

The complaint

Mr H says J M Finn & Co Ltd (trading as JM Finn) wrongly left his Self-Invested Personal Pension ('SIPP') unmanaged during transfer (of the SIPP) to a new firm.

JM Finn disputes the complaint. It mainly says Mr H's transfer instructions amounted to termination of its discretionary management service to the SIPP; that under the agreed terms of service, a client's notice of termination has immediate effect; that for this reason it stopped managing the SIPP upon receipt of his termination notice; and that it has no responsibility for the delay in completing the SIPP transfer.

What happened

I issued a Provisional Decision ('PD') for this case on 14 March 2024, in which I upheld it.

The background summarised in the PD was mainly as follows –

"Mr H was a longstanding client of JM Finn. Around 2004, he says, he appointed JM Finn to manage his SIPP on a discretionary basis. In his complaint, he explains that the individual manager that looked after his SIPP left the firm around 2021 and, around 2022, that manager joined Church House Investments Limited ('CHIL'). For this reason, and because the manager agreed to continue with the SIPP, he says he decided to move it to CHIL. His SIPP is provided by Curtis Banks.

CHIL wrote to JM Finn on 8 November 2022. The letter said Mr H had "... appointed Church House Investment Management as his financial advisors and [granted] authority for Church House Investment Management to request information ..." about the SIPP. The list of information requested included "A full transfer and discharge pack". The letter attached his signed and dated letter of authority in which he reconfirmed CHIL's appointment as his financial adviser.

On 11 November 2022 JM Finn sent an email to Mr H that included – "We recently received a request from Church House to provide information on your SIPP portfolio to them ahead of a transfer. Please can you confirm you are intending to close your SIPP at JM Finn?" The email also queried whether (or not) he sought to close his JM Finn Personal Portfolio Account ('PPA'). He responded on the same day and asked for the PPA's cash to be remitted to him.

On 23 November 2022 JM Finn pressed him for a response regarding the SIPP, and said –

"Please can you confirm it is your intention to transfer the SIPP as per my original email? We require explicit confirmation from yourself for the SIPP please. We also require instructions from Curtis Banks - please can you confirm you have contacted them to instruct us to transfer?"

His reply, on the same date, included – "Yes please be ready to move my SIPP". He also confirmed he had yet to contact Curtis Banks but that he planned to do so. JM Finn's response, also on the same date, included –

“Thank you for confirming. We have initiated the SIPP closure from our side but as mentioned we will need confirmation from Curtis Banks to arrange the transfer to Church House”.

Both parties also confirmed with each other that the transfer would be in specie.

Additionally, on the same date, JM Finn emailed a letter to Mr H that included the following –

“We have received your transfer instruction to move the portfolio to Church House, and I just wanted to get in touch to say it has been a pleasure to look after your portfolio and I wish you all the very best for the future.”

JM Finn says the correspondence on 23 November 2022, as depicted above, amounted to confirmation of termination, by Mr H, of its management service. It has treated this date as the termination date, and there is evidence that it charged no further management fees beyond this date.

It chased for progress in the SIPP transfer in December 2022 and in January and February 2023. Curtis Banks issued instructions for the transfer in May 2023, and the transfer was completed in June 2023. Prior to this, in April 2023, Mr H learnt that his SIPP portfolio was not being managed and complained about that. He has also referred to a 2021 investment in the SIPP, a decline in its value and evidence that JM Finn conducted a transaction in it after 23 November 2022. He says this shows it knew its management responsibility continued until the transfer was completed.”

The PD’s provisional findings were mainly as follows –

“The regulator’s Handbook includes Principles for Businesses that JM Finn will be familiar with. Principles 2, 3 and 6 require, in broad terms, firms to conduct their services with due skill, care and diligence, to make reasonable efforts to manage and control their affairs responsibly and effectively, and to uphold their customers’ interests and treat them fairly.

There is case law – Ouseley J, in R (British Bankers Association) v Financial Services Authority [2011] EWHC 999 (Admin) – which confirms The Principles are ever present requirements that firms must comply with. Furthermore, the Handbook’s Conduct of Business Sourcebook (‘COBS’) section, at COBS 2.1.1R, contains the client’s best interests rule which requires firms, engaged in activities including investment management, to uphold their clients’ best interests.

The above sums up the regulatory context in which JM Finn’s conduct should and will be determined. The next consideration is the contractual context.

Like the investigator said, there is nothing in the agreed terms for termination of JM Finn’s service that says a transfer instruction from a client equates to an instruction to immediately terminate its service. Indeed, it is JM Finn’s argument that termination of its service and the instruction to transfer the SIPP were two separate things. I agree, so there is no contractual provision in the terms for a transfer instruction to trigger immediate termination of service, and JM Finn concedes that both are separate matters.”

