involvement, there was always a realistic chance that Mrs T was being influenced to use unregulated investments, and I have seen no evidence that MPFS sought to warn her of the potential risks of this course of action. That would have been a far more impactful use of MPFS's time than chasing her to make an investment it would reasonably have known, in my view, that she had no intention of making.

So I think that on the balance of probabilities MPFS either knew about the likelihood of unregulated investments, or they ought to have known for the reasons stated. By not taking this into account in their advice they did not act in Mrs T's best interests.

Email to Mr D

In my provisional decision I referred to an email from MPFS to Mr D. MPFS were concerned that they had not had the opportunity to comment on this email, but that was one of the reasons my decision was provisional and not final. MPFS's view is that the email did not support that they 'routinely' gave SIPP/transfer advice knowing that the investment advice would not be accepted; they said that the phrase "as there is knowledge..." should have said "if there is knowledge…" and finally the email makes no reference to transfers to a SIPP that were then transferred onward to a SSAS.

It is clear from the email that MPFS was in principle willing to give pension transfer advice that resulted in unregulated investments. MPFS have not claimed that email was a forgery, nor have they tried to show that Mrs T's case was an isolated incident of investment advice not being accepted.

MPFS also say that the timing of the email (after Mrs T's advice) means that it is not relevant to this case. But the email discusses a change to how the arrangement would have to operate so it does show that MPFS had had cases of this nature before. And in any case, since the email was dated before Mrs T had made the investments it shows that MPFS was

aware of the risks in cases just like Mrs T's. If MPFS was acting in Mrs T's best interests, they should have contacted her to explain that they were concerned about the risks she could be exposed to from Mr D's advice, which of course is what they should have told her all along.

In not doing so and leaving her open to influence from unregulated introducers who were not bound to act in her best interests I don't think MPFS met what was required of them by the FCA rules and principles. And that in turn suggests to me that it's unlikely MPFS ever intended to meet those rules and principles at the time of giving its DB transfer advice either.

While the alleged typo in this email ('as' instead of 'if') could change the meaning of that sentence, when taken as a whole I think that the email still shows that MPFS was in principle prepared to offer DB transfer advice that would lead to unregulated investments, contrary to MPFS's advice.

I also explained above that I do not think that the use of a SSAS rather than a SIPP was a material part of the transaction in terms of the outcome for Mrs T – what was material was the loss of guaranteed income from the DB scheme and the loss of capital from the resulting investments. So I don't think it matters to this case whether the email mentions a SSAS or not. However I note it mentions funds being moved to a SSAS or invested into an offshore unregulated product, so it wasn't just about SSASs anyway.

Overall I think that the email gives more weight to the argument that MPFS were aware of the unregulated investments, but as I have said above, this was not the only piece of evidence I've relied on. I'm also mindful of the contemporaneous evidence that MPFS seems to have been expecting that Mrs T might accept the transfer advice, but reject the investment advice, by requiring her to sign for these separately. An adviser would typically not be expecting this to happen, and in the unlikely event it happened it would be more likely to find it being addressed on an ad hoc basis in further correspondence. The fact that MPFS laid out the correspondence in this way from the outset again adds weight to the conclusions I've reached here.

As a result, I do not see that MPFS's comments on the email change my view.

Would Mrs T have proceeded anyway?

MPFS say that Mrs T was motivated to transfer, having previously been advised not to transfer by another firm. She had already invested in Dolphin (with non-pension money) so made an informed decision to invest.

I have already explained why I think MPFS probably knew, or ought to have known, of the likelihood of Mrs T investing in unregulated investments, whether in the SIPP or a SSAS. In that case, MPFS should have made a point of explaining to her that she wouldn't have any protection if things went wrong when dealing with unregulated investments or advisers/promoters. And that these investments were unsuitable for her because of the risk of illiquidity and the potential for total capital loss, as I explained in my provisional decision.

The only reason she seems to have sought advice for a second time, having previously been advised not to transfer, is that the CETV had changed. But MPFS, the regulated adviser, should have explained that the higher CETV didn't make the transfer suitable for the reasons I gave in my provisional decision. MPFS said in the report that the transfer would result in lower benefits, so they knew that the higher CETV was not enough to make the transfer suitable.

MPFS should have known how important their role was in releasing the money from the DB

scheme, since the DB transfer could not happen without regulated advice. If they didn't consider their wider awareness of what Mrs T could end up being exposed to from their actions, then I can't see how they were acting in her best interests.

MPFS say that Mrs T would have transferred anyway, so their advice was not the cause of her losses. But when she had previously been advised not to transfer, she didn't transfer against advice. I cannot see why she would now choose to do the opposite and ignore regulated advice not to transfer. So I don't agree with MPFS on this point.

MPFS was a regulated adviser, who should have explained to Mrs T that they had an obligation to act in her best interests. I'm satisfied that if MPFS had acted in Mrs T's best interests then she wouldn't have suffered the losses she did. Therefore it is fair to hold them responsible for the full losses.

MPFS disagreed with my finding in relation to the DB transfer advice itself. I said that they had failed to consider whether the early retirement pension from the scheme, together with other resources, could meet her early retirement objective without the need to transfer. This is what MPFS had to show in order to demonstrate that the transfer was in her best interests as per COBS 19.1.6G.

