

## complaint

Mr W complained about Kingswood Financial Advisors. He said he was given unsuitable advice to transfer his pension plans to a self-invested personal pension (SIPP). The SIPP was set up to allow Mr W to invest in a Harlequin off-plan hotel development in the Caribbean.

## background

Mr W met with an advisor from Kingswood in September 2010. He had been referred to it by an agent for Harlequin in relation to transferring his personal pensions to a SIPP. At that meeting, a confidential financial review was carried out. It recorded, amongst other things:

- Mr W was in his late 50s and wanted to retire at 65.
- He earned about £28,000 per year.
- He owned a home jointly with his wife worth about £115,000. It had a mortgage of £46,000.
- He had £500 in a current account.
- He had debts of about £78,000.
- He was a member of an occupational pension (OPS) scheme with his current employer. The plan had a transfer value of about £58,000.
- He also had a personal pension (PP) plan with a transfer value of about £22,000.

The financial review recorded that Mr W had £140,500 in total assets. This included the entire value of his home. It said his total liabilities were about £124,000. Removing the outstanding mortgage amount from his assets meant Mr W's liabilities, in fact, exceeded his assets. His pensions were, in reality, his only real assets.

The review said Mr W had recently attended a seminar provided by the agent with regards to using his pension funds to invest in commercial property abroad. The review noted that Kingswood had not given any advice about the Harlequin purchase. It did say that it had given advice about how Mr W could use his pensions to enable the property purchase. Finally, the review recorded, under the "*summary of client needs*", that Mr W wished to transfer his pension funds to be able to access the property purchase.

At this meeting a risk profile was completed for Mr W. It recorded him as a '*six out of ten*' in relation to his attitude to risk (ATR). An ATR questionnaire was also completed. I note from that document Mr W ticked the following pre-printed answers:

- *I wish to break all ties with my employer and would prefer to move my funds to an individual plan which is under my control.*
- *A significant portion of my benefits which should be protected as far as is reasonably possible.*
- *I require the maximum possible lump sum upon retirement.* Handwritten next to that answer is the word "*now*".
- *I am happy to accept a larger degree of risk in exchange for the possibility of a higher pension in retirement.*

Mr W signed the contract to purchase the Harlequin investment about a month later. A number of other things all happened on the same day he signed the contract:

- Mr W signed the SIPP application form. This indicated Kingswood was the *financial advisor* and the agent was the *introducer*.
- Mr W also signed an advisor/broker agreement to be sent to the SIPP provider. It said that Kingswood was appointed by Mr W to provide him with advice and manage investments held within his SIPP. It also set out the initial fee and ongoing fee Kingswood would receive for doing so.
- Finally, he also signed the forms to transfer his OPS and PP plans to the SIPP.

About two days later, Kingswood produced a letter of advice and Pension Transfer Report for Mr W. This set out much of the information recorded in the confidential review and ATR questionnaire. It also said:

- Kingswood categorically stated that it was not giving any advice as to the suitability or otherwise of Mr W using his pension funds in this way.
- While Kingswood weren't advising Mr W about the suitability of the property purchase, it did urge Mr W to use any tax free cash produced from the transfer to reduce his debt.
- It was virtually certain that Mr W's pension benefits would be reduced if he transferred. It noted the critical yield for his OPS was around 18%.
- The report set out the benefits of his OPS.
- Mr W had taken advice from the agent and wished to invest in Harlequin.
- That following discussions Mr W wanted to proceed and Kingswood had confirmed only a SIPP would enable him to use his pension funds to invest in Harlequin.

Mr W signed on 1 November 2010 to confirm that he had read and understood the report. The SIPP was soon opened and by January 2011 both Mr W's pensions had been transferred to it. In total about £81,000 was transferred.

That same month £28,500 was paid to Harlequin as a 30% deposit from his SIPP. The remainder of the purchase price would be paid by Mr W in instalments as the property was built. This would be under a separate contract between Harlequin and Mr W for the remaining 70% share.

In March 2011, Mr W took about £19,000 in tax free cash from his pension.

In January 2012 Mr W invested also £19,500 from his SIPP into a different unregulated investment.

To date, Mr W's Harlequin property hasn't been built, and it's likely he has lost all of his original investment. As at June 2014, Mr W's Harlequin investment was valued by the SIPP provider at £1.

