

complaint

Mr P has complained about the advice he received from Kingsway Wealth Management Limited ("Kingsway") to transfer his existing pension plans to a Self-Invested Personal Pension (SIPP). Mr P says that he wasn't advised about the risks of investing in a SIPP compared to leaving his pension as it was. And he wasn't adequately informed about the costs of the transfer and ongoing charges.

background

I issued my provisional decision on this complaint on 21 March 2017. A summary of the background was set out as follows:

Mr P was introduced to Kingsway by D J Financial Solutions in 2011. Kingsway reviewed his pensions. This was to identify if there was a better structure taking account of his plans and objectives for the future.

A client information form was completed. Mr P was age 47 and earning about £23,000 a year. He had savings of about £1,000.

He had two pension plans. These were with Aviva and the total value was just under £50,000. He expected to join a new company scheme in the new year with 5% salary contribution.

His objectives were recorded as:

- Control flexibility of pension benefits other income option in addition to annuity purchase
- Greater investment fund choice – *disappointed with existing*
- To invest in property
- To invest in a specific investment(s) Renewable Energy Schemes i.e. Solar, Wind, Bio-Fuel
- To be able to invest in the full range of Revenue approved investments.

Mr P's attitude to risk –was assessed as 4 (on a scale of 1 – 5).

Mr P was advised to transfer his existing pension plans with Aviva to a SIPP. This was to meet Mr P's objectives. The options available within a SIPP were not available within his existing plan.

The suitability report went on to provide an analysis of the likely benefits from the SIPP compared to the Aviva pensions. This showed that the Aviva pensions could provide a fund value of £98,670 at age 65. This compared to a fund value of £93,900 with the SIPP. If a 1.5% a year charge was included for the investments the projected fund value for the SIPP fell to £71,600.

The transfer took place in early 2012. Mr P later invested in SCS Farmland and Global Forestry Investments Limited. That appears to have been after the involvement of the introducer.

Advice was given by DJ Financial Solutions to invest £15,000 in regulated investments on 27 February 2012.

One of our adjudicators investigated Mr P's complaint. In summary, he thought that the complaint should be upheld. Kingsway should not have advised Mr P to start a SIPP where the investment was unsuitable.

Kingsway didn't agree. The complaint was then referred to me.

My provisional findings were:

- Kingsway was required to follow the relevant rules set out by the regulator. This included an overall duty to act in a client's best interest. The rules also required an adviser to know their client and to give suitable advice.
- The SIPP had higher charges than Mr P's existing pension plans. That meant higher returns had to be achieved and suggests more risk had to be taken. The analysis in the suitability report showed that there was a significant shortfall by transferring to the SIPP. This was made worse by the charges of the investments. On the face of this analysis alone this SIPP was unsuitable.
- I think Kingsway was well aware that the investments were likely to be made in unregulated investments. It's clear that the forms it received from the other regulated business that this was the intention.
- It should have been clear to Kingsway that the investments Mr P was considering were likely to be relatively high risk. He had been assessed as having a medium to high attitude to risk. But, I think that is not a credible assessment. Mr P had minimal savings; and no other investments. His pensions were invested in insured funds. It should have been clear that the advice was likely to be unsuitable for Mr P.
- The introducer had two businesses. One of those was an appointed representative of another firm. The principal has explained to us that the adviser was not authorised to advise on unregulated investments. The introducer also had a second business. It's now clear that the investments were made through that business.
- The transfer into the SIPP was from a personal pension. The other adviser was regulated. And it didn't need to be a pension transfer specialist. I think this ought to have caused Kingsway to ask some questions before entering into this agreement.
- The unregulated firm arranged for Mr P to invest some of the monies that were transferred to his SIPP in unregulated investments. In my view, Kingsway couldn't avoid its duty to act in its client's best interest. The root cause of the unregulated investments being made was the advice to transfer the pensions to a SIPP. So it is both fair and reasonable for Kingsway to compensate Mr P for the losses on the unregulated investment in addition to the losses on the actual transfers.
- There was some advice given by the other regulated adviser to invest in regulated funds. Mr P has not complained about the advice he received to invest in those funds. Kingsway is not liable for any loss arising from those funds. The money invested in those funds should be excluded from the calculation of any loss.

Mr P accepted my provisional findings and had nothing further to add.

Kingsway disagreed. It said the decision was based on inaccurate or incomplete information. The objections Kingsway raised can be summarised as follows:

- A) The nature of the complaint seemed to have changed from what had been recorded on the complaint form.
- B) The background to the complaint recorded in my provisional decision was inaccurate:

- The proper extent of Kingsway's retainer wasn't recorded.
- Mr P had two pensions. There was no proper assessment of his wish for these to be invested in two different pension avenues.
- Mr P's income and that of his partner were inaccurate; as was the equity in his property and value of his pensions; and he was to join his employer's pension scheme.
- His attitude to risk was not properly considered in relation to the previous point.
- The relationship with the introducer hadn't been properly taken into account; the cause of the loss was the investments not the SIPP.
- The decision was inconsistent with other decisions.
- The statement that the investments in farmland and forestry "*appeared to have been after the involvement of the introducer*" wasn't accepted by Kingsway; unless it meant the investments were made after the Kingsway retainer had ended.

