

complaint

Mr C complains about the advice he was given by Pacific IFA Limited (Pacific) to transfer his personal pension into a self-invested personal pension (SIPP) and about Pacific not assessing the suitability of his investment in overseas property with Harlequin Property (Harlequin). He wants Pacific to compensate him for his losses.

background

Mr C and his wife were introduced to Pacific by a third party in April 2010. They met with Pacific on 14 April 2010 and both signed a client referral form and a client agreement on the same day. Pacific has said that it didn't receive any form of commission or referral/introduction fee. At the meeting, a financial review document was completed with Mr and Mrs C's personal and financial details.

A suitability report was then issued in June 2010 which said that Mr C was in his late 40s, married with no dependants. He earned £45,000 per year and had a joint outstanding mortgage with his wife of £190,000 on his main residence and another mortgage of £27,000 on another property. Together with his wife he also had paid two deposits totalling £81,000 to secure off plan overseas properties. He had a personal pension with a value of around £30,000. In addition he had a defined benefit pension with his employer. Pacific had completed an attitude to risk assessment for Mr C. The outcome was that he '*was prepared to take investment risks suited to a cautious balanced profile*'. This was number 4 on a risk scale of 1 to 10, with 10 being high risk.

The report said Mr C wanted advice on where to place his pension in order to facilitate the purchase of an overseas commercial property. So Pacific says it had limited its advice to establishing a SIPP with a suitable provider and didn't accept liability of any losses resulting from his chosen investment. Pacific recommended Mr C to transfer his personal pension to a particular SIPP provider under its family pension trust.

Pacific said that a spread of investments would match Mr C's cautious balanced attitude to risk and it did point out that his chosen investment was very high risk (9 or 10 on the risk scale when he was rated as 4). The suitability report commented on the general risks of off plan overseas commercial property investments via a SIPP. The report also mentioned that the family trust's charges were significantly higher than Mr C's personal pension plan.

Mr C signed the report to confirm he'd read and understood it on 9 June 2010. On the same day Mr C also signed the application to start a family pension trust with the recommended SIPP provider. The form said he would be transferring his personal pension and the intended investment was Harlequin Property. Mr C's financial adviser was stated as Pacific IFA Limited on this application. The trust was established on 30 June 2010.

Together with his wife Mr C completed a Harlequin Property contract to purchase a property in St Lucia for £135,000 on 20 July 2010. The first payment due was £40,500. Half of this payment (£20,250) was funded from Mr C's pension.

A few months later, in November 2010, Mr and Mrs C invested a total of £12,000 from their SIPP pension in Sustainable Growth Group (SGG), an unregulated collective investment scheme.

In April 2015 Mr C raised a complaint to Pacific through his representatives (R). He complained about the transfer of his pension into a SIPP and the investment of these funds into Harlequin property. R said Pacific failed to assess the suitability of the Harlequin investment.

Pacific rejected the complaint and so R referred the complaint to this service. Our adjudicator thought the complaint should be upheld. She thought the Harlequin investment was unsuitable for Mr C and Pacific shouldn't have recommended the transfer. She recommended that Pacific should compensate Mr C for any losses he suffered by transferring from a personal pension into a SIPP plus £300 compensation for the trouble and upset the losses in his pension caused Mr C.

Pacific disagreed and so the complaint was referred to me for a decision. Mrs C also raised a complaint which I've considered separately.

findings in my provisional decision

I previously issued a provisional decision explaining that I thought Pacific should have made it clear to Mr C that his intended investments were unsuitable for him and consequently they shouldn't have recommended the SIPP. However, I thought on balance Mr C would have gone ahead with the transfer anyway, so I didn't think Pacific should be held responsible for the losses Mr C incurred.

I repeat my findings in detail below.

provisional findings

Pacific says they provided limited advice to Mr C which only extended to the suitability of the SIPP wrapper. They say they didn't recommend the unregulated Harlequin investment to him and that Mr C had decided to invest into Harlequin before he was introduced to Pacific.

Based on what I've seen this seems to be correct. I've seen a copy of a contract that was set up between Harlequin and Mr and Mrs C on 25 March 2010 for the purchase of a property in St Lucia. This was about three weeks before the couple was introduced to Pacific. Mr C has also confirmed to us that information about the investment was given to him by the introducing third party and it was the introducer who told the couple it was a good investment for them. And the suitability report Pacific issued for Mr C doesn't recommend the Harlequin investment. So I'm satisfied that Pacific didn't advise Mr C to invest his pension into this high risk investment.

Having said that Pacific advised Mr C on the pension transfer and as part of that they should have considered the suitability of the underlying investments. The regulator's view on this is clear. In 2013 it issued an alert about advice on pension transfers without assessing the suitability of the intended investments. It said:

'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.'

'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 alert didn't mark a change in regulations. It was essentially a confirmation of how financial advisers should act. So Pacific should have assessed the suitability of the Harlequin investment and if found unsuitable for Mr C not recommended the SIPP.

