SIPP & SSAS round-up – Spring 2024

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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 investment duties, having effective processes in place for spotting fraud, transfers, due diligence, and delays. The cases also demonstrate how the ombudsmen and regulatory bodies address issues such as jurisdiction and their approach to determining cases.

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 pages 1 and 2 – and give you a heads-up for forthcoming TLT publications and events.

Contents

Key updates:

General levy: the **DWP consulted on options for changing rates of the General Levy** to mitigate the ongoing deficit in levy funding. One of the proposed options (option 3) was to impose an additional £10,000 premium for small schemes (under 10,000 members) from April 2026 – with no carve-out proposed for SSASs (save single-member schemes). In March, the government published levy amendment regulations alongside its **response to the consultation**. This noted that there had been a negative reaction to option 3, and was considered disproportionately damaging to SSASs. The government therefore proceeded instead with option 2 – a rise in the general levy by 6.5% a year for all scheme types during the three years from 2024/25 to 2026/27.

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**.

In March, the FCA released a speech on '**The future of pensions**', noting that it is intervening where it sees 'poor practice in firms, such as pockets of poor practice in SIPP markets. Operators must act to deliver good outcomes for retail customers and avoid causing foreseeable harm to them.'

In December, the **FCA highlighted that the treatment of interest earned by firms on customers' cash balances, including in SIPPs**, may not be in line with the Consumer Duty. It expects firms to review their approaches to ensure that their retention of interest provides fair value and is understood by consumers.

Dashboards: the DWP has announced the new staging timetable, with a longstop connection deadline of 31 October 2026. Schemes **must therefore now ensure they are prepared for connection**. The FCA has launched a further consultation on **the regulatory framework for pensions dashboard service firms**.

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

Cases: The **appeal** in the case of Options UK Personal Pensions LLP (previously Carey Pensions) v FOS was heard on 16 April 2024. This related to judicial review of a FOS decision on SIPP operators' due diligence obligations. The judgment is awaited.

FOS has confirmed the **increase to its award limits** for the coming financial year, to £430,000 for complaints referred on or after 1 April 2024 about acts or omissions by firms on or after 1 April 2019. **Different limits apply depending on when the complaint was brought**.

FOS' latest **Annual Report and Accounts** notes that it is seeing longer waiting times for customers, particularly in pensions cases 'due to the complex nature of some pension complaints'. Building on its recruitment of more specialist investigators in 2021/22, it has increased resource in its pension teams.

43% of pensions complaints were upheld in the period.

Retirement income advice: The FCA has published its findings in the **thematic review of retirement income advice**. The study explored how financial advisers are delivering advice, and assessed the quality of outcomes consumers are getting. It also looked at how firms are responding to changing consumer needs as a result of the rising cost of living. The report will be used to identify how firms are implementing the Consumer Duty.

In March, the FCA **stated** that it had **written** to financial advice firms, asking them to review their processes for providing retirement income advice and to consider what improvements could be made. 'We want to support a sector that can help consumers access pension benefits, invest with confidence and have a sustainable income when they retire.'

Sustainability Disclosure Requirements: the FCA's final rules and guidance on **Sustainability Disclosure and investment labelling** were published in late November. Its aim is to improve the trust and transparency of 'sustainable' investment products and reduce 'greenwashing'. These include an '**anti-greenwashing rule**' which will come into force on 31 May 2024.

The FCA notes that it intends to expand the regime to pensions 'in the medium term,' engaging with the DWP and TPR.

Consumer Investments Strategy – 2 Year Update: the FCA's update on its consumer investment strategy noted that past failings in firms' due diligence about non-standard assets held in SIPPs continue to drive FSCS costs.

During 2022, the FCA 'concluded some multi-firm work on SIPP operator due diligence. This work found that, while many SIPP operators no longer willingly accept non-standard investments, many firms still needed to improve their controls over intermediaries, particularly discretionary investment managers'.

General Code: TPR's **new general code of practice (the 'Code')** came into force on 28 March 2024. The Code is designed to show schemes 'how to approach governance and administration', and to provide 'consistent expectations' across different types of scheme at the level TPR considers appropriate for 'well-run schemes.' Elements of the Code apply to different types and sizes of schemes, and so not all requirements are relevant to SSASs and SIPPs. Our **Insight summarises the key considerations for SSAS trustees and SIPP operators**.

