

Complaint

Mr F's complaint is about the transfer of his pension plans into a SIPP, which was set up by ICF Group Limited in 2010. This was to invest in a Harlequin property. Mr F says ICF did not assess the suitability of the Harlequin funds for him.

Background

I issued my provisional decision on 15 September 2017, a copy of which is attached to and forms part of this decision. I explained why I intended to uphold the complaint in my provisional decision.

The third party acting for Mr F confirmed safe receipt of the provisional decision. ICF said that it had not received the provisional decision via the post. So, the adjudicator sent a further copy by email on 25 September 2017.

ICF has replied and in summary said:

- It was disappointed with my provisional decision. The UK Civil Courts determine cases on the balance of probabilities. It was alarming to see how ready I was to accept Mr F's version of events.
- Mr F has acknowledged to ICF that he doesn't think they are responsible for his losses.
- Mr F had already contracted to buy his investment and had paid a deposit to Harlequin prior to ICF's adviser meeting him. This is not in dispute and is readily conceded by Mr F.
- Any reasonable person can see that there is a clear disconnect between the purchase of the property and the purchase of the SIPP.
- Nothing on the file indicates advice has been given, apart from one tick on a form. Surely the reasonable assumption from this is that it was as stated, an "Execution only" case. For any avoidance of doubt we know we are allowed to do Execution only business as long as a strict process is followed, which it was.
- The form was just incorrectly completed by ICF's registered individual, he just made a mistake. A "Mistake" was a term accepted by the court and a legal argument was won on this basis.
- They have only as a result of this investigation become aware that there was a 'different process' for the SIPP provider, as only one version of the form was provided.
- They have set out at length what an ICF advised process would have looked like - and contrasted that with what this process looked like. They believe that this is a clearer statement of 'what was intended' than a single tick on a form.
- They maintain that they gave no advice and that the client told them exactly what he wanted. The following evidence supports their position:
 - ICF did not complete a fact find, attitude to risk, capacity for loss or any other advice specific forms.
 - ICF completed the case for a low, fixed fee.
 - ICF did not charge (or even discuss) with the client an ongoing advice fee.
 - ICF did not interfere in his thought processes or decision.
 - The adviser 'script' was delivered to Mr F and there was a signed confirmation that this was understood.

- The 'reasons why not' letter was written and sent to Mr F - setting out how ICF believed that the transaction had been provided. He never queried the very clear terms of engagement until he realised that he had lost his money. This was not a 22 page document - it was a one page letter, a length that anybody could in sending reasonably assume that anyone receiving it would read and understand - or challenge, if they disagreed with the basis of it.
- If Mr F had engaged them to provide him with 'advice' he would have gone elsewhere to arrange the SIPP.
- ICF cannot be as culpable as the Harlequin Group - as they are the people who perpetrated the fraud. They cannot be as responsible as the agent - who sold Mr F 'The Dream'; and certainly not as culpable as Mr F who committed to buying the Harlequin Investment (without taking any financial advice). And why should Hornbuckle Mitchell escape sanction? They apparently did do their due diligence and deemed the Harlequin investment to be an 'approved', if unregulated investment.
- Holding ICF responsible for all of Mr F's losses - on the grounds that they are the only regulated organisation still around or more likely, the easiest target - is completely incongruous and sets a very worrying precedent.

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 think the complaint should be upheld for the reasons given in my provisional decision.

Was advice given?

I explained in my provisional decision that none of the evidence is conclusive. I think the letter dated 3 September 2010 is important. It explains that no advice was being given. However, I think that the most important piece of evidence is the SIPP application form. This is signed by ICF's adviser and Mr F. A section of the form indicates that ICF is Mr F's financial adviser; and that Mr F had been given advice.

ICF says that the SIPP application had been completed in error. But it is the only record with both the adviser's and Mr F's signatures. I therefore attach a significant amount of weight to this evidence. On balance I therefore conclude that advice was given to Mr F.

ICF argues that the box ticked on the application form was a mistake. And that a court would ignore the effect of that mistake. I agree that it is possible a mistake would have no effect. However, in this case, the SIPP provider would have followed a different procedure. So the effect of the mistake could have meant that Mr F should have been prevented from investing in Harlequin.

