

## complaint

Mr B complains that Foster Denovo Limited gave him unsuitable advice in 2011, to transfer his deferred occupational scheme benefits (OPS) into a self-invested personal pension (SIPP). That was so that he could invest in Harlequin property.

## background

I issued my provisional decision on Mr B's complaint in October 2018 (see attached). I said I was minded to uphold his complaint for much the same reasons as previously given by our adjudicator, but that I proposed to make a different order for redress. Because of that, I invited further comments from Foster Denovo and Mr B before making a final decision.

Mr B accepted my provisional decision. Foster Denovo didn't. Foster Denovo said, in summary:

- It didn't promote the investments in Harlequin properties or other investments to Mr B or any other client. Prior to being introduced to Foster Denovo Mr B had already taken advice from an unregulated investment adviser.
- The provisional decision should've mentioned this statement made by Mr B - *"I can assure you that I have considered all the risks in the overseas investments proposed and I am satisfied that each investment is sound and worthwhile"*. Given this statement and that Mr B had taken advice from a different adviser, Foster Denovo had no reason to doubt that he had considered all of the risks in the overseas property investment.
- The email of 16 May 2011, is not covered in enough detail in the provisional decision either. Foster Denovo tried to get comfort that Mr B had considered risks such as currency fluctuations, the property price falling or losing all its value and Mr B's reassurance that he had experience in overseas property.
- Foster Denovo thinks that the information given in its suitability letter sets out clearly what Mr B was giving up by transferring out of his pension scheme. The email of 16 May 2011 gave him notice of the further risks.
- It questions how the ombudsman can be *"so sure"* that Mr B would've taken Foster Denovo's advice not to transfer out of his existing scheme.
- The provisional decision fails to recognise the importance of the third party's influence over Mr B's decision. The third party had already built up a relationship prior to the referral to Foster Denovo. Mr B had reserved the two properties before he was introduced to Foster Denovo and before it began its analysis. The third party also introduced Mr B to other unregulated collective investment schemes.
- It's difficult to know how much influence the third party was exerting over Mr B's thought processes. As a result, Foster Denovo finds it difficult to understand how the ombudsman can be *"so sure"* that Mr B would've listened to Foster Denovo's advice. In its experience, people who are set on a course of action become fixated so that whatever their adviser says it does not impact on the decision they have already made.
- Mr B mentioned to our adjudicator that other parties should be investigated regarding their involvement. Foster Denovo feels that Mr B placed more reliance on the advice he received from those outside of the regulatory environment.
- Foster Denovo did make Mr B aware that he was giving up a guaranteed pension income, exposing himself to volatility of pension fund value, no guarantee of future

growth and there was no guarantee his ultimate benefits would be greater than had they remained with his existing provider.

### **my findings**

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I am still of the view that Mr B's complaint should be upheld. My reasons are largely the same as set out in my provisional decision. However, I'll respond to the points that Foster Denovo's made in response to my provisional decision.

Foster Denovo thinks that I should have included more detail from some of the documents. I did not quote from the documents in full - I didn't think that necessary or appropriate given the volume of information I'd looked at. However to be clear, I have considered the full content of each of those documents when reaching my decision.

For the same reasons as explained in my provisional decision, I remain of the view that the suitability letter didn't give Mr B enough information about what he was giving up.

Foster Denovo asks how I could be "*so sure*" that Mr B would've accepted its advice. But that's not the test I have to consider here. The test I have to apply is what "*more likely than not*" Mr B would've done had he been better advised and/or informed. Foster Denovo hasn't said anything to persuade me that more likely than not he would've still proceeded with the transfer, which facilitated the Harlequin investments, even if it advised him against it. Had Foster Denovo advised Mr B that what he intended may not be suitable for his needs, I remain of the view that more likely than not he wouldn't have gone ahead with the transfer or made the investments in Harlequin property.

The complaint I'm considering is brought against Foster Denovo. I set out in my provisional decision the position as regards third parties. That position is unchanged.

For these reasons I uphold Mr B's complaint.

### **my final decision**

I uphold Mr B's complaint against Foster Denovo Limited.

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend the business to pay the balance.

**Determination and award:** I uphold the complaint and require Foster Denovo Limited to pay fair compensation of the amount produced by the calculations set out in my provisional decision - up to a maximum of £150,000 - plus simple interest at 8% a year on the total amount from the date of my final decision until the date of payment. Foster Denovo Limited should also provide details of its calculations to Mr B in a clear simple format.

