complaint

Mr C complains about the advice he was given to transfer his pension to a SIPP by Park Hall Financial Services Limited (PHFS) in 2009. He says this was to facilitate an investment in a 'non-standard' overseas property investment (Harlequin). He says that PHFS did not advise him of the appropriateness of the investment and breached certain Financial Service Authority/Financial Conduct Authority regulations and Principles.

background

I issued a provisional decision on 8 June 2020. A copy is attached and forms part of this final decision. In that decision I explained why my view was that Mr C's complaint fell within my jurisdiction and should be upheld.

Mr C accepted the provisional decision.

PHFS did not accept the provisional decision and made further submissions. Those submissions are lengthy and I have considered them in full. I will not set out every point it has made but in summary it:

- Said that it wishes to complain about how this service has dealt with the complaint.
- Said that Mr C had said his investment had been promoted to him by Alexander James Properties Limited (AJPL) and it introduced him to PHFS. PHFS was approached by AJPL in August 2009 to open a SIPP for Mr C on a 'direct offer' or 'execution only' basis.
- Said that in September 2009 a financial adviser working for another business, Mr F, contacted PHFS on behalf of *"my client* (Mr C)" to clarify details about his existing pension.
- Said that in October 2009 it sent Mr C a 'Direct Offer' pack relating to a SIPP. PHFS then set out some of the content of that pack, including statements to the effect that it was not giving advice about the suitability of the arrangement, Mr C should seek advice if he had any doubts about the whether the pension was suited to his needs and some of the risks of transferring his pension to a SIPP and purchasing property within a SIPP.
- Set out that the SIPP providers terms and conditions set out that it did not provide financial advice as to whether the SIPP was an appropriate product.
- Said that Mr C signed a PHFS form in October 2009 confirming he had received the Direct Offer pack indicating he understood of the requirements of the Direct Offer pack.
- Said it issued a letter to Mr C setting out it had not provided advice as to the SIPP or investment.
- Said that contracts for the sale of the investment property were exchanged in January 2010. Mr C had signed the contract in July 2009. A clause in the contract stated that the buyer would have the option of terminating the contract if the seller was prevented from proceeding with the construction of the property for a period of 12 months or more.
- Said that Mr C purchased another Harlequin property investment at around the same time – financed with a loan of £25,000.

- Set out certain submissions by Mr C referring to information about Harlequin on the internet and Harlequin correspondence – in 2011, 2012 and 2013.

- Referred to Mr F and his employment history with other independent financial adviser's (IFA's). And set out his interactions with Mr C – including carrying out financial planning. It also set out that Mr C signed a form in April 2012 allowing Mr F to replace PHFS as his financial adviser. Mr C had said that Mr F told him about the proposed Harlequin investment. Mr F spoke to Mr C about Harlequin around 8 April 2013 and appeared to have sent him a letter discussing negative developments in respect of Harlequin. It also referred to meeting notes Mr F had made in respect of Mr C.

- Referred to Mr F contacting the SIPP provider in August 2013 regarding releasing cash to allow the transfer of Mr C's holding to another Harlequin property.

- Referred to an individual called 'Mary' who appeared to have acted as an adviser/agent in relation to Mr C's purchase of the Harlequin investment and who Mr C's quotes as having told him in 2011 that there was, *"nothing to worry about".*

- Said that in November Mr C had signed an instruction allowing AJPL to act on his behalf in relation to the SIPP.

- Discussed the findings made in a previous decision by this service that Mr C had brought his complaint within the time limits set out in DISP.

- Referred to previous disclosures Mr C had made – particularly about the transfer of servicing right from PHFS in 2012. And referred to the lack of disclosure by Mr F – who appeared to be still working as a financial adviser.

- Referred to correspondence between employees of this service and Mr C.

PHFS then made submissions as to jurisdiction. In summary:

- It said that in reaching a finding that Mr C ought not to have reason for complaint before 25 January 2013, the 'adjudicator' (I assume PHFS means the ombudsman here) has failed to consider all the circumstances.

- It set out s14(3) of the Limitation Act 1980. And quoted from *Adams v Bracknell Forest BC* [2004] as to what knowledge a claimant might reasonably be expected to acquire and whether a claimant should seek expert advice.

- Said the evidence of awareness depended almost entirely on Mr C's recollection of events. And it has set out why this is unreliable – referencing the transfer of servicing rights and his disclosure of correspondence. It said Mr C's statement that he had never received correspondence from his new financial adviser after the transfer of servicing rights was untrue.

- It said Mr C's original complaint representative would have required him to conduct a search of relevant documents when it represented him.

- No accuracy can be placed on Mr C's version of event with respect to social media.

- All the evidence of knowledge before 15 January 2013 should be considered cumulatively (contacting the Harlequin agent, Harlequin statements, social media, Mr F's involvement, and legal proceedings with respect to a Harlequin employee and its

accountants). The evidence is that there was sufficient information to put Mr C on notice that he had cause for complaint.

PHFS then made submissions about 'fairness'. In summary:

- It referenced Mr C's willingness to withdraw his complaint in 2019. It said that the adjudicator's behaviour and correspondence indicated bias and it wished to raise a complaint about the manner in which this service has handled this complaint, with the independent assessor.

PHFS also:

- Made submissions about the reference to PRIN 2 and PRIN 6 in my provisional decision. It said that Mr C's contractual relationship was clearly set out at outset and he agreed that PHFS were not providing him with advice as to the suitability of the pension transfer and property investment. It made it clear that it could provide this for an additional fee.

- Referred to *Adams v Options Sipp UK LLP (formerly Carey Pensions UK LLP) v FCA* [2020] (Adams v Carey). And that the court held that, *"the scope of the defendant's duty under COBS 2.1.1 to act honestly, fairly and professionally in accordance with the best interests of its client had to identify the relevant factual context."* It said the key fact here was the agreement into which the parties had entered and that the Court held that COBS did not impose an obligation to advise which the parties had not agreed to. It said the same reasoning should be applied here as to PHFS's duties under PRIN. In the circumstances, PHFS's information about the risks of transferring and investing were sufficient to comply with PRIN. This was particularly so given the FSA guidance referred to in the provisional decision was not issued until 2013.

As to the suitability of the investment and causation, in summary:

- It said that the investment was not unsuitable. Mr C knew the risks, agreed to them and was willing to accept them. He had previous experience of investing in off-plan property.

- Said the findings in the provisional decision as to causation were wrong. It said there is no evidence that Mr C would not have switched his pension if PHFS had advised against it. He had already decided to invest in Harlequin and had signed to indicate that in July 2009. He appears to have been acting on the recommendation of Mr F who was a regulated IFA, together with AJPL. He had previously bought off-plan properties in the UK and also another Harlequin property. He decided to continue with the investment in 2013, despite knowing of the concerns about Harlequin. If PHFS had refused to carry out the transaction, Mr F would have found another firm to do so.

- Mr F's loss flowed not from setting up the SIPP but the purchase of the property in January 2010. PHFS advice in relation to setting up the SIPP did not result in investing in the property, particularly given the role of his other advisers.

- Whether Mr C could have mitigated his losses in 2011 and 2012 has not been considered.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

PHFS's submissions about the handling of the complaint by this service.

I am not certain if PHFS is conflating the actions of the adjudicator when dealing with Mr C's complaint and my own as an ombudsman, as it refers to the 'adjudicator' throughout its submissions, even when referencing decisions I have issued. But, be that as it may, this service operates a 'two stage' process whereby the adjudicator sets out their view of the complaint and if that is rejected by either party the complaint is considered afresh and independently by an ombudsman. This is what occurred here.

I would reiterate what I said in the provisional decision about the adjudicator asking Mr C to think about whether he should withdraw his complaint. That was Mr C's decision to take and it was left with him. On reflection he decided to proceed with his complaint.

I am then required to consider Mr C's complaint and arrive at a decision as to jurisdiction and (if necessary) the merits of it. I have reviewed the complaint and arrived at an independent view based on the evidence. I have not been influenced by any act of the adjudicator.

I would confirm that PHFS's concerns have been noted as a complaint about this service's handling of the complaint and that will be considered separately from my consideration of jurisdiction and the merits of Mr C's complaint.

