

## Ombudsman's Determination

Applicant	Mr Y
Scheme	Westerby Private Pension ( <b>the Pension</b> )
Respondent	Westerby Trustee Services Limited ( <b>Westerby</b> )

## Outcome

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

## Complaint summary

2. Mr Y complained that Westerby did not carry out sufficient due diligence when it allowed him to invest £80,000 in a loan note issued by Dolphin Trust (formerly known as Dolphin Capital). The loan note subsequently defaulted, and he lost the majority, if not all, of its value.
3. Mr Y asked to be reimbursed the amount he lost in the loan note.

## Background information, including submissions from the parties

4. Prior to 2014, Dolphin Trust was known as Dolphin Capital. In 2019, Dolphin Trust changed its name to German Property Group (**GPG**). Its business model was to buy German Listed Buildings, and to sell them off-plan to German citizens, before renovating the properties into luxury apartments. The buyers were able to take advantage of German tax advantages due to the listed nature of the buildings. Loan notes were issued to investors to fund the initial purchase of the listed buildings and secured by legal charges against the buildings.
5. Mr Y originally held a Self-Invested Personal Pension (**SIPP**), operated by Greyfriars Asset Management LLP (**Greyfriars**). His Greyfriars' SIPP held an investment in Dolphin Bonds UK III Limited Corporate Bonds (**the Bonds**) and cash.
6. The Pension is also a SIPP. Westerby is the Pension's independent trustee and its operator.

7. The Pension's Master Trust Deed and Rules dated 1 October 2008 (**the Rules**) state the following:

"Each Member shall be a trustee, jointly with the Scheme Trustee solely for the purpose of the Individual SIPP."

"3.3.2 - The Scheme Trustee may retain such of the money of the Scheme as it may decide in such bank accounts and, subject to any terms and conditions agreed between the Scheme Administrator or any one or more providers of the administration or other services to the Scheme....and the Member, shall invest or apply the balance of that money as it thinks fit...."

"5.3 - The Scheme Trustee, or the Member Fund Trustees as the case may be, shall exercise the powers under clauses 3.3 to 4.2 only in accordance with any directions given by the relevant Member, or any professional individual or body acting with the prior written authorisation of that Member...."

8. When a member signs the Pension's Supplemental Deed (**the Supplemental Deed**), it appoints them as a joint trustee with Westerby. The Supplemental Deed states the following:

"In the professed execution of the trusts, powers and discretions under this Supplemental Deed, no death benefit trustee or Member Fund Trustee shall be liable for any loss to the trust fund or to the Member Fund arising by reason of any improper investment made in good faith or negligence or fraud of any agent employed by him...."

9. Definitions of the terms used in the Rules and the Supplemental Deed are as follows:

- the Member is Mr Y;
- the Scheme Trustee is Westerby;
- the Individual SIPP is Mr Y's SIPP;
- the Scheme Administrator is Westerby;
- the Member Fund Trustees are Westerby and Mr Y; and
- the Member Fund is Mr Y's account in the Pension.

10. The Pension's Key Features document (**the Key Features Document**) states the following:

"We cannot provide any advice on the suitability of investments and reserve the right to refuse to accept a proposed investment."

"We would advise you to seek financial advice before making any investment decisions."

"We are not authorised to give you financial advice."

“We accept no responsibility for the performance of your chosen investment(s).”

“We cannot provide you with investment advice other than to confirm whether the intended investment is in accordance with HMRC regulations.”

“Certain assets such as private company shares or third party loans, are classified as ‘non-standard assets’ and will incur additional costs.”

11. In 2013, Westerby carried out due diligence on Dolphin Capital and its loan notes by obtaining the following documents:-

- A copy of a letter, undated, from Dolphin Capital to “whom it may concern”. The letter confirmed that Dolphin Capital had been operating for five years and had previously sourced private equity loans and loans from private individuals. All the existing loans and interest had been repaid in full. It was not authorised by the Financial Services Authority, and it recommended investors obtain financial advice before investing.
- A document issued by Dolphin Capital to introducers, which provided details on its marketing rules and practices. The document confirmed that Dolphin Capital’s instructions to introducers was to “tell and not to sell”, and to direct any investors who needed advice to a regulated financial adviser. Westerby said that this provided reassurance that Dolphin Capital was aware of the UK’s regulatory regime, and that potential investors would not be provided with advice by unauthorised parties.
- Dolphin Capital’s UK marketing brochure, undated, which contained the following information:
  - key features of the investment: it would provide a fixed return of 12% per annum over three or five years, and capital and interest would be secured by a first legal charge on a German Listed Building;
  - details about a legal firm having evaluated Dolphin Capital’s operation and assessed the investment;
  - a description of the tax advantages of German Listed Buildings to German citizens;
  - a step-by-step process for investing;
  - biographies of the key management personnel;
  - potential risks of the investment: removal of the tax advantage by the German Government, a major fall in German property prices, or the collapse of the Euro; and

