

complaint

Mr B complained that Sussex Independent Financial Advisers Limited (Sussex IFA) gave him unsuitable advice to transfer his personal pension plan (PPP) into a self-invested personal pension (SIPP). That was so that he could invest into Harlequin property; an overseas property development.

background

I issued my provisional decision on 27 March 2018, a copy of which is attached to and forms part of this final decision.

Sussex IFA did not accept my provisional decision. They said:

- It was important I consider all of the information they hold about Mr B at the time he decided to invest in Harlequin.
- Mr B previously transferred benefits from a final salary pension scheme. He did this even though he was advised not to do so. The reason being he wanted to invest in commercial or possibly residential property.
- A complaint was made to the product provider about the transfer. This was redirected to the firm that gave the advice. An introducer to that IFA was involved. And Mr B was expecting to receive a share of the commission for the transfer.
- An ombudsman concluded that Mr B transferred knowing that it would not have been in his best interest.
- Mr B had experience of working in the financial services industry.
- When he was introduced to Sussex IFA he had already agreed to buy Harlequin using his personal pension.
- There was a very substantial inducement for investing in Harlequin. This was processed by a different firm. The payment was then made to an account in Mrs B's name.
- Based on the facts Sussex IFA had described, Mr B would not have given up the sizeable inducement. That money was required for Mr and Mrs B's needs.
- The Harlequin agent had worked with Mr B. They were old friends.
- If Sussex IFA had been aware of the amounts paid to the introducer or Mr B they would not have proceeded with arranging the SIPP.
- If Mr B had not proceeded he stood to lose the £3,000 deposit, the £11,600 inducement and loss of the handsome returns his friend had put forward for the investment in Harlequin. This was set against the possible loss of his pension.
- The regulator's alert was not issued until January 2013. This was a number of years after Mr B was advised to arrange a SIPP. If that is a restatement of the existing rules, why have so many firms fallen foul of that measure?
- The Harlequin agent was an appointed representative of a network. Recent cases have indicated the network could be held responsible for the actions of their representatives.
- The SIPP provider had also paid over money from the SIPP for no asset or security. They should have carried out some due diligence on the investment.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I have come to the same conclusion as I reached in my provisional decision and for the same reasons.

Mr B's previous complaint

I have considered the outcome of Mr B's previous complaint to this service. There are similarities as he did act against advice in that case. But, in this case Sussex IFA did not advise him against investing in Harlequin. It is therefore difficult to know exactly what Mr B would have done if he had been given that advice.

Mr B's previous experience

The evidence I have about Mr B's previous experience indicates that he was not an experienced investor. Neither did he have any experience of investing in higher risk investments. I am satisfied that he acted on what he had been told by other people involved in the process.

What was Sussex IFA required to do?

I have explained that Sussex IFA was required to give suitable advice. I am aware that a number of financial advisers have tried to limit their advice to the choice of a SIPP and excluded the investment to be made. I accept that the regulator did not issue an alert about this issue until January 2013. But that alert was to remind advisers of their obligations under the existing rules. I remain of the view that Sussex IFA should have given advice to Mr B about the suitability of investing in Harlequin.

What would Mr B have done if he had been given suitable advice?

Mr B should have been given advice about Harlequin. Sussex IFA says that it was not allowed to do so. In my view, if Sussex IFA was not allowed, or prepared, to advise on Harlequin it should not have given any advice at all.

The rules required an adviser is to give suitable advice to their client. Harlequin was an overseas property development. The way the investment worked was unusual. The returns an investor could make depended on the development being successful and rental income from particular hotel rooms. In my view, there were multiple risks associated with the investment. This was all of Mr B's pension provision. He should have been advised not to invest. And I think he should also have been given an explanation of all of the risks involved.

It is possible that Mr B would have proceeded even if he had been given advice not to do so. I agree with Sussex IFA that he would lose the £3,000 deposit and the £11,600 inducement plus the possibility of higher returns from Harlequin. But those points all need to be set against the risk of losing his pension fund. In my view, that was a very significant risk.

