complaint

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

background

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

- Mr C was in his early 40s and married.
- He was employed and earned around £35,000 a year.
- His home was worth around £170,000, subject to a mortgage.
- He had around £10,000 on deposit and around £2,000 in ISAs.
- He had a personal pension plan (PPP) with a total transfer value (TV) of approximately £67,500.
- He held a money purchase scheme pension with his employer ("the employer's scheme") with a TV of about £11,500. His employer contributed about £75 per month to the scheme.
- 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 *"cautious" and "balanced".* In handwritten notes it recorded *"more balanced."*
- Handwritten in various places on in the document were remarks which said *"SIPP advice only required".*

In October 2009 a contract was produced by Harlequin and Mr C paid a £1,000 reservation fee for the property. The contract was pre-dated 9 October 2009.

On 10 October 2009, Pacific provided Mr C with a suitability letter. It said, amongst other things:

- Pacific was introduced to Mr C by the agent as he had chosen to invest in Harlequin property and wanted to use his pension funds to pay the deposit.

- Pacific weren'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 C 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 C preferred to invest in volatile investments for the potential for very significant growth of his investments. He understood he risked losing his capital.

- The investment was very high risk and Mr C could lose his entire fund.

In November 2009 the SIPP was established, and Mr C's PPP and employer scheme funds were transferred to it. In total, around £81,000 was transferred. In December 2009, £45,000 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. Pacific was paid £1,500 by Mr C for its advice to establish the SIPP.

Mr C complained in February 2015. He thought Pacific hadn't given suitable advice. 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 C would've still invested as he was committed to the purchase and only wanted limited advice. It said Mr C had already paid a £1,000 reservation fee and a draft contract had already been produced by the time he met with Pacific.

As a result the complaint was brought to this service. The adjudicator who investigated the complaint felt it should be upheld. She said:

- The rules required Pacific to take reasonable steps to ensure its recommendations were suitable. It also had to reasonably believe that Mr C could bear any related investment risks. These could not have been considered unrelated to the SIPP recommendation. Because of this, Pacific had to consider the risks of the Harlequin investment.

- Mr C was not an experienced investor and he relied on Pacific's advice.

- Mr C was a cautious to medium risk investor. He was proposing to lose a large proportion of his fund in the scheme. This was clearly unsuitable.

- Mr C would probably have followed advice against making the transfer and investment. Because of this, Mr C should be placed in the position that he would be in if he hadn't transferred.

- The regulator produced alerts and final notices supporting the adjudicator's position.

Pacific, in response to the adjudicator, said in summary:

- She retrospectively sought to rely on the FSA January 2013 alert, which had no regulatory status.

- She 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.

- Mr C would've invested in Harlequin even if it had advised him not to. Pacific said the evidence was *credible and indisputable*. This was on the basis that he paid a £1,000 reservation fee and had sought advice on the SIPP because he wanted to invest. He also had worked in the construction industry all his life, so knew about the risks of property investment.

- Pacific couldn't have advised Mr C on the investment. As a result it would have had to decline to advise him. It said Mr B would've carried out the transaction anyway on an 'execution only' basis or gone to another advisor.

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 C'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 C'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 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've read and considered everything that has been provided and make my decision only on the facts of this individual complaint. In summary, I think Pacific failed to give suitable advice.

the FSA alert

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. 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 the complainants to invest.

COBS 9.2

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 C'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 his existing 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 C 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 C had the capacity for loss required. I don't think it's reasonable to suggest that Mr C's experience working in the construction industry should've alerted him to the specific risks involved in this type of investment.

Mr C 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 C'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. The charges alone were, from the start, likely to be detrimental to the Mr C's pension assets while invested in an illiquid asset like Harlequin. The suggestion by Pacific that Mr C *"preferred volatile investments"* solely on the basis he was looking to invest in Harlequin is a self-serving argument. In the context of Mr C's circumstances, to which Pacific was aware, it isn't a reasonable conclusion to reach.

Would Mr C 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. I think, on balance, Mr C wouldn't have transferred to the SIPP and gone ahead with investing in Harlequin.

