

The complaint

Mr P complains about the advice given by HARBOUR ROCK CAPITAL LIMITED trading as Portafina ('Portafina') to transfer the benefits from his defined-benefit ('DB') occupational pension scheme to a self-invested personal pension ('SIPP'). Portafina processed the transfer of Mr P's scheme benefits to the SIPP on an 'insistent client' basis. Mr P says Portafina badly advised him and has caused him a financial loss.

What happened

Mr P approached Portafina in November 2019, having been recommended by a work colleague. Mr P wanted to discuss his pension and retirement needs so he completed Portafina's pension review information form providing it with details of his pensions (his occupational DB scheme and another pension).

On 29 January 2020 Portafina provided Mr P with a pension transfer value comparator ('TVC') report, as required by the regulator. The report stated that the cash equivalent transfer value ('CETV') of Mr P's DB scheme was £222,053.90. It also stated that the cost to replace the benefits Mr P was entitled to under his DB scheme if he transferred them to a personal pension was £542,181. The report went on to cite the annual investment return (also known as the critical yield) that the transferred pension would need to attain in order to provide the same benefits as the DB scheme at Mr P's chosen retirement age of 67. The critical yield for providing tax-free cash ('TFC') and a joint-life pension at age 67 was 9.3%.

On 7 February 2020 Portafina wrote to Mr P to say there was 'great news' on his pension, namely that his 'pot' was worth £222,053.90. The letter invited Mr P to book a phone appointment.

Advising Mr P over the phone on 12 February 2020, one of Portafina's paraplanners completed a fact-find to gather information about his circumstances and objectives. It established the following:

- That Mr P was 56 years old, married with no financial dependents and intended to retire at 67.
- That Mr P was a homeowner with a mortgage on his home with a monthly repayment of £975. He also owned two investment properties which yielded him a combined monthly income of £1,000. One of the properties was mortgaged costing £324 per month in repayments.
- Mr P had an unsecured loan which cost him £225 per month in repayments and an overdraft costing £250 per month in repayments.
- Mr P was employed earning £27,304 per year, giving him a net monthly income of £1,841.66. Mrs P had a net monthly income of £2,000. This gave them a combined monthly income, including the rental income of £1,000, of £4,841.66. Their essential monthly expenditure was noted as totalling £2,722 (including all mortgage and loan repayments) and their non-essential/leisure expenditure as £2,119.
- That apart from his DB scheme and a further small personal pension he had, Mr P had no other assets, savings or provisions for retirement.

- Both Mr and Mrs P expected to receive the full state pension at age 67. Mrs P was a member of the same DB scheme as Mr P and her benefits had a greater value.
- Mr P was looking to take the maximum TFC from his transferred DB scheme to pay off debt and put the rest in savings, make home improvements and buy a new car. Specifically Mr P was noted as requiring £55,513.48. Of this, £51,650 was to be used to tackle debt with the remainder put into savings.
- Mr P was noted as liking the idea of transferring his DB scheme benefits because he liked the 'flexibility of beneficiaries' with defined contribution ('DC') pensions.
- Both Mr and Mrs P had death in service cover from their employer of three times their salaries.

On 19 February 2020 Portafina sent Mr P its letter of recommendation where it advised Mr P not to transfer his pension because it wasn't in his best interests. The letter also included a section entitled, *'What happens if you still want to go ahead?'* There Portafina stated that if that was the case it would need to treat Mr P as an 'insistent client'. At the end of the letter, under a section headed *'What you need to do now'* Portafina said there were a number of options open to Mr P which were described on the enclosed 'Options Form'. It said Mr P should read the form, select the option that was right for him and return the form. Portafina went on to say that if Mr P intended to proceed against its recommendation then he should also complete the 'insistent client' declaration and return that too.

On 23 February 2020 Mr P signed the options form, ticking the box for 'Option 2' which stated, *"I understand your recommendation not to proceed; however, I still want to continue against your advice so that I can release a total tax-free cash lump sum of £55,513."* The form also included an insistent client declaration section where Mr P also ticked boxes that said he understood he was now an insistent client, the benefits he was giving up and the risks associated with the transfer. Mr P also stated, in his own words, why he wanted to proceed with the transfer.

