CAS-37412-G7F9

Ombudsman's Determination

Applicant	Mr Y
Scheme	Suffolk Life Master SIPP (**the SIPP**)
Respondent	Curtis Banks

Outcome

1. I do not uphold Mr Y's complaint and no further action is required by Curtis Banks.

Complaint summary

2. Mr Y's complaint is that Curtis Banks unreasonably required his investment manager to have professional indemnity insurance cover (**PI cover**) in place before he could reinvest funds within his SIPP account. He believes he was treated unfairly in this regard, and as a result he missed investment opportunities which resulted in him suffering a financial loss.

Background information, including submissions from the parties

3. Mr Y is a member of the SIPP. Curtis Banks (formerly Suffolk Life) is the SIPP provider. On 22 November 2018, Mr Y sold a property in his SIPP account and decided to reinvest the proceeds in a fixed interest bond that he had been considering for some time. Mr Y intended to appoint his personal adviser, who worked for City & Continental Ltd (**C&C**), as his investment manager for this purpose.

4. On 26 November 2018, C&C contacted Curtis Banks with a view to arranging its appointment as Mr Y's investment manager. Curtis Banks informed C&C that it would need to sign its Global Agreement and that the SIPP's terms and conditions (**the Terms**), required any investment manager to have PI cover in place. C&C explained that it did not have PI cover but expected to have it in place by February 2019, after a reorganisation.

5. On 22 December 2018, following formal instructions to appoint C&C, Curtis Banks issued Mr Y with an Investment Manager's Questionnaire and the Global Agreement. Curtis Banks told Mr Y that PI cover was not a regulatory requirement but, in accordance with the Terms, it required investment managers to have PI cover in

place when opening an account under the Global Agreement as part of internal investment controls.

6. Mr Y asked Curtis Banks to waive this requirement and allow C&C to act as his investment manager, on the understanding that PI cover would be in place in February 2019. Mr Y also offered to give an undertaking that he would waive Curtis Banks' liability during his period.

7. Curtis Banks said that a waiver was not possible. Its Investment Committee had considered this proposal but concluded that PI cover was necessary for any investment manager appointed under the Global Agreement from 2013 onwards, to counter enhanced risks.

8. Mr Y claimed that Curtis Banks was being inflexible. He said he had been discriminated against as those who held accounts prior to the introduction of this requirement did not have to appoint an investment manager with PI cover.

9. C&C arranged the necessary PI cover in March 2019. C&C and Curtis Banks signed the Global Agreement on 7 March 2019. Curtis Banks then transferred £100,000 from Mr Y's SIPP account to C&C on 11 March 2019, for investment in Mr Y's chosen fixed interest bond.

10. On 12 March 2019, Mr Y raised concerns with Curtis Banks. He said that the long delay in establishing an investment account with C&C had led to loss of investment income from 26 November 2018 to 12 March 2019.

11. On 20 May 2019, Mr Y complained to Curtis Banks, in summary he said:-

- Curtis Banks' requirement in the Terms for C&C to have PI cover in place before he could invest had caused him financial loss.
- There was no regulatory need for an investment manager to have PI cover and Curtis Banks was wrong to refuse to appoint C&C as his investment manager until it met this requirement.
- Curtis Banks' lack of flexibility and willingness to find a mutually acceptable compromise had led to him being financially disadvantaged.
- He had been discriminated against compared to other clients. Curtis Banks stated that PI cover was essential but had waived this requirement for existing C&C accounts in the SIPP.
- He had a free choice of investment manager but had decided to invest in the SIPP through C&C as it was already engaged for several other SIPP clients.
- He had suffered a financial loss because the price of his chosen investment had increased greatly since November 2018 when he wanted to appoint C&C. His estimated loss of capital was approximately £5,637. He had also lost investment income.

