

complaint

Mr R's representative complains on his behalf about the advice he received from Kingswood Financial Advisors (Kingswood).

It says Mr R was advised to transfer his Occupational Pension Scheme benefits (OPS) to a Self-Invested Personal Pension (SIPP), to facilitate an overseas property investment without there being any assessment of suitability of this transfer, or the investment in Harlequin Property.

The representative says the advice was unsuitable and didn't comply with the regulatory guidance on SIPP advice.

background

In my provisional decision of 24 October 2018, a copy of which is attached and forms part of this, my final decision, I said I was minded to uphold the complaint.

Mr R's representative responded and accepted my provisional decision.

Kingswood has made no new submissions.

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 done so, and in light of no new submissions, my conclusion remains as set out previously, and for the same reasons. I uphold this complaint.

I've covered the points I consider to be relevant to my decision and therefore I don't feel it necessary to go over the points again.

In terms of fair compensation, my aim is to put Mr R in the position he would now be in if he had received suitable advice. I think that: a.) he would have kept his existing pension; b.) he wouldn't have invested in Harlequin; and c.) as a result he wouldn't have opened the SIPP (and now be subject to ongoing SIPP fees); d) he would have invested the £14,000 of his own money differently. In setting out how to calculate fair compensation my objective is to address these issues. That is what I'm trying to achieve.

There are a number of possibilities and unknown factors in making an award. While I understand Harlequin will allow Kingswood to take over the investment from Mr R, the involvement of third parties – the SIPP provider and Harlequin – mean much of this is beyond this service's or Kingswood's control.

All the variables aren't known and each may have an impact on the extent of any award I 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 R back in the position he would have been in if suitable advice had been given, I think it's fair that Mr R is compensated now. I don't think I should wait and determine each and every possibility before making an award. What is set out below is a fair way of achieving this.

As I've said my aim is to put Mr R, as far as possible, into the position he would now be in if he had received suitable advice. Kingswood should calculate fair compensation by comparing the value of Mr R's pensions, if he had not transferred, with the current value of his SIPP.

In summary it should:

1. Calculate the loss Mr R has suffered by transferring out of his former employer's final salary pension schemes.

To do that Kingswood will need to take the following steps.

2. Obtain the actual transfer value of Mr R'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. If it is possible, pay a commercial value to buy Mr R's share in 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. I 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, Kingswood 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. But I think this is now unlikely.

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

Kingswood may ask Mr R 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 Mr R may receive from the investment and any eventual sums he would be able to access from the SIPP. Kingswood will need to meet any costs in drawing up the undertaking.

I have been provided with the contract between Harlequin and Mr R. This means the SIPP has paid a deposit under a contract with Harlequin. That is the loss I am trying to redress. I understand Mr R would have 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 R 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 R may want to seek independent advice on how to cancel this ongoing contract for the remaining amount.

If Kingswood takes over the contract from the SIPP trustees then it may be liable for the remaining amount of the purchase price. As a result any total award that Kingswood may have to pay could exceed £150,000. This won't be known until the redress in steps 1 and 2 above has been calculated. If it will exceed £150,000 then I can't tell Kingswood to take over

the contract from Mr R's SIPP. But I can address the ongoing SIPP fees that may continue if the SIPP can't be closed. I have dealt with this in step 5 below.

4. Pay an amount into Mr R's SIPP so that the transfer value in (2) is increased to equal the value calculated in (1). This payment should take account of any available tax relief and the effect of charges. It should also take account of interest as set out below.

If it's not possible to pay the compensation into the SIPP, Kingswood should pay it as a cash sum to Mr R.

I'm also not certain whether, currently, Mr R can pay the redress into a pension plan. If he can, it means that the compensation is able to be paid into a pension in the time until Mr R retires and he should be able to contribute to pension arrangements and obtain tax relief. If this is the case, the compensation should be reduced to notionally allow for the income tax relief Mr R could claim. The notional allowance should be calculated using Mr R's marginal rate of tax. For example, if Mr R is a basic rate taxpayer, the total amount should be reduced by 20%.

On the other hand, Mr R may not currently be able to pay the redress into a pension plan. But had it been possible to pay the compensation into the plan, it would have provided a taxable income. Therefore the total amount to be paid to Mr R should be reduced to notionally allow for any income tax that would otherwise have been paid.

