complaint

Mr G complained he was given unsuitable advice by Allan McRoberts (AM), trading as AM Wealth Management Services, to transfer his pension plan to a self-invested personal pension (SIPP). The SIPP was set up to allow Mr G to invest in a Harlequin off-plan hotel development in the Caribbean.

background

Mr G was referred to AM by an agent for Harlequin. This agent was an unregulated advisor. AM has maintained that the agent recommended and advised Mr G on investing in Harlequin.

In late 2010 Mr G met with AM. A fact find was carried out. It recorded that Mr G:

- Was in his mid-50s and married.
- Earned about £27,000 a year.
- Had £4,000 in savings.
- Had a property worth about £145,000.
- Had a personal pension plan with a transfer value of about £54,000.

No attitude to risk (ATR) questionnaire was completed.

The fact find document noted that Mr G was looking to invest in a hotel room abroad via his pension. As his existing pension didn't allow this it said he'd asked AM to look into options to enable this. It said AM wasn't advising on the actual hotel room purchase. The document recorded that Mr G had two personal pensions with two different providers.

In January 2011 AM provided a suitability report on the transfer of Mr G's pension to the SIPP. It recommended the transfer to a particular SIPP provider. The letter said, amongst other things:

- Mr G should be aware that AM's recommendation would have differed if he'd undertaken a full review of Mr G's financial circumstances.
- AM was not advising on the Harlequin purchase. It was just advising on the SIPP to allow Mr G to achieve this. It, again, said that Mr G would transfer two personal pensions with two different providers and that an objective of the transfer was to consolidate these funds.
- Mr G had *"been investing in pension funds over the past 3 years, you understand the implications of market fluctuations on investment returns."*
- Mr G's primary objective was to review his existing pension arrangements and assess whether it would be appropriate to transfer the benefits.
- Mr G wished to invest in funds that are more aligned to his requirements. But that his current pension providers do provide access to such funds.

- Mr G had a "high" attitude to risk. The letter provided an annex to explain the different definitions to describe a person's ATR; "high" is not listed as a defined term.

The suitability letter is dated 20 January 2011. Mr G signed a letter dated 10 January 2011 written to AM. It said:

> *"I am looking to consolidate my holdings in order to use my pension to purchase a hotel room abroad for pension purposes; you have advised that you will not be in anyway involved in the advice or recommendation of this purchase, purely on the setting up of the SIPP facility. Allan McRoberts has also made me aware of the advantages and disadvantages of the transfer and I am happy to proceed on this basis."*

This disclaimer is identical to those used previously by AM with different clients investing via a SIPP into Harlequin.

On 25 January 2011 Mr G's SIPP was opened and by early February 2011 Mr G's personal pension was transferred to the SIPP. Later that month a reservation fee of £1,000 was paid to Harlequin from the SIPP.

At the end of February 2011 Mr G signed the contract to purchase the entire Harlequin property through his SIPP. He would initially pay a 30% deposit from the SIPP followed by further stage payments as the property was built.

In March 2011, Mr G paid £48,000 from his SIPP to Harlequin. As of February 2013, Mr G's investment in Harlequin was valued at £1. To date, Mr G's investment hasn't been built and it's likely he has lost all of his original funds from the SIPP

Mr G complained to AM in April 2015. AM said it wasn't responsible for the decision to invest in Harlequin. That advice was given by the unregulated agent and they should be held responsible.

As a result, the complaint was brought to this service. One of our adjudicators upheld the complaint. She said AM failed to give suitable advice. She said it could only advise on the suitability of transfer by considering the underlying investment to be held in the SIPP. The adjudicator highlighted a number of provisions under COBS 9.2 which supported this. She also pointed to an FSA alert from 2013 which warned against the advice model AM had carried out.

AM disagreed. It maintained that the unregulated agent was responsible and it was unfair that it should take responsibility for their conduct. It also said the adjudicator had only looked at the FSA 2013 alert and had solely based her decision this. It said insignificant weight had been given to the disclaimer signed by Mr G.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. In doing so, I agree with the adjudicator. I think AM has done something wrong.

COBS 2.1.1R required AM to act *"honestly, fairly and professionally in accordance with the best interests of its client."* This is an independent duty on the firm. It can't simply say that the customer had already decided what he wanted to do, so it simply carried out his wishes regardless of whether it was in Mr G's best interests. I'm also mindful of the principles for business and in particular principles 1 (*integrity*), 2 (*due skill, care and diligence*), 6 (*customers interests*) and 9 (*reasonable care)*.

Therefore, although Mr G may have received advice from the agent, he had still been referred to AM for advice on the transfer. It still had an obligation to consider whether it was in his best interests. The suitability letter even refers to this being an objective of the advice.

I understand the agent used to be a regulated advisor, but was no longer authorised. That's why Mr G would have been referred to AM. I think AM knew this. This wasn't the only time AM had been referred clients who wanted to invest in Harlequin by the same agent. AM couldn't reasonably rely on Mr G being advised in this unregulated manner. It had an independent duty to give suitable advice.

