

complaint

Mr F complained about Pacific IFA Limited (Pacific). He said he was given unsuitable advice to transfer his personal pension plan (PPP) into a self- invested personal pension (SIPP). The SIPP was set up to allow Mr F to invest in an off-plan overseas Harlequin property development.

background

Mr F was introduced to the investment by an unregulated representative of Harlequin in 2009. Mr F was told that he would be contacted by the adviser from Pacific to help him with the pension transfer. The majority of the fund transferred was used as a deposit for the Harlequin property.

.A financial review, including a fact find was carried out by Pacific in October 2009. It recorded that Mr F had two PPP's of around £78,000 in total, due to mature when he was sixty five. It also recorded:

- Mr F was aged sixty one and married.
- He earned £31,000 a year and didn't expect to change his job.
- The family home was in his wife's name and worth £230,000.
- Their home had a small mortgage being repaid at £300 a month.
- He had £1,000 in a shared bank account.
- He had £100,000 in unsecured debt, being repaid at £1,200 each month.
- No other investments
- His wife was expecting an inheritance of £50,000.
- He wanted to retire at the age of seventy five.

Mr F was asked to assess his investment experience on a scale; and he put himself in the middle at “*about as much understanding/ knowledge as the next person*”.

Mr F assessed his main financial objective to be maintaining his standard of living in retirement. This was given as the highest priority available on the scale.

Mr F's attitude to investment risk was assessed at the same time. Mr F ticked the box saying his attitude was “*Balanced*”. This was said to mean that he was “*prepared to invest in equity based assets where the risk is spread across a variety of investments*” and the fund was “*managed on [his] behalf with the aim of potentially higher returns*”.

The fact find went on to say:

“*[Mr F] has a balanced view on investment but would like to invest in property via Mr F pension fund..[he] understands the risk of property investment*”.

More specific questions followed, testing Mr F's reaction to various scenarios. This gave an overall score that provided a risk level for a portfolio. This also suggested a balanced portfolio.

Pacific went on to provide Mr F with a suitability report.

The report said Mr F “*had selected to purchase the property based on ..[his] in depth knowledge of the products (as you are a sales agent of the overseas properties and have*

therefore decided on the investment strategy for your pension before discussing the options with myself.

Mr F says he had no previous experience of investing and he was not a sales agent. He says his only previous experience and knowledge was of selling a timeshare through the company that introduced him to Harlequin. This company went on to offer him and his wife a free weekend in Spain. Once they arrived they were told they could use their pension fund to buy into an investment. And they went on to meet a Harlequin representative back in the UK. They were then told Pacific would contact them to deal with the pension transfer; and this followed.

Mr F complained that he was given unsuitable advice, and as a result invested in a high risk investment, which has caused him loss. Pacific don't accept this.

Pacific say Mr F only sought limited advice for a suitable SIPP that would allow him to continue with his Harlequin investment. Pacific say their report made it clear their recommendation was based on this. And the rules at the time permitted a client to choose and agree the scope of advice with an adviser.

So Pacific say they didn't introduce, recommend or advise Mr F to invest in Harlequin; and they explained this to Mr F. They have pointed to the contents of their report which records Mr F had made the decision to invest in Harlequin, prior to Pacific's involvement. They don't accept any liability for any losses resulting from the investment; as they set out when the SIPP was set up and at the reviews that followed. Pacific say they had no legal or regulatory duty to assess the suitability or risks of the Harlequin investment as they weren't recommending it.

Pacific also told him that they thought a spread of assets was right, when held in a portfolio of suitable funds which matched his attitude to risk.

Pacific say Mr F chose not to follow the advice they provided and he'd already decided to invest in Harlequin. And he'd decided to use his pension funds to pay the deposit for the specific Harlequin property. Pacific say he later changed his mind and was advised on a different investment in March 2010.

The adjudicator upheld Mr F's complaint. In summary he said:

- Pacific made a personal recommendation of a '*designated investment*' (the SIPP) as defined by the regulator. This meant they had to take '*reasonable steps*' as set out in the conduct of business (COBS) rules to ensure its advice was suitable.
- They had failed to take account of Mr F's circumstances and objectives and his ability to bear the risk of loss.
- Pacific should have considered the underlying investment when they were recommending a SIPP. The risks involved made assessment particularly important.
- Pacific had enough information to conclude the SIPP was unsuitable for Mr F (because of the intended investment).
- Mr F would have been reliant on advice given his limited investment experience.

- The regulator had issued enforcement final notices against firms who had carried out this type of business prior to January 2013. This made clear that the firms had been obliged to assess the suitability of the proposed investments.

Pacific don't agree. They say they'd only been asked to recommend the most suitable SIPP for Mr F's investment and not on the underlying investment. And they'd done this, and made it clear they weren't advising on the investment.

They have added to their previous submissions, saying in summary:

- They were allowed to limit the scope of their advice. It was not for the adviser to impose on the client a service that he didn't want.
- Pacific acted "*honestly, fairly and professionally in accordance with the best interests of its client*".
- The information Pacific gathered was qualified by the limits on what they'd been required to do.
- As a result of the risk warnings Pacific provided and his own understanding of Harlequin, Mr F knew it was a high risk investment and that he could lose his capital. But he told their adviser, that property was an asset he understood.
- All the evidence suggested Mr F would have gone on to buy the property in any event. He'd already decided to use his pension savings to fund the deposit; and paid a reservation fee.
- The regulator's alert was issued few years after Pacific's advice, so it's not fair to say it's relevant here.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I have come to the same conclusion as the adjudicator, and for broadly the same reasons. I think Pacific has done something wrong.

