DRN-4776483

The complaint

Mrs B has complained about the advice given by Inspired Financial Solutions Limited ('IFS') to transfer her occupational defined benefit ('DB') pension to a self-invested personal pension ('SIPP') held with London and Colonial ('L&C').

Mrs B, through her representatives, has stated that the advice was unsuitable and has caused financial loss.

Whilst Mrs B is being represented in this complaint, for ease of reference, I have only referred to Mrs B throughout the decision below.

What happened

Mrs B completed IFS's Pension Transfer Analysis Application form in May 2011.

Within this document Mrs B confirmed her desired retirement age of 65 and selected a medium to high attitude to risk ('ATR').

The notes section confirmed that Mrs B's husband was moving his pensions to a SIPP to purchase a property overseas with potential high returns.

Regarding her priorities, the number one priority chosen by Mrs B was a structured investment portfolio which matched her ATR and other circumstances and requirements.

IFS documented their advice in the suitability letter issued on 8 June 2011.

This confirmed Mrs B was aged 48, in good health and had a medium to high ATR.

Mrs B objectives were confirmed as being:

- keen to have flexibility in retirement planning.
- keen to have a portfolio of investments which match attitude to risk.
- Mrs B was also recorded as saying, *"I wish to break all ties with my previous employer and would prefer to move my funds to an individual plan which is under my control".*
- extra sums being made available upon Mrs B's death was also recorded as an objective.
- The final driver behind the transfer of this pension scheme was noted as Mrs B's desire to transfer the scheme to a SIPP which would allow her to purchase a property overseas through a SIPP. Mrs B's husband was confirmed as already converting his personal pension to a SIPP to allow this.

The transfer value of the DB scheme was documented as being around £53,800 with the transfer summary section detailing that IFS were *"unable to recommend a transfer to a personal pension because the required rate of growth that must be achieved by a new plan*

would be 9.7% to match the guaranteed benefits offered by your final salary scheme so in this instance the best advice is to leave your pension where it is."

On 14 June 2014 Mrs B signed a letter confirming that regardless of the advice to retain the DB scheme she wanted to transfer, combine the proceeds with those of her husband, and then use the total funds to purchase a property.

A follow up advice letter was produced by IFS on 16 June 2011.

This started by repeating the initial advice to retain the DB scheme on the basis that the 9.7% growth rate was unrealistic.

The letter noted that Mrs B intended to *"invest in commercial property in Cape Verde which is allowable through the London and Colonial SIPP. I must state that this sounds like a high risk strategy and I could not recommend such a course of action. You are not looking for my guidance on this, you merely want me to arrange the transfer for you".*

The transfer was completed, and the proceeds moved to the L&C SIPP on 19 July 2011. Amounts of around £35,000 and £12,500 were then invested into commercial property in Cape Verde via The Resort Group. The remaining funds were left in cash to fund the various fees levied on the SIPP over time.

Mrs B registered her complaint with IFS in May 2023.

IFS issued a response in July 2023. This did not uphold the complaint and stated that the advice given at the time was to retain the DB scheme, with Mrs B rejecting this advice in order to complete the transfer.

Unhappy with the response, Mrs B forwarded her complaint to this service later in July 2023.

Whilst the case was under investigation IFS additionally stated that given the timelines involved, they also believed the complaint had been made too late and was not one which this service could consider. IFS noted several reasons why Mrs B would, or should have been, aware of potential issues with the advice much sooner.

IFS referenced a Panorama program looking into the Resort Group in 2016, the Financial Conduct Authority ('FCA') writing to shareholders in 2017, and the fact that income had stopped being paid from the property investments in 2019.

Our investigator looked into things and concluded that the complaint had been brought in time. Whilst the advice had been given in 2011, the events referred to by IFS did not prove Mrs B was (or should have been aware) of any concerns about the advice significantly before a complaint was made.

In considering the advice itself the investigator accepted that IFS had recommended the DB scheme be retained but concluded that the advice documentation did not do enough to explain the potential consequences of Mrs B's decision to transfer and invest in the Cape Verde properties. Our investigator concluded that had IFS met its obligations to Mrs B, and provided full advice and information, Mrs B would have followed their advice to retain the DB scheme.

IFS did not agree and stated that they believed they had given all the required information to Mrs B at the time of advice. IFS noted that the advice documentation clearly stated that their advice was to retain the DB scheme, that the proposed investments in Cape Verde were high risk and not something they would recommend, and that despite this information Mrs B

had insisted on a transfer.

