

complaint

Mr A's complaint is that he received unsuitable advice from an Appointed Representative (AR) of Intrinsic Financial Planning Ltd. He says he was advised to switch his personal pension to a self invested personal pension (SIPP) in order to invest in Harlequin, an unregulated collective investment scheme (UCIS).

background

The AR advised Mr A to transfer his personal pension to a SIPP. When this transfer was made Mr A invested all of the fund into Harlequin.

An investigator looked at the complaint and thought it should be upheld. He said:

From the declarations signed by Mr A, it was clear that the only advice the AR gave was to switch his personal pension to a SIPP. However, guidance from the regulator (the FCA) has made clear that in this situation consideration must be given to the intended investment(s) to be held within the SIPP. If the intended investments are unsuitable then so is the SIPP advice. It is clear from the suitability report for the SIPP advice that the AR knew that Mr A intended to invest in Harlequin.

For these reasons the investigator concluded that the advice Mr A received was unsuitable. He explained how he thought Mr A should be compensated for the losses suffered. He also considered that losing the entirety of his pension provision would have been very upsetting for Mr A. He said Intrinsic should pay Mr A compensation of £500 in recognition of this.

Mr A agreed with the investigator.

Intrinsic didn't. It said:

- Mr A didn't receive advice about Harlequin from its AR. This advice was provided by the adviser's unregulated company (or alternatively a Harlequin agent).
- This was confirmed in writing by Mr A.
- Intrinsic has no relationship with either the Harlequin agent or the adviser's non-regulated company. Intrinsic didn't receive any commission from Harlequin.
- It accepts that the AR advised Mr A about his SIPP.

I issued a provisional decision on this complaint in November 2017. In this decision I said the following:

'jurisdiction

We can consider a complaint under our compulsory jurisdiction if it relates to an act or omission by a firm in the carrying on of one or more listed activities, (including regulated activities), or any ancillary activities carried on by the firm in connection with those activities, (DISP2.3.1R).

Complaints about acts or omissions by a firm include complaints about acts or omissions in respect of activities for which the firm is responsible (including the business of any appointed representative for which the firm has accepted responsibility) (DISP2.3.3G).

And section 39(3) of the Financial Services Markets Act (FSMA) 2000 says:

“The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility.”

So there are two questions to be considered before I can decide whether the complaint is one we can look at under the compulsory jurisdiction of this service:

- 1. Were the acts Mr A complains about done in the carrying on of a regulated activity?*
- 2. Were those acts the acts of the principal firm, Intrinsic?*

Regulated activities are specified in Part II of the FSMA 2000 (Regulated Activities) Order 2001 (“the RAO”) and include advising on the merits of buying or selling a particular investment which is a security or a relevant investment (article 53 RAO), and making arrangements for another person to buy or sell or subscribe for a security or relevant investment (article 25 RAO).

Both a personal pension and a SIPP are relevant investments. It is not in dispute that the AR advised Mr A to switch his personal pension to a SIPP. This advice therefore constituted a regulated activity.

Therefore the first jurisdiction test has been met.

were those acts the acts of the principal firm, Intrinsic?

As set out earlier, Section 39 (3) of FSMA sets out the responsibility of Intrinsic for the acts of its AR. This means, Intrinsic will only be responsible for advice given by its AR while carrying on business for which Intrinsic had accepted responsibility.

In giving the advice to switch from a personal pension to a SIPP the AR was acting on behalf of Intrinsic. The business was transacted through Intrinsic and it was fully aware of the transaction. I am therefore satisfied that the pension switch advice was advice that Intrinsic has accepted responsibility for. This means that the second test has been met.

As both tests have been met then my decision is that this is a complaint that this service can look at.

my provisional merits findings

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

the scope of SIPP advice

The FCA has said (in 2013):

‘...where a financial adviser recommends a SIPP knowing that the customer will transfer out of a current pension arrangement to release funds to invest in an overseas property investment under a SIPP, then the suitability of the overseas property investment must form part of the advice about whether the customer should transfer into the SIPP. If, taking into

account the individual circumstances of the customer, the original pension product, including its underlying holdings, is more suitable for the customer, then the SIPP is not suitable.'

Whilst this post dates the advice I consider this was clarification of existing obligations on advisers rather than an imposition of new obligations. I am therefore satisfied that the advice to switch to a SIPP should have also taken into consideration the intended investment in Harlequin (the adviser knew this was Mr A's intention).

