

complaint

Mr P complained about the advice by L J Financial Planning Ltd (LJFP) to transfer his final salary pension benefits to a self-invested pension plan (SIPP). About £35,000 was then invested in a Harlequin overseas property.

Mr P is being represented.

background

Mr P told us he met introducers from Harlequin who put him in touch with a representative of LJFP. He said it was an introducer and the adviser who both told him he could invest via a SIPP.

The fact find LJFP carried out was limited but it did identify:

- Mr P had final salary benefit. The transfer value was £40,500.
- It was his only pension provision
- He did not want to start making regular contributions

Based on this, the adviser first made a recommendation *not* to transfer. Mr P signed an unaddressed, typed letter in August 2011 that said:

*'Dear Sir,
I note your advice not to transfer out of my existing final salary scheme.
However Irrespective of your advice I still wish to transfer the benefits into a SIPP'*

A recommendation letter referred to meetings and discussions. It said keeping the existing pension was recommended because of guaranteed benefits. But, Mr P insisted on transferring in his letter (quoted above). Based on this, the advice was to transfer to the SIPP to be paid into the SIPP bank account. Mr P would then make investment decisions himself.

The SIPP was set up in September 2011. The transfer to the SIPP bank account was made in January 2012. The Harlequin investment followed in February 2012.

LJFP did not uphold the complaint. It said:

- It had not been asked to consider the investment and received no related income.
- Only a non-advised, postal, arrangement-only SIPP service had been provided for a fixed fee.
- LJFP had not been involved in the investment.
- No advice was given or requested on the suitability of the transfer.

The complaint was referred to us. Mr P told us that he found out about the Harlequin investment by speaking to someone at a car boot sale. This was someone that had a bill board up. That referred to the pension crisis and how to secure you and your family's future. He understood the property had a guaranteed minimum return. This would supplement his income in retirement. It was presented to him that his final salary pension had become worthless.

Our adjudicator explained why he thought the complaint should be upheld. Among other things, he had looked the FCA's Principles and Conduct of Business Sourcebook (COBS) rules to consider if LJFP had acted fairly in arranging the SIPP.

In particular, he quoted Principle's 2 and 6;

- '2. Skill, care and due diligence – a firm must conduct its business with due skill, care and diligence...*
- 6. Customers interests – A firm must pay due regard to the interests of its customers and treat them fairly.'*

The adjudicator concluded that:

- LJFP had a duty to ensure any transaction it conducts on behalf of its client is appropriate.
- This applied even when a particular service was *demanded* - whether or not the transaction was advised or execution only.
- LJFP had recommended against transferring pension benefit – so it knew such a transaction would not be appropriate.
- The attempt to document Mr P as an insistent client was not persuasive as it appeared the letter had been typed for Mr P simply to sign.
- He had found no evidence of the adviser assessing whether Mr P had the required knowledge and experience to understand the risk he was taking.
- The adviser had failed in his duty of care under the principles and rules.

The adjudicator said LJFP should do a loss calculation in accordance with the regulatory guidance for the review of pension transfers using the latest assumptions on our website. He said LJFP should also pay £300 compensation for the trouble and upset caused.

LJFP disagreed with the adjudicator. It said:

- The complaint didn't refer to the suitability of the transfer to the SIPP, but entirely to the suitability of the Harlequin investment.
- The adjudicator had not considered the complaint, but tried to force a compensation payment where none was due.
- The complaint should be referred to the Harlequin introducer.
- LJFP did not recommend the Harlequin property.
- The request was for a product that would allow Mr P to self-invest. This complied with the rule that the firm had to give suitable advice. The FSA guidance and practice that the investment should be considered as part of the advice was not introduced until 2013. That was after the advice was given to Mr P. The complaint should be judged against the standards of the time.

The adjudicator quoted the complaint letter to confirm his view that the complaint is about the suitability of the transfer to the SIPP. And the complaint was 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. Having done so, I agree the complaint should be upheld.

To decide what is fair and reasonable, I have to take account of relevant law, regulation, guidance and what I consider to be good industry practice.

Harlequin is an unregulated investment. But LJFP has told us it did not advise on the Harlequin investment – it just recommended a SIPP for Mr P. Advising on a SIPP is a regulated activity. So we can investigate the advice to start the SIPP.

Did LJFP give advice?

LJFP said that it didn't give advice. If that was the case it would be treated as an execution only sale. So, I would expect Mr P to have asked LJFP to arrange the SIPP for him. He didn't do that. But, LJFP did recommend a SIPP to Mr P. That was so that he could invest in Harlequin. So, LJFP limited its advice to the SIPP. But, it was required to act in its client's best interests. And it was required to gather sufficient information to know its client and give suitable advice.

The suitability report said:

“Recommendations

Based on our discussions, I recommend that you keep your existing pension Scheme due to the Guarantees. However you insist that you want to make alternative arrangements I note your letter, In view of this I recommend the following: ...”

The report went on to recommend the SIPP. So, this wasn't an execution only sale.

Did Mr P act against the advice not to transfer?

