DRN-5615712

The complaint

Mr C complains about the setting up of a self-invested personal pension (SIPP), and the investments in a property syndicate subsequently made in it. The SIPP was operated by Merchant Investors Assurance Company Limited (now CASLP Ltd – "CASLP"). Mr C is represented by a Claims Management Company (CMC). The CMC says, in summary:

- CASLP failed to conduct adequate due diligence on the investments. Mr C was allowed to invest 100% of his portfolio into the investments, which was not balanced. This shows clearly that no care was taken.

- CASLP failed to investigate Mr C's capacity to understand what he was investing in.

- CASLP was duty bound to ensure that the investments were suitable, and that Mr C had the capacity to accept the risks associated with a SIPP. It failed to do this, or ensure Mr C was a high net worth individual or sophisticated investor.

- Mr C was completely unaware of the cost of the arrangements – these costs were not explained to him by CASLP.

What happened

There are two main parties involved in the events subject to complaint – CASLP and the IFA which Mr C says advised him to transfer to CASLP's personal pension in order to invest in the property syndicate ("the IFA").

Mr C says he was referred to the IFA by a friend, and the IFA then carried out a review of his existing pensions, recommending they be transferred to a SIPP and investments in property syndicates be made.

The timeline of the subsequent key events was as follows:

- 2 April 2007 – Mr C signs an application for the Merchant Investors Pension Portfolio. The application requested the transfer in of Mr C's three existing schemes, and was received by CASLP on 11 April 2007.

- 26 July 2007 - Mr C signs CASLP's Syndicated Property Purchase Factsheet and Risk Deed, in which he gave various declarations (I explore these in my findings) and requested a switch of the amounts that were to be transferred into a Syndicated Property Fund.

Mr C's money was ultimately used to contribute towards the purchase of a commercial properties – a UK high street property, which had a lease to a commercial tenant in place. I understand the syndicates was later closed, following the sale of the property in question.

Mr C made a claim to the Financial Services Compensation Scheme (FSCS) about the advice he received from the IFA. The FSCS accepted Mr C's claim, and calculated his loss to be more than the applicable limit on what it could pay; accordingly, it paid Mr C an amount

equal to that limit (£50,000).

Our investigator's view

Our investigator concluded the complaint should not be upheld. He said, in summary:

- CASLP established that the IFA had the necessary permissions and was authorised at the time it introduced Mr C's application. He had not seen any evidence to conclude that CASLP should have refused to accept Mr C's application from the IFA.

- The type of SIPP Mr C had was only for the purpose of investing into physical commercial property. No other types of investment (mainstream or otherwise) were permitted.

- Prior to the purchase a valuation was carried out by a RICS qualified surveyor. Professional and legal checks were also carried out.

- Various documentation relating to the investment was also provided by CASLP to Mr C. This shows that extensive information was provided to Mr C at the outset, and that he was made aware of the risks of investing into commercial property, as well as the responsibilities and limitations of his membership of the syndicate.

- Valuations have been provided since inception and Mr C was aware of the changes in value over the period he has held the investment.

- Overall, he was not persuaded that CASLP had acted unfairly or unreasonably in accepting the transfers into the pension and allowing the subsequent investments.

The CMC's response to the investigator's view

The CMC did not accept the investigator's view. It said, in summary:

- The application of annual SIPP fees, despite the illiquidity of the investments – which CASLP did not explain to Mr C - has not been considered.

- No due diligence was carried out on the IFA and the investigator has not seen the agreement with the IFA.

- COBS 2.11R, COBS 4.21R and 9.21R have not been looked at in great detail.

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.

Relevant considerations

I have taken into account a number of considerations including, but not limited to:

- The agreement between the parties.

- The Financial Services and Markets Act 2000 ("FSMA").

- Court decisions relating to SIPP operators, in particular Options UK Personal Pensions LLP v Financial Ombudsman Service Limited [2024] EWCA Civ 541 and the case law referred to in it including:
    - Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474
    - R (Berkeley Burke SIPP Administration) v Financial Ombudsman Service [2018] EWHC 2878
    - Adams v Options SIPP UK LLP [2020] EWHC 1229 (Ch)
- The FSA and FCA rules including the following:
    - PRIN Principles for Businesses
    - COBS Conduct of Business Sourcebook
- Various regulatory publications relating to SIPP operators, and good industry practice.

