complaint

Mr H has complained that Fairway Financial Consultancy wrongly advised him to transfer his personal pension into a self-invested personal pension (SIPP), to invest in a Harlequin overseas property development.

background

I issued a provisional decision on 11 February 2020, in which I set out the background to this complaint and my provisional findings. A copy of that decision is attached and forms part of this final decision.

In summary I concluded that rather than caveating its advice, Fairway should have been clear and unequivocal that Mr H should *not* transfer his pension. But I thought that even if Fairway had been this clear Mr H would still have wanted to transfer, because of the involvement of an unregulated agent (Mr N) and the 'draw' of financial incentives which Fairway didn't know about at the time. And I was satisfied that Fairway wouldn't, on a fair and reasonable basis, have been prevented from transacting this business for Mr H as an 'insistent client' if it chose to do so. Even if it chose not to do so, I was satisfied that Mr H could have acted as an insistent client through another firm or by opening a SIPP with a number of providers as an execution-only client.

Fairway said it agreed with my provisional decision and had no further comments to make. Mr H's representative responded on 3 March 2020 making the following points:

- It reiterated that the qualified advice Fairway gave to Mr H to transfer to the SIPP was unsuitable, because Harlequin was an unsuitable investment.
- Fairway didn't follow an insistent client process as it hadn't unequivocally advised Mr H not to make the investment first. As it wasn't willing to act for another client on an insistent basis, this proved that presuming Mr H's insistence wasn't sufficient.
- The representative didn't agree Mr H's main 'objective' (under COBS 9.2.2) was to invest in Harlequin – it was to pursue an alternative pension investment strategy. Suitable alternatives should have been considered in detail with clear advice.
- Fairway should have notified Mr H that advice should only be taken from a regulated adviser, such as themselves, and that Mr N wasn't qualified to provide that advice. Mr H would then have placed what Fairway said above Mr N, and not transferred.
- Between 22 August and 26 September 2011 some of the answers in the risk questionnaire Mr H completed with Mr N had been deselected (it assumes, by Fairway). These were:
    - *'I am prepared to invest for the medium term.'*
    - *'Repayment of debt is not a priority to me.'*
    - *'I haven't invested in the past and don't have significant experience or understanding of investment markets.'*
- COBS 9.2.6 says that Fairway should not have made a recommendation or provide its services on the basis of insufficient information, however it chose to do both.
- There should not be any regard for COBS 10 because as I noted, it refers to non-advised sales. This was an advised sale.
- Fairway hasn't kept a copy of the suitability letter signed by Mr H to acknowledge receipt, despite it regarding this as an important document.
- Fairway's fee per transfer of £1,000 per client would have been sufficient for it to be content for the transaction to go ahead. It was also reasonable to see from any lay investor's view, that Mr N, through a colleague in his business, was in some way affiliated with Fairway.

- Mr H had only originally been referred to Mr N for advice on the performance of his pension shortly before the events subject to this complaint. That advice resulted in a failed attempt to transfer the pension – this wasn't a significant prior relationship.
- The LLP was never set up to receive commission from this or other sales – it was to protect Mr H in the event that the investment failed.
- Neither the loan Mr H received of £5,000 nor the potential loss of a £1,000 reservation fee can be considered as significant when compared to his entire pension pot of £74,000, or the alternatives available of borrowing from family at nil interest.
- *'It was only on the insistence of Mr N that it [the loan] was accepted for the purposes of covering the monies required for the transfer.'*

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. In particular I've considered everything Mr H's representative has said in response to my provisional decision.

I don't underestimate the strength of feeling the representative has that this complaint should be upheld. But I haven't found sufficient grounds in anything that it's said to revise my opinion that Fairway isn't responsible for the losses Mr H has suffered. Let me explain why.

I'm in agreement with Mr H's representative that Fairway didn't provide suitable advice. To the extent that it thinks Fairway didn't gather sufficient information, I think the issue is more about the veracity of the information gathered because it came via Mr N. To answer another of its points, I'm aware that the adviser in this case was an acquaintance of Mr N's business partner. I don't know if that affected Fairway's inclination to question the evidence gathered but, whatever the position, I agree it should have conducted its own fact find exercise with Mr H – as any regulated adviser should have done.

But this alone isn't enough for me to uphold the complaint. I have to consider causation – in other words, if Mr H would likely have acted differently if this, and other steps in the process, been followed differently by Fairway.

I note the representative's observations about some answers to the risk questionnaire changing. A copy of the answers it says were recorded on 22 August wasn't submitted to this service previously or in the business file Fairway provided. Both Fairway's suitability letter and final response letter referred to the answers which we have on file and I summarised in my provisional decision, and suggest a higher risk appetite than the representative is now suggesting was the case.

Nevertheless it should be noted that I've already concluded that the advice to transfer was unsuitable in spite of this higher risk appetite. Noting Mr H's point that Fairway gathered insufficient information, I still think the transfer would have been unsuitable whatever further information Fairway could have gathered. The issue in this case is not the advice Fairway gave but the advice it *should have* given – and how Mr H would likely have reacted to that advice.

It seems to me that as Mr H was referred to Fairway by Mr N's property business, Fairway would have understood that he was already interested in investing in Harlequin. I think it would be fair to conclude that was his objective, as without the wish to invest in Harlequin there doesn't seem to have been a firm reason to consider a transfer to a SIPP at all. That doesn't however mean Fairway needed to agree that this was Mr H's objective. And as his representative has highlighted, it was open to Fairway to suggest other ways of improving on the return on his pension.