Looking at the suitability report I can see that Pacific pointed out the following:

- *Based purely on cost it was more beneficial to keep Mr C's existing pension in place as the SIPP had much higher charges than his personal pension*
- *Mr C's attitude to risk was cautious balanced and so Pacific would have considered a spread of investments targeted at his attitude to risk, but he had already chosen to invest partly into overseas property*
- *The Harlequin investment was much higher risk than Mr C's attitude to risk would allow for (9 or 10 on a scale where Mr C's attitude to risk would have been 4)*
- *The growth rate needed in the SIPP to match his existing benefits was not realistically achievable*

I think the above indicates that Pacific thought the intended investment wasn't suitable for Mr C. I appreciate that in order to invest his pension into Harlequin he needed a SIPP as his pension provider didn't allow this kind of investment. And as explained above it looks like Mr C already had made up his mind where he wanted to invest.

I've also considered the fact that Mr C had a defined benefit pension from his employer which formed the majority of his pension provision and which wasn't transferred. So it could be argued that he had some capacity to take risk on a relatively small personal pension for the chance of a better return. And I think it's plausible that Mr C was prepared to take some risk.

However, Pacific's role wasn't just to execute his wishes. They needed to assess the suitability of the investment for Mr C's circumstances and let him know if they considered it right for his circumstances. Investing into Harlequin didn't match his attitude to risk by a long way. His risk assessment showed his attitude to risk as cautious balanced and the Harlequin investment was non-standard and particularly high risk.

I appreciate Pacific say that Mr C's invested into a property fund in his personal pension and that he had previously invested into a couple of other overseas properties. However, I wouldn't say that makes him an experienced investor or that this makes the investment suitable for him.

Pacific should have made it clear to Mr C that the investment he was intending to make was unsuitable for him and consequently the SIPP was unsuitable for him. And as a result a recommendation for the transfer shouldn't have been made.

As a service we don't punish businesses for their mistakes. We try to put customers back in the position they would have been in if the correct action had been taken. And in these

particular circumstances I think on balance Mr C would have still invested his pension into Harlequin even if Pacific had advised him not to do this. I'll explain why.

The suitability report shows that Mr C, together with his wife, had already paid deposits on two further Harlequin properties (over £80,000 in total). £30,000 of this was financed by taking out a further advance on their mortgage which I don't think is a decision anyone would take lightly.

At the time Mr and Mrs C were introduced to Pacific they had already chosen and reserved a particular property overseas. It's likely they would have already paid a reservation fee of £1,000. Whilst this might not be a particularly large amount, I think it would have influenced Mr C's decision to go ahead with his original plans.

Pacific didn't go as far as not recommending the SIPP, but they did point out that the Harlequin investment was very high risk-much higher than Mr C's attitude to risk-and that there was a high risk of getting less at retirement than with his old plan. They also pointed out some of the specific risks relating to property investments overseas. I don't know how much of this was discussed during the meetings with Pacific. However, I've seen correspondence of Pacific explaining to the introducer (when asked for an update) that Mr C and his wife had decided to take the suitability report away and read it before going ahead with the SIPP. And they only proceeded with the transfer a couple of weeks later. So I think it's likely Mr C was aware that this was a high risk investment and would exceed the risk level he would usually be considered for and that the SIPP was a lot more expensive than his existing personal pension. However, he still decided to go ahead with the investment.

Mr C said he and his wife proceeded because Pacific still told them it was a good investment. However, I haven't seen anything that supports this. I think it's more likely that they proceeded because they had been told previously by the introducer that Harlequin was a good investment and he and his wife had already invested substantially into something that they obviously thought would be beneficial to them. I think it would have been quite a big step to cancel the reservation of the property, lose the reservation fee and try to unwind previous investments into other properties acknowledging previous investment decisions might have been wrong.

Mr C met the introducer through a mutual friend and seems to have trusted her enough to invest substantial amounts (far more than the amount he was about to invest from his personal pension pension) and go as far as securing a loan against his home. Once the SIPP was established Mr C also invested into another unregulated investment on the recommendation of the introducer. I think this shows Mr C and his wife were listening and trusting what the introducer was telling them. The introducer was the one who had given them the information about Harlequin and who accompanied them through the entire process. However, the introducer couldn't recommend the SIPP, so she introduced them to Pacific.

In contrast to this Mr C never had any contact with Pacific before he was introduced to them in April 2010. If Pacific had told Mr C that the SIPP (and the investments) were unsuitable for him, I'm therefore not satisfied that he would have put more weight on their advice than on the introducer's recommendation who was still helping him and his wife to organise this investment.

The suitability report mentioned that without the pension transfers Mr and Mrs C couldn't secure their chosen property overseas. So if Mr C had decided not to transfer his pension, the investment into their chosen property would have fallen through. Of course I don't know for certain what Mr C would have done. He said that-in hindsight-he would have stayed with his personal pension. However, for the reasons explained above I think at the time of the advice it's more likely he would've listened to the introducer and still trusted that this was a good investment for him.