The legal background:

As highlighted in the High Court decision in Adams the factual context is the starting point for considering the obligations the parties were under. In this case I am satisfied the contractual relationship between IFG and Mr C is a non-advisory, or execution only, relationship.

Setting up and operating a SIPP is an activity that is regulated under FSMA. And pensions are subject to HMRC rules. IFG was therefore subject to various obligations when offering and providing the service it agreed to provide – which in this case was a non-advisory service.

The case law:

I'm required to determine this complaint by reference to what is in my opinion fair and reasonable in all the circumstances. I am not required to determine the complaint in the same way as a court. A court considers a claim as defined in the formal pleadings and they will be based on legal causes of action. The Financial Ombudsman Service was set up with a wider scope which means complaints might be upheld, and compensation awarded, in circumstances where a court would not do the same.

The approach taken by the Financial Ombudsman Service in two similar (but not identical) complaints was challenged in judicial review proceedings in the Berkeley Burke and the Options cases. In both cases the approach taken by the ombudsman concerned was endorsed by the court. A number of different arguments have therefore been considered by the courts and may now reasonably be regarded as resolved.

It is not necessary for me to quote extensively here from the various court decisions.

The FCA rules

PRIN

The Principles for Businesses, which are set out in the FCA's Handbook "*are a general statement of the fundamental obligations of firms under the regulatory system*" (see PRIN

1.1.2G). The Principles apply even when the regulated firm provides its services on a non-advisory basis, in a way appropriate to that relationship.

Principles 2, 3 and 6 are of particular relevance here. They provide:

"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.

Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."

I am satisfied that I am required to take the Principles into account (see Berkley Burke) even though a breach of the Principles does not give rise to a claim for damages at law (see Options).

COBS

The CMC has referred to a number of COBS rules. However, much of what is subject to complaint pre-dates the COBS rules, which were introduced in November 2007. COBS 9 suitability and COBS 4 communications with clients are not, in my view, relevant to this complaint, in any event – so I have not considered these, insofar as the events post-date the introduction of COBs, or any similar rules under COB. I do however acknowledge that COBS 2.1.1R – the client best interests rule – does apply to any events which post-date the introduction of that rule.

The regulatory publications and good industry practice:

The regulator issued a number of publications which reminded SIPP operators of their obligations, and which set out how they might achieve the outcomes envisaged by the Principles, namely:

- The 2009 and 2012 Thematic Review Reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 "Dear CEO" letter.

The 2009 Report included:

"We are concerned by a relatively widespread misunderstanding among SIPP operators that they bear little or no responsibility for the quality of the SIPP business that they administer, because advice is the responsibility of other parties, for example Independent Financial Advisers…

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 clients and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers."

The Report also included:

The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*

- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*

- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*

- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*

- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*

- *Identifying instances of clients waiving their cancellation rights, and the reasons for this."*

I have considered all of the above publications in their entirety. It is not necessary for me to quote more fully from the publications here.

The 2009 and 2012 Thematic Review Reports and the "Dear CEO" letter are not formal guidance (whereas the 2013 finalised guidance is). However, all of the publications provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take them into account (as did the ombudsman whose decision was upheld by the court in the *Berkeley Burke* case).

Points to note about the SIPP publications include:

- The Principles on which the comments made in the publications are based have existed throughout the period covered by this complaint.

- The comments made in the publications apply to SIPP operators that provide a non-advisory service.

- Neither court in the Adams case considered the publications in the context of deciding what was fair and reasonable in all the circumstances. As already mentioned, the court has a different approach and was deciding different issues.

- What should be done by the SIPP operator to meet the regulatory obligations on it will always depend upon the circumstances.

I acknowledge that all of these publications post-date Mr C's applications to open the SIPP and enter into the property syndicate funds. However, the obligation to act in accordance with the Principles existed throughout the events in this case. It is also clear from the text of the 2009 and 2012 Thematic Review Reports (and the "Dear CEO" letter in 2014) that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, whilst the regulator's comments suggest some industry participants' understanding of how the good practice standards shaped what was expected of SIPP operators changed over time, it is clear the standards themselves had not changed.

