

The complaint

Mr F says BW SIPP LLP (BW) was responsible for errors and poor handling when he sought to transfer ownership of a commercial property into his Self-invested Personal Pension (SIPP). He says this caused him to abandon the transaction and has caused him financial detriment.

What happened

Firstly, I need to make clear what this decision does and doesn't cover. I'm focussed on those elements of Mr F's complaint which relate to the acts and omissions of BW. I'm not considering his allegations about the conduct of his financial adviser – which was the subject of a separate complaint.

Further, I don't have the authority to address issues raised by Mr F which relate to the conduct or quality of the legal services he received. These should be referred to the relevant companies in the first instance, and then the Legal Ombudsman if necessary.

In August 2018, following advice from his financial advisor Mr F switched three of his existing pension plans into a SIPP with BW. The purpose of this was for his SIPP to purchase a commercial property, which he already owned.

Broadly speaking, for most intents and purposes, a SIPP (including the investments it holds) is a separate legal entity to the beneficiary and/or any business interest they might have. This means it is protected in the eventuality of financial distress of those other parties.

This has a number of practical implications, for example, as well as Mr F appointing his own solicitor in the transaction, separate legal representation was also required to look after the interests of his SIPP. For the purposes of this decision I'll refer to this solicitor as (Z).

As part of the process Mr F completed a Property Purchase Questionnaire and signed up to the associated declaration on 16 August 2018. Following receipt of Z's Terms of Business, and after finalising the position with his own solicitor about car parking at the property in September 2018, he agreed to move ahead with the transaction on 19 October 2018.

During this process, Mr F advised that in the previous four years works had been carried out on the windows and flat roof at the commercial property. An important responsibility of Z was to conduct due diligence on the proposed investment being taken into the SIPP. Following to and fro between solicitors, it was confirmed by December 2018 that he hadn't sought building regulation approval for the works.

In January 2019 Z indicated that the SIPP trustees had three options to address the issue: ask Mr F to seek a building regularisation certificate (BRC) from the local council; reduce the purchase price to reflect the potential requirement for remedial works to be carried out; or to secure indemnity insurance. And it advised BW that the certificate would be the best option.

Between January and February 2019 BW's Investment Committee considered the request for Mr F's SIPP to purchase his commercial property. But it required a BRC before it would

approve the proposal because it didn't want to expose his SIPP to what it saw as potential liabilities.

Mr F still wanted to proceed with the transaction on 7 March 2018 and had arranged for an inspection of his property by the local authority. A BRC was obtained and BW staff informed its Investment Committee of such on 20 March 2019. The Committee confirmed its agreement for the transaction to proceed the same day.

BW confirmed to Mr F on 4 April 2019 that he could proceed with the purchase within his BW SIPP. Legal documents were signed and funds were being arranged to be transferred on 7 June 2019, but he decided to put matters on hold.

Mr F raised a complaint about what had happened during the transaction with BW. He identified several concerns, including what he considered to be mistakes it had made, and the increasingly complicated and expensive process he'd had to go through. Specific matters he raised included: the notification and quantum of legal fees incurred; errors in instruction such as informing the Investment Committee his property had had an extension, which he believes led to increased costs; conflicting guidance about rent collection arrangements; and the duplication of fees for matters he'd already dealt with.

BW apologised for what it acknowledged was unacceptable service and delays. It noted that it had capped its own costs in relation to the transaction and that Z had reduced its billable hours by a third. But it also pointed out its responsibility for looking after the interests of his SIPP. And that Mr F was aware of the costs involved. And he'd signed up to the terms of agreement which enabled it to make charges when there had been a withdrawal from a transaction, but costs had been incurred.

An Investigator considered Mr F's complaint. He didn't uphold it because although he could see BW hadn't done everything perfectly, he didn't think this resulted in him facing higher costs than he should've.

Mr F disagreed; in a recent submission he summarised his position in the following terms:

"I am under total disbelief that a professional company can make repeated mistakes and I am to pay for them!"

"In a nut shell, I was led to the door of BW by [my financial adviser] who advised me he would guide me through the process of securing a SIPP with BW yet after numerous mistakes were made and complaints to [him] he decided to not correspond with me leaving me at what I will call the mercy of BW, with no route forward I used BW complaints procedure..."

"I was forced into a situation out of my control and had to abandon the transaction due to the incompetence of BW, and regardless of reduced fees as a sign of good will etc or whatever, they caused the delays/mistakes in what was a simple transaction incurring abnormal fees."