On 4 March 2020 Portafina sent Mr P a letter enclosing its suitability/recommendation report (also dated 4 March 2020). The letter stated that Mr P wanted to disregard Portafina's recommendation thus, as an insistent client, it was recommending he transfer his DB scheme to a SIPP with a provider I shall call 'A'. It also said that Mr P would receive TFC of £55,513, that Portafina would manage his remaining fund and review the SIPP annually. Portafina told Mr P to read the suitability report and if he agreed with its recommendation, to sign the enclosed forms and return them to him.

The suitability report stated Mr P had a 'moderately cautious' attitude to risk ('ATR'). His sole objective for making the transfer was to cited as being to release TFC to repay debt and place the balance in savings. Portafina's adviser fee for the transfer was noted as being £12,602.70.

On 8 March 2020, Mr P completed the 'insistent client' declaration along with the transfer authority and beneficiary forms for the SIPP.

Between April and October 2020 there was a delay in the transfer proceeding due to the pandemic and the fact that, having opted out of his employer's DB scheme so the transfer could proceed, Mr P had opted back in and then needed to opt back out before it could go ahead.

On 15 October 2020, Mr P told Portafina that he now wanted to take a smaller amount of cash - £25,000 only. He said he still wanted to pay off his debt but that instead of putting any money in savings he just wanted to leave it invested in his pension. Consequently, Portafina said that Mr P would need a further call with one of its paraplanners.

The call with the paraplanner took place on 20 October 2020. Mr P explained that he had been to see a mortgage adviser and was potentially thinking of going ahead with a re-mortgage so was wondering whether it was still worthwhile accessing the full amount of available TFC from transferring his DB scheme. Portafina said it could make changes but would need to do a new suitability report. Mr P said that in that case, as doing that would take more time, he would just rather proceed as originally intended. Portafina told Mr P that he would need to sign further discharge forms.

On 12 November 2020, Portafina called Mr P to discuss the new analysis it had done based on the latest CETV. Mr P told Portafina that despite his debt not being too concerning for him he still wanted to proceed with the transfer rather than wait until he was in his sixties when he would be too old to enjoy himself. Mr P said he would rather have the benefit of the lump sum now why he was still healthy. Mr P also said he understood the risks involved and the guarantees he was giving up. Portafina said that the TFC now stood to be about £69,000. Mr P also told Portafina that it had been nine months or so since he started the process and that he had paid some of the debt off since so it was now less.

On 23 November 2020, Portafina issued Mr P with a second suitability report where it noted that Mr P's objective was unchanged from the previous suitability report but that the CETV now stood at £234,604. Portafina recommended Mr P didn't transfer his DB scheme but, as he was an insistent client, it was recommending he transfer his scheme benefits to a SIPP with A so that he could access the TFC he said he needed.

On 30 November 2020, Mr P signed the insistent client declaration, the options form and the transfer forms for both A and his DB scheme. In his own words on the options form Mr P said his reasons for proceeding against Portafina's advice were that he wanted to partially clear his debts, undertake home improvements, replace his boiler and upgrade his car. Mr P said a big factor in his decision to transfer was that both he and his wife were members of the same DB scheme and should they both die their children would receive nothing.

The transfer went ahead in the early part of 2021 and Mr P was paid TFC of £55,132.04 on 7 April 2021.

On 14 July 2023 Mr P, through his representative, complained to Portafina. Mr P said he had been poorly advised, that Portafina's insistent client process was flawed and that it hadn't acted in his best interests. Mr P said he had suffered a financial loss as a result.

Portafina looked into Mr P's complaint but didn't think it had done anything wrong. It said the advice it had given Mr P was suitable but that he had made a fully formed decision to disregard it and proceeded regardless, accepting the risks of doing so in the process.