“It is noteworthy that all the communications in November 2022 – as I quoted in the background above – were about the SIPP “transfer”. Nothing was said, by either party, about terminating the management of the SIPP (or JM Finn’s service). CHIL asked for information about the SIPP and a transfer pack; in terms of the SIPP, the communications from JM Finn were about its transfer; and the same applied to communication from Mr H. As the

investigator also noted, at no point thereafter, and during JM Finn's enquiries about progress in the transfer, did it mention termination of service (or that the SIPP was no longer being managed).

JM Finn had no grounds to conclude a service termination instruction from Mr H that he never gave – and, I repeat, it is agreed that his transfer instruction was a separate and different matter. It appears to have wrongly assumed that there was ground to terminate its service, and it must take sole responsibility for that.

These findings sit in the regulatory context I summarised above. It could not possibly have been in Mr H's best interest for JM Finn to have been seemingly careless enough to make such a wrong assumption, without reasonable cause to do so, that resulted in depriving his SIPP portfolio active discretionary management for around six months. Indeed, it is reasonable to conclude that he would have been mindful of the need to avoid an unmanaged SIPP portfolio whilst the transfer process was in play, hence the reason why he did not ask for a termination of service at the time. As I address below, JM Finn should have been mindful of the same.

The regulatory context required, as a minimum, that even if such an assumption had wrongly been made, JM Finn would have been acutely aware of due process that commonly applies to portfolio (including SIPP portfolio) transfers, time that can be consumed in the process and the risk or prospect of the portfolio's contents being unmanaged during that time period if it (JM Finn) no longer provided such management.

Behaving responsibly and effectively with due care, skill and diligence, and in Mr H's (and his SIPP's) interest, the above considerations ought reasonably to have led JM Finn to give him clear notice that it had stopped managing his SIPP and that he should ensure he has an alternative arrangement in place, for his and his SIPP's best interest. This would not have erased the erroneous assumption – because the fact remains that Mr H did not ask for termination of service, and neither did JM Finn, so no such termination should have happened – but it would at least have mitigated the matter and given him the opportunity to either affirm JM Finn's error or correct it, probably the latter.

For the above reasons, I am not persuaded to consider any unduly artificial end dates. With regards to the periodic statements of December 2022 and March 2023, I do not agree that Mr H ought reasonably to have been on enquiry about the management fees, to the extent of checking them and noticing that they had stopped on 23 November 2022. He had no reason to check management fees, he had not asked for the management service to stop so he would have had no reason to verify whether (or not) fees were being deducted. Furthermore, it had been a long running management service, seemingly on good terms (until the complaint events), so he possibly or probably had a level of assurance that the correct fees would have been deducted, and that fees did not need to be checked.

I understand and accept that the statements were intended for his consideration and that he would reasonably have been expected to read them. However, if, as it appears, he failed to read them to the extent of noticing stoppage of the management fees on the above date, I do not consider it enough or fair for that to dilute or alter JM Finn primary responsibilities for, firstly, making the wrong assumption about termination of service, and, secondly, failing to give notice to Mr H about that assumption."

"Had Mr H eventually given notice to terminate JM Finn's service, that would have applied. However, he never gave such notice. The closest equivalent to that must be when the transfer of his SIPP was completed. At that point, there was no longer a SIPP under JM Finn's management, so it can reasonably be concluded that its management service would have come to an inevitable end ..."

“For the above reasons, my provisional conclusion is that JM Finn’s management failure began on 23 November 2022 when it wrongly stopped its active discretionary management of the SIPP’s portfolio, and it ended when the SIPP transfer was completed.”

I concluded the PD by outlining the redress provisions I intended to make in a final decision if the PD’s findings and conclusions are retained.

Both parties were invited to comment on the PD.

Mr H confirmed he had nothing to add. JM Finn expressed disappointment in the PD’s conclusion. However, in order to draw a conclusion to the case it said it is prepared to accept the PD. With regards to the benchmark for calculating redress, it confirmed that its discretionary management of Mr H’s portfolio was benchmarked against the MSCI Growth TR Index. It attached performance information for this Index and it shared a calculation of redress using its performance as a benchmark.

JM Finn also made the point that the calculation of redress should reflect its management fees, which would have applied if it continued to manage the SIPP up to 18 July 2023 (when, it says, the transfer was completed).

The case was then returned to me for a final decision.

