DRN-4232900

The complaint

Mr F is represented.

In 2018 he was advised by Prestige Wealth Solutions ('PWS') to transfer his Defined Benefits Pension to a Qualifying Recognised Overseas Pension Scheme ('QROPS'), and into an offshore Investment Bond provided by Omega Financial Solutions ('OFS'). In 2020 his PWS adviser introduced him to Hoxton Capital Management (UK) Ltd ('Hoxton'), and the ongoing servicing of his pension portfolio was moved there in June that year. He then complained, through his representative, in 2021.

His representative says –

- The pension transfer (and underlying investment) advice in 2018 was unsuitable. [issue 1]

- Hoxton should be held responsible for the unsuitable 2018 advice because, in 2020, it should have reviewed the transfer and identified (and addressed) its unsuitability; and it is noteworthy that the same PWS adviser (from 2018) moved to Hoxton at the same time to continue servicing the pension portfolio. Furthermore, it is responsible for an undisclosed investment exit penalty he incurred. [issue 2]

- Hoxton *churned* Mr F's pension portfolio from 2020 onwards. [issue 3]

Hoxton disputes the complaint. It says it has no responsibility in issue 1, that it suitably reviewed the pension portfolio and that it refutes the allegation in issue 3.

What happened

One of our investigators looked into the complaint and first addressed our jurisdiction. He said Hoxton is not the correct respondent in issue 1 because PWS advised the transfer in 2018 and Hoxton had nothing to do with that advice – so Mr F is not an eligible complainant in issue 1 and the issue is outside our jurisdiction. He found that, in issue 2, Hoxton's obligation to review the pension portfolio in 2020 did not and does not create a responsibility for issue 1. He concluded that we have jurisdiction to look into Hoxton' obligation to review the portfolio (as it was in 2020) and the allegation in issue 3, but nothing else.

Mr F and his representative disagreed with the investigator's views on issues 1 and 2. They restated their assertion about Hoxton's responsibility to review and address the 2018 transfer.

They mainly argued that, in the 2020 review, Hoxton should have been aware of regulatory guidance and rules which meant, in the absence of grounds to consider otherwise, the transfer had to be viewed as unsuitable; that there were no grounds to consider otherwise; that by having the same adviser in common, the connection between PWS and Hoxton is established; that there is evidence the adviser directly serviced the pension portfolio under Hoxton from the point its service began, despite the *named adviser* on documents being a colleague; that there is also evidence he did so before he was authorised by the regulator to provide such advice, so Hoxton failed to protect Mr F's interests in this respect and breached regulatory principles; that allowing the adviser to review his own 2018 advice amounted to an unmanaged conflict of interests, and also breached regulatory principles; and that PWS operated under a UK regulated firm.

The investigator responded to the points raised but he was not persuaded to change his view on our jurisdiction. He acknowledged that our jurisdiction remained in dispute but, for the sake of completion, he shared his findings on the merits of the case (within the remit set in his jurisdiction view). He concluded that the complaint should not be upheld and mainly said the following –

- Mr F was introduced, by the adviser, to Hoxton in June 2020. He agreed a change of agency, to Hoxton, for the pension portfolio and agreed its 0.5% fee for its ongoing servicing.

- The fund switch report produced in the same month, at no initial charge, confirmed that he had a moderate risk profile and investment horizon of 10+ years; that he had medium level investment knowledge and experience; and that his objectives were to have his investments reviewed, to keep ongoing costs at a minimum, to diversify his investments, and to retain his holdings (already within the portfolio) in Sound Energy PLC ('SE') and Guinness Global Innovators (the 'GGI' fund).

- At the time of the review, over 80% of the portfolio was invested in the Marlborough Guernsey-domiciled fund (the 'Marlborough' fund); just over 13% was invested in the GGI fund; around 5% was held in cash; and around 1% was invested in SE shares.

- The SE shares and GGI fund holding were retained, as Mr F requested. Hoxton recommended liquidation of the Marlborough fund holding and reinvestment of the proceeds across a balanced portfolio of eight new fund holdings (with exposures to equities and bonds). The report said this achieved his cost reduction goal because it lowered the overall costs in the portfolio from around 2.60% to 0.60%, and that the new funds also matched his diversification objective. The report also informed him about the exit penalty to be incurred in liquidating the Marlborough fund holding, but said this should be recoverable through the ongoing costs savings over time.

