DRN-4305956

The complaint

Mr M is represented. He says Apollo Pension & Investment Advisers ('Apollo') is responsible for the unsuitable partial pension transfer – from his Scottish Widows Personal Pension ('SWPP') to a James Hay ('JH') Self-Invested Personal Pension ('SIPP') – it recommended in October 2013, and for the unsuitable unregulated German Property Group ('GPG')/Dolphin Capital ('DC') loan note investment made thereafter.

What happened

Apollo initially considered the complaint to be out of time. One of our investigators looked into this and concluded otherwise.

She referred to the regulator's rules on our jurisdiction, specifically the time limits for complaint referrals to us. She applied them to the facts, mainly to the following – the advice event taking place in October 2013; the loan note's due (or maturity) date on 20 February 2019 (which Apollo said was the start of the three years-time limit); JH's letter to Mr M in May 2019 declaring that the loan note was in default; Apollo's letter to him in July 2019 assuring him that DC will pay the full returns promised for his investment; and his complaint in March 2022.

The investigator concluded that the three years time limit, beginning from when Mr M knew or ought reasonably to have known of cause for complaint, began from JH's letter to him in May 2019, as that letter ought to have alerted him to a problem with his investment. On this basis, she concluded that his complaint in March 2022 was within the three years time limit and that we have jurisdiction to address it.

With regards to the complaint's merits, she mainly found as follows:

- Mr M's objective at the time of advice was recorded as being to review the SWPP and explore diversification of his investments into areas other than conventional equities. Fact find documentation recorded the SIPP's £117,500 value (including a protected rights component worth £71,500) and his low to medium risk profile.

- Apollo's suitability report recommended transfer of the protected rights component only, which is what happened thereafter. The report did not recommend a post-transfer investment, but there is evidence showing Apollo's introduction of Mr M to an unregulated third-party firm owned by Apollo's principal. In November 2013 Apollo wrote to JH declaring his intention to invest in the Dolphin Capital Scheme, and in February 2014 the loan note was invested in (on a five years term, with maturity on 20 February 2019).

- Apollo says the recommendation was made in order to give Mr M flexibility, but it has not demonstrated what flexibility he wanted or why he wanted to consider other types of investments.

- He had premium protection in the SWPP, which was one of the reasons he sought to retain it and did not want a full transfer. This suggests he was happy with the SWPP.

- It appears that the transfer was recommended mainly to facilitate a riskier/non-mainstream investment approach, but there is no evidence that Mr M had a history of making such investments. It also appears that the transfer and the SIPP arrangement were more expensive for him than the SWPP arrangement.

- Based on the regulator's requirements of firms at the time, with regards to pension transfers and underlying investments in unregulated products, and mindful of associated alerts it issued in 2013 and 2014 Apollo was obliged to ensure the overall transfer transaction (inclusive of subsequent investment of the SIPP) was suitable. Evidence shows it was aware the loan note investment plan, and it had a regulatory responsibility to ensure the investment was suitable for Mr M.

- The high-risk loan note investment was not suitable for him because it mismatched his low to medium risk profile and investment inexperience.

- Overall, both the transfer and the loan note investment were unsuitable for Mr M. His complaint should be upheld, he should receive redress for financial loss and £300 for the distress the matter has caused him.

Apollo disagreed with this outcome. It said it had found additional evidence that the complaint is out of time. With regards to merits, it said the investigator's findings were one-sided, biased and lacking in treatment of relevant evidence. It asserted that the investigator wrongly failed to address important risk warnings given to Mr M by the third-party firm and by JH; that she did not address the absence of a complaint from him during the investment term (and even thereafter); that there had been returns of 93.4% to investors, many investors benefitted from large maturity values and the investment was suitable for them; and that it is unreasonable to expect Apollo to foresee and advise on, with certainty, how the investment would perform.

The matter was referred to an Ombudsman.

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.

Jurisdiction

This has already been addressed by the investigator, as I summarised above. Until recently, Apollo appeared to have accepted her reasoned findings that the complaint is in time and is within our jurisdiction. For the sake of completeness, I have considered the matter. I echo and endorse her finding, for the same reasons she gave.