Changes to 'stronger nudge' rules: The FCA has proposed technical changes to its 'stronger nudge' rules to ensure they operate as intended, making clear that the pensions savings in scope of the stronger nudge rules are not limited to pension schemes which contain insurance and regulated fund elements.

The **stronger nudge** requires pension scheme providers (including operators of SIPPs) to offer to book a Pension Wise guidance appointment for members in certain circumstances.

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

- TLT's SIPP & SSAS team held its annual **SIPP & SSAS Festival** in December, featuring a variety of sessions including on complaints, with tips to mitigate key risks – recordings are available on our **SIPP & SSAS Hub**.
- **See also our Pensions Ombudsman updates** for a round up of general pensions determinations. Our **March edition** includes an overpayments update, incentive exercise considerations, and the rare enforcement of an estoppel defence.
- Catch us at the AMPS Annual Conference at IET Savoy Place, London on 14 May 2024

Scheme returns: Scheme returns for the tax year ending 5 April 2024 must be submitted via the new Managing Pension Schemes service. Additional information will also be requested in the updated scheme returns. **SIPP returns will ask for more details** at member level including in relation to land or property holdings, disposals, transactions; assets acquired and disposed of from or to a connected party; loans made or outstanding and repayment arrangements; and unquoted shares acquisitions and disposals.

FCA rules on default options and cash warnings now in force: **rules** came into force on 1 December 2023 requiring providers of non-workplace pension schemes to:

- offer a default investment option to new non-advised customers; and
- issue warnings to members holding more than 25% of their fund in cash for a sustained period regarding the risk of the fund value being eroded by inflation.

Mr N[1]: trustee's investment duties: co-professional trustee committed breach of trust

Facts

Mr N wished to set up a SSAS to facilitate an investment in Cape Verde hotels (developed by the Resort Group), having been told that he would be able to withdraw a tax-free cash sum and receive a high guaranteed return in the early years of investment.

In January 2014, a SSAS was established with Rowanmoor Group plc (Rowanmoor) via an interim deed; Rowanmoor Trustees Ltd (RTL) was appointed the sole trustee. A month later, a deed of appointment and amendment plus definitive trust deed and rules (TDR) replaced the interim deed; these listed Mr N as a member trustee and RTL as the 'continuing' independent trustee.

Rowanmoor wrote to Mr N stating that it could not advise on the suitability of and risks associated with the proposed investment. It suggested Mr N take appropriate legal and professional advice. The letter included a disclaimer excluding 'all liability in connection with [the] proposed purchase of the investment or resulting from such purchase'. Mr N confirmed that he understood the risks. He instructed Rowanmoor to make the investment, signing a client agreement regarding the services they would provide, including RTL's ongoing 'professional responsibility as [the] independent trustee' for the SSAS.

In 2018, Mr N complained that the investment had failed to meet his expectations, largely due to its very high fees; he tried to sell the investment but failed. Rowanmoor dismissed Mr N's complaint.

Decision

TPO upheld Mr N's **complaint** against RTL. Rowanmoor had discharged its responsibilities as administrator in a 'broadly satisfactory' manner. But RTL was held to have been at all material times a trustee – originally as sole, and later joint, trustee alongside Mr N. The investments chosen and held by the SSAS fell within RTL's responsibilities. The relevant documentation did not establish RTL as a bare trustee with limited decision-making powers; in particular, the TDR stipulated that trustee decisions must be unfettered (it granted the trustees collectively wide powers of investment), and unanimous.

While it was appropriate for Rowanmoor, the administrator, to expressly refuse to consider the suitability of and the risks of the investment, this was not true for the professional trustee. Had RTL fulfilled its duties in an appropriate manner, it would have been fully engaged in the investment selection process and warned Mr N regarding its suitability. By failing to do so, RTL exposed Mr N to an inappropriate investment which caused him financial detriment. Having regard to Mr N's profile, trustee duties and the information available at the time, TPO was satisfied that a reasonable trustee, having exercised its powers with care and for the beneficiary's best financial interests, would not have invested in this way. RTL's failings constituted a breach of trust.

TPO held RTL to a higher standard of care than Mr N due to its professional status. Mr N, as co-trustee, also fell short of fulfilling his investment duties; however, a lower standard applied to him. TPO also took into account that Mr N was not a member trustee at the time of the investment, and that Mr N was an 'unsophisticated' lay investor while RTL was a professional corporate trustee. Consequently, it was fair and equitable that Mr N should be allowed to pursue a claim against RTL.

