

## complaint

Mr E complained about the role Grosvenor Financial Consultants Ltd played in transferring his personal pension plan to a self-invested personal pension (SIPP). The SIPP was set up to allow Mr E to invest in a Harlequin off-plan hotel development in the Caribbean.

## background

Around July 2009 Mr E was contacted by a sales agent for Harlequin properties. Mr E knew the sales agent, having worked previously together. The agent thought Mr E might be interested in investing in Harlequin and explained how this could be done through a SIPP using existing pension scheme funds. Mr E attended presentations about Harlequin and was sufficiently impressed. He thought it seemed like a good idea.

Mr E was almost 60 years old at the time. He was receiving benefits from an occupational pension scheme at about £9,000 per year and also had a smaller annuity from a personal pension plan. Mr E had a third, uncrystallised, personal pension plan with a transfer value of about £38,900.

Mr E has explained that he thought the fund of this third plan was relatively small and that he was unlikely to receive much income from it when he sought to take the benefits in retirement. As a result he thought there was a chance to improve its value by investing in a Harlequin development.

Mr E said the agent told him that he had an arrangement with a financial advisor at Grosvenor who could arrange a SIPP for Mr E to invest his pension fund through. The agent explained, to Mr E that this was someone both he and Mr E knew from their past lives working in financial services.

Grosvenor said there were two meetings between Mr E and its advisor - on 13 July and on 25 August 2009. Grosvenor said that at the first meeting, Mr E told Grosvenor what he wanted to do. As a result, in advance of the second meeting it told Mr E that he had to produce a signed letter setting out his specific wishes in writing. Mr E did this and the letter stated:

*"Please accept this letter as confirmation of my instructions to assist me in transferring the funds held in the above account to a new account with [SIPP provider]."*

*"As you are aware, I have decided to use my pension funds to purchase a studio apartment in the Caribbean, and you have confirmed to me that this facility is only available through a SIPP. I am aware of the work you have done with [SIPP provider's] technical department and that they will allow this investment, and as such have asked for assistance in setting this up."*

At the meeting on 25 August 2009, Mr E signed the SIPP application forms and these were sent to the SIPP provided along with the Harlequin contract on 15 September. The Harlequin sales contract was signed by Mr E the same day he signed the SIPP forms.

On 22 September 2009, the SIPP was confirmed as opened. That same day Grosvenor produced a letter to Mr E. It said:

*"In the normal course of business with our clients, when we have given them a recommendation we would send to them a letter of suitability. This letter would contain explanations as to why we have made the particular recommendation and would provide adequate information to enable you to decide whether or not to accept our recommendation.*

*In this case, however, you have neither requested, nor did I give you, any advice concerning the suitability of the above contract. This type of transaction is known as "Execution Only", and you understand that when buying a contract under these terms, you will not benefit from some of the regulatory protection provided when authorised advice is given, and you may have no right to redress should the contract turn out to be unsuitable...*

*We arranged the above account at your specific request and to your exact instructions. "*

Grosvenor charged Mr E upfront commission of 3% along with annual commission of 0.5% for its work. Mr E's pension fund of about £38,900 was transferred to the SIPP at the start of October 2009 and £31,500 was invested in Harlequin at the end of November 2009. By September 2013 Mr E's investment was valued at £1 and it's likely he has lost all of the original money he invested.

Mr E has confirmed that he received a payment of £2,000 for recommending a friend invest at the same time as him through the same Harlequin sales agent.

Mr E brought his complaint, through a claims management company, against Grosvenor in February 2015. Grosvenor rejected the complaint. It said it hadn't given Mr E any advice about the suitability of the investment and the transaction was done on an *execution only* basis.

As a result, Mr E's complaint was brought to this service. In the course of our investigations, both parties have provided further information.

Grosvenor said Mr E had a long history of experience in financial services. It said, in effect, he knew what he was getting into, he understood the risks involved, and he made his own decision that this is what he wanted to do. It simply processed his express wishes. Grosvenor provided statements from three people who all claimed to have worked with Mr E in the past and all claimed he had an understanding of assets classes and investments. It should be noted that of the three statements provided, one is from the Harlequin sales agent, and one is from a former director of Grosvenor.

Grosvenor also highlighted the fact that Mr E had dealings with its advisor back in the early 1990s and that he was a director of a property management company.

Mr E denied knowing two of the three people within the statements provided by Grosvenor. He had no recollection of having worked with them almost 25 years ago. In contrast Mr E has provided three statements of his own. These are from people who also claimed to have worked with Mr E. They say he was only involved in managing sales staff and had no direct financial sales experience himself. They say his knowledge would have been limited.

Mr E explained that the roles he'd held in financial services had been from the late 1980's through to 2001. He'd been employed in management and senior sales management roles

and was never involved in selling or advice. He wasn't qualified to do so. He explained that he'd taken The Financial Planning Certificate papers 1 and 2, but hadn't needed them as he didn't advise clients. His role had been to motivate a sales team and carry out recruitment. Mr E didn't deny that he knew the Grosvenor advisor and bumped into him from time to time near where he lived. He also didn't deny he was a director of the property management company. He explained this was to do with a flat he owned and he'd had no involvement in the company after being asked to join.

