

complaint

Mr A is unhappy about the advice he received from Nurture Financial Planning Ltd (Nurture). This was to transfer his deferred final salary pension benefits to a Self-Invested Personal Pension (SIPP) in order to buy Harlequin Property; an unregulated overseas property development.

background

I issued my provisional decision on 28 November 2018, a copy of which is attached to and forms part of this decision.

Mr A accepted my provisional decision and had nothing further to add.

Nurture did not accept my provisional decision. They made the following points:

- Mr A failed to disclose a number of material facts. Nurture did not know he was to be paid a financial inducement. Had that been disclosed it would have changed their approach to the advice.
- The fact Mr A totally disregarded their advice to de-risk his investments shows a wilful disregard to any advice that was given to him.
- No consideration has been given to what would have happened if Mr A hadn't received the financial inducement. Would he have been able to pay his rent or become bankrupt?
- It would have been difficult for Mr A to deal with his debts. Nurture argued that the only way to deal with this would be by way of bankruptcy or IVA. They did not agree with my general statement that Mr A could have found other ways to pay off his debts. Nurture asked for further clarification of how this could have been resolved.
- Nurture had no idea Harlequin would turn out to be a fraudulent investment. It had been scrutinised by Guardian SIPP. If Mr A had considered his position he would have gone ahead anyway. The financial inducement was his main incentive to proceed.
- Nurture did not agree it caused any of Mr A's loss.

my findings

I've re-considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I remain of the view that Nurture should pay compensation to Mr A for the reasons given in my provisional decision.

I accept that Nurture didn't know that Mr A was receiving a payment from the Harlequin agent. But, Nurture was required to give suitable advice. The advice should have been not to transfer. So I have to think about what Mr A would have done if he had been given suitable advice.

Clearly, Mr A was in a difficult financial position. And I accept that it's possible that Mr A would have transferred his pension even if Nurture had given suitable advice. But it is important to recognise that this was a transfer from a defined benefit pension scheme. These were virtually guaranteed benefits. The rules required an adviser to start by assuming that a transfer would not be suitable.

The investment actually required a rate of return of over 8% each year to match the benefits being given up. A higher return would be required to improve on Mr A's benefits.

Nurture recognised that Harlequin was high risk. It recommended a more cautious approach for the rest of the funds in the SIPP. But the advice should have been not to invest in Harlequin. I think it's likely that Mr A would have had to explain why he wanted to invest in Harlequin. And at that point it's likely that he would have revealed that he was receiving a payment from the Harlequin agent. As Mr A told our adjudicators that he received a payment I don't see any reason why he wouldn't have told the adviser at Nurture.

The payments made to Mr A by the Harlequin agent were substantial. They were clearly a big incentive for Mr A to invest. But I think they should also have been a warning sign about the investment. I think it's a reasonable assumption that the Harlequin agent would have received a much larger payment. The amounts paid to the sales agents are one of the warning signs about Harlequin being a very high risk investment.

My decision really turns on whether Mr A would have accepted a short term benefit against the risk of losing a large part of his pension fund. Nurture has argued that his options would have been limited and it was likely he would have to apply for bankruptcy or an IVA. I don't agree.

The details of Mr A's circumstances did not record he had substantial debts. We now know that he used the payments from the Harlequin agent to pay his rent and repay some debt. But that doesn't indicate he was close to bankruptcy. I think other options could have been available to him. For example, he could have relied on friends and family to borrow money or live with them. I think such enquiries would now be difficult to make and almost impossible to evidence.

I cannot be certain about what Mr A would have done, if he had been given suitable advice. But he has indicated that he would not have transferred. I realise that he would now say that, but he wasn't given suitable advice. He didn't have the opportunity to act upon suitable advice. The available evidence doesn't indicate that he would have put his pension fund of over £105,000 at risk for a total payment of £5,500. I'm not persuaded that his short term financial needs were so desperate that he would have transferred if he had been given suitable advice.

I remain of the view that Nurture's advice did cause Mr A to transfer his pension benefits and invest in the first Harlequin property. But I don't think Nurture caused the losses for investing in the second Harlequin property.

fair compensation

My aim is to put Mr A as close to the position he would now be in if he had been given suitable advice. I think that he would have kept his final salary benefits. Nurture should therefore calculate the loss Mr A suffered and pay compensation to Mr A as set out in my provisional decision.

my final decision

I uphold this complaint. Nurture Financial Planning Ltd should calculate the loss suffered by Mr A and pay compensation to Mr A as set out in my provisional decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 10 February 2019.

Roy Milne
ombudsman

copy of provisional decision

complaint

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background

Mr A was introduced to Harlequin by a third party unconnected to Nurture. Mr A was then referred to Nurture to arrange a SIPP so that he could invest in Harlequin.