- Mr F signed the dealing instruction for liquidation of the Marlborough fund holding. Evidence directly from Marlborough confirms that Hoxton did not benefit from the liquidation and that it received no trail commission for the holding. Hoxton earned only the 0.5% fee for ongoing servicing. The fund switch at the point of onboarding – that is, the liquidation he instructed and the reinvestments he agreed – was the extent of what Hoxton did in the portfolio. There is no evidence of it engaging in frequent and excessive trading against Mr F's interest, amounting to churning.

- Hoxton reviewed the portfolio as it was supposed to, its recommendations met Mr F's profile and objective, and were not unsuitable. Its review of the portfolio did not mean it inherited responsibility for its suitability at the outset or prior to its service.

Mr F and his representative disagreed with this outcome. Their disagreement with the jurisdiction view remained and they maintained their main arguments for that and for the complaint (as a whole).

In addition, they listed the regulatory principles they say Hoxton's actions (or inactions) have breached; they referred to a statement from Mr F's new adviser saying there was a 3 - 5% upfront commission arising from the Marlborough fund holding at the outset which was concealed from him, and that the associated surrender charges were also concealed; they said it was unrealistic to expect cost savings over time to recover the exit penalty amount, and there is no evidence (or calculation) to show otherwise; they highlighted his submission that he was unaware of the 10 years term he was committed to in the fund and the penalty, and would have probably considered against the transfer if he was aware; they argued that the penalty rendered the recommendation unsuitable; and they said the Financial Services Compensation Scheme ('FSCS') has addressed OFS' role in his complaint about the Investment Bond so it is unclear why we cannot address the entire complaint.

The matter was referred to an Ombudsman.

What I've decided – and why

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

Jurisdiction

Our jurisdiction in Mr F's case remains in dispute. His representative says we have, or should have, jurisdiction to determine issue 1, and to determine Hoxton's responsibility for issue 1 (which forms a part of issue 2). As summarised above, the investigator found otherwise, and the matter (alongside the investigator's findings on merits) has been referred to me.

Hoxton is the complaint respondent, so treating issue 1 is necessary only if it relates to Hoxton. The complaint respondent is not the individual adviser that previously worked for PWS and then moved to Hoxton.

Issue 1's connection to Hoxton is part of the allegations summarised in issue 2. Mr F says there are grounds to draw such a connection. To determine the alleged connection, I am required to apply our jurisdiction rules, as they are, to evidence of the facts. I do this below. I have noted and considered all the arguments from Mr F's representative, including those about our jurisdiction. If and where those arguments are relevant, I will address them.

The regulator's Handbook includes said rules for our jurisdiction under its Dispute Resolution (DISP) provisions. DISP 2.3.1(R) says we can consider complaints about regulated activities. The Regulated Activities Order 2001 provides a list of such activities. In the context of investments (including pension investments), the regulated activity relevant to Mr F's complaint is *advising on investments*. It is his claim in issue 1 that the pension transfer (and underlying investment) 'advice' in 2018 was unsuitable and part of his claim in issue 2 is that Hoxton should be held responsible for the alleged unsuitable 'advice'.

Advising on investments is defined as:

"[advice] *given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor and advice on the merits of his doing any of the following (whether as principal or agent)* –

- *(i) buying selling, subscribing for or underwriting a particular investment which is a security or a [relevant investment], or*
- (ii) *exercising any right conferred by such an investment to buy, sell, subscribe for or underwrite such an investment*."

It is an undisputable fact that Hoxton did not conduct this activity in 2018. It was not Mr F's adviser at the time. PWS, a distinct and separate entity, was his adviser and PWS advised the pension transfer and underlying investment. His introduction to Hoxton did not happen until 2020, when his pension portfolio was moved to its service.

The adviser appears to have moved from PWS to Hoxton in 2020. I note Hoxton's submission that he did not do so until 2021, but I have seen evidence of him declaring that the portfolio was under his direct service (within Hoxton) in 2020. Both firms remained distinct and separate. There is no evidence that Hoxton undertook PWS' business in any way, or undertook its liability for the 2018 advice in any way. Such an event has not even been claimed by any party.

As I address in the next section (about merits) the argument about Hoxton's duty to review the pension portfolio is correct. However, there is nothing in the facts of the case, in the relevant regulations or in applicable law that says the duty extended to inheriting or sharing liability for PWS' 2018 advice.

