complaint

Mr and Mrs G complained together to Sesame Limited about its appointed representative Financial Distinction Limited.

The complaint Mr and Mrs G made is that in 2011 Sesame gave unsuitable advice to switch existing personal pensions to Self-Invested Personal Pensions (SIPPs) in order to invest in a Harlequin property investment in Barbados. Sesame did advise on the pension switch. It expressly said it was not advising on the investment in Harlequin. It said Mr and Mrs G's unregulated advisers in the Caribbean (EA) were advising about the investment.

Mr G's pension was worth around £132,000 at the time of the advice. Mrs G's pension was worth almost £20,000. The combined value was invested in Harlequin and that investment has failed and all the money is lost.

background

Mr and Mrs G are represented by solicitors. They complained to Sesame about the advice to Mr and Mrs G in one letter. Sesame did not uphold the complaint. The solicitors referred Mr and Mrs G's complaints to the ombudsman service on one complaint form.

I issued a provisional decision in which I first said the complaint should not be upheld. Put briefly, I thought:

- Sesame should not have acted in the way it did. It should have refused to act if it was not prepared to advise on the Harlequin investment.
- However Mr and Mrs G would have ended up with the same investment in any event. This was because EA knew another UK regulated adviser who would have arranged the investment for them.

Sesame agreed. Mr and Mrs G did not. They made further submissions.

I considered all of the evidence and arguments and issued a second provisional decision. Again put briefly, I said:

- Sesame should not have acted in the way it did. But on reflection it was not fair and reasonable to assume that Mr and Mrs G would have been treated in the same way by another adviser.
- It was appropriate to proceed on the basis that Sesame should have given suitable advice or some other adviser would have done so if Sesame had refused to act.
- The Harlequin investment was too high risk for Mr and Mrs G in their circumstances. So they should have been advised not to make the investment and not to transfer their pensions.
- Mr and Mrs G made their complaints together but they were two separate complaints that should be dealt with separately.
- To put things right Sesame should pay compensation to Mr G and to Mrs G for the financial and non-financial loss they have been caused.

Mr and Mrs G agreed with my revised view of things. Sesame did not. Its comments include:

- Sesame does not agree with my suggestion of £500 compensation each for Mr and Mrs G for distress and inconvenience. It says it challenges this on the grounds that it believes it dealt with the complaint in a fair and timely way. It says it does not think it should be penalised for the length of time taken by this service to deal with the complaint.
- It does not agree Mr and Mrs G have separate complaints that should be dealt with separately. The complaints were brought together. They have been dealt with together by Sesame and this service up to this point.
- Sesame says my provisional decision overlooks the scope of permissions under which the appointed representative was operating. The appointed representative was not authorised to advise or make arrangements in relation to unregulated investments such as the Harlequin investment. This means Sesame had not accepted responsibility for such advice and any complaint about it is not within the jurisdiction of the Financial Ombudsman Service.

I issued a further provisional decision to deal with this jurisdiction point. I said

> *"I note there is a restriction in the agreement between Sesame and Financial Distinction in relation to unregulated investments. However in my view that does not put this complaint (or complaints) beyond my jurisdiction for a number of reasons:*
>
> - *The restriction is only a matter between Sesame and Financial Distinction. It is something that regulates the position only between Sesame and Financial Distinction. It does not limit the scope of Sesame's liability to Mr and Mrs G. This is the position as found by the court in Ovcharenko v Investuk [2017] EWHC 2114.*
>
> - *And/or investment advice often involves matters that are linked such as advice to sell one thing in order to buy another. There is no bright line that divides one part from another. This was the finding of the court in TennetConnect v Financial Ombudsman Service [2018] EWHC 459. And the FCA has made it clear that when advising on transferring to a SIPP the known destination of the investment in the SIPP cannot be ignored. In this complaint (or complaints) the pension switch and investment are very closely linked – inextricably so if the reasoning of the regulator is applied to the facts of the complaint(s) - and so the entire transaction may be considered by the ombudsman service as in the TennetConnect case.*
>
> - *And/or in any event, the complaint may be decided on the basis that the adviser should have refused to advise on the pension switch since the adviser could not give suitable advice and act in accordance with the s.39 Agreement's requirement not to advise in relation unregulated collective investment schemes. This is a complaint about advice Sesame does not dispute it accepted responsibility for under the s.39 Agreement with Financial Distinction. So I can consider the complaint(s) on this basis even if I am wrong on the two bullet points above."*

I was also not persuaded by Sesame's arguments about whether there is one complaint or two. My view remained that there were two complaints and that they should be dealt with as two separate complaints.

