

complaint

Mrs H complains that Grosvenor Financial Consultants Ltd (GFC) gave her unsuitable advice to transfer her pensions to a Self-invested Pension Plan so she could then invest in an overseas property development (Harlequin). Mrs H says she did not understand the risk of the transaction or that she could lose all her money. She says this was not explained to her by GFC and it was not appropriate to carry out the transfer and investment.

background

I issued a provisional decision 14 January 2019. A copy is attached and forms part of this final decision. In the provisional decision I set out why I intended to uphold the complaint.

GFC did not accept the provisional decision and made further submissions. In summary it said:

- It did not have any agency for, or relationship to, the Harlequin investment.
- Mr and Mrs H contacted GFC after Hornbuckle Mitchell declined to deal with the SIPP applications because it did not deal direct with individuals.
- Mr and Mrs H reserved Harlequin properties before they approached GFC.
- Weight should be given to the letter Mr H wrote to GFC dated 6 March 2010 in which it was stated that both Mr and Mrs H understood GFC's role. This was written because GFC had refused to administer the purchase of the first two Harlequin properties and Mr and Mrs H intended to buy a third property directly with Harlequin.
- Mr and Mrs H are sophisticated, knowledgeable and professional investors. Since 2004 Mr and Mrs H have been Directors or company secretary for six companies. Mr H is registered at companies house as an architect, businessman and entrepreneur. One of his businesses had a turnover of £3 million.
- Mr and Mrs H have three Buy-to-Lets (BTL's) and researched this market themselves. These are investments.

Mr and Mrs H were asked for some more information regarding the issues GFC had raised. They said:

- That they did not approach Hornbuckle Mitchell directly. At that time they did not understand what a SIPP provider was or what it did and had not heard of the SIPP provider. GFC was recommended to them by Mr D.
- Mr H had worked in the construction industry all his life, mainly in an Architectural Design/Technical capacity. He had been a director of a small local building company with a turnover of about £1.8 million. Before he left that company it was not the established house builder that it is now and before he left, "*we dabbled with development in a very small and tentative way... a couple of individual residential units and a conversion of a large house into 6 flats*". Associated companies were set up to undertake the property developments.

- Mr H was also a director of a company involved in insulating conservatory roofs, which went into liquidation and a newly established business dealing in electric bikes and scooters. Mrs H had never been a company director.
- The BTL's were in the local market and aimed at the student market. They believe they are completely different than the SIPP investments which were off-plan and overseas. They put a 5% deposit down to purchase these properties.
- The only investments Mr and Mrs H held were a small amount of bank shares – worth £1,700.

Mr and Mrs H's comments were passed to GFC. GFC:

- Queried Mr H's comments about GFC's connections or agencies with any other parties. It said it did not have referral relationships or agencies with the party Mr H was referring to.
- Highlighted the dates Mr and Mrs H made Harlequin deposits and that this was before GFC dealt with them. It said that Mr and Mrs H must have had some savings as they paid deposits of £3,000 and also that using a SIPP was mentioned at the time so they must have had an awareness of SIPP's.
- Highlighted Mr H's involvement in property companies and that he was a controlling director. It believes Mr H was well aware of the risks involved.
- The BTL's were non-regulated and specialised and it would like confirmation of the lenders. It said Mr and Mrs H managed to research three specialist mortgages and source three BTL properties. It does not believe Mr and Mrs H are unsophisticated.

my findings

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

I would firstly confirm that I do not give Mr and Mrs H's submissions any greater weight than GFC's. I consider all the evidence, including the submissions that have been made by both parties to decide what is a fair and reasonable outcome in the circumstances.

I set out in the provisional decision that I did not believe the pension transfer to the SIPP could be safely considered execution-only and the reasons why. I remain of that view. Consequently GFC should have considered the consequences and risk of that transfer as well as the investments to be made.