TPO decided that specific (rather than joint) apportionment of contributions was appropriate in this case, at 80% for RTL and 20% for Mr N. TPO directed RTL to reimburse Mr N for his losses, and pay £1,000 for the 'materially significant' distress and inconvenience he suffered.

Impact

Trustees must ensure they are aware of and comply with their investment duties:

- Trustees are subject to statutory obligations when considering, making and holding investments. This includes obtaining proper advice before making an investment, 'having regard to the need for diversification of investments' and considering investments' continued suitability.
- These duties cannot be excluded by disclaimer or exoneration and indemnity provisions: legislation prevents any attempt or agreement to exclude or restrict a trustee's liability to take care or exercise skill in the performance of investment functions.
- Under common law, trustees must 'take such care as an ordinary prudent man would' when investing, act in the beneficiaries' best financial interests and avoid 'all investments attended with hazard'.
- Trustees should conduct due diligence as to the suitability of investments. In addition, they should be aware of industry guidance and intelligence: here, the government had issued warnings that there were serious issues with acquiring property in Cape Verde and that advice should be taken prior to making any such purchase. The FCA had also issued guidance in respect of unregulated collective investment schemes, labelling them 'complex, opaque, illiquid and risky'.

SSAS professional trustees and administrators should be clear on the role they have under their scheme rules and documentation and review their policies and procedures to ensure compliance with their duties.

1. **PO-25984**

Mr N[2]: failure to spot a fraud

TPO has upheld a complaint that the administrator of a SIPP accepted a fraudulent instruction to withdraw monies.

Facts

In April 2019, Mr N emailed the administrator of his SIPP (Administrator) requesting the withdrawal of £20,000 from his SIPP, indicating that the money should be paid into the bank account the Administrator had on record for him. There were email exchanges about the payment, and he signed a risk warning letter. On 18 April, the Administrator emailed to confirm that the payment would be made by close of business on 29 April.

However, unknown to all parties, Mr N's email account had been hacked prior to this date. As a result, exchanges which the Administrator believed were with Mr N were in fact with a fraudster. The fraudster asked to change the nominated bank account, and the Administrator sent instructions for doing so, requesting evidence in relation to the new account including an original or certified bank statement. A copy statement purporting to be certified by an accountant was returned.

Mr N noticed that payments had been made from his SIPP but had not arrived in his account, and asked his financial adviser to investigate, who then spotted the fraud. The Administrator offered to return half of the money (with Mr N's financial adviser to pay the remainder). Mr N complained.

Decision

The complaint was upheld: TPO found that the Administrator had acted negligently. Although he had sympathy for the position the Administrator was confronted with, TPO found that it did not act with reasonable skill and care. The Administrator accepted 'evidence' without confirmation, despite the fact that the 'certified copy' wording was 'clearly' scanned and pasted at low resolution onto a document of much higher quality. The new bank was nowhere near Mr N's home address, and the accountant was in a third different city. While this was all suspicious, 'it may not have been determinative'. However, in the context of preceding emails with the fraudster (which mentioned unexplained (and unlikely) 'little problems' in accepting deposits, in quick succession asked for the transfer first to be made to an overseas and then to a third party account, and which were written in 'flawed' English), an administrator acting with reasonable skill and care should have been prompted to carry out additional checks.

The Administrator's terms did not restrict liability for loss caused as a direct result of negligence. The determination helpfully runs through the elements that need to be established for a negligence claim to be successful, the first being whether a duty of care was owed. Case law holds that, where a party possessing a special skill undertakes to apply that skill for the assistance of another person who relies upon such skill, a duty of care arises; here, Mr N was relying on the Administrator to carry out professional administration services. TPO considered 'each of the foundations upon which a duty of care is based' (set out in *Caparo Industries v Dickman*): damage that is foreseeable; a sufficiently proximate relationship between parties; and for it to be fair just and reasonable to impose a duty of care. All of these were met.

TPO found that Mr N had acted reasonably to mitigate his loss, raising queries promptly and subsequently chasing. TPO held that, but for the Administrator's negligence, there would have been no loss (it did not consider Mr N or his financial adviser's conduct amounted to contributory negligence). He ordered the Administrator to reimburse Mr N, and to pay £1,000 for the serious distress and inconvenience caused.

Impact

There is plenty that administrators of SIPP and SSAS schemes can take from this determination.

