complaint

Mr S, through his representatives, complains about the advice he was given by Pacific IFA Limited in relation to transferring his personal pension and his occupational pension (OPS) into a self-invested personal pension (SIPP).

Mr S's intention was to invest these funds into overseas property with Harlequin Property (Harlequin) which is an unregulated investment. He says Pacific didn't assess the suitability and risks of this investment. The Harlequin investment failed and Mr S lost all his pension funds. He wants to be compensated for his financial losses.

background

Mr S said a third-party financial adviser (F) told him of the Harlequin property investment which promised better returns than his existing pensions and would enable him to retire at 62. It was suggested his pensions could be used to fund these overseas investments and in February 2010 he was referred to Pacific. At the time Mr S was self-employed and had two existing pensions, a personal pension of around £51,000 and OPS benefits of around £54,800. Mr S's wife worked as a personal assistant for F.

Mr S met with a Pacific adviser in February 2010. He signed several forms including a Financial Review Form and a Risk Questionnaire. I understand at least some of these forms had been completed previously with Mr S by F. Mr S also signed a client agreement. Pacific requested details from Mr S's existing pensions. They then recommended that a SIPP was established with Montpelier (now Curtis Banks). Mr S agreed to this recommendation and in March 2010 Mr S's personal pension was transferred to the SIPP and he used the funds to invest in a Harlequin property.

The transfer of Mr S's OPS benefits did not happen until October 2010. In the time between February and October more paperwork was completed with Mr S, including a Pension Transfer Questionnaire and an Investment Risk Questionnaire. In June 2010, Pacific recommended Mr S not to transfer his OPS benefits, however Mr S proceeded in any event and transferred his benefits to the SIPP. He paid £54,800 towards a second Harlequin property in October 2010.

The Harlequin properties weren't completed as planned and the investment failed. Mr S lost all his invested funds. His representatives provided detailed submissions which I all considered but I'm not going to repeat here in their entirety. Amongst other things they said:

- Pacific didn't provide any warnings to Mr S about the potential risks of transferring his pension in February 2010
- Pacific was advising Mr S in relation to both his pensions. They completed a Financial Review Form and a Risk Questionnaire collating Mr S's attitude to risk which wouldn't have been needed if they only facilitated the vehicle for the investment.
- Pacific's paperwork indicates that they recommended against the transfer of Mr S's OPS pension but this was primarily on the basis that there would need to be high returns to match the critical yield. And as the Harlequin returns predicted he could retire at 62, he wouldn't have perceived this as a problem. Pacific didn't state at any point that transferring his pension into the SIPP could put the entire fund at risk.

- The full implications of proceeding on an insistent client basis and the risks involved in the transfer weren't made clear. There isn't sufficient evidence that Mr S was an insistent client. Pacific's process was a "papering exercise".
- Pacific only met with Mr S for ten minutes in February 2010. This wasn't sufficient. They didn't ensure the advice was being understood by Mr S.
- Pacific breached several Conduct of Business rules (COBS) and Principles for Businesses. Amongst other things, they didn't act honestly, fairly and professionally and in Mr S's best interest. They didn't ensure the suitability of their advice. And they didn't give Mr S adequate comparisons about the benefits of his existing schemes and the recommended schemes for him to make an informed choice.
- Pacific couldn't advise on the investment vehicle (i.e. the SIPP) without considering the underlying investments.
- Pacific received commissions which Mr S didn't consent to.
- Pacific received fees for the set-up of the SIPP as well as annual fees for both investments. These fees were dependent on the transaction going ahead so created a conflict of interest.
- Mr S's losses are caused by Pacific's poor advice

Pacific also provided detailed submissions which again I considered in detail but I will only summarise the key elements here. They said:

- The complaint was referred outside the regulator's time limits, so shouldn't be considered.
- Mr S was introduced to Pacific by F and the advice to invest in Harlequin had come from F. Mr S's wife worked for F who was a regulated adviser.
- In February 2010, Pacific only provided a recommendation on the SIPP wrapper to enable Mr S to invest in his chosen investment. They hadn't been asked to advise on the pension transfer, whether to set up a SIPP or not, nor on the Harlequin investment. The division of responsibilities between F and Pacific was clear.
- It seems unlikely that the meeting with Mr S only took ten minutes given much paperwork was completed during this meeting and that the adviser would have had to introduce himself, explain their fees and the SIPPs available. The suitability report of 22 February reflects what was discussed.
- The report shows that when Mr S met Pacific the Harlequin investment was "ready". They assume this means Mr S had chosen the property, paid a reservation fee of £1,000, had transfer valuations from his existing pensions and had been issued with a purchase contract by Harlequin. All that was still needed was the SIPP.
- When it was established that one of his pensions was an OPS pension, Pacific was asked to provide pension transfer advice for this pension. Their recommendation for Mr S to leave the benefits in his OPS was clear. Mr S wanted to proceed anyway and was informed he would be treated as an insistent client. He wrote a letter saying he wanted to proceed and signed an insistent client declaration on 19 July 2010, so there's evidence he was an insistent client.
- Mr S would have known from the previous suitability report that the Harlequin investment was high risk and very speculative and that he could lose all his pension funds.
- Mr S's retirement age was confirmed in both suitability letters as 65 and not 62 as Mr S's representatives state. In some of the paperwork a reference is made to age 63 as this was the normal retirement age of the OPS scheme and comparisons of the OPS and SIPP were made to this age.
- All fees were clearly set out to Mr S and no secret commissions were paid to Pacific.

- Mr S would have proceeded with the investment in any event. He took steps to reserve a Harlequin property before Pacific's involvement which shows he relied on F. There is also evidence that there's a strong relationship between Mr S and his wife and F as Mrs S worked for him. And he proceeded despite being warned that Harlequin was high risk.
- Mr S knew at all times that Pacific wasn't advising him on the investment. He admits that advice came from F. Shortly after Mr S bought the second Harlequin property, he removed Pacific as the servicing agent for the SIPP.
- The SIPP trustees had independent legal duties and were expected to identify anomalous investments and seek appropriate clarification from clients about the suitability of what was recommended. Pacific was never asked for information from the trustee. The actual cause of loss was the SIPP's trustees' independent decision to invest SIPP monies into Harlequin. This breaks the chain of causation between Pacific's advice and Mr S's loss

I issued a provisional decision (PD) in which I found that the complaint had been referred within the regulator's time limits and that I intended to uphold Mr S's complaint.

Mr S accepted this decision. Pacific, through their representatives, disagreed both with my findings on jurisdiction and merits and provided further detailed submissions.

My findings

<u>jurisdiction</u>

In my PD I said the following:

Pacific raised concerns that Mr S didn't complain within the regulator's time limits which are set out in the DISP rules in regulator's handbook.