**Recommendation:** If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Foster Denovo Limited pay Mr B the balance plus simple interest at 8% per year on the balance from the date of my final decision until the date of payment.

This recommendation is not part of my determination or award. It will not bind Foster Denovo Limited. It is unlikely that Mr B can accept my final decision and go to court to ask for the balance. Mr B may want to consider getting independent legal advice before deciding whether to accept my final decision

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 29 December 2018.

Kim Parsons  
**ombudsman**

## Provisional decision

### complaint

Mr B complains that Foster Denovo Limited gave him unsuitable advice in 2011, to transfer his deferred occupational scheme benefits (OPS) into a self-invested personal pension (SIPP). That was so that he could invest in Harlequin property.

### background

Foster Denovo completed a review of Mr B's financial circumstances in May 2011 and issued him with a written report. He'd earlier met with his Foster Denovo adviser in February 2011, to discuss his circumstances. Prior to that meeting, he told his adviser he'd selected two investments, but this was subject to the transfer of his OPS benefits into a SIPP going ahead. He said he wouldn't progress these any further until they had had their meeting.

Mr B said he understood that his adviser couldn't specifically advise on the suitability of the investments and the final decision to proceed was his.

The following was noted about his circumstances at that time:

- Mr B was in his late forties, he was aiming to retire at 65 and was in good health;
- he'd been a member of an OPS from 1988 to 2000;
- he wanted to review his deferred OPS pension as his current employer didn't offer a pension. He could afford to pay around £150 per month into a pension;
- his attitude to risk was seven out of ten. His appetite for investment risk was noted as being 'Moderate to Low Adventurous';
- he was seeking a gross retirement income of £24,000 in today's terms;
- he was living with his partner and their two young children. His partner owned the home they lived in, which was mortgaged;
- he retained an interest in a house occupied by his former wife; and
- he was self-employed, earning around £35,000 per annum.

The adviser's recommendation letter provided details of the OPS benefits. It noted:

- his deferred pension revalued at age 65 would be around £28,000 per annum
- at 65, he could take tax free cash of around £121,000 and receive a reduced pension of around £18,000 per annum;
- the pension was index linked to a maximum of 5% per annum;
- it included a five year guarantee period, plus a 50% spouse's pension;
- a reduced pension of around £7,600 per annum could be taken from age 50;
- the death benefit was around £19,000; and
- the transfer value was nearly £180,000.

The adviser wrote: *"at our meeting you advised me that you wanted to utilise your existing pension fund to purchase property and other investments more accurately matched to your attitude to risk. You felt that these investments would offer you a more appropriate and flexible investment strategy with the potential for a greater capital growth than the fixed percentage increase of RPI attached to your existing scheme"*.

The critical yield required by the new investment to replace the benefits transferred was 7.3% at age 60 and 6.7% at age 65.

The adviser recommended *“taking into account your current age, your age at retirement and the relatively low yield required by the investments in a personal arrangement, I recommend that you accept the transfer value offered by the [OPS] and move the funds to a SIPP”*.

Following the advice, Mr B set up a SIPP. He made no further contributions into the SIPP. He invested in two Harlequin property investments. These were unregulated collective investment schemes (UCIS).

Mr B says he later became aware the advice he'd received may not have been suitable. He complained to Foster Denovo. It rejected his complaint saying:

- it hadn't made the recommendation to invest in Harlequin investments. He had taken advice from a third party and already agreed to invest in Harlequin before taking advice from Foster Denovo;
- Mr B was aware that by transferring he would lose the pension guarantees provided in his OPS; and
- he understood the risk of the Harlequin investments.

Mr B didn't agree and referred his complaint to us.

