

complaint

Mrs L complains that Douglas Baillie Limited should not have facilitated the transfer of her pension plans into a SIPP. The money was then invested in an unregulated investment.

background

Mrs L was referred to The Pension Specialist (an appointed representative of Douglas Baillie) by a third party. Douglas Baillie had an agreement with the third party who would introduce clients. That third party was not regulated.

Douglas Baillie was to provide advice on whether or not Mrs L should transfer her existing pension plans into a SIPP. That would allow her to make investments that would not be available via a fully insured plan.

A pension comparison information report was provided to Mrs L. That said that based on the limited information available it wasn't possible to take into account how important the existing pension plans were. The report dealt with each of Mrs L's four pensions separately. Mrs L was advised not to transfer two of her pensions. The next paragraph of the report explains that the transfers could be processed on an insistent client basis. That is the transfers would be against the advice to do so.

Mrs L was advised that transferring two of her pensions to lower charging plans could be better for her. But, the charges for external funds could be higher.

The report went on to explain that the costs for self-investing could be higher. A comparison of charges was given. And it explained that combining plans could reduce charges.

A copy of the letter was enclosed for Mrs L to sign and return if she agreed to proceed on that basis. Mrs L agreed to this and went ahead with the transfer.

The report made it clear that Douglas Baillie would not provide advice on the investments. After the transfers took place Mrs L would then be treated as an orphan client. That simply meant Douglas Baillie would be removed as the adviser.

Mrs L signed a pre-typed letter saying that she wanted to proceed against the advice. She would therefore be treated as an insistent client.

A second report was produced on 3 September 2012. This only dealt with three of Mrs L's pensions. The fourth plan was her then current employer's scheme that her employer paid into. That plan was not transferred.

The report started by explaining that Mrs L wanted to invest using a SIPP. The report explained that there were soft benefits of transferring. These were listed as consolidation; online access; wide investment fund range and retirement options.

After the transfers she then invested the bulk of her SIPP monies in Harlequin and StoreFirst.

The report said that Mrs L was aware of the advice in relation to the projections. It then went on to explain the advantages and disadvantages of transferring. The reasons why the transfer was suitable were given for each of the pension plans.

Mrs L complained to the firm. Douglas Baillie didn't uphold the complaint. It was then referred to this Service. The case was investigated by one of our adjudicators who felt that it should be upheld. In summary he said that:

- He did not see how Douglas Baillie could provide suitable advice on pension transfers based on information provided by a third party.
- Douglas Baillie had not met its obligations under the Principles of business. In particular he referred to Principle 2 and Principle 6.
- Douglas Baillie had provided Mrs L with a pre-typed letter confirming she wished to proceed as an insistent client, along with a prepaid envelope to return the letter. This was part of the suitability report which advised against the transfers. The adjudicator did not feel that the information provided was balanced. Because of this he felt that Mrs L could not have made an informed decision.
- Mrs L was a retail client and the adjudicator had no reason to believe she was a financial expert. Because of this she could not have been expected to understand the full level of risk she was exposing herself to.
- Mrs L had not been treated properly as an insistent client. After advising against the transfers the onus should have been on Mrs L to approach the firm (in her own words) asking for the transfers to go ahead. Instead Douglas Baillie had provided Mrs L with a pre-printed form and accompanying letter. The adjudicator felt that this had been part of the regulatory guidelines since well before the advice was provided.

The case was then reviewed by a second adjudicator who arrived at similar conclusions to the first adjudicator. Douglas Baillie did not agree with either of the adjudicators' findings and has noted:

- Douglas Baillie hadn't pre-determined that a SIPP was to be used.
- It disagreed both that it had not followed the principles of business and with the adjudicator's interpretation of how they should be followed.
- Douglas Baillie was entitled to rely on the information about Mrs L provided to it. It had also given Mrs L the opportunity to provide further information however she had not taken it.
- The advice given to Mrs L was not to transfer. She had signed a waiver to confirm that she wanted to proceed on an insistent client basis. This meant that Douglas Baillie should not be held responsible for her losses.
- Mrs L was introduced to the investments and itself by an unregulated third party.
- Mrs L would have transferred regardless of any action by Douglas Baillie. Its actions had not caused the loss.
- The redress proposed was not fair or reasonable. It did not take into account the actions or responsibilities of the third party.
- The approach taken by the adjudicator was inconsistent with the approach it was told would be taken by the Service's outreach department. It felt that the Service was not applying a consistent approach.
- Douglas Baillie was not subject to the previous regulatory regime to which the adjudicator had referred when talking about the insistent client guidance.

As agreement could not be reached the case has been referred to me for a final 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. I have come to the same conclusions as our adjudicator and for the same reasons.