While TPO 'did not wish to be prescriptive' as to additional reasonable steps the Administrator should have taken, he suggested these might have included contacting both Mr N, and the individual who had supposedly certified the statement, by telephone (while the Administrator required certification to include a telephone number, it did not use this to follow up). To avoid finding that a number provided links directly back to a fraudster, TPO recommended that a publicly available switchboard number should be used.

Scheme administrators need to look at the picture as a whole: while one possible 'flag' might have a reasonable explanation, a few together (as was the case here) should set alarm bells ringing.

Now more than ever, as TPR's General Code comes into force, internal controls and governance need to be up to scratch. Schemes should review their processes on payments. Are they fraud-proof, thorough, and tested?

This was a relatively unsophisticated one-off fraud. But schemes now need to be on the alert on a daily basis for cyber attacks and scams as these grow in complexity and spread, and ensure they are prepared for the challenge.

Mr K[3]: a high risk investment for a low-risk investor

Mr K complained that a company with FCA permission to arrange deals in investments (the Arranger) set up a SSAS for him which then invested in high risk and unregulated bonds. Mr K lost the money he invested.

Facts

Mr K wished to invest in Red Ribbon Asset Management plc (RRAM) Bonds, and engaged the Arranger to advise on and set up a SSAS to make the investment through. Mr K filled out forms noting that he was not a 'Sophisticated' or 'Professional Investor', but that he was a 'High Net Worth Individual'. However, he went on to sign a contradictory 'Sophisticated Investor Statement', and his bond application warranted, amongst other things, that he was experienced in business matters, could bear the economic risk of the investment, and had no need for liquidity of his investment. He authorised the investment in RRAM Bonds on an execution only basis. The 'highly unusual' investment failed, and Mr K complained.

Decision

FOS' investigator found that Mr K was in fact a low risk investor with limited sophistication, despite the content of his application form and certificate. If the Arranger had looked into the discrepancy between his documents, it should have discovered this and prevented the investment.

The investigator was also concerned about high charges. Mr K paid some £1,530 in initial charges – just over 9% of the £16,700 he'd transferred to the SSAS.

FOS held that the Arranger did not meet its obligations to Mr K under the FCA's 'Principles for Businesses' (PRIN). If the Arranger had conducted its business with skill, care and diligence (Principle 2) and taken reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems (Principle 3), it should have, for example, identified that a significant number of referrals had recently been made by one referrer for investments in RRAM Bonds. It should have 'realised that something might be amiss and looked into things further', rather than simply processing Mr K's instruction.

Principle 8 says a firm must manage conflicts of interests fairly, both between itself and its customers, and between its clients. Mr S, who made the introduction to Mr K, was employed both by the Arranger and by RRAM plc, which stood to profit from investment in RRAM Bonds. There was therefore in FOS' view a clear and 'very unsatisfactory' conflict of interest, which the Arranger failed to identify or manage.

Even had there been no conflict, there was a clear risk of consumer detriment. FOS found the Arranger at fault: if it had not processed Mr K's SSAS application, he wouldn't have gone ahead with the investment, and would have retained his monies. FOS ordered the Arranger to restore Mr K to the position he would have been in but for their involvement, plus pay back the fees they had charged (with interest).

Ordinarily redress is ordered to be paid into the pension arrangement. Here it was not appropriate, as it was unclear that Mr K needed a SSAS at all. Further, if Mr K could not wind up the SSAS easily due to the illiquid RRAM Bonds investment, then 'it would be fair' for the Arranger to pay five years' future SSAS administration fees.

Impact

Although the Decision is in respect of an arranger, it sets out some interesting points, not least in relation to FOS' jurisdiction and approach.

Here, FOS examined whether it had jurisdiction to consider the complaint at all, as a SSAS is an occupational pension scheme, and establishing and administering one is not a regulated activity. However, making the investment instruction for the purchase of the RRAM Bonds fell within the regulated activity of 'Making arrangements for another person… to buy, sell, subscribe for or underwrite a particular investment which is… a security', and so FOS held that it could consider a complaint about the Arranger's part in arranging the investment for Mr K.

The Arranger had complained about FOS' approach, arguing that FOS had 'substituted a completely different complaint' and introduced 'difficult to understand' points on conflicts at a late stage. In answer, FOS explains that it has 'an inquisitorial remit' which means it will 'look at the whole picture'. Even if a complaint is on the basis of a specific point that FOS finds is not relevant, FOS is not then confined to just considering that point. 'Unlike the courts, we don't require formal pleadings and we'll consider, even where a complainant is legally represented, the complaint more broadly'. Where FOS relies on a new argument, it usually, in the interests of fairness, issues a provisional decision to allow further comment as was the case here.

