DRN-4961594

The complaint

Ms C is represented.

She says a St. James's Place Wealth Management Plc ('SJP') partner ('the partner') gave her unsuitable pension switch advice in 2012 and 2019. She claims redress for financial loss resulting from the advice and a refund of all advice fees paid to the partner. Her complaint also alleges inappropriate conduct by the partner (mainly allegations about him using his wife in the advice process, advising Ms C through her husband, arranging meetings in her workplace, making unprofessional remarks about third parties and failing to address her concerns about his service).

SJP disputes the complaint.

What happened

On both occasions, in 2012 and 2019, the partner advised Ms C to move a pre-existing Personal Pension ('PP') into an SJP Retirement Plan ('RP'). In September 2020 she transferred her pension(s) to a new firm, having terminated the partner's service.

Based on available evidence, including fact-find and illustration documentation, and the suitability reports she declared receiving and understanding, Ms C's profiles at the times of advice and the advice she received were as follows –

2012

She was employed, unmarried with no financial dependents and no liabilities. Her focus was retirement planning. She was in her mid-50s and planned to retire at age 65. She had a Standard Life ('SL') PP (worth around £104,000 and into which she made gross monthly contributions of around £740 which were indexed to increase by 10% per year) and an Occupational Pension ('OP').

The partner's recommendation was to switch the SL PP – which was invested in SL's managed pension fund (around 67%), property fund (around 17%) and cautious managed pension fund (around 16%); and which had no life cover, Guaranteed Annuity Rates ('GAR'), or protected rights – to the SJP RP.

She sought capital growth and income, and the partner's 8 May 2012 suitability report said she was interested in the switch because she had concerns about the SL PP (the absence of ongoing advice for it and monitoring of it, and the lack of diversification within it). The report said she had a medium risk profile, a medium-term investment horizon (five to 15 years) and that with a total of around £25,000 in cash accounts and short-term holdings she had the capacity for loss to match the recommended transfer.

The partner did not recommend leaving the SL PP as it was because, he said, Ms C wanted access to SJP's investment management approach and she was unhappy with the absence of an OAS in the PP. He also said she had decided against conducting fund switches within the PP for the same reasons.

The partner addressed the Money Purchase Scheme ('MPS') that was available from her employer and into which her PP could have been transferred (and into which her future contributions could have been redirected). He noted that the MPS' annual charges (1.2%) was 0.52% per year lower than the 1.74% per year charges for the SJP RP he was recommending, so, without any guarantee, the latter would need to outperform the former by the same difference to make up for this. He also noted that, without any guarantee, the RP would need to outperform an available Stakeholder Pension plan by around 1% per year in order to provide the same retirement fund as the Stakeholder Pension plan.

The SL PP's Annual Management Charge ('AMC') was stated in the report as 1% minus a 0.379% rebate, so 0.621% overall. Therefore, this too was a lower charge compared to the RP. The adviser calculated that this was 1.109% per year lower than the RP's total charge so, without any guarantee, the RP would need to outperform the SL PP by this difference in order to provide the same retirement fund as the SL PP. He also noted that there were "… *fewer funds and fewer fund management teams to choose from with St. James's Place than with Standard Life*".

He concluded, in the report, that despite all these factors Ms C preferred his recommendation, irrespective of its additional costs, because she was attracted to the SJP approach to investment management. He also referred to an OAS from him, every six months, as being part of the package/recommended solution.

2019

Ms C was now married and approaching her mid-60s, and she wanted to retire at age 70. She was in the same employment, earning more, and her previous OP had been changed into an employment related Group Personal Pension ('GPP'). She still held the SJP RP recommended in 2012, and she now had a £159,000 mortgage.

Her focus was retirement planning and growth. The partner's 14 October 2019 report says she was interested in a pension switch because of a particular pension that was causing her concern, because she wanted an OAS for that pension and because she wanted access to SJP's approach to investment management.

This time, the pre-existing pension of concern was an Aviva Self-Invested Personal Pension ('SIPP') that she had opened in 2016. It was worth around £188,000 in 2019. The basis for this value was the transfer-in of a Defined Benefits Pension(s) ('DBP') she held with a previous employer(s). The DBP had been mentioned in the 2012 fact-find, but it was not in the scope of advice at the time. The partner had nothing to do with the DBP transfer advice, which appears to have happened between 2016 and early 2019. Records of contact between the parties shows that, in 2017, the matter was raised but the partner could not assist Ms C. He referred to the value of her DBP being below the minimum value required for SJP to provide specialist DBP transfer advice, so he suggested she obtain advice elsewhere.

The partner's fact-find document and suitability report refer to Ms C having opened the SIPP in order to have direct online control over it, but that she recently learnt the third-party adviser who arranged it was the only person with such control, so she considered this defeated its purpose.

The report also says she had received no OAS or contact from that adviser since the SIPP was set up; that the SIPP had been unmanaged, mainly uninvested and mainly held in cash since the beginning of 2019; that this was contrary to her best interest and risk profile; that she now wanted all her non-employer-based pensions to have an OAS; and that the SIPP

had no ancillary pension benefits to lose.