The representative seems to have overlooked that Fairway did touch upon this within its suitability letter. Page 3 referred both to choosing alternative funds (including speculative funds) with his current provider, or a stakeholder pension which would be cheaper. It can clearly be argued that Fairway should have gone further and made this its firm recommendation, but this assumes Mr H would have been open to varying the investments within his pension in ways other than involving the purchase of a Harlequin property. Given the way in which he was referred to Fairway, I find it unlikely that would have been the case.

I've carefully considered the representative's point that Fairway should have made a clear statement to the effect that it was regulated and Mr N's business was not. That might have been a prudent step to take, however I'm again not persuaded it would have made a fundamental difference here. One must ask the question why Mr H had to be referred to Fairway in the first place. Even in the absence of a statement from Fairway itself defining its role ,I think it would have been reasonably clear to Mr H that Fairway had more expertise in pension advice than Mr N, and it was for that reason he had been referred. I note he had been referred by a business he had gone to for pension 'advice' in the past and which had failed to carry out that advice.

Fairway could not hold itself out as being expert in property investment schemes, and did not do so. That makes it unlikely, in my view, that Mr H would have thought Mr N or his business partner were affiliated to Fairway. However Fairway did highlight a lot of the key risks, which it would appear Mr N did not – but Mr H was undeterred by those warnings. It seems to me Mr H received conflicting views on whether Harlequin property was a desirable investment for him to make. But ultimately and no matter how Fairway defined its role, it was for him to decide which characterisation of the investment he went with – that of the firm which promoted the investment but had failed to deal with his pension adequately in the recent past, or the firm he had been referred to for specific analysis of his pension arrangements.

For the same reason that Mr H was undeterred by the risk warnings, I consider it likely he would always have preferred to invest based on the (it appears) positive spin being placed on the investment by Mr N, in spite of any firm recommendation Fairway could have given not to invest at all. And whilst I don't know the reason why Fairway didn't insist on Mr H returning a signed copy of the suitability letter, in the case of the alternative advice it should have given *not to* transfer, it would have needed Mr H to confirm that he was wanting to act against its advice. I agree it couldn't have presumed his insistence. But for the reasons I explained in my provisional decision I consider Mr H would have been willing to provide that confirmation if it was necessary in order to proceed with the investment.

I understand the point about the LLP Mr H and his wife set up. This held a separate contract for the remaining 70% of the purchase price of the Harlequin property, payable on completion. Having an LLP enter into this contract potentially protected Mr H personally from having to fund the completion monies. However this actually shows the thought that was being put into the purchase from Mr N's side, and in my view is a further complication to being able to conclude that Mr H would have been prepared to disregard Mr N's encouragement to invest.

I said in my provisional decision that a further key element in Mr H's relationship with Mr N was the £5,000 incentive. It can be said with hindsight that £5,000 (and even the reservation fee of £1,000 in addition if this wasn't cancellable) was a relatively small fraction of Mr H's total pension funds – but I'm not satisfied Mr H would have seen it that way at the time. This mechanism effectively allowed him to liberate some of his pension fund before the minimum age he was allowed to do so, and served to further enhance the attractiveness of the proposition. I think it's fair to say that Mr H was already not expecting to lose his pension

fund, despite Fairway's warnings, otherwise it stands to reason that he would not have agreed to invest. It would appear, from Mr H's account, that such was his determination to invest that he accepted a loan from Mr N that he did not wish to take.

I've also given careful thought to the suggestion that Fairway's £1,000 charge was a 'contingent fee'; in other words it only stood to benefit if the transfer went ahead. Fairway suggests it would have sought to charge Mr H regardless, but I have to observe that its introductory letter to Mr H structures the fee on this basis. However I do note that this structure didn't prevent Fairway firmly advising against a transfer in some other cases where it felt it should do so. And although I think Fairway should have structured its fee differently, I don't think that alone can alter the strong evidence there is on this case to demonstrate that Mr H would have wanted to transfer in spite of any advice from Fairway.

Fairway says COBS 10 doesn't apply. I agree this was an advised sale, and advising against a transfer (as I think Fairway should have done) doesn't change that. But I was referring to COBS 10 as it provides a useful indication of the freedom businesses still had to carry out a transaction on a client's instruction that they didn't think was in the client's interests. I think that's relevant here.

In my provisional decision I went as far as considering the possibility of Fairway refusing to carry out the transaction. Even though I didn't think it would necessarily have had to refuse in the circumstances of this case, I concluded that there were other ways of Mr H going ahead. I would normally say it would be difficult for a consumer to know how to set up a SIPP without using an adviser, but it's apparent that Mr N was an influential force in this case – and as a Harlequin introducer he could easily find out which providers in the market would work with Harlequin. So that's why I have some confidence that Mr H would have found a way of investing, whether Fairway agreed to act on an insistent basis or not.

my final decision

For all of the reasons above and in my provisional decision, I've concluded that Fairway has not caused the losses Mr H has unfortunately suffered, and I do not uphold his complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 1 May 2020.

Gideon Moore
ombudsman

Provisional decision of 11 February 2020

background

In August 2011 Mr H completed a reservation form for his Harlequin property, which involved paying a non-refundable fee of £1,000. He did this having spoken to Mr N, who was an unregulated agent for Harlequin. Fairway has told us that it was then approached by Mr N to assist a number of clients who wanted to establish SIPPs in order to invest their pensions in Harlequin properties. In Mr H's case, this was to transfer a personal pension plan he already held. He also completed a form of authority for Fairway to act on his behalf at that time.

Both parties have commented about Mr N's association with another FCA-regulated firm. In fact, he hadn't carried out regulated financial services activities since 2003. (After the events involved in this complaint, he went on to work as an appointed representative of a different firm in 2012.) Fairway says that it understood (correctly) that Mr N didn't have authorisation to advise on pension transfers at that time.

