

complaint

Mr H complained he was given unsuitable advice by Designed 4 Life Ltd (D4L) to transfer his pension plans to a self-invested personal pension (SIPP). The SIPP was set up to allow Mr H to invest in a Harlequin off-plan hotel development in the Caribbean.

background

Mr H was referred to D4L by a sales agent for Harlequin around August 2010. This agent wasn't regulated to give advice on pension transfers. That's why Mr H was referred to D4L. Before he was referred Mr H paid a £1,000 reservation fee in relation to a specific Harlequin development.

In August and September 2010 D4L contacted Mr H's pension plan providers to request transfer values. At this time Mr H had five pensions:

1. A group personal pension plan (GPP) with a transfer value (TV) of about £14,400;
2. A free standing additional voluntary contribution plan (FSAVC) with a TV of about £11,000. This plan also had a guaranteed annuity rate (GAR) of about 7%;
3. A personal pension plan (PPP) with a TV of about £1,600;
4. Government final salary pension benefits with a TV of about £12,000;
5. Government final salary pension benefits with a TV of about £105,616.

An undated and unsigned fact find was produced by D4L. It noted the following about Mr H:

- He was in his early 40s, married and with no children;
- He earned about £50,000 per year.
- His home was worth about £200,000. He had an outstanding mortgage of £130,000.
- He owned a buy-to-let property worth about £140,000. This had an outstanding mortgage of £70,000
- He had three pensions – the GPP, FSAVC and PPP.
- He had an attitude to risk (ATR) of "10/10" – *"prepared to take very high risks."*
- His objectives were to consolidate his existing pension plans, control the flexibility of his plans, and gain greater investment choice. It noted that he had a specific investment in mind.

At the end of January 2011 Mr H met with D4L. He signed its client agreement. At the same time he also signed transfer forms for the GPP, FSAVC, and the smaller government final salary plan. At the same time Mr H also completed:

- The SIPP provider's "appropriateness test" in relation to the Harlequin property going into the SIPP. The form indicated the investment was a complex or unregulated investment. Mr H signed the form and indicated *"I have received advice"*. The form stated D4L gave that advice;
- The SIPP application form. The form was completed indicating it was an *advised* transaction. D4L's details were included as the advisor.

On 28 January 2011, two days after the pension transfer forms had been signed by Mr H, D4L produced a suitability report for Mr H. Mr H has denied ever seeing this document.

The suitability report said:

- D4L recommended Mr H transfer the GPP, FSAVC and PPP to the SIPP.
- The service being provided by D4L involved *“an examination of your needs and objectives by conducting a review of your financial position and future plans.”*
- Mr H’s priority was to review his retirement planning and he wanted advice in this area.
- Mr H had expressed an interest in using his pension to fund an overseas property purchase.
- In relation to investment experience; that Mr H was familiar with fund values going up and down as he was invested in personal pensions, and also had bank savings and a buy-to-let. He was an *“experienced investor”*.
- Mr H had a high risk ATR but preferred *“a self-select approach”* to where his money was invested.
- D4L recommended Mr H transfer his plans to the SIPP to meet his aims and objectives. It made no reference to the loss of the GAR attached to the FSAVC.
- Mr H had already committed to purchasing the Harlequin property. D4L had not provided any advice on the suitability of investment.
- Mr H had asked D4L to process the transfer regardless of the loss of benefits from his existing plans.
- Mr H’s attitude to risk was high and *“suitable for the transaction.”*

During February 2011 the SIPP was opened and Mr H’s three pensions (GPP, FSAVC and the smaller final salary benefits) were transferred. In total, about £37,400 was transferred to the SIPP. Later that month Mr H signed the sale contracts with Harlequin to invest in the property. In March 2011, £30,000 was paid from his SIPP to Harlequin as a 30% deposit. Mr H and his wife entered into a separate contract for the remaining 70% of the purchase price. This was due in stage payments as the property was built.

As of February 2014, Mr H’s investment in Harlequin was valued at £1. To date, Mr H’s property hasn’t been built and it’s likely he has lost all of his original funds from the SIPP. The remaining cash in his SIPP has been depleted by the ongoing SIPP fees.

Mr H complained to D4L in March 2015. D4L didn’t uphold the complaint. It said it was made clear to Mr H that D4L wasn’t advising on the suitability of the investment. Mr H understood this and didn’t want that advice. D4L said Mr H had already decided to invest in Harlequin before he was referred to it. He had already paid a £1,000 reservation fee. The SIPP was established for exactly this reason, to allow him to choose his own investments; which Mr H was aware of.