DISP 2.8.2R says:

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

(1) more than six <u>months</u> after the date on which the <u>respondent</u> sent the complainant its <u>final response</u> or <u>redress determination</u> or <u>summary resolution communication</u>; 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.

Pacific issued their final response letter on 11 November 2015 and this service received Mr S's complaint form and accompanying documents through his representatives by email on 25 April 2016, so within six months of the final response letter.

I also looked at the six-year limitation. Mr S complained about advice given to him by Pacific between February and October 2010. He sent a letter of complaint together with a complaint form to this service on 8 September 2015 which we received on 12 September 2015, so within six years of the events Mr S is complaining about. We forwarded his complaint to Pacific on 22 September 2015 with the request to investigate it.

Pacific disputes that this letter constituted a complaint as defined by DISP as they say Mr S didn't allege he suffered any financial loss, material distress or material inconvenience.

However, I disagree. In the letter Mr S said:

'I was advised back in 2010 to move my pensions into a Monpelier [sic] SIPP to facilitate the purchase of two Harlequin Hotels and Resort Properties.'

'Because of the Harlequin situation, I am now seeking compensation for what I consider to be inappropriate advice received and I understand you are able to make a complaint to the company on my behalf, which I would appreciate if you could on my behalf.'

In the accompanying complaint form he said:

'I was advised to invest my pensions into purchasing two Harlequin Hotel and Resorts Properties back in 2010. I believe the Harlequin situation is well known but I believe the advice I was given is inappropriate. I also believe that the full risk of doing so was not totally explained to me.'

The fact that Mr S was seeking compensation, against the background that the Harlequin investments at this stage had been worthless, implies to me that he alleged having lost out financially. So I'm satisfied Mr S's letter of 8 September 2015 meets the DISP definition of a complaint.

I note that Pacific also raised concerns that the complaint raised in September 2015 was significantly different to the one raised in April 2016 after the final response had been issued. They say in Mr S's original complaint he complains about advice to invest into Harlequin properties which Pacific says they didn't do. This is what they addressed in their final response letter. He didn't complain about the recommendation of the SIPP or about Pacific's recommendation not to transfer his OPS pension.

The complaint brought by Mr S's representatives in 2016 is broader and complains about Pacific's conduct in respect of Mr S's pension transfer into a SIPP and the subsequent investments. It doesn't mention that Pacific advised Mr S to invest into Harlequin.

Pacific says the second complaint was a new complaint that was raised in April 2016, so more than six years after Pacific gave its recommendation on the SIPP in February 2010. Mr S's first Harlequin property was meant to be completed by the end of 2011, so they say he would have been aware of having cause for complaint in early 2012 when the property hadn't completed as planned. So Pacific thinks Mr S also didn't complain within the three-year part of DISP 2.8.2 (2) R.

Again I have to disagree with Pacific here.

Mr S had sought professional advice after the initial complaint which led to more detailed and precise arguments in 2016 through his representatives. However, as far as I see it, the substance of Mr S's complaint throughout is that he ended up transferring his pensions into a SIPP and into Harlequin investments. In 2015 he complained about inappropriate advice and that risks weren't explained. Essentially, he's unhappy that he has lost his pensions. I don't think this has changed at any point.

I think it's clear from Mr S's submissions (both in 2015 and 2016) that he's unhappy with Pacific's advice and involvement in the Harlequin transaction and he considers them responsible for his losses. So I don't think his submissions in April 2016 are fundamentally a new complaint.

Having considered all available evidence I'm satisfied that Mr S raised his complaint in September 2015 within the regulator's time limits and I can continue to consider the merits of this complaint.

Pacific's comments after my PD and my findings

Pacific remain of the opinion that Mr S's complaint in 2015 didn't satisfy the definition of a complaint in DISP as he didn't allege a loss. They refer to dictionary definitions of the words "allege" being defined as "declare to be the case, especially without proof". And "declare" being defined as "announce openly or formally", "pronounce to be something" or "…assert empathetically…". Pacific says there was no express declaration or open announcement that Mr S had suffered a loss and a claim for compensation is not the same as an allegation that a loss has been suffered.

Pacific says it was wrong for me to rely on the background that the Harlequin investments at this stage had been worthless. There is nothing in the definition of complaint in DISP which refers to the background and there's no allegation in Mr S's letter that the Harlequin investments were worthless. An inference falls short of the required "allegation".

Mr S said in his complaint letter "I believe the Harlequin situation is well known". I mentioned that the investments had been worthless by this stage to illustrate what Mr S was likely referring to. However, even if I ignore this and only take into account what Mr S actually said in his complaint letter and complaint form, I'm still satisfied his submissions amount to a complaint as defined in DISP.

The complaint definition is DISP requires the complainant to allege he *"has suffered (or may suffer) financial loss, material distress or material inconvenience."* Mr S said he was seeking compensation. Compensation is an award "in recognition of loss, suffering or injury". Mr S didn't explicitly say he suffered (or may suffer) a financial loss or distress or inconvenience. However, the fact he said he was seeking compensation in my opinion implied without question he thought he suffered or may suffer one of these. And I consider this implication is sufficiently strong to meet the requirement of DISP of an allegation. There is no other relevant reason why Mr S would ask for compensation unless he was alleging there was a loss, distress or inconvenience.

I would also like to note that Pacific treated Mr S's submissions in September 2015 as a complaint and issued a final response letter.

In summary, I still consider Mr S raised a complaint - as defined in DISP - in September 2015.

Pacific also says the event Mr S complains about is the advice provided by them which predated September 2010 and so neither Mr S's complaint in September 2015 nor the complaint correspondence received by this service in May 2016 fall within the six-year time limit as set out in DISP.

I'm not sure what point Pacific tries to make here. As I said in my provisional decision the advice Mr S is complaining about was given from February 2010 onwards. So the six-year time limit would expire in February 2016 at the earliest. As explained previously I consider the complaint was made in September 2015, so within six years of the event Mr M is complaining about.

As the complaint has been raised within the six-year time limit, the three-year limit in DISP isn't relevant.

Having considered Pacific's comments with regards to jurisdiction, I remain satisfied that the complaint has been raised in time and that I can consider the merits of Mr S's complaint.

Merits of the complaint

In my provisional decision I said the following:

SIPP recommendation in February 2010

In Pacific's suitability report dated 22 February Pacific said:

'*You were introduced to Pacific by your IFA as you have chosen to purchase an offshore property from Harlequin and are going to utilise your pension funds to generate (initially) the deposit for the investment. You already have details of your pensions via [name of adviser] and you have the investment ready but your IFA does not deal with SIPPs and so we are looking at the wrapper for you. Our advice therefore is only on which SIPP provider will allow you to self invest.'*

They went on to explain that normally they would arrange a suitable portfolio for clients but in this instance they weren't giving formal advice on the investment. They would only give advice on the suitability of the vehicle with which Mr S could carry out his objective to proceed with the property investment via his pension fund.