Mr E said during his meetings with Grosvenor there'd been no assessment of the investment suitability, or the risks it carried. Though he admitted that the advisor told him that throughout and that he knew he wasn't being advised on the investment.

As far as Mr E was concerned, the only reason he had gone to Grosvenor is because the agent told him he had to as the agent wasn't authorised to carry out pension transfers. Because it was through a SIPP, Mr E thought it provided him with some protection that the investment was secure. He said he wouldn't have invested with cash or an alternative financing model such as a re-mortgage.

However, Mr E said that had Grosvenor explained the risks involved to him, and explained how the SIPP worked, he would have stopped and considered that advice. And in all likelihood wouldn't have gone ahead with the investment.

One of our adjudicator's considered the complaint. He said Grosvenor knew why Mr E wanted to take out the SIPP. The adviser had a duty to act honestly, fairly and professionally and in line with Mr E's best interests. And knowing the investment he planned, shouldn't simply have accepted the instruction without question. The adjudicator didn't think the adviser's responsibility had been set aside by the letter Mr E had signed.

He considered the adviser had been best placed to understand the risks Mr E was taking. And had a responsibility to make sure Mr E understood them. He didn't think it was reasonable to overlook the investment Mr E had planned, just because it was suggested by a third party.

It was clear that Mr E was transferring his personal pension to the SIPP. He was receiving a modest company pension and whilst he also received an income from buy-to-let properties, this didn't make him a sophisticated investor.

The adjudicator considered the adviser should have known the huge risks Mr E would be taking and warned him about this. There was no evidence this had happened. He thought that had Mr E received a warning he wouldn't have transferred his pension to the SIPP, but left it where it was.

The adjudicator accepted that having previously worked in financial services, Mr E would have had some understanding of risk. However, he wasn't satisfied that Mr E was made aware of the particular risks associated with the investment he placed.

Grosvenor disagreed with the adjudicator's findings. It maintained that Mr E was knowledgeable about financial services and understood what an execution only transaction meant.

## **my findings**

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

### ***execution only***

I don't accept that Grosvenor has provided clear and credible evidence that this was an execution only transaction.

I think that having worked in the financial services industry, Mr E ought to have understood the implications of signing a letter asking Grosvenor to set up a SIPP. However, I wouldn't go as far as to say the letter he signed was an "execution only" letter. I say this as the letter suggests a degree of selection being made before Mr E knew how his investment could be made. The letter also clearly echoes the words of the agent who had told him Grosvenor would arrange the SIPP for him and some of the details around it. This letter is also written after the first meeting with Grosvenor and after the arrangements have been discussed with its advisor. I also note that Grosvenor processed two further SIPP applications to invest in Harlequin brought to them by the same agent at the same time. The role of the agent and the influence he'd had on the advice being sought by Mr E should have caused Grosvenor to look at the transaction with independent eyes.

The letter provided by Grosvenor dated 22 September 2009 which refers to the transaction as being "execution only" is, importantly, not signed by Mr E. It's also been produced by Grosvenor four weeks *after* Mr E signed the documents to open his SIPP.

This wasn't a genuine example of a client approaching an advisor with a specific SIPP provider in mind and a direct instruction to solely process that pre-planned transaction. The only reason Mr E was aware of the SIPP provider was because the agent had highlighted the pre-existing arrangement Grosvenor had in place. The agent had ultimately an influence over the pre-determined investment decision Mr E was making. Grosvenor was in effect recommending the particular SIPP provider which would enable Mr E to invest in Harlequin. Mr E was brought to Grosvenor because it was a regulated financial advisor and the agent wasn't. It is hugely significant that Grosvenor 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. Underneath all of this, irrespective of how it was documented, Grosvenor was giving advice as to how Mr E could invest in Harlequin through a specific SIPP provider – even if it didn't advise on the suitability of the investment for him.

In January 2013 the FSA issued an alert. This alert didn't make any changes to the regulations. It simply re-stated the principles that already applied and those that applied in 2009. In particular it said the following:

*"Financial advisers using this model are under the mistaken impression that...they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect."*

This is the model that Grosvenor applied. It failed to look at the investment underlying the SIPP which was the purpose behind the transfer. Grosvenor had a duty to take reasonable care to ensure the suitability of its advice.

Grosvenor knew that the agent hadn't given independent or regulated advice to Mr E about the suitability of the investment for him. Grosvenor knew why Mr E wanted the SIPP and therefore had a responsibility to act in his best interests. COBS 2.1.1R required Grosvenor 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, having been brought to it by a sales agent for an unregulated investment scheme, had already decided what he wanted to do, so it simply carried out his wishes regardless of whether it was in Mr E's best interests. I'm also mindful of the principles of business and in particular principles 1 (*integrity*), 2 (*due skill, care and diligence*) and 9 (*reasonable care*). Grosvenor's adviser should have considered the risks associated with the investment and established whether Mr E understood them. I consider he failed to act in Mr E's best interests by failing to make enquiries and assuming that he did. I've seen no evidence that Mr E was ever categorised as anything but a retail investor.

