

complaint

Mr S, through his representatives, complains about the advice he was given by Fairway Financial Consultancy in relation to transferring his personal pension into a self-invested personal pension (SIPP).

Mr S's intention was to invest these funds into overseas property with Harlequin Property (Harlequin) which is an unregulated investment. He says Fairway didn't assess the suitability and risks of this investment. The Harlequin investment failed and Mr S wants to be compensated for his financial losses.

background

Fairway told us that they were introduced to Mr S by a sales agent for Harlequin in July 2011. They were asked to help a limited number of clients establish a SIPP to buy Harlequin properties using their pensions. There were two individuals who were involved in the sale of the Harlequin property, Mr D and Mr N.

Mr S says he was introduced to Mr N by a previous financial adviser -who was looking to arrange mortgage for him- and told him about a pension investment that Mr N was selling "which looked great" and "it might be worth having a chat with him". In April 2011 Mr D and Mr N arranged for Mr S to invest two of his pensions worth around £13,000 into a high-risk investment (Ark). Mr S's largest personal pension with Aviva was originally planned to go into the Ark investment too. Mr S signed a transfer application form for his Aviva pension on 31 March 2011 and agreed to the release of his Aviva funds in May 2011.

It's unclear why the plan for the Aviva pension changed, however this pension was eventually used to fund the Harlequin investment instead. Mr S says Mr N told him that the Harlequin transaction was less straightforward, and he wasn't qualified to give advice on this. So he introduced Mr S to Fairway.

On 20 July 2011 Mr S signed a range of documents. I understand that Mr S completed them with Mr N.

This included a confidential financial review which recorded that Mr S:

- was aged 47 and intended to retire at age 66;
- he was single and no dependent children
- was self-employed with a gross income of £80,000. The form, however, also stated that present income was zero. Mr S had recently taken on a local authority contract and was waiting for payment and was currently living on savings and bank overdraft. £80,000 was the estimated annual income when payments commenced.
- had a main residence and a second property valued combined at £940,000 with outstanding mortgages of £560,000.
- had a current account balance of £20,000 and a cash ISA worth £7,000.
- had credit card debt of £1,200 and an overdraft balance of £5,000.

A SIPP application form was also completed. This recorded that:

- Mr S had a personal pension with Aviva with an estimated value of £94,000 which was to be transferred into the SIPP
- Fairway was the financial adviser

- the introducer was Mr D
- the SIPP was to be used to buy a Harlequin property

A Harlequin Property Questionnaire showed that:

- Mr S was looking to buy a hotel room for £270,000. £81,000 would be financed through the SIPP and the property would be bought jointly with an Limited Liability Partnership in Mr S's name.

An "Appropriateness Test" for Harlequin was completed. This confirmed that Mr S:

- had not received advice about Harlequin and was an execution only customer;
- had decided to invest based on information from the investment provider;
- was comfortable with the risks involved with the investment; that there was no guarantee higher risks would lead to higher rewards and that he might get less back than he invested
- understood the investment might be difficult to sell which could affect taking benefits in retirement
- understood he was not covered by the Financial Services Compensation Scheme (FSCS), or this Service;
- had read and understood the terms and conditions of the investment.

Fairway say they were asked to establish the SIPP on an execution only basis and were offered a flat fee of £1,000 to do this. They say they didn't receive any commission from the Harlequin investment and they didn't recommend this investment to Mr S. They say in the interest of the customer, they decided to not only provide an execution-only service but advise on the transfer of pension benefits to a SIPP.

Fairway wrote to Mr S on 26 July 2011. Fairway says this was the first time they dealt with him. The letter explained that they had received documentation from Mr D about Mr S's request to establish a SIPP with Guardian, but that they would need to request information from his pension provider first. They understood that the funds were to be invested in an overseas property development. They stressed that they were unable to provide any advice in relation to this particular aspect of his plans. They said '*our advice would be limited to the specific issue of whether establishment of a Self Invested Personal Pension Plan and transfer of benefits to such a scheme are appropriate, based on your financial objectives*'. The letter also explained that they would charge a £1,000 administration fee for their services.

Fairway provided a handwritten call note to show that they spoke with Mr S on 2 August. The note shows that they asked Mr S for his authority to allow them to make enquiries with Aviva. They also told him that they had been informed by Mr D about his previous investment and that they considered this to be high-risk pension contract. They stressed that Fairway would class Harlequin of a similar nature.

