

Ombudsman's Determination

Applicant	Mr E
Scheme	Liberty SIPP
Respondent	Liberty SIPP Limited (Liberty SIPP)

Outcome

1. Mr E's complaint against Liberty SIPP is partly upheld, but there is a part of the complaint I do not agree with. To put matters right, for the part that is upheld, Liberty SIPP shall take whatever action is necessary to resolve the conflict of interest that has arisen. It shall also pay Mr E £500 in recognition of the significant distress and inconvenience he has suffered.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr E complains that Liberty SIPP has breached its duties by allowing a property, owned by his pension, to be sub-let. He also complains that Liberty SIPP has made administrative errors when managing his pension arrangement.

Background information, including submissions from the parties

Background

4. Mr E has an individual self-invested personal pension (**the SIPP**) which is provided and administered by Liberty SIPP. Mr E and Liberty Trustees Limited are the Trustees of the SIPP.
5. Liberty SIPP is the SIPP operator and administrator, it is authorised and regulated by the Financial Conduct Authority (**FCA**) and has permissions, amongst other things, to establish, operate and wind-up personal pension plans. Liberty SIPP does not have any advisory permissions. Advice to establish the SIPP was provided by Hunter Jamieson Ltd, an independent financial adviser (**IFA**).
6. The SIPP holds an investment in a commercial property, 30 Whitehall Street, Dundee (**the Property**). Mr E's SIPP owns a 66.81% share, the remaining 33.19% is owned

by another individual SIPP in the name of Mr P. Both SIPPs are administered by Liberty SIPP.

7. The Declaration of Trust and Option Agreement (**the Property Agreement**) sets out, amongst other things, the terms of the fractional ownership. A pre-emption clause exists within the Property Agreement which gives 'first refusal' to purchase the Property to the opposite party if either party wants to sell their share of the Property.
8. A property management agreement exists appointing Mr E as manager of the Property. A Schedule to the property management agreement, (**the Schedule**), which is provided in the Appendix, sets out Mr E's responsibilities as property manager. In summary, these responsibilities include; managing the day-to-day maintenance arrangements for the Property, ensuring the tenants do not breach any part of the lease and the invoicing and collection of rent.
9. In around January 2009, a lease (**the Lease Agreement**) was entered into between Messrs E and P and Liberty SIPP, as landlord, and Figure 8 Consultancy Limited (**Figure 8**) as the tenant.
10. A clause within section 19 of the Lease Agreement, prohibits sub-letting.
11. Under the terms of the Lease Agreement, Figure 8, as tenant, was obliged to, "maintain and repair the leased subjects so that the same are at all times in good and tenantable condition in every respect."
12. At the time the Lease Agreement was effected, Messrs E and P were shareholders and directors of Figure 8. Mr E subsequently resigned his directorship and Mr P is now the sole director and majority shareholder of Figure 8.
13. In November 2012, Liberty SIPP was notified in writing that, contrary to the Lease Agreement, two sub-leases had been put in place with effect from 1 October 2012.
14. In December 2012, it transpired that a further sub-lease had been arranged.
15. Mr E has said he was not consulted prior to the sub-leases being put in place.
16. Also, in December 2012, Mr E notified Liberty SIPP that the mandatory triennial rent review had not taken place and was a year overdue.
17. Mr E has received legal advice which states that the agreement of all three of the landlords is required in order to act against Figure 8 in respect of the breach of the Lease Agreement, by allowing sub-letting. Mr E has suggested that this creates a conflict of interest insofar as Mr P is the sole director and majority shareholder of Figure 8, the entity the action would be against.
18. On 18 March 2013, Mr E notified Liberty SIPP that he would give retrospective permission to the three sub-leases continuing until they expired, which would have been in a few weeks' time. However, he was unequivocal that the sub-leases should

not be renewed or extended without the express permission of all landlords. Mr E also informed Liberty SIPP that he would not consent to any further sub-letting.

