complaint

Mr P has a self-invested personal pension (SIPP) with Yorsipp Limited. He invested in a property development scheme in Cyprus in 2007. Mr P says Yorsipp has breached the duty of care it owes him in a number of ways when it made that investment on his behalf and he claims compensation from it for the losses he has suffered.

background

In 2007 Mr P was advised by an independent financial adviser, Mr A, to invest in a property development scheme in Cyprus that he (Mr A) was planning ("the Scheme"). And to transfer his pension to a SIPP with Yorsipp in order to make that investment.

Later Mr A's firm, MPFM, was taken over by Mr B. Mr A remained involved in the Scheme.

In 2009 Mr P made a further investment relating to the property development outside his SIPP. That was in the form of the purchase of an apartment in block C of the development in the name of a company owned or part owned by Mr P. At that stage the property had not been built and the contract provided for payment in stages as the building was completed. That contract was with a Cypriot company I will refer to as Company 1 and the contract said it owned the land that was to be developed and that it was subject to a mortgage.

Later Mr P became unhappy about the lack of progress with the property development and he contacted Mr B and Yorsipp about the investment made in his pension. Later Mr P was helped by a law firm that is now representing him in this complaint.

The complaint in broad terms is that Yorsipp paid money from Mr P's SIPP to Mr A's lawyer in Cyprus, Mr C, without understanding what it was paying for or what it was obtaining for Mr P in return for the money. It thought the investment was to be made in the Scheme by means of investing in a limited liability Cypriot company I will call Company 2. But Company 2 did not and has never owned the land to be developed. (Rather, it was owned by Company 1.)

Yorsipp argued that Mr P's complaint was made too late and should not be considered. I issued a jurisdiction decision in which I said the complaint had not been made out of time and should be considered.

The complaint was then considered by one of our investigators. During his investigation he asked Yorsipp for evidence of any checks it made before paying over the money for Mr P's investment. Yorsipp's lawyers said it did not need to make the sort of checks the investigator's questions seemed to suggest.

The investigator did not agree with Yorsipp's arguments. He wrote to the parties with his opinion about the complaint. He thought it should be upheld.

Yorsipp did not agree with the investigator and the complaint was referred back to me to determine.

I issued a provisional decision on 17 May 2019. In summary it was my view that:

- Yorsipp had not acted fairly and reasonably in all the circumstances.

- Yorsipp's obligations as SIPP operator included deciding whether to accept or reject an investment.
- Yorsipp was required to meet its regulatory obligations by identifying (and preventing) instances of potential consumer detriment.
- It was for Yorsipp as the SIPP operator to consider the nature of the investment - even on the basis of Yorsipp's own argument that it was only necessary to check the investment exists and satisfies HMRC's requirements.
- Yorsipp had paid out money from Mr P's SIPP for the Scheme before the structure of the Scheme had been finalised. It had paid out without understanding what it was paying for or what it was obtaining for Mr P in return.
- Yorsipp should be able to account for the funds it paid out on Mr P's behalf and it seems clear it cannot do so.
- Serious and fundamental allegations had been made against Yorsipp about it failing to secure title to anything for Mr P's SIPP and Yorsipp had still not demonstrated that it does hold good title to any reasonable rights on behalf of Mr P.
- It is not fair and reasonable for Yorsipp as a regulated financial services business to seek to rely on an exclusion clause in the trust deed to avoid liability for its errors.

I also set out how I thought Yorsipp should put things right for Mr P.

Mr P's lawyers queried the way I said things should be put right**.** Apart from that query Mr P accepted the provisional decision.

Lawyers acting for Yorsipp did not agree with my provisional decision. They made a number of comments including:

- Yorsipp does not dispute that COBS 2.1.1 requires firms to act *"honestly, fairly and professionally in accordance with the best interests of its client"* and that Principles 2 and 6 require a firm to conduct its business with due skill, care and diligence and to treat customers fairly.
- Yorsipp does not accept that these points impose general free-ranging duties on firms. They must be applied in the context of the services that the firm has undertaken to provide.
- It is important to consider the nature of SIPPs and the role of Yorsipp and the scope of its duties in that role.
- Yorsipp satisfied the scope of its duties by complying with the express instructions it has been given.
- SIPPs are self-invested or member directed pension arrangements. This is clear from the statutory background to SIPPs and the documentation relating to Yorsipp's SIPP.
- Yorsipp took clear evidenced steps to ensure the Scheme was HMRC and Deed and Rules compliant. There is no criticism in the provisional decision that it did not do so or did not do so in a fair and reasonable manner. It made ongoing checks for assurance on these points. Nothing in those ongoing checks supports the conclusion that the investment was unsafe.

- In this case Yorsipp paid over money to a regulated law firm in Cyprus - a firm Yorsipp had made checks upon. The lawyers were responsible for securing good title to the investment not Yorsipp.
- Yorsipp understood that Company 2 was intended to act as the purchaser of the target development land. And the funds were transferred to Mr C's law firm which

was acting in that land purchase and so it follows that the funds were transferred in order to obtain good legal title as part of the conveyancing process.

- A fair assessment of the complaint requires the ombudsman to take into account the role played by others in this matter – the adviser and the lawyers.
- It is not fair or reasonable to expect Yorsipp as a SIPP administrator to underwrite or indemnify the complainant's professional advisers for their failings by not investing the money as expected and or for the failure to evidence that good title had been obtained.
- This complaint is different from other cases that have been considered by the ombudsman service where there was no professional IFA involved. This is not a case where the SIPP administrator is responsible for the direct investment into the Scheme. Yorsipp transferred money to a regulated adviser which was then responsible for making the 'direct' investment on the complainants's behalf.
- The consumer had the benefit of professional financial and legal advice as to the structure of the Scheme and how it would generate a return, the holding and onwards transfer of SIPP funds, and obtaining good title to the target properties. Yorsipp's role as administrator did not encompass these duties.
- Yorsipp acted appropriately. It was instructed to transfer funds to the lawyers and it did so after making appropriate checks. The lawyer was then responsible for making the investment. The provisional decision does not say:
    - what additional checks should have been made
    - what was meant by it not being safe to pay over money to the lawyers
    - how in the circumstances any additional checks would have prevented the losses the consumer has suffered.
- Yorsipp as SIPP administrator was not under any duty to obtain good title for the properties purchased via property investment schemes. That obligation lies with the consumer's adviser and the lawyer acting in the purchase of the property to whom the money was paid. Yorsipp understand the money has been used to buy multiple properties by a number of companies linked with the lawyer Mr C. It is making further enquiries in this respect. But any issues relating to those properties are performance issues that Yorsipp is not responsible for.
- The trust deed includes an exclusion of liability that is common in the industry and consistent with the underlying philosophy of SIPPs. The consumer agreed to it when he applied for Yorsipp's SIPP with the benefit of professional advice. A fair and reasonable assessment of the complaint should apply this agreed provision.
- The relevant part says *"neither the Scheme Trustee nor the Scheme Administrator … shall be liable for any acts or omission not due to their own deliberate bad faith".*
- The consumer's representative did not challenge the exclusion. He argued that Yorsipp acted with deliberate bad faith. But there has been no bad faith by Yorsipp who has reasonably discharged its duties.
- If the complaint is upheld any redress should allow for the SIPP fees as these would have been incurred in any event.

my findings

It remains my view that we can consider this complaint.