On 1 September 2011 Fairway wrote to Mr S again and said they couldn't provide specific advice in relation to the proposed investment in Harlequin, however they suggested that investing in one particular investment of this nature should be classed as a high-risk investment approach.

They explained that Mr S's personal pension with Aviva was invested in a number of external investment funds and they would class his existing investment approach to be of a

"higher risk investment nature". Fairway said they would class the Harlequin investment as highly speculative and Mr S should be aware that there was the potential to lose his entire investment within his pension in the worst possible scenario.

They said other options would be to stay in his personal pension which offered a wide range of funds or move to another personal pension provider, however these options wouldn't allow Mr S's investment plans. So Fairway concentrated their research on providers who could assist with his requirements and selected Guardian as an appropriate SIPP provider as it could facilitate Mr S's objectives.

Fairway said: "*we are happy to recommend your existing benefits be transferred from your Aviva scheme to the Harlequin Self Invested Personal Pension arrangement.*"

Fairway pointed out that Mr S would be significantly increasing the investment risk nature of this element of his savings and that he shouldn't proceed unless he was prepared to take a speculative investment approach with his pension. Fairway informed Mr S they had forwarded his documents to Guardian to open the SIPP, but that there was a 30 day cooling off period if Mr S decided not to proceed.

Fairway also pointed to an Attitude to Risk document which they enclosed with the letter and which they said highlighted a number of issues with the investment Mr S should consider before completing the Harlequin investment. They said the issues highlighted were not a definitive list and they recommended that Mr S satisfied himself that he fully understood the nature of any proposed investment before committing his retirement provisions.

Page 1-3 of the document seem to have been previously completed with Mr S on 20 July 2011 (before he was introduced to Fairway). It showed Mr S as a customer with the highest risk profile and noted Mr S:

- could afford to lose a large proportion of money without his security being affected
- was prepared to accept a very high degree of risk
- his earning capacity is such that he could absorb this risk
- was prepared to invest for the long term and didn't require access to his money in the medium to long term
- accepted the risk of losing most or all of his money

Page 4 included some additional guidance from Fairway on their analysis of the investment prospects of Harlequin which Mr S was recommended to consider in detail before completing his purchase of the property. It said (amongst other things):

- By investing his entire fund within one specific investment sector and gearing the advance to include a significant proportion of borrowing Mr S was taking a high risk / high possible reward investment stance.
- Risks involved include the risk that demand for this type of rental accommodation may fall due to factors such as economic recession, geographical influences, exchange rate fluctuation and the nature of the loan facility agreed and terms and conditions of the advance as well as political risk.
- Fairway's enquiries had established that from an HMRC perspective Harlequin could be classified as an acceptable investment for a SIPP. But this did not guarantee it

was suitable for individual investors or that it would achieve positive returns. Each investor should consider the appropriateness of this investment based on their individual circumstances and investment objectives.

- Fairway said that they weren't overseas property specialists and weren't in a position to confirm the potential investment returns. This is why they couldn't make a specific recommendation on the individual investment Mr S wanted to make. They stressed that any investment of this nature should be considered high risk and as a result could result in the loss of Mr S's savings.
- Fairway was aware that Mr S's scheme was also invested in a high-risk manner. They also acknowledged Mr S having a second investment property worth more than double of his pension savings and a relatively large surplus monthly income which provided him with the ability to initiate additional savings. Given that his Aviva plan represented less than a third of his investments, Fairway was prepared to assist Mr S with his request if he acknowledged that he understood the risks and was prepared to accept the risk by signing and returning the enclosed copy of the report.
- Fairway said Mr S had confirmed the questions around his attitude to risk in the first part of the document when the document was completed on 20 July and his personal circumstances and objectives were discussed. If this wasn't his understanding of the questions that were raised with him, he should contact Fairway before taking any action.
- Fairway said that they had understood from Mr D that Mr S had previously started proceedings to transfer his benefits into Ark, a high-risk arrangement which they understood had recently been closed down by the Pensions Regulator. They said whilst this showed Mr S's willingness to take a high-risk investment approach with his pension, they would recommend extreme caution when considering any arrangement of this nature and he should defer any further action if he wasn't entirely satisfied he understood the risks involved.
- They acknowledged Mr S had his own home and a second investment property which meant he had a significant property portfolio from a valuation perspective and therefore could be considered to understand the nature of property investment. However Fairway stressed that overseas property investment especially those in development carried a significantly higher investment risk than UK property.
- The high-risk investment nature of Mr S's existing scheme could result in significant losses if market conditions deteriorated but his requested course of action would increase the risk as he would be investing his entire fund into one investment sector. So in a worst-case scenario all of his savings could be lost.
- Fairway referred to projected investment returns appearing to be enticing and showing high quality hotels and resorts. However, they pointed out that they were unable to substantiate those figures and whilst they appeared attractive, they recommended caution as they were unable to verify how these projections were calculated. The returns were by no means guaranteed.
- Fairway said they understood Mr S was investing in an existing hotel which was being updated and that the development should be completed the following year.

