## complaint

Mr G's complaint is that an adviser with Positive Solutions, now Quilter Financial Planning Solutions Limited, gave him unsuitable advice to transfer his existing pensions to a self-invested personal pension (SIPP) in order to invest in a Harlequin Property investment scheme. Mr G thinks the investment was too risky for him and he should have been advised against it.

## background

Mr G says in 2009 his brother told him about a type of investment he was considering. It was in an overseas property-based investment with Harlequin Property through a company I will refer to as the Harlequin agent. Mr G was told he could invest with Harlequin in his pension, but the Harlequin agent could not advise him about that. He was introduced to an adviser I will call Mr M, who was an adviser with Positive Solutions, as he was authorised to advise on pensions.

Mr G set up a SIPP with Rowanmoor as recommended by Mr M and transferred his pensions to it, and invested in the Harlequin Property investment. The investment was not a success. The property was not built, and parts of the Harlequin group went into administration.

The investment was in an unbuilt studio apartment in a development in the Dominican Republic. The contract was with Promatora San Patricio SA a company incorporated in the Dominican Republic.

Mr G bought a 50% share of the property on a "fractional ownership basis". The property was part of a larger development that was to be managed by, or on behalf of, Harlequin. The total purchase price was £60,000. Mr G paid the 30% deposit of £18,000 according to the contract. The balance was payable in stages as the building work progressed.

The target completion date for the property was 31 March 2013. This was subject to possible extension under the contract for delay caused by "force majeure".

The contract allowed the buyer to terminate the contract and request a refund within 90 days if the seller failed to transfer the property to the investor within 12 months of the completion date if the force majeure clause did not apply. The contract had a similar provision if the seller failed to sell the other share of the property within 12 months of the target completion date.

In March 2013 Essex police and the Serious Fraud Office announced they had launched an investigation into Harlequin.

In November 2013 Mr G emailed Rowanmoor saying it looked like Harlequin Property would be going into liquidation, and that his property had not been built, so he was going to write to Harlequin to cancel the contract and demand the return of his deposit.

Later Mr G complained to Positive Solutions with the help of a claims management company (CMC).

Positive Solutions did not uphold the complaint. It said the complaint had been made too late to be considered because Mr G should have known about problems with the Harlequin investment for more than three years before he complained.

Mr G referred his complaint to the Financial Ombudsman Service. One of our adjudicators considered the time bar arguments. The adjudicator thought the complaint had not been made too late and could be considered. Positive Solutions did not agree. The matter was referred to one of my fellow ombudsmen and she issued a jurisdiction decision saying the complaint had not been made too late and could therefore be considered.

Positive Solutions then said it did not think the complaint could be considered for a different reason. It said the adviser was not acting for it in this matter. Positive Solutions said the adviser was appointed to give advice on its behalf but was not authorised to give advice about unregulated investments like Harlequin, and Rowanmoor was not on its list of approved providers.

I issued a provisional decision in Mr G's complaint on 6 January 2021. I went through the evidence in detail. I explained why I thought we can consider the complaint and why I thought the adviser should have advised Mr G not to invest in Harlequin in his pension. However I went on to say, in the particular circumstances of this case, I thought it was more likely than not that Mr G would still have invested in Harlequin even if the adviser had given that advice.

I said this because Mr G's brother was the agent for Harlequin who introduced the investment to Mr G.

Positive Solutions did not make any comments in response to my provisional decision.

Mr G does not agree with my provisional decision. He has made a number of points including:

- The provisional decision is unfair.
- The provisional decision explains why Mr M was at fault in the advice he gave and Mr G trusted that advice form a certified IFA.
- As Mr G has repeatedly explained, he had no idea of his brother's business involvement in this or any other investment.
- Mr G had no real relationship with his brother and would not have trusted him with the future of his hard-earned pension fund.
- If, as suggested in the provisional decision, Mr G would have invested anyway, why did he need to involve Mr M?
- Mr G was looking for the best investment opportunity possible for his pension fund, not the first one he was told about. It was Mr M's duty to ensure that happened and he failed to do so, leading to the losses Mr G has suffered.

## my findings – jurisdiction

I have considered all of the evidence and arguments in order to decide whether we can consider this complaint.

