SIPP & SSAS round-up – Spring edition 2023

For what comes next
tlt.com

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 or SSAS provider or 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, and transfers. The first two cases look at similar issues that raise a variety of key learning points for SSASs, including on conflict and dispute management, governance, and trustee protections. The second two look at issues relating to transfers, including due diligence, appropriate timescales, and communications.

We also round up recent and expected developments for SIPPs and SSASs on pages 1 and 2 – and give you a heads-up for forthcoming TLT publications and events.

Contents

Key changes:

Complaints: FOS has **warned of expected rises in 2023 in complaints** related to:

- the suitability of pensions transfer advice
- scams involving investments and cryptocurrencies
- surrender and execution delays, and portfolio management complaints (driven by cost of living concerns)
- the overall impact of market performance (given that low performance often leads to an increase in investment and pensions complaints).

NB also that **FOS' award limits rose from 1 April**.

Consumer Duty: the **new Consumer Duty** aims to set a higher standard of consumer protection in retail financial markets. 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.

The FCA has written to firms in sectors including **Consumer Investments** to help them implement and embed the Duty effectively, setting out areas where particular focus is needed. It also published a **review of firms' plans to embed the Duty** within their businesses. Firms should review the messages contained in these carefully, particularly given the FCA's reminder that it may request evidence of how firms have made the necessary changes.

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

Retirement income advice: The FCA launched a **thematic review of retirement income advice** in January, assessing the advice consumers are receiving on meeting their income needs in retirement. The review 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.

Pensions Dashboards: in March, the **DWP announced** that the dashboard programme was to be 'reset' to allow additional time to develop and test its infrastructure and systems. Connection deadlines (the first of which was 31 August 2023) no longer apply. A new staging timetable is yet to be proposed; an update is expected on this in the summer. In the meantime, schemes and providers are still encouraged to undertake preparatory work. The FCA **confirmed** that its dashboard rules would be appropriately amended.

Smaller schemes such as SSASs are **likely to be brought into scope** in the future, but are not yet caught.

Sustainability Disclosure Requirements: the FCA consultation **Sustainability Disclosure and investment labelling** closed on 25 January. The FCA sought views in relation to pension products, to which it intends to expand the regime.

On 29 March, it issued an **update** noting that it was planning to publish its Policy Statement in Q3 2023, to take account of the significant written response to the consultation.

Improving consumer outcomes: The FCA published its **final rules on Improving outcomes in non-workplace pensions** in December. 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.

Firms have until 1 December 2023 to implement the rules.

Value for Money: A **consultation** published in January seeks to gather views and evidence on the metrics, standards and disclosure of data required under the proposed Value for Money ('VFM') framework and the proposed use of this data in comparisons and assessments of VFM. The consultation asks whether individual SIPP arrangements should be excluded from some of the proposed requirements. It states that SSASs will not be caught, as their members 'are more engaged with decisions around investments and are typically advised,' and may have less need for a VFM framework.

Cases:

Permission to appeal has been granted after the Courts again refused an application for permission to apply for judicial review of a decision taken by FOS in relation to Options UK Personal Pensions LLP (which previously traded as Carey Pensions), in relation to SIPP operators' due diligence obligations.

An order was made on 21 March staying further proceedings upon settlement, in a claim (*Victoria Hague and others v Options SIPP UK LLP*) concerning alleged negligent misrepresentation and breach of statutory duty in relation to the establishment and operation of SIPPs.

Publications:

See our Insight on **PSIG's updated Interim Practitioner Guide on Combating Scam**s for advice on steps to be taking now

Our **Spring Budget Insight** reflects on the key themes and action points arising for pension schemes.

See also our Pensions Ombudsman updates for a round up of general pensions determinations. Our **March edition** includes transfers issues, an uncoordinated approach to administering members' claims constituting maladministration, and a reminder on explaining the complexity of pensions to members.