Unhappy with the outcome of his complaint to Portafina, Mr P complained to the Financial Ombudsman Service. One of our Investigators looked into the complaint for Mr P and recommended that it was upheld. She thought the transfer wasn't a financially viable one and that there were flaws in Portafina's insistent client process. Our Investigator recommended that Portafina compensate Mr P in line with the regulator's guidance for non-compliant pension transfer advice.

Mr P accepted our Investigator's recommendation but Portafina didn't. It said that it had advised Mr P to remain in his DB scheme and provided him with numerous reasons as to why it was in his best interests to do so. Despite this, Portafina said Mr P wanted to proceed against its advice and did so on a fully informed basis. It said Mr P had a clear intent to transfer from the outset, even before it advised him.

Our Investigator thought about what Portafina had said but wasn't persuaded to change her mind.

The complaint was passed 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.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Having done so, I've decided to uphold the complaint for largely the same reasons given by our Investigator.

The regulator, the Financial Conduct Authority ('FCA'), states in its Conduct of Business Sourcebook ('COBS') that the starting assumption for a transfer from a DB scheme is that it is unsuitable. So, Portafina should have only considered a transfer if it could clearly demonstrate that the transfer was in Mr P's best interests (COBS 19.1.6).

Since 2018, COBS 9.5A includes additional guidance on insistent clients. It sets out three key steps for advisers to take.

- 1) Where a firm proceeds to execute a transaction for an insistent client which is not in accordance with the personal recommendation given by the firm, the firm should communicate to the insistent client, in a way which is clear, fair and not misleading, and having regard to the information needs of the insistent client so that the client is able to understand, the information set out in (2).
- 2) The information which the firm should communicate to the insistent client is:
 - a) that the firm has not recommended the transaction and that it will not be in accordance with the firm's personal recommendation;
 - b) the reasons why the transaction will not be in accordance with the firm's personal recommendation;
 - c) the risks of the transaction proposed by the insistent client; and
 - d) the reasons why the firm did not recommend that transaction to the client.

Acknowledgement from the insistent client - COBS 9.5A.4

(1) The firm should obtain from the insistent client an acknowledgement that:

- (i) the transaction is not in accordance with the firm's personal recommendation; and
- (ii) the transaction is being carried out at the request of the client.

(2) Where possible, the acknowledgment should be in the client's own words.

Portafina says that it provided suitable advice and acted in Mr P's best interests. It says that it followed the correct insistent client process. Mr P says Portafina's advice was negligent and he's suffered a loss as a result.

Having carefully considered all of the evidence presented, I think there were weaknesses and failings in Portafina's advice process, which meant it didn't act in Mr P's best interests.

And I think Mr P likely understood, or believed overall, that Portafina was recommending he should go ahead with the transfer.

I say this because on 19 February 2020 following the telephone discussion that the Portafina paraplanner had had four days earlier with Mr P about his circumstances and objectives, it sent him a letter with the outcome of its advice. It said that it strongly recommended he did not proceed with the transfer for the following reasons:

- the critical yield required to match Mr P's guaranteed benefits from his DB schemes was unachievable;
- the scheme was a significant proportion of his retirement provision;
- because the withdrawal didn't justify the impact it would have on his long-term retirement planning;
- his stated objectives could be met through alternative methods; and
- because he'd be losing his valuable DB scheme benefits.

But despite setting these reasons out, I don't think Portafina's letter clearly set out the risks associated with the transfer and, whilst there was reference to achieving his objectives through alternative means there was no discussion about what form this might take. And while Portafina later sent a more detailed suitability report, which I will refer to later on, at this stage Mr P had less information to go on to decide if being an insistent client was truly in his best interests.

The options form (which I referred to above) enclosed with the recommendation letter was sent to Mr P after the fact-find phone call which, I note, wasn't carried out by a financial adviser. And Portafina asked him to complete the forms – thereby making a decision about whether to disregard Portafina's advice based solely on the information in the letter and forms alone – before it issued him with its suitability report. I think that, on the face of it, the forms and the letter appear to conform with the regulator's regulations I've set out above. But I've thought about whether Portafina genuinely acted within the spirit of the regulations and communicated with Mr P in a way that was fair, clear, not misleading and taking into account his information needs; and I'm not persuaded that it did.

