

Ombudsman's Determination

Applicant	Mr & Mrs E
Scheme	Sanlam SIPP (the SIPP)
Respondents	Sanlam Life& Pensions UK Limited (Sanlam)

Outcome

1. I do not uphold Mr and Mrs E's complaint and no further action is required by Sanlam.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr and Mrs E have complained that Sanlam have failed in its duty of care to them as beneficiaries of the SIPP by:
 - failing to collect rent from the tenant for the property held within the SIPP;
 - failing to inform them that the rent for the property was in arrears;
 - failing to keep the land of the property held within the SIPP to a certain standard, which is a breach of the lease; and
 - legal costs have been incurred due to the rent arrears and non-payment of buildings insurance which are being incorrectly directed towards them.

Background information, including submissions from the parties

4. Mr and Mrs E applied to take out a SIPP with Merchant Investors (now part of Sanlam) in May 2010. When completing the application forms Mr and Mrs E signed a Risk Deed and declared:

"Now this deed witnesseth that the Subscriber(s) acknowledges and agrees that:

Merchant Investors Services Company Limited only facilitates the provision of a Self-Invested Fund via which the Subscribers may request that they acquire Commercial Property (including the Subscribers' own business premises) as an asset of the Fund and that Merchant Investors Service Company Limited, Merchant Investors Assurance Company limited and Merchant Investors (Trustee Services)

Limited do not accept any responsibility or liability for any claims or losses arising in relation to the subscribers' business or them individually, for the consequences of the investment decisions they make in relation to the Fund or otherwise.

In recognition of Merchant Investors Services Company Limited and Merchant Investors Assurance Company Limited agreeing to establish the Fund and, where appropriate, giving effect to the initial investors' request to appoint the investment manager of the fund I promise as follows:

1. To waive all rights, I or any person or persons claiming rights under any Account in my name, the value of which is determined in relation to the fund, may have at any time or times against Merchant Investors Services Company Limited and Merchant Investors Assurance Company Limited in respect of their duties or liabilities (other than those arising under the Financial Services and Markets Act 2000 and the FSA Handbook of Rules & Guidance or circumstances where they have acted in an unreasonable manner), whether in tort, contract or otherwise, in respect of anything done or omitted to be done (whether in accordance with the investment objectives and risk profile of the fund or not) by the investment manager or any other investment manager from time to time appointed by them at the request of the initial investors, in relation to the management of investments comprising the fund which is an asset, underlying asset or potential asset of the fund. For the avoidance of doubt, reference to the investment manager shall include any director, officer, partner, employee or agent of the investment manager.
2. To indemnify and keep indemnified Merchant Investors Services Company Limited and Merchant Investors Assurance Company Limited, at all times, on a full indemnity basis, from and against all actions, claims, demands, losses costs and expenses whatsoever incurred or sustained by them as a result of any such claim as aforesaid."
5. Mr and Mrs E transferred a property (comprising of land) to be held within the SIPP which was leased out to a tenant. They also appointed Killens to act as managing agents of the property. In its letter of appointment Killens confirmed "our involvement is to be maintained as a minimum and will primarily comprise of collecting the rent." Killens also said its involvement would not include finding a tenant, negotiating the terms of any letting or preparing any agreement for signature.
6. A new tenant, Miss A, was introduced by Mr and Mrs E and she took over the tenancy of the property in December 2012. Mr and Mrs E say that after 18 months of Miss A's tenancy, problems started to occur which included, the upkeep of the property and the payment of rent.
7. In March 2014, Mr E complained about the upkeep of the property and Sanlam served a notice on the tenant to rectify the situation. Whilst this appeared to be rectified, the problem since that period of time has reoccurred.

