

complaint

Mr B complained about advice given by Broadlands Partnership to transfer his pension benefits to a new SIPP. He says that the advice did not consider the suitability of the investment that he intended to make.

background

I issued my provisional decision for this complaint in April 2019. I set out the background to the complaint in that document. In summary, I set out the background as follows:

Mr B had a pension set up in 1999 as a Small Self-Administered Scheme (SSAS). This was on the advice of Mr M who worked for a different firm of advisers. The intention was for Mr B to use the funds to buy a commercial property and use it for his business.

In 2004 Mr B was unhappy with changes to the SSAS provider. This was discussed with Mr M, who by then was no longer authorised to advise on pensions. It was at that point Mr M introduced Mr B to Mr P who worked for another firm of advisers. The pension was then transferred to a new Self-Invested Personal Pension (SIPP) with Standard Life. During this time rental income from the property was building up in the pension bank account to a total of about £70,000.

In mid to late 2010 Mr M suggested that Mr B should look to invest the money in his pension bank account. By this time Mr M was running a company I will refer to as A. Mr M invited Mr B to a Harlequin properties presentation in his offices. Mr B was also later shown the Sustainable Agroenergy (SGG) and Global Forestry investments.

Mr B told us that Mr M explained that he was acting as an agent for Harlequin properties and Mr M had bought a Harlequin property himself. Mr P had just set up a new SIPP for Mr B. By this time Mr P was with Broadlands Partnership.

A copy of a suitability letter dated 29 April 2011 was addressed to Mr B, but he says he didn't receive it. The letter explained that Mr B was married, and earning £33,000. He had a SIPP with a commercial property. This had been used as an office for Mr B's business. The rental income was paid back into the SIPP in cash.

The advice from Broadlands was to transfer to a SIPP with Alltrust. Mr B acted on that advice and transferred to a new SIPP. A 'Supplemental Deed' was completed on 9 May 2011. This was witnessed and signed by Mr M.

There was a delay before the transfer was completed. The property in the SIPP was transferred in-specie. And about £60,000 was transferred in cash.

In December 2011, the SIPP was used to invest about £35,875 in Belem Sky Plantation (Belem), and £31,445 in SGG.

Mr B paid a reservation fee of £1,000 for a Harlequin property. This left approximately £8,000 in cash in the SIPP. Mr B then took out a loan of £80,000 on the property within his SIPP. Mr B has said that this was arranged by Mr M; a bank loan account statement in Mr B's name, dated 13 December 2012, is addressed to Mr M at Company A. Subsequently a total of £88,000 was invested by Mr B in a Harlequin property.

All of the investments Mr B made have, to one extent or another, failed. The Serious Fraud Office (SFO) has investigated SGG, with those responsible for the scheme ultimately given custodial sentences. The SFO has also opened investigations into those behind Belem, and those behind Harlequin.

Mr B complained to Broadlands Partnership. He is being represented. The complaint was made on the basis that Broadlands Partnership was advising Mr B about the transfer to the new SIPP. They should therefore have advised him about the investments to be made. The complaint letter referred to an alert issued in January 2013 by the regulator at that time, the Financial Services Authority. The complaint was that Mr B had suffered losses as a result of the costs of establishing the SIPP and investing in Harlequin.

Broadlands Partnership investigated the complaint and issued a final response. They said that Mr B had been unhappy with the service provided by his existing SIPP provider. The suitability report explained why the new SIPP would provide a better service. The only reference to overseas property was a note in the suitability report which said: "*may wish in future to purchase overseas property*". The excess funds were to be placed in the cash account. The adviser said he would then be pleased to recommend a portfolio commensurate with Mr B's attitude to risk.

Broadlands also explained that Mr B had a telephone review in 2012. They said he was happy with everything and exploring commercial borrowing in his SIPP. Mr B didn't respond to an offer of a further review in 2015.

In summary, Broadlands Partnership's position is that they gave suitable advice to transfer Mr B's SIPP as he was unhappy with the existing SIPP provider. They did not give any advice to invest in Harlequin or any other investments.

Mr B has provided additional evidence. He says that:

- Mr M and Mr P were working together and have other business ventures.
- It is inconceivable that Mr P didn't know that Mr M was selling Harlequin properties and that Mr B intended to use his pension fund to buy a property.
- Mr M was working with Broadlands Partnership. He has a close connection with Mr P as they owned flats in another country near each other and ran a business together.
- The sole purpose of the transfer was to invest in Harlequin and the other two investments.
- Mr M was solely responsible for arranging the loan on Mr B's property.
- The first time he had seen the suitability report was in response to the complaint. He felt that it had been put together retrospectively in response to the complaint. He has never said that he has an attitude as a moderately adventurous investor. This is their terminology and not his.
- Neither Mr M nor Mr P ever told him of the risks of investing in unregulated investments.

