

complaint

Mr L has complained about the advice he was given by Sussex Independent Financial Advisers Limited ("Sussex") to transfer his existing pension into a new plan, in order to invest in Harlequin Property ("Harlequin").

background

In 2009, Mr L transferred his existing personal pension into a self-invested personal pension (SIPP).

Once the transfer was completed, the SIPP fund was used to part finance a deposit for an investment in Harlequin. The deposit was 30% of the total investment: 20% was paid by the SIPP and 10% was paid in the form of 'commission sacrifice' from Guardian. The investment was made jointly by Mr L with his wife, Mrs L.

One of our adjudicators looked at the complaint and thought it should be upheld. He said:

- Mr and Mrs L were introduced to Harlequin by their mortgage adviser, who I shall call "Mr F". His network was promoting Harlequin. Mr F referred them to Sussex for advice on whether they could use their pensions to invest, as he could not give pension advice.
- Sussex had a duty to give suitable advice about the transfer and intended investment.
- There's no evidence the SIPP provider gave any advice.
- Sussex was aware Mr and Mrs L intended to invest in Harlequin. The available information shows that Sussex did not even consider whether a transfer was suitable, let alone the Harlequin investment.
- The regulator issued an alert in 2013 warning financial business they needed to take account of the underlying investments when advising on pension transfers.
- Mr and Mrs L had combined savings and investments worth around £11,000. They also had an overseas property valued at 250,000 euros. Even though they might have been prepared to accept the risk of the Harlequin investment, they could not bear that risk.

Sussex did not agree with the adjudicator. It said:

- It was Mr F who advised Mr and Mrs L to invest in Harlequin. He received a commission payment for selling them that investment, and he rebated part of this to Mr and Mrs L. If Mr F hadn't done this, the investment wouldn't have gone ahead. As such, arranging the SIPP did not fully facilitate the investment.
- It's true that Mr F couldn't arrange the pension transfer. That's why he referred Mr and Mrs L to Sussex. It recalls at the time the regulator was concerned that customers shouldn't be recommended a SIPP, unless they were going to use it for self-investment.

- The adjudicator referred to a regulatory alert issued in 2013. The alert said that, when firms were advising clients to transfer into a SIPP, they had to consider the suitability of the intended investment too. However, that alert was issued years after the advice.
- At the time of the advice, Sussex's duty was limited to whether the transfer was possible and whether the investment was permitted by HMRC rules. Mr and Mrs L were already contracted to purchase the investment. If Sussex had advised them not to proceed, it would be giving advice on an unregulated investment.
- Although the SIPP provider didn't give advice, it accepted the investment into the SIPP. As it would have carried due diligence on Harlequin, this shows there were no problems with the investment.

As the matter remains unresolved, the complaint has been referred to me for determination.

my findings

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

As noted above, Mr L invested jointly with his wife husband in Harlequin through a SIPP. But they each had individual accounts within the SIPP. So in this decision I will only be considering Mr L's complaint. Mrs L has also made a complaint which is being considered separately. I will at times however refer to both Mr L and Mrs L's circumstances.

It's clear that Mr L was introduced to the concept of investing in Harlequin by Mr F in November 2009. Mr L has confirmed that Mr F was promoting the investment through his business. He and Mrs L completed a Harlequin reservation form on 1 November 2009, and paid a non-refundable reservation fee of £1,000.

But as I understand it, Mr F wasn't authorised to advise on pension transfers. He therefore introduced Mr and Mrs L to allow this to take place.

Sussex completed a confidential financial review form, in which Mr L's personal and financial details were recorded. This showed that Mr L was 42 years old, and married with two dependants. He had a final salary pension scheme, and a personal pension plan valued at £4,000.

The form contained a section to record Mr L's attitude to investment risk. But because the quality of the copy is quite poor, it's difficult to read what this is. In a letter to Mr L in December 2009 Sussex said that his attitude to risk was three to four on a scale of one to five, which was described as "balanced to adventurous".

