complaint

Mr F complained that Kingswood Financial Advisors ("Kingswood") gave him unsuitable advice to switch his final salary pension benefits to a Self-Invested Personal Pension (SIPP), to invest in an unsuitable overseas unregulated property fund.

background

Mr F's financial adviser introduced him to Harlequin Property. That adviser was an appointed representative of a network. They also had a separate unregulated business.

Mr F was then referred to Kingswood. He told us the following about his circumstances at the time of the advice:

- Aged 46;
- Divorced;
- Annual earnings of around £10,000 to £15,000;
- Deferred Occupational Pension Scheme (OPS) with an value of about £170,000;
- Held no other investments or assets.

Mr F's attitude to risk was recorded as 9 on a scale of 1 - 10. I have not seen any evidence of the discussion about how this particular rating was determined.

A Transfer Value Analysis System report was prepared. The annual return required by the new scheme to match the ceding scheme (critical yield) was calculated to be 9.5% a year.

The recommendation report under the heading *'Your Needs'*, noted:

> *You have stated that you wish to use the money from your pensions to purchase the property in the Caribbean. I have not given you any advice on the suitability or otherwise of using your pension funds in this way.*

Under the heading *'Recommendation'* it stated:

> *You face a stark choice:*
>
> - *Keep the guarantees, remain in the OPS or;*
> - *Lose the guarantees and transfer to a individual pension (thus enabling you to proceed with your wish to purchase property via a new SIPP)*
>
> *Further to our discussions you do wish to proceed with the transfer and I confirm that only the self invested personal pension option will allow you to access the fund to enable you to purchase the property abroad.*
>
> *… I have highlighted the main consequences and the disadvantages….:*
>
> 1. *Your pension will be significantly lower that it would be should you leave your fund to your normal retirement age.*
> 2. *You will also lose out on the potential increases and growth in your fund.*
> 3. *Your death benefits after vesting will be lower than if your fund was invested…*
> 4. *New charges will be incurred for your new plan.*

Under the heading *'Provider Recommendation'* it stated:

> *I recommend Guardian as the provider of your plan as they offer the facility to purchase the property in the Caribbean.*

The SIPP was established in 2010. Kingswood received £8,970.20 for completing the transfer report and £1,500 administration fee for setting up the SIPP. SIPP charges were:

- £400 set up fee
- £395 annual fee

Harlequin Property offered the opportunity to invest directly, and in some instances through a SIPP, into resorts developed in the Caribbean. In the 'Guidelines for Purchasing' it noted:

> *When we refer to "the property", we are talking about the individual hotel room, apartment, cabana or villa that we are marketing.*

Under the heading 'Can I use a SIPP to purchase the property?' it said:

> *It is for an individual IFA, their advisors and the trustees of their SIPP to decide whether the property is suitable purchase for the SIPP member…*

Some of the money invested went to cover marketing expenses and sales costs, which included commission. The rest would be used for the development of the resort. But, funds were not specifically earmarked for the construction of the resort the investor was potentially purchasing. Third party finance may be used and lenders may be approached to provide loans, which might be secured against the asset.

In July 2011 Mr F invested in Sustainable Agroenergy. He invested a total of £18,000, leasing a total of three plots of land – each with a purchase price of £6,000. That was after a transfer had been made following advice from the other regulated financial adviser. That advice is the subject of a separate complaint to this service.

Mr F complained to Kingswood when the Harlequin investments run into difficulty. Kingswood investigated the complaint, but did not uphold it. One of our adjudicators concluded that the complaint should be upheld. He thought that Kingswood should have advised on the suitability of the Harlequin investment. If suitable advice had been given that would have been not to transfer to the SIPP and not to invest in Harlequin.

Kingswood didn't agree. Its position is:

- Kingswood only advised on the SIPP. They did not advise on the investments to be made.
- Mr F had a different adviser who sold the Harlequin property to him. He was introduced to Kingswood to assist with the transfer of funds from his existing pension schemes.
- Mr F had already made the decision to buy the Harlequin properties before Kingswood was instructed to assist in the SIPP arrangements.
- The other adviser was responsible for selling the investments and probably received commission.
- Mr F had already signed legally binding agreements to buy the Harlequin properties.

- Even if Kingswood had advised him not to transfer he would have done it anyway. His commitment to buying Harlequin properties was so strong that he would have ignored any advice given by Kingswood. It is the role of the other adviser that caused the loss by investing in Harlequin.

I issued my provisional decision for this case. I concluded that the advice to transfer to the SIPP should have included the suitability of investing in Harlequin. I thought the advice was unsuitable for Mr F and that he would not have transferred if he had been given suitable advice.

Kingswood didn’t agree. Their position is still as set out previously.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulator’s rules, guidance and codes of practice; and what I consider to have been good industry practice at the time.

What was Kingswood required to do?

Kingswood was required to comply with the regulations. That includes knowing its client and giving suitable advice. It was also required to act in its client’s best interest. I don’t think Kingswood can avoid these obligations by limiting its role to only advising on the SIPP.