Fairway has supplied the following documents which it says were provided by Mr N:

- A completed Confidential Financial Review ('fact find') bearing Fairway's own name.
- The first three pages of an Attitude to Investment Risk Questionnaire, which Mr H says Mr N emailed to him on 24 August, copying Fairway in. On this the highest of six risk categories had been ticked, including the following declarations:
  - *I can afford to lose a large proportion of money without my financial security being affected*
  - *I am prepared to accept a very high degree of risk*
  - *My earning capacity is such that I can absorb this risk*
  - *I am prepared to invest for the long term and do not require access to my money in the medium to long term*
  - *I accept the risk of losing most or all of my money*

  One declaration wasn't ticked: *I have existing investments and have a very good understanding of how investment markets work*
- A SIPP appropriateness document Guardian had required Mr H to complete. Rather than saying he had received advice (which required an FCA registration number to be given), Mr H stated he had not received advice and was an execution only customer. He signed below a declaration saying, amongst other things:

  '*I understand and am comfortable with the level of risk of this investment, there is no guarantee that higher risk leads to higher returns, and I may get back less than I have invested.'*

  'I understand that I may not easily be able to sell the investment and that this could impact on my ability to take pension benefits from my plan if I do not have sufficient liquid assets held elsewhere and that this in turn increases the risk to my retirement planning…'

The fact find recorded that Mr H was married, had three children, aged 45 and was self-employed with a gross annual income of £30,000. They had a joint mortgage of £40,000 and a little over £13,000 in deposits. Some handwritten notes on this document, which appear to be when Fairway took over and completed the advice process, record *'Inv in* [pension] *scheme £74k. Large proportion of future savings therefore stress to client risk being taken. High level of disposable income available for alternative savings regime.'* The disposable income noted on the fact find was £1,380 per month.

Fairway initially wrote to Mr H on 3 September 2011 setting out its fee of £1,000 to advise on whether a transfer of his existing pension to the SIPP was suitable. It set out in this letter that it was only in a position to advise on a SIPP, not the investment property.

By 26 September 2011 Fairway was in a position to issue its suitability letter (dated 23 September) to Mr H. This said his SIPP application had already been forwarded to Guardian, but the discharge form from his existing pension provider was enclosed if he wanted to go ahead having read the letter.

There was a small transfer penalty of 0.6% on the personal pension of about £74,000 Mr H was transferring, but no ancillary benefits (*eg* Guaranteed Annuity Rates) being lost.

Fairway has explained to this service that having taken compliance advice, it realised it would need to comment on the suitability of investing in a property development such as Harlequin in this letter. But it only commented in general terms as it did not wish to be seen to endorse Harlequin over any other commercial property investment. Fairway said:

> *'…we cannot provide specific advice in relation to your proposed investment however we would suggest that investing in one particular investment of this nature should be classed as a high risk investment approach.'*

It went on to say that Mr H's proposed investment was 'highly speculative', and *'there is the potential for you to lose the entire investment within your pension scheme as a worse possible scenario'.* It added, *'The Attitude to Risk questionnaire highlights a number of issues that we feel you should consider prior to completing this particular investment.'*

This appears to be a reference to some supplementary pages specifically about Harlequin, which were added to the attitude to risk questionnaire and sent to Mr H on 26 September. These included the following comments:

> *'We agreed that you have this investment risk profile because ...: You understand that by investing your entire fund within one specific investment sector and gearing the advance to include a significant proportion of borrowing you are taking a relatively 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 fluctuations and the nature of the loan facility agreed and the terms and conditions of the advance as well as Political risk.'*

This attitude to risk addendum set out that Harlequin appeared to be acceptable for inclusion in a SIPP, but was not guaranteed to perform as expected:

> '*You should not proceed with an investment of this nature unless you are prepared to take a high risk investment approach which could result in the loss of part or all of your savings. …*
>
> *On the basis that you understand the specialist nature of the Harlequin investment and the associated risk of utilising your savings in this investment we are happy to recommend establishment of a Guardian Self Invested Personal Pension to allow completion of this transaction.*
>
> ***However we would reaffirm that if you have any doubts about the nature of the Harlequin proposition or any aspect of the risks involved you should not proceed.***
>
> *The enquiries we have made on the projected investment returns appear to be very enticing showing high-quality hotels and resorts. The forecast investment returns appear extremely attractive. From an investment return perspective the income projected through rental of the rooms indicates investment returns in excess of 10% per annum with associated potential capital appreciation on the investment of over 20% per annum.*
>
> *We cannot substantiate these figures and whilst they appear to be very attractive, we would recommend caution as we have been unable to substantiate how these projections have been calculated. The projected investment returns are by no means guaranteed.*
>
> *…*
>
> *We have been advised that the funds you wish to utilise for investment within the Harlequin proposition will be used to invest within the Rodney Bay resort which we understand from our enquiries is now well established and is due to open next year….However, we cannot guarantee that any funds released to Harlequin will be used directly to complete your individual unit/s and therefore we would recommend you seek confirmation of this prior to authorising any payment to Harlequin.*

The sales information we have indicates that an investors funds can be repaid when required to SIPP investors. We would suggest caution here as this is rarely seen with investments held within Direct Property /Land investments. We would question whether Harlequin will retain sufficient cash reserves to facilitate significant withdrawals if demand arises. This could result in any investment being very illiquid i.e. your funds being tied up and unavailable for a significant time period.'

Fairway warned that if Mr H couldn't: fulfil the requirements to understand the nature and risks of the investment; afford to lose a large proportion of money without his financial security being affected; have earning capacity to absorb this risk; and avoid needing to access the money in the medium to long term; then:

'…we cannot recommend the establishment of the SIPP on your behalf and would not be in a position to proceed to act for you in establishment of your Self Invested Personal Pension plan. If this is the case you should contact us at your earliest opportunity. If we do not hear from you we will assume you are satisfied with your initial request and continue to establish your plan.'

