DRN-4056579

Financial Ombudsman Service

The complaint

Through his representative, Mr C complains that Feast Noble & Company LLP (FN&C) 'rubber stamped' or 'facilitated' advice which he had received from an unregulated introducer, to transfer his pensions to a Rowanmoor SIPP in order to invest in high risk unregulated investments that were unsuitable for him.

He says that in doing this it breached the regulator's Principles for Businesses and a number of its rules in COBS chapter 2, 4, 9 and 10, and section 27 of the Financial Services and Markets Act 2000 ('FSMA'). It is also concerned that through the actions it took, FN&C was communicating promotions of unregulated collective investment schemes (UCIS) contrary to the restrictions on such promotions.

What happened

Mr C says that he approached his existing adviser's (who I'll call Mr G) unregulated firm "AJP" in the summer of 2012, seeking further advice so that he could 'maximise his retirement income as far as possible'. He had an existing relationship with Mr G who had previously been regulated by the FSA/FCA. I can see that an individual of the same name shows on the FCA register as being authorised until December 2010.

At that time Mr C was aged 55. He had three personal pensions which (at the point of transfer) totalled £93,108. He says Mr G recommended he transfer to a Rowanmoor SIPP and invest in a variety of specific property investments which would outperform his existing plans at minimal risk. He followed that advice in view of their previous advisory relationship.

AJP wrote to Mr C on 5 July 2012 asking him to complete a FN&C client agreement and letters of authority to release information to FN&C – which it said (without further explanation) was 'our appointed IFA'. In Mr C's view, Mr G failed to explain that this was because he no longer had the necessary regulatory authorisation. The client agreement envisages an advisory relationship between FN&C and Mr C.

The letters of authority gave twin authority to release information to both FN&C and AJP. After Mr C had completed these documents, AJP then sent them to FN&C on 9 August under cover of a letter in which it said Mr C was *"proposing to arrange his own self investments linked to a SIPP and his preferred SIPP provider is Rowanmoor Pensions because of AJP's agreed charges".* It said it had retained a Rowanmoor application on file.

Included was also a fact find signed by Mr C on 1 August. This was on a template describing it as 'AJP Worldwide Pension Analysis Service in association with Feast Noble & Co LLP'. This set out that Mr C was wanting more choice in being able to self-invest, including in commercial property, and had a medium appetite for risk. Handwritten comments added:

> *"Specifically interested in the ability to self-invest as not happy with long term fund performance linked to insurer based funds, nor does he see any prospect of recovery ongoing given state of global economy. Directly held, tangible assets such as commercial property, land & commodities could be considered & subject to SIPP being set up, intends to seek separate information & guidance on such investment options."*

FN&C used Mr C's letters of authority to obtain information about Mr C's existing pension

arrangements, such as fund information and projections of benefits - for example by writing to Aviva on 16 August 2012. Aviva then responded to FN&C's postal address on 10 September 2012.

At some point – the date is unclear – AJP had given Mr C a 'direct offer pack' produced by FN&C, which in places sets out the potential advantages of using a SIPP, and specifically one with Rowanmoor with whom the pack said FN&C had 'established an arrangement'. It disclosed that FN&C would charge £1,250 as a setup fee and £200pa for ongoing administration. On 8 October 2012 Mr C signed the consent form from this pack confirming that he understood the requirements, risk warnings and fee structure and wished to proceed.

Then on 10 October, AJP (rather than FN&C) sent the necessary application paperwork to Rowanmoor. This included a copy of Mr C's client agreement and consent form with FN&C, and Rowanmoor's adviser fee agreement and application form. The application form is stamped with AJP's name on the cover page but bore FN&C's details in the 'independent financial adviser' section. It said Mr C would be investing in a *"mix of property and land related assets"*. I notice that – at least in theory – there was an option on Rowanmoor's application for Mr C to tick a box: *"I am not appointing an Independent Financial Adviser".*

It appears this first sending of the literature may not have met Rowanmoor's requirements, as the above documents (minus the FN&C client agreement/consent form but with an identity verification certificate) were re-sent by FN&C to Rowanmoor on 22 October. FN&C also wrote to Mr C that same day to confirm this and also the following points:

- that Mr C had applied as a result of the direct offer pack
- FN&C had not provided Mr C with advice and would only be administering the SIPP
- his intention was *"to invest, at some point in the future, in a range of investments of your own choice"*

Transfers into the new SIPP were received from Mr C's existing providers from 16-21 November 2012, with £1,250 being paid to FN&C on 11 December (of which I understand £450 was rebated back to AJP). The following investments were then made, evidently at the instruction of AJP directly to Rowanmoor and without FN&C being specifically aware:

- 27 November 2012: a £15,000 loan to develop Lomaxfind student halls of residence (Stoke on Trent), at 7.5%pa interest and due to be repaid on the fifth anniversary of project completion. AJP sent an instruction letter for this investment to Rowanmoor on 22 November, including a Rowanmoor 'high risk declaration' dated (by Rowanmoor) on 14 November.
- 29 November 2012: £25,000 in a 99 year lease on a Best Asset Management car parking space in Dubai. AJP sent an instruction letter for this investment to Rowanmoor on 22 November, including a 19 November 'high risk declaration'.
- 6 December 2012: £27,875 fractional share in Malgretoute Hotel Development Company (Freedom Bay, St Lucia) – targeted for completion in December 2014. AJP sent an instruction letter for this investment to Rowanmoor on 5 December, including a 3 December 'high risk declaration'.
- 18 April 2013: one 'B' share worth £5,000 in Physioflexx Limited. AJP sent an instruction letter for this investment to Rowanmoor on 17 April.
- 31 May 2013: £15,850 investment in a hotel room with Akbuk Resort Group (Harmony Bay, Turkey). AJP sent an instruction letter for this investment to Rowanmoor on 14 May. Mr C signed a high risk declaration for this on 24 May.

These were the only five investments made in the SIPP.

Whilst these investments were being made, on 25 April 2013 FN&C's agency on the policy was changed by Rowanmoor to AJP at Mr C's request. Rowanmoor seems to have treated this as meaning Mr C was an 'orphan client' to which it would have to start sending SIPP statements directly (presumably as AJP was an unauthorised firm), and wrote back to Mr C on the same day inviting him to appoint a new IFA.

By August 2013, I can see that FN&C had also taken its own action and wrote to Rowanmoor with a list of 33 clients including Mr C, for which it wanted to be removed as servicing agent. It's evident from how the request was acknowledged internally at Rowanmoor that these were also individuals who were associated with AJP. The following month (and on several later occasions) Mr C wrote to Rowanmoor requesting a preference to being a direct client of Rowanmoor and only authorising AJP to receive information about his plan. I've seen no evidence that another IFA was appointed to the plan.

By 1 September 2017, the amount in the SIPP bank account was £14,820 having received total income of £16,007 across all investments (apart from Physioflexx), but from which charges had been deducted. The investments were considered worthless apart from the Freedom Bay investment still valued at £15,400. Mr C's SIPP subsequently received £7,690 in settlement of this investment in May 2020.

Mr C's representative sent a preliminary letter to FN&C on 30 May 2018, believing that this was a more typical case of FN&C making a personal recommendation for Mr C to take out the SIPP. In its more extensive letter of claim dated 12 July 2018, it elaborated that FN&C advised Mr C by way of leading statements contained in the direct offer pack, and/or had accepted the duty of being Mr C's adviser – whether it had advised him on the SIPP or not.

