

## **complaint**

Mrs W has complained about advice from Kingswood Financial Advisors in 2010 to transfer her pension to a Self-Invested Personal Pension ("SIPP"). She says the adviser was negligent as he didn't think about whether the planned Harlequin investment was suitable.

## **background**

In 2010, Mrs W was referred to Kingswood Financial Advisors ("Kingswood") by an unregulated third party for pension transfer advice.

Kingswood looked at Mrs W's existing pension; assessed her views about risk and advised her to transfer to a SIPP. It noted that Mrs W wanted her money in a plan that offered greater investment choice. Mrs W said she was looking to buy a commercial investment property, but Kingswood hadn't given her advice about this.

Mrs W was told the SIPP was suitable and matched her views on risk; these Kingswood recorded as *"I accept the risk of a small loss to my money"*.

Mrs W transferred just over £104,000 to a SIPP. Kingswood then told Mrs W to move her investments to a new SIPP so a further £31,500 could be invested. This advice came as the first SIPP provider would no longer allow investment in Harlequin.

Mrs W made regular contributions to the SIPP between 8 September 2010 and 31 August 2012.

In May 2015, Mrs W complained to Kingswood. Her complaint was rejected as Kingswood said its advice was limited to providing a suitable SIPP "wrapper" to hold the investment recommended by another adviser. Kingswood's advice was clearly limited to the SIPP "wrapper", not the underlying assets.

The involvement of the other adviser was shown by letters sent to Mrs W's previous pension company. Also the Harlequin papers were witnessed by an employee of the other adviser.

Kingswood said that Mrs W made the decision to invest in Harlequin before it gave advice. The other adviser had received commission for that advice; Kingswood had not. There was a clear demarcation of duties.

Mrs W referred her complaint to us.

Our adjudicator thought Mrs W's complaint should be upheld. He said it was clear Harlequin was introduced by an unregulated third party. Kingswood then arranged the SIPP so the investment could be made. Kingswood said its role was limited to arranging the transfer to a suitable SIPP. The adjudicator felt it was wrong to do this without considering whether the underlying investment was suitable.

As a regulated firm, Kingswood had responsibilities to Mrs W. These were explained in the Conduct of Business Sourcebook (COBS). And the regulator had restated its views about the type of transaction Kingswood had arranged for Mrs W in an alert issued in January 2013.

Kingswood knew that Mrs W was transferring all of her pensions to the SIPP. And it knew the level of risk she was happy to take. It should have known that Harlequin was a high risk fund. This was only suitable for sophisticated investors. The adjudicator didn't think Mrs W was a sophisticated investor.

He didn't think Harlequin was suitable for Mrs W. Investing all of her pension in the fund further increased the risks. Kingswood should have made it clear to Mrs W that the fund was unsuitable. If she'd then chosen to ignore such advice, Kingswood should then have treated her as an insistent client. There was no evidence to suggest this was the case.

In saying that Harlequin was unsuitable, the adjudicator noted that Mrs W already owned additional property in 2010. He accepted that this was a holiday home, a home she'd bought with the intention of moving and a buy to let home owned by her husband. He didn't think that because Mrs W owned other property, this made Harlequin suitable. Instead, it should have prompted further questions about whether investing in more property was right.

He noted that Mrs W may have been persuaded that Harlequin was a good idea by an unregulated third party; however Mrs W wasn't able to complain to us about this. Kingswood's advice had been a regulated activity and it had to comply with certain regulations. That included considering Mrs W's circumstances and giving suitable advice. It also had to act in Mrs W's best interests.

The adjudicator didn't believe Kingswood could avoid its responsibility by providing limited advice.

Kingswood didn't agree and asked for the complaint to be referred to me for review. To-date Kingswood has made no further submissions.

### **my findings**

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulator's rules, guidance and codes of practice; and what I consider to have been good industry practice at the time.

What was Kingswood required to do?

Kingswood was required to comply with the regulations. That includes knowing its client and giving suitable advice. It was also required to act in its client's best interest. I don't think Kingswood can avoid these obligations by limiting its role to only advising on the SIPP.

What did Kingswood do?

Kingswood argues that it only provided advice on the SIPP and did not give advice on the investment made in Harlequin Property. It explains that Mrs W had already received advice from another adviser about Harlequin. Mrs W committed herself to buying the property by signing the relevant contracts. Kingswood therefore cannot be held responsible for the suitability of that investment. But, Kingswood was required to give suitable advice.

