Financial Ombudsman Service

complaint

Foreman Financial Services Ltd ("Foreman") recommended a self invested personal pension for Mr S to use to buy a Harlequin property. Mr S has said that they did not assess whether the investment was suitable for him.

background

Mr S was a client of another financial adviser. He was introduced to the Harlequin investment by that adviser. They attended a presentation together. Mr S decided to buy an off-plan property with Harlequin. The adviser was not authorised to advise on pensions. Mr S was referred to Foreman to arrange the SIPP. In July 2011 Foreman advised Mr S to transfer his existing pension to a SIPP. He then used his SIPP fund to buy the property.

Mr S complained that Foreman did not assess the suitability of the Harlequin investment. Foreman rejected the complaint. They said that Mr S received pension advice from the other adviser before approaching Foreman. That party was not permitted to set up SIPPs. Mr S was introduced to Foreman only for advice about the SIPP.

One of our adjudicators investigated this complaint. He said that Foreman should have considered the suitability of the Harlequin investment. He also said that Mr S should not have been advised to transfer into a SIPP. Mr S had seven buy-to-let properties. By transferring his only pension into a SIPP and investing in Harlequin he placed all his investments in one sector. This was a high risk strategy and not suitable to his 'dynamic' risk profile. An indicative asset allocation of a dynamic profile showed a 70% exposure to equities.

Foreman did not agree with the adjudicator. They said:

- Another authorised business gave the advice to transfer the existing pension and to invest in Harlequin. Although Foreman did not give specific risk warnings about Harlequin, some weight must be given to the fact that another business gave the investment advice.
- They followed the relevant rules applicable at the time, for giving advice. These rules did not reflect in any way the regulator's concerns brought in light in 2013.
- Mr S had already paid a deposit to invest in Harlequin by the time he approached Foreman.
- The only fair outcome on this case would be to open a complaint against the other business too. This is something the ombudsman has the power to do; or to invite Mr S to withdraw his complaint. It is not fair to hold Foreman responsible and ignore the other business's actions.
- Mr S had already decided to invest in Harlequin. Even if Foreman had advised against this course of action, Mr S would have gone to another adviser.

my findings

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

Mr S has confirmed he was introduced to the Harlequin investment by another adviser. I accept that individual played a significant part in Mr S's decision to invest in Harlequin. But, they could not give pension advice. That's why Mr S was referred to Foreman.

I am aware that Foreman has asked Mr S to complain to the other business about this issue. I could ask Mr S to do this. But, I am aware that the other adviser was a member of a network. He was not authorised to give advice on pensions or investments. The network would not accept responsibility for any advice given about Harlequin. I'm not going to delay this case any longer although I will deal with any potential liability for third parties later.

Mr S had a number of buy to let properties. These were all mortgaged. He was using his only pension to buy the Harlequin property. But, the pension was only able to pay the 30% deposit. The balance of the contract would have to be paid using a loan. In my view, this was a risky venture. It was an overseas property development. The returns from this were uncertain. Mr S already had a large property portfolio. And those properties had large loans outstanding. This was a very risky venture for Mr S.

Mr S was prepared to take risk with his pension fund. He indicated this with his answers to a risk questionnaire, which concluded that he was an adventurous investor. His chosen risk profile ('dynamic') was slightly lower. An indicative asset allocation for such a profile was to invest only 5% of its total assets in property. Mr S intended to invest his entire fund in Harlequin. Foreman should have advised against it.

Foreman has argued that at the time of the advice the Conduct of Business Sourcebook (COBS) rules did not reflect the regulatory concerns expressed in 2013. I disagree.

COBS 9.2.1 stated at the time that a firm must take reasonable steps to ensure that its advice is suitable for its client. When giving advice the firm must obtain information about the client's knowledge, experience, financial situation and investment objectives to enable it to give suitable advice.

COBS 9.2.2 also stated that when assessing suitability the firm must obtain such information as is necessary for it to understand the essential facts about him and have reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the advice meets his investment objectives and that he is able financially to bear any related investment risk.

Foreman only advised on the SIPP. They argue that Mr S had already decided to invest in Harlequin after being advised by another adviser. In my view, the suitability of the transfer needs to be considered in its entirety. The risk involved is about the investment rather than the SIPP. So, to give suitable advice in line with the rules the investment had to be considered.

COBS 9.2.1 required the firm to give suitable advice after considering the client's financial situation and investment objectives. Mr S wanted to invest in Harlequin based on what he had been told by the other adviser. But, that adviser wasn't authorised to give advice on pensions or investments. Being authorised to give advice comes with responsibilities. I think that the adviser at Foreman should have made sure Mr S understood the risks. And the advice had to be suitable. Mr S was transferring all of his pension to invest in Harlequin. This was clearly a high risk transfer. It was not suitable for Mr S.