One of our adjudicators investigated the complaint. He set out the background I have summarised above. His conclusion was that the complaint should be upheld. In summary, he gave his reasons as:

- It was highly unlikely that Broadlands was not aware of the intended investments.

- There was a close working relationship between Mr M and Broadlands. Mr M was acting as an agent for Harlequin. And Broadlands should have known that was the case from this and another complaint.
- Mr B told him that he asked Mr P if he would be investing in Harlequin. The reply was that it wasn't Mr P's sort of thing. The adjudicator thought this was a reliable statement from Mr B.
- The 'objectives' part of the suitability report states that 'it may be, in the future, that he wishes to purchase overseas property or specialised shares'. That described what took place and indicated that Mr P knew where Mr B intended to invest his pension money.
- Broadlands was giving advice to Mr B. So, in accordance with the rules at that time the advice had to be suitable. This had to include the investments to be made.
- He didn't feel that the description of Mr B's attitude to investment risk as moderately adventurous was fair. Given Mr B's investment history he thought Mr B was most likely to be a "balanced" risk investor.
- The investments Mr B made in the SIPP were unregulated and high risk. These were unsuitable for Mr B.
- If Broadlands had acted in his best interest they would have advised him against making the investments. And if they had given him that advice he wouldn't have made the investments.
- Although Broadlands said that it was unaware of the investments, the review in 2012 mentioned commercial borrowing. But just days before, Mr B had paid the £1,000 deposit for the Harlequin investment.

Broadlands didn't agree with the adjudicator. They told us:

- They were concerned about the way the investigation had been made and whether they had seen all of the evidence.
- They were not aware of the investments Mr B intended to make. But the SIPP administrator had sent information to Mr B to make clear all the risks of the investments to be made. They maintain they acted fairly towards Mr B.
- They did not see how the relationship between Mr P and Mr M could influence the conclusion about whether Broadlands had acted fairly towards Mr B.
- The conclusion that Mr B would not have made the investments had Broadlands acted in his best interests does not take account of the causation argument. That is whether any shortcomings by Broadlands caused the loss Mr B is complaining about.
- The adjudicator had not placed any weight on the reasons for the move to a different SIPP provider because Standard Life had not been providing the service Mr B required.
- The reference to overseas property or specialised shares in the suitability report was conceptual or generic at the time of the advice.
- The adjudicator had not provided any evidence that Mr B intended to make the unregulated investments at the time of the suitability report.
- Mr P was prepared to provide a statement about the events. He was not aware of the investments at the time of the advice, nor had any knowledge of the investments when they were subsequently made within the SIPP.
- Mr P offered to provide a portfolio suitable for Mr B in the suitability report, but he did not ask Mr P for that service.
- The presentations by Mr M for the investments were undertaken solely between Company A and Mr B.

- The regulatory guidance referred to by the adjudicator deals with attempts by advisers to separate advice from the underlying asset, when the adviser is aware of the investment. In this case, there was a gap of about 18 months between the suitability letter and the investments.
- The adjudicator made a finding that Broadlands should be liable for consequential losses as a result of Mr B taking out a loan on his commercial property to make the investment. That is inconsistent with other findings this service has made on other products.

The complaint was referred to me. I asked for additional evidence from Broadlands and Mr B to establish what, if anything, Broadlands knew about the investments to be made. Mr P provided a statement about his role in the investments. Broadlands also provided a copy of the file note of the review Mr P made of the SIPP in June 2012.

Mr B provided evidence to show a close working relationship between Mr P and Mr M.

I issued my provisional decision. I explained that I thought the complaint should be upheld. I said:

Was a new SIPP suitable?

Broadlands sent a recommendation report to Mr B on 29 April 2011. This set out Mr B's objectives. He had been unhappy with the service from his existing provider. He wanted a more personal service with reasonable charges and a wide variety of investment options. There was a possibility he would want to buy overseas property or specialist shares in the future.

Mr B says that he didn't receive this report. The letter accompanying the report was correctly addressed and I see no reason why it should not have been delivered. However, Broadlands did ask Mr B to sign and return a copy of the report. I haven't seen a copy of the signed report. Mr B says that the sole reason for the transfer was to make an investment in Harlequin.