In terms of information sought from Mr F, evidence of any contact/dealings between Mr F and Mr C has been sought from the firms Mr F represented at the time of the Harlequin investment and thereafter. Those firms have supplied their records, which I considered before reaching my provisional decision. Considering the other evidence available, such as that from the SIPP provider, I believe that evidence is sufficient to be able to make a decision as to both jurisdiction and, on a fair and reasonable basis, the merits of the complaint itself. That is acknowledging, as I did in the provisional decision, that Mr F played a role in the pension transfer and investment, as likely did a Harlequin agent.

jurisdiction

I considered the time limits for making a complaint in a decision of 17 May 2019 and in the attached provisional decision. To reiterate, the time limits are contained within the DISP (Dispute Resolution) Rules. The specific time limits that are relevant to this complaint are contained in DISP 2.8:

The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

(1) more than six months after the date on which the respondent sent the complainant its final response or redress determination; or

(2) more than:

(a) six years after the event complained of; or (if later)
(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received.

In my provisional decision I set out and discussed in some detail the evidence or information which was available to Mr C (and which PHFS has reiterated in response to the provisional decision), including social media and statements/correspondence from Harlequin.

It should be noted that my jurisdiction, and time limits in which an individual can make a complaint, are set out in DISP, not the Limitation Act 1980. Having said that, and as also discussed in my provisional decision, I believe it is relevant to consider if Mr C ought to have been put on enquiry (of cause for complaint) by the information he had received prior to 25 January 2013. I do not consider that he needed to know every cause of action he might have against PHFS – only that he may have cause for concern about the acts of PHFS in respect of his pension transfer to the SIPP and subsequent investment.

As I have said, I previously discussed these matters in some detail in the provisional decision (and before that my jurisdiction decision). I did not consider the individual matters which related to jurisdiction 'piecemeal' but considered whether the evidence as a whole would lead to a finding that Mr C did know or ought to have known that he had cause for complaint about PHFS – so that he could explore that further. I would refer the parties to the attached provisional decision.

It seems reasonably clear that Mr C did have discussions over time with Mr F and the Harlequin agent – Mr F was his longstanding financial adviser. But I remain of the view that the evidence does not suggest that Mr F or the agent put Mr C on notice of cause for complaint about PHFS prior to 25 January 2013. The information he received (prior to 25 January 2013) from these parties and Harlequin reassured him that he should not be concerned. The information Mr F supplied to Mr C before 25 January 2013, which I discussed in the provisional decision, was not of a nature that ought necessarily to have given him concern about the actions PHFS took in arranging the pension transfer so that the property investment could be made. I also discussed the delay in property completion and why Mr C's explanations were reasonable as to why he waited for completion. I would not repeat that here but direct the parties to the attached provisional decision. I also discussed the legal proceedings being taken by Harlequin against an employee and its accountants. These were actions Harlequin was taking, not actions being taken against Harlequin that would indicate that to Mr C that Harlequin was failing in some respect.

I would repeat that this was against a background where Mr C was receiving valuations from the SIPP provider in 2012 and 2013 which did not indicate that the investment had failed or was suffering from significant loss. So Mr C was receiving information to the effect that his investment was still secure and had value.

I would refer again to the content of my jurisdiction decision of 17 May 2019 where I summed up by saying that

"I agree that (Mr C) *did not need to know for certain that he had cause of action against PHFS for him to have sufficient knowledge of cause for complaint. But I do not believe that the evidence would show that he was, or ought reasonably to have been aware, prior to 25 January 2013, that he had such cause for complaint. As I said in the* (jurisdiction) *provisional decision, the evidence would not show that he was receiving information of such authenticity before 25 January 2013 that he was put on notice of cause for complaint - when he was also receiving information that social media comment should not be believed and that there were no issues with Harlequin. The time that SIPP providers were apparently told not to accept investment in the Caribbean is non-specific and I do doubt that* (Mr C), *as he says, would understand what that could mean."*

PHFS has said that Mr C's recollections as to such issues as media comment and his knowledge of cause for complaint should necessarily be treated as unreliable – materially because he did not recall the change of agency and some correspondence between himself

and Mr F. I do not believe such conclusions can be drawn. Mr C has explained at some length over time what he was privy to before 25 January 2013 and what he thought, and the available evidence is that it ought not to have been apparent to him that he cause for complaint about PHFS before that point.

My decision remains that Mr C complained with the three time limit set out at DISP 2.8.2(b).

merits of the complaint and causation

I set out in the provisional decision that I recognised the involvement of Mr F – but also that PHFS had arranged the transfer to the SIPP for Mr C in the knowledge that this was taking place so that an investment in property could be made. I said that although Mr F was involved I had not seen any evidence he was doing so representing the firm for which he was working at the time. And I have not seen any evidence he made a formal recommendation. Indeed it is indicative that when he wrote to Mr C in 2013 that he said he could not give any advice on this unregulated investment. And the evidence from the SIPP provider was that it was only PHFS involved in the transfer to the SIPP and the only party remunerated by the SIPP provider for carrying that out.

PHFS has made submissions about its obligations under PRIN. I set out in my provisional decision that, regardless as to whether PHFS carried out the SIPP transfer on an execution only basis (i.e. without providing advice), it did not meet its obligations under PRIN 2 and 6. I have considered what PHFS has said about this and its reference to Adams v Carey.

I have carefully considered the relevant law and what this says about the application of the FCA's Principles. In *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) ("BBA") Ouseley J said at paragraph 162:

"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."

And at paragraph 77 of BBA Ouseley J said:

"Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level Principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."

In (*R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) ("BBSAL"), Berkeley Burke brought a judicial review claim challenging the decision of an ombudsman who had upheld a consumer's complaint against it. The ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment. The ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and had not treated its client fairly.

Jacobs J, having set out some paragraphs of BBA including paragraph 162 set out above, said (at paragraph 104 of BBSAL):

> *"These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles-based regulation described by Ouseley J. was precisely not to attempt to formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6."*

The BBSAL judgment also considers section 228 of Financial Services & Markets Act 2000 ("FSMA") and the approach an ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL provides a strong endorsement for the approach taken by the ombudsman in that complaint, which I have described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

I've considered whether Adams v Carey changes the weight that I should give to the Principles in deciding this case. And, I find that it doesn't. In Adams v Carey, HHJ Dight did not consider the application of the Principles and they did not form part of the pleadings submitted by Mr Adams. It is also the case that that in Adams v Carey the obligations or duties being considered was that of a SIPP provider simply accepting investments in a SIPP, not an IFA proactively carrying out a pension transfer for a client so as to allow a property investment. Adams v Carey says nothing about the application of the FCA's Principles to the ombudsman's consideration of a complaint and does not consider the duties of an IFA in this situation.

As outlined above, Ouseley J in the BBA case held that it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what is fair and reasonable in all the circumstances of a case. And, Jacobs J adopted a similar approach to the application of the Principles in BBSAL. I am therefore satisfied that the FCA's Principles are a relevant consideration that I must take into account when deciding this complaint.

In this case, the business PHFS was conducting was transferring a pension so that a property investment could be made. I am satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to carry out that transfer in the particular circumstances and/or whether advice should be provided. I remain of the view that PHFS did not meet its obligations under PRIN 2 and 6 – it should have known that its actions were likely to bring about a situation which was not in Mr C's best interests. It proceeded in the knowledge that it was arranging a SIPP so that an overseas property (probably unregulated) investment could take place without any knowledge that Mr C, an ordinary consumer, had received appropriate guidance or advice (PHFS submits it received the referral from an unregulated introducer). It was aware the SIPP transfer and investment were linked and the investment could not take place without the SIPP transfer.

I did set out my view as to whether PHFS had caused Mr C's loss in my provisional decision. However I have considered PHFS's further submissions that it did not cause Mr C's loss.

I do not agree that he would likely have proceeded in any event with the transfer if PHFS had acted appropriately and advised against it or not processed the transfer. I set out the reasons why in the provisional decision. As previously discussed, Mr C was not a sophisticated investor and he did not have a great deal of wealth. In terms of investments the evidence indicates that his greatest asset was his pension – and that was modest. If Mr C had been advised against this course of action – one of the material reasons being that he was risking the loss of the

majority of his pension (a risk not discussed by PHFS) – then I believe it likely he would have taken account of that and not transferred or invested. And, as also discussed in the provisional decision, if PHFS had simply refused to enable the transaction then I not believe it is fair and reasonable to assume that another firm would have similarly, incorrectly, processed the transfer.

I acknowledged in the provisional decision that Mr F had been involved and had likely suggested this investment to Mr C. On that basis Mr C indicated his wish to invest before being referred to PHFS. But that does not in my view indicate that Mr F was 'set' on investing in Harlequin or he would have found some way to go ahead despite any action from PHFS. As I have said, but for PHFS's actions I do not believe he would have proceeded with the transaction. I do not believe that because Mr C was persuaded to also invest in another Harlequin property at approximately the same time, means that he was set on doing so with the investment considered here or that this was appropriate for him. Whilst PHFS did set out some of the risks in its 'Direct Offer' pack, they were not comprehensive and crucially did not take into account the risks to Mr C in his particular circumstances.