Further correspondence was exchanged before FN&C then issued its response to Mr C's representative on 9 May 2019. In summary FN&C's response said that:

- The assertion that FN&C had recommended the Rowanmoor SIPP to Mr C was factually incorrect, when the evidence was consistent that AJP provided that advice and all the documentation was provided by AJP.
- It had never collected ongoing fees from the SIPP as its agency was cancelled. Those fees were never said to be for ongoing advice, but rather administration.
- The direct offer pack said that FN&C was not providing advice on a transfer or any related investments, and that no disclosure of the information in that pack be considered as such.
- In support of this, the pack offered Mr C the options of seeking his own 'expert advice' about *"whether this pension plan is suited for your needs, or its affordability, risks or charges"* - or paying FN&C an additional fee, which he didn't take up.
- FN&C hadn't actually been retained by Mr C on the advisory basis stated in its client agreement, and AJP never acted as an agent of FN&C.
- FN&C wasn't aware which investments Mr C was planning to make with the SIPP, and understood that decision had yet to be made at the time. It never received commission from those investments, which likely went to AJP and/or Rowanmoor.
- It had established subsequently that Rowanmoor issued a series of letters to Mr C warning him of the high risks of the investments, before his SIPP had been set up [note that this is *not* correct – I've given the dates of those letters above].
- As Mr C had already decided to transfer to the SIPP on the basis of making certain investments that weren't disclosed to FN&C, it hadn't caused his losses. The final investment was made after FN&C's agency on the SIPP had ended.
- Had it advised Mr C against making the investments, the Rowanmoor waiver declarations (and an 'unquoted equity declaration' for the Physioflexx shares) he signed show that he would have proceeded regardless.

- To the extent that Mr C had not caused his own losses, they were caused by AJP 'illegally' advising him, and in turn Rowanmoor accepting instructions from AJP in breach of the SIPP agreement to only accept them from FN&C.
- Rowanmoor failed to carry out adequate due diligence on the proposed investments.

Mr C remained dissatisfied and referred his complaint to our service. FN&C informed us that it was a matter of record at Companies House that Rowanmoor had registered a debenture of £30,000 over any commissions payable to AJP. It said that this was relevant in showing a pre-existing connection between Rowanmoor and AJP.

One of our investigators thought the complaint should be upheld. On causation, he specifically took into account that Mr C had evidently been introduced to FN&C two months before he signed the consent form from the direct offer pack. However, he wasn't satisfied that Mr C had already decided to go ahead with the SIPP 'come what may' or that FN&C couldn't have influenced his decisions.

He also accepted that the Rowanmoor waiver declarations Mr C signed for high risk investments were at odds with his stated medium attitude to risk. However he thought Mr C wasn't an experienced or knowledgeable investor, and would have been more reliant on the people he was dealing with and less reliant on those documents when making his decisions.

FN&C's solicitor sent a lengthy response to the investigator's view, from which I shall focus here on the main points:

<u>The conclusions were premised on incorrect facts:</u>

- Mr C's own recollection was not that he was advised by FN&C but rather AJP. And if FN&C didn't make a personal recommendation to invest in a SIPP with respect to Mr C's individual circumstances, then how can it be said that a SIPP would always have been unsuitable for him given the wide range of investments he could make?
- FN&C didn't know at the time that AJP had recommended the SIPP and therefore that it given advice as an unauthorised firm in contravention of FSMA.

<u>The conclusions were reached with the benefit of hindsight:</u>

- The letters FN&C used to request information from the ceding schemes were standard throughout the industry, whether or not advice was being given.
- Mr C was only the second individual AJP had introduced to FN&C in 2012. The arrangement between the two firms was intended for the introduction of high profile sportspersons. FN&C only became aware later that the clients were not of the nature intended, electing to cease taking instructions from AJP in February 2013.
- FN&C had been taken advantage of by AJP, rather than the two firms colluding together as the investigator suggested.
- The relevance of the two FCA alerts the investigator referred to, issued after Mr C's transfer but relying on existing rules in COBS 9, is itself diminished by the fact that COBS 9 doesn't apply (a personal recommendation wasn't given to Mr C).

<u>The conclusions ignore the role and responsibility of AJP</u>

- FN&C wasn't informed Mr C wished to make unregulated investments. FN&C would conduct an assessment of each client who proposed to do so, and FN&C had told AJP on 24 August 2012 that any clients for which it determined unregulated investments weren't suitable would have to find an alternative IFA.
- Such discussions continued over a number of months to the point that AJP frustratedly asked (and FN&C didn't agree) that FN&C should only process the SIPP transfer for those unsuitable clients – and service the SIPP afterwards.
- FN&C reasonably believed that no such investments were being made because it would've expected to be notified by Rowanmoor of the same.

<u>The conclusions assume what Mr C would have done if FN&C had advised appropriately</u>

- Two of Mr C's personal pensions had previously been invested in 'property' and he had made pension transfers previously (presumably with Mr G) in 2006 and 2010.
- If FN&C had been informed Mr C was going to invest in unregulated investments it would only have been willing to act for him if he went into a regulated fund such as its five year advised portfolio with Aviva.
- If FN&C had expressed concerns about investing in unregulated investments, Mr C would have reverted to Mr G of AJP, who unlike FN&C he was in personal contact with. Mr G would have dismissed those concerns and/or found another IFA who didn't share them.
- AJP actually told it on 11 March 2013 that it had another IFA to which it was prepared to transfer agencies.
- It was wrong for the investigator to conclude Mr C would have heeded warnings from one regulated firm (FN&C) when he didn't heed them from another (Rowanmoor).

<u>The conclusions ignore the law on causation:</u> FN&C gave no further context on this point.

FN&C also wished to know from this service if the documents we've seen disclose the name of any other IFA that AJP had referred Mr C to and whether that IFA had been appointed to the SIPP, with the effect of terminating its own retainer, before any of the abovementioned investments had been made. It said that no final decision should be issued on the complaint before it had *"full disclosure of any relevant documents"*. For the avoidance of doubt this service has already shared the evidence on which my decision relies with FN&C.

Its solicitor subsequently sent this service several emails/letters between it, AJP and Rowanmoor - to which I shall refer in my findings. The solicitor emphasized that FN&C's agreement with AJP had broken down *because* it was unwilling to facilitate SIPPs to make widespread unregulated investments. It said 43 clients in total were transferred by AJP into FN&C's agency without their prior knowledge, and after the SIPPs had already been set up by AJP or another IFA. FN&C was later told this was because Rowanmoor couldn't accept investment instructions from AJP without there first being an authorised IFA associated with the SIPP. FN&C was *"in no way enriched by the relationship"* as it could only benefit by £800 each time (after AJP was paid £450 of FN&C's fee for filling in the paperwork).

The solicitor insisted that to the extent it was aware that other clients had made unregulated investments, FN&C assumed this was because they had been referred to another IFA for advice. It remained of the view that without full disclosure of the collusion between Rowanmoor and AJP, the matter could not be fairly decided. It also expected the ombudsman to make an apportionment for losses caused by other parties.

