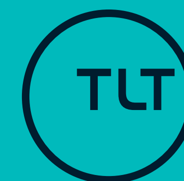
SIPP & SSAS round-up – Autumn 2023

For what comes next
tlt.com



Introduction

In this edition, we focus on some determinations from the Pensions Ombudsman (TPO) and the Financial Ombudsman Service (FOS) that highlight recurrent issues for SIPP and SSAS schemes, including conflicts of interest, dispute management and decision making, transfers, provider due diligence, and fees. The cases also demonstrate how the ombudsmen and regulatory bodies address issues such as limitation periods, exercise of their own powers, and compensation levels. 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.

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.

Contents

Developments round up and horizon scan 1

Determinations:

Mrs D: time limits, transfer delays, and trouble 3

A B Produce PLC (SSAS) Retirement Benefits Scheme: TPR Determination 4

Mrs N: a heavy price for a provider's due diligence failure 5

Mr T, and Mrs B: two cases of excess fees 6

Key changes:

Cases: **Permission to appeal** has been granted after the Courts earlier refused an application for permission to apply for judicial review of a FOS decision in relation to Options UK Personal Pensions LLP (previously Carey Pensions), in relation to SIPP operators' due diligence obligations. The appeal will be heard in April 2024.

Complaints: in its **Annual complaints data and insight 2022/23**, FOS noted that personal pensions remain some of the most complained-about products, with over 3,000 new complaints (its **latest half-yearly data**, released in October, continues to show an upwards trend). The FCA **also reports** on the continued rise in pensions-related complaints.

Consumer Duty: the **new Consumer Duty** came into force on 31 July 2023 for new and existing products or services that are open to sale or renewal (broadly, applying to the sale and purchase of SIPP back books). For 'closed book' products, the rules come into force on 31 July 2024.

The FCA issued a **Portfolio letter for SIPP operators**, setting out its 'expanded expectations' for these firms. FOS issued a blog over the summer looking at **the Consumer Duty's impact on resolving financial complaints**.

Dashboards: although the DWP has **'reset' the Dashboards timeline**, and **replaced** the original staging timetable with a longstop connection deadline of 31 October 2026, schemes **should still continue to prepare for connection**. The FCA's **dashboard rules** have been updated to reflect the changes.

SSASs are not yet caught but may be brought into scope in the future.

General levy: the **DWP is consulting on options for changing rates of the General Levy** to mitigate the ongoing deficit in levy funding. One of the proposed options is to increase levy rates from April 2024 by 4% per year plus an additional £10,000 premium for small schemes (with under 10,000 members) from April 2026. There is no carve-out proposed for SSASs (save for the current exemption from the levy for single-member SSASs), which the Government notes are a large proportion of small schemes. The consultation closes on 13 November 2023.

Improving consumer outcomes: Firms have until 1 December 2023 to implement the FCA's **rules on Improving outcomes in non-workplace pensions**. Providers must offer consumers a default investment option and warn them about the risk of inflation eroding the value of significant or sustained cash holdings. Some exemptions apply – contact us for details

Long-term asset funds: The FCA has published its **final rules and guidance** on rules to allow long-term asset funds ('LTAFs') to be marketed to a wider group of retail investors and pension schemes, including SIPPs. LTAFs will be classified as non-standard assets for SIPPs given that they have a minimum 90-day notice period for redemptions.

Retirement income advice: The FCA's **thematic review of retirement income advice** will explore how financial advisers are delivering advice, and assess the quality of outcomes consumers are getting. It will also look at how firms are responding to changing consumer needs as a result of the rising cost of living. A report setting out the FCA's findings is expected in Q4 2023, and will be used to identify how firms are implementing the Consumer Duty.

Sustainability Disclosure Requirements: we await the FCA's Policy Statement on **Sustainability Disclosure and investment labelling**, which had been due in Q3 2023. The FCA's consultation sought views in relation to pension products, to which it intends to expand the regime, with a consultation on proposals 'in due course.'

Transfers and scams: the FCA has issued advice on **how firms should support consumers with characteristics of vulnerability when providing pension transfer advice**.

Earlier in the year, it also published guidance on **UK authorised firms' responsibilities on accepting pension transfer referrals from overseas advisers**. It notes that transfers to UK-based international SIPPs holding offshore investments are often recommended during such advice.

The Pensions Regulator's ('TPR') **Strategy to combat pension scams** specifically notes that it will be reviewing the suitability of scam prevention warnings for people transferring to SIPPs and SSASs, and consider developing 'consumer protection messaging' around these products.

