

## **complaint**

Ms L complained about Fergus Burns' advice to switch her personal pension to a new plan and to invest in an unregulated overseas property development.

## **background**

Ms L confirmed she'd met a representative of an unregulated firm (SIPP-Able) at her home in 2012. Options were discussed about how she might invest her pension. She'd recently divorced and the pension was part of the divorce settlement.

Application forms for a self-invested personal pension (SIPP) were completed at the meeting and via the post. On the SIPP application Fergus Burns (trading as The Financial Planning Partnership) was named as the regulated advice business.

The transfer of around £63,000 was confirmed in July 2012 and £60,625 was subsequently invested in the unregulated property - Freedom Bay in St Lucia. SIPP fees were deducted from the plan until 2016 when Ms L was contacted directly by the SIPP provider to pay SIPP fees, as there was insufficient cash held in the plan.

An adjudicator looked into the complaint and, on the limited evidence that was available, concluded it should be upheld. It was the adjudicator's view that Ms L didn't have the necessary experience to understand the investment. He also thought the fund size wasn't sufficient to warrant a SIPP being set up as there was limited opportunity to take advantage of a wider choice of investments.

## **my findings**

I've considered all the evidence and arguments in order to decide what is fair and reasonable in the circumstances of this complaint. I agree with the adjudicator and uphold this complaint.

SIPP-Able which first contacted Ms L about her pension wasn't regulated, so it couldn't provide Ms L with advice. In order for the transfer to go ahead the SIPP provider required confirmation of the involvement of a regulated advice firm. Fergus Burns, being named as the regulated advice firm, facilitated the transfer to the SIPP. So I'm satisfied Fergus Burns was responsible for the advice to transfer.

Ms L's transfer value was just over £63,000. It wouldn't normally be considered appropriate to establish a SIPP with such a modest sum and without the prospect of any significant further contributions. I say this because SIPPs tend to involve higher charges than personal pensions and with a relatively small fund size there's limited scope to take advantage of the wider fund/investment choice available with a SIPP. So I'm not persuaded that it was in Ms L's interest to switch from a personal pension to a SIPP for those reasons.

Looking at the investment, Freedom Bay is an unregulated property development in St Lucia. Ms L didn't have any other personal pension provision. She'd received the existing pension as part of her divorce settlement. Ms L confirmed she didn't have any other investments. In the circumstances, it's clear she wasn't an experienced investor, yet Fergus Burns effectively advised her to invest 95% of her entire pension in an unregulated investment.

The investment in Freedom Bay wasn't appropriate for a normal retail investor like Ms L. The investment involved numerous risks I doubt Ms L understood properly. The risks included

(amongst others) currency risk, potential illiquidity and the risk of the venture failing entirely. In addition, Ms L didn't have the usual investor protections afforded such as referral rights to this service or Financial Services Compensation Scheme (FSCS).

The regulator (now the Financial Conduct Authority) has over the years issued warnings about firms' responsibilities with regard to advising on transfers to SIPPs and carrying out unregulated investments. One such alert issued on 18 January 2013 said the following:

*'The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating'.*

The alert was issued after Ms L's transfer. However this wasn't new information or guidance, rather it was a restatement of earlier guidance about how firms needed to regard such transactions. So it's clear the regulator required Fergus Burns to assess the transfer's suitability in the light of the proposed underlying investment.

However, given that I don't think transferring to the SIPP was in Ms L's best interests, it follows that had the SIPP not been established the unregulated investment wouldn't have gone ahead.

I've not seen any significant evidence that Ms L was dissatisfied with her existing pension. And I've concluded that had Fergus Burns not endorsed the transfer she'd have retained the existing plan and its investments.

Fergus Burns has said it has applied to the Financial Services Compensation Scheme to accept complaints about its advice (FSCS), as it isn't able to meet claims against it. However, the FSCS hasn't indicated it will accept cases against Fergus Burns.

## **compensation**

My aim is that Ms L should be put as closely as possible into the position she would probably now be in if she had not been given unsuitable advice.

I take the view that Ms L would have retained her existing personal pension and investments. It's not possible to say *precisely* what she would have done differently. But I'm satisfied that what I've set out below is fair and reasonable given Ms L's circumstances and objectives when she invested.

## **what should Fergus Burns do?**

To compensate Ms L fairly, Fergus Burns must:

- Compare the performance of Ms L's investment with that of the benchmark shown below. If the *notional value* is greater than the *actual value* there is a loss and compensation is payable. If the *actual value* is greater than the *notional value*, no compensation is payable.

Fergus Burns should add interest as set out below.

If this shows that redress is due, then this should be paid to Ms L's pension plan. The payment should allow for the effect of charges and any available tax relief.

The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If the payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Ms L as a lump sum after making a deduction of 15%. The payment would otherwise have been used to provide pension benefits, 25% of which would be tax free and the rest would have been taxed according to her likely tax paying status in retirement – presumed to be 20%. And so the 15% deduction adequately reflects this.

- Pay to Ms L £300 for the trouble and upset caused when she became aware she might have lost her pension.

Income tax may be payable on any interest paid. If Fergus Burns deducts income tax from the interest it should tell Ms L how much has been taken off. Fergus Burns should give Ms L a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
SIPP	still exists	the funds already held in the Aegon plan	date of the transfer	date of my decision	8% simple per year from date of decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)

### ***actual value***

This means the actual amount payable from the investment at the end date.

It may be difficult to find the *actual value* of the investment. So, the *actual value* should be assumed to be nil to arrive at fair compensation. Fergus Burns should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the compensation and the balance paid as I set out above.

If Fergus Burns is unable to purchase the investment, the *actual value* should be assumed to be nil for the purpose of calculation. Fergus Burns may require that Ms L provides an undertaking to pay Fergus Burns any amount she may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Fergus Burns will need to meet any costs in drawing up the undertaking.

### ***notional value***

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

### **on-going SIPP fees**

The SIPP only exists because of the Freedom Bay investment. In order for the SIPP to be closed and further SIPP fees prevented, this investment needs to be removed. But if Fergus Burns can't buy it Ms L is faced with future SIPP fees. I think it is fair to assume five years' of future SIPP fees. So, if Fergus Burns can't buy the investment, it should pay an amount equal to five years of SIPP fees based on the current tariff. This is in addition to the compensation calculated using a nil value for the investment.

I understand Ms L has been sent letters by the SIPP administrator's asking for fees to be paid directly. Fergus Burns should reimburse Ms L (following receipt of satisfactory proof of any fees she's paid directly) plus 8% per annum simple interest.

### **why is this remedy suitable?**

I've decided on this method of compensation because Ms L wasn't dissatisfied with her existing pension and investment.

### **my final decision**

I uphold the complaint. My decision is that Fergus Burns (trading as The Financial Planning Partnership) should pay the amount calculated as set out above. Fergus Burns should provide details of its calculation to Ms L in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I am required to ask Ms L either to accept or reject my decision before 30 April 2018.

Keith Taylor  
**ombudsman**