Having considered all of the available evidence, I remain of the view that Mr B would not have transferred to the SIPP. And he would not have invested all of his funds in Harlequin if Sussex IFA had given suitable advice. In reaching that conclusion, I have placed significant weight on the facts Sussex IFA did not give suitable advice and Mr B gave a very credible explanation about what he would have done if he had received suitable advice.

fair compensation

My aim is to put Mr B back in the position he would have been in if he had received suitable advice. I explained how I intended to make an award in my provisional decision. I think that is an appropriate method.

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 in my provisional decision. My decision is that Sussex Independent Financial Advisers Limited should pay Mr B the amount produced by that calculation. To be clear my award is the amount the firm must pay after the adjustment for the effect of tax on the loss. 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 Sussex IFA pays Mr B 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 Sussex IFA. It is unlikely that Mr B can accept my decision and go to court to ask for the balance. Mr B may want to get independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 30 June 2018.

Roy Milne
ombudsman

copy of provisional decision

complaint

Mr B complained that Sussex Independent Financial Advisers Limited (Sussex IFA) gave him unsuitable advice to transfer his personal pension plan (PPP) into a self-invested personal pension (SIPP). That was so that he could invest into Harlequin property; an overseas property development.

background

A third party contacted Mr B to introduce the opportunity to invest in Harlequin properties. It was suggested that he use his pension to invest in three separate Harlequin properties. Mr B required a SIPP so that he could invest in the Harlequin properties. He was referred to Sussex IFA for advice about setting up a suitable SIPP.

Sussex IFA completed documents with Mr B that recorded his personal and financial circumstances at the time. These were:

- Mr B ran a business; he also worked as a contract worker; his monthly income was £2,500 and monthly outgoings were £1,781.
- He had £1,500 in deposit accounts.
- He had some money in emergency funds which had been set aside for his children's university costs.
- His home was valued at £330,000 with an outstanding mortgage of £197,000.
- He was 51 years old.
- He wanted to retire at age 65 and needed an annual income of £20,000.
- His attitude to investment risk was *"Balanced"*.

Sussex IFA wrote to Mr B and said that:

- He had a PPP with a value of £141,768. There was a transfer charge of about £1,500. The monies in the plan had been transferred from a defined benefit scheme in 2004.
- The PPP had no guarantees in place. Sussex IFA advised Mr B to transfer his pension into a SIPP. That would then enable him to buy Harlequin properties.
- The total deposits for the three Harlequin properties would be £126,000. The balance of money in the SIPP would be used to cover the cost of fees within the SIPP.
- Advice was being limited to assessing the suitability of a SIPP.
- Mr B's primary objective was ensuring he had built up a large enough pension fund to be able to retire in 14 years' time.

Mr B complained to Sussex IFA when Harlequin ran into difficulties. They investigated the complaint, but did not uphold it. They said that their advice was limited to the choice of SIPP. They hadn't given advice about Harlequin.

Mr B told us:

- He had been introduced to Harlequin by an individual whom he met at a football reunion. That person was an agent for Harlequin.
- The agent had referred him to Sussex IFA for the pension transfer. Sussex IFA had then contacted him directly.
- A reservation fee of £1,000 per property was paid prior to contact from Sussex IFA. But the sums paid were returned when he paid the 30% initial deposit per property from his SIPP. He had bought three units with Harlequin.
- If the 30% deposits weren't paid the reservation fees would have been forfeited.
- He never met with Sussex IFA face-to-face; conversations were over the phone.

- He had initially decided against the investments, but was offered an inducement payment by the agent to make the investments; he was struggling to get two children through university at the time and that payment did weigh heavily on his decision.
- Had Sussex IFA advised him not to transfer the monies into a SIPP; and made him aware of the risks associated with Harlequin then he would probably have followed that advice. He would have weighed up the potential loss of his pension fund of £150,000 against the loss of the £3,000. He thinks he would have forfeited the £3,000.