I don't think it's in dispute that the original idea and recommendation to invest in Harlequin came from F. It seems F wasn't able to recommend a SIPP that allowed the Harlequin investment as he was a tied adviser, so Pacific got involved. I appreciate that F only asked Pacific to limit their advice to recommending a SIPP. However, when recommending the SIPP Pacific should have also considered the suitability of the underlying investment which they knew was an overseas property investment by Harlequin.

COBS 9.2.2R requires a firm to obtain the information necessary about its client to have a reasonable basis for believing its recommendation 'meets his investment objectives', that the client is able to 'bear any related investment risks' and that he had 'the necessary experience and knowledge' to understand those risks.

So whilst this is essentially setting out the requirement to carry out a fact find, it requires an understanding of the client's objectives – and the risks related to those objectives. It means that a firm cannot ignore the client's intention of investing into an unregulated or high-risk investment. If it doesn't consider this to be suitable in the client's circumstances, it should say so.

In 2013 the regulator became aware that a large number of businesses were misinterpreting what the rules required them to do. It issued an alert which said:

'The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes.'

'Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.'

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

I appreciate that this alert was issued after Pacific gave their advice in 2010. However, this alert didn't mark a change in regulations. It was just a reminder of how advisers were expected to act. Pacific says the adviser who gave Mr S advice in February wasn't qualified to give pension transfer advice. However, as explained above Pacific still needed to consider the suitability of the underlying investments when recommending a SIPP. If this particular adviser wasn't able to do this, Pacific needed to have brought in a different adviser. I also don't think they could have reasonably relied on Mr S already having received advice from F. They didn't know what Mr S had been told by F.

Before recommending a SIPP, Pacific should have assessed the suitability of the Harlequin investment and if found unsuitable for Mr S not recommended the SIPP. Looking at the paperwork Mr S completed which contains information about his circumstances and questions around his attitude to risk, I'm satisfied that the Harlequin investment wasn't suitable for him. And I think this should have been evident to Pacific as well.

The SIPP was only needed to facilitate the investment into Harlequin as this wouldn't have been possible within Ms S's existing pension plans. The investment into unregulated overseas property is a high risk and specialist investment which would only be suitable for the most experienced investors. Pacific did acknowledge in their report that the investment was very high risk and that Mr S could lose all of his funds.

At the time of the advice Mr S was 58 years old and self-employed with annual earnings of around £26,500. The Financial Review Report states his intended retirement age was 65. He had a personal pension funds of around £51,000 and an OPS pension with a transfer value of around £54,800. Other than that he had joint savings with his wife in a bank account worth

£27,000 and an ISA of £11,000. He held shares with his wife valued at £120,000. Mr S told us that these were shares his wife had inherited from her father.

Based on the above I'm satisfied that Mr S wasn't an experienced investor. Pacific's suitability report also acknowledges that Mr S describes his investment experience as "about as much understanding/knowledge as the next person" and based on the answers he gave in Pacific's Attitude to Risk Questionnaire his attitude to risk was balanced. In a different section of the form Mr S's attitude to risk with regards to pensions is marked as "4" which is the highest risk category marked as "adventurous". However, I can't see how this fits in with the rest of the information in the forms.

Even if Mr S was prepared to take some risk, he also only had about seven years until retirement so it would have been difficult to make up any substantial losses to his pension in this short amount of time. Given his circumstances I don't think he had the capacity to take such a high risk and losing his funds would have sincerely affected his financial security in retirement. So the investment was unsuitable for him and consequently so was the SIPP in this instance.

Pacific gave Mr S unsuitable advice. They shouldn't have recommended the SIPP and should have advised Mr S instead that his intended investment into Harlequin wasn't suitable for him as it was too high risk for him.

Pacific's comments after my PD and my findings

Pacific accepts that COBS 9.2 was to be followed when recommending the SIPP wrapper to Mr S. However, they say it's a misinterpretation that COBS 9.2.2R requires Pacific to consider the suitability of the underlying investment.

For reference I include the wording of COBS 9.2.2 R at the time of the advice given.

(1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:

(a) meets his investment objectives;
(b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and
(c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.

(2) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.

(3) The information regarding the financial situation of a client must include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.

Pacific says COBS 9.2.2R(1) required them to have a reasonable basis for believing that the specific transaction to be recommended satisfied each test as set out in sub paragraphs (a) to (c).

They say if my finding that the Harlequin investment was Mr S's investment objective was correct, then this would mean a recommendation against the establishment of the SIPP - and therefore not meeting his investment objective to invest into Harlequin- would be unsuitable. Pacific says this is irrational as I decided in my provisional decision that Pacific should have recommended against the SIPP.

Pacific also says the misinterpretation of COBS 9.2.2R (1) can be seen in how I applied the test under subparagraph (b). This requires the adviser to have a reasonable basis for believing the customer can "bear any related investment risk consistent with his investment objectives". Consistent means "the same as" or "in harmony with". Pacific points to COBS 9.2.2R (2) which they say prescribes what investment objectives are. This includes the customer's preference for risk taking and his risk profile. Pacific says reading the provisions in (1) and (2) together means the customer must be able to financially bear any related investment risks that are the same as his preferences for risk taking and his risk profile. So COBS 9.2.2R (2) provides the measure or level of risk against which the adviser then has to conduct their assessment under COBS 9.2.2 (1) (b).

I have to disagree with Pacific that I've misinterpreted the provisions in COBS 9.2.2R. Although it's correct that information regarding the investment objectives as described in COBS 9.2.2 (2) does include preferences regarding risk taking and the customer's risk profile, it must also include information about the length of the investment and the purpose of the investment.

Pacific has acknowledged that the relevant investment here is the SIPP. And the purpose of the SIPP was the investment into Harlequin. There was no other reason to establish a SIPP. I've never said Mr S's only investment objective was to invest in Harlequin. I said this couldn't be ignored. A usual objective when doing anything with one's pension is for example to maximise benefits in retirement in line with one's attitude to risk. However, I'm satisfied the underlying investment here is part of Mr S's investment objective.

Pacific had to have a reasonable reason for believing '*that the specific transaction to be recommended'* was as such that Mr S could financially bear any *'related investment risks'.* I consider the underlying investments in the SIPP to be risks that are related to the SIPP. In fact assessing the risk and suitability of a SIPP without knowing what a customer would invest in within the wrapper, is not reasonably possible.

Recommending against the SIPP - as Pacific should have done - wouldn't have breached suitability requirements of COBS 9.2.2. A customer might have conflicting objectives, for example someone might want to take absolutely no risk with their investment, but would like to receive an income which can't be achieved without taking more risk. In these circumstances a recommendation that meets these requirements as much as reasonably possible and still is in line with someone's attitude and capacity for risk, can be suitable.