Based on the information I have I think on balance Mr C was already committed to this kind of investment. So I think it's more likely he would have transferred his pension anyway and invested into Harlequin even if he had been recommended by Pacific not to do so. He could have done this by acting as an insistent client or by opening a SIPP directly without financial advice -although I accept it's possible that some SIPP providers might have insisted on Mr C having sought financial advice beforehand before accepting his business.

This means he would be exactly in the same position he is in now and so I won't be recommending that Pacific pays for any losses he has suffered from transferring his pension into a SIPP and investing into Harlequin.

responses to my provisional decision

I asked both parties to provide any further comments or information they might have. Pacific accepted my decision. Mr C's representative disagreed and-in summary-provided the following comments:

- Mr C was a lay investor and was relying on Pacific's knowledge and advice. He wouldn't have proceeded with the transfer if Pacific had recommended against it.
- Any previous assurances given by an introducer would be heavily outweighed by advice received from a trusted professional adviser.
- It's incorrect that Mr and Mrs C had invested into two further Harlequin properties. They had only invested into two properties. One paid for by a joint mortgage and another property which was the one Mr and Mrs C used their SIPPs for.
- Mr C took the suitability report home for review and considered it for a number of weeks before going ahead with the transfer. This shows he wouldn't have proceeded in any event. If Mr C had been sufficiently warned, he wouldn't have continued with the transfer.
- It wouldn't have been "quite a big step" to cancel the reservation of the property. The loss of any deposit that had been paid on the property would have been significantly less substantial than continuing to invest his pension in property Mr C was specifically advised against.
- The suitability report said that in the family trust Mr C "*will benefit from ongoing professional advice and will have access to a much improved investment platform*". This would be an encouraging statement for a lay investor. Whilst the report states that the investment was high-risk, Mr C received assurances from Pacific that it was still a good investment.

- Pacific should have clearly advised against the investment. Pacific providing general risks wasn't enough
- The ombudsman said Mr C was committed to the investment. However, The FCA Alert makes it clear that advisers cannot evade liability on this basis, as advisers have duties to consider the client's overall financial situation, to ensure that the client receives suitable advice and to prevent the client from making unsuitable investment decisions.
- The investment couldn't have happened without the SIPP transfer, so if Pacific had given suitable advice Mr C's losses could have been prevented.

my findings

I've carefully considered the response provided by Mr C's representative, however, my decision remains the same. I'll explain why.

Pacific should have recommended against the transfer, even if Mr C was committed to the intended investment. So I agree with Mr C's representative that there were failings in the advice process here. And I also agree that suitable advice *could* have prevented Mr C's losses.

However, I need to decide what I think –on balance- would have happened if Pacific had advised against the transfer. And based on the information I have I still think it's more likely than not Mr C would have proceeded with the transfer anyway (and would have incurred his losses). A positive recommendation from Pacific wasn't legally necessary to open a SIPP. So if Pacific had advised against the transfer Mr C still could have opened a SIPP and proceeded with an investment.

The suitability report suggests Mr C had already invested in two overseas properties. However, I accept that it's possible this wasn't recorded properly and the second property mentioned was the one he was about to invest in through the SIPP. This doesn't change the fact though that Mr C had invested before into Harlequin using mortgage funds, an undertaking that I don't think anyone would take lightly.

I appreciate that Mr C's representative says a professional adviser's advice would have outweighed any advice given by the introducer. And generally I would agree that people would put considerable trust into a financial adviser. But Mr C had an existing relationship with the introducer and obviously trusted her enough to take on a further mortgage based on her recommendation about Harlequin and I have to consider that the introducer was still helping Mr C to organise the investment and likely continuing to point out the advantages of the investment. So it's likely, in this particular case, he would have listened more to what the introducer was telling him, rather than an adviser that he had only met shortly before.

I agree that Pacific didn't go far enough as they didn't recommend against the transfer and didn't specifically say the investment was unsuitable. However, I can't see any evidence that Pacific said to Mr C this was a good investment.

Mr C's representatives referred to the part of the suitability report that said "*will benefit from ongoing professional advice and will have access to a much improved investment platform*". However, this relates to the benefit of investing into a family trust with Mrs C rather than have two separate SIPPs. I can't agree that this encouraged Mr C to think Harlequin was a

good investment. I think it's more likely that he understood this was a high risk investment, but trusted the assurances and information given by the introducer.

I agree with Mr C's representative that cancelling the reservation fee of the property on its own wouldn't have been quite a big step, particularly if the alternative was continued payments into an ill-advised investment. However, Mr C had already taken out a mortgage to invest into another Harlequin property and reserved another. I remain of the opinion that it would have taken quite a lot to accept that these investments weren't right for him and ideally should have to be rewound somehow. In hindsight this might seem a small price to pay to avoid losses to your pension. But at the time, having committed to overseas investments with Harlequin before, I think it's likely he wouldn't have changed his mind—even if Pacific had told him not to transfer.

my final decision

My decision is to uphold Mr C's complaint but I won't ask Pacific IFA Limited to pay any compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 5 January 2020.

Nina Walter
ombudsman