19. On 26 March 2013, Mr P responded to Mr E's correspondence, which had been forwarded to him by Liberty SIPP. Mr P informed Mr E that he had already renewed the two original sub-leases for a further six months. Mr P also said that he was at the advanced stages of arranging a fourth sub-lease.
20. On 28 March 2013, Mr E wrote to Liberty SIPP formally opposing Mr P's request for a further sub-lease.
21. On 15 April 2013, the fourth sub-lease, which Mr E had expressly opposed, was signed by Mr P on behalf of Figure 8 and by the sub-tenant.
22. On 17 December 2013, Mr P sought permission from Liberty SIPP to put a further sub-lease in place, as an existing sub-tenant was planning on vacating the Property. In relation to this, an email from Mr P to Liberty SIPP dated 4 February 2014, states the sub-lease had been entered into on the basis that no objections to Mr P's proposal had been received.
23. On 5 May 2015, Mr P informed Liberty SIPP that one of the existing sub-tenants had vacated the Property and another planned to in the future. He therefore proposed to bring in a new sub-tenant to occupy the two spare offices. In relation to this, in an email dated 15 May 2015, Mr P informed Liberty SIPP, "I have had to make a decision over whether to proceed or not, given the clear impasse that we all face. I have given my consent to DH Recruitment moving in, which they did yesterday..."

Summary of Mr E's position

24. Mr E instructed Thorntons Law LLP (**Thorntons**) to deal with matters on his behalf. The concerns which were raised are:-
 - The failure to carry out the triennial rent review on 16 January 2012, as required by the Lease Agreement.
 - Whether any rent collected by Liberty SIPP in respect of the Property was owed to Mr E's SIPP.
 - How Liberty SIPP proposed to deal with the four sub-leases. Particularly that the occupants under the first three sub-leases should vacate the property at the expiration of the sub-lease in force and that the fourth sub-tenant should leave immediately.
 - Whether certain repairs to the Property had been carried out by Figure 8 in accordance with the Lease Agreement.
 - That Liberty SIPP had breached Mr E's confidentiality and data protection rights by it forwarding his correspondence dated 18 March 2013, to Mr P.

- Liberty SIPP's refusal to pass on Mr E's legal costs, from Thorntons, to the SIPP, whilst deducting its own legal fees, on the same matter, from the SIPP.
- Liberty SIPP's repeated failure to consider Mr E's objections to existing and future sub-leases in relation to the Property.

25. Thorntons, on behalf of Mr E, argue that Liberty SIPP:-

- Has repeatedly and knowingly allowed sub-letting which is expressly prohibited under the terms of the Lease Agreement. It is not the case that sub-letting is only permitted, subject to the agreement of all landlords, yet Liberty SIPP is complicit in allowing Mr P to sub-let the Property and has done so knowing this is against Mr E's specific instructions.
- Was negligent in allowing the SIPP to be established without anticipating the possible consequences of a disagreement between Messrs E and P. Thorntons says Liberty SIPP ought to have advised Messrs E and P to take separate legal advice before entering into the agreement they did.
- Actively discouraged Mr E from seeking legal advice when the SIPP was established. All of the documentation relating to the establishment of the SIPP was provided by Liberty SIPP. This included a 'property questionnaire' which included the following statement:

"Trustees' Solicitor

Liberty chooses a solicitor who is familiar with both SIPP property purchase and our way of working. For England and Wales, JMW Solicitors based in Manchester will be appointed and Warner Solicitors in Edinburgh for Scottish Property.

We are sometimes presented with a fait accompli on the basis that the buyer's own solicitor has already done some work, but this nearly always leads to complications and more often than not delays the completion of the property and causes additional administration on our part. If you insist on using a particular firm, we reserve the right to involve our chosen solicitor and their costs would be additional to those of the already appointed solicitors. Furthermore, we would reserve the right to increase our administration fee for any additional work that is required as a result of using a solicitor unfamiliar with property purchases through a pension scheme."

- Made a statement which, "implies very strongly that the involvement of a third-party solicitor would be disadvantageous to the parties and could cause delays to the transaction and add to the costs..." Further, Thorntons says that although a disagreement between Messrs E and P could not be foreseen, Liberty SIPP as a prudent SIPP operator should have considered this when establishing an arrangement where two individual SIPPs have joint control of an asset. This is not

least because Mr P clearly has a conflict of interest in his role as both tenant and landlord.