### *time bar*

I agree with my fellow ombudsman's decision on time bar and have nothing to add on that point.

***jurisdiction – the not acting for Positive Solutions point***

Put briefly, we can consider Mr G's complaint if the complaint is about a regulated activity that Positive Solutions authorised Mr M to carry on.

Mr G says Mr M gave him advice to set up his SIPP, and transfer his pensions to it, so he could then invest in the Harlequin investment within the SIPP.

Advising someone to set up a SIPP and to transfer rights in existing personal pensions to it is a regulated activity. Arranging those deals is also a regulated activity.

Positive Solutions' main position is that if Mr M did do those things he was not acting for Positive Solutions when he did so and so it is not responsible, and the complaint cannot be considered against it.

***was there advice?***

Positive Solutions says the adviser made it clear he was unable to provide any advice. When one of our investigators asked for a copy of Mr M's statement it mentioned that Mr M had provided his information on another case. In this case Positive Solutions added the following from Mr M:

> *"To give you the background for this case my wife and I had invested in Harlequin ourselves through a friend. Later, around the end of 2009, I became a sub agent for Harlequin within the group [name of Harlequin agent]. This group was headed up by [Mr G's] brother..."*

And in the other case when asked for more information Positive Solutions said:

> *"As I recall I became a sub agent with [name of Harlequin agent] near the end of 2009 and as such it is unlikely that I would have received any commission.*
>
> *I can therefore confirm there was no conflict of interest and I acted for [the consumer in the other case] as his IFA, which at that point I had been doing so for [many years]"*

The above clarification was given despite the adviser having earlier said that he had made it clear he and Positive Solutions could not give advice.

In my view, it's possible Mr M may have changed his practice over time. However I do not think he had in his dealings with Mr G - which started in September 2009.

In my view the evidence does show that Mr M recommended a Rowanmoor SIPP to Mr G, and the transfer of his existing pensions to it, so that Mr G could invest in Harlequin. It's not clear that Mr M recommended the Harlequin investment itself, rather that idea seems to have come from Mr G's brother and/or the Harlequin agent.

***was the advice given on behalf of Positive Solutions?***

Mr M was not an employee of Positive Solutions – he was its agent. Positive Solutions says Mr M was acting beyond the scope of the agency agreement between them and so he was not acting for it if he gave the disputed advice.

The law recognises more than one type of agency. There is agency based on actual authority. And in this case, there was a written agency agreement between Mr M setting out the terms on which Mr M acted for Positive Solutions. There is a general point in agency of this type that the agent is required to try to act in the principal's best interests.

In this case the giving advice on investments Positive Solutions had not approved and not accounting to it in any way for any commission means Mr M was not acting in accordance with the actual authority he had been given.

That is not however the end of the matter because there is also agency based on apparent or ostensible authority. This arises when the principal represents to third parties through words or conduct that the agent has authority to act on its behalf, and the third party reasonably relies upon that representation.

The case law makes it clear that whether a claimant has relied on a representation is dependent on the circumstances of the individual case. So here, I must consider whether, on the facts of this individual case:

- Positive Solutions made a representation to Mr G that Mr M had Positive Solutions' authority to act on its behalf in carrying out the activities he now complains about; and

- Mr G reasonably relied on that representation in entering into the transactions he now complains about.

I need to decide whether Positive Solutions placed Mr M in a position which would, objectively, generally be regarded as carrying its authority to enter into transactions such as setting up of the SIPP, and transfer existing pensions to it, in order to invest in the Harlequin investment scheme. Put another way, did Positive Solutions knowingly – or even unwittingly – lead Mr G to believe that Mr M was authorised to conduct business on its behalf of a type (namely, advising and arranging investments) that he was not in fact authorised to conduct?

If I find that it did, I also need to decide whether Mr G reasonably relied on any representation Positive Solutions made.

***Did Positive Solutions represent to Mr G that Mr M had the relevant authority?***

The ultimate question is whether there was apparent authority in relation to this transaction. But to answer that question, it is right for me to consider whether Positive Solutions placed Mr M in a position which would objectively carry Positive Solutions' authority for Mr M to conduct business of a *type* he did in fact conduct.