Whilst the advice to switch from a personal pension to a SIPP was given by the AR, I am not persuaded that the AR gave any advice about Harlequin. I am satisfied that the Harlequin advice was given by a non regulated company connected to the AR (albeit the advice was given by the same individual). This was confirmed in writing by Mr A.

Harlequin was not a product that Intrinsic allowed its ARs to give advice on. Therefore in practice an Intrinsic AR would not be able to give advice that encompassed both the merits of switching a personal pension to a SIPP as well as the merits of investing in Harlequin.

However, whilst specific advice about Harlequin couldn't have been given I consider the adviser could have given general advice about the advisability of investing all of an investor's pension provision in a single unregulated investment. In my view the adviser could and should have advised against the transaction without straying into giving regulated investment advice about Harlequin (regulated investment advice is advice about the merits of buying or selling a particular investment).

If an investor wanted specific advice about the suitability of Harlequin and how that impacted on the suitability of the SIPP advice, then he should have been recommended to consult an adviser who was able to give this advice. The AR would not have been able to give this advice.

the risks of Harlequin

Mr A was investing in an unbuilt hotel development. He was paying a deposit of 30% on two properties. As the resort was built further substantial payments were required. It was anticipated that a mortgage could be taken out to cover these and it was expected that the expected rental income would meet the repayments on the mortgage. However, there was no guarantee that the resort would be successful and that using rental income to service the mortgage would be a viable option. Another option would be to sell the properties when they were completed. However, there was no guarantee that the properties could be sold at a substantial premium to the building cost or could be sold at all. Therefore the risks to Mr A's capital were substantial. There was no certainty that he would be able to sell the investment or obtain mortgage funding for the remaining outlay.

In addition to the above risks Mr A had none of the protections that would be available in a regulated collective investment scheme (Harlequin was an unregulated collective investment scheme). This would include for example the ability to make a claim to the Financial Services Compensation Scheme (FSCS). Harlequin was a resort in the Caribbean and therefore carried all of the risks associated with an emerging market.

For these reasons I am satisfied that Harlequin would generally be considered to be a high risk investment.

If Mr A had received regulated investment advice in compliant manner I am satisfied that he would have been advised not to go ahead. I say this for the following reasons:

Whilst Mr A had a recorded attitude to risk of high he had no experience of investments such as Harlequin. I don't think he had the knowledge and experience to appreciate the level of risk he was taking.

For Mr A to invest the whole of his pension fund in a single high risk unregulated investment exposed him to a very significant risk of loss. Such a strategy would not be compatible with his financial circumstances – he was not in a position to take such a high level of risk.

I am therefore satisfied that if Mr A had received compliant advice he would have been advised not to go ahead with the pension switch and investment in Harlequin.

would Mr A have heeded this advice or gone ahead regardless?

In my view an investor can generally be assumed to accept professional advice that they receive. The AR was Mr A's long standing and presumably trusted financial adviser, and as discussed above, could have advised against going ahead (within the terms of the AR agreement). Mr A's investment experience appears to be very limited and the more limited the experience of an investor the more likely in my view that they will accept advice.

I am therefore satisfied that it is more likely than not that had Mr A been advised not to go ahead with the pension switch/Harlequin investment he would not have done so.

It is therefore my provisional conclusion that this complaint should be upheld. If the AR had acted in the way that it should I consider that Mr A would not have invested in Harlequin.

I'm aware that a party involved with Harlequin has been charged with fraud offences. A court might therefore conclude that Mr A's loss didn't flow directly from Intrinsic's representative's failure to provide suitable advice. And on this basis, a court might not require Intrinsic to compensate Mr A – notwithstanding the clearly unsuitable advice. But in assessing fair compensation, I'm not limited to the position a court might take. And in this case I'm satisfied that Mr A wouldn't have made the Harlequin property investment had it not been for the failings of Intrinsic's AR. So I think it's fair that Intrinsic Financial Planning Ltd, who were responsible for the actions of its AR should compensate Mr A for any losses that he suffered.

fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mr A as close to the position he would probably now be in if he'd been given suitable advice. I think with suitable advice Mr A would have kept his existing pension. But it's unlikely to be possible for Intrinsic to reinstate Mr A into his previous pension scheme.

There are also a number of possibilities and unknown factors in making an award. While I understand Harlequin Property will allow Intrinsic to take over the investment from Mr A, the involvement of third parties – the SIPP provider and Harlequin Property – 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 – but I can't be certain of that.

While it's complicated to put Mr A 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 Intrinsic should wait and determine each and every possibility before making an award. What is set out below is a fair way of achieving this.

