

complaint

Mr G complains about James & James Financial Advisers Limited (“the business”). He says he was given unsuitable advice to transfer his personal pension plans (PPP) to a self-invested personal pension (SIPP). The SIPP was set up to allow Mr G to invest in an off-plan hotel development in the Caribbean.

background

In late 2011, an unregulated adviser recommended Mr G invest in Harlequin Property Limited. This adviser was an agent for Harlequin.

In January 2012, two contracts were produced by Harlequin. One contract was for the purchase of a 30% share by Mr G and his wife via their SIPP; the other was for the remaining 70% by Mr G and his wife personally. Mr G and his wife also paid Harlequin a £1,000 reservation fee. Mr G also approached the business for advice on a suitable SIPP provider.

Mr G completed the SIPP application form in February 2012, and the SIPP started a few weeks later. Mr G transferred his three PPPs to his SIPP.

Mr G, represented by a claims management company, complained to the business in December 2015 about the SIPP. The business didn't uphold the complaint. In summary, it said:

- Mr G and his wife had researched Harlequin independently following a friend's recommendation. They made their own decision to invest.
- Mr G was a balanced investor with previous investment experience.
- The advice to open a SIPP was suitable given Mr G's circumstances and objectives.
- The SIPP the adviser recommended was not conditional on Mr G investing in Harlequin.
- Mr G signed the SIPP provider's appropriateness test, confirming he understood the risks involved.

Mr G referred his complaint to this service. One of our adjudicators looked into it, and thought it should be upheld. She didn't think the business had given suitable advice. It should have considered the investment which was intended to be used in the SIPP, when advising on the suitability of the transfer. She also set out the appropriate redress.

The business didn't agree. Its representative said, in summary:

- There were other parties involved in the transaction, such as the SIPP provider and the agent who recommended the investment.
- It's possible Mr G would have proceeded with the transfer and investment regardless of any advice it gave.
- Mr G should take a proportion of the blame, and redress adjusted accordingly.
- It's not true that Mr G's attitude to risk wasn't established – it was established as balanced and the overall pension portfolio was within this level of risk.
- Mr G has since made other investments and bought a buy to let property.
- Hindsight is a wonderful thing – the Harlequin investment wasn't banned and there was no evidence of concern over the viability of the project. The adviser couldn't have predicted how the investment would turn out.

- Mr G was made aware that no advice was given at the time.
- The adviser sent Mr G a suitability report in June 2012, but the SIPP transaction didn't conclude until August 2012. This left Mr G over six weeks in which to query the suitability report.
- The proposed redress is disproportionate to any alleged wrongdoing.

The matter has now been passed to me for consideration.

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'm aware Mr G became a client of the business a few months before investing in Harlequin. I understand he was given other financial advice which he hasn't complained about.

In relation to the Harlequin investment, I've reviewed the documentation from the time. I've also considered the account of events provided by the adviser.

It seems clear Mr G was introduced to Harlequin by a third party agent – an unregulated individual. But the business' adviser was aware of this. He says he would have extolled the virtues of Harlequin, as he was investor himself. But he couldn't give Mr G any advice about whether the investment was suitable. The adviser told us Mr G wanted to know more and gave him permission to contact the agent.

The adviser later reported back to Mr G about how the Harlequin investment worked, and how it could be purchased through a SIPP. So it's clear the adviser was aware at a very early stage the SIPP was to be used for the specific purpose of investing in Harlequin.

The adviser issued a suitability report in June 2012. This said, amongst other things:

- Mr G wished to invest in overseas property, and had already researched this. He didn't require advice about this.
- Mr G wanted to restrict advice to a suitable SIPP provider to facilitate the investment.
- No advice was given regarding the underlying investment.
- Attitude to risk wasn't established as no advice was given regarding the investment.

But while the report said no advice was being given on the underlying investment, I don't think this was sufficient.

In January 2013 the FSA issued an alert about investments being used in SIPPs. This alert didn't make any changes to the regulations. It simply re-stated the principles that already applied, and which were relevant in 2012. 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 reflects the events that led to Mr G taking out the SIPP. The business had a duty to take reasonable care to ensure the suitability of its advice. It had to act in the clients' best

interests; that's an independent duty. It can't be avoided simply because an unregulated third party told Mr G to invest.

It's a misunderstanding for the business to suggest it was able to advise solely on the SIPP 'wrapper'. In these circumstances, if the underlying investment isn't suitable then the overall advice is unlikely to be suitable.

COBS 9.2.1 required the business to obtain the necessary information about Mr G's knowledge and experience relevant to the specific type of investment and the investment objectives. COBS 9.2.2 then required the business to consider whether the transfers from the existing plans to the SIPP met Mr G's investment objectives, whether he could bear the risks involved, and that he understood the risks.

The purpose of COBS 9 is to ensure consumers get advice that's suitable in their circumstances. Not looking at the purpose of the SIPP would mean to avoid looking at all of the factors the rules say are necessary to ensure suitability. And while the suitability report did say no advice was being given on the investment within the SIPP, this wasn't enough to discharge the business' responsibility.