12. On 12 July 2019, Curtis Banks replied to Mr Y but did not uphold his complaint. It explained that it had not caused Mr Y or his SIPP to incur any financial loss or to miss any investment opportunities, and added that:-

    - It had confirmed in November 2018 that it was unable to sign the Global Agreement until C&C held PI cover.
    - Mr Y could have chosen from a large number of investment managers, with which Curtis Banks had already established an agreement, and reinvested his funds into his SIPP account without delay.
    - Although there were no regulatory requirements for PI cover, this was put in place to provide protection for its clients. It reserved the right in the Terms not to appoint an investment manager if it did not meet its conditions.
    - Curtis Banks apologised that it could not agree to the waiver proposed by Mr Y, but this was outside its control. It had to comply with risk management protocols as a large organisation regulated by the Financial Conduct Authority.

13. Mr Y was not happy with Curtis Banks' response and there were further exchanges between them from April 2019 to September 2019.

Summary of Mr Y's position

- There was no regulatory requirement for investment managers, like C&C, to hold PI cover, as acknowledged by Curtis Banks.
- To apologise and say it was outside Curtis Banks' control did not make sense, when the requirement for an investment manager to have PI cover was its own and not a regulatory requirement.
- He accepted that, in the Terms, Curtis Banks reserved the right not to allow the appointment of an investment manager that it did not approve of. However, Curtis Banks' website did not make it clear that the appointment of an investment manager was subject to conditions. There was an anomaly in Curtis Banks saying that PI cover was an essential part of risk management when three existing accounts with C&C as investment manager did not have PI cover.
- The Global Agreement set out requirements to establish an arrangement with a new investment manager. C&C was a new investment manager for him, it was not new to Curtis Banks. Curtis Banks had already allowed C&C to partner other SIPP clients, therefore it was denying him the same privilege. This seemed "wholly unreasonable".
- Existing customers who had nominated C&C as their investment manager continued to execute trades while it finalised PI cover. So, he was unfairly penalised in comparison with other existing customers.

- His attempt to find middle ground was rejected by Curtis Banks' Investment Committee, without a satisfactory reason. This lack of flexibility and willingness to compromise had caused him financial loss. It had greater impact on him than other clients as he was no longer working and did not have the income to increase his pension fund.

- It was incorrect for Curtis Banks to suggest that he could have deposited his funds elsewhere to keep them 'in the market' and mitigate his loss. He was not an equity investor and other options for fixed income investments were limited and expensive.

Summary of Curtis Banks' position

14. Curtis Banks denied responsibility for any loss caused by delays in appointing C&C as Mr Y's investment manager, due to the requirement for PI cover and added:-

    - Curtis Banks was free to set the rules of business for investing in the SIPP. Its Terms provided:

      "8.3 Any appointment of an investment manager for your SIPP (or any part of your SIPP) will be on such terms as we direct the trustee to agree with that investment manager. These terms will be available. to you and you are responsible for ensuring that the terms of business is acceptable to you, including the fees payable to the investment manager.

      8.4 If you wish to use an investment manager with whom we do not have terms, we reserve the right to charge for agreeing terms to your SIPP and there is no guarantee that the investment manager will be acceptable."

    - Its Investment Committee had decided in 2013 that, although not a regulatory requirement, it would require all investment fund managers to have PI cover before it could agree to its appointment from that time. This was made a requirement of its Global Agreement.

    - Mr Y agreed to these Terms when opening the SIPP. Curtis Banks' website also stated that the appointment of investment managers was subject to conditions.

    - Mr Y was not discriminated against. Other accounts with C&C had been set up before 2013 when the Global Agreement was not yet in place requiring PI cover. No accounts had been established after that time, without the investment manager having PI cover.

    - Curtis Banks could not agree to waive PI cover for C&C. Investments were purchased in Curtis Banks' name for a client's SIPP, so it could not proceed unless it was satisfied that the SIPP funds were protected.

- It was not until March 2019 that C&C was able to comply with the terms of the Global Agreement. Funds held out of the market prior to this, were at Mr Y's discretion, as there were other options available.

- He could have chosen from many investment managers with which Curtis Banks had an established agreement and invested without delay. He also already had an investment account connected to his SIPP that he could have deposited funds with. This would have ensured that they were not held out of the market until C&C was able to acquire PI cover.

