

## **complaint**

Mr B complains about the advice he was given by Kingsway Wealth Management Limited. He says this exposed his pension to more risk than he was prepared to take.

## **background**

I set out the background to this complaint, and my provisional findings, in the provisional decision I issued in October 2017. In brief, I found that Kingsway was responsible for the advice Mr B was given to transfer his pension benefits into a SIPP, and for the subsequent investment in Cyprus One Limited. A copy of the decision is attached and forms part of this final decision.

Kingsway didn't agree. In response, it said:

- It has found new evidence that the two businesses Mr M was working for were one and the same.
- The advice Mr M gave was on behalf of his regulated business. This has been confirmed in other similar cases seen by the Financial Ombudsman Service.
- These businesses have tried to hide behind the suggestion that the investment was done on an execution only basis through Mr M's unregulated business.
- But in all instances regulated advice must be given before cash is removed from a SIPP.
- Mr M must have been giving regulated advice as he was advising on a SIPP, which is a regulated product.
- It's apparent this was all done on the same day. So it would be impossible for Mr B to know which hat Mr M was wearing.
- It's not fair and reasonable or consistent with other decisions for Kingsway to be held responsible for advising on the movement of cash out of the SIPP into Cyprus One Limited.

Mr B's representative also made some further comments. It said it would like me to reconsider the amount of compensation for the trouble and upset Mr B has been caused. This doesn't cover the substantial fees he's incurred as a result of the representative dealing with the complaint. Mr B was reliant on good people fighting to ensure he's compensated. If I'm not willing to increase the sum I should explain why Mr B isn't being back put in the same position as if he'd not been badly advised.

## **my findings**

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

I've noted the further points made by Kingsway. I appreciate it believes Mr M, acting on behalf of a different regulated business, was responsible for advising Mr B to invest in Cyprus One Limited.

Kingsway has provided evidence Mr M arranged such an investment. But this relates to a different customer, not Mr B. And it took place several months after Mr B made his investment. So I don't think this has a bearing on this case.

In relation to Mr B's investment, the letter to the SIPP provider from Mr M was written using the notepaper from his unregulated property company. So there's nothing to link this to his regulated business.

It's also important to note that Mr M's regulated business was an appointed representative of a principal. As I understand it, the principal hadn't authorised Mr M to advise on or arrange unregulated investments. And Mr B has complained about Kingsway. So it's Kingsway's acts or omissions that are relevant to this complaint.

In my provisional decision I noted that Mr M's letter had been submitted to the SIPP provider along with the SIPP application by Kingsway. This was based on the information we'd received from the SIPP provider. In response, Kingsway disputes this.

But in the end I don't think it's material whether or not Kingsway submitted the investment instruction. Kingsway was clearly aware of the nature of the intended investment, and recommended the transfer of Mr B's pension benefits in order to facilitate the investment. There was no other reason to move the benefits other than to allow the investment in Cyprus One Limited. So Kingsway remains responsible for this advice. I've explained previously why I think the advice wasn't suitable, and why Kingsway should have known this.

I fully accept Mr M was heavily involved in the overall transaction. But the investment couldn't have taken place without Kingsway also being involved. It sourced a SIPP provider that could accept the overseas investment and recommended this to Mr B. It also submitted the application to the SIPP provider and issued an invoice for £1,500. This was stated to be payment for "*providing advice and carrying out the necessary paperwork in establishing the SIPP*".

Kingsway has referred to several similar complaints reviewed by this service, involving itself and other businesses. But while I've noted these, I don't think they are material to this complaint. The circumstances and factors applying to each complaint are likely to be different, and I've considered Mr B's complaint on its individual circumstances.

Kingsway has confirmed it accepts it set up the SIPP. It also clearly advised Mr B to do this. For the reasons I've explained, Kingsway was also required to take account of how the SIPP was to be invested. I don't think it can limit its liability solely to the SIPP advice. So while I've considered the further points Kingsway has made, my view of the complaint remains unaltered.