The firm had a duty to ensure that any advice it gave Mrs L was suitable for her. I acknowledge that Douglas Baillie has said it advised against the transfers and that Mrs L was an insistent client. However I don't consider this to have been the case.

It is for me to decide what I think is fair and reasonable in all the circumstances. Mrs L was a retail client I think it is fair to me to conclude she wanted to be guided in her investment choice by others. Douglas Baillie wants to limit its responsibility to only part of the transaction.

was it fair that Douglas Baillie limited the advice to the transfers and setting up of the SIPP only?

I have concluded that it wasn't reasonable to do this. Let me explain why. Douglas Baillie was under a duty to act honestly, fairly and professionally in the best interests of its client. And to take reasonable steps to ensure that the advice it gave was suitable. I don't think that in exercising that duty it could reasonably disregard what investments were going to be put in the SIPP; and whether those investments met its client's investment objectives, financial situation, knowledge and experience.

The adviser had a duty to give suitable advice. I don't think the adviser could avoid that responsibility. I think that is particularly so when the third party was not regulated to give advice.

A key part of the decision to transfer is the growth that could be obtained in the SIPP. I cannot see how suitable advice can be given without considering the investments to be made.

Douglas Baillie entered into an agreement with the unregulated introducer. Clients were referred to Douglas Baillie from the other firm. It isn't clear from the evidence whether Douglas Baillie knew that Mrs L would invest in Harlequin and StoreFirst. I think it should have been aware that was the intention. Clearly, the unregulated firm was going to sell something to put in the SIPP. That should have caused some concern at Douglas Baillie. And it has since said that it thinks the other firm gave advice.

The SIPP was set up so that Mrs L could make investments that weren't available in a standard pension. That should have caused Douglas Baillie to consider whether the advice was suitable. And it needed to know what the investments were to recommend a SIPP that would accept the investments.

was Mrs L an insistent client or was it reasonable to treat her as one?

When Douglas Baillie made the personal recommendation it also sent a second copy of its letter and prepaid envelope for Mrs L to use if she disagreed with it. I would have thought that having sought advice, the most common behaviour is that a client then follows it. It seems to me to be unusual for the firm to have worked on the premise that the advice would be disregarded. And provide for that in their recommendation letter, immediately after the advice not to transfer was given. And then to give Mrs L such an easy way of putting its, albeit limited, advice to one side. The way that this was done meant that she didn't have to use her own words to explain why she wanted to go ahead in any event. That was in my view poor practice.

The advice concluded

If you would like to accept one or more of the transfer values on offer and move your benefits into a new personal pension plan, then please sign and return the enclosed copy of this letter in the prepaid envelope provided.

In my view, the tone of both reports is confusing. Advice not to transfer the pension benefits was immediately followed by an explanation of how to ignore that advice. There is no explanation from either Mrs L or Douglas Baillie about why Mrs L wanted to transfer her pensions.

If Douglas Baillie had acted honestly, fairly and professionally in the best interests of its client it is my view that the advice should have included the suitability of the investments. If that had been done Mrs L would have been better placed to decide if she wanted to go ahead. As it was - based on limited advice and a pro-forma insistent client document - she invested the bulk of her pension in Harlequin and StoreFirst. I do not think this would have happened if either she had been given suitable advice, or better practice had been adopted if she wanted to disregard their advice.

I think that the pension transfers, and therefore the underlying investments, would not have been made without the involvement of Douglas Baillie. And that had it genuinely advised against the transfers and not given Mrs L a way to proceed, it is unlikely that Mrs L would have proceeded.

what role did other firms have in arranging the investments?

I accept that another business was involved in introducing Mrs L to the underlying investments. However Mrs L has made a complaint against Douglas Baillie and I think that it is the actions of Douglas Baillie that has caused Mrs L to suffer a loss.

I have not asked for information from that third party as I feel I am able to decide the complaint made against Douglas Baillie on the evidence I have available.

There is some doubt as to whether this Service would be able to deal with a complaint brought by Mrs L about the other firm that introduced her to the underlying investments. But, the investments could not have taken place without the SIPP being started. That could only happen if Douglas Baillie was involved.

It's possible that the other firm involved could have some liability for the loss that Mrs L has suffered. If Douglas Baillie wishes to take an assignment of any rights of action against any third party involved in the sale of the investment, it may do so, after my award has been paid. That should only relate to any losses that Douglas Baillie pays compensation to Mrs L.

Mrs L's complaint referred to an alert given by the previous regulator. The alert was issued to draw attention to a particular business model. I have not relied on the alert in reaching my decision. But, I think it does represent the regulator's view about the correct interpretation of the rules.

