

## The complaint

Mr N complains that since 2010, Aspect Financial Solutions Ltd (Aspect) has taken ongoing fees from his pension pot but has not provided ongoing advice or servicing.

In order to put matters right Mr N wants Aspect to refund all the ongoing fund based adviser fees it has taken from his pension since 2010.

## What happened

I understand that in early 2010, Mr N received advice from Aspect (previously Oakley Financial Solutions Ltd) on his pension.

In the illustration prepared for Mr N, dated 3 March 2010, under the heading, 'What are the charges?' it said:

*An Establishment Charge of £153.96 per annum will apply. The charge will be taken quarterly from the account for the first 36 months. This is to cover the initial payment for advice to your financial adviser.*

*A charge of 0.50% per annum to cover the ongoing payments to your financial adviser will be taken quarterly from the account.*

In March 2020, Mr N contacted Aspect about a letter he had received from his pension provider setting out that his pension fund had fallen by more than 10% in value. I understand that Mr N discussed market conditions with an adviser and decided not to make any changes to his investments at that time.

It appears that on 22 July 2021, an adviser from Aspect contacted Mr N to arrange a meeting. The adviser says that during this call he agreed to contact Mr N again in October 2021, to arrange a meeting to review Mr N's pension and whether it would be possible to reduce the 'ongoing charges' Mr N was paying.

On 29 July 2021, Mr N then phoned the adviser again to complain about the charges Aspect had been taking from his pension pot. He requested a refund of the fund based adviser charges it had taken.

Aspect issued a final response letter later that day. It didn't uphold Mr N's complaint. It said the charges it had applied had been agreed in March 2010, and it said; '*...you have had access to full independent advice during this time...*'

Mr N was not satisfied with Aspect's response and referred the matter to this service. Aspect did not consent to this service considering Mr N's complaint. It said it felt it had been brought too late.

I issued a jurisdiction decision on Mr N's complaint on 15 September 2022. In it I explained that I had not considered the merits of Mr N's complaint, only whether Mr N's complaint had been brought within the timescales I am required to apply.

I set out why I thought this service could consider Mr N's complaint about the ongoing fees he had been charged from 29 July 2015 onwards.

I explained that this service does not have the power to consider every complaint referred to us. In particular, the rules set by the industry regulator the Financial Conduct Authority (the FCA), in the Dispute Resolution Sourcebook (DISP) say:

*The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*

*(2) more than:*

*(a) six years after the event complained of; or (if later)*

*(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*

*unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;*

Unless a business consents, or exceptional circumstances apply, I explained that this service is unable to consider a complaint made outside these time limits.

I noted that in his submissions Mr N had disputed the fairness of Aspect charging him an ongoing adviser fee. He said he had received little, if any service from Aspect beyond the initial advice in 2010, and he didn't think it was fair for a business to charge an ongoing fee without providing a service.

In summary, I said it was not in dispute that Mr N had brought his complaint more than six years after the initial advice was given. Aspect advised Mr N in 2010 and Mr N complained about the lack of ongoing advice and service in July 2021, around eleven years later.

I also noted that the ongoing 'fund based adviser charge' was set out in the statements sent to Mr N by his pension provider. As this was the case, I said I was satisfied that he ought reasonably to have been aware that an ongoing adviser fee was being deducted from his fund from the time he received the first statements in 2011. In view of this I said I didn't think this service could consider the ongoing adviser charge Aspect had deducted from Mr N's fund from 2010.

However, having carefully considered whether Mr N's complaint had been brought too late for this service to consider it, I said I didn't think this service was prevented from looking at the entirety of this complaint. I explained that I had reached this view as I thought each instance of Aspect charging a fee was an event which Mr N was able to complain about as the ongoing fee was, as Aspect had acknowledged to Mr N, intended to pay for ongoing advice and servicing.

As a number of the fees complained about were charged in the six years immediately leading up to Mr N's complaint on 29 July 2021, my jurisdiction decision was that whilst any ongoing fees charged prior to 29 July 2015, were beyond our power to consider, I thought this service could look into Mr N's concerns about the fees he had been charged in the six years immediately leading up to his complaint.

I said I had reached this view in line with DISP 2.8.2R. As Mr N had complained within six years of the charges made on or after 29 July 2015, I said I didn't think this service required Aspect's consent to consider these charges.

