complaint

Mr N's representative has complained, on his behalf, that Fairway Financial Consultancy acted negligently in transferring two of his existing pension plans into a Self Invested Personal Pension (SIPP). This was used to invest in a Harlequin overseas property development.

background

The background to this complaint is set out in my provisional decision dated 17 April 2020, a copy of which is attached.

In that decision, I said that I was minded to uphold the complaint in part, for reasons which are also set out in that decision.

In summary, I concluded that, whilst Fairway had demonstrated failings in the way it had dealt with Mr N, the available evidence supported the position that Mr N, with the assistance of an unregulated third party introducer, would in any case have proceeded with the Harlequin investment.

I was, however, persuaded that Fairway should refund the £1,000 fee it charged Mr N (deducted from his transferred SIPP funds), with the addition of interest. I said that this would be fair as Fairway shouldn't have facilitated the transfers.

In support of this, I concluded that Fairway's assessment of Mr N's attitude to investment risk was confusing, and that it had itself expressed the view that Mr N didn't understand what he was doing. I noted that, nevertheless, Fairway was prepared to accept Mr N as an "insistent client" and process the transaction, when all other circumstances should have made it obvious that doing so was contrary to his best interests.

I noted that Fairway might argue that, even if it had declined to transact the business, it would have still charged for the financial assessment which led to that conclusion – in other words a non-contingent fee.

But I thought it was doubtful that it would have charged Mr N for this, or that even if it had, Mr N would have been in a position to pay it. But I invited Fairway to provide evidence that it had successfully charged other individuals where it had declined to transact business.

The response of Mr N's representative to the provisional decision

In summary, Mr N's representative said the following:

- Previous decisions were at variance with the finding I'd made – namely that no liability fell upon Fairway as it was my "*guess*" that Mr N would have taken similar action with an unknown entity at a later date.
- Disproportionate weight was being applied to the matter of "*the bung*" – the cash advance payment which would be made to Mr N if he invested in Harlequin. This was the representative's description rather than Mr N's. He was, however, sure that what had happened was illegal.
- In his experience of dealing with similar cases, there was some kind of "*pecuniary advance*" in 75% of them. But this hadn't prevented our organisation from issuing decisions upholding the complaints.

- Mr N was a layman and clearly understood that the money was being paid to him as a business loan for becoming a sub agent of Harlequin. He was also told that it was being described as a loan purely for Harlequin's tax reasons and wouldn't need to be repaid.
- That Mr N had a historic gambling problem and personal debts was no different to many other people's circumstances.
- The call our investigator had with Mr N demonstrated that Fairway's actions had been non-compliant.
- Mr N was told by the third party introducer that the arrangement would be "*win-win*", in that the investment would be profitable and he was going to receive the advance payment. His keenness to complete the process – and his chasing of it – was therefore unsurprising. Even if he didn't have debts, he would have been keen to establish the investment.
- In another case decided by this service, the cash advance had been three times the size of Mr N's in percentage terms, but this hadn't prompted the deciding ombudsman to conclude that the consumer would have gone elsewhere to complete the transaction if the advising business had declined to do so.
- Mr N had repeatedly said in the telephone call with our investigator that he wouldn't have done it. Specifically, when put to him that he was an "insistent client", Mr N told the investigator that *"I can assure you that if I was told not to do it I wouldn't have done"*.
- If he wouldn't have done it then, he wouldn't have done it in the future through any other business. The issue of exactly what paperwork was being sent to Mr N also then become relevant.
- With regard to my conclusion that, despite Fairway's regulatory breaches, the complaint shouldn't be upheld, there was no reason to depart from conventional legal analysis of breach of duty, causation and calculation of loss.
- The court of appeal identified in the case of Equitable Life Assurance Society v Ernst & Young [2003] EWCA five questions to be asked by the court:

    - Does a legally enforceable duty of care exist?
    - If so, what is the scope of that duty?
    - What is the prospective harm, or kind of harm, from which the person to whom the duty is owed falls to be protected?
    - Has there been a breach of that duty?
    - If so, was the loss complained of caused by that breach, or was it caused by some other events or events unconnected with the breach?

- Citing a separate case, it was asserted that legal causation *"involves the relationship between the loss or damages suffered by the plaintiff and the fault of the defendant".* The law distinguishes between a breach that was the effective cause of the loss, and one that was "*merely the occasion of the loss*". In this instance, the loss clearly fell within the scope of Fairway's duty.
- The chain of causation could be broken where there was an intervening act, as summarised in the case of Stacey v Autosleeper Group Ltd [2014] EWCA.

    "(i) Although the legal burden of proof that the breach of contract caused loss rests throughout on the claimant, there is an evidential burden on the defendant if it contends that there was a break in the chain of causation,

(ii) To break the chain of causation, the intervening conduct of the claimant must be of such impact that it obliterates the wrongdoing of the claimant in the sense that the claimant's conduct must be the true cause of the loss rather than the conduct of the defendant. That is because, where the defendant's conduct remains an effective cause of the loss, at least ordinarily the chain of causation will not be broken,
(iii) It is difficult to conceive of anything less than unreasonable conduct on the part of the claimant breaking the chain,
(iv) Even unreasonable conduct will not necessarily break the chain, for example where the defendant's conduct remains an effective cause,
(v) Reckless conduct ordinarily breaks the chain of causation, although there is no general rule that only reckless conduct will do so.
(vi) The claimant's state of knowledge at the time of and following the defendant's breach is likely to be a factor of great significance,
(vii) However it does not follow that actual knowledge of the breach is a pre-requisite of breaking the chain,
(viii) The question of whether there has been a break in the chain is fact sensitive. In a given case the determination of whether the chain of causation is broken may involve the cumulative effect of a number of factors which have the effect of removing the wrongdoing sued on as a cause,
(ix) Whilst the authorities provide guidance they are not to be read as statutes,"

- It was suggested that I had overlooked the rule that where the loss caused by the defendant's breach of duty was the very loss against which the fulfilment of that duty would have avoided harm, it wasn't open to the defendant to rely upon the claimant's own act in going on to bring about the loss as an intervening act.
- Citing further case law, having found Fairway to be in breach of its duty to refuse to transact the business, it was contended that I should have concluded that it ought to be held liable for the loss caused by that failure.
- The hypothetical possibility that Mr N would in any case have arranged the transaction with the help of the introducer should not serve to interrupt the chain of causation.
- It was further argued that I hadn't given proper consideration to Mr N's own evidence that, if he'd been told not to proceed, he wouldn't have. I hadn't fairly considered the impact of effective financial advice in evaluating what course Mr N would have pursued.
- It was also difficult to conceive of an authorised firm which could have properly transacted the transfers and subsequent Harlequin investment on an execution only basis. If Fairway was unable to properly categorise Mr N as an insistent client, nor could any other firm acting in compliance with the COBS rules. Nor could the business have been properly implemented on an execution only basis.
- The provisional decision began with, but then departed from applying the conventional law for no discernible reason. It also denied Mr N the argument that, even if he had hypothetically used another authorised SIPP provider, such a business could have transacted business which no business complying with its regulatory duties could have done.
- The alternative hypothetical business must logically be one which would have adhered to its regulatory duties – a properly performing SIPP provider – and couldn't be one which was willing to breach them.

- The provisional decision was at variance with hundreds, if not thousands, of decisions which weren't simply analogous to, but "*facsimiles*" of what had happened here.
- Our assertion that this case, as with others, would be decided on its own merits, was problematic. This case was "*identical*" to others which had been upheld.
- Perhaps the most significant concern was the omission of the FCA's core principles for business in my provisional decision. My focus had fallen into error by an exclusive examination of certain rules contained within COBS, all of which I had in any case said Fairway were in breach of.
- It had been found to be the case in our judgements that a business could comply with rules, but still be found wanting with regard to the principles.

Mr N's representative also brought to my attention a decision issued by the Pensions Ombudsman, in which he concluded that a SIPP provider couldn't avoid responsibility for its actions on the question of whether the consumer wouldn't in any case have been dissuaded from proceeding with an investment if risk warnings had been given.

The Pensions Ombudsman said that it was the SIPP provider's responsibility to put the consumer into a position where he could make an informed choice, but it failed to do so. Mr N's representative said that there was symmetry here with Mr N's complaint.

Fairway's response to the provisional decision

Fairway's representative has also responded to my provisional decision in the following terms:

- It noted my conclusion – and the reasons for it - that nothing which Fairway did or said would have altered Mr N's decision to proceed.
- But it was difficult to see how Fairway could be faulted for treating Mr N as an insistent client – there was no specific regulatory guidance in place until several years later.
- My finding that Fairway should not have transacted the business was a very strong proposition, given that Mr N was a man of full age and capacity, who had been advised not to proceed.
- There were considerable risks involved in the Harlequin investment, but there was also the possibility of substantial financial gain.
- It was one thing to warn a client, but an outright prohibition for Mr N's protection was another. It was open to parliament to impose prohibitions, but in their absence, companies were entitled to offer promotions, and people were entitled to invest in them.
- It was therefore an extreme conclusion that Fairway shouldn't have allowed Mr N to invest in Harlequin
- There was a right to decline to transact business, as expressly stated in COBS 10.3.3, but there was no obligation to do so.
- That particular conclusion also differed from those reached by other ombudsmen at this service. In one decision, the ombudsman concluded that, even though encouragement to invest was suspected from Harlequin, the extensive risk warnings given by Fairway meant that it was possible to process that client on an insistent basis.