Value for Money: the **response** to the proposed Value for Money ('VFM') framework consultation was published in July. For more detail on the implications for SIPP arrangements specifically, ask us for a copy of our Mansion House proposals briefing.

The response confirms that SSASs will be excluded from the requirements, although 'these schemes can participate on a voluntary basis should they wish to do so.'

Recent and Forthcoming from TLT's SIPP & SSAS and Pensions team

- TLT's SIPP & SSAS team will be hosting its annual **SIPP & SSAS Festival** in December. Look out for further detail shortly.
- Our **webinar 'SSAS documentation: top tips to mitigate risks'** is now available on demand.
- **See also our Pensions Ombudsman updates** for a round up of general pensions determinations. Our **September edition** includes transfer timescales issues, dishonest trustee breaches, and a look at good decision-making in relation to the current hot topic of scheme surpluses.

Mrs D[1]: time limits, transfer delays, and trouble

While a complaint about a failure to invest SSAS funds was out of time, TPO upheld the element of the complaint regarding delays in the transfer value process.

Facts

Mrs D's late husband was one of five members of a SSAS ('the SSAS'), with Mrs D receiving an income from the scheme through capped drawdown following her husband's death. Two members plus the administrator acted as trustees for the scheme (together, 'the Trustees').

The SSAS's main asset was a commercial property ('the Property'), the rental income from which had been used to provide a pension for the retired members. But as the Property was now untenanted and in need of repairs, the SSAS was running at a huge annual deficit; the Property was therefore sold – with the sale proceeds placed into a basic current account. Throughout 2014 the Trustees searched for replacement investments, but did not find anything they deemed suitable, and the value of the SSAS assets decreased. The Trustees concluded that another property investment was unlikely to be suitable for the SSAS (raising concerns about the worth and lack of regulation of overseas property), writing to explain the situation and possible options to Mrs D in May 2015. The Trustees engaged two IFAs in the course of their deliberations, neither of whom they were happy with.

Mrs D decided to transfer out in September 2017. Delays with completion of the documentation among other things meant that the transfer only completed in January 2018. Mrs D complained to FOS, and then to TPO.

Decision

While the exact date of Mrs D's knowledge was open to interpretation, TPO found (on the balance of probabilities) that she would have been aware of the continuing failure to invest the funds by mid-2015. Therefore, TPO could not consider this element of the complaint, as it was only submitted in 2019. There were also no extenuating circumstances which would warrant TPO exercising discretion to investigate the complaint despite its late submission. The delay was not beyond the applicant's control.

In terms of the transfer delay, TPO noted that the average industry standard for dealing with a transfer payment ranged from 10-20 days, so found that, even allowing for unforeseen issues such as additional paperwork or staff absences, two months should have been sufficient. TPO ordered the professional trustee to compensate Mrs D for the loss suffered, making up the shortfall in the number of units she could have purchased had the transfer been completed on 4 November 2017. He also awarded £500 for distress and inconvenience.

Impact

There's lots of interest here, including how TPO will look at the issue of limitation, here in a 'failure to act' case (where it may be trickier to pinpoint when time starts to run), plus when he might allow a time extension.

That the transfer delay was criticised is not a surprise. Those running schemes should make sure processes are workable and kept under review, with safeguards to catch errors (see our **recent TPO Update** for more on this).

It would of course have been interesting to see how TPO dealt with the failure to invest complaint, had he been able. An investment strategy suited to all members of the pooled assets in this case would be hard to achieve. Members already in drawdown need more liquid and low risk assets, while those who are younger and still contributing are likely to prefer a long-term and higher gain outlook. Further, where trustees hold SSAS investments in cash over a long period, as well as the risk of complaints about poor investment returns trustees should be aware of the risk that if the bank or building society were to fail FSCS compensation may not cover the full amount of cash held in a current account.

As the members of a SSAS are also its trustees, complaints about investment decisions are rare. Where a SSAS has beneficiaries beyond the trustees, the trustees should ensure that their investment decisions take everyone into consideration.

Trustees are entitled to appoint and seek advice from professional advisers – but of course, they ultimately remain responsible for the scheme, and should ensure they are happy both with the advice given and the advisers' timeliness.

In this case delays, as well as being caused by IFA inactivity and sheer error, were also caused by leaving the day-to-day administration largely to one individual, and later by individuals involved in the relevant processes being on holiday. A well-governed scheme should ensure such eventualities are foreseen and alternatives are in place, such as delegation of trustee powers.