The notional allowance should be calculated using Mr R's marginal rate of tax in retirement. For example, if Mr R 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 Mr R 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 the redress calculation until the date of payment. Income tax may be payable on this interest.

5. Pay five years' worth of future fees owed by Mr R to the SIPP; if the Harlequin property can't be purchased.

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

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

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

6. Pay Mr R £400 for the distress and inconvenience caused.

Mr R has been caused some distress by the loss of his pension benefits. I think that a payment of £400 is appropriate to compensate for that distress.

For the final salary pension benefits:

Kingswood Financial Advisers must undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in October 2017.

This calculation should be carried out as at the date of my final decision, and using the most recent financial assumptions published (at the date of that decision). In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr R's acceptance of the decision.

Kingswood Financial Advisors must (if a transfer to a S32 buy out bond from a particular type of scheme)/ may wish to contact the Department for Work and Pensions (DWP) to obtain Mr R's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr R's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr R's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr R as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. 25% of the loss would be tax-free and 75% would have been taxed according to his likely income tax rate in retirement – which is presumed either to be 20% or 40% depending on Mr R's circumstances. So making a notional deduction of 15% or 30% overall from the loss adequately reflects this.

In relation to the £14,000

fair compensation

My aim is that Mr R should be put as closely as possible into the position he would probably now be in if he had been given suitable advice.

I take the view that Mr R would have invested differently. It's not possible to say *precisely* what he would have done differently. But I'm satisfied that what I've set out below is fair and reasonable given Mr R's circumstances and objectives when he invested.

what should Kingswood do?

To compensate Mr R fairly, Kingswood must:

- Compare the performance of Mr R's investment with that of the benchmark shown below. If the *fair value* is greater than the *actual value* there is a loss and compensation is payable. If the *actual value* is greater than the *fair value*, no compensation is payable.

Kingswood should add interest as set out below.

If there is a loss, Kingswood should pay into Mr R's pension plan to increase its value by the total 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 Kingswood is unable to pay the total amount into Mr R'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 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 Mr R's actual or expected marginal rate of tax at his selected retirement age.

For example, if Mr R is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr R would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

Income tax may be payable on any interest paid. If Kingswood deducts income tax from the interest it should tell Mr R how much has been taken off. Kingswood should give Mr R 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
Guardian SIPP	transferred	average rate from fixed rate bonds	date of investment	date transferred	8% simple per year on any loss from the end date to the date of settlement

actual value

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

fair value

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

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Kingswood should use the monthly average rate for the fixed rate bonds with 12 to 17 months maturity as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

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

why is this remedy suitable?

I've decided on this method of compensation because:

- Mr R wanted to achieve a reasonable return without risking any of his capital.
- The average rate for the fixed rate bonds would be a fair measure given Mr R's circumstances and objectives. It doesn't mean that Mr R would have invested only in a fixed rate bond. It's the sort of investment return a consumer could have obtained with little risk to the capital.
- The additional interest is for being deprived of the use of any compensation money since the end date.

my final decision

For the reasons set out above, and in my provisional decision, I uphold this complaint.

I direct Kingswood Financial Advisors to calculate and pay compensation as set out above.

Where I consider that total fair compensation requires payment of an amount that might exceed £150,000, I may recommend that the business pays the balance.

determination and money award: I require Kingswood to pay Mr R compensation as set out above, up to a maximum of £150,000.

The compensation resulting from the loss assessment must where possible be paid to Mr R within 90 days of the date Kingswood Financial Advisors receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Kingswood Financial Advisors to pay Mr R this compensation.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I also recommend that Kingswood Financial Advisors pays Mr R the balance. I further recommend interest to be added to this balance at the rate of 8% per year simple for any time, in excess of 90 days, that it takes Kingswood Financial Advisors to pay Mr R from the date it receives notification of his acceptance of the decision, as set out above.

If Mr R accepts my determination, the money award is binding on Kingswood. My recommendation is not binding on Kingswood.

Further, it's unlikely that Mr R can accept my determination and go to court to ask for the balance of the compensation owing to him after the money award has been paid. Mr R may want to consider getting independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 30 December 2018.

