

complaint

Mr M's complaint is about advice from Kingswood Financial Advisors (Kingswood) to transfer his previous employer's final salary pension plan into a Self-Invested Personal Pension (SIPP). This was so that he could buy two Harlequin properties. Mr M says this was unsuitable for him.

background

The background is set out in my provisional decision issued on 23 November 2017. A copy is attached and forms part of my final decision.

In summary I upheld the complaint. I explained I was satisfied that the advice to transfer to the SIPP was unsuitable. The transfer represented nearly 24 years' service and Mr M was giving up a valuable guaranteed income in retirement. Mr M would be relying on this to provide him with an income. I think that Kingswood should have advised Mr M against transferring to the SIPP; and also advised him not to invest in Harlequin.

Following the provisional decision Kingswood made no further comments.

Mr M said he was willing to accept the provisional decision and would accept £150,000. He had paid out more in administration fees due to the SIPP not having any money. It had been a really stressful time for him and would like this sorted out as soon as possible.

my findings

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

As Kingswood has not replied to my provisional decision I have no reason to reach a different decision. I uphold the complaint for the reasons given in my provisional decision. Compensation should be calculated as set out in my provisional decision. The calculation is to be made as at the date of this final decision.

my final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend that Kingswood pays the balance.

determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My provisional decision is that Kingswood Financial Advisors should pay the amount produced by that calculation up to the maximum of £150,000 (including distress and/or inconvenience but excluding costs) plus any interest on the balance as set out above.

If Kingswood does not pay the recommended amount, then any investment currently illiquid should be retained by Mr M. This is until any future benefit that he may receive from the investment together with the compensation paid by Kingswood (excluding any interest) equates to the full fair compensation as set out above.

Kingswood may request an undertaking from Mr M that either he repays to Kingswood any amount Mr M may receive from the investment thereafter, or if possible transfers the investment at that point.

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Kingswood pays Mr M the balance plus any interest on the balance as set out above

Under our rules, I'm required to ask Mr M to accept or reject my decision before 12 February 2018.

Roy Milne
ombudsman

provisional decision

complaint

Mr M's complaint is about advice from Kingswood Financial Advisors (Kingswood) to transfer his previous employer's final salary pension plan into a Self-Invested Personal Pension (SIPP). This was so that he could buy two Harlequin properties. Mr M says this was unsuitable for him.

background

Mr M was introduced to Kingswood by a third party.

A fact find was completed in 2010. This recorded details of Mr M's circumstances. He was in good health, aged 48 and intended to retire at age 60. He was self-employed; earning about £18,000 a year. He owned his home valued at £219,000 and had a mortgage of £103,000.

Kingswood sent a report with its advice on 5 October 2010. This recommended a transfer from Mr M's existing final salary scheme into a SIPP. This was to allow him to buy the Harlequin properties. It said that no advice had been given about investing in Harlequin, and the advice was only about the transfer.

The report said that the critical yield to match Mr M's final salary pension was 9.5% a year. Mr M was transferring nearly 24 years' service and the transfer value was about £126,000 at the time of the advice. The plan offered a guaranteed pension in retirement. The SIPP was recommended as it allowed Mr M to invest in the Harlequin property.

The transfer went ahead and the SIPP was set up. The Harlequin contracts were signed after the advice to go ahead. The pension fund was used to pay a 30% deposit on the property. The remainder would be jointly owned with another third party.

Mr M complained in 2015 about the advice to transfer. Kingswood did not uphold the complaint. It said Mr M had been contacted by an introducer and decided before he was referred to Kingswood to invest in Harlequin. He was aware that no advice was being given about the Harlequin investment.

One of our adjudicators investigated the complaint. She spoke with Mr M about what had happened. He explained that he attended a seminar about Harlequin. He was put in touch with an adviser at Kingswood. Kingswood then gave him advice to transfer to a SIPP.

Mr M has had to pay fees to the SIPP provider. There was not enough cash in the SIPP. He was visited by bailiffs and had to pay £890. He has been getting legal letters and is very stressed about the whole situation. He has lost everything.

The adjudicator upheld the complaint. She thought the advice to transfer the benefits from final salary scheme was not suitable. The investment growth just to match the benefits being given up was nearly 10% a year; this in itself would indicate the transfer was unsuitable. This was Mr M's only pension plan and he did not have the capacity for loss. He was relying on the adviser to provide suitable advice.