In February 2012, the adviser completed a fact find with Mr A. This recorded he was unemployed and had used up his capital and savings after being made redundant. Mr A also had other liabilities to repay. Mr A said that he was going through a tough time and was earning very little from temporary employment.

Mr A's deferred pension benefits would provide him with an estimated pension income of £8,088 at age 65; plus a tax free cash sum of £3,143. The transfer value was just under £105,000. The adviser was aware that Mr A intended to invest in Harlequin.

Nurture gave advice to Mr A about his pension benefits. His priorities were recorded as using his pension for his specific requirements. This was to buy a Harlequin property using part of his pension fund.

Nurture agreed to give advice on the pension, but not on the Harlequin investment. It said that the critical yield required to replace the benefits being given up was 3.3% a year. This was using a mid-market personal pension. Nurture recommended that because Mr A was investing in Harlequin that he should use the remaining funds to dilute the risk associated with Harlequin.

Nurture said that a SIPP was suitable for Mr A because:

- He wanted to buy a Harlequin property.
- He wished to actively manage some of his pension funds up to retirement.
- He wanted to adopt their investment process for the residual fund.
- He wanted to receive ongoing retirement advice.

Mr A agreed with the Harlequin selling agent for part of the commission payments to be paid to Mr A, if he bought a unit with Harlequin. Mr A has confirmed to us that he approached the selling agent directly to arrange a second investment in Harlequin and received another payment for that unit. His representative told us he received payments of £2,000 and £3,500.

One of our adjudicators investigated the complaint. She spoke with Mr A. During that call he described his position as 'vulnerable' and that he had become 'greedy' when he bought the second Harlequin unit.

Our adjudicator did not uphold the complaint, saying:

- Nurture ought to have assessed the suitability of the proposed investment in Harlequin as well as the SIPP.
- Nurture would have needed to show that transferring the benefits from his defined benefit scheme was to the benefit of Mr A.
- As a result of the transfer out from the scheme, Mr A forfeited valuable benefits.
- Mr A was recorded as having an attitude to risk of 7 on a scale of 1 – 10. She considered his ability to tolerate such a high level of risk had been overstated. The attitude to risk had been incorrectly categorised.
- However, she thought Mr A would have transferred his benefits and invested in Harlequin anyway. Mr A was unemployed and not receiving regular income. The benefit of securing the deal with the selling agent was important for Mr A as it eased his cash flow problems at that time.

Mr A's representatives asked for the case to be referred to an ombudsman. They said other Harlequin investors were offered similar incentives. And *"it is human nature for people to be attracted by such incentives, particularly when presented by such 'enthusiastic' salesmen and women"*.

Nurture did not add anything further.

Another adjudicator spoke with Mr A and I have listened to a recording of that call.

my provisional findings

I've considered all the available evidence and arguments to decide what's 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 codes of practice; and what I consider to have been good industry practice at the time.

What was Nurture required to do?

Nurture was required to comply with the regulations. It gave advice to Mr A. That means Nurture had to know its client and give suitable advice. It was also required to act in its client's best interest. I don't think Nurture can avoid these obligations by limiting its role to only advising on the SIPP.

Nurture did give advice about transferring out of a final salary pension scheme. The rules required the adviser to assume that the transfer would not be suitable. There is no evidence that this requirement was taken into account.

What did Nurture do?

Nurture said that it only provided advice on the SIPP and did not give advice on the Harlequin Property. Nurture did give advice on transferring to the SIPP and made a positive recommendation to do this. The advice was that Harlequin represented more risk than was appropriate for Mr A. Nurture's advice was to invest the remaining funds in safer investments to balance out this risk.

Nurture said Mr A had already decided to invest in Harlequin. However the contracts could not be signed until after the SIPP was established. Nurture was required to give suitable advice. That includes the advice to transfer out of the final salary scheme and advice about the investment. The investment growth achieved in the SIPP is important. To match the benefits being given up a growth rate of over 8% a year was required until age 60. Nurture should have considered whether the investment was suitable and could achieve that rate of growth.

What should Nurture have done?

The rules required Nurture to start by assuming that transferring Mr A's final salary pension was unsuitable. It provided a virtually guaranteed pension. It was all of Mr A's pension benefits. He had no other investments or savings. He could not afford to take risks with this pension.

The investment in Harlequin Property exposed Mr A's pension funds to significant risk. It was an overseas property development. Mr A was buying a hotel room in a property that had not been built. The funds were used to pay a 30% deposit on the property. This was owned by the SIPP. The balance of 70% was to be paid on completion of the property.

