complaint

Mrs S has complained about the advice she received from Sussex Independent Financial Advisers Limited ('Sussex') in 2009. This was to transfer her existing pension plan to a Self Invested Personal Pension ('SIPP') with Firm G. The SIPP was set up to allow Mrs S to invest in Harlequin, an unregulated investment scheme that comprised off-plan hotel developments in the Caribbean.

background

Mrs S was made aware of the opportunity to invest in Harlequin by a third party. This third party referred Mrs S to Sussex so that her pension could be used to make an investment in Harlequin.

Sussex recommended Firm G as a SIPP provider for Mrs S to transfer an existing personal pension to. In a recommendation letter to Mrs S in November 2009 Sussex said:

- Mrs S was 53 years old and worked as a retail assistant earning £10,000 per annum;
- She had outstanding credit card balances. Her husband had outstanding loans;
- Mr and Mrs S had an outstanding mortgage on their home;
- Mrs S had about £84,000 in personal pension plans with Firm S;
- She "*effectively do not have emergency funds*";
- She did have a second property which was rented out. There was an outstanding mortgage on this;
- "*Harlequin are offering the ability to acquire an asset abroad which has the potential of doubling in value and producing income of approximately £20,000 a year*";
- "*We discussed attitude to risk and on closer inspection and on considering your current approach to investments and how you have your current assets held, particularly in your pension funds, we agreed that you were actually in fact balanced which is 3 out of 5*";
- "*This self invested personal pension is suitable as this is the only product that is capable of holding such an investment and more importantly the [Firm G] SIPP is the only provider that will allow this property to be acquired in the proportions stated*";
- "*We discussed your attitude to risk again and I am now comfortable that the decision you have made to purchase this property and the subsequent decision to fund part of it via a SIPP is appropriate*"

Mrs S agreed to transfer to the SIPP with Firm G. About £83,000 was transferred to it from Firm S. Mrs S made ad hoc lump pension contributions of just over £10,000. £91,500 became invested in Harlequin.

Subsequently Harlequin encountered difficulties. Mrs S realised she was likely to lose most if not all of the money she had invested in Harlequin via the SIPP with Firm G. She complained to Sussex about the advice she was given to take out the SIPP.

Sussex did not uphold the complaint. Mrs S asked the Financial Ombudsman Service to review the matter.

Two of our adjudicators have looked into Mrs S's complaint. Both concluded the complaint should be upheld, and largely for the same reasons. I summarise the points raised by the adjudicators:

- Sussex had a duty not just to consider the suitability of the SIPP but also how it was going to be invested;
- Mrs S was an inexperienced investor close to retirement age;
- Harlequin was a high risk unregulated investment. But Mrs S was only prepared to take a balanced (or medium) level of risk;
- Mrs S could neither afford, nor did she have the appetite for, the level of risk she would be subjected to by investing most of her SIPP in Harlequin.

Sussex didn't agree with the adjudicators. It said:

- Mrs S had already made the decision to invest in Harlequin on the advice of the third party. Had Sussex given advice not to invest it is unlikely this would have been followed;
- Mrs S had other pension assets and a share in an investment property. Her husband also had pension assets;
- The fact that Mrs S transferred to the third party for ongoing advice in 2012 and did not contact Sussex again indicates that said third party was her real adviser;
- Mrs S did not respond to invitations given each year for a financial review. Had she done so Sussex would have had the opportunity to perhaps mitigate her loss;
- Sussex explicitly told Mrs S it was not giving advice on the Harlequin investment;
- At the time there was no indication the Harlequin investment would not make money. It is only with hindsight that this has been shown to be the case;
- It did not believe that the regulators' guidance at the time was explicit. Instead Sussex thinks at the time the advice was that a SIPP should not be set up if it was not going to be used as a self- invested vehicle because the charges were higher. It was not until 2013 that the regulator gave specific guidance.

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 done so, I agree with the conclusions reached by the adjudicators and for the same reasons.

I agree that Sussex gave Mrs S advice. That Mrs S may also have been advised by another party prior to approaching Sussex is not relevant. Her complaint is about advice from Sussex. I am persuaded by the evidence, notably the recommendation letter, fact find and attitude to risk discussions, Sussex acted in an advisory capacity.

Accordingly, it was obliged to give Mrs S suitable advice, having taken account of all her circumstances. I do not accept that Sussex can be said to have discharged this obligation by claiming its advice was limited to setting up the SIPP only.