Fairway discussed other funds with Mr H's existing provider, or a stakeholder pension which would charge less than his existing scheme. The suitability letter gave details of Guardian's costs which at least in the first year, *'will significantly exceed those charged under your existing scheme'*. The letter had a 'recommendation' section, which said:

'Your existing…scheme offers access to a broad range of investment funds. However, the contract does not provide you with the facility to self-invest within investments such as the Harlequin Plan…the Guardian Pension Contract is recommended as it provides a competitively charged contract, with the flexibility required, in order to allow you to take forward your proposed investment.

In view of this, we are happy to recommend your existing benefits be transferred…

We would reiterate that you should understand that by transferring benefits from a more conventional pension arrangement utilising the expertise of your selected Fund Managers, to a more specialist contract, your pension savings will initially incur greater charges which could ultimately result in a lower level of pension being available to you at retirement.

In addition, in view of your proposed investment within your new scheme, you will be significantly increasing the investment risk nature of this element of your savings. Therefore, you should not proceed with this transfer, unless you are prepared to take a more speculative investment approach with this element of your retirement provisions.'

Fairway requested Mr H sign and return a copy of this suitability letter. It's not clear he did this, but my understanding is he returned the discharge form allowing the transfer to proceed. This prompted Fairway to write to him again on 24 October 2011:

'As outlined within our correspondence and the Risk analysis enclosed we are unable to offer any guarantees on the potential investment nature of the Harlequin Overseas property proposition however we would stress once again that you should not proceed with your proposed investment within the Harlequin development unless you fully understand the high risk/ high potential reward nature of this investment.

As outlined within the Attitude to Investment Risk Questionnaire enclosed with our previous correspondence and within the Appropriateness Test documentation you signed on 22 August there are a number of issues you should consider. We would reemphasise that this form of investment is speculative and will increase the risk of loss to your savings.

Conversely if the investment performs as suggested by Harlequin the investment could produce very competitive investment returns however we would stress once again that these are not guaranteed.

Therefore, as previously stated we can only recommend establishment of your SIPP to facilitate your Harlequin investment on the basis that that you are entirely comfortable with the investment

nature of the Harlequin proposition… and your ability to initiate other long term savings from the surplus monthly income you have confirmed on the completed Confidential Financial Review.'

The transfer completed on 8 November 2011 and the proceeds invested in Harlequin. The property development subsequently encountered well-publicised problems and much of Mr H's investment is thought to be lost.

Mr H's complaint

A legal representative complained on behalf of Mr H in October 2014. The complaint was based on a Financial Services Authority (FSA) Alert of 18 January 2013 setting out the factors it required authorised firms to consider when Harlequin investments were involved.

In its final response, Fairway said that it recommended the transfer on the basis of Mr H's responses to questions indicating he was a high risk investor with surplus income to generate future investments, and that he understood the comprehensive risk warnings. Its advice was some 16 months prior to the FSA alert. However it considered it had taken into account the risks, in general, of the Harlequin investment in its recommendation – and that its performance was unsubstantiated and could not be guaranteed.

Mr H's representative referred his complaint to this service. Fairway told us that it was wary about what Mr N had asked it to do, as whilst it was very familiar with pension transfer advice, it knew little about overseas property developments. It was also aware of the regulator's expectations in respect of transfers from personal pension schemes to SIPPs:

'…we felt that in view of the high risk nature of the investment and the manner in which we had been introduced to Mr H we had a moral and ethical duty of care to highlight to him in clear and concise terms the investment risks involved in his proposed course of action.

We could have acted on an Execution Only basis however we felt that by highlighting these risks to him we could ensure that he was fully aware of the implications of his proposed course of action, a situation which we could not guarantee had he proceeded on an Execution only basis with another firm. We feel that had we refused to act for Mr H, thereby forcing him to use another firm on an Execution only basis we would have not acted in moral manner as the investment risk he was taking would not have been outlined to him.'

'Any reasonable person, on providing the answers he did and reviewing our suitability letter and Attitude to Risk questionnaire, would have realised that the Harlequin proposition was a highly speculative investment.'

'…regardless of the nature of our advice Mr H would have still proceeded with his chosen course of action, our advice would have had no effect on Mr H's ultimate decision and he would have proceeded with the transfer.'

Mr H told this service that in late 2010 Mr N had intended to transfer the original pension plan subject to this complaint to a new provider, with whom he had just started making contributions. But he omitted to do so and later told Mr H in July 2011 that it would be a 'good move' to invest it into Harlequin instead.

One of our adjudicators investigated the complaint and thought that it should succeed. He agreed with Fairway that it should have considered the suitability of the transfer as a whole, including the investment in Harlequin. Given the number of warnings regarding Harlequin in Fairway's documents, he also accepted that it did have doubts about the transaction. But in his view, those doubts didn't translate into a firm recommendation not to transfer, as risk warnings were just that – warnings. He went on to conclude that the transfer was not suitable for Mr H because:

- Mr H had limited savings and investments.
- Given his age and the time he had left to retirement, he couldn't afford to risk his only existing pension provision [putting aside the, presumably, small new plan he'd begun].
- He didn't have sufficient on-going income to absorb significant losses to his pension.

- Despite raising the prospect of increased charges, Fairway didn't base its advice on the prospect that Mr H would likely be worse off in retirement due to these.
- Harlequin also exposed investors to significant risks such as gearing, opaque corporate structures, illiquidity and risk inherent in non-regulated investments.