PHFS has referred to Mr C buying an off-plan UK property to indicate that he was willing to invest in overseas off plan property and that was suitable for him. Mr C has explained that this was not an off-plan property but a property he purchased for his main residence which he was renovating to make it 'liveable' whilst renting a property for his family to live in. So it was not an investment and I do not believe it indicates a propensity to invest in off-plan property, knowledge of such investing or that off-plan property investing was something he necessarily wished to do.

I did in my provisional decision discuss the period for which PHFS would have liability, saying that PHFS's liability did not end because Mr C had 'changed agency' and that it was unlikely Mr C could have mitigated his position in any event. PHFS has said the period 2011 – 2012 has not been considered but my view would remain the same. Despite the Harlequin contractual provisions I have not seen any evidence that in practice Mr C could have extricated himself from the investment in that period. And in any event in that period Mr C would not have thought he needed to. The issues with the investment only became clear to him in 2013.

I do not believe that it can be inferred that because Mr C continued with the investment in 2013 that this indicates he would have proceeded to transfer and invest in 2009 if advised against that. He was in an entirely different situation then, some years later and having now made the investment. It is clear from Mr C's submission that he thought this was now a *fait accompli* and having been put in this position he had no choice but to wait to see what would happen. As I have said, I do not believe that he could extricate himself from the investment in any event.

I am satisfied in the circumstances, for all the reasons given, that it is fair and reasonable to conclude that PHFS should compensate Mr C for the loss he has suffered.

In making these findings, I take account the potential contribution made by other parties to the losses suffered by Mr C. In my view, in considering what fair compensation looks like in this case, it is reasonable to make an award against PHFS that requires it to compensate Mr C for the full measure of his loss. But for PHFS's failings, Mr C's pension transfer would not have occurred in the first place and consequently the investment in Harlequin would not have been made.

As I said in the provisional decision, I am not asking PHFS 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 C's right to fair compensation from PHFS for the full amount of his loss.

fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mr C as close to the position he would probably now be in if he had not been given unsuitable advice.

As discussed, I think otherwise Mr C would have kept his existing pension. But it's unlikely to be possible for PHFS to reinstate Mr C into his previous pension scheme.

There are also a number of possibilities and unknown factors in making an award. While I understand Harlequin Property will allow PHFS to take over the investment from Mr C, the involvement of third parties – the SIPP provider and Harlequin Property – means much of this is beyond this service or PHFS's control.

All the variables are unknown and each may have an impact on the extent of any award this service may make. The facts suggest it's very unlikely that the property will be completed and unlikely that the contract and any future payments would be enforceable – but I can't be certain of that.

While it's complicated to put Mr C back in the position he would have been in if suitable advice had been given, I think it's fair that Mr C is compensated now. I don't think we should wait and determine each and every possibility before making an award. What is set out below is a fair way of achieving this.

In summary, PHFS should:

1. Obtain the notional transfer value of Mr C's previous pension plan, as at the date of my final decision, if it not been transferred to the SIPP.

2. Obtain the transfer value, as date of my final decision, of Mr C's SIPP, including any outstanding charges.

3. And then pay the amount of (1 – 2) into Mr C's SIPP so that the transfer value is increased by the amount calculated. This payment should take account of any available tax relief and the effect of charges.

In addition, PHFS should:

4. Pay any future fees owed by Mr C to the SIPP, for the next five years.

5. Pay Mr C £500 for the trouble and upset caused.

I have set out each point in further detail below.

1. Obtain the notional transfer value of Mr C's previous pension plan if it had not been switched to the SIPP. That should be the value at the date of my final decision.

PHFS should ask Mr C's former pension provider to calculate the notional transfer value that would have applied as at the date of my final decision had he not transferred his pension but instead remained invested.

If there are any difficulties in obtaining a notional valuation then the FTSE WMA Stock Market Income Total Return Index should be used. That is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

PHFS should assume that any contributions or withdrawals that have been made would still have been made, and on the same dates

2. *Obtain the transfer value as at the date of my final decision of Mr C's SIPP, including any outstanding charges.*

This should be confirmed by the SIPP operator. If the operator has continued to take charges from the SIPP and there wasn't an adequate cash balance to meet them, it might be a negative figure.

This could be complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. That may well be the case here.

To calculate the compensation, PHFS should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs, and take ownership of the investment(s).

If PHFS is unable to buy the investment(s), it should assume a nil value for the purposes of calculating compensation.

In return for this, PHFS may ask Mr C to provide an undertaking to account to it for the net amount of any payment he may receive from the investment. That undertaking should allow for the effect of any tax and charges on what he receives. PHFS will need to meet any costs in drawing up the undertaking. If PHFS asks Mr C to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

3. *Pay an amount into Mr C's SIPP so that the transfer value is increased to equal the amount calculated in (1). This payment should take account of any available tax relief and the effect of charges.*

If it's not possible to pay the compensation into the SIPP, PHFS should pay it as a cash sum to Mr C. But had it been possible to pay into the SIPP, it would have provided a taxable income. Therefore the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid. 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.

4. *Pay any future fees owed to the SIPP for the next five years.*

Had PHFS given suitable advice I don't think there would be a SIPP. It's not fair that Mr C continues to pay the annual SIPP fees if it can't be closed.

Ideally, PHFS should take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mr C back in the position he would have been in. But the ownership of the Harlequin property investment can't currently be transferred. It's likely that will change at some point, but I don't know when that will be – there are a number of uncertainties.

So, to provide certainty to all parties, I think it's fair that PHFS pays Mr C an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees) or undertakes to cover the fees that fall due during the next five years. This should provide a reasonable period for things to be worked out so the SIPP can be closed.

In return for the compensation set out above, PHFS may ask Mr C to provide an undertaking to give it the net amount of any payment he may receive from the Harlequin property

investment in that five year period, as well as any other payment he may receive from any party as a result of the investment.

That undertaking should allow for the effect of any tax and charges on the amount he may receive. PHFS will need to meet any costs in drawing up this undertaking. If it asks Mr C to provide an undertaking, payment of the compensation awarded by this decision may be dependent upon provision of that undertaking.

If, after five years, PHFS wants to keep the SIPP open, and to maintain an undertaking for any future payments under the Harlequin property investment, it must agree to pay any further future SIPP fees. If PHFS fails to pay the SIPP fees, Mr C should then have the option of trying to cancel the Harlequin property contracts to enable the SIPP to be closed.

In addition, PHFS is entitled to take, if it wishes, an assignment from Mr C of any claim Mr C may have against any third parties in relation to this pension transfer and Harlequin property investment. If PHFS chooses to take an assignment of rights, it must be effected before payment of compensation is made. PHFS must first provide a draft of the assignment to Mr C for his consideration and agreement.

5. Pay Mr C £500 for the trouble and upset caused.

I believe Mr C has been caused significant upset through the loss of a large proportion of his pension. I believe £500 is fair to recognise this.

If PHFS doesn't pay the compensation within 28 days of being informed that Mr C has accepted my decision, interest, at the rate of 8% simple a year on the fair compensation payable shall be paid from the date of my decision to the date of payment.

Income tax may be payable on any interest paid. If PHFS deducts income tax from the interest it should tell Mr C how much has been taken off. PHFS should give Mr C a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

My understanding is that Mr C's Harlequin investments were deposits. There are therefore more parts of the contract for the remaining purchase price of the property that haven't been paid yet. No loss has been suffered yet for these parts of the contract, so it isn't being compensated for here. But the loss may still occur. If the property is completed, Harlequin could still require those payments to be made. I think it's unlikely there will be a further loss. But Mr C needs to understand that this is possible, and he won't be able to bring a further complaint to us if the contract is called upon.

my final decision

Mr C has complained within the three year time limit set out in DISP 2.8.2(b). Therefore his complaint would fall within the jurisdiction of this service.

I uphold the complaint. I order that Park Hall Financial Services Limited calculate and pay fair compensation as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 11 September 2020.

David Bird
ombudsman

Copy provisional decision

summary of complaint

Mr C complains about the advice he was given to transfer his pension to a SIPP by Park Hall Financial Services Limited (PHFS) in 2009. He says this was to facilitate an investment in a 'non-standard' investment (Harlequin). He says that PHFS did not advise him of the appropriateness of the investment.

background to complaint

I issued a decision as to my jurisdiction to consider this complaint on 17 May 2019. I said that the complaint did fall within my jurisdiction. I said I would now go on to consider the merits of the complaint itself.