- the names and contact details of its professional suppliers: its German legal advisor was Bottermann Khorrami LLP (**BK**), who was also incorporated in England and Wales, its UK legal adviser was Pitmans Solicitors (**Pitmans**), and its German Trustee was Ladon Intertrust Treuhandgesellschaft mbH (**Ladon**).
- A copy of a loan note instrument drafted by Pitmans for £5m average 13.8% per annum fixed rate secured loan notes 2018, dated 31 May 2013.
- A copy of a letter dated 19 December 2012, from Investaco, an Independent Financial Adviser (**IFA**), which said that Dolphin Capital's structure "seemed credible and compliant from a UK Financial Promotions perspective".
- A copy of a letter dated August 2012, from BK to Dolphin Capital. The letter clarified that the holder of a legal charge did not own the property, but in the situation of a default, the charge holder could receive revenue from either a compulsory auction of the property or compulsory administration of the company.
- A copy of a letter dated 9 January 2013, from BK to Dolphin Capital. The letter advised issuing three or five year loan notes with security being a first charge on German properties. The properties would be held by individual Special Purpose Vehicles (**SPVs**) under the umbrella of Dolphin Capital. So, Dolphin Capital would be able to ensure that the securities could be arranged even if it did not own the property. This was because projects could complete in less than 24 months, which would require changing the whole loan note once a project was completed.

12. Westerby said that it also obtained the following documents in 2013:-

- A letter from BK, which outlined the legal structure of the loan notes and confirmed that legal charges would be held by Ladon.
- A document confirming the German tax advantages that Dolphin Capital relied on to provide returns.
- An independent credit report, which said that Dolphin Capital had "good creditworthiness".
- Copies of the legal charges over German Listed Buildings.

13. Westerby also said that it checked that Dolphin Capital and Ladon were genuine companies on the German Company Register.

14. On 12 June 2013, Dolphin Capital confirmed to Westerby that interest and capital from its loan notes would only be paid back to a SIPP, not directly to a member.

15. On 17 October 2013, Westerby wrote an investment review report on Dolphin Capital (**the Review Document**). It based its assessment on the following documents: Dolphin Capital's Information Sheet, Frequently Asked Questions sheet, Information Memorandum, dated September 2013, Sample Loan Note Offer, Further Opinion Note, dated September 2013, and Queen's Council (**QC**) Opinion Note (**the QC Note**), dated April 2013. The QC Note confirmed that the structure note outlined the risks of the loan notes from a regulatory perspective and that the investment would not constitute a collective investment for the purposes of section 235 of the Financial Services and Markets Act 2000 (**the 2000 Act**). Westerby conducted an internet search on Dolphin Capital, which did not highlight any adverse history. It decided that Dolphin Capital's loan notes were acceptable as a SIPP investment.
16. On 18 September 2014, Dolphin Capital issued an Information Memorandum (**the 2014 Information Memorandum**) for £3.8m of five year loan notes paying 13.8% per annum.
17. The 2014 Information Memorandum stated the following:-

"This document is important. If you are in any doubt in relation to the contents of this document or what to do in relation to them, you should consult with an appropriately qualified independent professional, such as an accountant, solicitor or stock broker who is appropriately authorised and regulated."

"An investment into a structure that utilises German Listed Buildings and New Build Sites as the underlying asset class may not be suitable for all recipients of this Information Memorandum, and appropriate advice should be sought by recipients."

"Prospective investors should consider if an investment into Dolphin is suitable for them in light of their personal circumstances and the financial resources available to them."

"Although this is a short-term secured investment, there can be no guarantee the specified (or any) return will be achieved. Investors are referred (without prejudice to the generality of the foregoing) to the Risk Factors section of this document."
18. The 2014 Information Memorandum also contained the following information:-
  - It had selected a number of independent financial advisers to provide information to prospective lenders.
  - It was raising funds to enable it to buy German Listed Buildings via SPVs with the intention of selling them to German citizens before renovations commenced. Borrowings would be secured by a legal charge.

- Under German tax legislation, high-rate tax paying German citizens were allowed significant tax breaks on the refurbishment costs of specific buildings. This could result in the buyers reclaiming up to 100% of refurbishment costs over the following 12 years as a legitimate deduction from their tax bill. It had been confirmed that the tax situation would remain until at least the next budget in 2018.
  - The capital and interest would be secured on the building by a legal charge. This would be stipulated in a legal charge deed and certificate and registered with the German Land Registry for the SPV owning the building. Ladon would hold the legal charge certificate in an Escrow. It would also hold the assignment deed in an Escrow, so that Dolphin Capital could use the legal charge in the event of liquidation.
  - Information about Dolphin Capital, key management personnel, and property purchase requirements.
  - It set out 18 risk factors. It said that loan notes involved a high degree of risk.
  - Details of its German legal adviser, BK.
  - The loans were not covered by the Financial Conduct Authority (**FCA**) or the Financial Services Compensation Scheme (**FSCS**).
  - The 2014 Information Memorandum had been reviewed and approved by an authorised firm within the meaning of the 2000 Act for the purposes of Section 21 of the 2000 Act.
19. In 2014, Westerby carried out due diligence on Dolphin Capital and its loan notes by obtaining the following documents:-
- The 2014 Information Memorandum.
  - An undated letter from Dolphin Capital to prospective investors, which enclosed a folder of due diligence documents.
  - Independent credit and company identification report dated 24 March 2014, which said that Dolphin Capital had “good creditworthiness” and a default probability within one year of 0.37%. The report included financial information. Another independent credit report dated 26 August 2014, which said that Dolphin Capital had “good solvency” and a default probability within one year of 0.36%. A copy of the ‘Federal Gazette’, an official German financial information provider, showed Dolphin Capital’s financial statements for the year ending 31 December 2012.
  - A list of Dolphin Capital’s shareholders and a list of Dolphin Capital Wealth Management Limited’s registered members.
  - A document entitled “Dolphin Capital Track record of German Government Listed Buildings”, which provided details of completed projects.