Mr G and Mr M did not have a client/adviser relationship before the events in this complaint. And Mr G seems to have been introduced to Mr M by the Harlequin agent. However there can be no question that in 2009 Mr G understood Mr M was with Positive Solutions since he communicated with Mr G using Positive Solutions stationery.

It's not clear Mr G was given a terms of business agreement in respect of the disputed advice. If he was it would have shown that Mr M could advise on and arrange investments and set up SIPP's for Positive Solutions' customers. None of these activities would be unexpected for an IFA firm. They are all the type of activity that IFA's are usually authorised to do.

Even if Mr G did see the terms of business agreement, any restrictions on the authority to give advice on transferring existing pensions, setting up a SIPP or using only certain investments would not have been visible to Mr G. So, for example, he would not have known that an adviser should only recommend approved investments, should obtain clearance from Positive Solutions before giving certain types of advice and should present the advice in certain ways.

If Mr G did not see the terms of business agreement, he did still know Mr M to be an adviser for Positive Solutions.

Positive Solutions held itself out as an independent financial adviser that gave advice and offered products from the whole of the market after assessing a client's needs. No information was provided to clients or potential clients about the agent being authorised in relation to approved products only.

Positive Solutions authorised Mr M to give investment advice on its behalf and Mr M was held out by it as authorised to give investment advice on its behalf. Positive Solutions arranged for Mr M to appear on the FSA register in respect of Positive Solutions. And Mr M was approved to carry on the controlled function CF30 at the time of the disputed advice.

Positive Solutions placed Mr M in a position which would, in the outside world, generally be regarded as having authority to carry out the acts Mr G complains about.

Positive Solutions provided Mr M with Positive Solutions business stationery so Mr M could advise on investments.

It was in Positive Solutions' interest for the general public, including Mr G, to understand that it was taking responsibility for the advice given by its financial advisers. I am satisfied that Positive Solutions intended Mr G to act on its representation that Mr M was its financial adviser.

I further consider that the provision of financial advice was a key part of Positive Solutions' business. It said in its terms of business that its "*Partners*" would give "*impartial, independent financial advice*". I do not see how Positive Solutions could have carried out its business activities at all if the general public had not treated registered individuals like Mr M as having authority to give investment advice on behalf of Positive Solutions.

It is my view that all of these points taken together mean that Positive Solutions did represent to Mr G that Mr M was authorised to give the investment advice he gave to Mr G.

***did Mr G reasonably rely on Positive Solutions' representation?***

It is Mr G's position that the Harlequin investment idea was introduced to him by the Harlequin agent but that the Harlequin agent could not advise about pensions and so it told him he would need to deal with a financial adviser that could. I take this to mean an adviser

that was allowed or permitted to advise about those matters. This was to be official or proper advice meaning advice from a regulated financial adviser not just an informal chat with someone who happens to know a bit about pensions.

Mr G knew Mr M to be with, or from, Positive Solutions and thought he was acting as a Positive Solutions' adviser when he gave the advice he complains about. Positive Solutions has said that Mr M made it clear that he was not acting as a Positive Solutions adviser when he gave the advice. There is no evidence to support this and the point tends to be undermined by Mr M himself in what he has said in another case.

I haven't seen any evidence to show that Mr G knew or should reasonably have known that Mr M was acting in any capacity other than as a Positive Solutions adviser.

In my view, on balance, the evidence does indicate that Mr G proceeded on the basis that Mr M was acting in every respect as the agent of Positive Solutions with authority from Positive Solutions so to act. In other words, Mr G reasonably relied on Positive Solutions' representation that Mr M was authorised to give the investment advice he gave to Mr G.

It is therefore my finding that Positive Solutions is responsible for the advice Mr G complains about and that we can consider his complaint.

**my findings - merits**

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

In 2013 the Financial Services Authority issued an alert in relation to "Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP". In summary it said that where an adviser recommends a SIPP knowing the client is intending to invest in a certain way, the investment must also be considered as part of the advice process.

Although this alert was issued after Mr M advised Mr G to take out a SIPP and transfer his existing pension rights to it, the alert was a reminder of existing obligations and therefore is relevant.

