SIPP & SSAS round-up – December edition 2022

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Introduction

With complaints about SIPPs and SSASs **as high as ever**, we summarise a selection of recent determinations from the Pensions Ombudsman (TPO) and the Financial Ombudsman Service (FOS). If you are a SIPP provider, SSAS professional trustee or administrator, or a financial advisor, read more to find out how the Ombudsmen approach certain complaints and how best to apply those outcomes to your own business.

In this edition, we focus on cases that highlight recurrent issues for these schemes, including conflicts of interest, decision making, illiquid assets, and fees.

We also round up recent and expected developments for SIPPs and SSASs on page 1 – and give you a heads-up for forthcoming TLT publications and events. We look forward to as many of you as possible joining us for our Winter Festival in the New Year!

Contents

Developments round up and horizon scan:

In the September edition of **Ombudsman News**, FOS flags its approach to dealing with complaints involving **unregulated collective investment schemes** (UCIS). These often involve investments made via a SIPP (with complaints pertaining, amongst other things, to the illiquid nature of these investments).

FOS reminds advisers to fully consider the suitability of UCIS as investments when advising on transfers. SIPP providers should ensure they have procedures in place to identify red flags that suggest a member's request to invest in a UCIS may be based on inadequate advice.

New Consumer Duty: the FCA made its rules on 27 July 2022 implementing the **new Consumer Duty**, which aims to set a higher standard of consumer protection in retail financial markets. Firms were required to have made an implementation plan by the end of October.

For new and existing products or services that are open to sale or renewal, the rules come into force on 31 July 2023 (drafted broadly, this will apply to the sale and purchase of SIPP back books). For 'closed book' products, the rules come into force on 31 July 2024.

For further information, see our **Consumer Duty hub**.

The Pensions Regulator's continued **anti-scams push** notes that it will work with its partners to review the suitability of **scam prevention** warnings for those transferring to SIPPs and SSASs.

The **FCA's Consumer Investments Strategy – 1 year update** notes that it is working with FOS and the FSCS to ensure consumers receive redress for SIPP advice failings as quickly as possible.

It also notes that, while the FSCS received fewer claims about SIPP operators than expected in 2021/22, it continues to wait on decisions from FOS which may 'lead to several SIPP operators' firms failing'. This may in turn lead to levy costs rising.

The FCA is **consulting** on rules to allow **long-term asset funds** (LTAFs) to be marketed to a wider group of retail investors and pension schemes. It aims to publish a final policy statement and final Handbook rules early in 2023.

FCA publications awaited

- The FCA has **recently confirmed** that a further consultation on Value for Money will run 'towards the end of this year'.

Pensions Dashboards: many pension providers will be required to implement their dashboard obligations by 31 August 2023 (following the DWP's deferral of the first round of staging dates).

The FCA's **final rules** were published on 1 November, and its **proposed regulatory framework** for consultation on 1 December. Providers of personal pension schemes, including SIPPs are now also required to connect to the dashboard from 31 August 2023, rather than June 2023, in line with the **DWP's requirements**. Providers with fewer than 5,000 pots in accumulation and that rely on a third-party integrated service provider to achieve compliance can use a later connection deadline of 31 October 2024, provided they notify the FCA by 30 April 2023 that they intend to rely on the extended deadline.

SSASs are not caught yet, as current draft regulations are relevant only to schemes with 100 or more members – but smaller schemes are **likely to be brought into scope in the future**.

The FCA published its **final rules on Improving outcomes in non-workplace pensions** on 1 December. These require providers to offer consumers a default investment option (although bespoke SIPPs (defined as 'empty wrapper' SIPPs) are exempt), and to warn them about the risk of inflation eroding the value of significant or sustained cash holdings. A cash warning is not required where the consumer has appointed an investment manager. Firms have 12 months to implement the rules, but 'given the current levels of inflation', the FCA encourages providers to send cash warnings now.

Sustainability Disclosure Requirements: the FCA published its consultation on **Sustainability Disclosure and investment labelling** on 25 October. The FCA seeks views in relation to pension products, to which it intends to expand the regime, with a consultation on proposals 'in due course'.

Forthcoming from TLT's SIPP & SSAS team:

Winter festival: TLT's SIPP & SSAS team will be hosting its annual SIPP & SSAS Winter Festival in early 2023. Look out for further detail on how to join shortly…

See also our Pensions Ombudsman updates for a round up of general pensions determinations. Our **September edition** includes the case of Mrs R, where TPO examined decision-making, and Mrs NiR, where an avoidable delay to a death benefit payment was criticised.

Mrs L[1]: the need for good conflicts governance, particularly in decision making

TPO has ordered SSAS trustees to reconsider a death benefit decision, and to address conflict of interests both in relation to the specific exercise of discretion and in terms of general scheme governance.

