

The complaint

Mr D complains that advice given by Kingswood Law IFA Limited to open a self-invested personal pension to enable him to invest in high risk Unregulated Collective Investment Schemes wasn't in his best interests.

Mr D is represented in this complaint by a Claims Management Company (CMC).

What happened

Mr D had been a client of Kingswood Law IFA Limited ("Kingswood") since 2004. His main point of contact was their adviser Mr W.

In late 2011 Mr D consulted Kingswood for advice on his pension. His main provision was a GPP held in cash with provider F, which originated from the benefits of his occupational pension scheme (OPS) from his employment with a firm I'll refer to as "B".

He provided Kingswood with a copy of a fact find he'd completed with another firm which arranged the transfer from his OPS to the GPP with F. From this, Kingswood captured the following information about Mr D's circumstances:

- Aged 52, living with his partner, a teacher;
- Two adult children who he anticipated supporting for a further 3-5 years;
- Employed by "B" a retail organisation for 30 years, annual salary around £50,000;
- A member of B's (defined contribution) pension scheme, valued just over £21,000, to which he contributes 7% of salary, employer contributes 12%;
- GPP valued at around £595,176 (originally his OPS with B), held in F's cash fund;
- Another personal pension with S valued at around £71,618
- Planned to retire in around ten years, with an income of around £50,000;
- Home valued at around £350,000 with an outstanding mortgage of £40,000
- Cash savings of £80,000 offsetting the mortgage, plus an ISA (value not recorded)
- A "*fairly conservative*" view over money

Mr D apparently wished to take more control over his retirement savings and liked the idea of building up a property portfolio to provide retirement income.

In 2012 Kingswood's adviser Mr W recommended Mr D transfer his GPP held with F, and his smaller personal pension to a self-invested personal pension ("SIPP"). It researched the market and recommended the Westerby SIPP which would be managed through a platform. Kingswood can't locate its suitability report showing the rationale for opening the SIPP or any subsequent investments. But the SIPP was opened and the funds from Mr D's GPP and his personal pension totalling around £666,800 were transferred to the SIPP in June and July 2012. His employer's DC pension wasn't transferred.

In September 2012 Mr D signed a statement confirming he was a "*high net worth individual*" meaning he had an income of over £100,000 or personal assets in excess of £250,000.

Kingswood can't evidence it assessed Mr D's attitude to risk ("ATR") at the time of the advice. But a questionnaire Mr D completed in April 2013 assessed his ATR as 8/10 defined as a "*moderately adventurous*" investor.

Mr D says within six months of opening his SIPP Mr W introduced him to Mr B and "*SIPPClub*", an organisation which provides free pension investment information. In April 2013 Mr D entered into a one-year unregulated third-party property loan of £40,500, which he arranged direct. In April and May 2013 Kingswood facilitated three further third-party property loans of various terms totalling £240,000, and in June 2014 a further 3-year loan of £100,000. Kingswood said it ensured Mr D had done his own due diligence for each of these investments, and it's not for them to comment on what Mr D should or shouldn't do.

In June 2013 a different Kingswood adviser recommended Mr D use 25% of his SIPP to establish a "core" portfolio of funds in line with his 8/10 risk profile to be held with provider A. This was to provide an element of liquidity, and somewhat offset the risks of his other investments.

SIPPClub promoted the prospects for Dolphin Capital, so Mr D purchased a £60,000 five-year loan note in Dolphin, in August 2013 and a second one in March 2014. The Dolphin scheme was described as the opportunity to invest in derelict government buildings in Germany which would be refurbished and sold or rented. The loan notes would pay interest and then the capital and interest would be returned at the end of the term.

In November 2014 the other Kingswood adviser reviewed Mr D's overall investment portfolio and recommended he invest £100k of his cash holdings in "absolute return" funds to balance his risk.