Although Mr and Mrs H have confirmed the amount owing on the BTL's I do not believe the amounts are material to the outcome of the complaint. I also do not believe that the lenders they used are material to the outcome. The fact that they did hold such property investments is relevant and it shows a willingness to invest in property. That is, that they did have experience of making property investments apart from their own home. And Harlequin was such property investment. I have taken that into account.

When Mr and Mrs H were referring to other investments, I believe they were referring to investments such as shares rather than physically holding real property. That said, BTL's are

investments. But Mr and Mrs H held no higher risk type investments at the time apart from a small amount of bank shares. This lack of any experience of investment plans or products in general would not tend to indicate investment sophistication, pension knowledge or that they were professional investors with an extensive knowledge of financial products. The cash sums they found to make deposits do not indicate wider investment experience. Whereas straightforward investments in real property are not regulated I do not agree that obtaining mortgages to buy modest properties such as Mr and Mrs H did necessarily implies investment sophistication. Buying a property to rent with a mortgage is not a complex transaction.

It is clear that Mr H did have long term experience of property and (relatively small scale) property development and I have considered his background in detail. I think it likely he would be aware of the risk of investing in as yet to be developed property in the UK. But what I do not believe he likely understood (and therefore Mrs H understood) were all the combined risks involved with transferring pensions and then investing most of the pension funds in an unregulated overseas property development. I would highlight that most of Mrs H's pension value derived from a defined benefit occupational pension scheme and she was not likely made aware of the disadvantages of giving up such benefits. She may well have been told that she could use a SIPP to do this before she approached GFC but that does not mean she was aware of all the issues involved in the transfer or exactly how a SIPP operated. Her lack of any experience in this area would not suggest that she did.

Mr and Mrs H may have reserved the properties before they approached GFC but if all the risks had been explained and they had been given advice that it was not suitable to proceed to risk almost the entirely of their pension funds in an unregulated high risk overseas investment then, given that was from a regulated professional party, I think they would have taken notice of that. I do not believe it likely that they would have then transferred and invested.

I do not believe that Mrs H invested in a third property direct is persuasive that she would have transferred and invested her pension if given appropriate guidance and advice. She did not have that guidance and advice when investing in the third property.

I would also reiterate what I set out in the provisional decision about this transfer and investment not being in Mrs H's best interests and GFC not fulfilling its responsibility in terms of Principles 2 and 6.

I would confirm that my decision is not affected by any relationship GFC might have had with any parties involved in the promotion of Harlequin. My decision would be the same whether it had any such relationship or not.

For the reasons discussed in my provisional decision and this final decision I believe the complaint should be upheld.

my final decision

I uphold the complaint. I order Grosvenor Financial Consultants Ltd to calculate and pay redress as set out in the attached provisional decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 8 April 2019.

David Bird
ombudsman

copy provisional decision

complaint

Mrs H complains that Grosvenor Financial Consultants Ltd (GFC) gave her unsuitable advice to transfer her pensions to a Self-invested Pension Plan so she could then invest in an overseas property development (Harlequin). Mrs H says she did not understand the risk of the transaction or that she could lose all her money. She says this was not explained to her by GFC and it was not appropriate to carry out the transfer and investment.

background

Mrs H says that she first became aware of the Harlequin investment in the summer of 2009 through friends. She was then contacted by an individual (which I will call Mr D) who discussed the Harlequin investment with her and her husband. Mr D recommended they speak to a financial adviser with respect to using their pensions to invest in Harlequin. She says GFC then contacted them and the documents to create the SIPP and transfer her pensions was completed at GFC offices.

Mrs H's representatives complained to GFC that it had failed to take reasonable steps to ensure that Mrs H fully understood the information given to her and the risks of the SIPP and Harlequin investment. It said that the entirety of Mrs H's pension was invested in an unregulated investment. It said that GFC had not carried out sufficient fact finding to establish the investment was suitable for Mrs H or assessed her attitude to risk. It also did not explain she could lose all her investment.