But Fairway recommended Mr S to check with Harlequin that his funds would be used to complete his individual unit.

- Fairway also warned to be cautious with regards to sales information promising that funds could be returned to SIPP customers if required. They said they would question whether Harlequin would hold enough cash reserves to be able to pay out significant funds if there was a demand as this could result in his funds being illiquid and unavailable for a significant period of time.
- There were a number of warnings given in the document in bold letters:

'As advised under the heading Attitude to Investment Risk we would class your proposed investment as highly speculative and as such you should not proceed with an investment of this nature unless you are prepared to take a high-risk investment approach which could potentially result in the loss of part or all of your savings.'

'In our opinion this specialist form of investment is only suitable for investors who fully understand the nature of the investment, the potential rewards and risks associated with this specialist form of investment and understand that this element of their total retirement savings could be significantly reduced in value or in extreme circumstances entirely lost.'

'If you feel that you cannot fulfil all of these requirements (this referred to the indicators of Mr S's risk profile on page 3) then we cannot recommend establishment of the Self Invested Personal Pension on your behalf and would not be in a position to proceed to act for you in establishment of this. If this is the case you should contact us at your earliest opportunity.'

'We therefore recommend that you do not proceed with this investment unless you fully understand the nature of the proposed investment and are prepared to accept the potential risks involved.'

'In view of the risk nature of your proposed investment and the fact that you wish to invest your entire Aviva scheme in this manner our recommendation must be not to proceed.'

Mr S signed the report and returned it to Fairway. The SIPP was established and the investment into Harlequin went ahead. The Harlequin development subsequently failed and Mr S's investment is essentially worthless.

One of our adjudicators thought this complaint should be upheld. He said Fairway should have advised Mr S that the Harlequin investment was unsuitable for him and consequently shouldn't have recommended the SIPP. He said if Fairway had done so, Mr S wouldn't have proceeded with the investment and therefore wouldn't have incurred his investment losses. The adjudicator recommended Fairway to compensate Mr S for these losses.

Fairway provided substantive submissions which I'm not going to repeat in detail. However, in essence they said their recommendation to Mr S was not to proceed with either the SIPP or the investment and that they had pointed out the risks of the Harlequin investment to him putting him in a fully informed position. They said Mr S had acknowledged he was prepared to take the highest risk profile possible and he had demonstrated his high-risk

investment approach by investing into Ark and lost these funds shortly before he was introduced to Fairway. So he was clearly a high-risk investor.

Fairway said Mr S disregarded their advice, so would have proceeded with his investment regardless of Fairway's actions. He had also already paid a reservation fee of £1,000 on the Harlequin property and completed the transfer request to Aviva months before he was introduced to Fairway which showed he had already decided to proceed. They say Mr S would have invested into Harlequin in any event and so they shouldn't be held responsible for his losses.

The complaint was referred to me for an ombudsman's decision. I issued a provisional decision not upholding Mr S's complaint. I asked both parties for further information or comments they wanted me to consider.

Fairway agreed with my decision. Mr S's representatives disagreed and made further representations which I'll address below.

my findings

I've re-considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulator's rules, guidance and codes of practice; and what I consider to have been good industry practice at the time.

In my provisional decision I said:

was the transfer into a SIPP suitable for Mr S?

I don't think it was. The SIPP was only needed to facilitate the investment into Harlequin as this wouldn't have been possible within Mr S's personal pension plan. The investment into unregulated overseas property is a high risk and specialist investment which would only be suitable for the most experienced investors. And I don't think Mr S falls into this category.