Adjudicator's Opinion

15. Mr Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by Curtis Banks. The Adjudicators' findings are summarised below:-

    - Clause 8.3 of the Terms states that "Any appointment of an investment manager for your SIPP (or any part of your SIPP) will be on such terms as we direct the trustee to agree with that investment manager." Clause 8.4 of the terms also states that there is no guarantee that the investment manager will be acceptable.

    - In the Adjudicator's view, under the Terms, Curtis Banks could set its own requirements for managing investment risk in the SIPP and did not have to waive them in individual cases if it were not appropriate to do so.

    - Mr Y agreed to the Terms when he opened the SIPP. He was also informed that PI cover was required when he decided to appoint C&C as his investment manager. Curtis Banks had introduced this policy in 2013, so whether C&C had been appointed without PI cover before that date, on other accounts in the SIPP, was irrelevant.

    - Any delay in reinvesting the funds, while C&C secured PI cover was not due to Curtis Banks but to Mr Y. In the Adjudicator's opinion, if Mr Y were concerned about any potential loss, he may have incurred while being out of the markets, he could have chosen another investment manager who already had PI cover. Curtis Banks did not need to waive the requirement for PI cover if it did not wish to do so, and Mr Y had other options he could have explored to reinvest the funds.

    - Accordingly, Curtis Banks was not liable for any losses that Mr Y may have incurred because C&C had to acquire PI cover before it could be appointed as his investment manager and make the investments that Mr Y had intended.

16. Following the Adjudicator's Opinion, there were further exchanges between Mr Y and my office. In summary Mr Y said:-

    - He was disappointed that the Opinion did not directly address a number of points he had made, which he felt were central to his argument.

- In essence his complaint was founded on issues of treating customers fairly (**TCF**) and discrimination, rather than a simple assertion that it was, in principle, unreasonable for Curtis Banks to require investment managers to take out PI cover. The fact that it is not a regulatory requirement simply demonstrates that this measure is a matter of choice which Curtis Banks could waive for a short time if it so wished.

- He has never argued that Curtis Banks was not entitled to make a commercial decision to require its investment managers to maintain PI cover. His "fundamental point" was that, in applying this requirement specifically to him at the time in question while not at the same time applying the same requirement to all their other existing customers, Curtis Banks clearly treated him unfairly. It had prevented him from executing his investment choices when other mutual customers of the same investment manager, and perhaps other investment managers, were not so prevented from trading.

- It was unreasonable for Curtis Banks to discriminate against him in this way when time was of the essence for him. Curtis Banks admitted this discrimination in its letter of 12 July 2019.

- He had intended to appoint C&C, with which he had a longstanding relationship, rather than any individual. In the weeks preceding completion of the property sale, he had discussed this with Curtis Banks by telephone and had referred to the Curtis Banks website concerning choice of investment managers. Nothing was said to him personally, or flagged on the website, to suggest that his intention to appoint an existing investment manager might be in any way "problematical".

- At the time he wanted to appoint C&C as his investment manager, Curtis Banks was already working with C&C as an investment manager for other Curtis Banks SIPP customers, hence an agreement was already in place between these parties, even if not in its latest form. C&C was certainly convinced that it had an existing agreement with Curtis Banks as indicated to him by email on 28 November 2018.

- He "strongly" refutes the suggestion that he could have chosen from a large number of investment managers with which Curtis Banks had already established a Global Agreement. He queried:-

    - How would he have accessed a full list of these investment managers and how would he have known that the investment managers had PI cover?

    - How would he or Curtis Banks have known which investment managers would have been willing to execute fixed income trades of the nature that he had in mind?

    - Why didn't Curtis Banks make this suggestion to him in November/December 2018, when it had become aware of his predicament?

- At the time of the Investment Committee's decision in January 2019, his SIPP was, to the best of his knowledge and belief, subject to terms dated January 2017 as this was the last change of terms of which he had received notification. These were not the same Terms that applied when he first opened the SIPP. But he acknowledged that he was aware of the position in January 2017, although as a property investor he had little reason to review the investment managers provisions in detail.

- When responding to his complaint on 12 July 2019, Curtis Banks appended a different set of terms dated July 2019, and which amend Section 8 by adding a rider to clause 8.3 and inserting a new clause 8.4. Clearly these July 2019 conditions did not apply at the material time, and this later version of clause 8.4 should therefore have no bearing on the Adjudicator's Opinion.