GFC replied to that complaint and said:

- It was instructed to set up the SIPP on an 'execution only' basis. Mrs H's husband had signed a letter confirming this.
- As the transaction was on an 'execution only' basis it was not required to carry out any fact finding or assessment of risk.
- The application form for the SIPP confirmed no advice had been given.
- No advice was given or sought and this was drawn to the attention of Mrs H.
- It did not undertake any 'due diligence' on the investment.
- Clear warnings as to the investment were provided.

The complaint was referred to this service. An adjudicator at this service considered the complaint. She thought it should be upheld. Whilst she noted GFC's comments that it did not provide advice on the investment to be held in the SIPP, she thought that Mrs H would have understood she was receiving advice on the SIPP and investment. The investment was not in her view suitable for Mrs H.

GFC did not agree and made reference to a letter it issued on 28 August 2009 stating that it was not providing advice on the investment and it was high risk. It also made reference to a letter written by Mrs H stating she understood the risks involved. It made reference to Mrs H acting independently and having no further contact with GFC after the transfer to the SIPP and investment of the money had been carried out. It says Mrs H invested in Harlequin subsequently, independently, and without any assistance from GFC. GFC also made reference to another complaint considered by this service.

The complaint has therefore been referred to me for review.

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.

Mr and Mrs H were effectively acting jointly with regard to the Harlequin investments and SIPP and so I will refer to Mr H at times.

GFC has said that it did not give advice on the investment and this was an 'execution only' transaction. This generally describes a situation where the business simply carries out a transaction of the individual's choosing on their instruction with no advice being given.

Indeed, there is a letter to Mr and Mrs H of 28 August 2009. The letter says:

*"I am confirming that this transaction will be on an **Execution Only** basis. This is because Grosvenor has no dealings nor desire to advise about this type of product which might be deemed to be **high risk and unregulated**.*

You have approached Grosvenor Financial Consultants Limited (GFC Ltd) directly because of our knowledge off Pensions, specifically Self Invested Personal Pension's (SIPP's) which you wish to use to make this purchase.

GFC Ltd cannot stress enough that you should request independent legal advice regarding this product as it is deemed to be high risk and unregulated.

You will receive no advice from GFC and the only correspondence will be regarding your Hornbuckle Mitchell SIPP that you have requested that we arrange."

It should be noted that Mrs H has said that she never received this letter.

In addition, Mr H wrote to the GFC adviser on 6 March 2010 saying:

"I write to confirm that Grosvenor Financial Consultants Ltd have been appointed solely to facilitate the financial transactions in the acquisition of the 3 properties that myself and (Mrs H) have purchased at Buccament Bay through Harlequin Properties.

At no point have Grosvenor Financial Consultants Ltd been requested, or have offered any financial advice, recommendations or opinion with regard to the acquisition of the properties, the company (Harlequin Properties Ltd), the method of financing of the purchase, the market or the location of the development. Grosvenor Financial Consultants Ltd have carried out their duties exactly as requested by (Mr and Mrs H), for which they wish to express their gratitude."

However there is clear dispute between this and Mrs H's version of events. She says:

"As Grosvenor got local offices we went and were given all documents to sign. At no point did (the adviser) ever explain that this was a high risk or unregulated investment. He also did not explain to us that he was dealing with us on an execution only basis. We believed we paid him a fee for his advice. We never had a financial review of our pensions previously - we didn't have a financial adviser, so we did not know what to expect. He never discussed our Attitude to Risk with us, and it was only when (their representative) asked us for copies that we understood what should have happened prior to the pension transfer."

What is in my view clear is that GFC had full knowledge of why the SIPP was being created and how it was being funded. It administered the setting up of the SIPP and suggested what SIPP to be used. GFC wrote to the SIPP provider on 3 November 2009 enclosing discharge forms for Mrs H's Occupational Pension Scheme (OPS) and enclosed Harlequin purchase contracts. GFC also wrote to the SIPP provider on 23 November 2009 saying:

"Now that the initial sum of (about £47,000) has been received by (Mrs H's) pension from North Yorkshire County Council, please find enclosed a signed Telegraphic Transfer form which will allow you to proceed with (Mrs H's) purchase of property in the Caribbean."