IFS also stated that Mrs B had been additionally advised by a separate business (I have referred to this business as 'Firm A' throughout the decision below) regarding the Cape Verde investments.

As no agreement could be reached the case has been 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.

IFS did not raise any objections to our investigator's findings in relation to our jurisdiction over this complaint, however, they also did not confirm whether they agreed with the outcome reached in this regard.

As such I have firstly considered whether I agree that this is a complaint which can be considered by this service.

The Financial Conduct Authority's (FCA) Dispute Resolution Rules (DISP) set out the rules that we must comply with when deciding whether we can investigate a complaint.

DISP R 2.8.2, states:

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

(2) more than:

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

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint; unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received; unless:

(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R or DISP 2.8.7 R was as a result of exceptional circumstances.

In this case the advice was more than six years before the complaint was made. As such I have focused on point 2(b) of the rules above – when was Mrs B (or when should Mrs B have reasonably been) aware of a potential cause for complaint about the advice received.

IFS have pointed to a Panorama program in 2016, a letter from the FCA in 2017, and the fact income stopped being received from the Cape Verde investments in 2019 as reasons why Mrs B ought to have been aware of potential issues with her pension more than three years before she complained.

However, as per our investigators findings I do not believe the Panorama program can be used to deem the complaint too late – the available evidence doesn't support the position that Mrs B watched or was aware of the program.

Additionally, whilst the FCA did write to some shareholders, not all were written to with the available evidence not supporting the conclusion that Mrs B was sent, or read, such a letter.

Finally, whilst income from the investment did cease, Mrs B would only have been aware of this once an annual statement showing this had been received. As noted by our investigator, whilst the July 2020 statement did show no income was being received, this statement was received less than three years before Mrs B complained, and as such, my view is that the complaint is in time and one which we can consider further.

Having reached this conclusion, I have gone on to consider the merits of the complaint.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Businesses ('PRIN') and the Conduct of Business Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive, or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The applicable rules, regulations, and requirements

The below is not a comprehensive list of the rules, regulations, and guidance which applied at the time of the advice but provides useful context for my assessment of IFS's actions here.

Principle 6: A firm must pay due regard to the interests of its customers and treat them fairly.

Principle 7: A firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair, and not misleading.

COBS 2.1.1R: A firm must act honestly, fairly, and professionally in accordance with the best interests of its client (the client's best interests' rule).

The provisions in COBS 9 deal with the obligations when giving a personal recommendation and assessing suitability. And the provisions in COBS 19 specifically relate to a DB pension transfer.

The regulator, the Financial Conduct Authority ('FCA'), states in COBS 19.1.6G that the starting assumption for a transfer from a DB scheme is that it is unsuitable.

So, IFS could only have considered a transfer if it could clearly demonstrate that the transfer was in Mrs B's best interests.

IFS carried out a transfer value analysis report (as required by the regulator) showing how much Mrs B's pension fund would need to grow by each year to provide the same benefits as her DB scheme (the critical yield).

Both suitability letters issued by IFS confirm that their recommendation was not to transfer, on the basis that achieving the critical yield of 9.7% was unrealistic. I would agree with this conclusion – the transfer of the DB pension was likely to lead to Mrs B being worse off in retirement with a transfer being unsuitable.

It was recorded that Mrs B still wanted to transfer, and so IFS went on to process this on an insistent client basis.

At the time of the advice there was no regulatory advice or guidance in place in respect of insistent clients. But as per the requirements documented above, IFS had to *"act honestly, fairly and professionally in accordance with the best interests of its client"* and had to provide

information that was clear, fair, and not misleading.

So, IFS's recommendation had to be clear, and Mrs B had to have understood the consequences of going against the recommendation.

Whilst IFS have noted the involvement of another adviser (Firm A) in recommending the Cape Verde investment, the FCA had been clear that it was IFS's responsibility to consider the suitability of the eventual investments which were going to be made by Mrs B.

In 2013, the FCA published an alert in which it stated:

"Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.

The FCA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating."

I appreciate that the above alert was issued after this advice was given in 2011, however the alert was not providing new or amended guidance, it was the FCA re-stating the existing principles.

Additionally relevant in this case is the July 2010 Unregulated Collective Investment Schemes: Good and poor practice report.

Within this the regulator identified the steps advisers should take to ensure unregulated investments (such as the Cape Verde property investment made by Mrs B) were marketed and recommended only to suitable investors, with exposure to such investments limited to a small proportion of that investor's portfolio.