I should also say here that I've noted Portafina's comments – made when responding to our Investigator's view on this complaint – relating to the sequence of events. Specifically its comment that it sent Mr P its suitability report on 19 February 2020. I've set out the sequence of events in some detail above in the background section to this decision and, as it can be seen from there, Portafina's suitability report was dated 4 March 2020 and thus post-dated its letter of advice/recommendation of 19 February 2020. Indeed, in the suitability report, reference was made to the fact that Mr P had already decided to disregard the recommendation not to proceed (by virtue of having completed the options form and insistent client declaration).

So the advice/recommendation letter of 19 February 2020 was not, as contended by Portafina, 'full pension transfer advice'. And its first 'insistent client' letter of 4 March 2020 was the cover letter that accompanied the suitability report. So I don't think that Mr P had enough information before him on 19 February 2020 to make a fully informed decision about whether to proceed as an insistent client.

The evidence I've seen – and to which I have referred above – indicates that, at the time he was being asked to sign the two forms, Mr P didn't fully understand the advice he was being given. Looking at what he wrote on the options form – that predated the suitability report – under the section entitled, '*in your own words*' Mr P says he and his wife have "*decided to go*

back to our bank and restructure our overdraft/loan so it does not impact on our tax free lump sum". He also focusses on how he can build up his pension after withdrawing his TFC and how he wouldn't touch what was left until he retired at age 67.

I don't think what Mr P wrote and ticked on the two forms he completed on 23 February 2020 demonstrates that he understood the information he had been given. Mr P's written statement about restructuring his loan/overdraft seems at odds with his objective of obtaining TFC to clear debt – as if he had decided to restructure his lending instead of using the TFC. And whilst the completion of both forms pre-dated the suitability report, I can't see that Mr P's written comments lead to any review by Portafina in the suitability report of the advice it had given Mr P in the recommendation letter. Indeed, I can see that the suitability report repeated his objective for the transfer, namely debt clearance.

So it strikes me that Portafina's process here was geared towards facilitating the transfer. In this situation I'd expect the emphasis of the documentation to be the reasons why the transfer was not in Mr P's best interests. But the information on the form enclosed with the letter, which Portafina asked Mr P to complete and return, was limited to the loss of guarantees and the growth required to match his existing benefits. While Portafina later sent a more detailed suitability report, at this stage Mr P had little information to go off to decide if being an insistent client was truly in his best interests.

Without sight of the suitability report, Mr P was unable to read and digest it before having to decide if he wanted to go ahead anyway. So I'm not persuaded Mr P was able to make an informed choice here. It was only after receiving Mr P's confirmation that he wanted to proceed with the transfer that Portafina sent him its full suitability report. And while the report repeated the recommendation not to transfer out of his DB scheme, it was followed by a positive recommendation, advising Mr P to transfer his benefits to a SIPP with A to facilitate access to his tax-free cash. And this was all set out under a heading titled '*Our recommendation*'.

This position carried through to the Autumn of 2020 as well. By that time Mr P was notably thinking it might not be worthwhile taking as much TFC because he had seen his mortgage adviser and was thinking about re-mortgaging. During the phone call with one of Portafina's paraplanners on 20 October 2020 he said he didn't need as much TFC as he'd originally said. But rather than review the advice it had given Mr P, Portafina said to Mr P that if he was making changes it would need to do a new suitability report. Mr P's main concern then seemed to be further delays to the whole process so he told Portafina to proceed with the original plan. I think that had Portafina been acting with Mr P's best interests in mind however, it should have said to him that he should take as much time as he needed before taking such a significant and irrevocable decision.

And in a further call between Portafina and Mr P on 12 November 2020 Mr P appears unsure about the need for TFC at all as his debts had reduced since he first sought advice and he was still talking about refinancing his debts. I can see that Portafina asked Mr P whether he still wanted the same amount of TFC given his debt values had changed and I can see too that it asked him if he still wished to continue with the transfer but I can't say that either call demonstrates that Mr P understood the risks associated with the transfer or why the transfer itself wasn't in his best interests.

