complaint

Mr H complained about Pacific IFA Limited. He said he was given unsuitable advice to transfer his personal pension plans (PPP) to a self-invested personal pension (SIPP). The SIPP was set up to allow Mr H to invest in an off-plan hotel in the Caribbean.

background

In 2009 an unregulated third party recommended Mr H invest in Harlequin property. This third party was also an agent for Harlequin. Mr H was referred to Pacific by the agent in September 2009. A confidential financial review was carried out over the telephone. It recorded, of note:

- Mr H was in his mid-50s; he was employed and earned around £22,000 a year;
- His home was worth around £70,000, subject to a mortgage;
- He didn't have any savings;
- He held three PPPs with the same provider with a combined value of approximately £80,000;
- He had *"about as much knowledge as the next person"* regarding investments;
- A single attitude to risk (ATR) questionnaire was completed. It produced a score of *"balanced portfolio"*. A single ATR was recorded as *"the client has a cautious to balanced view on investment risk with regard to the stock market, but would also like to invest in Harlequin overseas property which has the risk of a property investment."*

On 24 September 2009 Mr H signed the client agreement with Pacific, the notes from the fact find and the ATR questionnaire. At some point, though the date is unclear, Mr H paid £1,000 to reserve a property within the Harlequin investment. A contract of sale was produced, pre-dated as "7 October 2009".

Pacific sent Mr H a report setting out its advice on 12 October 2009. This is the same date that Mr H signed the application form to open the SIPP. The report said:

- Pacific was introduced to Mr H by the agent as he had chosen to invest in Harlequin property and wanted to use his pension funds to pay the deposit;
- Pacific wasn't associated with Harlequin and hadn't offered any advice in relation to the suitability of the investment;
- Pacific had only given advice on a suitable SIPP to enable Mr H to invest in the Harlequin property via his PPPs;
- He preferred that Pacific restricted its review to only consider a suitable way of accessing his PPPs to invest in Harlequin;
- Mr H preferred to invest in volatile investments for the potential for very significant growth of his investments. He understood he risked losing his capital;
- The amount of investment risk inherent in the plans from which Mr H had agreed to transfer was broadly lower than the plan Pacific recommended.

One week later Mr H signed the contract to purchase the Harlequin property. At the end of October 2009 the SIPP was established, and
Mr H's PPPs were transferred to it. £39,000 was paid to Harlequin as an initial deposit. This represented 30% of the purchase price. The remainder would be paid in instalments from the SIPP as the property was built.

Following the Harlequin purchase, the remaining money in the SIPP was left in a deposit account until September 2010. Then, on the advice of Pacific, Mr H put the funds in an investment portfolio.

In February 2015, Mr H complained to Pacific. In summary he said the advice to transfer his pensions had been unsuitable. As of January 2016 Mr H's Harlequin investment was valued by the SIPP provider at £1.

Pacific rejected the complaint. It said that it had only advised him on the SIPP and not the Harlequin investment. In addition, it said even if it had given different advice, Mr H would've still invested as he was committed to the purchase and only wanted limited advice.

As a result the complaint was brought to this service. Pacific raised additional points:

- COBS didn't require IFAs to advise customers on the suitability of underlying investments made by their SIPPs – it allowed clients to choose the scope of advice they required.

- Mr H hadn't provided enough information about his wider circumstances. This meant COBS 9.2.6 prevented Pacific from advising him whether to invest in Harlequin or not.

- The 2013 FSA alert held no regulatory status.

- Pacific advised Mr H on how to invest the remaining funds in the SIPP in 2011. Mr H said in June 2011 that he didn't want to follow up on information provided about the investments.

The adjudicator who investigated the complaint felt it should be upheld. Pacific didn't agree. It reiterated and built on some of the points it had already raised, and added:

- The adjudicator had misinterpreted the specific wording of COBS 9.2. It said a correct reading of the regulation meant Pacific had no obligation to consider the investment when advising on the SIPP choice.

- The cost of obtaining all the information needed to make a recommendation would've exceeded the fee Pacific charged
Mr H. As such Pacific would've refused to give advice.