I appreciate Mr S's Aviva pension was invested in relatively high-risk funds. However, it still had an element of diversification and was a standard investment. The Harlequin investment was a non-standard and undiversified investment which was much higher risk. We asked Mr S how the investments were chosen in his Aviva pension and he said he followed the advice of his financial adviser when the pension was set up. He had left the management of the funds to them. Given that Mr S didn't have any other investments other than a second property in the UK and a couple of smaller pensions I think this is plausible. I don't think having this pension automatically makes him an experienced investor.

I understand that Mr S invested his other two smaller personal pensions into Ark, another high-risk investment, shortly before investing into Harlequin. This was also arranged by Mr D and Mr N. Fairway has said that at the time of the advice they knew the Ark scheme had been closed by the Pensions Regulator but didn't know whether investments had been lost and how much Mr S had invested. Mr S says he didn't know at the time that the investments into Ark had been lost. Again I find this plausible. If Mr S had known that his very recent investments recommended by Mr D and Mr N had been lost, I think it's unlikely he would have relied again on their recommendation.

Both the Ark investment and the Harlequin investment were marketed to him by Mr D and Mr N within a few months. On balance it's likely Mr S didn't know how high risk the Ark investment was. It was quite a complex scheme for a lay person to understand. So the fact that Mr S invested two of his pensions into Ark around the same time as into Harlequin doesn't mean he's an experienced investor with the highest possible attitude to risk.

Mr S wanted to invest a substantial part of his retirement provisions into Harlequin. Yes, he had a home and a buy-to-let property, but both properties still had considerable outstanding mortgages. And at the time of the transfer he was living on his savings and an overdraft. The income on the fact find was expected income. Mr S told us at the time he had been living on savings and his overdraft for about two years as he had been unable to work due to a broken wrist.

He still had about 15 years to go until his planned retirement, so he had enough time to make up some potential losses and it's likely he wanted to take some risk with his pension, something he did in his existing pension.

However, the Harlequin investment was much higher risk than this and based on his circumstances I don't think he had the capacity to take such a high risk (even if he wanted to). Losing all his funds would have affected his financial security in retirement. So I think the investment was unsuitable for him and consequently so was the SIPP.

what were Fairway's responsibilities

Fairway gave advice to Mr S, so they had to make sure their recommendations were suitable for him. Fairway is adamant they recommended against Mr S's transfer to the SIPP and the Harlequin investment. However, I disagree.

Fairway relies on the one sentence in the attitude to risk report which says:

'In view of the risk nature of your proposed investment and the fact that you wish to invest your entire Aviva scheme in this manner our recommendation must be not to proceed.'

However, Fairway then immediately caveats this by explaining that Mr S is already invested in a high-risk manner in his Aviva pension and that he has a second property and disposable income. They say that they are prepared to assist Mr S with his request if he acknowledges that he understands the risks and is prepared to accept the risk by signing and returning the enclosed copy of the report.

And in the recommendation letter they say '*we are happy to recommend your existing benefits be transferred from your Aviva scheme to the Harlequin Self Invested Personal Pension arrangement.*'

So whilst there are lots of caveats and risk warnings, I'm satisfied that Fairway did in fact recommend the SIPP transfer to Mr S. And as part of that advice they also needed to consider the suitability of the underlying investments. The regulator's view on this is clear.

Fairway originally told Mr S they wouldn't give any advice on the underlying investment. However, they later included more information about the nature of the Harlequin investment and gave Mr S detailed guidance.

I've considered the suitability letter dated 1 September and the detailed attitude to risk questionnaire. Mr S's representatives say Mr S never saw that document and the warnings contained within it. However, the letter was signed by Mr S and it referred to the attitude to risk questionnaire highlighting a number of issues which Mr S should consider before completing the investment. So I'm satisfied Mr S received this information and that the letter sufficiently made it clear that he should read the attached information before he proceeded. I think Fairway made it very clear that Mr S's intended investment was high risk and that he could lose all his money. This was mentioned several times. However, essentially Fairway left the decision whether the investment was suitable to Mr S.

It wasn't sufficient to give Mr S all the information to allow him to make an informed choice about whether this was suitable for his circumstances.