So, IFS should have been aware that they were required to assess the suitability of the Cape Verde investment, and should have been aware of the 2010 good practice report which explained why the Cape Verde investment was not likely to be suitable for Mrs B.

Whilst I appreciate the suitability letter did note that the proposed investment *"sounds like a high risk strategy and I could not recommend such a course of action"* I do not consider this sufficient.

Further information including the unregulated nature of the investment, and the fact they were predominantly meant for experienced, sophisticated, and high net worth individuals should also have been provided.

The Cape Verde investment Mrs B was considering was fundamentally different from anything the IFS documentation indicates she had held before. Returns were not made based on the movements in investment markets but were instead based on occupancy rates achieved in the property purchased, with the investment having additional risks associated with potential liquidity issues and exchange rate risk.

I note that the IFS documentation records that this pension did not represent a significant proportion of Mrs B's retirement provision, however, there is no further detail as to what other pension provision Mrs B had. As such, no accurate assessment of this can be made leaving the possibility that Mrs B would have ultimately ended up over-exposed to a high-risk unregulated investment.

I have considered that the content of the suitability letters also state that Mrs B did not want further advice on her proposed investment, however it was IFS's responsibility to put her in an informed position before she rejected their advice and chose to proceed as an insistent client.

Had full information been provided by IFS about the Cape Verde investment I believe the most likely outcome would have been Mrs B's realisation that the investment did not match her circumstances or objectives.

Mrs B was noted as having a medium-high ATR with the proposed Cape Verde investment sitting outside of this. In addition, it is unclear how the Cape Verde investment aligns with Mrs B's desire for a "portfolio" of investments.

Overall, had the conflict between Mrs B's recorded objectives and the features of the Cape Verde investment been adequately discussed I have concluded the ultimate outcome would have been the retention of the existing DB scheme.

As mentioned above I am aware that Mrs B was advised of the Cape Verde investment by Firm A, however the investment was made with IFS's involvement in the transfer of Mrs B's DB scheme.

Had IFS acted appropriately and provided Mrs B with full, suitable information around the Cape Verde investment I have concluded, on balance and on a fair and reasonable basis, that it would never have been made. As such, I consider it reasonable to hold IFS responsible for the entirety of Mrs B's losses.

The redress instructions below reflect this.

Putting things right

A fair and reasonable outcome would be for IFS to put Mrs B, as far as possible, into the position she would now be in but for the errors in their advice process. I consider she would have likely remained in the occupational scheme.

IFS should 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.

For clarity, Mrs B has not yet retired, and she has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age of 65, 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, the calculation should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mrs B's acceptance.

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

- calculate and offer Mrs B redress as a cash lump sum payment,
- explain to Mrs B before starting the redress calculation that:
    - 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 the redress prudently is to use it to augment the current defined contribution pension
- offer to calculate how much of any redress Mrs B receives could be used to augment the pension rather than receiving it all as a cash lump sum,
- if Mrs B accepts IFS's offer to calculate how much of the redress could be augmented, request the necessary information, and not charge Mrs B for the calculation, even if she ultimately decides not to have any of the redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mrs B's end of year tax position.

Redress paid directly to Mrs B 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, IFS may make a notional deduction to allow for income tax that would otherwise have been paid. Mrs B likely income tax rate in retirement is presumed to be 20%. However, if Mrs B would have been able to take 25% tax-free cash from the benefits the cash payment represents, then this notional reduction may only be applied to 75% of the compensation, resulting in an overall notional deduction of 15%.

My aim is to return Mrs B to the position she would have been in but for the actions of IFS. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. That appears to be the case here.

To calculate the compensation, IFS should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs and take ownership of the investment. If IFS is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything IFS has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, IFS may ask Mrs B to provide an undertaking to account to it for the net amount of any payment she may receive from the investment. That undertaking should allow for the effect of any tax and charges on what she receives. IFS will need to meet any costs in drawing up the undertaking. If IFS asks Mrs B to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

The SIPP only exists because of the illiquid investment. In order for the SIPP to be closed and further SIPP fees to be prevented, the investment needs to be removed from the SIPP. I've set out above how this might be achieved by IFS taking over the investment, or this is something that Mrs B can discuss with the SIPP provider 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 IFS pay Mrs B an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

My final decision

As per the rationale above I am upholding this complaint and require Inspired Financial Solutions Limited to calculate and pay redress in line with the methodology outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 24 July 2024.

John Rogowski
Ombudsman