I noted that Aspect said that the quarterly fee it received was to cover 'ongoing' servicing. (I noted it also referred to its 'on-going advisory service' in the letter it sent to Mr N in March

2021.) In light of this I said I didn't agree with its position that, simply because the fees were disclosed at the outset, Mr N's entire complaint should be time barred.

I said the crux of Mr N's complaint was that Aspect had received a quarterly fee for ongoing servicing and Mr N felt he had received little, if any service or ongoing advice from Aspect. I explained that whether Mr N had received a service in return for the quarterly fees related to the merits of his complaint. I confirmed that I had not considered the merits as part of the jurisdiction decision.

An investigator then considered the merits of Mr N's complaint. Having done so he said he was of the view that Mr N's complaint should be upheld. In order to resolve matters he said Aspect should refund the ongoing adviser charge it had received from Mr N's pension pot from 29 July 2015 to 7 January 2020.

He said he had reached this view as he didn't think arranging three withdrawals from Mr N's pension pot since July 2015, was the level of service that Mr N could reasonably have expected in return for the regular fees Aspect was taking from his pension pot.

He said he thought that, particularly as Mr N had a significant amount of money invested, Aspect should have been able to provide a more formal and structured record of the service it said it had provided to Mr N. In the absence of anything to show formal reviews had been carried out, such as records showing that discussions took place with Mr N, detailing what was discussed and recommended (even if it was to do nothing), he said he didn't think he could safely conclude that Mr N had received the level of service he could reasonably have expected.

Aspect did not accept our investigator's view. It raised a number of detailed points. In particular:

- it reiterated its view that Mr N's complaint should be time barred. It asked for this issue to be reconsidered as the ongoing fund based adviser charge had been put in place prior to the RDR review. It said, '*...the ongoing trail agreed was for the advice given on this transfer and for arranging the account... Mr N now seems to believe the ongoing charges are for subsequent financial advice, which is not the case*'.

- it accepted that in the suitability letter sent to Mr N in 2010 its adviser had set out '*... the expectations with regard to ongoing reviews and when they would occur, i.e. every 5 years ...*'. And it said, '*Mr N has received a level of service from this company in excess of these expectations. The expectation of service was clearly set out and agreed to at outset as evidenced by the suitability letter*'.

- it said that in Mr N's original complaint he said he '*had never asked for, or received, advice from us*'. Aspect said, '*It would seem Mr N is to be believed by you based on the fact that his adviser, did not record the interactions in a formal manner*'. This does not mean that it did not happen.' It referred to copies of emails it had attached with its response to our investigator's view. These emails were between Aspect and Mr N's pension provider and related to drawdowns from Mr N's pension pot. Aspect said these emails were '*proof that there was contact between Mr N and our company*'. And it said, '*This shows that [name of adviser] was in constant contact with Mr N during the period in question and provided advice and servicing for this plan*'.

- It also said that in 2015, '*...around the time the agreed five-year review of the plan would take place, [name of adviser] dealt with Mr N and forwarded to [name of pension provider] a document ... enabling [name of pension provider] to change the arrangement from capped*

*drawdown to flexi drawdown. Despite us attempting to carry out a further 5 year review in 2020/21 Mr N did not allow this to happen’.*

*- it also said it felt it was unreasonable for the investigator to say it should repay the ongoing adviser fees it had received since July 2015 to 7 January 2020, as Mr N had ‘received a service from this company during the six years previous to his complaint ...By recommending a 100% repayment plus interest, you are implying no service or advice has been provided which is clearly not the case.’*

I issued my provisional decision on Mr N’s complaint on 3 March 2023. In it I explained that, like our investigator, I thought Mr N’s complaint should be upheld. However, I said I thought the redress should cover the period between 29 July 2015 and the date Mr N stopped the ongoing fee based adviser charge being paid to Aspect. I also addressed again the points Aspect had raised in relation to the jurisdiction of this complaint. I set out my provisional decision as follows:

### *Jurisdiction*

In its response to the investigator’s merits view, I noted that Aspect had raised further points in relation to whether this service could consider Mr N’s complaint. It said:

*... the contract clearly states what the charges are in respect of and that they are FOR ARRANGING THIS ACCOUNT, ie the advice for this product as at 2010 and not related to future advice. Please see the commission disclosure illustration previously supplied for this point.*

*Our Client Agreement contract also confirmed how charges would be taken and this was acknowledged and signed by Mr N... There is no mention within the contracts of the trail commission being in respect of ongoing services or advice. The ongoing trail agreed was for the advice given on this transfer and for arranging the account and Mr N signed to acknowledge this. Mr N now seems to believe the ongoing charges are for subsequent financial advice, which is not the case.*

It also said my jurisdiction decision did not take into account that it had advised Mr N ‘...pre-RDR, and as such the ongoing charges are covered under this and cannot be treated as separately invoiced charges.’

And it said it felt I had incorrectly interpreted FCA Fact Sheet 10 as ‘...the charges for putting the arrangement in place were agreed at outset in 2010, a contract signed by the client, no alterations have been made to the way in which the charges were paid and are, therefore, covered by RDR rules. If correct consideration had been given to this point, the case remains time-barred ...’

I carefully considered Aspect’s comments, but as I had set out in my jurisdiction decision on this matter, I said I was satisfied, based on the evidence that had been provided to this service, that the ongoing, fund based adviser charge that Aspect received was intended to cover the cost of ongoing financial advice and servicing. I said I had relied on the following evidence to reach this decision:

The illustration provided to Mr N dated 3 March 2010, from the product provider, set out under the heading ‘What are the charges?’:

*An Establishment Charge of £153.96 per annum will apply. The charge will be taken quarterly from the account for the first 36 months. **This is to cover the initial payment for advice to your financial adviser.***

*A charge of 0.50% per annum to cover the ongoing payments to your financial adviser will be taken quarterly from the account.*

(bold is my emphasis)

In view of this, I said it appeared that a separate 'Establishment Charge' was agreed with Mr N to cover the cost of the initial advice he received.

Likewise, I noted that only an 'Establishment Charge' was detailed in the suitability letter sent to Mr N. I said I could not find anything in the suitability letter that showed Aspect had discussed with Mr N that **in addition** to the 'Establishment Charge' of nearly £400, it would also be taking an additional 0.5% of Mr N's fund each year, to cover the cost of the initial advice.

I explained that, as Aspect was aware, it is required to ensure that all communications with customers are clear, fair, and not misleading. I said that if Aspect had intended to take a fee of 0.5% per year from Mr N's fund, in addition to an establishment charge of nearly £400, to cover the cost of the initial advice, this should have been clearly set out in the suitability letter it sent to Mr N.

But I noted that the suitability letter dated April 2010, said:

*Costs of the Transfer*

*For completing the transfer Oakley Financial will be paid £384.94 which will be taken as an establishment charge of £153.96 per annum over 36 months. I have included an illustration for the transfer with this letter.*

There was no reference to ongoing trail commission in this suitability letter.

I said I was also mindful that Aspect had clearly stated in previous submissions to this service that, *'Part of the rationale for the ongoing charge was to cover our ongoing servicing of the drawdown arrangement over the lifetime of the plan and also the fact that Mr N was charged a reduced initial charge for putting the arrangement in place.'*

I said I appreciated that Aspect now wished to change its position and had said the *'... ongoing trail agreed was for the advice given on this transfer and for arranging the account...'*. But I said I was not satisfied that the records Aspect had supplied, or its earlier submissions to this service supported this claim.

In reaching this view I explained that I had considered the suitability letter Aspect issued to Mr N in April 2010, and its correspondence with Mr N when he complained in July 2021. I noted that in its final response letter to Mr N dated 29 July 2021, Aspect had not disputed that the ongoing adviser fee it had been receiving was for providing Mr N with ongoing advice and servicing. It said ongoing *'...service [was] initially provided by [name of adviser] and latterly by [name of second adviser]'*. And it said, Mr N *'...had access to full independent advice during this time through both [name of advisers]'*.

I said that if the ongoing adviser fee was in fact simply trail commission, and there had been no offer or agreement to provide ongoing advice in return for the ongoing adviser fee, I would have expected this to have been clearly stated in both the suitability letter and Aspect's final response letter to Mr N.