GFC were registered by the SIPP provider as the servicing IFA for the SIPP.

the SIPP

In terms of the SIPP I do not believe the transaction can be safely considered 'execution only'. Firstly the information GFC gave (which I have referred to) was that it was not giving advice as to the investment. It is not at all clear, and would not have been to Mrs H, that it wasn't giving advice as to the SIPP. Indeed I am not of the view that the circumstances suggest it was an execution only transaction. Mrs H did not approach GFC with a SIPP in mind or in fact that a transfer to a SIPP was what she should do. Mrs H had only been told that she may be able to use her pensions to invest in Harlequin and then had been contacted by, or directed to, GFC who had proposed a SIPP to her and carried out the pension transfers.

Furthermore Mrs H was clearly not the type of sophisticated, knowledgeable or professional investor who would normally be involved in execution only transactions and this would likely have been apparent to GFC.

I say this as Mrs H has said that she worked as a part time teaching assistant up to 2011 and her taxable income in 2009/10 was nil. She had pensions worth about £55,000, most of which was built up in what I understand was a final salary (defined benefit) OPS. With her partner, she had about £2,000 in cash. She also had three buy to let properties with her partner valued at £360,000 with mortgages of £320,000. She has confirmed that she had not invested before she made the investment in Harlequin.

So Mrs H would clearly not have appeared to be an individual who would 'know what she was doing'. GFC should have taken this into account, particularly given the nature of the entire undertaking. I will discuss this further later in this decision.

In my view Mrs H was entitled to believe that GFC was looking after her interests in recommending the SIPP to be used and that the pension transfer was appropriate for her. Given that I do not believe the SIPP arrangement can be considered properly execution only, GFC should have obtained sufficient information to ascertain if the pension transfer to the SIPP was appropriate and suitable. It did not do so and if it had I believe it would have been clear that it was not appropriate.

GFC was aware that most of the pension value was a transfer from Mrs H's OPS, which was a local government final salary (defined benefit) pension scheme. There were no warnings or assessment provided about the benefits she was giving up, such as a guaranteed increasing income and dependents benefits. Given her limited savings, experience and pension benefits, it was very unlikely to be appropriate for her to transfer these benefits to a SIPP, losing these guarantees. And GFC was aware that the intention was then to invest in an unregulated high risk investment. GFC would or should have been aware of these factors and should have advised her against the transfer.

I would highlight:

COBS 19.1.5R

If a firm arranges a pension transfer or pension opt-out for a retail client as an execution-only transaction, the firm must make, and retain indefinitely, a clear record of the fact that no personal recommendation was given to that client.

As discussed, I do not believe GFC made it sufficiently clear that it was not providing advice (if it wasn't) on the pension transfer.

the Harlequin investment

I'm mindful that in January 2013, the Financial Services Authority (FSA) issued an alert:

"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investment proposed to be held within the new pension. In particular, we have seen advisers moving customer's retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes)..."

The cases we have seen tend to operate under a similar advice model. An introducer will pass customer details to an unregulated firm, which markets an unregulated investment (e.g. an overseas property development). When the customer expresses an interest in the unregulated investment, the customer is introduced to a regulated financial adviser to provide advice on a SIPP capable of holding the unregulated investment. The financial adviser does not give advice on the unregulated investment, and says it is only providing advice on a SIPP capable of holding the unregulated investment. Sometimes the regulated financial adviser also assists the customer to unlock monies held in other investments... so that the customer is able to invest in the unregulated investment...

... 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. If, taking into account the individual circumstances of the customer, the original pension product, including its underlying holdings, is more suitable for the customer then the SIPP is not suitable.