In my view the responsibilities and duty of care required by a regulated professional financial adviser requires a higher degree of consideration of the investor's circumstances. COBS rules are relevant to this complaint, particularly COBS 9.2.1, which states:

'1. A firm must take reasonable steps to ensure that a personal recommendation or decision to trade is suitable for its client.

2. When making the personal recommendation or managing his investments the firm must obtain the necessary information regarding the client's:

> a. *Knowledge and experience in the investment field relevant to the specific type of designated investment or service;*
>
> b. *Financial situation; and*
>
> c. *Investment objectives;*

So as to enable the firm to make the recommendation or take the decision which is suitable for him.

This rule required Sussex to have obtained the necessary information regarding the client's knowledge and experience relevant to the specific type of investment and investment objectives. Essentially this rule required Sussex to have considered whether the transfer of Mrs S's pension to Harlequin met her objectives, whether she properly understood the risks involved and if she had capacity for that risk.

Mrs S's attitude to risk was found to be 3 out of 5 making her a medium risk investor. I don't consider that the Harlequin investment matched her attitude to risk.

Mrs S didn't have any relevant investment experience or expertise. Her income was modest and she was close to retirement age. She had no previous experience in stock and shares. Although she had a pension with her current employer at the time, she says that she would have difficulty if she was out of work. I think Mrs S's ability to tolerate risk has been overstated. I don't think it's reasonable for Sussex to have assumed that Mrs S could accept the level of risk associated with this investment.

COBS 2.1.1 is also relevant as it says that it was necessary for Sussex to have acted *"honestly, fairly and professionally in accordance with the best interests of its client".* Sussex cannot simply say that Mrs S wanted to transfer her pension and it therefore followed instructions by providing her with a suitable SIPP that would accept the Harlequin investment. I believe that Sussex had a duty to have fully considered the suitability of the transaction and whether it was in the best interest of Mrs S.

Sussex says that the advice given is in respect to the transfer of pension and not on the underlying investment. But in my view Sussex could not have been in a position to have provided Mrs S with suitable advice without considering whether the underlying investment was in itself suitable, even if the pension administrator had undertaken its own due diligence of the investment.

I understand Mrs S wouldn't have been able to have invested into Harlequin within her existing pension plan. And so a SIPP would've been needed to have to do so. In light of this, it is likely that Mrs S would have had to accept the higher charges associated with a SIPP arrangement. However, that assumes the adviser provided suitable advice on the proposed property investment and that a SIPP was suitable for Mrs S.

I have not seen persuasive evidence that a SIPP was suitable for Mrs S. She had no particular investment experience and, apart from Harlequin, I have not seen evidence that she wanted to manage her own investments. The SIPP carried higher charges than her existing arrangements but did not offer any particular investment advantages over and above those arrangements.

The Harlequin property group exposed investors to significant risks such as gearing, opaque corporate structures, illiquidity and risks inherent in non-regulated investments, such as investors potentially not having recourse to the FSCS or the Financial Ombudsman Service. It was not suitable for Mrs S given all her circumstances.

The investment into Harlequin was higher risk than could reasonably be suitable given Mrs S's financial circumstances. In my view Sussex should have advised Mrs S that the transfer of her pension to a SIPP and to then invest in Harlequin was unsuitable. The concentration of Mrs S’s funds into one investment only, Harlequin, exacerbated the risks of what was already an unsuitable investment.

Finally, I have noted that Sussex say any liability it has for this complaint should cease from 2012 when Mrs S transferred to another adviser. By implication, Sussex says that the new adviser, at that point, became liable for any losses sustained by Mrs S as the SIPP and Harlequin investment remained in situ after 2012.

But at the time Mrs S transferred to the new adviser, there was no indication that Harlequin was in difficulty. When the new adviser may have been aware that Harlequin was in difficulty, in 2013, it was already illiquid and so remedial action was not then possible. It follows that I do not agree that Sussex’s liability ended in 2012.

Sussex should have assessed the suitability of the Harlequin investment as well as the suitability of the SIPP since it was aware of Mrs S's intentions. Had Sussex considered the suitability of the investment in line with Mrs S's circumstances and financial objectives, it's likely it wouldn't have recommended Mrs S continue with the Harlequin investment.

fair compensation

My aim is to put Mrs S as close as possible to the position she would probably now be in if she'd been given suitable advice. I think that she would have kept her existing personal pension; 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, therefore, the objective is to address these three issues.

There are a number of possibilities and unknown factors in making an award. All the variables are unknown and each may have an impact on the extent of any award we may make. The facts suggest it's unlikely the Harlequin property will be completed and unlikely that the contract and any future payments would be enforceable. While it's complicated to put Mrs S back in the position she would have been in if suitable advice had been given, I think it's fair she 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 compromise.