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

what I must take into account:

I'm required (by DISP 3.6.4R) to decide this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. In considering what is fair and reasonable in all the circumstances of the case I must take into account:

- relevant law and regulations; regulators' rules, guidance and standards; and codes of practice
- and, where relevant, what I consider to have been good industry practice at the relevant time.

comments about Principles for Business and SIPP operators:

In my view, the FSA, now FCA's Principles for Business are of particular relevance to my decision on what is fair and reasonable in this case.

In *British Bankers Association, R (on the application of) v The Financial Services Authority & The Financial Ombudsman Service* [2011] EWHM 999 (Admin) Ouseley J said at paragraph 162:

> *"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 requirement 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."*

And at paragraph 77:

> *"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 of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."*

So, the Principles have a wide application, and I need to have regard to them when deciding what is fair and reasonable in the circumstances of this complaint.

The FSA and the FCA have made a number of publications which remind SIPP operators of their obligations and set out how they might achieve the outcomes envisaged by the Principles:

- The 2009 and 2012 thematic review reports.
- The October 2013 guidance.
- The July 2014 "Dear CEO" letter.

The September 2009 report included the following:

> *"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 (IFAs)…*

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. It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.

We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the member to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate the SIPPs that are unsuitable or detrimental to clients.

Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their customers' interests in this respect, with reference to Principle 3 of the Principles for Business ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

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."

The 2012 report included the following:

"Principle 2 of the Principles for Business, states 'a firm must conduct its business with due skill, care and diligence'.

Some SIPP operators were unable to demonstrate that they are conducting adequate due diligence on the investments held by their members or the introducers who use their schemes, to identify potential risks to their members or to the firms itself. In some firms this was made worse by an over-reliance on third parties to conduct due diligence on behalf of the operator. In some cases this has resulted in taxable investments being inadvertently held, and monies invested in potentially fraudulent investments."

In the October 2013 SIPP operator guidance, the FCA said:

"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.

All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a "client" for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."

The *"Dear CEO"* letter provides a reminder that the Principles apply and an indication of the FCA's expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the Principles. The letter said:

"As you may be aware, we have recently conducted a thematic review of SIPP operators following up on the guidance we issued in October 2013 (FG13/8). In this review, we focused on:

- *The due diligence procedures SIPP operators used to assess non-standard investments, and*
- *How all firms were adhering to the relevant prudential rules.*

During our review, we found that a significant number of SIPP operators are still failing to manage these risks and ensure consumers are protected appropriately, despite our recent guidance. In our view, the failings we identified put UK consumers' pension savings at considerable risk, particularly from scams and pension fraud. We have already discussed this with the firms concerned, explaining that these failings are unacceptable and need to be addressed.

I am now writing to you, and the CEOs of all SIPP operators, because our thematic review indicates that these failings continue and are widespread, despite previous communications. We are concerned that many firms in this sector continue to demonstrate a lack of engagement with some areas of their regulatory obligations, and hence pose a threat to the quality of outcomes experienced by consumers.

I would encourage you to review the key findings from our thematic review in the Annex to this letter, and ask you to take action to ensure that your business is able to demonstrate an appropriate degree of protection for consumers' pension savings.

Where firms fail to meet our expectation and continue to put UK consumers outcomes at risk we will take further action."

Although I have only quoted selected parts of the publications, to illustrate their relevance, I have considered them in their entirety.

I acknowledge that the 2009 and 2012 reports and *"Dear CEO"* letter are not formal *"guidance"* (whereas the 2013 guidance is). However, the fact that the reports and *"Dear CEO"* letter did not constitute formal guidance does not mean their importance should be underestimated. As mentioned, they provide a *reminder* that the Principles for Businesses apply and are an indication for the kinds of things a SIPP operator might do to produce the outcomes envisaged by the Principles. So I must view them as significant.

I recognise that these publications were made after the events subject to complaint, but the Principles that underpin them existed throughout. Yorsipp's regulatory obligations existed from the outset of Mr P's relationship with it. So the reports, letter and guidance – which each gave the regulators' view on the kinds of steps a SIPP operator might take in practice to achieve the outcomes envisaged by the Principles – are each relevant considerations in this case. Some were issued after the events subject to complaint, but the regulations and Principles that underpin them existed throughout.

It is also clear from the text of the 2009 and 2012 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 regulators' comments suggest some industry participants' *understanding* of how the standards shaped what was expected of SIPP operators changed over time, it is clear the standards themselves did not change.

Further it is clear that some of the comments made by FSA were shaped by observation of good practice within the industry at the time it carried out its reviews. As such it is evidence of good industry practice at the time I can take into account.

That doesn't mean that in considering what is fair and reasonable, I will only consider Yorsipp's actions with these documents in mind. The reports, letter and guidance gave non-exhaustive guidance. They did not say the suggestions given were the limit of what a SIPP operator should do. As the annex to the *"Dear CEO"* letter notes, what should be done to meet regulatory obligations is dependent on the circumstances. Ultimately, it was for a business to decide for itself how to meet its regulatory obligations – it should not have been reliant on the regulators to tell it what to do. Ultimately, I'm looking at whether, in making the investment in the Scheme on behalf of Mr P, Yorsipp treated Mr P fairly and reasonably. And, in doing that, I'm looking to the Principles for Businesses and the publications listed to provide indications of what Yorsipp should have done to act fairly and reasonably in relation to Mr P.

I consider that the FCA's Principles 2, and 6 are of particular relevance to my decision about what is fair and reasonable in this case.

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"* (PRIN 1.1.2G). Principles which are of particular relevance are 2, and 6:

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

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

In this case, the business Yorsipp was conducting was its operation of SIPPs. I am satisfied that meeting its obligations when conducting this business would include deciding to accept or reject particular investments.

I consider Yorsipp was required to meet its regulatory obligations by identifying (and preventing) instances of potential consumer detriment. This should not be confused with providing advice on the suitability of an investment or overall arrangement for a consumer's needs and circumstances. The fact that Yorsipp was not authorised to give advice did not preclude it from meeting its regulatory obligations by thinking carefully about the business it was accepting. And declining to accept business does not amount to providing advice. Yorsipp could have declined to accept Mr P's instructions without providing him with investment advice.

good industry practice

The regulator's reports, guidance and letter referred to above go a long way to clarify what should be regarded as good practice and what should not. In my view, it was good practice to check before accepting an investment into a SIPP that it was what it purported to be.