Nor can I see that Portafina made any real effort to ensure Mr P fully understood the message it was giving him, as it was required to under the regulations. I think Portafina missed the opportunity here to drive home why the adviser was recommending he didn't transfer, namely because it would jeopardise his retirement income and his reasons for

transferring out weren't good enough and were, in fact, dissipating with the passage of time and his own uncertainty. Instead, the calls largely focussed on the mechanics of moving the transfer along and how much money Mr P now needed, rather than what that meant for his retirement.

Portafina's second suitability report on 23 November stated that Mr P's objective was unchanged from its previous suitability report. Given what I have set out here, I am unable to agree with such a statement. Mr P certainly no longer needed over £55,000 to clear debt – he had made that clear to Portafina in the previous couple of months. And he had told Portafina in a recent call that he thought he should take TFC now, and not wait until his sixties, because he was still young enough to enjoy himself. Thus the second suitability report, by not reflecting and analysing Mr P's changed circumstances, was misleading. It didn't address Mr P's altered position about how much money he now thought he needed nor why he had to access his TFC to get it. There was no analysis of how else Mr P might tackle his debt and no mention of the other reasons Mr P had mentioned during the course of the advice process (being young enough to enjoy the money, undertaking works on his home, buying a new car) and why transferring his DB scheme to achieve them wasn't in his best interests.

On this occasion Mr P signed the insistent client declaration, the options form and the transfer forms for both A and his DB scheme after receiving the second suitability report. Like before he put in his own words why he was proceeding against Portafina's recommendation, with his stated reasons being almost identical to what he'd said on his previous form on 23 February 2020.

I think if Portafina firmly believed in its advice and recommendation, and it was acting in Mr P's best interests, it could have made greater effort to make sure he understood what he was giving up and when he gave the answers he did (on the forms and during the phone calls). Where it is clear he didn't understand, Portafina could have declined to execute the transfer for him. It wasn't obliged to continue with the transfer of Mr P's DB scheme. Instead it proceeded to effect the transfer in a situation where, I think it can reasonably be said, its client demonstrated he didn't fully understand what he stood to lose by agreeing to proceed. Mr P proceeded to transfer in return for TFC he demonstrably didn't need.

I think it ought to have been clear to Portafina that Mr P had little knowledge or experience of financial and investment matters based on the information available at the time of the advice. For example there's nothing recorded on the assets section of the fact-find to suggest Mr P was an experienced investor. I accept he had purchased investment properties to rent out but in terms of Mr P making investment decisions it appears he was completely inexperienced. I'm mindful too that Portafina noted Mr P's attitude to risk in the suitability report as being 'moderately cautious'. But I've not seen any risk profiling questionnaire underpinning that assessment, so I don't know why Mr P was so assessed. But, as Portafina thought this was the case I think it should have been on notice that it had to be very careful if it was to take him through the insistent client route.

In order to fulfil the regulator's requirements under COBS 9.2, Portafina needed to give Mr P advice on the overall suitability of the transaction envisaged, that is the transfer and the choice of pension and investment. Instead, it first gave Mr P advice on the advice to transfer, and only considered the suitability of the proposed alternative in the full suitability report *after* securing his confirmation to proceed on an insistent client basis. And whilst I realise a second suitability report followed and that Mr P indicated after its receipt that he wished to (still) proceed as an insistent client, the fact that he did, doesn't alter my thinking on this issue. That's because despite the change to Mr P's objective in the interim, the second

report was almost identical to the first as were the reasons Mr P gave for wanting to proceed against Portafina's recommendation. It's not unreasonable to think that Mr P saw the second report and form as an extension of the first particularly given the 'recommendation' to transfer to a SIPP with A remained the same.

By recommending that Mr P transfer his benefits to a particular scheme, not only did this undermine the recommendation not to transfer, I think Portafina has effectively given him a recommendation to transfer out of his DB scheme. If Portafina didn't think that transferring out of the DB scheme to a SIPP was in Mr P's best interests, it needed to ensure that it gave clear advice that the *whole* of the transaction was unsuitable for him. In my view it shouldn't have separated out the elements. For this reason, I think on receipt of the full suitability reports Mr P could have believed that Portafina approved of his decided course of action.

