DRN-5378327

The complaint

Mr L has a self-invested personal pension (SIPP) with DP Pensions Limited. In 2010 he invested in property-based investments with Harlequin Property. Mr L says DP Pensions failed to carry out appropriate checks on the Harlequin investments before making them in his SIPP. He says if it had made such checks DP Pensions would have found out the investments were "manifestly unsuitable" for pensions, it would not have permitted them within his SIPP and he would not have suffered the losses he has suffered. Mr L claims compensation from DP Pensions for those losses.

What happened

In 2010 Mr L had recently lost his job and was going through a divorce. Mr L saw his existing financial adviser who referred him to Mr H as he was more expert on pensions.

Mr H had (or said he had) a regulated financial advice business. Mr H also had another business called Atlantic Overseas Investment ("Atlantic") which he referred to as "*a nonregulated business to facilitate tax planning and present additionally…offshore properties".* Mr L says Mr H advised him to invest in overseas holiday property with Harlequin Property in his pension.

On 17 November 2010 Mr L signed a terms of business agreement with Facts and Figures Financial Planners Limited ("Facts & Figures"), completed a fact find and signed letters of authority for that firm to obtain information about his existing pensions. On the fact find it was noted that Mr L was introduced to Facts & Figures by "Atlantic".

Facts & Figures is not the name of Mr H's regulated advice firm. Facts & Figures was a separate advice firm which was authorised to advise on pension transfers.

Mr L applied for a SIPP with DP Pensions in November 2010. It was recorded on the SIPP application form that:

- Mr L had a financial adviser called "Facts & Figures"
- Mr L wanted to transfer to the SIPP a personal pension with an estimated transfer value of around £50,000 and an occupational pension with an estimated transfer value of over £300,000.
- Mr L wanted to invest in a property investment *"through Harlequin via Atlantic Overseas."*
- The "Investment Manager" was recorded as Atlantic Overseas Investments.

The completed application form was sent to DP Pensions by Facts & Figures with a covering letter dated 18 November 2010.

Mr L has provided a copy of a suitability report prepared for him by Facts and Figures dated 30 November 2010 (i.e. after Mr L had signed the DP Pensions application form which included the request to transfer both his existing pensions to the SIPP). And after the application had been sent to DP Pensions by Facts & Figures.

The report refers to an earlier meeting and was written on the basis that Mr L wanted to invest in holiday property in the Caribbean and that Facts and Figures had been asked to recommend a pension plan for that purpose.

The following was also recorded in the suitability report:

> *"You believe that irrespective of all normal criteria for assessing pension transfers you are very keen to effect the transfer to a SIPP to invest in overseas property."*

The report did not give any advice on the suitability of making such investments in Mr L's pension.

The report concluded that Mr L should not transfer his defined benefits occupational pension but went on to say that Mr L was insistent on making the transfer. On that basis, the report recommended that Mr L transfer his pensions to a SIPP with DP Pensions.

The report also said Facts and Figures fee for arranging the transfer was 5% of the transfer value which meant a fee of over £18,000.

The report asked Mr L to sign to confirm that he was happy with the recommendations contained in the report and the copy of the report I have seen bears a signature that purports to be Mr L's signature and is dated 6 December 2010.

I note that though Mr L says he was not aware of the involvement of Facts & Figures he has also said he signed some documents without knowing what they were or paying close attention to them. Mr L has not alleged that the signature on the suitability report is not his.

Soon after the SIPP was set up over £300,000 was transferred into it from Mr L's defined benefit occupational pension scheme and around £50,000 was switched into the SIPP from a personal pension. (In the Conduct of Business rules the term transfer is used when referring to the transfer of a defined benefit occupational pension while the same type of transaction relating to a defined contribution personal pension is referred to as a switch. For convenience I will generally refer to both as a transfer.)

In December 2010 Mr L invested in four Harlequin Property investments. He paid out around £345,000 for the deposits on four off-plan investment properties.

In 2012 Mr L invested further money in two additional Harlequin Property investments outside his pension. As I understand it, Mr L will have paid almost £60,000 in total for the deposits for those two properties.

Problems developed within the Harlequin Group which came to the surface from around 2013. In 2013 the Serious Fraud Office and the police announced they were launching enquiries into Harlequin.

In 2017 Harlequin Property (SVG) Limited went into bankruptcy. Also in 2017 the Serious Fraud Office brought charges against the Chair of the Harlequin Group.

As mentioned above, Mr L had a meeting to discuss matters with DP Pensions in 2017. Mr L says this is when he discovered the involvement of Facts & Figures.

In 2018 Mr L made a complaint to Facts & Figures. Mr L then referred that complaint to the Financial Ombudsman Service.

Solicitors acting for Mr L wrote to DP Pensions on 11 February 2019 to set out his complaint against it. They said (amongst other things) that DP Pensions had failed to assess whether the Harlequin investment was an appropriate investment for a SIPP and failed to:

- assess whether the Harlequin scheme was appropriate for a SIPP
- ensure it was a safe and secure investment
- ensure the investment was genuine and not a scam or linked to fraudulent activity.

And it is Mr L's case that but for the various breaches of duty by DP Pensions he would not have transferred his pensions to it and would have left his pensions in their existing arrangements.

DP Pensions said in its final response letter dated 20 May 2019 the complaint had been made to it too late to be considered.

Mr L referred his complaint about DP Pensions to the Financial Ombudsman Service in June 2019.

Facts & Figures went into liquidation in December 2019. Mr L made a claim to the Financial Services Compensations Scheme (FSCS) in respect of the advice from Facts & Figures. The FSCS upheld that claim. In 2020 it calculated Mr L's loss at almost £800,000 and it offered Mr L its maximum permitted payment of £85,000. Mr L accepted that payment.

As part of that settlement, Mr L assigned to the FSCS his right to make claims against other parties involved in the matter and the right to make a claim against DP Pensions has been reassigned back to Mr L from the FSCS. A term of that reassignment is that Mr L must repay the FSCS the money it has paid to him from any money recovered from DP Pensions.

I issued a jurisdiction decision on 17 March 2023 in which I said the complaint had not been referred to DP Pensions outside the applicable time limits and could therefore be considered.

The merits of Mr L's complaint were then considered by one of our investigators. She thought the complaint should be upheld. As DP Pensions did not agree the complaint was referred back to me to determine. I apologise to Mr L and DP Pensions for the length of time this has taken.

During the time this matter was waiting to be allocated to an ombudsman Mr L has informed us that he has received a further payment of almost £37,000 from FSCS which it recovered from the firm dealing with Facts & Figures insolvency.

I issued a provisional decision on 15 November 2024. I explained why I thought Mr L's complaint should be upheld and what DP Pensions should do to put things right.