It is unclear why Apollo says it has now found additional evidence that shows the complaint is out of time – that is, outside the three years time limit. The time limit begins from when Mr M knew or ought reasonably to have known that he had cause for complaint. Like the investigator said, this point (when he knew or ought reasonably to have known of such cause) existed when he received JH's notice in May 2019 declaring a default in the loan note investment. That declaration was indeed the first notice he had that something had gone wrong with the investment, so it was the earliest that he knew or ought reasonably to have known of cause for complaint about the investment (and the pension transfer that led to it).

Mr M's complaint in March 2022 was made within three years of the May 2019 communication. If, as Apollo now says, it can be shown that his complaint is out of time, it must be shown that his awareness of cause for complaint was or ought reasonably to have been earlier than May 2019, and earlier than March 2019 (three years before the complaint).

Apollo submitted three documents. One is a copy of a letter to investors from GPG dated 4 November 2019. Next, is a copy of a status report for GPG dated 20 December 2019. Then there is a copy of another GPG letter to investors dated 28 January 2020.

None of these letters pre-date May or March 2019. None of them stand as evidence of notice to and/or awareness by Mr M of cause for complaint prior to May or March 2019. We have already established that the default declaration in May 2019 was the first point at which he knew or ought reasonably to have known of cause for complaint. Therefore, reference to subsequent correspondence does not assist Apollo's dispute.

For all the above reasons, I am satisfied the complaint is in time, that we have jurisdiction to address it and that Apollo's recent dispute is unsupported by the evidence it has presented.

<u>*Merit*</u>

SWPP to JH SIPP Partial Transfer

Overall and on balance, I consider that Apollo's recommendation of the partial pension transfer was unsuitable, and available evidence suggests that it was not something Mr M had sought. Furthermore, for the reasons given below, the transfer appears to have been devoid of a credible purpose. These findings support the conclusion that suitable advice to Mr M at the time would probably have been to retain the SWPP arrangement as it was (in the absence of a good reason to change it).

Apollo wrote to JH on 4 October 2013 to confirm submission of Mr M's SIPP application and to summarise the partial transfer. That happened before 11 October 2013, when Apollo issued Mr M with its suitability letter, so it seems the transfer had been executed before he had a chance to consider the details of advice.

Apollo then wrote again to JH on 18 November 2013, saying Mr M intended to invest in the DC loan note. However, it played no role in recommending the investment – the third-party firm did that – and its letter to him on 22 October 2013 had said it "… *does not recommend specific alternative investments …*". The loan note was an alternative investment, so Apollo appears to have played a role in arranging, for Mr M, the type of investment it previously said it *does not recommend*.

On 11 November 2013 Mr M had signed an agreement with the third-party firm instructing the DC loan note investment. As the investigator said, this firm was owned by Apollo's principal. Apollo introduced Mr M to this firm, and its letter to him of 22 October declared its principal's potential conflict of interest in the introduction. The third-party firm then appears to have advised the loan note investment.

The loan note investment happened on 20 February 2014, and it used £25,000 of the partial transfer value (which was around £71,000). On 27 March 2015 Apollo wrote to Mr M to address investment of the remainder. The letter said almost £45,000 had been held in cash, in the SIPP, since the partial transfer and it proceeded to recommend how this cash holding should be invested.

All the above support the conclusions that follow.

The partial transfer was seemingly rushed. It was executed a week *before* Apollo's suitability report was issued to Mr M. There is no evidence of an interim form of advice during this week, so he does not appear to have had any opportunity to properly consider the details of Apollo's advice prior to the advice being executed.

The suitability report says Apollo's recommendation responded to Mr M's desire to review the SWPP, to consider investment diversification and to consider diversification into unconventional – or alternative – assets. Yet, the report's recommendation made no mention of any diversification ideas (or advice) and no mention of unconventional/alternative investment ideas (or advice). Less than three weeks later, Apollo informed Mr M that it does not recommend alternative investments.

This calls into question the notion that Mr M sought unconventional/alternative investments. As the investigator noted, nothing says he had previous experience of such investments. There is also no evidence that he asked for them.

It is more likely (than not) that the idea of such investments was Apollo's consideration, and that it refrained from advising further on them because it was mindful of the third-party firm introduction that it intended to present afterwards (for that purpose). The connection between Apollo's principal (who advised Mr M on the transfer) and the unregulated third-party firm is undisputed. He ran both firms. In the present case, he used Apollo for the transfer recommendation and used the third-party firm for the unregulated loan note recommendation. He probably did both in order for the former to serve, and set up, the latter. For these reasons, the idea of an objective for alternative investments was probably initiated and/or emphasised by him.