26. Mr E claims that detriment has arisen as a consequence of Figure 8 allowing sub-tenants to occupy the Property. This, he says, creates two main risks:

“1) The risk of increased activity including security and wear and tear...

2) If the main tenant ceases to trade the trustees will be unable to re-market the property with 4 sitting tenants and the income they produce does not cover the running costs of the property. This would not only limit the income to the SIPP's but would result in a month-by-month reduction in their values until the leases expire.”

Summary of Liberty SIPP's position

27. Liberty SIPP takes the view that the catalyst for Mr E's complaint stems from his personal dispute with Mr P. It says that prior to the dispute all matters, including sub-leases, were agreed by the parties. By way of illustration Liberty SIPP quoted an email from Mr P:

“[Mr E] operates a business which directly competes with my company and his actions appear to be motivated by a desire to gain a commercial advantage for himself, rather than what is in the best interest of the SIPP.”

28. Liberty SIPP considers it has taken reasonable steps to try and break the impasse between Messrs E and P so that agreement can be reached, allowing the parties to move forward.
29. Liberty SIPP does not provide financial or legal advice. The SIPP was established after Messrs E and P received advice from a suitably qualified IFA and there is no regulatory requirement that Liberty SIPP advocate that Messrs E and P obtain separate legal advice. It could not be foreseen, when the SIPP was established, that there would be such a significant breakdown in the relationship between the parties.
30. Many of the issues Mr E has complained about, such as the collection of rent arrears and periodic maintenance are his responsibility as property manager.
31. Mr E appointed Thorntons in a personal capacity, so a payment from the SIPP toward Thorntons' professional fees would not be permitted and would attract an unauthorised payment charge.

Adjudicator's Opinion

32. Mr E's complaint was considered by one of our Adjudicators who concluded that some further action was required by Liberty SIPP. The Adjudicator's findings are summarised briefly below:-

- It is evident that when Mr E and Mr P's professional partnership ended, this was not an amicable parting of company. This has resulted in a difference of opinion between Messrs E and P in terms of their role as landlord to Figure 8. But the scope of the complaint is limited to the actions of Liberty SIPP. Although Mr P is a co-trustee for the purposes of the Property Agreement, he is not a Trustee in relation to Mr E's SIPP. So, the (in)actions of Mr P cannot be considered as part of this dispute.
- Despite Mr E's SIPP owning the greater share of the Property, the Property Agreement does not confer Mr E more rights or voting power, by virtue of his higher fractional ownership. Mr E considers that as the majority shareholder he should have the casting vote. However common ownership in unequal shares does not imply majority rule. Thus, for the purposes of the Lease Agreement, Mr E, Mr P and Liberty SIPP each have equal influence as landlord. Further, under the provisions of the Property and Lease Agreements, the unanimous agreement of all landlords is required to act against the tenant.
- Mr E considers that Liberty SIPP is at fault for allowing a legal document to be drafted which does not deal with the eventuality which has occurred in this case, that Mr E and Mr P would come to have opposing business interests. The Adjudicator agreed this does cause complications in the effective management of the Property. But Liberty SIPP's failure in this regard does not amount to maladministration.
- Liberty SIPP is not authorised or regulated to provide financial advice and it is not qualified to provide legal advice. Mr E approached Liberty SIPP, on the advice of a suitably qualified, authorised, IFA, with a view to establishing an individual SIPP to facilitate the purchase of a commercial property. Liberty SIPP has established the SIPP in accordance with the instructions Mr E provided.
- There is no evidence to suggest that, at the time the SIPP was established, it was envisaged that Messrs E and P would have such a significant disagreement. So, this could not have been reasonably foreseen by Liberty SIPP. The nature of the agreement Messrs E and P entered into is complex, and it may well have been prudent for them to seek legal advice prior to proceeding with the establishment of their SIPPs and the purchase of the Property. But there was not any regulatory requirement for Liberty SIPP to have advocated that Mr E seek legal advice. Further, there is nothing to suggest Liberty SIPP had a contractual obligation to advise him to seek independent legal advice. Nor did Liberty SIPP voluntarily assume responsibility for ensuring that Mr E obtained independent legal advice.
- Thorntons argue that the property questionnaire implies, very strongly, that involving a third-party solicitor would be disadvantageous to the parties, would increase costs and could cause delays to the transaction. The Adjudicator agreed that some aspects of the paragraph could be misunderstood if considered in isolation. But he concluded that when read in its entirety, the statement cannot be

construed as Liberty SIPP actively discouraging Mr E from seeking independent legal advice. Rather the main purpose of the paragraph was to alert Mr E to the risks of delay and increased costs that could arise from engaging his own solicitor and/or a solicitor unfamiliar with property purchases through SIPPs.