I am satisfied that the advice to transfer to the SIPP was unsuitable. The pension benefits were the only asset Mr A had. He was giving up a valuable guaranteed income in retirement. Mr A would be relying on this to provide him with an income. I think that Nurture should have advised Mr A against transferring to the SIPP; and also advised him not to invest in Harlequin.

What would Mr A have done?

A reservation fee was due to be paid for the property before Mr A was referred to Nurture. I haven't seen any evidence that this was paid. Given Mr A's financial position I think it's unlikely this was paid.

Nurture was a firm regulated to give financial advice and I think Mr A would have given that some weight. If suitable advice had been given that would have been not to transfer. Mr A was using all of his pension that was virtually guaranteed.

Mr A went on to buy a second Harlequin property. Nurture didn't know about this and it went against Nurture's advice to invest cautiously to offset the risk of the Harlequin property that Nurture did know was to be bought using funds in the SIPP.

Mr A received a payment from the Harlequin sales agent for each of the Harlequin properties. He was in financial difficulty at the time. I have to think about whether he would have transferred his pension if Nurture had advised him not to do so. In reaching that decision I have to take account of the fact that Mr A was not given an explanation about the risks involved. And Nurture gave a positive recommendation to transfer. Set against that are the payments Mr A received when he was in financial difficulty. Nurture also argues that Mr A was a friend of the Harlequin agent.

I have reviewed all of the evidence, including listening to the latest conversation our adjudicator had with Mr A. Clearly, Mr A was in a difficult financial position. He used the money he received from the Harlequin agent to pay off debts and pay his rent. However, I'm not satisfied that Mr A could not have found other ways to pay off his debts. The payments he received were for just over £5,000. But, the transfer value of his pension was over £100,000. He was putting all of his pension at risk to deal with a short term problem.

The initial report given to Mr A about the transfer of his defined pension benefits quoted a critical yield of 3.3%. But that was wrong. It was based upon a transfer to a lower charging pension. A transfer value analysis was completed showing a critical yield of over 8% a year was required to match the benefits being given up at age 60. Although Mr A didn't intend to retire until 65 he could take the benefits without penalty at age 60. The critical yield was an indication that this provided better benefits for him.

The pension benefits were the only asset Mr A had. Transferring these to a SIPP represented a high degree of risk for him. And investing half of the transfer in Harlequin exposed those assets to even more risk. I think the benefits of investing in Harlequin had been sold to him by the Harlequin agent. Nurture should have pointed out the risks. Instead they gave no advice on Harlequin.

As I said earlier the Harlequin investment contained a number of risks. I think if Mr A had been warned about these risks he would have considered the position carefully. I also think that Nurture should have advised him against the transfer; and also advised him against investing in Harlequin. This is very different to what I am sure was the positive approach taken by the Harlequin agent.

Taking all of these factors into account I think Mr A would not have transferred his pension.

What loss did the advice given by Nurture cause Mr A?

Nurture's advice was to transfer Mr A's pension benefits to a SIPP. It knew the first investment in Harlequin was to be made and advised Mr A to invest the balance of the funds more cautiously. I think that advice was unsuitable and that Mr A should have been advised to keep his deferred pension benefits. And I think Mr A would have accepted that advice.

However, Mr A bought a second Harlequin property. This was without the knowledge of Nurture and against its advice to invest those funds more cautiously. Mr A indicated that he became a bit greedy with the second purchase. In my view, Nurture shouldn't be liable for the losses caused by the second Harlequin property. Although that loss wouldn't have happened if Nurture had given suitable advice I consider that the link to the unsuitable advice was broken.

The role of other parties in the transactions

Mr A has said he was referred to Nurture for advice on his pensions. Nurture has said that Mr A had already received advice and decided to invest in Harlequin before he received advice from Nurture. The third party introduced Mr A to Nurture and was acting as an agent of Harlequin. They were not regulated to give financial advice. Nurture was a firm regulated to give advice. Suitable advice should have been not to transfer. So I think Nurture is responsible for the losses.

But the third party played some part in the decision to invest in Harlequin. If Nurture wishes to claim some of the losses from any other party it may take an assignment of any rights of action Mr A has against them. That is, if it pays Mr A's losses in full.

Should Nurture pay compensation?

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 Nurture's unsuitable advice. And on this basis, a court might not require Nurture 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. It may be there has been a break in the "chain of causation". That might mean it wouldn't be fair to say that all of the losses suffered flowed from the unsuitable advice. That will depend on the particular circumstances of the case. No liability will arise for an adviser who has given suitable advice; even if fraud later takes place. But the position is different where the consumer wouldn't have been in the investment in the first place without the unsuitable advice. In that situation, it may be fair to assess compensation on our usual basis – aiming to put Mr A in the position he would have been in if he'd been given suitable advice.