A sum of £11,600 was paid into Mrs B's bank account in June 2010; that was paid by a third party. The third party has said they processed the payment as they were asked to do so by an introducer.

Sussex IFA told us:

- Mr B had already made a commitment to buy three Harlequin properties. That was before being introduced to them. Mr B had already made direct contact with Harlequin and had completed and signed agreements.
- Mr B was under a time constraint and wanted to arrange a SIPP as quickly as possible.
- It did test Mr B's knowledge of the intended investments during a telephone discussion and he came across as very knowledgeable.
- Mr B had already received information about Harlequin. This was similar to information they had obtained; because of this they had no doubts that Mr B knew what he was doing.
- It never gave any advice about the Harlequin holdings.

One of our adjudicators investigated this complaint. He concluded that Mr B should have been advised not to transfer his pension into the SIPP. And if Mr B had been given that advice he would not have invested in Harlequin. He therefore concluded that the complaint should be upheld.

Sussex IFA did not agree. They told us that:

- They were not engaged to advise on the investments to be held within the SIPP and its retainer letter confirms this.
- At the date they gave the advice they were not required by the regulator to advise on the underlying investments.
- The regulator's current stance was adopted after their advice was given.
- At the time there was no concern with Harlequin; that has only now arisen following the revaluation and the appointment of administrators.
- They had written to Mr B a number of times to invite him to arrange a meeting. That was to discuss information from his SIPP provider. And also to offer a review of his investments. Mr B did not take up any of their invitations
- Had a review been carried out, then Mr B would have been advised to disinvest from Harlequin. That was before the investments were revalued in the financial year ending 2014. The regulator had issued two alerts in early 2013 and there were concerns within the industry at the time as a result of the alerts.
- During this period Harlequin was offering to refund some of the deposits; or to transfer the investments to a resort which had been partially completed. Had a review been carried out, the advice would have been to move the investments; and Mr B would have been able to do so.
- An unregulated third party advised Mr B on the Harlequin holdings.
- If they had advised Mr B not to invest in Harlequin, he would have ignored the advice given his circumstances at the time.
- A previous complaint Mr B made to this Service about the transfer of his defined pension benefits was unsuccessful. This shows that Mr B acted regardless of the advice received; and also that he had some knowledge of SIPPs already.
- Mr B was extremely knowledgeable during discussions and had clearly done his own research prior to contacting them.
- Mr B had not disclosed that he would be receiving an inducement payment; if he had told them, then they would not have arranged the transfer.

Mr B replied and told us that:

- He had not made any contact with Harlequin.
- There was no time constraint.
- He does not recall Sussex IFA testing his knowledge of Harlequin and he had no idea what a SIPP was.
- He thought that Sussex IFA was undertaking a full assessment of the suitability of the SIPP and the Harlequin holdings.
- He obtained no independent information about Harlequin; the introducer advised him about Harlequin and told him that Sussex IFA would assess the suitability of a SIPP.

my provisional findings

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

When considering what is fair and reasonable, I am required to take into account relevant law and regulations, regulator's rules, guidance and standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

What did Sussex IFA do?

Sussex IFA gave advice to Mr B about transferring his PPP to a SIPP. No advice was given about the Harlequin properties.

What was Sussex IFA required to do?

When Mr B's SIPP was set up, if advice was given, firms were required to know their client and give suitable advice. They also had to act in their client's best interest.

The advice given to Mr B was to set up a SIPP. But the transfer to the SIPP was made with the intention of investing in Harlequin properties. This SIPP is simply the wrapper to hold the investments. In my view, suitable advice cannot be given without considering the investments to be made. An adviser cannot avoid its duty to give suitable advice by limiting the scope of the advice it will provide.