Kingswood did give advice about transferring out of a final salary pension scheme. The rules required the adviser to assume that the transfer would not be suitable. There is no evidence that this requirement was taken into account.

What did Kingswood do?

Kingswood argues that it only provided advice on the SIPP and did not give advice on the investment made in Harlequin Property. It said Mr F had already decided to invest in Harlequin. However the contracts were signed after the advice and Kingswood was required to give suitable advice. And that includes the advice to transfer out of the final salary scheme.

What should Kingswood have done?

The rules required Kingswood to start by assuming that transferring Mr F’s final salary pension was unsuitable. It provided a virtually guaranteed pension. It was a large part of Mr F’s pension benefits. He could not afford to take risks with this pension.

The investment in Harlequin Property exposed Mr F’s pension funds to significant risk. It was an overseas property development. Mr F was buying a hotel room in a property that had not been built. The funds were used to pay a 30% deposit on the property. This was owned by the SIPP. The balance of 70% was also paid but jointly with another third party.

Kingswood's suitability letter did emphasise the risks of the Harlequin investment. But, Kingswood was under a duty to give suitable advice. It is difficult to see how suitable advice to start the SIPP can be given without considering the proposed investment.

Mr F's occupational pension had valuable guaranteed benefits. A return of 9.5% a year was required from the SIPP to match the benefits given up. That was higher than the highest rate of return allowed by the regulator for illustrating future growth rates. Another way of thinking about that is that the benefits provided a virtually guaranteed return of 9.5% a year.

There is mixed evidence about Mr F's financial position at the time. The benefits were Mr F's entire pension. He was earning £120,000 a year. This changed shortly after the advice. His earnings are now significantly lower. Mr F disputes these figures.

In my view, the advice to transfer the final salary benefits was unsuitable. It was a significant part of Mr F's pension planning. His earnings were high at the time of the advice. But, the growth required to match the benefits being given up was high. It was unlikely that the growth could be met without taking significant risk.

I accept that Mr F was prepared to accept some risk. But, I cannot see how the assessment that he was prepared to accept a high level of risk was arrived at. In any event, the final salary benefits were the majority of his pensions and other investment. Placing all of this in one single unregulated investment was very speculative. In my view, that was more risk than Mr F should have been advised to accept. Suitable advice would have been for Mr F to keep his final salary pension benefits.

What would Mr F have done?

Mr F had already paid a reservation fee to buy a Harlequin property. He signed the Harlequin contract on 9 August 2010. A pension transfer report was produced and dated July 2010. The report was sent to Mr F in a letter dated 18 August 2010 and referred to a recent meeting.

It is clear that Mr F approached Kingswood to advise him about a suitable SIPP for the Harlequin investment. I have already said that I think that advice was unsuitable.

The evidence indicates that Mr F had not signed the contracts before he met with Kingswood. And as the Harlequin property was being bought within the SIPP the contract could not be signed until after the SIPP was recommended. My conclusion is that if Kingswood had advised Mr F not to transfer his pension that he would not have done so.

The role of other parties in the transactions

Mr F has said he was referred to Kingswood for advice on his pensions. Kingswood has said that Mr F had already received advice and decided to invest in Harlequin before he received advice from Kingswood. The other third party introduced Mr F to Kingswood and was acting as an agent of Harlequin. They were not regulated to give financial advice. Kingswood was a firm regulated to give advice. Suitable advice should have been not to transfer. So I think Kingswood is responsible for the losses.

But the third party played some part in the decision to invest in Harlequin. If Kingswood wishes to claim some of the losses from any other party it may take an assignment of any rights of action Mr F has against them. That is, if it pays Mr F's losses in full.

Should Kingswood pay compensation?

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

But in assessing fair compensation, I'm not limited to the position a court might take. It may be there has been a break in the "chain of causation". That might mean it wouldn't be fair to say that all of the losses suffered flowed from the unsuitable advice. That will depend on the particular circumstances of the case. No liability will arise for an adviser who has given suitable advice; even if fraud later takes place. But the position is different where the consumer wouldn't have been in the investment in the first place without the unsuitable advice. In that situation, it may be fair to assess compensation on our usual basis – aiming to put Mr F in the position he would have been in if he'd been given suitable advice.

I think it would be fair and reasonable to make an award, given the specific circumstances of this case. This is notwithstanding arguments about a break in the "chain of causation" and the "remoteness" of the loss from the (poor) advice given. I am satisfied that Mr F would not have bought the Harlequin Properties had it not been for the failings of Kingswood's adviser. If the adviser had given Mr F suitable advice, the investment in Harlequin would not have been made. And I consider that the advice given by the adviser completely disregarded Mr F's interests. As a direct result of Kingswood's failure to give suitable advice, Mr F invested the whole of his pension into a specialised, unregulated investment with a limited track record.