1. PO-26429

A B Produce PLC (SSAS) Retirement Benefits Scheme[2]: TPR Determination

Our September TPO Update covered a case in which TPO expressed the hope that TPR would replace the trustees of a scheme. In this Determination notice, we see it doing just that.

Facts

The four member trustees of a SSAS ('the SSAS') were members of the same family. There had been a 'severe' and 'irreconcilable' breakdown in the relationship between the individuals; disputes between the family members had escalated into formal proceedings before TPO and the High Court. The previous independent trustee resigned in early 2022 as it felt that its role had become untenable because of the ongoing disputes.

One member trustee brought an application to TPR for the appointment of an exclusive independent trustee. Among other things, they claimed that the other member trustees had improperly refused to engage with a request for payment of their benefits, and improperly placed scheme assets on long term deposit without other trustees' knowledge or agreement resulting in liquidity being unavailable for them to take their benefit entitlement.

In addition, scheme accounts had not been prepared for a number of years; rent due monthly from the employer to the SSAS had not been paid (this income was needed to provide liquidity to pay pension benefits); and there had been a disagreement as to whether to allow a transfer in to the SSAS in respect of one member.

Decision

The Pensions Act 1995 gives TPR power to appoint a trustee to a scheme if it is satisfied that it is reasonable to do so. Grounds include needing to secure that trustees have and exercise the necessary knowledge and skill to administer a scheme properly, or to secure the proper use or application of a scheme's assets. TPR concluded that it was reasonable to appoint a new independent trustee (the original independent trustee did not wish to continue) on both grounds, granting them sole and exclusive powers. There was a 'serious risk' that without an independent trustee, the trustees as a whole lacked the ability to administer the scheme; for example, in the past, the independent trustee had had to step in to prevent actions being taken by the members that would have given rise to unauthorised payments.

TPR found also that there was a risk of 'historic and ongoing unremedied breaches of legislation due to a mistaken reliance on small scheme status' (for example, in relation to employer-related investments, and the appointment of a scheme auditor). The SSAS's trust deed and rules had not been updated since 1988 (despite attempts by the independent trustees to get the members to do so) and so did not satisfy the criteria for 'small scheme' exemptions from some legislative requirements, in particular by still permitting decisions to be made by majority of trustees rather than by unanimous agreement of the member trustees.

Impact

Many points in this determination notice are relevant to the running of SSASs:

- Proper decision-making: SSASs are often used between families or colleagues. A breakdown in relationships in such circumstances and a falling out between member trustees can give rise to the risk that they might be influenced by personal interests or wider disputes when taking trustee decisions. This may result in discretionary decision-making powers not being properly exercised.
- Conflicts: here, there was a failure to identify and manage conflicts of interest. Our **Spring 2023** and **December 2022** SIPP & SSAS briefings have more on how small scheme conflicts can be managed.
- Required knowledge: running a SSAS requires careful understanding, particularly where there is no professional trustee. Member trustees should seek proper advice, take training (for example on tax matters, conflicts, and decision making), and consider appointing a professional trustee.
- Internal controls and governance: these need to be up to scratch. Ensure the correct appointments are made, paperwork and records created (for example, a register of trustees' interests and conflicts of interest policy is adopted and maintained), and meetings run appropriately.
- Where a relationship between member trustees breaks down, a professional trustee of a SSAS can be left in a difficult position, particularly where a dispute between member trustees stalemates trustee decision-making. In these circumstances, a useful solution may be to approach TPR to exercise its power to appoint an independent trustee with exclusive powers.

2. A B Produce PLC (SSAS) Retirement Benefits Scheme - Determination notice

Mrs N[3]: a heavy price for a provider's due diligence failure

Mrs N complained to FOS that a SIPP provider ('the Provider') did not carry out sufficient due diligence on the authorisation of the IFA she used to receive transfer advice.

Facts

In 2014, Mrs N transferred her pension benefits to a SIPP. An overseas IFA ('the IFA') was appointed to provide the required transfer advice. At the time, all parties believed that the IFA had the necessary authorisation to be able to advise on, and make arrangements in respect of, personal pensions in the UK.

The IFA advised Mrs N to invest her money in two funds in the SIPP. Later in 2014 the Provider wrote to Mrs N to explain that those funds were now considered higher risk than originally determined, following a policy statement from the FCA. Consequently, investment in these funds was only permitted where full advice had been provided by a regulated IFA and it was therefore imperative Mrs N seek advice from the IFA on these investments again. The IFA advised she retain these investments.