Sussex should calculate fair compensation by comparing the value of Mrs S's pension, if she hadn't transferred, with the current value of her SIPP. In summary:

1. Obtain the notional transfer value of Mrs S's previous pension plan(s) as if they hadn't been transferred to the SIPP. That should be the value at the date of this decision;

2. Obtain the transfer value as at the date of the decision of Mrs S's SIPP, including any outstanding charges;

3. Pay a commercial value acceptable to Firm G to buy Mrs S's share in the Harlequin properties;

4. Pay an amount into Mrs S'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.

In addition, Sussex should:

5. Pay five years' worth of future fees owed by Mrs S to the SIPP;

6. Establish how much Mrs S has paid into the SIPP as net ad hoc lump sum and regular monthly contributions and add interest to each contribution at 8% simple gross per annum from the date each contribution was made to the date of this decision. The total interest should then have 20% income tax deducted. The total net interest is then added to the total of net contributions made. The combined total is to be paid as cash to Mrs S;

7. Pay Mrs S £250 for the trouble and upset caused by the unsuitable advice.

I have provided further details of my redress direction below.

***1.** Obtain the notional transfer value of Mrs S's previous pension plan(s) as if they hadn't been transferred to the SIPP. That should be the value at the date of this decision*

On the date of decision, Sussex should ask Mrs S's former pension provider to calculate the notional transfer value that would have applied had she not transferred her pension but instead remained invested in the same funds.

If there are any difficulties obtaining a notional valuation then the FTSE UK Private Investors 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. This is *except* for the two lump sum contributions made in April 2010 and the regular monthly contributions that Mrs S made later.

The lump sum contributions were only made because Mrs S was led to believe it was worth maximising the Harlequin opportunity as much as she could. She would not have paid these contributions into a pension plan otherwise. The regular contributions were only made to meet the SIPP provider's administration fees. In my view, Mrs S, with suitable advice, would have left both the lump sums and regular contributions in her bank account.

2. *Obtain the transfer value* as *at the date of the decision of Mrs S's SIPP including any outstanding charges*

Sussex should deduct the result of **2** from the result of **1**. That is the loss to Mrs S's pension.

3. *Pay a value acceptable to Firm G to buy Mrs S's share in the Harlequin properties*

The SIPP only exists because of the investments in Harlequin. In order for the SIPP to be closed and further SIPP fees to be prevented, the Harlequin investments need to be removed from the SIPP. The valuation of the Harlequin investments may prove difficult, as there is no market for them. To calculate the compensation, Sussex 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 Sussex is unable to buy the investments, it should give them a nil value for the purposes of calculating compensation.

In the unlikely event the properties are completed, Harlequin could require the remaining payments to be made (as only a deposit has been paid so far by Mrs S). I think it's unlikely there will be further loss. But there might be. Mrs S needs to understand this, and that she won't be able to bring a further complaint to us if the contracts are called upon. Mrs S may want to seek independent advice on how to cancel the ongoing contracts for the remaining amount.

4. *Pay an amount into Mrs S'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, Sussex should pay it as a cash sum to Mrs S. Mrs S won't be able to pay all of 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 Mrs S should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mrs S's marginal rate of tax in retirement. Mrs S is likely to be a basic rate taxpayer in retirement. The notional allowance will be a reduction in the total amount equivalent to the current basic rate of tax. Mrs S would have been able to take a tax free lump sum. The notional allowance should be applied to 75% of the total amount.

In other words, if any (or all) of the pension loss is to be paid as cash Sussex should calculate such a cash payment as 85% of the amount that would have otherwise been paid into a pension arrangement.

5. *Pay five years' worth of future fees owed by Mrs S to the SIPP*

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

To provide certainty to all parties, I think it's fair Sussex pays Mrs S 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 Mrs S with some confidence that she 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 investments 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.

my final decision

I uphold this complaint.

Sussex Independent Financial Advisers Limited must pay compensation to Mrs S in accordance with the ‘fair compensation’ method set out above.

If the award is not paid within 28 days of Sussex Independent Financial Advisers Limited being notified of Mrs S accepting my final decision then simple interest should be added to the award at 8% gross a year from the date of this decision until the date of payment. Income tax may be due on this interest. This 8% interest applies to (**4**) and (**6**) above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mrs S to accept or reject my decision before 11 December 2017.

Terry Connor
ombudsman