- Testimonials from some of Dolphin Capital's existing investors and contractors.
- A letter from BK in April 2014, which explained the tax advantages of German Listed Buildings and provided a tax calculation example.
- A letter dated 31 October 2012, from BK to Dolphin Capital, which confirmed that Appendix A and B in the Security Trustee Conditions would be completed and issued by the Security Trustee, Ladon, once the loan notes were fully issued and the legal charges were in place. Appendix A would list the note holders and Appendix B would specify the properties charged.
- BK's annual accounts to 31 July 2013, and its annual return dated 9 August 2014.
- A copy of a letter from Ladon to Dolphin International Group Limited (**Dolphin IG**) dated October 2014, which listed the legal charges Dolphin Capital had established for Ladon. The three year note was secured by ten properties and the five year note by eight properties.

20. Westerby also said that it:

- maintained a monitor to ensure that all payments of interest and capital for Dolphin Capital's loan notes were being received as they fell due; and
- checked that BK was registered on the German Federal Bar official register of lawyers.

21. In July 2014, a "Dear Chief Executive Officer letter" (**the CEO Letter**) was sent by the FCA to all CEOs of SIPP operators, which specifically referred to the need for due diligence on non-standard investment business to ensure that assets allowed into a pension scheme were appropriate. The CEO Letter highlighted the need for SIPP operators to carry out the following:

- correctly establish and understand the nature of an investment;
- ensure that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation;
- ensure that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable);
- ensure that an investment can be independently valued, both at point of purchase and subsequently; and
- ensure that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.).

22. In 2016, Westerby carried out the following checks on Dolphin Trust and its loan notes:-

- In respect of Dolphin IG:-
  - Confirmed that its annual accounts were up to date by checking Companies House.
  - Obtained a copy of its dormant annual accounts to 30 June 2015.
  - Obtained a copy of its annual return dated 12 June 2016, from Companies House.
  - Verified its officers by checking Companies House.
- In respect of Dolphin Capital Wealth Management Limited:-
  - Confirmed that its annual accounts were up to date by checking Companies House.
  - Obtained a copy of its annual accounts to 31 December 2015.
  - Obtained a copy of its annual return dated 9 March 2016, from Companies House.
  - Verified its officers by checking Companies House.
- In respect of BK:-
  - Confirmed that its annual accounts were up to date by checking Companies House.
  - Obtained a copy of its annual accounts to 31 December 2015.
  - Obtained a copy of its annual return dated 9 August 2015, from Companies House.
  - Verified its officers and their personal appointments by checking Companies House.
- Viewed 'The SIPP Club' website, which provided details of an 'independent' review and site visits to Dolphin Trust in Germany. The site visits took place in July 2013, July 2014 and May 2016. The conclusion of the initial review and subsequent updates was supportive of Dolphin Trust and the loan notes.
- Obtained a copy of Dolphin Trust's marketing brochure, dated September 2014.
- Obtained a copy of Dolphin Trust's investor newsletter, dated September 2016.
- Obtained a copy of a Dolphin Trust loan note instrument drafted by Pitmans for £3.8m average 10% per annum fixed rate secured loan notes 2021, dated 20 July 2016.



- Verified that Pitmans was a recognised law practice by checking with the Law Society.
  - Obtained plans and pictures of some of Dolphin Trust's development sites.
  - Obtained a copy of an assignment of a registered legal charge, dated October 2013.
23. On 1 April and 1 May 2017, Dolphin Trust issued Information Memorandums for £3.5m of two-year loan notes paying 10% per annum and £3.8m of five-year loan notes paying 10% per annum (**the 2017 Information Memorandums**).
24. In addition to the information provided in the 2014 Information Memorandum, the 2017 Information Memorandums contained the following information:-
- They stated:

“The content of this promotion has not been approved by an authorised person within the meaning of the Financial Services and Markets Act 2000. Reliance on this promotion for the purposes of engaging in any investment activity may expose an individual to a significant risk of losing all of the property or other assets invested.”
  - They confirmed:-
    - Dolphin Trust did not deal with clients directly, only via an IFA.
    - It was exempt from general restrictions in section 21 of the 2000 Act on the communication of financial promotions on the grounds that it was made exclusively to investment professionals, high net worth individuals, high value entities, sophisticated investors or self-certified sophisticated investors.
25. Dolphin Trust issued an Information Sheet (**the Information Sheet**) for the two and five year 10% loan notes, which was approved by Blackstar Wealth Management Limited, a firm authorised and regulated by the FCA, which stated the following:
- “Any person that chooses to consider the Dolphin Trust opportunity must satisfy themselves that they can afford to absorb the risks involved as set out in the IM [Information Memorandum] and fully understand that this investment involves the provision of secured loan capital that is then used for the purposes of investment in selected German Listed Building projects, with the intention of renovation and sale.”
- “No business undertaken by a lender directly with Dolphin Trust or a Group Company is covered by the UK Financial Services Compensation Scheme or the Financial Ombudsman Scheme and consequently applicants will not be eligible to apply for any compensation from the FSCS.”
26. The Information Sheet also contained the following information:-
- Dolphin Trust, formerly Dolphin Capital, had been trading since 2008.

- The loan notes would be secured with a registered first legal charge on German Listed Buildings.
- Apartments within the German Listed Buildings would be sold off-plan before renovation work commenced. Payments would be released by buyers on a phased basis.