In 2015 the Provider wrote again to Mrs N to explain that one fund was being investigated by auditors and that the fund managers had decided to liquidate and return client investments in it. It had also been discovered that the IFA did not, in fact, have the requisite authority to be able to advise on personal pensions in the UK. A replacement company to which the IFA's customers were originally to be migrated was deemed not suitably independent, and so the Provider urged Mrs N to have her SIPP reviewed by a new third party IFA.

In 2016 the Provider urged Mrs N to make a redemption request in respect of her holdings in the two funds, but she did not take them up on this. Mrs N subsequently lost a significant amount of her money.

Decision

While FOS noted that it may have been the case that the IFA gave unsuitable advice to Mrs N, the Provider had its own distinct set of obligations when considering whether to accept Mrs N's application for a SIPP. FOS concluded that the Provider ought to have identified that the IFA did not have the necessary permissions to be able to advise Mrs N to invest in the funds in 2014. This failure ran contrary to their regulatory obligations. It was also not good industry practice for the Provider to continue to accept business from the IFA once this failing had been identified.

Mrs N subsequently lost a significant amount of her money.

In distinguishing other similar cases, FOS concluded that here it had seen no evidence that Mrs N would have likely continued to invest in the funds had she known that they were high risk. The Provider was directed to put Mrs N in the financial position she would have been had she not invested in the SIPP, plus awarded interest and £500 for the distress and inconvenience she suffered. As the complaint Mrs N raised was against the Provider, FOS did not consider action against the IFA, but did direct that Mrs N assign any rights she may have against the IFA to the Provider.

Impact

SIPP providers must undertake appropriate due diligence on all IFAs in relation to their funds; this includes checking that IFAs have obtained the requisite authorisations, particularly where non-UK domiciled advisors are involved. Any 'anomalous features' identified should alert providers to the need for particularly careful due diligence.

In reaching its decision FOS considered the FCA's Principles for Businesses: Skill, care and diligence (Principle 2), Management and control (Principle 3) and Customers' interests (Principle 6). It also pointed to FCA Regulatory publications that remind SIPP operators of their obligations, notably the 2009 and 2012 Thematic Review Reports, the 2013 SIPP Operator Guidance and the July 2014 'Dear CEO' letter. SIPP providers should therefore make sure they are aware of these. As with other recent decisions, FOS considered that these publications were relevant and examples of good practice at the time, even though they post-dated the events that took place in the complaint, on the basis that the FCA Principles underpinning them had existed throughout.

Where FOS upholds a complaint, it can make an award requiring a financial business to pay compensation of up to £150,000. Here, while it could not order more, it also 'recommended' that the Provider meet any costs in excess of this.

3. **Decision Reference DRN-4308188**

Mr T, and Mrs B[4]: two cases of excess fees

TPO and FOS have both recently opined on the issue of SIPP fees erroneously or over charged.

Facts

Mr T complained that an administrator charged excessive fees for administering the SIPP. Following their appointment, a new SIPP administrator had assured Mr T that the change would not have an impact on the fees charged. At no time was Mr T informed of any new fee structure, and no agreement about fees was ever entered. The new administrator's website claimed that yearly fees would be no more than £400, but Mr T was charged significantly more. Mr T argued that the fee structure agreed with the former administrator had covered administration, financial advice, and discretionary fund management; it seemed that the new administrator continued to charge him on the same basis, even though it only provided basic administration of the SIPP. Finally, the administrator failed to respond to both elements of Mr T's queries and his eventual complaints.

In the case of Mrs B, the member was unhappy that ongoing charges of over £5000 were taken from her SIPP after she had told the adviser she no longer required its services. The adviser offered Mrs B compensation, reduced to allow for 20% tax relief (on the assumption that she would pay as much as possible of the compensation back into the SIPP), plus a 15% reduction on the remainder (to allow for the future tax treatment of funds that couldn't otherwise be paid into the pension). Although markets had fallen, as a goodwill gesture the adviser made no further downward adjustment to the amount offered. £300 was added as compensation for Mrs B's distress and inconvenience. Mrs B was unhappy with the assumption that she would pay the compensation back into her SIPP. She felt that she had insufficient support from the adviser on how to make such a payment. She also complained about the length of time it took the adviser to act on her complaint, and queried what would have happened if she hadn't noticed the discrepancy.