Mr L agrees with my provisional decision. DP Pensions does not. It has made a number of points during the complaint and in response to my provisional decision, including:

- DP Pensions acts on a non-advisory basis. This is the context in which the complaint must be considered. It does not give advice and it is not permitted to do so.
- DP Pensions did not act in breach of duty in accepting the Harlequin investment.
- There was no obligation to consider whether the investment was suitable for Mr L.
- It was a matter for Mr L to satisfy himself that the investment was suitable for him.
- Mr L signed an indemnity in which he agreed he was responsible for such decisions and would indemnify DP Pensions against any claim in respect of such decisions. A reason for the indemnity was to make sure Mr L understood the importance of the decision and that he should consider very carefully whether the investment was suitable for him.
- DP Pensions did carry out due diligence on the investments. This included:
    - Reviewing Harlequin's annual returns to Companies House.
    - Obtaining Harlequins' report and accounts for the year ending 31 March 2009.
    - Obtaining a report on Harlequin from a credit agency.
- There was nothing in the checks that led it to believe the investment was a scam, fraudulent, taxable property, or that DP Pensions would not obtain good title. The investment therefore met DP Pensions requirements.
- There was nothing DP Pensions could reasonably have discovered that was not known to Mr L when he decided to invest in Harlequin.
- The Harlequin investment was widely sold by advisors at the time and there was no publicly available information which would reasonably have given DP Pensions cause for concern.
- Mr L invested in Harlequin outside his pension so was clearly keen to invest in Harlequin. It also shows that if DP Pensions had refused to allow the investment, he would have invested in it using a different SIPP provider.
- Mr L went against the advice of Facts & Figures which also shows Mr L would have gone ahead with the investment regardless of anything DP Pensions may have done.
- Mr L had paid reservation fees of £1,000 for each property and would not have wanted to lose that money.
- At around the time of the advice Mr L owed his employer a large sum of money. If he was able to repay that sum because of the pension transfer that is another reason why he would have gone ahead with the transfer in any event.
- A previous complaint against DP Pensions made by a different member who invested in Harlequin was not upheld. Mr L's complaint should be treated in a consistent way.
- Facts & Figures caused Mr L's decision to invest in Harlequin. There are published ombudsman decisions against that firm all involving investments in Harlequin and all upheld against that firm.
- Mr L complained to the Financial Ombudsman Service about Facts & Figures, and made a claim to the FSCS about that firm which shows he held it responsible for his losses.

- It was reasonable for DP Pensions to think Facts & Figures would perform its role appropriately.
- Mr L's application was the first received from Facts & Figures and there was no reason not to accept it. There was for example no pattern of behaviour to give any cause for concern. DP Pensions did decide not to accept further applications to invest in Harlequin from Facts & Figures when it became clear after 14 applications, that all of its applications involved Harlequin investments and Facts & Figures stopped referring further business to it after that.
- The Financial Ombudsman Service seeks to hold DP Pensions to a standard that is higher than that found in the rules, guidance or law.
- There was no obligation to obtain a copy of the suitability report, it was only an example of what could be done given in the 2009 Thematic Review Report. The 2012 Report did not refer to suitability reports. And the finalised guidance in 2013 did not include an obligation to request copies of suitability reports.
- DP Pensions was in no position to judge the situation regarding Mr L being an insistent client as DP Pensions is not authorised to give advice. There is no requirement on DP Pensions not to accept business submitted to it on an insistent client basis.
- The level of commission in the case at 5% was normal and not a cause for concern. Rather it gave some reassurance that advice was being given and DP Pensions had no reason to think that a regulated firm would not follow correct processes when giving advice.
- There is no obligation on DP Pensions as an execution only SIPP provider to assess the appropriateness of a decision made by a customer. DP Pensions was not therefore required to question why Mr L was proceeding with the pension transfer against advice.
- Atlantic was listed on the SIPP application as the Investment Manager, but DP Pensions had no reason to think its involvement went beyond being a sales agent for Harlequin.
- There is no evidence to show Atlantic gave any advice or put Mr L under any pressure to invest.
- There is no prohibition of unregulated introducers. Nor was there any reason to reject Mr L's application because an unregulated firm was involved.
- It seems to have been accepted that Mr L was not aware of the involvement of Facts & Figures but this is not credible. There is reason to have doubts about Mr L's honesty. In any event, memory is not reliable and documentary evidence should be preferred.
- If Mr H gave advice, it's likely he did so in his capacity as an adviser with his regulated firm. There are published ombudsman decisions against that firm where it denied giving advice relating to Harlequin, but the complaints were nevertheless upheld against that firm.
- It was incumbent on Facts & Figures to consider the receiving product when advising on pension transfers. This was referred to in an alert issued by the FCA - *"This post-dates the investment but sets out what expectations were at the time."*

- Facts & Figures and/or Atlantic caused Mr L's losses not DP Pensions.
- DP Pensions would only have been able to reject Mr L's application. It would not have been able to explain why as that would have involved a value judgment and breached its regulatory permissions. And if DP Pensions had rejected Mr L's application Facts & Figures and/or Atlantic would have referred Mr L's application to a different SIPP provider instead.
- It's wrong to apply the *Berkeley Burke* and *Options* court decisions. They relate to the approach taken by the Financial Ombudsman Service, but the approach should still be informed by the relevant case law and the *Adams* case is the only relevant example.
- The Financial Ombudsman Service has repeatedly referred to matters that were published after Mr L's SIPP application. This is unfair. Those documents are not relevant. DP Pensions cannot be at fault for not taking into account things that had not yet been published.
- Liability cannot be based on a pattern of referrals from Facts & Figures that did not exist at the time of Mr L's SIPP application.
- There was no obligation on DP Pensions to find out about Facts & Figures business model or see a copy of the recommendation report. Even if DP Pensions had asked it seems unlikely Facts & Figures would have disclosed that it intended only to refer clients who wanted to invest in Harlequin.
- Although there is a presumption against the suitability of pension transfer advice, there was nothing to prevent a member of a defined benefit pension scheme transferring against advice. Mr L may have had good reason to want to transfer his pension.
- Part of the reasoning in the provisional decision is based on DP Pensions making findings that would have required it to go well beyond the scope of duty on a reasonably competent SIPP provider.
- But if DP Pensions had rejected the application the evidence indicates it is more likely than not that Mr L's application would have been made to a different SIPP operator instead and he would have invested in the same way and suffered the same losses.

What I've decided – and why

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

I've considered all of the points made by the parties. I have not however responded to all of them below; I have concentrated on what I consider to be the main issues.

I have noted DP Pensions' reference to an ombudsman's decision relating to it, a different consumer, and a Harlequin investment. I am not bound by that decision. I am required to make my own decision about what is fair and reasonable in the circumstances of this case. And that said, there do seem to be some material differences between this case and that other case. In particular, the two cases involve two different adviser firms.

Relevant considerations:

I'm required to determine this complaint by reference to what I consider to be fair and reasonable in all the circumstances of the case. When considering what is fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

I have taken into account a number of considerations including, but not limited to:

- The agreement between the parties.
- The Financial Services and Markets Act 2000 ("FSMA").
- Court decisions relating to SIPP operators, in particular *Options UK Personal Pensions LLP v Financial Ombudsman Service Limited* [2024] EWCA Civ 541 (*"Options"*) and the case law referred to in it including:
  - *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474 ("*Adams"*)
  - *R (Berkeley Burke SIPP Administration) v Financial Ombudsman Service* EWHC 2878 (*"Berkeley Burke"*)
  - *Adams v Options SIPP UK LLP* [2020] EWHC 1229 (Ch) (*"Adams – High Court"*)
- The FSA and FCA rules including the following:
  - PRIN Principles for Business
  - COBS Conduct of Business Sourcebook
  - DISP Dispute Resolution Complaints
- Various regulatory publications relating to SIPP operators, and good industry practice.