27. In 2017, Westerby carried out due diligence on Dolphin Trust and its loan notes by obtaining the following documents:-

- The 2017 Information Memorandums.
- The Information Sheet.
- Dolphin Trust's marketing brochure, undated.
- In respect of Dolphin Trust:
  - a copy of its annual accounts to 31 December 2015;
  - an extract from its company register; and
  - a copy of its management accounts to 31 December 2016.
- A copy of a loan note instrument for £3.5m of two year loan notes paying 10% per annum, dated 1 April 2017.
- A copy of a loan note instrument for £3.8m of five year loan notes paying 10% per annum, dated 1 May 2017.
- Copies of letters from Ladon to Dolphin Trust detailing legal charges:-
  - For the one year loan note, the letter was dated 14 March 2017 and confirmed details of three legal charges.
  - For the three year loan note, the letter was dated 11 April 2017 and confirmed details of 13 legal charges.
  - For the five year loan note, the letter was dated 8 June 2017 and confirmed details of 11 legal charges.
- Documents listing Dolphin Trust's projects under construction and setting out property sales and progress in March and June 2017.
- Two news articles from 'PR Newswire'. One was dated 11 January 2017, announcing Dolphin Trust's signing of a new agreement with Zublin AG, a German construction company, and the other was dated 13 February 2017, describing Dolphin Trust's purchase of land and buildings.

28. Westerby also viewed 'The SIPP Club' website, including the one and two year site visit updates.

29. On 20 September 2017, Dolphin Trust wrote to investors who had expressed an interest in investing in a loan note. It said that due to delays resulting from client identity checks, it had temporarily switched to Moneycorp for processing new investment payments. It confirmed that no funds could be released to Dolphin Trust until security over a property was in place.
30. On 26 October 2017, Mr Y completed and signed the Pension's application form (**the Pension's Application Form**), which confirmed the following:-
- In section 7 – “transfers”, he would be transferring approximately £357,000 from his Greyfriars' SIPP by cash and in-specie.
  - In section 8 – “investment strategy”, he ticked boxes confirming that he would be investing in a “discretionary managed portfolio”, “third party loans” and “other”.
  - In section 9 – “taking your pension benefits”, he stated that he intended to take benefits at age 56 “or thereabouts”. He was currently 55 years old.
  - In section 12 – “adviser charges”, he stated that he had not received advice from an authorised financial adviser.
  - In section 14 – “declaration”, he confirmed the following:

“I agree that I am solely responsible for all decisions relating to investment decisions in connection with my arrangement in the scheme and will hold Westerby Trustees Services Limited fully indemnified against any claim in respect of such decisions.”
31. Mr Y signed the Pension's non-standard asset questionnaire (**the Questionnaire**). The Questionnaire confirmed that non-standard assets may carry a high degree of risk, could be difficult to value and sell and most were not regulated by the FCA and not covered by the FSCS. The following was included or confirmed in the Questionnaire:-
- The statement:

“Westerby will only allow investment in non-standard assets where full advice on the investment has been given by a qualified financial adviser or you would, if asked, be able to satisfy the FCA's criteria for a high net worth, sophisticated or elective professional client overleaf.”
  - A high net worth investor was someone with an annual income of £100,000 or more or net assets of £250,000 or more.

- A sophisticated investor was someone who had sufficient knowledge and experience to understand the risks involved in investing in risk investments including non-standard assets and could accept the risk of losing their entire investment. For example, they could be working or had worked in the last two years in a professional capacity in the private equity sector, or in the provision of finance for small and medium enterprises.
- By signing the declaration, Mr Y agreed to the following statements:
  - “I understand the risk factors involved with non-standard assets and I am comfortable that my attitude to risk is appropriate and I am prepared to suffer a total loss of my investment.”
  - “I have not received any advice from Westerby with regard my investments and will not hold Westerby responsible should I suffer a financial loss as a result of my investments.”
  - “I understand that non-standard investments can be difficult to value at any given time and this may have an impact when calculating my pension benefits and overall scheme value.”
  - “I understand that non-standard investments can take time to sell and accept that I may be locked into an investment for the whole specified term. I accept that this may affect my ability to draw pension benefits from my fund.”
  - “I understand that non-standard investments are not regulated by the FCA or covered by the FSCS and accept that if something goes wrong I may not be able to claim any compensation or redress.”
  - “I confirm that I have taken financial advice specific to the investment specified in this questionnaire or that I meet the FCA requirement criteria for a high net worth/sophisticated or elective professional adviser.”
  - “I elect to be treated as a HIGH NET WORTH/SOPHISTICATED/ELECTIVE PROFESSIONAL INVESTOR....”

- Mr Y stated that he was a Chartered Accountant.

32. On 30 October 2017, the following actions took place:-

- Mr Y and Westerby signed the Supplemental Deed.
- Westerby wrote to Mr Y (**the October 2017 Letter**) and confirmed the following:
  - it was not authorised to provide financial advice, including on investments;
  - his pension and investments were being arranged at his own request on an ‘execution only’ basis; and
  - it had not given him any financial advice.

