

## **complaint**

Mr W has complained that Douglas Baillie Limited gave him unsuitable advice to transfer his occupational pension scheme benefits to a SIPP. This transfer was to enable investment into overseas land and storage units.

## **background**

Mr W was referred to The Pension Specialist (an appointed representative of Douglas Baillie) by a third party. Douglas Baillie had an agreement with the third party who would introduce clients. The third party would then be paid a fee from the commission Douglas Baillie would receive.

Douglas Baillie was to provide advice on whether or not Mr W should transfer his pension from a final salary scheme into a SIPP. That would allow him to make the investment.

A pension comparison information report was provided to Mr W in April 2012. That said that based on the limited information available it wasn't possible to take into account how important the pension was. It did provide a critical yield, which was the growth rate required to match the benefits being given up. As that critical yield was too high, advice was given not to transfer.

The next paragraph of the report explains that the transfer could be processed on an insistent client basis. That is the transfer would be against the advice to do so. A copy of the letter was enclosed for Mr W to sign and return if he agreed to proceed on that basis.

The report made it clear that Douglas Baillie would not provide advice on the investments. That advice would be provided by Mr W's existing adviser. If he had any further requirements Mr W should contact the introducer. After the transfer took place Mr W would then be treated as an orphan client. That simply meant Douglas Baillie would be removed as the adviser.

Mr W signed and returned a copy of the letter. Another report was sent to him in June 2012. This set out his demands and needs and that he wanted to invest in a SIPP. It explained that Douglas Baillie had only been asked to provide Mr W with advice on transferring to a SIPP. They did not provide ongoing advice. He would therefore be treated as an orphan client. That meant Douglas Baillie would be removed as the servicing agent for the SIPP.

The report then set out benefits of the transfer; these were referred to as soft benefits. These were consolidation; online access; wide investment fund range and retirement options. It explained that Mr W would lose the guarantees provided by his final salary scheme. Transferring the benefits to the SIPP would require a return of about 10% a year. This was said to be higher than Douglas Baillie would normally advise a client to transfer. If Mr W wanted to transfer, it would have to be dealt with on an insistent client basis.

The letter went on to explain that the benefits of the final salary scheme would be lost on transfer. The benefits from the SIPP would depend on the fund value and annuity rates. Douglas Baillie's advice was that the critical yield was too high. But, if Mr W wanted to proceed then Mr W would be treated as an insistent client. It then gave reasons why a transfer was appropriate. A summary of the main advantages to Mr W of a transfer were given. These related to the flexibility and investment choice.

Disadvantages of the transfer were summarised as the loss of the guarantees and that the critical yield was high.

The letter posed the question “*why is this suitable?*” It then gave reasons that the transfer was suitable. These were:

- The investment choice available in the new plan allowed selection of funds which met Mr W's requirements.
- Greater flexibility and control over the time it went to draw benefits.
- Personal control over pension planning.
- The flexibility of deciding when to draw benefits.

Mr W transferred his final salary benefits to the SIPP recommended by Douglas Baillie. He then invested in two investments that were sold by the unregulated business. Those investments were:

- £35,000 in GAS – Verdant Australian Agricultural Farmland.
- £35,250 in Storefirst.

These investments were both unregulated. Mr W signed forms sent by the SIPP provider acknowledging that these were high risk or speculative. Both investments are now illiquid meaning that they cannot be sold at the moment.

The complaint was investigated by one of our adjudicators. She summarised Mr W's circumstances at the time of advice as:

- He was aged 47 and married with one dependant.
- He was employed earning £29,000 a year.
- He and his wife were financially struggling and this was affecting their health.
- He intended to retire at age 60. He had preserved benefits in a final salary pension scheme representing more than 21 years' service. The transfer value was about £70,000.
- He had no savings or other investments and no other pension provision.
- He had an outstanding interest only mortgage of about £141,000 with no repayment vehicle in place.

Douglas Baillie has argued that the transfer proceeded on an insistent client basis and that they advised against it. They also said that they gave no investment advice. The adjudicator wrote to Douglas Baillie and said that the complaint should be upheld. In summary she said:

- She could find no evidence to suggest that Mr W could be classed as an insistent client given his lack of investment experience and financial knowledge.
- The suitability report gave some warning against the transfer. But, it mostly supported the transfer and gave many reasons why it was suitable.
- The benefits held within the final salary scheme represented a significant length of service and were Mr W's only pension provision.
- She disagreed with Douglas Baillie that Mr W was a 'Balanced Investor'. Given his financial circumstances and that the benefits to be transferred represented his only pension provision she argued that he would likely have been prepared to take little to no risk.