In July 2018 Mr D's first investment of £60,000 in Dolphin was due to mature, and he was told by Mr B to expect around £114,485, being the original loan plus interest. Mr D was told if he wanted to reinvest the proceeds in another Dolphin loan note he'd need to open a different SIPP, as Westerby no longer allowed such investments. Unfortunately the promised maturity payment didn't materialise, and later that year Dolphin went into liquidation in Germany. Due to the large number of creditors the investments in Dolphin are effectively worthless, and the scheme is under investigation.

In November 2020 Mr D through his CMC, complained to Kingswood about the advice to transfer his pension funds into the SIPP and invest in Dolphin, which it said meant he'd given up valuable guaranteed pension benefits, And Dolphin was a UCIS which was far too risky and caused Mr D a considerable financial loss.

Kingswood didn't uphold his complaint. It said Mr D's losses didn't arise from its advice, and his pensions had no guaranteed benefits. They'd opened the SIPP but didn't advise on the investments in Dolphin. Kingswood's adviser (not Mr W) had made Mr D fully aware of the risks of investing in unregulated investments, and it had recommended Mr D balance his portfolio to offset the other investments within his SIPP.

So Mr D referred his complaint to this service.

I issued a provisional decision on this case in August 2022, as I'd come to a different outcome to our investigator who hadn't upheld the complaint.

He didn't think Kingswood had carried out all its regulatory responsibilities at the time of the advice, and thought there was a link, through Mr W, between Kingswood and SIPPClub. But as Mr D had admitted that he would have gone ahead anyway, he didn't think it was fair to hold Kingswood responsible for his loss.

Provisional findings

I won't set out my provisional decision in its entirety, but my provisional findings were as follows, in summary:

The investigator reached his view not to uphold the complaint mainly based on a phone call in January 2022, in which Mr D said if he'd been advised against transferring he'd have gone ahead anyway.

Having listened to the call, I thought he and the investigator were slightly at cross purposes. I thought Mr D meant he'd always have transferred his GPP with provider F, (originally his final salary OPS with B), to take advantage of the enhanced transfer value (which was substantial at £597,300), due to his concerns about the viability of the company and pension scheme. But I didn't think that meant if he'd been properly advised by Kingswood, he'd also have gone ahead with the investment in Dolphin.

I set out Kingswood's obligations contained in the regulator's handbook under the "conduct of business sourcebook" (COBS) and principles for businesses (PRIN). The most relevant rules to this complaint are;

- COBS 2.1 says a firm must act honestly, fairly and professionally in accordance with their client's best interests.
- COBS 9.2 says a firm needs to obtain the necessary information regarding their client's knowledge and experience in the investment field, financial situation and objectives.
- PRIN 6 says a firm must pay due regard to their customers' interests and treat them fairly.
- PRIN 9 says a firm must take reasonable care to ensure the suitability of its advice.

Kingswood's position is it didn't make any specific recommendations to Mr D about investments within his SIPP. But in supplementary guidance over the years, the regulator had made clear the expectation that an adviser shouldn't simply recommend a transfer to a SIPP, without advising on the investments held within it the consumer intends to make. I wasn't satisfied Kingswood had acted in Mr D's best interests, and I hadn't seen any evidence to show it had reviewed the suitability of the proposed investment in Dolphin. Even though Mr W was aware of Mr D's intention to invest in UCIS (or perhaps suggested he do so via SIPPclub) and had selected a SIPP provider specifically as it permitted that type of investment, which not all do.

The transfer from Mr D's OPS with B in 2011 to the GPP with F had been handled by another firm and had since been held in F's cash fund. So I was satisfied the transfer Kingswood advised on didn't result in Mr D losing guaranteed pension benefits. I thought that because of Mr D's concerns about the viability of his employer, and he hoped to retire in ten years on a similar level of income as his salary, he'd be open to opportunities to maximise his retirement income. But without the evidence of a suitability report I wasn't satisfied Kingswood had shown why a SIPP was appropriate for Mr D. And importantly that it had assessed the suitability of the investments within the SIPP particularly Dolphin, which was a high risk UCIS affording him no consumer protection.