This is because if you give regulated advice and the recommendation will enable investment in unregulated items you cannot separate out the unregulated elements from the regulated elements.

... The FSA asks regulated firms, in particular financial adviser and SIPP Operators to report those FSA firms that are carrying on these activities in breach of the FSA requirements..."

This alert didn't make any changes to the regulations, it was not new regulation that had not applied previously. It simply re-stated the principles that already applied, and which were in place in 2009 when the transfer and investment took place.

My view is not dependent on comments made by the industry regulator as to the type of process GFC carried out to facilitate the investment. I take an independent view based on the circumstances of the complaint and take into account the rules, law and good practice in place at the time to arrive at a decision that is fair and reasonable in all the circumstances. But my view is consistent with general comments from the regulator about this type of process – that consideration should be given when advice is given to transfer a SIPP, to the suitability of the overall proposition – both SIPP and investment to be taken out.

The regulator's comments refer directly to the situation here – where advice is being given (or should have) about a SIPP to invest in overseas property. It said that where an adviser recommends a SIPP knowing that the customer will sell current investments to fund overseas property then the suitability of that investment must be taken into account.

I would reiterate that I do not agree that simply because the regulators 'alerts' were given after GFC undertook the transaction that they are irrelevant – all the alerts did was highlight the existing obligations (which applied at the time this transaction took place) when giving advice such as this. It was not setting out new standards for businesses to follow.

I would reiterate that I appreciate that GFC says it was not giving advice. But as I have said it did recommend the SIPP to be used and I am not persuaded this was or should be deemed to be an execution only transaction. Given that it was giving advice as to the SIPP it should then have taken into account the investment of which it clearly was aware.

It is my view that in order to give suitable advice under COBS 9 as to the SIPP, GFC would have to take into account the investment itself, for which the SIPP was created and was the reason for the whole arrangement going ahead. The SIPP advice cannot be artificially separated from the investment to follow. GFC has its own responsibilities when providing the advice on the SIPP to make sure its responsibilities are discharged and it cannot simply ignore those responsibilities.

I agree there might be circumstances where it is appropriate to limit the scope of advice and where that would not necessarily conflict with a business's obligations to act in the best interests of its client and provide suitable advice. But those circumstances do not exist here. It was not possible to provide suitable advice and act in Mrs H's best interests in a situation where GFC knew the destination of the funds (Harlequin overseas commercial property) and the SIPP were clearly linked. I am not persuaded that GFC can limit its regulatory obligations in this way. If GFC felt that it could not give advice on the investment based on the information it had then it should have declined to give any advice at all or carry out the transaction.

in any event should GFC have proceeded with the transfer and investment?

There are overarching reasons why in my view GFC should not have proceeded with this transaction at all or on an execution only basis.

When considering what is fair and reasonable in the circumstances, I am required to take into account relevant: law and regulations; regulator's rules, guidance and standards; and codes of practice. I am also required to take into account, where appropriate, what I consider to have been good industry practice at the time.

I consider that the FCA's Principles 2 and 6 are of particular relevance to my decision about what is fair and reasonable in this case.

The Principles for Businesses, which are set out in the FCA's handbook "*are a general statement of the fundamental obligations of firms under the regulatory system*" (PRIN 1.1.2G). Principles 2 and 6 say:

"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.

Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."

The Principles have a wide application, and I need to have regard to them when deciding what is fair and reasonable in the circumstances of this complaint.

GFC was very likely aware that Mrs H was not an experienced or wealthy investor who was accustomed to entering into execution only transactions without advice. It had classified her as a retail client. It was also aware that the intention was to invest in an overseas unregulated high risk investment where there was the potential for all the money to be lost. Furthermore it was or should have been aware that most of the money for investment derived from a final salary pension scheme.

I do not believe that GFC met its obligations under the principles to simply arrange the transfer of pension benefits and administer the investment on an execution only basis. It should have been aware that there were very extensive risks inherent in this which Mrs H was likely not aware of. To simply process the transaction aware of this information and where it was clear that Mrs H did not have the wherewithal to likely appreciate all the risks herself was not acting in its customer's best interest. I do not believe it could ignore these risks and carry out the transaction on an execution only basis.