Dara Islam
ombudsman

COPY OF MY PROVISIONAL DECISION

complaint

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The representative says the advice was unsuitable and didn't comply with the regulatory guidance on SIPP advice.

background

Mr R found out about Harlequin Property from an adviser firm, acting as an agent of Harlequin sometime in 2009. Mr R was referred to Kingswood to set up a SIPP. He had OPS benefits with a total value of around £36,000.

Mr R met with a Kingswood adviser in February 2010. It was noted that Mr R had recently attended a seminar about purchasing property abroad. He indicated he wanted to use his existing pension fund to facilitate the purchase.

Mr R's circumstances were recorded in the fact find as follows:

- Aged 36, married with three dependants
- Self-employed director of his own company
- Jointly owned home, valued at £165,000 with a £115,000 mortgage secured against it
- Owned another property valued at £35,000
- He held £20,000 in savings
- His OPS was the only pension arrangements held by him and his wife
- His attitude to risk was noted as "eight", on a scale of one to ten.

Harlequin chased an update on the SIPP application which hadn't yet been recommended or made. Kingswood provided a copy of the transfer value and confirmed a critical yield of 8.5% to match the estimated retirement benefits of £8,055 a year.

In mid-February Mr R and his wife signed one of two contracts relating to the purchase of a 70% share of a hotel property, personally, for £105,000. Kingswood then applied for the Hornbuckle Mitchell SIPP.

The adviser explained he would give no advice on the purchase of the property, but was able to recommend a contract that would facilitate the pension transfer.

Kingswood recommended Mr R transfer his OPS into a SIPP. The adviser's suitability letter noted the following:

"You have indicated that you may be looking at using the funds to purchase a commercial investment property. I have not given you any advice on the suitability or otherwise of using your pension in this way".

Mr R applied for the Guardian SIPP in early June 2010. Kingswood confirmed that Hornbuckle Mitchell would no longer accept the SIPP application for the purpose intended. Kingswood recommended a Guardian SIPP which was subsequently accepted.

In late July 2010 Mr R signed the second contract. A SIPP for £45,000 was being used to purchase a 30% share of a hotel property.

In August 2010, the OPS was transferred into the SIPP. Mr R appears to have made a net pension contribution totalling £14,000 and £45,000 was invested in Harlequin Property the same day. In late August, a fee of £3,318 was paid to Kingswood.

At the end of August 2010, Harlequin confirmed to Mr R in writing that all the contracts had been returned by the SIPP provider and enclosed signed copies of the contracts.

In July 2013, Guardian sent Mr R a statement to confirm the Harlequin property was worth £1.

Mr R complained to Kingswood in March 2015 but it said it had no record of this letter. A complaint was later made to our service in June 2015.

Kingswood then responded to Mr R in October 2015. It rejected the complaint saying it was unable to uphold a complaint regarding the suitability of the purchase of an overseas property via the resulting SIPP as this advice had already been given by another financial adviser. In short it said:

- Potential losses were discussed with Mr R and accepted by him. Along with what benefits would be lost if the transfer was to proceed.
- It made clear that it wasn't providing any advice with regard to the purchase of the overseas property.
- Mr R had made up his own mind before he came to Kingswood and had attended a seminar.
- Prior to arranging the pension transfer Kingswood contacted Hornbuckle Mitchell and subsequently Guardian, who confirmed the purchase of an overseas property with Harlequin was an allowable investment through its SIPP.

Kingswood also wrote to our service in November 2015, prior to the adjudicator's view. It made the following key points:

- The advice was solely in relation to the transfer, to allow Mr R to follow his own strategy.
- Kingswood made it clear no advice would be given in relation to the property.
- It has no association with Harlequin and would never provide advice regarding those investments.
- The suitability report and the pension transfer report made it clear that Mr R faced a "stark choice" about whether or not to transfer. Mr R made the decision to transfer in order to get better returns.
- Pension advice had been provided by a regulated firm.
- It was unfair to hold Kingswood responsible for the losses when it was only responsible for recommending the SIPP. The adviser should be responsible for recommending the property purchase.

One of our adjudicators recommended the complaint be upheld. He thought the advice to transfer and invest in the SIPP were unsuitable. He thought Mr R was an inexperienced investor and Harlequin Property investment exceeded the degree of risk Mr R was prepared to take. He also thought Mr R wouldn't have transferred had he been advised not to. The adjudicator explained how Mr R should be compensated for the advice he'd received.

