SIPP & SSAS round-up – Summer edition 2022

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Introduction

With complaints about SIPPs and SSASs **on the rise**, we summarise a selection of recent determinations from the Pensions Ombudsman (TPO) and the Financial Ombudsman Service (FOS). We focus on a pair of determinations in relation to investment advice, of which there have been a flurry in relation to SIPPs and we are seeing more in relation to SSASs, and a pair of death benefit cases, which continue to be tricky for trustees.

We also round up recent and expected developments for SIPPs and SSASs on page 5 – and give you a heads-up for forthcoming TLT publications and events.

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Mr L[1]: scheme administrator's duty did not extend to advising SSAS trustee on investments

TPO held that a scheme administrator carried out its contractual duties in relation to the establishment of a SSAS and the investments held by it.

Facts

Mr L was the sole member and trustee of the Dartford 1967 Ltd SSAS (the SSAS), which was established to facilitate an investment in an overseas resort (the Investment).

An unregulated introducer, First Review, sent Mr L's transfer application to the SSAS scheme administrator stating that the administrator would review the investment and pass it to HMRC for a '12-point check'. Mr L's agreement with the scheme administrator provided that they would act as administrator to the SSAS and ensure that he obtained investment advice as required under the Pensions Act 1995 (PA95).

Mr L received an undated investment report provided by Broadwood Assets Ltd (Broadwood), an unregulated firm. The report outlined general risks associated with unregulated property investments and described the Investment as suitable for adventurous investors with a diverse portfolio. Mr L signed the report to acknowledge that he had read and understood it, and in April 2015 instructed the scheme administrator to make the Investment. The investment instruction stated that Broadwood was an appropriately qualified adviser for the purposes of PA95.

In 2017, Mr L requested the return of his investment. The scheme administrator chased for its return, but no refund was made. While there was no evidence that the Investment was a scam, at the time of Mr L's complaint in 2020, the property still remained under development. Mr L complained to TPO that the scheme administrator failed to ensure he received independent advice or understood the risks associated with the Investment.

Decision

TPO dismissed the complaint.

There was no maladministration. The scheme administrator had carried out its contractual duties: its responsibilities under the agreement and SSAS were limited to using all reasonable endeavours to ensure Mr L obtained proper advice which met the SSAS trust deed's requirements, and did not extend to providing advice on the Investment and its suitability. There was no fiduciary relationship between the scheme administrator and Mr L – it was not professional trustee of the SSAS. It reasonably concluded that Mr L had received 'proper advice', given Broadwood's pensions and investment experience. Further, since the Investment was in a company limited by guarantee, Mr L was not purchasing shares and consequently regulated advice was not required under PA95, and so Broadwood's unregulated advice was sufficient.

TPO concluded that it was for Broadwood, not the scheme administrator, to disclose the potential risks including of unauthorised payments, to Mr L. In addition, the administrator was not aware of or responsible for First Review's claim regarding HMRC's '12-point check' of the Investment.

The scheme administrator was not responsible for the return of Mr L's funds. It was reasonably expected to regularly chase progress on the matter where possible, which it had done. Therefore, TPO did not consider that the scheme administrator had any liability for Mr L's potential losses.

Impact

The determination highlights the complexity of the issue of investment advice in a SSAS.

Among other things, TPO noted that if Mr L felt that he had not been able to properly consider Broadwood's advice, as the trustee and beneficiary it was incumbent on him 'to have demanded the opportunity to do so'.

TPO also stated that while a SSAS may not have been a suitable pension arrangement for Mr L, the scheme administrator had no obligation to advise him on the suitability for his circumstances and was entitled to accept the instruction 'however inadvisable it may have been'.

However, it is worth noting that TPO remarked upon the fact that Broadwood had appeared in other complaints of a similar nature against other SSAS providers. Whilst the scheme administrator had not breached its duties, TPO warned it that it should be 'vigilant' in such circumstances, and of unregulated introducers generally: although SSAS providers are not obliged to refuse business from unregulated financial advisers, not being more 'wary' of them might mean not acting in clients' best interests. In this case the scheme administrator did not act as professional trustee - the outcome may be different where there is a fiduciary relationship with the member.