- In another decision, the same ombudsman concluded that, although a business needed to act in the client's best interest, this didn't necessarily mean that it should refuse to act altogether. And the ombudsman also noted that the business had taken reasonable steps to ensure that the client understood what he was doing.
- In this case, Fairway treated Mr N as an insistent client and gave clear and unambiguous risk warnings.
- Whilst each case turned on its own facts, common law required consistency in these types of cases. Arbitrariness was a ground for judicial review.
- Relating to my reference to another case where Fairway declined to act, it was up to Fairway's discretion as a commercial enterprise to decide for whom it should act. It didn't follow that, where there was a preparedness to act for one there would be a breach of duty where it acted for another.
- Mr N had already made his firm intention to invest in Harlequin known to Fairway, and chased the progress of the transaction when he thought it was too slow. Had Fairway then informed Mr N it wouldn't be proceeding this would have been an obvious failure to treat Mr N fairly.
- The circumstances in that separate case where Fairway had declined to act were also wholly different to those present here.
- With regard to the matter of the advisory fee, at no point had Fairway said that its payment would be conditional on whether it decided to facilitate the transfer. It was agreed that Mr N would pay Fairway £500 for the pensions advice and a further £500 to facilitate the transfer.
- The decision as to whether to transact the business was for the financial adviser, but this should have no bearing on Fairways' entitlement to charge a separate advisory fee.
- Fairway wouldn't have been in a position to provide its advice without first carrying out the work to undertake the assessment of Mr N's financial circumstances. This would have incurred a charge.
- The advice wasn't unsuitable – as acknowledged by the provisional decision. It was unreasonable therefore to conclude that where correct advice had been given, but the client still wished to proceed against that advice, the onus should be on the adviser to justify the professional fees.
- Mr N had indicated that he was in a position to pay the £1,000 fee – and that he had this money in his current account. But even if he couldn't, this was irrelevant and Fairway could have taken action to pursue recovery of the fee.
- As to my finding that the enhanced risk questionnaire was likely not sent to Mr N, the representative said that Fairway wished to make its advice short and concise. This approach had been endorsed by a senior ombudsman at this service. Had it not kept its advice about the risks of the investment as short and concise as possible, it would no doubt have attracted criticism for this.
- There was no evidence that the enhanced risk questionnaire wasn't sent to Mr N, other than the testimony of Mr N himself.

my findings

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I'm required by the Financial Services and Markets Act 2000 (FSMA) and DISP to determine the complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the complaint.

When considering what's fair and reasonable, I need to take into account relevant: law and regulations; regulators' rules, guidance along with standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

I note that both parties have taken some findings in isolation and out of context. My decision is intended to be read as a whole and, in some instances, I have provided several reasons for reaching a conclusion.

The further points raised by Mr N's representative

I'll initially address the representative's comment that previous cases, which he's said are identical in nature, have had different outcomes as to whether liability can be attributed to a business on the basis that the consumer, even if properly advised or denied the business' services, wouldn't have acted any differently.

In response, I'd firstly say that no two cases are identical, or *"facsimiles"* of each other. There may be similarities, but there will be specific, relevant factors within each case upon which the outcome will depend. And in reaching my conclusions in this case, I've considered all of the evidence available to me and all of the circumstances of the complaint. That includes the very specific nature of Mr N's circumstances, as portrayed both by the contemporaneous evidence, his comments in bringing the complaint, and the helpful supplementary information provided by his representative, along with what I consider to have been his likely objectives at the time of the advice.

I would also assure Mr N's representative that there exist other determinations from this organisation where the ombudsman has concluded that, even if the advice had been different, a consumer would still have taken the same course of action. My provisional conclusions were therefore by no means unique in that regard. I consider my approach to this matter to be consistent, justified on the evidence and in line with the remit of fair and reasonable.

I've noted the comment about Mr N having a layman's understanding that the cash advance was being paid to him as a business loan. But that he was also told that it was only being described as a loan for tax purposes, and that he wouldn't need to repay the money. There's an obvious contradiction here – either Mr N understood the money to be a loan or he didn't. It cannot be both.

My view is that he believed it to be non-repayable – and I don't think this is controversial. But I don't think it in any case has any bearing on the outcome. It was a cash payment which I consider Mr N was keen to receive, irrespective of whether it might need to be repaid at some later date. And although I don't think I need to make any firm conclusion on this to reach a fair and reasonable determination, I think it's in any case doubtful as to whether Mr N would have been able to repay the sums from money held outside of his SIPP. His financial circumstances simply did not permit this.

Mr N's representative has also sought to downplay the importance of Mr N's circumstances in deciding how determined Mr N might have been to receive the cash advance. It's been argued that his gambling debts were insubstantially different to many other people's, and having been offered a "win-win" combination of an upfront cash payment and the allure of significant returns, his chasing of the transfer and reinvestment process was only natural.

But I'm not persuaded by this argument, which is in any case in stark contrast to the portrayal of Mr N's financially straitened situation in the representative's previous account. As a reminder, we've been told the following:

- Mr N had gambling debts;
- He had an outstanding loan;
- He had already (albeit unsuccessfully) attempted to liberate his pension to access cash;
- He lived from week to week, if not day to day, on his finances; and
- The cash payment was therefore the driver behind the transfers and reinvestment.

I also accept Mr N's assessment that he would have viewed the proposition put to him by the third party introducer as a "win-win". This doesn't help Mr N's case here though. And whilst it may be the case that several of the above features might be quite commonplace, I think it would be rare that all of these would apply to the general population. As such, and as I said in my provisional findings, I can understand why Mr N was particularly keen to receive a cash payment – and why he would, more likely than not, have in any case proceeded with the transfer and reinvestment even without the involvement of Fairway.

To reiterate my reasoning on this point, in addition to the above factors which contributed to Mr N's determination to access the cash incentive, this is further reinforced in my view by Mr N chasing the process and complaining that it was taking too long.

And even if Fairway had declined to transact the business, there were SIPP providers which would have accepted this type of business, and specifically Harlequin investments, on an "execution only" basis.

And my view remains that, if Fairway hadn't transacted the business, Mr N's introducer would have found a different way, most likely through the "execution only" route mentioned above, to achieve the same goal.

I've then thought carefully about the further contention that Mr N wouldn't have proceeded if he'd been advised against the transfer by Fairway.

There are two points to be addressed here. The first, perhaps most notable, one is that Fairway *did* advise Mr N not to proceed with the transfers.

As I said in the provisional decision, Fairway advised Mr N that he should retain his deferred benefits with the occupational pension scheme as the critical yield was too high to make such a transfer feasible. Fairway also noted that Mr N wanted to retire early, which pushed the critical yield required to match the scheme benefits higher still. Alternatives were set out, one of which was to leave the pension funds where they were.

Fairway recommended that course of action, saying that *"it is difficult to find a reason to agree with your request to transfer on a recommended basis"*.

Regarding the proposed transfer from the personal pension plan (PPP), Fairway further said in the suitability report that transferring this to a highly speculative SIPP investment should *"only be considered for more sophisticated investors who understand the risks involved and are aware you can totally lose all of your pension fund monies*".

As the PPP provider also offered higher risk funds, Fairway said that Mr N would be better

off keeping it where it was, not only because of the higher charges which would apply in the new plan, but because Mr N had no prior experience in higher risk investments.

My view remains that the expanded rationale for these arguments, along with the assessment of the Harlequin investment itself, lie in a document which I provisionally concluded didn't accompany the suitability report – and which I'll address later in this decision. But the suitability report nevertheless contained several instances of Mr N being advised *not* to proceed.

Furthermore, Mr N's own representative has quite clearly said (using a rather extreme example to emphasise this exact point) that it didn't matter what was said to Mr N – if Fairway was prepared to transact the business, he would have proceeded. Mr N may have more recently, whilst bringing the complaint, have said that if he was told not to do it, he would have accepted that advice, but I have to also bear in mind that this is a view expressed whilst in the process of bringing a complaint – and with the obvious potential benefit of hindsight.

For clarity, I have taken Mr N's comments into account, but I must also give them the appropriate weight, taking other commentary from his representative and actual contemporaneous advice and actions into account as well.

And in terms of the commentary provided around Mr N's financial circumstances, his representative set out in quite emphatic terms as to why the cash payment was the incentive here. And that nothing which was said or advised by Fairway would have made a difference to his decision to proceed.

As a reminder, the representative said that *"In any event this letter could have told him he was going to die if he signed it. It wouldn't have made any difference at all. "The bung" was the driver."*

Arguments in relation to causation, and the law relating to breaks in that chain, have also been raised. I'm mindful of not only the approach the courts take when applying these considerations, but also the associated case law to which Mr N's representative has referred. The DISP rules require me to decide cases on a fair and reasonable basis, taking into account all the circumstances of the case. That said, I must have regard for relevant law, and so I'll set out my view on how that case law supports the findings I've made here.