Having taken account of the relevant considerations, I have reached the same conclusions as the investigator, for similar reasons. I have not seen sufficient evidence, in the circumstances of this complaint, to conclude that CASLP, acting fairly and reasonably to meet its regulatory obligations, should have concluded it should not accept Mr C's application to open a SIPP and transfer existing pensions into it and/or his later applications to make an investment in a property syndicate fund.

The property syndicate

CASLP was not acting in an advisory capacity. It was acting in an execution only capacity, as the administrator of Mr C's SIPP. CASLP did not therefore have any obligation to ensure the suitability of the transfer to the SIPP and investment made in it.

But, considering the relevant regulatory obligations and standards of good practice set out above, CASLP should have carried out due diligence on the investment which was consistent with those obligations and standards. I have therefore considered what such due diligence should have led CASLP to conclude about the investment, and the steps CASLP took.

It is clear, from the evidence available, that CASLP undertook sufficient due diligence into the investment. CASLP has provided evidence to show it checked the fund was to acquire title to the property, and secure arrangements were in place, with independent parties involved etc.

So, did CASLP reach a fair and reasonable conclusion about the fund and did it take adequate steps, in the circumstances, when allowing investment in the fund? Like the investigator, I think it did.

The fund was clearly a genuine investment, and operated as described. It was therefore fair and reasonable, in principle, for CASLP to conclude the fund was an appropriate investment for its SIPP. However, CASLP should also have recognised there were some features about the investment – it was a high risk Unregulated Collective Investment Scheme (UCIS) -which meant it should take steps to reduce any risk of consumer detriment. And I am satisfied it did take sufficient steps, in the circumstances of this particular case.

The Factsheet, which was signed by Mr C for the investment he made, included the following (bold font as original):

"What are the risks?

Please note the syndicated property arrangement is categorised as a high risk investment and should only be entered into by those investors who are willing to accept such a level of risk. Some of the risks are highlighted below but this list is not intended to be exhaustive. For a more comprehensive description of the risks involved please refer to the Syndicated Property Purchase Guide previously provided to you by the Syndicate Co-ordinator."

At the same time as signing the Factsheet, Mr C signed the Risk Deed for the investment. That included the following:

"I acknowledge and agree that:

investment in commercial property involves significant risk, the fund will be exposed to higher volatility and/or risk than other funds of the Company because of a smaller spread of investments and/or greater risks inherent in the actual investments selected and these risks will be increased if the property is untenanted and where there is borrowing to facilitate the purchase of a property…"

"I have:

A. *received and read the Syndicated Property Purchase Guide, the Factsheet and the Syndicated Property Agreement describing how the Syndicated Property arrangement works, and I have taken appropriate advice from my independent financial adviser acting as my agent, before applying for my Personal Pension Portfolio for Syndicated Property policy to be linked to units in the fund and in relation to the suitability of and risks attached to linking my pension benefits to a single commercial property investment."*

So, Mr C was given an explanation of the risks involved which, in my view, was clear and specific to the investment in question, and signed to acknowledge this. And he was asked to declare he had received advice from the IFA on the "*suitability of and risks attached to linking my pension benefits to a single commercial property investment*", and did so.

In my view these were reasonable steps to take, in the circumstances, and consistent with CASLP's regulatory obligations at the time.

I note the CMC has referred to CASLP failing to ensure Mr C was categorised as high net worth or sophisticated. However, I am not persuaded CASLP needed to do this, as Mr C had declared he had received advice on the suitability of the investment for him from the IFA, which was a basis on which it could be promoted under the COB or COBS rules which were in place at the time. So, I do not think CASLP should reasonably have identified that the investments had not been compliantly promoted to Mr C, and required sight of high net worth or sophisticated investor certificates.

So, I am satisfied it was fair and reasonable for CASLP to allow the investment. However, I also need to consider the introduction of business from the IFA.

The IFA

The IFA was authorised at the relevant time, with the correct permissions. And Mr C's advisor was a pension transfer specialist, with permission to give advice on defined benefit transfers as well as personal pensions.

CASLP says it did check the IFA's authorisation and permissions, and put terms of business in place with the IFA, but has not been able to locate a copy of those terms (it says it only holds some archived paper records, and none of the staff which worked in the business at this time are there now).

