Financial Ombudsman Service

complaint

Ms H complained she was given unsuitable advice by Kingswood Financial Advisors to transfer her personal pension plan to a self-invested personal pension (SIPP). The SIPP was set up to allow Ms H to invest in Harlequin off-plan hotel developments in the Caribbean.

background

Around early 2010, Ms H and her partner, Mr J, met with an agent for Harlequin. This agent had provided financial advice to Ms H and Mr J in the past. The agent recommended Ms H and Mr J invest in Harlequin property. The agent referred them both to Kingswood for advice on transferring their personal pensions into a SIPP.

In February 2010 Kingswood met with both Ms H and Mr J. A fact find was carried out. In relation to Ms H, amongst other aspects, it recorded:

- She was about 50 years old and self-employed.
- She had a gross annual income of about £30,000.
- She had a personal pension with a transfer value of about £38,000.
- She owned a house with her partner worth about £100,000.
- She owned a second property worth about £85,000.
- With Mr J, she had £60,000 in a deposit account.

The note of the meeting indicated that Ms H and Mr J had informed Kingswood that they had been in negotiations with a third party over an overseas property purchase.

About a week later, Kingswood sent a letter of advice. It recommended Ms H and Mr J transfer their personal pensions into a SIPP. The letter of advice said:

- She had indicated she wanted to use her funds to invest in Harlequin.

- Kingswood had not provided any advice on the suitability of using her pension funds in this way.

- She would transfer her entire personal pension into the SIPP.

- Her objective was to achieve a much better return than in the bank or building society, and match or beat the rate of inflation.

The letter doesn't make clear what Ms H's attitude to risk (ATR) was. It appeared to say in relation to both Ms H and Mr J that their ATR was "*6-7*." That they *"would like to take a moderate amount of risk"* with the funds. However, we haven't been provided with an ATR questionnaire in relation to Ms H; only in relation to Mr J which corresponded with the rating given in the letter.

Kingswood recommended a particular SIPP for Ms H to transfer her pension to. This was for the sole purpose of allowing Ms H to invest money from the SIPP into Harlequin.

In July 2010 Ms H and Mr J signed the sale contracts to buy two Harlequin properties. The payments from their SIPPs were, approximately, as follows:

	Contract for property in	Total share of property bought by SIPPs	Funds used from Ms H's SIPP	Funds used from Mr J's SIPP
1	Barbados	30%	£24,000	£24,000
2	St Lucia	22.76%	£10,609.50	£26,944.50
		Total:	**£34,609.50**	**£50,944.50**

The remainder of the purchase prices would be paid by Ms H and Mr J in instalments as the properties were built. This would be under separate contracts between Harlequin and Ms H and Mr J for the remaining shares.

In July 2010, Kingswood arranged for Ms H and Mr J to transfer their SIPPs to a different SIPP provider. This was on the basis that the original SIPP provider had informed Kingswood it wouldn't accept a second Harlequin property in the SIPP. This was arranged and in October 2010 money was paid from Ms H's SIPP to purchase the second property.

To date, neither development has been built, and it's likely Ms H and Mr J have lost all of their original funds. As at August 2013, Ms H and Mr J's investment in the properties were valued at £1 for each property.

In March 2015 Ms H and Mr J complained to Kingswood. It said the advice to transfer their pensions had been unsuitable. Kingswood hasn't provided any response in relation to Ms H. In relation to Mr J it said:

- Mr J was advised by the agent on purchasing the property, not Kingswood. He had already made up his mind to invest.
- Kingswood was only asked to advise on which SIPP would allow Mr J to invest in Harlequin. The only suitable option was a SIPP. The very nature of a SIPP is to allow investment in areas not normally available to the public.
- Kingswood told Mr J it was not advising on the suitability of using his pension fund to invest in Harlequin property. He was told it was only advising on a suitable SIPP to allow him to carry out his wishes.
- It's not fair that Kingswood is held responsible for advice given by an un-connected advisor from a different firm.
- The losses from transferring were explained to Mr J in a comprehensive suitability report.

I think it's reasonable to assume that this response extends to the complaint of Ms H as well as Mr J on the basis they were jointly advised.

Our adjudicator thought Kingswood hadn't given Ms H suitable advice and upheld the complaint. He said that Kingswood should put Ms H back in the position she would've been in if she hadn't transferred her pension.