Facts

TPO heard a complaint from Mrs L, a beneficiary and trustee (alongside a number of other member trustees – 'the Other Trustees') of the Pentos Forman SSAS (the SSAS). She complained that the Other Trustees had failed to pay death benefits within two years of her husband's death, and raised complaints regarding their administration and trusteeship of the SSAS.

Mrs L's husband was a member of the SSAS. After he died, the trustees agreed that Mr L's beneficial interest should be passed to Mrs L. The main asset of the SSAS was a farm, made up of a number of parcels of land (including a riding school owned by Mrs L's daughter). From 2006 onwards there was discussion between the trustees about selling the farm, so that members could take their pensions, but disagreement as to whether the best price could be achieved by selling the farm intact or in separate lots. The rules of the SSAS specified that decisions should be unanimous; where a unanimous decision could not be reached, the rules required an expert to be appointed.

The professional trustee wrote to the trustees pointing out that the death benefits needed to be settled within two years of Mr L's death in order to avoid a tax charge. It expressed concern about the lack of agreement over the sale, and a continuing dispute about money owed by Mrs L's daughter in respect of her riding school. It noted that trustee meetings were taking place without its involvement, and that it had not been given minutes; Mrs L was also excluded from these meetings. The professional trustee said that it would not agree to resolutions passed in meetings from which trustees had been excluded. (TPO calls these inquorate meetings 'pointless and improper'.)

Decision

TPO partly upheld Mrs L's complaint. It ordered that the trustees as a whole (that is, including Mrs L) needed to draw up a policy on how to manage conflicts of interest (here, Mrs L had conflicts in that she was a potential beneficiary of the death benefit, and had an interest in ensuring the continuation of her daughter's business). They should then reconsider the death benefit decision, including how it should be paid, taking into account Mrs L's conflicts of interest; if no unanimous agreement could be reached, the trustees should appoint the required independent expert.

In addition, as both Mrs L and the Other Trustees had caused delays in paying the death benefit within the two-year period, the trustees as a whole were ordered to pay any arising tax charge before payment of the benefit.

Impact

As noted in our **Summer briefing** (where we review a case where a conflicted trustee did not recuse themselves), the nature of SIPPs and SSASs (with members acting as trustees) mean issues concerning trustees' fiduciary duties can arise relatively often. Trustees should ensure they have processes in place to manage the inherent conflicts.

While the Pensions Regulator's codes are not binding, they will be taken into account; here, they had not been followed. The code states that schemes must have processes to manage conflicts, with, as a minimum, a written conflicts policy, register of interests, and conflicts being addressed at regular board meetings.

The nature of a SSAS, with scheme rules requiring trustee decisions to be made by unanimous agreement of the member trustees, makes a policy on managing conflicts of interest particularly important. TPO suggests that in these cases the conflicted trustee should share relevant information, then withdraw from further discussions between the remaining trustees. The conflicted trustee will, however, need to approve the decision itself to satisfy the requirement for unanimous agreement.

In terms of decision-making, TPO sets out in the determination its 'clear guidance' as to what trustees need to do when exercising a discretion such as a death benefit. In this case, the trustees had not complied with TPO's expectations – they did not ask themselves the correct questions, nor take into account all relevant factors. TPO noted that a focus on the requirement for unanimity had led to an impasse.

Finally, arguments between trustees about how to deal with a commercial property can be a common occurrence. It is therefore helpful to have a dispute resolution clause in your rules, potentially with the ability to refer to an independent expert.

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1. CAS-12702-V0Y8

Mr R[2]: SIPP trustee had the right to distribute benefits as it saw fit

In our second death benefits case, FOS has rejected a complaint about the distribution of SIPP benefits. The judgment, albeit very short, contains some useful reminders.

Facts

Mr R was unhappy about how Novia Financial Plc ('Novia', as trustee of the Novia SIPP) distributed his brother's pension benefits after his death, and the lack of clarity and communication around the processes followed.

Mr R's brother died in January 2020. There was no expression of wish or nominated beneficiary on the policy. Novia was informed that Mr R's brother was unmarried and had no children or other dependants. His will asked that his assets generally be distributed 30% to charities, 20% to Mr R and 10% each to five other beneficiaries.

Novia, on behalf of the SIPP trustees, made their decision on how to distribute the funds and wrote to the beneficiaries in Mr R's will in April 2020 informing them each of their share. The funds were distributed 20% to Mr R and 16% each to the other five beneficiaries.

Mr R complained that Novia was wrong to divide the 30% of the plan value which might otherwise have gone to charities between the other five beneficiaries but excluding him. He argued that it did not make sense to apply the spirit of the will in relation to him, but not to the others. He also complained that Novia hadn't given him a detailed explanation as to how they had arrived at their decision.

Decision

FOS did not uphold Mr R's complaint.

As with TPO, FOS will not pass judgement on whether a scheme's distribution is fair or whether a different way of distributing benefits would have been more logical.