Having considered the evidence available, I said I remained satisfied that Mr N's complaint, that Aspect had not provided ongoing advice, could be considered from 29 July 2015 onwards.

I explained that Mr N could not have known in 2010, when he received the initial advice from Aspect that it would subsequently fail to meet his expectations in relation to the ongoing advice and servicing he was paying for and expected it to provide.

I said I remained of the view that each instance of Aspect charging a fee, a fee it has said '*was to cover our ongoing servicing*', was an event Mr N was able to complain about. And a number of the fees complained about were charged in the six years immediately leading up to Mr N's complaint on 29 July 2021. I noted that, as I explained in my jurisdiction decision, whilst I could not consider any ongoing fees charged prior to 29 July 2015, I remained satisfied that this service could look into Mr N's concerns about the fees he was charged in the six years immediately leading up to his complaint.

Additionally, I noted that Aspect had not provided anything to this service to support its claim that Mr N had agreed to an arrangement involving a lower initial charge, plus 'trail commission' to cover the cost of its initial advice. If this had been agreed with Mr N, I said I thought this should have been clearly disclosed and set out in the suitability report. In the absence of anything to support Aspect's claim, I said I could not safely find that Mr N had made any such agreement with Aspect.

I noted that Mr N had been clear that he understood he would receive ongoing advice from Aspect in return for the ongoing fund based adviser charge he was paying. I also noted that the suitability report set out that Mr N had received limited advice in 2010, and it appeared that fact find information from 2002 had been used to make the recommendation. In light of this I said I thought it was likely that, if the Establishment Charge was lower than Aspect might usually have charged, this reflected that a full review of Mr N's personal and financial circumstances had not been carried out in connection with the advice Mr N received in 2010.

#### *Regular reviews*

As I was satisfied that Aspect had agreed to provide ongoing advice and servicing to Mr N, in return for an ongoing fund based adviser fee, I considered whether Aspect had fulfilled the agreement it had made to provide this service to Mr N.

The suitability report sent to Mr N dated April 2010 said:

#### *Reviews*

*These will continue in the same way as before with the next review being due in 2011.*

*Further reviews will then take place every 5 years; previously this was a triennial review (every 3 years).*

*This review is taken to show how your fund is performing and comparing with an OMO (Open Market Option) Annuity.*

I asked Aspect to provide its records relating to these reviews as it hadn't provided anything to this service in relation to them. I noted that, as per the suitability report, the reviews should have been carried out in April 2016, and again in April 2021. Aspect was unable to provide anything to show or suggest that it had carried out a review comparing Mr N's fund performance against an OMO annuity, or any review of the performance of his fund.

It did however provide copies of emails between Aspect and Mr N's product provider dated January 2015, February 2015, April 2015, April 2017, and April 2018 relating to drawdowns Mr N wanted to make from his pension.

It said these emails evidenced that '*...a review took place in 2015 (refer to emails dated January, February and April 2015), some 12 months before it was due, where Mr N's instructions were conveyed to [the product provider] by [name of adviser] following contact*

*with his client. Furthermore, [name of adviser] made it known to Mr N that he could contact him at any time to review his plan, an opportunity that Mr N made use of many times. The reviews of his plan were not restricted to the 5 year timescale, thereby providing Mr N with more than he was expecting. The emails provided to you indicate when these reviews took place.'*

I carefully reviewed the emails Aspect had provided. Having done so, I said I didn't think any reasonable person would be satisfied that these emails evidenced that Aspect had carried out a review of Mr N's investments. I said it appeared the adviser was simply passing on drawdown instructions to Mr N's product provider. There was nothing to suggest any review was carried out of Mr N's investments or that he had received any advice. Based on the evidence provided, I said I could not reasonably agree with Aspect's claim that *'...it is apparent that we have provided not only the expectations covered at the time of transfer but additional help and assistance to Mr N ...'*

I also considered that Aspect had previously provided a copy of a letter it sent to Mr N in January 2020. The letter asked Mr N to complete a General Investment Review Questionnaire, a Pension and Drawdown Review Questionnaire and a Risk Profile Questionnaire, so that it could *'...ensure that your arrangements continue to remain suitable for you.'*

Mr N said he didn't receive this letter. I said I had not been provided with anything to show that chaser letters or emails were sent to Mr N, despite Aspect not holding up-to-date information on Mr N's personal and financial circumstances or having reviewed his pension arrangements since 2010.