In another complaint that was subject to judicial review challenge it was reported in that case that the SIPP operator provided the ombudsman in that case with a statement from a trade association honorary secretary. It said enquiries by an operator in 2011 (the time that was relevant to the case) might usually be made into "*matters affecting title, HMRC compliancy, compliance, money laundering and overt criminal activity* ". I think it was good industry practice to check such matters in 2007/08 *ie* at the time of events in this complaint.

the roles of the various parties

Mr P is the complainant. He became a member of a Yorsipp SIPP through which he was an investor in the Scheme. Mr P is assisted in the complaint by his lawyer in this complaint.

Mr P was advised to switch his pensions to a SIPP to invest in the Scheme by Mr A using a trading name I have shortened to MPFM. Mr P was therefore a client of Mr A.

Later Mr B took over that MPFM business – the adviser business.

Yorsipp (Trustees) Limited is the trustee of the SIPP. The key features document for the Yorsipp SIPP in 2007 said:

> *Yorsipp (Trustees) Limited is the* [SIPP] *trustee and they have chosen to delegate the day to day management and administration to Yorsipp Limited.*

Since 2007 operating a personal pension, including a SIPP, has been a regulated activity. Yorsipp is a regulated business. It's the operator of the SIPP in this complaint.

At least some, if not all, of the employees and/or officers of Yorsipp seem to work for both entities and at the time of events in this complaint used an email address with "@Yorsipp.com" that did not distinguish between the two entities. The main point of contact between Yorsipp/Yorsipp (Trustees) Ltd and Mr C, and the person involved in sending or receiving the emails I refer to below, was a senior officer of both Yorsipp and Yorsipp (Trustees) Limited. The knowledge and understanding of the Scheme of the two entities was therefore effectively the same. I will generally refer to Yorsipp throughout for simplicity and only distinguish between the two entities if necessary.

As a member of a Yorsipp SIPP, Mr P is also a client of Yorsipp. It is the respondent firm in the complaint. It is also assisted by its lawyers in this complaint.

Yorsipp did not advise Mr P to invest in the Scheme. Nor did it manage the Scheme. Its only role was operator or administrator of the SIPP only.

It seems Mr A was the instigator of the Scheme. It seems to have been his idea and he managed or operated the Scheme either personally or through a company or companies he owns or controls which are distinct from the MPFM adviser business transferred to Mr B.

Mr A was assisted by a lawyer in Cyprus, Mr C. Mr C had a law firm I will just refer to as Mr C's law firm. He also had another business, described as a professional services firm providing business advisory and company administration services, which I will call Mr C's services business. And he has a nominee or custodian business.

Yorsipp (Trustees) Limited entered into a Fiduciary Services Agreement between it, Company 2 and Mr C's services business. That agreement is dated 10 December 2007 and includes a Declaration of Trust in which Mr C's services business declares it holds 1,000 shares in Company 2 in trust for Yorsipp (Trustees) Limited. That Declaration is also dated 10 December 2007. (This was not however seem to be the date they were signed as will be seen below.)

the investment in this case – the proposal

The investment in this case seems to have been based on or have its origin in an undated document headed The Proposal, as follows:

> *"The Proposal*
> *At present, it is difficult to find investments which offer both reasonable potential growth whilst also being cautious/balanced when it comes to risk.*
>
> *With this is in mind,* [MPFM] *in conjunction with Firms in Cyprus have put together an investment opportunity investing into a property development in the heart of Larnaca which will be developed over the next 2/3 years.*
>
> *It is proposed to offer some specific clients of* [MPFM] *the opportunity to invest into this type of arrangement using their pension funds by way of investment via a SIPP (Self Invested Pension Plan).*
>
> *This type of investment, a SIPP, means that a client is more in control of where their pension money is invested which can be, for example, either property or share portfolios.*
>
> *The plan is to have approximately twelve clients who will invest pension money using a Yorsipp contract allowing them access to invest into property development in Larnaca, Cyprus without the need to be actively involved in finding property/land or developing the same.*

> *The development, of which details are attached, will have the mixture of provide [sic] investors and SIPP investors. The attraction of this type of proposal is that you will invest into this plan for a period of approximately three years after which the property will be sold either on the open market or it has been agreed by the developer that there will be a guaranteed buy-back and that will be at the purchase price. Therefore there are limited downsides by way of risk whilst having potential for capital growth over three years.*
>
> *More specifically looking at the risk profile of this type of investment I would highlight that there is a guaranteed buy-back from the developer, at the purchase price along with paying any legal fees. This, therefore, makes the investment a limited downside but leaves the potential for capital growth. This is also important as the SIPP cannot invest in residential property and this development will be deemed residential when the completion certificate is granted. To this end, the guaranteed buy-back would come into play.*
>
> *It is also worth pointing out that there is the potential for currency fluctuations between Sterling and the Euro, however, as we have in the last few months Sterling seems to* [sic] *weakening and the Euro is strengthening, however, there is no guarantees and is something that cannot be predicted very easily.*
>
> *Finally, I would confirm that you will not personally own an apartment or part of the development outright."*

The above is a general description of an investment proposition or idea. More details of the proposed development were given in a brochure. But it is clear from the above that the intention was to invest in property development within a pension – not, say, to invest in individual apartments to occupy.

The brochure consisted of:

- an artist's impression of the intended development
- two tables listing the proposed number of apartments in blocks A, B and C and details like number of bedrooms, size, and so on
- an artist's impression of the view from the balcony of one of the proposed apartments
- floor plans for apartment 302 in block B
- floor plans for apartment 301 in block B
- floor plans for the apartment type used for rooms 101,102, 201 and 202 of Block B
- a further artist's impression of the intended development
- a final page giving the address of the proposed development.

So it is clear that the intention was to develop a specific plot of land at a specific location in Cyprus. It was not, say, an investment in a property developer with an unspecified portfolio of development projects.

when was Mr P's investment?

Mr P applied for a SIPP with Yorsipp on 20 July 2007. As I said in my provisional decision, the application was endorsed with the following handwritten comments and signed by Mr P on 5 October 2007:

> *"I authorise pension funds to be transferred to the client account of [Mr C] & Company, Larnaca, Cyprus."*

In fact that endorsement was not on the application form as such it was on a form called "Yorsipp Property Questionnaire". It is accepted by the parties that only the last two pages of that 13 page form were completed as the full standard form was not considered appropriate for the Scheme. It was nevertheless understood that the instructed payment was in respect of the Scheme investment.

This was not therefore a simple instruction only to pay money to the client account of a law firm. It was and was understood to be a payment instruction made in respect of an investment in the Scheme despite that not being clear on the face of the document itself.