One of our adjudicators upheld the complaint. He provided a detailed explanation as to why he had done so. In particular he highlighted:

- The suitability report didn’t reflect what actually happened. Mr H had transferred final salary benefits as well as his FSAVC and GPP. The report didn’t refer to the final salary benefits. The total transfer value stated in the report (about £27,000) wasn’t enough to cover the property deposit.
- Mr H applied to transfer the final salary benefits shortly before the suitability report was produced. It was clear the business arranged the transfer. It probably recommended it.
- Details of the final salary benefits were written on the SIPP application after Mr H signed it.

- Mr H said he hadn't received the suitability report. Given the errors in the report this seemed likely. He would have queried the errors if he had received it.
- The suitability report should have explained the final salary benefits Mr H would be giving up. It should have set out the results of transfer analysis. This would have included the critical yield.
- Mr H's attitude to risk had been recorded as "10/10". There wasn't any evidence showing how this was worked out. Investors with this attitude were rare. He had never invested in anything like Harlequin before. His previous plans didn't suggest he had that attitude.
- Mr H thought his attitude to risk was medium. He said that the agent told him he would get his money back in three to four years. He was not an experienced investor.
- The business recommended the transfers and SIPP. It had to comply with COBS suitability rules. Those rules required it to consider any related risks. The adviser knew that Mr H intended to buy the overseas property. The risks of that investment were not unrelated to the SIPP. So COBS required the adviser to consider the risks of the investment.
- FSA alerts from January 2013 made it clear that the adviser should have considered the suitability of the investment. Final notices also made this clear.
- If he had been properly informed Mr H probably wouldn't have transferred. He should be put in the position he would have been in if he hadn't.

D4L responded to the adjudicator's view. It simply said it shouldn't be liable for a client's investment choice within a SIPP.

D4L was given a further opportunity to provide any comments on the various factual findings and conclusions that the adjudicator had made. It said:

- It didn't recommend Mr H invest in Harlequin.
- The SIPP provider should be accountable for what went into the SIPP.
- The FSA alert was issued in 2013 and changed the rules.
- Mr H was already committed to the investment. He had already paid a 'deposit' and signed the contract before meeting D4L.
- It wasn't fair that it and other financial advisors were held responsible for failings by the sales agents, the SIPP providers and the FCA.

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 considered the detailed reasoning provided by the adjudicator, I agree with his conclusions. In fact there's little more I can usefully add. D4L failed to provide suitable advice. They had a responsibility to provide it. Mr H has suffered a loss as a result of this failing.

D4L said that the scope of its agreement restricted its advice to just choosing the right SIPP. This is what Mr H wanted as he had already committed to investing in Harlequin. And he knew D4L was only advising on this. In January 2013 the FSA issued an alert. This alert

didn't make any changes to the regulations. It simply re-stated the principles that already applied and those that applied in 2010 and 2011. In particular it said the following:

"Financial advisers using this model are under the mistaken impression that...they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect."

This is the business model that D4L applied. It failed to look at the investment underlying the SIPP which was the purpose behind the transfer. D4L had a duty to take reasonable care to ensure the suitability of its advice. It had to act in its client's best interests. That's an independent duty; it can't be avoided simply because an unregulated third party told Mr H to invest. It's a misunderstanding of COBS 9.2 to suggest these rules allowed D4L to advise solely on the 'wrapper' in these circumstances; if the underlying investment isn't suitable than the overall advice is unlikely to be suitable

Therefore, although Mr H may have received advice from the agent, he had still been referred to D4L for advice on the transfer. It still had an obligation to consider whether it was in his best interests. Mr H was looking at transferring his pension plans to a SIPP; to determine whether that was suitable or not required D4L to understand the property that the SIPP was going to invest in. The purpose of COBS 9 is to ensure consumers get advice that's suitable in their circumstances. To interpret COBS 9.2 in a narrow way so that D4L closed its eyes to the purpose of the SIPP would avoid looking at all of the factors that the rules say are necessary to ensure suitability.

There is much within the documentation to suggest, despite what it now says, that D4L did provide some advice about the underlying investment. The SIPP provider's 'appropriateness' form signed by Mr H indicated this was the case. Mr H said that at the meeting the D4L advisor made a number of comments endorsing Harlequin and that the advisor stated he had invested in a different Harlequin resort. Mr H said until the discussion with D4L he was still nervous about proceeding. I have listened to the call between Mr H and the adjudicator. I find his account believable and credible. It appears Mr H had very little idea of what he was really investing in, how it was structured and what the effect of moving his pension funds into a SIPP really was.

There are a number of factual errors in the suitability report. The most glaring was the failure to mention the transfer of Mr H's smaller final salary benefits. When this was put to D4L, it denied it had recommended or arranged the transfer of Mr H's government plan. It sought to point the finger at Mr H or another IFA for arranging the transfer. The plan's administrators have confirmed that the only request for a TV came from D4L. It also confirmed no other IFA had contacted it. It's of note that the transfer form was signed at the same time as other forms in the presence of D4L. This was two days before the suitability report was provided. The SIPP application form held by the SIPP provider, and presumably completed by D4L, also contained the final salary TV.

