

The complaint

Ms H complains that James Hay Administration Company Ltd ('James Hay') should have notified her sooner that her investment was allocated differently to the way she understood it to be.

Ms H also complains that James Hay failed to act with due care and diligence when accepting her self-invested personal pension ('SIPP') application and the underlying investment.

What happened

Ms H had an existing SIPP with a SIPP operator I'll refer to as 'E'. Ms H's financial adviser, who had advised her to set up the SIPP, was a 'Mr P' from Grosvenor Financial Consultants Ltd ('GFC').

Through her SIPP, Ms H made an unconnected third-party loan of £341,000 to Skelwith Leisure (Raithwaite) Limited ('SLR'). As I understand it, the loan was to be used for the purchase and/or development of the land and hotel on the Raithwaite Estate near Whitby. I'll refer to Ms H's investment as 'the Raithwaite investment'.

In April 2014, also on the advice of GFC, Ms H established a SIPP with James Hay and transferred the Raithwaite investment to it in-specie along with a cash balance.

On 22 July 2015, SLR entered into administration. SLR was replaced as borrower by Yorkshire Ventures (Estates) Limited ('YV'). Ms H's loan was restructured on 3 March 2016 with an extended term to 31 December 2019. The terms of the restructured loan were documented in a loan agreement known as the Master Credit Facility Agreement ('MCFA').

As part of this restructure, Ms H's loan was split into three tranches. £75,000 was in tranche A, which paid quarterly interest at 6% per year. The remaining £266,000 was split equally between tranches B and C, which paid interest at 8% per year, but this was rolled-up for payment at maturity rather than paid out immediately. Each tranche also potentially differed in repayment priority in the event of the borrower defaulting on the loan.

Ms H has told us that following the restructure, she instructed Mr P to put her entire loan in tranche A, as she preferred regular interest payments despite the lower rate.

On 22 November 2019, YV changed its name to Raithwaite Trading Company Limited ('RTCL'). Ms H's loan was due to be redeemed in full by RTCL on 31 December 2019, but this didn't happen, and her loan has been in default since this date.

In June 2020, James Hay decided to value the investment at zero.

On 1 October 2020, GFC stopped being authorised to carry out regulated activities.

In January 2021, James Hay wrote to Ms H and explained that in 2016 and 2017 it carried out a review and reconciliation exercise of all its Raithwaite loans, and during this review it identified that Ms H's loan was paying a different rate of interest to that agreed in the MCFA.

In March 2021, James Hay informed Ms H that it raised this with GFC and received the following response:

“James Hay was told that your RTCL loans had been switched to a different facility and that [GFC] would be arranging for legal documents to be put in place to legally document these switches.

[Mr P] has recently told us that he never instructed his legal advisers to put in place this legal documentation and therefore the switches did not take place. Furthermore, he has also told us that his legal advisers have informed him that it is not actually possible to amend the MCFA without the agreement of all parties to the MCFA. Therefore your RTCL loan positions, including the facilities to which your loans have been made, are unchanged from the positions quoted in the MCFA.”

I understand that in July 2023, Ms H received around £95,000 from the sale of the Raithwaite investment. And that in July 2024, Ms H received compensation of approximately £150,000 following a review by E on the due diligence it conducted on the Raithwaite investment before permitting it into her SIPP.

Background to the complaint

Ms H complained to James Hay following receipt of its January 2021 letter. It didn't uphold her complaint. It said the following in its final response dated March 2021:

- The SIPP terms and conditions confirm that James Hay isn't responsible for monitoring the activities of her financial adviser or any of its acts or omissions.
- James Hay isn't authorised to provide advice. Ms H is solely responsible for all investment decisions.
- In 2016, James Hay carried out a reconciliation exercise of Raithwaite loans because of anomalies with the amount of interest being paid. During this exercise, Mr P informed James Hay that Ms H's loan had been completely switched to tranche A and that GFC was arranging for legal documentation to be prepared to confirm this.
- Mr P had recently told James Hay that, in fact, he didn't instruct his legal advisers to make any changes to the loan documentation and therefore Ms H's loan remained split across tranches A, B and C.
- James Hay would continue to provide updates on the investment as information became available.
- GFC was regulated by the Financial Conduct Authority ('FCA'), and it was reasonable for James Hay to take a significant level of comfort from this given the regulatory obligations on authorised advisers.
- Any complaint with respect to the investment should be directed to the parties involved when the investment was originally made. James Hay isn't responsible for the financial advice or investment recommendations provided by GFC, or any self-directed investments Ms H made when she was a client of E.