- Mr H would've invested in Harlequin even if it had advised him not to. This was on the basis that he paid a £1,000 reservation fee and had signed the Harlequin contract before the SIPP was established. He knew at the time that he hadn't sought advice on the investment.

- Pacific couldn't have advised Mr H on the investment. As a result it would have declined to advise him. It said Mr H would've carried out the transaction anyway on an 'execution only' basis or set up the SIPP himself.

- Had Mr H gone to another adviser who'd have carried out the due diligence the 2013 FSA alert required, the cost of the advice would've been prohibitive. It's likely that Mr H would've then gone ahead on either of the bases set out above.

The adjudicator shared additional points about the specific redress issues with Harlequin and the contract within the SIPP. Mr H and his representatives didn't have anything further to add.

Pacific replied and said in summary:

- The SIPP trustees are under an independent legal obligation to act in the best interests of the SIPP trust at all times. If Harlequin is in breach of the purchase contract between the SIPP trustee and it, then the SIPP trustees are under a legal obligation not only to act in the best interests of the SIPP trust but also to take reasonable steps to mitigate losses to the SIPP. This means they should have actively considered whether to terminate the Harlequin contract for breach, and to wind up the SIPP to prevent further SIPP fees. These steps are out of the control of Pacific and it shouldn't be liable for any future loss.

- Any direction to pay future SIPP fees, where the SIPP remains active is inconsistent with the approach to compensation awards. The actual potential loss suffered by the customer is not the entirety of the SIPP fees, but the difference between the SIPP fees and the fees the investor would've had to pay if in the ceding scheme (on a no transfer basis) or an alternative suitable pension scheme (if a transfer would still have gone ahead). No pension scheme is free. It is therefore the fee differential that represents the potential loss. This loss should also be netted down.

As no agreement was reached, the complaint has been passed to me for a final decision.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of Mr H's complaint. In doing so, I agree with the adjudicator. I think Pacific has done something wrong.

The arguments put forward by Pacific as to why it didn't have any obligation to consider the suitability of the underlying investment have been well rehearsed between Pacific and this service. A number of final decisions have been issued which set out why the arguments put forward by Pacific aren't accepted. I don't think, given Mr H's circumstances, Pacific was free to limit its advice to solely the suitable SIPP wrapper without giving any attention to the suitability of the underlying investment which was behind the purpose of the transfer.

Pacific has provided detailed submissions to argue its position. These reflect broadly the same arguments it has made on a number of other complaints. I have addressed these previously in final decisions and therefore don't intend to set out a further full response on each point. That's in no way a criticism of Pacific and is much to do with the order in which the various complaints have been considered by this service. I assure all parties I have read and considered everything that has been provided and make my decision only on the facts of this specific complaint. In summary, I think Pacific failed to give suitable advice.

In January 2013 the FSA issued an alert. This alert didn't make any changes to the regulations. It simply re-stated the principles that already applied and those that applied in 2009 and 2010. In particular it said the following:

> *"Financial advisers using this model are under the mistaken impression that…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."*

This reflects the business model that Pacific applied. Pacific had a duty to take reasonable care to ensure the suitability of its advice. It had to act in its clients' best interests; that's an independent duty. It can't be avoided simply because an unregulated third party told Mr H to invest. It's a misunderstanding of COBS 9.2 to suggest these rules allowed Pacific to advise solely on the 'wrapper' in these circumstances; if the underlying investment isn't suitable then the overall advice is unlikely to be suitable The purpose of COBS 9 is to ensure consumers get advice that's suitable in their circumstances. The interpretation applied by Pacific is too narrow, overly literal and fails to consider the regulations in context. Not looking at the purpose of the SIPP would mean to avoid looking at all of the factors that the rules say are necessary to ensure suitability.

COBS 9.2.1 required Pacific to obtain the necessary information regarding Mr H's knowledge and experience relevant to the SIPP and the investment objectives. Having done so, COBS 9.2.2 required Pacific to consider whether the transfer from the personal pensions to the SIPP met his investment objectives, he could bear the risks involved, and that he understood the risks.