Having had sight of the evidence that we received from Mr C's representative (comprising Rowanmoor's reply to its DSAR), the solicitor said it was convinced that Rowanmoor's involvement lay at the heart of Mr C's losses and this service should require Rowanmoor to compensate Mr C for the full measure of his loss – or at the very least, that firm should bear the greater share of the loss. (This was before complaints against Rowanmoor have been passed to the Financial Services Compensation Scheme to be determined.)

Our investigator acknowledged all of the solicitor's points. Regarding the fact that some investments were placed after FN&C ceased acting nominally as Mr C's adviser, he said that the ombudsman might make an allowance for that.

He also commented on another of Mr C's representative's points, that s.27 of FSMA ('Agreements made through unauthorised persons') – where here AJP is the unauthorised person – gave Mr C a legal right to recover sums transferred by him under an agreement to take out the SIPP through FN&C. The investigator thought it might be arguable that Mr C had that right, and the ombudsman might want to consider this argument. So he invited the

solicitor's response. No specific response has been received on this s.27 point.

The findings from my Provisional Decision of 28 February 2023

I've taken into account that on the one hand, Mr C was referred to FN&C having apparently already chosen (with AJP's assistance) Rowanmoor to be his SIPP provider – because he wanted to invest directly in commercial property opportunities. But on the other hand, FN&C had provided a direct offer pack, which at some point Mr C saw, in which it promoted Rowanmoor to be that choice of SIPP provider for people looking for those opportunities.

The sequence of these events is not clear: we only know that Mr C signed the consent form from the offer pack about two months after he was first referred to FN&C. That doesn't of course mean he only saw the offer pack at that later date, and even if he did that was still before the SIPP application was submitted to Rowanmoor. Either way, it does seem clear that the only SIPP provider ever under discussion was Rowanmoor, because it was known to facilitate the sorts of investments Mr C was going to be making without much difficulty.

Some of FN&C's arguments around the extent of the service it was providing here are contradictory: in effect it admits that it was taking a view on the likely suitability of the client base for making unregulated investments. Making an assessment of which clients were and which were not going to be suitable for this type of investment would, to my mind, involve some sort of case by case analysis. If so, it seems likely to me that was what the information AJP was providing in a fact find for FN&C was being used for.

FN&C then suggests that it informed AJP of any clients which did not appear suitable, but it hasn't provided any evidence of doing that in specific relation to Mr C. Nor did it communicate the result of any such assessment to Mr C. And its solicitor's arguments suggest that FN&C shouldn't have been willing to arrange Mr C's SIPP if it didn't think he was a suitable client for unregulated investments – especially given that when the SIPP commenced I can't see it had any other knowledge that another authorised adviser was or would be involved. But as I'll go on to explain, FN&C did go on to arrange a SIPP which was in all likelihood going to be used to make unregulated investments. It seems to me that the only way of reconciling these arguments is that that the very framework that was put in place to prevent unsuitable SIPPs being set up, wasn't followed by FN&C in this case.

FN&C clearly went on to carry out the regulated activity of arranging the SIPP and was bound by the regulator's principles and rules in doing so. But before looking at that, I'm going to consider the investigator's argument (which FN&C disagrees with) that FN&C gave advice to Mr C. Advice which meant it should have communicated to him whether the SIPP was suitable for him based on his circumstances and objectives, which implicitly included what investments he intended to make within it. FN&C has correctly observed in my view that what the investigator is referring to here is a personal recommendation.

Did FN&C make a personal recommendation to Mr C?

FN&C's main communication with Mr C about the SIPP was its direct offer pack. Just because Mr C considers he was advised by APJ doesn't of itself rule out that the direct offer pack from FN&C also contained investment advice. FN&C allowed this direct offer pack to be shown to Mr C by AJP and as Mr C signed to confirm he had read it before investing, I'm satisfied on the balance of probabilities that he did.

There are several references in this pack to the effect that FN&C *was "not making any recommendation as to the suitability of this arrangement"* - and FN&C "*will not provide advice, or recommendation as to the suitability of investment into commercial property".* It said it was willing to provide an advice service, *"however this will incur additional fees."* However, merely saying advice isn't being provided doesn't negate any other statements

being made that do, on a reasonable reading, actually amount to advice. COBS 2.1.2R refers:

> *"A firm must not, in any communication relating to designated investment business seek to:*
> *(1) exclude or restrict; or*
> *(2) rely on any exclusion or restriction of;*
> *any duty or liability it may have to a client under the regulatory system."*

Much of the pack doesn't comment on the merits of an investment with any particular provider – the references to commercial property are generic, and there are also generic references to the fact stakeholder pensions tend to be cheaper. So, I don't agree with Mr C's representative that the pack constituted a promotion of the unregulated investments to be made *within* the SIPP.

But the nature of the direct offer pack changes in the section entitled, *"Why should you use the Rowanmoor Pensions SIPP Arrangement"*, under which FN&C emphasizes Rowanmoor's award winning service, high standards, and fee structure. And on the subsequent page under *"Should I transfer my pension benefits into a SIPP?"* there are a number of references to the Rowanmoor SIPP being the specific SIPP under consideration.

There's no doubt at this point that this is a recommendation as to a course of action involving a particular, specified investment (the Rowanmoor SIPP): one which contains an element of opinion on FN&C's part. It therefore contains all the necessary elements described at PERG 8.25-8.29G in the regulator's handbook for it to constitute the regulated activity of 'advising on investments'.

I'm also mindful that PERG 8.28.4G sets out that information being provided by a firm may take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation. The pack details the advantages of SIPPs (which would plainly apply to the specific Rowanmoor SIPP being mentioned). However Mr C wouldn't necessarily be aware that all of the claimed tax benefits, and most of the 'flexibility' features, were largely the same as those that were enjoyed by his existing pensions (or at least, providers).

The intention of the pack was clearly to promote the idea of making commercial property investments (in general) through the Rowanmoor SIPP. But a SIPP wasn't the *only* way of pooling money into such investments. There was no acknowledgement in the pack that many retail investors use the insurer's own property funds under a personal pension. These offer many of the same advantages of commercial property investment cited – including the key income and capital gains tax advantages – and actually with a wider spread of properties. The investments only accessible through a SIPP which Mr C would be looking at would employ a more specialised sort of pooling where funds were concentrated into a specific development, usually at significantly more risk.

So, I think Mr C was left with a misleading impression of the benefits of commercial property investment through the Rowanmoor SIPP, as part of an activity being carried out by FN&C that amounted to *advising on investments*. But crucially, I don't think that is the same as FN&C making a personal recommendation. The latter is defined in the regulator's handbook as (amongst other things) a recommendation that is presented as suitable for the person to whom it is made; or based on a consideration of the circumstances of that person.

Mr C likely met or spoke to Mr G of AJP, who he was already acquainted with, whereas FN&C's direct offer pack wasn't addressed to him personally. And the substance of FN&C's relationship with him was that there wasn't any more advice than I've determined was contained in the direct offer pack. FN&C was clearly wrong to accept Mr C's client agreement on the basis that *"we advise and make a recommendation for you after we have*

assessed your needs", but I accept this was a pre-ticked option on the form. I also accept that the use of standard letters to request details from the ceding schemes referring to 'reviewing' Mr C's arrangements was likely done out of convenience.