I have seen details of the charges for the Alltrust SIPP. I haven't seen details of charges for any other providers. I think it's likely that Alltrust was recommended because of some issues with Standard Life, but also with a view to making non-standard investments.

Is Broadlands responsible for the investments in Sustainable Agroenergy and Belem Sky Plantations?

The recommendation report explained that the majority of the fund was invested in commercial property. This was to be placed in a cash account until the transfer was completed and then a portfolio commensurate with Mr B's attitude to risk would be recommended.

In my view, leaving the recommendation about investments until later was not appropriate. Broadlands was giving advice to Mr B. That advice had to be suitable. And investment advice should have been considered as part of the advice to recommend the SIPP.

Given that part of the recommendation report explained that Mr B might want to invest in overseas property or specialised shares, I think it's likely that the adviser knew investments were to be made at the time. In any event, even if the funds had been held in a cash account, the adviser at Broadlands should have recommended suitable investments very shortly after the transfer.

Broadlands did not give Mr B suitable advice. The investments in SGG and Belem were made as a result of things said by Mr M. I'm satisfied that these investments would not have been made if Broadlands had given Mr B suitable advice.

Is Broadlands responsible for the loan and investment in Harlequin?

The only reference made in the recommendation report to overseas property is that Mr B might want to invest in overseas property at some point in future. After the investments in SGG and Belem were made, there were no funds available for Mr B to use to invest in Harlequin. I now have to decide whether Broadlands knew that a loan was to be obtained on the commercial property so that Mr B could invest in Harlequin.

Mr P explained that he did not know about any of the investments. I think this is unlikely. I said earlier that I think the investments in SGG and Belem would not have been made if Mr P had given suitable advice to Mr B. But, it is still possible that the investment in Harlequin could have gone ahead.

Broadlands has provided a copy of the note showing that a review took place. This appears to have been in June 2012. At that point, notes were made about the property with Harlequin and that Mr B was also exploring commercial property. I think this review was made in line with Broadlands' agreement with Mr B to provide ongoing advice.

In my view, the advice given in June 2012 should have strongly advised against Mr B borrowing to invest in Harlequin. I see no reason to think that Mr B would have ignored suitable advice. If suitable advice had been given he would not have borrowed against his commercial property or invested in Harlequin. If that advice had been given at the time, I think it would have prevented Mr B from investing in Harlequin.

Broadlands' representative replied and asked for a personal hearing. I explained that I did not think a hearing was required, but if they wished to make oral representations that they could speak with our adjudicator and a recording of the call would be available for me to listen to. A signed affidavit has also been provided by Mr M.

I have listened to a recording of the call. In summary, the points made were:

- There had been a misapplication of the Principles and Rules set out in the regulator's handbook. In particular, COBS 2.1.1 and COBS 9.2.1.
- They disputed the chronology of events set out in the provisional decision and by the adjudicator. Mr B, Mr M and Mr P were not all friends. This misunderstanding appears to have led to the belief that Mr P had a greater understanding of the investments to be made than he actually had.
- The reference to overseas property and specialist shares was to a property in country abroad and shares in Mr B's employer's business.
- Mr B bought four properties. One of these was owned by Mr M.
- The investments actually made were not considered or mentioned as part of the advice.

- Obligations on an adviser are set out in COBS. There is no provision for costs. There must be an understanding of the service being provided and the cost of that service.
- Mr B wasn't aware that he had complained to Broadlands.
- Early in 2012 Mr M discussed Harlequin with Mr B. Mr M arranged the mortgage and Broadlands had no knowledge of this. Mr M was receiving the statements.
- Mr M had seen Harlequin being built. All discussions about the investments that were made in 2011 and the Harlequin property bought in 2012 were between Mr M and Mr B. Broadlands did not know about the investments to be made.
- Company A referred clients to Broadlands. It was a one way direction as Broadlands did not refer clients to Company A.
- There was no request for advice about the investments to be made. This was not in the contemplation of the parties. The products were only entered into at a distance from the advice on the SIPP.
- It is unfair and incorrect to present redress as it is, particularly the interest rate to be used. Broadlands didn't know about the investments or the loan.
- The complaint should correctly be made to Company A or Alltrust.

my findings

I've re-considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I have come to the same decision that I reached in my provisional decision. I shall explain why.

Jurisdiction

The complaint originally made to Broadlands by Mr B's representative was that unsuitable advice had been given to Mr B without considering the investments to be made, specifically Harlequin. However, in his letter to the representative dated 19 October 2016, Mr B explained that the SIPP was set up to invest in Harlequin and the two other investments. The representative wrote to our adjudicator explaining that the complaint should have included the SGG and Belem investments.