Forthcoming from TLT's SIPP and SSAS team:

'SSAS documentation: top tips to mitigate risks' webinar – 24 May 2023

TLT's SIPP & SSAS team will be hosting its annual **SIPP & SSAS Festival** in the autumn. Look out for further detail…

Ms E[1]: conflicts and breaches of duty on distributing death benefits

TPO found that both the member and professional trustees of a SSAS (together, 'the Trustees') failed to administer the scheme appropriately and made an improper decision in relation to the distribution of death benefits.

Facts

Mr Allen set up a SSAS in 2015, which Mr SD (a colleague and friend) and Mrs Allen (Mr Allen's wife) joined. All three were member trustees, with a professional trustee appointed in addition.

Mr SD's original application to join the SSAS nominated two beneficiaries – Ms E (his sister), and Mr Allen. After being diagnosed with cancer, in 2017 he completed a new nomination asking that his share be split between his estate and Ms E. A will, a 'letter of wishes' and further notes left for Ms E expressed that the funds be used to help his family, albeit released 'in an orderly fashion' from the SSAS so as not to 'ruin the original plans' he and the Allens had for the scheme. Mr SD died in November 2017.

Mr and Mrs Allen refused to pay the benefits as per the 2017 nomination, and argued that Mr SD's will was invalid. After much delay, they offered to pay £25,000 of Mr SD's funds to his estate and £161,000 to Ms E – with a large balance being kept by Mr Allen. Ms E rejected the offer.

Decision

Conflict of interest: The Allens would not accept that a conflict existed. They did not have a process in place to identify or manage actual or potential conflicts, and the professional trustee did not address or guide the member trustees in this respect either, acting in a 'passive, or at best reactive, role.' All Trustees therefore acted in breach of their duty of care. They would have been able to delegate their decision to an independent party. Instead, they rejected requests to appoint any independent arbiter.

Exercise of discretionary power: TPO found that the decision was improperly made. The member trustees distributed the benefits in their own favour, breaching their duties of care and of acting in the best financial interests of the beneficiaries of the SSAS. In taking no active part in the decision making, the professional trustee breached the same duties.

TPO found that for the Trustees to decide without evidence that Mr SD did not have testamentary capacity was perverse. The 2017 nomination was held to be valid. In addition, in making their decision, the Trustees had ignored the requirements of the rules and the consequences of breaching them.

Too much emphasis was placed on irrelevant factors: the two year limit in which death benefits could be paid before incurring tax charges should have been irrelevant to the identification of the eligible recipients. In any case, TPO held that the decision could have been made far earlier had the Trustees managed the conflicts of interest.

Liability and protections: As the Trustees acted in bad faith and dishonestly, TPO held that the exonerations under the scheme rules did not apply. The professional trustee's refusal to manage conflicts or seek legal advice was 'recklessly indifferent to Ms E's interests,' and it remained impartial only to protect its own interests; its actions were therefore also 'dishonest.' As the liabilities relating to their breaches of trust and duty were attributable to the Trustees, the indemnity under the scheme rules also failed.

Result: TPO upheld Ms E's complaint. Having taken independent medical advice, TPO directed that the balance of Mr SD's death benefits be paid to Ms E (with interest, recalculated to date and revalued to reflect any increase in scheme asset values). If the delay (which could have been avoided) in making the payment resulted in any tax liability for Ms E, this should be borne by the Trustees.

Ms E was awarded £3,000 in recognition of her severe distress and inconvenience.

Impact

The determination addresses some key concepts. As is often the case, the decision is a useful refresher on trustee decision-making, and in relation to death benefits in particular.

The nature of a SSAS also makes careful conflict management vital. As there was 'a clear and serious conflict' in this case, the Trustees should have sought legal advice on how to manage this.

TPO's determination usefully considers various protections from liability for trustees, under scheme documentation, legislation, and general trust principles, examining the case law in this area including on the meaning of dishonesty. Trustees should seek guidance on what protections they do have, and where there stand or fall.