I accept Mr E knew he was taking a chance on improving his pension fund, but had Grosvenor explained the risks involved in the investment to Mr E I'm satisfied that, on the balance of probabilities, he wouldn't have proceeded with the investment. I've seen no evidence to suggest Mr E was so committed to this investment he would have ploughed on regardless. It seems at no point did anyone explain the high level of risk involved. Like many investors he was persuaded by the manner in which Harlequin was sold and endorsed. The literature he was provided with would not have made the risks clear. While he did have other pension provisions, these were relatively modest.

### ***Mr E's financial services experience***

Much has been made by both parties as to the level of sophistication Mr E would have had as an investor. There are clearly differing views about the level of knowledge and experience Mr E gained in his former roles in financial services. What isn't in dispute is that he left the industry in 2001, that his interest in the Harlequin investment was generated by its agent, with Grosvenor's role seemingly to set up the SIPP and pension transfer, so the investment could be placed.

In looking at Mr E's overall employment history and the submissions of both parties, I accept the account put forward by Mr E regarding his background and knowledge. I've found his account credible and frank.

Having left the industry in 2001, I'm not persuaded that Mr E was likely to have had up to the minute knowledge of pensions and investments. I think he'd have had some knowledge of risk. But I don't believe this would have extended to a detailed understanding of complex property investments such as those offered by funds like Harlequin over the previous eight years he had been away from the industry. This was a high risk, highly geared, off-plan, illiquid investment.

Even if I accept Grosvenor's submission at its highest, I can't see any evidence that Mr E's background would have meant he would have appreciated and understood the risks involved in investing in Harlequin Property with his pension. Or that with suitable advice about the risks involved he would have just continued on anyway with the investment.

### **fair compensation**

My aim is return Mr E to the position he would now be in if he'd received suitable advice. It's not easy to say what that position would have been. But I think it's likely that he wouldn't

have transferred his personal pension into the SIPP, and wouldn't have invested in Harlequin, and as a result wouldn't have opened the SIPP in the first place. In setting out how to calculate fair compensation my objective is to address these three issues. That's 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 the business to take over the investment from the consumer. The involvement of third parties - the SIPP provider and Harlequin – mean much of this is beyond this service or Grosvenor'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 consumer back in the position they would have been in if suitable advice had been given, I think it's fair that Mr E is compensated now. I don't think we should wait and determine each and every possibility before making an award. The proposed redress below is slightly different to that proposed by the adjudicator in his original view. On 18 August 2016, the adjudicator contacted both parties setting out the additional elements. No comments were provided on this.

What is set out below is a fair way of achieving this. Grosvenor should:

- 1. Obtain the notional transfer value of Mr E's previous personal pension on the date of decision if it hadn't been transferred to the SIPP.*

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.

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

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

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

- 3. Pay a commercial value to buy the Harlequin property investment from Mr E's SIPP.*

The SIPP exists because of the investment in Harlequin. In order for the SIPP to be closed and further SIPP fees to be prevented, the entire Harlequin investment needs to be removed from the SIPP. We understand this can be done.

The valuation of the Harlequin investment may prove difficult, as there is no market for it. To calculate the compensation, Grosvenor 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 Grosvenor is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation.

Grosvenor may ask Mr E 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 E may receive from the investment and any eventual sums he would be able to access from the SIPP. Grosvenor will need to meet any costs in drawing up the undertaking.

The SIPP has paid a deposit under a contract with Harlequin. That is the loss I'm trying to redress. Mr E has agreed for the SIPP to pay the remainder of the purchase price under that contract. Those sums haven't 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 this is unlikely and as a result I think it's unlikely there will be further loss. But there might be. Mr E needs to understand this, and that he won't be able to bring a further complaint to us if this contract is called upon.

4. *Pay an amount into Mr E's SIPP so that the transfer value is increased to equal the value calculated in (1). It should then be reduced by £2,000 reflecting the payment Mr E received from the agent. This payment should take account of any available tax relief and the effect of charges.*

Mr E was paid £2,000 by the agent for bringing others to invest at the same time as him. Had suitable advice been given, I suspect he, and possibly others, wouldn't have continued with the investment. He therefore benefited initially from that decision to invest. It's fair that this sum is deducted from any compensation paid.

If it's not possible to pay the compensation into the SIPP, Grosvenor should pay it as a cash sum to Mr E. But had it been possible to pay the compensation 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 E's marginal rate of tax in retirement. For example, if Mr E 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 E would have been able to take a tax free lump sum, the notional allowance should be applied to 75% of the total amount.

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

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

I think Grosvenor should be able to take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mr E back in the position he would've 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 Grosvenor pays Mr E an upfront lump sum equivalent to five years' worth of SIPP 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 E with some confidence that he will not be subject to further fees.

### **my final decision**

I uphold the complaint. My decision is that Grosvenor Financial Consultants Ltd should pay the amount calculated as set out above.

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.

Under the rules of this service, I'm required to ask Mr E to accept or reject my decision before 30 September 2016.

Benjamin Taylor  
**ombudsman**