In summary, Intrinsic should:

- 1. Obtain the notional transfer value of Mr A's previous pension plan, on today's date, if it had not been transferred to the SIPP.*
- 2. Obtain the transfer value, as at today's date, of Mr A's SIPP, including any outstanding charges.*
- 3. And then pay an amount into Mr A's SIPP so that the transfer value is increased to the amount in (2). This payment should take account of any available tax relief and the effect of charges.*
- 4. Pay any future fees owed by Mr A to the SIPP, for the next five years.*
- 5. Pay Mr A £500 for the trouble and upset caused.*

I have set out each point in further detail below.

1. Obtain the notional transfer value of Mr A's previous pension plan if it had not been transferred to the SIPP. That should be the value at the date of this decision. Intrinsic should ask Mr A's former pension provider to calculate the notional transfer value that would have applied as at the date of this letter had he not transferred his pension but instead remained invested. If there are any difficulties in obtaining a notional valuation then the FTSE WMA Stock Market Income Total Return Index should be used (this would appear to be the closest match in terms of risk of Mr A's original pensions fund). That is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

Intrinsic 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 today's date of Mr A's SIPP, including any outstanding charges. This should be confirmed by the SIPP operator. If the operator has continued to take charges from the SIPP and there wasn't an adequate cash balance to meet them, it might be a negative figure.

3. Pay an amount into Mr A's SIPP so that the transfer value (in 1) is increased to equal the amount in (2). 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, Intrinsic should pay it as a cash sum to Mr A. But had it been possible to pay into the SIPP, 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 A's marginal rate of tax in retirement.

4. Pay any future fees owed to the SIPP for the next five years.

Had Intrinsic given suitable advice I don't think there would be a SIPP. It's not fair that Mr A continues to pay the annual SIPP fees if it can't be closed. Ideally, Intrinsic should take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mr A back in the position he would have been in. But the ownership of the Harlequin Property

investment can't currently be transferred. It's likely that will change at some point, but I don't know when that will be – there are a number of uncertainties.

So, to provide certainty to all parties, I think it's fair that Intrinsic pays Mr A an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees), or undertakes to cover the fees that fall due during the next five years. This should provide a reasonable period for things to be worked out so the SIPP can be closed.

In return for the compensation set out above, Intrinsic may ask Mr A to provide an undertaking to give it the net amount of any payment he may receive from the Harlequin Property investment in that five year period, as well as any other payment he may receive from any party as a result of the investment. That undertaking should allow for the effect of any tax and charges on the amount he may receive. Intrinsic will need to meet any costs in drawing up this undertaking. If it asks Mr A to provide an undertaking, payment of the compensation awarded by this decision may be dependent upon provision of that undertaking.

If, after five years, Intrinsic wants to keep the SIPP open, and to maintain an undertaking for any future payments under the Harlequin Property investment, it must agree to pay any further future SIPP fees. If Intrinsic fails to pay the SIPP fees, Mr A should then have the option of trying to cancel the Harlequin Property contract to enable the SIPP to be closed. In addition, Intrinsic is entitled to take, if it wishes, an assignment from Mr A of any claim he may have against any third parties in relation to this pension transfer and Harlequin Property investment. If Intrinsic chooses to take an assignment of rights, it must be affected before payment of compensation is made. Intrinsic must first provide a draft of the assignment to Mr A for his consideration and agreement.

The SIPP has paid a deposit under a contract with Harlequin Property. Mr A 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 Property 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 A needs to understand this, and that he won't be able to bring a further complaint to us if this contract is called upon.

5. Pay Mr A £500 for the trouble and upset caused.

Mr A has been caused significant upset by the events this complaint relates to, and the apparent loss of all of his pension benefits. I think that a payment of £500 is fair to compensate for that upset.'

Mr A accepted my provisional decision, Intrinsic didn't. Neither party had anything further to add.

my findings

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

As neither party has said anything further I confirm that for the reasons set out in my provisional decision my final decision is that the complaint should be upheld. And that Intrinsic should compensate Mr A in the way set out above. I said that if the money can't be

paid into the SIPP then a cash sum should be paid to Mr A – reflecting his tax position. To clarify, if Mr A has not taken his tax free lump sum and assuming he is, in retirement, a basic rate tax payer this will be a 15% reduction. The compensation shouldn't be paid into the SIPP if it would conflict with any existing protection or allowance.

my final decision

My final decision is that this complaint should be upheld. I order Intrinsic Financial Planning Ltd to pay compensation to Mr A as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 29 January 2018.

Michael Stubbs
ombudsman