

complaint

Mr D complained he was given unsuitable advice by Designed 4 Life Ltd (D4L) to transfer his pension plans to a self-invested personal pension (SIPP). The SIPP was set up to allow Mr D to invest in a Harlequin off-plan hotel development in the Caribbean.

background

Mr D said he initially contacted D4L and an advisor at D4L recommended he invest in Harlequin property. D4L confirmed that a mortgage broker who used to work for it provided that initial recommendation. As a result Mr D was referred to the director of D4L for advice on his pension transfers around October 2010.

At this time D4L contacted Mr D's two pension plan providers to obtain transfer values (TV) of his pension plans. It also wrote to Harlequin and sent Mr D's reservation form and 'deposit' for the particular property he was proposing to invest in. Around this time a fact find was carried out. It appears this was done over the phone. That fact find recorded that Mr D:

- Was around 40 years old.
- Was self-employed and had an annual income of about £35,000.
- Had a home worth about £200,000 with an outstanding mortgage of £100,000.
- Had two personal pensions. They had a combined TV of about £47,000.
- Had an attitude to risk (ATR) profile of 9 -10 on a scale of 10. It said Mr D "wants to invest in a Harlequin property which is a high risk investment."

On 18 February 2011, Mr D signed the contract to purchase 30% of the Harlequin property through his new SIPP. The remaining 70% of the purchase price would be met by Mr D personally in a separate contract. The remaining amount would be paid in stage payments as the property was built.

On 22 February 2011, Mr D signed to transfer both his pension plans into the SIPP. He also signed the SIPP application form and an 'appropriateness test' form required by the SIPP provider.

That form explained that if Mr D had not received advice regarding a complex or unregulated investment an appropriateness test needed to be completed. Mr D did not tick either box to indicate he had or hadn't received advice about the Harlequin investment. But the name of D4L was entered into the advisor box indicating it had advised on the investment.

In March 2011, the SIPP provider contacted D4L to query whether it had provided advice about the Harlequin investment; presumably as a result of the ambiguity caused by the un-ticked boxes. The director of D4L responded "yes advice was given."

A suitability report was produced dated 24 February 2011. It said:

- D4L recommended Mr D transfer his plans to the SIPP.
- The service being provided by D4L involved "*an examination of your needs and objectives by conducting a review of your financial position and future plans.*"
- Mr D's priority was to review his retirement planning and wanted advice in this area.
- Mr D had expressed an interest in using his pension to fund an overseas property purchase.

- In relation to investment experience, Mr D was an “*experienced investor*”. This was because he had experience seeing his bank account value go up and down, had personal pensions and had a buy-to-let property.
- Mr D had a high risk ATR but preferred “*a self-select approach*” to where his money was invested.
- D4L recommended Mr D transfer his plans to the SIPP to meet his aims and objectives.
- Mr D had already committed to purchasing the Harlequin property. D4L had not provided any advice on the suitability of investment. D4L said Mr D had been given advice before his contact with it.
- Mr D had asked D4L to process the transfer regardless of the loss of benefits from his existing plans.
- Mr D’s attitude to risk was high “*and is suitable for the transaction.*”

By March 2011 the SIPP was established. A total of about £52,000 was transferred into it. In April 2011 £46,500 was transferred from the SIPP to Harlequin to pay for the property.

By March 2014, the SIPP provider valued Mr D’s investment in Harlequin at £1. To date, Mr D’s property hasn’t been built and it’s likely he has lost all of his original investment from the SIPP. The remaining cash in his SIPP has been depleted by the ongoing SIPP fees.

Mr D complained to D4L in March 2015. D4L didn’t uphold the complaint. It said it was made clear to Mr D that D4L wasn’t advising on the suitability of the investment. Mr D understood this and didn’t want that advice. D4L said Mr D had already decided to invest in Harlequin albeit a former adviser of D4L had recommended it. He had already paid a £1,000 reservation fee. The SIPP was established for exactly this reason – to allow him to choose his own investments; which Mr D was aware of.

One of our adjudicators considered the complaint. He upheld it. He thought D4L had a regulatory obligation to give Mr D suitable advice. To do this it needed to understand the underlying investment which was behind the transfer. He thought D4L hadn’t given suitable advice when it advised Mr D to transfer his plans. He also noted that although D4L said it didn’t provide any advice on the Harlequin investment, the e-mail from D4L to the SIPP provider said that it did.