I noted that when Mr N contacted Aspect in March 2020, about information he had received from his pension provider setting out that his pension fund had fallen in value it appeared this did not prompt the adviser to carry out a review to ensure Mr N's *'arrangements continue to remain suitable for you.'*

I said that, even if I accepted that Mr N did receive the letter in January 2020, asking him to provide up-to-date information about his personal circumstances, I didn't think it was reasonable for Aspect to claim that Mr N *'did not allow'* a review to happen. I said I thought the adviser Mr N spoke to in March 2020, about his fund value should have arranged a review to gather current information about Mr N's circumstances and review Mr N's pension arrangements. I said it was not clear to me how the adviser was able to properly discuss what Mr N should do, if anything, about the fall in the value of his fund, without an up-to-date picture of Mr N's circumstances. I was particularly mindful that it appears the fact find information Aspect held about Mr N had not been updated since 2002.

As I had already set out, I said I was satisfied that Aspect was taking an ongoing fund based adviser fee to provide ongoing advice and service to Mr N. I said I had not seen anything that showed the reviews the adviser said would be provided were carried out. As this was the case, I said I thought Aspect should refund all the ongoing fund based adviser fees it had received from July 2015, to the date the product provider stopped payments to Aspect.

I noted Aspect had said it felt it was unreasonable for our investigator to say it should repay all the on-going adviser fees it had received since July 2015 as Mr N had *'received a service from this company during the six years previous to his complaint ...By recommending a 100% repayment plus interest, you are implying no service or advice has been provided which is clearly not the case.'*

I said I was mindful that between July 2015 and July 2021, Aspect received around £8,000 in fund based adviser charges from Mr N's pension pot. I said I didn't think that sending a few

emails to Mr N's product provider requesting drawdowns from his pension pot, two generic letters asking Mr N to provide it with up to date fact find information (and failing to send any follow up when it did not receive a reply from Mr N) and taking a telephone call from Mr N in March 2020, was *'in excess of the expectations'* it had set out in its suitability letter in 2010.

I noted Aspect said its adviser spoke to Mr N on other occasions but *'did not record the interactions in a formal manner'*. I said that, as Aspect would be aware, it is required - by its regulator, the Financial Conduct Authority - to keep adequate records. As Aspect could not provide records of any formal reviews and Mr N had no recollection of any such reviews happening, I said I could not safely find that Aspect had carried out a review of Mr N's investments. And even if a discussion about Mr N's pension arrangements had taken place, I said I was mindful that Aspect had not gathered any information about Mr N's current circumstances on which to base any advice or recommendation.

Having carefully considered this matter I said I didn't think it was reasonable for Aspect to retain the ongoing fund based adviser charges it had received from Mr N's pension pot from 29 July 2015, to the date the payments were stopped. I said I had reached this view as it could not provide any evidence to show that it had reviewed Mr N's pension arrangements in line with the commitment it made in the April 2010 suitability letter.

Both Mr N and Aspect responded to my provisional decision. Mr N accepted my provisional decision. Aspect did not accept my provisional merits decision and also reiterated that it did not accept my jurisdiction decision.

I am mindful that Aspect has provided several responses to my provisional decision addressing different aspects of Mr N's complaint, however it has not provided new information, aside from an email from Mr N's pension provider.

I note that Aspect has said it wants me to respond to all the points it has raised. This service is an informal dispute resolution service, and I am not required to address every point raised. I have instead addressed what I consider to be the key points in this complaint. I trust Aspect will not find this a discourtesy. I am also mindful that, on occasion, Aspect has provided contradictory responses in its submissions.

### **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 reviewed all the information that has been provided in connection with this complaint, including all Aspect's responses to my provisional decision. Having done so I remain of the view that Mr N's complaint should be upheld. I'll explain why.

#### *Jurisdiction*

In its responses to my provisional merits decision Aspect said I had not *'...provided any reasoning or supporting evidence of your decision process despite being asked on several occasions.'*

It is not clear to me why Aspect believes I have not provided any reasoning to explain why I am satisfied that this service can consider Mr N's complaint from 29 July 2015 onwards. My reasoning and the evidence I relied upon to reach my decision was set out in both the provisional and jurisdiction decision and I also addressed the jurisdiction of Mr N's complaint in my provisional decision (the details of which are set out above).