Finally, it is unusual for TPO to institute his own decision rather than remit it to trustees, but understandable in the circumstances: the member trustees 'would not be able to make a new decision with any degree of impartiality,' and the professional trustee had 'shown a lack of willingness and/or ability to fulfil its duties.'

1. PO-22369

Mr N[2]: SSAS trustees directed to draft conflicts management policy and resolve dispute

In a complaint about the investment and administration of a SSAS, TPO led the trustees towards a practical resolution.

Facts

Mr N and Mrs GF-R, his former wife, were both member trustees of a SSAS ('the Scheme'), alongside an independent trustee ('the IT,' and together, 'the Trustees').

The Scheme's primary asset was a property ('the Farm'). Mrs GF-R was the tenant, with a rental agreement in place between her and the Scheme until 2002. However, after the lease ended, Mrs GF-R continued to occupy the Farm without a lease. Mr N accused Mrs GF-R of breaches of trust, arguing that she had failed to fulfil her duty to ensure that the Scheme received rental income from the Farm. He argued that Mrs GF-R's refusal to agree Trustee minutes over the years (and later to attend meetings) obstructed the administration of the Scheme.

Mr N raised complaints regarding the Scheme's actuarial valuation and apportionment of funds. He also argued that the IT had failed in the responsibilities it had to implement leases and monitor rent collection. He accused the IT of giving Mrs GF-R preferential treatment over the interests of the members by failing to take action over or report supposed 'unauthorised payments' made to her from the Scheme. Mr N also complained about the IT's failure to call Trustee meetings after September 2016, and argued that it had committed fraud in relation to the annual accounts and use of monies for administration fees.

Decision

Limitation periods: TPO dismissed some of Mr N's complaints as having been submitted outside the three-year statutory time limit. As the evidence showed Mr N had been aware of the issues in good time, TPO decided not to exercise his discretion to consider the case outside the limitation period.

Governance: TPO held that the Trustees were collectively responsible for the effective management of the Scheme. While independent trustees have a higher standard of care, the poor relationship between the two member trustees put the IT in a difficult position here; nevertheless, it should have proactively sought a resolution of the members' disputes, including by the appointment of an independent expert.

The Scheme lacked adequate internal controls and effective governance, with only irregular trustee meetings, and no steps taken to mitigate conflicts of interest. Mrs GF-R should, for example, have been asked to excuse herself from discussions between the other Trustees relating to the Farm and its rental.

Directions: in spite of some maladministration, TPO held that the exoneration in the Rules applied to Mrs GF-R and the IT (as there was no fraud, nor breach of investment duties under legislation). Although Mr N had acted in good faith in bringing his complaint, as the Trustees had a duty to act unanimously, TPO held that they had all failed in their responsibilities.

While Mr N had suffered severe distress and inconvenience, rather than award a payment TPO felt that a resolution to the situation was needed. He directed the Trustees to create a conflicts policy and register (particularly addressing the conflicts between the member trustees). He ordered the Trustees to agree matters relating to the allocation of Scheme funds, appointing an independent expert (and reporting the matter to the Pensions Regulator ('TPR')) in the case of any further disagreement.

Impact

Trustees of a SSAS should be alive to the obvious potential for disagreements to arise between members, making conflict and dispute management a key issue.

In addition, ahead of TPR's General Code coming into force this year, all schemes need to ensure their governance is in order, with the necessary policies and practices in place, followed, and kept under review. These include a policy on managing conflicts of interest and maintaining a register of interests.

This determination looks at arguments around ongoing failure to collect historic rent. The IT here maintained that it had never acted or marketed itself as property manager, and that the position had defaulted to the member trustees. Although the IT's failures did not constitute a breach of the legislation in relation to trustee investments, TPO noted that a trustee's failure to ensure a scheme's assets are maintained and insured constitutes a failure to act in members' best financial interests.