The suitability report confirmed she still had a medium risk profile, and that her investment horizon was at least five years. It said she had an emergency fund of £15,000 in accessible cash accounts and that she was comfortable in meeting the new mortgage payments from her income.

The partner recommended a switch of the SIPP to the SJP RP. He said he would normally not make such a recommendation for a SIPP that had only recently been established, but in her case the SIPP was uninvested, no management charges had been incurred in it and she had incurred no adviser charges in the DBP transfers into the SIPP (those charges had been covered by the DBP scheme). Furthermore, he said the recommendation met Ms C's objectives and addressed the concerns she had about the SIPP.

The report noted that due to its associated charges, and without guarantee, the RP would need to outperform the SIPP by 1.16% per year (reduced to 0.95% per year after a discount applied to the Initial Advice Charge ('IAC')) in order to provide the same retirement fund as the SIPP, and that in addition to the higher charges the following were also disadvantages of the RP – fewer funds, fewer fund management teams, and early withdrawal charges.

The investment allocations (and their risk profile descriptions) for the RP's post-switch portfolio were – 15% in an international corporate bond (lower-medium); 15% in a global equity fund (medium); 15% in an international equity fund (medium); 15% in a sustainable and responsible equity fund (medium); 15% in a strategic managed fund (medium); 10% in a global managed fund (medium); and 15% in a North American fund (upper-medium).

The Complaint

Ms C's representative mainly alleges the following –

- in both years her existing pensions were very suitable and were already meeting her needs;
- they also had favourable low charges and access to an adequate range of funds that matched her investor profile and met her investment needs;
- therefore, the transfers were unnecessary;
- for these reasons, and given the RP's higher costs and the absence of guarantees for the required outperformance, the switch recommendations were unsuitable;
- the partner failed to properly assess and determine her investor profile and failed to advise her on the total costs (including product, platform, transfer, initial advice and OAS costs) in the recommended solutions;
- he also did not disclose that his advice was tied to SJP products and did not advise her about the alternative of seeking independent financial advice;
- and the partner committed inappropriate behaviours and service failures in the advice process (including those mentioned above and the claim that she did not receive the OAS she paid for).

SJP disputes the complaint. With regards to the part of the complaint about the OAS, it mainly says –

- The May 2012 advice (followed by recommended SL PP to SJP RP switch in June 2012) happened before implementation of the December 2012 Retail Distribution Review ('RDR') which created the requirement for Ongoing Advice Charges ('OACs') to be distinct, separate and subject to cancellation if the client wished to cancel the associated OAS. This requirement was not retroactive, so it cannot be applied to the May 2012 advice and agreement with Ms C.

- Therefore, no OAC applies to her case for the 2012 advice and agreement.
- The requirement applied to the October 2019 advice, so the OAC applied in relation to this advice only, and any subsequent associated transactions.
- The 2019 switch happened in December, so its anniversary in December 2020 would have been when the partner's annual review, under the OAS that Ms C paid the OAC for, would have happened. However, she terminated his service and moved her pension to a new firm in September 2020, before the review could happen.
- In any case, there is ample evidence of the partner's ongoing and numerous contacts, engagements, annual reviews and advice to Ms C (individually and sometimes jointly with her husband) every year between 2012 and 2019.

With regards to suitability of the partner's advice, SJP mainly says –

- The requirements of the Conduct of Business Sourcebook ('COBS') section of the regulator's *Handbook*, at COBS 9A, meant the partner had to properly assess Ms C's profile (including her needs and objectives), ensure that his recommendations matched her profile (her objectives, investment term, risk profile, capacity for loss, investment knowledge and investment experience), and properly assessed the costs and benefits of his recommendations and established that the latter outweighed the former. The requirements in COBS 9, which applied to the 2012 advice, did not include a costs/benefits analysis, which was introduced in COBS 9A after January 2018. Instead, the requirement was to show a good reason for recommending a more expensive solution and this can be met where higher costs relate to a benefit that is valued by the client.
- Documentation related to his advice shows that all relevant aspects of her profile was properly assessed in 2012 and in 2019. Notably, in terms of her objectives in both years, she sought to benefit from a dedicated adviser in an OAS, and by 2019, having tried to self-manage the SIPP with the third-party adviser and given her bad experiences in that respect, she realised she was better off having all her non-employer-based pensions advised, managed and monitored under the same OAS. She also saw the benefits in SJP's approach to investment management. The SL PP was also over invested in property.
- The same set of documentation shows that the partner's advice in 2012 and 2019 matched Ms C's profile(s) and addressed her objectives and associated concerns, that his advice included assessment of the costs and benefits of his recommendations, and that his advice showed that the benefits of his recommendations outweighed their costs. The SJP approach to investment management was an added benefit.
- With regards to the 2012 advice, it is noteworthy that the SJP RP had a similar fund allocation to the SL PP, that at the time of advice the former had outperformed the latter between the 2012 switch and Ms C's service termination in 2020 the outperformance was 10.48%. The RP in 2019 was significantly different to the preceding SIPP because the SIPP had been held mainly (61%) in cash, whereas the RP was invested. At the time, the RP had outperformed the SIPP by over 21% and between the 2019 switch and the 2020 service termination the outperformance was 3.6%.