MPFS said *"Within the client information form under Income Requirements there is a question 'Could the requirement be met either fully or partially by other non-pension sources of income? The comment on this is YES- 'cash in bank plus income from investments plus both will continue to work'."*

But I have seen no evidence that MPFS quantified her likely income need if she retired early, or what her income might reduce to if working part time so that they could work out the shortfall. So I can't see how MPFS were able to say yes to this question. Indeed, since the statement refers to income from investments, which would include the existing Dolphin investment, that income would also have been unpredictable given the investment risks involved. So I don't think MPFS took reasonable steps to ensure their advice was suitable. And if they did do any analysis of this nature, then there is no evidence that it was shared with Mrs T so she was not able to make an informed 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.

I have carefully considered MPFS's response to my provisional decision, and for the reasons already given I remain of the view I set out in my provisional decision and explained further above.

Putting things right

A fair and reasonable outcome would be for Mitchell Prockter Financial Services Limited to put Mrs T, as far as possible, into the position she would now be in but for the unsuitable advice. I consider she would have remained in the occupational scheme. MPFS must therefore undertake a redress calculation in line with the regulator's guidance on DB transfer redress. This is currently set out in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

I am aware that on 2 August 2022, the FCA launched a consultation on changes to this guidance and has set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice.

In this consultation, the FCA said that it considers that the current methodology in FG17/9 remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

Nevertheless, the basic objective of the proposed amendments still remains to put a consumer, as far as possible, into the position they would be in if the business had advised them to remain in the DB scheme.

A policy statement was published on 28 November 2022 which set out the new rules and guidance - https://www.fca.org.uk/publication/policy/ps22-13.pdf. The new rules will come into effect on 1 April 2023.
The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 for the time being. But until changes take effect, firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

In response to my provisional decision, Mrs T decided to opt for the FG 17/9 method of calculation.

However, if the complaint hadn't been settled in full and final settlement by the time any new guidance or rules had come into effect, I would have expected MPFS to carry out a calculation in line with the updated rules and/or guidance in any event. Given that new rules come into effect very shortly, I think it's reasonable in the circumstances that MPFS waits until 1 April 2023 to do a loss calculation following the new rules. MPFS should use the actual value of the SSAS which Mrs T subsequently transferred into for their calculations, because in my view MPFS knowingly exposed Mrs T to the losses in the SSAS.

Any part of the losses in the SSAS caused by Mr T making his own contributions, which then proportionally increased the investment in Dolphin, should not be for MPFS to compensate in this complaint. I've seen no evidence that it advised Mr T, who will need to approach any other parties who advised him. That means the value of the SSAS used for loss assessment purposes, after taking into account a nil value for the Dolphin investments (see below), will need to be proportioned down in the ratio that the amount received from this DB transfer bears to the total contributions to the SSAS.

In accordance with the regulator's expectations, this calculation should be undertaken or submitted to an appropriate provider promptly once any new guidance/rules come into effect.

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

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mrs T as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to her likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The compensation amount must where possible be paid to Mrs T within 90 days of PS22-13 coming into effect on 1 April 2023.Further interest must be added to the compensation amount at the rate of 8% per year simple from 1 April 2023 to the date of settlement for any

time, in excess of 90 days, that it takes MPFS to pay Mrs T.

Income tax may be payable on any interest paid. If MPFS deducts income tax from the interest, it should tell Mrs T how much has been taken off. MPFS should give Mrs T a tax deduction certificate in respect of interest if she asks for one, so she can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Putting things right is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. That appears to be the case here.

I would normally give MPFS the option of agreeing an amount with the SSAS provider as a commercial value for the Dolphin investment, then pay the sum agreed to the SSAS plus any costs, and take ownership of that investment. However, I don't think that is achievable here given that some of the SSAS funds used to purchase the Dolphin investment came from Mr T's own contributions. So as MPFS is unable to buy the investment from the SSAS, and there seems to be no market for the Dolphin investment, it should give it a nil value for the purposes of calculating compensation.

In return for this, MPFS may ask Mrs T to provide an undertaking to account to it for the net amount of any payment she may receive from the investment in future (in proportion to how much of it was funded from her DB transfer). That undertaking should allow for the effect of any tax and charges on what she receives. MPFS will need to meet any costs in drawing up the undertaking. If MPFS asks Mrs T to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

My final decision

For the reasons given above, I uphold this complaint. I require Mitchell Prockter Financial Services Limited to take the actions detailed in the "Putting things right" section above and provide Mrs T with their calculations in a clear and simple format.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

Determination and money award: I require Mitchell Prockter Financial Services Limited to pay Mrs T the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I additionally require Mitchell Prockter Financial Services Limited to pay Mrs T any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I only require Mitchell Prockter Financial Services Limited to pay Mrs T any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Mitchell Prockter Financial Services Limited pays Mrs T the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mrs T.

If Mrs T accepts my decision, the money award is binding on Mitchell Prockter Financial Services Limited. My recommendation is not binding on Mitchell Prockter Financial Services

Limited. Further, it's unlikely that Mrs T can accept my decision and go to court to ask for the balance. Mrs T may want to consider getting independent legal advice before deciding whether to accept this decision.

Where the full loss is in excess of £160,000 and Mitchell Prockter Financial Services Limited doesn't follow my recommendation, it may only call upon an undertaking for Mrs T to repay future profits from the Dolphin investment once the compensation MPFS has paid (plus anything paid by any other parties to which she may complain), and any proceeds from the investment, begin to exceed the loss MPFS originally calculated in full, rather than the binding amount of £160,000.Your text here

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs T to accept or reject my decision before 12 April 2023.

Martin Catherwood
Ombudsman