In May 2015 Mr W complained to Kingswood that the advice to transfer was unsuitable. He said that Kingswood should have considered the suitability of the Harlequin investment for

him. Kingswood rejected his complaint. It said in their rejection, and in further submissions to this service:

- Mr W had been advised on the investment by the agent – an unconnected advisor.
- He had already made the decision to invest before he met with Kingswood.
- The agreement between Kingswood and Mr W was to advise only on the suitability of the SIPP to hold overseas property. It said Mr W knew this.
- The risks and features relating to the transfer were set out in detail for Mr W – he made an informed decision.
- The agent received commission on the Harlequin property purchase and was behind Mr W investing.
- The 2013 FSA Alert didn't apply to the situation where one advisor gave advice on the investment and another advisor gave advice on the SIPP.
- A SIPP allows a member of the public to make their own decision and choose their own investments. That's what happened in this case.

One of our adjudicators considered Mr W's complaint. She thought Kingswood hadn't given suitable advice and upheld the complaint. Kingswood hasn't provided any response to her view. As a result the complaint has been referred to me for a final 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. Having considered the reasoning provided by the adjudicator, I agree with her conclusions. In fact there's little more I can usefully add. Kingswood failed to provide suitable advice. They had a responsibility to provide it. Mr W has suffered a loss as a result of this failing.

Kingswood said that the scope of its agreement restricted its advice to just choosing the right SIPP; this is what Mr W wanted as he had already committed to investing in Harlequin. And he knew Kingswood 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. 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 Kingswood applied. It failed to look at the investment underlying the SIPP which was the purpose behind the transfer. Kingswood 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 can't be avoided simply because an unregulated third party told Mr W to invest. It's a misunderstanding of COBS 9.2 to suggest these rules allowed Kingswood 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.

Therefore, although Mr W may have received advice from the agent, he had still been referred to Kingswood for advice on the transfer. It still had an obligation to consider whether it was in his best interests. Mr W was looking at transferring his pension plans to a SIPP; to determine whether that was suitable or not required Kingswood to understand the property that the SIPP was going to invest in. 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 Kingswood closed its eyes to the purpose of the SIPP would avoid looking at all of the factors that the rules say are necessary to ensure suitability. So although Kingswood said the FSA alert didn't apply to its situation, I don't agree. From the evidence I've seen the facts fit exactly the practice Kingswood carried out.

The property was high risk, highly illiquid, highly geared and speculative. The deposit represented over a third of the value of his pension fund. There's no evidence he had any experience of property investments like Harlequin. In fact, I'm not aware that he had any real investment experience at all. Mr W's confidential financial review reveals in stark terms that he had limited capacity for loss. His liabilities were greater than his assets. He had a considerable amount of debt. His pension represented the only really significant asset he had as he approached retirement. To some extent Kingswood was aware of this, and did go on to point out that Mr W should pay off his debts. But at no time did Kingswood advise Mr W that the purchase would be unsuitable for him.

Kingswood recorded that Mr W had an attitude to risk of *six out of ten*. His answers to the ATR questionnaire led to this categorisation. Mr W also indicated that he was happy to accept a larger degree of risk in return for a higher pension in retirement. However he also indicated he wanted to ensure a significant proportion of his benefits were protected. Kingswood failed to reconcile the inconsistencies in Mr W's responses. Irrespective of his answers, the ATR alone can't mean the investment was suitable.

As well as Mr W's attitude to risk, the rules required Kingswood to consider Mr W's financial situation. It also required Kingswood to be satisfied that he was able to bear the investment risks. It failed to do this. Mr W clearly didn't have the capacity for loss required for such a high risk investment. Any future funding to cover further stage payments on the investment were likely to be made via a loan – incurring further liabilities for Mr W.

The only reason provided for Mr W to transfer into the SIPP was to invest in Harlequin. I think on any view, Kingswood should've advised Mr W that the transfer 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.

I recognise there may have been other reasons why a transfer to a SIPP may have been suitable for Mr W. But Kingswood didn't consider this. While looking back it's difficult to be sure what someone would've done if suitable advice had been given. I think, on balance, Mr W wanted and needed to access his pension funds.

He had significant debts with a number of different lenders and indicated in the ATR questionnaire that he wanted to access his tax free cash "*now*". His representative has confirmed that he used the tax free cash to pay off part of his debts. So the transfer out of his OPS and PPP to a SIPP to facilitate this may not have been unsuitable in itself. His debts were significant and waiting to access his OPS benefits may not have been suitable in Mr W's circumstances. However, for all the above reasons, investing in the Harlequin property wouldn't have been suitable for Mr W. I think with suitable advice he wouldn't have gone ahead with it and his funds would have been invested differently.

The property was recommended to Mr W by the agent. But Kingswood was a regulated independent financial advisor. I think any advice that the transfer wasn't suitable due to the high risk nature of the underlying investment would've been significant for Mr W and carried due weight - despite what the agent may have told him.