The complaint was referred to our service.

Our Investigation

One of our investigators looked into the complaint and addressed what he considered to be its three main components – the 2012 advice, the 2019 advice and SJP's OAS. He concluded that the complaint about the 2012 advice should be upheld because that advice was unsuitable, and he set out how redress for any associated financial loss should be

approached. Then he said the other two components of the complaint should not be upheld.

In relation to the 2012 advice, the investigator found that even if aspects of the partner's advice were appealing to Ms C, that did not automatically mean the advice was suitable for her. He said the partner's recommendation addressed her needs to achieve better investment diversification, compared to the SL PP's portfolio, and to have the OAS that did not previously exist, but the partner was obliged to consider whether (or not) the switch and associated higher costs justified the recommendation. The investigator noted that the suitability report acknowledged the outperformances required to cover the higher costs, but he was not satisfied that the partner established that Ms C stood to benefit from the switch in that context.

The investigator also referred to the partner's concession, in the suitability report, that there were fewer funds to choose from in the SJP RP than there were in the SL PP, and he found that diversification could have been achieved by fund switches within the SL PP, without the need for a pension switch. He was not persuaded that the OAS justified the pension switch. He said Ms C was facing long term investments that she was likely to hold until her retirement, so it is not obvious that she would have benefited from the OAS to the degree that it justified the higher costs.

With regards to the 2019 advice, he said circumstances were different, because the objective was about rectifying problems Ms C faced from another adviser's recommendation – a SIPP that was mainly uninvested, contrary to her risk profile (thereby exposing her SIPP's value to erosion in the absence of growth and as a result of fee deductions and inflation), and unmanaged. Therefore, he found, the SIPP was unsuitable for her and the partner's advice sought to correct that. With regards to the higher costs, the investigator considered that the recommended RP was more likely to grow and outperform the SIPP (which, as it was at the time, was more likely to lose value over time), so in this context the higher costs could be justified.

The investigator found that available evidence did not support Ms C's claim that the advice did not properly capture her profile, and he said the recommendation matched her profile at the time.

The investigator agreed with SJP's point about the RDR and about the absence of a separate OAC prior to implementation of the RDR, despite the partner agreeing to carry out an OAS for Ms C. Furthermore, he noted that the fees charged in relation to the 2012 advice did not include an OAC. For the 2019 advice, he noted that an OAC was separately applied and received by the partner. However, the investigator found that the partner's service was terminated before the first annual review was due, and considering the case overall it cannot be said that SJP failed to provide reviews whilst continuing to collect fees.

SJP disagreed with this outcome. It recapped on the facts of the complaint and on its main submissions, as summarised above, and it made some wider comments about our service's general approach to unsuitable advice complaints and to comparable complaints against SJP. It also said that it considers Ms C's complaint about the 2012 advice to be out of time, that it apologises for not highlighting this earlier and that because it did not do that it does not ask for a dismissal of the complaint – but it should still be noted that it considers the complaint, and complaints like it, to be out of time.

In response to the investigator's specific findings, it welcomed his conclusions that the complaint about the 2019 advice and the OAS issue should not be upheld. With regards to him upholding the complaint about the 2012 advice, SJP said this conclusion is wrong for the following main reasons –

- The investigator applied the wrong test to the suitability of the 2012 switch advice. At the time, COBS 9 applied – not COBS 9A, which followed implementation of the MiFID II Directive in 2018 – and under COBS 9.2.1R there was no requirement to apply a cost/benefit analysis to the recommended switch, which is what the investigator did in his findings.
- Instead, regulatory guidance issued in July 2012 (shortly after the advice to Ms C) confirmed that where "*a more expensive solution is recommended, there need[s] to be a good reason and this reason needs to be justified to the client*", and where "*additional costs apply, firms must judge whether they are suitable in light of the needs and objectives of the client. Additional costs may be justifiable where they are associated with a specific benefit that is valued by the client*".
- There is evidence that Ms C attached distinct and significant value to the OAS and to SJP's approach to investment management. These elements were part of the recommended switch and they came at additional costs. The additional costs (and the comparative outperformances required to address them) were transparently explained to her. The value she attached to these elements remained nevertheless, leading her to accept the partner's advice, so this serves as a key reason (and justification) for which the recommended switch was suitable. The increased cost "… *of 1.109% per annum was not significantly higher than the approximate 1% charge that the FCA would expect to see for advice, alone* …".
- Ms C was moving towards retirement at the time of advice. A client in her position will have an increasing need to ensure his/her pension investments are monitored, balanced and under advice. Therefore, it is wrong for the investigator to have found that the OAS was unnecessary because the pension was a long-term investment that Ms C was likely to hold until retirement.
- There is no evidence that, in the absence of the partner's advice, Ms C would have addressed her concerns about the SL PP herself. She was not comfortable making decisions without advice.
- The 2012 pension switch led to an increase in the value of her pension from around £104,000, as it was in 2012, to around £196,000, as it was in 2019.