The regulator doesn't permit UCIS to be promoted to retail clients like Mr D. And regardless of the form he signed, I thought Kingswood knew Mr D didn't meet the definition of a high net worth individual, (meaning an income of £100,000 and/or personal assets of £250,000), and Mr D hadn't been asked to provide supporting evidence of his assets. Although his net worth in 2013 had been expressed as £1.24m, it was much lower when his pension funds, main residence and assets owned jointly with his wife were excluded.

I thought it likely the form had been pre-prepared by Kingswood and Mr D signed it “as a formality” without appreciating the implications. Mr D may have been a longstanding client of Kingswood, but they knew he wasn’t an experienced, sophisticated investor. And Mr D may not have understood the distinction of Mr W advising him formally on behalf of Kingswood and making investment opportunity suggestions through SIPPClub.

It seemed Mr D had entered into the first of five third-party property loans without the assistance of Kingswood, but it had facilitated the other four, which suggested tacit support for the investment strategy. And I didn’t think Mr D would’ve thought Kingswood considered the two investments in Dolphin differently. I said it was possible Mr B, Mr W and SIPPClub may have genuinely believed Dolphin to be a good investment with the potential for high returns, but it was nonetheless an unregulated, non-mainstream investment unsuitable for an unsophisticated investor with limited capacity for loss, as Kingswood knew Mr D to be. And in terms of due diligence it didn’t provide the same personal contact with the borrowers afforded by the third-party property investments Mr D had already made.

The other Kingswood adviser had set out the risks of investing in “*unregulated loans and other investments*” which Mr D appeared to accept by replying by email to say, among other things, that he entered into such loans “*with a full and clear understanding of the potential risks and pitfalls involved*”. He also agreed with his risk rating of 8/10 and “*fully accept the risks associated with this score and the types of investments from my pension fund associated with this*”.

But I didn’t think that was enough to absolve Kingswood of its responsibility to act in Mr D’s best interests. And when having invested an initial £60,000 in a Dolphin loan note, Mr D expressed interest in investing a further £40,000 (he actually invested another £60,000), Kingswood hadn’t expressed any concern to Mr D about the suitability of such an investment for him, or at increasing the already significant proportion of his portfolio in high risk unregulated investments.

Mr D said he was happy with the other third-party property-related investments as he’d been repaid. But I said just because they didn’t lose money doesn’t make them suitable. Mr D had expressed an interest to build up a property portfolio to provide retirement income, but there’s no evidence Mr D had considered investing in UCIS or Dolphin specifically before his SIPP was opened. Mr D may have felt flattered to have been considered a sophisticated investor with the necessary understanding, net worth and capacity for loss to invest in those schemes, but I thought it unlikely he’d have approached Kingswood about such high-risk investments had these not been suggested to him.

So in summary, while it was reasonable for Kingswood to recommend Mr D invest his pension savings which were held in cash, I thought the advice to open a SIPP in order to invest in high risk investments and UCIS wasn’t in his best interests.

So I was minded to uphold the complaint, and set out what Kingswood should do to put things right.

Responses to the provisional decision

Both parties responded.

Mr D’s representatives accepted the provisional decision, apart from clarifying that the second investment Mr D made in Dolphin was £60,000 not £40,000.

I've corrected this in the background section, as Mr D did initially express an interest in investing a further £40,000, but the loan notes show he made two £60,000 investments.