My view that the complaints should be upheld remained unchanged. As for the compensation for trouble and upset I said that this was to compensate for the distress and inconvenience caused in relation to the loss of the pension funds that Sesame advised Mr and Mrs G to transfer. The compensation is not an award for the way the complaint has been dealt with – I made no findings or comments about that in my provisional decision.

Sesame does not agree. It drew my attention to a court case that was decided just before my provisional decision and which I had not mentioned – Anderson v Sense Network - which it in effect said came to the opposite conclusion to the court cases I had referred to. Sesame remains of the view that it is only responsible for the acts or omissions of its appointed representatives to the extent it permits them. And it does not permit advice on unregulated investment schemes.

Sesame disagrees that it should have refused to act on the pension switches as it was clear Mr and Mrs G – who had already invested in such a scheme before and had paid a reservation for a further property – wanted to proceed with the investment. Sesame says my first view was right, that Mr and Mrs G would have invested even if warned against it.

The adviser made it very clear he could only advise Mr and Mrs G on the SIPP and not the Harlequin investment.

Sesame also says it remains its view that Mr and Mrs G have only one complaint, and that it was made as one and dealt with as one.

my findings

preliminary point:

Mr and Mrs G had dealt with some advisers who I will call Mr and Mrs E. Those advisers represented a number of different regulated financial services firms in the UK. They also had their own unregulated business ("EA"). Later they moved overseas and set up a second unregulated business ("EAI"). For simplicity I will refer to the advice Mr and Mrs G got from Mr or Mrs E or their businesses as advice from EA.

EA introduced Mr and Mrs G to the idea of investing in a Harlequin property investment. By this time they had already invested in other overseas property investments with the help of EA. The Harlequin investment property was in Barbados. This investment could be arranged using money in Mr and Mrs G's existing personal pension funds in the UK. The investment could not however be held in that type of pension – but it could be held in SIPPs.

EA introduced Mr and Mrs G to an appointed representative of Sesame to deal with the switch of their existing UK pensions into SIPPs. The Sesame adviser's report included:

> *"Your current financial advisers [Mr and Mr E] of [EAI] have introduced you to me in order that I help you facilitate a Guardian Pension Consultant SIPP for the sole purpose of providing a deposit to help fund and ultimately purchase a Harlequin Investment in Barbados.*
>
> *You have already paid a £1,000 cash deposit…for the reservation of the property valued at £450,000.*
>
> *You require a 30% deposit (£135,000) for your property, so a further balance of £134,000 is required. It is your intention to use your existing pension funds for the balance. In order to allow this – a specialist SIPP provider has been identified by [EA] – 'Guardian' pension*

Consultants that will allow your pension funds to be used for the remaining deposit for the investment property. After speaking with you, you have confirmed that you would like my help in transferring your existing two pension funds into your Guardian SIPP which will help facilitate the Harlequin purchase.

…I have explained to you that I will only be advising on your pension transfers to your Guardian SIPP – and will not be advising you in the suitability of the Harlequin investment property itself – something that I know very little about and cannot advise you on. You have informed me that this will be your second investment property with Harlequin as you already own one in St Lucia.

I have been informed that Guardian Pension Consultants have a specialist team within their administration department for the purpose of any Harlequin property investments, something that not all SIPP providers are prepared to consider. It is for this reason that we will be using the Guardian SIPP facility for you.

…Taking into account your objectives, attitude to investment risk and affordability set out in this report, I can recommend the Self-Invested Personal Pension Plan (SIPP) with Guardian for [Mr G], as the fund size to transfer would justify the additional costs that undoubtedly he will incur within a SIPP and investment of this nature.

However, [Mrs G] has a much smaller fund and would not normally be advised to transfer this existing fund into a SIPP, primarily because of the charges involved and the nature of the intended investment. However, as it is your intention to use both SIPP's for the combined deposit required … then while I cannot advise that this is a suitable transfer, it is required for your purchase to be completed. This transfer must be treated as not advisable, but as this transfer is for a very specific purpose (and without it your property purchase cannot complete), I am prepared to accept your request to transfer this fund, in order to assist your purchase.