In 2011, The Conduct of Business Sourcebook (COBS) said under 9.2.1R: '*a firm must take reasonable steps to ensure a personal recommendation is suitable for its client*'. And COBS 9.2.2R said it was '*necessary for a firm....to have a reasonable basis for believing that the transaction to be recommended...*

- (a) *meets his investment objectives*
- (b) *is such that he is financially able to bear any related investment risks consistent with his investment objectives*
- (c) *is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction...*

Mr S's overall objective here wasn't only the transfer of his pension into a SIPP but included the investment into Harlequin At the very least Mr S wasn't able to bear the financial risk of his investment as explained earlier in my decision. I think Fairway shouldn't have simply accepted the risk profile questionnaire that was provided to them by Mr D. Fairway should have realised that at least two of the statements wouldn't apply to Mr S (even if he had thought differently):

"I can afford to lose a large proportion of money without my financial security being affected"

"My earning capacity is such that I can absorb this risk"

If Fairway had done their own proper risk assessment and fact find with Mr S, I think they should have come to the conclusion that Mr S had a lower risk profile, particularly with regard to his capacity to take any risk with his pension for the reasons I've explained above.

Mr S told us that the buy-to-let property was used by his daughter who only paid minimal rent to cover costs and at the time of transfer he had been living on his savings and his overdraft for two years. He was also going through a separation at the time which meant he had to pay a settlement to his partner (although contrary to what his representative had told us, he said both the home and the buy-to-let property belonged to him at the time.) And two of his pensions worth about £13,000 had been recently invested in the high-risk Ark scheme. I think Fairway could have known about all this if they had done the fact find themselves.

Even if Mr S was prepared to take high risks with his finances, Fairway should have told him directly and without qualifications that they recommended against the transfer. The investment was unsuitable and consequently so was the SIPP as there was no other reason for the SIPP than to facilitate the Harlequin investment.

In summary, I don't think Fairway met their obligations for giving suitable advice.

what would Mr S have done if Fairway had given his suitable advice?

As a service we don't punish businesses for their errors. We try to put customers into the position they would be in if the correct action had been taken. I appreciate that suitable advice *could have* avoided Mr S's losses. And I'd say many customers would follow the recommendation of a regulated financial adviser.

However, in these particular circumstances I think on balance Mr S would have still invested his pension into Harlequin even if Fairway had advised against a transfer. I say this for several reasons.

risks explained

Fairway did point out that there was the possibility Mr S could lose all his money. They also explained specific risks of overseas property and raised concerns that the advertised attractive returns were not guaranteed and Fairway didn't know how they had been calculated. The messages were clear.

So Mr S would have known about the high risks of the investment and proceeded anyway. I'm not convinced that in this particular case a recommendation not to transfer (or even a refusal to establish the SIPP) would have changed Mr S's actions.

I think it's likely that any risks warnings or advice given by Fairway were outweighed by what Mr S was told by Mr N. We asked Mr S why he invested despite the warnings. He said Mr N told him risk letters were sent to everyone and although usually if something sounded too good to be true it was, in this case it really was that good and he would make "a lot of money" by investing. Mr S said he just went with "what the guy selling it" (i.e. Mr N) told him.

By the time Fairway got in touch with Mr S for the first time in July 2011, he had already made his plans to transfer his Aviva pension. It originally was meant to go into the Ark scheme, but was eventually invested into Harlequin. He had completed the SIPP and Harlequin paperwork and had paid a non-refundable deposit of £1,000 to reserve the property.

It wasn't that Mr S was looking for advice from Fairway whether he should proceed. It seems Mr N had already convinced him he should, just like he had with the Ark scheme. And Mr N only introduced Fairway into the process as he couldn't recommend the SIPP himself.

incentives

Mr N offered business development loans to his clients once the sales were completed. These payments went directly to clients and incentivised them further to invest. I've seen evidence for this on different cases.

We asked Mr S if he received such an offer and he confirmed that he was offered and received a £10,000 interest free loan which was paid after the Harlequin investment was paid for through the SIPP. He said the money went to his ex-partner in the separation settlement.

I think it's likely such large incentives would have helped Mr N convince Mr S that positive returns from the investment were likely. I think the proposition of receiving £10,000 in cash would have been attractive, particularly as Mr S hadn't had any income for the past two years and was going through a separation

causation

Fairway shouldn't have recommended the SIPP. However, I don't think a negative recommendation from Fairway would have stopped Mr S from investing. It seems that Mr S was not paying attention to what Fairway was telling him. He had no relationship with them, and told us that he relied on the information given to him by Mr N. He ignored Fairway's risk warnings. So in this particular case I don't think it's likely he would have paid much attention to a clear recommendation not to transfer.