33. On 31 October 2017, Mr Y signed the October 2017 Letter to confirm that he had read and understood it.
34. Mr Y transferred cash and the Bonds in-specie from the Greyfriars SIPP to the Pension.
35. On 18 January 2018, Mr Y signed an application form (**the Dolphin Trust Application Form**) to invest £80,000 in Dolphin Trust's Secured Convertible Loan Note 2022. Interest was payable at 10% per annum every six months.
36. On 22 January 2018, Mr Y signed a document authorising Metro Bank to transfer £80,000 to the Moneycorp bank account.
37. On 23 January 2018, Westerby signed the Dolphin Trust Application Form.
38. On 29 January 2018, a novation agreement was issued for transferring the Bonds in-specie from the Greyfriars' SIPP to the Pension.
39. On 30 January 2018, the following actions took place:
  - Westerby signed the Metro Bank transfer authority;
  - Dolphin Trust issued a certificate to Mr Y for £80,000 in Dolphin Trust's Secured Convertible Loan Note 2022 (**the Loan Note**); and
  - Westerby received confirmation that the in-specie transfer of the Bonds had been completed.
40. In October 2018, the FCA issued another "Dear CEO letter", highlighting the judgment in the cases of *R (Berkeley Burke SIPP Administration Limited) v. Financial Ombudsman Service Limited*<sup>1</sup>, and drew SIPP operators' attention to their due diligence obligations when accepting customers' investments, with reference to the Principles and other rules in the FCA Handbook. The FCA pointed out that these were not new obligations and had been highlighted following the Financial Services Authority's second thematic review in October 2012.
41. Initially, Mr Y's SIPP received several interest payments from the Loan Note, but in early 2019, the interest payments stopped. Mr Y said that he subsequently heard from other investors that Dolphin Trust's loan notes had defaulted.
42. In May 2019, Mr Y complained to Westerby and said that it had not told him about the interest payments stopping.
43. On 21 June 2019, Westerby responded to Mr Y's complaint with the following points:-
  - It was aware that there had been delays in the repayment of capital from Dolphin Trust's loan notes due to changes in the German property market. It was liaising with GPG's senior representatives on the matter.

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<sup>1</sup> <https://www.bailii.org/ew/cases/EWHC/Admin/2018/2878.html>

- Although Dolphin Trust had been renamed as GPG, it did not change Dolphin Trust's obligations.
- There were no outstanding interest payments due to Mr Y's Westerby SIPP.

44. On 9 July 2019, Westerby wrote to Mr Y with the following points:-

- One interest payment was outstanding for the Loan Note.
- On 16 April 2019, when it received a generic letter from Dolphin Trust, it had been made aware of the Loan Note's default. It was up to Westerby's individual administrators to inform relevant clients of a default. In Mr Y's case, the administrator had failed to let him know. It apologised and accepted that its communications had been poor.
- It was in contact with GPG and had been given a dedicated contact team to deal with queries. It was told that GPG would provide a timeline for payments as soon as GPG was able.
- It was liaising with GPG to verify the assets and security arrangements in place.

45. On 2 September 2019, Westerby received a letter from GPG (**the September 2019 Letter**). It said that projects had been delayed, but capital was safe as it was secured on assets in one of the World's most stable property markets. It provided a link to videos of specific development projects.

46. On 3 September 2019, Westerby forwarded a copy of the September 2019 Letter to Mr Y. Westerby said that it was liaising with GPG to obtain further updates and information on the security arrangements, and it was trying to arrange a meeting with GPG. It provided him with GPG's direct contact details.

47. On 17 October 2019, Westerby forwarded a copy of GPG's annual investor letter and update to Mr Y. Westerby said that it planned to meet GPG at the end of October 2019.

48. On 4 November 2019, Westerby conducted a meeting with GPG. Westerby says that GPG provided information about the properties that were secured for the loan notes.

49. On 9 December 2019, Westerby updated Mr Y on its meeting with GPG. It said that he may receive a letter from GPG about a corporate review and possible restructuring proposal.

50. On 28 January 2020, GPG wrote to Westerby (**the January 2020 Letter**) with the following points:-

- It was experiencing implementation problems, which was partly the reason for the defaults.
- There had been unforeseen events which it had not been prepared for.

- Its communications had not always been professional, which had destroyed trust with investors.
  - It had considered insolvency and restructuring. Due to GPG's sustainability, it had decided to restructure.
  - It was appointing an audit firm (**the Audit Firm**) to assist with the restructuring.
  - It had received an offer from a German community of investors who would take over Dolphin Trust's entire property portfolio.
  - It would submit the offer to investors in six to eight weeks.
51. On 5 February 2020, Westerby forwarded a copy of the January 2020 Letter to Mr Y. It said that it had already verified his investment with GPG, so there was no need for him to complete an investor information sheet, which it believed some investors had received.
52. On 5 March 2020, another investor in Dolphin Trust's loan notes wrote to Westerby (**the March 2020 Letter**) with the following points:-
- GPG was insolvent on a balance sheet basis.
  - He did not believe that investors were being told the whole story by GPG or its representatives.
  - When he had attended a meeting with the Audit Firm, he was told that liquidation would probably mean almost total loss, and any remaining value would take many years to be returned.
  - There had not yet been an offer for the purchase of the properties.
  - Restructuring could provide the best return.
  - He offered to organise a meeting of UK investors and set up a steering committee.
  - He asked interested investors to email him or GPG.
53. On 12 March 2020, Mr Y complained to Westerby with the following points:-
- He did not believe that he had received an update from Westerby on the Loan Note since June 2019.
  - Other investors had told him that there was a risk that all his investment might be lost.
  - The security for the Loan Note was to be provided by a legal charge held by the Security Trustee. He believed the Security Trustee was Whites UK Limited (**Whites**).
  - He asked the following questions:

- What due diligence had it carried out on the investment?
  - What action was taken to ensure the legal charges were in place with the Security Trustee and were the legal charges still in place?
  - What actions did it proactively take to protect and recover interest and capital from the Loan Note, for example by enforcing legal charges or other methods?
  - He asked for a copy of all the paperwork relating to the Loan Note.
54. On 24 March 2020, Westerby forwarded a copy of the March 2020 Letter to Mr Y. It asked him to contact the investor if he wished.
55. Westerby said that on 13 and 15 May 2020, it updated Mr Y on the position of the Loan Note.
56. On 21 May 2020, Westerby replied to Mr Y's complaint with the following points:-
- It could only permit the SIPP to hold the Loan Note if he was a high net worth or sophisticated investor, or if he had received a recommendation from a regulated financial adviser. As his SIPP was being established on an 'execution only' basis, and he had not received financial advice, it had confirmed that he met the criteria of a high net worth or sophisticated investor by asking him to complete the Questionnaire. It noted that he was a Chartered Accountant.
  - It was required to undertake reasonable due diligence on the Loan Note to ensure that it was genuine and acceptable as a SIPP's asset. Its due diligence was based on the CEO Letter and to the standard expected by the FCA. It itemised the due diligence it carried out on the Dolphin Trust loan notes in 2013, 2014, 2016 and 2017. It had decided that the investment could be held within the SIPP by high net worth or sophisticated investors.
  - It had sought evidence that the relevant securities were in place by appointing solicitors with offices in the UK and Germany to inspect the German Land Registry to verify titles and legal charges. Due to the opaque nature of the German Land Registry, it had not been able to obtain this information but it believed that the legal charges were still in place.
  - Germany was a long-standing member of the Financial Action Task Force. This gave Westerby confidence that a business on the scale of Dolphin Trust, which was attracting significant international investment, would act within the law.
  - It had been in regular contact with GPG to try to determine the reasons for the payment delays and an indication of timescales for repayment. This included telephone calls with GPG's CEO and its client relationship team, and a face-to-face meeting. It had kept him informed of developments by writing to him on multiple occasions during 2019 and 2020.



- Correspondence from a GPG creditors group had confirmed that GPG could be restructured and funds recovered for investors. This suggested that the problems were due to a failure of GPG's business model, rather than fraud or misconduct. So, the default was the result of investment risk, not a failure of Westerby's due diligence process.
- It was not clear that enforcing legal charges would result in a substantial return of capital but would result in significant legal costs and would likely force GPG to file for bankruptcy. This was likely to result in substantial or even total loss of funds for investors. It was not aware that Whites was the Security Trustee.
- The forced sale of a property before renovation was completed could result in a loss as it was possible that it would be sold for less than the combined purchase price and renovation costs.
- It understood that GPG was exploring repayment options, but there was no timescale for the return of funds or the amount that would be paid.
- It enclosed documents relating to the Loan Note.

57. In July 2020, GPG filed for insolvency.

58. In June 2025, GPG's CEO was convicted of fraud.

59. Following the complaint being referred to The Pensions Ombudsman, Mr Y made further submissions that have been summarised below.

60. Mr Y's further submissions:-

- The letter from Ladon to Dolphin Trust, dated 8 June 2017, containing the list of legal charges, did not specify the property values. Westerby did not re-evaluate the legal charges when he invested in the Loan Note in January 2018. Westerby should have checked that the legal charges were in place, as they were a key reason for him going ahead with the investment.
- Dolphin Trust's marketing material stated that investors' money would be sent to BK's bank account. He pointed out that his money had been sent the Moneycorp bank account, and it was unclear whether the funds were then sent to BK and Ladon.
- There were still many questions to be answered, and Westerby had shown no interest in helping him with the situation.

## **Adjudicator's Opinion**

61. Mr Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by Westerby. The Adjudicator's findings are summarised in paragraphs 62 to 74 below:-

62. Westerby had two distinct roles in relation to the management of Mr Y's SIPP. In order to establish whether its actions amounted to maladministration, the Adjudicator needed to consider each role separately.

*Westerby's role as a trustee*

63. To assess the extent of Westerby's role as a trustee in accepting investments into Mr Y's SIPP, the Adjudicator considered the Rules. While Mr Y and Westerby were joint trustees of his SIPP, the Rules in section 3.3.2 state, "...the Member, shall invest or apply the balance of that money as it thinks fit...", and in section 5.3, "The Scheme Trustee....shall exercise the powers under clauses 3.3 to 4.2 only in accordance with any directions given by the relevant Member....".

64. The Adjudicator also considered the following:-

- In the Key Features Document issued to members, it states, "We cannot provide any advice on the suitability of investments...." and "We accept no responsibility for the performance of your chosen investment(s)."
- In the Pension's Application Form, which Mr Y signed on 26 October 2017, it states, "I agree that I am solely responsible for all decisions relating to investment decisions in connection with my arrangement in the scheme and will hold Westerby Trustees Services Limited fully indemnified against any claim in respect of such decisions."
- In the Questionnaire, Mr Y agreed to the following statements:

"I understand the risk factors involved with non-standard assets and I am comfortable that my attitude to risk is appropriate and I am prepared to suffer a total loss of my investment."