TPO's directions here are practical, which aim to move the Trustees towards resolving the disagreements and towards a solution (rather than issuing a penalty).

2. PO-21173

Mr E[3]: staying on top of standards in transfers

Mr E complained that a scheme did not carry out sufficient due diligence when transferring his benefits to a SSAS.

Facts

In 2013, Mr E received an unsolicited approach about transferring his benefits from his original occupational scheme ('the OPS') to a SSAS. He chose to proceed without taking advice, and signed a disclaimer to this effect. He sent the OPS a copy of the SSAS's HMRC registration and trust deed and rules (showing he was sole trustee).

A transfer of £52,000 was made in August 2014. The SSAS' investment was in 'offshore truffle trees.' In 2018, the High Court wound up several companies that carried out 'investment scams promising high-value truffles for commercial sale', including the one that operated Mr E's investment. He has since been unable to access his investment.

Mr E complained to the OPS. His complaints included the fact that it did not conduct sufficient due diligence, that it failed to send him warning literature about scams, that it did not engage with him directly, and that the investment was high risk when he was not a sophisticated investor. He asked to be put back in the position he would have been had the transfer not taken place.

Decision

TPO concluded that no further action was required by the OPS.

The Adjudicator considered the industry practice and guidance in place at the time of transfer, including TPR's 2013 'Pensions liberation fraud – the predators stalking pensions transfers' guidance. TPR's publications set out a two-stage process, requiring additional due diligence where the initial analysis has raised cause for concerns.

But there had been nothing to indicate (by the measures of that time) that the SSAS was a pension liberation or scam risk. Amongst other things, Mr E had not mentioned the unsolicited approach he had received to the OPS.

> Schemes must get up to speed with any new scams guidance quickly

Whilst TPR's 2013 guide (in force at the time of the transfer) noted that a receiving scheme being only recently registered was a possible 'reg flag', the Adjudicator noted that it is not unusual for a SSAS to be established only shortly before a transfer.

As sole trustee of the SSAS, Mr E was responsible for the administration and management of the plan, including the selection of investments. Moreover, the OPS was not aware of the investments Mr E had selected, and it would not have been able to advise him in any case, as it was not authorised to do so. The OPS was aware that Mr E had instructed an authorised independent financial adviser and it was reasonable in TPO's view to assume he had received proper investment advice.

TPO therefore found that the OPS had not failed in its due diligence.

Impact

As we have commented often before, schemes are repeatedly reminded that they must act in line with current legislation, industry practice and guidance on preventing scams. See as further illustration of this another recent case – **Mr I**: by 2019, the Pension Scams Industry Group's ('PSIG') 'Code of Practice on Combating Scams' had been issued and updated, and required more stringent checks (including on newly-established receiving schemes). The scheme in the case of Mr I was supported by TPO in its decision not to have allowed a transfer given concerning features, despite the member claiming a 'very good knowledge of finance.'

Mr E's complaint was ahead of its time: engaging fully with members seeking to transfer is now also recommended – the recent case of **Mrs G** discusses this.

Effective and compliant scam-prevention means getting up to speed with any new guidance quickly (see our latest **Pensions Ombudsman Update** for more on this duty). Our **recent Insight** provides information on a March 2023 update to PSIG's Code and our recommended actions in light of those changes; make sure you are aware of these.

In relation to SIPPs and SSASs specifically, the PSIG Code suite of guidance flags that such schemes potentially present higher risks (with international SIPPs picked out for particular attention). Overseas and high risk or unregulated investments are of course also flagged. Whilst the OPS was never aware of the nature of the investment planned in this case, 'offshore truffle trees' might now raise eyebrows…

3. **CAS-74470-Y3J1**

Mr K[4]: unreasonable delays and unfulfilled promises

FOS found that a delay in a transfer from one SIPP to another was unreasonable, and caused potential investment losses.