Mr W on behalf of Kingswood responded at length, making the following points, in summary:

- Mr D has been a client of Kingswood for over 15 years, the file can't demonstrate the extent of the relationship;
- Mr D didn't want his sizeable pension fund invested in the stock market;
- Mr D's role as a retail loss prevention manager gave him experience of due diligence and decision making;
- His concerns about the viability of his ex-employer proved to be justified, and he carried out due diligence on his pension investments;
- Mr D originally approached Kingswood about obtaining a mortgage in order to join a HMO (house in multiple occupation) buy-to-let property franchise business, as an alternative career;
- This explained his need for a SIPP, but it's not true Mr D hadn't thought about investing in UCIS or Dolphin prior to consulting Kingswood;
- The property-related loans are not UCIS, and two of the third-party loan investments, were also franchisees in the same HMO business;
- Mr D was aware of his responsibilities to the SIPP provider to act prudently, commercially and securely;
- Mr D has demonstrated the extent of the research he carried out prior to agreeing to the third-party loans, including checking the company website, Companies House, reviewing financial statements and discussing strategy with the borrower;
- Mr D was aware it wasn't prudent to have *"all eggs in one basket"*;
- Given this, there was no reason for Kingswood to think Mr D wouldn't have taken the same approach prior to investing in Dolphin;
- But the Dolphin investment wasn't known about or facilitated by Kingswood;
- By the time he invested in Dolphin Mr D was a sophisticated investor;
- Mr D fully understood the risks and said *"unregulated loans of this natureare my preferred choice of investment vehicle in order that I can drive higher returns...."*
- Mr D showed a keen interest and desire to invest in property loans through his pension and this isn't something Kingswood can say he should or shouldn't do;
- Mr D fully understood the distinction between regulated financial advice through Kingswood and the investment opportunities in UCIS being suggested to him by Mr W and Mr B through SIPPClub. Mr D said *"I have been very pleased with the advice, communication, and support"* and had *"gone into the whole area of unregulated investments with a full and clear understanding of the risks associated with these type of investments"*.
- Mr D was not a "passenger" in this process, he actively participated and enjoyed doing so;
- Mr D remains a happy client of Kingswood, and Kingswood would advise him the same way again, given his requirements;
- A funds only solution for his pension was not appropriate at all;
- Kingswood understands Mr D is unhappy with the loss from the Dolphin investment, but his complaint has been driven by the CMC;
- The evidence is irrefutable, and the complaint should not be upheld;
- It cited another similar case at this service which wasn't upheld;
- But if the complaint is upheld the redress should factor in Mr D's ATR which was established by Kingswood as 8/10, meaning a proportion of his investment would always have been in high risk funds.

So I'm now in a position to issue the final decision.

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.

Having done so I still think the complaint should be upheld, as I'm not satisfied the transfer to a SIPP to invest in high risk investments was suitable advice for Mr D's circumstances.

I'll remind Kingswood that each case is assessed based on its particular merits so the other case it has mentioned isn't relevant here.

Kingswood's position is that Mr D was an experienced, sophisticated, high net worth individual, who didn't want his pension invested in the stock market, instead he wanted to use his pension funds to invest in property. They simply arranged the SIPP to enable him to do that. And they believe they discharged their responsibilities by ensuring he fully understood the risks involved. They deny recommending, knowing of or facilitating the investments in Dolphin.

The funds within the GPP were Mr D's main retirement provision, and were held in cash, which would've been eroded over time by inflation. Mr D said he was interested in investing in property, (by joining a property-related franchise), to boost his pension. And also to potentially replace his employment income should his concerns about the viability of his employer come to pass. But Kingswood's role wasn't simply to ask Mr D what he'd like to do with his pension funds, and then implement his wishes. As a regulated financial adviser, Kingswood should have used their professional expertise to determine an investment strategy appropriate for Mr D's circumstances, attitude to risk, capacity for loss and investment horizon.

Kingswood hasn't provided a copy of its suitability report, so it's not clear what recommendations it made to Mr D. Kingswood says it wouldn't have been appropriate to invest his pension in the stock market. The other adviser subsequently recommended 25% of his portfolio (£165k) be invested in a range of funds, but this was after Mr D had been investing in third party property loans. But I've seen no evidence of an overall cohesive strategy.