Sussex IFA knew that monies transferred into the SIPP would then be invested into Harlequin. This was a single transaction. If the investments were unsuitable for Mr B then Sussex IFA should not have recommended the transfer into the SIPP.

The regulator issued an alert in January 2013. That said the regulator had concerns about a business model where advice was being given to set up a SIPP, but without considering the investment.

Sussex IFA made the point that this alert was issued after the advice was given to Mr B. But, in my view, the alert only reinforces the existing duties placed on advisers by the rules and the regulatory principles. I think Sussex IFA should have considered the suitability of the investments when they gave advice to start the SIPP.

Was the advice suitable?

The risks associated with the Harlequin holdings were considerable. These were unusual holdings, operating in a very specific way and without a track record. They might reasonably be described as sophisticated and/or complex investments. They could suffer significant losses, the nature of which would be difficult to predict or estimate at the outset.

The Harlequin investment exposed investors to significant risks such as gearing, opaque corporate structures, illiquidity and the risks inherent in non-regulated investments. It ought to have been

evident that these risks were greater than the balanced approach Mr B was prepared to accept; especially in light of the lack of any consumer protection.

Sussex IFA had recorded Mr B's attitude to investment risk as being balanced. With that in mind, I take the view Sussex IFA ought to have been aware that an investment in Harlequin was unlikely to be suitable for Mr B. Indeed, I have real doubts whether it would have been suitable for all but the most experienced of investors and certainly not for Mr B.

It is important for advisers to take these matters into account when assessing the suitability of the products for a client. And for potential investors to understand that such investments presented a significant risk to the monies being invested. I think that the degree of risk was not adequately explained to Mr B. This was all of his pension. I think the risks for him were significant.

I think Mr B ought to have been advised not to transfer his monies into a SIPP; and not to invest any of his pension funds into Harlequin. In my view, the advice given was not suitable.

What would Mr B have done if Sussex IFA had advised him against the transfer into the SIPP?

I have carefully considered what Mr B told the adjudicator. I have listened to the recording of their telephone conversation. I think that Mr B came across as being very credible. He said that after being approached about the investment the agent contacted him a number of times. Mr B was not sure about the investment, but the agent offered to pay him some of the commission. It was at that point that the £3,000 in reservation fees was paid. A referral was then made to Sussex IFA. Mr B said he would have considered the advice not to transfer and discussed with his wife. He would have weighed up the possible loss of his pension fund of about £150,000 against the loss of £3,000 and the £11,600 inducement. He said that he would not have transferred.

On balance, I accept what Mr B said. Listening to the telephone conversation with the adjudicator I was struck by the way he considered the question. I could tell that he gave the matter a lot of thought. I think it most likely that Mr B would have discussed the advice with his wife. And weighing the possible loss of his pension fund against the loss of the reservation fees and the incentive payment I think he would have accepted the advice and agreed not to transfer.

What about the role of third parties?

While other businesses were involved in the background Mr B has made a complaint against Sussex IFA and I think that it is the actions of Sussex IFA that have caused Mr B to suffer a loss.

The investment could not have taken place without the SIPP being started and without pension monies then being transferred into that arrangement. It seems that could only happen if Sussex IFA was involved.

It is possible that the other businesses involved could have some liability for the losses Mr B has suffered. If Sussex IFA wishes to take an assignment of any rights of action against any third party involved in the sale of the investments, it would not be inappropriate for it to do so, but only after redress has first been paid. Further, the assignment should only relate to any losses for which Sussex IFA fully redresses Mr B.

Should Mr B have asked Sussex IFA to review his SIPP?

Sussex IFA said that Mr B didn't reply when they offered him to review his SIPP. But, as far as I can see there was no indication that they told him there were problems with Harlequin. So, I don't think there's any reason why Mr B should have thought he needed a review. And I'm not convinced that Mr B would have been able to obtain a refund of the deposit. It is possible that could have happened. But, I think after problems with Harlequin emerged it's unlikely that many investors would have received a return of the deposit.

fair compensation

My aim is to put Mr B back in the position he would now be in if he had received suitable advice. I think that he would have kept his existing pension. Sussex IFA should calculate fair compensation by comparing the value of that pension, if he had not transferred, with the current value of his SIPP.