COBS 2.1 also needed to be considered by Pacific which is to act honestly, fairly and professionally in accordance with the best interests of its client. Pacific knew Mr S was only intending to transfer into a SIPP to invest into Harlequin and from the information available to them this was a high-risk investment which he didn't have the capacity to take. So a recommendation of a SIPP to facilitate this unsuitable investment wasn't in Mr S's best interest.

Pacific says this service must have regard to relevant law which includes a high court judgment *Russell Adams v Options Sipp UK LLP (formerly known as Carey Pensions UK LLP)*. In the judgment it was found that the essence of the contract between the client and the SIPP provider was execution-only and the client was to be responsible for their own investment decisions. The judgment found contractual terms between the parties had to be taken into account. COBS 2.1.1 couldn't be construed as imposing an obligation on the SIPP provider to advise.

Pacific says similar principles should apply to this complaint. They made it clear in the suitability report that they would only advise Mr S on the SIPP and not the underlying investments. They say consequently COBS 2.1.1 didn't impose a duty to advise on the underlying investment as it fell outside of the retainer/contract.

I've considered the judgment, however, I think the circumstances in this complaint are significantly different. Pacific didn't act on an execution-only basis. They were giving advice on the SIPP, so the regulatory obligations of COBS 9 did already apply. And as explained above part of the suitability assessment of the SIPP would have included the suitability of the underlying investment.

COBS 2.1.2R sets out clearly that a firm must not seek to exclude or restrict any duty or liability it may have to the client under the regulatory system. So Pacific couldn't limit their obligation in COBS 9 to assess suitability of the underlying investment by taking instructions to only consider the SIPP wrapper in isolation.

Pacific argues that COBS 9.2.2R is caveated by the words "giving due consideration to the nature and extent of the service provided"; the words "extent of the service provided" being a reference to the extent of the advice to be provided. They say it follows that the application of COBS 9.2.2R is directly affected and potentially limited by the extent of the agreed retainer.

The obligations in COBS 9.2.2 R do only apply to the advice Pacific gave which I accept is the SIPP advice in this case. However, as explained above the suitability of a SIPP can't be considered without assessing the underlying investments. So I disagree with Pacific's argument that COBS 9.2.2 R itself is potentially limiting their obligations in this respect.

Pacific also refers to the judge's considering the relevance of thematic reviews, guidance and alerts published by the regulator between 2013 and 2017. The judge concluded that these had no direct bearings on the matter he had to decide as they were published after the event. Pacific argues this means this service can't consider the 2013 alert I referred to in my PD either. Instead, Pacific says this service is required to apply the usual principles of construction to the COBS Rules that were prevailing at the time of the advice in question.

As explained above I'm satisfied that in 2010 the provisions in COBS 9.2.2 required Pacific to assess the suitability of the underlying investments when recommending the SIPP.

So in summary, I'm still satisfied Pacific shouldn't have recommended the SIPP in these circumstances.

Advice to transfer Mr S's OPS pension benefits into a SIPP

In my PD I said:

Pacific issued a suitability report to Mr S on 22 June 2010. The accompanying letter said their recommendation was for Mr S to retain his benefits in the OPS scheme. If he wanted to leave his pension as it was, he should sign the enclosed Client Declaration to confirm his acceptance of Pacific's advice. The declaration said:

'I confirm that I have read and understood the report given to me by my adviser in relation to the transfer of the deferred benefits held in my ex-employer's pension scheme. I accept the recommendation to leave the benefits within my ex-employer's pension plan.'

They also explained that if Mr S still wanted to proceed, they would require a signed declaration stating he wished to proceed with the transfer after receiving Pacific's full advice.

The report compared Mr S's OPS benefits with benefits he might receive in a SIPP. At the end of the report they summarised their reasons for recommending not to transfer as follows:

- If the critical yield wasn't achieved he would retire with an overall lower retirement fund and it was highly unlikely the critical yield could be achieved over the term to age 63.
- The yields were higher at age 60, so early retirement with higher benefits in a personal pension was unrealistic.
- Tax free cash might be higher following a transfer but Mr S had said this wasn't important to him.
- Spouse's pension on death would be reduced if critical yield wasn't achieved.
- The risk of suffering reduced benefits if his OPS entered the Pension Protection Fund existed, but reduced benefits were still likely to be higher than those Mr S could expect from a personal pension
- Mr S would suffer reduced benefits in retirement by transferring to an alternative arrangement.
- Although this would mean Mr S couldn't take advantage of the investment opportunity presented to him, the adviser didn't consider that Mr S's term to retirement and the critical yield favoured a transfer. He said he considered Mr S's very aggressive attitude to risk but that still didn't lead him to recommend the transfer.
- The OPS benefits presented a significant proportion of Mr S's pension funding and so it wouldn't be in his interest to subject them to the significant levels of risk presented by the investment opportunity when Mr S intended to draw retirement income within the next seven years

Mr S didn't sign the enclosed client declaration. Instead Mr S wrote a short letter dated 29 June 2010 to Pacific stating "*I can confirm that I wish you to proceed with the transfer after receiving your full advice".*

Pacific then spoke to Mr S on 6 July. I don't know what exactly was discussed in this call, but it was referred to in a follow up letter on 9 July, so I'm satisfied it took place and that at this stage Mr S still wanted to proceed.

On 9 July 2010 Pacific wrote to Mr S to confirm that he had chosen to proceed with the transfer against their recommendation and that he would therefore be treated as an insistent client. They explained that Mr S might not be entitled to make a complaint against Pacific through the regulator or our service if he should later feel the decision wasn't in his best interest. They repeated the reasons of why Mr S should stay in his OPS scheme as described in their report on 22 June.

Pacific said overall they didn't consider that the benefit of control and flexibility outweighed the disadvantages of transferring and that to retain his existing benefits in the OPS remained their recommendation, particularly considering the critical yield.

As Mr S wanted to proceed, Pacific said they would arrange for his transfer value to be paid into a SIPP and recommended the Montpelier SIPP for this transaction with a retirement age of 65. They reiterated that they didn't provide the investment strategy for Mr S but only advised him on the SIPP provider.

Pacific listed some general risks of investments and additional risks which applied to off-plan overseas commercial property via a SIPP including

- Currency/exchange rate risk
- Liquidity risk
- Regulatory Risk
- Political Risk
- Delivery Risk
- Diversification Risk

The letter went on to say that Mr S had confirmed that he wished to take advantage of the investment opportunity in overseas commercial property and so Pacific would therefore arrange the transfer. They recommended the same SIPP as before.

With this letter Pacific enclosed an insistent client form and OPS scheme discharge form. The insistent client form asked Mr S to confirm that he had read and understood Pacific's suitability report with regards to the transfer of his OPS benefits and that he didn't accept the recommendation made by Pacific. And that he had read the letter explaining that he would be classed as an insistent client and accepted the implications.