What should Kingswood have done?

The investment in Harlequin Property exposed Mrs W's pension funds to significant risk. It was an overseas property development. The way the investment was intended to work was not entirely clear. The rental income from a hotel room was to be paid to Mrs W. But, the income depended on the success of the venture. I think this should have been clear to Kingswood when their adviser wrote to Mr and Mrs W in January 2010.

This was all of Mrs W's pension. It was being used to buy two hotel rooms in properties that hadn't been built. Part of the cost was being met by Mr W's pension. In total 30% of the hotel rooms would be owned by Mr and Mrs W's SIPP's. The balance of 70% would have to be paid for using other assets or by borrowing.

Mr and Mrs W did have other properties. One of those was abroad and used for family holidays. The other was a rental property. But, I agree with the adjudicator that these did not give Mrs W the knowledge or experience of investing in Harlequin.

I am satisfied that the recommendation to transfer to the SIPP was unsuitable. It was most of Mrs W's retirement provision. The investment was too risky for Mrs W. I think that Kingswood should have advised Mrs W against transferring to the SIPP; and also advised her not to invest in Harlequin. That advice should have been given before the application for the SIPP was made.

The contracts for the Harlequin property had been signed by Mr and Mrs W before they met with Kingswood. But, the contract also had to be signed by the Trustee of the SIPP. That couldn't be done until the application for the SIPP had been made.

I think it is also relevant that the advice was initially to start a SIPP with one provider, but a different provider had to be found. That should have caused Kingswood to ask questions about why the first SIPP provider would not accept the investment in Harlequin.

What would Mrs W have done?

Mrs W had paid a reservation fee of £1,000 to Harlequin. That didn't commit her to completing the contract. And the contract hadn't been signed by the Trustee of the SIPP. So, if Kingswood had given suitable advice I need to consider what Mrs W would have done.

Kingswood should have advised Mrs W that investing in Harlequin was high risk. She could lose all of her pension. If she didn't sign the contract I think she would have lost the £1,000 reservation fee. It would have been a difficult choice to make. But, I think, on balance, that Mrs W would have taken notice of the advice. Kingswood was a firm regulated to give financial advice and I think Mrs W would have given that some weight. I think Mrs W would not have transferred her pension.

## The role of other parties in the transactions

The role of the other adviser is important. Clearly, anything he said could have influenced Mrs W to invest in Harlequin Property. But, Mrs W isn't able to refer a complaint about that to this service. I understand that the other adviser had two businesses with similar names. One was an appointed representative of a network of regulated advisers. But, I know that the network would not allow its representatives to advise on unregulated investments. The other business was an agent for Harlequin Properties. I think it's likely that the adviser was dealing with Mrs W as an agent of Harlequin. Albeit, that I accept the introduction was made because of the contact using the firm that was regulated to give advice. One of the aims of regulation was to provide consumer protection. Kingswood was providing advice that was a regulated activity.

I have concluded that the advice to start the SIPP was unsuitable. It follows that those losses are the responsibility of Kingswood. My view is that all of the losses flowed from the unsuitable advice. I don't think suitable advice could be given without considering the transaction as a whole. And if suitable advice had been given then the investment in Harlequin Property would not have gone ahead.

I know that it would be difficult for Kingswood to reclaim any of the losses from the third party. But, I think Mrs W should be compensated for her losses in full. Those losses could not have been made unless a regulated firm was involved. If Kingswood wants to take an assignment of any rights of action against any third parties from Mrs W then I think that would be reasonable. Mrs W should co-operate with Kingswood if they try to recover those losses.

The investment in Harlequin cannot currently be sold. Mrs W should be returned to the position that she would now be in, if she had been given suitable advice. I consider that Kingswood should compensate Mrs W in full and take ownership of the investment in Harlequin.

## **fair compensation**

Mrs W transferred benefits from her former pension company to the SIPP and then made contributions between 8 September 2010 and 31 August 2012.

My aim is to put Mrs W as close to the position she would probably now be in if Kingswood had given suitable advice. I consider that this should have been for Mrs W to keep her existing pension.

There are a number of possibilities and unknown factors in making an award. While I understand Harlequin will allow Kingswood to take over the investment from Mrs W, 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 I 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 Mrs W back in the position she would have been in if suitable advice had been given, I think it's fair that Mrs W is compensated now. I don't think I should wait and determine each and every possibility before making an award. What is set out below is a fair way of achieving this.