It should have either declined to carry out the transaction or provided further guidance or advice on the overall arrangement of transfer, SIPP and investment. I do not believe it acted with due care or in Mrs H's interest in accordance with Principles 2 and 6.

the suitability of the SIPP and investment for Mrs H

I have previously set out why I do not believe the transfer to the SIPP was likely suitable or appropriate.

In terms of the Harlequin investment Mrs H has said:

"We were told this was a safe investment. We were told the SIPP providers had done all their checks. The firm advertised in Kudos and had famous people advertising for them, such as Pat Cash and Liverpool football club. However, we would have never agreed to move our pensions if we would have been told that we could lose it all."

The Harlequin investment was an 'off plan' unregulated speculative overseas property investment. It was high risk and the investor faced the real possibility of losing all their money. Because it was unregulated Mrs H did not benefit from the protection afforded by the Financial Services Compensation Scheme.

Mrs H's investment experience was extremely limited and does not suggest that she was an experienced investor who could appreciate all the risks of what she was doing or would not be reliant on GFC to consider her best interests. She had no experience of high risk, unregulated investments.

Mrs H's circumstances do not indicate that she was prepared to lose all her money or that she was suited to the risks this investment presented. As a result of the SIPP investment, virtually the entirety of her pension funds were invested in Harlequin.

The value of Mrs H's pension funds was modest at about £52,000. And, as discussed, this was the only pension savings she had. The majority of that money was placed in Harlequin. Placing such a proportion of the value of the pension into one particular asset was unsuitable—because of the lack of any diversification. And here the money was invested in one overseas unregulated high risk asset.

I believe it is clear that this was not a suitable investment for Mrs H and it was not suitable to recommend the transfer and setting up of this SIPP on this basis.

did GFC cause Mrs H's loss

Mrs H was dependent on GFC to act in her best interests. I do not believe she could assess this risk of the overall arrangement of SIPP and investing in Harlequin for herself.

It does not seem to be disputed that Mrs H approached GFC with the Harlequin property investment. But that was likely a result of a previous promotion of that investment to her—Mrs H had not arrived at this decision on her own.

If GFC had declined to carry out the transfer and investment or advised Mrs H that she should not transfer or invest in Harlequin I think it more likely that she would have taken account of that and it would have been persuasive, coming from a professional regulated financial adviser. I think it is more

likely that she would not then have invested or transferred and these actions would have changed her motivation to invest in Harlequin.

It follows that she would not have transferred, nor needed to have transferred, her pension to the SIPP. So neither the SIPP nor the investment would have taken place but for GFC's actions. Consequently any loss Mrs H has suffered through transferring to the SIPP and investing in Harlequin has been caused by GFC's actions.

I'm aware that a party involved with Harlequin Property has been charged with fraud offences. A court might therefore conclude that the loss doesn't flow directly from GFC's unsuitable advice. And on this basis, a court might not require GFC to compensate Mrs H – 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. I am satisfied that Mrs H would not have made the Harlequin Property investment had it not been for the failings of GFC. And I consider that GFC's actions given by the adviser completely disregarded Mrs H's interests. As a direct result of the adviser's failure to give suitable advice, Mrs H invested her pension into a specialised, high risk, unregulated investment with a limited track record.

So I think that it's fair and reasonable to hold GFC responsible for the whole of the loss suffered by Mrs H. I am not asking GFC 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 Mrs H's right to compensation from GFC for the full amount of the loss.

fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mrs H as close to the position she would probably now be in if she had not been given unsuitable advice.

As discussed, I think otherwise Mrs H would have kept her existing pensions. But it's unlikely to be possible for GFC to reinstate Mrs H into her previous pension schemes.