For the above reasons, it is a matter of fact that the regulated activity alleged in issue 1 was/is completely remote and unrelated to Hoxton. This also means, contrary to the allegation in issue 2, there is no connection between the regulated activity in issue 1 and Hoxton.

The regulator's rules for eligibility to complain are that – an eligible complainant must be a consumer, a micro-enterprise, a charity, a trustee of a trust, a small business or a guarantor [DISP 2.7.3 R]; and an eligible complainant must <u>also</u> show that the complaint comes from a relationship covered by the rules [DISP 2.7.6 R].

Given the facts, the 'consumer' category is the only one under DISP 2.7.3 R relevant to Mr F. He does not fall into any of the other categories. Guidance from the rules says a consumer is *any natural person acting for purposes outside his* [or her] *trade, business or profession*. Evidence shows he meets this definition. I have seen nothing to show or suggest that he engaged with his pension in the course of his trade, business or profession.

However, as emphasised above, the second part of the requirement must also be applied. The rule under DISP 2.7.6 R covers a number of relationships, including that between a *customer* (or potential customer) and a business. This is relevant to Mr F because the transfer of his pension account to Hoxton features in the complaint and he seeks to hold Hoxton responsible for the pension before that.

It is a matter of fact, and it is not disputed, that Mr F became Hoxton's customer at the point his pension portfolio moved to its agency. His representative says he was engaging with Hoxton earlier in 2020 before the change of agency formally happened. This appears to have been likely and I agree with his representative's argument that he would have been a *potential customer* at the time (before the formal change of agency).

However, it is also a matter of fact that he was neither a potential customer nor a customer of Hoxton in 2018; and that, with regards to the events in 2020, the complaint issues (concerning review of the pension portfolio and the churning allegation) mean only its responsibilities from when it undertook agency are relevant. I repeat that the complaint respondent is Hoxton, not the individual adviser. In addition, the rule and guidance above relates to a complainant and the business/firm s/he has complained about. Therefore, and with regards to the 2018 advice, Mr F's arguments about his continuing relationship with the adviser, and about PWS and Hoxton having the adviser in common, are irrelevant to determining the relationship requirement for his eligibility as a complainant.

Mr F and his representative say PWS could have been operating under a UK regulated firm. The present complaint is not against PWS (or, if any, its parent company), so this is not relevant. They also refer to his FSCS case and appear to argue that the FSCS' jurisdiction should influence ours. Our jurisdiction is as stated in the DISP section of the regulator's Handbook and I have applied the relevant parts above. I do not have discretion to do otherwise.

For the above reasons, I conclude that I do not have jurisdiction to address issue 1, responsibility for issue 1 is unrelated to the complaint, and my remit is limited to determining the merits of the pension portfolio review matter (including the allegation about not disclosing the exit penalty *during the review*) in issue 2 and the churning allegation in issue 3.

Merits

Alongside the complaint issues, submissions have been made for Mr F about alleged regulatory breaches by Hoxton. They include the claim that Hoxton mismanaged a conflict of interest. I understand the allegations, but our service is not the industry regulator. If and where they are relevant to determination of the merits of the complaint issues they will be considered in that context. However, it is beyond my remit to investigate and make findings on alleged regulatory breaches in isolation. I will not be doing that. That is a matter for the regulator.

With regards to the conflict of interests allegation, only if a wrongdoing(s) by Hoxton in the complaint issues is found would it be necessary to address it – that is, in order to consider whether (or not) a mismanaged conflict of interest caused or contributed to such wrongdoing. Otherwise, the matter will be no more than a part of the alleged regulatory breaches by Hoxton, and I have explained above my approach towards that.

Issue 2 (Pension Portfolio Review and Exit Penalty)

Hoxton reviewed Mr F's pension when it undertook agency in 2020. Its fund switch report of 10 June 2020 confirms this explicitly as follows (on its second page) – "*Review and analysis of your existing pension held with Momentum Malta and RL360*" [my emphasis]. I have not seen evidence that he objected to the report's contents at the time, so I consider them reliable.

The question to address is therefore not about whether (or not) Hoxton reviewed the pension portfolio. It did that. The question to address is whether (or not) its review advice, based on the portfolio as it was at the time of the review, was suitable. It was not responsible for past advice on the portfolio, but it was responsible for its suitability from the point of the review onwards.