Mr S signed the insistent client form on 19 July 2010.

At this point new transfer valuations were requested from the OPS scheme (as the previous guaranteed value had expired). New valuations were received in September and funds were transferred to the SIPP.

I've carefully considered the insistent client process Pacific followed here.

COBS 9 didn't include a specific rule on insistent clients at the time of the advice. However, COBS 2.1.1R required a firm to 'act honestly, fairly and professionally in accordance with the best interests of its client'.

I've also taken into account that the regulator issued a factsheet to advisers in 2015 to provide a "helpful reminder" of the regulator's position on advising insistent clients. This followed a thematic review it had conducted on advice for insistent clients in 2014.

The key steps to take in the regulator's view were:

1. To provide suitable advice for the individual client and this advice must be clear to the client
2. To be clear with the client about the risks of their chosen course of action
3. It should be clear to the client that their actions are against the adviser's advice.

During the industry-wide review of pension transfers and opt-outs the regulator had also suggested that a note in the client's 'own hand' provided more compelling evidence of their insistence to proceed.

Pacific advised Mr S not to transfer his OPS benefits which was suitable advice. The suitability letter in June 2010 clearly set out that Pacific's recommendation was for Mr S to keep his OPS benefits. The enclosed declaration was for Mr S to confirm that he understood and accepted the advice to leave his benefits in the OPS scheme. But instead of signing and returning this enclosed declaration, he made the decision to write a letter saying he wanted to proceed.

Pacific's follow up letter on 9 July again made it clear that the recommendation was to leave his benefits in the OPS and it made Mr S aware that he would now be treated as an insistent client as he chose to continue with the transfer. So overall I'm satisfied that Mr S would have understood that he was going against Pacific's advice when he proceeded.

However, on the whole I do have concerns about Pacific actions here. On the accompanying letter to the suitability report they do say they recommend Mr S to retain his OPS benefits but then also immediately give him instructions on how he can proceed against their recommendation. I think an adviser would usually expect his client to follow his advice, so showing him a way how to proceed against their advice straight away doesn't seem to be acting in the client's interest.

In his letter Mr S then used the exact same words that Pacific had suggested. He just said that he wanted to proceed. It didn't give any reasons why. Whilst it looks like he wrote the letter himself (rather than Pacific giving him a letter to sign) I don't consider that he was using his own words. He simply reiterated what Pacific had said they needed him to say if he wanted to proceed. This should have prompted Pacific to probe Mr S on his reasons why he still wanted to proceed and make sure he understood the risks of going against Pacific's advice. Particularly because - as far as I can see - Pacific hadn't discussed the findings in their report with Mr S. I appreciate that there was a phone call on 6 July, however Pacific wasn't able to provide a call recording or any notes about what exactly was discussed during this conversation.

Looking at the follow up letter I think it was likely confirmed in the phone call that Mr S wanted to go ahead and that he was informed he would be treated as an insistent client. With regards to Mr S's reasons for proceeding the letter just says that Mr S wanted to take advantage of the overseas investment opportunity.

I don't doubt that Mr S still wanted to proceed. However, based on what I've seen I'm not satisfied that Pacific gave him enough information to allow him to make an informed decision and fully understand the risks of his planned actions. Pacific's key reasons for not recommending the transfer were mainly based on the critical yield that needed to be achieved by the SIPP to match Mr S's OPS benefits. Pacific said it was unlikely that the critical yield would be achieved in a personal pension and if it wasn't achieved Mr S would have reduced benefits.

I think the most likely reason that Mr S wanted to proceed was the Harlequin investment promised attractive returns. I think this should have been clear to Pacific. When Mr S wanted to proceed against Pacific's recommendation he should have been told in clear and non-misleading terms that he was giving up very secure and valuable benefits in his OPS and instead he was investing in a non-standard, highly speculative investment which could not just mean that he might be worse off in retirement but that there was a real risk of losing the majority or all of his funds.

Together with his previous investment from his personal pension into Harlequin, Mr S was about to invest all his retirement savings into one undiversified investment. Pacific should have made it clear to Mr S that the Harlequin investment was too high risk for his circumstances, that he couldn't afford any significant losses to his retirement provisions so close to retirement and that he simply shouldn't invest. Pacific should have known Mr S's planned actions weren't in his best interest.

Pacific pointed out that in their original suitability letter in February 2010 under risk warnings they had stated: *"your investment is very high risk and you could lose all your funds".* So they say Mr S would have known the Harlequin investment was high risk. However, in the same letter Pacific pointed out several times that they weren't advising Mr S on the investment and this warning was included on page 10 of a 11-page letter amongst a list of generic investment warnings. It wasn't prominent or explained why the Harlequin investment would be high risk. And at no point was it explained that the investment was unsuitable for Mr S.

The only mention of investment risk in the later suitability report in June 2010 was at the end of the 12-page letter where Pacific says *"it wouldn't be in your interest to subject [your pension savings] to the significant level of risk presented by the investment opportunity".* However, it doesn't explain what these risks are or that the investment could lead to significant losses.

In the letter of 9 July Pacific included another list of generic investment risks. There was also a bullet-point list of risks relating to off-plan overseas investments. However, I don't think any lay person would have understood these without more detailed explanations or that that these risks could lead to major losses and why.

They also mentioned that the property he intended to buy was being sold at a higher price than the funds he was transferring into the SIPP. This meant he had to make additional contributions or be able to borrow against the value of the assets in the SIPP to meet the final stage payments towards the property. Pacific warned that Mr S had to understand that this carried a significant risk as the ability to borrow would be affected by several factors including the market value of the property and lending conditions. In the worst-case scenario Mr S could be left personally liable to complete the purchase with funds outside of his SIPP. Pacific said in the letter that they supposed Mr S's decision to transfer as an insistent client meant he was prepared to accept those risks.

I appreciate that this sets out one specific risk for the Harlequin investment. But again I'm not satisfied that this would have given Mr S a full understanding of the complexities of this non-standard investment which was only suitable for the most experienced investors. Also I consider that any warning like this should have been included in the original suitability letter before Mr S made his decision whether to proceed or not.

Based on what I've seen it looks like Pacific didn't do enough to ensure Mr S understood the full risk he was taking by transferring his OPS benefits into a SIPP and invest into Harlequin. They quickly accepted Mr S's wish to proceed although they should have been aware that his planned investment was unsuitable for him. Pacific should have made it clearer to Mr S that the Harlequin investment was unsuitable for his circumstances and that he shouldn't invest. By not doing this they didn't act in his best interest.

Instead they recommended the same SIPP to him as before. I also see some conflict of interest here. Pacific's fees were paid from the SIPP, so they had a business interest for Mr S to transfer his pension into the SIPP.

In summary, I don't think Mr S can be treated as a truly insistent client as I don't think Pacific gave him all the information they should have done or acted in his best interest.