- James Hay has internal processes that it follows in respect of accepting applications and instructions to open SIPPs, and for dealing with the request and receipt of monies and/or investments via a transfer instructed from another registered pension scheme.
- All communications sent by James Hay about the investment were issued in good faith and based on information provided by GFC and Mr P that James Hay reasonably believed was credible at the time, and which seemed to be borne out by the payments of interest that were received by affected investors.
- It would be unfair to expect James Hay to bear the material consequences and costs of a sequence of events that has unfolded because of the actions or omissions of others.

Ms H didn't accept James Hay's response and referred her complaint to this service. In her initial referral, she explained that she wanted to complain about both GFC and James Hay. She said her complaint against GFC related to the suitability of the investment and its failure to make the requested changes to the investment in 2016. Whereas her complaint against James Hay was that it had failed to carry out her instructions. She provided the following additional information about her complaint against James Hay:

- James Hay had a duty to check that Mr P had in fact transferred all her loan into tranche A. The realignment of the loan tranches couldn't have been done without James Hay's signing the legal paperwork.
- The half-yearly SIPP valuation statements received since October 2016 expressly stated that her entire loan was in tranche A.
- James Hay didn't notify her that the realignment hadn't been done until January 2021, despite its reconciliation exercise in 2016.
- The interest she has received has been at 6% per year, in line with tranche A.
- As a result of James Hay's actions (coupled with GFC's), she has lost out on loan interest payments, and her prospects of repayment of the capital amount have been severely affected.

GFC entered liquidation shortly before Ms H made her complaint, so we informed her that she would need to contact the Financial Services Compensation Scheme ('FSCS') to make a claim about it. When Ms H did so, the FSCS explained that as it's the compensation scheme of last resort, it's awaiting the outcome of her James Hay complaint before it will take any further action in relation to her GFC claim.

One of our Investigators reviewed Ms H's complaint and concluded that it shouldn't be upheld.

Ms H didn't agree with the Investigator's findings. She queried why James Hay didn't notify her of the anomaly earlier in its reconciliation exercise. She said had James Hay done so, she would have been able to complain to GFC before it entered liquidation. She also said that James Hay was the sole signatory to her SIPP, so she didn't have to consent to make changes to her investment.

The Investigator considered Ms H's response which involved requesting further information from James Hay. After reviewing the information provided by the parties, they weren't persuaded to change the outcome. They added the following to their original view:

- They understood why James Hay didn't alert investors sooner of anomalies, as it had no concrete evidence to counter GFC's assertion that Ms H's loan had been switched entirely into tranche A.
- James Hay chased GFC on several occasions and was reassured that the legal documentation would be provided.
- Even if James Hay had informed Ms H of the anomaly, her position would likely be no different as had she raised it with GFC it would have likely provided her with the same assurances it provided to James Hay. It would also be impossible for Ms H to switch her investment between tranches without the assistance of GFC.

Ms H still didn't agree with the Investigator's findings and requested that an Ombudsman review her complaint. She explained that in May 2015, she told Mr P that she was nervous about the Raithwaite investment and wanted to withdraw her funds. So, she said had James Hay notified her of the anomaly, she would certainly have complained to GFC. She added that James Hay had provided misleading and inaccurate information in statements when it knew legal documentation hadn't been provided to evidence the switch to tranche A.

The Investigator referred Ms H's complaint for an Ombudsman's decision. While the complaint was awaiting allocation to an Ombudsman, Ms H raised further concerns about James Hay's failings. She said:

- James Hay didn't inform her of the nature of her investment.
- In James Hay's permitted investment lists from June 2015 and June 2020, and its May 2016 guide of specialist investments, it's stated that "*the proportion of a client's SIPP invested in specialist investments is limited to 40% of the total value of the SIPP held with us at point of purchase*". But her April 2015 SIPP valuation shows that at that time her loan equated to 99.63% of the value of her SIPP. James Hay should have notified her of this limit and not allowed her SIPP to exceed it.
- James Hay ceased accepting non-standard investments into its SIPPs in January 2017. It should have notified her of this change.

My provisional decision

I recently issued a provisional decision on this complaint. I concluded that Ms H's complaint shouldn't be upheld. James Hay accepted the provisional decision and didn't provide any further submissions. Conversely, Ms H didn't accept the provisional decision and made further submissions. In summary, Ms H said:

- Had she been informed that James Hay was reviewing and reconciling the loans, she would have contacted the FCA about GFC.
- She doesn't agree that her position wouldn't be different had she been made aware of the anomaly with the allocation of her investment.
- She had concerns over the repayment of the loan and the anomaly would have been a red flag. Her concern was evidenced by her extremely swift response to

James Hay when it notified her of the anomaly in January 2021.