I don't think AJP's collection of Mr C's personal circumstances and objectives on a 'fact find' conferred any obligation on FN&C to make a personal recommendation. However it did provide useful information for FN&C to decide if it was consistent with its wider regulatory obligations to arrange the SIPP for Mr C – something to which it has itself referred – so I'll return to this later. And AJP's completion of the fact find also lends weight to the suggestion (which again I'll come to later) that AJP was also advising Mr C.

The arrangements made between AJP and FN&C seem to me to place FN&C in the position of 'carrying out the motions' of being an adviser such that this was acceptable for Rowanmoor's purposes, without actually making a personal recommendation to Mr C. In these circumstances I don't agree with the investigator that solely because FN&C advised on the SIPP, it had to tailor the advice it gave him to the specific investments he would be making within the SIPP. Those obligations effectively stem from COBS 9.2.2R in the regulator's handbook (such as understanding the client's investment objectives, his ability to bear investment risks related to those objectives, and having the necessary knowledge and experience). But COBS 9 only applies to a firm making a *personal recommendation*.

That doesn't mean that the direct offer pack resulted in no regulatory obligations on FN&C at all, however. The client's best interests rule at COBS 2.1.1R and the fair, clear and not misleading rule at COBS 4.2.1R still applied. FN&C didn't make a personal recommendation to Mr C specifically, but it did in my view give advice and information on the Rowanmoor SIPP that wasn't likely to be in the best interests of many retail consumers (those for whom the additional risks of the sort of unregulated commercial property investments only accessible within a SIPP weren't warranted). And it hadn't given a fair, clear and not misleading overview of the other ways in which such investors could still access commercial property through insured funds.

I appreciate that FN&C will say that the direct offer pack wasn't targeted at investors like Mr C, but rather the high net worth sportspeople it has referred to. But I'll keep in mind that FN&C knew that Mr C saw its pack (and signed to say he had done so) as I go on to consider next what other information FN&C should have known.

What did FN&C know about AJP's involvement and Mr C's investment intentions?
Even though Mr G was no longer authorised I don't find it implausible, as Mr C says, that he continued to give Mr C advice. Not only because of their earlier advisory relationship, but also from what's been preserved of the AJP website either side of the events. Whilst peppered with warnings that AJP wasn't providing advice, it said was an alternative asset broker finding 'investment solutions' for clients and that it recognised *"the importance for an inclusion of alternative 'strategies' to pension and investment portfolios".*

It would have been fairly difficult to find solutions for clients' pensions without giving advice and in any event, I think it's clear from the way AJP referred Mr C to FN&C that it had strayed into advising on the use of a personal pension (which is definitely a specified investment) to make the alternative investments. AJP told FN&C that Mr C preferred to use Rowanmoor because of AJP's 'agreed charges', which is significant for two reasons.

Firstly, rather than simply highlighting that SIPPs could be used to make the alternative investments it was advising Mr C on, AJP had steered Mr C towards one particular provider. In effect it had made the same mistake as FN&C did in bringing a specific SIPP into the scope of its advice. It told FN&C it had 'retained a Rowanmoor application form on file'. So I find Mr C's testimony that AJP had also advised him plausible and persuasive.

Secondly, it shows that from the very beginning FN&C should have been aware that AJP had some sort of agreement with Rowanmoor, and it had every opportunity to enquire further as to what transactions AJP would be carrying out on Mr C's SIPP. I note AJP's website actually said it was *"Continuing to work closely with a 'best of breed' team of industry professionals including niche SIPP and SSAS companies".*

FN&C says it didn't know what Mr C was going to use his SIPP for, or that the investments would be unregulated – but this also doesn't stand up to scrutiny. As a result of the fact find AJP completed, FN&C knew that Mr C was considering *"Directly held, tangible assets such as commercial property, land & commodities"*. A similar note was made on the Rowanmoor application form which AJP had filled in.

Given that Mr C was responding to a direct offer pack focusing on the use of a SIPP for commercial property, that's hardly surprising. And I don't think the target market for this direct offer would be people – usually businesspersons – already with their own commercial property in mind. It was people who, as the pack suggested, were attracted to 'popular investments' including hotel rooms and other property overseas: investments which it should have been fairly obvious were likely to be unregulated by their very nature.

The emails between AJP and FN&C which its solicitor has provided also shed further light on how much FN&C knew about the clients. When reading the following messages I've taken into account that FN&C has since claimed that it originally believed that these clients were going to be high net worth sportspeople and that Mr C was only the second such client, and says it only later realised over time that the clients were not of the background suggested.

In an email from FN&C to Mr G of AJP dated 24 August 2012, FN&C gave updates on a number of other clients' applications which, judging by the many lines of redacted text, are already likely to number more than two. FN&C is free to say otherwise. It culminated with the following admission that many of the clients were investing in 'alternative assets':

> *"Based on the number of cases now in our agency, which are in drawdown, I have asked* [named individual] *to obtain PDFs (where possible) of assets which each client holds. No doubt, she will speak to* [other named individuals] *shortly.*
>
> *In the cases where alternative assets cannot be justified, I would suggest that the client is advised in the first instance and if they still wish to proceed, then, sadly, they will have to find another adviser to facilitate this. However, if they are happy to go down the regulated route, then we would pay AJP a substantial Introducer Fee. I'm afraid, at this stage, I can't think of a better way around it."*

I'm therefore satisfied that FN&C already knew shortly after Mr C was referred to it, and about two months before it submitted his application to Rowanmoor, that a pattern was developing where AJP's clients were proposing to invest in unregulated investments that it was unable to justify (and would have to advise them against making). It is plainly not tenable from the evidence FN&C has presented that it could successfully deny knowledge of this fact until after Mr C's SIPP had been established.

There is then a somewhat prophetic email from FN&C to AJP which its solicitor has quoted from dated 11 January 2013 (I haven't been shown the original, but the first three of Mr C's investments had been made by this point):

> *"Soon, if not already, the FSA will carefully monitor the sale of unregulated assets and the fact that all the transfers that I'm doing end up in unregulated funds could attract unwelcome attention. It is true that I am not involved with the final investment choice but, as the only regulated individual in this process, it is inconceivable that I won't be asked how these introductions came to me and why it didn't raise any concerns with me, should*

there be a problem in the future.

My other concern is that none of the clients that I've looked at so far…should be investing in anything unregulated, based on the information that we've received. They simply don't have sufficient financial wherewithal to understand the full implications of unregulated investment, particularly with regard to risk and any recourse if things go wrong, and I don't wish to be linked to any clients who have not clearly demonstrated that they know what they're doing."

FN&C's solicitor suggests this email was sent in response to FN&C gaining access to Rowanmoor's online portal in July/August 2012, from which it could see that all clients were in unregulated investments. It explains the long time to react by saying that FN&C was waiting for AJP to provide it with prospectuses, in order to determine how risky the investments were. But its email makes no reference to any analysis of the investments. It relates to information it had about the clients – information such as that which AJP had already supplied for Mr C on the fact find.

So, I find the premise of the second email (that FN&C knew there was a serious problem with the introductions) little different to that conveyed in the earlier one of 24 August 2012. And the earlier message looks likely to me to be FN&C's initial reaction to seeing details of the investments on Rowanmoor's online portal.

I say the January 2013 email was prophetic, because on 28 January Rowanmoor then wrote to FN&C alerting it to the FCA Alert on authorised IFAs working with unauthorised introducers. Rowanmoor's letter pointed out that the FCA expected it to "whistle blow" if it saw examples of advice being given only on the pension transfer and not on the investments. FN&C says it took comfort in concluding from this letter that Rowanmoor would place no more unregulated investments at AJP's direct request.

