

complaint

Mr W 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 W and his wife to invest in a Harlequin off-plan hotel development in the Caribbean.

background

In June 2010 a different advisor, acting as an agent for Harlequin, recommended Mr W and his wife invest in the property. This agent was an appointed representative to a different authorised firm. The agent was not authorised to advise on unregulated investments.

The agent referred Mr and Mrs W to Kingswood for advice on transferring their pensions into a SIPP. In July 2010 Kingswood met with Mr and Mrs W. A fact find was carried out. For Mr W it recorded:

- He was in his mid-40s.
- He was self-employed with a gross annual income of about £18,000.
- He owned a property with his wife worth about £250,000.
- He owned jointly further properties worth about £600,000.
- He had mortgages of £175,000
- He had a personal pension with a transfer value of about £29,000.
- He had no other investments and no other pension provision.

In correspondence with this service, Mr W disputed the accuracy of some of the fact find. He said he owned four terraced houses with his brother with a combined value of £150,000. Mr W said he was encouraged by the agent to inflate the value of his assets.

Later that month Kingswood sent a letter of advice. The letter recommended Mr and Mrs W transfer their personal pensions into a SIPP. In relation to Mr W, 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 pension to the SIPP.
- His attitude to risk was 6-7. He accepted the risk of a moderate loss to his money.
- His objective was to achieve a much better return than in the bank or building society, and match or beat the rate of inflation.
- Moving his funds to the SIPP was consistent with his attitude towards investment.

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

In July 2010 Mr W signed the sale contract to buy the property. Around August 2010 Mr W's funds were transferred into the SIPP. Mr W paid £27,500 as part of a 30% deposit from his SIPP. £10,000 was paid from Mrs W's SIPP for the remainder of the deposit. They would jointly own the property together. The remainder of the purchase price would be paid by Mr and Mrs W in instalments as the property was built.

To date, the property hasn't been built and it's likely Mr W has lost all of his original investment from the SIPP. As at March 2015, Mr and Mrs W's property was valued by the SIPP provider at £1.

In February 2014 Mr W complained to Kingswood. He said the advice to transfer his pension had been unsuitable. Kingswood rejected his complaint. It said:

- Mr and Mrs W were advised by the agent on purchasing the property, not Kingswood.
- Kingswood was only asked to advise on which SIPP would allow Mr and Mrs W to invest in the property.
- Kingswood told Mr and Mrs W it was not advising on the suitability of using their pension funds to invest in the property.
- The losses from transferring were explained to Mr and Mrs W.
- Mr and Mrs W had already made up their mind to invest.
- The SIPP provider was responsible for carrying out the due diligence on the property.

Mr W brought his complaint to this service. Our adjudicator thought Kingswood hadn't given Mr W suitable advice and upheld the complaint. She said that Kingswood should put Mr W back in the position he would've been in if he hadn't transferred his pension.

Kingswood doesn't agree with the adjudicator. In addition to the above it said:

- It's not fair that Kingswood is held responsible for advice given by an un-connected advisor from a different firm.
- As Mr and Mrs W were already committed to buying the property, the only suitable option for them was to transfer to a SIPP.

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.

Mrs W has also brought a complaint to this service. I will deal with her complaint in a separate decision.

(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 W 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 W's best interests. I'm also mindful of the principles of business and in particular principles 1 (*integrity*), 2 (*due skill, care and diligence*), 6 (*customers interests*) and 9 (*reasonable care*).

Therefore, although Mr W 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.

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 W's investment objectives, he could bear the risks involved, and that he understood the risks.

Mr W 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. 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 from 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 W transferred his entire pension fund. He didn't have experience of property investments like Harlequin. In fact there's no evidence he had any experience of investments of this type at all. Owning tangible terraced houses with his brother certainly isn't comparable.

Kingswood recorded Mr W having an attitude to risk whereby he would accept a *moderate* loss of money. It said his objective was to earn a better rate than leaving his funds in a bank account. The property represented all of his pension provision in the SIPP. The only reason he transferred into the SIPP was to invest in Harlequin. The SIPP carried significantly higher charges than Mr W's personal pension. I think on any view, Kingswood should've advised Mr W that the transfer to the SIPP to invest in Harlequin property wasn't suitable.

If, having given advice to Mr W 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 W was). This would involve making it clear to Mr W what the risks were, that his actions were against Kingswood's advice and what the alternative options were to him.