1. PO-16688

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Mr T[2]: SIPP provider was on notice of potential customer detriment

In the TPO determination on page 1, Mr L referred to recent legal developments in respect of SIPPs. However, as TPO made clear, SSASs and SIPPs are distinct and subject to different regulatory regimes. In the case of Mr T, FOS ordered the SIPP provider to compensate a member for losses, even though he had been introduced by a regulated firm authorised to provide financial advice (CIB, since dissolved).

Facts

Mr T had transferred to a SIPP to invest in the same overseas property development company as Mr L (see page 1). FOS, as TPO had, noted that the investment did not appear to be a scam; however, it had not produced the returns expected and the member had not been able to sell his investment.

Decision

FOS held that prior knowledge of introductions made by CIB should have put the SIPP provider on notice that there was a risk of consumer detriment: CIB had been introducing execution-only (ie non-advised) business to the SIPP provider for some time, and the advice it had given on some cases had already been flagged by the provider as needing review; the business it was introducing also had 'anomalous' features – large volumes of high-risk business for overseas property developments.

The SIPP provider argued that as CIB was regulated, it was not obliged to undertake further due diligence. However, FOS held that the SIPP provider should have carried out what it called 'reasonable checks': greater due diligence on CIB's practices, to uncover risks which should have led to them declining the application. FOS determined that the SIPP provider should have ceased to accept introductions from CIB before it accepted Mr T's introduction. In the circumstances, it was fair and reasonable to ask the SIPP provider to compensate Mr T for the loss he suffered.

FOS set out some examples of wider enquiries that it believes the SIPP provider should have made in respect of CIB's business model, including checking how CIB came into contact with potential customers, what its arrangements with the investment company were, and whether anyone else was providing information to customers.

FOS considered the application of Adams v Options (see page 5) to Mr T's case, but largely distinguished it. However, both that case and the determination here prioritise safeguarding consumers over contractual limitation of that duty. FOS based its own conclusions on the FCA Principles, specifically Principles 2 (conducting business with due skill, care and diligence), 3 (taking reasonable care to organise and control affairs responsibly and effectively, with adequate risk management), and 6 (paying due regard to the interests of customers and treating them fairly). As FOS notes, it must consider what is fair and reasonable in all the circumstances bearing in mind various relevant considerations including the Principles and good industry practice at the time. Similar reasoning was applied in determinations relating to **Mr G**[3] and others more recently.

> "...it doesn't follow that faith can be blind and nothing further needs to be checked.

Impact

The FOS determination is clear that, whilst dealing with a regulated firm should offer reassurance that regulatory rules are being complied with, 'it doesn't follow that faith can be blind and nothing further needs to be checked – especially if there are warning signs that things are not as they should be'.

SIPP providers should have systems that allow them to identify when they are seeing large numbers of referrals from the same intermediaries, to investments in high risk or 'esoteric' investments. Where this is identified, SIPP providers should be asking to see the suitability letters provided to clients, to ensure that advice has been given (albeit not – yet at least – that the advice was suitable). SIPP providers should also have processes in place to evidence the due diligence carried out on introducers.

It is also worth noting FOS' view that FCA publications providing examples of good industry practice are a relevant consideration and can be taken into account, even where they were published after the events subject to the complaint on the basis that the Principles underpinning them had existed throughout. This contrasts with TPO's approach in determinations such as **PO-15140**, where an FCA (then FSA) publication issued after due diligence was carried out was held not to be applicable.

2. **DRN-3042933** and 3. **DRN-3092441**

Mrs Y and Mr L[4]: trustee failed to address conflict of interest

TPO has ordered the trustee of a SSAS to give effect to a death benefit payment, reimburse the complainant for any tax charge arising from its late payment, and pay £2,000 for serious distress and inconvenience.

Facts

TPO oversaw complaints by **Mrs Y** against Mr L (and the SSAS professional trustee company), and by **Mr L** against the professional trustee.