…Financial Distinction Ltd have invoiced you directly £500.00 each for our services for the transfer of funds from your respective personal pension plans and the set up of your new Guardian SIPP's."

The letter also mentioned that an alternative of Mr G making a further contribution to his pension to allow him to pay the entire deposit from his pension fund had been considered. But Mr G was "not keen" to do so.

It is the case that Mr and Mrs G were advised about their pension switches at the same time and the advice was set out in one letter. And that they have complained at the same time and in one letter.

However the advice Sesame gave was to Mr G to switch *his* pension to a SIPP so he could then use the pension fund to make a joint investment with Mrs G. And the advice to Mrs G was that though it was not normally advisable for her to switch *her* pension she could do so. She could then use the pension fund to make a joint investment with Mr G. Each pension was in Mr or Mrs G's sole name – and the advice given did to a degree differentiate between the two transfers.

'Complaint' is defined in the glossary to the FCA rules as follows:

"Any oral or written expression of dissatisfaction, whether justified or not, from or on behalf of, a person about the provision of, or failure to provide a financial service…which alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience…"

So a complaint has to be about the provision of a financial service.

In this dispute, the financial service complained about is the advice to Mr G and the advice to Mrs G to set up individual SIPPs and switch their existing individual pensions to the SIPPs to invest in Harlequin - without also advising on the suitability of the Harlequin investment.

I think that was individual advice as the pensions were held individually. The pensions were different as were some of Mr and Mrs G's personal circumstances (such as size of pension fund and income). And the advice to each was very slightly different because of those differences. It was the case that Mr and Mrs G went through that advice process together and the advice was delivered in one document. It was nevertheless two pieces of investment advice even though they were closely related. And Mr and Mrs G were invoiced separately £500 each for that separate advice.

In my view there was a provision of a financial service to Mr G and the provision of a financial service to Mrs G. And that we have a complaint which so far has been made jointly about those services. It is however my view that there are two complaints and that they should be treated as two complaints.

It is therefore my view that the complaints should treated as separate complaints rather than as one single complaint notwithstanding the fact that for convenience the advice was delivered in one report and the complaints were made in one complaint letter and one complaint form.

This decision is the decision in Mrs G's complaint.

jurisdiction

I've considered all the available evidence and arguments and it is my view that we can consider Mrs G's complaint.

I note what Sesame has said about not authorising advice about unregulated investment schemes. However, as I mentioned above, there is no dispute that Sesame authorised the advice that was given about the switching of Mrs G's pensions to a SIPP. I can therefore consider the complaint that Sesame should have done something different when giving that switch advice.

Whether or not the outcome would have been different is a matter to be considered when considering the merits of the complaint.

merits

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

what was Sesame engaged to do?

In this case Sesame was approached by EA to advise Mr and Mrs G.

Sesame, in effect, says in made it clear it was only giving limited advice. Mr and Mrs G might not agree about that but it was made clear to Mr and Mrs G by Sesame that it was not advising on the Harlequin investment and that was not challenged at the time.

I will therefore proceed on the basis that Sesame agreed to give Mr and Mrs G limited or focused advice only.

is an FCA regulated adviser permitted to give limited advice?

In March 2012 the FSA published finalised guidance on *simplified advice*. It said simplified advice is not a defined term in its rule book but is used to describe a streamlined advice processes to address straightforward needs. It is focused on one or more specific needs and does not involve analysis of the consumer's circumstances that are not directly relevant to those needs.

The FSA said this was similar to *focused advice* which was also an undefined term. It said focused advice is a situation where the client requests that a firm only gives a personal recommendations relating to a specific need, designated investment or certain assets. With focused advice the client stipulates (or, in my view, at least agrees) the boundaries of the service they wish to receive.