As both parties couldn't agree with the Investigator's view, Mr F's complaint has been passed to me to review afresh. I issued my provisional decision earlier this month. I'm grateful to both parties for their short final submissions, which I've thought about carefully. But neither has given me telling reason to depart from my main initial findings and conclusions.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and

reasonable in the circumstances of this complaint.

Where there's conflicting information about what happened and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what's most likely to have happened.

I've not provided a detailed response to all the points raised in this case. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. While I've taken into account all submissions, I've concentrated my findings on what I think is relevant and at the heart of this complaint.

I'm upholding Mr F's complaint, but not to the extent he'd like. I'll explain why.

The first thing I've considered is the extensive regulation around transactions like those performed by BW for Mr F. The FCA Handbook contains eleven Principles for businesses, which it says are fundamental obligations firms must adhere to (PRIN 1.1.2 G in the FCA Handbook). These include:

- Principle 2 - which requires a firm to conduct its business with due skill, care and diligence.
- Principle 6 - which requires a firm to pay due regard to the interests of its customers.
- Principle 7 - which requires a firm to pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.

So, the Principles are relevant and form part of the regulatory framework that existed at the relevant time. They must always be complied with by regulated firms like BW. As such, I need to have regard to them in deciding Mr F's complaint.

My starting point is the authority for BW to take funds from Mr F's SIPP in order to settle outstanding bills arising from the management and administration of his pension. This includes provision for the situation where transactions don't proceed, but where expenses have been incurred.

Mr F acknowledges receiving the Property Guide and Panel Solicitor Fee schedule, which set out in some detail the costs typically associated with a SIPP property purchase.

Mr F also signed a Property Purchase Questionnaire on 16 August 2018, this included an agreement and declaration. There are various clauses relevant to his case, including BW's appointment of panel solicitors and other professionals to protect the interests of his SIPP. Of most relevance is Section 14 point 11, which states:

"I/we acknowledge that, in the event of the purchase not proceeding for whatever reason, all costs incurred up to the point that BW SIPP LLP and any third party providers receive notification of the cancellation, will be met by me/us. Third party fees (e.g. panel solicitor) will be settled by the relevant SIPP fund(s), in proportion to all intended co-owners."

I think this provision is clear. BW was able to take funds from Mr F's SIPP in order to settle fees and charges arising.

But I also need to consider some of the specific concerns Mr F raises about the actions of BW. He thinks it made mistakes which led to higher legal fees being levied against his SIPP. For example, and most significant to him, was the instance where BW referred matters to its Investment Committee and it initially formed the wrong impression about works on Mr F's property.

On 10 January 2019, BW's Investment Committee considered the proposal for purchase of Mr F's commercial property by his SIPP. It rejected the request saying:

"In order to consider this again we would require option 1 from the solicitor's email to be met which is '1. Require that the seller obtains a regularisation certificate from the local authority's building control department (including undertaking any works necessary to obtain such a certificate) prior to completion'. The reasoning behind this is that should this not be granted retrospectively, we understand that BW could be liable to demolish the unapproved extension and the costs associated with this. This is not a risk we are willing to take on."

However, I can see on 1 February 2019 BW staff clarified the position for its Investment Committee:

"...We passed the info to the client and have received the response attached. The works we are missing the certificate for consists of three replacement windows and a flat roof. I'm unsure if this changes matters but please advise so we can respond to client."

On 4 February 2019, the Investment Committee restated its position:

"Unfortunately, the client's comments don't change our position and we would still request that the certificate is obtained prior to purchase as our concerns still persist that we could be left with a potential liability to restore the property back to its former self. As the vendor here is the client we feel that this is something which the client can reasonably carry out prior to us accepting it in the BW SIPP."

So, I can understand why Mr F was concerned about reference to his property having had an extension when this wasn't true. BW tried to put his mind at rest on this point – it acknowledged the reference was spurious and led to no additional work being undertaken or fees being charged. I recognise he's sceptical on this point, but the information I've seen leads me to conclude the matter was clarified, and it was other outstanding matters which meant the proposal couldn't continue until a building regulation certificate had been secured.