Both ombudsmen do, however, consider whether trustees exercised their discretion fairly – that is, whether they have reasonably considered all relevant information and not acted negligently. In this case, there was no dispute that the only relevant beneficiaries were the persons mentioned in the will. Novia excluded the charities from their distribution (no reasons were given), which FOS notes 'they are entitled to do'. They then decided the proportions in which the money should be distributed. Again, FOS found that the trustee didn't make any error, ignore any relevant information, or come to an unreasonable decision.

Mr R wanted a detailed explanation of how the trustees had reached their decision. However, FOS notes that Novia couldn't share information about other beneficiaries with him, and had no obligation to justify their decision to not pay him a higher share.

Mr R was also unhappy about the lack of clarity in Novia's communications generally. However, FOS points out that, as the SIPP didn't form part of the estate Novia wasn't able to share information (including valuations) with Mr R until it was decided that he would be a beneficiary.

Novia acknowledged that some information they provided (here, about the SIPP having a closed fund) could have been clearer. They apologised, and FOS considered this apology sufficient in the circumstances.

The SIPP value decreased between the time Novia was informed about the death of Mr R's brother and when it was cashed in. FOS found, again, that the trustee had not acted unreasonably: moving funds into cash just before it was to be paid out was not inappropriate.

Impact

Trustees of a SIPP usually have full discretion as to how they distribute death benefits – as the judgment notes, they don't have to follow a nominated beneficiary form, or a will, and (subject to the scheme rules) can distribute to beneficiaries that weren't specified by the deceased if they consider this appropriate. This discretion means that pension benefits fall outside a member's estate and are not subject to inheritance tax. However, proper process for the making of the decision remains vital – as here, it will spare the decision being remitted.

Although the decision is largely comforting for trustees, it touches on a number of important issues:

- this determination seems to stand in contrast with TPO's approach that trustees should be transparent about their decision-making and give reasons for their conclusions. Either way, trustees must ensure their process is sound, their reasoning explored and documented
- trustees should be clear on what documents and information they allow potential beneficiaries to see in such cases, and communicate this consistently to affected parties. Seek advice on data protection issues if necessary
- communication – particularly in scenarios such as death cases, where potential beneficiaries may already be under considerable stress, information should be handled sensitively, and should be timely and accurate.

2. DRN-3136572

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Mr N[3]: member responsible for decision to invest in illiquid funds that delayed the closure of a SIPP

TPO has rejected a complaint against the provider of a SIPP (Provider) and the SIPP administrator (Administrator).

Facts

Mr N held an execution-only SIPP. The Provider provided the investment and stockbroking services, with the Administrator providing the pension and administration services. Both charged fees for their roles. Neither was responsible for investment choices, and they did not offer advisory services. Mr N was responsible for all investment decisions, including choosing and managing the investment content of his SIPP and for all buying and selling of stock held within it.

Mr N had withdrawn the bulk of the SIPP's assets over the years; at the time complained of, it held assets worth £1,705, and so he decided to close the SIPP as the effect of fees on the remaining value would make it uneconomic.

Mr N informed the Provider and Administrator of his wishes, but the Administrator explained that three lines of stock held within his SIPP were illiquid and untradeable, having been delisted from the Alternative Investment Market. It confirmed that it would establish what options might be open to Mr N, as the SIPP could not be closed while it still held assets. To prevent unnecessary delays in the event the illiquid assets became liquid, the Administrator provided Mr N with a closure form to be held on record. It noted however that £500 would need to be left in his SIPP to cover ongoing administration charges.

Mr N eventually telephoned the Provider and sold all his liquid SIPP assets. He suggested donating the illiquid assets to charity, but was told this was not possible: SIPP investments that retained or might acquire a future value could not be charitably donated, due to HMRC rules (unauthorised payment tax charges could result).

In July 2019, the Provider issued a final response to Mr N's complaint about its part in the matter. It apologised for the distress and inconvenience caused to Mr N due to the inability to close his SIPP account, but noted the SIPP could not be closed while it held assets, and the assets could not be sold because they were illiquid. The Provider had explored the possibility of closing the SIPP without incurring future fees, but the Administrator did not change its decision, and so fees would be payable to the Administrator until the funds could be sold. These fees were in line with industry standards. The Provider paid £100 to Mr N in recognition of the time he had spent trying to resolve the matter.

Decision

TPO agreed with the Adjudicator that no action was needed. Mr N had been aware of the fee structure and respective roles of the parties from the outset (the literature contained adequate warning). Under the SIPP terms and conditions the Administrator had the right to charge fees while the SIPP existed. Mr N had made his own investment choices, and neither the Provider nor Administrator owed him compensation for any losses. He should have been conducting his own research into the continued financial strength and viability of the assets so that he could take action before they became illiquid.