- It was insufficient to make a decision on the basis of *“too many uncertainties”*.
- I hadn’t commented on the permitted investments. While her investment was transferred to James Hay in-specie before the 40% specialist investment limit was imposed, James Hay had a duty to advise her of this material change in perceived risk. Clearly, James Hay had recognised the risk of her investment but didn’t convey this to her. This would have been another red flag.
- She was given no opportunity to act because James Hay didn’t advise her of the anomaly with the allocation of her investment or the lower limits on specialist investments.
- James Hay bears some responsibility which should be acknowledged at the very least.
- James Hay has a duty of care to her, and while it may have done nothing wrong in strict legal terms, hadn’t done everything right either. It wasn’t fair and reasonable that she was being penalised for that.

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.

When considering what’s fair and reasonable, I’ve taken into account relevant law and regulations; regulators’ rules, guidance and codes of practice; and what I consider to have been good industry practice at the time.

It’s my role to fairly and reasonably decide if the business has done anything wrong in respect of the individual circumstances of the complaint made and – if I find that the business has done something wrong – award compensation for any material loss or distress and inconvenience suffered by the complainant as a result of this.

I’ve carefully considered the points Ms H made in response to my provisional decision. Many of these points have been raised previously and were considered when reaching my provisional decision.

I will say that I’m satisfied my finding regarding there being too many uncertainties about what would have happened had Ms H pursued GFC is reasonable. Ms H has said that she would have approached the FCA in relation to GFC had James Hay made her aware of the allocation anomaly. But again, there is no guarantee this would have resulted in compensation. The FCA doesn’t keep individual consumers updated on its investigations, and any investigation, if the FCA did decide to investigate, would have likely taken some time.

And I don’t think it’s necessary to comment in detail on the permitted investments, because I’m not persuaded that Ms H’s position would be materially different even if James Hay had advised her of its limits.

I therefore haven’t been persuaded to depart from my provisional findings. So, I’ve repeated those findings below, with a few minor changes, to reflect my final decision.

Jurisdiction

As a preliminary issue, I can't see that James Hay has consented to us considering the complaint if it was made outside the time limits that apply to referring a complaint to this service. I note that James Hay hasn't objected to us considering Ms H's complaint during the course of our investigation.

Although I can see that Ms H made her complaint more than six years after some of the events she's complaining about, I haven't seen anything that makes me think she knew, or ought reasonably to have known, of her cause to complain to James Hay more than three years before she complained. So, I've gone on to consider the merits of the complaint.

Merits

James Hay's actions in relation to the allocation of Ms H's investment

Ms H has told us that she requested GFC switch her loan entirely to tranche A, as she preferred the regular interest it provided. While this isn't in dispute, the available evidence supports what she's said.

The evidence provided by James Hay shows that in November 2016, it contacted Mr P in relation to issues it had identified with Raithwaite loans in its SIPPs. The issues included *"interest payments that do not appear to reconcile to loan agreements"*. James Hay said *"resolving these issues is taking up a considerable amount of time at both organisations"* and that it would like to *"dedicate some resource"* to resolve them.

Following communications between the two firms, Mr P agreed in a letter dated September 2017 that *"each client will be individually audited"*. James Hay subsequently asked Mr P for confirmation on how GFC would be documenting moves between tranches. James Hay chased GFC for a response, stating *"if you cannot provide a solution, that is acceptable to [James Hay], to this issue then the impacted lending SIPPs will have to be reverted to the position that is documented in the loan agreement dated 3rd March 2016...we will write to the SIPP members to inform them of this and advise them that they could be entitled to receive compensation from Grosvenor, if they feel that they have suffered detriment as a direct a [sic] result of Grosvenor not being able to honour the agreement to move their loans between facilities."*

GFC responded that it would be providing side letters as confirmation of the allocation changes, which meant wholesale changes to the original loan agreement wouldn't be necessary. James Hay asked for confirmation from GFC's legal advisers that side letters were legally robust and enforceable.

In July 2018, GFC told James Hay that a redemption to the loan was expected shortly and this affected what documentation would need to be completed. Regarding allocation switches, GFC said *"our solicitors have advised that a letter (approved by [James Hay]) be signed by the client before final redemption confirming that they are aware of the alterations, and that the capital sum and final interest is correct."*

In August 2018, GFC confirmed to James Hay that Ms H's investment was entirely in tranche A.

James Hay has explained that GFC maintained that a redemption of the loans was imminent until mid-2019. But by the end of 2019, it became clear that this was not the case and the loans defaulted. James Hay continued to chase Mr P for confirmation on how the default would affect allocation switches. It was only in January 2021 that Mr P informed James Hay *"it has now become apparent that the instruction to lawyers to draft legal documents to*

amend the Tranches was not requested. In fact, I have now been made aware that if the lawyers had been instructed the amendment could not have been completed without 100% lender agreement, which in retrospect would not have been granted.”