- It is not unreasonable for Liberty SIPP to confirm it would charge for any additional costs arising from Mr E using a solicitor unfamiliar with what is a quite specialist transaction. Nor is it unreasonable for Liberty SIPP to retain its own solicitor and seek to recover the additional costs of doing so. But, in any event, the decision on whether or not to seek independent legal advice was still clearly one for Mr E to make. On this basis the Adjudicator did not conclude that Liberty SIPP's statement amounted to a breach of trust.
- The Adjudicator agreed with Mr E's assessment that Figure 8 is in breach of the Lease Agreement. However, the first three sub-leases were arranged and put in place prior to Liberty SIPP being notified that this had happened. Consequently, it is difficult to see what action Liberty SIPP could have taken to prevent this occurring, when the knowledge that Figure 8 had breached the terms of the Lease Agreement was only acquired after the fact.
- The fourth sub-lease was arranged by Mr P after Liberty SIPP had informed him that Mr E objected to the sub-letting. So, Liberty SIPP properly communicated Mr E's wishes to Mr P. However, when the fourth sub-lease was arranged, Liberty SIPP ought to have identified that a conflict of interest had arisen insofar as it was engaged to administer two SIPPs with opposing approaches in relation to the management of an asset shared between the SIPPs. Given that the unanimous agreement of all landlords was required to rectify the impasse between the two SIPPs, Liberty SIPP should not have continued in its role as administrator. The correct course of action at this stage would have been for Liberty SIPP to take steps to mitigate the conflict of interest. However, Liberty SIPP took no action and thus made an administrative error.
- The detriment Mr E describes because of Figure 8 allowing sub-tenants to occupy the Property has not crystallised into an actual financial loss and is largely hypothetical. Although there is a risk this loss could occur, equally (and arguably to a greater extent) there is the chance that it will not.
- The Adjudicator said that even if he were to accept that the presence of the sub-tenants would increase the dilapidations to the Property through increased footfall and general wear and tear, this would be mitigated by the fact that Lease Agreement requires Figure 8 to make good any repairs to the Property, so that it maintains a good state of repair. In this respect the risk of dilapidations would fall to Figure 8 rather to Mr E's SIPP.
- Similarly, the landlords would not be prevented from removing the sub-tenants should Figure 8 become insolvent. The starting point is that the Lease Agreement does not permit Figure 8 to grant sub-leases so arguably these are invalid, and the

sub-tenants have no right to occupy the Property in any event. On this basis the sub-tenants could be properly removed from the Property.

- But in any event, the Adjudicator considered that the financial benefit to Figure 8 of the sub-leases being arranged may well mitigate the very risk Mr E had identified, that Figure 8 may cease trading. It is not disputed that Figure 8 was in arrears with the rent owed to the two SIPP's. By sub-letting Figure 8 was able to obtain a discount on council rates and, in turn, could meet the rent payments. But for the sub-letting, it is entirely likely further arrears would have accrued. So, although Figure 8 was technically in breach of the Lease Agreement, it is possible that, in doing so, it has mitigated further financial detriment to Mr E's SIPP caused by the accrual of rent arrears.
- As property manager it was for Mr E to: establish whether repairs to the Property had been carried out by Figure 8 in accordance with the Lease Agreement; carry out triennial rent reviews; and collect rent and apportion this to the SIPP bank account. Thus, any complaint that Liberty SIPP failed in this regard cannot succeed since these were Mr E's responsibilities and not those of Liberty SIPP.
- Under Clause 3 of the Property Agreement which deals with the terms of Mr E's appointment as property manager he, "may reclaim reasonable expenses from the Property Account as agreed with the Trustees." But, this must be read in conjunction with paragraph B of the Recitals which states that:

"With effect from the date of this agreement, the Trustees appoint the Manager to act on their behalf as property manager alongside any other party who has acquired the property with the Trustees."
- However, each Trustee engaged a separate representative, so, in seeking legal advice and incurring legal costs with Thorntons, Mr E was not acting on behalf of the Trustees as required by paragraph B. Rather he was acting in his personal capacity and cannot, under the provisions of Clause 3, recover his legal fees as expenses incurred in his role as property manager.
- Clause 1 of the Property Agreement, which deals with Grant of Powers, is prescriptive about the services Mr E was to provide and procure, these services are set out in the Schedule. Clause 1 also reiterates, numerous times, that these services were to be provided, "on behalf of the Trustees" and, "as directed by the Trustees." But crucially the Schedule does not mention that Mr E can procure legal advice as part of his role. On potentially contentious issues such as tenants breaching their lease and rent collection difficulties, the Schedule requires Mr E to revert to the Trustees and Scheme Administrators. Further, Clause 2.2 of the Property Agreement requires Mr E to liaise with the Trustees and Scheme Administrators in providing the services prescribed in the Schedule. But, it is clear that there was no liaison between Mr E and the Trustees with respect to the legal advice in question. Consequently, the Adjudicator did not agree that Mr E had the powers to seek legal advice and incur legal fees, on behalf of the SIPP, in his role

as property manager. On this basis the SIPP is not required to meet Mr E's legal costs.

33. The Adjudicator upheld the complaint in part. He recommended that Liberty SIPP should take whatever is necessary in order to resolve the conflict of interest and pay Mr E £500 in recognition of the significant distress and inconvenience he has suffered.
34. Mr E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Both parties provided their further comments, summarised below, which do not change the outcome.
35. Thorntons, acting on Mr E's behalf, said, in summary -
 - The Adjudicator has, "subjectively decided what the "key" issues of the complaint are rather than dealing with each of the individual points raised." Mr E, "remains of the view that many of the submissions made on his behalf have not received sufficient attention."
 - In particular, the argument that, Liberty SIPP, "as a prudent SIPP operator, should be considering [the prospect of a dispute between two parties] whenever they are putting in place a structure where two separate SIPPs jointly own an asset" has not been fully addressed. Thorntons says, "It seems anomalous to suggest that there is no legal or regulatory requirement (or duty of care) for [Liberty SIPP] to have advocated that [Mr E] seek legal advice in relation to the SIPP arrangements." And that it doubts that the Pensions Ombudsman, "would be happy with all SIPP providers adopting the approach taken by [Liberty SIPP] here as a matter of good practice."
 - The assessment that Mr E has suffered no financial loss is misjudged. The Property was purchased as a long-term investment and, due to its location, Mr E anticipated significant growth in value. Due to the dispute, Mr E has decided to forego the anticipated gains and sell his interest in the Property. An independent valuation of the property, carried out in June 2018, suggests that he will make no financial gain from his investment. In addition, Mr E has spent approximately £15,000 on legal representation.
 - The Adjudicator seems to suggest that a tenant in breach of a lease is better than no tenant. Whilst this would ensure continued income to the SIPP, there was no assessment of the possibility of a third-party tenant subletting the whole of the Property. Further, unlike the tenant which was in place, Mr E's company is successful and credit worthy, yet there was no consideration of his company taking over the lease.
 - Mr E raised concerns to Liberty SIPP that, at one point, the tenant was six months in arrears with rent payment. Liberty SIPP's failure of diligence to act in the best interests of both SIPPs clearly points towards maladministration.

- It is unjust that Mr E has so far been unable to pass on any of his legal costs in connection with this matter. They have clearly been incurred by him in circumstances other than in a personal capacity. The Adjudicator has identified:-
 - (i) The terms of the Property Agreement as the reason why Mr E is not entitled to recover his legal fees;
 - (ii) that Liberty SIPP's documents could be misunderstood, and;
 - (iii) that a conflict of interest had arisen.
- As such, the outcome is that Mr E has, "been left with a somewhat one-sided property Management Agreement that does not cover all of the points that it would DO [sic] had he been advised to seek separate legal advice on the terms of the [Liberty SIPP] documentation."
- Although Liberty SIPP has been ordered to resolve the conflict of interest, Mr E, "understandably feels that this is acting 'after the event' and that the damage has already been done". Thus, any monetary payment to Mr E should reflect this.
- The award of £500 recommended by the Adjudicator for the distress and inconvenience Mr E suffered as a consequence of the conflict of interest is, "an arbitrary amount... It is [Mr E's] view that the Senior Adjudicator has seriously underestimated the impact that this dispute has had on him, both financially and on his health and wellbeing."