I've also noted the comments by Mr B's representative about the sum that should be paid in respect of the trouble and upset he's been caused. I appreciate he may have paid his representative to assist him in his complaint. But this was an arrangement between the two of them. Because using the Financial Ombudsman Service is free to complainants, we don't normally award compensation if a consumer decides to be represented when making a complaint.

Further information on this subject can be found on the Financial Ombudsman Service website.

Mr B is being compensated for the unsuitable advice he was given. This is intended to put him back in the position, as closely as possible, as if he'd not been given that advice. He's also being compensated for the trouble and upset he's been caused by the advice and

having to complain about it. On the whole, I think the compensation set out in my provisional decision is fair and reasonable.

### **fair compensation**

Kingsway should calculate fair compensation by comparing the value of Mr B's pension, if he hadn't transferred, with the current value of his SIPP. In summary, Kingsway should:

1. Obtain the notional transfer value of Mr B's previous pension plans, if they hadn't been transferred to the SIPP.
2. Obtain the actual transfer value of Mr B's SIPP in relation to the Cyprus One Limited investment, including any outstanding charges.
3. Pay a commercial value to buy Mr B's share in the Cyprus One Limited investment.
4. Pay an amount into Mr B'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, Kingsway should:

5. Pay Mr B £500 for the trouble and upset caused.

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

- 1. Obtain the notional transfer value of Mr B's previous pension plans if they hadn't been transferred to the SIPP.*

If there are any difficulties in obtaining notional valuations for the plans, then the FTSE WMA Stock Market Income Total Return Index should be used instead. That is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

- 2. Obtain the actual transfer value of Mr B's SIPP, including any outstanding charges.*

This should be confirmed by the SIPP provider. It should only relate to that part of the SIPP which was invested in Cyprus One Limited. The difference between 1 and 2 is the loss to the pension.

- 3. Pay a commercial value to buy Mr B's Cyprus One Limited investment.*

I understand it is possible to remove the Cyprus One Limited investment from the SIPP. Valuing this investment may prove difficult, as there may be no market for it. To calculate the compensation, Kingsway should agree an amount with the SIPP provider as a commercial value, and then pay the sum agreed plus any costs and take ownership of the investment.

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

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

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

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

I am also not certain whether, currently, Mr B 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 B 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 B could claim. The notional allowance should be calculated using Mr B's marginal rate of tax. For example, if Mr B is a basic rate taxpayer, the total amount should be reduced by 20%.

On the other hand, Mr B 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 B should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr B's marginal rate of tax in retirement. For example, if Mr B 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 B 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 Mr B £500 for the trouble and upset caused.*

Mr B has been caused some distress by the loss of his pension benefits. I appreciate Mr B thinks the sum proposed by the investigator isn't enough. But while I can understand Mr B was worried at the apparent loss of his benefits in the SIPP, this wasn't his only pension provision. Also, he still had several years before retirement. So, taking everything into account, I think a payment of £500 is appropriate compensation for the distress he's suffered.

**my final decision**

I uphold the complaint and require Kingsway Wealth Management Limited to compensate Mr B as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 8 February 2018.

Doug Mansell  
**ombudsman**

## **COPY OF PROVISIONAL DECISION**

### **complaint**

Mr B complains about the advice he was given by Kingsway Wealth Management Limited. He says this exposed his pension to more risk than he was prepared to take.

### **background**

In 2009, Mr B was advised by Pension Transfers Ltd (an appointed representative of Kingsway) to transfer his pension benefits from two personal pension plans into a self-invested personal pension (SIPP). The pension fund was then invested in Cyprus One Limited. This offered the opportunity to invest using a Genuinely Diverse Commercial Vehicle. It involved investing in the development of residential apartments in Limassol, Cyprus.