Our investigation has been about all three investments made in the SIPP. Broadlands were made aware of that and have been given the opportunity to respond to the complaint. I am satisfied that the complaint is about the advice to set up the SIPP and the suitability of all three investments.

Hearing

Broadlands and their representatives have been able to make their points in writing and in a telephone call with the adjudicator. I accept the witness statement from Mr M as being a true version of events. I remain of the view that I can fairly decide the complaint without a formal hearing.

The relevant rules

Broadlands' representatives say that the relevant rules are PRIN 2.1.1R; COBS 9.2.1R and COBS 10.2.1. PRIN 2.1.1 R sets out the principles firms must apply when conducting business. They say the relevant two principles are:

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

I agree that these principles are relevant. The relevant rule in the Conduct of Business Sourcebook is COBS 2.1.1R. This is the client's best interests rule: "*A firm must act honestly, fairly and professionally in accordance with the best interests of its client.*"

The rule that is most important in this case is COBS 9.2 about assessing suitability. Included in COBS 9.2.1R is:

- (1) A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client;
- (2) When making the personal recommendation or managing his investments, the firm must obtain the necessary information regarding the client's:
 - (a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;
 - (b) financial situation; and(c) investment objectives;

so as to enable the *firm* to make the recommendation, or take the decision, which is suitable for the *client*

COBS 9.2.2R includes the following:

- (1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:
 - (a) meets his investment objectives;
 - (b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and
 - (c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.

COBS 10.1.1 is relevant where certain types of investment are arranged. As Broadlands was giving advice to Mr B this is not relevant to this complaint.

Broadlands did give advice to Mr B to set up the SIPP with Alltrust. That advice was set out in their recommendation report. In my view, the key point is whether that advice was suitable for Mr B. Broadlands then reviewed the SIPP in June 2012. I have considered whether Broadlands gave advice and whether that advice was suitable.

Role of Mr M and Alltrust

The witness statement from Mr M confirms that he sold the investments in Harlequin, SGG and Belem to Mr B. This was not in dispute. Mr M also confirmed that Mr B had been his client when he was a regulated adviser. Although Mr B and Mr P were known to each other, Mr M introduced them.

I accept what Mr M has to say in his witness statement. I think it is clear that he sold the investments to Mr B. He and Company A could have some liability to Mr B for the losses suffered. And Alltrust was required to comply with rules and regulations about accepting investments in the SIPP. It's possible that other parties could have some liability.

I am dealing with a complaint against Broadlands. If Broadlands wishes to take an assignment of any rights of action Mr B may have against third parties, it may do so. I will deal with this more fully in the section about fair compensation.

Advice

Broadlands set out their advice in a recommendation report dated 29 April 2011. This was to transfer to a SIPP with Alltrust. Mr B's commercial property was to be transferred to the new SIPP and Broadlands would provide advice for the remaining cash at a later date. As Broadlands was providing advice about a regulated investment that advice had to be suitable. In my view, that included the cash held within the SIPP. Broadlands should have given advice about where those funds were to be invested.

Mr B was assessed as having a moderately adventurous attitude to investment risk. However, Broadlands also had to consider whether Mr B was able to bear any financial risks. Based on the information available to Broadlands, Mr B did not have the capacity for the loss he could suffer.

The advice was given on the basis that Mr B was unhappy with the service from his existing pension provider. It was mentioned that Mr B may wish to purchase overseas property or specialised shares in future. The advice was restricted to the objectives set out. However, the regulator's alert in January 2013 explained that the rules required the advice to be suitable. I agree with that interpretation of the rules. Broadlands had to consider the assets within the SIPP and how they were to be invested.

The recommendation report said that the excess funds should be placed in a cash account and then the adviser would be pleased to establish a portfolio commensurate with Mr B's attitude to risk. In my view, this was not suitable as some thought should have been given to the investments when the transfer was made. The adviser should have provided a suitable recommendation for the excess funds.

Broadlands' representatives says that the cost of advice should be taken into account when assessing what they had agreed to do. I do not agree. Broadlands was required to comply with the relevant rules. That meant suitable advice had to be given. But it appears from the recommendation report that a portfolio would be recommended after the transfer was made. In my view, that should have been considered as part of the advice.