PHFS responded to the jurisdiction decision and maintained that Mr C had complained too late and another Independent Financial Adviser (IFA) had liability in any event. I shall call this adviser Mr F. I have read PHFS's response in detail but, in brief:

- It said that Mr C had requested that the SIPP provider remove PHFS as his adviser in 2012.
- Mr C had one adviser from 2009 to the present date – Mr F. The only deviation to this was when this adviser directed him to PHFS to set up the SIPP.
- Mr C has referred to having discussions with his advisor in 2012.
- The contract for Harlequin contained a full refund clause and many people were exercising this.
- It made references to matters in the public domain regarding Harlequin from 2010 to 2012. It said that real concerns were in the public domain and Mr C discussed such with his adviser in 2012. That is constructive knowledge of cause for complaint. Constructive knowledge means enough information to put someone on enquiry. This occurred in 2012.

A *"Transfer of Servicing Rights"* form has now been provided dated 20 April 2012 that appointed Mr F of an unrelated firm of IFA's, as Mr C's new IFA in respect of his SIPP. I shall

call this IFA, firm A. This effectively removes PHFS as the appointed IFA for the SIPP. Mr C says he does not remember signing this but does not dispute the signature on the form is his.

Mr C says that the only records of correspondence he has with the SIPP provider or Mr F are some emails and an update letter about Harlequin from Mr F (I will discuss these in more detail later in this decision).

More information was then sought from Mr C and the financial advisers (other than PHFS) he had dealt with.

On receipt of this information PHFS made further submissions. I have read those submissions in detail, but, in summary it:

- Referred to Mr C's intention to withdraw the complaint in 2019, after his representatives had declined to deal with the complaint further. It said that the ombudsman service investigator *"appears"* to have encouraged Mr C to continue with his complaint – which it does not believe looks impartial, especially when combined with the short timescales in which PFS has been asked to respond during the complaint.
- Said that it had asked for information from Mr F but he had declined to disclose anything. It had received information from the SIPP provider and the businesses that Mr F worked for over time.

- Said that despite Mr F being Mr C's adviser for *"over 30 years"* he had not disclosed any correspondence between them.

- Said that firm A had been acting for Mr C from March 2012 and it therefore took responsibility for all advice about the Harlequin investment from at least March 2012.

- Referred to a letter issued whilst Mr F was at SJP which noted that Mr C was an 'Aggressive investor'. It said that at the time of PHFS's involvement in 2009, Mr C had decided to buy two Harlequin properties.

- Referred to the involvement of a Harlequin agent from another business who was to discuss potential properties with Mr C. Referred to Mr C's other Harlequin property purchase which involved loan agreements and interest payment rebates. It thought this showed he knew what he was doing.

- As well as Mr F being Mr C's financial adviser, Mr F and Mr C were friends and co-investors. They merely needed PHFS to set up the SIPP so he could switch his pension funds to it.

- PHFS gave Mr C the option of receiving advice but he declined. Nevertheless PHFS did *"warn/advise"* of the risk of investing in Harlequin. It highlighted a document that PHFS had issued which warned of the risks of investing in commercial property.

- Referred to an email from Mr F of 3 September 2009 whilst he was working for another business which set out:

  "This is untrue. It is a personal pension. Mr (C) *has never been in, nor had the opportunity to join an occupational scheme. He has been with the same employer all his working life and I have known him professionally since he started".*

- Referred to Mr F noting in 2007 and 2013 that he was of the view that Mr C was an 'aggressive investor'. That the evidence was that Mr F was acting for Mr C from early 2012 – including letters setting out that Mr C had a reasonable knowledge of investments. A 'risk appendix' dated 23 April 2012 set out that, *"An aggressive investor can tolerate both large and frequent fluctuations through time".*

- Mr C would have proceeded to invest in Harlequin in any event. He was in active discussion with the Harlequin agent and Mr F about Harlequin and facilitated another Harlequin investment through a borrowing arrangement. He needed PHFS to help him access pension funds via the SIPP and would have proceeded with another business if PHFS had refused.

- Mr C's relationship with Mr F was in place for a long period of time – prior to 2007. File notes show a 'joint enterprise' - Mr F, Mr C and the Harlequin agent. References are made to sharing commissions and 'kickbacks'.

- Mr C signed a SIPP provider disclaimer stating that he did not wish to receive legal advice.

- Mr F witnessed the signatures on both Harlequin contracts. Mr F did not advise Mr C at any point about avenues to redress his situation re Harlequin. Mr F was seeking to ensure that Mr C remained invested.

- As to limitation, PHFS reiterated that knowledge (for the purposes of the three year time limit) is knowing enough to put on person to enquiry to seek advice. It made reference to legal proceedings on the subject.

- Most of Mr C's disclosures are dated in 2013 but there are two Harlequin updates of 8 November 2011 and 18 October 2012 which refer to, *"court cases, embezzlement, missing funds of 13.5m".* Using the 2011 date this means the period to complain expired in 2014.

- The complaint has been made too late – the statements/warnings of 2011 and 2012 together with the contractual entitlement to a refund and delay in construction means that Mr C is out of time.

- The complaint has been made against the wrong party.

Mr C was asked specifically about the file notes obtained from firm A which included comment that Mr C was potentially to be involved in marketing Harlequin properties. He said that he had not seen these notes before and that any indication he would be involved in marketing Harlequin properties, *"could not be further from the truth".*

He said that Mr F was encouraging him to approach friends, family members and colleagues about buying Harlequin property and that he could receive commission by doing so. Mr C says he didn't want to do this and only told, *"one or two friends, and close family what I had been advised to do"* and that was all.

He said he told Mr F that none of his family had pensions and that he did not discuss financial matters with friends. Mr C says that he only told Mr F that he would *"think about it".* He says that he never had any discussions with the Harlequin agent about promoting Harlequin. He says he was proactively contacted by the Harlequin agent – the Harlequin agent having been informed by Mr F that he was interested in promoting Harlequin – about the Harlequin promotion. But he told her that he had only said he would think about it.

He did speak about Mr F's intentions and said, *"…although I can blame him for the advice he gave me, and what he tried to pursue me to do (along with my partner) I still feel that Park Hall did not advise me correctly, at any time. I have been let down by* (Mr F) *I would agree, and I have been let down by Park Hall, they could, and should have advised me, they didn't, as with* (Mr F)*, there clearly seems to have been one agender* (sic)*, to make money out of me, not to do the thing that they are in business for, and to advise their client".*

He also said that the only record he had of communication between himself and Mr F about Harlequin was the letter of 8 April 2013 he had supplied. He said:

"Communication at the start of the process only really involved (Mr F) *in telling me about Harlequin, he told me it was a good opportunity in increasing the value of my pension pot for retirement. He introduced me to* (the Harlequin agent) *who was the agent. He then told me he would contact Park Hall, as it would have to be them who would have to set-up my SIPP.*

If we communicated about Harlequin, it was either a telephone conversation or at the annual review we had."

Mr C has supplied a significant amount of correspondence, mostly from Harlequin. I have considered that but will not list it all in this decision. But I would highlight the following (particularly with relevance to jurisdiction):

- A Harlequin statement of 8 November 2011 referencing social media, *"defamatory statements"* about Harlequin.

- A Harlequin publication from 12 June 2012 referencing "malicious" social media about Harlequin.

- A Harlequin statement of 18 October 2012 referencing, *"defamation proceedings"* by Harlequin against its former accountants.

- An email of 4 March 2013 supplying a Harlequin note regarding an individual seeking redress on behalf of Harlequin investors.

- A 28 March 2013 Harlequin statement referencing the cancellation of a Panorama programme on Harlequin.

- A Harlequin notification of July 2013 that Harlequin had won a legal action against a construction firm tasked with the building of Harlequin properties.

- An 11 July 2013 Harlequin statement which referenced, *"restructuring options"* to *"ensure effective delivery of investments".*

my provisional findings

I do not agree that the service dealing with this complaint has been anything but impartial. When Mr C was considering withdrawing his complaint because his representative no longer wished to act for him, the investigator merely asked Mr C to take some time to think about that. The decision as to whether to do so was left with Mr C. Having taken some time, Mr C decided to continue, unrepresented. Mr C has been, at various times, given more time to respond generally because of his personal circumstances. Similarly PHFS has been granted more time to present its submissions when requested. It has made significant submissions over time and has had every opportunity to do so.

my jurisdiction to consider this complaint

PHFS maintain that Mr C has complained too late - later than the three and six year periods allowed. I set out in my jurisdiction decision that I agreed that the six year time limit had expired - but not the three year period. I explained why in my jurisdiction decision.