I would also add that, as Aspect will be aware, the suitability letter it sent to Mr N in April 2010 said:

*I am now writing to confirm our recent discussions regarding the SIPP arrangement with [name of product provider]. **In line with our promise to you, and FSA requirements, we continue to review your fund selection, costs and performance in line with your stated objectives.***

(bold is my emphasis)

I understand that Mr N had a flexible drawdown plan and was therefore able to take withdrawals from his fund. However, as the suitability letter reflected, at the time the advice was given he was required to have regular reviews to ensure that the withdrawals were not more than the maximum income level permitted (in line with GAD rates).

If, as Aspect has more recently claimed, ‘...*the ongoing trail agreed was for the advice given on this transfer and for arranging the account...*’ this should have been very clearly stated in the suitability report as Mr N would then have been aware that he would need to make separate arrangements to ensure regular reviews were carried out.

It is not in dispute that financial advisers can receive trail commission for advice given before 31 December 2012. But in Mr N’s case, Aspect clearly set out in the suitability report that it would provide ongoing advice and has previously accepted that the fund based adviser fee was to provide ongoing advice and service. Having very carefully considered the evidence available I am not satisfied that Aspect’s more recent claim - that the fund based adviser fee it has received was in fact trail commission, and there was no agreement to provide ongoing advice and service to Mr N in return for this fee – is correct.

The suitability letter Aspect sent to Mr N in 2010, clearly stated that the ‘*cost of completing the transfer*’ (to the new SIPP provider) was £384.94. It made no reference whatsoever to any ongoing charge or trail commission. It did however clearly set out that, ‘...*in line with our promise to you, and FSA requirements, we continue to review your fund selection, costs and performance in line with your stated objectives*’.

I also note that in its email to this service dated 22 August 2021, Aspect said:

*...we believe some of the complaint raised by Mr N may have been brought out of time **due to the fees being charged more than 6 years ago...**The advice given (which has not been complained about) was to transfer his SIPP ... As part of this process, Mr N was provided with, and agreed to, our firm's charges, both initial and ongoing, which are included in the... Illustration ...**For the avoidance of doubt, this illustration specifically states that there is an ongoing advisory charge of 0.5% of the investment per annum, paid quarterly.***

(bold is my emphasis)

In light of this and all the evidence and information I have previously referred to in the jurisdiction decision and my provisional decision, I am satisfied that the fund based adviser fee Mr N has been charged was to pay for ongoing advice on his SIPP. I am not satisfied that Aspect’s more recent claim that the ongoing adviser fee was in fact trail commission and there was no agreement to provide ongoing advice, is correct.

I also note that in its most recent submissions to this service Aspect said:

*Mr N understood that he would receive ongoing advice from Aspect in return for the ongoing fund based adviser charge. This shows that Mr N agreed to pay ongoing fund based adviser charges in return for the servicing level agreed with him in the Suitability Letter.*

If Aspect accepts this is the case it is not clear to me why it has also sought to claim that ‘...*the ongoing trail agreed was for the advice given on this transfer and for arranging the account...*’

As I am sure Aspect will appreciate, only one of these statements can be a correct reflection of what was agreed in 2010. Based on the evidence and information that has been provided to this service I am satisfied that Aspect's statement that *'Mr N understood that he would receive ongoing advice from Aspect in return for the ongoing fund based adviser charge'* is correct.

I note Aspect has very recently provided an email from Mr N's product provider; it says that this email supports its claim that the ongoing 'fund based adviser fee' was in fact trail commission. I have carefully considered this email. Having done so, it is not clear to me why Aspect feels this email shows that there was no agreement to provide Mr N with ongoing advice and service in return for what was clearly described in the regular statements Mr N received from the product provider as a 'fund based adviser fee'.

I would again remind Aspect that it is required to ensure that it treats its customers fairly and that all communication with its customers is clear, fair, and not misleading. The suitability letter it issued to Mr N clearly set out that it would 'continue to review' his pension arrangements and failed to disclose the ongoing fund based adviser charge it has received.