C) The provisional decision can't be justified as a fair and reasonable outcome because:

- 1) The circumstances didn't take proper account of:
 - a) The existing pension.
 - b) The employer's pension.
 - c) Willingness to accept medium to high risk.
- 2) It failed to take proper account of the various retainers and obligations of Kingsway.
- 3) The introducer would be paid commission for reviewing Mr P's investments. And it was expressly recorded the obligation to give investment advice was on the introducer, not Kingsway.
- 4) It isn't fair and reasonable to conclude there was any ongoing obligation on Kingsway to advise on investments it had no involvement or control over.
- 5) As I didn't understand why Kingsway was involved if it believed the other party was regulated demonstrated more information was required before issuing my decision.
- 6) My decision was inconsistent with other decisions that were not upheld; it questioned the rationale for such differing decisions.
- 7) The introducer should have recommended sale of the investments if they were unsuitable; as Mr P hadn't sold the investments he agreed they were suitable.

D) It didn't agree with the outcome. And I hadn't taken into account Mr P's medium to high attitude to risk into account in assessing fair compensation; the award of additional interest didn't reflect that either.

I wrote to Kingsway to clarify some of the points in my provisional decision. I explained that I understood Mr P did have other pension provision. But the funds it advised on were still a large part of his pension provision. The charges on the SIPP were higher and I thought this was significant. Kingsway knew that an unregulated investment was to be made. This should have been identified as unsuitable for him.

I said that the role of the other adviser was crucial. But, as he was a regulated adviser there was no need for Kingsway to be involved. Kingsway should have known that the advice was unsuitable. And that but for Kingsway's actions Mr P would not have suffered a loss. Therefore Kingsway should pay compensation.

Kingsway replied and asked me to review my findings. It said that some of the facts were inaccurate. And the main question was whether the other adviser involved gave regulated advice.

The SIPP was part of Mr P's pension provision. It was a mixture of both regulated and unregulated investments. The decision as to how much was invested was made by the other adviser. That adviser was regulated and authorised to give advice. At that point the other adviser was giving advice to Mr P about a SIPP, which is a regulated product. If that advice is given by someone who was unregulated they are breaking the law. If they are regulated then he must be giving advice as an appointed representative of a network.

During the investigation I have not confirmed that we have clarified with the SIPP provider who gave the instruction to make investments. If it was an unregulated person the SIPP provider had not complied with regulation. Kingsway says that they were dealing with a regulated adviser, yet I do not believe he had delivered regulated advice.

Kingsway didn't agree with me that the effect of charges on the SIPP was significant. The projected shortfall after 17 years if the fund grew at 5% a year was £4,770. It said that couldn't be viewed as significant.

The other adviser was not able to review or use all the SIPP providers in the marketplace. He asked Kingsway to review his choice of SIPP provider. He then wanted to retain Mr P as his client. They knew Mr P was dealing with a regulated individual offering regulated advice.

It did not agree with my conclusion the other adviser was not acting as a regulated adviser to sell the unregulated investments. And this was not consistent with other decisions issued by this service.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I think the complaint should be upheld for the reasons given in my provisional decision.

What is the complaint?

The summary of the complaint in my provisional decision was taken from the final response letter issued by Kingsway. Mr P has expressed his complaint in different ways, but Kingsway has always known what the complaint is about. I'm satisfied that the summary reflects the issues Mr P is complaining about.

What did Kingsway do?

Kingsway gave advice to Mr P. They tried to limit that advice to assessing whether a transfer of his personal pension to a SIPP was viable. Any advice about the assets to be held within the SIPP was to be given by a different firm.

I remain of the view that the advice to transfer to the SIPP was unsuitable. Although Mr P did have other pension assets, this was still a large part of his overall wealth. The charges on the SIPP were higher than the existing plan. Kingsway knew that unregulated investments were to be made. They should have known that these were unsuitable for Mr P.

What should Kingsway have done?

Kingsway was required to give Mr P suitable advice. I think that the advice to start the SIPP was unsuitable for the reasons given above. I accept that the other adviser instigated the review and contacted Kingsway to arrange the transfer to the SIPP. But, I think that the charges were significant. The effect of the charges over a 17 year term was close to £5,000. So the performance of the SIPP needed to be much better than the existing pension plan. And it should also have been apparent that Mr P was not a client for whom unregulated investments were suitable.

I think Kingsway should have questioned why the other adviser thought unregulated investments using a SIPP were suitable for Mr P. Given that the other adviser was not allowed to advise on a full range of SIPPs by their network, this should have given further cause for concern. In my view, suitable advice would have been to either retain the existing plan; or move to a lower charging plan with a range of standard investments.

What loss did Kingsway cause?

Mr P transferred to a SIPP. He then invested in unregulated investments. He then invested regulated funds after receiving advice which was from the other adviser as an appointed representative of a network. In my view the SIPP and unregulated funds were unsuitable. These could not have happened unless Mr P received advice. Kingsway gave that advice and so I think they caused that loss.