And even if this had raised some doubts or concerns with Mr S, I think it would have been quite a big step to cancel the reservation of the property, lose the reservation fee and miss out on a substantial incentive payment. Of course in hindsight I'm sure Mr S would say he would have accepted these losses in order to avoid losing his entire pension, but I don't think at the time he would have seen it this way. I think it's likely Mr N would have continued to clear any possible doubts.

I think Mr S would have proceeded with his investment in any event. He could have done this by acting as an insistent client (once he had been given a negative recommendation and Fairway had documented clearly the fact that Mr S was going against their explicit recommendation.)

I've considered whether Fairway should have refused to set up the SIPP for Mr S. The regulator doesn't require businesses to generally refuse acting for clients after a negative recommendation. It's possible for clients to proceed on an insistent client basis. Fairway did have to act in the client's best interest. However, I don't think this necessarily always means refusing to act altogether. I think Fairway suspected Harlequin was encouraging Mr S to invest, so they gave him extensive risk warnings and explained the potential consequences of losing all of his money.

I think Fairway took reasonable steps to ensure Mr S understood what he was doing and wasn't investing without understanding the risks of his planned actions. So if he had been given a clear recommendation -without caveats- against the transfer and Mr S still wanted to

proceed despite all warnings, I think they wouldn't have acted unfairly by helping him to execute his wishes. In any event, even if Fairway had refused to assist, I think Mr S would've explored alternatives to invest (with the help of Mr N). Mr S wasn't required to have a recommendation from a financial adviser to open the SIPP and invest in Harlequin.

On balance I think Mr S would have incurred the same losses even if Fairway had given him suitable advice. I empathise with the position Mr S finds himself in, but I don't think Fairway's actions caused his losses. And so it wouldn't be fair to uphold the complaint against them. For these reasons I'm not intending to request Fairway to compensate Mr S.

Response to my provisional decision

Mr S's representatives submitted the following comments and information in response to my non-uphold decision:

- Mr S is adamant that he never received any letters or calls from Fairway. He only ever had contact with Mr N and Mr D. Any documents he signed were given to him in face-to-face meetings with Mr N.
- It was Mr D who introduced Mr S to the Ark and Harlequin investments at the same time. Mr S had no previous investment experience. He wasn't aware of any issues with the Ark investments. He wouldn't have trusted the same person with the arrangement of another pension investment of £83,000 if he had known he had just lost £13,000.
- Mr S has never seen the financial fact find. He says he has never lived on his savings and overdraft. The work referred to as "the local authority contract" is only part of his self-employed work. He carried out work for commercial and domestic clients and earned £70,000-£80,000 per year. At the time of the advice he had the contract with the council for many years.
- With regards to the incentive paid, they say Mr S wasn't struggling financially and didn't need the extra cash. He had been offered the interest free loan to make an additional cash contribution as well as using the balance for himself. He used the sum to support his partner and mother of his children.
- Mr S can't recall paying a £1,000 deposit. The SIPP contract shows a purchase price for 30% share of the property for £81,000. The contract was dated after the suitability report was issued. Mr S's representatives query whether I think this means no deposit was required.
- Fairway accepted the introduction from an unregulated firm and failed to obtain information about Mr S's personal or financial circumstances. They also failed to ensure Mr S received any correspondence they had passed to the third-party introducer. They shouldn't have facilitated the transfer without assessing whether Mr S could bear the risk of the investment. They shouldn't have relied on the risk self-assessment form provided to determine Mr S's overall ATR. They should have identified he wasn't an experienced investor and didn't fully understand the risks involved in the transaction.
- Fairway is portraying Mr S to have acted against their advice or risk warnings. But this is simply a papering exercise. There wasn't an acknowledgement from Mr S that

the transaction was against Fairway's recommendation and it was being carried out on his request. Fairway failed to satisfy the requirements for an insistent client.

- Mr S's representatives also provided some further documents they had requested from Aviva. They include letters from Aviva to Mr S and Fairway on 1 August 2011 explaining that they can't release any information to Fairway as the letter of authority isn't dated and they request a new one. On 10 August Fairway sent a fax to Aviva asking for information about the plan. They attached a signed letter of authority from Mr S dated 2 August and a copy of Aviva's letter of 1 August which had a handwritten note (seemingly from Fairway) on it. The note said:

2/8/11-phoned Aviva asked for return of authority-not available. Left message on Mr S's answerphone new authority (with date) posted out for signature and return.