The report says Mr F's profile at the time of the review included the following – objectives to review the portfolio, to keep ongoing costs to a minimum, to diversify the portfolio and to retain the SE shares and GGI fund holding; a moderate (or balanced) risk profile; a medium capacity for loss; capacity for a 10+ years investment term; and a medium level of investment knowledge and experience (including past structured notes investment experience).

He did not ask for advice on a pension switch, nor did he ask for advice on whether (or not) the 2018 pension transfer was suitable. Hoxton appears to concede that it considered neither of these. With regards to the former, I have not seen grounds to say Hoxton ought reasonably to have looked into and/or recommended a pension switch in 2020, and the regulator's stance against conducting such switches without good cause is well known (and was well known at the time).

Hoxton could have taken (and shared) a view on the suitability of the 2018 transfer, but the fact that it did not does not automatically establish a wrongdoing. There is evidence that it reacted, and gave its attention, to the instruction to review and rebalance the portfolio promptly. That was not unreasonable. Furthermore, I have not seen evidence that a recommendation to reverse the 2018 transfer would have been suitable and, jointly, viable in all the circumstances as they were in June 2020. Perhaps such a review might have produced information from which Mr F then considered a complaint about the transfer (related to PWS), but for the above reasons I am not satisfied that Hoxton did something wrong by not reviewing the transfer (on its own).

As the investigator noted, Hoxton observed Mr F's instruction to retain the SE shares and GGI fund holding. The pension portfolio was his to determine as he wished, so Hoxton was obliged to do that. It could not have reasonably done otherwise. Furthermore, Mr F's position on these holdings were reasoned. It appears that he sought to avoid crystalising a significant paper loss in the SE shares and he held a bullish outlook for the performance of the GGI fund. Therefore, my consideration of the suitability of the review discounts these holdings. In total, both holdings occupied just under 15% of the portfolio, so Hoxton's task was essentially to review the remainder 85% of the portfolio.

Around 80% of the portfolio was occupied by the Marlborough fund holding and around 5% was held in cash. Hoxton recommended a full liquidation of the former and retention of the latter. Its advice was to invest 27% of the liquidation proceeds in two bond-based funds; 24% equally split between a developed world equities index fund and an emerging markets equities index fund; 10% in a world index fund and another 10% in the Royal London Sustainable World Trust C fund; 19% in a Vanguard LifeStrategy fund (60% equities weighted and 40% bonds weighted); and 10% in the Fundsmith Equity I Acc fund. The recommendation was implemented and Mr F signed the dealing instruction for all the reinvestments.

In the context of the portfolio (as a whole), the bond-based fund holdings occupied just over 20%, the developed and emerging markets equities index fund holdings occupied around 20%, the world index fund holding occupied 8%, the other new holdings (which had a mix of equities and bonds related assets, but more of the former) occupied around 31%, then the allocations for the SE shares, GGI fund holding and cash remained as they were.

In terms of objectives and risk, I do not consider that the review/rebalancing was unsuitable. As summarised above, the portfolio presented a reasonable match for a balanced risk profile – riskier equities related assets reasonably balanced by a suitable amount of less risky bonds related assets. Furthermore, the eight funds (and their percentage allocations) broadly reflected Hoxton's balanced model portfolio. I have considered the factsheet for this model portfolio and the factsheets for the individual funds. They all present a reasonable match for a moderate/balanced risk profile, in terms of asset classes and market/sector exposures.

The funds had a combination of growth objectives and combined growth and income objectives, and this too suitably matched the interests of a pension portfolio – whereby growth is needed to sustain long-term income, by providing a basis for such income generation and by preventing erosion of capital (as a result of income withdrawals over time).

The funds also addressed the cost reduction and diversification objectives.

Hoxton made no initial charge for the review/rebalancing. Only its 0.5% ongoing service fee applied. No ongoing charge was incurred for the SE shares and for the cash holding, but Ongoing Charges Figures ('OCFs') applied for the others. The total OCF for the portfolio was reduced from 2.63% (prior to the review) to 0.64% (after the review). This matched Mr F's pursuit for a reduction in ongoing costs.

His representative has highlighted the exit penalty (of almost £10,000) that was incurred in liquidating the Marlborough fund holding. This penalty (and its amount) was referred to in the fund switch report, so it is not the case that it was not brought to Mr F's attention. Hoxton had no responsibility for the recommendation of this holding, so I do not consider the arguments about the holding's minimum term and exit penalty being concealed from him, and about what he would have done (but for the concealment) relevant to the present complaint. The same applies to the suitability of the exit penalty, because Hoxton was not responsible for that. Its advice triggered application of the penalty, but as I address next I am not persuaded it did anything wrong in giving the advice.