It's common in Harlequin property purchases for the buyer to pay a £1,000 reservation fee. I've not been provided with any evidence regarding Mr W paying this or not. But even if Mr W had done so, this represented a small proportion of the total purchase price. Even if it wasn't refundable, I don't think this would have prevented him from stopping the investment given the greater risk and possible losses he would've been advised he was exposing himself to.

I've reached this decision on the balance of probabilities. Given the significant risks involved in investing in Harlequin, and the greater weight Kingswood's advice should reasonably have had, I'm satisfied this test has been met. On balance, I believe Mr W wouldn't have invested in the property had Kingswood given him suitable advice.

Kingswood has pointed the finger at the agent for giving Mr W advice about the investment. What Mr W was told by the agent isn't clear, and no evidence has been provided about that. But, for the reasons I have already given, I don't think this means Kingswood aren't responsible for the losses Mr W incurred. If Kingswood had given suitable advice Mr W wouldn't have invested. In fact, despite what Kingswood says, the SIPP application form identified Kingswood as the financial advisor, and the agent as the introducer. Kingswood also had Mr W sign a form which would provide Kingswood with an ongoing fee for providing advice on any investments held within the SIPP.

The agent wasn't a regulated advisor. It's significant that Kingswood is. It brings responsibilities, duties and protections towards clients which an unregulated advisor doesn't have. Kingswood had a regulated duty to give suitable advice but didn't.

For the reasons above, I don't think Kingswood gave Mr W suitable advice and he should be compensated for this.

Mr W went on two years later to invest in a further unregulated product. I've not been provided with any evidence which shows Kingswood knew about this or were involved in any capacity. As a result, I don't think it can be held responsible for Mr W's later decision to invest in it through his SIPP.

### **fair compensation**

On 16 May 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 the opportunity to provide comments on the proposed approach. No comments were provided to us.

My aim is to put Mr W 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 transferred to the SIPP to access his tax free cash. But I don't think he would have gone on and invested his pension funds in Harlequin. I note that Kingswood was not involved in the subsequent investment in a different unregulated scheme. The sum invested should be deducted as a withdrawal.

In other cases, we have directed the business to make a payment to cover future SIPP fees. However, in those cases the SIPPs would not have existed but for the investment in Harlequin. In this case, I think the transfers to a SIPP may still have occurred. So I'm not making an award for future fees as they would have been incurred in any event.

There are a number of possibilities and unknown factors in making an award. While we understand Harlequin will allow Kingswood 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 Kingswood'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 W 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.

1. Calculate the 'fair value' of Mr W's SIPP using the benchmark shown below.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Guardian SIPP	still exists	for half the investment: FTSE WMA Stock Market Income Total Return Index; for the other half: average rate from fixed rate bonds	date of investment in SIPP	date of calculation	8% simple from calculation to settlement

The *fair value* is what the SIPP would have been worth at the end date had it achieved a return using the benchmark.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, you should use the monthly average rate for the fixed rate bonds with 12 to 17 months maturity as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Apply those rates to the investment on an annually compounded basis.

Any withdrawal, income or other payments out of the investment should be deducted from the *fair value* at the points they were actually paid so they cease to accrue any return in the calculation from those points on. These should include the tax-free cash payments, as well as the additional unregulated investment and any associated costs.

Provide the details of the calculation to Mr W in a clear and simple format.

I've chosen this method of compensation because:

- Mr W wanted capital growth with a small risk to his capital.
- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.
- The WMA index is a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.

- I consider that Mr W's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr W into that position. It doesn't mean that Mr W would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. But, I consider this a reasonable compromise that broadly reflects the sort of return Mr W could have obtained from investments suited to his objective and risk attitude.
- Mr W has not yet used his pension plan to purchase an annuity.

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

This should be confirmed by the SIPP provider. The difference between 1 (*the fair value*) and 2 (*the actual value*) is the loss to his pension.

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

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.

The SIPP has paid a deposit under a contract with Harlequin. That's the loss I am trying to compensate. Mr W agreed to pay the remainder of the purchase price under a separate contract. Those sums haven't 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 W 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 W may want to seek independent advice on how to cancel this ongoing contract for the remaining amount.

4. *Pay an amount into Mr W's SIPP so that the transfer value is increased to equal the fair 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, Kingswood should pay it as a cash sum to Mr W. The compensation should be reduced to notionally allow for the income tax relief Mr W could claim. The notional allowance should be calculated using Mr W'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 Mr W £300 for the trouble and upset caused.*

Mr W has been caused some distress by the loss of all of his pension benefits and the uncertainty that this has brought him about his future retirement provision. 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 W's complaint against Kingswood Financial Advisors. 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 W to accept or reject my decision before 6 July 2016.

Benjamin Taylor  
**ombudsman**