I don't disagree with the observations of the law around causation as set out by Mr N's representative. And in particular, that if the chain of causation began with Fairway - as has been asserted here - the later help of the introducer shouldn't interrupt the chain of causation. But I'm afraid that the premise as set out by Mr N's representative of where the chain of causation began is, in my view, misguided. The chain of causation began with Mr N's initial contact with the third party introducer. This is what set him upon the path of transferring into the Harlequin investment, and as asserted by Mr N's representative, it was a combination of the high returns touted by that introducer, along with the cash incentive, which made him keen to proceed.

My view is that Fairway erred because of its failure to decline to transact the business, but the reference here to the court's findings as to what extent that act or omission might break the chain of causation are distinctly unhelpful to the argument put forward by Mr N's representative.

To further clarify, my view is that Fairway breached its duty to act in Mr N's best interests. But crucially, I don't think Fairway's act or omission altered the chain of causation which had started with Mr N's initial contact with the introducer.

To quote directly from the case law referred to by Mr N's representative – "*The question of whether there has been a break in the chain is fact sensitive. In a given case the determination of whether the chain of causation is broken may involve the cumulative effect of a number of factors which have the effect of removing the wrongdoing sued on as a cause"*.

The particular facts of this case persuade me, for all the reasons set out in this and the provisional decision, that Fairway didn't break the chain of causation - this began with the third party introducer. Irrespective of any advice given by Fairway, Mr N would in any case have proceeded. And if Fairway had declined to transact the business, it is my conclusion, based on the evidence, that Mr N and the introducer would have found another way of achieving the objective. So, to use the same terminology from that judgement, I don't think the actions of Fairway obliterated that initial wrongdoing.

So, my view remains that Fairway's actions would have made no difference to the ultimate outcome, which is that Mr N would in any case have proceeded.

There may be other cases, involving unregulated third party introducers, where this service has concluded that the actions, or lack thereof, of the regulated IFA meant that the chain of causation would have been broken – most likely that advice not to proceed or a refusal to transact the business would have prevented the consumer from proceeding.

But, as I've said above, we look at cases on their individual merits. And I'm afraid that neither of the above scenarios exist here. For the reasons already set out, and as corroborated by Mr N's representative, it didn't matter what Mr N was advised to do, although I note he was told not to transact the business – he would have proceeded regardless. And if Fairway hadn't transacted the business, I'm persuaded on a fair and reasonable analysis of the evidence that a combination of the incentive payment and the means at the introducer's disposal would have resulted in Mr N finding an alternative way of achieving the objective.

I've also thought carefully about whether my provisional finding on this case effectively leaves Mr N in limbo as regards recourse to financial compensation for any losses incurred. I'm aware that, by finding that Mr N could have used an unknown party to transact the business, there might be the impression that there exists no party against whom such a claim could feasibly be brought.

Mr N's representative has also argued that no regulated business could have properly transacted the business on an insistent client or execution only basis.

But this isn't the case. My provisional finding was that Mr N would have been able to transfer his funds directly to a SIPP provider on an execution only basis. That provider wouldn't have been required to conduct a suitability assessment, or categorise Mr N as an insistent client. It could have accepted the business on an execution only basis – and as I said in my provisional decision, my understanding is that there were SIPP providers who would have been prepared to do so.

But the SIPP provider would have had its own separate responsibilities for determining whether it was appropriate to establish a SIPP on the known basis. Irrespective of the means of transferring into the SIPP, that provider nevertheless needed to undertake its own "due diligence" into the type of investment to be used – and determine that it was an acceptable asset to be held within Mr N's SIPP. This would be the case with any SIPP provider through which Mr N might ultimately have invested in Harlequin, even without the assistance of Fairway.

And as far as further avenues of recourse are concerned, consideration doesn't need to extend to a hypothetical SIPP provider. The fact is that Mr N did transfer his pension funds to a SIPP provider. My understanding is that the particular SIPP provider used here may not have accepted this type of business without the involvement of an IFA. But it still needed to ensure that the investments were "SIPP-able" and acceptable to be held in Mr N's SIPP.

I make no finding here as to whether that SIPP provider fulfilled its obligations. That is outside of the scope of this complaint against Fairway. And I'm in any case aware that the SIPP provider is no longer trading. As such, any complaints against it are being referred to the Financial Services Compensation Scheme (FSCS). However, the principle remains the same. My conclusion regarding the inability of Fairway to prevent Mr N from investing doesn't deny Mr N the opportunity of seeking redress elsewhere if he so chooses.

Finally, Mr N's representative said possibly the most concerning aspect of the provisional decision was that I'd failed to assess the case against the core regulatory principles, preferring instead to focus upon specific regulatory obligations contained in COBS.

I must with respect point out that dwelling upon the high level principles would have made no practical difference to my ultimate findings here. I consider my conclusions relating to Fairways failures to be quite unambiguous, without the necessity of dwelling on high level regulatory principles - Fairway failed on a number of counts to adhere to its regulatory obligations, didn't treat Mr N fairly, and didn't act in his best interests.

And as I said in the provisional decision, I'd taken into account the regulator's rules and guidance. This included the core principles.

But I'm afraid that if Mr N's representative considers that a particular focus in my assessment on the high level principles of business would alter my conclusion as to whether Mr N, for *his* part, would in any case have proceeded with the Harlequin investment, he is mistaken. And it's not easy to conceive how such a conclusion might reasonably be drawn.

The further points raised by Fairway's representative

Fairway's representative has said that, given the lack of specific regulations around insistent client categorisation in place at the time of the advice, it was difficult to see how it could be faulted for this.

I have no difficulty here. There may have been no specific regulatory guidance in place at the time, but as stated in the provisional decision, my view remains that the very obvious features of this case meant that other regulatory requirements, such as to act in Mr N's best interests, were completely ignored.

To reiterate my reasons for that conclusion, Mr N's lack of understanding of the proposition (as noted by Fairway itself), his contradictory responses to risk attitude, his lack of any investment experience and incapacity to sustain any loss, in addition to the opaque and high risk nature of the investment itself meant that not only could Mr N not reasonably be described as having any of the attributes possessed of a genuinely insistent client, but the establishment of these very facts was where Fairway's involvement should have ended.

Turning to the argument that Fairway had a right, but not an obligation, to decline to facilitate the transfers and reinvestment, my view is that there are situations in which to do so would be so obviously contrary to a client's best interests that to transact the business would be reckless. And given what I've said above, and in the provisional decision, about Mr N's lack of understanding of what he was doing, I think this quite arguably meets that bar.

In other decisions referenced by Fairway, the consumer's circumstances and level of understanding and experience were different – hence the different outcomes. Each case is decided on its own merits. And so I'm not concerned here that there's an issue with the "consistency" or "arbitrariness" of my findings in this particular case - to be clear there is not.

I'd also query as to why Fairway might consider there to be the right – if not an obligation – to not transact business if it wasn't expected that, in certain situations, a business might invoke that right.

Fairway is of course well aware that the right to not transact business is of some significance, as evidenced by its use of that right in the case of the other consumer for whom it declined to provide advice. Individual circumstances may differ, but the same principle applies, and I believe is aligned with my view that some circumstances reasonably dictate that the business simply should not be transacted. I maintain that this was the case for Mr N.

Fairway had the right to decide whether or not to transact this business, and had invoked that right on at least one other occasion. It nevertheless decided to proceed in this instance, but for all the reasons given, my view is that by doing so it wasn't acting in Mr N's best interests.

I'm also concerned by the comment which seems to suggest that, by declining to transact the business once Mr N had made his intentions clear and had started to chase its progress, Fairway would obviously be failing to treat him fairly. At whatever stage it becomes apparent that to proceed would be so comprehensively against a client's best interests, this should be of no importance or relevance to the proper course of action in that situation. The process should end, and the client should be advised as to why this is the case.

Turning then to the issue of the fee charged, my provisional conclusion was that the whole of this - £1,000 - should be returned to Mr N. My rationale was that Fairway shouldn't have transacted the business, and so the fee for doing so should be repaid – with interest. I said it was doubtful that Fairway would have charged Mr N if it hadn't transacted the business, and that it was doubtful that Mr N would have been in a position to pay it. But I invited Fairway to provide evidence that it had successfully charged other individuals where it hadn't transacted the business.

Fairway hasn't done so, but has argued that the advisory fee wouldn't have been contingent upon the transfers proceeding – this would have been payable even if it didn't transact the business. It's also said that Mr N did have the ability to pay it as he was recorded in the fact find as having £1,000 in his current account.

I've thought carefully about this, but I remain of the view that the whole fee should be refunded. In support of this conclusion, I think it's highly unlikely that Mr N would have wanted, or been in a position, to enter into an agreement to pay an advisory fee in the event that the transfer and reinvestment into Harlequin didn't proceed. I think it's likely that Mr N was aware that the transaction would proceed, even on an insistent client basis, when he became a client of Fairway.

I realise that Fairway may object to that conclusion on the basis that it says it undertook a proper assessment of his financial circumstances before the advice was given. But even taking account of what I consider to have been very obvious reasons as to why the transaction shouldn't have proceeded – as set out above – Fairway was prepared to do so on an insistent client basis. And it has argued vociferously that it is up to a capable, adult individual to decide how to invest their money. So, I don't think Mr N's awareness that Fairway would process the transaction at the outset, even on an insistent client basis and with what it considered to be appropriate risk warnings, is a particularly tendentious conclusion to draw.