If Mr W 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 W 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 W 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 W wouldn't have transferred to a SIPP and gone ahead with investing in the property.

The property was recommended to Mr W by the agent who was also a financial 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've been significant for Mr W 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. It said Mr W didn't query the report and this showed he was committed to investing. But I think that misses the point. Kingswood didn't advise Mr W *not* to transfer. It recommended the SIPP for him. He relied on their endorsement of the proposed pension transfer to facilitate the investment.

Mr and Mrs W paid a reservation fee of £1,000 each. The fee was loaned to them by the agent and they later repaid him. 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 W 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 and Mrs W were 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 W incurred. If Kingswood had given suitable advice Mr W 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. The adjudicator dealt with the issue of an assignment of a right of action from Mr W as one option. If that is something Kingswood wish to pursue than it must be after the redress is paid to Mr W.

In the same way, Kingswood said the SIPP provider confirmed it had carried out the necessary due diligence on the property. No evidence has been provided of this. If Kingswood feels that the SIPP provider may also be liable for the losses suffered, then that's a matter for them. Mr W contracted with Kingswood. Because of Kingswood's regulated advice he transferred into the SIPP and invested in Harlequin.

fair compensation

On 21 April 2016, an 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 original adjudicator's 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 W as close 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 the business 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 Mr W back in the position he would have been in if suitable advice had been given, I think it's fair that Mr W 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 W's pension, if he hadn't transferred, with the current value of his SIPP, in summary:

1. Obtain the notional transfer value of Mr W'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 transfer value as at the date of the decision of Mr W's SIPP, including any outstanding charges.
3. Pay a commercial value to buy Mr W's share in the property.
4. And then pay an amount into Mr W'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, Kingswood should:

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

6. Pay Mr W £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 W'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 calculation, Kingswood should ask Mr W'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 W's SIPP, including any outstanding charges.*

This should be confirmed by the SIPP provider. 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 W's share in the property.*

The SIPP only exists because of the investment in Harlequin. I think it would be fair if the property could be removed from the SIPP. Mr W would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP.

The valuation of the property may prove difficult, as there's no market for it. For calculating compensation, Kingswood should agree an amount with the SIPP provider as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment. If Kingswood is unable to buy Mr W's investment in Harlequin, it should give it a nil value for the purposes of calculating compensation.

The contract with Harlequin is for Mr W's share in 30% of the property. That was paid as a deposit. That loss is being compensated here.

There is another contract for the remaining 70% of the purchase price of the property. Mr and Mrs W have not yet paid this contract, so, as yet have not suffered any actual loss for this contract. But they might. I'm aware that in August 2013 Mr and Mrs W wrote to Harlequin to cancel the contract. It's not clear whether any response was ever received.

I understand that this contract could be called upon if the development progresses. At that stage Mr and Mrs W could be required to raise funds to meet their liability. In my view, that liability wouldn't exist if Kingswood had advised Mr and Mrs W not to use their pensions to buy the Harlequin property.

I've considered whether to make an award. But I can't tell Harlequin what to do. I can't set the terms of any new contract is assigned to Kingswood. I can't be certain about the value of the contract.

But in any event I don't think the development will progress. So I think it's unlikely this contract will convert into an actual loss for Mr W; but I can't say for certain. For that reason I'm not making an award for the contract for the remaining 70% of the purchase price. Mr W needs to understand that even though I think it's unlikely, it's still possible. He won't then be able to bring another complaint to us if this contract is called upon.

- 4. Pay an amount into Mr W'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 W. But 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 Mr W's marginal rate of tax in retirement. For example, if Mr W is likely to be a basic rate taxpayer in retirement, the notional allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax.

- 5. Pay any future fees owed to the SIPP until it is cancelled.*

Had Kingswood given suitable advice I don't think there would be a SIPP. It's not fair that Mr W 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 W 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 pays Mr W 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 W with some confidence that he will not be subject to further fees.

In return for that, Kingswood may ask Mr W 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 the business asks Mr W 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 the business fails to pay the SIPP fees, Mr W always has the option of trying to cancel the Harlequin contract to enable the SIPP to be closed at any time.

- 6. Pay Mr W £300 for the trouble and upset caused.*

Mr W 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 W'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 W to accept or reject my decision before 20 June 2016.

Benjamin Taylor
ombudsman