

complaint

Mr M complains, via his solicitor, about the advice provided by Allan McRoberts (AM) to transfer his personal pensions into a self-invested personal pension (SIPP) in order to invest in Harlequin overseas property.

background

Mr M was referred to AM via an unregulated third party who made introductions to Harlequin. AM completed a 'fact find' for him in October 2010, which recorded that he was aged 40, married, and working in management. He had £12,000 in savings and £270,000 invested in property (which Mr M has told us was his own home and highly mortgaged).

AM carried out an 'attitude to risk' assessment. As it only shows the answers recorded for Mr M rather than the questions asked, its value in assessing this complaint is limited. From what I can tell, some of the answers appear to be in conflict. They suggest Mr M preferred to 'speculate to accumulate' (the highest risk of three options); yet he also wanted a 'stable, reliable return' (the lowest risk of five options). But other answers suggested he was happy accepting a loss of up to half his fund in the short/medium term, and that he might consider adding to his investment if that happened.

Mr M signed a letter addressed to AM on the same day he signed its client agreement in November 2010. I'm aware the wording of this letter is largely the same as other AM clients signed. It confirmed he understood that the charges under a SIPP would be higher than his current plans but added:

"I have been particularly unhappy with service received to date with no ongoing advice, poor online facilities and over complicated phone service.

I am looking to consolidate my holdings in order to use my pension to purchase a hotel room abroad for pension purposes, you have advised that you will not be in any way involved in the advise [sic] or recommendation of this purchase, purely on the setting up of SIPP facility.

Allan McRoberts has also made me aware of the advantages and disadvantages of the transfer and I am happy to proceed on this basis."

A SIPP illustration was given to Mr M in early February 2011 followed by a suitability report explaining AM's recommendations. This described Mr M as an 'experienced investor' and explained:

"You are currently looking into investing in a hotel room abroad via your pension holdings, your existing arrangements do not allow for this facility, therefore you have asked me to look into options that will enable you to do this, however I am not advising on the actual hotel room purchase."

"At the present time, your prime objective is to review your existing Personal Pension contract...to assess whether it would be appropriate to transfer the benefits."

"We established that your attitude to risk could realistically be described as Capital Growth [4th highest out of 5 categories].

As a Capital Growth investor your portfolio will be invested primarily in equities (shares).

...However, although your ATR is Capital Growth you have advised that with this investment you intend to eventually invest in the purchase of a hotel room, which is a very speculative undertaken [sic]. I have outlined the increased risk of this action and you are happy to proceed on this basis."

Standard risk warnings were given; for instance the fact that units can fall as well as rise in value.

Mr M signed the SIPP application form on the day of the suitability report, with AM recorded as having given him advice on the transaction. AM would take a 3% initial fee from the funds transferred into the SIPP, which were received in late February/early March. These were from two personal pensions. They had both been invested in the insurers' standard managed funds and Mr M was no longer making contributions to either plan.

Mr M wrote a cheque from his SIPP bank account to pay the £1,000 reservation fee on the Harlequin property. He then signed the Harlequin contract in mid-March 2011, which was for him to commit the majority of his £53,000 pension transfer as the deposit on the property (30% of the total investment). Had the scheme operated successfully, Mr M would later have been asked to fund the remaining 70% in stages.

The solicitor's complaint on behalf of Mr M focused on recent FCA alerts following this sale; including one which pointed out that firms advising on a SIPP for the purpose of making esoteric investments should be assessing the suitability of those investments. In response AM emphasized that the unregulated introducer had made very clear that Mr M was committed to investing in Harlequin before their first meeting. It considered that this was the very nature of 'self investment' for which SIPPs were established.

Mr M told us that he first became aware of Harlequin via a 'friend/colleague' who had also invested. This transpired to be the individual who AM believed was a Harlequin agent. Letters Mr M sent us, apparently with the assistance of that individual, denied that he was a Harlequin agent – but said that he had introduced Mr M to an overseas property company which was itself an agent.

Mr M recalled AM had explained he would need to be a 'high adventurous' investor to invest in Harlequin, but that it considered he met those criteria. He didn't recall the categorisation 'speculate to accumulate' being used. He claimed had it not been for this endorsement from a regulated adviser that Harlequin was suitable for him, he wouldn't have invested.