I agree that it was not appropriate to advise on the setting up of a SIPP and the transfer of personal pensions to it without taking also into account the intended investment in Harlequin in this case.

The investment in Harlequin was relatively high risk. In my view investing in an unregulated off-plan overseas property investment scheme involved a high degree of risk which was not by normal standards suitable for Mr G. He was not a sophisticated investor. He did not own his own home and his savings were earmarked for use as a deposit for a house. He was not in such a secure financial position that he would generally be thought to be able to take a high degree of risk with his pension. And one of the pensions transferred had the benefit of a guaranteed annuity rate which was lost when that pension was transferred.

However there is a factor in this case that makes Mr G's case different to what might be considered normal. Mr G was introduced to the idea of investing in Harlequin by his brother (who he says introduced him to the Harlequin agent).

It's Mr G's case that he dealt with the named Harlequin agent and there is evidence of that, such as a letter from Harlequin in October 2010 and the copy letter from the Harlequin agent in August 2010. So there is no suggestion that Mr G dealt with a different Harlequin agent, one that was nothing to do with his brother.

Mr G's brother is shown on the Companies House website as one of the directors of the Harlequin agent. Mr M says Mr G headed up the company. When we asked Mr G about his brother and the Harlequin agent, Mr G did not say there had been a mistake and that his brother was not a director or was not involved.

In all the circumstances there seems to be no dispute that Mr G's brother was, in effect, the Harlequin agent.

Positive Solutions, in effect, says that if Mr M did give unsuitable advice, I should still not find against it because that wrong did not cause Mr G's loss. And that's because he would have invested in Harlequin in any event because of his close connection to the Harlequin agent who promoted the investment.

Mr G says a number of things about this, but an overarching point is the argument that it's not relevant. He went to Mr M for regulated advice. Mr M was under an obligation to give suitable advice. If he didn't give suitable advice the complaint should be upheld because if Mr M had advised him not to invest, Mr G would not have invested.

Mr G asks why Mr M was involved if he was just going to follow his brother's recommendation to invest in Harlequin. The answer to that is that the regulated adviser was apparently needed to deal with investments within pensions. Those pension funds must be in a SIPP so a SIPP had to set up and the existing pensions transferred to it. These are matters normally dealt with by regulated financial advisers and Mr G's brother was not a regulated financial adviser. That's why Mr M was involved. And because he advised on the SIPP and the existing pensions, he should have considered the suitability of the Harlequin investment for Mr G's pension. But the issue remains whether Mr G would have invested in Harlequin if Mr M had said the Harlequin investment was unsuitable for Mr G's pension.

I have to decide disputed matters on the basis of the evidence making my findings on the balance of probabilities. That does not mean just accepting the evidence presented to me without question even where there is little or no directly conflicting evidence. Points such as the consistency of the account and the plausibility of the account, need to be considered as well as consistency with all other available evidence.

If, after considering all of these matters, I think what Mr G argues to be more likely than not, I should uphold his complaint. If I cannot come to that conclusion then I cannot uphold Mr G's complaint. That is the case even if it does not feel fair to Mr G for me to come to that view.

I appreciate that Mr G has repeatedly said he had no idea about his brother's business involvement with Harlequin. But, as I explained in my provisional decision, on balance I am not persuaded that what Mr G says is more likely than not – which is the test I must apply when assessing the evidence. There are several points that lead me to that view. Individually they are not all necessarily of equal value or on their own determinative. But taken together the points do mean I am not persuaded that what Mr G says is more likely than not. And Mr G has not really disputed or given an alternative explanation for those points when he commented on my provisional decision.

As a first point I note that Mr G did not give a full and open account of matters from the outset.

Mr G's account of events to Positive Solutions and to the first adjudicator make no mention of the original idea of investing in Harlequin coming from his brother. Rather, Mr G said:

> *"[Mr M's first name] approached me with the Harlequin investment…" and*
>
> *"I had no understanding of pensions or investing when [Mr M] told me about the opportunity to invest in Harlequin Properties."*

These points are not completely contrary to Mr G's more fully described account of events – but they do tend to give a different impression.