In January 2015 FCA published Finalised Guidance FG15/1: *Retail investment advice: Clarifying the boundaries and exploring the barriers to market development*. It made a number of comments about focused advice as follows:

> *"4.6 …It is perfectly feasible, within … our domestic regulatory framework, to provide a service that focuses on a specific need of the customer and which does not require the detailed factfind of a full advice offering.*
>
> *4.7 An example of this might be a customer who had straightforward requirements and was looking for advice on how to invest money in a stocks and shares ISA. In this situation the customer and intermediary could agree that the service provided would be focused on this one situation and would not include wider discussion of say the customer's pension or mortgage situation, or indeed their other investments beyond assessing the attitude to risk and capacity for loss.*
>
> *4.8 The adviser would be able to focus on a smaller number of questions, including around the aims and objectives of the customer, and come to a suitable recommendation. Thus, if an intermediary and customer agree to look at just one specific need/objective, this would be focused advice. In this situation, an intermediary can give a recommendation on a specific need or objective and only on that need or objective. Another way of looking at this would be to say that the intermediary is able to limit the scope of a service, but the depth of the suitability obligation cannot be limited. Firms would need to collect the relevant information to make sure that provide a suitable recommendation within the specific scope of the advice that have agreed.*
> *…*
> *4.12 It is also important to highlight that, even within focused advice, there remains a duty to use reasonable skill, care and diligence when providing advice. The standard of care required to discharge that duty is that exercised by the reasonably competent adviser…"*

Both sets of guidance were published after the advice in this case. But both are commenting on rules and obligations that were in place at the time the advice was given – they do not create new rules or obligations. So while the guidance is not directly applicable it is of assistance.

It is clear that at the time the advice was given in this case it was, in principle permitted, for an adviser to give focused advice.

The limits placed on the advice suggests the adviser assumed no responsibility for the suitability of the Harlequin investment and therefore had no duty to protect Mrs G from the loss she has suffered as result of the failure of that investment. And in turn that suggests the loss is not recoverable from Sesame.

There is however a point that leads away from that conclusion. It is reflected in the FCA's comment:

> *"Another way of looking at this would be to say that the intermediary is able to limit the scope of a service, but the depth of the suitability obligation cannot be limited."*

The issue is whether an adviser can advise on the suitability of a transfer into a SIPP without also considering the way in which the pension funds are to be invested.

were the limits on the advice in this case of a permitted type?

In this case Sesame did give focused advice – but while it is clear from the above that focused advice is permitted, the adviser is not completely free to set those limits. And in this regard I think that two pieces of guidance issued by the FCA make it clear that the freedom to agree limits is restricted in the area relevant to this case.

The first is the Pension Transfer Alert dated January 2013 which criticised a business practice which is more or less identical to the one in this case. The alert said:

> *"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes). Examples of these unregulated investments are … overseas property developments…*
>
> *The cases we have seen tend to operate under a similar advice model…The financial adviser does not give advice on the unregulated investment, and says it is only providing advice on a SIPP capable of holding the unregulated investment…*
>
> *Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.*
>
> *The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs…), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy the pension transfer must take account of the overall investment strategy the customer is contemplating.*
>
> *For example, where a financial adviser recommends a SIPP knowing that the customer will transfer out of a current pension arrangement to release funds to invest in an overseas property investment under a SIPP, then the suitability of the overseas property investment must form part of the advice about whether the customer should transfer into the SIPP. If,*

> *taking into account the individual circumstances of the customer, the original pension product, including its underlying holdings, is more suitable for the customer, then the SIPP is not suitable.*
>
> *This is because if you give regulated advice and the recommendation will enable investment in unregulated items you cannot separate out the unregulated elements from the regulated elements.*
>
> *There are clear requirements under the FSA Principles and Conduct of Business rules and also in established case law for any adviser, in the giving of advice, to first take time to familiarise themselves with the wider investment and financial circumstances. Unless the adviser has done so, they will not be in a position to make recommendations on new products."*

The other piece of guidance is on investment advisers and authorised firm's responsibilities when accepting business from unauthorised introducers or lead generators from 2016. Of particular note is the final paragraph

> *"Providing a simplified or limited advice process to consumers to facilitate investment into unregulated, high risk, illiquid products, whether they are based in the UK or overseas, or delegating regulated activity to an unauthorised party will* ***not*** *mean that the firm can avoid liability or regulatory action for unsuitable advice (or lack of advice)…"* [original emphasis]

Both of sets of guidance were published after the advice in this case. But both are commenting on rules and obligations that were in place at the time the advice was given. They do not create new rules or obligations. So while the guidance is not directly applicable it does give guidance on how regulated firms should have acted at the time of the advice in this case.