The investment was high risk, highly illiquid, highly geared and speculative. In contrast, Mr H didn't have any experience of property investments like Harlequin. In fact there's no evidence he had really any investment experience at all. He was described as *"having as much knowledge as the next person".* I've seen no evidence that Mr H had the capacity for loss required.

Mr H was recorded as having a *"balanced"* attitude to risk. This categorisation is based on the answers to the ATR questionnaire. But that doesn't mean the investment was suitable. As well as Mr H's attitude to risk, the rules required Pacific to consider his financial situation. It also required Pacific to be satisfied that he was able to bear the investment risks. It failed to do this.

Pacific has argued that it was prevented from giving advice by COBS 9.2.6. This was because Mr H didn't provide information about his wider circumstances. It should be clear that it wasn't up to Mr H to offer this information up (I find it doubtful that Mr H would have known what specific information he should be providing) – Pacific was required to conduct a proper fact finding exercise with him. It didn't record that
Mr H refused to answer any questions. I think it's more likely that they weren't discussed in any great detail. Mr H denied ever meeting or speaking to anyone from Pacific. But I think it's likely that he did speak to someone on the telephone to enable the fact find to be completed. It was up to Pacific to ensure it had all the information it needed before making a recommendation – or refuse to do so. Pacific said it was Mr H who completed the fact find and ATR having been sent the forms by post. Given the phrase in the ATR questionnaire *"the client has…"* I think, on the balance of probabilities, this is unlikely to reflect a true reflection of what occurred and that Mr H referred to himself in the third person.

Pacific's argument about the fee that would have been involved in advising Mr H had it considered the underlying investment is speculative. There would have been a decision to make about what that fee would've been, but I can't see that it would necessarily have been prohibitive. That would have been a commercial decision for Pacific to make and whether it wished to take on the work and at what fee. But it didn't; and speculation about what that would have been doesn't detract from the key issue. Pacific's duty to Mr H was, in short, to ensure that the transfer of his PPPs to the SIPP with a specific underlying investment was suitable given his attitude and capacity to risk.

I don't agree that this would've involved things such as obtaining foreign legal advice and valuation advice. A competent adviser should've been aware of the general risks involved in investing pension funds in off-plan overseas commercial property. These factors should've been enough to make an adviser question the suitability of the proposed transaction for Mr H's specific circumstances.

Would Mr H have acted differently had suitable advice been given?

While looking back it's difficult to be sure what someone would've done if suitable advice had been given. Pacific said that Mr H would've proceeded on an execution only or insistent client basis. I think, on balance, Mr H wouldn't have transferred to the SIPP and gone ahead with investing in Harlequin.

The property was recommended to Mr H by a third party. But Pacific was a regulated independent financial advisor. I think any advice that the transfer wasn't suitable due to the high risk nature of the underlying investment would've been significant for them, taking into account he wasn't a sophisticated or experienced investor.

Pacific said that it was, in fact, Mr H himself who sought to restrict the advice from Pacific. I find it difficult, on the balance of probabilities, to accept that this likely to have been true. He had no investment experience of any kind and I think it's highly unlikely that he went to Pacific with the express desire to limit its advice.

The suitability letter did expressly set out the limitations of the advice but I don't accept this changes the responsibility on Pacific. Mr H was seeking advice from Pacific and for it to say if the investment wasn't suitable. Pacific said the letter told him it wasn't responsible for his decision to invest in Harlequin. But I don't think this meant he should've sought separate advice on this element. He'd been referred by the third party to Pacific – an independent financial advisor – for financial advice.