It is right to say that there was amongst the documents originally sent to the ombudsman service by Mr G, and his CMC, a letter from Harlequin from October 2010 that referred to the Harlequin agent by name. So it would be wrong to say Mr G was denying the involvement of the Harlequin agent at this early stage – but he wasn't talking about it either. And what he did say gave the impression that Mr M had introduced the idea of investing in Harlequin to Mr G.

It was only when an investigator asked about Mr G's relationship with the Harlequin agent and referred to the letter from October 2010, and asked for copies of all other correspondence with the Harlequin agent, that Mr G said:

> *"[The Harlequin agent] was recommended by a family member in 2009."*

Mr G did not provide copies of any correspondence with the Harlequin agent in response to this request. But he did later provide a copy of a letter from the agent after the investigator had pointed out Mr G's brother's relationship with the agent.

Mr G's reference to a recommendation by a *"family member"* rather than specifying the recommendation was from his brother, and how it came about, leaves an impression that Mr G wanted to give out as little information as he could. It was only after being asked more questions that Mr G mentioned that the family member was his brother.

Mr G did not mention that his brother had a connection with the Harlequin agent – but that is consistent with his case that he did not know that his brother was connected with the Harlequin agent.

But then if Mr G did not know his brother was the Harlequin agent why did he not mention that his brother had suggested the investment in the first place? On its own the point is not fatal to his claim. He could still say, as he does, that Mr M is the regulated adviser and he should have given proper advice. That argument only becomes harder to make if the brother was more than just another potential investor, if he was also involved in the selling of the Harlequin investment.

There is also the point about Mr G not providing copy documents when asked and then providing a copy document from the Harlequin agent later to support a point he was making at that time.

All in all I have concerns about the lack of an open and consistent accounting for events from Mr G.

Next, there is the issue of plausibility.

I accept not all families are the same and that Mr G and his brother may not be close. But according to Mr G his brother told him he was thinking of investing in a property investment with Harlequin through a Harlequin agent he named. This was an agent he was a director of but did not mention that to Mr G. This does not seem very plausible.

I can see that Mr G might not have known that his brother was an agent for Harlequin before the conversation started if they are not close and his brother changes his job often. But why would the brother not mention it when they were talking about Harlequin investments? It's difficult to make sense of that. The connection to Harlequin was of interest, relevant even. Why not talk about it?

It is important not to use hindsight. In 2009 and 2010 when these discussions were taking place Harlequin investments were being actively promoted to investors as attractive investments. They may have a poor reputation now, but they did not have that reputation then. So it's not obvious why Mr G's brother would be reluctant to reveal his connection with the investments.

One possible explanation might be that the brother thought Mr G did not trust his judgement or motives. And that Mr G would not want to have anything to do with it if he knew his brother was involved and the brother kept quiet to ensure he got his commission on Mr G's investment. But this does not seem to add up because Mr G trusted his brother's judgement enough to express an interest in the same non-mainstream investment his brother was apparently considering. Why would that be if Mr G somehow thought his brother lacked judgement or was untrustworthy or irresponsible?

And this was before the Harlequin agent had told him it was possible to invest through his pension. Mr G had no investments - but was saving for a deposit on a house. So it was a big commitment for Mr G, and he was interested in his brother's investment idea before he knew a regulated adviser would have to be involved.

Mr G says he did not discover his brother's connection to the Harlequin agent until we asked him about it in 2020 suggesting either they never discussed the investment again after that first conversation and/or the brother continued to mislead him over a number of years. And the brother also somehow arranged for their mother to be registered as the company secretary of the Harlequin agent without her knowing (or remembering).

It seems unlikely that in all his dealings with both Mr M and the Harlequin agent that no one ever mentioned or discussed the connection with his brother given they have the same last name - and Mr M knew of the connection.

Also for some unspecified reason the usual fee Mr M charged according to the printed schedule of charges was waived in Mr G's case. This might seem to suggest he was treated as a special case in some way.