Mr Y and Mr L were both members and joint trustees (alongside the professional trustee) of the David Whitehead & Sons Ltd Small Self-Administered Scheme (the SSAS).

Mrs Y, the widow of Mr Y, complained that Mr L had failed to pay death benefits within two years of her husband's death. She argued that he frustrated and delayed the payment, including by failing to give the professional trustee an up-to-date portfolio valuation.

Mr L's claim challenged the amount of death benefit payable. He disputed his and Mr Y's respective shares of the SSAS funds, claiming that he was entitled to a larger share. Amongst other things, Mr L and his wife had purportedly made a directors' resolution which allocated all employer contributions for a period to Mr L only.

The trustees appointed an independent expert to assess the split and determine the amount of death benefit payable. Mr L argued that the expert's determination should be set aside on the grounds that it was reached in a perverse manner, and failed to take into account certain pieces of evidence.

Decision

TPO upheld Mrs Y's complaint against Mr L.

Mr L had breached his fiduciary duty not to put himself in a position of actual or potential conflict of duty or interest as both a trustee and beneficiary under the SSAS. The trust deed and rules contained provisions allowing Mr L to delegate all or any of his powers, duties, trusts or discretions – an option for managing the conflict of interest in relation to the death benefits – but Mr L had not attempted to do so.

The evidence pointed to the fact that Mr L had understood throughout the payments due to Mr Y, and would have been aware that the directors' resolution he had passed would have taken himself over tax limits.

TPO dismissed Mr L's complaint.

There was no reason to set aside the independent expert's determination, as it was not perverse. No agreement between the employer and trustees allocated additional employer contributions to Mr L, as was required under the rules, and the 2020 directors' resolution was ineffective under the rules. The SSAS professional trustee's calculation as to the splitting of the fund was therefore correct.

TPO ordered Mr L to provide the professional trustee with any additional information required to give effect to the expert's determination, and to pay Mrs Y £2,000 for the severe distress and inconvenience caused. He was also instructed to reimburse Mrs Y for any tax charge she may incur as a result of the late payment of the death benefit.

Impact

Trustees must not place themselves in a position where duty and interests may conflict, nor act for their own benefit without informed consent.

The nature of a SSAS – a few individuals being both trustees and beneficiaries – means issues concerning trustees' fiduciary duties can arise relatively often. Conflicts of interest can also arise in a SIPP where the member is a co-trustee of their member fund. Providers should ensure they have processes in place to manage the inherent conflicts that arise, in particular with regard to the allocation of benefits.

The determination is a reminder of the importance of trustees properly documenting decisions on allocation of contributions and benefits, in accordance with their trust deed and rules, and that where disagreements arise dispute resolution provisions can be helpful.

It is also worth noting that TPO also commented on Mr L's indemnity protection, as a trustee. The rules provided that if the employer failed to refund Mr L in respect of any costs against him he was entitled to be indemnified from assets of the SSAS. TPO noted that in those circumstances Mrs Y may be entitled to make a further complaint on the basis that her future benefit entitlement had been effectively reduced. Whether a trustee benefits from indemnity protection will depend on the trust deed and rules and the circumstances, for example whether they have acted in deliberate breach of trust.

4. **CAS-59054-Y3C4** and **CAS-35438-M6P6**

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The Estate of Mr K[5]: non-payment of death benefits was maladministration

TPO has held that a trustee of a SSAS failed to pay death benefits to an estate within a reasonable timeframe, and had ceased to properly administer the scheme.

Facts

Mr K was a member of the Timoran Capital SSAS (the SSAS). He received a terminal diagnosis in 2017, and died in the July of that year. Ms N, Mr K's daughter and his executor, had requested the SSAS to disinvest Mr K's funds and pay out cash also held on his behalf, but no payments were made either before his death or as death benefits.

In January 2018, the administrator and Ms N both chased Mr Tristram Norriss (one of the two supposed trustees of the SSAS) about the payment of Mr K's benefits. The administrator received no response; Mr Norriss responded to Ms N, giving some reassurances that the payments would be made. Ms N continued to chase when the payments were not forthcoming. On a few occasions the 'trustees' replied, pushing back the payment date with each response, before finally postponing the release of the funds to November 2019.