The legal background:

As highlighted in the High Court decision in *Adams* the factual context is the starting point for considering the obligations the parties were under. And in this case it is not disputed that the contractual relationship between DP Pensions and Mr L is a non-advisory, or execution only, relationship.

Setting up and operating a SIPP is an activity that is regulated under FSMA. And pensions are subject to HMRC rules. DP Pensions was therefore subject to various obligations when offering and providing the service it agreed to provide – which in this case was a non-advisory service.

I have considered the obligations on DP Pensions within the context of the non-advisory relationship agreed between the parties.

The case law:

I'm required to determine this complaint by reference to what is in my opinion fair and reasonable in all the circumstances. I am not required to determine the complaint in the same way as a court. A court considers a claim as defined in the formal pleadings and they will be based on legal causes of action. The Financial Ombudsman Service was set up with a wider scope which means complaints might be upheld, and compensation awarded, in circumstances where a court would not do the same.

The approach taken by the Financial Ombudsman Service in two similar complaints was challenged in judicial review proceedings in the *Berkeley Burke* and the *Options* cases. In both cases the approach taken by the ombudsman concerned was endorsed by the court. A number of different arguments have therefore been considered by the courts and may now reasonably be regarded as resolved.

It is not necessary for me to quote extensively from the various court decisions.

I do however note here that the *Berkeley Burke* and *Options* cases involved unsuccesful judicial review challenges to ombudsman decisions on complaints with similar underlying disputes to Mr L's complaint. Like Mr L's complaint, the underlying complaints in the *Berkeley Burke* and *Options* cases involved:

- execution only SIPP providers,
- applications to open a SIPP and make an investment on the advice of a third party,
- SIPP applications made before the publication of the 2012 Thematic Review Report, the 2013 Guidance and the 2014 Dear CEO letter, all referred to below.

The Principles for Businesses:

The Principles for Businesses, which are set out in the FCA's Handbook "*are a general statement of the fundamental obligations of firms under the regulatory system"* (see PRIN 1.1.2G). The Principles apply even when the regulated firm provides its services on a non-advisory basis, in a way appropriate to that relationship.

Principles 2, 3 and 6 are of particular relevance here. They provide:

> "*Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*
>
> *Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.*
>
> *Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly*."

I am satisfied that I am required to take the Principles into account (see *Berkley Burke*) even though a breach of the Principles does not give rise to a claim for damages at law (see *Options*).

The regulatory publications and good industry practice:

The regulator issued a number of publications which reminded SIPP operators of their obligations, and which set out how they might achieve the outcomes envisaged by the Principles, namely:

- The 2009 and 2012 Thematic Review Reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 *"Dear CEO"* letter.

The 2009 Report included:

“We are concerned by a relatively widespread misunderstanding among SIPP operators that they bear little or no responsibility for the quality of the SIPP business that they administer, because advice is the responsibility of other parties, for example Independent Financial Advisers…

We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses (‘a firm must pay due regard to the interests of its clients and treat them fairly’) insofar as they are obliged to ensure the fair treatment of their customers…

some SIPP operators have not been taking basic measures such as checking, on an ongoing basis, that advisers who introduce clients to them are FSA authorised and have the appropriate permissions. Some firms did not have formal terms of business agreements with advisory firms, and many do not gather and analyse management information tracking where their business comes from, together with indicators as to its suitability for clients…

We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate SIPPs that are unsuited or detrimental to clients.

Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime…

The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm’s clients, and that they do not appear on the FSA website listing warning notices.*
- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*
- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*
- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more ‘esoteric’ investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate*

clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.
- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*
- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*
- *Identifying instances of clients waiving their cancellation rights, and the reasons for this."*

I have considered all of the above publications in their entirety. It is not necessary for me to quote more fully from the publications here.

The 2009 and 2012 Thematic Review Reports and the *"Dear CEO"* letter are not formal guidance (whereas the 2013 finalised guidance is). However, like the ombudsmen who decided the underlying complaints in the *Berkeley Burke* and *Options* cases I consider that all of the publications provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take them into account (as did the ombudsmen whose decisions were upheld by the court in the *Berkeley Burke* and the *Options* cases).

Points to note about the SIPP publications include:

- The Principles on which the comments made in the publications are based have existed throughout the period covered by this complaint.
- The comments made in the publications apply to SIPP operators that provide a non-advisory service.
- Neither court in the *Adams* case considered the publications in the context of deciding what was fair and reasonable in all the circumstances. As already mentioned, the court has a different approach and was deciding different issues.
- What should be done by the SIPP operator to meet the regulatory obligations on it will always depend upon the circumstances.

DP Pensions' position in broad terms:

In broad terms DP Pensions' position is:

- It carried out due diligence to a degree that was appropriate for its role as non-advisory SIPP operator.
- Its due diligence did not reveal any cause for concern at the time.
- In any event, any failings on its part did not cause Mr L's losses.
- It is not fair in the circumstances to require DP Pensions to compensate Mr L.

What did DP Pensions' obligations mean in practice?

As mentioned above, I am satisfied that the regulator's publications referred to above provide a reminder that the Principles for Businesses apply and give an indication of the kinds of things DP Pensions, as a non-advisory SIPP operator, might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles.

I'm satisfied that to meet its regulatory obligations, which included when conducting its operation of its non-advisory SIPP business, DP Pensions was required to consider whether to accept or reject particular investments and/or referrals of business with the Principles in mind. I say this based on the overarching nature of the Principles (as is clear from the case law) and based on good industry practice.

I note that in practice this was also (broadly at least) DP Pensions' view since it did for example carry out checks on investments before deciding whether to allow them in its SIPP. And it did decide not to permit any further Harlequin investments for Facts & Figures introduced customers after it became concerned that all of the business being referred to it by Facts & Figures was being invested in Harlequin. DP Pensions did not go so far as to refuse to accept any further business from Facts & Figures as such, but I think it would accept that it could have done so if it had wished.

I am satisfied that a non-advisory SIPP operator could decide not to accept a referral of business or a request to make an investment without giving advice. And I am satisfied that in practice many non-advisory SIPP operators (including DP Pensions) did refuse to accept business and/or refuse to make investments without giving advice – as with the 14th referral from Facts & Figures where DP Pensions refused to make the Harlequin investment.

So DP Pensions conduct in practice indicates an acknowledgment that it does have some responsibility for the quality of the SIPP business it administers, even when that business is introduced by a regulated adviser. It would therefore appear to accept, in practice, the principle that it should have procedures and controls to enable it to identify matters such as possible instances of financial crime and consumer detriment such as unsuitable SIPPs.