Kingsway has explained that the other adviser was not allowed to advise on the full range of SIPPs. I understand from what Kingsway has said that the other adviser had selected a SIPP. And so Kingsway's role was to assess whether that SIPP was suitable for Mr P. I have already concluded that the SIPP was not suitable. Kingsway should therefore have given advice to Mr P not to transfer to the SIPP. I would normally expect a consumer to follow the advice there were given from a regulated adviser. The transfer to the SIPP and subsequent investments were made to provide greater returns for Mr P. I think if he had been given a balanced assessment and advised against doing this it is likely he would not have transferred to the SIPP or made the investments.

What about the role of other parties?

I accept that the role of the other adviser is crucial. He had two businesses one of which was unregulated and the other regulated as an appointed representative of a network. It is possible that either of those businesses could have some liability. But, I also remain of the view that Kingsway gave advice for which it is liable. This service is not able to deal with a complaint about the unregulated business. And I'm satisfied that the unregulated investments were sold by the unregulated business. That's because in the same way that the network would not allow the adviser to recommend a full range of SIPPs; neither will it allow advice to be given on unregulated investments.

The SIPP provider did accept the investments. There were some responsibilities on that business before accepting and dealing with Mr P as its client. But, that does not relieve Kingsway of its obligation to give suitable advice.

I have reviewed the approach taken by this service in dealing with other complaints against Kingsway. I think these show that Kingsway had not given suitable advice. The difference is about the way compensation is awarded. And I think there are a number of different approaches that could reasonably be taken. I'm satisfied that the facts in each case are slightly different.

In this case, there was further advice given after the unregulated investments have been sold. That was by the regulated adviser. I think at that point the adviser should have reviewed the investments in the SIPP. So it's possible that the other adviser acting as an appointed representative of a network could have some liability. But in my view the actions of Kingsway allowed the SIPP to be established and unregulated investments to be made. The reality of the situation is that the same person recommended those unregulated investments and then later regulated investments. I think it's unlikely they would have recommended selling the unregulated investments after they had advised Mr P to buy them. So I don't think it's fair in this case that Kingsway's liability should cease at that point.

I think what I have set out below represents fair compensation. But I recognise that other parties may have some liability. If Kingsway wishes to take an assignment of any rights from Mr P so that they may take action to recover any losses caused by the other parties I am happy for them to do so. Mr P's should cooperate with Kingsway to recover any losses from other parties, if full compensation is paid by Kingsway.

fair compensation

My aim is to put Mr P as close to the position he would probably now be in if he had been given suitable advice by Kingsway. I think Mr P would have invested differently. It is not possible to say *precisely* what he would have done, but I am satisfied that what I have set out below is fair and reasonable given Mr P's circumstances and objectives when he invested.

what should Kingsway do?

To compensate Mr P fairly, Kingsway must:

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

Kingsway should also pay interest as set out below.

If there is a loss, Kingsway should pay an amount into Mr P's pension plan to increase its value by the total amount of the compensation and any interest. That should take account of the effect of charges and any available tax relief.

If Kingsway is unable to pay the total amount into Mr P's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mr P's marginal rate of tax in retirement. Mr P is likely to be a basic rate taxpayer in retirement. The *notional* allowance should be a reduction in the total amount equivalent to the current basic rate of tax. However, Mr P would have been able to take a tax free lump sum. The *notional* allowance should be applied to 75% of the total amount.

- Pay Mr P £300 for the distress caused by the loss to his pension fund.

Income tax may be payable on any interest awarded.

Investment name	status	benchmark	from ("start date")	to ("end date")	Additional interest
SIPP	still exists	FTSE UK Private Investors Income Total Return Index	date of investment	date of my decision	8% simple a year from date of decision to date of settlement

actual value

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

My aim is to return Mr P to the position he would have been in but for the unsuitable advice. This is complicated where an investment is illiquid (meaning it could not be readily sold on the open market). I understand that SCS Farmland and Global Forestry cannot be sold. It is difficult to know the *actual value* of these investments. Kingsway should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the total payable to Mr P and the balance be paid as I set out above.

If Kingsway is unable to buy the investment the *actual value* should be assumed to be nil for the purpose of calculation. Kingsway may wish to require that Mr P provides an undertaking to pay Kingsway any amount he may receive from the investment in the future.

fair value

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

The £15,000 invested in February 2012 should be treated as a withdrawal. That's because the advice was given by DJ Financial Solutions.

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

why is this remedy suitable?

I have chosen this method of compensation because:

- Mr P wanted capital growth and was willing to accept some investment risk.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.

- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr P's circumstances and risk attitude.
- Mr P has not yet used his pension plan to buy an annuity.

my final decision

I uphold the complaint. My provisional decision is that Kingsway Wealth Management Limited should pay the amount calculated as set out above.

Under our rules, I'm required to ask Mr P to accept or reject my decision before 1 March 2018.

Roy Milne
ombudsman