- She noted that Douglas Baillie did not undertake a credible assessment of Mr W's circumstances so could not have established Mr W's attitude to risk.
- Douglas Baillie ought to have been aware of and assessed the suitability of the intended investments.
- The critical yield was 10% which was far higher than could realistically be achieved given Mr W's correct attitude to risk.
- The benefits Mr W was giving up were guaranteed and would not fluctuate.

Douglas Baillie did not agree with the adjudicator. Its representative provided a detailed response. The key points are summarised below:

- Douglas Baillie advised Mr W in unambiguous terms not to proceed with the advice.
- There was no obligation for Mr W to sign the insistent client waiver.
- There was no agreement for Douglas Baillie to provide investment advice, only the pension transfer.
- The FCA guidance on assessing the suitability of the intended investment as part of the product advice was not issued until 2013.
- Douglas Baillie advised Mr W that the advice was based on limited information and invited him to complete the financial planning profiler. Mr W did not provide further information.
- The 'Balanced Investor' attitude to risk rating was a default rating and Mr W did not amend this.
- Mr W had already decided to transfer to the SIPP before receiving the advice from Douglas Baillie, based on advice given by a third party.
- Douglas Baillie provided Mr W with ample information on which to make an informed decision, ultimately advising him not to proceed with the transfer.

I reviewed the file and wrote to Douglas Baillie. I explained that I thought the complaint should be upheld. But, I said that the payments Mr W received when the investments were made should be deducted from the loss.

Douglas Baillie's representative didn't agree. It repeated the points made previously. But, it also said that the losses were caused by a third party and that Mr W should take action against that firm.

### **my findings**

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

The firm had a duty to ensure that any advice it gave Mr W was suitable for him. I acknowledge that Douglas Baillie has said it advised against the transfer and that Mr W was an insistent client. However I don't consider this to have been the case.

It is for me to decide what I think is fair and reasonable in all the circumstances. Mr W was a retail client I think it is fair to me to conclude he wanted to be guided in his investment choice by others. Douglas Baillie wants to limit their responsibility to only part of the transaction.

**was it fair that Douglas Baillie limited the advice to the transfer and setting up of the SIPP only?**

I have concluded that it wasn't reasonable to do this. Let me explain why. Douglas Baillie was under a duty to act honestly, fairly and professionally in the best interests of its client. And to take reasonable steps to ensure that the advice it gave was suitable. I don't think that in exercising that duty they could reasonably disregard what investments were going to be put in the SIPP.

The adviser had a duty to give suitable advice. I don't think the adviser could avoid that responsibility. The third party was not regulated to give advice. I think that Douglas Baillie should have considered whether the investment was suitable. That was the sole purpose for starting the SIPP.

The advice to move to a SIPP was from a final salary pension. The rules at the time required advice to be given by a specialist adviser; or checked by a specialist adviser. The advice had to start with a presumption that transferring the pension benefits was unsuitable. A key part of the decision to transfer is the growth that could be obtained in the personal pension. I cannot see how suitable advice can be given without considering the investment to be made.

**was Mr W an insistent client or was it reasonable to treat him as one?**

I have carefully considered how I should approach this issue. The regulator issued guidance for the industrywide review of pensions in 1994. That guidance explained how firms should assess cases involving insistent clients. The guidance only applied to cases that fell within the review period which finished in June 1994. But, the approach set out in that guidance can be applied to this case.

The guidance specifically dealt with the review of "insistent clients". It explained that firms should be alert for any signals such as unusually high numbers of "insistent clients" or the use of technical or standard phrases by investors.

When Douglas Baillie made the personal recommendation they also sent a second copy of their letter and prepaid envelope for Mr W to use if he disagreed with them. I would have thought that having sought advice, the most common behaviour is that a client then follows it. It seems to me to be unusual for the firm to have worked on the premise that the advice would be disregarded. And provide for that in their recommendation letter, immediately after the advice not to transfer was given. And then to give Mr W such an easy way of putting their, albeit limited, advice to one side. The way that this was done meant that he didn't have to use his own words to explain why he wanted to go ahead in any event. That was in my view poor practice.

Their advice concluded

*If you would like to accept one or more of the transfer values on offer and move your benefits into a new personal pension plan, then please sign and return the enclosed copy of this letter in the prepaid envelope provided.*

In my view, the tone of the letter is confusing. Advice not to transfer the pension benefits was immediately followed by an explanation of how to ignore that advice. There is no explanation from either Mr W or Douglas Baillie about why Mr W wanted to transfer his pension.

I think it is also relevant that Douglas Baillie was paid commission. But, that was only paid if the transfer went ahead. In my view, this is a conflict of interest. The starting assumption for a pension transfer was that it was unlikely to be in the client's best interest. That was required by the rules at the time of the advice. The interests of Douglas Baillie were therefore at odds with the best interests of its client.