Such procedures and processes should not be token or carried out just for their own sake. The procedures and processes should be reasonable steps to produce the outcomes required by the Principles including, when providing its non-advisory service, paying due regard to the interests of its customers and treating them fairly.

In my view in broad terms this means being proactive and asking questions where appropriate. Depending on the circumstances, only reacting to an emerging picture or trend may not be enough.

I am satisfied that, in order to comply with its regulatory obligations, a non-advisory SIPP operator should have due diligence processes in place to check the SIPP applications it receives and investments they are asked to make on behalf of members or potential members. And DP Pensions should have used the knowledge it gained from its due diligence checks to decide whether to accept a SIPP application or particular investment instruction.

Due diligence carried out by DP Pensions

Without going into detail, I accept that DP Pensions did carry out due diligence checks on both Facts & Figures and on the Harlequin investment. DP Pensions considered it did this to a degree that was appropriate to its role as a non-advisory SIPP operator. I will not set out all of the checks made by DP Pensions here, but I have noted all it has said.

In relation to the due diligence DP Pensions did carry out I set out here a point DP Pensions has made as I will return to it below.

When asked about any further checks it made on Facts & Figures after it had first agreed to accept business referrals from it, DP Pensions said:

> *"Having identified that all the clients introduced by Facts & Figures were to invest in Harlequin, they were notified that we would not be accepting any more Harlequin cases. Although the 14th client opened a SIPP with [DP Pensions] we did not permit the Harlequin investment application. Facts & Figures subsequently advised them to transfer to [another SIPP provider] where they invested in Harlequin.*
>
> *Our process in 2010 was to contact the financial adviser for a telephone review of business around every six months. However, Facts & Figures did not return any of our calls and ceased introducing business to us at the same time. We expect this was because of our refusal to accept any more Harlequin cases from them."*

I note here that I have not forgotten and do not overlook the point that Mr L's was the first application DP Pensions received from Facts & Figures.

Facts & Figures

DP Pensions took some comfort from Facts & Figures being an authorised and regulated advise firm – points which it checked. But it is clear from the above that in practice DP Pensions did not consider Facts & Figures regulatory status meant the quality of the business introduced to it by Facts & Figures was assured. Or that there was nothing more for it, DP Pensions, to do in its capacity of execution only SIPP operator to reasonably protect its interests and those of its clients and potential clients.

In its guidance in 2013 the regulator said it had seen examples of good industry practice during its work with SIPP operators which included:

> *"understanding the nature of the introducer's work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied they are appropriate to deal with."*

In my view such checks by a SIPP operator to be made before starting, and during, a relationship with an introducer were appropriate and consistent with the obligations under the Principles for Businesses and good industry practice.

One of our investigators asked DP Pensions what it understood of the introducer's (meaning Facts & Figures') "*business model/client process to involve*".

From the answer given by DP Pensions it seems the checks in this area were not detailed. It seems to have mostly amounted to Facts & Figures wanting to do business with a SIPP operator that was local to it, which would provide a personal service to its clients. No information was provided by DP Pensions about what it discovered about Facts & Figures business model as such. DP Pensions seems to have generally been satisfied that all was in order because Facts & Figures was a regulated firm that had been in business for some time.

It is clear now that Facts & Figures had, or intended to adopt, a particular way of doing business for at least a strand of its pension business if not all of it.

Facts & Figures had, or was establishing, a relationship with Atlantic under which Atlantic would introduce consumers to Harlequin investments and refer consumers to Facts & Figures if the investment was or was likely to be made via a pension.

And in those cases Facts & Figures would give advice on transferring a pension to a SIPP in order to invest in Harlequin, with advice given on the basis that Facts & Figures was not advising on the investment, only on the pension that could be used to make the investment. I will call this limited advice.

It should be kept in mind that Atlantic will, at that time, generally speaking, have regarded the Harlequin investment as a genuine and worthwhile property-based investment. There may have been issues about the level of commission that Atlantic was most likely receiving which it probably did regard as commercially sensitive, but generally it would have been open and positive about its business.

It should also be kept in mind Facts & Figures is likely to have considered the Harlequin investment as a genuine investment with the question of whether or not the investment was actually suitable for the consumer being a different question but not one it was being asked to answer.

And it should be kept in mind that Facts & Figures will have considered this limited advice model to be a business practice that was permitted, and did not involve a breach of any rules.

In this regard it is to be noted that in 2013 the FSA issued an alert where it said a number of firms were using this advice model 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. There are two relevant points that this alert shows here. First is that a number of firms were operating in this way based on a mistaken belief so there is no reason to think they were not operating openly or would have tried to conceal how they were acting in this way if asked.

The second point is that although a number of firms were acting in that way the general tenor of the alert is that this is exceptional behaviour, that the behaviour was not the norm. That is also my view – that most advice firms were not acting in that way at that time. The practice was, in that sense, unconventional.

Bearing in mind the first of those two points, it is my view that if asked Facts & Figures would have disclosed its business relationship with Atlantic and its limited advice methodology.

Alternatively, Facts & Figures might have been evasive if asked questions about its business model which would have caused concern. This is a possibility if Facts & Figures had itself thought this Atlantic/Harlequin/limited advice business was questionable in some way perhaps because the investments were being "sold" rather than recommended through a reasonable advice process or if it thought high levels of commission being paid in relation to Harlequin was distorting any advice process.

Either way, before receiving Mr L's application DP Pensions should have discovered at the outset the business model that existed at the time and did, in time, lead to 14 SIPP applications to it in a relatively short period all involving investment in Harlequin. Or DP Pension would have been suspicious about Facts & Figures refusing to answer questions or giving evasive answers to its reasonable enquiries.

Alternatively on receiving Mr L's application – the first from Facts & Figures – DP Pensions should reasonably have checked that application against what it had reasonably discovered about DP Pensions business model. And that checking process might reasonably have included asking to see a copy of the suitability report. In my view in the particular circumstances when faced with a new to it business using an unconventional business model, it would have been good business practice to obtain and review a copy of the suitability report if the SIPP operator had decided not to refuse such business outright but had instead decided to take things a step at a time and see how things looked in practice.

And in my view DP Pensions should reasonably have made enquiries about Atlantic who were named in the SIPP application form if it had not already found out about Atlantic and its role by that stage from Facts & Figures.

In the event DP Pensions made assumptions about the roles of the parties in Mr L's application based on an incomplete understanding in Mr L's case. It assumed Facts & Figures would have given advice to Mr L appropriately because Facts & Figures was a regulated firm authorised to advise on pension transfers. And because it was being paid commission at a level that seemed appropriate for an adviser providing an appropriate service.

And it made an assumption about the role of Atlantic. DP pensions has said it had no reason to believe Atlantic's involvement *"went beyond being a sales agent for Harlequin being responsible for arranging paperwork and organising signatures etc."*

Pension Transfers

Transferring a defined benefit pension scheme to a personal pension – which includes a SIPP – is an issue that has concerned the regulators for a long time. DP Pensions would have been aware of this. The conduct of business rules included the following guidance to advisers at the time of Mr L's SIPP application in 2010:

COBS 19.1.6G

> "When advising a *retail client* who is, or is eligible to be, a member of a *defined benefits occupational pension scheme* whether to transfer or opt-out, a *firm* should start by assuming that a transfer or opt-out will not be suitable. A *firm* should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the *client's* best interests."