Overall and on balance, I am not persuaded that Mr M's objective included the pursuit of unconventional/alternative investments.

Apollo gave no advice on investment diversification in the suitability report. Allocation of £25,000 for the loan note investment happened promptly after the report. However, it did not advise on investing the majority remainder of the transfer value until 17 months after the suitability report. The report said the SWPP was in cash, but nothing in it said or suggested that a delayed post-transfer reinvestment was planned. Instead, the report said investment decisions were to be made as soon as the transfer was completed. The loan note investment decision was made by 11 November 2013. However, no such decision was made for the remainder, and majority, of the SIPP's cash until March 2015.

Overall and on balance, I am not persuaded that the report's claim about diversifying Mr M's pension investments was meaningful. It could not have been meaningful because Apollo did not advise on it in the report, or upon completion of the transfer. It did not advise on it until 17 months after the report.

The report presents no analysis of the SWPP, yet it says Mr M's objective was to review it. There is no consideration of the facilities available in the SWPP and the report does not even provide a costs/benefits comparison between the SWPP and the SIPP it was recommending. Its contents acknowledge that there ought to have been such a comparison, but Apollo justified not doing so as follows –

"*We often will conduct a comparison between the benefits and cost of your current plan and that of any proposed new plan. In this case it has not been possible to provide a true comparison since both providers assume different growth rates in their projects and much depends upon the cost of underlying assets in your fund of course. Unless both plans assume the same funds, hence the same underlying charges (not possible). only then can a comparison be made. If both plans could do that, then there would be no point in transferring part of your plan in any event! However given that SIPPs charge flat fees and the adviser charges are also flat fees, there is arguably less need to rely on comparisons since it is* *accepted that fiat fees worth better for investors*."

This explanation lacks merit. Firms routinely present costs comparisons in their pension transfer/switch advice, and there is a regulatory expectation upon them to do so. Circumstances in 2013 were no different. The regulator's checklist (published in 2009) for pension switching highlighted four key issues it expected firms to focus on in the course of advising a transfer/switch. One of those issues was 'charges', and firms were expected to consider whether (or not) the consumer was being advised to switch to a pension that is more expensive than her/his existing pension without good reason. Hence firms' use of, and advise on, costs comparisons. If Apollo was properly engaged in reviewing the SWPP it would have conducted such a comparison, but it did not.

Overall and on balance, I do not consider that Apollo reviewed the SWPP, and it appears that it made no effort to do so.

Based on all the above, it is doubtful that Apollo's advice was led by any objectives Mr M had. The same applies to what the report seems to present as an objective for 'flexibility'. Like the investigator said, Apollo has not demonstrated the sort of flexibility Mr M allegedly sought. Apollo's report advised on none of the stated objectives. None of them were connected to what appears to have been either its isolated pension transfer recommendation or, as seems more likely, its pension transfer recommendation designed to facilitate the third-party firm's introduction thereafter and then that firm's recommendation of the unregulated loan note investment.

The conclusion that naturally follows, from the above, is that there was no good reason to recommend the transfer to Mr M. Apollo's transfer advice was unsuitable. There is no evidence that he was insistent on a transfer or on a change from the SWPP. As such, it is more likely (than not) that without Apollo's unsuitable advice he would have retained and continued with the SWPP. If he proceeded to reinvest the SWPP's cash, the Fact Find document says the SWPP was previously invested before he moved it to cash, so I am persuaded that he probably would have reinvested – based on his default low to medium risk profile – within the SWPP.

DC Loan Note Investment

This would not have happened but for the unsuitable pension transfer. In other words, it is not necessary to make a finding on whether (or not) this investment was suitable for Mr M. The investment was not his idea and he does not appear to have been aware of it prior to the third-party firm's recommendation, so there is no basis to say he would have made the same investment in the SWPP. The damage was caused at the point of the unsuitable pension transfer, so all that followed would have been avoided but for the transfer.