Mr G emailed Rowanmoor in November 2013 after he had heard that Harlequin might go into liquidation. He asked if the payment had been paid to Harlequin for the deposit on the property. He went on to say:

> *"… it looks like Harlequin property is about to go into liquidation & my property in Las Canas to which the Sipp relates… will never even be built & therefore my pension fund will just sit there & be eaten up over time with fees & expenses. As the completion date is now more than 6 months overdue with no sign of the property even being built, I am going to write to Harlequin & cancel my contract with them. If my deposit his indeed already been paid to them they should refund it within 90 days but I would like you to confirm this status please…."*

We asked Mr G if his brother or anyone else helped him with this email and he said no. The email does seem both uninformed and quite well informed. On the one hand it shows Mr G did not understand the pension statements he received from Rowanmoor – the payment out of the deposit still meant he had an asset in his SIPP – ie the interest in the property he was buying.

On the other hand, the email shows knowledge of the right to a refund of the deposit within 90 days of notice of termination. Mr G could have checked this point in the contract himself. But if he had he would have seen that notice to terminate could be given after 12 months delay not six (as Rowanmoor pointed out to him when he asked it to try to get his money back). It seems like the writer of Mr G's email has some understanding but had not checked the details. And Mr G generally presents as someone who would not have an understanding without checking the details (just as he was checking with Rowanmoor whether or not it had paid his money to Harlequin).

Also as Mr G's CMC pointed out on his behalf in the early part of this complaint when time bar was still in issue, his contract was not with Harlequin Property it was with Promatora San Patricio SA. And at that time Harlequin itself was not saying the properties would never be built – it was saying it was in dispute with third parties who had let it down and that it was hoping to turn things around.

Overall, I am of the view that the email shows some understanding of the position regarding Harlequin which seems consistent with it having been discussed with Mr G's brother despite what Mr G says.

And these points about the email to Rowanmoor in November 2013, add to the doubts created by the other points I have mentioned.

In my view when taken cumulatively there is reason to have doubt about the plausibility of Mr G's versions of events.

In my view it is just as likely, if not more likely, that Mr G was introduced to the Harlequin investment by his brother who also told him that he was thinking of investing himself and that he/his company had become a Harlequin agent. Mr G was then referred to Mr M (by his brother or one of the brother's colleagues) to consider the possibility of investing in the Harlequin Property through his pension.

Mr M should have told Mr G that investing his pension in the Harlequin property scheme was a high-risk venture and not suitable for him.

The question is what would have happened next? Mr G says he would have accepted that advice – that he would not have invested on his brother's recommendation in preference to the advice of a regulated adviser. That is of course possible but is it more likely than not? In my view it is not.

One of Mr G's pensions included a guaranteed annuity rate. Mr M was not absolutely crystal clear on the point, but he did point out that this was a valuable right that Mr G would lose if he invested in the pension. This does not seem to have caused Mr G any concerns despite it giving the adviser concerns even if he did not go so far as to advise against the transaction as he should.

Next Mr G's pensions were valued at around £24,000 - though Mr G had started to pay into an occupational pension, so this was not his entire pension provision. Even with the guaranteed annuity applying to one of the funds, the pensions Mr G transferred were forecast to provide a pension of only around £2,000 a year. By comparison the Harlequin property investment will have seemed a very attractive proposition. Mr G's brother would naturally have been very optimistic about the investment and may well have reduced or refunded commissions to Mr G. The idea will also have seemed attractive if his brother was also investing in Caribbean holiday property. And the adviser himself had also invested in a Harlequin property apparently. There may well have been a fear of missing out.

Mr G says he wanted the best investment opportunity possible for his pension fund and so was not looking to invest in the first one he was told about. I understand the point but, in my view, it is just as likely, if not more likely, that Mr G would have thought the Harlequin investment opportunity was the best opportunity for him in the circumstances even if the adviser had said he thought the investment was unsuitable for his pension.

On balance I am unable to conclude it is more likely than not that Mr G would not have invested in the Harlequin investment if Mr M had advised him not to. If Mr M had advised him not to, Mr G could still have insisted on investing. And in my view, this is just as likely if not more likely than Mr G choosing not to invest in the Harlequin property investments his brother was promoting.

I am therefore unable to say that it is fair and reasonable in all the circumstances that Positive Solutions should compensate Mr G for the losses he has suffered as a result of investing in Harlequin.

**my final decision**

I do not uphold Mr G's complaint against Quilter Financial Planning Solutions Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 30 April 2021.

Philip Roberts
**ombudsman**