The adjudicator made the following key observations:

- The rules required the business to take reasonable steps to ensure its recommendation was suitable. It had to have a reasonable basis for believing Mr R could bear any related investment risks and the risks of the proposed investment could not have been considered unrelated to the recommended SIPP. The business therefore had to consider the risks of the proposed investment.

- The transfer and SIPP were unsuitable because they had been recommended specifically to allow an unsuitable investment.
- One of the two contracts had been signed after Mr R met Kingswood but before the recommendation was made. But the consequences of not paying the deposit would have been loss of the £1,000 reservation fee. Harlequin had said the contract could be cancelled.
- Mr R was not an experienced investor. He couldn't have assessed the risks himself without advice.
- Kingswood had said Mr R's attitude to risk was adventurous. This was unlikely to be accurate. The answers to the questionnaire were not consistent.
- The promoter might have persuaded Mr R to make the investment regardless. But Mr R had been referred to Kingswood for pension advice that the promoter couldn't provide and so he would have seen Kingswood's advice as significant. The transfer was clearly unsuitable. So advice against making it would have been strongly worded if given.
- The promoter probably hadn't given a balanced explanation of the risks involved.
- Mr R probably wouldn't have transferred if he had been advised not to.
- This service is unable to consider a complaint against an unregulated firm.
- The regulator had produced alerts and final notices that supported the adjudicator's position.

Kingswood didn't respond to the adjudicator's view.

As no agreement has been reached the complaint has been referred to me for review.

my provisional findings

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

Having done so, subject to any further submissions provisionally I'm minded to uphold this complaint and award Mr R higher compensation for trouble and upset.

What was Kingswood required to do?

Advice to transfer from an OPS to a SIPP was a regulated activity. Therefore Kingswood, who provided this advice, was required to comply with regulations. This included an overall duty to act in Mr R's best interests and give suitable advice under the Conduct of Business rules (COBS).

The adviser couldn't have given suitable advice to Mr R to transfer the pension without considering the investment to be made. The SIPP was simply a wrapper to hold investments, and the sole reason for opening the SIPP was to make the Harlequin Property investment.

What did Kingswood do?

I appreciate Kingswood says it only provided advice in relation to the SIPP and didn't give advice on the investment made in the Harlequin Property. It says Mr R already received advice from another adviser about Harlequin and had already signed one of two contracts.

But, Kingswood was required to give suitable advice. Given that the SIPP was recommended to hold the specific investment I don't consider the risks of the Harlequin investment are unrelated to the recommended SIPP. In other words I don't think Kingswood could have given advice to transfer without considering the investment.

This is consistent with the regulator's alerts published on this point which remind advisers that when advice to transfer to a SIPP is given, consideration should also be given to the suitability of the overall proposition – the wrapper and the expected underlying investments.

I also think the regulator's alerts, not published till after the events, are still relevant and also important as reminders of the existing COBS.

What should Kingswood have done?

The investment in Harlequin Property was unregulated and exposed Mr R's pension funds to significant risk. It was an overseas property development with no track record. The way the investment was intended to work wasn't entirely clear.

The rental income from the overseas property was to be paid to Mr R. But, the income depended on the success of the venture. I think this should have been clear to Kingswood when the adviser wrote to Mr R in February 2010. And I think the adviser was well aware of the type of investment Mr R was thinking of making.

The SIPP for £45,000 was being used to purchase a 30% share of a property. Part of the cost was being met by Mr R's pension. In total 30% of the hotel property would be owned by Mr R's SIPP.

I'm satisfied that the advice to transfer Mr R's entire pension to the SIPP was unsuitable. The investments were too high risk for Mr R, who was an inexperienced investor. I note it was recorded in the 2010 Pension Transfer Report that Mr R was happy to take significant risk with the capital, within the pension fund. But I don't think an adventurous attitude to risk was suitable – but it appears to be what was required from those interested in the investment.

Kingswood, in a response in November 2015, said that it believes the only reason Mr R has complained is due to problems associated with the overseas property. If he had invested into a SIPP using mainstream investment funds he would not be in the position he is now.

But I think Kingswood should have advised Mr R against transferring to the SIPP; and also advised him not to invest in Harlequin. I also think Mr R should have been advised that an adventurous level of risk was unsuitable for him and that he could lose all his money by taking this course of action.