"I have not received any advice from Westerby with regard my investments and will not hold Westerby responsible should I suffer a financial loss as a result of my investments."
- In the Supplemental Deed, which Mr Y signed on 30 October 2017, it states, "...no....Member Fund Trustee [which includes Westerby] shall be liable for any loss to the trust fund or to the Member Fund arising by reason of any improper investment made in good faith or negligence or fraud of any agent employed by him....".
- By signing the October 2017 Letter on 31 October 2017, he confirmed that he understood that Westerby was not authorised to provide financial advice, it had not given him any financial advice, and his investments were being arranged at his own request on an 'execution only' basis.

65. The Rules say that Westerby, in its role as a trustee, could only act on Mr Y's specific investment instructions, and the Supplemental Deed and the Key Features Document made it clear that Westerby would not be held accountable for any subsequent investment loss. Also, Mr Y confirmed that he accepted the risks of investing in non-standard assets and knew that he was solely responsible for his investment decisions by signing the Pension's Application Form, the Questionnaire, and the October 2017 Letter. Westerby's actions in respect of its role as a trustee in allowing Mr Y to invest in the Dolphin Trust loan note, did not amount to maladministration.

*Westerby's role as the SIPP operator*

66. Mr Y signed declarations in the Pension's Application Form, the Questionnaire, the Supplemental Deed, and the October 2017 Letter, exonerating Westerby from any responsibility for losses resulting from his investment decisions. Effectively, Mr Y's investment instructions were implemented by Westerby on an 'execution only' basis. However, SIPP operators are regulated by the FCA and required to comply with the Principles and the COBS within the FCA Handbook.
67. When considering COBS, SIPP operators have quite wide obligations, particularly under COBS 2.1.1.R where there is an obligation on firms to act in the best interests of the client. However, this rule must be balanced against the general principle that consumers should take responsibility for their own decisions. This was tested in *Ehrentreu v IG Index Ltd (Rev 1) [2018] EWCA Civ 79*, where the Court of Appeal held that very clear express words would be required to create a contractual obligation to protect another party from potentially inflicting economic harm on itself. This general principle of personal responsibility is particularly pertinent for SIPPs, which by their very nature are self-invested, implying a greater degree of personal responsibility.
68. COBS 2.1.1 was also analysed in *Adams v Carey*<sup>2</sup> at first instance in the High Court. Carey is another SIPP operator. As this aspect of the case was not revisited in the subsequent Court of Appeal, the High Court decision remains good law. The main findings of the High Court decision were as follows:-
- The agreement between the parties is key in identifying the extent of the duty imposed by Rule 2.1.1. Where a customer agreement provides for a firm to carry out an 'execution only' role, the COBS duty must be read in that light.
  - COBS Rule 2.1.1 does not impose a duty on a SIPP operator to refuse to accept high risk investments. The fact that an investment is high risk and speculative does not of itself make it manifestly unsuitable.
  - COBS Rule 2.1.1 does not impose a duty on a SIPP operator to consider the suitability of a SIPP or the underlying investments held in it if the contract with the member provides otherwise.

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<sup>2</sup> *Adams v Options SIPP UK LLP* [2020] EWHC 1229 (Ch)

69. COBS 10 requires a SIPP operator to assess the appropriateness of prospective investments for a member before carrying out activities on their behalf, such as executing investment orders. Although COBS 10 is deemed not to be applicable to 'execution only' business, the FCA has made it clear that 'execution only' SIPP operators still owe members some duties regarding the suitability of underlying investments, not least because of the requirements of COBS 2.1.1, and the existence of the Principles.
70. While the FCA and COBS 10 do not provide specific rules or formal guidance about the required level of a SIPP operator's investment due diligence, the CEO Letter sent by the FCA in July 2014 does refer to the need for due diligence to be carried out on non-standard investments. Mr Y invested in the Loan Note, which should be considered as non-standard assets, in January 2018. This was after the FCA sent the CEO Letter, so, Westerby would have been expected to have carried out the checks referred to in the CEO Letter before Mr Y invested in the Loan Note.
71. The Adjudicator reviewed Westerby's due diligence carried out on Dolphin Trust's loan notes during the period 2013 to 2017, and compared them to the checks set out in the CEO Letter as follows:-

- *Correctly establish and understand the nature of an investment.*

Westerby reviewed Dolphin Trust's Information Memorandums in 2013, 2014 and 2017. It also reviewed other general information documents, such as several marketing brochures, an investor newsletter and the Information Sheet. Together, these documents described Dolphin Trust's loan notes in some detail and set out the relevant risks. Westerby adequately established and understood the nature of the loan notes before allowing Mr Y to invest in the Loan Note.

- *Ensure that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation.*

Westerby carried out the following checks:-

- In respect of Dolphin Trust:
  - verified it was a genuine company by checking the German Company Register;
  - obtained annual reports;
  - verified its officers;
  - obtained independent credit reports;
  - checked the 'Federal Gazette' for financial information; and
  - obtained relevant news articles.

- In respect of Dolphin IG:
  - verified it was a genuine company by checking Companies House;
  - obtained annual accounts and annual returns; and
  - verified its officers by checking Companies House.
- In respect of Dolphin Trust's German lawyer, BK:
  - verified it was a genuine company by checking Companies House;
  - obtained annual accounts and annual returns;
  - verified its officers by checking Companies House;
  - checked that it was registered on the German Federal Bar official register of lawyers; and
  - obtained various clarification letters from BK to Dolphin Trust about the loan notes and legal charges.
- In respect of the Security Trustee, Ladon:
  - verified it was a genuine company by checking the German Company Register;
  - obtained lists of legal charges that were in place up to June 2017; and
  - obtained a copy of a legal charge.
- Verified that Dolphin Trust's UK lawyer, Pitmans, was a recognised law practice by checking the Law Society.
- Checked the existence of previous loan note instruments drafted by Pitmans.
- Verified the tax benefits available to German citizens from investing in German Listed Buildings.
- Obtained verification that the development projects were genuine.