An adjudicator reviewed the complaint. Our adjudicator upheld the complaint saying:

- there was no actual quantified need for Mr B to transfer his OPS benefits into the SIPP. The revalued, guaranteed, OPS pension was higher from age 65 than the retirement income Mr B said he was seeking at retirement. So, it was open to Foster Denovo to advise against the transfer;
- the guaranteed nature of the OPS wasn't highlighted enough;
- the deferred pension would've provide a significant tax free lump sum;
- Mr B wanted to get involved in property speculation. But, the transfer advice didn't meet the relevant laws and regulations. Firstly, under Rule 9 of the Financial Services Authority's Conduct of Business Sourcebook (COBS), the adviser was required to obtain information about where the funds would be invested and to provide suitable advice. The adviser knew from the outset where Mr B intended to invest the funds once transferred. To advise whether the SIPP was suitable, she ought reasonably to have compared the two options against Mr B's objectives and circumstances, which she did not. Secondly, the promotion of UCIS to the general public is prohibited by the Financial Services and Markets Act 2000, unless certain exemptions apply. The main exemptions relate to certified high net worth or sophisticated investors. Mr B had not signed to accept that he was either of these things, and his circumstances did not suggest he was either. There was no evidence to support the business relying on either of these exemptions. The Harlequin investments were property developments in the Caribbean with a range of risks;
- the risks ought to have been clearly explained to Mr B. There was no history of him having invested in UCIS previously. If Mr B had then *insisted* that he wanted to invest in the Harlequin investments, Foster Denovo should have treated him as an insistent consumer, which it did not; and
- the transfer to the SIPP was more expensive and the investment in Harlequin investments exposed Mr B's pension fund to significant risk. Our adjudicator therefore considered the advice unsuitable. He thought Mr B had lost out because of the advice he was given.

Foster Denovo didn't agree with our adjudicator's view. It made a number of points. I've summarised the relevant points below:

- Mr B doesn't dispute that he knew there was some risk involved if he wanted to get a better investment return;
- Mr B had sufficient time until he reached retirement to make the investments;
- Mr B intended to purchase overseas property and other investments;
- the adviser did not have any links to the introducer and only advised on the regulated SIPP wrapper, not the underlying investments; and
- the adviser did not assess the Harlequin investments.

The firm also pointed out that in its suitability letter it had correctly addressed the following:

- the benefits being given up from the OPS and the critical yield required to replace them;
- the general issue of underfunded OPSs;
- the advantages and disadvantages of the transfer;
- that the adviser did not breach the COBS rules;
- Mr B took advice from another firm regarding the Harlequin investments;
- Mr B was aware that setting up a SIPP required regulated advice;
- there was no referral or fee arrangement between the firm and the introducer;
- Mr B worked in the property industry. He held a number of buy to let properties, so he understood the risk of investing in property.

In addition, the business included additional documents it felt were relevant. These included:

- an e-mail from Mr B to the adviser (16 May 2011) where Mr B said "... values are also open to increase then this is a risk I am prepared for" and "...I am satisfied that each investment is sound and worthwhile";
- details of Mr B's enquiry from November 2011, asking about insurance to cover any Harlequin default;
- a contract for the St Lucia Harlequin investment, signed by Mr B before he met his Foster Denovo adviser. Foster Denovo said this showed Mr B had decided to make the investment before it gave any advice and therefore it should not be liable for the suitability of that investment. It said if the investment had been a success, there would've been no complaint.
- the firm referred to a final decision issued by this service rejecting a complaint in July 2015. Foster Denovo said this complaint was similar to Mr B's; and

It also identified statements made by the adjudicator, which it did not think were a fair reflection of the facts.

### **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. Having done so, I agree with the conclusions reached by the adjudicator and for much the same reasons.

Foster Denovo's position is that it only gave advice on the SIPP wrapper and not on the Harlequin and other land investments because Mr B had already received advice from another adviser.

The suitability report records the following:

#### *"Intended investments*

*We have discussed how you wish to invest your pension funds once they are transferred to the SIPP and you advised me that you would like to split the funds as follows:*

| <b>Investment</b>                      | <b>Initial Deposit</b> |
|--|------------------------|
| <i>Harlequin Property</i>              | <i>£31,500</i>         |
| <i>Los Pandos Vineyard</i>             | <i>£30,000</i>         |
| <i>Equity Investment Portfolio</i>     | <i>£65,000</i>         |
| <i>Cash – prior to payment of fees</i> | <i>£53,146</i>         |

#### *Property and Land Purchase*

*I have not advised on the actual property and land that is to be purchased and therefore cannot comment on how valid they are as investment vehicles or their potential for capital growth. We are not property experts, and cannot comment on the suitability of specific individual properties*

*Once you have put down your initial deposit, I am aware that the respective balances will be due in stages and the level of cash you wish to leave in the SIPP will cover future instalments”*

Foster Denovo advised Mr B to set up a SIPP and transfer his OPS funds into it. This means that it was required to know its client and give suitable advice.