If Douglas Baillie had acted honestly, fairly and professionally in the best interests of its client it is my view that it should not have limited its advice in this way. If that had been done Mr W would have been better placed to decide if it wanted to go ahead. As it was - based on limited advice and a pro-forma insistent only document - he invested all of his pension in two unregulated investments. I do not think this would have happened if either he had been given suitable advice, or better practice had been adopted if he wanted to disregard their advice.

### **did the advice cause the loss?**

Mr W did receive two payments totalling about £3,800. I think these were paid from the other business involved. It's possible that these payments would have caused Mr W to transfer regardless of anything that Douglas Baillie said. I think that's unlikely. Mr W needed some money, but this was his only pension. He was taking a risk that he could lose all of his pension. I think that Douglas Baillie should have explained that the investments Mr W intended to make were unregulated. They exposed his pension fund to the risk he could lose everything.

I think that the pension transfer, and therefore the underlying investment would not have been made without the involvement of Douglas Baillie. And that had it genuinely advised against the transfer and *not* given Mr W a way to proceed, it is unlikely that Mr W would have proceeded.

I accept that another business was involved in introducing Mr M to the underlying investment. However Mr W has made a complaint against Douglas Baillie and I think that it is the actions of Douglas Baillie that have caused Mr W to suffer a loss. One of the reasons for regulation is the protection of consumers. In my view, the approach adopted here had the effect of trying to avoid regulation.

I have not asked for information from that third party as I feel I am able to decide the complaint made against Douglas Baillie on the evidence I have available.

There is some doubt as to whether this service would be able to deal with a complaint brought by Mr W about the other firm that introduced him to the underlying investment. But, the investment could not have taken place without the SIPP being started. That could only happen if Douglas Baillie was involved.

It's possible that the other firm involved could have some liability for the loss that Mr W has suffered. If Douglas Baillie wishes to take an assignment of any rights of action against any third party involved in the sale of the investment, it may do so, after my award has been paid. That should only relate to any losses that Douglas Baillie pays compensation to Mr W.

Mr W's complaint referred to an alert given by the previous regulator. The alert was issued to draw attention to a particular business model. I have not relied on the alert in reaching my decision. But, I think it does represent the regulator's view about the correct interpretation of the rules at the time of the advice given to Mr W.

Douglas Baillie also referred to a conversation with a department at this service about our approach to these cases. I don't have details of the conversation. Our usual approach is to deal with each case on its own merits, which I have done.

### **fair compensation**

My aim is to return Mr W to the position he would now be in, if he had received suitable advice. I think that he would have kept his existing pension and not started the SIPP.

Douglas Baillie should arrange for a loss calculation to be carried out using the methodology set out by the regulator for the industry-wide Pension Review. But, that should use the latest assumptions published for the cases that fall outside the review. The date and assumptions are published on our website.

If a loss is found then Douglas Baillie should pay redress in line with the methodology used in the Pension Review. Redress should be made to a pension plan for Mr W.

I am trying to return Mr W to the position he would now be in but for the unsuitable advice. This is complicated where an investment is illiquid (that is could not be readily sold on the open market). It is difficult to know the *actual value* of the investment. The *actual value* should be assumed to be nil to arrive at fair compensation. Douglas Baillie should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be reduced from the total payable to Mr W. The balance should then be paid as set out above.

The payments of £3,800 should be deducted from the loss. The simplest way is to treat it as a withdrawal at the date it was paid.

If Douglas Baillie is unable to buy the investment the *actual value* should be assumed to be nil for the purpose of calculation. Douglas Baillie may wish to require that Mr W provides an undertaking to pay Douglas Baillie any amount he may receive from the investment in the future. That must allow for any limits on the payments that can be withdrawn and the effect of any tax and charges.

If there is a loss, Douglas Baillie should pay an amount into Mr W's pension plan, to increase the pension plan value by the total amount of the compensation and any interest. That should allow for any available tax relief and/or costs.

If Douglas Baillie is unable to pay the total amount into Mr W's pension plan, it should pay that amount direct to him. The amount should be reduced to notionally allow for the income tax that would otherwise have been paid.

The notional allowance should be calculated using Mr W's marginal rate of tax in retirement. For example, if Mr W would be a basic rate taxpayer in retirement and that rate would 20%, the *notional* allowance for tax would equate to a 20% reduction in the total amount. At retirement he would have been able to take 25% as a tax-free lump sum but the remaining 75% would have been subject to income tax at his marginal rate of tax. So the *notional* allowance for tax would equate to a 15% reduction in the total amount (20% on 75%).

Douglas Baillie should also pay Mr W £300 for the distress and inconvenience caused to him by its actions. He has lost most of his pension. That must have been worrying for him.

**my final decision**

I uphold Mr W's complaint. I direct Douglas Baillie Limited to calculate and pay redress as set out above.

Under our rules, I'm required to ask Mr W to accept or reject my decision before 26 February 2016.

Roy Milne  
**ombudsman**