- Furthermore, the Adjudicator only quoted part of the full wording of clause 8.3, and one might infer from the next omitted sentence thereof that Curtis Banks contemplated the need for flexibility on occasions.

- In clause 8.3, Curtis Banks' delegates responsibility for ensuring that the terms of business agreed by Curtis Banks with the appointed investment managers are acceptable to the customer. On this basis, one might think that Curtis Banks would be similarly prepared to accept his offer to take responsibility for a temporary waiver of the PI cover requirement.

- The decision of Curtis Banks' Investment Committee, to require that all investment managers have PI cover, was made in 2013. In his view, Curtis Banks had "ample time" to address this issue with C&C long before he had elected to appoint C&C. He was therefore a victim of Curtis Banks' tardiness, or perhaps its lack of care, given the perceived importance of the PI cover requirement.

- He queried why, after so many years of this relaxed approach to enforcing this requirement, his request for temporary flexibility hit such a brick wall. Perhaps because he had been identified by the investment committee to be in some way a high-risk customer for unsubstantiated reasons.

- Curtis Banks' reasons for asserting that it did not discriminate against him or could not temporarily waive the PI cover requirement for C&C, do not stand up to reasonable examination and made little sense to him.

- By not agreeing to temporarily waive its PI cover requirement in his case, Curtis Banks treated him unfairly, as it had "clearly" waived this requirement for other customers.

- TCF is a fundamental principle of overarching financial conduct regulation and would be paramount if in conflict with firms' contractual terms and conditions.

- He disagrees with the view that C&C being previously appointed without PI cover on other accounts in the SIPP was irrelevant. No explanation has been given as to

why this is irrelevant other than the quoted contractual terms, one clause of which did not apply at the time in question.

17. In response the Adjudicator said:-

- Mr Y had made Curtis Banks aware of his intention to appoint C&C as his investment manager in late November 2018. Following this, Curtis Banks emailed C&C to inform it of its requirements to set up an account, including the requirement for C&C to have PI cover.

- There were several emails between Curtis Banks and C&C between 28 November 2018 and March 2019, concerning Curtis Banks' requirement for C&C to have PI cover. During this period, on 4 December 2018, Curtis Banks emailed CC and said:

> "Having raised this with our Investment Committee they have advised that due to not currently having Professional Indemnity Insurance we would not be able to establish any further accounts with you as this is a requirement in order to sign into our global investment agreement.
>
> I appreciate we do currently hold a number of accounts with you, therefore, it has been agreed this accounts [sic] can remain…"

- Curtis Banks had made C&C aware, within a reasonable time (less than a week), that it could not appoint it as Mr Y's investment manager until it had PI cover. On the balance of probabilities, C&C would have made Mr Y aware of the contents of this email. So, Mr Y could have mitigated any losses that he believes he has incurred, by appointing an alternative investment manager, who had the required PI cover.

- The Adjudicator noted Mr Y's comment that he would not have known which investment managers had PI cover, or if any of those investment managers would have been willing and able to execute the trades in accordance with his requirements. However, Mr Y could have requested this information from Curtis Banks. Curtis Banks did not have an obligation to provide Mr Y with this information unless he specifically asked for it. So, there was no maladministration by Curtis Banks in this regard, and Curtis Banks had not treated Mr Y unfairly.

- Curtis Banks did not discriminate against Mr Y, when it did not agree to waive the requirement for C&C to have PI cover, so that C&C could be appointed as Mr Y's investment manager. In its letter to him dated 12 March 2019, Curtis Banks said:

> "Regarding the three existing accounts we already had with [C&C] this has been agreed to honour those existing accounts as they were set up before our policy changed to introduce our Global Agreement. Our Global Agreements came into force in 2013 and we therefore haven't established any more accounts since then…"

- Curtis Banks confirmed to Mr Y that the accounts held with C&C were in place prior to the implementation of the Global Agreement, that is why there was no requirement for C&C to have PI cover for those accounts.