I've also noted the comment relating to the money which Fairway says Mr N had in his bank account – as evidenced by the fact find. But the availability of this towards paying for an advice fee which might result in no transfer – and so no access to the cash incentive – seems highly unlikely to me, especially given what is known about Mr N's wider circumstances and the reasons he wanted access to the cash in the first place. The prospect that Mr N would be prepared to pay for a separate assessment of his financial situation which would cost him £500, without the knowledge that Fairway would process it on an insistent client basis even if it considered the transfers unwise, is in my view vanishingly remote.

Furthermore, in the suitability report, it said the following about the fee structure:

"From my own point of view, we have already agreed with you that our charges would be £1,000, which is £500 to provide advice in respect of the pensions that you hold and a further £500, in order to facilitate the transfer of your pension funds to an alternative provider."

This made no mention of the possibility of the transfers not proceeding, or what would happen if Mr N decided not to proceed. For example, the suitability report doesn't say that it had been agreed that there would be a £500 fee for advice, and that *if* the advice was to transfer, there would be a further £500 fee for facilitating the transfers. There's no real separation of the two, such that Mr N might reasonably have inferred that a non-contingent fee might in any case be payable, even if the transfers didn't proceed.

I'd also add that, although Fairway has said that the £500 fee was in respect of the financial assessment and that it was non-contingent, the Deduction of Fees Agreement signed by Mr N and dated 6 July 2011 set out a fixed amount of £1,000 in respect of the transaction. No separation was made here between an advisory fee which would in any case be due from Mr N and the further fee for facilitating the transfers. The agreement also said that the amount would be taken from Mr N's SIPP. So it would be contingent upon there being a SIPP from which it could be deducted. And if Fairway intended to collect this irrespective of the transfers proceeding, it should have made this clear to Mr N. Had he known this, I don't think Mr N would have proceeded. There was no prospect, certainly from Mr N's perspective,

of there being a non-contingent arrangement here. So my finding is that, but for Mr N's confidence that the transaction would proceed, Fairway would not have had him as a client.

Fairway has also said that it could have pursued recovery of the fee through the courts. But given the manner in which the fee was described as set out above, both in the suitability letter and the Deduction of Fees Agreement, I think this would have been unlikely. And insofar as Fairway's position on this has been emboldened by my comments relating to the suitability of its advice to not transfer, I'd refer it to my conclusions on other aspects of the advisory process, which have noted significant defects, particularly in its attitude to risk assessment and categorisation of Mr N as an insistent client.

My view is that the process Fairway followed in giving its advice, including its willingness to treat Mr N as an insistent client, was – for the reasons given - flawed and not in his best interests. My conclusion is that Mr N is likely to have suffered the same losses by another route with the assistance of the introducer. But although I've taken Fairway's comments into account, I find it unlikely it would have been in a reasonable position to pursue Mr N directly for the fee if it had declined to facilitate the transfers for him. So, having considered all of these points, my view is that it would be fair and reasonable to require Fairway to refund the entire fee.

Finally, I note that Fairway has objected to my conclusions on the matter of whether the enhanced risk questionnaire was sent to Mr N along with the suitability report. Its representative has said that the explanation is quite straightforward, in that it wished to make the suitability report as concise and short as possible, as endorsed by one senior ombudsman.

But I'm afraid I find that explanation unconvincing. In the first instance, the fact that the analysis of the Harlequin investment lies in a separate document doesn't alter the length of the overall content which Mr N was expected to read. It also doesn't explain why the suitability report would say that it couldn't give advice on the Harlequin investment, yet do the precise opposite in the "accompanying" document. As a reminder, it said the following:

"I must, at this stage, indicate that we can in no way give any advice with regard to the Harlequin Property Investment that you intend to make, as this is outside of our remit of advice and you would have to produce your own due diligence investigations into whether this investment is suitable for you and your pension."

If the enhanced risk questionnaire did in fact accompany the suitability report, I would expect to have seen reference to the fact that advice *was* being given in the separate document – not the precise opposite.

Fairway's representative has said that there was no evidence that the enhanced questionnaire wasn't sent, other than Mr N's own recollection. But I disagree – on a fair and reasonable assessment of the quite persuasive evidence as set out above – and whilst for all the other reasons given it doesn't change the outcome of the case – my view remains that the enhanced risk questionnaire didn't accompany the suitability report.

summary

Overall, my conclusions on this case remain the same. I've noted the comments made by both parties, but for the reasons given in this – and the attached provisional decision – I'm

not persuaded, on a fair and reasonable assessment of the facts, that the outcome should change.

I remain of the view that Fairway demonstrated significant failings here. As I've reiterated above, I don't think that the "enhanced" questionnaire was provided to Mr N and as outlined in the provisional decision, the fact finding with regard to his attitude to risk was incoherent and not fit for the intended purpose.

Fairway also confirmed its view that Mr N didn't understand what he was doing – but it was nevertheless still prepared to accept Mr N as an insistent client and process the transaction, when all other circumstances should have made it obvious that doing so was entirely contrary to his best interests.

That said, given the known circumstances and additional commentary from his representative, I haven't been able to ignore Mr N's likely determination to access the cash payment – and the underlying reasons for that. And this would have been achieved by completing the transfers and reinvestment in Harlequin.

Specifically with regard to the additional comments made by both parties, as Fairway wasn't the genesis of the financial proposition, my view is that it cannot have been the beginning of the chain of causation. This lay with the unregulated introducer. And I'm not persuaded that any act or omission on behalf of Fairway "broke" that chain.

Even if it had declined to transact the business, my view is that Fairway couldn't have prevented Mr N from investing in Harlequin. On a fair and reasonable analysis of the facts of this case, even without the involvement of Fairway, my view remains that Mr N would have proceeded anyway through other avenues available to him.

My view relating to the return of the fee paid from Mr N's pension funds to Harlequin also remains the same. In his financial position at the time, I'm not persuaded that, had he considered there was even a remote possibility of the transfers not proceeding, but nevertheless being asked to pay £500 for the advisory service, he would have agreed to become a client of Fairway.

In closing, I anticipate that, of the two parties, this outcome will be most disappointing to Mr N. I think it's only fair that I point out that much of my reasoning relating to whether Mr N would in any case have proceeded, with or without the assistance of Fairway, has been based upon the account given of Mr N's circumstances and intent by his representative. Mr N's representative has himself said that he's used his own language, rather than Mr N's, to describe some aspects of the case. If Mr N feels that he has in any sense been misrepresented, this is something he may of course refer to his representative.

I'd also ask Mr N to carefully consider what I've said about the separate responsibilities of the SIPP provider when deciding what type of investment might be appropriate to be held within a SIPP.

my final decision

My final decision is that I uphold the complaint in part. I direct Fairway Financial Consultancy to compensate Mr N in line with the direction in the attached provisional decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 23 November 2020.

Philip Miller
ombudsman

COPY OF PROVISIONAL DECISION

complaint

Mr N's representative has complained, on his behalf, that Fairway Financial Consultancy acted negligently in transferring two of his existing pension plans into a Self Invested Personal Pension (SIPP). This was used to invest in a Harlequin overseas property development.

background

Mr N was introduced to the prospect of investing in Harlequin by a third-party introducer – that introducer wasn't regulated by the Financial Services Authority (FSA) - the regulator at that time. And so they approached Fairway to help a number of clients, including Mr N, establish a SIPP to invest in Harlequin properties using their pension funds.

In a financial review dated 6 July 2011, Mr N was recorded as being 41 years old, single, with one dependent child and was employed, earning approximately £37,500 pa. He was a member of his then employer's pension scheme, and in terms of assets and liabilities, he didn't own his home, had no savings or investments – but had an outstanding loan of £12,000.

Other than his membership of his employer's pension scheme, his pension funds were split between two deferred defined benefit schemes and a personal pension plan (PPP). Mr N planned to retire at age 66, but also liked the idea of retiring early.

His attitude to investment risk for the pension funds he was interested in transferring into the SIPP was recorded as "6" on a scale of 1 to 6 – a highly speculative rating.

The application for a SIPP was completed and signed on the same date - 6 July 2011. Fairway then submitted the SIPP application form to the SIPP provider on 5 September 2011. Fairway was recorded as Mr N's financial adviser and the agreed fee for processing the transaction was £1,000 - £500 for the advisory process and £500 for facilitating the transfer.

On 19 September 2011, Fairway sent Mr N its suitability report. In that report, Fairway set out its position that Mr N should not transfer his pensions to the SIPP. It said that Mr N should retain his defined pension scheme as the critical yield was too high to make such a transfer feasible. It was noted that Mr N was keen to retire early, which pushed the critical yield required to match the scheme benefits higher still.

In that suitability report, the business also said the following:

"I understand, however, that you will still want to proceed and we have provisions to take this forward on the basis of an Insistent Client, as these are your own funds and you are entitled to do what you wish with the pension, on the basis that you have received advice in this respect."

Addressing the PPP benefits Mr N held with Prudential, Fairway said the following:

"I must once again recommend that the transfer to a highly speculative Self Invested Personal Pension Plan should only be considered for more sophisticated investors who understand the risks involved and are aware you can totally lose all of your pension fund monies. As Prudential also offer highly speculative funds, I believe that you will be better off maintaining the pension with Prudential, if not only for the charges involved, but also as it would appear that you have not had experience in higher risk investments in the past."