FN&C appears to now be using this as an excuse for why it did not find out what investments Mr C had already made - even though his SIPP had by this point already been in force for about two months, and it admits it had already realised it needed to find this out for all of the investors (including Mr C) previously. That is again a contradiction which makes little sense. And despite the misgivings it had about AJP by this point, from what I can see FN&C sought no further clarification from and gave no prompt instructions to Rowanmoor; made no immediate attempt to remove itself from the SIPP; and made no attempt to contact Mr C to make him aware of its concerns.

It appears that FN&C broke ties with AJP at around the time of an email I haven't seen from 11 March 2013, where AJP apparently indicated it had another authorised firm lined up to process the transfers. As I've explained above, no such firm took agency over Mr C's SIPP before the final two investments were made – and FN&C was wrong to assume (without checking) that this had happened. However, I note that Rowanmoor accepted the instruction for Mr C's final investment (given on 14 May 2013) about three weeks after it changed FN&C's agency on the policy to AJP at Mr C's request – and I'll make allowance for this later in my decision.

I've seen all I need to conclude that on the balance of probabilities, FN&C knew all along that Mr C was likely going to be making unregulated or high risk 'alternative' investments within his SIPP, of the sort that were unlikely to be appropriate for him as a retail investor – and that AJP would be arranging those investments directly with Rowanmoor. With the exception of Physioflexx a small investment about which we have little information), Mr C's other investments were all in commercial property – either in the UK or overseas. This was precisely the sort of investment promoted in the direct offer pack to which he'd responded.

It doesn't matter whether FN&C knew precisely which schemes Mr C was going to be

investing in, although I do think it missed numerous opportunities to find that out (and AJP's own website would have been a giveaway). There appear to have already been more than two clients in Mr C's position by the time it began raising concerns in August 2012, but it took an inexplicably long time to act on those concerns – by which time it had forwarded Mr C's application to Rowanmoor on 22 October 2012, and AJP had been able to make the investments directly with Rowanmoor.

The evidence also suggests it was AJP's *modus operandi* to send FN&C information about the client on a fact find. Indeed I've noted it's possible that FN&C valued this information so that it could have reassurance about the type of clients it was accepting from AJP. It's of more concern, therefore, why it didn't then act on this information more quickly. The fact find showed Mr C worked in maintenance and earned £24,500pa. Other than his own home and a 50% share in an inherited property, Mr C's only other savings were £4,500 in ISAs. A box had been ticked on the form to say that the deferred pensions Mr C was contemplating transferring into a SIPP were *"a significant proportion of my financial wealth with which I do not want to take unnecessary risks".*

FN&C has commented that 43 clients were transferred by AJP into its agency without their prior knowledge and after their SIPPs had already been set up. If that is correct, it is difficult to see how such arrangements could be made without the clients' or FN&C's knowledge. But in any event I can't see that it has any bearing on Mr C's case, because FN&C already knew (and failed to enquire into or rectify) that it had arranged a SIPP for him within which AJP had likely advised Mr C to invest entirely in unregulated assets.

How should FN&C have acted, given what it knew in Mr C's case?

In order to decide the fair and reasonable outcome to this complaint, I've taken into account whether FN&C complied with the FCA's principles and rules – given the wider circumstances of the relationship it entered into with AJP, what it expected to happen through that relationship, and what actually transpired. In my view the most relevant of the Principles for Businesses set out in the PRIN section of the handbook to the complaint are these:

- *Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*
- *Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.*
- *Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly.*

There is also an overlap here with the client's best interests rule at COBS 2.1.1R(1): *A firm must act honestly, fairly and professionally in accordance with the best interests of its client.*

By the time it sent off Mr C's application, and given what I've said above was recorded in the fact find, FN&C ought to have known that he wasn't the type of high net worth sportsperson it was expecting to be introduced by AJP. FN&C received the fact find shortly after 9 August 2012, and we know that by 24 August it knew that there quite a few more people AJP had referred who were in a similar position of not being suited to investing mainly in 'alternative assets'. At this stage I think it's most likely that FN&C continued to contemplate the possibility for a while longer that as a result of the business model it was using, it might not have any liability to Mr C for the suitability of his SIPP or the investments he made within it.

That doesn't change the fact that before it even submitted Mr C's SIPP application, FN&C should have realised that the overseas and/or highly specialised commercial property schemes AJP was in all likelihood going to arrange, weren't going to be suitable for much – if any – of Mr C's portfolio. FN&C should have been mindful that the transfer process could

only be started using the information it had obtained from Mr C's ceding schemes, which AJP as an unauthorised firm might otherwise have found it difficult to obtain.

I think FN&C would have been aware that AJP's submission of Mr C's application had failed, as it was resubmitting the same application some days later. Even though FN&C did actually inform Rowanmoor that it hadn't advised Mr C, there's an obvious mismatch between the layer of comfort Rowanmoor was evidently getting from FN&C's inclusion in the SIPP arrangements and the apparent belief FN&C had, at least initially, that it wouldn't bear any responsibility for the investments Mr C went on to make. I think an adviser acting reasonably in FN&C's position ought to have been much more concerned about the role it was playing; irrespective of whether it was only collecting a net fee of only £800 per case.

This did not add up at all – and it all happened in the context of FN&C being aware AJP had already been discussing the SIPP and/or commercial property investments directly with Mr C, after carrying out fact finding with him that could easily have been consistent with providing advice. Mr C hadn't just responded directly to FN&C's direct offer pack: he expressed an interest in transferring to the SIPP *via AJP*. AJP had clearly been discussing funding a SIPP using Mr C's existing pensions: the only way FN&C knew how to contact Mr C's ceding schemes was as a result of the information collected on the fact find by AJP. FN&C never met or spoke to Mr C.

I think that FN&C might have reasonably suspected, at the very least, that AJP was carrying on the specified activity of *advising on investments* (Article 53 of the Regulated Activities Order) in relation to the SIPP itself - given that its ability to go on to recommend the resulting unregulated investments depended on transfers first being made into the SIPP. It's also very much part of FN&C's arguments in response to the complaint that AJP had advised Mr C.

But even if I'm wrong on that, FN&C should also have considered the prospect that AJP either already was, or would be going on to, carry out the specified activity of *arranging deals* (Article 25(1)) for any assets that would on analysis amount to collective investment schemes or loan notes, as these are types of specified investment. And given its close involvement in co-ordinating Mr C's application for the SIPP – FN&C literally paid AJP for filling in the paperwork – AJP was also at the very least *making arrangements with a view to* Mr C transacting in the SIPP, which is a separately specified activity under at Article 25(2).

AJP wouldn't have been able to rely on any of the exclusions available from the 'making arrangements…' activity, essentially because its referral of Mr C was not a one-off, and it wasn't (at least intentionally or by design) referring Mr C to FN&C for the purpose of Mr C then receiving independent advice. AJP was clearly carrying out its activities by way of business, so to do so without FCA authorisation raised the possibility of significant consumer detriment and in all probability was a legal breach of FSMA – at least in respect of the 'making arrangements…' activity and potentially others.