I remain of the view that Mr F should have been advised not to invest in Harlequin. I have no reason to think that Mr F would have ignored suitable advice not to transfer to the SIPP and not invest in Harlequin. So I think that if Mr F had received suitable advice he would have followed that advice.

What if ICF did not give advice?

Even if I am wrong about ICF giving advice, I think that they should not have arranged the transfer to the SIPP. There is no dispute that ICF arranged the transfer of Mr F's personal pensions to the SIPP. That is a regulated activity. ICF should therefore have taken account of the conduct of business rules in the FSA Handbook.

I think an important rule is COBS 2.1.1. This is referred to as the *client's best interests rule*. ICF said to us that they knew Mr F had discussed investing in Harlequin with the Harlequin agent. They knew that the agent was not regulated to give financial advice. The advice included transferring Mr F's personal pensions to the SIPP. As I have already said that was a regulated activity. ICF thought that Mr F had been given advice by an unregulated person. That should have alerted ICF to a number of problems. There would be no consumer protection for Mr F for that advice. It was illegal to give advice without being authorised. The type of investment was unusual and any cursory examination should have alerted ICF to many different risks.

In my view, any competent adviser should have refused to transact this business. It was clearly not in Mr F's best interests.

Would Mr F have invested in Harlequin anyway?

ICF made the point that if they had advised Mr F not to invest in Harlequin he would have found another firm to arrange the SIPP. It's possible that could have happened. However, in my experience, it is unusual for the consumer to ignore advice from a regulated firm.

I think with the information ICF had about the way Mr F had been 'sold the dream' that ICF should have realised Harlequin was not appropriate for Mr F. One of the reasons regulation was introduced for financial services was for consumer protection. In this case it is very clear that the only reason Mr F was looking to transfer his pension to a SIPP was to invest in Harlequin. ICF knew that was because of the actions of the Harlequin sales agent. They weren't regulated to give financial advice. I think ICF should have refused to arrange the SIPP. And if any other financial adviser knew how Mr F had been 'sold the dream', they should also have refused to arrange the SIPP.

The role of other parties in selling Harlequin to Mr F

I realise that a number of other parties were involved in selling Harlequin to Mr F. However, I think that without ICF it is unlikely the investment in Harlequin could have taken place. So I think it is fair that ICF should compensate Mr F in full. If ICF wishes to pursue any other party to recover part of the loss it may do so. If Mr F is compensated in full, then he should agree to cooperate with ICF to recover the losses.

fair compensation

ICF should compensate Mr F as set out in my provisional decision.

my final decision

I uphold the complaint. ICF Group Limited should calculate and pay compensation as set out in my provisional decision. Simple interest is to be added to my award at a rate of 8% gross a year from the date of this decision to the date of payment.

Under our rules, I'm required to ask Mr F to accept or reject my decision before 6 December 2017.

Roy Milne
ombudsman

copy of provisional decision

complaint

Mr F's complaint is about the transfer of his pension plans into a SIPP, which was set up by ICF in 2010. This was to invest in a Harlequin property. Mr F says ICF did not assess the suitability of the Harlequin funds for him.

background

Mr F met with an unregulated sales representative from an unregulated third party. They were acting as an agent for Harlequin property and promoted this to him. As he had no resources apart from two personal pension plans, these were earmarked for investment in Harlequin. However, the third party was not a regulated financial adviser and so could not arrange the transfer of the personal pensions to a SIPP.

ICF's adviser was asked by a representative of the Harlequin agent to arrange the pension transfers for Mr F and to set up the SIPP for him. ICF's adviser also liaised with the SIPP provider in order to invest the SIPP capital into Harlequin.

A total of £75,491 was transferred into the SIPP. Including the £1,000 deposit, a total of £62,500 was invested in Harlequin funds, with the balance remaining in cash in the SIPP bank account in order to meet the SIPP fees.

Subsequently, the SIPP provider was informed of the problems Harlequin was experiencing, and informed Mr F that the value of the Harlequin investment was now £1.