COBS 9.2.1 required AM to obtain the necessary information about the client's knowledge and experience relevant to the specific type of investment and the investment objectives. Having done so, COBS 9.2.2 required AM to consider whether the transfer from the personal pension to the SIPP met Mr G's investment objectives, he could bear the risks involved, and that he understood the risks.

Mr G was looking at transferring his personal pension to a SIPP. To determine whether that was suitable or not required AM to understand the property that the SIPP was going to invest in. AM knew that was the objective behind the transfer. To be able to advise in accordance with the rules, it had to understand the risks associated with the property. Without this information it could not say whether the transfer was suitable or not. GEN 2.2.1 states "*every provision in the Handbook must be interpreted in the light of its purpose."* The purpose of COBS 9 is to ensure consumers get advice that's suitable in their circumstances. To interpret COBS 9.2 in a narrow way so that AM closed its eyes from the purpose of the SIPP would avoid looking at all of the factors that the rule (and the rest of Chapter 9) says are necessary to ensure suitability.

AM said the adjudicator had overly relied on the FSA 2013 alert. However, all the FSA directive did was re-state the rules that would have applied at the time of the advice to Mr G. The alert illustrated exactly the concerns raised by the regulator over the sort of practice AM was carrying out. I reiterate part of the alert: *"Financial advisers using this advice model are under the mistaken impression that this process meant they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and they only need to consider the suitability of the SIPP in the abstract. This is incorrect."*

AM said it was made clear to Mr G that the scope of its agreement restricted its advice to just choosing the right SIPP. Mr G signed a letter confirming he understood this. It's of note that Mr G signed the disclaimer before he'd received the suitability letter from AM. While AM may have given advice orally when it met with Mr G at the end of December 2010, I find it disconcerting that Mr G was being asked to sign a disclaimer before even reading the suitability letter containing the written advice. Nonetheless, for all the reasons above, I don't think it is fair or reasonable for AM to rely on the disclaimer as a justification for its limited advice.

(2) was the transfer suitable?

The property was high risk, highly illiquid, highly geared and speculative. In contrast, Mr G transferred his entire pension provision. There's no evidence he had any experience of property investments like Harlequin. His fact find recorded he had limited capacity for loss.

AM said that Mr G had a *"high"* attitude to risk. It's not clear how it reached this conclusion; *"high"* wasn't a formal categorisation used by AM. The rules required AM to consider Mr G's financial situation. It also required AM to be satisfied that he was able to bear the investment risks. It failed to do this. Mr G didn't have the capacity for loss required for such a high risk investment. The charges alone were likely to be detrimental to Mr G's pension assets while invested in an illiquid asset like Harlequin.

The investment represented most of his pension provision in the SIPP. The only reason he transferred into the SIPP was to invest in Harlequin. I think on any view, AM should've advised Mr G that the transfer of a significant proportion of his pension funds to the SIPP to invest in Harlequin property wasn't suitable. There's no evidence that the transaction was carried on either an 'insistent client' or 'execution only' basis.

(3) role of the agent

AM said it wasn't fair that it was held responsible for the advice given by the agent. What Mr G was told by the agent isn't clear, and no evidence has been provided about that. But, for the reasons I have already given, I don't think this means AM aren't responsible for the losses Mr G incurred. If AM had given suitable advice Mr G wouldn't have invested.

I understand that AM feels it has been made a *"scapegoat"* and that the agent has walked away from this complaint without any liability whatsoever. The comparison between AM and the agent though isn't a fair one. The agent isn't a regulated advisor. We have no jurisdiction over it. It is hugely significant that AM is. It brings a privilege to advise on pension transfers and gives responsibilities, duties and protections towards clients which an unregulated advisor doesn't have. AM had a regulated duty to give suitable advice but didn't.

The argument that Mr G would have simply gone elsewhere and still have invested is misplaced. I don't accept that Mr G would either have still have invested, or gone to a different advisor for a different answer. If AM had given suitable advice it wouldn't be dealing with this complaint. It's as simple as that.

For the reasons above, my view is that the transfer of Mr G's pension plan to the SIPP to invest in Harlequin wasn't suitable. I don't think AM gave Mr G suitable advice and he should be compensated for this.

fair compensation

On 28 April 2016, an adjudicator contacted all parties and explained how redress in this complaint might be approached. This included certain aspects that weren't set out in the adjudicator's original view. AM said in response that it was *"bizarre"* that AM would be required to take over the investment from Mr G as the investment was in line with Mr G's attitude to risk.

My aim is to put Mr G as close as possible to the position he would probably now be in if he'd been given suitable advice. I think that he would have kept his existing personal

pension; wouldn't have invested in Harlequin; and as a result 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. While we understand Harlequin will allow AM to take over the investment from the consumer. The involvement of third parties - the SIPP provider and Harlequin – means much of this is beyond this service or the business's control.

All the variables are unknown and each may have an impact on the extent of any award this service may make. The facts suggest it's unlikely that the property will be completed and unlikely that the contract and any future payments would be enforceable. While it's complicated to put the Mr G back in the position he would have been in if suitable advice had been given, I think it's fair that Mr G is compensated now. I don't think we should wait and determine each and every possibility before making an award. What is set out below is a fair way of achieving this.