Mr F thought that the way the costs of the transaction were conveyed was misleading and incorrect. And he says fees were incurred when his consent should've been sought. I think there's merit in his argument. For example, when he was trying to resolve matters with BW in October 2020 he told it:

"...I was advised by yourselves on 7 June 2019 that the fee [for Z] was £1440 including VAT, but by November 2019 this had risen to £1696 plus VAT. I was unaware of this as I didn't receive any advice of it. I was then chased...for a total of £3076, when again I had not received any advice or invoices..."

"I am prepared to be realistic regarding legal work and relevant costs. However I do not believe that the legal costs are reasonable in this case...I simply cannot understand why they are more than double that which you advised me on 7 June 2019. Further they also materially exceed the original illustration you provided 'cost of property acquisition £2,000 inc VAT'"

There are several matters to unpick here. Firstly, the illustration for the 'cost of property acquisition' was an estimate of BW's fees. I can see Mr F has been provided with a breakdown of these charges, which I understand were to be capped at £2,000. The fees charged by Z were a separate matter. I think it should've been clear to him from the various documents he received that BW would be making charges and that these were separate from the legal fees he'd incur.

However, I can see on 7 June 2019 BW advised Mr F that Z's legal fees would be £1,440. This was based on a 'flat-fee' assumption. It was misleading because Z had already done more work on his case than standard because of the complications that had arisen along the way. And it should've made clear this was a figure excluding disbursements, such as search fees.

Further, two invoices were raised, one for £1696 in July 2019 and another for £1380 in October 2019. Mr F says he didn't receive all the paperwork. And the full position on legal fees doesn't appear to have been revealed to him until June 2020. I can see how in the context of BW's earlier advice about charges, this added to his confusion and concern.

So, BW failed to communicate with Mr F about his legal fees in a way that was clear and not misleading.

I've thought further about how Mr F should've been kept informed of legal fees being incurred. The terms of Z's agreement with BW said (bolding is my emphasis):

"...we estimate fees at £1,200 plus VAT and disbursements. This is not a fixed or capped fee but we will discuss any revision to the estimate with you. Your continued instructions after being provided with a revised estimate will be taken as your acceptance of it. If at any time you require an estimate or updated estimate of what our fees are likely to be or wish to set a limit beyond which we must obtain your authority to proceed, please contact me."

Z also set out the hourly rates of those it expected to be working on his case. This was Mr A at £305 and Mr B at £170. It also said hourly rates were normally reviewed annually with changes brought into effect from 1st May. It said changes in hourly rates would be notified. While I note that Mr B conducted all of the work on Mr F's case, his fee rate did increase over time.

I think there are some problems here for BW. It hasn't provided any evidence of how it (or Z as its service provider/agent) kept Mr F informed of the growing costs associated with the purchase by his SIPP of his commercial property. Neither did it inform him about changes to the hourly rate he was being charged. This was a significant failing.

Matters became intractable between the parties by the end of 2020. Mr F wrote to BW in the following terms on 18 December 2020:

"As [Z's] fees are not to be reduced further, I wish to raise a formal complaint in an effort to finally resolve matters including the important fact that some of the legal fees should not have been charged to me (see my points below)."

"Your email of the 18th Jan 2019 which clearly states that a decision was made not to take on the property and I quote: "The reasoning behind this is that should this not be granted retrospectively, we understand that Barnett Waddingham could be liable to demolish the unapproved extension and costs associated with this. This is not a risk we are willing to take on"

"Let's be clear on this. THE PROPERTY DID NOT HAVE AN EXTENSION! So where did [Z] get this information from as he was working under Barnett Waddingham's instruction? This was the catalyst that created the extra work involved with [Z], so whoever got the information wrong, it is at their cost not mine!"

I've covered this particular matter – I've found that mention of the extension to his property didn't have the effect of adding more cost into Z's fees. Issues associated with his declaration of works on the flat roof and windows did have an effect.

Mr F believes due to the errors caused by BW, he's incurred additional legal fees, however I've not seen any evidence of additional fees being charged in relation to such. Indeed, Z provided a schedule which broke down its billable hours by activity. This showed it could've sought payment (excluding disbursements) for £3,503 (or £4,204 including VAT) up until 7 July 2019. But it only charged £2150 excluding disbursements (or £2,580- including VAT).

It's not the role of this Service to scrutinise legal fees. But there's nothing obvious from Z's schedule that stands out as being wrong. So I can't agree with Mr F on this matter.