So the guidance to advisers – which DP Pensions will have been aware of even though it did not give advice – was that the starting assumption should be that advice to transfer from a defined benefit pension scheme to a SIPP is unsuitable for a retail client.

In Mr L's case his application form did say Mr L was proposing to transfer from a pension with a transfer value of over £300,000 from a pension scheme of a large household name employer. DP Pensions will have known or at least should have thought it a realistic possibility that that pension was a defined benefits pension without that point actually being referred to expressly on the application form. If it did not know, it could easily have found out.

DP Pensions should therefore reasonably have known that it had received an application to set up a SIPP and transfer to it a defined benefits pension and that such a transfer was unlikely to be suitable for a retail investor such as Mr L.

I do not say here that DP Pensions could give advice or should have done so, or even that it knew the transfer advice was unsuitable. Or that it should have automatically refused to accept the application because it involved a pension transfer. I only make the point that the presumption of unsuitability was part of the context in which Mr L's SIPP application was received and processed by DP Pensions.

Harlequin

I make some general points relating to Harlequin below, being aware that some of the points made refer to events after Mr L's investment application. However many of those points are based on general investment principles and the Principles for Businesses that applied at the time of Mr L's application to DP Pensions.

In its Dear CEO letter in 2014 the FCA said:

> *"…our thematic review focused on non-standard investments, it is important to note that guidance on due diligence applies to all investments."*

When the overarching nature of the Principles for Business is considered the above statement is an obvious point. I do not accept that the requirements of the Principles distinguish between things that are technically within the definition of an unregulated collective investment scheme (UCIS) or a non-standard investment. It is the substance rather than the form or label that is important.

Although Harlequin property investments were generally promoted as property investments they were not straightforward property investments for a number of reasons. They involved buying a property in a hotel or resort development overseas that had not yet been built. The investor paid a deposit of around a third and further payments were due as the building progressed.

So an investor like Mr L who invested in a Harlequin property had entered into a commitment to pay for the rest of the property not just the initial deposit – though Harlequin did offer a loan arrangement for the payment of the balance of the purchase price.

And when the property was complete it was not a property that the investor could use for their own holiday and/or personally rent out like a more usual holiday or second home. The property was to be managed with the other properties in the hotel or development. This was to be done by or on behalf of Harlequin. And the return on any given hotel room or villa did not depend on the occupancy rate of the individual room or villa, at least not initially. Rather, the income was to be calculated in relation to the whole project.

There was typically a two-year rental guarantee of 10% for the first two years followed by a 50% rental arrangement, and a guarantee to offer investors a 70% mortgage.

All of this meant the Harlequin property investment was not a straightforward property investment but was either UCIS or very much like one. This ought to have been apparent to DP Pensions from even a fairly superficial review of the investment.

In the 2013 SIPP guidance The FCA said:

> *"UCIS are complex, opaque, illiquid and risky and tend to invest in high-risk ventures such as films, green energy initiatives and overseas property funds. They are not covered by FOS or FSCS protections.*
>
> *We have stated previously that UCIS are high risk, speculative investments which are unlikely to be suitable for the vast majority of retail customers."* The FCA went on to say:
>
> *"If firms are involved with UCIS they should ensure they:*
> - *Have enhanced procedures for dealing with UCIS…*
> - *Undertake appropriate due diligence on each UCIS scheme – this due diligence, together with all research should be kept under regular review"*

In January 2013 the FSA issued an alert to advisers relating to Harlequin. It set out some points advisers should consider such as:

- Considering how the building work is progressing on the various sites and any factors involved in reported delays to completion
- Establishing precisely how their customers' funds are to be used during the construction phase and the terms of their purchase agreement
- A full assessment of all publicly available information about overseas property investments through Harlequin property and on all the parties associated with these investments.

As mentioned above. the SFO and the police launched enquiries into Harlequin soon after in March 2013

In 2016 there was a court decision in a claim brought by Harlequin against its accountants and business advisers. In that case the judge in effect described Harlequin's business model as a Ponzi scheme fraud.

Clearly neither Mr L nor DP Pensions will have known about the fraud being carried on at or by Harlequin at the time of Mr L's investment. And it is important to keep in mind how things seemed at the time. But in that regard, it is notable that within six months of Mr L's investment, DP Pensions was concerned about all its Facts & Figures introduced clients investing in Harlequin Property investments. This indicates that, rightly in my view, DP Pensions did not regard Harlequin as a "vanilla" investment but rather as something that might involve harm if used in the wrong situations. And that this was something that might occur if the investment was entered into in as part of a process in which the investment and its suitability for the individual investor was given insufficient consideration.

What should reasonably have happened in Mr L's case?

I now pull the three above strands together to consider how things reasonably should have seemed to DP Pensions at the time it received Mr L's application.

DP Pensions should have been aware before Mr L's application had even been received that:

- Facts & Figures was a regulated financial adviser firm authorised to advise on pension transfers.
- Facts & Figures had a business relationship with Atlantic who was an agent for or was otherwise involved in promoting Harlequin investments.
- Some of Atlantic's potential Harlequin investors might make their investments in their pensions. When this was a possibility, Atlantic would introduce the potential investor to Facts & Figures.
- When such a potential investor was introduced to Facts & Figures it would
    - advise on the suitability of a new pension for the purpose of investing in Harlequin. It would not advise the potential investor on the suitability of investing their pension in Harlequin.
- The Harlequin investment itself involved an off-plan investment in property overseas in a hotel or resort development which was to be managed by or on behalf of Harlequin. As the investment involved property it was likely to be relatively illiquid and even more so given that the property was to be managed by or on behalf of Harlequin.
- The investment did not have FSCS or Financial Ombudsman Service protections.
- The investment involved commitments to pay further sums in the future.
- The investment was a non-mainstream investment that might be a UCIS. It was complex, high risk and unlikely to be suitable for most retail investors.
- There was either no provision for advice about the suitability of the Harlequin investment within this process or any recommendation that amounted to advice was from an unregulated firm, Atlantic, who was a sales agent for Harlequin. And it would seem unlikely that a retail investor would choose to invest their pension in this way without encouragement to do so.
- Some of the potential customers might transfer out of defined contribution pensions in order to make the Harlequin investments in their pension. And transfers from a defined benefits pension are not suitable for most retail investors.

Bearing all these points in mind, DP Pensions should reasonably have had concerns about the business Facts & Figures was proposing to introduce to it. It should have decided that the limited advice model in conjunction with a high-risk non-mainstream investment like Harlequin involved a real risk of consumer detriment. The arrangement was fraught with risk to itself and its potential clients and DP Pensions ought reasonably to have concluded that it would not accept that business.