I think that advice should have been given before the application for the SIPP was made. I'm mindful Mr R said he was reliant on the individuals he was dealing with, including in my opinion Kingswood. In this instance the SIPP wouldn't have existed but for Kingswood's advice and the transfer wouldn't have been possible.

What would Mr R have done?

It seems Mr R may have paid the reservation fee of £1,000 to Harlequin and he and his wife had already signed the first contract for a 70% personal share of a hotel property.

I don't think that committed him to the purchase at that point. Mr R says he doesn't know why he signed the first contract other than he thought there was additional paperwork.

He signed the second contract only after the recommendation. But failure to make the first payment within the 45 days of reservation appears to have been a breach of contract and Harlequin was chasing for payment and threatening cancellation. And it wasn't until late August 2010 when both contracts were signed by Harlequin.

If Kingswood had given suitable advice I need to consider what Mr R would have done. I think Kingswood should have advised Mr R that investing in Harlequin was high risk. And transferring his entire pension provision was unsuitable because the proposed investment was unregulated, high risk and speculative. He could have lost a significant part, if not all, of his pension. I acknowledge it is also likely Mr R would have lost the £1,000 reservation fee because he'd already signed a contract. So it would have been a difficult choice to make. But on balance I think it's more likely than not Mr R would have taken notice of the advice and abandoned the purchase without losing any more money. Despite his young age, he didn't have capacity to lose a significant part of his money.

Kingswood was a firm regulated to give financial advice and I think Mr R would have given significant weight to any advice it gave about the suitability of the investment. I don't think that Mr R would have transferred his pension or gone against such advice.

The role of other parties in the transaction

The role of the adviser is important. Clearly anything he said could have influenced Mr R to invest in Harlequin. I'm conscious Mr R and his wife had already signed a contract before being given the recommendation by Kingswood and therefore its likely Mr R wasn't advised of the risks involved.

The third party it seems was an agent of Harlequin Properties. I'm mindful Mr R says the Harlequin investment was promoted to him by the Harlequin agent sometime in 2009 and the same agent also referred him to Kingswood in order to receive pension advice. However, once Mr R was introduced to Kingswood, the evidence clearly shows that Kingswood took on the responsibility for providing him with suitable advice regarding this. One of the aims of regulation is to protect consumers. Kingswood was providing advice on investments. This is a regulated activity.

In my view the advice to start the SIPP was unsuitable. Suitable advice would have been for Mr R to continue in his existing pension arrangement. I'm satisfied Kingswood is responsible for the losses suffered by Mr R because it flowed from the unsuitable advice. I don't think advice could have been given without considering the transaction as a whole. The losses Mr R made wouldn't have been made if suitable advice from a regulated firm was involved. In other words suitable advice should have been not to transfer. So I think Kingswood is responsible for the losses.

But the third party played some part in the decision to invest in Harlequin. If Kingswood wishes to claim some of the losses from any other party it may take an assignment of any rights of action Mr R has against them. That is, if it pays Mr R's losses in full.

In other words, if Kingswood wants to take an assignment of any rights of action against any third parties from Mr R then I think that would be reasonable. Mr R should co-operate with Kingswood if it tries to recover those losses.

There is no market for the investment in Harlequin. Mr R should be returned to the position that he would now be in, if he had been given suitable advice. I think Kingswood should compensate Mr R in full and take ownership of the investment in Harlequin.

Should Kingswood pay compensation?

I'm aware that a party involved with Harlequin has been charged with fraud offences. A court might therefore conclude that Mr R's loss didn't flow directly from Kingswood's unsuitable advice. And on this basis, a court might not require Kingswood to compensate Mr R – notwithstanding the clearly unsuitable advice.

But in assessing fair compensation, I'm not limited to the position a court might take. It may be there has been a break in the "chain of causation". That might mean it wouldn't be fair to say that all of the losses suffered flowed from the unsuitable advice. That will depend on the particular circumstances of the case. No liability will arise for an adviser who has given suitable advice; even if fraud later takes place. But the position is different where the consumer wouldn't have been in the investment in the first place without the unsuitable advice. In that situation, it may be fair to assess compensation on our usual basis – aiming to put Mr R in the position he would have been in if he'd been given suitable advice.