Mr B made Foster Denovo aware that the transfer to the SIPP was made with the intention of investing in Harlequin investments. This SIPP was simply the wrapper to hold the investments. In my view, Foster Denovo couldn't give Mr B suitable advice without considering the investments to be made

Foster Denovo knew of Mr B's intention. If the investments were unsuitable for Mr B then Foster Denovo should not have recommended the transfer into the SIPP.

The Harlequin scheme operated in a very specific way, requiring an initial deposit (30%) and later staged payments as the build progressed. I've seen two invoices from Harlequin requiring Mr B to pay a 30% deposit to purchase a studio/hotel room in the St Lucia property investment (deposit £36,500) and a hotel/studio room in the Dominican Republic investment (£33,500 deposit). According to the invoices, the 'reserved date' for these investments was January and March 2011 respectively, with the deposits being due in April and June 2011. I understand Mr B went on to pay the deposit for these investments out of his SIPP. The SIPP was set up after Mr B received the report from his Foster Denovo adviser in May 2011.

There was no performance history in respect of either these investments. The Harlequin investments might reasonably be described as sophisticated and/or complex investments. They exposed investors to significant risks; especially in light of the lack of any consumer protection. Foster Denovo recorded Mr B's attitude to risk as '*moderate to low adventurous*'. With that in mind, I take the view that Foster Denovo ought to have been aware that an investment into Harlequin was unlikely to be suitable for Mr B given his circumstances.

Foster Denovo ought reasonably to have explained the full extent of the risks involved when assessing suitability. I think that the degree of risk was not adequately explained to Mr B.

It is evident from Mr B's email to Foster Denovo dated November 2011, that he doesn't appreciate the risks involved. After he's told that there is no insurance policy available to cover against Harlequin failing to meet its obligations. He responds:

*“It appears highly unlikely that Harlequin would default (but of course there are no guarantees) so I will have to proceed with the life cover only”.*

The risks for him were significant and I think the information he was given could've been much clearer to enable him to make an informed choice about whether the investments he proposed to make were suitable for him, given his circumstances.

Mr B was employed in the property field. He told Foster Denovo he understood currency risk and was seeking to invest in residential property in Spain. But, I can't see that his own level of knowledge would've caused him to disregard any advice that was offered by Foster Denovo about the suitability of what he was considering. I think Foster Denovo ought reasonably to have done more to make Mr B aware of the nature of the Harlequin arrangement; how it worked and the risks involved.

In my view, the advice given was not suitable.

*What would Mr B have done if Foster Denovo had advised him against the transfer into the SIPP?*

Mr B said had Foster Denovo advised him not to transfer his pension into the SIPP he thinks he would've accepted its advice. I think this likely. Mr B also told Foster Denovo he planned to invest in a Spanish vineyard. But, based on what I've seen and the communications between Foster Denovo and the firm that introduced Mr B to it, I think the primary driver for the transfer was to invest in Harlequin properties. Mr B went on to make two Harlequin property investments. I haven't seen enough to persuade me that he would've still gone ahead with setting up the SIPP if he'd been told about the risks and decided not to invest in Harlequin property.

He told his adviser at the outset that he wouldn't progress the investments he'd selected any further, until after their meeting, and subject to the SIPP being set up. So, although he had 'reserved' the investments before he received the report in May 2011, had he been given more suitable advice I think he wouldn't have gone ahead and paid the deposits. In reaching this conclusion I have also taken into account that the contracts Foster Denovo has referred me to were not signed by the seller until August 2011, so the contracts were not actually 'exchanged' until after Mr B took advice from Foster Denovo.

So, I think he has lost out because of the advice he received from Foster Denovo.

#### *The role of third parties*

While other businesses were involved here, Mr B has made a complaint to us against Foster Denovo. So I need to consider how its actions contributed to his loss.

I find that Foster Denovo is responsible for his loss as the investment could not have taken place without the SIPP being set up and his pension monies being transferred into it. Mr B took and accepted the advice from Foster Denovo to set up the SIPP and transfer his OPS benefits into it, knowing he'd told it of his intentions. In my view, Foster Denovo didn't do enough to highlight the risks involved of his intended actions or advise him against transferring out of the OPS, given what he was giving up and his retirement objectives.