The matter was referred to an Ombudsman.

SJP requested that the Ombudsman issue a Provisional Decision ('PD') on the complaint in any event, even if one was not required, thereby allowing for further comments from the parties before a Final Decision ('FD'). It acknowledged that a PD would usually only apply where an Ombudsman's decision differed from the investigator's view, but it said it had an arrangement in place with our service that supports its request.

The investigator conveyed his unawareness of any such arrangement, but SJP's request has been noted in the complaint's file.

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.

SJP's Request for a PD

I have enquired into whether (or not) there is an arrangement in place to issue a PD for this complaint in any event. I am informed there is no such arrangement. As I set out below, my conclusions are the same as the investigator's – I uphold Ms C's complaint about the 2012 advice, but I do not uphold her complaints about the 2019 advice and the OAS. On this basis, I do not need to issue a PD.

Jurisdiction

I have noted that SJP considers the complaint about the 2012 advice to be out of time. I acknowledge that, despite this, it does not object to us looking into its merits.

The regulator's *Handbook* contains rules on the time limits for complaints. They are set out in the Dispute Resolution section of the Handbook. The rules say we cannot consider a complaint referred more than six years after the complaint event or (if later) more than three years after the complainant knew or ought reasonably to have known there was cause for complaint – unless the complainant has written (or some other) record that shows a complaint was received in time.

DISP 2.8.2(5)R allows us to address a late complaint where the respondent firm has 'consented' to us doing so. In the wording of SJP's comment, it says it would not ask us to dismiss the 2012 advice related complaint, but it is not quite clear that it has given us *consent* to address it despite its view that the complaint is out of time. I do not consider that I can assume such consent, so I will address our jurisdiction.

Ms C's complaint was sent, by her representative, to SJP on 11 September 2023, and then referred to our service in January 2024. The complaint was therefore made more than six years after the 2012 advice, outside the six years time limit. The next consideration is the three years time limit.

This applies, if later than the six years time limit period, from when a complaint knew or ought reasonably to have known of cause for complaint.

I have not seen evidence of any complaint(s) from Ms C to the partner prior to September 2023. SJP has shared with us summary records of meetings and discussions between her (sometimes with her husband) and the partner between 2010 and 2019 and I have not identified any complaint(s) within those records. It follows that I also have not seen any evidence that the performance of the SJP RP prompted her to complain within this period (from 2012 onwards). The same applies to the time beginning from 2020, after she terminated the partner's service.

Overall, I have not seen grounds on which Ms C knew or ought reasonably to have known of cause to complain about the 2012 SJP RP recommendation until she engaged with her representative to review that advice. It is somewhat evident from the drafting of the complaint that her representative has advised her on technical grounds on which the 2012 advice can be viewed as unsuitable, as opposed to something tangible going wrong with the RP since that advice. Overall, I am satisfied that the time of her receipt of such advice is when she knew, and ought reasonably to have known, of cause for complaint. Based on the letter of authority she signed in the appointment of her representative, that engagement happened around June 2023, and her complaint was submitted within three years thereafter, in September 2023.

For the above reasons, her complaint was made within the three years time limit, is in time and is in our jurisdiction.

Merits

The 2012 Advice

Overall and on balance, I am not persuaded that the partner's advice to switch from the SL PP to the SJP RP was suitable for Ms C.

Evidence of her circumstances at the time shows she was in a relatively good financial position, around 10 years ahead of her planned retirement age. As I summarised above –

"*She was employed, unmarried with no financial dependents and no liabilities. Her focus was retirement planning. She was in her mid-50s and planned to retire at age 65. She had a Standard Life ('SL') PP (worth around £104,000 and into which she made gross monthly contributions of around £740 which were indexed to increase by 10% per year) and an Occupational Pension ('OP')*."

In addition to the assets in the quote above, she had monthly disposable income of around £2,000, an emergency cash fund of £25,000, no debts, no financial liabilities, no dependents, a separate life cover policy, and the valuable DBP(s) from her previous employment(s).

The fact find document from 2012 says she wanted to "*Have as much capital as possible on retirement to produce a "decent" income*", to access SJP's approach to investment management, to have an OAS and to have more control over fund selection in the PP because she had no such control in her employer-based pension arrangements. The other consideration at the time, linked to the fund selection objective, also appears to have been the state of diversification within the PP's portfolio.

The task facing the partner was to help her in achieving a suitable overall solution. In some cases, where there is cause to evaluate the stated objectives and their suitability for the client, the process that follows can, and should, include such evaluation. Furthermore, financial services come with associated costs, so charges/costs/fees had to be an important part of exploring and producing a suitable solution for her. I note these points for the reasons I address further below.