I think it more likely than not that CASLP did take the steps that it describes, and I am satisfied it was, as a starting point, fair and reasonable for CASLP to accept applications referred by the IFA. But, to meet its regulatory obligations, CASLP should also have had regard to the nature of the business being referred to it by the IFA. So, should CASLP have identified any anomalous features which presented a risk of consumer detriment and, if so, did it take adequate steps to address these?

The overall volume of business introduced by the IFA does not, in my view, appear to be anomalous. CASLP says applications arrived at a frequency of around five per month. That, in my view, was not sufficient to suggest a significant risk of consumer detriment, in the circumstances.

In terms of conflicts of interest, the IFA was an independent third party – it appears to have had no connection to CASLP. So, there was no conflict of interest between CASLP and the IFA. But there was a conflict between the IFA and some of the parties associated with the investment (the property advisor and managing agent) – they had a common director; and linked businesses therefore stood to benefit from the IFA's recommendation. And CASLP was aware of this.

CASLP says it:

- Obtained various assurances from the IFA in respect of matters impacting the fair treatment of customers.

- Understood that customers were fully aware of the links between the IFA and other parties, as a result of the manner in which the services of the other parties (for example, the managing agent) were marketed to customers.

- Ensured certain controls, which mitigated the risk of conflicts of interests, were in place – including by requiring that all property valuations be obtained from independent third parties.

And it has provided some further detail of the steps it took, as follows:

- It took steps to obtain information from the IFA and the linked businesses to understand and obtain assurances as to whether staff at the linked businesses had the requisite professional expertise and qualifications to act as either property adviser or managing agent. And additionally took steps to understand how the linked businesses would manage any conflicts of interest that arose if it were to act in a dual capacity as both property adviser and managing agent.

- It challenged the level of management fees that the linked businesses proposed to charge syndicate members as a managing agent, robustly requiring evidence that the linked businesses had obtained agreement to these from 100% of syndicate members.

- Required the linked businesses to agree to a site visit, to verify and discuss their systems and controls in respect of the proposed managing agent services.

- Required that, under any prospective agreement for the linked businesses to provide managing agent services to syndicate properties, any property valuations would be carried out by independent third parties. This was expressly required to manage the risk of property valuations being inflated for the purposes of increasing property value-based commissions or fees payable to the IFA or the linked businesses.

- During the same period, it obtained further assurances from the IFA that it undertakes due diligence in respect of syndicate properties on behalf of clients, including by taking the advice of relevant professionals regarding any property purchase, property lending, and related issues.

And it has pointed out it was the IFA's job to manage any conflicts of interest it had, when it gave advice; there was no regulatory obligation on CASLP to manage the IFA's conflicts of interest.

I think it more likely than not that CASLP did take the steps it describes - I think it is reasonable to accept CASLP's account of events, which it arrived at after extensive searches of its archives.

I have given this careful thought – considering the circumstances of this particular case – and do not think there is sufficient evidence here to uphold the complaint based on CASLP failing (insofar as the point relates to a decision by it as a SIPP operator as to whether to accept or reject Mr C's application) to take sufficient action to address the conflict between the IFA and the linked businesses, or CASLP proceeding in the light of assurances it received.

I have not seen sufficient evidence to show CASLP should have been aware of any other anomalous features in this particular instance. So, I am satisfied it was fair and reasonable for CASLP to accept the introduction of business from the IFA.

Other points raised by the CMC

The CMC has said CASLP did not explain the fees/charges associated with the arrangements. However, the factsheet set out the details of all the parties involved in the syndicate, and all the fees/charges payable. This was set out in clear terms in a framework at the outset of the factsheet which, as mentioned, was signed by Mr C. Mr C was also provided with illustrations for the SIPP, which set out the costs associated with that. I do not therefore think the evidence shows CASLP did not give Mr C an explanation of fees/charges.

The CMC also refers to CASLP having taken fees from Mr C's SIPP whilst the investments were illiquid. There is, in my view, no reasonable basis on which to say CASLP should not have taken ongoing fees, due to illiquidity. The investments were liquid to the extent described at the outset throughout. And it would only be fair to say CASLP should not have levied the fees which were agreed at the outset if it should not have allowed the investments. The available shows CASLP did explain the liquidity position to Mr C, in any event.

My final decision

For the reasons given, I do not uphold the complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 11 July 2025.

John Pattinson
Ombudsman