In response D4L repeated similar arguments that it provided in its final response to Mr D. It said that Harlequin was still a viable investment and was likely to be built. It couldn’t have advised on it as it didn’t know enough about it. It also reiterated that it should not be responsible for Mr D’s decision as to what he wanted to use his SIPP for. It said it shouldn’t be responsible for poor investment performance.

my findings

I’ve considered all the available evidence and arguments to decide what’s fair and reasonable in the circumstances of this complaint. In doing so I agree with the adjudicator; D4L failed to give suitable advice.

D4L’s stance that it didn’t advise on the Harlequin property isn’t supported by the evidence I’ve seen. The director of D4L provided an unambiguous reply to the SIPP provider in response to a very specific question about the Harlequin property – “*advice was given.*” D4L indicated that the initial contact with Mr D came about through a mortgage broker regulated by it. I also note that D4L were involved in sending the reservation fee (though D4L use the

term 'deposit') to Harlequin along with the reservation form in November 2010. Four months before the contract was signed by Mr D, four months before its advice was given, and six months before the 30% deposit was paid from the SIPP.

This is the same reservation fee which D4L state had been paid *before* Mr D was referred to them. When given the opportunity to comment on the adjudicator's view D4L didn't provide any response on these events. No matter what was recorded in the suitability report, I think the e-mail and chronology of events, on the balance of probabilities, makes it clear D4L did provide some advice on the investment and did advise Mr D it was suitable for him; that was clearly unsuitable advice.

Even if the suitability report and D4L's argument is correct. And it didn't advise on the Harlequin investment. That still means it didn't provide suitable advice. D4L said that the scope of their agreement restricted their advice to just choosing the right SIPP. This is what Mr D wanted as he had already committed to investing in Harlequin. And he knew D4L was only advising on this. In January 2013 the FSA issued an alert. This alert didn't make any changes to the regulations. It simply re-stated the principles that already applied and those that applied in 2010 and 2011. In particular it said the following:

"Financial advisers using this model are under the mistaken impression that...they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect."

This is the business model that D4L said it applied. It failed to look at the investment underlying the SIPP which was the purpose behind the transfer. D4L had a duty to take reasonable care to ensure the suitability of its advice. It had to act in its client's best interests. That's an independent duty; it's a misunderstanding of COBS 9.2 to suggest these rules allowed D4L to advise solely on the 'wrapper' in these circumstances; if the underlying investment isn't suitable then the overall advice is unlikely to be suitable

The purpose of COBS 9 is to ensure consumers get advice that's suitable in their circumstances. To interpret COBS 9.2 in a narrow way so that D4L closed its eyes from the purpose of the SIPP would avoid looking at all of the factors that the rules say are necessary to ensure suitability.

The property was high risk, highly illiquid, highly geared and speculative. In contrast, Mr D transferred his entire benefits to fund the purchase. There's no evidence he had any experience of property investments like Harlequin. In fact his investment experience was limited to a buy-to-let property. Classing Mr D as an "*experienced investor*" appears to have no reasonable justification.

D4L recorded that Mr D had a "*high*" attitude to risk. He was recorded as the highest possible on the scale. It's not clear how it reached this conclusion. The ATR simply said he "*wants to invest in a Harlequin property which is a high risk investment*". On balance, I think this suggests that Mr D's risk profile has been fitted to the investment, and not the other way around. The rules required D4L to consider Mr D's financial situation. It also required D4L to be satisfied that he was able to bear the investment risks. It failed to do this.

The only reason Mr D transferred into the SIPP was to invest in Harlequin. I think on any view, D4L should've advised Mr D that the transfer of his entire pension provision to the SIPP to invest in Harlequin property wasn't suitable. There's no suggestion that the transaction was carried out on either an 'insistent client' or 'execution only' basis.

D4L said that the investment hasn't failed and therefore, presumably, Mr D's SIPP may still retain some value. The issue in this complaint is whether the pension transfers to the SIPP, with that underlying asset, was suitable or not for Mr D. The investment is presently valued at £1. It hasn't been built, and it is almost three years past the targeted completion date. As the approach to compensation below sets out, *if* there is any later value in the investment, then D4L may be able to benefit from it. But this point doesn't detract from reaching a conclusion on the suitability of the advice. If the investment was now doing well, the transfer would still have been unsuitable.

Despite what D4L say, this complaint isn't about investment performance. This complaint is about unsuitable advice to transfer Mr D's pension plans to a SIPP for the sole purpose of funding in Harlequin. For the reasons above, my view is that the transfer wasn't suitable. I don't think D4L gave him suitable advice and Mr D should be compensated for this.

fair compensation

On 22 April 2016, the adjudicator contacted all parties and explained how redress in this complaint might be approached. This included certain aspects that weren't set out in the adjudicator's original view. Both parties were given two weeks to provide any comments on the proposed approach. No comments have been provided to us.