The property was recommended to Mr C 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 C 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 very little 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. Pacific provided a copy of a "*replacement contract proforma*" signed by Mr C. It said this form demonstrated Mr C's instructions that he wanted to move his pension funds to enable him to self-invest in property. I've considered the document but don't think it adds anything to Pacific's argument. The form is written in the third person (*"the client is happy…"*) suggesting it was completed for Mr C by the advisor. It was signed at the same time as the SIPP application form and after the suitability report had been provided. I find little weight can be attached to it regarding Mr C's apparent intentions before he met with Pacific.

The suitability letter did expressly set out the limitations of the advice but I don't accept this changes the responsibility on Pacific. Mr C 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 upfront payment of the reservation fee and the existence of the draft contract demonstrated Mr C'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. The chronology of events also, to some extent, doesn't support Pacific's argument. Mr C was recommended the Harlequin investment before he met with Pacific, but the draft contract wasn't dated until after his first meeting with it. In fact it was dated one day before the suitability letter and not signed until November. At the first meeting with Pacific it would have been reasonably clear that such a transfer, in all the circumstances, was unlikely to be suitable for him.

Finally, Pacific said that Mr C would've proceeded on an execution only basis or by using another IFA. Therefore, even if Pacific hadn't advised Mr C, he still would've invested as he would've been given the same unsuitable advice wherever he'd gone. I don't accept this argument and I'm not sure what point Pacific is trying to make. The fact that other IFA's may have given unsuitable advice can't ever be a justification for Pacific doing the same. Nor can it be assumed that Mr C wouldn't have been advised suitably if he'd gone elsewhere. In any event, had Pacific refused to give advice, it wouldn't now be in the position it finds itself in.

fair compensation

On 16 May 2016 the adjudicator contacted all parties and explained certain aspects concerning redress that weren't set out in her original view. Both parties were given the opportunity to provide any comments on the proposed approach. No comments were provided to the adjudicator's e-mail but I'm aware Pacific has recently commented on our general approach in relation to other cases. I've considered those comments below.

My aim is to return Mr C 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 pensions 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 C 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.

Mr C transferred funds from his employer's money purchase scheme. I understand that scheme remains in place and has since received further contributions. I have accounted for this below.

Pacific should calculate fair compensation as follows:

1. *Obtain the notional transfer value of Mr C's previous PPP and employer's scheme on the date of decision if they had not been transferred to the SIPP.*

The value should be confirmed by the providers of both the PPP and the employer's scheme. 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 – including those to the employer's scheme, and on the same dates.

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

This should be confirmed by the SIPP provider. The difference between 1 and 2 is the loss to his pension.

3. *Pay a commercial value to buy Mr C's share in the Harlequin Property investment.*

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 C 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 C 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 C 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 C needs to understand this, and that he won't be able to bring a further complaint to us if this contract is called upon.

I've considered what Pacific said in relation to this approach. That, in short, any undertaking would be technically meaningless as it doesn't bind the professional trustees. I don't agree the approach is meaningless though I understand the point it is making.

I re-emphasise - the decision to make use of an undertaking is a matter for Pacific if it can't take over the investment, which is what in the first instance should take place. The reality of the SIPP and the manner of the scheme is that it is Mr C's pension. He is the beneficiary and will decide what happens to the funds within it. As a result, in the event that any funds are returned to it by Harlequin, he is in reality entitled to make a decision about what happens with those funds when he is able to access them. Given the arrangement, it seems highly unlikely that the professional trustees would seek to block the wishes of Mr C. Should Pacific wish to extend the undertaking to Mr C's beneficiaries in the event of his early death, then that appears reasonable

4. *Pay an amount into Mr C'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 C. But the compensation should be able to be paid into a pension in the time until Mr C 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 C could claim. The notional allowance should be calculated using Mr C's marginal rate of tax.

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

Had Pacific given suitable advice I don't think there would be a SIPP. It's not fair that Mr C 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 and simplest way of putting Mr C 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 C 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 C with some confidence that he will not be subject to further fees.

I've considered what Pacific said in relation to this approach. In relation to the SIPP fees, Mr C has the SIPP for which he is liable to further charges. If Pacific had given suitable advice Mr C wouldn't have the SIPP. That is the straightforward point that the redress 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 C to cancel the SIPP 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 C 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 C 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 C 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 C will not have to pay any additional fees. But I need to compensate Mr C 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.

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

Mr C 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

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 C the amount produced by that calculation.

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.

Under our rules, I'm required to ask Mr C to accept or reject my decision before 11 August 2016.

Benjamin Taylor
ombudsman