I set out in my jurisdiction decision that the complaint had been made on 25 January 2016. So it was whether Mr C was aware (or ought to have been aware) of cause for complaint before 25 January 2013 that was relevant to the three year limit. If he was or ought to have been aware before that point, then he would be out of time.

The email Mr C has provided and referred to above is an exchange between him and Mr F. On 8 April 2013 Mr F sent an email to Mr C attaching an update as regards his investment in Harlequin.

The update provided by Mr F discusses the current situation with Harlequin, that there are current legal proceedings against the developer of the properties (not Harlequin itself) and that there has been some negative press about Harlequin. In my view it puts a generally positive slant on the situation and does not say that any losses are likely. It says that the outlook is positive for Harlequin. I note that at the end of the update the adviser says he cannot advise Mr C what to do as this was an unregulated investment.

Mr C in his email reply of 9 April 2013 mentions thinking, *"long and hard over the past few weeks, since this all started playing out".*

He says:

"We were extremely frightened at the beginning as we thought I would definitely lose my pension and we thought we would need to pay off the loan. We came to the decision, after I had been talking with you and (the Harlequin agent) *that we would just plough-on, and deal with the consequences if they came."*

And:

"Over recent weeks of course things have come to light (all detailed in your letter) I personally feel a lot more positive about Harlequin. I'm determined, with (individual's) *backing to stick with Harlequin. I want our investments to work and I, like you can see only the positive side. At the same time, I do realise that things can still go wrong, I'm prepared to keep going."*

He refers to friends, *"reading all the headlines over the past few weeks",* which I would assume is likely a reference to published information about Harlequin.

I think it is apparent, as discussed in my jurisdiction decision, that there was information available to Mr C that caused him concern about the investment – and the possibility he could lose the money he

had invested. But the correspondence is after 25 January 2013. I have taken into account that Mr C references information becoming available *"over recent weeks".* This tends to suggest that the negative information about Harlequin had been available some weeks previously to 8 April 2013. But it has not been established that this was before 25 January 2013 and Mr C has previously said that it was only after 2013 that he became aware that there may be a serious problem with his investment.

I have noted that Mr C signed a firm A form that appointed Mr F as his adviser to the SIPP in 2012. But that does not lead to a finding that Mr C had knowledge for cause for complaint at that point. It merely means he is appointing a new adviser. Neither does it necessarily mean that PHFS's liability for its actions in 2009 end at that point (I will discuss this later in this decision).

C says of situation since 2012:

"I never received any official correspondence from him re advise (sic), *from when I now learn the Company he was working for at the time became my advisors. I'm now realising that after that date, because I wasn't aware that they were my advisors, I didn't ask any questions. All I can say is it clearly shows how totally naive I was, I hadn't a clue who was advising me from 2012, and the non-existent advice or communication that I had from Park Hall when I started the purchase of the property with a SIPP from 2009 up until 2012"*

In terms of the statements of 2011 and 2012 they only reference what Harlequin believes is some suspect comments on social media and some actions it is taking. There is no definitive evidence as to what that comment was or whether it had any foundation. The statements in themselves are not of a nature that ought not to have put Mr C on notice that he had cause for complaint against PHFS. And it cannot be assumed that any social media content would or ought to have put Mr C on notice - but we have asked Mr C for more detail about what he was reading on social media. He has said:

"To start with most of the negative comments were mostly found on Tripadvisor and an online "press" service called The Caribbean Press. I came across it, as I think most people would have from links on posts, put onto Tripadvisor. It would be mostly someone who had stayed at the resort, or someone who new (sic) *staff at the resort etc... Most of this was futile stuff, and on Tripadvisor, as you would expect, some investors (I never did) who appeared to know what they were talking about, would shoot the accusations down. Once the resort had been open approx three months then you got some of the people who had stayed at the resort fighting back. Of course, it came to pass that the instigator of the comments would accuse anyone when fighting back, of being someone that's working for Harlequin, a Harlequin investor , who of course is desperate to ensure that this does not affect their investment, and so-on.*

Harlequin also started to send out memos, denouncing these comments, and started to make Tripadvisor remove them, and any new posts as soon as they were put-on. I was told that Harlequin had threatened Tripadvisor with court proceedings. Most of the content of threats were about staff not being paid, how slow the building was going, personal comments about Dave Ames, accusations about what was being done with the
investors money, that Harlequin didn't own the land of some of the resorts that were being built or was going to be built on. They would accuse it all of being a scam, a Ponzi Scheme and so on.

The next website that came along, was dedicated, too it would appear, do as much damage as possible to Harlequin. The site was I think called "Harlecon" Again; it was all
negative articles about the resort, personal accusations against Dave Ames and his family, and again being accused of operating a Ponzi scheme. Within a very short amount of time, the website was taken down. There were accusations that it was an aggrieved? Senior member of an Accountancy Firm that they were using or had used. It went to court, I can't remember if they won the case, but I know that Harlequin were awarded money.

So again, any concerns that I had were alleviated, and any negativity I saw online, I just did not believe, and it was backed-up by the agent and memos that came from Harlequin or from Dave Ames."

It is notable that it is recorded on financial fact finding documents of 2012 and 2013 (which I will refer to later in this decision) that were completed by Mr F at firm A, that the SIPP value (the majority of

which was invested in Harlequin) had not fallen. So it was not that Mr C was aware that he had lost his investment or money at that time.

I would also mention that the Serious Fraud Office did not begin their investigation into Harlequin until March 2013.

So I remain of the view that there was not enough information of any standing that ought to have meant that Mr C has cause for complaint against Park Hall.

non-completion

We have asked Mr C about the lack of completion of his property in 2011. We asked Mr C what he thought when the property wasn't completed on time and whether he asked for his money back after the six months period allowed for in the contract expired. He has said:

"I was aware of all of this before I took on the property. I was told by the "Agent" when I was thinking about investing my Pension. I was not unduly worried to begin with. I had purchased two Off plan houses in the UK before, and they both went over the original completion date for various reasons.

As I recall, it was not (Mr F) *who I spoke too about the delay, I went too the Agent. At the time she was purchasing 4 properties. She assured me again (and another number of times) that it was nothing to worry about.*

A number of the explanations she gave me was that the Caribbean workforce were very laid back, they worked at a slow pace (which Harlequin became very frustrated about) but the workforce needed to be from the Island to ensure the engagement of the Islands population, so it was what it was. Another explanation was that materials were delayed, changes in the design of the complex, the weather.

Some might call me gullible! Maybe in hindsight it was the case, but I really believed in this project and what I was told, and why delays were happening. The reasons from the start that I believed this was all cossha, and did so until it really did start falling apart, the involvement of sports celebrities (Pat Cash & Gary Player) Liverpool Football Club were a partner, running a sports academy, sending ex players like David Fairclough, Ronnie Whelan, Robbie Fowler etc.... The Liverpool youth team stayed at the Resort. They had as ambassadors the likes of Andy Townsend (ex footballer) and TV property guru Phil Spencer. The West Indies Cricket team stayed at the resort when they played a test match in the country (against Australia I think) Then they had (what I would call) minor celebrities staying at the resort. This was posted-out on the Harlequin website, and they would also send out briefings when they had "news" of something big

All of this did give you a sense of security, because naturally you would think that they would not want to be associated to anything which would tarnish their name and credibility.
I didn't at anytime ask for my money back because I believed in the project. I looked at "Trip Advisor" the majority of comments were favourable, of course there were poor comments also, but that's the norm on something like that. When I did point out some of the more drastic comments, I called the agent for reassurance, and she was always able to give me that. You would get emails with the accusations that these were people that wanted to discredit Harlequin, disgruntled ex employees, and also Padraig O'Halloran (who they eventually took to court) so, I would feel confident that there was nothing to it, that there were a lot of jealous people at how well Harlequin were doing. I was constantly being told "keep the faith" there were many investors that are Professional Advisors, Development investors, they wouldn't invest in something that was a scam, they would have done due diligence etc..... I believed! I really did think (and was told until the very end) "It would be sorted out" No I never attempted to claim the money back, and was never advised too. I trusted Harlequin and I trusted the people who should know.

As I stated before, because of the advice, or rather lack of it, I never knew or understood the massive risk I was taking."