My aim is to put Mr D as close as possible to the position he would probably now be in if he'd been given suitable advice. I think that he would have kept his existing pension plans; wouldn't have invested in Harlequin; and as a result 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. While we understand Harlequin will allow D4L to take over the investment from the consumer. The involvement of third parties - the SIPP provider and Harlequin – mean much of this is beyond this service or the business'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. While it's complicated to put the consumer back in the position he would have been in if suitable advice had been given, I think it's fair that Mr D 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.

D4L should calculate fair compensation by comparing the value of Mr D's pension plans, if he had not transferred, with the current value of his SIPP. In summary:

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

2. Obtain the actual transfer value as at the date of the decision of Mr D's SIPP, including any outstanding charges.
3. Pay a commercial value to buy Mr D's share in the Harlequin property.
1. And then pay an amount into Mr D's SIPP so that the transfer value 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, D4L should:

2. Pay five years' worth of future fees owed by Mr D to the SIPP.
3. Pay Mr D £300 for the trouble and upset caused.

I have explained how D4L should carry this out in further detail below.

1. *Obtain the notional transfer value of Mr D's previous pension plans if they had not been transferred to the SIPP. That should be the value at the date of this decision.*

On the date of decision, D4L should ask Mr D's former pension providers to calculate the notional transfer value that would have applied had he not transferred his pension plans but instead remained invested in the same funds.

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.

D4L 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 D's SIPP, including any outstanding charges.*

D4L should then deduct the result of 2 from the result of 1. That is the loss to his pension.

3. *Pay a commercial value to buy Mr D's share in the property.*

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. We understand this can be done.

The valuation of the Harlequin investment may prove difficult, as there is no market for it. To calculate the compensation, D4L 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 D4L is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation.

The SIPP has paid a deposit under a contract with Harlequin. That is the loss I am trying to redress. Mr D agreed to pay the remainder of the purchase price under a separate contract. Those sums have not yet been paid, so no further loss has been suffered. However, if the property is completed, Harlequin could require those payments to be made. I think it's unlikely that the property will be completed, so I think it's unlikely there will be further loss. But there might be. Mr D needs to understand this, and that he won't be able to bring a further complaint to us if this contract is called upon. Mr D may want to seek independent advice on how to cancel this ongoing contract for the remaining amount.

4. *Pay an amount into Mr D's SIPP so that the transfer value is increased to equal the value calculated in (1). 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, D4L should pay it as a cash sum to Mr D. But the compensation should be able to be paid into a pension in the time until Mr D retires and he should be able to contribute to pension arrangements and obtain tax relief.

The compensation should be reduced to notionally allow for the income tax relief Mr D could claim. The notional allowance should be calculated using Mr D's marginal rate of tax.

Simple interest should be added at the rate of 8% a year from the date of 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 D to the SIPP.*

Had D4L given suitable advice I don't think there would be a SIPP. It's not fair that Mr D continues to pay the annual SIPP fees if it can't be closed.

I think D4L should be able to take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mr D back in the position he would have been in. But I don't know how long that will take. Third parties are involved and we don't have the power to tell them what to do. To provide certainty to all parties, I think it's fair that D4L pay Mr D 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 D with some confidence that he will not be subject to further fees.

In return for that, D4L may ask Mr D to provide an undertaking to account to it for the net amount of any payment he may receive from the Harlequin investment in that five year period. That undertaking should allow for the effect of any tax and charges on the amount he may receive from the investment. D4L will need to meet any costs in drawing up the undertaking. If D4L asks Mr D to provide an undertaking, payment of the compensation awarded by this decision may be dependent upon provision of that undertaking.

If, at the end of those five years, D4L wants to keep the SIPP open, and to maintain an undertaking for any future payments under the Harlequin investment, it must agree to pay any further future SIPP fees. If D4L fails to pay the SIPP fees, Mr D always has the option of trying to cancel the Harlequin contract to enable the SIPP to be closed at any time.

6. *Pay Mr D £300 for the trouble and upset caused.*

Mr D has been caused some distress by the loss of all of his pension benefits. I think that a payment of £300 is appropriate to compensate for that upset.

my final decision

For the reasons outlined above, I uphold Mr D's complaint against Designed 4 Life Ltd. I consider that fair compensation should be calculated as set out above.

Simple interest should be added to my award at the rate of 8% gross a year from the date of this decision until the date of payment. Tax may be due on this interest.

Under our rules, I'm required to ask Mr D to accept or reject my decision before 27 June 2016.

Benjamin Taylor
ombudsman