Pacific's comments after my PD and my findings

Pacific says as I acknowledged their advice not to transfer was suitable and Mr S knew he was acting against this advice, it's irrational to say he wasn't truly an insistent client. They also say - similar to the 2013 alert - the 2015 factsheet by the regulator concerning insistent clients shouldn't be taken into account as it was published after the advice was given. The factsheet is not evidence of industry practice in 2010 and I had acknowledged in my PD that COBS 9 didn't include a specific rule about insistent clients. In any event, there's no indication that Mr S didn't himself type the letter in which he said he wished to proceed.

Pacific also disagree that their accompanying letter to the suitability report breached COBS 2.1 by giving Mr S instructions on how he could proceed against their recommendation. This part of the letter wasn't a recommendation, advice or an instruction which Mr S would have relied on; it was just reinforcing that he would be going against Pacific's advice if he proceeded.

My view remains that Pacific's process here wasn't in Mr S's best interest and I don't think they treated him fairly. I don't doubt that Mr S knew he was acting against Pacific's advice and it wasn't my intention to imply that he didn't write the letter himself nor that Pacific's letter was an instruction or advice for Mr S to go against their recommendation.

However, Pacific told Mr S what they required if he wanted to go against their recommendation, so they already anticipated this scenario. I appreciate that they say they knew Mr S was being advised by F. However knowing Mr S was being influenced by a third party, I think this was even more reason for them to ensure that Mr S understood why Pacific was recommending against the transfer. And based on his short letter simply repeating the words Pacific had suggested, I don't think they could have reasonably been satisfied Mr S fully understood the risks of proceeding. As said before I also don't think Pacific made the risks of investing into Harlequin or the unsuitability of it for Mr S clear enough.

I mentioned the 2015 factsheet as this *reminded* advisers of good practice when keeping their client's best interest in mind. Pacific's obligations don't stem from this factsheet. These are things that Pacific should have considered in order to treat Mr S fairly and act in his best interest as set out in COBS 2.1 and in the Principles. It's also worth mentioning that as far back as 1994, during the industry-wide pension review, the regulator at the time made it clear that insistent clients should be '*fully counselled on the implication of their choice'* and that *'the customer's decision to override the adviser's recommendation is also credibly evidenced'.* So none of the good practice I referred to is new. Pacific had just given Mr S a recommendation not to transfer. They knew Mr S didn't have the capacity to take this high risk with his pension. So when he then told them without any real reasoning that he was ignoring their recommendation they should have done more to ensure he did understand the consequences of his actions, particularly in respect to the risk he was taking with the Harlequin investment.

Pacific says I should point to evidence that Mr S didn't know about the risks he was taking. I did acknowledge in my PD that Pacific did point out some of the risks. However, looking at the information Pacific provided to Mr S I don't think they pointed out in clear and strong enough terms that the Harlequin investment wasn't suitable for him and risks he was taking on. I don't think the information they provided would have given a lay person like Mr S a full understanding of the complexities of a non-standard investment which was only suitable for the most experienced investors. I can't see that - other than the need to finance the completion funds- the risks of the investment were properly explained in detail. And especially once Mr S was planning to act against their recommendation, they should have probed his reasons for this further.

Mr S says he proceeded because he had been told that all due diligence had been done on the investment and as the first property looked good, he thought it was worth proceeding with a second one. He says he was told he could possibly retire early at 62 and it was an opportunity to take his family on holiday to a luxury resort. I think it's likely this information was given to Mr S by F and not by Pacific.

However, if Pacific had probed Mr S on his reasons for transferring against their advice as they should have, they likely would have realised that Mr S's reasons to invest were based on having been given positive messages about the investments by F. To enable him to make an informed decision Pacific should have made much clearer what benefits he was giving up and what specific high risks the investment entailed to allow him to properly weigh up the benefits and risks. As I said in my PD, although a phone call seems to have taken place on 6 July, the content of it is unknown and I can't see that Pacific discussed and explained their findings to Mr S in detail to ensure he fully understand he was investing into something very high risk that wasn't suitable for him.

Pacific also disagrees with my finding that there was a conflict of interest as Pacific was paid from the SIPP. They say contingent charging was only banned recently and was common practice at the time. They say I didn't consider that they advised against the DB transfer to their own financial detriment. And that I failed to identify any other suitable SIPP than the one they recommended to Mr S. If Pacific had recommended a new SIPP Mr S would have been charged even more fees as double the administration charges would apply.

Pacific is right that contingent charging was common practice at the time. And in different circumstances this might not have been an issue. However, there was no need for Pacific to recommend a SIPP to Mr S at all at this stage. He already had a SIPP which held his first Harlequin investment, so he simply could have transferred his pension into the existing SIPP once Pacific had given their advice not to transfer. It's true that Pacific would have suffered financial detriment by advising against the transfer if Mr S had followed that advice. And that's exactly my point. It was in Pacific's interest for Mr S to proceed in any event. If they had acted in Mr S's best interest they wouldn't have given him a SIPP recommendation he didn't need which led to further charges to him on a transaction that was already going against his best interest. So in my view they put their own interests above those of Mr S.

would Mr S have transferred anyway? and *Role of other parties*

In my PD I said:

I don’t think Pacific met their obligations towards Mr S either when they gave advice in February 2010 or when they advised him about the pension transfer later that year.

I carefully considered whether I think Mr S would have transferred his pension in any event like Pacific have suggested. However, on balance I don’t think he would have done. I’ll explain why.

I’ve taken into account that by the time Mr S was introduced to Pacific in February 2010, F had already advertised the Harlequin investment to him and the suggestion to use his pension funds had been made. I can also see that a day after Pacific gave their advice in February, Mr S signed the Harlequin contracts witnessed by F. It’s likely that by this point Mr S had already reserved a property and paid a reservation fee of £1,000. I’ve also considered that Mr S’s wife worked for F and Mr S told us that he knew F socially. So I think it’s likely that Mr S and his wife put some trust into F and what he told them about Harlequin.

So I can see the argument Pacific is making. Mr S had already made the decision to transfer his pensions and invest them into Harlequin, the investment was lined up and ready to go and F would have some influence over Mr S during this time so he might have listened more to the person he knew than the Pacific adviser.

It’s likely that F would have focussed on the positives of the Harlequin investment. As well as being a financial adviser he was also setting up his own company promoting overseas property investments. Mr S says he was told about better returns, the ability to retire at 62 and it would give him somewhere to take his family on holiday. So I’m sure all of this would have looked attractive to him.