Mr C has explained why he waited for completion of his property and that he was reassured that completion would happen eventually. His explanation is reasonable. So I do not believe that Mr C ought to have complained earlier by reason of his property not being completed on time. I would

reiterate the findings that I made in my jurisdiction decision – that there is insufficient evidence that Mr C ought to have been aware that he had cause for complaint about PHFS prior to January 2013.

the merits of the complaint

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

It is clear that Mr F was involved in Mr C's switch of his pension to the SIPP and then investment in Harlequin. He had been Mr C's financial adviser before and after this switch was made – there are financial planning documents from 2007 which have been completed by Mr F for Mr C and then again in 2012 and 2013. As PHFS has said, a transfer of IFA for the SIPP to Mr F of firm A, dated 20 April 2012 and signed by Mr C, was sent to the SIPP provider. And there is also a letter of 20 April 2012 from Mr F of firm A to the SIPP provider asking for various details about the SIPP.

It seems clear that Mr F has been Mr C's adviser throughout and until at least 2017. I agree with the comment made by PHFS that it was only involved in the switch to the SIPP. It was not Mr C's longstanding financial adviser – that was Mr F.

At the point when this switch took place, Mr F was a representative of another firm of financial advisers – which I will call firm B. But there is a lack of evidence that Mr F was representing firm B when he gave advice to Mr C. There is none of the usual financial planning documentation at firm B which would indicate a normal financial planning process

had been followed. And that firm has no record of any service or advice provided in relation to Harlequin. There are no fact finding documents from 2009 or recommendations about the pension switch or Harlequin. There are other financial planning documents at firm B (and firm A) which evidence that Mr F was giving financial advice to Mr C but they are unrelated to the pension advice or investment in Harlequin.

There is a fee agreement with the SIPP application to pay PHFS £650 in respect of the creation of the SIPP. And the SIPP application itself records PHFS as the *"Independent Financial Adviser"* in respect of the SIPP application. There is an accompanying letter from the SIPP provider to PHFS that confirms the switch has completed and £650 will be paid to it.

So it is clear that PHFS arranged the SIPP for Mr C and was remunerated for that. As I say it is also clear that Mr F was involved and Mr C says this was the individual who advised him to invest in Harlequin. I do not believe that is disputed. I have therefore considered carefully what PHFS has said about liability and that liability for the Harlequin investment and any losses should rest with Mr F.

However, PHFS has its own responsibilities and liability in terms of this pension switch and investment.

the Harlequin investment

I'm mindful that in January 2013, the Financial Services Authority (FSA) issued an alert:

"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investment proposed to be held within the new pension. In particular, we have seen advisers moving customer's retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes)…

The cases we have seen tend to operate under a similar advice model. An introducer will pass customer details to an unregulated firm, which markets an unregulated investment (e.g. an overseas property development). When the customer expresses an interest in the unregulated investment, the customer is introduced to a regulated financial adviser to provide advice on a SIPP capable of holding the unregulated investment. The financial adviser does not give advice on the unregulated investment, and says it is only providing advice on a SIPP capable of holding the unregulated

investment. Sometimes the regulated financial adviser also assists the customer to unlock monies held in other investments… so that the customer is able to invest in the unregulated investment…

… where a financial adviser recommends a SIPP knowing that the customer will transfer out of a current pension arrangement to release funds to invest in an overseas property investment under a SIPP, then the suitability of the overseas property investment must form part of the advice about whether the customer should transfer into the SIPP. If, taking into account the individual circumstances of the customer, the original pension product, including its underlying holdings, is more suitable for the customer then the SIPP is not suitable.

This is because if you give regulated advice and the recommendation will enable investment in unregulated items you cannot separate out the unregulated elements from the regulated elements.

… The FSA asks regulated firms, in particular financial adviser and SIPP Operators to report those FSA firms that are carrying on these activities in breach of the FSA requirements…"

This alert didn't make any changes to the regulations, it was not new regulation that had not applied previously. It simply re-stated the principles that already applied, and which were in place in 2009 when the switch and investment took place.

My view is not dependent on comments made by the industry regulator as to the type of process PHFS carried out to facilitate the investment. I take an independent view based on the circumstances of the complaint and take into account the rules, law and good practice in place at the time to arrive at decision that is fair and reasonable in all the circumstances. But my view is consistent with general comments from the regulator about this type of process – that consideration should be given when advice is given to switch or transfer to a SIPP, to the suitability of the overall proposition – both SIPP and investment to be taken out.

The regulator's comments refer directly to the situation here – where advice is being given (or should have) about a SIPP to invest in overseas property. It said that where an adviser recommends a SIPP knowing that the customer will sell current investments to fund overseas property then the suitability of that investment must be taken into account.

The fact that the regulators 'alerts' were given after PHFS undertook the transaction does not mean they are not relevant – all the alerts did was highlight the existing obligations (which applied at the time this transaction took place) when giving advice such as this. It was not setting out new standards for businesses to follow.

I would reiterate that I appreciate that PHFS says it was not giving advice about Harlequin. But as I have said it did recommend the SIPP to be used. Given that it was giving advice as to the SIPP it should then have taken into account the investment to be made of which it clearly was aware.

It is my view that in order to give suitable advice under COBS 9 as to the SIPP, PHFS would have to take into account the investment itself, for which the SIPP was created and was the reason for the whole arrangement going ahead. The SIPP advice cannot be artificially separated from the investment to follow. PHFS has its own responsibilities when providing the advice on the SIPP to make sure it its responsibilities are discharged and it cannot simply ignore those responsibilities.

I agree there might be circumstances where it is appropriate to limit the scope of advice and where that would not necessarily conflict with a business's obligations to act in the best interests of its client and provide suitable advice. But those circumstances do not exist here.

It was not possible to provide suitable advice and act in Mr C's best interests in a situation where PHFS knew the destination of the funds (overseas commercial property) and the SIPP were clearly linked. I am not persuaded that PHFS can limit its regulatory obligations in this way. If PHFS felt that it could not give advice on the investment based on the information it had, then it should have declined to give any advice at all or carry out the transaction.

in any event should PHFS have proceeded with the transfer and investment?

There are overarching reasons why in my view PHFS should not have proceeded with this transaction at all or, even if the transaction could be said to be such, on an execution only basis.

When considering what is fair and reasonable in the circumstances, I am required to take into account relevant: law and regulations; regulator's rules, guidance and standards; and codes of practice. I am also required to take into account, where appropriate, what I consider to have been good industry practice at the time.

I consider that the FCA's Principles 2 and 6 are of particular relevance to my decision about what is fair and reasonable in this case.

The Principles for Businesses, which are set out in the FCA's handbook *"are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G). Principles 2 and 6 say:

> *"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*
>
> *Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."*

The Principles have a wide application, and I need to have regard to them when deciding what is fair and reasonable in the circumstances of this complaint.

PHFS was aware that the intention was to invest in an overseas property investment. Furthermore it was or should have been aware that most of the money for investment derived from a pension to support Mr C financially in retirement.

I do not believe that PHFS met its obligations under the Principles to simply arrange the switch of pension benefits and administer the investment on an execution only basis. It should have been aware that there were very extensive risks inherent in this which Mr C was likely not aware of. To simply process the transaction aware of this information and where it was clear that Mr C did not have the wherewithal to likely appreciate all the risks himself was not acting in its customer's best interest. I do not believe it could ignore these risks and carry out the transaction.

It should have either declined to carry out the transection or provided further guidance or advice on the overall arrangement of transfer, SIPP and investment. I do not believe it acted with due care or in Mrs C's interests in accordance with Principles 2 and 6.

the suitability of the SIPP and investment for Mr C

In considering the suitability of the switch to the SIPP and Harlequin investment I have taken into account the evidence about Mr C's circumstances, investment experience and attitude to investment risk.

As discussed, there is very little financial planning documentation relating to the pension switch in 2009. However there are records which have been supplied by firms which Mr F represented before and after this point.

There is a 'fact find' from firm A of 2007. This records Mr C as willing to take a 'medium to high' risk with regards investments. It also records his salary as about £45,000 a year and that his occupation is 'Director – Operation Manager'. He is recorded as having most of his money in cash (about £40,000) with one stocks and shares ISA. There is one existing personal pension recorded with a value of about £45,000.

There is also a recommendation letter from 2007. In this letter is the following comment in respect of Mr C's attitude to risk.

"Having known you for a number of years, you have not been averse to a more aggressive attitude to investment risk and have seen the benefits of investing long term in these type of funds, at the

same time witnessing the disasters that can beset investments of a high risk nature in the short to medium term.