Having said the above, it is somewhat evident that the investment mismatched Mr M's default risk profile and investment experience (or inexperience), and it could be helpful to comment on this. The suitability report confirmed that the SWPP was in cash and Apollo's subsequent letter to Mr M confirmed that it would not recommend alternative investments. It therefore seems safe to conclude that it was a considerable leap for him to go from risk-free cash to a high-risk unregulated loan note investment; and that Apollo probably knew that recommendation of alternative investments would be unsuitable for him.

The investment went against his risk profile and there is no evidence of him having any previous investment experience that could have supported his understanding of it. Furthermore, and as I address below, risk warnings made no difference to the matter of suitability. They served the purpose of giving Mr M information about associated risks, but that does not automatically mean he understood the information and it certainly does not mean the warnings (alone) made the investment suitable.

The pension transfer was unsuitable, and so was the associated loan note investment.

Apollo's Rebuttal

I address Apollo's comments on the investigator's view as follows:

- I have not seen evidence of the bias it alleges. In any case, I have reviewed the case afresh and independently, and I have reached the conclusions set out above and below.

- Apollo's point about risk warnings seems misguided. It refers to risk warnings which were only about the *investment*, not about the pension transfer. However, it did not advise on the investment. As such, the warnings and the point it makes about them are irrelevant to its responsibility for the unsuitable pension transfer recommendation. Even if the warnings were relevant to Apollo, as I said above risk warnings (alone) do not define suitability of an investment. The advising firm's obligation is to assess suitability for its client and to make suitable investment recommendations. Disclosure of associated risks forms part of that, but primarily the suitability of exposure to those risks (and the other key aspects of an investment) must be assessed and advised on.

- The timing of the complaint is irrelevant to the suitability (or otherwise) of advice to Mr M in 2013. The same applies to how others might have experienced the loan note investment – that too is irrelevant to the consideration of suitability for Mr M in 2013. Furthermore, the alleged experiences are only about the loan note investment, so they are also irrelevant to the suitability of Apollo's pension transfer advice.

- Apollo says it is unreasonable to expect that it could foresee, with certainty, the investment's outcome. It does not appear that the investigator said or suggested there is such an expectation.

  However, Apollo knew Mr M had received advice from the third-party firm to invest in the loan note and it knew that, based on that advice, he intended to do so. It wrote to JH to convey that intention. With this knowledge and with knowledge of Mr M's default low to medium risk profile and relative investment inexperience, it would have known that an unregulated high-risk loan note investment was probably a mismatch for him and was unsuitable for him. It is this matter of unsuitability that it knew of (or ought reasonably to have known of) and was obliged to attend to – not the matter of forecasting precisely how the investment will end.

  The regulator's Principles for Businesses, at Principle 6, requires a firm to pay due regard to the interests of its customers and treat them fairly. This is partly echoed in the regulator's Conduct of Business ('COBS') rules, at COBS 2.1.1R, which requires a firm to act honestly, fairly and professionally in accordance with the best interests of its clients. These regulatory provisions are directly relevant to a firm's responsibility for the suitability of its recommendations. Furthermore, the regulator issued an alert in 2013 warning firms against recommending pension transfers/switches without assessing the suitability of the investment(s) that were likely to be held within the new pension. This message was repeated and developed in another regulatory alert in 2014.

  Apollo's obligation to address suitability of the loan note investment arose from the facts – that is, its principal's role in advising both the pension transfer and the investment, and therefore its awareness of both – and it arose in the regulatory context summarised above. In failing to address the unsuitability of the loan note investment and advise against it, Apollo did not discharge that obligation and it did not uphold Mr M's best interest.

Putting things right

Fair compensation

My aim is that Mr M should be put as closely as possible into the position he would probably now be in if he had been given suitable advice.

I take the view that Mr M would have remained with his previous provider. The investigator referred to using the SWPP's notional value had the transfer not happened, to benchmark redress. I agree, but I also cannot be certain that a value will be obtainable for what the SWPP would now be worth but for the transfer. Its cash would probably have been reinvested after the point of advice.

However, I am satisfied that what I have set out below, including provision for an alternative benchmark if the SWPP's notional value cannot be calculated, is fair and reasonable, given Mr M's profile at the time of advice.

What must Apollo do?

To compensate Mr M fairly, Apollo must:

- Compare the performance of Mr M's investment with the notional value if it had remained with the previous provider. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.