I note that DP Pensions has itself said – albeit when arguing that Facts &Figures is responsible for Mr L's losses, it was incumbent on Facts & Figures to consider the receiving product when advising on pension transfers, that this was referred to in an alert issued by the regulator and that:

> "*This post-dates the investment but sets out what expectations were at the time."*

Certainly, in time, DP Pension came to the view that the Harlequin related business being referred to it by Facts &Figures was not acceptable. This is the view it came to after 14 applications. In my view it should have reached the same conclusion before accepting any business from Facts & Figures.

Alternatively, DP Pensions might, perhaps, have decided to proceed cautiously and agree to consider an application to see for itself what things looked like in practice. It might therefore have decided to review a first application – Mr L's application - to see how things looked in practice rather than in theory. I refer to this as a possibility but consider that it ought not to have been necessary to take up Facts & Figures, its first potential client's and its own time, trouble and energy in this way had reasonable processes been in place to make appropriate checks before the first application was received. As DP Pensions has mentioned in relation to a different point, the potential investor might have been required to pay a reservation fee for the investment so a decision sooner rather than later in the process would be better, before too much time/and or money was possibly wasted.

Accordingly, DP Pensions might have considered Mr L's application and if it had it would have been aware of the following:

- Mr L's application had been submitted by Facts & Figures which was a regulated financial adviser firm authorised to advise on pension transfers.
- Facts & Figures had a business relationship with Atlantic who was an agent for or was otherwise involved in promoting Harlequin investments and Atlantic was involved in Mr L's application.
- The process involved a suitability report from Facts & Figures. It should, acting in accordance with the Principles and good industry practice, have asked to see a copy of the suitability report for this first case and it would have seen that Facts & Figures had advised on the suitability of a new pension for the purpose of investing in Harlequin – and that it had advised Mr L against the transfer.
- It would see that Facts & Figures had not advised Mr L on the suitability of investing in Harlequin.
- It would see that the suitability report contained no warning about the risks of the Harlequin investment.
- The Harlequin investment itself involved an off-plan investment in property overseas in a hotel or resort development which was to be managed by or on behalf of Harlequin. As the investment involved property, and to be managed as part of a larger concern, it was likely to be relatively illiquid.
- The investment did not have FSCS or Financial Ombudsman Service protections.
- The investment involved commitments to pay further sums in the future.
- The investment was a non-mainstream investment that might be a UCIS. It was complex, high risk and unlikely to be suitable for most retail investors - and Mr L was a retail investor.
- As there was no provision for advice about the suitability of the Harlequin investment from Facts & Figures any recommendation was most likely from an unregulated firm, Atlantic, who was a sales agent for Harlequin. And it would seem unlikely that a retail investor would choose to invest in this way without encouragement to do so.
- Mr L was proposing to transfer around £300,000 from a defined benefit pension and around £50,000 from a personal pension and use all those funds to pay for the deposits on four Harlequin properties leaving no funds to pay the balance of

the purchase price or to buy other investments to spread the investment risk he was taking through diversification.
- Mr L was proposing to transfer from defined benefits pension to a SIPP which was unlikely to be suitable for a retail investor such as Mr L.

So on review of Mr L's case things should reasonably have looked very concerning. The business model adopted by facts & Figures had, in practice, led to a situation in which:

- Mr L was proposing to transfer his defined benefits pension to a personal pension which is not normally suitable.
- Mr L was proposing to invest in a UCIS or UCIS like investment which is not normally suitable for a retail investor.
- Mr L was proposing to invest in effect all of his pension in that way and such a non-diversified approach to investing is not normally suitable for any investor.
- Mr L had not apparently been given advice by an authorised and regulated adviser on the suitability for him of investing his pension in Harlequin.

DP Pensions ought to have realised that the above involved very considerable risk to Mr L, risks he did not seem to appreciate or understand. DP Pensions should have concluded in Mr L's case that the limited advice model in conjunction with a high-risk non-mainstream investment like Harlequin involved a real risk of consumer detriment. The arrangement was fraught with risk to itself and its potential client Mr L and DP Pensions ought reasonably to have concluded that it would not accept that business.

In my view, based on the Principles and good industry practice DP Pensions should reasonably have decided that it was not appropriate in all the circumstances to proceed with Mr L's SIPP application.

In the circumstances it is my view DP Pensions did not treat Mr L fairly or act in a way that was consistent with its regulatory obligations and good industry practice in accepting and processing his application to open a SIPP, transfer his existing pensions to it and invest in Harlequin.

What would have happened if DP Pensions had refused Mr L's application?

DP Pensions says when it refused to allow the 14^{th} application from Facts & Figures to be invested in Harlequin, Facts & Figures in effect withdrew the application and went to another SIPP provider where the consumer invested in Harlequin. It says this is what would have happened if it had refused Mr L's SIPP application. And it says this because Mr L transferred his defined benefits pension against Facts & Figures advice and because he also later invested non-pension money in further Harlequin investments. And because he had paid a reservation fee of £1,000 for each investment.

I do not however consider that such a turn of events was inevitable or the most likely outcome if DP Pensions had acted in accordance with the Principles and good industry practice and refused Mr L's application.

It is clear that DP Pensions was not authorised to give advice and so it was not in a position to advise Mr L that his proposed investment was unsuitable for him. But it's also clear that an application can be refused without giving advice.

DP Pensions, and any other reasonable SIPP operator could have, for example, said it was not prepared to accept Mr L's application to open a SIPP and invest in investments such as Harlequin without the consumer being advised about the suitability of the Harlequin investments for pension investments by an authorised and regulated financial adviser and this would have been a reasonable step for DP Pensions to take in the circumstances.

I am required to come to a decision that I consider to be fair and reasonable in all the circumstances. I do not consider it fair and reasonable to say that DP Pensions should not be considered at fault, or that it should bear no responsibility for its faults, if another SIPP operator would have acted in the same way had DP Pensions refused the application.

In my view the fair and reasonable approach is to say that if DP Pensions had told Facts & Figures it would not deal with it if it acted on a limited advice basis, other SIPP operators should have done the same. And this would have meant that either Facts & Figures would have given full advice, or the application would not have come about in the first place as that business model with Atlantic would have collapsed as unworkable.

If the connection with Atlantic had not collapsed completely by the time of Mr L's application, Facts & Figures would have given full advice which would have included clear advice about the unsuitability of the Harlequin investment as well as clear advice about the unsuitability of transferring an occupational pension to a SIPP in order to invest in Harlequin. I also consider it more likely than not that if Facts & Figures had given properly and fully considered advice it would also have advised against switching the personal pension to invest in Harlequin. Harlequin was, as already mentioned, a non-mainstream, complex, high-risk investment and not suitable for most retail investors such as Mr L.

It is also my view that if fully considered advice had been clearly given Mr L would have accepted that advice and would not have moved his pensions and he would not have invested in Harlequin. I do not consider that it follows that Mr L would not have accepted such advice just because he did not accept the advice not to transfer. It is not clear that that advice was clearly given and appropriately timed. Although it seems likely Mr L did receive the suitability report since he seems to have signed a copy, it is not clear he gave it much attention and it was written days after the application had already been signed and sent to DP Pensions.