The regulator's Principles for Businesses, at Principle 6, required the partner to pay due regard to Ms C's interests and treat her fairly. This responsibility was 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 and in relation to designated investment business carried on for a retail client. These regulatory provisions are directly relevant to a firm's responsibility for the suitability of its recommendations.

In 2009, the regulator produced a checklist for pension switching, which highlighted four key issues that advising firms were expected to consider. In the course of his 2012 advice the partner would have – or ought reasonably to have – been mindful of this. One of the four considerations was 'charges' and the question to address was – is the consumer being switched to a pension that is more expensive than the existing one(s) or a stakeholder pension without good reason? This same question is broadly reflected in the rules and guidance SJP has cited as being the correct test to apply in relation to the 2012 advice.

The 2012 regulatory guidance that SJP has mentioned included the following –

"*Replacement business*
2.11 We continue to identify firms failing to consider the impact and suitability of additional charges when conducting replacement business. Several firms in our review failed to consider the costs and features of the existing investment, and were unable to quantify the additional charges associated with the new investment. In addition, several firms failed to provide a comparison of the costs of the existing investment and the new recommendation in a way the client was likely to understand.

2.12 We saw examples of firms recommending switches based on improved performance prospects, but providing no supporting evidence to show that these performance prospects were likely to be achieved. While we acknowledge that firms cannot be precise about the potential for higher returns, where improved performance is an objective of the client, firms should clearly demonstrate why they expect improved performance to be more likely in the new investment.

2.13 Firms often failed to collect adequate information on the existing investment or failed to consider the features and funds available within the existing solution. Firms should collect adequate information on the existing investment to demonstrate they have taken reasonable steps to ensure the suitability of their recommendation."

Evidence shows that the partner was sufficiently clear, to Ms C, about the additional costs of his recommendation, the impact of that in terms of outperformances required, and the comparisons to which the outperformance forecasts related. As such, I do not consider that he did anything wrong with regards to the concerns the regulator addressed in paragraph 2.11 above.

However, the impact of the additional costs had to be meaningfully addressed, in terms of how the recommendation would compensate for that. In the circumstances of the case, I do not accept that references to the prospect of accessing SJP's investment management approach and its OAS, on their own, were enough to do this. Furthermore, whilst no guarantees were given, the advice does not appear to have presented to Ms C a sufficiently defined strategy, over the likely 10 years term of the recommended RP (until her selected retirement age), on how the required outperformance was likely/more likely to be achieved. This being relevant to the concern the regulator addressed in paragraph 2.12 above. Illustrations were conducted, but on their own they did not amount to such a strategy.

I understand SJP's point about the value that it says Ms C attached to the OAS and SJP approach to investment management elements of the partner's recommendation, but the fact remains that her primary objective was, understandably, to "*Have as much capital as possible on retirement to produce a "decent" income*". This sets the context in which any preference she might have had for SJPs investment management approach and its OAS should be considered.

In other words, it is unlikely she would have had or retained any such preference if the likely outcome presented to her was that the additional costs in the partner's recommendation, could or would defeat her aim of maximising her retirement capital, or if she was told that her aim could be achieved without such additional costs. I have noted SJP's argument about a cost/benefits analysis requirement coming into place years after the 2012 advice, but such an analysis arguably stood within the partner's overarching responsibility to uphold her best interests. In principle, the notion of incurring additional costs that were not justified, and that could potentially erode the capital she sought to maximise, could not have been in her best interest.

To be clear, I accept that Ms C could have attached tangible value to SJP's investment management approach and to its OAS, and I accept that it would not have been unreasonable for her to do so. Such professional services in monitoring, advising on and managing a pension can indeed be beneficial. However, what I am looking into here is whether (or not) in the circumstances of her case the additional costs of the recommended solution justified them.

Those additional costs were as the partner set out to her – the SJP RP came with a total of 1.73% in annual charges; that was 0.53% per year more than the employer related MPS alternative that was available to her; it was around 1% per year more than a Stakeholder

Pension alternative that was available to her; and it was 1.109% per year more than the SL PP she already had. It was inevitable that the RP needed to stand a good chance of outperforming the SL PP, by 1.109% per year, in order to make the recommendation worthwhile, so a cost/benefits analysis was somewhat inescapable.

The difference in costs, between the SL PP's AMC of 0.621% and the recommended SJP RP solution's total charges of 1.73% per year, was significant. The latter was almost three times the former.

Information from the regulator's survey of financial advisers, published in April 2016 and titled 'FCA survey of firms providing financial advice', says at the time "*The median ongoing percentage charge for investment advice was between 0.5% and 0.75%, depending on the amount of investable assets*" and that "*The median percentage fee for ongoing advice on retirement income was around 0.5% across all pot sizes*".