- Pay into Mr M's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If Apollo is unable to pay the total amount into Mr M'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 total amount 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 is not a payment of tax to HMRC, so Mr M would not be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Mr M's actual or expected marginal rate of tax at his selected retirement age.

- It is reasonable to assume that Mr M is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr M 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%.

- Pay to Mr M £300 for the distress the matter has caused him. This is a reasonable amount to reflect the trouble he has faced in being led into an unsuitable pension transfer and an unsuitable investment thereafter.

- Provide Mr M with a calculation of redress in a clear and simple format.

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

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
SIPP Portfolio	Still exists but illiquid	Notional value from previous provider; or alternative benchmark stated below.	Date of investment	Date of settlement	Not Applicable

Actual value

This means the actual amount payable from the investment at the end date.

It may be difficult to find the *actual value* of the SIPP portfolio. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case. Apollo should take ownership of any illiquid assets by paying a commercial value acceptable to the pension provider. The amount Apollo pays should be included in the actual value before compensation is calculated.

If Apollo is unable to purchase illiquid assets, their value should be assumed to be nil for the purpose of calculating the *actual value*. Apollo may require that Mr M provides an undertaking to pay it any amount he may receive from the illiquid assets in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Apollo will need to meet any costs in drawing up the undertaking.

Notional [Fair] Value

This is the value of Mr M's investment, based on his low to medium risk profile, had it remained with the previous provider until the end date. Apollo should request that the previous provider calculate this value based on how the SWPP would have performed on a low to medium risk profile between the start and end dates.

Any withdrawal from the SIPP should be deducted from the notional value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Apollo totals all those payments and deducts that figure at the end to determine the notional value instead of deducting periodically.

If the previous provider is unable to calculate a notional value for the SWPP, Apollo will need to determine a fair value for Mr M's investment instead, using this alternative benchmark (applying the same adjustments stated above):

- For half the investment, the FTSE UK Private Investors Income Total Return Index;
- For the other half, the average rate from fixed rate bonds.

The SIPP only exists because of illiquid assets. In order for the SIPP to be closed and further fees that are charged to be prevented, those assets need to be removed. I have set out above how this might be achieved by Apollo taking over the illiquid assets. Alternatively, this is something that Mr M can discuss with the provider directly. But I do not know how long that will take.

Third parties are involved and we do not have the power to tell them what to do. If Apollo is unable to purchase the illiquid assets, to provide certainty to all parties it is fair that it pays Mr M an upfront lump sum equivalent to five years' worth of wrapper fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

Why is this remedy suitable?

- If the previous provider is unable to calculate a notional value, then I consider the measure below is appropriate.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.

- 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.

- I consider that Mr M's low to medium risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. The 50/50 combination would reasonably put Mr M into that position. It does not mean that Mr M would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return he could have obtained from investments suited to his objective and risk attitude.

compensation limit

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, £160,000, £350,000, £355,000, £375,000 or £415,000 (depending on when the complaint event occurred and when the complaint was referred to us) plus any interest that I consider appropriate. If fair compensation exceeds the compensation limit the respondent firm may be asked to pay the balance. Payment of such balance is not part of my determination or award. It is not binding on the respondent firm and it is unlikely that a complainant can accept my decision and go to court to ask for such balance. A complainant may therefore want to consider getting independent legal advice in this respect before deciding whether to accept the decision.

In Mr M's case, the complaint event occurred before 1 April 2019 and the complaint was referred to us after 1 April 2020 but before 1 April 2022, so the applicable compensation limit would be £160,000.

decision and award

I uphold Mr M's complaint on the basis stated above. Fair compensation should be calculated as I have also stated above. My decision is that Apollo should pay him the amount produced by that calculation, up to the relevant maximum.

recommendation

If the amount produced by the calculation of fair compensation is more than the relevant maximum, I recommend that Apollo pays Mr M the balance. This recommendation is not part of my determination or award. Apollo does not have to do what I recommend.

My final decision

For the reasons given above, I uphold Mr M's complaint. I order Apollo Pension & Investment Advisers to calculate and pay him redress (and compensation for distress) as set out above, and to provide him with a calculation of redress in a clear and simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 17 October 2023.

Roy Kuku
Ombudsman