Regardless of whether Aspect now claims that the fund based adviser fee was in fact trail commission, the fact remains that it committed to providing on-going reviews of Mr N's pension arrangements and has claimed on a number of occasions, *'... that Mr N agreed to pay ongoing fund based adviser charges in return for the servicing level agreed with him in the Suitability Letter'*.

I therefore see no reason why an email from Mr N's pension provider dated March 2023, would change my decision that Mr N clearly understood that the ongoing fund based adviser fee he was paying was to cover the cost of Aspect 'continuing to review' his pension arrangements.

As I explained in both the jurisdiction decision and my provisional merits decision, Mr N could not have known at the outset, in 2010, when he received the initial advice from Aspect that it would subsequently fail to meet his expectations in relation to the ongoing advice and servicing he was paying for, and expected it to provide.

I therefore remain satisfied that each instance of Aspect receiving a fee – a fee it has said *'was to cover our ongoing servicing'* - is an event Mr N is able to complain about. A number of the fees complained about were paid to Aspect in the six years immediately leading up to Mr N's complaint on 29 July 2021. So, as I explained in my jurisdiction decision, whilst I cannot consider any ongoing fees prior to 29 July 2015, I remain satisfied that this service can look into Mr N's concerns about the fees that were taken from his pension fund in the six years immediately leading up to his complaint.

### *Merits*

In its most recent submissions to this service on the merits of Mr N's complaint Aspect has reiterated its view that, despite being unable to provide evidence to show that the ongoing reviews it committed to were carried out, I should accept that these reviews did take place.

The suitability letter set out that:

*...In line with our promise to you, and FSA requirements, we continue to review your fund selection, costs and performance in line with your stated objectives...*

and

*...[Reviews] will continue in the same way as before with the next review being due in 2011.*

*Further reviews will then take place every 5 Years; previously this was a triennial review (every 3 years). This review is taken to show how your fund is performing and comparing with an OMO (Open Market Option) Annuity.*

In the absence of any contemporaneous records, such as updated fact find information recording Mr N's personal and financial circumstances at the time any review was carried out, or a report setting out the adviser's recommendations, I cannot safely find that Aspect did carry out reviews of Mr N's pension arrangements in line with the commitments it made in the 2010 suitability report. Again, I would remind Aspect that it is required, by its regulator, the FCA to keep adequate records. In the absence of records to support Aspect's claims I cannot reasonably find that any reviews did take place.

I note that Aspect has said that its adviser did not use the fact find information recorded in 2002 *'for the advice given in 2010'*. But it has not provided this service with anything that would allow me to safely find that it held more up-to-date information about Mr N's personal and financial circumstances or indeed **any** information about his attitude to investment risk. Aspect says that the very limited records it has been able to provide from 2015, in particular the Benefit Variation form Mr N signed *'was completed following discussions with, and advice from, [name of adviser]... He could not have done this without [name of adviser] having conducted a review of his pension plan'*.

I cannot reasonably agree with Aspect's position. The emails for the time the benefit variation form was submitted do not suggest any review of Mr N's circumstances had been carried out. The emails between Aspect and the product provider only refer to Mr N having requested *'...a monthly payment at the amount paid in previous years...paid monthly to start ASAP!!'*

There is nothing in these emails that could reasonably lead me to conclude that Aspect had *'...continued to review your fund selection, costs and performance in line with your stated objectives.'*

Likewise, I note that Aspect says *'...it is unclear how you can find either 1) Mr N received no advice during the period in question, or 2) the value of our advice is zero. The total amount of trail commission received in the six-year period in question was £7,631.50. How has the amount we are expected to repay not been reduced or completely removed by the service and advice provided to Mr N?'*

As I set out in my provisional decision, I don't think any reasonable person would agree that sending a few emails to Mr N's product provider requesting drawdowns from his pension pot, two generic letters asking Mr N to provide it with up-to-date fact find information (and failing to send any follow up when it did not receive a reply from Mr N) and taking a telephone call from Mr N in March 2020, was *'in excess of the expectations'* it had set out in its suitability letter in 2010.

And, as I also explained in my provisional decision, unlike our investigator I think Aspect should repay all the fund-based adviser charges it has received from 29 July 2015 to the date the payments were stopped.