Mr S had paid a reservation fee of £1,000 for the Harlequin property by the time he was introduced to Foreman. If Foreman had given suitable advice Mr S could have cancelled his investment. He would have lost the reservation fee.

I have thought about what Mr S would have done, if he had been advised not to transfer his pension. This is not an easy question to answer as Mr S wasn't given that advice. He now knows that he has lost his investment. I cannot say for certain what Mr S would have done. He has told us that he would not have transferred. But, I have to treat that assertion with some caution. Mr S was prepared to accept considerable risk. And he had already invested in property. He was clearly attracted to the Harlequin concept.

However, Mr S was referred to Foreman for advice to set up the SIPP. That's because the other parties involved weren't regulated to give the advice. This seems to me to be a crucial part of the process. Foreman had to give suitable advice. And I think ought to have made it clear that it was the only firm able to give that advice. Mr S should therefore have placed a lot of weight on the advice. Although he would have probably lost his £1,000 he was putting his pension fund at risk. That was over £80,000. And there was a commitment to further borrowing. I think it's most likely that Mr S would have accepted the advice. He would not have transferred his pension and not invested in Harlequin.

I also accept that it is possible that Mr S would have sought advice from another adviser if Foreman had told him not to take out a SIPP. But, they would also have been required to give suitable advice. If they did, I think it's unlikely that Mr S would have transferred his pension.

I consider that Mr S has been caused some distress by the loss of his pension fund. I understand that investors are still being asked to continue making the relevant payments into their Harlequin investments, despite all of the recorded problems. Foreman should pay Mr S £300 for this distress and inconvenience he has suffered.

I realise that Foreman thinks that other parties have some liability for the loss. I think that Foreman should compensate Mr S in full. But, Mr S should agree to provide Foreman with an assignment of any rights of action that Mr S may have against any third parties. Foreman can then decide whether it wishes to recover some of the payment it makes from those third parties.

fair compensation

My aim is to put Mr S in the position he would now be in if he had received suitable advice. I think that he would have: a.) kept his existing pension; b.) wouldn't have invested in Harlequin; and c.) 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 Foreman 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 Foreman's control.

All the variables are unknown and each may have an impact on the extent of any award I 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 Mr S back in the position he would have been in if suitable advice had been given, I think it's fair that he is compensated now. I don't think I should wait and determine each and every possibility before making an award. What is set out below is a fair way of achieving this.

Foreman should calculate fair compensation by comparing the value of the consumer's pension, if he had not transferred, with the current value of his SIPP. In summary:

1. Obtain the notional transfer value of Mr S's previous pension plan on the date of the final decision, if it had not been transferred to the SIPP.

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

3. Pay a commercial value to buy Mr S's share in the Harlequin investment.

4. Pay an amount into Mr S'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 any charges. It should also take account of interest as set out below.

5. Pay any ongoing SIPP fees until the SIPP can be cancelled. Alternatively, if the SIPP cannot be cancelled Foreman should pay five years' worth of future fees owed by Mr S to the SIPP.

6. Pay Mr S £300 for the distress and inconvenience caused.

I have explained how Foreman should carry this out in further detail below:

1. Obtain the notional transfer value of Mr S's previous pension plan on the date of the final decision, if it had not been transferred to the SIPP.

If it is not possible to obtain the value of the existing pension the FTSE WMA Stock Market Growth 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.

Foreman 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 S's SIPP on the date of the final decision, including any outstanding charges.

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

3. Pay a commercial value to buy Mr S's Harlequin investment.

The SIPP only exists because of the investment in Harlequin. In order for the SIPP to be closed and further SIPP fees to be prevented, the 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, Foreman 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 Foreman is unable to buy the investment, 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. The consumer 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.

The consumer 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 Foreman 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 Foreman 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 I can't tell the firm to take over the contract from the consumer's SIPP. But I 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.

4. Pay an amount into Mr S'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. It should also take account of interest as set out below.

If it's not possible to pay the compensation into the SIPP, Foreman should pay it as a cash sum to Mr S. The compensation should be able to be paid into a pension in the time until Mr S retires and he should be able to contribute to a pension and obtain tax relief.

The compensation should be reduced to notionally allow for the income tax relief Mr S could claim. The notional allowance should be calculated using Mr S's marginal rate of tax. For example, if he is a basic rate taxpayer, the total amount should be reduced by 20%.

Simple interest should be added at the rate of 8% a year from the date of the final decision until the date of payment. Income tax may be payable on this interest.

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

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

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

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

6. Pay Mr S £300 for the distress and inconvenience caused.

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

If Foreman wishes to take an assignment of any rights of action Mr S may have against third parties it may do so. That is provided it has compensated Mr S in full.

my final decision

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

Foreman should provide details of its calculation to Mr S in a clear, simple format.

Under our rules, I am required to ask Mr S either to accept or reject my decision before 10 October 2016.

Roy Milne
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