Kingswood did not reply to the complaint. It wanted to postpone a final decision being issued as it was currently mediating with its insurers. The adjudicator explained that Mr M did not wish matters to be delayed and was not part of the mediation. So the complaint would be referred to an ombudsman.

Mr M explained that the whole situation was causing him serious problems. He was £1,300 in debt with the SIPP provider and also very stressed about the whole situation. He was never told the investment was high risk and they told him he would benefit from it.

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.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulator's rules, guidance and codes of practice; and what I consider to have been good industry practice at the time.

What was Kingswood required to do?

Kingswood was required to comply with the regulations. That includes knowing its client and giving suitable advice. It was also required to act in its client's best interest. I don't think Kingswood can avoid these obligations by limiting its role to only advising on the SIPP.

Kingswood did give advice about transferring out of a final salary pension scheme. The rules required the adviser to assume that the transfer would not be suitable. There is no evidence that this requirement was taken into account.

What did Kingswood do?

Kingswood argues that it only provided advice on the SIPP and did not give advice on the investment made in Harlequin Property. It said Mr M had already decided to invest in Harlequin. However the contracts were signed after the advice and Kingswood was required to give suitable advice. And that includes the advice to transfer out of the final salary scheme.

What should Kingswood have done?

The rules required Kingswood to start by assuming that transferring Mr M's final salary pension was unsuitable. It provided a virtually guaranteed pension. It was all of Mr M's pension benefits. He could not afford to take risks with this pension.

The investment in Harlequin Property exposed Mr M's pension funds to significant risk. It was an overseas property development. Mr M was buying a hotel room in a property that had not been built. The funds were used to pay a 30% deposit on the property. This was owned by the SIPP. The balance of 70% was also paid but jointly with another third party.

I am satisfied that the advice to transfer to the SIPP was unsuitable. The transfer represented nearly 24 years' service and he was giving up a valuable guaranteed income in retirement. Mr M would be relying on this to provide him with an income. I think that Kingswood should have advised Mr M against transferring to the SIPP; and also advised him not to invest in Harlequin.

What would Mr M have done?

A reservation fee was due to be paid for each property before Mr M was referred to Kingswood. He told our adjudicator that he hadn't paid the fees. However, this did not commit him to completing the contract as this was not signed until after the advice to transfer. Kingswood was a firm regulated to give financial advice and I think Mr M would have given that some weight. If suitable advice had been given that would have been not to transfer. Mr M was using all of his pension that was virtually guaranteed. I think Mr M would not have transferred his pension.

The role of other parties in the transactions

Mr M has said he was referred to Kingswood for advice on his pensions. Kingswood has said that Mr M had already received advice and decided to invest in Harlequin before he received advice from Kingswood. The other third party introduced Mr M to Kingswood and was acting as an agent of Harlequin. They were not regulated to give financial advice. Kingswood was a firm regulated to give advice. 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 M has against them. That is, if it pays Mr M's losses in full.

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 M's loss didn't flow directly from Kingswood's unsuitable advice. And on this basis, a court might not require Kingswood to compensate Mr M – 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 M 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 M would not have bought the Harlequin Properties had it not been for the failings of Kingswood's adviser. If the adviser had given Mr M suitable advice, the investment in Harlequin would not have been made. And I consider that the advice given by the adviser completely disregarded Mr M's interests. As a direct result of Kingswood's failure to give suitable advice, Mr M invested the whole 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 M. I am not asking Kingswood to account for loss that goes beyond the consequences of its failings. I am 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 am not able to determine. However, that fact should not impact on Mr M's right to compensation from Kingswood for the full amount of his loss.

fair compensation

My aim is to put Mr M 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). In setting out how to calculate fair compensation my objective is to address these three issues. That is what I'm trying to achieve.

There are a number of possibilities and unknown factors in making an award. The involvement of third parties – the SIPP provider and Harlequin – mean much of this is beyond this service or Kingswood's control. I understand Harlequin will not now allow Kingswood to take over the investment from Mr M.

All the variables are unknown and each may have an impact on the extent of any award I 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 Mr M back in the position he would have been in if suitable advice had been given, I think it's fair that Mr M 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.

Kingswood should calculate fair compensation by comparing the value of Mr M's pension, if he had not transferred, with the current value of his SIPP.