In my view the guidance does make it clear that an adviser may not act in the way Sesame did in this case – that it cannot limit its responsibilities in relation to the overall suitability of the overall SIPP transfer advice including the investment to be made in the SIPP or rely on the unauthorised introducer to give part of that advice.

As the FCA guidance says:

> *It is essential that at all times you maintain full and complete ownership of the advisory process between yourselves and your customer, and any regulated advice you provide must meet the requirements set out in our Handbook.*

what does that mean in this case?

In my view the above means Sesame was under an obligation to give suitable advice including advice on the intended use of the SIPP, or refuse to advise if it was unable to give such advice. Sesame says it does not allow its advisers to advise on unregulated investment schemes such as Harlequin. So the adviser should have made this clear in this case and should have refused to act. It was not appropriate to in effect delegate the obligation to give suitable advice on the investment to be held in the SIPP to the unregulated introducers of the business EA.

The same can be said about any other regulated adviser to whom Mrs G had turned if Sesame had refused to advise on the pension switch.

was the Harlequin investment unsuitable for Mrs G?

Mr and Mrs G's attitude to risk in relation to pensions was recorded by Sesame as point 5 on a 6 point scale. There is no reason to think that any other adviser to whom Mrs G turned if Sesame had refused to act would have assessed their attitude to risk at a materially higher level.

The features of this point 5 were described as follows:

Your likely circumstances	Risk I am prepared to take with my money	Potential return	Potential Loss	Typical Investment Type
I can afford to lose a large proportion of my money without my financial security being affected.	I accept the risk of a significant loss of risk to my money.	Potential growth significantly above inflation.	I understand that under some circumstances I could lose a lot of my money and that there is a medium chance of these circumstances arising.	North American funds European funds UK Specialist & Small Company funds Japanese & Asia Pacific Equity funds
I am prepared to accept a high degree of risk.			Moderate losses might occur quite often. …	Specialist & Small Company funds invested in North America & Europe
My earning capacity is such I can absorb this risk.				Narrow theme/sector funds

The Harlequin investments were unregulated collective investments in a single property development scheme. It was investing off-plan, in a developing economy. The investment was clearly a higher risk investment – and involved more risk that the types of investment described as typical investments for risk rating 5.

The typical investments for risk rating 6 were given as:

- High risk-reward diversifying funds
- Global and Regional Emerging Market funds
- Technology & Telecoms funds
- Very small 'enterprise' investments.

In my view the Harlequin investment was closer to those investments and the level 6 descriptor for potential loss:

> *"I understand that under some circumstances I could lose all of my money and that big losses might occur quite often"*

The Harlequin investment was a single project investment. That meant the failure of the project would likely lead to total or almost total loss because of that lack of diversity.

Added to this Mr and Mrs G already had exposure to other overseas property based investments at the time of the advice.

In my view the Harlequin investment was not a suitable investment for Mr and Mrs G even if, which they dispute, their attitude to risk was as high as level 5.

On that last point it is not completely clear what Mr and Mrs G's attitude to risk was at the time of the advice in this case. Mr and Mrs G's lawyers have said Mr and Mrs G are low risk investors. And that Mr and Mrs G were *"advised the products were low risk"* and that *"the products matched their low risk profile."*

However I cannot see that there is any evidence that either records or clearly demonstrates that Mr and Mrs G did have a low attitude to risk for their pension investments. And there is one instance in this case where EA expressly said the Harlequin investment would be said to be a high risk investment by an FSA regulated adviser.

That is not to say that I think Mr and Mrs G knew, and fully understood, and made a properly informed decision, to accept the risks they were taking. Nor do I think they were high risk or speculative investors.

I think, on balance, factors such as Mr and Mrs G's ages, general financial position and investment track record mean it's more likely than not they had a broadly medium rather than an especially high or an especially low attitude to investment risk. This is particularly so for pension investments as both had over ten years to go to the time they were intending to retire.

what should have happened?

Sesame should not have limited its advice in the way it did. An adviser should have said it had to advise on the switch to include the suitability of the known use the pension fund funds ie the Harlequin investment. And it should have said the transfer to invest in Harlequin was unsuitable for Mrs G and clearly advised her against it. If the Sesame adviser was unable to do this he should have explained why he could not and refused to act further. Advice would have been obtained from a different regulated adviser.