Mr S's representatives refer to Fairway's handwritten telephone note (also of 2 August) they provided with their file which states that Fairway talked to Mr S about the risk of the investment. They ask whether Fairway shouldn't have covered what was discussed during this call when they sent Mr S the new letter of authority.

They also say the note Aviva provided shows Fairway left Mr S a clear message on what he needed to do (sign, date and return a new letter of authority), so there was no requirement for Mr S to call back Fairway that day or for Fairway to call Mr S again.

Mr S is adamant he never spoke to Fairway and didn't have a conversation in relation to any risks on 2 August 2011.

- They also say Fairway's handwritten note dated 2 August in which they refer to risk explanations isn't trustworthy considering some of the Aviva transfer forms were already signed in May 2011.
- Given the fact that this was Mr S's only pension provision, it's more likely than not he wouldn't have gone ahead with the transfer and the investment into Harlequin.

I've carefully considered all the information Mr S's representatives provided. However, I remain satisfied that the fair outcome is still not to uphold Mr S's complaint. I'll explain why.

Many of things they say have already been considered and are not in dispute from my side.

For example, I'm aware and already acknowledged that Mr S's was dealing mainly with Mr N and Mr D and I agreed that it's unlikely Mr S would have known about the failed Ark investment before investing in Harlequin. I also made a finding that Fairway didn't give suitable advice and should have done things differently. Mr S also wasn't an insistent client. You can only be an insistent client if you go against a recommendation and as I said in my provisional decision, Fairway recommended the SIPP and didn't clearly recommend against the transaction as they should have done.

With regards to Mr S's financial situation I've relied on what Mr S told our investigator during a phone call. The fact find was discussed with Mr S and he confirmed that what's stated on the fact find is correct. The income from the local authority contract hadn't yet started and he told us the previous two years he had been unable to work due to a broken wrist. And even if

he didn't *need* the extra cash, I think a cash incentive like this would have been attractive. I also think being offered upfront loans which could be paid back from investment returns would have helped convince Mr S that the investment would likely provide good returns.

The Harlequin contracts usually required a £1,000 fee on reservation of the property. Mr S's representatives have provided a contract for Mr S for 30% of the property and it doesn't mention the reservation fee. However, usually there was a second contract for the remaining 70% of the property which meant further payments were due on completion of the property. These contracts tended to include the reservation fee. So it's still likely Mr S paid this. However, in any event, my assumption that Mr S had paid a reservation fee was only a small factor here. Even if Mr S didn't pay a reservation fee of £1,000 I still think the loan incentive and the information and assurances from Mr N would have outweighed any clear advice from Fairway.

I appreciate that the note on Aviva's documents indicates Fairway left Mr S a message on 2 August that he needed to sign, date and return a new letter of authority. And it might be true that a return call from Mr S or another call from Fairway wasn't strictly necessary. However, I don't think this means another call didn't happen. So I don't agree with Mr S's representatives that one note contradicts the other. I think the main purpose of the call was organising the letter of authority. And when the investigator spoke to Mr S he admitted that he couldn't remember many details from the time of the advice as it was a long time ago, so the fact he can't remember this possibly short phone call, doesn't mean it didn't happen. And I see no other reason to doubt the authenticity of Fairway's call note.

I would also like to note that when I referred to the risks that were pointed out by Fairway I primarily considered the suitability report that was issued to Mr S a month later. This was signed by him, so I'm satisfied he received it. The call on 2 August was by no means the deciding factor to this case.

It's correct that some of the transfer forms for Aviva were completed in May 2011. In fact most forms were completed before Fairway issued their suitability report. As explained, using Mr S's pension funds was already being planned by Mr D and Mr N before Fairway got involved. Mr S knew that the transfer was going ahead. So I can't see how previously signed transfer forms in May call a phone conversation in August into question.

In summary, for the reasons set out above, I'm still satisfied Mr S would have transferred his pension into a SIPP and into the Harlequin investment anyway, even if Fairway had given him suitable advice.

my final decision

My decision is that I don't uphold Mr S's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 19 July 2020.

Nina Walter
ombudsman