The circumstances that Hoxton faced appear to have been somewhat pre-determined, and they created a scope that was inherently limited. It had the choice between recommending a portfolio with ongoing costs savings (to match one of the objectives) by rebalancing the Marlborough fund holding, or retaining that holding in order to avoid the exit penalty (thereby essentially do nothing with the portfolio). The Marlborough fund holding had to be the focus of the review/rebalancing. The SE shares and GGI fund holding could not be touched, as per Mr F's instructions. It was arguably sensible to retain the cash allocation as it was, and even if it was not, rebalancing only 5% of the portfolio (which was the cash allocation) was unlikely to make any difference to it or to its ongoing costs.

In other words, the Marlborough fund holding was the scope given to Hoxton for its review/rebalancing. In this context, its advice to liquidate it and rebalance the space it took in the portfolio was inevitable, and the exit penalty was an unavoidable consequence. Its recommendation to liquidate the fund was coupled with the recommendation of the eight new holdings. They had a mix of equities and bond-based assets. They included developed and emerging market exposures, direct equities investments and equities index-based investments, and funds which were individually diversified (internally) in terms of asset classes.

This achieved a reasonably good level of diversification. In terms of fund management diversification, the recommendation also appears to have been better for the portfolio than the Marlborough fund holding. The mix of holdings in eight funds which appear to have been run by at least five different fund managers was more diversified than the holding in the Marlborough fund, in which other than a 2% cash allocation the underlying sub-funds were all managed by Marlborough.

In terms of ongoing costs and diversification, I do not consider that the review/rebalancing was unsuitable. I also do not consider that the recommended investments mismatched Mr F's investment knowledge and experience at the time. They did not introduce investment types that he had no previous experience of.

Overall, on balance and for all the above reasons. I conclude that Hoxton's review and rebalancing of Mr F's pension portfolio was not unsuitable. I do not uphold issue 2.

Issue 3 (Churning Allegation)

The relevant regulatory definitions of churning are:

"*A series of transactions that are each suitable when viewed in isolation may be unsuitable if the recommendation or the decisions to trade are made with a frequency that is not in the best interests of the client.*"

"*Principle 6 (Customers' interests) requires a firm to pay due regard to the interests of its customers, and treat them fairly. A firm should therefore not "churn" a customer's account, that is, enter into transactions with unnecessary frequency having regard to the customer's agreed investment strategy. A firm should also not switch a private customer within or between packaged products unnecessarily, having regard to what is suitable for that customer. Firms are reminded that a customer's interests are paramount."*

These quotes focus on the frequency with which a firm carries out transactions for its client, on the motive behind such transactions and on the client's best interests. The overall effect is that frequent transactions in a client's portfolio should be reasoned, and they ought not to be carried out only or mainly for the purpose of generating commission for the firm. Instead, they should be carried out in the client's best interests.

The scope for churning in an advisory service is more limited than that in a discretionary service, because a firm gives advice but the client retains the final decision on whether (or not) any trading or transaction (from the advice) is executed. Nevertheless, in some cases it might still be possible for clients receiving an advisory service to be unduly influenced by a firm's advice – to the extent of following unreasoned or poorly reasoned frequent transaction recommendations without questioning them – so I have considered issue 3 in this context.

Mr F received an advisory service from Hoxton. However, I have not seen evidence of churning in his case, and the circumstances of the case do not appear to have allowed for such that. The review and fund switch advice was the only advice he received from Hoxton before he terminated its service, so there is no evidence of a high frequency of trading recommendations from it (or undue influence on Mr F to agree such recommendations).

As set out above, the remit for its advice was essentially predetermined and limited to rebalancing the Marlborough fund holding (and the space it took in the pension portfolio). There is evidence directly from Marlborough that Hoxton derived no financial benefit from the holding or from its liquidation, and that it received no trail commission from it. It did not apply an initial charge for the review/rebalancing and it did not charge separately for implementing the investments it recommended. Its set (and agreed) fee was for ongoing servicing of the pension portfolio, and that fee was not connected to trading or transaction activity.

For the above reasons, it has not been established that Hoxton churned Mr F's pension portfolio. I do not uphold issue 3.

My final decision

For the reasons given above, I do not uphold Mr F's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 6 September 2023.

Roy Kuku
Ombudsman