A reasonable alternative adviser would have given suitable advice – that Harlequin was not a suitable investment for Mrs G and that therefore Mrs G should not switch her pension to a SIPP in order to invest in Harlequin.

what would have happened next?

In my first provisional decision I said that Mr and Mrs G would not have accepted Sesame's advice not to invest in Harlequin. And that is a possibility. However I think the starting point in making a fair and reasonable assessment should be that a consumer will accept the advice he or she is given by their regulated adviser unless there is strong evidence to the contrary.

In this case there was evidence in that:

- Mr and Mrs G had a long relationship with EA.
- EA had been able to give regulated advice in the UK but could no longer do so as they had moved to the Caribbean and no longer represented any UK regulated firm.
- So Mr and Mrs G would have seen EA as trusted, competent and potentially more expert on the Caribbean investment than a UK based regulated adviser.

But these points worked to make Mr and Mrs G accept EA's advice to invest in Harlequin. As too did their own liking for the investment after it had been recommended to them by EA and the point that they had already paid a reservation fee for the property before Sesame became involved. And that they had been led to believe that they were getting a below market value price for the property/investment

Also Mr and Mrs G were told by Sesame that switching Mrs G's pension was not advisable but she made the switch anyway. This tends to point to a preference for EA's advice over Sesame's. As does the non-acceptance of the suggestion that Mr G top-up his pension before the transfer so that there would be enough funds in his pension to make the Harlequin investment using his pension fund only.

These points are all true but do need to be considered in context. The possible top-up of Mr G's pension is recorded only as a suggestion not a clear recommendation that was not accepted. The advice not to switch Mrs G's pension was not strongly made or followed through. The adviser did not clearly advise Mrs G not to switch. The adviser did still give it the go-ahead for Mrs G's switch in the particular circumstances of the case.

A reasonable regulated adviser's advice not to proceed with the Harlequin investment should have been given in clear and unambiguous terms so there was no room to doubt the suitability of the investment in Harlequin for Mrs G's pension. Clear objective regulated advice should have been forceful and should have had a strong impact on Mr and Mrs G. They had indeed been dealing with EA for some time but it was nevertheless an adviser/advisee relationship of sorts – albeit one that was no-longer regulated. It was not, say, a long and close personal friendship or family relationship. Nor did Mr and Mrs G have an existing or potential relationship with Harlequin that went any deeper than being an ordinary retail investor. All this means Mr and Mrs G were not so biased in favour of EA or Harlequin that they could not, or would not, listen to reason from a reasonable regulated financial adviser whose services they were paying for.

Suitable advice from a regulated adviser may well have brought the adviser into conflict with EA but it ought to have been very difficult for EA to argue against clear objective and independent advice.

It is possible EA may have misled Mr and Mrs G in some way and talked them around even if an independent adviser had given suitable advice. So Mr and Mrs G might have invested in EA on an insistent client or execution only basis. But on reflection, I do not think it is fair and reasonable to assume the worst in that way.

Of necessity I have to speculate about what would have happened if Sesame had given correct advice or if reasonable advice had been given by an alternative adviser if Sesame had refused to advice. But such speculations should be reasonable and on the basis that all involved would act as they reasonably should. To assume the worst without strong evidence pointing in that direction would undermine the investor protection purpose of the relevant conduct of business rules.

On careful consideration I am not persuaded that the evidence is strong enough to say that Mrs G would not have accepted, and acted on, the suitable independent advice – whether given by Sesame, or since Sesame says its advisers could not give such advice, any alternative regulated adviser.

the complaint should be upheld and Sesame should pay fair compensation

So it is my finding that the complaint should be upheld. Sesame should therefore pay compensation to Mrs G to put her in the position she would now be in if Mrs G had been given suitable advice. Suitable advice would have been not to make the investment. As the switch was made only to make the investment the advice would also have been not to make the pension switch.