One of our adjudicators concluded that Mr M's complaint should succeed. The circumstances of this sale were very similar to those described in the 2013 FCA alert. This underlined that under the regulator's rules in 2011 AM needed to assess the suitability of the underlying investment Mr M wanted to make, in order to ascertain whether a transfer to a SIPP was suitable for him. The adjudicator didn't think a substantial investment in an overseas property was suitable for the majority of Mr M's pension funds.

AM didn't agree. It said:

- The adjudicator should contact the unregulated introducer and he should share some responsibility for the complaint. There's been direct involvement between him and the SIPP provider.
- The introducer was paid by the overseas property company for introducing the business. The company itself got more than 10% or £6,000 from the Harlequin investment and it's likely Mr M got a share of that fee.

- The company traded from the same offices as other regulated mortgage and advice companies as part of the same group. But they told AM that due to their workload his services would be welcome to set up a SIPP for Mr M.
- Mr M and other family members were still his clients and they trusted him as a result. He had 20 years' experience in financial services including pension advice (albeit not currently as a regulated adviser).
- AM didn't advise Mr M on any unregulated products. He signed a disclaimer confirming this, as recommended by AM's third party compliance support department.
- The SIPP provider had assured AM that it had carried out appropriate due diligence on the Harlequin investment.

We updated the parties that there might be some complications in AM buying the Harlequin contract from Mr M's SIPP, if the complaint was upheld (as the adjudicator had suggested). This reflected the fact the SIPP had only paid the deposit on the property. Under his contract with Harlequin Mr M had agreed for the SIPP to pay the remainder of the purchase price under that contract. In the (perhaps unlikely) event the remaining payments were demanded under the contract, AM would potentially be paying more compensation than the maximum binding award we can make of £150,000.

So if AM didn't buy the Harlequin contract for this or another reason, and the SIPP couldn't be closed as a result, we might direct AM to pay a lump sum equivalent to a number of years' SIPP fees (for example five years' fees). And AM could require Mr M to provide an undertaking to account to it for the net amount of any payment he later received from, or in relation to, the Harlequin investment.

As agreement couldn't be reached, the complaint was passed to me for a decision. We asked Mr M for more information about his connection with the unregulated introducer; including why he was a 'colleague' and whether he'd had an advisory relationship with the introducer in the past. (Mr M was still describing him as his 'financial adviser'.)

Information found by AM about the introducer's online presence suggested that he was still an Associate Partner of the overseas property company (rather than merely an 'introducer'), as well as employed by a number of other unregulated investments, mortgage and lettings firms. Separately, the SIPP provider confirmed to us that it had direct contact from this overseas property company at the time of sale (about where Mr M should pay his Harlequin reservation fee to).

Mr M confirmed that the introducer had first been recommended to him about 13 years ago but only as a mortgage broker, and there was no wider family association. He'd asked the introducer if he could review his pension arrangements and that's why Harlequin was suggested. The introducer firmly told him he wasn't authorised to give pension advice and referred him elsewhere for this. He denied any sharing of commission took place, and wasn't aware if the introducer received any commission. The term colleague was one he routinely used to describe people he dealt with in his own company, and he had simply lapsed into using this word. It didn't mean he had any professional connection to the introducer.

my findings

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

To set the advice Mr M received from AM in context, I've endeavoured to establish in the steps above the nature of the referral it received from the overseas property company. I note that the 'introducer' (as I have referred to him) is still an Associate Partner of that company and in my view was likely acting in a somewhat greater capacity than just an introducer.

But I should emphasize that the overseas property company wasn't regulated to carry out investment business. The other firms that traded from the same address were only regulated for such things as mortgages, non-investment insurance contracts and consumer credit. Its website (which does mention investment advice) currently says that "*Some of the above services are available through our carefully chosen partners*" – in this case AM seems to have been chosen as a partner.

If AM was told that this company was authorised to advise on SIPP's, and AM was simply helping it out with a workload problem, then AM is free to take matters up with that company if it considers it's been misled. But I can't know whether the conversation between that company and AM happened exactly as AM has suggested. And in any event AM should've been aware of the regulatory responsibilities that came with advising on a SIPP. It could and should have been careful in accepting any assurances it was given by that company.