We discussed your attitude to risk in conjunction with the St. James's Place brochure entitled 'Guide to choosing your attitude to risk'. The brochure explains investment risk in detail and I left it with you for future reference. You confirmed that your attitude to risk with regard to this particular aspect of your financial planning is medium to high, i.e. 4 on a scale of 1-5 where 1 is low and 5 is high."

It should be noted that this was in respect of a modest regular contribution into an ISA.

In 2012 the firm A fact find records that Mr C's SIPP was worth £56,000. It also records Mr C had £5,000 in a bank current account, about £7,000 in a collective share based investment and that his salary was about £40,000 a year. Fact finds of February and November 2013 have similar information, albeit the February fact find has cash savings of about £70,000.

In an recommendation letter of 21 October 2013 Mr F, representing firm A said:

"Your attitude to investment risk

I explained how, when making financial provision to fulfil your objective the degree of risk you are willing and able to take for each one would be a major factor in considering the most appropriate choice of product. Your ability to cope with a loss in relation to the capital invested was also considered during our discussions. Specifically we discussed the effect
the loss of any capital invested would have on your standard of living and we have taken this into account in our recommendations.

We established that your attitude to risk could realistically be described as Aggressive.

The Aggressive Investor aims to maximise long-term expected returns rather than to minimise possible short-term losses. An Aggressive Investor values high returns relatively more and can tolerate both large and frequent fluctuations through time in portfolio value

in exchange for a higher return over the long term. The following criteria may help to ensure that such investors have the best chance of achieving these goals: The portfolio should have at least an approximately 80 percent chance of achieving a nonnegative return over a ten year holding period."

In 2013 a firm A fact find shows that Mr C held most of his money in cash, with a modest share-based investment. There are no recorded high risk investments and no unregulated investments apart from the Harlequin investment. It is indicated that there are some further pension savings with firm B.

In a recommendation letter of 2013 Mr F, representing firm A said:

"We established that your attitude to risk could realistically be described as Aggressive. However, after further discussion when completing the investment objectives section within the platform, you concluded that you were prepared to accept a different level of risk in respect of this GIA investment of Balanced. The Balanced Investor is somewhat concerned with short-term losses and may shift to a more stable option in the event of significant losses. The safeties of investment and return are typically of equal importance to the Balanced Investor. The following criteria may help to ensure that such investors have the best chance of achieving these goals: The portfolio should have at least an approximately 80 per- cent chance of achieving a non-negative return over a five-year holding period. On this occasion you felt that investing in a Balanced fund as opposed to an Aggressive fund, which in actuality is what your attitude to risk is, was more suitable as although you intend for this investment to continue until your planned retirement at 65, which is in 15 years' time, you will have to cash a proportion of it in in five years' time to cover your annual SIPP charges."

You have left £2,500 in cash within your SIPP to cover your charges for the next 5 years, at this point you will need to cash in some of your invested units to pay your charges. You would like to stay ahead of the charges as much as possible and it is your intention with this investment to try and make a profit so that future charges are paid from the money earned rather than the initial £10,000 invested.

Although you have an Aggressive attitude to risk normally, you did not want to risk investing your money into a fund which could have a high chance of volatility and would prefer to have a more balanced investment approach on this occasion.

Again you are aware that there is no guarantee and that your fund could go down as well as up, but you wanted to try and minimise the risk of this happening by investing in a more balanced fund rather than a more aggressive fund."

Mr C was not employed in financial services and his background does not suggest he was a financially sophisticated investor. His salary was about £45,000 per year. It is not recorded on any of the financial planning documents I have seen that he had anything but modest investments in retail collective share-based holdings such as ISA or unit trusts. Mr C had very little in the way of risk-based investments.

Whilst Mr C is noted as an 'aggressive' investor, I have not seen evidence of him entering into high risk or unregulated investments. In fact it seems he had very little experience of risk based investments at all.

The Harlequin investment was an 'off plan' unregulated speculative commercial overseas property investment. It was high risk and the investor faced the real possibility of losing all their money. Because it was unregulated Mr C did not benefit from UK protections – such as that afforded by the Financial Services Compensation Scheme.

Mr C's circumstances do not indicate that he was prepared to lose all the money invested in Harlequin or he could afford to do so. They also do not indicate that he was suited to the risks this investment presented. Of about £61,000 transferred to the SIPP, £42,000 was invested in Harlequin. This was a large proportion of Mr C's pension savings – which were now being put at the risk of total loss. It was clearly unsuitable to place so much of Mr C's pension savings at this risk and he should have been advised by PHFS against doing so.

Mr C's investment experience was very limited and does not suggest that he was an experienced investor who could appreciate all the risks of what he was doing or would not be reliant on PHFS to give him suitable advice and consider his best interests. I have not seen that PHFS gave Mr C enough information to put him in a fully informed position about whether to undertake the pension switch and invest in Harlequin. Mr C was not supplied with any form of recommendation or tailored advice by PHFS as to the suitability of switching his pension to invest in Harlequin.

I do note that Mr C made a deposit for another Harlequin property using a loan. Mr C has said he did this based on the positive information he was being supplied with about Harlequin being a good investment. I do not believe that Mr C making another investment based on the guidance he was being given means that this type of investment was suitable for him. His circumstances strongly suggest that this was not a suitable investment for most of his pension money.

This switch and investment arrangement presented risks which I believe were too high, and unsuitable for Mr C and higher than the level of risk Mr C likely wished to take with so much of his money.

I therefore believe the complaint about the switch to undertake the Harlequin investment should be upheld.

did PHFS cause Mr C's loss

Mr C was dependent on PHFS to act in his best interests. I do not believe he could assess this risk of the overall arrangement of SIPP and investing in Harlequin for himself.

It does not seem to be disputed that Mr C approached PHFS with the Harlequin property investment already in mind. But that was likely a result of a previous promotion of that investment to him – Mr C had not arrived at this decision on his own.

If PHFS had declined to carry out the transfer and investment or advised Mr C that he should not switch his pension or invest in Harlequin I think it more likely that he would have taken account of that

and it would have been persuasive, coming from a professional regulated IFA. I think it is more likely that he would not then have invested or switched and these actions would have changed his motivation to invest in Harlequin.

It follows that he would not have switched, nor needed to have switched, his pension to the SIPP. So neither the SIPP nor the investment would have taken place but for PHFS's actions. Consequently any loss Mr C has suffered through transferring to the SIPP and investing in Harlequin has been caused by PHFS's actions.

The financial loss has flowed from Mr C switching out of his existing pension and into a SIPP. For the reasons I set out below I am satisfied that had Mr C been given suitable advice, the loss would not have been suffered.

Had PHFS advised Mr C correctly I find it very unlikely that Mr C would have tried to find another firm to arrange the SIPP. In any event, I don't think it's fair and reasonable to say that PHFS should not be responsible for its errors because another firm would have made the same mistakes. I think it's fair instead to assume that another firm would have advised against the switch to the SIPP and investment – and Mr C would not have proceeded in that situation. So again, I think the end result would have been that Mr C would not have made the investment or the switch from his existing pension that proceeded it.

It has been suggested that Mr C was very much involved in the marketing of Harlequin investments and was therefore familiar with the operation and risks.

There is a file note that was made by Mr F, in relation to Mr C, when Mr F was representing an IFA unrelated to PHFS. This is dated 15 April 2010:

"I took details for TRUTH and now need to go over it carefully to see that I've got all of the calculations right and show them some scenarios like retiring early or adding more Harlequin properties."

And:

"He said he has been trying to promote Harlequin properties but everybody he speaks to thinks it's too good to be true. I need to examine ways we can get in front of people for Andy as I'm sure Mary has offered him a cash payment for everyone she successfully sells. Could see if I can get in on the TRUTH / My Docs and throw the Harlequin thing in."

There is also a note from 20 April 2010:

"Spoke to him about approaches for Harlequin, suggested that if he referred then on the basis of Truth and My Docs

He acknowledged (Harlequin agent) *had offered him incentives on selling Harlequin Properties. I said I would work as a team with him if he wanted me to go in and talk to them. What I didn't say was to extend it out so that if I managed to find people to refer on I could also ensure* (Mr C) *got his kick back."*

As set out earlier in this decision, Mr C has been asked about these file notes. He has said that it is not the case that he was considering being an 'agent' for Harlequin investments or was interested in promoting them. I have not seen any evidence that he did become an agent or promote Harlequin. It seems to me that the Mr C was advised to invest in Harlequin by Mr F and had discussions with Mr F and a Harlequin agent about doing so. I have not seen evidence that his role was anything but that of an investor, or that he had any specialist knowledge of Harlequin investments.