I acknowledge that this postdates the 2012 advice by around four years, that the survey happened in the post-RDR era and, as I address below in relation to the OAS component of Ms C's complaint, that the 2012 advice did not charge separately for the OAS. However, it is also the case that any pursuit, by her, for ongoing advice would have happened *after* the 2012 initial advice. Probably no earlier than around a year thereafter, so it would have happened from 2013 onwards, during the post-RDR era.

In this context, I consider the survey to be reasonably relevant and it suggests that the cost of an OAS to her, for pension/retirement income related advice, from around 2013 onwards could have been around 0.5%. There is a form of added support for this finding in the regulator's July 2013 Thematic Review of the RDR, six months into its implementation. In a section highlighting concerns that some firms were yet to declare their fees in cash terms the document says – "… *this typically applied to firms whose ongoing charge is a percentage, for example 0.5%, of the amount invested*" [my emphasis]. If the regulator could use the 0.5% rate as an example of an OAS fee rate in July 2013 it would suggest such a rate was available at the time.

After discounting 0.5% per year – for any OAS that she might or could have obtained (from an independent financial adviser) for the SL PP from 2013 onwards – an additional cost of 0.609% per year remained in the SJP RP recommendation. I am not persuaded that this was, or could be, justified. The discount already allows for the OAS that SJP says Ms C placed value upon. If SJP says the value of its approach to investment management can be considered in relation to the 0.609% per year remainder, I would disagree. That approach is already catered for in the discount for the likely cost of an OAS. If I view this additional cost/remainder as the fee to cover the IAC for the initial 2012 advice, over the 10 years likely term of the RP this would amount to a total fee of around 6% (spread over that term). This would be an IAC rate that I cannot reasonably consider to have been in Ms C's best interests.

The above findings show how the additional costs associated with the partner's recommendation did not, in my view, justify it. This view stands even in the light of the OAS that SJP says was of value to Ms C, and that it appears to say was an unyielding objective for her. Furthermore, I consider, on balance, that the OAS (from SJP or elsewhere) was probably not an unyielding objective for her at the time and/or that, in her circumstances, she did not need it and did not need to undertake the expenses associated with it.

First, and with regards to an OAS from SJP, it is more likely (than not) that if an analysis akin to the above was presented to her – or, at the very least, if advice was given to her on the alternative of securing an OAS in 2013 in the wider market (with foresight towards the imminent RDR implementation and towards the fact that any OAS she desired would begin

in 2013 and in the post-RDR era) – she would have taken a different view on the costs of the partner's recommendation. She is unlikely to have been persuaded to undertake an increase of over 1% per year in charges for a solution, mainly for its inclusive OAS, when she could have waited a year (until time for an annual review) to shop around for an OAS in the market at more competitive rates.

With regards to consideration of an OAS in general, it strikes me that the priority need at the time was probably to review and rebalance the existing SL PP's portfolio. There was no issue about the availability of funds within it. The partner conceded in his advice that there were actually fewer funds available in the SJP RP, and the product comparison in his suitability report showed that the RP had a total of 31 funds in contrast to 204 funds available in the PP.

In 2012 the SL PP was invested in three funds, as mentioned in the background section above. It had been held since 1994. As of 2012, it appears that it had not been reviewed and/or rebalanced for some time.

In these circumstances, a review of Ms C's profile, a review of the PP's portfolio, recommendations on matching one to the other and on fund switches within the PP to achieve this, would have been a viable and cost-effective solution for her. Any desire she had for an OAS could have been addressed as I stated above – in order words, it could have been parked to one side at the time, for her to review in the future if she retained such a desire (no earlier than when she might have sought a first annual review in 2013). Had this been done and had she engaged a separate OAS in or after 2013, it would have given scope for her to evaluate, over time, whether (or not) it was value for money. If, at any time, she considered it was not, and that the PP's portfolio did not need as much ongoing attention as she might have previously thought, she could terminate it. The same could not apply to the 2012 recommendation because there was no sperate OAS and OAC that could be terminated. Both, in a sense, were incorporated into the overall advice and solution recommended to her.

Overall, on balance and for the reasons given above, I do not find that the 2012 advice was suitable for Ms C. Her situation could have been addressed by fund switches within her existing SL PP and that would have avoided the significant increase in costs that she undertook by following the partner's recommendation. Any desire she had to keep her pension under review and under advice could have been approached in a different and more cost-effective way, as set out above, and in a way that gave her control over any OAS that she might have later put in place.

SJP has referred to how her RP's value increased between 2012 and 2019. I have noted this, and I observe that the performance was broadly in line with the higher rate performance projected in the 2012 illustrations for the advice. However, no level of performance was guaranteed in the advice and none was definitively predicted, so this does not automatically mean the advice was suitable. To find or suggest otherwise would be an unfair assessment of suitability with the benefit of hindsight. Having said this, and without prejudice to the redress provisions below, any good performance in the RP over time might mean, upon applying the redress benchmark, that there is little or no financial loss to redress.

The 2019 Advice

Ms C's circumstances, in general and especially in relation to her SIPP, presented different factors in 2019. Those circumstances were as I summarised in the background section above.