Mr M was taking on Mr M as its own client and it was directly accountable to the regulator for its own actions. AM couldn't ensure it gave him suitable advice without considering the underlying investment within the SIPP, as this was a key risk in making the transaction; which it was required to take into account in Chapter 9 of the COBS rulebook. And it couldn't avoid this by setting out in the disclaimer that it would be restricting its advice. That, in my view, would be a breach of the regulator's rules both to ensure suitability and also to treat Mr M fairly and act in his best interests.

To underline this, it would be strange for AM to suggest it relied on Mr M's SIPP provider doing its 'due diligence'; if in fact it wasn't part of AM's 'brief' to advise on Harlequin. Any due diligence the provider carried out was no substitute for the adviser's own suitability assessment. And if – as I think AM should've established – Harlequin was unlikely to be suitable for Mr M, that would reinforce the doubts it should've had as to why it was being asked by another firm to carry out the transaction. So on balance the involvement of other parties doesn't give me grounds to limit AM's liability to Mr M, if its advice was unsuitable.

I'll now turn to the reasons why I consider the investment in Harlequin was unsuitable for Mr M. I accept he was told about the higher charges in the 'disclaimer' he signed, but this in itself doesn't render an unsuitable recommendation suitable.

After the SIPP charges, reservation fee and adviser's fees were taken into account, Mr M was committing the vast majority of his existing pension provision to what was just the 30% deposit on the property. He would be expected to fund the remaining 70% in due course – from what I assume would be borrowing either inside or outside his SIPP. This would potentially put even more of Mr M's future pension provision – and certainly his future wealth – at even greater risk. I think this can only be said to have been a speculative investment.

Mr M's existing pensions were invested in standard managed funds. As other, safer funds might have been available I agree this may indicate that he had willingness to accept *some* risk. The attitude to risk answers gathered by AM – inconsistent though they are – suggest the same thing. But I'm not persuaded Mr M wanted to take as much risk as was involved in Harlequin, or in fact understood that there was a real possibility of total loss.

The regulator's requirements were for AM to justify in the suitability report *why* the transaction was suitable. AM's report doesn't justify why Mr M had the capacity to accept what even the adviser agreed was a more speculative approach than his attitude to risk would indicate. There's no evidence other than the disclaimer Mr M signed that he was concerned about his existing providers' service, but I fail to see how making a speculative investment and potentially losing everything would address those concerns.

In addition to this increased investment risk, the SIPP would cost £295 to set up, £490 to run each year and £500 to invest in Harlequin. The overall reduction in investment growth due to charges averaged out at 2.8% per year on the illustration. In my view this put further pressure on the Harlequin investment to outperform Mr M's existing plans which were unlikely to have charged this much. It made the whole transfer a high risk proposition.

Mr M says that he only transferred on the strength of the recommendation of AM – a regulated firm. I can't know genuinely how much weight Mr M placed at the time on the fact that AM was regulated, but I do think it's relevant that Mr M says the introducer told him he couldn't advise on the SIPP. And in my view AM should firmly have told him transferring to a SIPP wasn't suitable. So I have to consider what difference that would've made.

Mr M had specifically been referred to AM for specialist pensions advice and he knew this. So I don't think he could've dismissed its recommendation likely. And that recommendation should have included a clear explanation that he could lose his entire pension fund by making this speculative investment. Whereas I've highlighted above that Mr M was given standard risk warnings to the effect that units could go up as well as down.

So, despite any encouragement from the introducer or the overseas property company to invest in Harlequin, Mr M should have (but didn't) get clear indications to the contrary from AM. In order to decide whether this would've altered his decision to invest it's reasonable for me to consider the strength of his relationship with the introducer – including the possibility that (as claimed by AM) there was a financial benefit to him in investing.

We've asked Mr M at length about his description of the introducer as both a friend and colleague. Mr M has now explained this fully, and on balance I don't think there's sufficient evidence for me to conclude that he'd have been prepared to totally disregard AM's considered advice based purely on the strength of that relationship.