The due diligence Westerby carried out before Mr Y invested in the Loan Note, adequately ensured that the investment was genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation.

- *Ensure that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable).*

The nature of an unsecured loan note means that there is no underlying asset to be held in custody. However, Dolphin Trust's loan notes were secured by legal charges. Westerby obtained a copy of a legal charge and received lists of properties which the loan notes had legal charges against. The lists were dated June 2017, which was seven months before Mr Y invested in the Loan Note. Westerby's checks in this regard were adequate and carried out within an acceptable timeframe of Mr Y investing in the Loan Note. The Adjudicator was not provided with any evidence to suggest that the legal charges were invalid or unenforceable.

- *Ensure that an investment can be independently valued, both at point of purchase and subsequently.*

The nature of an unsecured loan note meant that its value is the sum of the value of the discounted cash flows, interest and final capital repayment an investor receives from the investment. As the loans were private, and not tradeable, the only relevant valuation was at maturity, which was the amount of the initial investment. This check cannot be reasonably applied to private loan notes.

- *Ensure that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.).*

The Adjudicator accepted that Westerby said that it maintained a monitor to ensure that all payments of interest and capital for its clients with loan notes were paid when due. While Westerby has acknowledged that it did not inform Mr Y that his April 2019 interest payment had not been received, it was aware of the default when it took place. Westerby's checks for the investment's impairment were adequate.

72. The Adjudicator was satisfied that Westerby's actions were adequate in complying with the checks set out in the CEO Letter.

73. The Adjudicator also noted the following in Mr Y's complaint:-

- The risks and characteristics of the Loan Note were explained to him in the Information Memorandums and other company literature. He confirmed that he understood the risks of the investment by signing the Questionnaire prior to investing in the Loan Note.
- He is a Chartered Accountant, so had a financial background. The Adjudicator expected him to understand the risks of the investment.
- Westerby's role was not to stop him from investing in high-risk investments, particularly as he had confirmed that he was a high net worth or sophisticated investor.
- Dolphin Capital/Trust was a legitimate business which had been trading since 2008.

74. Westerby's failure to proactively inform Mr Y of the Loan Note's default, amounted to maladministration. For complaints where there had been maladministration, the Pensions Ombudsman (**the PO**) could award redress for non-financial injustice. If a financial award was made, this started at £500 for significant distress and inconvenience. Any distress caused by the failure to notify him of the default was not primarily caused by Westerby's maladministration but stemmed from the investment's failure. The maladministration did not quite meet the threshold for a distress and inconvenience payment in line with the PO's current guidance<sup>3</sup>. It was unlikely that a non-financial injustice award would be made if Mr Y referred his complaint to an Ombudsman for final decision.
75. Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Neither Mr Y nor Westerby provided any further evidence or comments on the complaint.
76. I agree with the Adjudicator's Opinion.

### **Ombudsman's decision**

77. Mr Y complained that Westerby did not carry out sufficient due diligence when it allowed him to invest £80,000 in the Loan Note issued by Dolphin Trust. The Loan Note subsequently defaulted, and he has lost the majority, if not all, of its value.
78. I sympathise with Mr Y, as it is apparent that he invested in a high risk asset, which subsequently defaulted, and he has most likely lost his entire investment. However, the situation I need to consider is whether Westerby, in its role as either trustee or SIPP operator, had a legal responsibility to stop Mr Y from investing in the Loan Note.
79. It is clear from the Rules, the Supplemental Deed and the Key Features Document, that Mr Y was solely responsible for making investment decisions in his SIPP, and Westerby would not be held accountable for any subsequent investment loss. So, the SIPP was a member-directed arrangement, where investments were directed by Mr Y on an 'execution only' basis. Mr Y accepted this position by signing the Application Form and the Questionnaire, and acknowledging the risks that a non-standard asset might entail. In its role as trustee, Westerby's actions do not amount to maladministration.
80. In Westerby's role as SIPP operator, I would expect it to have considered the Loan Note in light of the checks set out in the CEO Letter. The Adjudicator has summarised the checks carried out by Westerby on the investment, and I agree that they were adequate and reasonable when compared to the guidance in the CEO Letter. So, in its role as SIPP operator, Westerby's actions also do not amount to maladministration.

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<sup>3</sup> [https://www.pensions-ombudsman.org.uk/sites/default/files/publication/files/Updated-Non-financial-injustice-September-2018-2\\_0.pdf](https://www.pensions-ombudsman.org.uk/sites/default/files/publication/files/Updated-Non-financial-injustice-September-2018-2_0.pdf)

81. While Westerby's inaction to proactively inform Mr Y of the Loan Note's default in April 2019 does amount to maladministration, I agree with the Adjudicator that the consequences of the maladministration do not meet the threshold to award a distress and inconvenience payment to Mr Y. This is because it was only a relatively short period of time that Mr Y was unaware of the situation, as he was shortly afterwards alerted to the default by other investors, and any distress would have mainly been caused by the failure of the investment rather than the lack of communication from Westerby.
82. I do not uphold Mr Y's complaint.

**Dominic Harris**

Pensions Ombudsman  
20 August 2025