The subject of the recommended pension switch in 2019 was the SIPP. Therefore, whilst I

have found above that the earlier 2012 switch advice was unsuitable, the fact is that it happened and the 2019 advice was about switching a different/new asset/product (the SIPP). Ms C's SJP RP (with the inclusive OAS) remained in place. This, as a matter of fact, is part of her circumstances as they were at the time and I cannot reasonably ignore that. Therefore, without prejudice to my findings above about the unsuitability of the 2012 advice (and the RP recommendation at the time), I have treated it as a factual part of her circumstances in addressing the 2019 advice.

Evidence from SJP's records of the partner's engagements with Ms C (with and without her husband) between 2012 and 2019 shows that those engagements were quite extensive. The records show that both sides had meetings and/or discussions for the provision of reviews/advice around 22 times between July 2013 and December 2019. With these facts, SJP has a better basis to argue that an OAS for the SIPP (or the pension arrangement in the SIPP) was a distinct priority for Ms C in 2019.

She had used that service over the previous six to seven years, she had probably become accustomed to it and, judging by the contents of some of her meetings and discussions with the partner, she appears to have received ongoing input from the adviser on a number of different matters related to her pensions. It is possible to see why, as SJP asserts, she positively wanted the same type of service, from the partner, for the arrangement in her SIPP, and there is a better case to show why she valued the service – based on the records of engagements it appears to have been beneficial to her, in terms of receiving ongoing professional input, over the years. Overall, and for these reasons, it would appear that even if the partner did not recommend his solution Ms C would probably have insisted on an OAS for the SIPP in any case or sought one elsewhere.

The SIPP was not under any form of advice, it was unmanaged and, quite importantly, it was mainly uninvested. The last aspect alone stood in conflict with her objective for growth in her retirement capital. As I stated above, the partner recognised that ordinarily it would not have been advisable to switch away from the SIPP, given that it had recently been put in place, but its uninvested, unmanaged and unadvised state made a difference to the considerations he applied. Ms C's objective was to address this state of the SIPP.

Of course, costs remained an important factor. However, on balance, I do not consider that the additional costs to Ms C in the 2019 recommendation made it unsuitable.

After a discount was applied by the partner, the charges associated with the recommended switch (which included the separate OAS) required outperformance of 0.95% per year when compared to the SIPP. In the regulator's 2020 report on the evaluation of the RDR it said – "*Our research shows the average charges are 2.4% of the amount invested for the initial advice and 0.8% per annum for ongoing advice*" [my emphasis] This would suggest that, in terms of the OAS alone, the additional *overall* costs (including the cost of the new advice, and for which the outperformance was needed) was not far from what Ms C would probably have had to pay for an OAS, on its own, in the open market. Isolating the OAS element in the recommendation, the 2019 illustration for the advice says the OAC was 0.25% per year.

Ms C had a medium risk profile. Her financial circumstances now included a mortgage liability that previously did not exist in 2012, but she was also earning significantly more, and fact find evidence shows that she still had a healthy level of net monthly disposable income (£1,803). Her SJP RP's value had appreciated to around £197,000, there was almost as much value in the SIPP (thanks to the transferred DBP(s)) and there was value of around £114,000 in the GPP. Her cash reserve was around £15,000.

I have not seen evidence to call into question her medium risk profile assessment and, on balance, I am persuaded that her financial circumstances gave her the capacity for loss to

match that risk profile.

The investment allocations recommended for the SJP RP's post-switch portfolio were as I summarised in the background section above, and as I repeat – 15% in an international corporate bond (lower-medium); 15% in a global equity fund (medium); 15% in an international equity fund (medium); 15% in a sustainable and responsible equity fund (medium); 15% in a strategic managed fund (medium); 10% in a global managed fund (medium); and 15% in a North American fund (upper-medium). Overall, I do not consider that this portfolio, as a whole, mismatched Ms C's medium risk profile and capacity for loss.

Overall, on balance and for the reasons given above, I do not consider that the 2019 advice was unsuitable.

The OAS

As I said earlier, there was no separate OAS and OAC for the 2012 advice. The advice and arrangement arising from it happened in mid-2012, around six months before implementation of the RDR, so the partner was not obliged to charge separately for an OAS at the time. This means that whilst an OAS was included in the recommended solution, Ms C did not pay a separate fee for it.

Nevertheless, and as I also said above, between July 2013 and December 2019, the partner engaged with Ms C around 22 times for reviews of and advice on her pensions, and to address a number of issues related to them over the years. Records of these engagements show that, overall, they were meaningful and that the gave her ongoing professional advice on and input into her pension affairs. In this context, I cannot fairly conclude that she did not receive the OAS she was expecting to receive.