36. Liberty SIPP said, in summary:-

- Purchasing a property in a SIPP differs to a normal residential conveyance. The suggestion that Mr E used a panel solicitor was to ensure that the solicitor he appointed had a proper understanding of how the purchase should be carried out. Using a solicitor inexperienced with a SIPP property purchase would, in all likelihood, lead to delays in completion and additional costs and frustration. But, the role of the solicitor was purely to act on the conveyance and not to give individual legal advice to each SIPP member. Liberty SIPP's suggestion that a panel solicitor be used for the conveyance is not unusual and is consistent with the approach taken by other SIPP operators.
- Messrs E and P established the SIPP on the advice of an authorised and regulated IFA. The IFA introduced both clients to Liberty SIPP; but, before doing so, would have met with Messrs E and P, carried out suitability checks and then made a recommendation to establish the SIPPs. Liberty SIPP has said:-

"That at this stage neither the [IFA, Mr E or Mr P] considered or discussed the possibility of how a breakdown in their own personal relationship would affect a) their business or b) their pensions is difficult to understand... If Thorntons are saying that [Liberty SIPP], rather than [the IFA] who knew both members personally, met them both on a number of occasions and

looked at their personal and business financial circumstances, are to blame then this can only be for one reason and this relates to their own legal fees.”

- Both Mr E and Mr P agreed to, and signed, the Property Agreement. If there had been any concern about the issue of majority ownership and voting rights, then these should have been noted at the time. However, “the possibility of [Messrs E and P] falling out and the ramifications that this would have for their pension fund was not raised by anyone until it actually happened.”
- To ensure there would be no unauthorised payments charge levied by HMRC, Liberty SIPP, “received specific legal advice that as it was clear that [Mr E] appointed Thorntons on a personal front – something which Thorntons confirmed to Liberty – that these fees should be paid from him personally.”
- Liberty SIPP has, “spent a lot of time and money in trying to resolve this matter.” This included arranging a meeting, between all the parties, at Thorntons’ offices and seeking legal advice on the matter of Thorntons’ fees, but “sadly it was [Mr E] who wouldn’t accept any compromise.”
- Liberty SIPP has not sought to recover its own legal fees from Mr E’s SIPP, “despite them being caused by circumstances outside [Liberty SIPP’s] control and occurring as a direct result of the breakdown in [Messrs E and P’s] personal and business relationship.”
- Liberty SIPP agreed to pay the £500 recommended by the Adjudicator as it was, “happy to try and close this matter.”

37. I agree with the Adjudicator’s Opinion and I will therefore only respond to the key points made by the parties for completeness.

Ombudsman’s decision

38. As a publicly funded body, which provides applicants with a free alternative of going to court, my Office operates with limited resources which must be used proportionately. Mr E and Thorntons on his behalf have made detailed submissions, but the purpose of this Determination is to set out my conclusions, and the reasons for reaching them, rather than addressing each individual point raised. I am satisfied that I have identified, and will address, the key issues which are pivotal to the outcome of this dispute.
39. I can see that as both co-trustee for the purpose of the Property Agreement and as Director of Figure 8, the tenant of the Property, Mr P does have a potential conflict of interest. But so too would Mr E have done at the time the SIPP was established, since, at that time, he was also a director of Figure 8. I note no complaint was made about this at that time, which lends weight to the argument that it is hindsight and Mr E’s personal disagreement with Mr P which has given rise to this dispute.