Kingswood doesn't agree with the adjudicator and the complaint has been passed to me for a decision.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. In doing so, I agree with the adjudicator. I think Kingswood has done something wrong.

Mr J has also brought a complaint to this service. I will deal with his complaint in a separate decision.

(1) what was suitable advice?

Kingswood said that the scope of its agreement restricted its advice to just choosing the right SIPP. This is what Ms H wanted as she had already committed to investing in Harlequin. And she knew Kingswood was only advising on this.

COBS 2.1.1R required Kingswood to act *"honestly, fairly and professionally in accordance with the best interests of its client."* This is an independent duty on the firm. It can't simply say that the customer had already decided what she wanted to do, so it simply carried out her wishes regardless of whether it was in Ms H's best interests. I'm also mindful of the principles for business and in particular principles 1 (*integrity*), 2 (*due skill, care and diligence*), 6 (*customers interests*) and 9 (*reasonable care)*.

Therefore, although Ms H may have received advice from the agent, she had still been referred to Kingswood for advice on the transfer. It still had an obligation to consider whether it was in her best interests. I understand the agent was an appointed representative of a regulated firm. But he wasn't authorised to advise on unregulated investments such as Harlequin properties or pension transfers. That's why Ms H was referred to Kingswood. I think Kingswood knew this. Kingswood couldn't reasonably rely on Ms H being advised in this unregulated manner. It had an independent duty.

COBS 9.2.1 required Kingswood to obtain the necessary information about the client's knowledge and experience relevant to the specific type of investment and the investment objectives. Having done so, COBS 9.2.2 required Kingswood to consider whether the transfer from the personal pension to the SIPP met Ms H's investment objectives, she could bear the risks involved, and that she understood the risks.

Ms H was looking at transferring her personal pension to a SIPP. To determine whether that was suitable or not required Kingswood to understand the property that the SIPP was going to invest in. Kingswood knew that was the sole objective behind the transfer. To be able to advise in accordance with the rules, it had to understand the risks associated with the property. Without this information it could not say whether the transfer was suitable or not. GEN 2.2.1 states "*every provision in the Handbook must be interpreted in the light of its purpose."* 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 Kingswood closed its eyes from the purpose of the SIPP would avoid looking at all of the factors that the rule (and the rest of Chapter 9) says are necessary to ensure suitability.

(2) was the transfer suitable?

The property was high risk, highly illiquid, highly geared and speculative. In contrast, Ms H transferred her entire personal pension. There's no evidence she had any experience of property investments like Harlequin. Her fact find recorded she had limited capacity for loss.

Kingswood recorded that Ms H would like to take a *moderate amount of risk*. It said her objective was to earn a better rate than leaving her funds in a bank account. At no point does Kingswood reconcile this inconsistency with the high risk nature of the property she was proposing to invest her pension funds in. The only reason she transferred into the SIPP was to invest in the property. I think on any view, Kingswood should have advised Ms H that the transfer to the SIPP to invest in the property wasn't suitable.

Having given advice to Ms H that her proposed course of action wasn't suitable, Kingswood had a number of options open to it. Kingswood could choose not to carry out the transaction. Or it could look to carry out the transfer but on an insistent client basis (if that's what Ms H was). This would involve making it clear to Ms H what the risks were, that her actions were against Kingswood's advice and what the alternative options were to her. There's no evidence that the transaction was carried on either an 'insistent client' or 'execution only' basis.

If Ms H had truly been advised by another party, then she would still remain free to follow that advice if she really wanted to. But the argument that anything other than transferring into a SIPP wouldn't be right for Ms H seems to confuse 'suitability' with 'doing what the client says she wants'. These are not necessarily the same thing. It assumes the client truly understands the risks involved and that the stated outcome genuinely reflects the investment objectives of the client. This is important and goes to the heart of being a regulated advisor.

(3) what would Ms H have done?

While looking back it's difficult to be sure what someone would've done if suitable advice had been given. I think, on balance, Ms H wouldn't have transferred to the SIPP and gone ahead with investing in the properties.

The property was recommended to Ms H by the agent who was also a financial advisor. But Kingswood 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 Ms H and carried due weight - despite what the agent may have told her about Harlequin. Kingswood said it highlighted the losses associated with the transfer. But I think that misses the point. Kingswood didn't advise Ms H *not* to transfer. It recommended the SIPP for her. She relied on its endorsement of the proposed pension transfer to facilitate the investment.

