

complaint

The complaint is about the advice The FG (IFA) Limited ("FG") gave to Mr W to transfer his existing pensions to a self-invested personal pension (SIPP). The SIPP was set up to invest in Harlequin Property.

background

Mr W found out about Harlequin Property from a firm called Global Property Partnership. He was then referred to PMI Independent Financial Advisers ("PMI") to set up a SIPP. PMI was an appointed representative of FG.

PMI wrote to Mr W with a number of documents to arrange the SIPP. This included a fact find document for Mr W to complete with his personal and financial details. PMI explained that if the pensions included any guaranteed benefits that the advice could be not to transfer. If the transfer did not proceed PMI wouldn't charge a fee. It also enclosed a presentation on how a SIPP property purchase works.

The fact find recorded that at the time of the advice Mr W was:

- aged 42;
- married, with one dependant;
- an accountant, with an annual gross income of £62,000;
- a member of his employer's pension scheme and had some personal pension plans.

PMI advised Mr W to transfer a number of existing pensions into a SIPP.

The Harlequin Property has not been completed. Mr W complained to PMI. It rejected the complaint as it said it only advised on a SIPP for Mr W to use. The complaint was then referred to this service. We asked Mr W to provide us with some information. This was similar to the information on the fact find, but Mr W told us:

- his salary was about £52,000;
- he also had a few buy to let properties. Those properties were still held, some with negative equity and all with high loans to value;
- he was told the investment was high risk, but wasn't advised against making the investment;
- the adviser said that he had invested in Harlequin himself, which Mr W took as a personal recommendation.

I issued a provisional decision, in which I said:

- Mr W was referred to PMI for advice about a SIPP. PMI knew that the SIPP was to be used to buy a Harlequin Property. As such, PMI was required to know its client and give suitable advice.
- The regulator issued an alert in January 2013. In the regulator's view, suitable advice could not be given without considering the intended investment.
- Mr W intended to invest most of his pension in Harlequin Property. He didn't have any other savings. PMI had identified the investment as high risk. Therefore, suitable advice should have been not to invest and not to transfer into a SIPP.
- Even though Mr W was an accountant he did not have any investment experience. Mr W said to us that when he met his wife they both had a property each. So they moved together in one of them and rented the other. Later on, they bought a couple more properties that they now rent out.
- PMI's presentation on Harlequin was misleading. It was based on the assumption that the property was a bargain at £100,000. It then assumed it would double in value. The only risk warning given was that if there was insufficient money in the pension fund, it was possible Mr W would have to top it up.

I concluded that Mr W was misled about the risks of investing in Harlequin. The presentation gave an unfairly positive picture. And when the adviser said that he had invested himself, this was a positive opinion that it was a good investment.

I invited both parties to comment on my provisional decision.

Mr W confirmed that he had nothing further to add.

FG did not agree with my view. It said:

- Harlequin is still trading and actively promoting its business. It is even recommending that successful claimants reinvest their compensation into a Harlequin Property.
- Mr W was not misled. PMI carried out his express wishes. I have acted unfairly in my determination to uphold the complaint irrespective of PMI's role and the circumstances.
- The suitability letter clearly stated that Mr W's funds could be at risk. There was nothing unclear about that statement.
- The SIPP fund was not most of Mr W's pension. He had been employed in a senior position for a number of years. In fact, he wanted to transfer his pension with his employer too. He refused to provide PMI with full information to complete the fact find.
- PMI did not give investment advice. Mr W had chosen how much to invest and where to invest. Mr W had a few buy-to-let properties; so he would be classed as a professional investor as defined by the new Buy To Let mortgage rules. He was well aware of the risks involved in investing in an off plan, overseas development by an unknown developer. Mr W had negative equity in his properties – so he was well aware he could lose money on property ventures.

- In the telephone conversation with our service Mr W said that the investment was too good to be true. If so, it normally is and should be avoided.
- Mr W refused to give full information. PMI requested the information in its letter of 16 July 2010.
- It was Global Property that told Mr W the adviser had also bought a property with Harlequin. At no time did the adviser tell Mr W that the investment was appropriate for his needs. Mr W made the decision without any influence from PMI.
- Mr W admitted that the investment was high risk. He claims he would not have gone ahead with the investment if he was told not to. But PMI did not tell him to invest or not to invest. It was his decision to do so.
- Mr W claimed that he had no idea how the venture worked. This is why the presentation was sent to him. It was Global Property who sold the property and went through the process with him.
- It is disappointing that I accepted all of Mr W's claims, while I dismissed PMI's statements.
- PMI, in fact, prevented Mr W from transferring all his pensions to Harlequin.
- The effects of the decision will put FG out of business.