He complained to ICF. They rejected the complaint, saying they had acted for Mr F on an execution only basis, and had not given him any advice.

Mr F was unhappy with this response and referred his complaint to this Service. One of our adjudicators investigated the matter. He concluded that it should be upheld. There has been an exchange of correspondence about this. In summary, the adjudicator said:

- ICF had given Mr F advice. This was based on forms completed by ICF and sent to Hornbuckle Mitchell. And also a conversation the adjudicator had with Mr F.
- If the application had been completed on an execution only basis Hornbuckle Mitchell would have used a different process.
- ICF had not obtained sufficient information on Mr F's financial situation to justify proceeding on an execution only basis. From the information that had been presented to ICF, the adjudicator thought ICF should have advised Mr F not to transfer either of the pensions and not to invest in Harlequin.

ICF did not accept the adjudicator's findings. There has been further correspondence with our adjudicators. In summary, ICF's position is as follows:

- It didn't agree it had given Mr F any advice;
- ICF believed it was operating within the prevailing rules and regulations in arranging the SIPP on an execution only basis;
- It had read the execution only statement to Mr F, who had agreed he wanted to proceed on that basis;
- Mr F had already made his decision to use his pension plans to invest in Harlequin using a specific SIPP. ICF was not in the habit of recommending that SIPP provider;
- It wasn't fair for the adjudicator to conclude that Mr F received advice. This was only on the basis of a box ticked on the application form;

- Mr F had never seen that section of the application form [which was completed by the adviser] so he could not use this mistaken tick as evidence that Mr F had been advised;
- ICF believed the overriding principle of this Service is to judge upon the intention; what was intended by both parties, rather than upon administrative evidence such as an application form.

my provisional findings

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

Was advice given?

ICF has provided a copy of a letter to Mr F dated 3 September 2010. In the letter, the adviser explained he would normally send a letter explaining why he had made a particular recommendation. However, in this case Mr F had not requested and the adviser had not provided any advice.

ICF also provided a statement from the adviser with his account of events. He explained he was introduced to the Harlequin agent by another client. The Harlequin agent had a number of clients who were interested in using pension funds to invest in Harlequin. ICF's adviser agreed to assist, but only on the basis that no advice would be given.

The Harlequin agent contacted ICF's adviser. He explained that Mr F wanted to invest in Harlequin using a SIPP. ICF's adviser then arranged a meeting with Mr F. The adviser says he explained matters to Mr F but he was not providing advice. ICF has an "execution only" script which the adviser followed.

Mr F was contacted by our adjudicator. He said that he went to a meeting with ICF's adviser and the Harlequin agent. He said that ICF's adviser did give him advice.

In my view, none of the evidence above is conclusive. I think the letter dated 3 September 2010 is important. It explains that no advice was being given. However, I think that the most important piece of evidence is the SIPP application form. This is signed by ICF's adviser and Mr F. A section of the form indicates that ICF is Mr F's financial adviser; and that Mr F had been given advice.

ICF says that the SIPP application had been completed in error. But it is the only record with both the adviser's and Mr F's signatures. I therefore attach a significant amount of weight to this evidence. On balance I therefore conclude that advice was given to Mr F.

What should ICF have done?

I have concluded that ICF was giving advice to Mr F. It should therefore have gathered enough information about him to provide suitable advice. I think if it had done so, that suitable advice for Mr F would have been not to transfer to the SIPP and not invest in Harlequin. This was the bulk of Mr F's pension provision. Investing all of his pension funds in one overseas property development was in my view a high risk strategy.

I have no reason to think that Mr F would have ignored suitable advice not to transfer to the SIPP and not invest in Harlequin. So I think that if Mr F had received suitable advice he would have followed that advice.

What if ICF did not give advice?

Even if I am wrong about ICF giving advice, I think that they should not have arranged the transfer to the SIPP. There is no dispute that ICF arranged the transfer of Mr F's personal pensions to the SIPP. That is a regulated activity. ICF should therefore have taken account of the conduct of business rules in the FSA Handbook.