- Curtis Banks had not established any new accounts with C&C, or any other investment managers since the implementation of its Global Agreement if the investment manager did not have PI cover. So, in the Adjudicator's view, the Ombudsman would not deem that Mr Y was discriminated against in this regard.

- The Adjudicator appreciated that the requirement for investment managers to have PI cover is not regulatory. However, Curtis Banks' requirement for investment managers to have PI cover is its commercial decision. Mr Y's disappointment with Curtis Banks not agreeing to waive its PI cover requirement for C&C is not sufficient for the Ombudsman to deem Curtis Banks' actions amounted to maladministration.

- Curtis Banks has a right to make commercial decisions for the effective running of its business. In the Adjudicator's opinion, the Ombudsman would not direct it to amend or change its commercial decision.

- The Terms that were applicable when Mr Y requested C&C be appointed as his investment manager was the 2017 Terms. Clause 8.1 (c) of these Terms states:

  > "…we reserve the right not to direct the trustee to appoint any person chosen if they do not meet our requirements. These requirements include a requirement that the investment manager is based in the United Kingdom, has the necessary regulatory permissions, will report transactions to us in a timely manner and suitable format and will act on instructions given by us. If you are unsure whether your chosen investment manager is acceptable to us please contact us…"

- The 2017 Terms did not specifically say that investment managers were required to have PI cover. However, these Terms did not say that the requirements listed were the only requirements needed for an investment manager to be appointed. Curtis Banks acted in accordance with the 2017 Terms when it did not appoint C&C until all its requirements were met.

- It was unfortunate that, at the time Mr Y wanted to appoint C&C as his investment manager, C&C did not have PI cover. However, Curtis Banks had informed C&C, within a reasonable time, that it could not be appointed as Mr Y's investment manager until it had PI cover.

- Ultimately, it was Mr Y's decision not to appoint an alternative investment manager, after he was informed that C&C could not be appointed until it met Curtis Banks' requirements. The Adjudicator considered that the Ombudsman would not hold Curtis Banks accountable for any losses Mr Y believes he incurred between 26 November 2018 and 12 March 2019.

18. Following the further exchanges between Mr Y and my office, Mr Y requested his complaint be referred to me for a Determination. In summary he said:-

- He is disappointed that both the central arguments he had put forward in support of his complaint, and many of the more detailed points that he had made in response to commentary by the Adjudicator and Curtis Banks have not been addressed in any meaningful way.

- "Common sense dictates" that he must have been treated unfairly when he was prevented from making trades through his chosen investment manager at a time when other Curtis Banks' clients, with the same investment manager, were not so prevented.

- "Clearly" this was a case of one rule for one, and one rule for the others, resulting in unfair discrimination. Moreover, it gives the lie to the suggestion that it was essential to apply the PI cover requirement for the protection of all of Curtis Banks' clients.

- It has been argued that Curtis Banks' contractual terms entitled them to make a 'commercial decision' to apply this PI cover requirement in his particular case. This flies in the face of Curtis Banks over-arching regulatory duty to treat its customers fairly. TCF should be paramount and the offending contractual clauses set aside in this instance. The question also arises as to whether there are provisions in the Terms which might in themselves be unfair.

- It has also been argued that he could have elected to use another investment manager which would have enabled him to execute his cornerstone investment without delay. His previous points regarding this aspect remain unanswered and does not appear to have been considered.

- The Adjudicator in her latest letter said that he could have requested information from Curtis Banks to enable him to identify investments managers willing and able to execute the trades he was minded to make. This statement misjudges his state of knowledge concerning Curtis Banks' behind the scenes investment managers systems, the panel constituents, their potential appetites, and whether they were party to the Global Agreement.

- It is entirely unreasonable to expect him to have thought of this without being prompted by Curtis Banks. "There was a significant asymmetry in the information that was available to [him]. If this alternative had truly occurred to Curtis Banks at the time that he was asking for help in resolving his problem, why didn't Curtis Banks draw this to his attention and avoid a complaint?"

- Moreover, this argument assumes that a suitable investment manager could have been identified from 'the large number available' without undue delay. As far as he could see, no one has so far demonstrated that this outcome would in fact have been achievable, "so this line of defence by Curtis Banks is surely moot".