In 2016, Mr B complained to Kingsway. But while Kingsway accepted it had advised Mr B to transfer into the SIPP, it said it had no knowledge of the subsequent investment. As such, it didn't uphold his complaint.

Mr B then referred the matter to us. Kingsway told us Mr B had complained too late. It thought he should have been aware he had cause for complaint at least three years before he complained.

Our investigator considered the complaint. He didn't agree with Kingsway's suggestion that Mr B's complaint was out of time. He also thought the complaint should succeed. He didn't agree Kingsway's responsibility was only limited to the advice it gave on transferring into the SIPP. Instead, it should also have considered how Mr B would be investing. Kingsway couldn't have given suitable advice on the transfer without taking this into account.

Mr B's representative confirmed Mr B was generally happy with the outcome. But the sum of £500 compensation the investigator proposed for the trouble and upset caused, in addition to the financial loss, should be increased. This was because it wouldn't come close to the professional fees Mr B has had to pay as a result of the poor advice he was given by Kingsway.

Kingsway didn't accept the investigator's view. In response, it made a number of points:

- It has provided advice on a regulated product – the SIPP. The SIPP provider could only take instructions from a regulated individual.
- The reason Kingsway was involved was because Mr B's existing regulated adviser was restricted in the choice of SIPP provider. It was this adviser who suggested investing in property.
- The fees within the SIPP were lower than Mr B's existing policies.
- There was no mention of a specific fund in the suitability letter as Mr B intended to invest directly in property, which wouldn't have an annual management charge.
- The application form clearly shows the investment was made by Mr B's other adviser under his regulated firm and reference number.
- As Kingsway wasn't involved in Mr B investing in Cyprus One Limited, it can't be fair and reasonable for it to be held liable for his losses from that investment.

The matter has now been passed 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.

*time limits*

Kingsway argued that Mr B had left it too late to complain about the advice he was given in 2009. The investigator didn't agree, and explained why when issuing his view of the complaint. I note Kingsway didn't refer to this when responding to the investigator. So it's not clear if it now accepts that the complaint is within our jurisdiction. But, for the avoidance of any doubt, I've firstly considered this point.

The rules applying to this service say that, where a business doesn't agree, I can't consider a complaint made more than six years after the event complained of, or if later, more than three years after the complainants were aware, or ought reasonably to have been aware, of cause for complaint. Dispute Resolution rule (DISP) 2.8.2R can be found online in the Financial Conduct Authority's handbook.

Mr B was given the advice in 2009. So this is clearly more than six years before he complained in 2016. But the matter for me to consider is whether he was aware, or ought reasonably to have been aware, he had cause for complaint more than three years before he complained.

Kingsway says Mr B should have been put on notice that the investment may have been unsuitable because of the regular updates he received. But I don't think these would have alerted Mr B to the possibility he'd been given unsuitable advice. While the updates did confirm that the property development wasn't proceeding as originally anticipated, they also set out the measures being taken to address this issue. And during this time Mr B was receiving valuations of his pension fund from the SIPP provider that indicated the investment was still worth what he'd invested. I therefore don't agree Mr B's complaint is outside the relevant time limit.

*the merits of the complaint*

I note Kingsway maintains it only advised Mr B about transferring into the SIPP, not about the subsequent investment in Cyprus One Limited. I've considered this point, and in doing so have taken account of the events that occurred around the time the advice was given.

Mr B has told us he met with an individual, who I will call Mr M, at a financial seminar in 2009. Mr M said he was an independent financial adviser, and Mr B became his client.

It was Mr M who introduced Mr B to Kingsway, for the purpose of setting up a SIPP. Mr M carried out the factfinding exercise to establish Mr B's circumstances, and passed this on to the Kingsway adviser. There's a file note where the adviser records a conversation with Mr M. This says Mr B wanted to invest in commercial property, and needed a SIPP provider that would allow this option.