However, I don’t think Mr S was at a point where he couldn’t have changed his mind. If Pacific had clearly told him that the SIPP and the Harlequin investment were unsuitable for him explaining that this was a specialist high-risk investment which meant there was a real risk of losing large parts of his pension I think it’s likely he wouldn’t have wanted to continue. I appreciate it can be difficult sometimes to backtrack from a plan particularly when a deposit had already been paid. But if Mr S had received full information on the risks of the investments and a clear recommendation not to proceed from an independent financial adviser like Pacific, I think on balance he would have decided to protect his pension funds even if that meant losing a £1,000 deposit. I’ve also asked Mr S whether F offered him any loans or other monetary incentives to invest into Harlequin. Mr S said he didn’t and I have no reason or evidence to make me think this isn’t correct.

Of course I don’t know for certain what Mr S would have done. But on balance, I think, if Pacific had given suitable advice in February 2010 Mr S would have decided not to invest into Harlequin and would have left his pensions where they were. And the second advice later that year wouldn’t have happened.

I appreciate Pacific says both advice processes were separate transactions, however of course they are linked and cannot be regarded as unconnected events. There was a delay of receiving the benefit details from the OPS administrators which is why both transfers didn’t happen at the same time.

However, even if I regarded the second advice process independently, the same considerations apply as before. If Pacific had given Mr S all the information he needed, I don’t think he would have transferred his OPS benefits.

As indicated earlier in this decision I'm aware that the idea to invest in Harlequin and to use pension funds to make this investment originally came from F. He was also a regulated adviser and had the same obligations when advising a client as Pacific. I think it's likely that F gave Mr S advice - whether formally or informally.

However, this doesn't absolve Pacific from their obligations. Even if Mr S had received advice from F, they still needed to ensure that their own advice to Mr S was suitable. From what I've seen they wouldn't have known what F had told Mr S about Harlequin and using his pensions; and based on the information they had it should have been clear that the transfer to a SIPP and the investment into high risk investments like this were unsuitable in Mr S's circumstances.

If Pacific had acted appropriately, I don't think Mr S would be in the situation he is now. So I think it's fair to hold them responsible for Mr S's losses. I can only look at the complaint that has been brought to us which is against Pacific. Whether other parties - like F or the SIPP provider - might also be responsible for the same losses is a distinct matter, which I am not able to determine here. However, that fact should not impact on Mr S's right to compensation from Pacific for the full amount of his loss. Pacific is free to pursue other parties for some of these losses once they've compensated Mr S in full.

Pacific's comments after my PD and my findings

Pacific says it's irrational to say that they caused Mr S's losses when it's clear that Mr S was obviously trusting F's advice over the advice given by Pacific. He had no previous dealings with Pacific, but personally knew F who was involved from the outset and until the end of the process. The second property was only chosen and reserved after Pacific had given their advice and F was involved here too. The second property wasn't within contemplation of Pacific when they gave their advice. They say this means they can't be held liable for losses flowing from the second investment as Mr S didn't rely on Pacific when making his decision to invest.

Pacific also mentions that they were removed as servicing agents on the SIPP by Mr S shortly after the transactions and assumes that F was appointed instead. Mr S says he didn't actively remove any advisers, but Pacific argues that Mr S must have signed relevant instructions. Pacific is of the opinion that the role of F hasn't properly been investigated or scrutinised by this service.

Pacific says there's no evidence to support the finding that F likely would have focussed on the positives of the investment. Mr S in fact said that he was told by F "*all due diligence had been done, with information on possible returns and risks*". Also, F was a regulated adviser working for a large network and so they query what evidence there is that F would have only focussed on the positives. Furthermore, Pacific says the PD failed to have regard to the principle that consumers should take responsibility for their own decisions.

I don't know what exactly F told Mr S about the risks of the Harlequin investments. However, as explained in my PD, F was setting up his own business to promote overseas property and according to Mr S, he also had invested himself in Harlequin. So I think it's reasonable to assume F thought this kind of investment was a good idea and would have promoted it as such. This is not to say that risks wouldn't have been mentioned at all. However, I think if the full risks of the investment had been explained to Mr S by F, I don't think he would have wanted to proceed. Based on the information provided, he wasn't a high risk or experienced investor. Mr S says he was told about the ability to retire early and having a holiday home for the family, which I think supports that Mr S was left with a positive impression of the investment. More importantly, I can't see that Pacific explored how much Mr S actually was told previously or understood about the risks.

I considered the relationship between Mr S and F and carefully thought about whether he would have acted differently if Pacific had given him stronger and clearer warnings and ensured he properly understood the consequences and risks of his actions. And my view remains that on balance I think he would have acted differently. I agree that there was a more personal relationship between F and Mr S than between him and Pacific and I've taken into account that F was involved in arranging the investments for Mr S. So I think Mr S was in the first instance more likely to listen to what F was telling him.

However, Pacific knew there was a third party involved in the background and so when Mr S wanted to go against their recommendation and proceed with a transaction that wasn't in his best interest without giving any explanation, they should have probed his motives further. If they had properly explained all the risks to him and made sure he understood that there was a real chance he could lose all his pension and that he categorically shouldn't be doing this as this was a high risk, complex and non-standard investment only suitable for high risk investors - which Mr S wasn't - as well as giving up valuable benefits in the DB scheme, I think on balance he would've listened. As I said before, it's likely he hadn't been told all this before in detail, so I think a focus on the real risks he was planning to take on would have given him a more realistic picture.

The second property might not have been selected yet when Pacific gave their advice in June 2010, however they knew Mr S wanted to invest his OPS benefits into Harlequin. And whether he had used these funds towards his first property or a second one doesn't change the fact that he should have been more clearly informed of the risks of the investment.

As this was an advice setting Pacific was obliged to make suitable recommendations and act in Mr S's best interest. A customer isn't prevented from going against the adviser's advice and proceeding as an insistent client. If they are given all the necessary information to understand the reasons of the adviser's recommendation and the risks and consequences of their intended action, then they are responsible for their own actions. However, as explained earlier in this decision, I don't think Pacific gave Mr S enough information to allow him to make an informed decision and therefore be treated as a genuine insistent client.

In summary, I still remain of the view that Pacific is responsible for Mr S's losses.

putting things right

In my PD I set out the following redress:

Mr S should - as much as possible - be put in the position he would be in now if he hadn't transferred his pensions into the SIPP and invested his funds into Harlequin. I think Mr S would have kept his existing pensions and not have opened a SIPP or invested into Harlequin.

To do this Pacific should:

A- Obtain the current notional transfer value of Mr S's personal pension at date of calculation assuming that it had not been transferred to the SIPP.

If there are any difficulties in obtaining notional valuations then the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index) should be used. It's a fair measure for someone who was prepared to take some risk to get a higher return.

B- Obtain the value of Mr S's OPS benefits. This should be calculated in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in October 2017.

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

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

C- Pay a commercial value to buy the Harlequin investment

The SIPP only exists because of the investments in Harlequin. In order for Mr S to be able to close the SIPP and stop paying ongoing charges, the Harlequin investments need to be removed from Mr S's SIPP. The valuation of the Harlequin investments may prove difficult as there is no market for them. For calculating compensation, Pacific should agree an amount with the SIPP provider as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investments.

