

complaint

Mr C complained he was given unsuitable advice by Kingswood Financial Advisors to transfer his pension plan to a self-invested personal pension (SIPP). The SIPP was set up to allow Mr C to invest in a Harlequin off-plan hotel development in the Caribbean.

background

In early 2011, an unregulated advisor, acting as an agent for Harlequin, recommended Mr C invest in Harlequin. At the time Mr C was in his early 50s. The agent referred Mr C to Kingswood for advice on transferring his pension into a SIPP. In February 2011 Kingswood met with Mr C. A fact find was carried out. It recorded that he had:

- A salary of about £27,000.
- A home jointly owned with his wife. It had about £80,000 equity.
- About £35,000 on deposit account.
- About £2,400 in loans.
- An occupational pension plan.
- A personal pension plan with a transfer value of about £39,000.

The fact find noted that Mr C had attended a seminar about buying property abroad and that the “*initial advice idea*” was to facilitate Mr C being able to enter into a property purchase contract. The fact find noted that Kingswood had told Mr C that it wasn’t advising him on the property but could provide advice on transferring his pension to allow the property purchase.

An attitude to risk (ATR) form was partially filled in. The questions to determine Mr C’s ATR weren’t completed, but instead a comment was recorded on the form that “*Mr C is aware of the risks associated with this type of investment.*” The ATR form was signed by Mr C.

Soon after Kingswood sent a letter of advice; it recommended Mr C transfer his personal pension into a SIPP. The letter of advice said:

- He had indicated he wanted to use his funds to invest in the property.
- Kingswood had not provided any advice on the suitability of using his pension funds in this way.
- He would transfer his entire personal pension into the SIPP.
- His objective was to achieve a much better return than in the bank or building society, and match or beat the rate of inflation.
- He “*would like to take a small amount of risk*” but “*was fully aware that the SIPP contract and the investment you are proposing with the pension are of a higher risk than you would normally undertake.*”

Kingswood recommended a particular SIPP for Mr C to transfer his pension to. This was for the sole purpose of allowing Mr C to invest money from the SIPP into the Harlequin property.

It was not covered in detail in the fact find or the letter of advice, but Mr C was also a member of an occupational pension plan. From that plan he received a pension of about

£3,180 per year from the age of 50. He had already taken his tax free lump sum and used it to make improvements to his home.

In March 2011 Mr C signed the sale contract to buy the property. In May 2011 Mr C's funds were transferred from the SIPP to Harlequin. Mr C paid £37,500 as a 30% deposit from his SIPP. The remainder of the purchase price would be paid by Mr C in instalments as the property was built. This would be under a separate contract between Harlequin and Mr C for the remaining 70% share. Mr C said he was told by Harlequin that a mortgage would be arranged for him to cover the remaining 70% when it became due.

In October 2011 Mr C, with his wife, decided to invest in a second Harlequin property in the same resort. He paid £30,000 directly to Harlequin as a 30% deposit. This was from the funds he held on deposit account (which he'd received from his redundancy in 1999). This was not through his SIPP. I'm not aware that Kingswood had any involvement in Mr C's investment in the second property.

To date, the development hasn't been built, and it's likely Mr C has lost all of his original investments. As at February 2014, Mr C's first property was valued by the SIPP provider at £1.

In December 2014 Mr C complained to Kingswood. He said the advice to transfer his pension had been unsuitable. Kingswood didn't respond to his complaint so he brought it this service. Kingswood provided a response to us. It said:

- Mr C was advised by the agent on purchasing the property, not Kingswood.
- Kingswood was only asked to advise on which SIPP would allow Mr C to invest in the property. The only suitable option was a SIPP.
- Kingswood told Mr C it was not advising on the suitability of using his pension fund to invest in the property. Only on transferring to a SIPP to allow him to carry out his wishes.
- It's not fair that Kingswood is held responsible for advice given by an un-connected advisor from a different firm.
- The losses from transferring were explained to Mr C.

Our adjudicator thought Kingswood hadn't given Mr C suitable advice and upheld the complaint. He said that Kingswood should put Mr C back in the position he would've been in if he hadn't transferred his pension.

Kingswood doesn't agree with the adjudicator and the complaint has been passed to me for a decision.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. In doing so, I agree with the adjudicator. I think Kingswood has done something wrong.

(1) what was suitable advice?

Kingswood said that the scope of its agreement restricted its advice to just choosing the right SIPP. This is what Mr C wanted as he had already committed to investing in Harlequin. And he knew Kingswood was only advising on this.