Separately and alternatively to this, as FN&C admits identifying, its mutual clients with AJP were proceeding to invest a significant proportion of their SIPPs in alternative assets. Its own actions (but taken too late) show that this was contrary to the advice or arrangements that it would expect to be making for many if not all of those retail clients as an FCA authorised firm. So there was obviously also a systemic problem resulting from AJP's involvement.

I think FN&C ought reasonably to have realised – even without communicating a personal recommendation to Mr C – that his intended use of a SIPP to make investments in alternative assets was also highly unlikely to be appropriate for someone in the circumstances which were disclosed to it in the fact find. As I noted above, it should also have been mindful that Mr C had seen a direct offer pack which evidently was targeted at other (more sophisticated or higher net worth) investors.

It seems AJP had already attempted to arrange the SIPP by contacting Rowanmoor itself. Fortunately – or so FN&C should have thought – that application had failed. This meant that in resubmitting the application itself, and failing to highlight to Mr C that he had responded to and been influenced by a direct offer pack that should not have been targeted at him, FN&C was acting contrary to Mr C's best interests.

I don't think FN&C met its obligations to the regulator under Principles 2, 3, or 6 here. If it had conducted its business with due skill, care and diligence and took reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems, it should already have identified that there was a significant risk of consumer detriment in the referrals it was receiving from AJP. In line with that, I think it should also have spotted the clear risks to Mr C of the SIPP application proceeding and, acting in his best interests, declined to proceed.

What would Mr C have done if FN&C had declined to proceed with his application?

I think it would have been incumbent on FN&C, in identifying the significant risk of detriment from AJP's involvement, to set the matter straight and notify Rowanmoor that it was playing no part in the applications. But the earliest I can see it gave instructions to Rowanmoor was in August 2013, after Mr C's five investments had been made. And given how Mr C was already a responder to its direct offer pack, then in observing Principle 6 and COBS 2.1.1R(1) I think FN&C was also obliged to explain to Mr C why it could not go ahead.

This meant FN&C needed to tell Mr C that it had been asked to arrange a SIPP that it had reason to think was going to be used to make investments that could prove to be unsuitable for him. It should have set out that there were rules it had to follow, as an authorised firm, which AJP was not subject to, and what Mr C would lose by continuing to work with AJP – such as being able to complain or access compensation arrangements. I can't see how, after initially offering Mr C the SIPP opportunity and taking him on as a client, FN&C could discharge its obligations to him by doing anything else.

So, I've considered the impact of FN&C giving such an explanation to Mr C. I think Mr C's faith in what Mr G was telling him would have been shaken. He says in his testimony that Mr G hadn't told him he was no longer authorised by the FSA/FCA. On that basis I think Mr C would have been shocked to learn differently. If Mr C is mistaken and he did know that Mr G was no longer authorised, he would most likely have known that was the reason for FN&C's involvement – and yet here the authorised firm (FN&C) was giving him a reason to doubt the course of action he was being encouraged to take. Whichever it is, I don't think Mr C would have dismissed what FN&C was telling him lightly.

As a result it's entirely possible that Mr C's willingness to proceed stopped there and then. But to the extent that I recognise he had a long-standing relationship with Mr G, there would also have been practical difficulties if – on AJP's encouragement – he still wanted to take advantage of the commercial property investments being shown to him. I'm not satisfied that AJP would have been able to find either another IFA or another SIPP provider that was willing to transact on the same basis as the arrangement it had with FN&C.

I've taken into account that a box could be ticked on Rowanmoor's application saying *"I am not appointing an Independent Financial Adviser"*. This suggests that it was theoretically possible, at one point in time, for Rowanmoor to accept applications on that basis. However, I'm not persuaded it would have been possible for AJP to do this at the time of Mr C's application, and/or in order to embark on its particular choice of investments. Rowanmoor seems to have made a point of requesting that the application was resubmitted by FN&C in order to limit its own liability in respect of the investments Mr C might make. That is reinforced by Rowanmoor's request that Mr C appoint a new (authorised) IFA to his plan *after* FN&C was removed.

I don't find it likely on the balance of probabilities that another IFA would have been prepared to contravene the regulator's principles and rules in the way FN&C did. I'm not saying it's impossible, and I note FN&C says AJP believed it had found such an IFA, but I don't find it would have been more likely than not to happen. I would make a similar observation about the likelihood of another SIPP provider being prepared to accept applications directly from an unauthorised introducer. I'll explain why.

FN&C's refusal to get involved would in all likelihood have delayed any SIPP application beyond January 2013 – when the FCA's alert raised concerns about authorised firms' relationships with unauthorised introducers. And in October 2012 the FSA had published its second thematic review into SIPP operators, again raising significant concerns about firms who had accepted business from these introducers directly.

There is no compelling evidence that Mr C was able to make any further investments under another IFA's agency – for the simple reason that four of his investments were actually made whilst FN&C still held agency over the plan. And I think it's likely Rowanmoor was only prepared to make the fifth a few weeks after FN&C lost agency because it was a continuation of that chain of investments. We know a new IFA had not even been appointed to the plan by September 2013, when Mr C then asked to be a direct client of Rowanmoor.

In all of these circumstances I don't see how I could fairly conclude that – more likely than not – AJP would have been successful in finding another SIPP provider or authorised adviser to facilitate these investments for Mr C. From what I can see, Mr C lacked the knowledge or expertise to make these investments unassisted. The insured property funds that he invested in with his previous providers, or the fact he made transfers before, were most likely because he had been advised to do so by an authorised firm (such as Mr G at the time), or alternatively these were generic fund options he was steered towards by the provider itself. I don't think either of these show a predetermination to only seek out investments in property or land assets – and in particular unregulated ones.

Because of this, I don't think it alters the outcome of this complaint that Mr C was prepared to sign high risk disclaimers. I've considered the wording of the letters and they amount to saying that Rowanmoor hadn't assessed the suitability of the investment for Mr C's personal circumstances, or the risks involved. They encourage him to seek legal and other professional advice. What Mr C signed read largely as follows: *'I understand there are risks inherent in the proposed transaction and that Rowanmoor Pensions will not be liable on the basis stated above. However I do not wish to appoint legal advisers in this matter.'*

In my view Mr C's willingness to sign these forms was consistent with the fact he believed he was being advised professionally by AJP. I can't fairly say his decision would have been the same had FN&C warned him that he was being encouraged to take an inappropriate course of action – or even that he would have been able to make those investments anyway, for the reasons I've given above.

FN&C's solicitor says that this service hasn't followed the law on causation. I've taken into account the law but also what I consider to be fair and reasonable, and this is not explained solely by reference to case-law. The approach I've taken is consistent with that which this service generally adopts and shouldn't be unexpected. On balance, I'm persuaded that but for FN&C's shortcomings Mr C wouldn't have gone ahead and started the Rowanmoor SIPP (or another SIPP similar to it) and made the sorts of investments he made. I think he would have most likely remained with his existing personal pension providers.

Other arguments raised by Mr C's representative

The investigator only briefly touched on some further arguments that were raised. Firstly, I don't think the representative's comments about the COBS 10 'Appropriateness' chapter of the regulator's handbook apply in this case. At the time of the events subject to this complaint, COBS 10 was stated to apply (so far as is relevant here) where a firm *'provides investment services… other than making a personal recommendation and managing investments'*; or where it arranges derivatives or warrants in response to direct offer promotions.