I explained I had reached this decision as I was not satisfied that the letter Aspect sent to Mr N in January 2020, asking Mr N to provide it with information about his personal and financial circumstances was sufficient evidence that a review of Mr N's circumstances would have been carried out. I reached this view as I noted I had not been provided with anything to show that chaser letters or emails were sent to Mr N when Aspect did not receive a response (Mr N says he did not receive the letter), despite Aspect not holding up-to-date

information on Mr N's personal and financial circumstances, or having reviewed his pension arrangements since 2010.

I also noted that when Mr N contacted Aspect in March 2020, about information he had received from his pension provider setting out that his pension fund had fallen in value it appeared this did not prompt the adviser to carry out a review to ensure Mr N's *'arrangements continue to remain suitable for you.'*

I said that, even if I accepted that Mr N did receive the letter in January 2020, asking him to provide up-to-date information about his personal circumstances, I didn't think it was reasonable for Aspect to claim that Mr N *'did not allow'* a review to happen. I said I thought the adviser Mr N spoke to in March 2020, about his fund value should have arranged a review to gather current information about Mr N's circumstances and review Mr N's pension arrangements. I said it was not clear to me how the adviser was able to properly discuss what Mr N should do, if anything, about the fall in the value of his fund, without an up-to-date picture of Mr N's circumstances. I was particularly mindful that it appeared the fact find information Aspect held about Mr N had not been updated since 2002.

Aspect has not provided anything in its responses to my provisional merits decision that shows it took adequate steps to *'review your fund selection, costs and performance in line with your stated objectives.'* at any point between 29 July 2015, and the date Mr N stopped the ongoing payments to Aspect. As this is the case, I do not think it would be fair or reasonable to allow it to retain part of the ongoing fund based adviser fees it has received since 29 July 2015, as it has not provided anything to show it carried out the reviews it committed to provide to Mr N.

I am also mindful that, if reviews had been carried out, Mr N may have made different decisions regarding the level of withdrawals he took from his pension pot. He might also have been advised to make changes to the funds he was invested in if his personal circumstances had changed, or his capacity to take investment risk was impacted by a change in his circumstances. The costs Mr N was incurring should also have been reviewed as part of the reviews Aspect had committed to carry out.

Having very carefully considered this matter I remain satisfied that Mr N's complaint should be upheld. Aspect has not provided anything to show Mr N received the ongoing service and advice it had committed to provide. And although it has made contradictory submissions regarding the ongoing fund based adviser fee it received, I am satisfied based on the evidence that has been provided, that this charge was intended to pay for the provision of ongoing advice. By failing to carry out the reviews it committed to provide, I am not satisfied that Aspect treated Mr N fairly.

### **Putting things right**

My decision is that, in the absence of anything to show that Aspect met its commitment to *'continue to review your fund selection, costs and performance in line with your stated objectives'* and provide reviews every five years, to *'show how your fund is performing'*, I think Aspect should repay the fund based adviser charges it has received between 29 July 2015, and the date the payments were stopped.

To compensate Mr N for the loss of the use of this money Aspect should also pay 8% simple interest per year on the fund based adviser charges it has deducted from Mr N's pension fund. The interest should be calculated from the date the charge was paid to Aspect, to the date of settlement.

- Aspect should pay into Mr N's pension plan to increase its value by the amount of

the compensation and interest. The amount paid should allow for any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If Aspect is unable to pay the compensation into Mr N's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr N won't be able to reclaim any of the reduction after compensation is paid.
- The *notional* allowance should be calculated using Mr N's actual or expected marginal rate of tax at his selected retirement age.
- It's reasonable to assume that Mr N is likely to be a basic rate taxpayer at his selected retirement age, so the reduction would equal 20%. However, if Mr N would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

If Aspect pays the compensation directly to Mr N, income tax may be payable on any interest paid. If Aspect deducts income tax from the interest, it should tell Mr N how much has been taken off. Aspect should give Mr N a tax deduction certificate in respect of interest if Mr N asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

### **My final decision**

My decision is that, for the reasons I have set out above, I uphold this complaint. In order to put matters right Aspect Financial Solutions Ltd should calculate and pay the redress set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 27 April 2023.

Suzannah Stuart  
**Ombudsman**