Letters in 2018 requesting an update on the payment received no further response. In February 2019, Ms N escalated her complaint to TPO. The trustee failed to respond to any of TPO's communications.

Decision

TPO upheld the complaint.

No trust deed or rules existed for the SSAS, and TPO found that Mr Tristram Norriss was the sole trustee (there being no evidence that the second trustee actually existed). Mr Norriss submitted no defence.

TPO held that the trustee's inaction or refusal to pay death benefits to the estate within a reasonable length of time amounted to maladministration and a breach of trust. His failure to provide any explanation, or respond to Ms N's complaint or to TPO's enquiries, was an 'unacceptable failure'. While noting such maladministration would ordinarily warrant a distress and inconvenience award, TPO could not make such directions as Ms N was complaining in her capacity as an executor.

TPO directed Mr Norriss to provide a full account of the benefits attributable to Mr K's share of the SSAS and pay the benefits to Ms N as executor of the estate, plus 8% interest from 6 July 2017 to the date of payment.

Impact

While the facts here are obviously both specific to this scheme and rather unusual, the determination should act as a reminder for SSASs to review their serious ill health and death benefit payment processes. In such circumstances, schemes should look to act as promptly and sensitively as possible whilst acting properly and within their remit.

It is also a reminder that schemes should have processes in place to deal with complaints, and any escalation to regulators and ombudsmen services, fully and swiftly.

In this case, the extreme inaction and refusal to enter proper correspondence on the complaint meant that TPO also saw fit to refer the SSAS to the Pensions Regulator.

The appointment of a professional trustee to a SSAS, to assist the member trustees with managing the scheme properly, would of course reduce the risk of complaints such as this.

> "The two death benefit determinations contain useful reminders for SSASs both of trustee duties and important practicalities. In particular, SSAS trustees need to be particularly awake to the issue of conflicts

5. **PO-28905**

Key developments:

The 'Stronger Nudge' came into force on 1 June 2022, for both occupational and personal pension schemes. See the **FCA's rules relevant to SIPPs**.

SSASs, providing they meet certain conditions, are exempt.

Pensions Dashboards: many pension providers will be required to implement their dashboard obligations by 30 June 2023.

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

See the FCA's **proposed rules** for pension providers, including SIPPs. Final rules are expected in the Autumn.

New Consumer Duty: the FCA expects to make new rules by 31 July 2022 implementing the **new Consumer Duty,** which aims to set a higher standard of consumer protection in retail financial markets.

Please register for our series of webinars **"The Consumer Duty and SIPP Providers"**, on 4 - 8 July 2022, in which we will explore the impact for SIPP providers.

A response on **Improving outcomes in non-workplace pensions** is expected from the FCA in the second half of 2022.

The FCA has also **recently confirmed** that a further consultation on Value for Money will run later in the year.

Proposed rules on **Sustainability Disclosure Requirements and investment labels** are due for consultation in quarter 2 2022.

Forthcoming increase in Normal Minimum Pension Age: with the **Finance Act 2022** now into force, schemes should ensure members are aware of the change.

Other items of interest:

***Adams v Options:* update**

The Supreme Court has refused leave to appeal in *Adams v Options UK Personal Pensions LLP* (also known as the Carey Pensions case). The 2021 **Court of Appeal judgment** therefore remains good law for now.

Forthcoming from TLT's SIPP & SSAS team:

SSAS mini-series: considering current legal issues and opportunities in SSAS.

SIPP & SSAS Winter Festival 2022: TLT's SIPP & SSAS team will be hosting its annual conference in November. Look out for a save the date email that will be issued shortly with further detail.

See also our recent Pensions Ombudsman briefing for a round up of general pensions cases. This includes the case of Mr S, where TPO **decided** that the member had not been unjustly enriched when benefits were transferred to the member's SSAS, and then loaned on to his business, which subsequently went into administration. The SSAS recovered none of the sums loaned.

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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.
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- We work to resolve complaints and disputes at an early stage where appropriate, minimising cost and management time for clients.

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