Although FN&C didn't make a personal recommendation or manage funds for Mr C, its advice on the SIPP also didn't meet the regulator's definition of 'investment service'. This is essentially one of a number of prescribed services involving a 'financial instrument', which in turn were defined in the relevant EU Directive on Markets in Financial Instruments ("MiFID"). They cover a range of specific securities and other investments that can be traded, but not a personal pension wrapper itself. And FN&C didn't arrange anything other than the SIPP in this case, so it hasn't arranged derivatives or warrants for Mr C either.

The investigator invited FN&C's solicitor to respond to his comments about s.27 of FSMA. It has not done so. As I'm satisfied that there are adequate grounds for Mr C's complaint to be upheld without reference to s.27 of FSMA, I am not going to spend further time commenting on that here.

I also set out how I proposed this complaint should be redressed in my Provisional Decision, which I'll come to again later. But essentially, I said that it could exclude the fifth (Akbuk Resort Group) investment from the redress it paid.

Responses to my Provisional Decision

Mr C confirmed that he accepted the Provisional Decision. In summary, FN&C's adviser wanted the following points to be noted:

- He categorically *didn't* know that Mr C was going to be making unregulated or high risk investments in his SIPP. So, it was impossible for him to prevent something that to his knowledge hadn't happened.
- He *did* know that AJP *"was going to be advising/coercing/encouraging* [Mr C] *to make these types of investment but* [Mr C] *couldn't make these types of investment without going through me to do them."*
- He reiterated a point which I already thought was incorrect – that Mr C had already signed 'unregulated investment forms' prior to making the SIPP transfer.
- It was 11 February 2013 (not 11 March) when AJP informed FN&C it had lined up a different IFA to take over agency on the SIPPs. *"There was no reason for me to question this, as he needed an IFA to peddle his unregulated investments."*
- As a result, FN&C shouldn't be held responsible for the fourth (Physioflexx) investment.
- I should confirm what has happened between Mr C and FSCS in respect of Rowanmoor's role in this affair. Mr C has a duty to mitigate his loss and the likely outcome of a 'provider due diligence' complaint would achieve this.
- Rowanmoor should have rejected Mr C's application to take out the SIPP.
- This and another similar complaint has caused him, his family and staff significant stress and upset over the last six years, at a time when there was illness in his family. As a small firm he feels *"bullied and persecuted"* rather than the necessary level of care taken in exercising our powers.
- His errors *"pale into insignificance"* compared to the deliberate misconduct by other parties and we should not question his honesty and integrity when we have never met him.

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.

Whilst I recognise this will be very disappointing for FN&C and its adviser, I haven't been persuaded to revise my provisional findings. Before I explain why, I'd also like to say I appreciate the time they have taken to highlight their concerns with the outcome and the process used to reach it – and I will also address those concerns first.

As a dispute resolution service, we are always mindful of the people at the end of our decisions – be they consumers or individuals running a small firm – and the impact of our decisions on those individuals. However, the adviser in this case is not the only person who will say they were caused great upset which, in my view, could have entirely been avoided if FN&C had not facilitated the arrangements with AJP: arrangements which I questioned on a number of levels in my Provisional Decision.

The adviser observes that I haven't met him. It is not my intention to question his honesty or integrity on a personal level but to refer to the regulatory standards that his firm (FN&C) was bound to adhere to. When referring to personal contact it's also worth noting here that a key part of my reasoning was that FN&C should itself have had direct contact with Mr C to explain the concerns it admits having about AJP's actions. It should have cautioned him about the risks he would be taking if he proceeded with investments it admits knowing were highly likely to be unsuitable for investors like him.

The reason FN&C gives for its adviser not taking those steps is essentially an assumption that AJP and Rowanmoor would be 'stuck' without its cooperation. In my view that falls significantly short of demonstrating that FN&C complied with the regulator's principles and rules to act in Mr C's best interests. It conveniently allowed it to avoid cautioning Mr C at all about the inappropriate course of action he was likely to be taking. And I accept this has now come at considerable cost to FN&C, because it has exposed FN&C to the losses I proposed it should compensate in my Provisional Decision. But those losses flow directly from FN&C's failure to follow regulatory rules and guidance, which is what I'm considering here.

FN&C says that I should acknowledge the role AJP and Rowanmoor played in those losses – I expect it wishes me to only make it pay at most a proportion of them. And it appears to be concerned that Mr C will obtain compensation from FSCS in respect of Rowanmoor's involvement, in addition to the compensation I'm requiring it to pay, with the possibility that these may overlap.

I do understand the adviser's concerns on this point – it obviously isn't particularly 'neat' that some complaints fall to be considered by FSCS on account of the firms being in liquidation. But that is an aspect of the regulatory landscape that I cannot control. AJP has in any event been dissolved and it's not clear as a result whether Mr C could have been successful in obtaining compensation from that firm. It also wasn't bound by the rules and guidance FN&C was, which means it is reasonable to expect FN&C to compensate Mr C for investments facilitated by AJP that it was in a position to prevent.

And concerning the point about Mr C's duty to mitigate his loss, I'm not aware that the law requires him to take action against *every party* that might have caused him loss if, in fact, he believes one party alone could have prevented those losses. He might choose to complain to others to maximise his chances of recovering compensation, and that might indeed be necessary in this case in respect of at least the fifth investment which I'll explain more about below. But ultimately, that's a matter for him - and it's a matter for FSCS and not this service if it decides to pay further compensation following the award I make.

I'm not satisfied the points being made here are issues that relate to Mr C's duty to mitigate his loss going forward. That's a different question, and it should be noted there that it's somewhat difficult for Mr C to mitigate a loss where investments remain illiquid and he cannot access them. I also have difficulty with FN&C's argument that Rowanmoor shouldn't have established the SIPP at all, given that it was arranged by an FCA-authorised adviser (FN&C) in circumstances where FN&C admits it already had misgivings about the involvement of an unregulated third party. I don't think this argument assists FN&C.

I said in my Provisional Decision that I had seen the 'unregulated investment forms' which had been signed *before* Mr C's application for the SIPP was submitted by FN&C. The dates of those forms are given in the background section above. I don't therefore know why FN&C has persisted with this point. If it's referring to a different form than the Rowanmoor 'high risk declaration' I'm referring to – perhaps some sort of reservation form for the investments themselves – it hasn't provided any evidence of these for me to comment on. In any event, if no funds had been received in the SIPP, or Mr C had been deterred (by FN&C engaging properly with him) from making the investments, I'm satisfied on balance they wouldn't have happened.

Putting things right

In assessing what would be fair compensation, my aim is to put Mr C as close as possible to the position he would probably now be in, if FN&C had treated him fairly. On the balance of probabilities I'm persuaded that Mr C would have remained in his previous pension plans, instead of transferring to the Rowanmoor SIPP.

On the matter of the fourth (Physioflexx) investment, FN&C suggested it only realised later on that Rowanmoor had still been prepared to make investments after the FCA issued its Alert on unregulated introducers. It now adds that AJP informed it that it had lined up a different IFA to take over agency on the SIPPs a month earlier than I said in the Provisional Decision. But that hasn't changed my view. It must have strongly suspected – and did nothing to dispel the probability – that Rowanmoor had already 'gone behind its back' as the authorised firm in accepting investment instructions directly from AJP *before* January 2013.