And in any event, and is important to note that the limited advice, which was not followed, was compromised by the context in which it was given and received. The advice was the product of a flawed process that meant the advice not to transfer was delivered in a half-hearted and not sufficiently convincing way. Mr L had been persuaded that investing in Harlequin was a good idea and no clear advice from a credible source had been given to the contrary. So the way Mr L reacted to the advice in those circumstances does not provide a reliable indication of the way he would have reacted to appropriate advice clearly delivered.

Nor does the point that Mr L was aware of the features of the Harlequin investment mean that he properly understood whether transferring his pensions to invest in the Harlequin investments was a suitable thing for him to do. This was something on which Mr L needed full appropriate advice from an authorised financial adviser and the advice he did receive was incomplete and therefore an unsafe basis for making the decision he made.

There is no evidence that Mr L was so fixed to the idea of investing in Harlequin that he would not have listened to reason. Indeed there is some evidence he was less than fully committed when he asked Mr H for some reassurances about Atlantic in an email in November 2010. Mr H gave reassurances about Atlantic which is not really surprising. It is clear now that Mr L was asking the wrong person the wrong questions but the point that he was asking tends to indicate he was open to listening. And in my view it indicates Mr H would have listened to clear appropriate advice from an authorised and regulated adviser if he had received it.

Although DP Pensions has speculated about Mr L perhaps having good reason to want to transfer his pension because of his divorce or because he owed his employer money there is no evidence they were relevant points at the time. For example, there is no evidence that Mr L repaid his employer from his pension – very nearly all the money was invested in Harlequin or paid out in fees.

I do not consider that Mr L would have decided in the face of clear and appropriate advice from and authorised and regulated adviser that any of these matters or the reservation fees, if paid and not refundable, were sufficient reasons to go ahead with the transfer of his pensions and the investments into Harlequin. I consider it more likely than not that with clear and appropriate advice Mr L would have left his pensions as they were and he would not have invested in Harlequin.

The involvement of other parties

In this decision I'm considering Mr L's complaint about DP Pensions. But I accept other parties were involved in the transactions complained about, including Facts & Figures and Atlantic. Mr L made a claim against Facts & Figures and the FSCS has paid its maximum award (plus an additional £30,000 plus).

DP Pensions has argued that this shows Mr L thinks Facts & Figures is primarily responsible. But even though Mr L has made a complaint/claim against that firm it does not follow that that firm and only that firm is responsible for the position Mr L is in.

The DISP rules set out that when an Ombudsman's determination includes a money award, it may be such amount as the Ombudsman considers to be fair compensation for financial loss, whether or not a Court would award compensation (DISP 3.7.2R).

In my opinion it's fair and reasonable in the circumstances of this case to hold DP Pensions accountable for its *own* failure to comply with its regulatory obligations, good industry practice and to treat Mr L fairly.

The starting point, therefore, is that it would be fair to require DP Pensions to pay Mr L compensation for the loss he's suffered as a result of its failings.

I accept that other parties, including Facts & Figures, might have some responsibility for initiating the course of action that led to Mr L's loss. However, I'm satisfied that it's also the case that if DP Pensions had complied with its own distinct regulatory obligations as a non-advisory SIPP operator, the pension transfer and switch and Harlequin investment would not have come about in the first place, and the loss he's suffered would have been avoided.

It's my view that it's appropriate and fair in the circumstances for DP Pensions to compensate Mr L to the full extent of the financial losses he's suffered due to its failings. And, having carefully considered everything, I don't think that it would be appropriate or fair in the circumstances to reduce the compensation amount that D P Pensions is liable to pay to Mr L.

The indemnity signed by Mr L

I do not consider it fair and reasonable to say that DP Pensions should not be held responsible or should not compensate Mr L for his losses because he signed an indemnity. If DP Pensions had refused Mr L's application, as it should have done, the indemnity would not apply and so I do not consider it fair and reasonable for DP Pensions to seek to rely on the indemnity and avoid paying compensation to Mr L.

Putting things right

I consider that DP Pensions failed to comply with its own regulatory obligations and didn't put a stop to the transactions that are the subject of this complaint. My aim in awarding fair compensation is to put Mr L back into the position he would likely have been in had it not been for DP Pensions' failings. Had DP Pensions acted appropriately, I think it's *more likely than not* that Mr L would have remained a member of the pensions schemes he transferred into the SIPP.

Mr L also transferred monies from both defined contribution and defined benefit schemes. To put things right DP Pensions will need to undertake different types of loss calculations, one in relation to the monies that originated from the defined benefit scheme and another in relation to monies that originated from the defined contribution scheme. As part of doing this DP Pensions will need to calculate the portion of Mr L's current SIPP value that's attributable to each of the respective transfers/switches and apply them to the relevant calculations.

In light of the above, DP Pensions should:

- Obtain the actual transfer value of Mr L's SIPP, including any outstanding charges.
- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
- Undertake loss calculations as set out below in respect of each of the schemes from which monies were transferred into the SIPP and pay any redress owing in line with the steps set out below.
- If the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.
- If Mr L has paid any fees or charges from funds outside of his pension arrangements, DP Pensions should also refund these to Mr L. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.
- Pay to Mr L £1,000 to compensate him for the distress and inconvenience he's been caused.

I've set out how DP Pension should go about calculating compensation in more detail below.

Treatment of the illiquid assets held within the SIPP:

The Harlequin investments are likely to be illiquid. I think it would be best if any illiquid assets held could be removed from the SIPP. Mr L would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP. The valuation of the illiquid investment/s may prove difficult, as there is no market for it. For calculating compensation, DP Pensions should establish an amount it's willing to accept for the investment/s as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment/s.

If DP Pensions is able to purchase the illiquid investment/s then the price paid to purchase the holding/s will be allowed for in the current transfer value (because it will have been paid into the SIPP to secure the holding/s).

If DP Pensions is unable, or if there are any difficulties in buying Mr L's illiquid investment/s, it should give the holding/s a nil value for the purposes of calculating compensation. In this instance DP Pensions may ask Mr L to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding/s (but after he has first recovered the full amount of his loss if the full amount of fair compensation is not paid – see the comments below about the limits on my powers of award). That undertaking should allow for the effect of any tax and charges on the amount Mr L may receive from the investment/s and any eventual sums he would be able to access from the SIPP. DP Pensions will have to meet the cost of drawing up any such undertaking.

Calculate the loss Mr L has suffered as a result of making the transfer in relation to monies originating from defined benefit schemes:

DP Pensions must 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.

Mr L said on his SIPP application form that he intended to retire at 65. He is now past that age and Mr L has said he continues to work on a part time basis because it is not financially possible for him to retire. Given the pension provision Mr L had before transferring to the SIPP retirement at 65 should have been possible. And so on balance, I'm currently satisfied that Mr L would have wanted to take benefits from his pension at that age had he remained in the defined benefit pension scheme and been able to do so. So the calculation should assume Mr L took benefits from the pension from age 65, or the earliest point subsequently that he would have been permitted to.

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 L's acceptance of my final decision.

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

- always calculate and offer Mr L redress as a cash lump sum payment,
- explain to Mr L before starting the redress calculation that:
    - their 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 their redress prudently is to use it to augment their defined contribution pension

- offer to calculate how much of any redress Mr L receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr L accepts DP Pensions' offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr L 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 L's end of year tax position.