In the 2019 advice the OAS and OAC were separately provided for, so Ms C paid the latter as a distinct fee for the former. I share the investigator's view on this aspect of the complaint. The partner's service was terminated around a month before the anniversary of the 2019 advice and around three months before the anniversary of its implementation. Given evidence of the extent to which he had conducted reviews and discussions with Ms C over the years up to the 2019 recommendation, I consider it more likely (than not) that he would have conducted the 2020 review when it became due, but for her service termination. Indeed, having met with her in October 2019 as part of his advice that month, the records show that he met with her again in December 2019 as part of implementation of the advice.

Overall, on balance, and especially with due regard given to the full extent of ongoing advice and contacts between the partner and Ms C up to December 2019, I am not persuaded that the partner/SJP did anything wrong in terms of the OAS arranged in 2019 and in terms of the 2020 review that he/it could not provide (because the time of the review was preceded by Ms C's termination of his/its service).

Ms C's other complaint issues

I do not wish to be dismissive about her allegation of inappropriate conduct from the partner, but addressing such a matter, in isolation, is beyond my remit. Our service is not the industry regulator, so I do not have the power to do that.

If and/or where the allegation is relevant to the complaint issues, I can consider it. The complaint about the 2012 advice has been upheld, so any finding of inappropriate conduct from the partner would not add to that conclusion, and I have not seen evidence of such conduct in relation to the complaints about the 2019 advice and the OAS.

The partner's records of meetings and discussions with Ms C does mention, in parts, meetings held with her and her husband and meetings arranged at her workplace. However, I have not seen evidence to establish that they were done contrary to her instructions or objections. The appearance is that she wilfully took part in those meetings. Furthermore, there does not appear to be a complaint from her (about the partner) earlier than the 2023 complaint made by her representative on her behalf.

Putting things right

fair compensation

For the reasons given above, the only complaint matter that is upheld is the unsuitability of the 2012 advice, so redress is limited to this matter only.

My aim is that Ms C should be put as closely as possible into the position she would probably now be in if she had been given suitable advice in 2012. As explained above, that advice should have recommended retaining and rebalancing her existing SL PP.

The investigator's view referred to the use of her previous pension's notional value, had the pension switch not happened, as the redress benchmark. I agree. However, and as he also stated, it is not certain that that value will presently be obtainable from the provider of the pension.

I am satisfied that what I have set out below, including provision for an alternative benchmark (based on her profile at the time of advice) if the notional value of the previous pension plan cannot be obtained, is fair and reasonable redress for Ms C.

The start date for the calculation of redress is the date on which the 2012 pension switch was implemented. The premise for the calculation (and any redress arising from it) is the finding that, but for the partner's unsuitable advice, Ms C would probably have rebalanced and retained the SL PP. I have not seen evidence that she would not have retained it to date, so the end date for the calculation of redress is the date of settlement.

what must SJP do?

To compensate Ms C fairly, SJP must:

- Compare the performance of *the investment* in the table below with the *notional value* benchmark in the table below. 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 the difference is the compensation payable to Ms C.

- Pay the compensation into Ms C'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 SJP is unable to pay the total amount into Ms C's pension plan, it should pay that amount direct to her. 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 Ms C would not be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Ms C's actual or expected marginal rate of tax at her selected retirement age. If she would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

- Provide the details of the calculation to Ms C in a clear and simple format.

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

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
The SJP Retriement Plan	No longer exists	Notional value from previous provider; or alternative benchmark stated below.	Date of 2012 pension switch	Date of settlement	Not Applicable

actual value

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

notional [fair] Value

This is the value of the investment, based on the performance of a version of the SL PP that suitably matches Ms C's profile (including her medium attitude to risk), had it remained with the previous provider until the end date. SJP should request that the previous provider calculate this value.

Any withdrawal from the investment 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 will accept if SJP 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 SL PP, SJP will need to determine a *fair value* for Ms C's investment instead, using this alternative benchmark (and applying the same adjustments stated above) – the FTSE UK Private Investors Income Total Return Index.

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 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 Ms C's medium risk profile can be reflected in this benchmark, in the sense that she was prepared to take some risk to achieve higher growth in her pension capital. It does not mean that she would have invested in some kind of index tracker investment. Rather, I consider this a reasonable benchmark that broadly reflects the sort of return she could have obtained from investments, in an SL PP portfolio (rebalanced in 2012), suited to her 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, £170,000, £190,000, £195,000, £350,000, £355,000, £375,000, £415,000 or £430,000 (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 Ms C's case, the complaint event occurred before 1 April 2019 and the complaint was referred to us after 1 April 2023 but before 1 April 2024, so the applicable compensation limit would be £190,000.

decision and award

I uphold the complaint on the grounds stated above. Fair compensation should be calculated as I have also stated above. My decision is that SJP should pay Ms C 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 SJP pays Ms C the balance. This recommendation is not part of my determination or award. SJP does not have to do what I recommend.

My final decision

For the reasons given above, I uphold Ms C's complaint about the 2012 advice and I order St. James's Place Wealth Management Plc to carry out redress as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms C to accept or reject my decision before 5 December 2024.

Roy Kuku
Ombudsman