The Kingsway adviser's suitability letter issued in September 2009 says Mr B was seeking advice on his existing pension arrangements with the objective "*to invest in specific investment(s)*". The letter said the advice was focused solely upon the viability of the transfer of Mr B's personal pensions into a SIPP. Any investment advice was to be provided by his own financial adviser.

The adviser set out a number of areas in which Mr B could invest through a SIPP, including unit trusts, deposit accounts and commercial property. But the letter also said it was possible to invest in residential property through a Genuinely Diverse Commercial Vehicle. This is a fairly unusual and non-mainstream type of investment. So it's not clear why it would have been referred to specifically unless there was some suggestion it was being considered as a potential investment for Mr B. I also note the SIPP provider was chosen because, amongst other things, it allowed a full range of investment.

I note the letter also contains a comparison of Mr B's current pensions with the position if he were to transfer to the SIPP provider recommended. This shows that the pension fund at age sixty will be around £30,000 less within the SIPP than if left in his current policies. So this implies there was no obvious financial benefit from transferring.

The letter says a generic fund charge of 1.5% had been used for calculating the SIPP value. But the charge could be higher or lower than this, depending on the investment chosen. So Kingsway had no real way of telling whether transferring into the SIPP would be suitable for Mr B, as it was unable to carry out a proper assessment.

Kingsway argues that its advice model, where it only recommended the SIPP and not any investments used within it, was approved by the then regulator, the Financial Services Authority. It's referred to an email it received from the FSA in December 2008.

I've read the email, and don't think it supports Kingsway's position. I appreciate it says:

*"From the limited information you have provided us, there would appear to be no breach in the proposed advice structure, but we recommend you seek your own legal advice on this."*

But the email then goes on to make further comments, including some warnings about the approach Kingsway intended to use. In particular, it said:

*"It is also essential that all clients referred to Pension Transfers Ltd are assessed by Pension Transfers Ltd to satisfy themselves that the transfer to a SIPP is suitable for the client. You should consider the aspect that 1 firm is giving advice about a product, whereas the client is getting advice about funds from another adviser. In our view, it is difficult to separate advice on the merits of joining a SIPP from the merits of particular investment assets to be held under that SIPP compared to the funds and benefits from the ceding scheme."*

So I think this should have made Kingsway aware there were potential problems with simply advising consumers to transfer to a SIPP without taking account of their investment intentions.

I'm also mindful that in January 2013, the FSA issued an alert:

*"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investment proposed to be held within the new pension. In particular, we have seen advisers moving customer's retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes)..."*

*The cases we have seen tend to operate under a similar advice model. An introducer will pass customer details to an unregulated firm, which markets an unregulated investment (e.g. an overseas property development). When the customer expresses an interest in the unregulated investment, the customer is introduced to a regulated financial adviser to provide advice on a SIPP capable of holding the unregulated investment. The financial adviser does not give advice on the unregulated investment, and says it is only providing advice on a SIPP capable of holding the unregulated investment. Sometimes the regulated financial adviser also assists the customer to unlock monies held in other investments... so that the customer is able to invest in the unregulated investment...*

*... where a financial adviser recommends a SIPP knowing that the customer will transfer out of a current pension arrangement to release funds to invest in an overseas property investment under a SIPP, then the suitability of the overseas property investment must form part of the advice about whether the customer should transfer into the SIPP. If, taking into account the individual circumstances of the customer, the original pension product, including its underlying holdings, is more suitable for the customer than the SIPP is not suitable.*

*... The FSA asks regulated firms, in particular financial adviser and SIPP Operators to report those FSA firms that are carrying on these activities in breach of the FSA requirements..."*



This alert didn't make any changes to the regulations. It simply re-stated the principles that already applied, and which were in place in 2009 when the advice was given.