Pacific said the existence of the draft contract and the fact Mr H paid the reservation fee before the SIPP was established showed Mr H's intention to go ahead with the purchase. However, the reservation fee represented a small proportion of the total purchase price. Even if it wasn't refundable (which I think is unclear), I don't think this would have prevented him from stopping the transfer given the greater risk and possible losses he would've been advised he was exposing himself to. There was no other reason put forward for transferring to the SIPP other than to invest in Harlequin. Mr H in fact signed the sale contract on 19 October 2009; this was after he had been advised by Pacific. While the date he reserved the specific Harlequin property is unclear, the contract was dated 7 October 2009. This is after he had first been contacted by Pacific. At this stage it would have been clear that the proposed transfer of his PPPs to fund it would be unsuitable. The events were not a foregone conclusion at this stage. I also don't agree with Pacific's assertion that had Mr H sought out a different IFA it still would have resulted in him investing.

responsibility of the SIPP trustees

Pacific said that the SIPP trustees made the investment in the SIPP and therefore should seek to cancel the Harlequin contract if they consider there to have been a breach. It says this means Pacific can't be liable for any losses suffered by Mr H.

The trustees didn't advise Mr H to invest in Harlequin - that was Pacific's responsibility. Even if Pacific is right about the ongoing obligation on the SIPP trustees, I don't see that that the chain of causation relating to their advice and the consequences of it was broken. If Pacific feels that other parties may also be liable for the losses suffered, then that's a matter for it. Mr H contracted with Pacific. Because of Pacific's regulated advice he transferred into the SIPP and invested in Harlequin. I think it remains fair and reasonable that Pacific is liable for the consequences of that advice. The redress set out below indicates that Pacific should take over the contact with Harlequin from Mr H's SIPP. In doing so Pacific will be in a position to seek to terminate the contract should it wish.

should an award be made to cover future SIPP fees?

If Pacific had given suitable advice Mr H wouldn't have the SIPP. That is the straightforward point that the redress below is dealing with. I therefore need to consider how he should be compensated for his losses. Ideally, I would like the Harlequin property to be removed from the SIPP. And the way I intend for that to happen is for Pacific to take ownership of the property. That would enable Mr H to cancel the SIPP (should he wish to move his investment portfolio) and avoid those future charges. But, there are difficulties with transferring the ownership. If the Harlequin ownership can't be transferred I think an award ought to be made for the additional fees Mr H will have to pay.

I accept that he would have still paid fees for his existing pensions. And providing a lump sum now means that Mr H will have the money available to invest or obtain a return. So possibly the lump sum should be discounted. But I don't know how long Mr H will have to pay the fees. The problems with Harlequin have been going on for some years. It isn't clear how much longer these problems will continue. And fair compensation should mean that Mr H will not have to pay any additional fees. But I need to compensate Mr H for his losses now.

In my view, awarding a lump sum for an amount equivalent to five years fees strikes a fair balance. It's possible that the Harlequin investment could be removed from the SIPP in less than five years. But given the time it has taken to date I think it is possible that it could take a number of years more to resolve all of the issues. So using a figure of five years' worth of fees is an approximate and fair award to resolve the issue now.

For the reasons above, my view is that the transfer of Mr H's pension plans to the SIPP to invest in the Harlequin wasn't suitable. I don't think Pacific gave him suitable advice and Mr H should be compensated for this.

fair compensation

My aim is to return Mr H to the position he would now be in if he'd received suitable advice. It's not easy to say what that position would have been. But I think it's likely that the he wouldn't have transferred his PPPs into the SIPP, wouldn't have invested in Harlequin and as a result wouldn't have opened the SIPP (and now be subject to ongoing SIPP fees). In setting out how to calculate fair compensation my objective is to address these three issues. That is what I'm trying to achieve.

There are a number of possibilities and unknown factors in making an award. While we understand Harlequin will allow the business to take over the investment from the consumer. The involvement of third parties - the SIPP provider and Harlequin – mean much of this is beyond this service or Pacific's control.

All the variables are unknown and each may have an impact on the extent of any award this service may make. The facts suggest it's unlikely that the property will be completed and unlikely that the contract and any future payments would be enforceable. While it's complicated to put the consumer back in the position they would have been in if suitable advice had been given, I think it's fair that Mr H is compensated now. I don't think we should wait and determine each any every possibility before making an award. What is set out below is a fair way of achieving this. Pacific should:

1. *Obtain the notional transfer value of Mr H's previous PPPs on the date of decision if they hadn't been transferred to the SIPP.*

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.

Pacific should assume that any contributions or withdrawals that have been made would still have been made and on the same dates.