I can't know how any commission paid was distributed within the overseas property company, although it would stand to reason that an Associate Partner would probably have been rewarded in some way for bringing business from Mr M. However on the strength of the evidence available, I can't be sure that Mr M personally benefited from any commission paid. There was no obligation for him to receive a share.

In order to have gone ahead with the transaction if AM had advised him to the contrary, Mr M would either have needed to ask to be treated as an insistent client (without this being solicited by AM); or found a different firm to advise him. The overseas property firm was already unwilling to give advice. So I think it's more likely that Mr M wouldn't have proceeded with a course of action he'd been told wouldn't be in his best interests – particularly as he'd potentially lose regulatory protection by disregarding the advice.

So having weighed up Mr M's wider situation at the time, I think AM's failure to give proper advice did result in him making the SIPP transfer and investing in Harlequin. I don't think Mr M would've done either of these things had AM given him suitable advice.

fair compensation

My aim is to put Mr M 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 pensions; 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 issues.

There are a number of possibilities and unknown factors in making an award. It appears that Harlequin will allow AM to take over the investment from Mr M. But the involvement of other parties such as the SIPP provider may complicate this. The facts also suggest it's unlikely that the property will be completed such that the contract and any future payments would be enforceable. So I think it's fair that Mr M is compensated now without waiting for each and every possibility to be determined.

AM should calculate fair compensation as follows:

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

On the date of this decision, AM should ask Mr M's former pension providers to calculate the notional transfer value that would have applied had he not transferred his pensions 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.

AM 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 M's SIPP, including any outstanding charges (meaning that this could be a negative figure).*
3. *Pay a commercial value into the SIPP to buy Mr M's Harlequin investment.*

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 M 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, AM 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 AM is unable to buy Mr M's investment in Harlequin, 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 M has agreed for the SIPP to pay the remainder of the purchase price under that contract. Those sums have not yet been paid, so no further loss has been suffered. However, if the property is completed, Harlequin could require those payments to be made. I think it's unlikely that the property will be completed, so I think it's unlikely there will be further loss. But there might be.

Mr M needs to understand this, and that he won't be able to bring a further complaint to us if this contract is called upon. Equally, if the business takes over the contract from the SIPP trustees then it may be liable for the remaining amount of the purchase price. As a result any total award that the business may have to pay could exceed £150,000. In that event I can't require AM to take over the contract from Mr M's SIPP as part of a binding award I make. But I can address the ongoing SIPP fees that may continue if the SIPP can't be closed. I've dealt with this in step 5 below.

4. *Pay an amount into Mr M's SIPP so that the transfer value in (2) 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 may not be possible to pay the compensation into the SIPP as a single amount (perhaps due to Mr M's income and consequent tax relief allowances). If so, AM should pay any amount it can't pay into the SIPP as a cash sum to Mr M. But it may notionally reduce the cash amount to allow for the tax relief that will apply if Mr M later reinvests this into a pension plan when he is able to do so. The notional allowance should be calculated using Mr M's marginal rate of income tax.

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

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

I think AM should be able to take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mr M 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. AM is also not bound by my decision to pay any more than £150,000. So although it may wish to do so I can't require it to take over the investment if this means future payments will be demanded under the contract.

To provide certainty to all parties, I think it's fair that AM pays Mr M 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 M with some confidence that he will not be subject to further fees.

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

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

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

my final decision

Where I uphold a complaint, I can make a money award that a firm pays compensation of up to £150,000; plus any interest and/or costs. If I consider that fair compensation is more than £150,000, I may recommend the firm pays the balance.

I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Allan McRoberts should pay Mr M the amount produced by that calculation. That is up to a maximum of £150,000.

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. Income tax may be due on this interest.

If fair compensation exceeds £150,000, I recommend that Allan McRoberts pays Mr M the balance. And that it pays simple interest at 8% a year on the balance from the date of this decision until the date of payment.

This recommendation is not part of my award. It does not bind Allan McRoberts. It is unlikely that Mr M can accept my decision and go to court to ask for the balance. Mr M may want to get independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 6 October 2016.

Gideon Moore
ombudsman