It's also not clear how Kingswood assessed Mr D's attitude to risk or how it had changed from his stated "*fairly conservative*" view over money. Kingswood hasn't provided any questionnaire, we just have the output from one apparently completed after the advice which assessed him as 8/10, an undated fact find within which "*Adventurous*" is circled, and the recommendation email dated 14 June 2013 which said this reflected Mr D's "*moderately adventurous*" or 8/10 risk score. Kingswood hasn't shown Mr D's responses to the questionnaire or how clear the questions were.

I've also seen nothing to show Kingswood had factored in Mr D's capacity for loss or investment horizon, in other words whether he could afford losses, and the prospects he had to make up any losses.

At the time of the advice he was 52 and hoped to retire in ten years (the retirement date for his GPP was March 2019). But Mr B was concerned about the viability of his employer, so although he was a member of B's defined contribution scheme to which he and his employer were contributing, if B ceased trading Mr D would lose both his income and future pension contributions. The investment in Dolphin of £120,000 represents almost 20% of Mr D's overall portfolio, and he had limited time to make back those losses, at the same time his income was reduced.

The regulator precludes the promotion to UCIS or non-mainstream investments to retail clients. The rules about this are set out in COBS 4.12.

Kingswood treated Mr D as a HNWI individual and a sophisticated investor as set out in COBS 4.12.6, which meant Mr D had to self-certify to income of £100,000 or net assets (not including his primary residence or pension funds) of £250,000 or more. It's not in dispute Mr D signed a HNWI form on 24 September 2012. But Mr D's income as captured in the fact find was £50,000 (and he anticipated this income coming to an end), and his personal net assets weren't valued at £250,000. So I think Kingswood knew Mr D wasn't in fact a HNWI individual.

Mr D was also certified by the other Kingswood adviser as a '*sophisticated investor*' on 8 April 2013. Under COBS 4.12.7 a firm could certify an investor as 'sophisticated' if it had signed a certificate within the last 36 months confirming the investor had been assessed by that firm as "*sufficiently knowledgeable to understand the risks associated with engaging in investment activity in non-mainstream pooled investments*". The investor also had to sign a prescribed statement and Mr D did so. But from Kingswood's timeline of events, Mr D's first third party property investment in April 2013, and the three further investments arranged through Kingswood were made in April and May 2013. So he had little investment experience at the point he was certified.

And even if Mr D had been a HNWI and sophisticated investor, the regulator suggested UCIS should make up no more than 10% of an overall portfolio. So the two investments in Dolphin at almost 20% represented too large a proportion of Mr D's SIPP. I think Kingswood recognised this which is why in 2014 they recommended Mr D invest 25% (£165k) of his portfolio in a range of UK and global funds and equities, to improve liquidity (as even successful property investments are difficult to turn into cash), and mitigate the risks.

Mr D may have enjoyed researching and discussing the investments with the HMO property franchisees, and those investments have worked well for him. So he may have been tempted by the investment in Dolphin, which it seems was suggested to him through SIPPClub. And given his recent positive experience with the third-party property loans, despite the warnings he may have felt his money wasn't at much risk. But I don't accept this research together with his experience in the retail industry meant he's able to carry out the level of due diligence required to assess the suitability of a non-mainstream unregulated investment. Mr D engaged and paid a substantial fee to Kingswood for this. Kingswood said it had no reason to doubt Mr D "would have taken the same diligent approach to his research [into Dolphin] as he had historically done with his other investments. And that it wasn't for Kingswood to say what Mr D should or shouldn't do. But I think that's exactly what a financial adviser is supposed to do, particularly if it's aware the client is taking risks with their pension, and doesn't meet the criteria of a HNWI or sophisticated investor.