The statement for Mr P's SIPP from July 2008 shows the SIPP was opened in July 2007. Money was transferred into the SIPP from three existing pensions in August 2007. On 9 October 2007 Yorsipp made a payment out of around £37,000 from the SIPP which it recorded in the SIPPs records as a holding in "Cyprus Property Fund".

company 2

The involvement of Company 2 - and the working relationship between Yorsipp and/or Yorsippp (Trustees) Limited and Mr C can be seen in the various emails I refer to below.

In an email dated 24 October 2007 Yorsipp attached some notes it prepared relating to the Scheme and its requirements following a meeting with Mr C and possibly Mr A. The notes are addressed to Mr C and included:

> "[Mr C]
>
> *As discussed at our meeting the best way to proceed with the investment is to appoint you to act on our behalf in the purchase process. I have broken down the professional appointments needed to allow the purchase to proceed.*
>
> *Holding the property*
>
> *Your presentation highlighted the most efficient way of holding the property is via a Cypriot company, which therefore makes the owner of the property the company and the SIPP investors would be shareholders. I have attached the HMRC notes on conditions in which we may invest in a vehicle holding residential property…*
>
> *Where we are investing through a company my main concern will be checking it has not breached the residential property rules at the time of purchase and on an ongoing basis. We would, on an annual basis, write to the company's secretary for confirmation the company still adheres to the terms for residential property.*
>
> *I understand from* [Mr A] *that there will be no Information Memorandum produced. However I will need to see some form of document to show the intentions of the company.*
>
> *For each of the members investing in the company we will require an instruction letter to invest in the property along with confirmation of the level of investment. A disclaimer that we have not made any investment recommendation and any liability of Yorsipp (Trustees) Ltd is restricted to the members assets in the trust will also be required…"*

It should be noted that the above postdates the payment out of Mr P's SIPP to Mr C's law firm.

In an email dated 15 March 2008 from Mr C to Yorsipp, Mr C said:

> *"Following my meeting with [Mr A] in London last week please be kind enough to clarify to me some issues in order for me to finalise the structure.*
>
> *I have received so far directly from Yorsipp into my clients account stirling 689,212,53. I need to know the amount send [sic] by each of your members in order to allocate the shares accordingly…*
>
> *At present the company exists however … [one of my firm's companies] holds the shares in trust for [Mr A] until you inform me of the allocation.*
>
> *As far as I know the investment is for [the Scheme].*
>
> *Please also instruct me whether I will remain director into the company or you will appoint one. If I remain I need to know who will be giving me instructions…"*

On 25 July 2008 one of Mr C's colleagues from his firm emailed Yorsipp. The email included:

> *"…Please find attached two drafts of the contract of sale for the purchase of apartments for the pension fund, one with payment structured according to stages of completion of apartments and the other stating that the majority of the funds will be paid upon signing. Euro 30,000 to be paid upon delivery of the apartments and Euro 6,000 to be paid upon issuance of the title deed for the apartments. Please bear in mind that three contracts, one for each apartment can be prepared if you so wish.*
>
> *Please also find attached the certificates of the company* [ie Company 2]*, which will be the purchaser of the separate apartments. It is a shelf company that has already been incorporated by our office and we can apply to the Registrar of Companies for the changes to be made so that Yorsipp (Trustees) Ltd will be the shareholder of 100% of shares and then the Trust Agreements between Yorsipp (Trustees) and each of the beneficiaries, stating that Yorsipp (Trustees) is holding certain percentage of shares on trust for each beneficiary according to his contribution. Please also find attached a specimen of such trust agreement for your review and comments…*
>
> *Futhermore, could you please kindly advise whether you wish the contracts to be backdated or not.*
>
> *It is our understanding that the company must not be a closed company. Please verify whether you agree with the following analysis:*
> 1) *The vehicle will hold three properties directly, and the properties are residential properties:*
> 2) *No asset (ie any of the three apartments) has a value that exceeds 40% of the total value of the assets*
> 3) *The above point can be supported by an evaluation*
> 4) *The vehicle is a company, which is not resident in the UK…*

On 22 August 2008 Yorsipp chased Mr C for the information it wanted. In an email it said:

> *"… It is quite urgent I sort out our records and need the basic information for next Friday so we can run our reports in September. The revenue [ie HMRC] have made it very clear that all conditions for investing in the property can't not [sic] be shown they will levy a penalty, the total tax bill can amount to 70%..."*

Later the same day Mr C emailed Yorsipp and said:

"I will prepare a new structure ans [sic] send it to you on Monday for approval…"

On 25 August 2008 Mr C emailed Yorsipp as follows:

"…I hereby provide you with an alternative solution…As already explained a shelf company will be used [Company 2] *with registration number … Incorporation date is 10th December 2007.*
Director is [Mr C].
Shareholder [Mr C].
I suggest that the shares are transferred to my company that provides services [Mr C's nominee business]*and a trust agreement is signed between my firm and the members.*
My firm will issue certificates in the format you have requested in Yorsipp (Trustees) Ltd…
My Firm will also be the director of [Company 2].
I believe that through this structure all conditions are met…
Please let me know whether you agree in order to proceed and send everything over for signature otherwise please proceed and advise the exact structure you need…"

Yoursipp replied on 1 September 2008:

"…I am a lot clearer on the company. I do have some questions on the trust agreement.

The legal owner is Yorsipp (Trustees) Ltd, our trust deed and rules will show the member as the beneficiary under the pension scheme. This would allow for the delegation of powers to be between Yorsipp (Trustees) Ltd and yourself, we would seek approval for this from the members.

I do not fully understand the trust arrangement you sent. I was expecting an agreement with yorsipp [sic] appointing your firm to act as nominee for us. I am unclear as to why the agreement you sent would have [Company 2] on it.

I hope I am explaining the structure we normally use, of course we are dealing with two legal systems albeit very similar."

So it is clear from the above that the role of Company 2 and the structure of the investment more generally had not been resolved at the time of the payment out from Mr P's SIPP to Mr C's law firm in October 2007 shortly before the Fiduciary Services Agreement and Declaration of Trust are dated.

what happened to the investment?

According to Mr P's representative the story is involved. In summary and anonymised form, Mr P's representative says:

- Mr A was an IFA in the UK who traded as MPFM.
- Mr A also owned the 100 issued shares in MPFM Ltd which was separate to his IFA business.
- In 2007 the shares in MPFM Ltd were transferred to Mr C the lawyer in Cyprus.
- Mr A was made bankrupt in Scotland in early 2008.
- Later papers were filed at UK Companies House to show the shares in MPFM Ltd had been transferred to a Cypriot company I will call Company 3.
- The shares in Company 3 are owned by another Cypriot Company - Company 4. And the shares in Company 4 are owned by a close relation of Mr A.