FG has also provided copies of two documents and asked for my response to them. They were:

- Comments from the chairman of a UK based provider of financial compliance services training and support, about our service's assessment on a similar complaint.
- A report showing the results of a survey of IFAs on our service.

my findings

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

our approach to complaints against FG

FG clearly feels very strongly about the approach this service has taken to a number of complaints against it. These all relate to the same business model. It is the business model described by the regulator in its alert to firms of January 2013. A number of investors were introduced to FG by Global Property. The intention was to set up a SIPP to invest in Harlequin. FG says that it didn't give advice on Harlequin.

Many of the points raised by FG relate to the way this service has dealt with complaints against it. And there are more general comments about the way that we handle complaints against IFAs. I am required to make a decision based on what I think is fair and reasonable in the circumstances of this complaint. In doing so I have to take account of the law and regulations; regulator's rules, guidance and standards; codes of practice; and what I consider to be industry good practice at the time.

FG isn't happy with our handling of complaints against the firm. I don't intend to deal with any issues about that in this decision. I have read all of the correspondence and taken everything that's been said into account. In this decision I have dealt with points that are relevant to the outcome of this complaint.

what did PMI do?

It is not in dispute that Mr W had been sold the idea of buying a Harlequin property by Global Property. He was then referred to PMI to advise on a SIPP so that he could use his pension fund to buy the property.

The first letter from PMI to Mr W included a presentation about how the process worked. It gave an example of how a £50,000 pension could be used to buy a Harlequin Property worth £100,000. It said that was a "*Bargain!*" It assumed that the property doubled in value to £200,000 by the time it was completed. The SIPP would then be able to borrow £62,500. The income from the property would then repay the interest on the loan.

I remain of the view that the presentation was misleading. It described the process in a way that emphasised the positives. There were no meaningful risk warnings.

Mr W also says that the adviser said he had invested in Harlequin himself. The adviser denies this. He says that Global Property must have told Mr W about this. I have now dealt with a number of complaints about FG involving the same adviser. I have to deal with each complaint on its own facts. But, I think it is relevant that a number of unconnected people have all said that they were told by the adviser that he had invested in Harlequin. Taking all of the available information and evidence into account I think the adviser told Mr W he had invested himself. And this was likely to have influenced the decision to invest.

PMI advised Mr W to start a SIPP. That was intended to be used to buy the Harlequin Property. I think it also misled Mr W about the risks of investing in Harlequin.

what should PMI have done?

FG argues that it followed the rules at the time. The alert issued by the regulator in January 2013 was after it gave its advice. FG says this isn't relevant. I don't agree.

PMI was giving regulated advice. The rules required a firm to act in its client's best interests; obtain enough information about Mr W to then give suitable advice. That has not changed. The alert in January 2013 pointed out that a business model was being used with firms advising on a SIPP without considering the investment. The business model was not complying with the rules in place at the time.

what advice should have been given?

Harlequin was an unregulated, overseas property development. The way it would operate was unclear. There were many risks of investing. Mr W was using most of his pension at the time to invest. I think it's clear that he should have been advised not to invest in Harlequin.

what would Mr W have done?

FG has argued that Mr W should be treated as a professional investor. He was a qualified accountant. And he owned a number of buy to let properties. I think Mr W knew about the general risks of investing in property. But, Harlequin was a different type of investment from a bricks and mortar property. It operated in a very different way. I don't accept that Mr W was a professional investor for this type of investment.

Mr W wasn't given suitable advice. So, I have to work out what he would have done if he had been given that advice. He was referred to PMI for advice about starting a SIPP. PMI was a regulated firm of financial advisers. I think that Mr W would have given a lot of weight to advice from PMI not to invest. He has told us that he wouldn't have invested in Harlequin. I have to treat that evidence with some caution because we now know that there are problems with Harlequin.