In summary:

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

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

2. Obtain the actual transfer value of Mr M's SIPP on the date of this decision, including any outstanding charges.

3. If it's possible, pay a commercial value to buy Mr M's share in the Harlequin Property investment.

4. Pay an amount into Mr M'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.

In addition, Kingswood should:

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

6. Pay Mr M £2,000 for the distress and inconvenience caused.

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

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

Mr M should be put back into the position he would have been in had he not transferred from his former employer's final salary scheme. Kingswood should undertake a redress calculation in line with the methodology issued by the Financial Conduct Authority in October 2017.

If this demonstrates a loss, the compensation amount should if possible be paid into Mr M'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 the payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr M as a lump sum. The compensation can be reduced by 15%. The loss was to Mr M's pension and so would otherwise have been used to provide pension benefits, 25% of which would be tax free and the rest would have been taxed at the rate he paid income tax in retirement – I think that will be at basic rate which is currently 20%. And so the 15% deduction adequately reflects this.

2. Obtain the actual transfer value of Mr M's SIPP on the date of this decision, including any outstanding charges.

This should be confirmed by the SIPP provider. The difference between 1 and 2 is the loss to the pension.

3. Pay a commercial value to buy Mr M's Harlequin Property investment.

The SIPP only exists because of the investment in Harlequin. In order for the SIPP to be closed and further SIPP fees to be prevented, the Harlequin investment needs to be removed from the SIPP. I understand this could be done. However, I also understand that Harlequin will not allow this at the moment.

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.

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

I have been provided with the contracts between Harlequin and Mr M. He signed different contracts for the deposit and the remainder. Separate contracts were signed. It means that the SIPP has paid two deposits under two contracts with Harlequin. That is the loss I am trying to redress. Mr M agreed to pay the remainder of the purchase price 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. Mr M needs to understand this, and that he won't be able to bring a further complaint to us if these contracts are called upon. Mr M may want to seek independent advice on how to cancel the ongoing contracts for the remaining amounts.

If Kingswood takes over the contracts from the SIPP trustees then it may be liable for the remaining amounts of the purchase price. As a result any total award that Kingswood may have to pay is likely to exceed £150,000. This won't be known until the redress in steps 1 and 2 above has been calculated. If it exceeds £150,000 then I can't tell Kingswood to take over the contract from Mr M'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 M's SIPP so that the transfer value is increased to compensate for the loss. 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 M.

Mr M won't be able to pay all of 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 M should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr M's marginal rate of tax in retirement. Mr M is likely to be a basic rate taxpayer in retirement. The notional allowance will be a reduction in the total amount equivalent to the current basic rate of tax. Mr M 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 my decision until the date of payment. Income tax may be payable on this interest.

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

Had Kingswood given suitable advice the SIPP would not exist. It's not fair that Mr M continues to pay the annual SIPP fees if it can't be closed.

To provide certainty to all parties, I think it's fair that Kingswood pays Mr M 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 M with some confidence that he will not be subject to further fees.

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

6. Pay Mr M £2,000 for the distress and inconvenience caused.

Mr M has been caused a great deal of distress by the loss of his pension benefits. He has been sent invoices for fees in the SIPP. As these weren't paid he was sent demands for these by the SIPP provider's lawyers. He then had a visit from bailiffs to pay the outstanding fees. I think that all of this has been very distressing for Mr M. A payment of £2,000 is appropriate to compensate for that distress.

Kingswood may ask Mr M 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 M 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. This only applies if Kingswood pays the loss in full.

If Kingswood pays the loss in full it may take an assignment from Mr M of any claim he may have against any third parties. This may only relate to the pension transfer and investment in Harlequin. Kingswood must provide a draft of the assignment to Mr M for him to consider and agree. The assignment should be in place before compensation is paid. Kingswood must agree to pay the compensation in full before using this option.

my provisional decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend that Kingswood pays the balance.

determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My provisional decision is that Kingswood Financial Advisors should pay the amount produced by that calculation up to the maximum of £150,000 (including distress and/or inconvenience but excluding costs) plus any interest on the balance as set out above.

If Kingswood does not pay the recommended amount, then any investment currently illiquid should be retained by Mr M. This is until any future benefit that he may receive from the investment together with the compensation paid by Kingswood (excluding any interest) equates to the full fair compensation as set out above.

Kingswood may request an undertaking from Mr M that either he repays to Kingswood any amount Mr M may receive from the investment thereafter, or if possible transfers the investment at that point.

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Kingswood pays Mr M the balance plus any interest on the balance as set out above.