

## **complaint**

Mr G has complained about advice he received from The Financial Factory Ltd to transfer a pension into a self-invested personal pension (SIPP). The pension was then invested in a Harlequin investment.

## **background**

The Financial Factory Ltd ('FF') advised Mr G to transfer his personal pension to a SIPP in 2012. At the time Mr G's circumstances were as follows:

- He was age 62.
- He ran his business from which he'd received an income of around £90,000.
- The pension to be transferred had a value of about £222,000. He also had another pension worth around £140,000.
- He had substantial savings in a range of ISAs and investment bonds (including £164,000 in Venture Capital Trusts). Mr G also had a joint investment in Harlequin with his late wife – who also had an investment in Harlequin in her own name.

FF had been advising Mr G and his wife since around 2006. During this time, FF had given them numerous pieces of advice, including the advice to invest in VCTs and pensions.

FF's advice letter said:

- Mr G was unhappy with the charges and performance of his pension and wanted to transfer to a SIPP to invest in Harlequin.
- Its advice was restricted to only recommending a SIPP that would allow Mr G to invest in Harlequin.
- FF wasn't advising Mr G on the Harlequin investments. The investment had been presented to Mr G by an agent of an unregulated company (this was in fact the same person as the FF adviser).
- Whilst FF wasn't giving advice on the investment, it told him the Harlequin investment was high risk and he could lose all his money. It also told him the investment was unregulated.
- Mr G was looking to retire at a maximum age of 75.

Mr G went ahead with the transaction. After the transfer to the SIPP, he invested £58,500 to buy a 30% share in one Harlequin property and £135,000 to buy a 30% share in another. The remaining 70% he was intending to fund outside his SIPP.

After the deduction of various fees about £25,000 was left in cash in Mr G's SIPP. This money remained in cash until February 2015. By this point, it'd reduced to £23,500 due to further fees. On FF's advice, this money, apart from £1,000, was transferred to the other pension Mr G held at the time. As of September 2016, the cash left in the SIPP had fallen in value to about £260. The Harlequin properties were also valued at £1 each.

In 2016, Mr G complained about the advice. An adjudicator thought the complaint should be upheld. He said:

- The rules required FF to take reasonable steps to ensure its advice was suitable. The SIPP advice should also have considered the risks of the proposed Harlequin investment.

- He didn't think the Harlequin investments were suitable for Mr G. He noted FF's advice letters to Mr G over the years had mostly described him as having a medium attitude to risk. The main exception had been the advice to invest in the VCTs. Harlequin involved significant risks, including liquidity and exchange rate risks and as a result was a higher risk investment.
- But, even if it was taken that Mr G had a high attitude to risk, he didn't think Mr G was in a position to bear the risks associated with the investment of his pension in the Harlequin properties. Mr G had a relatively large income and level of assets. But, he'd a relatively short period until retirement and the pension transferred and mainly invested in Harlequin made up of over 50% of his retirement savings. And Mr G had already invested in Harlequin and exposed himself to the risks involved. So, FF should've advised him against any further investment.
- The transfer to the SIPP had also been unsuitable due to the significant amount of money left in cash.
- He thought if FF had given suitable advice to Mr G to not transfer his pension and invest in Harlequin, on balance, Mr G would've followed this advice.

FF didn't agree. It also said that it had stopped trading.

### **my findings**

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

### **SIPP advice**

The advice Mr G was given was defective. It did not encompass the intended investment in the SIPP (Harlequin). The FSA (the then regulator) made it very clear than when recommending a SIPP for the purpose of holding a particular investment the advice must encompass the suitability of the intended investment.

In an alert about SIPP advice issued by the FSA in January 2013 said the following:

*'For example, where a financial adviser recommends a SIPP knowing that the customer will transfer out of a current pension arrangement to release funds to invest in an overseas property investment under a SIPP, then the suitability of the overseas property investment must form part of the advice about whether the customer should transfer into the SIPP.'*

This was not done and hence there were serious failings in the advice that FF gave Mr G. Whilst the FSA alert was after the advice FF gave Mr G I consider the FSA was highlighting what the existing rules and guidance said rather than issuing new guidance.

However, just because the advice didn't follow the procedure laid down by the regulator doesn't mean that the complaint should be automatically upheld. It is possible that Harlequin was a suitable investment for Mr G – in this case the complaint would not be upheld - notwithstanding the failings in the advice process.

If Harlequin wasn't a suitable investment then Mr G should have been advised this was the case. However, it cannot be assumed that an investor who is advised that an investment is unsuitable will automatically follow that advice. It is possible that if, for example, an investor has reached his own conclusions about an investment he would decide to go ahead irrespective of any advice given.

Therefore the two issues which will decide the outcome of Mr G's complaint are:

- Was Harlequin a suitable investment for Mr G's SIPP?
- And if the answer to the first question is no – would Mr G have still gone ahead with the investment if FF had advised him not to?