Sussex also sent Mr L a report setting out its recommendations. This noted that Mr L was keen to invest in commercial property abroad, and that's why a SIPP was being recommended. But because of the guarantees attached to the final salary pension, this wasn't being transferred. His current pension provider did have a SIPP contract, but this

couldn't be used to invest in Harlequin. And while the report said Mr L had taken advice from the SIPP provider, I've not seen evidence to support this. Instead, it's clear that the recommendation to transfer into the SIPP came from Sussex.

But Sussex knew that the reason for the transfer was to facilitate the investment in Harlequin. In fact, from the evidence I've seen Mr L was referred to Sussex by Mr F for this specific purpose. I've not seen evidence he could have gone ahead with the investment other than by using his pension fund. Sussex seems to have been willing to go along with arranging the transfer without fully considering the consequences for Mr L.

Sussex should have appreciated that the investment wasn't suitable for Mr L. This was an unregulated collective investment scheme for an off-plan commercial property development in the Caribbean. It involved a high degree of risk which wasn't compatible with Mr L's risk profile. In addition, the investment meant that all the fairly modest pension provision Mr L had built up in his personal would be invested in this one fund.

I appreciate Mr L also had a final salary pension. But Sussex doesn't appear to have recorded any details of the benefits provided. So it's unclear what additional provision this afforded. In any event, I don't think the fact he had this further pension justified the advice to transfer his personal pension.

While Sussex didn't advise Mr L to invest in Harlequin, it wasn't able to provide suitable advice on the transfer without also taking account of the intended investment.

As the adjudicator noted, the FSA issued an alert in January 2013 relating to pension transfers. In part, this said:

"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 than 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..."

I appreciate that the alert was issued after the advice was given to Mr L. But the 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.

Sussex says advising Mr L not to invest in Harlequin would have been giving advice on an unregulated investment. But if Sussex felt it was unable, for whatever reason, to give such advice, I don't think this would have prevented it from making Mr L aware of the very real risks investing in Harlequin posed to his pension fund.

I appreciate it's likely Mr L was convinced about investing in Harlequin as a result of his discussions with Mr F. I understand he'd acted as Mr L's financial and mortgage adviser for a number of years. So it's likely a certain degree of trust will have built up. The fact that Mr F was rebating some of his commission may well also have played some part.

I also appreciate that Mr L had already shown some commitment towards investing in Harlequin by paying a reservation fee.

But while I've taken all this into account, I don't think it changes the outcome of the complaint. I think that if Mr L had been made fully aware of the risks involved he would have decided not to go ahead with the investment. Had he done so, it's likely he'd have lost the reservation fee. This would have been a hard decision to make. But regardless of this, I think that if Mr L was aware he'd be putting his pension provision at significant risk, he'd have chosen not to transfer his pension and invest in Harlequin.

It's possible there are other businesses involved which could have some liability for the loss Mr L has suffered. If Sussex wishes to take an assignment of any rights of action against any third party involved in the sale of the investment, it would not be inappropriate for it to do so, but only after redress has first been paid. Further, the assignment should only relate to any losses for which Sussex fully redresses Mr L.

I'm aware that a party involved with Harlequin 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 L – 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 find that it would be fair and reasonable to make an award, given the specific circumstances. I am satisfied that Mr L wouldn't have made the transfer or the Harlequin investment had it not been for the failings of Sussex. If the adviser had given her suitable advice, the investment wouldn't have been made. And I consider that the advice given by Sussex completely disregarded Mr L'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 L. 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.

fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mr L 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 L would have kept her 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 L 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 L 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 L'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 L's SIPP, including any outstanding charges.
3. And then pay the amount of (1 – 2) into Mr L'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 L to the SIPP, for the next five years.
5. Pay Mr L £350 for the trouble and upset caused.

I have set out each point in further detail below.

1. *Obtain the notional transfer value of Mr L'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 L'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 this decision of Ms L'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 L'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 L. 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 L'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 L 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 L 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 L 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 L to provide an undertaking to give it the net amount of any payment he may receive from the Harlequin 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 L 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 L 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 L 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 effected before payment of compensation is made. Sussex must first provide a draft of the assignment to Mr L for his consideration and agreement.

5 Pay Mr L £350 for the trouble and upset caused.

my final decision

I uphold this complaint. I direct Sussex Independent Financial Advisers Limited to calculate and pay Mr L redress as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 22 February 2019.

Doug Mansell
ombudsman