I'm sure that debt reduction, the chance to make some home improvements, to enjoy his TFC whilst he was younger and to upgrade his car all seemed like attractive objectives to Mr P. But by the Autumn of 2020, Mr P wasn't even sure he was going to use any of the TFC to reduce his debt so the principal reason, and the trigger for seeking advice to transfer in the first instance, had arguably fallen away completely. In any event, Portafina captured very little information about the loans aside from the repayment amounts. There is no information about the type, the name of the lenders or any outstanding terms nor, crucially what the loan and overdraft balances were.

So whilst it is clear to me that Mr P's loan repayments were likely a reasonable portion of his net expenditure it appears he was managing to afford them each month. There is no information about why the loans needed to be repaid early.

Mr P also told Portafina in the Autumn of 2020 that he had taken advice from a mortgage adviser about restructuring his mortgage and that he may not indeed use the TFC to reduce his debts. In so doing that reduced his objectives for the transfer to enjoying the money, home improvements and upgrading his car. But Mr and Mrs P had non-essential/leisure expenditure as £2,119 each month – as noted on the fact-find. Yet I can't see that using some of this to achieve Mr P's downwardly revised objectives (be that by saving up or taking out a personal loan) was explored in any detail by Portafina as an alternative to irrevocably transferring the guaranteed benefits associated with Mr P's DB scheme. I've seen no meaningful discussion about alternative ways for Mr P to achieve his objectives.

So I can't reasonably accept that Mr P had no option but to transfer his pension, take the TFC and clear his debt. It appears there was possibly some disposable income that could have allowed his debts to be restructured so they were more affordable to him thereby negating the 'requirement' to transfer his pension and lose his valuable retirement benefits. Mr P was clearly very comfortable with the idea of restructuring his debt and re-mortgaging, so it was Portafina's duty to demonstrate to him that paying interest on a loan was financially better than taking money out of a guaranteed pension plan and reducing the benefits available to him in retirement. Portafina should not merely have accepted his viewpoint without challenge. And I can't see that Portafina assessed what income Mr P would need in retirement or how he'd fund it if he transferred out. In my view, that was a key failing.

And if Mr P genuinely could not wait to access his TFC (and I'm not persuaded that it couldn't), I think Portafina ought to have explored the possibility of him taking his benefits from the DB scheme early. He was aged 56 by the Autumn of 2020 and the DB scheme allowed early access (albeit with actuarial reduction) from age 55. The scheme's normal retirement date was age 65. The TVC that Portafina produced included analysis if Mr P took his scheme benefits at age 57 and showed that he could, at that point, have received TFC of

£41,013. Given that Mr P had said to Portafina in October 2020 that he was thinking he may now need no more than £25,000 in TFC this was an option that should, if it was acting in Mr P's best interests, have been put to him by Portafina. And remaining in the DB scheme would have put Mr P on a stronger financial footing by retaining his guaranteed pension benefits.

I don't necessarily think that what I've set out above is what Mr P would have done if suitable advice had been given. Instead I am seeking to demonstrate that there were alternative ways of him meeting his needs, none of which were explored by Portafina. Ultimately I don't think that any of Mr P's needs were so pressing that he would've insisted on transferring his pension to a SIPP had he properly understood the impact on his retirement.

Portafina had to act with due care and skill and in Mr P's best interests. And by not seeking to properly understand his financial situation, and specifically his income needs, I'm not persuaded it can be said to have been acting in Mr P's best interests. Furthermore, Portafina's failure to explore alternative options with Mr P meant that, in reality, I think he believed he could only meet his needs by transferring his scheme to a SIPP. Portafina's recommendation had to be clear and Mr P had to have understood the consequences of going against the recommendation. By not explaining the risks to Mr P of his supposed preferred course of action, and by not seeking to properly understand Mr P's objectives, financial circumstances and what he was really trying to achieve before carrying things out, I'm not persuaded Portafina can be said to have been acting in his best interests.