Facts

Mr K complained that a SIPP operator ('the Operator') treated him unfairly, causing him to have to transfer his SIPP to another provider, and that delays they then caused to the transfer process resulted in lost investment returns.

Mr K had a SIPP with a provider which was acquired ('Firm A') by the Operator in 2019, and then migrated to a SIPP with the Operator (the 'New SIPP'). His funds had been held in cash, and in January 2020, he met with his IFA to discuss investing his fund. The New SIPP didn't allow direct IFA access, so investments couldn't be made in the way that Mr K wanted. He therefore started the process of switching to a different SIPP provider. His IFA sent a letter of authority and information request to the Operator, but had to chase this a number of times. The transfer to the receiving SIPP completed on 4 June 2020.

Mr K complained to the Operator about their delay in responding. The Operator identified several service failings, and offered £100 for the distress and inconvenience that their mistakes caused.

In October 2020 Mr K complained again. He complained that the Operator misinformed customers about the transition to its SIPP following the acquisition of Firm A, and that they caused delays to his transfer which delayed him being able to invest his funds.

Decision

FOS changed its mind from its early provisional finding, and partially upheld Mr K's complaint. Mr K had not been unfairly treated with the transfer of his earlier SIPP to the Operator's product, but the Operator had caused unreasonable delays that prevented the switch from its SIPP.

Unfair treatment:

Whilst Mr K expected that his IFA would be able to access his SIPP and make trades on his behalf, it was the Operator SIPP's prerogative not to allow that. Mr K was not told or led to believe that he would be able to use his SIPP in that way.

Correspondence sent to all customers affected by the acquisition of Firm A provided easy links to their terms and conditions (which the email made clear may be different from their previous terms), as well as giving the opportunity to raise questions. The Operator provided fair notice and adequate information to enable Mr K to understand specific features that were important to him prior to migrating to the Operator's SIPP.

Delayed transfer:

FOS held that the Operator let Mr K down in the service that it provided. The Operator had acknowledged that it caused a delay, but had not 'fairly recognised the impact of that.'

The Operator caused unreasonable delays. While firms at that time had been adjusting working practices because of restrictions caused by Covid (and the Operator had a backlog of requests due to the approaching end of the tax year), they had taken too long to provide the required information. In particular, agreeing to email something on a particular day and then failing to do so was not reasonable; further, providing information that stated that cash transfers could take 'up to three weeks' both gave Mr K an expectation and promised a standard of service on which the Operator failed to deliver.

The delays in the provision of initial information and then the transfer itself were held to have added 22 working days during which Mr K's pension was unnecessarily out of the market. FOS ordered the Operator to put Mr K, as closely as possible, into the position he might have been had the money been available 22 working days earlier than it was, calculating his notional investment loss.

FOS held that the compensation of £100 already paid reflected the distress and inconvenience caused, and so no further award for distress and inconvenience was ordered.

Impact

The determination highlights the importance that communications to members have when a SIPP business is acquired. Ensure your communications are clear, easy to access and to navigate, comprehensive and timely.

In a market that is currently busy with acquisition activity, the determination provides useful practical points for SIPP operators to ensure that customers are treated fairly in an acquisition, such as providing clear and fair notice where terms and conditions are different and giving customers the opportunity to have any questions addressed.

Keeping to legislative and best-practice timescales for administrative actions is of course vital. Beware of over-promising: giving assurances that may not be easily kept opens schemes up to further complaints. Where delays are likely to occur, schemes should be transparent with members, and keep them updated.

4. DRN-3685044

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
T +44 (0)333 006 1166
M +44 (0)7890 596 178
E damien.garrould@TLTsolicitors.com

Noline Matemera
Partner
T +44 (0)333 006 0734
M +44 (0)7900 737 812
E noline.matemera@TLTsolicitors.com

Paul Gair
Partner
T +44 (0)333 006 0092
M +44 (0)7825 081 375
E paul.gair@TLTsolicitors.com

tlt.com/contact

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