The decision is also a reminder of the importance and operation of PRIN (which FOS felt the Arranger 'did not fully appreciate'). 'The Principles always have to be complied with… specific rules do not supplant them and cannot be used to contradict them'. On that basis, FOS' decision that there was no requirement to carry out an appropriateness test under COBS 10 was not the end of the matter.

Mr R[4]: assessing financial loss in a delay case

Mr R complained that the administrator of his SIPP (Administrator) caused delays to the transfer of his holdings in a SIPP and did not keep him updated on how the transfer was progressing, leading him to miss out on the investment he wished to make.

Facts

Mr R was concerned about the possible implications of the UK's departure from the EU at the end of 2020, and so wanted monies in his SIPP to be held in Japanese Yen rather than Sterling. As the SIPP did not have a Yen option, he requested to transfer his benefits to a different SIPP (Receiving SIPP).

Following a series of errors and delays, the process did not complete until 16 October 2020 – despite much chasing from Mr R. The initial Adjudicator's Opinion found that the transfer was delayed by 29 working days (noting that it held 5 working days as a reasonable period for each stage of the transfer process to take). The delay amounted to maladministration. The Adjudicator determined that the transfer should have happened on 7 September 2020, and ordered that Mr R be restored to the position he would have been in had the transfer been made at that date.

Decision

The Administrator accepted the Adjudicator's Opinion that, but for their maladministration, the transfer would have completed on 7 September. They did not, however, agree on the method of calculating the financial loss that occurred during the period of delay. TPO therefore had to address this issue, and reach a decision on what investment decision Mr R would have made at that point.

It turned out that despite Mr R's intentions, Japanese Yen was not an investment option in the Receiving SIPP, and so Mr R's loss and compensation could not be linked to the fluctuation in the exchange rate between Sterling and Yen during the period of delay, as he had initially requested. He subsequently submitted that he would have invested in the Baillie Gifford Japanese Smaller Companies Accumulation Fund (the Baillie Gifford Fund) had he received the money in September.

> "...it may be necessary for a tribunal to be more sceptical than simply to accept what an investor says.

To address the question of the benefit of hindsight, TPO asked itself why Mr R did not make the investments he claimed he would have done in September 2020, at the point the cash was finally received (in October 2020). Mr R said he believed he had already missed out on the recovery in equity markets and decided to wait for a market downturn. He eventually reinvested in the December, as a downturn did not materialise. The Baillie Gifford Fund achieved strong returns during the September to October delay period. While it was impossible to establish, with certainty, exactly what action Mr R would have taken if the cash had been transferred on time, based on his investment experience and knowledge of the Japanese market, and the advice that he and his bank were giving to their own clients at the time, TPO found on the balance of probabilities, that Mr R would have intended the cash to be fully invested in the Baillie Gifford Fund.

On balance, TPO also found that it was likely that Mr R would have sold all of his Baillie Gifford Fund in mid-October 2020 (the fact that he chose not to invest in the Baillie Gifford Fund when the delayed monies did arrive indicated that the investment had become less attractive and suggested that he may have taken profit around that time). For these reasons, TPO found that Mr R would have held the investment in the Baillie Gifford Fund during the relevant period of 7 September to 16 October 2020.

TPO ordered the Administrator to put Mr R back into the position he would have been in if the cash from the SIPP had been transferred to the Receiving SIPP on 7 September and invested in the Baillie Gifford Fund. It was also ordered to reimburse his platform charges for the period of delay plus interest, and pay him £1,000 for the serious distress and inconvenience (the delay and poor communications having caused him to suffer serious anxiety, impacting on his long-term health). The Administrator should also cover any related tax charges and the cost of determining the loss.

Impact

TPO here had to decide on the balance of probabilities how Mr R would have invested, to calculate his loss. Referring to the *Tenconi* and *North Star* cases, TPO said that it had to consider whether Mr R's 'detailed and compelling' submission was based on the benefit of hindsight, and therefore its job was to test the evidence rigorously 'by reference to logical self-consistency'.

Such a question is a factual one for TPO (considering, for example, the member's pattern of investing and financial experience), but with the burden on the member to show what he would have done had the money arrived on the correct date. TPO notes that sometimes it may be necessary for a tribunal to be more sceptical than simply to accept what an investor says.

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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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