The adjudicator concluded that Fairway should have advised against transferring Mr H's pension for the purposes of investing in Harlequin – instead of adding the caveat that he *could* transfer if he was willing to accept the risks. Had it done so, he considered it highly unlikely that Mr H would have continued to transfer. But had Mr H still been intent on continuing, he considered Fairway would have needed to treat him as an 'insistent client' – by requiring him to specifically acknowledge that he was acting against its advice.

Fairway disagreed with the adjudicator's findings for the following main reasons:

- It received no financial incentive for facilitating the pension transfer other than the flat fee of £1,000 Mr H paid for establishing the SIPP. But it understood Mr N paid a rebate of his own commission to Mr H. This explains why Mr H disregarded the comprehensive warnings, as this inducement was far more important to him.
- The adjudicator was wrong to suggest that Fairway didn't give a clear recommendation not to transfer. Two different letters included the words, *'We therefore recommend that you do not proceed with this investment* [unless…]*'* and *'You should not proceed with your proposed investment…*[unless…]'.
- In line with the COBS rules, it had identified that Mr H didn't have the necessary experience and knowledge to understand the transaction. So it explained the risks and warned him of the consequences in clear and concise terms.
- The adjudicator's stance appears to be totally contrary to the FCA's objectives of ensuring investor protection and improving the public's perception of a trustworthy and professional financial services industry.
- The ultimate decision on whether to take forward the investment had to lie with Mr H. Advisers must retain the option to act in accordance with an investor's ultimate wishes, provided the investor has been placed in an informed position.
- With hindsight it should have secured a more robust explanation from Mr H of why he was so determined to proceed. But the outcome would still have been the same: Mr H was determined to proceed having paid a reservation fee, pre-completed paperwork and wanting to secure his commission rebate.
- It treated Mr H as an insistent client. There were and are still no specific guidelines within COBS rules stating how 'insistent clients' should be handled – this is only briefly covered in COBS 10.3.3 (in a chapter about non-advised services).
- More recently, the FCA has stated that *'Provided a client is placed in an informed position an adviser may proceed with an investment the client wishes to take forward despite an adviser's recommendation to the contrary'.*

The adjudicator requested Mr H provide a response. The key points he made were:

- Mr N said he was so confident in the scheme that he would personally lend him £5,000 to be repaid on first commission.
- He did not need to raise any money at the time of the transaction. If he had, he could have borrowed from parents, got a bank loan or added to his mortgage at a low rate.
- He initially refused the £5,000 because he was worried about owing this sum to Mr N. However, Mr N insisted and said that even if he didn't get the commission he would owe him nothing – so Mr H banked this cheque at the end of December 2011.
- If Fairway had categorically told him not to proceed then he would not have gone ahead, as he didn't have the necessary experience and knowledge. That is why he took the advice of a financial adviser.

After seeing sight of Mr H's response and the full file, Fairway repeated much of its already submitted arguments. The following new points were added:

- The record showed it expressed caution where any investor exhibited an interest in Harlequin, and on one occasion it refused to act for a further introduced client.
- Its decision to stress the inherent risks within the risk questionnaire (which it referred to in its letters), rather than incorporate these within the suitability report, was deliberately intended to highlight them in a more targeted manner.
- In our questionnaire, Mr H had mentioned (then crossed through) the following about Harlequin: *'…was told that would be getting a yearly income in the meantime before retirement anyway.'* This response confirms his objective was to access benefits from his pension savings before the minimum pension age of 55.

The adjudicator considered the further points made by both parties. He remained of the view that Fairway should have firmly told Mr H not to transfer his pension to a SIPP for the purposes of property investment. In contrast the suitability report he'd seen gave qualified advice to Mr H (on the basis of whether he could accept the risk), and placed the onus on Mr H to make a decision. It effectively moved the risk in ensuring appropriate advice was given, from the adviser to the client.

He accepted that the cash inducement, which wasn't initially disclosed in the information Mr H provided to us, might alter the matter and would be considered carefully by an ombudsman. But he continued to think that if unqualified advice was provided Mr H would have followed it, notwithstanding that he would lose the benefit of the inducement.

Fairway responded by pointing out the following over the course of a number of letters:

- Harlequin was not a conventional investment which had the benefit of historic investment performance, or a star rating – in order to be reviewed by a financial adviser in detail.
- If a financial adviser was approached by a client wishing to establish a SIPP to facilitate a commercial property purchase (for example), it could only consider the proposition in general terms. Fairway could not make a specific recommendation on whether the client should purchase a particular building or unit – and the same applied for a property-based investment scheme such as Harlequin.
- Whilst it set out to Mr H at the time that it did not have specialist knowledge in the overseas property market, it did highlight the additional risks it perceived in the development due to currency fluctuations and accessibility.
- A scheme such as Harlequin fell within Mr H's assessment as a high risk investor. Had he said he was balanced or low risk, it would have categorically stated that Harlequin was not appropriate and made a clear recommendation against it.
- There was inevitably an overconcentration in a single asset as Mr H was purchasing a single off-plan property unit, and couldn't buy a smaller number of shares as he could with conventional investments. That was why Fairway drew his attention to the alternative of using conventional, higher risk insured funds.
- If Mr H was truly interested in any advice Fairway provided he wouldn't have totally ignored the report and would have raised these issues with Fairway.
- It wasn't aware the ombudsman service had concluded Harlequin fulfilled the criteria of an unregulated collective investment scheme (UCIS). This wasn't deemed to be the case at the time of its advice.
- Mr H advised Fairway in writing that he was prepared to take a high-risk investment approach. How could Fairway subsequently defend itself if it had advised against the investment entirely, and Harlequin had subsequently achieved high returns?
- Mr H has admitted he and his wife were 'sceptical' of the Harlequin proposition (despite having paid £1,000 to reserve the investment). Yet the number of warnings he ignored contradicted statements that he did not want to risk his pension monies.
- Fairway did say to Mr H that he should not proceed. So it assumed it could classify him as an insistent client when he returned the discharge form nonetheless.
- It believed Mr H was set up as a sub-introducer, to secure commission payment for the introduction of new investors to Harlequin.