There are also a number of possibilities and unknown factors in making an award. While I understand Harlequin Property will allow GFC to take over the investment from Mrs H, the involvement of third parties – the SIPP provider and Harlequin Property – means much of this is beyond this service or GFC'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 Mrs H back in the position she would have been in if suitable advice had been given, I think it's fair that Mrs H 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.

As I understand it one of the pensions that was transferred was an occupational final salary (defined benefit) plan and one was a money purchase AVC attached to the occupational scheme. I have set out fair redress on this basis.

In summary, GFC should:

- A) With respect to the final salary OPS pension, undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in October 2017 (I have set out this out in more detail below).
- B) With respect to the money purchase AVC:
 1. Obtain the notional transfer value of Mrs H's previous pension plan, as at the date of my final decision, if it had not been transferred to the SIPP.
 2. Obtain the transfer value, as date of my final decision, of that value of Mrs H's SIPP represented by the AVC, including any outstanding charges.
 3. And then pay the amount of (1 – 2) into Mrs H's SIPP so that the transfer value is increased by the amount calculated. This payment should take account of any available tax relief and the effect of charges.

In addition, GFC should:

4. Pay any future fees owed by Mrs H to the SIPP, for the next five years.
5. Pay Mrs H £250 for the trouble and upset caused.

I have set out each point in respect of 'B' (the AVC) in further detail below.

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

GFC should ask Mrs H's former pension provider to calculate the notional transfer value that would have applied as at the date of this decision had she not transferred her pension but instead remained invested.

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.

GFC 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 that value of Mrs H's SIPP represented by the AVC, including any outstanding charges.*
- 3 *Pay an amount into Mrs H's SIPP so that the transfer value is increased to equal the amount 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, GFC should pay it as a cash sum to Mrs H. 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 Mrs H's marginal rate of tax in retirement.

4 Pay any future fees owed to the SIPP for the next five years.

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

Ideally, GFC should take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mrs H back in the position she would have been in. But the ownership of the Harlequin Property 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 GFC pays Mrs H 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, GFC may ask Mrs H to provide an undertaking to give it the net amount of any payment she may receive from the Harlequin Property 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. GFC will need to meet any costs in drawing up this undertaking. If it asks Mrs H to provide an undertaking, payment of the compensation awarded by this decision may be dependent upon provision of that undertaking.

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

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

5 Pay Mrs H £250 for the trouble and upset caused.

I believe this matter would have caused significant inconvenience and upset for Mrs H and she should receive a payment for this.

further guidance as to calculation A:

GFC must undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in October 2017.

This calculation should be carried out as at the date of my final decision, and using the most recent financial assumptions published (at the date of that decision). In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mrs H's acceptance of the decision.

GFC may wish to contact the Department for Work and Pensions (DWP) to obtain Mrs H's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mrs H's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs H's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mrs H as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. 25% of the loss would be tax-free and 75% would have been taxed according to her likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

Where I consider that total fair compensation requires payment of an amount that might exceed £150,000, I may recommend that the business pays the balance.

determination and money award: I require GFC to pay Mrs H compensation as set out above, up to a maximum of £150,000.

The compensation resulting from the loss assessment must where possible be paid to Mrs H within 90 days of the date GFC receives notification of her acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes GFC to pay Mrs H this compensation.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I also recommend that GFC pays Mrs H the balance. I further recommend interest to be added to this balance at the rate of 8% per year simple for any time, in excess of 90 days, that it takes GFC to pay Mrs H from the date it receives notification of her acceptance of the decision, as set out above.

If Mrs H accepts my determination, the money award is binding on GFC. My recommendation is not binding on GFC.

Further, it's unlikely that Mrs H can accept my determination and go to court to ask for the balance of the compensation owing to her after the money award has been paid. Mrs H may want to consider getting independent legal advice before deciding whether to accept this decision.

my provisional decision

I uphold the complaint and intend to order GFC to calculate and pay redress as set out above.

David Bird
ombudsman