But again, Fairway reiterated that the pension funds were Mr N's to do with as he wished. And that it would be *"happy to take this forward as an Insistent Client"*.

Fairway caveated its advisory process at this point by saying the following:

"I must, at this stage, indicate that we can in no way give any advice with regard to the Harlequin Property Investment that you intend to make, as this is outside of our remit of advice and you would have to produce your own due diligence investigations into whether this investment is suitable for you and your pension."

Fairway has said that, with the suitability report, it included an attitude to risk questionnaire, which had been "enhanced" since its initial completion on 6 July 2011. Mr N answered a series of questions relating to his willingness to expose his pension funds to investment risk.

In the initial section rerating to risk category "1", Mr N confirmed the following by inserting crosses next to the relevant statements:

- Losing any money would significantly affect his financial security.
- He didn't take risks and was very cautious.
- He was likely to need access to his money in the short term.
- Repayment of debt was a priority for him.
- He hadn't invested in the past and had no significant experience or understanding of investment markets.

In the next section – risk category "2" - which explored a willingness to lose some money, Mr N indicated agreement with all of these statements bar one - that repayment of debt was *not* a priority for him.

In the section entitled risk category "3", Mr N as confirmed that his financial security would be affected if he lost anything other than a small amount of money, that he was prepared to take a small amount of risk and that his financial situation was such that immediate access to his money wasn't essential.

The section for risk category "4" recorded Mr N's financial security as not being at risk if he lost some of his money and that he had some experience and understanding of how investment markets worked.

Mr N confirmed agreement with just one statement in risk category "5", which was that he had existing investments and had a good understanding of how investment markets worked.

And finally, in risk category "6", Mr N agreed with all of the available statements, as follows:

- He could afford to lose a large proportion of money without his financial security being affected.
- He was prepared to accept a very high degree of risk.
- His earning capacity was such that he could absorb risk.
- He was prepared to invest for the long term and didn't require access to his money in the medium to long term.
- He had existing investments and a very good understanding of how investment markets worked.

In a "freehand" section, Mr N said that his existing PPP with Prudential and his deferred employee benefits could be considered high risk for a self-investment and that he accepted risk category "6" for these funds.

In supplementary pages in the same document, which Fairway has said were included with the suitability report, Fairway noted that Mr N had concluded that his existing pension arrangements were no longer suitable to meet his objectives of investing in the Harlequin overseas property development. But it also said that it needed to ensure that the proposed investment was suitable for him. It added the following:

"Also in view of (the) speculative nature of the investment, our starting point must be that this is only suitable for sophisticated investors who have experience in this area of investments, and are aware that they can lose all their funds invested.

We have not seen any evidence, including your existing pension investments, that you have taken a highly speculative investment like the one that you now require. Details of your existing investments do not all seem to bear out your appetite for higher risk investments and that you can afford to lose all these savings."

Taking all that we have seen into account, we are not comfortable that you can understand the highly speculative nature of the proposed Harlequin investment, and an investment of all your pensions in one speculative investment cannot be a good investment choice for you and your long term needs. On this basis Fairway does not recommend the Harlequin investment or the transfer of your pensions, and that no SIPP is set up.

You have however made it clear that this is the investment that you want for your pension, and are prepared to take the risk that you can lose your pension funds.

We are not totally sure you have fully understood this risk in its entirety, but you have made it clear in your own words that you have, and you have already complained about the time that this is taking to (the introducer), and that you do not want to lose this investment opportunity.

We must therefore ensure that you have all the appropriate risk warnings, and that you know that our advice is not to proceed with this investment or to set up the SIPP to facilitate the investment."

Fairway emphasised the risks involved in the proposed investment – notably that all of Mr N's pension funds could be lost - and urged extreme caution with regard to the projected investment returns. It said there was no risk diversification in the Harlequin investment and it recommended employing an independent agent to verify the progress and development of the overseas property. It further suggested that Mr N employ a legal

specialist to ensure that his pension funds would be used to complete the property he was buying.

Fairway expressed scepticism regarding the assurance that investors' funds could be repaid when needed – its view was that this was rarely the case with direct property investment due to issues with liquidity.

Taking all of the above into account, Fairway concluded that this type of investment would only be suitable for sophisticated investors who understood the risks involved. With specific regard to its assessment of Mr N, it said the following:

"As mentioned we do not believe that you fall into the category of a sophisticated investor, and therefore do not recommend that the proposed investment is suitable, and neither is the SIPP vehicle to set this up."

Fairway noted Mr N's responses relating to his willingness and capacity to take a high level of risk, but it said that none of the statements attesting to this matched what it had seen or understood to be his set of circumstances – so it asked him to think very carefully about the answers he'd given. It said:

"Your answers to the questions on the Risk questionnaire show that you do not want to lose any money on the one hand, but for the pensions that you have asked us to review that you are prepared to accept this very high risk investment approach, which is not borne out by previous investment decisions that you have made as far as we can see."

With particular regard to the contradictions in the risk-related answers he'd given, Fairway suggested that these were indicative of a more balanced attitude to risk – which was consistent with his existing pension plans. It said the following:

"If your existing investments were held in similar investments to the Harlequin proposition, and if you were considering a smaller investment into their plan, then this investment could be considered. Unfortunately, this is not the case, and a recommendation to transfer cannot be made."

Fairway summarised its appraisal of the situation as follows:

*"To reiterate all that has been said, we therefore recommend that you do not proceed with this investment and do not set up the SIPP to receive the transfers from your existing pensions. You have been fully appraised (*sic*) of the full facts of the Harlequin investment and you have confirmed that (you) are prepared to accept the potential risks involved despite our recommendation that you still want to proceed."*

But Fairway acknowledged that Mr N had been introduced to the investment proposition by a third party and that he would still wish to proceed. It addressed this as follows:

"However, it is clear that as you have been introduced, on the basis that you require to invest your pensions in this plan, and that as we are not prepared to proceed on an execution only basis, i.e. where we provide no advice and just set up the plan for the investment that you require, then advice must be given and as far as we can ascertain understood. If you still wish to proceed, we will process your investment as an insistent client and arrange to set up the SIPP and transfer in your pensions, it must be understood that by doing this you are acting against our advice."

Fairway confirmed that Mr N wished to proceed on this basis, but if he changed his mind, to let it know.

According to Mr N, the introducer agreed to give him £4,500 from his commission if he committed to the Harlequin investment - this was categorised as a business development loan. If he was able to introduce others to the Harlequin investment, he was also offered 10% of the investment value. Mr N has confirmed that he hasn't repaid the business development loan and didn't introduce anyone else.

The transfers from the two separate schemes completed on 2 and 4 November 2011. A letter from the administration manager at Harlequin Property dated 12 July 2011 indicated that Mr N had already reserved his development unit and it asked that payment of the £1,000 reservation fee be made within seven days of the reservation. No contracts would be issued until the fee was received.

But according to a subsequent letter dated 8 November 2011, payment wasn't received until that date. It seems that the £1,000 reservation fee as taken from the transferred pension funds, and the remaining pension funds, amounting to approximately £33,000, were invested into Harlequin.

Unfortunately, the property development ran into difficulties and my understanding is that much of Mr N's pension funds have been lost.

The complaint

Mr N's representative submitted the following key points of complaint:

- Although it was acknowledged that Mr N had been introduced to the Harlequin investment by a third party, he wasn't tied into that investment at the point of being referred to Fairway. The £1,000 reservation fee hadn't been paid.
- It believed there was some kind of relationship between the introducer and Fairway – hence the referral to facilitate the transfers.
- The entire arrangement, including the SIPP application, was started on 6 July 2011, which it had assumed had taken place at Fairway's office. But the representative had since learned that the whole process was undertaken remotely by post, which it interpreted as evidence that the referral had simply been a rubber stamp of the introducer's investment proposal.
- Fairway had a duty to ensure that the underlying investment in the SIPP was suitable for him, and it failed in this regard.
- The attitude to risk questionnaire Mr N had was dated 6 July 2011 and didn't have the additional pages (which contained the advice not to proceed) which were added later. Mr N denied ever seeing the "enhanced" version referred to by Fairway, which also had the second date of 19 September 2011 added.
- The SIPP application was dated 6 July 2011 – and so there couldn't have been reflection and research on the suitability of the transfers. The transactions just needed to be processed.
- The main driver was clearly the £4,500 which would be paid to Mr N – although Mr N thought he may have actually received around £2,000 of this. It was accepted that Mr N was chasing the parties involved to process the transaction quickly. But Fairway should have stopped the transaction from happening.