COBS 2.1.1R required Kingswood to act "*honestly, fairly and professionally in accordance with the best interests of its client.*" This is an independent duty on the firm. It can't simply say that the customer had already decided what he wanted to do, so it simply carried out his wishes regardless of whether it was in Mr C's best interests. I'm also mindful of the principles for business and in particular principles 1 (*integrity*), 2 (*due skill, care and diligence*), 6 (*customers interests*) and 9 (*reasonable care*).

Therefore, although Mr C may have received advice from the agent, he had still been referred to Kingswood for advice on the transfer. It still had an obligation to consider whether it was in his best interests. Especially in the full knowledge that the only reason Mr C was transferring to the SIPP was to invest in Harlequin.

COBS 9.2.1 required Kingswood to obtain the necessary information about the client's knowledge and experience relevant to the specific type of *designated investment* and the investment objectives. Having done so, COBS 9.2.2 required Kingswood to consider whether the transfer from the personal pension to the SIPP met Mr C's investment objectives, he could bear the risks involved, and that he understood the risks.

Mr C was looking at transferring his personal pension to a SIPP. To determine whether that was suitable or not required Kingswood to understand the property that the SIPP was going to invest in. Kingswood knew that was the sole objective behind the transfer. Its advisor had dealt with a number of similar transactions in the past. To be able to advise in accordance with the rules, it had to understand the risks associated with the property. Without this information it could not say whether the transfer was suitable or not. GEN 2.2.1 states "*every provision in the Handbook must be interpreted in the light of its purpose.*" The purpose of COBS 9 is to ensure consumers get advice that's suitable in their circumstances. To interpret COBS 9.2 in a narrow way so that Kingswood closed its eyes to the purpose of the SIPP would avoid looking at all of the factors that the rule (and the rest of Chapter 9) says are necessary to ensure suitability.

(2) was the transfer suitable?

The property was high risk, highly illiquid and speculative. In contrast, Mr C transferred his entire personal pension. He did have an occupational plan as well, though this would only provide him with a small pension. There's no evidence he had any experience of property investments like Harlequin. In fact, I'm not aware that he had any real investment experience at all.

Kingswood failed to carry out an assessment of Mr C's ATR. But it did record that Mr C would like to take a *small amount of risk*. Kingswood was aware that the property was a higher risk product than Mr C would normally invest in. It said his objective was to earn a better rate than leaving his funds in a bank account. At no point does Kingswood reconcile these inconsistencies. It simply said Mr C "*understood*" the risks. It's not clear how Kingswood determined this and no explanation has been given to justify Mr C's departure to a high risk investment. The only reason he transferred into the SIPP was to invest in the

property. I think on any view, Kingswood should've advised Mr C that the transfer to the SIPP to invest in the Harlequin property wasn't suitable.

If it had given advice to Mr C that his proposed course of action wasn't suitable, then Kingswood had a number of options open to it. I don't think the suggestion that it couldn't do anything *but* advise him to transfer into a SIPP is correct. Kingswood could choose not to carry out the transaction. Or it could look to carry out the transfer but on an insistent client basis (if that's what Mr C was). This would involve making it clear to Mr C what the risks were, that his actions were against Kingswood's advice and what the alternative options were.

If Mr C had truly been advised by another party, then he would still remain free to follow that advice if he really wanted to. But the argument that to suggest anything other than transferring into a SIPP wouldn't be right for Mr C seems to confuse 'suitability' with 'doing what the client says he wants'. These are not necessarily the same thing. It assumes the client truly understands the risks involved and that the stated outcome genuinely reflects the investment objectives of the client. This is important and goes to the heart of being a regulated advisor.

(3) what would Mr C have done?

While looking back it's difficult to be sure what someone would've done if suitable advice had been given. I think, on balance, Mr C wouldn't have transferred to a SIPP and gone ahead with investing in the property.

The property was recommended to Mr C by the agent - an unregulated advisor. But Kingswood was a regulated independent financial advisor. I think any advice that the transfer wasn't suitable due to the high risk nature of the underlying investment would have been significant for Mr C and carried due weight - despite what the agent may have told him about the property. Kingswood said it highlighted the losses associated with the transfer. But I think that misses the point. Kingswood didn't advice Mr C *not* to transfer. It recommended the SIPP for him. He relied on their endorsement of the proposed pension transfer to facilitate the investment.

Mr C paid a £1,000 reservation fee. This represented a small proportion of the total purchase price. Even if it wasn't refundable, I don't think this would have prevented him from stopping the transfer given the greater risk and possible losses he would've been advised he was exposing himself to. There was no other reason put forward for transferring to the SIPP other than to invest in the property.

I have reached this decision on the balance of probabilities. Given the significant risks involved in investing in the property, and the greater weight Kingswood's advice should reasonably have had, I'm satisfied this test has been met. On balance, I believe Mr C wouldn't have invested in the property had it not been for the restricted advice Kingswood gave him.