I cannot see any reason for saying that Sesame should not pay compensation for its failure to give suitable advice or refuse to act so reasonable regulated advice could be obtained elsewhere. For example I cannot see that it was unreasonable in the circumstances for Mrs G to rely on the advice received from EA. After all, Sesame did not clearly warn her against doing what she did. Sesame neither told her that the Harlequin investment was unsuitable for her. Nor did it tell her about the risks of taking advice from EA as unregulated advisers. I cannot see that there was therefore any contributory negligence on Mrs G's part. Nor can I see that there has been any later failure on her part such as a failure to take reasonable steps to limit the loss she has suffered.

fair compensation

It is my view that there is no reason to think Mrs G would have switched her personal pensions at all if she had been given suitable advice. So fair compensation should aim to achieve that, or a financially equivalent, position. I set out below a fair way of achieving that. Sesame should:

1. Obtain the notional transfer value of Mrs G's switched pension as at the date of my final decision had the pension not been transferred to the SIPP.

Sesame should ask Mrs G's former pension provider to calculate the notional transfer value it would have applied as at the date of this decision had it not transferred the pensions but instead remained invested. If there are any difficulties in obtaining a notional valuation then the FTSE WMA Stock Market Income Total Return Index should be used. That is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

2. Obtain the notional transfer value of Mrs G's SIPP at the date of my final decision.

This should be confirmed by the SIPP operator. If the operator has continued to take charges from the SIPP and there wasn't an adequate cash balance to meet them, it might be a negative figure.

3. And then pay an amount into Mrs G's SIPP so that the transfer value is increased by the amount calculated in (2). This payment should take account of any available tax relief and the effect of charges.

If it's not possible to pay the compensation into the SIPP, Sesame should pay it as a cash sum to Mrs G as appropriate. But had it been possible to pay into the SIPP, it would have

provided a taxable income. Therefore the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mrs G's marginal rate of tax at retirement. For example, if Mrs G is a basic rate taxpayer in retirement, the *notional* allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mrs G would have been able to take a tax free lump sum, the *notional* allowance should be applied to 75% of the total amount.

4. Pay any future fees owed by Mrs G to the SIPP, for the next five years.

Had Sesame given suitable advice I don't think there would be a SIPP. It's not fair that Mrs G continue to pay the annual SIPP fees if it can't be closed. Ideally, Sesame should take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mrs G back in the position he would have been in. But as I understand it the ownership of the Harlequin Property investment can't currently be transferred. It's likely that will change at some point, but I don't know when that will be – there are a number of uncertainties.

So, to provide certainty to all parties, I think it's fair that Sesame pays Mrs G an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees), or undertakes to cover the fees that fall due during the next five years. This should provide a reasonable period for things to be worked out so the SIPP can be closed.

In return for the compensation set out above, Sesame may ask Mrs G to provide an undertaking to give it the net amount of any payment she may receive from the Harlequin Property investment in that five year period, as well as any other payment she may receive from any party as a result of the investment. That undertaking should allow for the effect of any tax and charges on the amount she may receive. Sesame will need to meet any costs in drawing up this undertaking. If it asks Mrs G to provide an undertaking, payment of the compensation awarded by my decision may be dependent upon provision of that undertaking.

If, after five years, Sesame wants to keep the SIPP open, and to maintain an undertaking for any future payments under the Harlequin Property investment, it must agree to pay any further future SIPP fees. If Sesame fails to pay the SIPP fees, Mrs G should then have the option of trying to cancel the Harlequin Property contract to allow the SIPP to be closed.

The SIPP has paid a deposit under a contract with Harlequin Property. Mrs G has agreed for the SIPP to pay the remainder of the purchase price under that contract. That sum has not yet been paid, so no further loss has been suffered. However, if the property is completed, Harlequin Property could require those payments to be made. I think it's unlikely that the property will be completed, so I think it's unlikely there will be further loss. But there might be. Mrs G needs to understand this, and that she won't be able to bring a further complaint to us if this contract is called upon.

5. Pay Mrs G £500 for the trouble and upset caused.

Mrs G has been caused significant upset by the events this complaint relates to, and the apparent loss of all of pension benefits. Sesame should pay Mrs G £500 to compensate for that trouble and upset.

6. Compensation is to be paid promptly

The above compensation is to be paid within 28 days of Sesame being informed that Mrs G has accepted my decision. If it is not, interest on any part of the compensation that has not been paid (including the payment for trouble and upset) is to be paid at the rate of 8% simple interest a year from the date of this decision until the date of payment.

my final decision

I uphold the complaint. My decision is that Sesame Limited should pay fair compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G to accept or reject my decision before 2 August 2019.

Philip Roberts
ombudsman