- The representative didn't dispute that Mr N signed the suitability report, although it wasn't known where he was or who he was with when this happened. Although again, the representative said that the content of the letter was largely irrelevant as the payment Mr N was going to receive was the driver behind the transaction.
- No one ever told Mr N that the proposal was anything other than a good idea. But it was up to Fairway to stop him from doing it, rather than collecting commission for doing the opposite.
- As endorsed in other decisions issued by this service, disclaimers and risk warnings didn't necessarily render otherwise inappropriate investments suitable. But the representative said that those risk warning were in any case inadequate.
- The record of Mr N wanting to personally control his pension funds was unrealistic – nothing about his circumstances was consistent with this. Rather, he needed the protections and guarantees afforded by a defined benefit occupational pension scheme.
- The critical yields quoted in the suitability report were predicated upon transfers into mainstream investments, rather than the Harlequin property development.
- As the report was "fee based", the representative queried why the advice wasn't simply to leave the pension funds where they were.
- The transferred funds were only enough to cover 30% of the purchase price and Mr N had no way of funding the remainder. This added to the unsuitability of the arrangement, which should have been obvious to Fairway.
- The representative acknowledged that in some instances of poor advice or negligence, the conclusion had been drawn that what happened would have happened anyway, irrespective of the advice given.
- But he didn't think this applied here. The process hadn't begun before Fairway became involved and its involvement was the means by which the transaction occurred. And without Fairway's involvement, Mr N would still have his pension funds intact.

Fairway's response to Mr N's complaint

Fairway didn't uphold Mr N's complaint, saying that it had recommended that he not make the transfer and invest in Harlequin – also noting that he did so anyway on an insistent client basis.

Mr N's representative referred the complaint to this service. And in its submission to us, Fairway set out what it considered to be several key aspects in response to the complaint that had been made, as follows:

- It didn't sell or promote the product to Mr N in any way.
- It would appear that Mr N's reservation deposit was paid at the time of the transfer to the SIPP – it was unclear as to whether Mr N was already committed to paying this when he was initially referred to Fairway. But it wasn't in any case aware at the time that deposits were being paid.
- There was no relationship between Fairway and the introducer - and no financial remuneration (other than the fee charged to Mr N) was gained from it.
- The process to establish the SIPP had already been started when Mr N met with Fairway – but this hadn't been on its advice.

- Mr N's signature on the suitability report demonstrated that he'd received the relevant documents. It was noted in particular that Mr N had said he hadn't received the additional comments attached to the risk questionnaire, but he'd signed Fairway's letter dated 19 September 2011 which said that this had been included.
- It conducted a thorough suitability assessment – it didn't just process instructions submitted by the introducer.
- It was unaware of the financial incentive paid to Mr N or the "introducer agreement" which Mr N had entered into with Harlequin.
- Mr N would have proceeded with the proposition, irrespective of any advice given by Fairway. This was demonstrated by him chasing the progress of the transaction (and making a complaint about this). And Mr N's determination had also been acknowledged by his representative, who'd said that the incentive was the driver behind it.
- It had been asserted that Fairway shouldn't have transacted the business, but its regulatory obligations when it was recommending an opposite course of action were to make the client aware of this and clearly set out the reasons why. It was then up to the client whether they wished to proceed on an insistent client basis.
- They didn't meet with Mr N at any point during the process. No pressure was placed upon him and he was given all the time he needed to consider the documents sent to him.

Our investigator's assessment

As part of her investigation, our investigator had a telephone conversation with Mr N. Mr N told her the following:

- At the time, he had four pensions, but only wanted to transfer two of those.
- He had a gambling problem, and wanted access to extra cash. He'd previously tried to "liberate" his pensions but had been unsuccessful. He then met with the Harlequin "introducer" and was told that the investment would earn a return after two years.
- The introducer told him to invest in the Harlequin property development, with assurances of the income he'd receive in the future. This appealed to Mr N and he thought it sounded like a good investment.
- The introducer said that he'd give him £4,500 of his "commission", which would be called a "business development loan". He would also be paid 10% of any other investment introductions he made to Harlequin. But he hadn't repaid the loan, nor had he introduced anyone else.
- Mr N signed various documents on 6 July 2011, but didn't have any direct contact with Fairway. He discussed anything it sent him with the introducer. But he thought the documents submitted by Fairway weren't the same as the ones which had been sent to him and he suspected that Fairway had changed some of the dates.
- The introducer reassured him that it was a "win-win" investment scenario - the main driver for him being the £4,500 payment.
- But Mr N said that he wouldn't have done it if he was told not to. He would have kept his pensions where they were. He felt that Fairway shouldn't have allowed him to do it, especially as he was a cautious investor and would only have been prepared to take a small amount of risk.

Following her investigation, the investigator wrote to Fairway explaining why she thought the complaint should be upheld. She said the following in summary:

- The process of transferring to a SIPP had started in July 2011, before the advice given by Fairway. The former shouldn't have preceded the latter.
- The advice process needed to take into account the underlying investment – and Fairway was aware that the SIPP funds would be invested in Harlequin.
- Mr N's attitude to risk was assessed as being highly speculative, but the available evidence didn't support this – nor was there evidence to suggest that Mr N had held speculative investments before.
- Regulations required Fairway to gather enough information to demonstrate that it knew its client and that any subsequent advice was suitable for them.
- There was also guidance relating to "insistent client" classifications, in that the advice had to be suitable and it should be made clear that they are acting against that advice.
- It was acknowledged that this guidance was issued after the event complained of, but the investigator nevertheless felt this reflected the expected standards at the time.
- But the investigator was in any case not persuaded that Mr N understood the risks of what he was doing.
- The investment was unregulated and Mr N could lose all of his investment. There was also no analysis or explanation as to how the remaining 70% of the investment would be funded.
- The SIPP application was submitted to the SIPP provider on 5 September 2011 - 14 days before the advice was formally conveyed to Mr N. The SIPP was therefore set up before Mr N had been given any warnings or advice that he shouldn't be transferring his pensions or investing in Harlequin.
- There were also no written instructions from Mr N that he wished to act against the advice – and so it shouldn't have been transacted on an insistent client basis.
- Mr N should have been given the opportunity to consider the advice before the SIPP application form was submitted.
- Taking into account all the of circumstances, Fairway should not have transacted the business

Fairway disagreed, however. Its reasons can be summarised as follows:

- Fairway didn't introduce Mr N to Harlequin and the referral to it by the introducer wasn't made with an advisory process in mind. It was expected to set up the SIPP with the documentation which had been submitted. But Fairway knew that it needed to advise on both the SIPP and the underlying investment.
- The enhanced risk questionnaire, which detailed Fairway's reasons why Mr N shouldn't proceed with the Harlequin investment, was enclosed with the suitability report of 19 September 2011. Mr N signed this to confirm he wished to proceed with the transfers and the investment.
- It wasn't aware at the time that Mr N had previously tried to liberate his pension funds
  – but the fact that this was the case constituted further evidence that Mr N was determined to access additional cash.
- Mr N was always able to contact Fairway, either face to face or by telephone, and it felt that the advice to not proceed with the SIPP or the Harlequin investment

ought to have prompted him to do so. That he didn't was indicative of him viewing the Harlequin introducer as his adviser, and that he was keen to access the promised
£4,500 in return for his investment.

- As to Mr N's, and the investigator's, assertion that Fairway shouldn't have transacted the business, Fairway referred to the FCA Handbook - specifically COBS 10.3. This set out what an adviser needed to do where a client wished to proceed against advice. And Fairway considered that it had adhered to those requirements in making Mr N aware of the very high risk involved.
- There was no adverse publicity relating to Harlequin at the time and so Fairway couldn't have known that Mr N would lose his pension funds.
- Mr N had also complained about what he considered to be the delays in the process, which Fairway believed further demonstrated that he was very keen to proceed.
- It agreed that it seemed the £1,000 reservation fee had been deferred until it could be paid from the pension funds. But it still thought that Mr N would nevertheless have been liable for this even if he hadn't proceeded.
- Although the process to set up the SIPP had started before the suitability report was issued, this could have been cancelled within the cooling off period – and the transfers didn't in fact complete until early November 2011. So there was plenty of time for Mr N to withdraw from the process.
- The guidance referred to by the investigator about insistent clients wasn't published for several years after the time in question. But Fairway nevertheless considered that it adhered to that guidance – it advised Mr N not to proceed, but he chose to do so anyway.
- Fairway had no way of knowing that the property development was an unregulated collective investment scheme in 2011.
- It had no knowledge of the £4,500 incentive which was to be paid to Mr N – this indicated that the investment proposal was high risk and, had it been aware of this, it would have refused to transact the business.
- The suitability report and enhanced risk questionnaire clearly set out the risks of the proposal – and these were sent to Mr N well in advance of the transfers actually completing in November 2011.

In summary, Fairway maintained that its advice was suitable. It said that had it known about the undisclosed factors – the prior attempt at liberation, the gambling problem and the £4,500 incentive payment, it wouldn't have transacted the business. As it was, however, it acted in good faith and adhered to FSA regulations.

As agreement couldn't be reached, the complaint was referred to an ombudsman for review. I note that Fairway also asked for a hearing, but following the investigator's response that these weren't usually necessary, but nevertheless asking it for its reasons for the request, Fairway hasn't responded further on that issue.

Having reviewed the available information, I'm confident that there's sufficient documentary evidence for me to be able to reach a fair and reasonable conclusion on this case. And I'll now set out my findings accordingly.

my provisional findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I'm required by the Financial Services and Markets Act 2000 (FSMA) and DISP to determine the complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the complaint. When considering what's fair and reasonable, I need to take into account relevant: law and regulations; regulators' rules, guidance and standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

The applicable rules, regulations and requirements

When advising upon a SIPP, a financial business needs to also consider the underlying investment to be used – so the suitability of the overall transaction. Chapter 9 of COBS within the regulator's handbook deals with the requirements on a business making a personal recommendation in relation to a "designated investment". At this point, I should say that I'm satisfied that the advisory process which took place here fulfilled the criteria of a personal recommendation. At the time of the advice, a personal recommendation was described in the FSA handbook as being:

"a recommendation that is advice on investments… and is presented as suitable for the person to whom it is made, or is based on a consideration of the circumstances of that person."