AM should calculate fair compensation by comparing the value of Mr G's pension, if he hadn't transferred, with the current value of his SIPP, in summary:

1. Obtain the notional transfer value of Mr G's previous pension plan if it had not been transferred to the SIPP. That should be the value at the date of this decision.

2. Obtain the transfer value as at the date of the decision of Mr G's SIPP, including any outstanding charges.

3. Pay a commercial value to buy Mr G's share in the Harlequin property.

4. And then pay an amount into Mr G'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.

In addition, AM should:

5. Pay five years' worth of future fees owed by Mr G to the SIPP.

6. Pay Mr G £300 for the trouble and upset caused.

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

1. Obtain the notional transfer value of Mr G's previous pension plan if it had not been transferred to the SIPP. That should be the value at the date of this decision.

On the date of this decision, AM should ask Mr G's former pension provider to calculate the notional transfer value that would have applied had he not transferred his pension but instead remained invested in the same funds.

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

AM should assume that any contributions or withdrawals that have been made would still have been made, and on the same dates.

2. *Obtain the transfer value as at the date of the decision of Mr G's SIPP, including any outstanding charges.*

This should be confirmed by the SIPP provider. AM should then deduct the result of 2 from the result of 1. That is the loss to his pension.

3. *Pay a commercial value to buy Mr G's share in the property*.

The SIPP only exists because of the investment in Harlequin. I think it would be fair if the property could be removed from the SIPP. Mr G would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP.

The valuation of the property may prove difficult, as there's no market for it. For calculating compensation, AM should agree an amount with the SIPP provider as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment. If AM is unable to buy Mr G's investment in Harlequin, it should give it a nil value for the purposes of calculating compensation.

The SIPP has paid a deposit under a contract with Harlequin. That is the loss I am trying to redress. Mr G has agreed for the SIPP to pay the remainder of the purchase price under that contract. Those sums have not yet been paid, so no further loss has been suffered. However, if the property is completed, Harlequin could require those payments to be made. I think it's unlikely that the property will be completed, so I think it's unlikely there will be further loss. But there might be.

Mr G needs to understand this, and that he won't be able to bring a further complaint to us if this contract is called upon. Equally, if the business takes over the contract from the SIPP trustees then it may be liable for the remaining amount of the purchase price. As a result any total award that the business may have to pay could exceed £150,000. This won't be known until the redress in steps 1 and 2 above has been calculated. If it will exceed £150,000 then this service can't tell AM to take over the contract from Mr G's SIPP. But we 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.

AM doesn't agree with this approach. But I think it's entirely consistent with the approach of this service in similar cases. The aim, as I've already explained, is to put the consumer back in the position they would have been had they received suitable advice. As I think Mr G wouldn't have invested in Harlequin, it's fair that he no longer holds that investment.

4. *Pay an amount into Mr G'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.*

If it's not possible to pay the compensation into the SIPP, AM should pay it as a cash sum to Mr G. 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 G's marginal rate of tax in retirement.

5. Pay any future fees owed to the SIPP until it is cancelled.

Had AM given suitable advice I don't think there would be a SIPP. It's not fair that Mr G continues to pay the annual SIPP fees if it can't be closed.

I think AM should be able to take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mr G back in the position he would have been in. But I don't know how long that will take. Third parties are involved and we don't have the power to tell them what to do. To provide certainty to all parties, I think it's fair that AM pays Mr G 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 G with some confidence that he will not be subject to further fees.

In return, AM may ask Mr G to provide an undertaking to account to it for the net amount of any payment he may receive from the Harlequin investment in that five year period. That undertaking should allow for the effect of any tax and charges on the amount he may receive from the investment. AM will need to meet any costs in drawing up the undertaking. If it asks Mr G to provide an undertaking, payment of the compensation awarded by this decision may be dependent upon provision of that undertaking.

If, at the end of those five years, AM wants to keep the SIPP open, and to maintain an undertaking for any future payments under the Harlequin investment, it must agree to pay any further future SIPP fees. If AM fails to pay the SIPP fees, Mr G always has the option of trying to cancel the Harlequin contract to enable the SIPP to be closed at any time.

6. Pay Mr G £300 for the trouble and upset caused.

Mr G has been caused some distress by the loss of all of his pension benefits. I think that a payment of £300 is appropriate to compensate for that upset.

my final decision

Where I uphold a complaint, I can make a money award that a firm pays compensation of up to £150,000; plus any interest and/or costs. If I consider that fair compensation is more than £150,000, I may recommend the firm pays the balance.

I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Allan McRoberts should pay Mr G the amount produced by that calculation. That is up to a maximum of £150,000.

Simple interest should be added to my award at the rate of 8% gross a year from the date of this decision until the date of payment. Tax may be due on this interest.

If fair compensation exceeds £150,000, I recommend that AM pays Mr G the balance. And that it pays simple interest at 8% a year on the balance from the date of this decision until the date of payment.

This recommendation is not part of my award. It does not bind AM. It is unlikely that Mr G can accept my decision and go to court to ask for the balance. Mr G may want to get independent legal advice before deciding whether to accept this decision.

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

Benjamin Taylor
ombudsman