- The investment Scheme involved building apartments at a specific site in Cyprus which was owned by Company 1.
- Company 1 had mortgages registered on the land in 2007 and 2008. The mortgages totalled about 1.75 million Cypriot Pounds.
- In July 2008 MPFM Ltd acquired all 1,000 issued shares in Company 1. MPFM Ltd therefore indirectly acquired the land subject to the mortgages secured on it. And MPFM Ltd is effectively owned by Mr A's relation.
- Also in July 2008 Mr A was appointed sole director of Company 1.
- Company 2 was set up originally by or for Mr C or one of his businesses. He owned all the issued shares. It was to be used to acquire and develop the property or acquire the shares of the company that owned the property (Company 1).
- The shares in Company 2 were held in trust for Yorsipp by Mr C's services business from December 2008.
- Company 2 did not however acquire the land from Company 1 or the shares in Company 1.
- As at 2016 the land was still owned by Company 1 but there had been no development on the land and there was no planning permission to develop it.

According to Yorsipp UK and its recently appointed Cypriot lawyers:

- Company 2 was struck off the Cypriot register of companies in 2016.
- *"The main purpose of the investment was the* [Scheme] *project which from our own enquiries appears to have run into trouble with the financing bank … foreclosing on the mortgage on the plots on which the project would have been constructed."*

It is not clear what has happened to the money that was paid out of Mr P's SIPP account. It was paid to Mr C's law firm and as far as I am aware it has not given a precise accounting for the funds it received.

Accordingly as late as 19 March 2012 Yorsipp sent the following email to Mr C.

> *"…As previously mentioned I have not received any of the accounts or financial information on* [Company 2] *that I have requested. I desperately need this information to provide comfort to our compliance people.*
>
> *If I can reiterate it is not for me to consider the nature of the investment but rather account for the funds that have been sent."*

As far as I am aware the position has not changed materially since Yorsipp sent that email. For example as recently as when responding to my provisional decision Yorsipp's lawyers said:

> *"Yorsipp intends to provide a further update on the status of the Complainant's investment in due course. However in the context of this Complaint we are able to confirm that Yorsipp obtained advice from Cypriot law firm [name given] in connection with the status of the Scheme. [That firm] has met with [Mr C's law firm] to discuss the Scheme [and] has been told that the investment monies received from Yorsipp were used to purchase multiple properties in Cyprus. Different holding companies were set up to purchase these properties….*
>
> *[The new Cypriot law firm] is waiting to receive back the results of Cypriot Land Registry searches it has conducted against the names on these companies…*

> *It is expected that the results of these Land Registry Searches will then evidence what properties these companies own. In turn it will help [the new Cypriot law firm] to advise upon the status of the Complainant's investment…*
>
> *For the avoidance of doubt Yorsipp considers the current status of the Scheme is an 'investment performance' issue which the [ombudsman service] has already concluded is not something Yorsipp is obliged to guarantee or is responsible for."*

Yorsipp has provided no update on the outcome of the enquiries being made on its behalf.

some comments about the nature of SIPPs

In general terms a personal pension scheme is an arrangement in which a consumer saves money to build up a fund to be used to provide an income in retirement. To encourage such saving, pension schemes get favourable tax treatment compared to most other forms of investments. But those tax advantages are subject to conditions. One of them is that the investor does not have completely free access to the money that is invested. And one of the ways that access is controlled is that the money is paid over to a third party and not held by the investor.

Often a pension scheme, as in this case, involves a trust arrangement. And in broad terms the pension trustee holds the pension savings for the investor. Those savings are usually used to buy investments that are held within the pension arrangement. And with a SIPP the member has a high degree of control over the investments – the member directs the trustee as to which investments are to be held in the scheme. The investments are legally owned by the pension trustee who holds them for the benefit of the member of the scheme.

I note the comments made by Yorsipp's lawyers about the legislative background and philosophy of SIPPs. In particular I note that the intention with a SIPP is that the member directs the way the SIPP is invested. And I note that the role of the SIPP operator is distinct from and different to that of any adviser the member choses to consult in relation to the investments in the SIPP. I also note, for example that the FSA said in its report of 2009:

> *"We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs."*

SIPP operators do however have duties and obligations as SIPP operators – that point is not disputed by Yorsipp although the extent of those duties is.

Another point about SIPPs that is relevant to this complaint is that there are restrictions on the types of investment that may be held in SIPPs in order for the SIPP to qualify for preferential treatment and/or not suffer tax penalties. These restrictions have been referred to as HMRC requirements or rules or conditions in this complaint. One such requirement is that SIPPs may not invest in residential property. They can however invest in a company or fund that invests in residential properties if certain conditions are met.

Yorsipp summarised HMRC's conditions to Mr C in October 2007 as follows:

- *"The fund value must be at least £1 million*
- *It must have at least three properties*
- *No one property must exceed 40% of the value of the fund*
- *The member, along with anyone connect to the member, must not hold more than 10% of the fund. We would normally expect a minimum of 10 unconnected persons."*

obligation to carry out the member's instruction

Yorsipp has suggested that it did as it was required to do by complying with its member's instructions to pay money to Mr C's law firm. I accept the general principle of a SIPP is that the member decides how to invest their pension fund and gives directions or instructions to the SIPP operator who makes those investments on behalf of the member. However it is clear from the above that there are some restrictions on the investments a member of a SIPP may make in order to qualify for preferential tax treatment. And so Yorsipp did make some checks before it made the investment in this case.

It is not sufficient answer to this complaint to say that Yorsipp followed the instruction it was given. This point was considered in the case of *Berkeley Burke Sipp Administrators v Financial Ombudsman Service* [2018] EWHC 2878 (Admin). In that case the SIPP provider argued that it was obliged to execute the instruction a member had given by COBS11.2.19R. And on that point the judge said:

> *"132…there is no difficulty in concluding, as the Ombudsman concluded, that the Principles were applicable to the question of whether BBSAL should accept the investment in the first place, and that COBS 11.2.19R applied to the execution of the transaction once that decision was made…*
>
> *134. First, the Principles are indeed the ever-present sub-strata or overarching framework which stood over COBS 11.2.19R…*
>
> *135.Secondly, any suggestion that a SIPP provider must, as a result of COBS 11.2.19R, execute a transaction, regardless of the duties contained in the Principles, produces surprising results and in my view cannot be right. A number of examples were given during the course of argument as to circumstances in which, having received an instruction, the SIPP provider would or might think it inappropriate to proceed, or at the very least query the transaction with his client. These included situations where: (1) the proposed investment was not then "SIPPable"; i.e. was not eligible for the tax benefits of putting an investment into a SIPP; (2) the SIPP provider knew that although it was then SIPPable, there had been a legislative change which meant that it would no longer be SIPPable in a few months time; (3) the SIPP provider had received information which cast doubt on the integrity of those who were promoting the proposed investment, or as to whether underlying assets actually existed; (4) the SIPP provider had learnt of problems, such as a possible insolvency, which affected the proposed investment. In all of these situations, I consider that there is scope for the operation of the Principles, and that COBS 11.2.19R does not mandate the SIPP provider to proceed to execute the transaction. This is consistent with the underlying purpose of the COBS rules, which have their origin in MiFID, namely consumer protection.*
>
> *136. Thirdly, it seemed to me that, ultimately, BBSAL did not dispute that the Principles were potentially applicable in some situations; so that in certain circumstances a SIPP provider could and should properly decline to accept an investment. In his oral opening submission, when asked whether there was a duty to execute even if the investment was not SIPPable, Mr. Kirk sensibly submitted that the obligation to execute was not "immutable". He accepted that there were some circumstances – where execution would further a fraud, or breach the criminal law such as the Proceeds of Crime Act 2002, or where existing express duties were incompatible with execution – where the SIPP provider could decline to execute…*
>
> *137. In my view… once it is accepted (correctly) that COBS 11.2.19R was not immutable and did not override the Principles, the question of the application of the Principles to the particular circumstances of the case was a matter for the Ombudsman… If, as I conclude, the*