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

fair compensation

My aim is to put Mr F in the position he would now be in if he had received suitable advice. I think that: a.) he would have kept his existing pension; b.) he wouldn't have invested in Harlequin; and c.) as a result he wouldn't have opened the SIPP (and now be subject to ongoing SIPP fees). In setting out how to calculate fair compensation my objective is to address these three issues. That is what I'm trying to achieve.

There are a number of possibilities and unknown factors in making an award. The involvement of third parties – the SIPP provider and Harlequin – mean much of this is beyond this service or Kingswood's control. I understand Harlequin will not now allow Kingswood to take over the investment from Mr F.

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

Kingswood should calculate fair compensation by comparing the value of Mr F's pension, if he had not transferred, with the current value of his SIPP. An adjustment will need to be made for a transfer received in the SIPP of £13,129 on the advice of the other regulated financial adviser. An amount of £18,195 was the invested in SGG which will need to be deducted.

In summary:

1. Calculate the loss Mr F has suffered by transferring out of his former employer's final salary pension scheme.

To do that Kingswood will need to take the following steps.

2. Obtain the actual transfer value of Mr F's SIPP on the date of this decision, including any outstanding charges. This should be adjusted to allow for the £13,129 received and £18,195 invested in SGG. Kingswood is not responsible for those amounts.

3. If it's possible, pay a commercial value to buy Mr F's share in the Harlequin Property investment.

4. Pay an amount into Mr F's SIPP so that the transfer value in (2) is increased to equal the value calculated in (1). This payment should take account of any available tax relief and the effect of charges. It should also take account of interest as set out below.

In addition, Kingswood should:

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

6. Pay Mr F £500 for the distress and inconvenience caused.

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

1. Calculate the loss Mr F has suffered by transferring out of his former employer's final salary pension scheme.

Mr F should be put back into the position he would have been in had he not transferred from his former employer's final salary scheme. This calculation should carried out as at the date of my final decision; using the most recent financial assumptions published at the date of this decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr F's acceptance of the decision.

Kingswood may wish to contact the Department for Work and Pensions (DWP) to obtain Mr F'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 F's SERPS/S2P entitlement.

If this demonstrates a loss, the compensation amount should if possible be paid into Mr F's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If the payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr F as a lump sum. The compensation can be reduced by 15%. The loss was to Mr F's pension and so would otherwise have been used to provide pension benefits, 25% of which would be tax free and the rest would have been taxed at the rate he paid income tax in retirement – I think that will be at basic rate which is currently 20%. And so the 15% deduction adequately reflects this.

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

This should be confirmed by the SIPP provider. The difference between 1 and 2 is the loss to the pension. An adjustment should be made for the £13,129 received on the advice from Intrinsic. And the subsequent £18,195 invested in SGG should be treated as a withdrawal. Kingswood is not responsible for those amounts.

3. *Pay a commercial value to buy Mr F's Harlequin Property investment.*

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

The valuation of the Harlequin investment may prove difficult, as there is no market for it. To calculate the compensation, Kingswood should agree an amount with the SIPP provider as a commercial value, and then pay the sum agreed plus any costs and take ownership of the investment.

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

I have been provided with the contracts between Harlequin and Mr F. He signed different contracts for the deposit and the remainder. Separate contracts were signed. It means that the SIPP has paid two deposits under two contracts with Harlequin. That is the loss I am trying to redress. Mr F agreed to pay the remainder of the purchase price under separate contracts. Those sums have not yet been paid, so no further loss has been suffered. However, if the properties are completed, Harlequin could require those payments to be made. I think it's unlikely that the properties will be completed, so I think it's unlikely there will be further loss. But there might be. Mr F needs to understand this, and that he won't be able to bring a further complaint to us if these contracts are called upon. Mr F may want to seek independent advice on how to cancel the ongoing contracts for the remaining amounts.

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

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

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

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

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

5. *Pay five years' worth of future fees owed by Mr F to the SIPP; if the Harlequin property cannot be purchased.*

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

To provide certainty to all parties, I think it's fair that Kingswood pays Mr F 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 F with some confidence that he will not be subject to further fees.

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

6. *Pay Mr F £500 for the distress and inconvenience caused.*

Mr F has been caused a great deal of distress by the loss of his pension benefits. A payment of £500 is appropriate to compensate for that distress.

Kingswood may ask Mr F to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the Harlequin investment That undertaking should allow for the effect of any tax and charges on the amount Mr F may receive from the investment and any eventual sums he would be able to access from the SIPP. Kingswood will need to meet any costs in drawing up the undertaking. This only applies if Kingswood pays the loss in full.

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

my final decision

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

Determination and award: I uphold the complaint. My decision is that Kingswood Financial Advisors should pay compensation of the amount produced by the calculations above - up to a maximum of £150,000 - plus simple interest at 8% gross a year on the total amount from the date of this decision until the date of payment. Kingswood should also provide details of its calculations to Mr F in a clear simple format.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Kingswood pays Mr F the balance plus simple interest at 8% gross a year on the balance from the date of this decision until the date of payment.

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

Under our rules, I'm required to ask Mr F to accept or reject my decision before
12 July 2018.

Roy Milne
ombudsman