Sussex IFA should:

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

If there are any difficulties in obtaining a notional valuation then the FTSE UK Private Investor 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.

It is to be assumed that any contributions or withdrawals that have been made would still have occurred and on the same date.

An allowance is to be made for a withdrawal of £3,000 at outset, as Mr B would have lost the reservation fees which were returned to him. An allowance should also be made for a withdrawal of £11,600 on 18 June 2010; that's the payment Mr B received from the Harlequin agent.

2. Obtain the current transfer value of Mr B's SIPP, including any outstanding charges. That should be the value at the date of this decision.
3. Pay a commercial value to buy Mr B's Harlequin Property investments.

The SIPP only exists because of the investments in Harlequin. I think it would be best if the Harlequin investments could be removed from the SIPP. Mr B 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 Harlequin investments may prove difficult, as there is no market for them. For calculating compensation, Sussex IFA should agree an amount with the SIPP provider as a commercial value. They should then pay the sum agreed plus any costs and take ownership of the investments.

If Sussex IFA is unable to buy Mr B's investments in Harlequin, they should give them a nil value for the purposes of calculating compensation. Sussex IFA may then ask Mr B to provide an undertaking to account to them for the net amount of any payment he may receive from his investment in Harlequin Property up to the amount of compensation paid. That undertaking should allow for the effect of any tax and charges on the payment.

The contract with Harlequin is for 30% of each property. That was paid as a deposit. There is another part of the contract for the remaining 70% of the purchase price of the property. I understand that this contract could be called upon if the development progresses. At that stage Mr B could be required to raise funds to meet his liability. In my view, that liability would not exist if Sussex IFA had advised Mr B not to use his pension to buy the Harlequin properties.

I think that Sussex IFA should compensate for any loss. Ideally, I would like all contracts to be taken on by Sussex IFA. But, the maximum award I can make is for £150,000. By including the contracts for the balance of the 70% of the properties in my award I think that could mean the award was, in theory, for more than £150,000. I think it is unlikely that the development will progress. So, it is unlikely that Mr B will be asked to pay any money for this part of the contracts. I therefore do not think I should make an award for this.

But Mr B needs to understand this, and that he will not be able to bring a further complaint to us if this contract is called upon. Mr B may want to seek independent advice on how to cancel this ongoing contract for the remaining amount.

Sussex IFA should also:

4. Pay an amount into Mr B'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 is not possible to pay the compensation into the SIPP, Sussex IFA should pay it as a cash sum to Mr B. 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 B's marginal rate of tax in retirement. For example, if Mr B is most 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 B 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 B to the SIPP. Had the business given suitable advice I do not think there would be a SIPP. It is not fair that Mr B continues to pay the annual SIPP fees if it cannot be closed.

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

In my view, awarding a lump sum for an amount equivalent to five years' fees strikes a fair balance. It is possible that the Harlequin investments could be removed from the SIPP in fewer than five years. But given the time it has taken to date I think it is possible that it could take a number of years more to resolve all of the issues. So using a figure of five years' worth of fees is an approximate and fair award to resolve the issue now.

6. Pay Mr B £250 for the distress and inconvenience caused.

Mr B has been caused some distress by the loss of his pension benefits. I think that a payment of £250 is appropriate to compensate for that distress.

my provisional 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 Sussex Independent Financial Advisers Limited should pay Mr B the amount produced by that calculation. To be clear my award is the amount the firm must pay after the adjustment for the effect of tax on the loss. 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 Sussex IFA pays Mr B 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 Sussex IFA. It is unlikely that Mr B can accept my decision and go to court to ask for the balance. Mr B may want to get independent legal advice before deciding whether to accept this decision.