Given that FN&C sought no further clarification from Rowanmoor following its January 2013 letter about the FCA alert, that doesn't in my view provide sufficient comfort that Rowanmoor wouldn't continue to do the same. So I don't think it would be appropriate to make any reduction to redress in respect of the fourth investment.

Regarding the fifth (Akbuk) investment, I've taken into account that FN&C agreed at the outset to take an ongoing fee of £200pa – it informed Mr C in writing this was to deal *"with the administration of the plan initially and in future years"*. That provides another reason why it should have found out what investments were being made. However the fifth investment was made after Mr C himself removed FN&C as agent from the SIPP, and I'm satisfied that makes a material difference. From this point Mr C now couldn't have expected FN&C to have any administrative or other responsibility for the fifth investment. And it's usually the case that a SIPP provider will also notify the agent that they've been removed from the SIPP. That would also give FN&C an expectation that it no longer had a future responsibility.

This investment couldn't have been arranged if FN&C hadn't allowed the SIPP to be set up. However, I don't think it would be fair to base compensation in respect of the fifth investment on a simple 'but for' test in the particular circumstances here. I think a reasonable point for FN&C to cease to have any responsibility for ongoing investments is when Mr C removed FN&C as agent from his SIPP.

My Provisional Decision discussed the debenture Rowanmoor held over AJP. I said I had already concluded that it should have been obvious to FN&C that AJP was closely involved with Rowanmoor before it sent off Mr C's SIPP application. So, I didn't think this evidence changed the fact that Mr C's losses on the first four investments could all have been avoided by FN&C acting prudently and in Mr C's best interests.

I think it's important to point out that I'm not saying FN&C is wholly responsible for the losses simply because Rowanmoor has defaulted to FSCS. My starting point as to causation is that FN&C inappropriately arranged a SIPP and failed to caution Mr C against getting involved with AJP. So it is responsible for the losses Mr C suffered in transferring to the SIPP and investing as he did.

That isn't, to my mind, wrong in law or irrational – but reflects the facts of the case and my view of the fair and reasonable position. FN&C could have prevented the transfer and the investments. Instead its actions allowed them to be facilitated and it failed to make Mr C aware of the likely risks he would be exposed to from the investments AJP was known to be arranging. Because of all the findings I've reached it is, in my view, fair and reasonable that FN&C should account to him for the full extent of his losses on investments one to four.

It isn't possible to say precisely where Mr C would have invested, had he not invested his three pensions into the Rowanmoor SIPP and not made the first four investments. But I'm satisfied that what I've set out below is fair and reasonable given Mr C's circumstances and objectives when he invested.

To compensate Mr C fairly Feast Noble & Company LLP must therefore:

- Compare the performance of Mr C's Rowanmoor SIPP with that of the benchmark shown below. If the fair value is greater than the actual value, there is a loss and compensation is payable. If the actual value is greater than the fair value, no compensation is payable.

- If there is a loss, make sufficient payment into Mr C's pension plan to increase its value by the amount of the compensation and any interest. Its payment should allow for the effect of charges and any available tax relief. FN&C shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.

- If FN&C is unable to pay the compensation into Mr C'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.

- The notional allowance should be calculated using Mr C's expected marginal rate of tax whilst he is drawing his pension benefits. I consider it likely Mr C will be a basic rate taxpayer in retirement, so this reduction would equal the current basic rate of tax. However, as Mr C would have been able to take a tax free lump sum from his SIPP, the reduction should be applied to 75% of the compensation – meaning a reduction of 15% overall.

- Pay Mr C £300 for the distress and inconvenience he has suffered as a result of FN&C's failure to treat him fairly and act in his best interests, leading to the loss of the majority of his pension benefits.

- Provide the details of the calculation to Mr C in a clear, simple format.

investment name	status	Benchmark	From ("start date"	To ("end date")	Further interest
SIPP (excluding Akbuk Resort Group investment)	still exists	FTSE UK Private Investors Income Total Return Index	date of each transfer respectively	date of this Final Decision	8% per annum simple if not settled within 28 days of receipt of Mr C's acceptance of the Final Decision

Actual value

This means the actual transfer value of the whole SIPP including any proceeds of the fifth investment in Akbuk Resort Group (Harmony Bay) at the end date. (I've set out under the next heading what adjustments can be made to the fair value to ensure the investment into, and income from, the fifth investment can be excluded from the calculation.)

In respect of the investments still held in the SIPP that haven't been closed down and are illiquid (meaning they cannot be readily sold on the open market), it may be difficult to find their actual value. So, the value of any such investment(s) should be assumed to be nil when arriving at the actual value of the SIPP. FN&C should take ownership of any such illiquid investment(s) – other than Akbuk Resort Group – by paying a commercial value acceptable to the SIPP provider. This amount should be deducted from the compensation before adjustment for tax, and the balance paid as above.

If FN&C is unable to purchase the investment(s) their value should be assumed to be nil for the purposes of calculation. It may wish to require that Mr C provides an undertaking to repay it any amount he may receive from those investment(s) in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. FN&C will need to meet any costs in drawing up the undertaking.

Fair value

This is what the sums transferred to the SIPP would have been worth at the end date had they grown in line with the benchmark.

The gross amounts of any withdrawal, income or other distribution paid **out of** the SIPP to Mr C directly should be deducted from the fair value at the point(s) they were actually paid so they cease to accrue any return in the calculation from that point on. Other than what I set out specifically below, this does not apply to distributions retained **within** the SIPP, as this will be accounted for (after charges) in the SIPP's actual value.

In order to remove the investment in Akbuk Resort Group (Harmony Bay) from the calculation, a **deduction** of £15,850 (the investment amount) should be made from the fair value on 31 May 2013. **Additions** should also be made to the fair value for the following known distributions made from Harmony Bay into the SIPP (FN&C should check there were no more distributions or a final payment from Harmony Bay as these would also need to be added from the dates they were paid):

06/09/2013	£154.00	02/12/2014	£158.00
29/11/2013	£154.00	03/03/2015	£308.00
11/03/2014	£ 16.50	02/06/2015	£308.00
06/06/2014	£154.00	01/09/2015	£308.00
08/09/2014	£308.00	14/12/2015	£158.00

[no further income until at least 1 September 2017]

I recognise that there are potentially more accurate ways of allowing for the investment in Harmony Bay, but there is no guarantee that Rowanmoor would have been able to provide a notional value excluding this investment even before it went into administration. As such, I consider this to be the most appropriate method of arriving at fair compensation.

To the extent that the SIPP continues to exist because of investments that are illiquid (with the exception of the Harmony Bay investment if that remains illiquid), those investments need to be removed from the SIPP. I've set out above how this might be achieved by FN&C taking over the investments, or this is something that Mr C can discuss with Rowanmoor's successor directly. But I don't know how long that will take.

Third parties are involved and we don't have the power to tell them what to do. To provide certainty to all parties, I think it's fair that FN&C also pays Mr C an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees) - if the SIPP cannot be closed due to illiquid investments other than the fifth investment in Harmony Bay. This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

Why is this remedy suitable?

I've chosen this method of compensation because:

- From the information collected on AJP's fact find, Mr C wanted capital growth and was willing to accept some investment risk.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr C's circumstances and risk attitude.

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

My final decision

I uphold Mr C's complaint and require Feast Noble & Company LLP to pay him compensation as set out above.

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

Gideon Moore
Ombudsman