The investments in SGG and Belem were not made until December 2011. That was without any involvement from Broadlands. However, I think it is likely that the adviser knew that overseas property and more speculative investments were to be made. And I think it's likely that he knew about the type of schemes being sold by Mr M and company A. If suitable advice had been given, I think Mr B would have invested in suitable investments. His funds would not have remained in cash and it is unlikely that Mr B would have invested in more speculative unregulated investments.

The investment in Harlequin was not made until December 2012. Mr M arranged a mortgage on the commercial property in the SIPP and the proceeds were used to buy the Harlequin property. Broadlands say that they did not know about this investment. However, the adviser did conduct a review with Mr B over the telephone in June 2012. This specifically referred to the Harlequin investment. A pension review was offered and a note explains that "*he is happy with everything said he was borrowing through his SIPP*". There are comments about Harlequin in the handwritten notes.

Advice was being given at that time and the adviser knew about Harlequin, but the investment had not been made. A reservation fee of £1,000 had been paid, but the borrowing and investment in Harlequin could have been avoided. In my view, suitable advice should have been given at that review in June 2012. Mr B should have been advised that investing in Harlequin was high risk and speculative, especially as Mr B had to borrow to invest. If suitable advice had been given, Mr B would not have borrowed funds in his SIPP and would not have invested in Harlequin.

fair compensation

My aim is that Mr B should be put as closely as possible into the position he would probably now be in if he had been given suitable advice. I think that Mr B should have been advised to invest the cash in the SIPP in line with his attitude to risk. He should also have been advised not to borrow funds in his SIPP to invest in Harlequin.

I think Mr B would have invested differently. It's not possible to say *precisely* what he would have done, but I'm satisfied that what I've set out below is fair and reasonable given Mr B's circumstances and objectives when he invested.

what should Broadlands do?

To compensate Mr B fairly, Broadlands must:

For the loan and investment in Harlequin

- Establish the loan repayments made to date by Mr B. Those payments should be made to him including any interest paid.
- Arrange to repay the balance of the loan in full.
- Pay a commercial value to buy Mr B's Harlequin Property investment. The valuation of the Harlequin investment may prove difficult, as there is no market for it. To calculate the compensation, Broadlands 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 Broadlands is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation.

For the cash in the SIPP

- Compare the performance of each of Mr B’s investments with that of the benchmark shown below.

A separate calculation should be carried out for each investment. If the *fair value* is greater than the *actual value*, there is a loss. The losses should be combined and the total is the amount of compensation payable.

If there is a loss, Broadlands should pay a sum into Mr B’s pension plan to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

If Broadlands is unable to pay the compensation into Mr B’s pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mr B’s actual or expected marginal rate of tax in retirement. Mr B is likely to be a basic rate taxpayer in retirement. The reduction should equal the current basic rate of tax. However, as Mr B would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

- Pay Mr B £500 for the distress and inconvenience caused by the loss of his pension fund.

Broadlands should add interest as set out below. Income tax may be payable on any interest paid. If Broadlands deducts income tax from the interest, it should tell Mr B how much has been taken off. Broadlands should give Mr B a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

investment name	status	benchmark	from (“start date”)	to (“end date”)	additional interest
Belem Sky Plantation	still exists	FTSE UK Private Investors Income Total Return Index	date of investment	date of my decision	8% simple a year from date of decision to date of settlement
Sustainable Agroenergy	still exists	FTSE UK Private Investors Income Total Return Index	date of investment	date of my decision	8% simple a year from date of decision to date of settlement

for each investment:

actual value

This means the actual amount paid or payable from the investment at the end date.

It may be difficult to find the *actual value* of the investment. This is complicated where an investment is illiquid (meaning it could not be readily sold on the open market) as in this case. So, the *actual value* should be assumed to be nil to arrive at fair compensation. Broadlands should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the compensation and the balance paid as I set out above.

If Broadlands is unable to buy the investment the *actual value* should be assumed to be nil for the purpose of calculation. Broadlands may require Mr B to provide an undertaking to pay Broadlands any amount he may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Broadlands will need to meet any costs in drawing up the undertaking.

fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Any additional sum that Mr B paid into the investment should be added to the *fair value* calculation at the point it was actually paid in.

Any withdrawal, income or other distribution out of the investment should be deducted from the *fair value* calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I'll accept if Broadlands totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

I've chosen this method of compensation because:

- Mr B wanted capital growth and was willing to accept some investment risk.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr B's circumstances and risk attitude.

my final decision

I uphold the complaint. Broadlands Partnership must now calculate the loss Mr B has suffered and pay fair compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 10 February 2020.

Roy Milne
ombudsman