#### *The other decision*

I have looked at the decision that Foster Denovo has referred us to (DRN9016012). But I think Mr B's case is different in a number of ways, so this doesn't change my view. In particular, the complainant in this case was a professional adviser listed on the FCA register. Mr B is not a professional adviser. Nor was he a professional overseas commercial property investor. The ombudsman concluded in this case that the business' views on the suitability of the investment would've had little impact on the complainant's decision to invest. Here, had Foster Denovo advised Mr B appropriately on the suitability of the investments, given his particular circumstances, I have concluded that more likely he would've accepted its advice and not proceeded to set up the SIPP.



*Should Foster Denovo pay compensation?*

This service is aware that a party involved with Harlequin has been charged with fraud offences. A court might therefore conclude that Mr B's loss didn't flow directly from Foster Denovo's unsuitable advice. And on this basis, a court might not require Foster Denovo to compensate Mr B – notwithstanding the clearly unsuitable advice.

But in assessing fair compensation, I'm not limited to the position a court might take. It may be there has been a break in the "chain of causation". That might mean it wouldn't be fair to say that all of the losses suffered flowed from the unsuitable advice. That will depend on the particular circumstances of the case. No liability will arise for an adviser who has given suitable advice; even if fraud later takes place. But the position is different where the consumer wouldn't have been in the investment in the first place without the unsuitable advice. In that situation, it may be fair to assess compensation on our usual basis – aiming to put Mr B in the position he would've been in if he'd been given suitable advice. I think it would be fair and reasonable to make an award, given the specific circumstances of this case. This is notwithstanding any possible arguments about a break in the "chain of causation" and the "remoteness" of the loss from the (poor) advice given. I am satisfied that Mr B would not have bought the Harlequin Properties had it not been for the failings of Foster Denovo's adviser. If the adviser had given Mr B suitable advice, I don't think he would've set up the SIPP to invest in Harlequin property. I don't think the advice he got took into account his best interests or retirement objectives. As a direct result of Foster Denovo's failure to give suitable advice, Mr B invested a large chunk of his pension into a specialised, unregulated investment with a limited track record, foregoing his guaranteed benefits in the OPS.

So I think that it's fair and reasonable to hold Foster Denovo responsible for the whole of the loss suffered by Mr B. I am not asking Foster Denovo to account for loss that goes beyond the consequences of its failings. I am satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I am not able to determine. However, that fact should not impact on Mr B's right to compensation from Foster Denovo for the full amount of his loss.

***fair compensation***

I'm minded to make the following order for Foster Denovo to pay Mr B fair compensation. My aim is to return Mr B to the position he would now have been in if he had received suitable advice. I think that he would have:

- a.) kept his existing pension;
- b.) wouldn't have invested in Harlequin; and
- c.) as a result wouldn't have opened the SIPP (and now be subject to ongoing SIPP fees).

In setting out how to calculate fair compensation my objective is to address these three issues. That is what I'm trying to achieve.

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

In summary:

1. Calculate the loss Mr B has suffered by transferring out of his OPS. To do that Foster Denovo will need to take the following steps.
2. Obtain the actual transfer value of Mr B's SIPP on the date of this decision, including any outstanding charges.
3. If it's possible, pay a commercial value to buy Mr B's share in the Harlequin Property investments.
4. Pay an amount into Mr B's SIPP so that the transfer value in (2) is increased to equal the value calculated in (1). This payment should take account of any available tax relief and the effect of charges. It should also take account of interest as set out below.
5. Pay five years' worth of future fees owed by Mr B to the SIPP, if the Harlequin properties cannot be purchased.
6. Pay Mr B £300 for the distress and inconvenience caused to his retirement planning.

I have explained how Foster Denovo should carry this out in further detail below.

*1. Calculate the loss Mr B has suffered by transferring out of his former employer's OPS.*

Foster Denovo must undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in October 2017.

This calculation should be carried out as at the date of my final decision; using the most recent financial assumptions published at the date of this decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr B's acceptance of the decision.

Foster Denovo may wish to contact the Department for Work and Pensions (DWP) to obtain Mr B's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr B's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation for any past loss i.e. extra net income or tax-free cash Mr B would already have received from the OPS should be paid to him as a lump sum.