The Administrator could not be compelled to donate the assets to charity where this would result in an unauthorised payment, nor could it release illiquid stock. It had acted within its powers, provided explanation of the situation to Mr N, and responded within an acceptable timeframe.

The Provider's offer of £100 and waiving of its future fees for Mr N was adequate award for his distress and inconvenience.

Impact

Illiquidity of assets is an issue that comes up in practice for SIPP operators (see also our note on page 1 regarding UCIS complaints). Within the current pensions tax framework, there is a risk of unauthorised payments where there is doubt as to an asset's current or future value. This is an area where the SIPP industry is looking to the regulators to work together on a solution that provides best outcomes for members and SIPP operators.

Scheme documentation that clearly sets out roles and responsibilities, and the fee structure, are vital. The decision provides comfort that SIPP operators may, where permitted under the scheme documentation, continue to charge fees for services provided while the SIPP exists and require a member to set aside a proportionate amount of cash to cover future fees. It is also a reminder that acting on complaints in a timely manner, and providing explanations to complainants in responses, is key.

3. CAS-37994-X1V8

Mr S[4]: SIPP operator's duties and powers in relation to SIPP commercial property investment

TPO rejected a number of complaints against the operator of a SIPP (Operator).

Facts

In 1997, Mr S signed a declaration enabling the establishment of his SIPP. As part of this, Mr S agreed to pay fees to the Operator in accordance with a 'Technical Details Brochure'. The rules were amended over time, amongst other things to reflect a change of SIPP provider.

In 2005, funds in the SIPP were used to purchase the SIPP Property (the only SIPP asset). Mr S used an IFA not employed or affiliated with the Operator to assist with the purchase.

In March 2018, Mr S emailed the Operator with concerns, including that the SIPP had been mis-sold. He believed that it was unsuitable because of its high costs and charges, which resulted in him not being paid a pension for several years. He queried which rules were in force for the SIPP, and why there had been 'unilateral changes' to them. He was also dissatisfied that in order to settle fees, the Operator could sell assets within the SIPP without his consent.

In December 2018, following a series of communications between the parties, Mr S sent the Operator a letter outlining his full complaints. In response, the Operator acknowledged that Mr S had been given inconsistent information regarding the rules in the past, and offered him £500 in recognition of any distress or inconvenience this may have caused.

Decision

The rules: TPO found that Mr S had not suffered financial loss as a result of receiving conflicting information about the rules. While it may have caused Mr S some 'frustration and inconvenience', TPO was not persuaded this was significant. The Operator's action to correct its error was 'more than reasonable' in its view.

It was unclear which rules Mr S thought had been unilaterally changed; the Adjudicator could therefore not investigate this element further. In any event, the Operator as trustee had always had the power to amend the rules.

Sale of assets: Generally speaking, trustees are the legal owners of pension scheme assets and may manage them accordingly, including selling them to realise fees. Here, the establishing rules of the SIPP also specifically gave the Operator power to deal with investments in the way they proposed.

Trustees must of course act in beneficiaries' interests, and the provision here conferred a power of sale only where necessary to allow it to comply with its overall obligations. Therefore, it may only be reasonable for trustees to use such a power in certain (exceptional) circumstances. However, as the Operator was yet to force a sale of the SIPP Property, and said it currently had no intention to do so, TPO could not comment on this further.

Fees: Mr S was made aware of and agreed to the Operator's fees at the outset, by signing the declaration. The brochure stated that the level and form of the charges would be reviewed 'and may be increased at any time.' The Operator had always informed its clients of fee changes by bulk mail, and the fees were listed in Mr S's SIPP bank statements.

While Mr S may not be happy with the fees, and they may be high in relation to the income generated by the SIPP, it did not necessarily follow that there had been maladministration. TPO noted that Mr S could have taken action including transferring to another provider.

Impact

The determination raises a number of important points:

- trustees are responsible for ensuring SIPP investments are appropriate in relation to HMRC requirements; it is the member's responsibility to ensure the SIPP is, and remains, suitable for their own needs. The Operator suggested that Mr S took IFA advice to review whether the SIPP was appropriate for him. The Adjudicator held this was reasonable advice
- whether a provider can sell a property without the member's consent (to meet fees etc) will depend on the scope of the power of sale in the scheme documentation and circumstances of the case at the time (for example whether there is a risk of non-compliance with pensions tax rules and unauthorised payments)
- as with Mr N, clarity on fees (both in terms of level, and the ability to review them) from the outset, and subsequent clear documentation of any changes, is key. Schemes should also take care when updating rules, and ensure members are clear what version is in force and how this may be accessed.

4. PO-28652

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Chambers 2022 (for TLT Pensions)

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- We understand the commercial needs of our clients and the nuances of the pensions market, so we adapt our strategic advice on dealing with complaints and tactical approach to find the best fit.
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