I think it would be fair and reasonable to make an award, given the specific circumstances of this case. This is notwithstanding arguments about a break in the "chain of causation" and the "remoteness" of the loss from the (poor) advice given. I am satisfied that Mr R would not have bought the Harlequin Properties had it not been for the failings of Kingswood's adviser. If the adviser had given Mr R suitable advice, the investment in Harlequin would not have been made. And I consider

that the advice given by the adviser completely disregarded Mr R's interests. As a direct result of Kingswood's failure to give suitable advice, Mr R invested the majority of his pension into a specialised, unregulated investment with a limited track record.

So I think that it's fair and reasonable to hold Kingswood responsible for the whole of the loss suffered by Mr R. I'm not asking Kingswood to account for loss that goes beyond the consequences of its failings. I'm satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I'm not able to determine. However, that fact should not impact on Mr R's right to compensation from Kingswood for the full amount of his loss.

fair compensation

My aim is to put Mr R in the position he would now be in if he had received suitable advice. I think that: a.) he would have kept his existing pension; b.) he wouldn't have invested in Harlequin; and c.) as a result he wouldn't have opened the SIPP (and now be subject to ongoing SIPP fees); d) he would have invested the £14,000 of his own money differently. In setting out how to calculate fair compensation my objective is to address these issues. That is what I'm trying to achieve.

There are a number of possibilities and unknown factors in making an award. While I understand Harlequin will allow Kingswood to take over the investment from Mr R, the involvement of third parties – the SIPP provider and Harlequin – mean much of this is beyond this service's or Kingswood's control.

All the variables aren't known and each may have an impact on the extent of any award I 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 R back in the position he would have been in if suitable advice had been given, I think it's fair that Mr R is compensated now. I don't think I should wait and determine each and every possibility before making an award. What is set out below is a fair way of achieving this.

As I've said my aim is to put Mr R, as far as possible, into the position he would now be in if he had received suitable advice. Kingswood should calculate fair compensation by comparing the value of Mr R's pensions, if he had not transferred, with the current value of his SIPP.

In summary:

3. Calculate the loss Mr R has suffered by transferring out of his former employer's final salary pension schemes.

To do that Kingswood will need to take the following steps.

4. Obtain the actual transfer value of Mr R'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.

4. If it is possible, pay a commercial value to buy Mr R's share in 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. I 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, Kingswood 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. I think this is now unlikely.

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

Kingswood may ask Mr R 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 Mr R may receive from the investment and any eventual sums he would be able to access from the SIPP. Kingswood will need to meet any costs in drawing up the undertaking.

I have been provided with the contract between Harlequin and Mr R. This means the SIPP has paid a deposit under a contract with Harlequin. That is the loss I am trying to redress.

I understand Mr R would have 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 R 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 R may want to seek independent advice on how to cancel this ongoing contract for the remaining amount.

If Kingswood takes over the contract from the SIPP trustees then it may be liable for the remaining amount of the purchase price. As a result any total award that Kingswood may have to pay could exceed £150,000. This won't be known until the redress in steps 1 and 2 above has been calculated. If it will exceed £150,000 then I can't tell Kingswood to take over the contract from Mr R's SIPP. But I can address the ongoing SIPP fees that may continue if the SIPP can't be closed. I have dealt with this in step 5 below.

6. Pay an amount into Mr R's SIPP so that the transfer value in (2) is increased to equal the value calculated in (1). This payment should take account of any available tax relief and the effect of charges. It should also take account of interest as set out below.

If it's not possible to pay the compensation into the SIPP, Kingswood should pay it as a cash sum to Mr R.

I'm also not certain whether, currently, Mr R can pay the redress into a pension plan. If he can, it means that the compensation is able to be paid into a pension in the time until Mr R retires and he should be able to contribute to pension arrangements and obtain tax relief. If this is the case, the compensation should be reduced to notionally allow for the income tax relief Mr R could claim. The notional allowance should be calculated using Mr R's marginal rate of tax. For example, if Mr R is a basic rate taxpayer, the total amount should be reduced by 20%.

On the other hand, Mr R may not currently be able to pay the redress into a pension plan. But had it been possible to pay the compensation into the plan, it would have provided a taxable income. Therefore the total amount to be paid to Mr R should be reduced to notionally allow for any income tax that would otherwise have been paid.