If Pacific is unable to buy Mr S's investments in Harlequin, it should give them a nil value for the purposes of calculating compensation. In this instance Pacific may ask Mr S to provide an undertaking to account to it for the net amount of any payments he may receive from the Harlequin investment. That undertaking should allow for the effect of any tax and charges on the amount Mr S may receive from the investments and any eventual sums he would be able to access from the SIPP. Pacific will need to meet any costs in drawing up the undertaking.

Pacific then needs to obtain the actual transfer value of Mr S's SIPP as at the date of calculation, allowing for any outstanding charges and taking into account any nil value given to the Harlequin investment (or commercial value paid into the SIPP for that investment).

D- Calculate Mr S's loss as A+B-C and pay this sum into Mr S's SIPP.

This payment should take account of any available tax relief and the effect of charges. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension plan isn't possible or has protection or allowance implications, it should be paid directly to Mr S as a lump sum after making a notional deduction to allow for 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.

E- Pay five years' worth of future fees owed by Mr S to the SIPP; if the Harlequin property cannot be purchased.

Had Pacific given suitable advice the SIPP would not exist. It's not fair that Mr S continues to pay any annual SIPP fees if it can't be closed. To provide certainty to all parties, I think it's fair that Pacific pays Mr S an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed. There are a number of ways they may want to seek to achieve that. It will also provide Mr S with some confidence that he will not be subject to further fees.

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

F- Mr S has been caused a great deal of distress by the loss of his pension benefits. He can't work due to medical problems and has no pension income that he can rely on. This has caused him severe financial hardship. Pacific should pay Mr S £1000 in compensation for this. This payment should be made directly to Mr S.

The payment resulting from all the steps above is the 'compensation amount'. The compensation amount must where possible be paid to Mr S within 90 days of the date Pacific receives notification of his acceptance of my final decision. Further interest must be added to any unpaid amounts of compensation at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Pacific to pay Mr S.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

Pacific's comments after my PD and my findings

Pacific says the direction to agree a commercial value with the SIPP provider and then take ownership of the investments is outside of this service's power and unenforceable for the following reasons:

- The parties to the Harlequin contracts are the SIPP trustees and Mr S and not the SIPP provider. The purchase of the investment would require a novation of the Harlequin contracts which Harlequin might not allow.
- There's a lack of uncertainty as the direction is for Pacific to agree a "commercial value" with a third party.

- If the direction is followed through, this would involve Pacific assuming Mr S's (contingent) liability to pay Harlequin the future staged payments under the Harlequin contracts. These payments would exceed the £150,000 statutory cap on money awards and this service doesn't have the power to make a direction which requires Pacific to make a payment in excess of the statutory cap.

I do understand Pacific's concerns. There are other parties involved in the operation of the investment and I appreciate that Pacific might be prevented from buying it. So it's possible that Pacific might not be able to follow this direction.

I also acknowledge Pacific's point about them possibly having to take on Mr S's liabilities under the Harlequin contracts. Mr S's SIPP has paid deposits under the two Harlequin contracts. Mr S will have agreed for the SIPP to pay the remainder of the purchase price under that contract. Those sums have not yet been paid. If Pacific takes over the contract from the SIPP, then it may be liable for the remaining amount of the purchase prices in the unlikely event that the developments do proceed. So when added to the loss Pacific will be compensating Mr S for now, the combined sum may exceed the total award I can make of £150,000. If the total compensation does exceed £150,000 (which is likely in this case) then I can't require Pacific to take over the contract from Mr S's SIPP.

Equally, if Mr S keeps the investment and the properties are completed, Harlequin could require those payments to be made which would be further losses to him. I think it's unlikely that the property will be completed, so I don't think there will be further loss. But there might be. Mr S needs to understand this, and that he won't be able to bring a further complaint to us if this contract is called upon.

Having said all that, I explained what Pacific should do if agreeing a commercial value and buying the investments isn't possible, i.e. they should use a nil value for the investment in their calculations. So in any event they will be able to calculate and pay compensation for Mr S. And to acknowledge that removing the investments from the SIPP might be a complicated process which could take some time, I asked Pacific to cover five years' worth of SIPP fees which I still think is fair for reasons set out previously.

Pacific also challenged the £1,000 in compensation for distress and inconvenience. They say when he complained in 2016 Mr S said he was 64 and continued to work, not that he had to stop working due to ill health as stated in my PD. They also say Mr S would have started to draw his state pension and related state benefits a year later and the fact that he cannot work due to ill health isn't Pacific's fault. They also challenge how I can make such an award when Mr S chose to ignore Pacific's warnings in October 2010 about investing the funds in his SIPP into a second property instead of leaving a proportion in cash. If he had done that he could have drawn some retirement income from the SIPP.

Mr S's circumstances have changed since he complained in 2016. His representatives told us that he's been facing financial hardship and now isn't able to work due to ill health which I have no reason to doubt.

I appreciate that in a letter in October 2010 when Pacific received the paperwork for the second property, they told Mr S that if he wanted to retire he would have to sell the properties; whereas if he left a proportion in cash he could draw some tax-free cash. However, I can't see that this was a formal recommendation. And even if he had left some of his funds in cash at this point, the key issue is that in my view Mr S wouldn't have transferred his pensions at all if Pacific had given him suitable advice and would now have a secured income from his DB pension as well as an additional income from his personal pension.

So the distress and financial hardship he experiences is caused by Pacific's failings. With his DB scheme he could have retired at 63 and he could have drawn benefits from his personal pension at the time if he wanted. Instead he had to continue working and when he couldn't do this anymore his financial situation worsened. The losses suffered through the transfers have impacted him for several years and I have no doubt caused him substantial distress and worry. So I think the amount of £1,000 is reasonable in the circumstances.

my final decision

Where I uphold a complaint that was referred to this service before 1 April 2019 but on or after 1 January 2012, I can award fair compensation to be paid by a financial business of up to £150,000 plus any interest that I think is appropriate. If I think that fair compensation is more than £150,000 I may recommend that the business pays the balance.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out above. My decision is that Pacific IFA Limited must pay Mr S the amount produced by that calculation – up to a maximum of £150,000 plus interest on that £150,000 as described above if payment is made more than 90 days after this decision.

Recommendation: If the amount produced by the calculation of fair compensation is more than £150,000 I recommend that Pacific IFA Limited pay Mr S the balance plus interest on that balance as described above if payment is made more than 90 days after decision.

This recommendation is not part of my determination or award. Pacific IFA Limited doesn't have to do what I recommend. It's unlikely that Mr S can accept my decision and go to court to ask for the balance. Mr S may want to get independent legal advice before deciding whether to accept the final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 25 September 2020.

Nina Walter
ombudsman