- One of the key factors cited by the Adjudicator in coming to her initial view was the effect of Clause 8.4. Curtis Banks has also relied on this in their own arguments.
- He has demonstrated that this wording does not appear in the 2017 Terms. Regrettably, this flaw in the findings does not appear to have been recognised or considered in subsequent reviews.
- With regard to Clause 8.3, he suggests that it is implicit that such terms should be reasonable.
- Curtis Banks has stated that it is essential for its clients' investment managers to have PI cover in order to mitigate potential losses for those clients. If this statement is taken at face value, it seems to him that the failure of Curtis Banks to proactively roll out its Global Agreement across all its investment managers, within a reasonable period after the Global Agreement's introduction over 10 years ago, raises some interesting regulatory questions about Curtis Banks risk management practices and governance.

19. After considering Mr Y's further points, I do not agree that this complaint should be upheld. I explain my reasons for my decision below.

Ombudsman's decision

20. Mr Y's complaint is that he was treated unfairly by Curtis Banks when it did not allow him to use his chosen investment manager. He says this was because that investment manager did not have PI cover, even though Curtis Banks had allowed other clients with the same investment manager to make trades. He believes he has incurred a financial loss because of Curtis Banks' actions in this regard.

21. Curtis Banks implemented the Global Agreement in 2013. This was prior to Mr Y informing Curtis Banks that he wished to appoint C&C as his investment manager. On 4 December 2018, Curtis Banks informed C&C that it could not establish any further accounts with it (C&C), as C&C did not have PI cover. Mr Y was later informed of this.

22. It was Mr Y's decision to not appoint an alternative investment manager, who had PI cover, to complete the re-investment of the cash into his chosen fund. It was not Curtis Bank's responsibility to inform Mr Y of the option to appoint an alternative investment manager nor was it Curtis Banks' responsibility to inform him of which investment managers had the relevant PI cover and would be willing to execute his trade.

23. I note Mr Y's comments that Curtis Banks had treated him unfairly because it had let other customers continue to use C&C as their investment managers, despite C&C not having the required PI cover, but that it had not allowed him to do so. Curtis Banks previously explained that it had allowed C&C to remain as an investment manager for

those customers for whom it was an investment manager prior to the implementation of the Global Agreement.

24. I do not find that Mr Y was treated unfairly in this regard. This is because I have seen no evidence that Curtis Banks established further accounts with C&C or other investment managers, who did not have PI cover, following the implementation of the Global Agreement.

25. I note Mr Y's comments that the Adjudicator had quoted the wrong Terms in her Opinion. While it is regrettable that the wrong Terms were quoted, this does not change the outcome of Mr Y's complaint.

26. The Terms that were applicable to Mr Y at the time that he requested C&C be appointed were the 2017 Terms. Paragraph 17 above quotes clause 8.1 (c) of those Terms. Clause 8.1 (c) states that Curtis Banks has the right to direct the trustee not to appoint any person chosen if they do not meet the requirements.

27. I note that this clause did not explicitly state that investment managers had to have PI cover. However, the clause is a broad one which says that the requirements include those mentioned. I find, it would not be unreasonable to expect Mr Y to have recognised that the list was not intended to be exhaustive.

28. The responsibility to appoint an investment manager that met Curtis Banks' requirements was Mr Y's and not Curtis Banks'. Mr Y was made aware, within a reasonable period, that C&C could not be appointed as his investment manager as it did not have the required PI cover. Mr Y decided not to appoint an alternative investment manager, thereby mitigating any loss he may have incurred, while awaiting confirmation of C&C's PI cover. That was his decision to make and he would have been aware of the possible consequences of doing so.

29. Curtis Banks cannot be held responsible for a decision that Mr Y made after being aware of the situation.

30. I do not find there was any maladministration by Curtis Banks that resulted in Mr Y incurring a financial loss or that Curtis Banks treated Mr Y unfairly, in relation to the appointment of C&C as his investment manager.

31. I do not uphold Mr Y's complaint.

Anthony Arter

Pensions Ombudsman
21 July 2021