The overall process took longer to complete than a standard property purchase by a SIPP. In one letter BW sent to Mr F it apologised for its service and the delays in this regard. It also undertook to cap its costs at £2,000. And it's appropriate to acknowledge that Z did reduce its billable hours by nearly a third. I think this was a significant concession.

What remains somewhat ambiguous from both parties is why it took these decisions to mitigate the costs faced by Mr F. Neither has been clear about the things they got wrong and neither has provided further commentary here.

With regards to other costs associated with the transaction, Mr F said:

"During the build-up I had carried out several tasks of instructing valuers, asbestos reports, solicitor, rent, insurance, etc. These were all picked up on by BW who then emailed me what was now in place or had been done and then charged me for it."

BW says it instructed the valuation, solicitors and insurance report as it was required to do for a SIPP property purchase. Where anything was instructed by Mr F it was still required to review and document the reports and surveys to ensure they comment on and evidence the information needed to satisfy its due diligence responsibilities. Therefore BW legitimately accrued time and cost on these matters. And where documents were provided to the solicitor, they would similarly have spent time reviewing these. It said this was normal in property purchase transactions.

Mr F hasn't been able to evidence that BW raised charges that were inappropriate or incorrect.

Mr F says he thinks moving his commercial property into his SIPP should've been a straight-forward transaction. There were several other issues that cropped up during the process that left Mr F dissatisfied with BW's service. For example, there was some confusion with what would happen with the car-parking space associated with his commercial premises. There were problems with the lease his solicitors had drawn-up for a prospective tenant, and the insurance arranged. And different expectations about how property management would proceed, in particular rent collection.

I've thought about what Mr F has said, but I disagree with his overall observation. There are many moving parts to a commercial property purchase by a SIPP. I've already set out the necessary distinction between Mr F as the owner and his SIPP as the purchaser. Both had interests which needed to be protected.

This necessarily gave rise to the engagement of different parties, such as the two sets of solicitors, the SIPP provider, any advisers and Mr F. It's possible to see how communications can sometimes go awry.

There have clearly been delays and miscommunications on Mr F's case. For example, BW's Investment Committee process seems to have been drawn out and the outcome from this was slow in being relayed to him. On the other side, I think the Property Questionnaire Mr F

completed had a number of gaps, for example around property management details which required follow-up work.

But I haven't concluded, being mindful especially of the cost mitigations Z and BW put in place for Mr F, these matters led to him incurring what he described as abnormal costs – the crux of his complaint.

While I appreciate that Z's legal fees were about £1,100 more than he'd been led to believe in June 2019, when set against costs already sunk and the scale and complexity of the overall transaction, this was relatively modest. I don't think it could've been the main trigger for his decision to withdraw – it wouldn't have been a proportionate response. He could've proceeded and still challenged those fees he felt were incorrect/inappropriate.

In his response to my provisional decision, Mr F noted it wasn't Z's fees that caused him to withdraw (he wasn't aware of the full scale of these at that time). Rather, he's confirmed:

"I had told my solicitor in June 2019 that if we met with any more mistakes or problems before exchange from BW that I wished to pull out, and that is what happened!"

I can see that Mr F had been associated with the commercial property for nearly 20 years. He had formed clear views about how he'd wanted to proceed, including overall management. But he wasn't an expert in pension matters. And the situation he was entering into was complicated. So, there was a learning curve for him to go through.

Overall, I've found there were failings in how BW communicated with Mr F about the transaction it was overseeing for him, to bring his commercial property into his SIPP. Most significant were those relating to setting out in a clear and not misleading way what fees and charges he was incurring. This along with other snags led to undermine his confidence in the service it was providing and contributed to protracted negotiations and ultimately dispute over what he should pay.

Putting things right

When I'm considering a complaint like Mr F's I think about whether it's fair to award compensation for distress and inconvenience. This isn't intended to fine or punish a business – which is the job of the regulator. But when something's gone wrong, recognition of the emotional and practical impact can make a real difference.

We're all inconvenienced at times in our day-to-day lives – and in our dealings with other people, businesses and organisations. When thinking about compensation, I need to decide that the impact of BW's actions was greater than just a minor inconvenience or upset. It's clear to me that this was the case here.

In recognition of the trouble and inconvenience it has caused Mr F, I require BW SIPP LLP to pay him £300.

My final decision

I'm upholding Mr F's complaint for the reasons I've set out. I now require BW SIPP LLP to put things right in the way I've directed.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 26 December 2022.

Kevin Williamson

Ombudsman