What I’ve decided – and why

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

I have reviewed Mr H’s complaint. Neither party has made any submissions against the PD so there is nothing to address in this respect. I uphold the complaint. I retain the findings and conclusions in the PD (including those quoted above) and I incorporate them into this decision.

The redress provisions that follow are mainly the same as those I outlined in the PD.

Putting things right

fair compensation

My aim is to put Mr H as close as possible to the position he would now be in if his SIPP portfolio had not been deprived, by JM Finn, of active discretionary management between 23 November 2022 (the start date) and the date on which his SIPP transfer was completed (the end date) – ‘the redress period’.

The natural redress benchmark will be the agreed and/or mandated active and/or model discretionary portfolio that JM Finn had been applying to the SIPP prior to and/or up to 23 November 2022, and that it would have applied to the SIPP during the redress period. JM Finn is ordered to provide details of this, and of the agreement and/or mandate on which it was based, to Mr H for his verification, as part of the calculation of redress.

In this regard, JM Finn has referred to the MSCI Growth TR Index and it has provided information on the performance of this Index. It should share this information with Mr H for the verification mentioned above. I have noted its point about the reflection of its management fees within the calculation of redress. I agree, for the reason it has given, so that should be considered implicit in the calculation ordered below.

Mr H is ordered to engage meaningfully and co-operatively with JM Finn to provide it with all information and documentation, reasonably required for its calculation of redress, which it does not already have.

what must JM Finn do?

To compensate Mr H fairly, JM Finn must do the following:

- Compare the performance of his SIPP portfolio with that of the benchmark shown below during the redress period. If the fair value is greater than the actual value the difference must be paid to him in compensation. If the actual value is greater than the fair value, no compensation is payable.
- Pay any interest set out below. Income tax may be payable on any interest paid. If JM Finn is required by HM Revenue & Customs to deduct income tax from the interest, it must tell him the deduction amount and give him a tax deduction certificate if he asks for one, for him to reclaim the tax from HM Revenue & Customs if appropriate.
- Pay the compensation into Mr H's pension plan, to increase its value by the amount of the compensation and any interest. The payment should allow for the effect of charges and any available tax relief. The compensation should not be paid into his pension plan if it would conflict with any existing protection or allowance. If the compensation (and interest) cannot be paid into his pension plan, pay it directly to him. Had it been possible to pay it into the plan, it would have provided a taxable income, so 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 his actual or expected marginal rate of tax at his selected retirement age. For example, if he is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. If he would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation. In this respect, Mr H appears to have confirmed that he has already exhausted his full tax-free lump sum.
- Pay him £350 for the distress, trouble and inconvenience he has been caused. His experiences in the case resulted from JM Finn neglecting his SIPP portfolio when he had placed full reliance on it (and granted discretion to it) to manage the portfolio, from it failing to meet the reasonable trust and confidence he had also placed in it in this respect and to act in his best interest. Being let down in these ways would have undoubtedly caused him a notable amount of distress, trouble and inconvenience. I consider that £350 is fair compensation for that – separate and distinct from redress for any financial loss.
- Provide the calculation of the compensation to him in a clear and simple format.

| investment name | Status | Benchmark | from ("start date") | to ("end date") | additional interest |
|-----------------------|--------------|--|------------------------|---------------------------------|---|
| Mr H's SIPP Portfolio | Still exists | JM Finn's agreed and/or mandated active and/or model discretionary portfolio (as applied | 23 November 2022 | Date on which the SIPP transfer | 8% simple per year from the end date to the date of |

| | | | | | |
|--|--|---|--|---------------|--|
| | | to the SIPP prior to and/or up to 23 November 2022, and as would have been applied to the SIPP during the redress period) | | was completed | settlement (to compensate Mr H for loss of use of the redress amount during this period) |
|--|--|---|--|---------------|--|

actual value

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

fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

compensation limits

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 H's case it appears unlikely that any redress will exceed any of the compensation limits, but he should note that the complaint events began after 1 April 2019 and the complaint was referred to us after 1 April 2023, so the applicable compensation limit would be £415,000.

decision and award

I uphold the complaint on the grounds stated above. Fair compensation must be calculated as I have also stated above. My decision is that JM Finn must pay the amount produced by that calculation up to the relevant limit.

recommendation

If the amount produced by the calculation of fair compensation is above the relevant limit, I recommend that JM Finn pays the balance. This recommendation is not part of my determination or award. JM Finn does not have to do what I recommend.

My final decision

For the reasons given above and in the PD, I uphold Mr H's complaint. I order J M Finn & Co Ltd (trading as JM Finn) to calculate and pay him compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 17 April 2024.

Roy Kuku
Ombudsman