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

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

*3. Pay a commercial value to buy Mr B's Harlequin Property investments.*

The SIPP only exists because of the investment in Harlequin. In order for the SIPP to be closed and further SIPP fees to be prevented, the Harlequin investment needs to be removed from the SIPP. I understand this could be done. However, it's not clear if Harlequin will allow this at the moment.

The valuation of the Harlequin investment may prove difficult, as there is no market for it. To calculate the compensation, the business should agree an amount with the SIPP provider as a

commercial value, and then pay the sum agreed plus any costs and take ownership of the investment.

If the business is unable to buy the investment, the business should give it a nil value for the purposes of calculating compensation

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

The SIPP has paid a deposit under two contracts with Harlequin. Mr B agreed for the SIPP to pay the remainder of the purchase price under those contracts. Mr B says those sums have not yet been paid. So no further loss has been suffered. However, if the properties are completed, Harlequin could require those payments to be made. I think it's unlikely that the properties will be completed, so I think it's unlikely there will be further loss. But there might be. Mr B needs to understand this, and that he won't be able to bring a further complaint to us if this contract is called upon. Mr B may want to seek independent advice on how to cancel the ongoing contracts for the remaining amounts.

If Foster Denovo takes over the contract from the SIPP trustees then it may be liable for the remaining amount of the purchase price. As a result any total award that Foster Denovo may have to pay could exceed £150,000. This won't be known until the redress in steps 1 and 2 above has been calculated. If it exceeds £150,000 then this service can't tell the business to take over the contract from Mr B's SIPP. But we can address the ongoing SIPP fees that may continue if the SIPP can't be closed. I have dealt with this in step 5 below.

*4. Pay an amount into Mr B's SIPP so that the transfer value is increased to compensate for the loss. This payment should take account of any available tax relief and the effect of charges. It should also take account of interest as set out below.*

If it's not possible to pay the compensation into the SIPP, Foster Denovo should pay it as a cash sum to Mr B.

Mr B won't be able to pay all of the redress into a pension plan. But had it been possible to pay the compensation into the plan, it would have provided a taxable income. Therefore, the total amount to be paid to Mr B should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr B's marginal rate of tax in retirement. Mr B is likely to be a basic rate taxpayer in retirement. The notional allowance will be a reduction in the total amount equivalent to the current basic rate of tax. Mr B would have been able to take a tax free lump sum. The notional allowance should be applied to 75% of the total amount.

Simple interest should be added at the rate of 8% a year from the date of this decision until the date of payment. Income tax may be payable on this interest.

*5. Pay five years' worth of future fees owed by Mr B to the SIPP, if the Harlequin properties cannot be purchased.*

Had Foster Denovo given suitable advice the SIPP would not exist. It's not fair that Mr B continues to pay the annual SIPP fees if it can't be closed.

To provide certainty to all parties, I think it's fair that Foster Denovo pays Mr B an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed. There are

a number of ways they may want to seek to achieve that. It will also provide Mr B with some confidence that he will not be subject to further fees.

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

*6. Pay Mr B £300 for the distress and inconvenience caused.*

Mr B has been caused a great deal of distress by the loss of his pension benefits. I think a payment of £300 is appropriate to compensate for that distress.

If Foster Denovo pays the loss in full it may take an assignment from Mr B of any claim he may have against any third parties. This may only relate to the pension transfer and investment in Harlequin. Foster Denovo must provide a draft of the assignment to Mr B for him to consider and agree. The assignment should be in place before compensation is paid. Foster Denovo must agree to pay the compensation in full before using this option.

**my provisional decision**

I am minded to make the following order. Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend the business to pay the balance.

**Determination and award:** I am minded to uphold the complaint and require Foster Denovo Limited to pay compensation of the amount produced by the calculations above - up to a maximum of £150,000 - plus simple interest at 8% a year on the total amount from the date of my final decision until the date of payment. Foster Denovo Limited should also provide details of its calculations to Mr B in a clear simple format.

**Recommendation:** If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Foster Denovo Limited pays Mr B the balance plus simple interest at 8% per year on the balance from the date of my final decision until the date of payment.

This recommendation is not part of my determination or award. It will not bind Foster Denovo Limited. It is unlikely that Mr B can accept my final decision and go to court to ask for the balance. Mr B may want to consider getting independent legal advice before deciding whether to accept my provisional decision.

Kim Parsons  
**ombudsman**