Douglas Baillie also referred to a conversation with a department at this Service about our approach to these cases. I don't have details of the conversation. Our usual approach is to deal with each case on its own merits. My decision is based on the facts of this particular case and how the rules should have been correctly applied.

fair compensation

My aim is to put Mrs L in the position she would now be in if she had received suitable advice. I think that she would have:

- a.) kept one of her existing pensions with Standard Life;
- b.) would have transferred two of her existing pensions with Aviva and Phoenix to a cheaper alternative;
- c.) wouldn't have invested in Harlequin or Store First; and d.) 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 and StoreFirst should allow the business to take over the investment from the consumer. The involvement of third parties - the SIPP provider, Harlequin and StoreFirst – 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 Harlequin 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 Mrs L 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.

Douglas Baillie should calculate fair compensation by comparing the value of Mrs L's pension, if she had not transferred, with the current value of her SIPP. In summary:

1. Obtain the notional transfer value of Mrs L's pension plan with Standard Life on the date of decision if it had not been transferred to the SIPP. And calculate the value of the Aviva and Phoenix pension plans if they had been transferred to a cheaper pension. I think that the funds would have been invested to achieve a return. Mrs L was prepared to accept some risk, so I think an index with some exposure to risk should be used.
2. Obtain the actual transfer value of Mrs L's SIPP on the date of decision, including any outstanding charges.
3. Pay a commercial value to buy Mrs L's share in the Harlequin Property and StoreFirst investments.
4. Pay an amount into Mrs L'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, Douglas Baillie should:

5. Pay five years' worth of future fees owed by Mrs L to the SIPP.
6. Pay Mrs L £250 for the distress and inconvenience caused.

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

1. Obtain the notional transfer value of Mrs L's pension plan with Standard Life on the date of decision if it had not been transferred to the SIPP. For the plans with Aviva and Phoenix, Douglas Baillie should calculate the returns in line with the FTSE WMA Stock Market Income Total Return Index.

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.

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

2. Obtain the actual transfer value of Mrs L's SIPP on the date of decision, including any outstanding charges.

This should be confirmed by the SIPP provider. The difference between 1 and 2 is the loss to the pension.

3. Pay a commercial value to buy Mrs L's share in the Harlequin Property and StoreFirst investments.

The SIPP only exists because of the investments in Harlequin and StoreFirst. In order for the SIPP to be closed and further SIPP fees to be prevented, the Harlequin and StoreFirst investments need to be removed from the SIPP. I understand this can be done.

The valuation of the Harlequin and StoreFirst investments may prove difficult, as there is no market for them. To calculate the compensation, Douglas Baillie 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 investments.

If Douglas Baillie is unable to buy the investments, it should give them 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. As I understand it, Mrs L 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. Mrs L needs to understand this, and that she won't be able to bring a further complaint to us if this contract is called upon. Mrs L may want to seek independent advice on how to cancel this ongoing contract for the remaining amount.

4. Pay an amount into Mrs L'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, Douglas Baillie should pay it as a cash sum to Mrs L.

But had it been possible to pay the compensation 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 Mrs L's marginal rate of tax in retirement. For example, if Mrs L 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. However, if Mrs L would have been able to take a tax free lump sum, the notional allowance should be applied to 75% of the total amount.

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

5. Pay five years' worth of future fees owed by Mrs L to the SIPP.

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

I think Douglas Baillie should be able to take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mrs L back in the position she 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 Douglas Baillie pay Mrs L 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 Mrs L with some confidence that she will not be subject to further fees.

In return for that, Douglas Baillie may ask Mrs L to provide an undertaking to account to it for the net amount of any payment she may receive from the Harlequin and StoreFirst investments in that five year period. That undertaking should allow for the effect of any tax and charges on the amount she may receive from the investments. Douglas Baillie will need to meet any costs in drawing up the undertaking. If Douglas Baillie asks Mrs L 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, Douglas Baillie wants to keep the SIPP open; and to maintain an undertaking for any future payments under the Harlequin and StoreFirst investments. It must agree to pay any further future SIPP fees. If Douglas Baillie fails to pay the SIPP fees, Mrs L always has the option of trying to cancel the Harlequin or StoreFirst agreements to enable the SIPP to be closed at any time.

6. Pay Mrs L £250 for the distress and inconvenience caused.

Mrs L has been caused some distress by the loss of her pension benefits. I think that a payment of £250 is appropriate to compensate for that distress.

my final decision

I uphold this complaint. Douglas Baillie Limited should now:

- Calculate the loss suffered by Mrs L and pay compensation as set out above.
- Pay Mrs L £250 for the distress and inconvenience caused.

Under our rules, I'm required to ask Mrs L to accept or reject my decision before 27 June 2016.

Roy Milne
ombudsman