It's also significant that without the inclusion of the final salary plan, Mr H wouldn't have had enough funds in his SIPP to cover the 30% deposit (never mind the additional fees to the SIPP provider and to D4L). I agree with the adjudicator that it appears highly unlikely that D4L didn't know and didn't recommend Mr H carry out this transfer as well as the other two plans. It wouldn't make any sense for the SIPP to be established without the required deposit amount within it. However, by not including this within the suitability report D4L failed to explain what the loss of final salary benefit meant and failed to provide any analysis of its

value. While it's in dispute as to whether Mr H received a copy of the report; if he had, he wouldn't have been able to make an informed assessment as to whether he wished to proceed or not.

The suitability report also failed to mention the GAR attached to Mr H's FSAVC plan. This meant Mr H wasn't able to make an informed decision on whether he was prepared to give up this guarantee or not. Even if, as D4L claims, it didn't have to advise on the suitability of the property (which it should be clear I don't agree with). The advice given in the suitability report about the circumstances surrounding Mr H's transfer was, in any event, incomplete and misleading on a number of elements. That advice alone was wrong.

The property was high risk, highly illiquid, highly geared and speculative. In contrast, Mr H transferred valuable pension benefits to fund the purchase. One was a final salary scheme, one had a GAR. There's no evidence he had any experience of property investments like Harlequin. In fact his investment experience was limited to his pension plans and a buy-to-let property. Classing Mr H as an "*experienced investor*" appears to have no reasonable justification.

D4L recorded that Mr H had a "*high*" attitude to risk. He was recorded as the highest possible on the scale. It's not clear how it reached this conclusion. The ATR simply said in the notes "*to purchase Harlequin property*". On balance, I think this suggests that Mr H's risk profile has been fitted to the investment, and not the other way around. Mr H denied there was any discussion about his ATR. The rules required D4L to consider Mr H's financial situation. It also required D4L to be satisfied that he was able to bear the investment risks. It failed to do this.

The only reason Mr H transferred into the SIPP was to invest in Harlequin. I think on any view, D4L should've advised Mr H that the transfer of a significant proportion of his pension provision to the SIPP to invest in Harlequin property wasn't suitable. There's no suggestion that the transaction was carried out on either an 'insistent client' or 'execution only' basis.

While looking back it's difficult to be sure what someone would've done if suitable advice had been given. Mr H did have a larger government final salary scheme which would have provided him with about £9,100 per year on retirement. I accept that the amount placed in the SIPP wasn't his only pension provision. But I think, on balance, Mr H wouldn't have transferred to the SIPP and gone ahead with investing in the property if advised against doing so.

The property was recommended to Mr H by the agent. But D4L was a regulated independent financial advisor. I think any advice that the transfer wasn't suitable due to the high risk nature of the underlying investment would've been significant for Mr H and carried due weight - despite what the agent may have told him about Harlequin.

Mr H paid a £1,000 reservation fee. This represented 1% of the total purchase price. Even if it wasn't refundable, I don't think this would have prevented him from stopping the transfer given the greater risk and possible losses he would've been advised he was exposing himself to. There was no other reason put forward for transferring to the SIPP other than to invest in Harlequin.

I have reached this decision on the balance of probabilities. Given the significant risks involved in investing in Harlequin, and the greater weight D4L's advice should reasonably

have had, I'm satisfied this test has been met. On balance, I believe Mr H wouldn't have invested in the property had D4L given him suitable advice.

D4L said that the investment hasn't failed and therefore, presumably, Mr H's SIPP may still retain some value. The issue in this complaint is whether the pension transfers to the SIPP, with that underlying asset, were suitable or not for Mr H. The investment is presently valued at £1. It hasn't been built, and it is almost three years past the targeted completion date. As the approach to compensation below sets out, *if* there is any later value in the investment, then D4L may be able to benefit from it. But this point doesn't detract from reaching a conclusion on the suitability of the advice. If the investment was now doing well, the transfer would still have been unsuitable.

Finally, D4L has said it's not fair that it is being held responsible for other parties' failings. As I have explained D4L was the regulated advisor. It failed to carry out its regulatory duties. Had it done what the rules required, I don't think Mr H would have invested. The argument that it has done nothing wrong and it can avoid those responsibilities fails to stand up to any scrutiny whatsoever.

For the reasons above, my view is that the transfer of Mr H's plans to the SIPP to invest in Harlequin wasn't suitable. I don't think D4L gave him suitable advice and Mr H should be compensated for this.

fair compensation

On 22 April 2016, the adjudicator contacted all parties and explained how redress in this complaint might be approached. This included certain aspects that weren't set out in the adjudicator's original view. Both parties were given two weeks to provide any comments on the proposed approach. No comments have been provided to us.

