Financial Ombudsman Service

complaint

Mr F complained he was given unsuitable advice by Sussex Independent Financial Advisers Limited (Sussex) to transfer three pre-existing personal pensions to a self-invested personal pension (SIPP). The purpose of the transfer was to enable Mr F to invest in a Harlequin property scheme.

background

In early 2010 Mr F was introduced to Sussex by a third party adviser. At the time, he needed a regulated business to facilitate the transfer of his existing personal pensions to a SIPP.

A few months before the advice took place, Mr F paid a £1,000 reservation fee to Harlequin to reserve an off-plan commercial property development in the Caribbean. This scheme was an unregulated collective investment scheme (UCIS).

Harlequin required an initial deposit of 30% (£39,000) followed by the remaining 70% (£91,000) on completion. Mr F wanted to transfer his existing pensions to a SIPP and use his SIPP to fund the initial deposit of 30%.

Mr F's personal circumstances were recorded. He was in his mid-fifties, single and in employment with a salary of around £20,000. He owned his own home with an outstanding mortgage, owned a buy-to-let property and had savings of around £20,000.

Mr F was said to have a "speculative" attitude to risk which meant he was happy to accept an increased risk of a loss of capital for potentially higher investment returns.

In March 2010 the suitability report recorded Mr F wanted to achieve a yearly pension of £20,000 at age 65. It recorded Mr F was concerned his existing pension arrangements were not going to provide this kind of income in retirement.

The report said Mr F was "keen" to invest in Harlequin and wanted to use his personal pensions to do so. It said Mr F felt the potential capital growth and rental income from a Harlequin property would provide a more realistic chance of achieving his target income.

In the suitability report the adviser said all alternative options had been discounted apart from a SIPP. This was because Mr F wanted to invest in overseas property.

Sussex recommended Mr F transfer his personal pensions to a SIPP. General risk warnings were provided. In May 2010 Mr F transferred three personal pensions worth just under £50,000 to his SIPP. Shortly after, Mr F used his SIPP fund to pay the 30% deposit on his investment with Harlequin.

In September 2015, Mr F's representative complained to Sussex. Sussex provided a final response and rejected his complaint.

In its final response Sussex said Mr F had a risk profile of 5 out of 5, which meant an *"esoteric investment"* like Harlequin was *"extremely suitable"* for him.

Sussex further said Mr F had always intended to use his personal pensions to invest in Harlequin. It says they provided him with advice four months after he completed Harlequin's application form - where he stated his intention to finance the investment using his own SIPP provider.

One of our adjudicators considered Mr F's complaint. He said that it should be upheld and set out his reasons as follows:

- Although Mr F had signed an agreement and paid a £1,000 reservation fee, Sussex was still required to give suitable advice. It couldn't treat it as a non-advised sale.
- Sussex was unable to decide whether the SIPP was suitable or not, unless it also took into account what the SIPP would be investing in.
- The Harlequin investment was high risk and should have only been recommended to specific types of investors. The adjudicator didn't think the investment was suitable for him.
- The adjudicator didn't think Sussex should have relied on Mr F completing his own risk profile. He thought an assessment of Mr F's risk appetite could only be done by considering all his financial circumstances. The adjudicator thought Mr F's circumstances indicated he was a more cautious investor.
- The adjudicator thought if Mr F had received suitable advice recommending against the purchase, he would have been prepared to lose his reservation fee instead of taking such a risk with his pension at his age.

Sussex didn't agree with the adjudicator's opinion. In response, it said:

- Mr F's risk profile was completed with the benefit of a long discussion about the risk he was prepared to take. Sussex said Mr F confirmed to the adviser he had *"nothing to lose".*
- It made no recommendation to Mr F about the suitability of investing in Harlequin. Sussex said had it made a recommendation it would have been in breach of the FSA rules at the time.
- Mr F wanted to transfer his pension. He didn't want investment advice. He'd already committed to invest in Harlequin.

As no agreement has been reached the case has been referred to me for a decision.

my findings

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

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've reached the same decision as the adjudicator. I uphold this complaint.

I agree with the adjudicator. Sussex had a duty to provide suitable advice and to act in the best interests of Mr F. It couldn't make a recommendation to set up a SIPP without considering the underlying investment. A SIPP is only an investment wrapper. It is not an investment in itself.

And I'm also mindful that in January 2013, the FSA issued an alert:

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

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

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

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

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

This alert didn't make any changes to the regulations or set out any new approach. It simply re-stated the principles that already applied, and which were in place in 2010 when the advice was given.

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

So Sussex should have considered whether it was in Mr F's best interest to invest in Harlequin. It should have considered whether it was suitable for him to invest almost all his private pensions into a UCIS. UCIS are generally considered to be high risk and speculative investments.

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

I'm not satisfied that the investment was suitable for Mr F. I think it posed too high a degree of risk, although his attitude to risk was recorded as "speculative" that doesn't seem to match his circumstances. There is no record of any significant investment experience and certainly nothing to suggest that he had invested speculatively before. He had mortgage debt and although he had some savings I've not seen anything to suggest any substantial capacity for loss.

Sussex could not recommend the SIPP without considering the suitability of the underlying investment. The Harlequin investment was not a suitable investment for this amount of Mr F's pension. I'm satisfied that if Sussex had met its regulatory obligations and given suitable advice it would have advised against this investment. Had it done that, I think Mr F would probably not have gone ahead even if that meant losing his deposit (of £1,000).

I'm aware that a party involved with Harlequin Property has been charged with fraud offences. A court might therefore conclude that the loss doesn't flow directly from Sussex's unsuitable advice. And on this basis, a court might not require it to compensate Mr F – despite 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 the consumers in the position they would have been in if they'd been given suitable advice.

In this particular case, I conclude that it would be fair and reasonable to make an award, given the specific circumstances. I am satisfied that Mr F would not have made the Harlequin Property investment had it not been for the failings of Sussex. If the adviser had given him suitable advice, the Harlequin Property investment 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 the adviser's failure to give suitable advice, he invested his pension into a specialised, unregulated investment with a limited track record.

So I think that it's fair and reasonable to hold Sussex responsible for the whole of the loss suffered by Mr F. I am not asking it 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.

putting things right

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

I think that with suitable advice Mr F would have kept his existing pension.

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

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

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

In summary, Sussex should:

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

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

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

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

5. Pay Mr F £300 for the trouble and upset caused.

I have set out each point in further detail below.

1. Obtain the notional transfer value of Mr F's previous pension plan if it had not been transferred to the SIPP. That should be the value at the date of this decision.

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

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

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

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

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

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

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

The notional allowance should be calculated using Mr F's marginal rate of tax in retirement, assumed to be 20%.

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

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

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

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

In return for the compensation set out above, Sussex may ask Mr F to provide an undertaking to give it the net amount of any payment he may receive from the Harlequin Property investment in that five year period, as well as any other payment he may receive from any party as a result of the investment. That undertaking should allow for the effect of any tax and charges on the amount he may receive. Sussex will need to meet any costs in drawing up this undertaking. If it asks Mr F to provide an undertaking, payment of the compensation awarded by this decision may be dependent upon provision of that undertaking.

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

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

5 *Pay Mr F £300 for the trouble and upset caused.*

my final decision

I uphold the complaint about Sussex Independent Financial Advisers Limited and order that it calculate and pay redress as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 14 December 2018.

Keith Taylor
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