I think it's most likely that Mr W would not have invested in Harlequin. I think PMI reinforced the positive points. It should have advised against it. I think Mr W would have given any advice from PMI not to invest serious thought. I conclude that he would have acted on suitable advice. He would not have transferred his pensions to the SIPP, or invested in Harlequin.

the role of Global Property and the SIPP provider

FG says that Global Property and the SIPP provider should share some liability. I accept that Global Property played some part in the sale of the Harlequin Property. But, that firm isn't regulated. One of the reasons for regulation was to provide consumer protection. FG should have realised that this business model exposed Mr W and other clients to significant risks. It was a regulated firm and was required to follow the regulator's rules. I don't think it did. If FG followed the rules then Mr W wouldn't have invested in Harlequin.

The SIPP provider was regulated. But, it accepted business from a regulated adviser. It's possible that the SIPP provider could have some liability.

I'm only considering a complaint against FG. I have explained why I think FG did something wrong. If FG thinks that any third party has contributed to the loss it is free to take action against those third parties. As part of my award I will allow FG to take an assignment of any rights of action against any third party. That is if my award is paid in full. FG may then try to recover some part of the award.

fair compensation

My aim is to put Mr W in the position he would now be in if he had received suitable advice. I think that he would have: a.) kept his existing pensions; b.) wouldn't have invested in Harlequin; and c.) 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 FG 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 FG'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 they 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 I should wait and determine each any every possibility before making an award. What is set out below is a fair way of achieving this.

FG should calculate fair compensation by comparing the value of Mr W's pensions, if he had not transferred, with the current value of his SIPP. In summary:

1. Obtain the notional transfer value of Mr W's previous pension plans on the date of this decision, if they had not been transferred to the SIPP.
2. Obtain the actual transfer value of Mr W's SIPP on the date of this decision, including any outstanding charges.
3. Pay a commercial value to buy Mr W's share in the Harlequin Property investment.
4. Pay an amount into Mr W'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, FG should:

5. Pay five years' worth of future fees owed by Mr W to the SIPP.
6. Pay Mr W £300 for the distress and inconvenience caused.

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

- 1. Obtain the notional transfer value of Mr W's previous pension plans on the date of this decision if they had not been transferred to the SIPP.*

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.

- 2. Obtain the actual transfer value of Mr W'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.

- 3. Pay a commercial value to buy Mr W'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 can be done.

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

FG may ask Mr W 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 W may receive from the investment and any eventual sums he would be able to access from the SIPP. FG will need to meet any costs in drawing up the undertaking.

Currently, I have not been provided with the contract between Harlequin and Mr W. So I am not certain whether he signed a different contract for the deposit and the remainder, or a single contract.

If separate contracts were signed, it means that the SIPP has paid a deposit under a contract with Harlequin. That is the loss I am trying to redress. Mr W 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 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.

If a single contract was signed, it means that the SIPP would pay the entire amount. The SIPP has paid a deposit under a contract with Harlequin. That is the loss I am trying to redress. Mr W agreed for the SIPP to pay the remainder of the purchase price under that 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 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. Equally, if FG takes over the contract from the SIPP trustees then it may be liable for the remaining amount of the purchase price. As a result any total award that FG may have to pay could exceed £150,000. This won't be known until the redress in steps 1 and 2 above has been calculated. If it will exceed £150,000 then I can't tell FG to take over the contract from Mr W'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 W'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.*

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

I am also not certain whether, currently, Mr W can pay the redress into a pension plan. If he can, it means that the compensation is able to be paid into a pension in the time until Mr W retires and he should be able to contribute to pension arrangements and obtain tax relief. If this is the case, 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. For example, if Mr W is a basic rate taxpayer, the total amount should be reduced by 20%.

On the other hand, Mr W may not currently be able to pay 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 W should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr W's marginal rate of tax in retirement. For example, if Mr W is likely to be a basic rate taxpayer in retirement, the notional allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mr W 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 the redress calculation until the date of payment. Income tax may be payable on this interest.

5. Pay five years' worth of future fees owed by Mr W to the SIPP.

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

I think FG should be able to take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mr W 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 FG pays Mr W 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 W 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 W £300 for the distress and inconvenience caused.

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

I appreciate that FG will think my decision is unfair. I have explained why FG did not comply with the rules in place at the time it gave advice to Mr W. I realise that this decision could have serious consequences for FG's business. But, that is not a matter that I can take into account in reaching my decision.

my final decision

I uphold the complaint. I direct The FG (IFA) Limited to calculate fair compensation as set out above and pay Mr W the amount produced by that calculation.

Under our rules, I'm required to ask Mr W to accept or reject my decision before 3 November 2016.

Roy Milne
ombudsman