40. Liberty SIPP is the administrator of Mr E's SIPP and I must consider its obligations to Mr E in that capacity. Particularly whether Liberty SIPP breached its obligations in circumstances that amount to maladministration. This raises three main questions:
- (i) Was there any obligation on Liberty SIPP to advise Mr E to seek independent legal advice;
 - (ii) whether, as Thorntons has alleged, the statements made in Liberty SIPP's property questionnaire actively discouraged Mr E from seeking independent legal advice; and,
 - (iii) has a conflict of interest arisen and, if so, has Liberty SIPP managed this appropriately?
41. Thorntons has argued that, before establishing the SIPP, Liberty SIPP, as a prudent SIPP operator, ought to have considered the prospect of a dispute between two discrete SIPP members with a jointly owned asset. But I consider that applying Liberty SIPP's duty of care to Mr E, in the way in which has been suggested by Thorntons, places a greater burden on Liberty SIPP than is envisaged by the relevant statute or regulations. I say this not least because it was not apparent, at the time the SIPP was established, that Messrs E and P would have such an acrimonious dispute.
42. Liberty SIPP, as administrator to Mr E's SIPP, is not qualified to provide legal advice and there is no legal or regulatory requirement that Liberty SIPP advise Mr E to seek independent legal advice. Likewise, no obligation to recommend that Mr E seeks independent legal advice arises, as a result of Liberty SIPP's contractual relationship with him. Nor can I see that it voluntarily assumed responsibility for doing so. Thus, the fact that Liberty SIPP did not suggest that Mr E should do so, does not amount to an error.
43. Thorntons suggests that Liberty SIPP's 'property questionnaire' discouraged Mr E from seeking independent legal advice and highlights that the Adjudicator conceded that "some aspects of the paragraph could be misunderstood." But, I find it disingenuous to suggest that the statements within the property questionnaire should be read in isolation.
44. When read in its entirety the intention of the paragraph, clearly, is to: alert Mr E to the delays Liberty SIPP has previously experienced, when a non-panel solicitor is used; to minimise costs to Mr E's SIPP as a consequence of appointing a solicitor unfamiliar with SIPP property purchases; and, to inform Mr E of the provisions Liberty SIPP has in place to recover costs and protect its position. I do not find Liberty SIPP's warning to be unreasonable and I do not consider that this amounts to a breach of trust.
45. Thorntons has argued that Mr E's inability to recover his legal costs is, "unjust." However, if the costs have not been properly incurred as part of Mr E's role as property manager and in accordance with the Property Agreement and the SIPP's

governing rules, then this may be deemed, by HMRC, to be an unauthorised payment and may attract a punitive tax charge.

46. For the same reasons as explained by the Adjudicator, I find that Mr E was not acting on behalf of the Trustees, but was acting in his personal capacity, when he sought advice from Thorntons. Thus, he cannot, under the provisions of Clause 3 of the Property Agreement, recover his legal fees as expenses incurred in his role as property manager. Further, in any event, I find that the Schedule to the Property Agreement does not authorise Mr E to procure legal advice and incur costs on behalf of the SIPP. In seeking advice from Thorntons, Mr E was acting outside his role as property manager, therefore I cannot direct that the costs he has incurred should be met by the SIPP.
47. On the subject of the Schedule to the Property Agreement, and for completeness, this document specifies that it is Mr E who is responsible for; establishing whether Figure 8 had effected repairs to the Property as per the Lease Agreement, collecting and apportioning rent to the SIPP bank accounts and carrying out rent reviews. For this reason, any complaint about Liberty SIPP's failure to fulfil these duties is bound to fail.
48. Thorntons has pointed out that the tenant was, at one point, six-months in arrears and that it may have been more favourable for Mr E's company, which was in a strong trading position, to assume the lease. However, I cannot see that such a proposal was made at that time, so I find that this is an argument which has been advanced now with the benefit of hindsight. Further, the Property Agreement requires the unanimous agreement of all the landlords before being able to act against the tenant. I consider it unlikely that Mr P would have agreed to his own company's lease being terminated, so I find it unlikely that this proposal would have been viable, even if it had been suggested sooner.
49. In this case the personal conflict between Messrs E and P has led to a disagreement in terms of how to deal with the tenant, in particular the sub-letting. But Liberty SIPP does not have any powers to unilaterally prevent the sub-leases from being arranged. So, in the case of the first three sub-leases, which were arranged prior to Liberty SIPP and Mr E being notified that this had happened, it is difficult to see what Liberty SIPP could have done to prevent this.
50. However, the forth sub-lease was arranged after Mr E had given Liberty SIPP a clear instruction that he objected to this course of action. At this point a conflict of interest was manifest and Liberty SIPP ought to have identified that it could not, objectively, continue to act in the interests of both Mr E and Mr P's SIPPs, since both parties had conflicting interests.
51. At this stage, the correct course of action would have been for Liberty SIPP to take steps to mitigate the conflict of interest. For example, by closing either one or both of the SIPPs and/or appointing a new, independent, Trustee and administrator to the