The notional allowance should be calculated using Mr R's marginal rate of tax in retirement. For example, if Mr R 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 Mr R 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 the redress calculation until the date of payment. Income tax may be payable on this interest.

7. Pay five years' worth of future fees owed by Mr R to the SIPP; if the Harlequin property can't be purchased.

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

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

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

7. Pay Mr R £400 for the distress and inconvenience caused.

Mr R has been caused some distress by the loss of his pension benefits. I think that a payment of £400 is appropriate to compensate for that distress.

For the final salary pension benefits:

Kingswood Financial Advisers must undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in October 2017.

This calculation should be carried out as at the date of my final decision, and using the most recent financial assumptions published (at the date of that decision). In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr R's acceptance of the decision.

Kingswood Financial Advisors must (if a transfer to a S32 buy out bond from a particular type of scheme) may wish to contact the Department for Work and Pensions (DWP) to obtain Mr R's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr R's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr R's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr R as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. 25% of the loss would be tax-free and 75% would have been taxed according to his likely income tax rate in retirement – which is presumed either to be 20% or 40%

depending on Mr R's circumstances. So making a notional deduction of 15% or 30% overall from the loss adequately reflects this.

In relation to the £14,000

fair compensation

My aim is that Mr R should be put as closely as possible into the position he would probably now be in if he had been given suitable advice.

I take the view that Mr R would have invested differently. It's not possible to say *precisely* what he would have done differently. But I'm satisfied that what I've set out below is fair and reasonable given Mr R's circumstances and objectives when he invested.

what should Kingswood do?

To compensate Mr R fairly, Kingswood must:

- Compare the performance of Mr R's investment with that of the benchmark shown below. If the *fair value* is greater than the *actual value* there is a loss and compensation is payable. If the *actual value* is greater than the *fair value*, no compensation is payable.

Kingswood should add interest as set out below.

If there is a loss, Kingswood should pay into Mr R's pension plan to increase its value by the total 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 Kingswood is unable to pay the total amount into Mr R'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 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 Mr R's actual or expected marginal rate of tax at his selected retirement age.

For example, if Mr R is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr R would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

Income tax may be payable on any interest paid. If Kingswood deducts income tax from the interest it should tell Mr R how much has been taken off. Kingswood should give Mr R 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
Guardian SIPP	transferred	average rate from fixed rate bonds	date of investment	date transferred	8% simple per year on any loss from the end date to the date of settlement

actual value

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

fair value

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

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Kingswood should use the monthly average rate for the fixed rate bonds with 12 to 17 months maturity as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

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

why is this remedy suitable?

I've decided on this method of compensation because:

- Mr R wanted to achieve a reasonable return without risking any of his capital.
- The average rate for the fixed rate bonds would be a fair measure given Mr R's circumstances and objectives. It doesn't mean that Mr R would have invested only in a fixed rate bond. It's the sort of investment return a consumer could have obtained with little risk to the capital.
- The additional interest is for being deprived of the use of any compensation money since the end date.

my provisional decision

For the reasons set out above, I'm minded to uphold this complaint.

I direct Kingswood Financial Advisors to calculate and pay compensation as set out above.

Where I consider that total fair compensation requires payment of an amount that might exceed £150,000, I may recommend that the business pays the balance.

determination and money award: I require Kingswood to pay Mr R compensation as set out above, up to a maximum of £150,000.

The compensation resulting from the loss assessment must where possible be paid to Mr R within 90 days of the date Kingswood Financial Advisors receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Kingswood Financial Advisors to pay Mr R this compensation.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I also recommend that Kingswood Financial Advisors pays Mr R the balance. I further recommend interest to be added to this balance at the rate of 8% per year simple for any time, in excess of 90 days, that it takes Kingswood Financial Advisors to pay Mr R from the date it receives notification of his acceptance of the decision, as set out above.

If Mr R accepts my determination, the money award is binding on Kingswood. My recommendation is not binding on Kingswood.

Further, it's unlikely that Mr R can accept my determination and go to court to ask for the balance of the compensation owing to him after the money award has been paid. Mr R may want to consider getting independent legal advice before deciding whether to accept this decision.

Dara Islam
ombudsman