

complaint

Mr H has complained about the advice he was given by Affinity Financial Advisors Ltd (Affinity) to transfer his existing pension contracts to a self-invested pension plan (SIPP).

background

In October 2011 Mr H was advised by Affinity to transfer his three existing pension plans into a SIPP.

At the time of the advice Mr H was aged 46. Affinity did not record information about his employment, income, expenditure, assets, savings, liabilities or risk profile. It was recorded that this information was not obtained because Mr H wished to invest in the Verdant Wealth Australian Farmland and was only seeking Affinity's help in identifying a suitable SIPP provider.

Mr H said that he was initially approached by a third party which suggested that he look at farmland investments. The same party explained that such investments could only be made with the involvement of an independent financial adviser (IFA). Mr H decided to transfer based on Affinity's advice that the returns from farmland were better than the returns on his existing pensions.

The adjudicator who investigated the complaint made reference to the regulator's alerts in 2013 and 2014, which pointed out that firms advising on transfers into SIPPs had a duty to assess the suitability of the underlying investments in the SIPP. The adjudicator said that Affinity was fully aware of Mr H's intended investment and that it had noted that the adviser was unable to offer advice on that investment.

The adjudicator concluded that the adviser did not ascertain Mr H's attitude towards risk and did not gather sufficient information about him to allow a suitable recommendation to be made. Given that the adviser could not offer advice on the intended investment, Affinity should not have offered advice about a possible transfer into a SIPP. As a means of redress, the adjudicator proposed a comparison between the current transfer value of the SIPP with the combined notional transfer values of the plans transferred (on the assumption that they would have remained in force and invested in the same funds as they were invested in). He also proposed a refund of the fee Affinity received for the advice, provided that the fee was paid to Affinity before the transfer of funds to the SIPP.

Affinity accepted the parameters placed by the regulator on this type of business and, consequently, understood why the adjudicator reached his conclusions. It said, however, that any loss calculation should be conducted after the sale of the investment. Affinity also argued that Mr H was aware of all the scenarios set out in the suitability report and had informed Affinity that a solicitor would be involved should he decided to progress with the investment.

Affinity has reiterated to this service that it did not offer investment advice to Mr H and that, at the time of advice, there was no regulatory directive on this type of business.

Mr H accepted the conclusion reached by the adjudicator and confirmed that he had no further comments to make.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

It is important to note that the regulatory alerts published in 2013 and 2014 did not amend any existing regulations about SIPP transfer advice. They rather reminded businesses of the existing regulatory requirements in place, which said that the provision of suitable advice required consideration of the overall position, including that of the underlying investments. As such, our service has not examined the suitability of the advice retrospectively, as Affinity has argued.

Having reviewed the available information I agree with the conclusions reached by the adjudicator and for the same reasons. The adviser was aware of the intended unregulated investment and was unable to offer advice on it. As such, he ought not to have proceeded with giving advice on a suitable SIPP provider only, especially when he did not collate sufficient information about Mr H's circumstances and needs. The fact that Mr H may have used other third parties in the transaction does not absolve Affinity's responsibility of giving suitable advice.

I also appreciate that the investment cannot be sold at the current time. However, if Mr H had not been given advice he would not have had to wait to use his pension funds now. Furthermore, I consider that if I am to allow a loss calculation in the future this may present difficulties. For example, Affinity may cease to trade which means that Mr H could be unable to obtain any redress.

In my opinion if Affinity had advised against the investment in the Verdant Wealth Australian Farmland fund Mr H would have followed that advice. I uphold this complaint.

fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mr H as close to the position he would probably now be in if he had not been given unsuitable advice.

I take the view that Mr H would have invested differently. It is not possible to say *precisely* what he would have done differently. But I am satisfied that what I have set out below is fair and reasonable given Mr H's circumstances and objectives when he invested.

what should Affinity do?

To compensate Mr H fairly, Affinity must:

- Compare the current transfer value of Mr H's SIPP to the return the SIPP could have obtained using the benchmark set out in the table below. The compensation payable is the difference between the *fair value* and the *actual value* of the SIPP. If the *actual value* is greater than the *fair value*, no compensation is payable.

Affinity should also pay interest as set out below.

If there is a loss, Affinity should pay such amount as may be required into Mr H's pension plan, allowing for any available tax relief and/or costs, to increase the

pension plan value by the total amount of the compensation and any interest.

If Affinity is unable to pay the total amount into Mr H'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 H's marginal rate of tax at retirement.

For example, if Mr H 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 H would have been able to take a tax free lump sum, the *notional* allowance should be applied to 75% of the total amount.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
The Lifetime SIPP	still exists	combined notional transfer value of the pension plans transferred into the SIPP, on the basis that they would still be in force and invested in the same funds as previously	n/a	date of redress calculation	8% simple per year from "end date" (if compensation is not paid within 28 days of the "end date")

Affinity should also refund any fees that have been paid directly by Mr H. (Any fees paid from the SIPP will be allowed for in the redress calculation set out above.)

actual value

This means the current transfer value of the SIPP.

My aim is to return Mr H 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) as in this case with the investment in the Verdant Wealth Australian Farmland fund. It would be difficult to know the *actual value* of the investment. In such a case the *actual value* should be assumed to be nil to arrive at fair compensation. Affinity 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 H and the balance be paid as I set out above.

If Affinity is unwilling or unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. Affinity may wish to require that Mr H provides an undertaking to pay Affinity any amount he may receive from the sale of the investment in the future.

fair value

This is what the transfer value of the SIPP would be worth if the return on the SIPP was equal to the benchmark.

Any additional sum paid into the SIPP should be added to the *fair value* calculation from the point in time when it was actually paid in. Any withdrawal, income or other payment out of the SIPP should be deducted from the *fair value* 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 Affinity totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

I have decided on this method of compensation because:

- Mr H wanted capital growth and was willing to accept some investment risk. He was invested in managed funds in his existing pension contracts.
- Mr H has not yet used his pension plan to purchase an annuity.

my final decision

I uphold Mr H's complaint against Affinity Financial Advisors Ltd. My decision is that Affinity Financial Advisors Ltd should pay the amount calculated as set out above.

Affinity Financial Advisors Ltd should provide details of its calculation to Mr H in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr H either to accept or reject my decision before 25 January 2016.

Adrian Hudson
Ombudsman