The arguments put forward by Pacific as to why they 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 F's circumstances, Pacific was free to limit their 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 their position. These reflect broadly the same arguments they have made on a number of other complaints. These have been addressed previously in some detail in final decisions, so I don't intend to set out a further full response on each point. That is not a criticism of Pacific and is as much to do with the order in which the complaints have been considered by this service. I'd like to assure all parties I have read and considered everything that has been provided and have made 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 their advice. They had to act in their clients' best interests; that's an independent duty. It can't be avoided simply because an unregulated third party told Mr F to invest. It's a misunderstanding to suggest Pacific were able 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 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.

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

The investment was a high risk and highly illiquid investment, which was highly geared and speculative. Mr F didn't have any experience of property investments like Harlequin. In fact there's no evidence he had any real investment experience at all. And I haven't seen anything that makes me think he had been a sales agent for the investment.

Mr F was recorded as having a "*balanced*" attitude to risk. This was based on the answers to the ATR questionnaire. But that doesn't make the investment suitable. I don't think any investor who had a balanced attitude to risk, and also had any degree of knowledge or experience would have invested such a substantial proportion of personal funds into such a high risk investment,

And in any event, as well as Mr F's attitude to risk, Pacific were required to consider his financial situation. Mr F didn't have alternative savings or investments, and did have a high level of debt.

So I think Pacific failed on all these requirements. I've seen no evidence that Mr F had the capacity or appetite for loss, or risk of loss, required; and everything I've seen suggests otherwise.

Pacific has argued they were prevented from giving advice. I don't accept that because Mr F didn't provide enough information about his wider circumstances, this would be a valid reason. It wasn't for Mr F to offer this information up and I haven't seen anything that makes me think he would have known what could be required. Pacific should have conducted a proper fact finding exercise.

I think Pacific should have been aware of the general risks involved in investing pension funds in off-plan overseas commercial property. And these factors, combined with what was known about Mr F, should have been enough to make an adviser question the suitability of the transfer and investment for Mr F's specific circumstances.

would Mr F have acted differently had suitable advice been given?

While looking back it's difficult to be sure what someone would have done if suitable advice had been given. Pacific say Mr F would have gone ahead even if advised otherwise. I don't agree, I think it's reasonable to think Mr F would have followed advice and wouldn't have transferred to the SIPP or invested in Harlequin.

The suitability letter did expressly set out the limitations of the advice but I don't accept this changes the responsibility on Pacific. Mr F was seeking advice from Pacific and for them to say if the investment wasn't suitable. Pacific said the letter told him they weren't responsible for his decision to invest in Harlequin. But I don't think this meant he should have sought separate advice on this element.

Pacific said the fact Mr F paid the reservation fee before the SIPP was established showed his intention to go ahead with the purchase. But this fee represented a small proportion of the total purchase price. Even if it wasn't refundable I don't think this would have prevented him from stopping the transfer given the greater risk and possible losses he would have 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.

should an award be made to cover future SIPP fees?

If Pacific had given suitable advice Mr F wouldn't have the SIPP. I've looked at this in the redress below. And I've had 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 F to cancel the SIPP (should he wish to move his investment portfolio) and avoid 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 F will have to pay.

I accept that providing a lump sum in respect of future fees now, means that Mr F 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 F 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 F will not have to pay any additional fees. But I need to compensate Mr F 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 F'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 F should be compensated for this.

fair compensation

My aim is to put Mr F in the position he would now be in if he had received suitable advice. It's not easy to say what that position would have been. But I think it's likely that 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 Pacific IFA to take over the investment from Mr F. The involvement of third parties - the SIPP provider and Harlequin – mean much of this is beyond this service or the business'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 Mr F back in the position they would have been in if suitable advice had been given, I think it's fair that Mr F 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 current notional transfer value of Mr F's previous pension plan if it had not 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 current actual transfer value of Mr F's SIPP 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 any remainder funds. Fair compensation doesn't need to take into account any delay in Mr F's funds being invested in the portfolio. Pacific advised on the transfer, they knew Mr F'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 F to that position.

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

3. Pay a commercial value to buy Mr F'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 be given a nil value for the purposes of calculating compensation.

Pacific may ask Mr F 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 F 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 loss I'm trying to redress. Mr F 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 F 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 F'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 *[consumer has paid deposit of £1000 before the advice]*. It should also take account of interest as set out below.

If it's not possible to pay the compensation into the SIPP, Pacific should pay it as a cash sum to Mr F. But the compensation should be able to be paid into a pension in the time until Mr F 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 F could claim. The notional allowance should be calculated using Mr F's marginal rate of tax.

In addition, Pacific should:

- 5 Pay five years' worth of future fees owed by Mr F's to the SIPP.

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

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.

6 Pay Mr F £300 for the upset caused.

Mr F has been upset and worried by the loss of his pension benefits and the uncertainty around his future benefits in retirement. I think Pacific should pay him £300 to reflect this.

my final decision

For the reasons given above I uphold Mr F's complaint against Pacific IFA Limited.

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 business pays the balance.

I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Pacific should pay Mr F 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 F 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 their calculation to Mr F in a clear, simple format.

Under our rules, I'm required to ask Pacific IFA Limited to accept or reject my decision before 14 November 2016.

Louise Wilson
ombudsman