Mr G (and his late wife) were overexposed to Harlequin investments. They represented a very significant proportion (around 50%) of his overall pension assets. Given his existing exposure to Harlequin and a commitment to make substantial further investment in Harlequin outside the SIPP, Harlequin would form the majority of his overall assets. It was also an investment that carried a very significant degree of risk. There was gearing involved which increased the already high risk of the scheme. There were risks surrounding the development of the resort, whether it would be a success commercially and issues surrounding the risks of operating in less developed economies. In addition the secondary market for 'hotel room' type investments was highly uncertain. The capital value and income producing potential of Harlequin was therefore highly uncertain. Mr G was also relatively close to the time when he indicated he wanted to take benefits from the scheme. In addition Harlequin was not a regulated investment (it was an investment rather than a direct property investment) and Mr G didn't have the protections he would have from a regulated investment.

My conclusion is that any advice to further increase his overall exposure to Harlequin would have been unsuitable for Mr G.

I must therefore consider whether Mr G would he have gone ahead with the Harlequin investment if he had been advised not to.

In my view an investor, such as Mr G, who regularly uses the services of a regulated financial adviser would generally be assumed to act on any advice they were given. In my view going against advice would be something that an experienced and knowledgeable investor who was confident in their own decision making skills would do. Having considered Mr G's investment history I'm not persuaded that he meets this description.

The investments made by Mr G would all appear to have been made based on advice he had been given. I have seen no evidence that Mr G ever made any investments without advice. With the exception of some VCT investments (which Mr G said were only made for tax purposes) Mr G's investments were all packaged products such as investment bonds – not the typical investments of a sophisticated investor.

Mr G has said that he regularly received advice from his adviser and would unquestioningly follow any advice that was given. This is consistent with his investment history. Looking at this in more detail there seems a number of questionable recommendations that were given and accepted by Mr G.

For example a Norwich Union pension policy was set up and transferred after just over a year, as was a Zurich investment bond. In my view such switching advice, given the very short holding period, looks hard to justify. In my view a knowledgeable investor would have appreciated that such short term switching would not generally be considered good advice and not accepted it.

Whilst 'proper' advice wasn't given some discussion about risk and the features of Harlequin did take place. However, the evidence I have seen persuades me that FF downplayed the risks of Harlequin to Mr G.

A meeting would appear to have been held on 5 January 2012 at which a number of documents concerning the SIPP and Harlequin applications were completed. One of these documents Mr G completed was an investment declaration in respect of the Harlequin investment. This was signed by Mr G and dated 5 January 2012. This declaration said:

*'These types of investments are categorised as Medium to High Risk investments and you have confirmed that your attitude to risk falls within these brackets and you are fully aware of all of the risks that are involved with this investment.'*

I do not consider this to be an accurate reflection of the risks of Harlequin- which I set out above. In my view Harlequin would generally be considered to be high risk than 'medium to high'. In addition no mention is made of Mr G's very significant exposure to Harlequin and the additional risk that this represented.

A suitability report for the SIPP advice has been provided. This is dated 6 January 2012 – the day after the meeting referred to above. This describes the risk of Harlequin in different terms saying for example that the worst case scenario would be a total loss. However, Mr G has said that he did not receive a copy of this letter.

A range of documents were signed by Mr G at the 5 January 2012 meeting. These included a further execution only form as well as a form for the SIPP operator which confirmed that advice had been given by FF.

The above picture of Mr G is of an investor who was prepared to follow the advice of his adviser. I am satisfied that he didn't pay a lot of attention to the documents he was signing – if he had he would have queried the inconsistencies. These are not generally the actions of a sophisticated and knowledgeable investor. My conclusion therefore is that Mr G relied on his adviser and if he had been advised not to make the Harlequin investment he would have accepted this advice.

For the reasons set out above my conclusion is that the complaint should be upheld. Because:

- FF should have advised on the suitability of Harlequin for Mr G's SIPP and not just the wrapper.
- A further investment in Harlequin was unsuitable for Mr G.
- FF should have advised Mr G accordingly

- If it had, it is more likely than not that Mr G would have accepted the advice not to invest.

I also consider that the loss of such a significant proportion of his pension fund will have been upsetting for Mr G. I consider the sum of £500 would be a suitable sum to compensate him for this.

### **calculating compensation**

In assessing what would be fair compensation, I consider that my aim should be to put Mr G as close to the position he would probably now be in if he had not been given unsuitable advice. Our adjudicator thought it was fair to compare the return Mr G has received from his SIPP to that he would have received from a suitable investment. As mentioned, I think with suitable advice Mr G would have kept his existing pension. But it's unlikely to be possible for FF to reinstate Mr G into his previous pension plan. There are also a number of possibilities and unknown factors in making an award. While I understand Harlequin will allow FF to take over the investment from Mr G, the involvement of third parties – the SIPP provider and Harlequin – means much of this is beyond this service or the business'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 – but I can't be certain of that.