Decision

TPO determined that action was required by the new administrator to remedy the financial injustice and the distress and inconvenience suffered by Mr T. The administrator had not provided information about its fees and charges. The exact fee structure was never agreed with Mr T (it was, apparently, available unsigned and undated on its website); in addition, the fees actually charged were much higher than specified on the website. Fees were charged 'per activity' despite the adminstrator having given assurances they would not be, and should also have reflected the reduced service it offered. In addition, it had failed to notify Mr T of the migration of the advice element of his SIPP to another adviser. Its failures amounted to maladministration. The administrator was ordered to charge Mr T the 'mid-range' fee of those it quoted on its website, refunding the excess payments together with the interest the money would have earned had it not been deducted from the SIPP account.

FOS upheld Mrs B's complaint, and agreed that the adviser had not offered sufficient support to Mrs B to transfer the compensation back. The offer from the adviser to put things right was held to be fair and reasonable.

Impact

Some perhaps obvious points – but worthwhile reminders – arise from these two quite different cases:

- Schemes should have clear, comprehensive and transparent fee agreements in place with members
- If changes to fee levels, or the services provided, occur, affected members (and all paperwork) must be kept up to date, and in a timely manner
- Operators should be particularly mindful of this if they acquire SIPP or SSAS books that have different fees and fee structures
- Have systems in place to catch errors – don't leave it to members to spot them
- Respond to both queries and complaints swiftly and thoroughly, and with regard to legislative and best-practice timescales. In Mr T's case, TPO held that the failure to respond would have caused 'serious' distress and inconvenience, and awarded £1,000. In contrast, in Mrs B's case, on being made aware of its mistake, the adviser promptly made proposals to put it right.

The offer from the adviser to put things right was held to be fair and reasonable.

4. **Mr T: CAS-39737-H8R7 ; Mrs B: Decision Reference DRN-4199830**

TLT's SIPP & SSAS Practice

Your 'one stop shop' for all legal matters affecting SIPP & SSAS schemes.

Our national team understands the issues facing SIPP and SSAS providers. We provide a responsive service, delivering clear solutions based on commercial and practical reality, to help clients achieve their aims.

The lawyers are dynamic, very practical and commercially minded, with the ability to explain highly technical subjects in simple language.

Chambers 2022 (for TLT Pensions)

Why TLT

- Experienced team with deep SIPP & SSAS expertise.
- We understand how SIPPs & SSASs are structured and the relevant legal issues.
- Able to advise on all three regulators: HMRC, The Pensions Regulator and the FCA.
- 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.
- We have unrivalled experience of running outsourced complaints projects in financial services – we can deliver a cost-effective and efficient resolution to portfolio complaint risks for clients.
- We work to resolve complaints and disputes at an early stage where appropriate, minimising cost and management time for clients.

tlt.com

Damien Garrould
Partner, Pensions
T +44 (0)333 006 1166
M +44 (0)7890 596 178
E Damien.Garrould@TLT.com

Emma Bradley
Partner, Tax
T +44 (0)333 006 1282
M +44 (0)7747 462 131
E Emma.Bradley@TLT.com

Paul Gair
Partner, Banking & Financial Services Litigation
T +44 (0)333 006 0092
M +44 (0)7825 081 375
E Paul.Gair@TLT.com

tlt.com/contact

Belfast | Birmingham | Bristol | Edinburgh | Glasgow | London | Manchester | Piraeus

TLT LLP and TLT NI LLP (a separate practice in Northern Ireland) operate under the TLT brand and are together known as 'TLT'. Any reference in this communication or its attachments to 'TLT' is to be construed as a reference to the TLT entity based in the jurisdiction where the advice is being given. TLT LLP is a limited liability partnership registered in England & Wales number OC308658 whose registered office is at One Redcliff Street, Bristol, BS1 6TP. TLT LLP is authorised and regulated by the Solicitors Regulation Authority under ID 406297.

In Scotland TLT LLP is a multinational practice regulated by the Law Society of Scotland.

TLT (NI) LLP is a limited liability partnership registered in Northern Ireland under ref NC000856 whose registered office is at River House, 48–60 High Street, Belfast, BT1 2BE

TLT (NI) LLP is regulated by the Law Society of Northern Ireland under ref 9330.

TLT LLP is authorised and regulated by the Financial Conduct Authority under reference number FRN 780419. TLT (NI) LLP is authorised and regulated by the Financial Conduct Authority under reference number 807372. Details of our FCA permissions can be found on the Financial Services Register at https://register.fca.org.uk