Rather than Mr C being set on a Harlequin investment he says this was proposed by Mr F as a way to increase his pension. I do not believe Mr C approached Mr F with Harlequin in mind and he was simply persuaded to invest as this was a good idea regarding his future. I do not agree that Mr C would have invested in Harlequin whatever PHFS agreed or did not agree to do.

So I am satisfied that Mr C would not have continued with the SIPP, had it not been for PHFS's failings, and would have remained in his existing scheme. And, whilst I accept that Mr F is likely responsible for initiating the course of action that has led to his loss, I consider that PHFS failed unreasonably to advise against that course of action when it had the opportunity and obligation to do so.

In making these findings, I take account the potential contribution made by other parties to the losses suffered by Mr C, particularly Mr F. In my view, in considering what fair compensation looks like in this case, it is reasonable to make an award against PHFS that requires it to compensate Mr C for the full measure of his loss. But for PHFS's failings, Mr C's pension switch would not have occurred in the first place.

I am not asking PHFS 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 C's right to compensation from PHFS for the full amount of his loss.

I'm also aware that a party involved with Harlequin Property has been charged with fraud offences. A court might therefore conclude that the loss doesn't flow directly from PHFS's unsuitable advice. And on this basis, a court might not require PHFS to compensate Mr C – notwithstanding the PHFS failure.

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 the consumers in the position they would have been in if they'd been given suitable advice.

In this particular case, I conclude that it would be fair and reasonable to make an award, given the specific circumstances. I am satisfied that Mr C would not have made the Harlequin Property investment had it not been for the failings of PHFS. And I consider that PHFS's actions given by the adviser completely disregarded Mr C's interests. As a direct result of PHFS's failure to give suitable advice, Mr C invested his pension into a specialised, high risk, unregulated investment with a limited track record.

period of liability for Mr C's loss

PHFS has submitted that any liability for Mr C's loss would end when 'agency' for the SIPP was transferred to firm A. As discussed, the loss flowed from the lack of suitable advice provided in 2009. Merely because firm A registered itself as the advisory firm for the SIPP does mean that it becomes liable for losses from that point – that were caused by the actions
in 2009. I have not seen persuasive evidence that firm A reviewed the Harlequin investment when the agency for the SIPP was transferred. Having said that it seems to me highly likely that the Harlequin investment was discussed with Mr C in 2013 – because there is record of potentially switching the type of Harlequin property holding Mr C held, with the SIPP provider.

Be that as it may, it does not seem to me that, even if it is argued that firm A could have sought to mitigate losses by attempting some form of sale or transfer of the Harlequin investment after it had assumed agency, this could have taken place. I have not seen any persuasive evidence or other example that would indicate the holding could have been sold back to Harlequin or to another entity that was willing to buy. It does not seem that Mr C's property was ever completed and Harlequin overall was in a distressed state after 2013. So there was not a point where Mr C could have mitigated his losses and sold the investment. Consequently Mr C's current loss flows directly from the action taken by PHFS in 2009. He would not be invested in Harlequin were it not for its actions.

fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mr C as close to the position he would probably now be in if he had not been given unsuitable advice.

As discussed, I think otherwise Mr C would have kept his existing pension. But it's unlikely to be possible for PHFS to reinstate Mr C into his previous pension scheme.

There are also a number of possibilities and unknown factors in making an award. While I understand Harlequin Property will allow PHFS to take over the investment from Mr C, the involvement of third parties – the SIPP provider and Harlequin Property – means much of this is beyond this service or PHFS's control.

All the variables are unknown and each may have an impact on the extent of any award this service may make. The facts suggest it's very unlikely that the property will be completed and unlikely that the contract and any future payments would be enforceable – but I can't be certain of that.

While it's complicated to put Mr C back in the position he would have been in if suitable advice had been given, I think it's fair that Mr C is compensated now. I don't think we should wait and determine each and every possibility before making an award. What is set out below is a fair way of achieving this.

In summary, PHFS should:

1. Obtain the notional transfer value of Mr C's previous pension plan, as at the date of my final decision, if it not been transferred to the SIPP.

2. Obtain the transfer value, as date of my final decision, of Mr C's SIPP, including any outstanding charges.

3. And then pay the amount of (1 – 2) into Mr C's SIPP so that the transfer value is increased by the amount calculated. This payment should take account of any available tax relief and the effect of charges.

In addition, PHFS should:

4. Pay any future fees owed by Mr C to the SIPP, for the next five years.

5. Pay Mr C £500 for the trouble and upset caused.

I have set out each point in further detail below.

1. Obtain the notional transfer value of Mr C's previous pension plan if it had not been switched to the SIPP. That should be the value at the date of my final decision.

PHFS should ask Mr C's former pension provider to calculate the notional transfer value that would have applied as at the date of my final decision had he not transferred his pension but instead remained invested.

If there are any difficulties in obtaining a notional valuation then the FTSE WMA Stock Market Income Total Return Index should be used. That is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

PHFS should assume that any contributions or withdrawals that have been made would still have been made, and on the same dates

2. Obtain the transfer value as at the date of my final decision of Mr C's SIPP, including any outstanding charges.

This should be confirmed by the SIPP operator. If the operator has continued to take charges from the SIPP and there wasn't an adequate cash balance to meet them, it might be a negative figure.

3. Pay an amount into Mr C's SIPP so that the transfer value is increased to equal the amount calculated in (1). This payment should take account of any available tax relief and the effect of charges.

If it's not possible to pay the compensation into the SIPP, PHFS should pay it as a cash sum to Mr C. But had it been possible to pay into the SIPP, it would have provided a taxable income. Therefore the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid. 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.

4. Pay any future fees owed to the SIPP for the next five years.

Had PHFS given suitable advice I don't think there would be a SIPP. It's not fair that Mr C continues to pay the annual SIPP fees if it can't be closed.

Ideally, PHFS should take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mr C back in the position he would have been in. But the ownership of the Harlequin property investment can't currently be transferred. It's likely that will change at some point, but I don't know when that will be – there are a number of uncertainties.

So, to provide certainty to all parties, I think it's fair that PHFS pays Mr C an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees)or undertakes to cover the fees that fall due during the next five years. This should provide a reasonable period for things to be worked out so the SIPP can be closed.

In return for the compensation set out above, PHFS may ask Mr C to provide an undertaking to give it the net amount of any payment he may receive from the Harlequin property investment in

that five year period, as well as any other payment he may receive from any party as a result of the investment.

That undertaking should allow for the effect of any tax and charges on the amount he may receive. PHFS will need to meet any costs in drawing up this undertaking. If it asks Mr C to provide an undertaking, payment of the compensation awarded by this decision may be dependent upon provision of that undertaking.

If, after five years, PHFS wants to keep the SIPP open, and to maintain an undertaking for any future payments under the Harlequin property investment, it must agree to pay any further future SIPP fees. If PHFS fails to pay the SIPP fees, Mr C should then have the option of trying to cancel the Harlequin property contracts to enable the SIPP to be closed.

In addition, PHFS is entitled to take, if it wishes, an assignment from Mr C of any claim Mr C may have against any third parties in relation to this pension transfer and Harlequin property investment. If PHFS chooses to take an assignment of rights, it must be effected before payment of compensation is made. PHFS must first provide a draft of the assignment to Mr C for his consideration and agreement.

5. Pay Mr C £500 for the trouble and upset caused.

I believe Mr C has been caused significant upset through the loss of a large proportion of his pension. I believe £500 is fair to recognise this.

If PHFS doesn't pay the compensation within 28 days of being informed that Mr C has accepted my decision, interest, at the rate of 8% simple a year on the fair compensation payable shall be paid from the date of my decision to the date of payment.

Income tax may be payable on any interest paid. If PHFS deducts income tax from the interest it should tell Mr C how much has been taken off. PHFS should give Mr C a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

My understanding is that Mr C's Harlequin investments were deposits. There are therefore more parts of the contract for the remaining purchase price of the property that haven't been paid yet. No loss has been suffered yet for these parts of the contract, so it isn't being compensated for here. But the loss may still occur. If the property is completed, Harlequin could still require those payments to be made. I think it's unlikely there will be a further loss. But Mr C needs to understand that this is possible, and he won't be able to bring a further complaint to us if the contract is called upon.

my provisional decision

I believe Mr C has complained within the three year time limit set out in DISP 2.8.2(b). Therefore his complaint would fall within the jurisdiction of this service.

I also believe his complaint should be upheld and fair compensation calculated and paid as detailed above.

David Bird
ombudsman