SIPPs. However, Liberty SIPP did not take any action to avoid the conflict of interest. I find that this amounts to maladministration.

52. As there has been an administrative error, I must now consider whether any injustice has arisen as a result.
53. I understand that since bringing his dispute to my Office, Mr E has decided to sell his share in the Property. He claims that, as a result, he has foregone the expected investment returns, resulting in financial injustice. However, I do not agree. There is no guarantee that the Property would appreciate in value, so this does not amount to an actual financial loss, rather a loss of expectation. Further, I would need to be satisfied that there was a direct causal link between this dispute and Mr E's decision to sell the Property. Whilst I can accept that Mr E's difficulties with the Property may have influenced his decision to sell his share, I am not persuaded that this was the sole consideration. I understand Mr E has used his SIPP to purchase a further commercial property, from which his company now trades. So, I consider this will also have contributed to his decision.
54. My powers enable me to make an award for non-financial injustice, but such awards are not intended to be punitive, rather they recognise the distress and inconvenience an applicant has suffered. However, I will only direct an award if the distress and inconvenience has been significant. Awards tend to be modest, usually starting at £500 and rarely exceeding £2,000.
55. In this case I agree that Mr E has suffered distress and inconvenience, which could otherwise have been avoided if Liberty SIPP had identified that a conflict of interest had arisen and had taken adequate steps to rectify the situation.
56. Therefore, I uphold Mr E's complaint in part.

Directions

57. Within 21 days of the date of this Determination, Liberty SIPP shall take whatever action it considers necessary in order to resolve the conflict of interest which has arisen as a consequence of administering two SIPPs which are in opposition to one another.
58. Liberty SIPP shall, also within 21 days of the date of this Determination, pay Mr E £500 in recognition of the significant distress and inconvenience he has suffered.

Anthony Arter

Pensions Ombudsman
29 August 2018

Appendix

Schedule to the property management agreement.

"SCHEDULE

THE SERVICES as referred to in the Liberty Pension Scheme Property Management Agreement between LIBERTY TRUSTEES LIMITED, [Mr E], [Mr P], and LIBERTY SIPP LIMITED dated.... 2009

1. Advising the tenants of any change in ownership of the Property for and on behalf of the Trustees.
2. The day to day management of the Property, broadly comprising the security and maintenance arrangements for the Property.
3. To ensure the tenants do not breach any part of their lease and to promptly notify the Trustees and the Scheme Administrator if such a breach occurs or is anticipated.
4. The invoicing of tenants for and on behalf of the Trustees for rent, service charge, insurance premiums and other payments due from the occupiers/users of the Property.
5. The collection of rent with any VAT payable, service charge, insurance premiums and other payments due from the occupiers/users of the Property for and on behalf of the Trustees.
6. Promptly deposit any income in respect of the property to the bank account as directed by the Trustees
7. To immediately advise the Trustees and the Scheme Administrator should there be any rent collection difficulties, be they actual or anticipated and take appropriate action to secure any deficit against the tenant in a timely fashion.
8. Keeping and maintaining such files and records in relation to the Property as may be required by the Trustees' auditors or any relevant public, fiscal or regulatory authority.
9. To promptly forward copies of invoices to the Scheme Administrator in respect of rent due and any refurbishment or development costs incurred, and any VAT payable or reclaimable thereon.
10. On production of the relevant invoice, to arrange for prompt reimbursement of property insurance premiums paid by the trustees and to clearly advise the tenant that this insurance only relates to the replacement value of the buildings, 3 years' loss of rent and £5 million public liability cover, all other insurance being the responsibility of the tenant.
11. To forward a policy schedule of the insurance to the Scheme Administrator within one month of the policy being valid."