Principles have room to operate in a situation where COBS 11.2.19R is potentially applicable, then it was for the Ombudsman to decide how the Principles apply in a particular context…"

the involvement of Mr A and Mr C's law firm (1)

Yorsipp has argued that its position is different to the SIPP administrator in the above case. It says in its case it was not responsible for the direct investment. It transferred the money to a regulated law firm which was responsible for making the direct investment. And in this case, unlike in the above case, Mr P had the benefit of professional financial and legal advice.

In my view it is not clear Mr C or his law firm were acting for Mr P at the time he invested in the Scheme through his SIPP. Or that Mr A acting on Mr P's behalf obtained Mr C's advice. It seems to be the case that Mr A consulted Mr C on the investment proposal he was formulating and in which Mr P later invested. It seems Mr A consulted Mr C in his capacity as a potential operator and then operator of the Scheme. And perhaps also as an IFA generally since he wanted to promote the Scheme to the clients of his IFA business. It is not however clear that Mr A consulted Mr C on Mr P's behalf.

It is however clear that there was a relationship between Mr C or his firm and Yorsipp and/or Yorsipp (Trustees) Ltd at around that time.

All of that said, Yorsipp did know that Mr A was a regulated adviser advising Mr P and that Mr C or his law firm was advising Mr A. And there was no regulated financial adviser involved in the investment in the Berkeley Burke case.

However, while it is the case there are some differences, it seems to me that Yorsipp similarly accepts that the obligation to execute a member's instructions is not immutable since it says it was under a duty to check whether the investment was permitted under HMRC's and under its own rules. The implication is that if an investment was not permitted under one or other or both sets of rules Yorsipp would not have made the investment. And even if that is not Yorsipp's position it is my view that that is the conclusion it should have come to if it had concluded that one or other or both sets of rules were not satisfied. In my view it also follows that Yorsipp ought not to have made the investment until reasonably satisfied that the relevant rules were complied with and not, say, invest first and check or (finish checking) later.

Yorsipp's point is perhaps more that it was reasonable for it to rely on the member's professional financial and legal advisers in forming its view when making its checks.

There is no real suggestion by Yorsipp that it could just abandon its checks because of the involvement of the professional financial and legal adviser. It does not say it could just assume all was in order because other professionals were involved. And whether or not that is Yorsipp's position, in my view it is not appropriate for the SIPP operator to make assumptions about any matters which ought to concern it – such as compliance with HMRC's requirements – just because the member's IFA had advised the member that the investment was suitable for him to invest his pension in.

So it remains my view that Yorsipp had to make checks that were appropriate to the circumstances even on its own argument. And it follows that it should have been satisfied with the outcome of those checks before it paid out any money on behalf of a member.

what checks did Yorsipp make?

Understandably Yorsipp did not make an investment based on The Proposal document alone. There were meetings and exchanges of emails with Mr C and Mr A.

Lawyers for Yorsipp have argued the following:

> *"…at [the time of events in this case] and acting in its capacity as a SIPP administrator, [Yorsipp] was only required to assess whether or not a prospective investment met HMRC requirements (for unlisted shares) relating to a member's control over or connection with the company whose shares were to be purchased."*
>
> *"Yorsipp …was not required to (and nor could it) warrant or guarantee that the Scheme complied with HMRC rules and guidance for SIPPs . Instead, the duty on Yorsipp was simply to take reasonable steps to ensure it did."*
>
> *"By reference to the limited due diligence steps Yorsipp was under a regulatory and industry requirement in 2007 to perform Yorsipp submits the evidence …confirms it discharged the duty owed to the complainant and other investors in the Scheme."*

The lawyers say the evidence shows:

- Mr P and the other investors were receiving professional advice from an IFA (Mr A at MPFM) so it was reasonable for Yorsipp to assume that MPFM was advising Mr P on how the Scheme was structured. (I have commented on the appropriateness of relying on such assumptions above.)
- MPFM on behalf of the complaint obtained specialist advice from a local law firm. (I have commented on this point above.)
- To document how the Scheme was to operate Yorsipp entered into a Fiduciary Services Agreement with the corporate vehicle it was intended would act as purchaser of the development land – Company 2.
- A Declaration of Trust Document from December 2007 shows Mr C's services business holds 1,000 shares in Company 2 as nominee and trustee for Yorsipp (Trustee) Limited (on behalf of its members).
- Yorsipp satisfied itself Mr C was a qualified Cypriot lawyer by obtaining a copy of his practising certificate.
- Yorsipp obtained a copy of the certificate of incorporation of Company 2.
- Yorsipp obtained copies of Mr C's appointment certificates as director/company secretary of Company 2
- Yorsipp obtained a copy of the Company 2 shareholding certificate.

The lawyers say the above show that reasonable steps were taken.

were those steps sufficient?

Yorsipp says it was under a duty to check that the investment was permitted under its rules and HMRC's rules. This could be described a checking that the investment could be held in the SIPP – that it was 'SIPPable' as in the Berkeley Burke case above.

Yorsipp does not dispute that COBS 2.1.1 requires (regulated) firms to act to act *"honestly, fairly and professionally in accordance with the best interests of its client"* and that Principles 2 and 6 require a firm to conduct its business with due skill, care and diligence and to treat customers fairly. It says this does not impose general free ranging duties on firms and the

obligations must be considered in the context of the service a firm has agreed to provide. And that it satisfied the scope of its duties by complying with the express instructions it has been given (and I have dealt with that point above).

For the avoidance of doubt, I do not say Yorsipp was required to guarantee compliance with HMRC's requirements. It was required to take reasonable steps to ensure compliance.

When taking those steps Yorsipp would need to consider the investment in a reasonable level of detail and form a reasonable understanding of it. During that process if it noticed anything that gave it cause for concern it ought reasonably to act on those concerns.