My aim is to put Mr H 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 pension plans; 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 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 will allow D4L to take over the investment from the consumer, the involvement of third parties - the SIPP provider and Harlequin – 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 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 he would have been in if suitable advice had been given, I think it's fair that Mr H is compensated now. I don't think we should wait and determine each and every possibility before making an award. What is set out below is a fair way of achieving this.

D4L should calculate fair compensation by comparing the value of Mr H's pension, if he had not transferred, with the current value of his SIPP. In summary:

1. Obtain the notional transfer value of Mr H's previous FSAVC and GPP plans if they hadn't been transferred to the SIPP. That should be the value at the date of this decision.
2. Perform a loss calculation in relation to the smaller final salary scheme using the methodology determined by the regulator for the industry wide pensions review. But using the assumptions for cases which fall outside the review.
3. Obtain the actual transfer value as at the date of the decision of Mr H's SIPP, including any outstanding charges.
4. Pay a commercial value to buy Mr H's share in the Harlequin property.
1. And then pay an amount into Mr H's SIPP so that the transfer value is increased to equal the value calculated in (1) and (2). 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, D4L should:

2. Pay five years' worth of future fees owed by Mr H to the SIPP.
3. Pay Mr H £300 for the trouble and upset caused.

I have explained how D4L should carry this out in further detail below.

1. *Obtain the notional transfer value of Mr H's previous FSAVC and GPP 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 decision, D4L should ask Mr H's former pension providers to calculate the notional transfer value that would have applied had he not transferred his pension but instead remained invested in the same funds.

The adjudicator in his view said the notional value of the FSAVC should be uplifted by a ratio of the GAR divided by the Current Annuity Rate (CAR). I agree that this is a fair way of compensating Mr H's for the loss of the plan's benefits. I would expect the notional value of the FSAVC plan should be uplifted by a multiplier of around 1.4. This is based on the GAR of 7%. And on looking at available rates, 5% appears to be a fair representation of the best currently available CAR on the same basis as Mr H's FSAVC plan on retirement at 60. When D4L come to calculate the redress they should provide any evidence of the CAR they have used to Mr H.

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.

D4L should assume that any contributions or withdrawals that have been made would still have been made, and on the same dates.

2. *Perform a loss calculation in relation to the smaller final salary scheme using the methodology determined by the regulator for the industry wide pensions review. But using the assumptions for cases which fall outside the review.*

The latest assumptions and review date can be found on our website.

If Mr H's membership of the scheme cannot be reinstated, the compensation should be paid to his pension plan less any tax relief the provider has confirmed will apply. If the plan provider will not accept redress payments, or if the redress exceeds the annual allowance, some or the entire sum should be paid direct to Mr H as a lump sum less a deduction to take account of tax relief he will receive on payment of the sum to a pension plan. D4L should provide details of its calculations to Mr H.

3. *Obtain the transfer value as at the date of the decision of Mr H's SIPP, including any outstanding charges.*

D4L should then deduct the result of (3) from the result of (1) and (2). That is the loss to his pension.

4. *Pay a commercial value to buy Mr H's share in the 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, D4L 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 D4L is unable to buy the investment, 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 H 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 H 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 H may want to seek independent advice on how to cancel this ongoing contract for the remaining amount.

5. *Pay an amount into Mr H'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.*

If it's not possible to pay the compensation into the SIPP, D4L should pay it as a cash sum to Mr H. But the compensation should be able to be paid into a pension in the time until Mr H 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 H could claim. The notional allowance should be calculated using Mr H's marginal rate of tax.

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.

6. Pay five years' worth of future fees owed by Mr H to the SIPP.

Had D4L given suitable advice I don't think there would be a SIPP. It's not fair that Mr H continues to pay the annual SIPP fees if it can't be closed.

I think D4L should be able to take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mr H 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. To provide certainty to all parties, I think it's fair that D4L pay Mr H 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 H with some confidence that he will not be subject to further fees.

In return for that, D4L may ask Mr H 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. D4L will need to meet any costs in drawing up the undertaking. If D4L asks Mr H 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, D4L 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 D4L fails to pay the SIPP fees, Mr H always has the option of trying to cancel the Harlequin contract to enable the SIPP to be closed at any time.

7. Pay Mr H £300 for the trouble and upset caused.

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

my final decision

For the reasons outlined above, I uphold Mr H's complaint against Designed 4 Life Ltd. I consider that fair compensation should be calculated as set out above.

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. Tax may be due on this interest.

Under our rules, I'm required to ask Mr H to accept or reject my decision before 1 July 2016.

Benjamin Taylor
ombudsman