The adjudicator duly queried whether Mr H was a Harlequin sub-introducer and also asked him to explain why he had decided to invest in Harlequin despite Fairway's warnings to the contrary. Mr H

said he never introduced anyone to the scheme and never received any commission. Mr N did suggest he recommend friends to the scheme, but he never did this. His representative added that payment of the £1,000 reservation fee was normal practice and compulsory in all cases. This was not a commitment to proceed. So it remained of the view that Mr H would have pulled out of the investment on clear, unequivocal advice from Fairway – as he could not afford to lose his pension savings.

Fairway then began to raise concerns, as a result of other complaints it received, about the extent of the long-term relationships these Harlequin investors already had with Mr N. Its view now was that all of the investors concerned would have proceeded, irrespective of its advice, because of the relationship of trust they had already built up with Mr N. Unlike with Mr N, the investors had no previous relationship with Fairway, which explained why they were willing to disregard its advice.

my provisional findings

I've considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. I appreciate this will be very disappointing for Mr H but my current view differs from that of the adjudicator: I don't consider his complaint should be upheld. I'll set out my reasoning under a series of headings below.

what are the regulator's rules applying to this case?

Fairway initially undertook to provide advice to Mr H on the transfer of his personal pension to a new SIPP provider. But it appears to have correctly recognised before the conclusion of its dealings with Mr H, that it was responsible for considering the suitability of the overall transaction including the destination of his funds once they arrived in the SIPP (Harlequin).
The reason for this is in chapter 9 of the COBS rulebook, which applies to a firm making a personal recommendation in relation to a designated investment. (I note Fairway's concern that Harlequin hadn't been identified as a UCIS at the time of its advice, but both the transferring personal pension and receiving SIPP were designated investments.)

COBS 9.2.2R required Fairway to obtain the information necessary to have a reasonable basis for believing its recommendation *'meets his investment objectives'*; that Mr H was able to *'bear any related investment risks'*; and that Mr H had *'the necessary experience and knowledge'* to understand those risks.

Mr H's main objective was to invest in Harlequin property. The SIPP was recommended specifically for that purpose. So it follows that the risks Harlequin entailed were related to the recommended product. Whilst the complaint brought by Mr H's representative was based on an FSA alert in January 2013 about Harlequin and other unregulated investments, the FSA published this alert to draw attention to the fact that a significant number of firms weren't following these existing rules. Indeed, Fairway's position seems to be that it revised its approach whilst dealing with Mr H to ensure that it did comply with those rules.

COBS 9.2.2R is effectively setting out the requirement for any regulated firm to carry out a 'fact find'. I'm concerned in this case that the fact find process seems to have been initiated by Mr N. And at least in respect of Mr H's attitude to risk, Fairway was supplied with Mr H's view (likely reached in conjunction with Mr N) that he was in the highest of six categories on its scale. Fairway appears to have accepted this assessment without question.

COBS 2.4.6R suggests that Fairway could be taken to be in compliance with the rules requiring it to obtain information '*to the extent it can show it was reasonable for it to rely on information provided to it in writing by another person'*. But COBS 2.4.7E implies an assessment of whether the other person is 'competent' to provide the information, and COBS 2.4.8G suggests it would be reasonable for Fairway to rely on information provided by *'an unconnected authorised person or a professional firm'*.

In this case, it doesn't appear Mr N was either authorised or in an otherwise regulated profession at the time of Mr H's pension transfer. As an agent for Harlequin, it was also in his financial interests for

the investment to proceed. Taking all of this together, I think Fairway shouldn't have accepted Mr H's assessment as a high risk investor where it was likely Mr N had been involved in that assessment. It should have carried out its own assessment, and then proceeded to assess the suitability of the transaction based on this.

This doesn't mean Fairway needed to be expert in overseas property schemes, particularly given that this was not an investment proposition it brought to Mr H's attention itself. There were almost certainly other parties with a more detailed understanding of how the scheme worked, so I don't think it was wrong of Fairway to warn Mr H that it didn't specialise in these types of investments. And I can understand its comparison with the situation where a client wants to invest their SIPP in a UK commercial property – whilst more expert solicitors or surveyors are likely to be involved, the financial adviser can still draw the key risks of this type of investment to the client's attention, and say whether they recommend it on that basis.

In this case I think Fairway made a reasonable effort to identify the key risks involved in Harlequin, which went further than just property-related risks as it was an investment scheme. And given the steps it took I think Fairway was in a position to make a clear recommendation as to whether or not Mr H should invest. Part of this involved issuing a suitability letter, which under COBS 9.4.7R (amongst other things) had to *'explain why the firm has concluded that the recommended transaction is suitable for the client'*. But as I've noted in a number of places above, Fairway's recommendations were qualified by such statements as:

- *'On the basis that you understand the specialist nature…and the associated risk…we are happy to recommend…'*
- *'Therefore, you should not proceed with this transfer, unless you are prepared to take a more speculative investment approach…'*

I take a similar view to the adjudicator that this had the effect of shifting the implications of the adviser giving potentially unsuitable advice from Fairway to Mr H. The regulator's rules required Fairway to explain whether it could justify a decision for Mr H to transfer his pension and invest in Harlequin based on such things as his attitude to and capacity for risk – and if not, why not. Mr H would have been free to disregard a clear and unequivocal recommendation and act as an 'insistent client', which is what Fairway believes he was in effect doing in response to its qualified recommendation.