This issue is perhaps what sort of things should Yorsipp as a SIPP operator in 2007/2008 have had concerns about?

I explained above that I consider Yorsipp was, as SIPP operator, required to meet its regulatory obligations by identifying (and preventing) instances of potential consumer detriment. And that good industry practice was for SIPP operators to make enquiries into matters affecting title, HMRC compliance, money laundering and overt criminal activity. That remains my view.

It is clear that Yorsipp was concerned about satisfying HMRC requirements in relation to residential property and did make some checks on that issue. And in relation to Mr C and Company 2. But it does not seem to have ensured that the basics were in place when making its checks for compliance with HMRC's requirements.

While trying to ensure that the company it was to invest in complied with HMRC requirements for a company investing in residential property, Yorsipp failed to heed the point that there was no structure in place for the acquisition of the land and the development of the residential property. Yorsipp does not seem to have checked that it was investing in a company that owned the land that was to be developed. Or in a company that had the resources to acquire the land and develop it. Or one that was a participant in a clearly set out, well defined and plausible plan to acquire the resources and clear title to the land and develop it for the residential use it was concerned about.

In the notes to Mr C sent to him on 24 October 2007 – after it had paid over Mr P's money – Yorsipp said:

> *"I understand from Mr A that there will be no Information Memorandum produced. However I will need to see some form of document to show the intentions of the company."*

It is not clear Yorsipp obtained such a document. It has not produced it during this dispute.

Yorsipp has said that the Fiduciary Services Agreement documented how the Scheme was to operate. But that is not the case. The agreement does not expressly refer to the Scheme. It does not mention the property to be developed. It does not even mention that there is any intention to develop any property or build any apartments.

So apart from the fact that it post-dates the payment out of Mr P's SIPP, it is not possible to work out anything about the property development scheme from the Fiduciary Services Agreement or the Declaration of Trust relating to the shares in Company 2.

Nothing has been produced in this dispute that sets out any agreed mechanism or process to show what interest Mr P had in Company 2 or the shares in it that were held for Yorsipp. There is nothing to show how those shares were supposed to correspond to an interest in the specific Cypriot property investment Scheme the investment was supposed to relate to – despite the following comment made in the notes to Mr C:

> *"From each of the member's [sic] investing in the company we will require an instruction letter to invest in the property along with confirmation of the level of investment."*

So in Mr P's case it is not clear what share of the Scheme he was supposed to be buying or what level of interest he was supposed to have in the shares. SIPP investors were not buying apartments, or at least not at that time, and investors were not buying clearly defined units in a unitised arrangement. It was not and still is not clear what an investor was buying when apparently investing in the Scheme.

There was no clearly understood process or mechanism in place for any investment in Company 2, to turn into an investment in a specific parcel of land to be developed into apartments. That was and remains unclear and not understood by Yorsipp. And so as recently as mid 2019 its newly appointed lawyers in Cyprus had apparently spoken to Mr C and been told that the money received from Yorsipp had been used to purchase multiple properties in Cyprus and that different holding companies were set up to purchase those properties. But that is not the investment Scheme Mr P gave instructions to invest in. And it's not the Scheme Yorsipp says it thought it was it was investing in. But without a clear documented structure Yorsipp could not really know what was going to happen to the money it was paying over. It could not have a reasonable understanding of the rights and obligations of the parties involved in the Scheme and in particular what it was obtaining for Mr P in return for the payment.

From the checks made on the Scheme by Yorsipp it ought to have realised it was not clear how Company 2 was to acquire and develop the land which was to be developed – how much it was expected to cost and how was it to be financed. Did it look like Company 2 had the resources to acquire and build the proposed apartments on it? Who was selling the property to Company 2? Was it a transaction at an appropriate value? Was it a bona fide arm's length transaction involving seemingly reliable parties?

Yorsipp should have realised it had no understanding of how the investment was to work as a scheme. And I do not here refer to its prospects as profitable investment. It was not Yorsipp's role to consider its suitability as an investment for the member. But when it was checking it for HMRC rules compliance it could and should have formed a view about whether it was a coherent scheme and consequently whether it was something it could reasonably pay its member's money into.

It remains my view that Yorsipp paid money out of Mr P's SIPP before it had fulfilled the duties it says it was under. At the time the payment was made Yorsipp did not know that the payment out was made in circumstances that would satisfy HMRC requirements. I accept it had made checks on Mr C and asked about the investment. But it remains the case that it had not got answers that would have enabled it to understand the Scheme – and indeed the answers it got gave the impression that answers were being made up as things went along. In saying that I do not mean in the sense of a fiction being created. Rather in the sense that the details of the structure just had not been thought through yet. Yorsipp should not have invested in the Scheme in the circumstances and it was not fair and reasonable to do so.

Yorsipp paid out money from Mr P's SIPP for the Scheme before the structure of the Scheme had been finalised. It had paid out without yet understanding what it was paying for and what it was obtaining for Mr P in return. It should not have done so. It was not fair and reasonable to do so.

I say this because the lack of a clear and settled structure was not just a technicality - it meant the security of the investment was unclear.

One of Yorsipp's points is that it acted reasonably because the payment was made to a law firm on which satisfactory checks had been made and with whom it had a Fiduciary Services Agreement. On the latter point the Fiduciary Services Agreement was with Mr C's services business rather than his law firm. Yorsipp's answer to that point is that the situation would be no different if the agreement had been with the law firm. This argument does not however answer the point that it was premature to pay over money to anyone until Yorsipp was reasonably satisfied that all was in order and that it was safe to pay out its member's money. And in this context, I say safe in the sense that it was reasonably satisfied on points such as the sort of points mentioned in the Berkeley Burke case I referred to above:

- that the investment was 'SIPPable',
- was not subject to any imminent change that would change its 'SIPPable' status,
- there were no doubts about the integrity of the investment or the existence of the underlying assets,
- the investment seemed solvent.

Yorsipp should not have paid over any money until it was reasonably sure it was safe to do so and that it was acquiring for Mr P something appropriate in return for that payment. It could not reasonably have come to that conclusion when it made the payment in Mr P's case. Or at any time since as it's unclear that the Scheme has ever been formalised and put on a footing that a SIPP operator could have reasonable confidence in.

And for the avoidance of doubt I repeat that there was no obligation on Yorsipp to guarantee or underwrite the success of an investment. A scheme could work as a scheme and turn out to be a poor investment. It might not perform well. But in this case Yorsipp should have realised from its checks that the Scheme itself was not something it should have paid its members money into. And that is not a matter of investment performance.