While it's complicated to put Mr G back in the position he would have been in if suitable advice had been given, I think it's fair that Mr G 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.

In summary, FF should:

1. Obtain the notional transfer value of Mr G's previous pension plan, on today's date, if it had not been transferred to the SIPP.
2. Obtain the transfer value, as at today's date, of Mr G's SIPP, including any outstanding charges.
3. The loss Mr G has suffered is the difference between these two sums.
4. And then pay an amount into Mr G's SIPP so that the transfer value is increased by the amount calculated in (3). This payment should take account of any available tax relief and the effect of charges.

In addition, FF should:

5. Pay any future fees owed by Mr G to the SIPP, for the next five years.
6. Pay Mr G £500 for the upset caused by the significant loss of his pension fund.

I have set out each point in further detail below.

#### Step 1

FF should ask Mr G's former pension provider to calculate the notional transfer value that would have applied as at the date of this decision had he not transferred his pension but instead remained invested.

If there are any difficulties in 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.

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

#### Step 2

This should be confirmed by the SIPP operator. If the operator has continued to take charges from the SIPP and there wasn't an adequate cash balance to meet them, it might be a negative figure.

#### Step 4

Pay an amount into Mr G's SIPP so that the transfer value is increased to equal the amount calculated in step 3. 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, FF should pay it as a cash sum to Mr G. But had it been possible to pay into the SIPP, 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 Mr G's marginal rate of tax in retirement.

Step 5.

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

Ideally, FF should take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mr G back in the position he would have been in. But the ownership of the Harlequin investment can't currently be transferred. It's likely that will change at some point, but I don't know when that will be – there are a number of uncertainties.

So, to provide certainty to all parties, I think it's fair that FF pays Mr G an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees), or undertakes to cover the fees that fall due during the next five years. This should provide a reasonable period for things to be worked out so the SIPP can be closed.

In return for the compensation set out above, FF may ask Mr G to provide an undertaking to give it the net amount of any payment he may receive from the Harlequin investment in that five year period, as well as any other payment she may receive from any party as a result of the investment. That undertaking should allow for the effect of any tax and charges on the amount she may receive. FF will need to meet any costs in drawing up this undertaking. If it asks Mr G to provide an undertaking, payment of the compensation awarded by this decision may be dependent upon provision of that undertaking.

Mr G should be aware that any such amount would be paid into his pension plan so he may have to realise other assets in order to meet the undertaking.

If, after five years, FF wants to keep the SIPP open, and to maintain an undertaking for any future payments under the Harlequin investment, it must agree to pay any further future SIPP fees. If FF fails to pay the SIPP fees, Mr G should then have the option of trying to cancel the Harlequin contract to enable the SIPP to be closed.

In addition, FF is entitled to take, if it wishes, an assignment from Mr G of any claim Mr G may have against any third parties in relation to this pension transfer and Harlequin investment. If FF chooses to take an assignment of rights, it must be affected before payment of compensation is made. FF must first provide a draft of the assignment to Mr G for her consideration and agreement.

The SIPP has paid a deposit under a contract with Harlequin. Mr G has 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 G needs to understand this, and that he won't be able to bring a further complaint to us if this contract is called upon.

4. *Pay Mr G £500 for the trouble and upset caused.*

Mr G has been caused significant upset by the events this complaint relates to, and the apparent loss of all a substantial part of his pension benefits. I think that a payment of £500 is fair to compensate for that upset.

I'm aware that a party involved with Harlequin had been charged with fraud offences. A court might therefore conclude that Mr G's loss didn't flow directly from FF's unsuitable advice. And on this basis, a court might not require FF to compensate Mr G – 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 G would not have made the Harlequin investment had it not been for the failings of FF. If it had given Mr G suitable advice, the Harlequin investment would not have been made. And I consider that the advice given by the adviser completely disregarded Mr G's interests. As a direct result of FF's failure to give suitable advice, Mr G 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 FF responsible for the whole of the loss suffered by Mr G. I am not asking FF 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 G's right to compensation from FF for the full amount of his loss.

**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 The Financial Factory Ltd should pay Mr G the amount produced by that calculation – up to a maximum of £150,000 plus any interest set out above.

If The Financial Factory Ltd does not pay the recommended amount, then any investment



currently illiquid should be retained by Mr G. This is until any future benefit that he may receive from the investment together with the compensation paid by The Financial Factory Ltd (excluding any interest) equates to the full fair compensation as set out above.

The Financial Factory Ltd should provide details of its calculation to Mr G in a clear, simple format.

**recommendation:** If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that The Financial Factory Ltd pays Mr G 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 The Financial Factory Ltd. It is unlikely that Mr G can accept my decision and go to court to ask for the balance. Mr G may want to consider getting independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr G either to accept or reject my decision before 11 October 2017.

Michael Stubbs  
**ombudsman**