2. *Obtain the actual transfer value of Mr H's SIPP on the date of decision, including any outstanding charges.*

This should be confirmed by the SIPP provider and will include the value of his portfolio investment in which he invested the remainder funds. I agree with the adjudicator that fair compensation doesn't need to take into account the delay in Mr H's funds being invested in the portfolio. Pacific advised on the transfer, it knew Mr H's funds were being moved from PPPs – in which they were invested – to a SIPP and would require further action to invest. If suitable advice had been given, the transfer wouldn't have taken place. As a result it's fair to return Mr H to that position.

The difference between 1 and 2 is the loss to his pension.

3. *Pay a commercial value to buy the Harlequin property investment from Mr H's SIPP.*

The SIPP exists because of the investment in Harlequin. In order for the SIPP to be closed and further SIPP fees to be prevented, the entire Harlequin investment needs to be removed from the SIPP. We understand this can be done.

The valuation of the Harlequin investment may prove difficult, as there is no market for it. To calculate the compensation, Pacific should agree an amount with the SIPP provider as a commercial value, and then pay the sum agreed plus any costs and take ownership of the investment. If Pacific is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation.

Pacific may ask Mr H to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the Harlequin investment That undertaking should allow for the effect of any tax and charges on the amount Mr H may receive from the investment and any eventual sums he would be able to access from the SIPP. Pacific will need to meet any costs in drawing up the undertaking.

The SIPP has paid a deposit under a contract with Harlequin. That is the loss I'm trying to redress. Mr H has agreed for the SIPP to pay the remainder of the purchase price under that contract. Those sums haven't yet been paid, so no further loss has been suffered. However, if the property is completed, Harlequin could require those payments to be made. I think this is unlikely and as a result I think it's unlikely there will be further loss. But there might be. Mr H needs to understand this, and that he won't be able to bring a further complaint to us if this contract is called upon.

4. *Pay an amount into Mr H's SIPP so that the transfer value is increased to equal the value calculated in (1). 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, Pacific should pay it as a cash sum to Mr H. But the compensation should be able to be paid into a pension in the time until Mr H retires and he should be able to contribute to pension arrangements and obtain tax relief.

The compensation should be reduced to notionally allow for the income tax relief Mr H could claim. The notional allowance should be calculated using Mr H's marginal rate of tax.

5. *Pay five years' worth of future fees owed by Mr H to the SIPP.*

Had Pacific given suitable advice I don't think there would be a SIPP. It's not fair that Mr H has to continue to pay the annual SIPP fees if it can't be closed.

I think Pacific should be able to take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mr H back in the position he would've been in. But I don't know how long that will take. Third parties are involved and we don't have the power to tell them what to do. To provide certainty to all parties, I think it's fair that Pacific pays Mr H an upfront lump sum equivalent to five years' worth of SIPP fees. This should provide a reasonable period for the parties to arrange for the SIPP to be closed. There are a number of ways they may want to seek to achieve that. It will also provide Mr H with some confidence that he will not be subject to further fees.

6. *Pay Mr H £300 for the trouble and upset caused.*

Mr H has been caused some distress by the loss of his pension benefits and the uncertainty around his future benefits in retirement. I think that a payment of £300 is appropriate to compensate for that upset.

my final decision

Where I uphold a complaint, I can make a money award that a firm pays compensation of up to £150,000; plus any interest and/or costs. If I consider that fair compensation is more than £150,000, I may recommend the firm pays the balance.

I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Pacific IFA Limited should pay Mr H the amount produced by that calculation. That is up to a maximum of £150,000.

Simple interest should be added to my award at the rate of 8% gross a year from the date of this decision until the date of payment. Tax may be due on this interest.

If fair compensation exceeds £150,000, I recommend that Pacific pays Mr H the balance. And that it pays simple interest at 8% a year on the balance from the date of this decision until the date of payment.

Pacific should provide details of its calculation to Mr H in a clear, simple format.

Under our rules, I'm required to ask Mr H to accept or reject my decision before 12 August 2016.

Benjamin Taylor
ombudsman