This advice was based on an assessment of Mr N's circumstances and objectives, and the wording of the suitability report repeatedly referred to the recommendation which was being made. The recommendation didn't need to be for a client to undertake a transfer, switch or investment – it could be to *not* proceed. So I'm satisfied that this was a recommendation, presented as suitable for Mr N, and which had been based on a consideration of his circumstances – in other words, a personal recommendation. As such, the provisions of COBS 9 relating to personal recommendations on the basis of suitability apply here, rather than COBS 10, which deals with assessments of appropriateness.

I've also noted Fairway's assertion that, at the point of advising Mr N, the Harlequin property investment hadn't been identified as a UCIS, but this is immaterial to our ability to consider the suitability of the advice if the ceding investments and/or the receiving SIPP investment were designated investments.

This is also not a comprehensive list of the rules and regulations which applied, but provides useful context for my assessment of the business' actions here.

COBS 2.1.1R required a business *to "act honestly, fairly and professionally in accordance with the best interests of its client".* And in order to ensure this was the case, and in line with the requirements COBS 9.2.2R, Fairway needed to gather the necessary information for it to be confident that its advice met Mr N's objectives. It also needed to ensure that Mr N had the necessary experience and knowledge to understand the risks he was taking. Broadly speaking, this section sets out the requirement for a regulated advisory business to undertake a "fact find" process.

In this case, Mr N was referred to Fairway by a third-party introducer, which had already carried out the fact-finding process and submitted these details as part of the referral. I'll

comment further on what I consider to be the risks involved on relying upon such a process later in this decision, but where such a situation exists, COBS 2.4.6R says that Fairway would be compliant with the rules in terms of information gathering so long as it could show *"it was reasonable for it to rely on the information provided to it in writing by another person"*.

This is caveated though by COBS 2.4.7E, which indicates that an assessment should be undertaken as to whether that third party is competent to gather and provide the required information. COBS 2.4.8G further indicates that it would be reasonable for an advising firm to rely on information if it was provided by *"an unconnected authorised person or a professional firm"*.

Once the fact finding was complete, COBS 9.4.7R required a business to *"explain why the firm has concluded that the recommended transaction is suitable for the client"* – in other words, it needed to provide its client with a suitability report outlining its advice and the reasons for it.

Of additional relevance to this case is the "insistent client" categorisation attributed to Mr N by Fairway. As noted by Fairway, whilst there now exists specific guidance on this issue, there was no rule within COBS at the time relating to this. For the reasons set out above, my view is that COBS 9 – relating to personal recommendations – applies here. But it's useful to note the provisions of COBS 10.3.3, which related to non-advised sales in situations where a business had told a client that a product or service it had asked them to undertake was inappropriate for them. And specifically that, having regard to the circumstances, if a business deemed it to be inappropriate, it had the choice not to facilitate that service.

Also, to accommodate "insistent client" type situations in the case of opt outs and transfers from defined benefit pension schemes, COBS 5.3.25R existed in an earlier iteration of the handbook which required a business to *"make and retain a clear record"* of its advice not to proceed and its client's instructions to nevertheless go ahead. It needed to then issue a further *"confirmation and explanation, in writing…that the firm's advice is that the (client) should not proceed".* It was also considered good practice for the business to obtain instructions to proceed in the client's own hand - this would constitute more compelling evidence of their insistence to go ahead.

Did Fairway adhere to its obligations?

As I've said above, the starting point for Fairway's involvement in this process was the referral from the third-party introducer. This introducer wasn't regulated and so was unable to facilitate the proposed transaction on Mr N's behalf, which involved transfers into the SIPP from both a PPP and a defined benefit pension scheme.

It's unclear as to how and why Fairway was chosen as the financial business by the introducer. Mr N's representative has suggested a "relationship" existed between the two, with the implication being that there was a financial benefit to Fairway beyond that received from the fee charged to Mr N. The available evidence doesn't support that position, but I don't think it's in any case relevant to the outcome of this case. Irrespective of the manner of the referral, Fairway still needed to adhere to its regulatory requirements as set out above.

Mr N was assessed as having a highly speculative attitude to risk – this was borne of the answers given in the attitude to risk questionnaire and apparently Mr N's own assertion that he wished to take this position with his existing pension arrangements. But to say that the document in question presented a confusing picture would be an understatement. Mr N was confirming that he was a very cautious investor with no investment experience or knowledge, who couldn't afford to take any risks with his money, whilst simultaneously attributing to himself the very highest attitude to risk and a very good understanding - and experience - of investment risk.

Such a document which contains so many obvious inconsistencies and contradictions shouldn't have been relied upon to determine Mr N's actual attitude towards, and capacity to take, investment risk. This would fail the most basic test of knowing your client. These inconsistencies were noted by Fairway, but it was nevertheless willing to accept that Mr N wished to expose his pension funds to the highest level of investment risk, albeit with caveats.

These were contained in the suitability report produced on 19 September 2011 and the risk questionnaire initially completed on 6 July 2011 - and then "enhanced" by 19 September 2011 for, according to Fairway, inclusion with the suitability report.

I'll firstly deal here with my concerns relating to the "enhanced" risk questionnaire. Mr N's representative has said that Mr N didn't receive this – and only had the original version. And I think this is entirely plausible. To explain why, there are several anomalies which should be brought to light. Fairway has said that it referred to the attitude to risk questionnaire in the suitability report, which Mr N signed to attest to its veracity. Fairway's position is therefore that he must have seen the "enhanced" version. But this doesn't follow at all. The reference is simply to the risk questionnaire – no mention is made of its "enhanced" nature since it was first completed some two months previously. I find this odd, given that the "enhancement" in fact constituted the mainstay of Fairway's reasoning as to why Mr N shouldn't go ahead with the proposed Harlequin investment.

I would also question as to why, having decided that it would comment in some detail on the Harlequin investment and its suitability for Mr N in the enhanced risk questionnaire, the suitability report - which, to reiterate, Fairway has said was sent at the same time - contained the following paragraph:

"I must, at this stage, indicate that we can in no way give any advice with regard to the Harlequin Property Investment that you intend to make, as this is outside of our remit of advice and you would have to produce your own due diligence investigations into whether this investment is suitable for you and your pension."

It simply makes no sense for Fairway to have included this when it was quite prepared to comment on it in the accompanying document.

But even if Fairway is able to produce a credible explanation for this, I would question as to why the commentary added to the risk questionnaire wasn't simply included in the suitability report. It would be by far the more obvious place for it to appear – in a document which would bear Mr N's signature to confirm he'd received and read it.

These quite concerning facts relating to the "enhanced" risk questionnaire really do in my view call into question whether that version of it accompanied the suitability report at all. The weight of evidence here makes me think it's more likely than not that the additional

commentary was appended after the suitability report was issued – and quite possibly after the transfers and investment had completed.

And this has clear ramifications for the corresponding weight I can give to the content of that enhanced risk questionnaire. As I've said above, this contained a detailed recommendation not to proceed. But if Mr N didn't receive this, and was guided by the content of the suitability report alone, I must consider what that would have meant to Mr N – and whether it would ultimately have made a difference to the action he took.

So I've considered the suitability report in detail. It had two parts, that relating to the defined benefit transfer and that relating to the PPP. One of the aspects of pension planning which was deemed to be important to Mr N was to be able to personally control his pension fund. I tend to agree with Mr N's representative, however. There's simply nothing about Mr N's circumstances or prior investment experience which would be consistent with this – and Fairway should have challenged it. I don't entirely rule out the possibility that he had the time and volition to control and manage his investments - if not necessarily the experience and understanding to do so effectively - but the prospect seems to me to be quite remote. And in any case, I can't see that investment in a single "bricks and mortar" overseas asset which might well have future liquidity problems would afford him that "personal control" which he's said to have sought.

With regard to the proposed transfer from the defined benefit scheme, Fairway said that Mr N should retain this as the critical yield was too high to make such a transfer feasible. It was also noted that Mr N wanted to retire early, which pushed the critical yield required to match the scheme benefits higher still. Alternatives were set out, one of which was to leave the pension funds where they were. Fairway recommended this, saying that *"it is difficult to find a reason to agree with your request to transfer on a recommended basis"*.

I agree with Fairway that this was the right recommendation for Mr N, given his circumstances and objectives.

But Fairway nevertheless acknowledged that Mr N would still want to proceed, and so it said it had provisions for Mr N to do so on an insistent client basis (which I'll address in the next section). It also said that the flexibility of investment which Mr N was recorded as seeking wasn't available from his defined benefit scheme and that he wanted the possibility of enhanced growth. Fairway did point out, however, that growth rates, and so any prospect of early retirement, couldn't be guaranteed.

Turning to the PPP, the suitability report said that transferring this to a highly speculative SIPP investment should *"only be considered for more sophisticated investors who understand the risks involved and are aware you can totally lose all of your pension fund monies*".