This process is complicated but the basic aim is to calculate the *fair value* that would have applied to the pension funds transferred plus regular contributions (including tax relief) and then deduct the *actual value*. The compensation is the amount needed to make the *fair value* and the *actual value* equal.

If there is a loss, Kingswood should pay an amount into Mrs W's pension plan to increase the pension plan value by the total amount of the compensation and any interest. That should allow for the effect of charges and any available tax relief.

If Kingswood is unable to pay the total amount into Mrs W's pension plan, it should pay that amount direct to her. Had it been possible to pay into the plan, 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 Mrs W's likely marginal rate of tax in retirement. I think Mrs W is likely to be a basic rate taxpayer in retirement; the compensation should be reduced by the current basic rate of tax. However, if Mrs W would have been able to take a tax free lump sum, the *notional* allowance should be applied to 75% of the total amount.

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

Equally, if Kingswood takes over the contracts from the SIPP trustees then it may be liable for the remaining amount of the purchase price. As a result any total award that Kingswood may have to pay could exceed £150,000. If it will exceed £150,000 then I can't tell Kingswood to take over the contract from Mrs W's SIPP. But I can address the ongoing SIPP fees that may continue if the SIPP can't be closed.

### ***fair value***

- At the date of this decision, Kingswood should ask Mrs W's former pension company to calculate the *notional* transfer value if she had not transferred. That should assume she remained invested in the same funds and made the regular contributions she subsequently paid to her SIPP.
- If her former pension company is either unwilling, or unable to provide a notional transfer value, then I consider the *fair value* of these benefits should be determined by comparison to an appropriate benchmark. The suggested benchmark isn't intended to be a precise comparison, but I consider it fair and reasonable considering Mrs W's circumstances at the time. I also consider it broadly reflective of the levels of risk Mrs W was exposed to by investment through her former pension.

| investment name                                   | status       | benchmark                                                                                                                                                 | from ("start date") | to ("end date")     | additional interest                                       |
|---------------------------------------------------|--------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------|---------------------|-----------------------------------------------------------|
| SIPP with investment made into the Harlequin fund | still exists | for half the investment: FTSE WMA Stock Market Income Total Return Index; for the other half: Bank of England average rate from one year fixed rate bonds | date of investment  | date of my decision | 8% simple a year from date of decision to date of payment |

**actual value**

This means the actual amount payable from the SIPP at the end date.

My aim is to return Mrs W to the position she would have been in but for the unsuitable advice. This is complicated where an investment is illiquid (meaning it could not be readily sold on the open market) as in this case.

It could be difficult to know the *actual value* of the investment. In that case the *actual value* should be assumed to be nil to arrive at fair compensation. Kingswood should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the total payable to Mrs W and the balance be paid as I set out above.

If Kingswood is unable to buy the investment the *actual value* should be assumed to be nil for the purpose of calculation. Kingswood may wish to require that Mrs W provides an undertaking to pay Kingswood any amount she may receive from the investment in the future.

Also, if for any reason the Harlequin investment cannot be bought and removed from the SIPP (meaning that Mrs W couldn't close the SIPP and transfer elsewhere, should she wish to) Kingswood should pay the ongoing SIPP charges until such time as this is possible.

Kingswood should also pay Mrs W £250 for the distress and inconvenience caused by its actions.

**my final decision**

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend the business to pay the balance.

**determination and award:** I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Kingswood Financial Advisors should pay Mrs W the amount produced by that calculation – up to a maximum of £150,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

If Kingswood does not pay the recommended amount, then any investment currently illiquid should be retained by Mrs W. This is until any future benefit that she may receive from the investment together with the compensation paid by Kingswood (excluding any interest) equates to the full fair compensation as set out above.

Kingswood may request an undertaking from Mrs W that either she repays to Kingswood any amount Mrs W may receive from the investment thereafter or if possible, transfers the investment at that point.

Kingswood should provide details of its calculation to Mrs W in a clear, simple format.

**recommendation:** If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Kingswood pays Mrs W the balance plus any interest on the balance as set out above.

This recommendation is not part of my determination or award. It does not bind Kingswood. It is unlikely that Mrs W can accept my decision and go to court to ask for the balance. Mrs W may want to consider getting independent legal advice before deciding whether to accept this decision.

Under our rules, I am required to ask Mrs W either to accept or reject my decision before 19 December 2016.

Roy Milne  
**ombudsman**