I appreciate that later in 2009 Mr P, through a company he owns or controls, made a non-SIPP investment in an apartment in the Scheme development in this case. I do not however think that this means Mr P would have made a direct investment in 2007 if Yorsipp had refused to make the SIPP investment. Such a refusal would have put things in a different light and more likely than not would have made Mr P more cautious about making the investment in 2007/08. It is therefore my view that if Yorsipp had refused to make the investment into the Scheme Mr P would not have invested in it in 2007/08. Whether Mr P personally, or through a company, would also have made the 2009 investment is not an issue that comes within the scope of this complaint.

the exclusion of liability in the trust deed

Yorsipp says the Trust Deed includes an exclusion of liability for the Scheme Trustee and the Scheme Administrator except for deliberate bad faith. It says it has not been guilty of

bad faith. It says Mr P agreed to the exclusion which is of a type that is common in the SIPP industry. And therefore, the exclusion should apply.

In my provisional decision I said it is not fair and reasonable for a regulated firm to seek to rely on such an exclusion clause. That remains my view.

In responding to my provisional decision Yorsipp said it does not dispute that COBS 2.1.R requires it to act honestly, fairly and professional in accordance with the best interests of its clients.

COBS 2.1.2 R includes the following rule that has been in place since November 2007:

> "A firm must not, in any communication relating to *designated investment business* seek to:
> (1) exclude or restrict; or
> (2) (2) relay on any exclusion or restriction of
> any duty or liability it may have to a *client* under the *regulatory system*."

Designated investment business includes operating a personal pension scheme and the regulatory system includes the Principles and the rules such as the COBS rules.

It is my view that either as a result of the direct application of the rule or the underlying Principles including the requirement to treat customers fairly it is not fair and reasonable for Yorsipp to rely on the exclusion clause in the Trust Deed in this complaint.

the involvement of Mr A and Mr C's law firm (2)

Other parties were involved in this matter such as Mr A as the adviser, and Mr C and/or his law firm. It may be the case that Mr A gave unsuitable advice or that others have acted wrongly towards Mr P in some way, but Yorsipp had its own distinct set of duties when considering whether or not to make the investment Mr P had directed it to make.

I am satisfied that Yorsipp failed to adopt good practice and comply with the regulatory obligations on it at the time when it made the payment out of Mr P's SIPP in respect of the investment in the Scheme. It failed to take reasonable steps to ensure it had a reasonable understanding of the Scheme and ensure it was a reasonable safe and secure investment in which to pay its member's money and it failed to acquire a something appropriate in return for the payment it made.

I am satisfied that if Yorsipp had acted appropriately it would not have made the payment out of the SIPP to invest in the Scheme for Mr P and he would not otherwise have made the investment in the Scheme. I consider it appropriate and fair in the circumstances for Yorsipp to pay the full award for the remaining financial loss suffered through making the investment, as it would not have gone ahead but for its failings. If it wishes, Yorsipp can have the option to take an assignment of any rights of action Mr P has against third parties before compensation is paid. Compensation may be contingent upon Mr P's acceptance of this term of settlement.

Some clients of Mr A/MPFM who invested in the Scheme were paid partial compensation by Mr B on behalf of MPFM. I am not sure if any payment was made in Mr P's case but if it was credit should be given for that payment so that Mr P is not paid that compensation twice.

how to put things right – fair compensation

In assessing what would be fair compensation, I consider my aim should be to put Mr P as close as possible to the position he would probably now be in had Yorsipp acted appropriately.

In my provisional decision I said:

> *"The normal approach is to compare Mr P's present position with the position he would have been in but for the wrong we are trying to put right. It is not clear what Mr P would have done if he had not invested in the scheme. The investment was in his pension so he would have made an investment of some type. And the investment was on the face of it relatively high risk for the reasons I gave above although The Proposal does suggest the scheme would be suitable for an investor who wanted to invest on a cautious/balanced basis.*
>
> *It is difficult to know what alternative investment Mr P would have made but it seems reasonable to say it would also have involved some risk rather than none or even low risk. I therefore presently think the benchmark proposed by the investigator - FTSE UK Private Investors Income total return index…- is a reasonable benchmark in the circumstances.*

That remains my view. I think Mr P would have invested the money invested in the Scheme differently. It's not possible to say precisely what he would have done differently. But I'm satisfied what I've set out below is fair and reasonable in all the circumstances.

In my provisional decision I said Mr P should be paid compensation on the basis of comparing his current position with a benchmark. Yorsipp thinks a deduction should be made from the redress to reflect the SIPP fees Mr P would have paid in any event.

Our published policy in this area is:

> *"Adjusting the benchmark return for charges would also complicate the calculation for you. This complexity isn't justified because the benchmark return isn't the actual figure the customer would have got before charges, but a broad measure of potential loss. So, we generally consider it fair to use the benchmark return as a measure of what the customer would have got net of charges."*

In my view it is fair and reasonable to apply that normal policy in this complaint. I do not therefore make any provision for the further deduction of SIPP fees from the fair compensation set out below.

what should Yorsipp do?

To compensate Mr P fairly, Yorsipp must:

- Compare the performance of Mr P's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investment. If the *actual value* is greater than the *fair value*, no compensation is payable.

  Yorsipp should also pay interest as set out below.

  If there is a loss Yorsipp should pay into Mr P's pension to increase its value by the total amount of compensation and any interest. The amount paid should allow for the effect of any charges and any available tax relief.

Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

If Yorsipp is unable to pay the total amount into Mr P's pension, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The notional allowance should be calculated using Mr P's actual or expected marginal rate of tax at his retirement age.

For example, if Mr P is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr P would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

- Pay to Mr P £300 for the trouble and upset caused to Mr P by Yorsipp's error.

- In return Mr P should:

    - assign his rights against third parties (as discussed above) if Yorsipp so requests
    - give the assignment or undertaking in respect of the Scheme as mentioned below.

Yorsipp will have to meet any costs of drawing up any assignment and/or undertaking.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
The Scheme	still exists	FTSE UK Private Investors Income Total Return Index	date of investment	date of my decision	8% simple per year from date of decision to date of settlement (if compensation is not paid within 28 days of Yorsipps being notified of acceptance)

actual value

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

If at the end date the investment is illiquid (meaning it could not be readily sold on the open market), it may be difficult to work out what the *actual value* is. In such a case the *actual value* should be assumed to be zero. This is provided Mr P agrees to Yorsipp taking ownership of the investment, if it wishes to. If it is not possible for Yorsipp to take ownership,

then it may request an undertaking from Mr P that he repays to Yorsipp any amount he may receive from the investment in future.

When calculating the actual value credit should be given for any compensation received from or on behalf of MPFM

fair value

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

why is this remedy suitable?

I have decided on this method of compensation because:

- Mr P wanted capital growth and was willing to accept some investment risk.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison in the circumstances.

My final decision

I uphold the complaint. My decision is that Yorsipp Limited should pay the amount calculated as set out above.

Yorsipp Limited should provide details of its calculation to Mr P in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr P either to accept or reject my decision before 23 February 2020.

Philip Roberts
ombudsman