Fairway said that, as the PPP provider also offered higher risk funds, Mr N would be better off keeping it where it was, not only because of the higher charges which would apply in the new plan, but because Mr N had no prior experience in higher risk investments. But again, Fairway said that it would be prepared to make the transfer on an insistent client basis.

It's fair to say that the recommendations were for Mr N not to proceed with the transfers – which I consider to have been suitable advice. But my overall view of the suitability report was that it lacked the impact of the "enhanced" risk questionnaire –

notably because it completely omitted any analysis of the proposed investment itself and its suitability or otherwise for Mr N. I also think that the accompanying commentary relating to him being able to do as he wished with his pension funds would have diluted the sentiment not to proceed.

I've also noted that the suitability report was produced two weeks *after* the SIPP application was submitted. I acknowledge that there's no requirement as to the timing of issuing a suitability report, and often an investment may have been initiated before, or at the same time, as the suitability report was produced. But this would usually be in situations where the advice was to proceed and the client had agreed with that advice.

This is a different set of circumstances. The advice was not to proceed, with Mr N having been categorised as an insistent client who was acting against that advice. And I think the submission of the application before the suitability report was issued might justifiably have conveyed the impression to Mr N that the report was a standard and necessary part of the process – a box which needed to be ticked, rather than information to be given serious thought before the application proceeded.

I also have concerns about the acknowledgement in the suitability report that the transfers would proceed on an insistent client basis if Mr N signed at the end – rather than asking him to put into his own words why he wished to do so. And given the circumstances here, I think it would have been a very valuable exercise – and may well have brought to light the cash amount he was being paid. Fairway mentioned that Mr N had articulated his reasons in his own words, but I can find no documented record of this. And given the lack of contact between the two parties other than by post, I struggle to see what other format this might have taken.

So overall, I don't think the suitability report by itself was sufficient as a recommendation not to proceed. The enhanced risk questionnaire would have been a more compelling document if Mr N had received it – but for the reasons set out above, I have considerable doubts as to whether this was the case.

What should Fairway have done?

By its own admission, Fairway concluded that Mr N didn't understand what he was doing. But it nevertheless categorised him as an insistent client and was prepared to go ahead on that basis. Even if I am to accept that Mr N was very keen to proceed with the investment, which would certainly make him "determined", it seems to me an unlikely, if not impossible, conclusion to reach from a regulatory perspective that Mr N could reasonably be categorised as an insistent client if he didn't understand what he was doing.

But even if I'm wrong on that – and I accept that specific guidance relating to insistent clients wasn't formalised until several years later - this would still fail the most fundamental test of acting in a client's best interests. And it's important to note that this requirement of acting in a client's best interests applied regardless of whether Fairway considers it was acting under the requirements of COBS 9 or COBS 10. Taking account of Mr N's lack of understanding, his contradictory responses relating to risk attitude, his lack of any investment experience and incapacity to sustain any loss, in addition to the opaque and high risk nature of the investment itself, this is, in my view, where Fairway's involvement in the process should have come to an end. This is true irrespective of whether the "enhanced" risk questionnaire was actually provided to Mr N or not.

And whilst I don't strictly need to – as even in isolation my view is that Fairway shouldn't have facilitated Mr N's proposal - to add context here, Fairway has provided details of another case involving Harlequin investment where it declined to advise or proceed with the transfer and SIPP application. My understanding is that it involved opting out of a defined benefits pension scheme and then transferring the accrued benefits – and as the client was still a member of the OPS, it felt it wouldn't be able to assess the value of the benefits to be relinquished. Whilst the circumstances may be different, it's nevertheless indicative of Fairway's preparedness to *not* advise or transact business if it felt doing so would be contrary to the client's best interests.

In its defence of this particular point, I note that Fairway has cited its regulatory obligations to process business if a client insists, so long as appropriate risk warnings are given. But this is of course not the case. Fairway didn't have to transact the business, and as I've said above, declined to do so for at least one other individual.

Would this have made a difference to the outcome?

I've concluded that, given everything Fairway knew about Mr N (even excluding the gambling problem, the incentive payment and the attempts at pension liberation, of which I accept Fairway was unaware), it shouldn't have agreed to process the transfers.

And having declined to do so, it would have been up to it as to whether it charged an "advice fee", depending upon how much work it considered it had put into the matter.

But I'm not persuaded that this would have prevented Mr N from proceeding. I'll explain why.

In a section of the complaint letter entitled "The bung", Mr N's representative said the following:

"Quite obviously this was the "initial driver". The bung was dressed up as a "business development loan". Look at Mr N's circumstances – what part of £4,500 wouldn't have been attractive to him? In the event he thinks he may have received "about £2,000".

Mr N lived from week to week if not day to day with regard to monies. This was a lottery win to him. (The introducer) was selling him the "Caribbean dream" plus there was £4,500 in to boot. As that advert on the telly says "why wouldn't you"? It is not denied that Mr N would have been chasing (the introducer) for the money. It would make no sense if he wasn't two months later.

The reason "why you wouldn't" would be because an authorised and regulated firm, having been appointed to give advice, now apparently on a fee basis, both could and should have stopped it happening."

So Mr N's representative has argued that Fairway should have stopped Mr N doing it. But this is a different argument to saying that Fairway shouldn't have processed the transfers into the SIPP. My view is that Fairway could and should have declined to transact the business, but I don't think this would have stopped Mr N from proceeding.

Mr N had gambling problems, had an outstanding loan, no liquid assets to speak of and very little disposable income. He'd (albeit unsuccessfully) tried to access his pension

funds through “liberation” to access cash and by his own admission was keen to receive the cash incentive promised by the introducer. Given that set of circumstances, I can readily, and with no judgement on my part, understand why.

As confirmed above, Mr N had also been chasing the progress of the transfers and even complained that it was taking too long. This further demonstrates, in my view, his commitment to completing the transaction. And as further evidence of Mr N’s determination, I note his representative said with regard to the suitability report that:

“In any event this letter could have told him he was going to die if he signed it. It wouldn’t have made any difference at all. “The bung” was the driver.”

My understanding is that there were SIPP providers who would accept this type of business on an “execution only” basis – so without the involvement of a regulated business - and who themselves accepted Harlequin investments.

Had Mr N been acting alone, a situation which would in all likelihood in any case not have made him aware of Harlequin or presented the possibility of the cash incentive, I’m not certain that he would have sought other opportunities to complete the transfers and reinvestment. But Mr N wasn’t acting alone, and had the service of a resourceful introducer at his disposal. I say “resourceful” having noted the methods employed by that introducer to bring people on board and the clear commitment he had to investing them in Harlequin – demonstrated best perhaps by the cash payments he was prepared to offer.

It happens to be the case here that Fairway agreed to process the transfers into the SIPP. But if it had declined, as I consider it should, I think it’s more likely than not that the introducer would have found a different way of achieving the same goal without the services of Fairway. And this could have been done by an execution only transfer, even of the defined benefits, to a different SIPP provider.

I’m therefore satisfied that Mr N could, and would, have still proceeded with the transfers and subsequent investment.

Summary

That the business has demonstrated significant failings here is not, in my view, in doubt. As I’ve said, I have doubts relating to the provision of the “enhanced” questionnaire to Mr N and the fact finding with regard to his attitude to risk could scarcely have been more confusing. Fairway also confirmed its view that Mr N didn’t understand what he was doing. Nevertheless, Fairway was prepared to accept Mr N as an “insistent client” and process the transaction, when all other circumstances should have made it obvious that doing so was entirely contrary to his best interests.

That said, I cannot ignore Mr N’s demonstrable determination to access additional cash, which would have been achieved by completing the transfers and reinvestment in Harlequin – and on a fair and reasonable analysis of the facts of this case, my view is that he would have proceeded anyway, even without the involvement of Fairway.

What does Fairway need to do?

For the reasons given, I don't think it would be fair or reasonable to hold Fairway liable for the loss of Mr N's pension funds. I think this would have happened anyway. But Fairway charged Mr N £1,000 to transact the business and my understanding is that this was paid from his transferred pension funds. £500 was in respect of the advisory process and the remainder was charged to set up the SIPP. As my conclusion here is that Fairway should not have facilitated the transfers, I think this should be refunded to Mr N in its entirety.

Fairway might argue that if it had declined to transact the business, this would have been only after it had undertaken its financial assessment, which would have incurred a cost. I think it's doubtful that it would have charged Mr N for this or that Mr N would in any case have been in a position to pay it without the transfers completing – however, if it can provide evidence that it successfully charged other individuals where it declined to transact the business, I may revise that view.

That fee would otherwise have remained in Mr N's pension fund, albeit for the reasons given, still in a SIPP. On the basis that the purchase price (and corresponding deposit) for the Harlequin investment would have remained the same, that additional £1,000 would have likely remained in cash.

Fairway should therefore calculate what that £1,000 would now be worth with the addition of compound interest at base rate, from the date of payment to Fairway to the date of settlement. It should then increase Mr N's SIPP by that amount, taking into account the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr N as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid in retirement. 25% of the loss would be tax- free and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

my provisional decision

My provisional decision is that I uphold the complaint in part. And I'm currently minded to direct Fairway Financial consultancy to compensate Mr N as set out above.

Philip Miller
ombudsman