The adviser tried to document Mr P as an insistent client and disclaim responsibility for the transfer of the pension to the SIPP. In my view, the advice that was given was not good enough. I would expect a comparison of the benefits between the final salary pension and the SIPP to have been made. Clear explanations about the benefits being given up should have been provided. None of these were in the letter sent to Mr P.

I don't think the advice given to Mr P not to transfer was adequate. He wasn't in a position to make an informed choice to disregard the advice. The letter he signed was also a pro-forma printed letter. These were all points specifically mentioned by the regulator in the guidance for the review of pension transfers issued in 1994. That's the minimum standard I would expect to see in this case.

Could LJFP limit its advice to the choice of the SIPP?

LJFP was required to know its client. And then it had to give suitable advice. It's true that the FSA issued an alert in January 2013 about a business model where firms were advising on a SIPP without considering the investment to be made. The FSA made it clear that suitable advice could not be given without considering the investment. This was not new guidance. It

was a bulletin explaining the regulator's view about how the rules should be interpreted. I agree with that interpretation. I cannot see how suitable advice can be given without considering the investment to be made. There is after all no real risk in the SIPP itself.

I don't think that LJFP could advise on the SIPP without considering the investment. It knew that Mr P wanted to invest in Harlequin. That was clearly a risky investment. It was for all of Mr P's pension benefits. In my view, this was a high risk strategy for Mr P. He should have been strongly advised against it.

Would Mr P have transferred to the SIPP if he had been properly advised not to transfer?

Mr P told us that his final salary benefits were made to sound worthless. He also said he was told about minimum guaranteed returns from Harlequin. It's difficult to know what he was told, but I think Mr P believed he was going to get better returns. The risks should have been explained to him. And he should have been told about the benefits he was giving up. Whilst I can't be certain, I think it's unlikely that Mr P would have ignored advice from a regulated independent financial adviser not to transfer, had a full comparison been made. I'm satisfied that he would have kept his existing benefits, if he had been suitably advised.

What about the role of the third party introducer?

LJFP says that the complaint should be made to the third party introducer. It was that firm that sold the Harlequin property. I accept that anything said by that firm probably influenced Mr P to invest in Harlequin. But, we cannot consider a complaint against that firm. One of the aims of regulation was to provide consumer protection. LJFP is a regulated firm. It was giving regulated advice. In my view, the SIPP would not have been arranged if LJFP had not agreed to be involved. LJFP has therefore caused the loss.

If LJFP wishes to take action against any other parties that it thinks may have contributed to Mr P's loss it may do so after the compensation has been paid. It may wish to take an assignment of any rights of action that Mr P may have against any third parties.

fair compensation

My aim is to put Mr P in the position he would now be in if he had received suitable advice. I think that he would have:

- a.) kept his existing pension;
- b.) wouldn't have invested in Harlequin; and
- c.) as a result wouldn't have opened the SIPP (and now be subject to ongoing SIPP fees).

In setting out how to calculate fair compensation my objective is to address these three issues. That is what I'm trying to achieve.

There are a number of possibilities and unknown factors in making an award. While I understand Harlequin will allow LJFP to take over the investment from Mr P. The involvement of third parties - the SIPP provider and Harlequin – mean much of this is beyond this service or LJFP'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 they would have been in if suitable advice had been given, I think it's fair that Mr P is compensated now. I don't think I should wait and determine each and every possibility before making an award. What is set out below is a fair way of achieving this.

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

1. Conduct a loss assessment in accordance with the regulatory guidance for the review of pension transfers and pay the difference between the *fair value* and the *actual value* of the investment. The loss assessment should use the latest set of assumptions published on our website.
2. Pay a commercial value to buy Mr P's share in the Harlequin Property.
3. Pay an amount into Mr P'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, the business should:

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

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

1. *Conduct a loss assessment in accordance with the regulatory guidance for the review of pension transfers and pay the difference between the fair value and the actual value of the investment. The loss assessment should use the latest set of assumptions published on our website.*

The value of the SIPP should be confirmed by the SIPP provider. That is after the payment of the commercial value for the Harlequin property.

2. *Pay a commercial value to buy Mr P's Harlequin 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, the business 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 LJFP is unable to buy the investment, the business 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 P 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 P 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 P may want to seek independent advice on how to cancel this ongoing contract for the remaining amount.

3. *Pay an amount into Mr P's SIPP so that the transfer value is increased to equal the value calculated in (1). This payment should take account of any available tax relief and the effect of charges. It should also take account of interest as set out below.*

If it's not possible to pay the compensation into the SIPP, LJFP should pay it as a cash sum to Mr P.

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

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

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

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

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

In return for that, LJFP may ask Mr P 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. LJFP will need to meet any costs in drawing up the undertaking. If LJFP asks Mr P 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, LJFP 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 LJFP fails to pay the SIPP fees, Mr P always has the option of trying to cancel the Harlequin contract to enable the SIPP to be closed at any time.

5. *Pay Mr P £300 for the distress and inconvenience caused.*

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

Provide the details of the calculation to Mr P in a clear, simple format.

my final decision

I uphold the complaint. L J Financial Planning Ltd should pay compensation as set out above.

Under our rules, I'm required to ask Mr P to accept or reject my decision before 20 June 2016.

Roy Milne
ombudsman