As Fairway has noted, the FSA didn't have a specific rule in COBS 9 on insistent clients at that time. It referred to COBS 10.3.3, which addresses non-advised sales where a firm had warned a client that the product or service they had asked to carry out was inappropriate for them. Nevertheless that rule does suggest the firm still had a choice whether to facilitate a transaction on an insistent client basis *'…having regard to the circumstances'.*

COBS 2.1.1R required a firm to *'act honestly, fairly and professionally in accordance with the best interests of its client'*. Insistent clients had also previously arisen in the case of opt-outs or transfers from defined benefit pension schemes, for which purpose there had been a rule in the previous COB handbook (5.3.25R) requiring a firm to *'make and retain a clear record'* of both its advice against, and the client's instructions to proceed. And then to provide a *'further confirmation and explanation, in writing…that the firm's advice is that the* [client] *should not proceed…'.* The regulator had also suggested during the industry-wide review of pension transfers and opt-outs that a note in the client's 'own hand' provided more compelling evidence of their insistence to proceed. The regulator has since published further guidance on insistent clients more generally, but this post-dates Mr H's transfer.

Fairway made a recommendation to Mr H, which in my view was to proceed (albeit with caveats) rather than not to proceed. But in a way which is similar to what the regulator envisaged with insistent clients, Fairway then gave a second explanation in writing of its advice. It appears this was out of concern that he fully understood the consequences of his decision to transfer. But it's important to note that this second letter was *also* a recommendation to transfer, with essentially the same caveats.

So I need to make clear that whilst the sequence of letters and the warnings they contained was unusual, this was far from being an insistent client case. But what I will go on to consider now is:

- what Fairway's advice to Mr H should have been;
- if it had given advice not to transfer, whether this would have made a difference to Mr H's decision; and
- whether Mr H could fairly have been treated as an insistent client.

what Fairway's advice to Mr H should have been

Whether Fairway knew that Harlequin met the criteria to be a UCIS or not, it's clear that this was a high risk, non-mainstream investment. The addendum to Fairway's attitude to risk questionnaire highlighted, amongst other things, that Mr H was investing within one specific sector; the scheme involved gearing (borrowing); there were economic, geographical, political and exchange rate risks; and the projected returns couldn't be substantiated. It added that his investment might be pooled with other sums, not necessarily used to complete the development he'd selected, and that it was unclear how Harlequin would be able to repay the investment if required.

All of these points, which I agree with, suggest to me that the Harlequin scheme could only have been suitably recommended to experienced investors who could also afford to take the multiple risks involved. Mr H was transferring almost all of the pension provision he'd built up to that point in conventional insured funds. What savings he and his wife had were not exposed to risk. The one box he didn't tick on the attitude to risk questionnaire was that he had existing investments, or understood how markets work. So I couldn't fairly say Mr H was an experienced investor.

As COBS 9.2.2R makes clear, it is not only Mr H's investment objectives – stated to include *'his preferences regarding risk taking*' – which Fairway needed to assess; but also whether he can *'bear any related investment risks'*. In other words, his *capacity* to take risk was just as relevant as his attitude to risk. Mr H appears to have confirmed on the attitude to risk questionnaire that he was willing to take a high risk for a potentially higher reward. He also indicated that he had the capacity to take this risk because his financial security would be unaffected if he lost most or all of the money, as a result of his earning capacity and being willing to invest for the long term.

Despite this answer I consider it should have been apparent to Fairway that there was a problem with Mr H's capacity to take this risk, whether or not he considered himself to be a risk taker. He might not have viewed the loss of his pension as an immediate threat to his financial security, because this was an asset he couldn't access until age 55. However as a self-employed person he would need this pension to support himself throughout retirement.

Fairway did record surplus income of £1,380 per month, and it appears some of this was being paid into a new pension. However his earnings were not what I would call substantial and with three dependent children, I'm doubtful that Mr H would be able to make significant further long-term commitments. It would also take many years to accumulate another fund of £74,000, and Mr H was putting a sum of that size at considerable risk by investing in Harlequin.

I'm satisfied that the only suitable advice Fairway could reasonably have given to Mr H in these circumstances was not to transfer his pension to a SIPP to invest in Harlequin. It could have explored, as it did highlight at the time, whether he could improve the potential returns by varying the fund choice – either in his existing plan or a low-cost stakeholder alternative. But Mr H in my view had limited scope to significantly increase the risks he was taking, as he would be reliant on these funds to a significant degree in retirement.

Whether Fairway advised on no transfer at all, or to switch between insured funds in a low cost plan, I consider the COBS rules required it to give this advice without any qualifications – so that Mr H was in no doubt that Fairway's view was that he should not transfer to a SIPP or invest in Harlequin. It's notable that this could have been achieved relatively easily by Fairway simply not including the caveats in either of its letters which transferred the risk of unsuitable advice to Mr H. Indeed Fairway says that if Mr H had been a low or medium risk investor (which I think he was), it would have given precisely this advice.

whether clear advice not to transfer to a SIPP would have altered Mr H's decision

Fairway says that an unequivocal recommendation not to transfer would have made no difference due to the greater level of confidence Mr H evidently had in what Mr N was saying. I can see its point of view, and I understand why it wanted the adjudicator to ask Mr H more questions about his prior dealings with Mr N. We know a fair bit about this from the questionnaire Mr H completed for the Financial Ombudsman Service which he then clarified in a subsequent letter. Mr H said:

> *'I initially just wanted advice as I was not sure if my pension was performing well.* [Mr N] *came recommended to me as a financial advisor.* [Mr N] *recommended I transfer my pension to* [another provider]*. When I realised there were errors in the monthly payments I contacted him. Then at a later date he informed me that there had been an error and the funds … had not been transferred. … He asked if my wife and I believed in fate and this was meant to be and this is how I ended up transferring the pension with Harlequin.'*

Separately, Mr H has suggested Mr N held himself out as working for another regulated firm. The FCA register does not bear this out, although I'm aware that firm employed many of the staff who used to work for the company through which Mr N was last regulated in 2003. It's possible that firm was involved in arranging the other pension Mr H mentions, because it's unlikely Mr N would have been dealing directly with providers as an unregulated individual. I accept this is Mr H's honest recollection of how Mr N presented himself, but this does confirm in my view that they had a prior relationship and it appears Mr H continued to place faith in Mr N despite some apparent shortcomings in setting up his other pension.