(4) role of others

Kingswood said it wasn't fair that it was held responsible for the advice given by the agent. What Mr C was told by the agent isn't clear, and no evidence has been provided about that. But, for the reasons I have already given, I don't think this means Kingswood aren't responsible for the losses Mr C incurred. If Kingswood had given suitable advice Mr C

wouldn't have invested. It had a duty to give that advice but didn't. If Kingswood thinks another advisor is partly responsible than it may wish to seek action against that party.

In the same way, Kingswood said the SIPP provider confirmed it had carried out the necessary due diligence on the property. If Kingswood feels that the SIPP provider may also be liable for the losses suffered, then that's a matter for it. Mr C contracted with Kingswood. Because of Kingswood's regulated advice he transferred into the SIPP and invested in Harlequin.

(5) the second property

Mr and Mrs C invested in a second property in October 2011. This wasn't via Mr C's SIPP. There's no evidence that Kingswood were involved in this purchase. While I think Mr C wouldn't have invested in the second property had he been given suitable advice by Kingswood in relation to the first; I don't think Kingswood should be held responsible for any losses arising from investing in the second property.

I've seen no evidence that Kingswood knew when it gave advice on transferring his pension that a second property purchase was being considered. I also note that Mr and Mrs C signed the second contract six months after the first one. And again, this followed the recommendation of the same agent. Some time had passed. As a result, I think the loss from the second property is too remote to hold Kingswood responsible.

fair compensation

On 21 April 2016, the adjudicator contacted all parties and explained how redress in this complaint might be approached. This included certain aspects that weren't set out in the adjudicator's original view. Both parties were given two weeks to provide any comments on the proposed approach. No comments were provided to us.

My aim is to put Mr C as close as possible to the position he would probably now be in if he'd been given suitable advice. I think that he would have kept his 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 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 Kingswood 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 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. While it's complicated to put the consumer back in the position he would have been in if suitable advice had been given, I think it's fair that Mr C is compensated now. I don't think we should wait and determine each any every possibility before making an award. What is set out below is a fair way of achieving this.

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

1. Obtain the notional transfer value of Mr C's previous pension plan if it had not been transferred to the SIPP. That should be the value at the date of this decision.
2. Obtain the actual transfer value as at the date of the decision of Mr C's SIPP, including any outstanding charges.
3. Pay a commercial value to buy Mr C's share in the Harlequin property.
4. And then pay an amount into Mr C'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, Kingswood should:

5. Pay five years' worth of future fees owed by Mr C to the SIPP.
6. Pay Mr C £300 for the trouble and upset caused.

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

1. *Obtain the notional transfer value of Mr C's previous pension plan if it had not been transferred to the SIPP. That should be the value at the date of this decision.*

On the date of decision, Kingswood should ask Mr C's former pension provider to calculate the notional transfer value that would have applied had he not transferred his pension but instead remained invested in the same funds.

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.

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

2. *Obtain the transfer value as at the date of the decision of Mr C's SIPP, including any outstanding charges.*

Kingswood should then deduct the result of 2 from the result of 1. That is the loss to his pension.

3. *Pay a commercial value to buy Mr C's share in the property.*

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, Kingswood 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 Kingswood is unable to buy the investment, it 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 C 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 C 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 C may want to seek independent advice on how to cancel this ongoing contract for the remaining amount.

4. *Pay an amount into Mr C'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, Kingswood should pay it as a cash sum to Mr C. But the compensation should be able to be paid into a pension in the time until Mr C 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 C could claim. The notional allowance should be calculated using Mr C's marginal rate of tax.

Simple interest should be added at the rate of 8% a year from the date of decision until the date of payment. Income tax may be payable on this interest.

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

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

I think Kingswood should be able to take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mr C 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 Kingswood pay Mr C 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 C with some confidence that he will not be subject to further fees.

In return for that, Kingswood may ask Mr C 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. Kingswood will need to meet any costs in drawing up the undertaking. If Kingswood asks Mr C to provide an undertaking, payment of the compensation awarded by this decision may be dependent upon provision of that undertaking.

If, at the end of those five years, Kingswood 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 Kingswood fails to pay the SIPP fees, Mr C always has the option of trying to cancel the Harlequin contract to enable the SIPP to be closed at any time.

6. Pay Mr C £300 for the trouble and upset caused.

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

my final decision

For the reasons outlined above, I uphold Mr C's complaint against Kingswood Financial Advisors. I consider that fair compensation should be calculated as set out above.

Simple interest should be added to my award at the rate of 8% gross a year from the date of this decision until the date of payment. Tax may be due on this interest.

Under our rules, I'm required to ask Mr C to accept or reject my decision before 23 June 2016.

Benjamin Taylor
ombudsman