I've also looked at how the investment in Cyprus One Limited was made. It seems the original intention was for the SIPP to be invested in a cash fund, if only as a temporary measure. But from the evidence I've seen, it appears the application for the SIPP and the instruction to invest in Cyprus One Limited was sent to the SIPP provider at the same time by Kingsway. The letter referring to the investment was from Mr M. But this was on headed notepaper from a different business from the one under which he was a regulated adviser. It appears that Mr M had set up this separate company through which he could engage in transactions for unregulated investments.

It may be that Mr B was advised initially by Mr M about transferring into a SIPP and also about investing in Cyprus One Limited. But Kingsway took responsibility for advising Mr B on whether or not he should transfer into a SIPP, and so should have ensured this was suitable for him. As noted above, it couldn't have done so without also considering how he would be investing.

Kingsway knew Mr B had been assessed by Mr M as being a medium risk investor. This was included in the information recorded on the factfind. It also knew the type of investment it was likely to have been used in the SIPP. Kingsway should have appreciated this wasn't suitable for Mr B, and advised him accordingly.

I accept it's possible Mr B may have ignored any advice not to transfer his pension benefits. But I think it's more likely he would have listened to the advice from the regulated adviser who was tasked with advising on transferring his benefits, and chosen not to do so if he'd been given such advice.

#### **putting things right**

For the reasons I've explained above, I don't think there was a valid justification for advising Mr B to transfer out of his existing pension plans. As such, the method of compensation should reflect this.

Kingsway should calculate fair compensation by comparing the value of Mr B's pension, if he hadn't transferred, with the current value of his SIPP. In summary, Kingsway should:

1. Obtain the notional transfer value of Mr B's previous pension plans, if they hadn't been transferred to the SIPP.
2. Obtain the actual transfer value of Mr B's SIPP in relation to the Cyprus One Limited investment, including any outstanding charges.
3. Pay a commercial value to buy Mr B's share in the Cyprus One Limited investment.
4. Pay an amount into Mr B'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, Kingsway should:

5. Pay Mr B £500 for the trouble and upset caused.

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

1. *Obtain the notional transfer value of Mr B's previous pension plans if they hadn't been transferred to the SIPP.*

If there are any difficulties in obtaining notional valuations for the plans, then the FTSE WMA Stock Market Income Total Return Index should be used instead. That is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

*2. Obtain the actual transfer value of Mr B's SIPP, including any outstanding charges.*

This should be confirmed by the SIPP provider. It should only relate to that part of the SIPP which was invested in Cyprus One Limited. The difference between 1 and 2 is the loss to the pension.

*3. Pay a commercial value to buy Mr B's Cyprus One Limited investment.*

I understand it is possible to remove the Cyprus One Limited investment from the SIPP. Valuing this investment may prove difficult, as there may be no market for it. To calculate the compensation, Kingsway should agree an amount with the SIPP provider as a commercial value, and then pay the sum agreed plus any costs and take ownership of the investment.

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

Kingsway may ask Mr B to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the Cyprus One Limited investment. That undertaking should allow for the effect of any tax and charges on the amount Mr B may receive from the investment and any eventual sums she would be able to access from the SIPP. Kingsway will need to meet any costs in drawing up the undertaking.

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

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

I am also not certain whether, currently, Mr B 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 B 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 B could claim. The notional allowance should be calculated using Mr B's marginal rate of tax. For example, if Mr B is a basic rate taxpayer, the total amount should be reduced by 20%.

On the other hand, Mr B 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 B should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr B's marginal rate of tax in retirement. For example, if Mr B 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 B 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 Mr B £500 for the trouble and upset caused.*

Mr B has been caused some distress by the loss of his pension benefits. I appreciate Mr B thinks the sum proposed by the investigator isn't enough. But while I can understand Mr B was worried at the apparent loss of his benefits in the SIPP, this wasn't his only pension provision. Also, he still had several years before retirement. So, taking everything into account, I think a payment of £500 is appropriate compensation for the distress he's suffered.

**my provisional decision**

I uphold the complaint and intend to award compensation as set out above.

Doug Mansell  
**ombudsman**