I've carefully considered the available evidence I've outlined above. Having done so, I'm not persuaded that James Hay is responsible for any loss suffered by Ms H due to her investment not being switched fully to tranche A in 2016.

James Hay proactively reviewed the interest paid on Raithwaite loans and identified an anomaly in the interest being paid on Ms H's loan when compared to that set out in her loan agreement. James Hay proceeded to raise this with GFC, which confirmed it would be providing legal documentation of the allocation switch. James Hay chased GFC on a number of occasions after it didn't receive this legal documentation. GFC maintained throughout that Ms H's loan was entirely in tranche A.

Once James Hay had confirmation that the allocation hadn't been switched as expected, it immediately informed Ms H and changed the information on its systems to reflect the actual position of the investment.

GFC's actions meant that the information James Hay provided on Ms H's SIPP statements was incorrect for several years. I do appreciate the importance of the accuracy of the information, so I can understand why Ms H is concerned about this. But I don't think the incorrect information was James Hay's fault. Mr P told James Hay he had switched Ms H's entire investment to tranche A. And the interest paid into the SIPP suggested that Mr P had indeed switched her investment. So, I think James Hay was providing information it believed at the time to be correct. And I don't think it's fair for me to hold James Hay responsible for that in the circumstances of this complaint when the error and incorrect information was the fault of another firm.

I'm also not persuaded that financial loss has been caused as a result of James Hay's actions. GFC has explained that changes to the allocation of Ms H's loan couldn't have occurred without the agreement of all lenders, which wouldn't have been provided. So, even if GFC had actually attempted to change the allocation, this wouldn't have taken place in any event. In fact, Ms H received regular interest on the whole of her loan due to the error (as she preferred), which she shouldn't have actually received in light of the tranches in which her monies were actually invested.

I note Ms H says if James Hay had informed her sooner about the anomaly she could have pursued GFC before it entered liquidation and potentially received compensation from it. But I think there are too many uncertainties about what would have happened had she done this for me to consider awarding compensation. For instance, GFC could have rejected her complaint, and there is no guarantee she could have obtained compensation from it via another avenue before it entered liquidation in January 2021.

James Hay's acceptance of the Raithwaite investment

When considering what's fair and reasonable with regard to this aspect of Ms H's complaint, I consider the FCA's Principles for Business to be of particular relevance.

The Principles for Businesses ('PRIN') which are set out in the FCA's Handbook *"are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G – at the relevant date).

In addition, at paragraph 77 of *R (on the application of the British Bankers Association) v The Financial Services Authority* [2011] EWHC 999, Ouseley J said:

“Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level principles which find expression in the Principles, whoever formulated them. They are the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules.”

And at paragraph 162, Ouseley J added:

“The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirements they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules.”

I consider Principle 6 to be of particular relevance:

“Customers’ interests – A firm must pay due regard to the interests of its customers and treat them fairly.”

In September 2009, the predecessor to the FCA, the Financial Services Authority (‘FSA’), published a thematic review report on SIPPs which stated:

“We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses (‘a firm must pay due regard to the interests of its customers and treat them fairly’) insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a ‘client’ for COBS purposes, and ‘Customer’ in terms of Principle 6 includes clients...”

The context that these comments were made in was in relation to the quality of the business that a SIPP operator accepts. I’ve carefully considered James Hay’s obligation to treat its customers (and specifically Ms H) fairly when deciding what is fair and reasonable in the circumstances of this complaint.

Ms H invested in the Raithwaite investment via a previous SIPP held with a different SIPP operator prior to the James Hay SIPP being set up. A few years after the investment was made, Ms H established the James Hay SIPP and transferred the Raithwaite investment into it in-specie. So, I don’t think James Hay was responsible for Ms H’s investment in the Raithwaite investment. And, even if I were to agree (and I make no finding on this point), that James Hay shouldn’t have accepted the in-specie transfer of the investment, I don’t think that Ms H would be in a materially different position.

In conclusion

I understand that my findings will come as a disappointment to Ms H, and I sympathise with her position. I hope she understands that, while I make no award, this isn’t because I underestimate the seriousness of the situation – in respect of what’s happened with her

pension. Rather, it's because I'm not persuaded that James Hay is responsible for what has gone wrong under the circumstances.

My final decision

My final decision is that I don't uphold Ms H's complaint about James Hay Administration Company Ltd and therefore make no award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms H to accept or reject my decision before 3 January 2025.

Alex Salton
Ombudsman