I acknowledge that Mr L has received two compensation payments from the FSCS, and that he has had the use of the monies received from the FSCS. The terms of Mr L's reassignment of rights require him to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the assignment if required. I am unsure if those terms apply to both payments received from FSCS. I think it's fair and reasonable to make no p*ermanent* deduction in the redress calculation for the compensation Mr L received from the FSCS which is repayable. And it will be for L to make the arrangements to make any repayments he needs to make to the FSCS. However, I do think it's fair and reasonable for some allowance to be made for the sum(s) Mr L actually received from the FSCS and has had the use of for a period of the time covered by the calculation.

As such, for the purposes of the calculation that's being carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4, if it wishes, DP Pensions *may* notionally, for the period from the point of their payment through until the valuation date (as per the DISP App 4 definition of that term), allow for the payment(s) Mr L received from the FSCS following the claim about Facts & Figures, as a notional deduction (while not an income withdrawal payment, for the purposes of the calculation it may be treated as a notional income withdrawal payment). Where such an allowance is made then DP Pensions must also, at the end of the calculation, allow for a notional addition to the overall calculated loss that's equivalent to the payment(s) Mr L received from the FSCS following the claim about Facts & Figures**.** The effect of this notional addition will be to increase the overall loss calculated using the most recent financial assumptions in line with PS22/13 and DISP App 4, by a sum that's equivalent to the payments Mr L received from the FSCS.

Redress paid directly to Mr L as a cash lump sum in respect of a future loss includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4.3.31G(3), DP Pensions may make a notional deduction to allow for income tax that would otherwise have been paid. Mr L's likely income tax rate in retirement is presumed to be 20%. In line with DISP App 4.3.31G(1) this notional reduction may not be applied to any element of lost tax-free cash.

Calculate the loss Mr L has suffered as a result of making the transfer in relation to monies originating from the defined contribution pension:

DP Pensions should first contact the provider of the pension which was transferred into the SIPP and ask it to provide a notional value for the policy as at the date of calculation. For the purposes of the notional calculation the provider should be told to assume no monies would have been transferred away from the plan, and the monies in the policy would have remained invested in an identical manner to that which existed prior to the actual transfer.

Any contributions or withdrawals Mr L has made from the SIPP will need to be taken into account whether the notional value is established by the ceding provider or calculated as set out below.

Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. The same applies for any contributions made, these should be added to the notional calculation from the date they were actually paid, so any growth they would have enjoyed is allowed for.

If there are any difficulties in obtaining a notional valuation from the previous provider, then DP Pensions should instead arrive at a notional valuation by assuming the monies would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return index). That is a reasonable proxy for the type of return that could have been achieved over the period in question.

As above, I acknowledge that Mr L has received a sum of compensation from the FSCS, and that he has had the use of the monies received from the FSCS. The terms of Mr L's reassignment of rights require him to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the assignment if required. So, I think it's fair and reasonable to make no *permanent* deduction in the redress calculation for the compensation Mr L received from the FSCS and is repayable. And it will be for Mr L to make the arrangements to make any repayments he needs to make to the FSCS. However, I do think it's fair and reasonable to allow for a *temporary* notional deduction equivalent to the payment(s) Mr L actually received from the FSCS for a period of the calculation, so that the payment(s) ceases to accrue any return in the calculation during that period.

As such, if it wishes, Mr L may make an allowance in the form of a notional deduction equivalent to the payment(s) Mr L received from the FSCS following the claim about Facts & Figures, and on the date the payment(s) was actually paid to Mr L. Where such a deduction is made there must also be a corresponding notional addition, at the date of my final decision equivalent to all FSCS payment(s) notionally deducted earlier in the calculation.

To do this, DP Pensions should calculate the proportion of the total FSCS' payment(s) that it's reasonable to apportion to each transfer into the SIPP, this should be proportionate to the actual sums transferred in. And DP Pensions should then ask the operators of Mr L's previous pension plan(s) to allow for the relevant notional deduction(s) in the manner specified above. The total notional deductions allowed for shouldn't equate to any more than the actual payment(s) from the FSCS that Mr L received. DP Pensions must also then allow for a corresponding notional addition as at the date of calculation as at the date of my final decision, equivalent to the accumulated FSCS payment(s) notionally deducted by the operators of Mr L's previous pension plan(s).

Where there are any difficulties in obtaining notional valuations from the previous operators, DP Pensions can instead allow for both the notional deduction(s) and addition(s) in the notional calculation it performs, provided it does so in accordance with the approach set out above.

The notional value of Mr L's existing plan(s) if monies hadn't been transferred (established in line with the above) less the proportion of the current value of the SIPP that's attributable to monies transferred in from the same existing plan(s) (as at the date of my final decision) is Mr L's loss.

Pay an amount into Mr L's SIPP so that the transfer value is increased by the loss calculated above in relation to monies originating from defined contribution schemes:

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr L's pension. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr L as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

SIPP fees:

If the illiquid investments can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Mr L to have to continue to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

As mentioned above, if Mr L has paid any fees or charges from funds outside of his pension arrangements, DP Pensions should also refund these to Mr L. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.

Distress & inconvenience:

I think the loss of the pension provision that is the subject of this complaint will have caused Mr L significant distress and inconvenience.

Mr L has lost all or nearly all of his pension and his retirement plans have been completely uprooted. Mr L has had to continue to work past his normal retirement age and can see no prospect of ever being able to retire. Although some monies have been recovered from the FSCS this has been only a small proportion of the overall loss he has suffered which the FSCS calculated at almost £800,000 back in 2020. Such an overwhelming loss will naturally have involved a great deal of distress and I consider that DP Pension should pay Mr L £1,000 to compensate him for the distress and inconvenience he has suffered and will continue to suffer if he does not recover his losses in full which may be the case given the limits on my powers of award referred to below.

Mr L should note that compensation for distress and inconvenience is subject to, not additional to, the maximum award limits mentioned below. Or put another way the maximum sum will include the amount I award for distress and inconvenience.

Interest:

Fair compensation in respect of the loss attributable to Mr L's defined benefit pension should be calculated and paid in accordance with the above-mentioned guidance.

Fair compensation in respect of the loss attributable to the defined contribution pension should be calculated as set out above. It should be paid within 28 days of DP Pensions being notified of Mr L's acceptance of my final decision. If it is not interest is to be paid on this part of my award (subject to the limits mentioned below) at the rate of 8% simple interest per year from the date of my decision to the date of payment.

My final decision

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest and/or costs/interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

Final Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out above. My decision is that DP Pensions Limited should pay Mr L the amount produced by that calculation – up to a maximum of £160,000 plus interest as set out above.

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that DP Pensions Limited pays Mr L the balance.

This recommendation is not part of my determination or award. DP Pensions Limited doesn't have to do what I recommend. It's unlikely that Mr L can accept my decision and go to court to ask for the balance. Mr L may want to get independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 3 April 2025.

Philip Roberts
Ombudsman