Kingswood should've categorised Mr D as a retail investor, with neither the experience, financial means, capacity for loss or investment horizon for non-mainstream or UCIS type of investments. I don't think it acted in Mr D's best interest by simply asking him to acknowledge the warnings, and I'm not persuaded Mr D understood the consumer protection implications arising from Mr W's relationship with both Kingswood and SIPPClub.

I'll respond here to Kingswood's point about the risk level of the proposed redress. As mentioned earlier I've seen nothing to show how Mr D's ATR was arrived at. But I'm satisfied Mr D wasn't a cautious investor, and was prepared to accept some risk in order to maximise returns. Which is why I selected the "Growth" index. This is set out below under "why is this remedy suitable".

Putting things right

To compensate Mr D fairly, Kingswood Law must:

- Compare the performance of Mr D's investment with that of the benchmark shown below. If the actual value is greater than the fair value, no compensation is payable. If the fair value is greater than the actual value there is a loss and compensation is payable.
- Kingswood Law should add interest as set out below.
- Kingswood Law should pay into Mr D's SIPP to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.
- If Kingswood Law is unable to pay the total amount into Mr D's SIPP, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr D won't be able to reclaim any of the reduction after compensation is paid.
- The notional allowance should be calculated using Mr D's actual or expected marginal rate of tax at his selected retirement age.
- It's reasonable to assume that Mr D is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr D would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

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

Portfolio name	Status	Benchmark	From (start date)	To (end date)	Additional interest
SIPP	Some liquid/some illiquid	FTSE UK Private Investor Growth index	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

This means the actual amount payable from the investment at the end date.

It may be difficult to find the actual value of the portfolio. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case.

Kingswood Law should take ownership of any illiquid assets by paying a commercial value acceptable to the pension provider. The amount Kingswood Law pays should be included in the actual value before compensation is calculated.

If Kingswood Law is unable to purchase illiquid assets, their value should be assumed to be nil for the purpose of calculating the actual value. Kingswood Law may require that Mr G provides an undertaking to pay Kingswood Law any amount he may receive from the illiquid assets in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Kingswood Law will need to meet any costs in drawing up the undertaking.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark. Any additional sum paid into the investment should be added to the fair value calculation from the point in time when it was actually paid in.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Mr D wanted Capital growth and was willing to accept a higher level of investment risk.
- The FTSE UK Private Investor Growth index is made up of a range of indices with different asset classes. It's a fair measure for someone who was prepared to take a higher than average risk to get a higher return.

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend the business to pay the balance.

Kingswood Law IFA Limited should provide details of its calculation to Mr D in a clear, simple format.

Determination and award: my provisional decision is I uphold the complaint. I consider that fair compensation should be calculated as set out above. Kingswood Law IFA Limited should pay Mr D the amount produced by that calculation – up to a maximum of £160,000 (including distress or inconvenience but excluding costs) plus any interest on the amount set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that Kingswood Law IFA Limited pays Mr D the balance plus any interest on the amount as set out above.

This recommendation is not part of my determination or award. It does not bind Kingswood Law IFA Limited. It is unlikely that Mr D can accept my decision and go to court to ask for the balance. Mr D may want to consider getting independent legal advice before deciding whether to accept this decision.

If Kingswood Law IFA Limited does not pay the recommended amount, then any portfolio currently illiquid should be retained by Mr D. This is until any future benefit that he may receive from the portfolio together with the compensation paid by Kingswood Law IFA Limited (excluding any interest) equates to the full fair compensation as set out above.

Kingswood Law IFA Limited may request an undertaking from Mr D that either he repays to Kingswood Law IFA Limited any amount he may receive from the portfolio thereafter or if possible, transfers the portfolio to Kingswood Law at that point.

Mr D should be aware that any such amount would be paid into his pension plan so he may have to realise other assets in order to meet the undertaking.

My final decision

My decision is I uphold this complaint.

I direct Kingswood Law IFA Limited to compensate Mr D as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 14 October 2022.

Sarah Milne
Ombudsman