I note the adviser didn't explore Mr G's attitude to risk with specific reference to his pension. But an assessment was made in relation to other investments. This indicated he had a balanced attitude to risk. On the whole, I think it's unlikely he would have wanted to take a greater degree of risk with his pension benefits.

Harlequin was a high risk and highly illiquid investment, which was highly geared and speculative. These were all risk factors that should have been evident to the adviser. In the suitability report the adviser noted that Harlequin was a specialist investment. Mr G didn't have any experience of property investments of this nature. While he had invested previously, this seems to have been largely in mainstream investments.

In addition, the PPPs which were transferred to the SIPP held a variety of funds. But as a result of the transfer all the money was concentrated in one fund and one asset type. This in itself increased the risk Mr G would be taking.

So on the whole I don't think it was suitable for Mr G to transfer his PPPs to the SIPP and invest in Harlequin.

I've considered what Mr G would have done had he not started the SIPP. Clearly, it's not possible to know for certain. But on balance I'm not convinced he would have gone ahead with transferring his PPPs and investing in the Harlequin fund.

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

Mr G paid a deposit of £1,000 to Harlequin. But I think the business should have stated that the proposed investment was inappropriate and the transaction shouldn't go ahead. This may have meant Mr G losing the deposit. But this would have been less than the potential loss of the pension benefits he'd accrued in his PPPs.

The business suggests Harlequin's agent and the SIPP provider should share some responsibility. There's no doubt the agent played a part in Mr G investing in the Harlequin fund. But the agent wasn't authorised to give financial advice. That role was fulfilled by the business.

The SIPP provider was regulated. But, it accepted business from a regulated adviser. It's possible the SIPP provider could have some liability.

But here I'm only considering a complaint against the business. I have explained why I think the business did something wrong. If it thinks any third party has contributed to the loss it's free to take action against those parties. As part of my award I will allow the business to take an assignment of any rights of action against any third party, provided the award is paid in full. The business may then try to recover some part of the award, if it wishes.

fair compensation

My aim is to put Mr G in the position he would now be in if he had received suitable advice. I think that he would have: a.) kept his existing pension; b.) wouldn't have invested in Harlequin; and c.) as a result wouldn't have opened the SIPP (and now be subject to ongoing SIPP fees). In setting out how to calculate fair compensation my objective is to address these three issues. That is what I'm trying to achieve.

There are a number of possibilities and unknown factors in making an award. I understand Harlequin will allow the business 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 Mr G back in the position he would have been in if suitable advice had been given, I think it's fair that he's 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.

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

1. Obtain the notional transfer value of Mr G's previous pension plan on the date of this decision if it had not been transferred to the SIPP.
2. Obtain the actual transfer value of Mr G's SIPP on the date of this decision, including any outstanding charges.
3. Pay a commercial value to buy Mr G's share in Harlequin Property Limited.
4. Pay an amount into Mr G's SIPP so that the transfer value is increased to equal the value calculated in (1). This payment should take account of any available tax relief and the effect of charges. It should also take account of interest as set out below.

In addition, the business should:

5. Pay five years' worth of future fees owed by Mr G to the SIPP. [alternatively the business should pay ongoing SIPP fees until the SIPP can be cancelled]
6. Pay Mr G £300 for the trouble and upset he's been caused.

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

1. *Obtain the notional transfer value of Mr G's previous pension plan on the date of this decision if it had not been transferred to the SIPP.*

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 he'd remained in his previous investments.

The business 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 Mr G's SIPP on the date of this 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 Mr G's Harlequin Property investment.*

The SIPP only exists because of the investment in Harlequin. In order for the SIPP to be closed and further SIPP fees to be prevented, the Harlequin investment needs to be removed from the SIPP. We understand this can be done.

The valuation of the Harlequin investment may prove difficult, as there is no market for it. To calculate the compensation, the business should agree an amount with the SIPP provider as a commercial value, and then pay the sum agreed plus any costs and take ownership of the investment.

If the business is unable to buy the investment, the business should give it a nil value for the purposes of calculating compensation.

The business may ask Mr G to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the Harlequin investment. That undertaking should allow for the effect of any tax and charges on the amount he may receive from the investment and any eventual sums they would be able to access from the SIPP. The business will need to meet any costs in drawing up the undertaking.

The SIPP has paid a deposit under a contract with Harlequin. That is the loss I am trying to redress. Mr G 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 G 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 G may want to seek independent advice on how to cancel this ongoing contract for the remaining amount.

4. Pay an amount into Mr G'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, the business should pay it as a cash sum to Mr G.

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

5. Pay five years' worth of future fees owed by Mr G to the SIPP.

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

I think the business should be able to take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mr G 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 the business pay Mr G 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 G with some confidence that he will not be subject to further fees.

In my view, awarding a lump sum for an amount equivalent to five years fees strikes a fair balance. It's possible that the Harlequin investment could be removed from the SIPP in less than five years. But given the time it has taken to date I think it is possible that it could take a number of years more to resolve all of the issues. So using a figure of five years' worth of fees is an approximate and fair award to resolve the issue now.

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

Mr G has been caused some distress by the loss of his pension benefits. I think a payment of £300 is appropriate compensation for this.

my final decision

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 7 December 2016.

Doug Mansell
ombudsman