I think it would be fair and reasonable to make an award, given the specific circumstances of this case. This is notwithstanding arguments about a break in the "chain of causation" and the "remoteness" of the loss from the (poor) advice given. I am satisfied that Mr A would not have bought the Harlequin Properties had it not been for the failings of Nurture's adviser. If the adviser had given Mr A suitable advice, the investments in Harlequin would not have been made. And I consider that the advice given by the adviser completely disregarded Mr A's interests. As a direct result of Nurture's failure to give suitable advice, Mr A invested pension into a specialised, unregulated investment with a limited track record.

So I think that it's fair and reasonable to hold Nurture responsible for some of the loss suffered by Mr A. I am not asking Nurture to account for loss that goes beyond the consequences of its failings. I am satisfied those failings have caused the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I am not able to determine. However, that fact should not impact on Mr A's right to compensation from Nurture for his loss.

Did Mr A's actions contribute to the loss?

However, I do think it would be unfair to ask Nurture to compensate Mr A for the loss he suffered as a result of buying the second Harlequin property. That's because they had advised him to invest in more cautious assets to balance the risk of the Harlequin property. In my view, that did break the chain of causation for the loss caused by Nurture.

fair compensation

My aim is to put Mr A as close to the position he would now be in if he had been given suitable advice. I think that he would have kept his final salary benefits.

what should Nurture do?

My aim is to put Mr A 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 bought the first Harlequin property or invested in the funds Nurture recommended; but
- c) wouldn't have received the payment of £2,000 from the sale of the first Harlequin property;
- d) the loss from the second Harlequin property was not caused by Nurture's advice.

In setting out how to calculate fair compensation my objective is to address these four issues. That is what I'm trying to achieve.

There are a number of possibilities and unknown factors in making an award. While I understand Harlequin could allow Nurture to take over the investment from Mr A that is now unlikely.

All the variables 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 A back in the position he would have been in if Nurture had acted in his interests, I think it's fair that Mr A 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.

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

1. For the final salary scheme; review this transfer in line with the methodology issued by the Financial Conduct Authority in October 2017.
2. Pay a commercial value to buy Mr A's first Harlequin Property.
3. Obtain the transfer value of Mr A's SIPP on the date of calculation, including any outstanding charges. This value should take account of any payment made for the Harlequin property in 2. The value should also be adjusted to allow for the value of the investment that Nurture actually advised Mr A to make. That is if he had followed that part of the advice
4. Deduct the payment of £2,000 Mr A received for the sale of the first Harlequin property.

I have explained how Nurture should carry this out in further detail below.

1. For the final salary scheme; review this transfer in line with the methodology issued by the Financial Conduct Authority in October 2017.

This calculation should be carried out as at the date of my final decision; using the most recent financial assumptions published (at the date of that decision). This should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr A's acceptance of the decision.

Nurture may wish to contact the Department for Work and Pensions (DWP) to obtain Mr A's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr A's SERPS/S2P entitlement.

If the review calculation demonstrates a loss, the compensation should, if possible, be paid into Mr A'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 payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr A as a lump sum. Had it been possible to pay the compensation into the plan, it would have provided a taxable income. Therefore the compensation may 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. Mr A is likely to be a basic rate taxpayer in retirement. The notional allowance should equate to a reduction in the total amount equivalent to the current basic rate of tax. However, as Mr A would have been able to take a tax free lump sum, the notional allowance should be applied to 75% of the total amount.

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

2. Pay a commercial value to buy Mr A's first Harlequin Property.

The valuation of the Harlequin investment may prove difficult, as there is no market for it. To calculate the compensation, Nurture 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 Nurture is unable to buy the investment, Nurture should give it a nil value for the purposes of calculating compensation (including in step 1 above).

3. Obtain the transfer value of Mr A's SIPP on the date of calculation, including any outstanding charges. This value should take account of any payment made for the Harlequin property in 2. The value should also be adjusted to allow for the value of the investment that Nurture actually advised Mr A to make. That is if he had followed that part of the advice

This should be confirmed by the SIPP provider. However, if Mr A had followed Nurture's advice he would have a different value. Part of the fund would have been invested in other assets. I think this would almost certainly be a higher value. So, Nurture should use the value of the SIPP, if Mr A had followed their advice.

Nurture will need to explain how the investment they recommended would have performed. An explanation of this will need to be included with their calculations.

4. Deduct the payment of £2,000 Mr A received for the sale of the first Harlequin property.

Mr A wouldn't have received a payment from the Harlequin agent. He has benefitted from this payment. It should therefore be deducted from the loss.

my provisional decision

I intend to uphold the complaint. Nurture should calculate the loss Mr A has suffered and pay redress as set out above.