Ultimately I don't think Mr P was able to make an informed choice here – it seems to me that he most likely went ahead with the transfer as he believed it seemed like a good idea and this was the only way to meet his objectives. Portafina failed to properly understand Mr P's overall position and failed to recommend to him that it was in his best interests to do nothing or, if he genuinely needed access to some cash and this couldn't wait, to consider accessing benefits from his DB scheme instead. Furthermore, I think the way Portafina presented its recommendation to Mr P would've led him to believe it was giving him a positive recommendation to transfer out of the scheme. And I think this would've given Mr P the impression that Portafina agreed with his approach.

Portafina recommended that Mr P invest in a 'poised portfolio' of funds with A. As I'm upholding the complaint on the grounds that Mr P cannot be truly regarded as an insistent client therefore making the transfer out of his DB scheme unsuitable, it follows that I don't need to consider the suitability of the investment recommendation. This is because Mr P should have been clearly and properly advised to remain in the DB scheme and so the investments in the SIPP wouldn't have arisen if suitable advice had been given.

Overall, and on balance, given these failings, I don't think it would be reasonable for me to conclude the process Portafina followed meant that Mr P can truly be regarded as an insistent client - I think Portafina made it altogether too easy for him to agree that he was an insistent client. Portafina's overall communication with Mr P wasn't clear or fair. It didn't act in Mr P's best interests. And it failed to act with due care and skill.

I now need to consider if Portafina had followed the insistent client process correctly, whether Mr P would've still gone ahead. Portafina says that because Mr P used his own language and it followed the regulator's guidance to ensure he understood the insistent client process then that is evidence that he would've transferred her DB pension benefits early regardless of Portafina's involvement; but I disagree.

If Portafina had acted in Mr P's best interests, providing a recommendation on the suitability of the whole of the transaction envisaged at the outset, addressing Mr P's true objectives at

the time and presenting alternative courses of action, explaining that he would most likely not be able to achieve his required retirement income if he transferred out, I don't think he would've insisted on going ahead with the transfer. As I've outlined above, I don't consider Mr P to be an experienced investor who possessed the requisite knowledge, skill or had the confidence to go against the advice and recommendation he was given. I think he relied solely on the advice and process Portafina employed.

So if things had happened as they should have, taking everything into account, I don't think it likely Mr P would have insisted on going ahead with the transfer.

In light of the above, I think Portafina should compensate Mr P for its failings using the regulator's defined benefits pension transfer redress methodology.

Putting things right

A fair and reasonable outcome would be for the business to put Mr P as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr P would have most likely remained in the occupational pension scheme if suitable advice had been given.

Portafina must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:
<https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter>.

For clarity, Mr P has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age of 67, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr P's acceptance of the decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Portafina should:

- calculate and offer Mr P redress as a cash lump sum payment,
- explain to Mr P before starting the redress calculation that:
 - his redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
 - a straightforward way to invest his redress prudently is to use it to augment his DC pension
- offer to calculate how much of any redress Mr P receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr P accepts Portafina's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr P for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr P's end of year tax position.

Redress paid to Mr P as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, Portafina may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr P's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

Where I uphold a complaint, I can award fair compensation of up to £415,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £415,000, I may recommend that the business pays the balance.

My final decision

Determination and money award: I uphold this complaint and require HARBOUR ROCK CAPITAL LIMITED trading as Portafina to pay Mr P the compensation amount as set out in the steps above, up to a maximum of £415,000.

Recommendation: If the compensation amount exceeds £415,000, I also recommend that HARBOUR ROCK CAPITAL LIMITED trading as Portafina pays Mr P the balance.

If Mr P accepts this decision, the money award becomes binding on HARBOUR ROCK CAPITAL LIMITED trading as Portafina.

My recommendation would not be binding. Further, it's unlikely that Mr P can accept my decision and go to court to ask for the balance. Mr P may want to consider getting independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 18 July 2024.

Claire Woollerson
Ombudsman