I think an important rule is COBS 2.1.1. This is referred to as the *client's best interests rule*. ICF said to us that they knew Mr F had discussed investing in Harlequin with the Harlequin agent. They knew that the agent was not regulated to give financial advice. The advice included transferring Mr F's personal pensions to the SIPP. As I have already said that was a regulated activity. ICF thought that Mr F had been given advice by an unregulated person. That should have alerted ICF to a number of problems. There would be no consumer protection for Mr F for that advice. It was illegal to give advice without being authorised. The type of investment was unusual and any cursory examination should have alerted ICF to many different risks.

In my view, any competent adviser should have refused to transact this business. It was clearly not in Mr F's best interests.

fair compensation

My aim is to put Mr F 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. Harlequin could allow ICF to take over the investment from the consumer, but I understand that won't be allowed. The involvement of third parties - the SIPP provider and Harlequin – mean much of this is beyond this service's or ICF'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 Mr F back in the position he would have been in if suitable advice had been given, I think it's fair that Mr F is compensated now. I don't think I should wait and determine every possibility before making an award. What is set out below is a fair way of achieving this.

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

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

5. Pay five years' worth of future fees owed by Mr F to the SIPP. [alternatively the firm should pay ongoing SIPP fees until the SIPP can be cancelled]
6. Pay Mr F £300 for the distress and inconvenience caused.

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

1. *Obtain the notional transfer value of Mr F's previous pension plan on the date of calculation if it 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.

ICF should assume that any contributions or withdrawals that have been made would still have been made, and on the same dates.

2. *Obtain the actual transfer value of Mr F's SIPP on the date of calculation, 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 F'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. 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, ICF 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 ICF is unable to buy the investment, ICF 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 F 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 F 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 ICF 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 ICF 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 this service can't tell ICF to take over the contract from Mr F's SIPP. But we 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 F'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, ICF should pay it as a cash sum to Mr F.

But the compensation should be able to be paid into a pension in the time until Mr F 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 F could claim. The notional allowance should be calculated using Mr F's marginal rate of tax. For example, if Mr F is a basic rate taxpayer, the total amount should be reduced by 20%.

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

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

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

ICF may ask Mr F 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. ICF will need to meet any costs in drawing up the undertaking. If ICF asks Mr F to provide an undertaking, payment of the compensation awarded in this view may be dependent upon provision of that undertaking.

6. Pay Mr F £300 for the distress and inconvenience caused.

Mr F 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'm aware that a party involved with Harlequin has been charged with fraud offences. A court might therefore conclude that Mr F's loss didn't flow directly from ICF's unsuitable advice. And on this basis, a court might not require ICF to compensate Mr F – notwithstanding the clearly unsuitable advice.

But in assessing fair compensation, I'm not limited to the position a court might take. It may be there has been a break in the "*chain of causation*". That might mean it wouldn't be fair to say that all of the losses suffered flowed from the unsuitable advice. That will depend on the particular circumstances of the case. No liability will arise for an adviser who has given suitable advice even if fraud later takes place. But the position is different where the consumer wouldn't have been in the investment in the first place without the unsuitable advice. In that situation, it may be fair to assess compensation on our usual basis – aiming to put the consumers in the position they would have been in if they'd been given suitable advice.

In this particular case, I conclude that it would be fair and reasonable to make an award, given the specific circumstances. This is notwithstanding arguments about a break in the "*chain of causation*" and the "*remoteness*" of the loss from the (poor) advice given. I am satisfied that Mr F would not have made the Harlequin investment had it not been for the failings of ICF. If it had given Mr F suitable advice, the Harlequin investment would not have been made. And I consider that the advice given by the adviser completely disregarded Mr F's interests. As a direct result of ICF's failure to give suitable advice, Mr F invested a significant proportion of his pension into a specialised, unregulated investment with a limited track record.

So I think that it's fair and reasonable to hold ICF responsible for the whole of the loss suffered by Mr F. I am not asking ICF to account for loss that goes *beyond* the consequences of its failings. I am satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I am not able to determine. However, that fact should not impact on Mr F's right to compensation from ICF for the full amount of his loss.

my provisional decision

I uphold the complaint. ICF should calculate and pay compensation as set out above.