It's common in Harlequin property purchases for the buyer to pay a £1,000 reservation fee. If Ms H had done this, this represented a small proportion of the total purchase price. Even if it wasn't refundable, I don't think this would have prevented her from stopping the transfer given the greater risk and possible losses she would've been advised she was exposing herself 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 Kingswood's advice should reasonably have had, I'm satisfied this test has been met. On balance, I believe Ms H wouldn't have invested in the property had Kingswood given her suitable advice.

(4) role of others

Kingswood said it wasn't fair that it was held responsible for the advice given by the agent. What Ms H was told by the agent isn't clear, and no evidence has been provided about that. But, for the reasons I have already given, I don't think this means Kingswood isn't responsible for the losses Ms H incurred. If Kingswood had given suitable advice Ms H wouldn't have invested. It had a duty to give that advice but didn't. If Kingswood thinks another advisor is partly responsible than it may wish to seek action against that party.

In the same way, Kingswood said the SIPP provider confirmed it had carried out the necessary due diligence on the property. If Kingswood feels that the SIPP provider may also be liable for the losses suffered, then that's a matter for it. Ms H contracted with Kingswood. Because of Kingswood's regulated advice she transferred into the SIPP in order to invest in Harlequin.

fair compensation

On 21 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 were provided to us.

My aim is to put Ms H as close as possible to the position she would probably now be in if she'd been given suitable advice. I think that she would have kept her existing personal pension; 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's what I'm trying to achieve.

There are a number of possibilities and unknown factors in making an award. We understand Harlequin will allow Kingswood 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 properties will be completed and unlikely that the contracts and any future payments would be enforceable. While it's complicated to put the consumer back in the position she would have been in if suitable advice had been given, I think it's fair that Ms 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.

Kingswood should calculate fair compensation by comparing the value of Ms H's pension, if she hadn't transferred, with the current value of her SIPP. In summary:

1. Obtain the notional transfer value of Ms H's previous pension plan if it had not been transferred to the SIPP. That should be the value at the date of this decision.

2. Obtain the transfer value as at the date of the decision of Ms H’s SIPP, including any outstanding charges.

3. Pay a commercial value to buy Ms H’s share in the properties.

4. And then pay an amount into Ms 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. It should also take account of interest as set out below.

In addition, Kingswood should:

5. Pay five years’ worth of future fees owed by Ms H to the SIPP.

6. Pay Ms H £300 for the trouble and upset caused.

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

1. *Obtain the notional transfer value of Ms H’s previous pension plan if it had not been transferred to the SIPP. That should be the value at the date of this decision.*

On the date of decision, Kingswood should ask Ms H's former pension provider to calculate the notional transfer value that would have applied had she not transferred her pension but instead remained invested in the same funds.

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.

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

2. *Obtain the transfer value as at the date of the decision of Ms H’s SIPP, including any outstanding charges.*

Kingswood should then deduct the result of 2 from the result of 1. That is the loss to her pension.

3. *Pay a commercial value to buy Ms H’s share in the properties*.

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

The valuation of the Harlequin investments may prove difficult, as there is no market for them. 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 investments.

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

The SIPP has paid a deposit under two contracts with Harlequin. That is the loss I am trying to redress. Ms H agreed to pay the remainder of the purchase prices under separate contracts. Those sums have not yet been paid, so no further loss has been suffered. However, if the properties are completed, Harlequin could require those payments to be made. I think it's unlikely that the properties will be completed, so I think it's unlikely there will be further loss. But there might be. Ms H needs to understand this, and that she won't be able to bring a further complaint to us if these contracts are called upon. Ms H may want to seek independent advice on how to cancel the ongoing contracts for the remaining amount.

4. *Pay an amount into Ms 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, Kingswood should pay it as a cash sum to Ms H. But the compensation should be able to be paid into a pension in the time until Ms H retires and she 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 Ms H could claim. The notional allowance should be calculated using Ms 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.

5. *Pay five years' worth of future fees owed by Ms H to the SIPP.*

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

I think Kingswood should be able to take over the investments to allow the SIPP to be closed. This is the fairest way of putting Ms H back in the position she 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 Ms 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 Ms H with some confidence that she will not be subject to further fees.

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

6. *Pay Ms H £300 for the trouble and upset caused.*

Ms H has been caused some distress by the loss of all of her 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 Ms H's complaint against Kingswood Financial Advisors. 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 Ms H to accept or reject my decision before 27 June 2016.

Benjamin Taylor
ombudsman