Mr H has also disclosed a financial incentive he received from investing in Harlequin, although I'm concerned that it was some time into our investigation before he did so. I accept he wouldn't necessarily have been unresponsive to advice not to transfer having only paid the £1,000 Harlequin reservation fee, but £5,000 is not an insignificant sum. Mr H suggests he could have borrowed that amount easily, but borrowing on standard terms would attract interest. This incentive would have increased Mr and Mrs H's liquid non-pension assets by more than a third at that time. Importantly in my view it was a benefit Mr H was gaining from his pension without having to wait until the minimum age of 55 to do so. I've found no evidence that Fairway was aware that Mr H was receiving this incentive.

Whilst Mr H describes the £5,000 as only a loan from Mr N, this appears to have been a loan against a future stream of commission for recommending other investors to Harlequin. In common with other clients of Mr N, he was advised to set up a Limited Liability Partnership (LLP) to receive these payments. Mr H denies he received payments through the LLP and its accounts support this, but nevertheless the partnership was set up and has never been dissolved. I don't think this is information Fairway was aware of until the complaint, and it's further evidence of Mr H's willingness to act on Mr N's advice.

I've also considered the extensive risk warnings Fairway provided. I think Fairway is right to question why Mr H didn't once, over the course of two letters, query the concerns it was highlighting. I don't think this can be entirely explained simply by the fact that Fairway did recommend the transfer but with caveats. The caveats identified significant concerns which, if Mr H had been intent on relying on Fairway's (rather than Mr N's) advice, I think he would have acknowledged and discussed with Fairway further.

In the end, although Fairway's recommendation should have been clearer, I think Mr H would still have made his own decision to disregard advice not to transfer because of the strength of the relationship he had with Mr N. It would have been a significant retreat not only to cancel the reservation of the property for which he'd already paid £1,000, but also lose the 'loaned' £5,000 incentive payment which he was likely to recover from future commission.

As I mentioned above Fairway appears to have assumed Mr H was intent on proceeding – as its letter provided a way for him to do so (returning the discharge form). I don't think Fairway would have been acting in Mr H's best interests if it had instead given a clear and unequivocal recommendation not to

transfer, but readily facilitated a transfer by enclosing the discharge form with the same letter. But from the evidence we have I can't safely conclude that the outcome would have been any different, had Fairway given its recommendation and then awaited contact from Mr H.

Fairway's letter to Mr H of 23 September 2011, in combination with the attitude to risk questionnaire it enclosed, highlighted essentially the same concerns I would expect to have seen in a letter which firmly advised against transferring. I'm not satisfied Mr H was relying to any great degree on what Fairway told him. It seems likely to me that Mr H would have got back in contact, stating his intention to proceed nonetheless. And that would then have meant Fairway needed to consider if it should treat him as an insistent client.

whether Mr H could fairly have been treated as an insistent client

As a result of Mr H asking to make the transfer despite its advice, Fairway would have had a record of those instructions. That would be consistent with the regulator's previous expectations on insistent clients, for example in COB 5.3.25R. As COBS 10.3.3 indicates (whilst in a chapter about non-advised sales it is supported by subsequent regulatory guidance), it would then be a matter for Fairway to decide if it was willing to process his case as an insistent client.

I accept that there might be limiting cases where the transaction was so clearly not in the client's best interests that a business should, on any fair and reasonable basis, not have carried it out. That might perhaps be where there was clear evidence of undue influence, or a severe lack of understanding on the consumer's part. I don't think that's the case here, particularly given the efforts Fairway would still have gone to in its advice to highlight the key risks, and it didn't know about the incentive Mr H was receiving.

It's not surprising that investors often first learn of schemes like Harlequin through unregulated individuals. But based on what Fairway knew of Mr N's involvement I don't consider it would have had a strong reason to believe when embarking on its advice, that Mr H was not open to considering that advice seriously and carefully. It's evident that Fairway did become concerned about why Mr H and other individuals were intent on proceeding, but it dealt with this in a similar way to how the regulator expected firms to deal with insistent clients – by re-stating the concerns it had. And I still don't think Fairway's second letter would have deterred Mr H from transferring even if had been written without caveats, and in acknowledgement that he'd already instructed it to act against its advice.

Fairway mentions it did decide not to act for another investor. This investor may not have been in the same situation as Mr H – for instance I'm aware of investors with defined benefit pensions that Fairway firmly recommended against transferring. But even if Fairway had refused to act for Mr H, which I don't think it had to do in this case, I think it's evident he was intent on transferring in any event. He could have done this by acting as an insistent client through another firm or by opening a SIPP with a number of providers as an execution-only client. So that also gives me reason to say it wouldn't be fair to hold Fairway responsible for his loss.

Naturally, Mr H will regret having decided to invest in Harlequin, but he played a key part in that decision. In my view it isn't fair and reasonable to hold Fairway responsible for the consequences of the shortcomings in its advice, when Mr H would likely still have transferred and invested in Harlequin, but for those shortcomings.

my provisional decision

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

Gideon Moore
ombudsman