PO-17273 & PO-17315

8. In September 2016, Mr and Mrs E received a letter from Sanlam which informed them that rent arrears had occurred between May 2016 and September 2016. Mr and Mrs E say that:
 - 1) they should have been informed of the rent arrears at an earlier point; and
 - 2) the rent arrears should not have been allowed to occur at all.
9. As a result of the rent arrears and issues with who had liability for the buildings insurance for the property, Mr and Mrs E decided to have the tenant evicted and take her to the small claims court for the rent arrears. The tenant has since left the property but the question of the arrears has not been referred to the small claims court as Sanlam has stated that it is not willing to pay the legal costs for this. Sanlam has also said that if Mr and Mrs E wish to go to the small claims court, they will have to pay the cost of doing so. Mr and Mrs E do not believe that this is correct.
10. Mr and Mrs E also say they are approximately £11,000 out of pocket due to no fault of their own. They are the victims whilst Miss A has benefited, even though she breached the conditions of her lease, and Sanlam and its solicitors have continued to charge their fees. Mr and Mrs E consider that Sanlam should bear these losses and not them.
11. Sanlam say that its duties as the SIPP administrator do not extend to the day to day management of the property. Killens was appointed as the managing agent for the property. After Miss A failed to pay any rent in May 2016, it contacted Killens and the tenant to ascertain why the rent had not been paid. Killens did not reply. Miss A replied to say that she had been in hospital and would pay the arrears. In July 2016, when no rent had been received, it issued a final warning letter which prompted the payment of one month's rent.
12. Sanlam also say, that at that time it had a good line of communication with Miss A and, as she had paid one month's rent, it thought the matter could be resolved. On 26 July 2016, Miss A offered to double the monthly rent payable to clear the arrears. As no further payments were received on 18 August 2016, solicitors were instructed to issue a letter before action. Miss A did not reply to the solicitor's letter and on 30 August 2016, Sanlam wrote to Mr and Mrs E to ask how they wished to proceed.
13. On 8 September 2016, Miss A proposed a payment plan but this was rejected by Mr and Mrs E. Sanlam say that at this point the matter became more complicated as Mr and Mrs E contacted Miss A, and due to the nature of Mr and Mrs E's communication Miss A threatened her own legal action. The property is adjacent to Mr and Mrs E's residence and there was frequent interaction between the two parties.
14. Sanlam deny that it failed to take any action or failed to inform Mr and Mrs E when it was necessary. It was for Killens to collect the rents and manage the property accordingly. It was for the managing agent to inspect the property and give notice of any items of concern. Sanlam gave Killens notice of Mr and Mrs E's concerns but received no response.

PO-17273 & PO-17315

15. Sanlam had made Mr and Mrs E aware that any legal costs incurred would be met from the SIPP's funds except for the initial letter before action, issued in August 2016, and those accrued as a result of Mr and Mrs E contacting the solicitor directly. The instruction to pursue Miss A through the courts was solely Mr and Mrs E's decision and Sanlam outlined the costs and risks associated with such action.
16. Sanlam also say that although Mr and Mrs E wished to pursue an action against Miss A, the Court received a counter claim from her claiming that she had been continuously harassed by Mr and Mrs E, and that they had used the land for their own purposes. Sanlam had evidence concerning these claims from Miss A. In view of this, and following advice from its solicitors, Sanlam made a business decision not to pursue Miss A for the arrears as:
 - (a) there was no guarantee that Sanlam would win the case;
 - (b) Sanlam would have to provide the Court with incriminating documentation relating to Mr and Mrs E's alleged behaviour; and
 - (c) it was likely that Mr and Mrs E would have been summoned to give evidence in Court.

Adjudicator's Opinion

17. Mr and Mrs E's complaint was considered by one of our Adjudicators who concluded that no further action was required by Sanlam. The Adjudicator's findings are summarised briefly below:-
 - The first point of note is that Sanlam are not the managers of the property and as such are not responsible for introducing tenants, negotiating or collecting the rents, or ensuring that the property is maintained in good order. Killens was appointed as the manager of the property but, at Mr and Mrs E's instigation, its role was kept to a minimum.
 - Mr and Mrs E had introduced Miss A as a prospective tenant for the property and, to all intents and purposes, had agreed the level of rent to be paid. Mr and Mrs E are now trying to recoup the loss of rent and the other costs that they have incurred as a result of the breakdown in the relationship with Miss A, however, the Adjudicator considered that these could not be reclaimed from Sanlam.
 - There is an inherent risk with any property investment that either the expected rental income or the expected price on selling will not be achieved. Furthermore, there is the added risk that a tenant will default on the rent or will not keep the property in good repair. These are all risks that fall on the investors and not necessarily the SIPP provider. In this complaint Killens was responsible for collecting the rent and Sanlam's role was the administration of the SIPP. It appears that although Killens was responsible for collecting the

rent it did not take a lot of interest in whether the rent was collected and was not engaged to monitor the upkeep of the property.

- Sanlam recognised that the rent had not been paid in May 2016, and could have simply referred the matter to Killens to deal with Miss A. But in this instance Sanlam entered into correspondence with Miss A to try and resolve the issue. Although Sanlam thought it had found a resolution for the payment of the rent arrears, this proved not to be the case and Mr and Mrs E were notified of the rent arrears in September 2016. The Adjudicator did not consider that Sanlam had failed to collect the rent, or acted unreasonably, or with undue delay. Mr and Mrs E have also indemnified Sanlam, as set out in the Risk Deed which they have signed, against any claims arising from their investment in the property.
 - Mr and Mrs E have also claimed that Sanlam failed to keep the property up to standard. But this was not Sanlam's responsibility as it was not the property manager. Killens was the property manager but had not been appointed to monitor the upkeep of the property. By default, therefore, Mr and Mrs E were responsible for monitoring the condition of the property and given their proximity could, if necessary, request the Tenant to comply with the lease. However, due to the breakdown in their relationship with Miss A, this became more difficult.
 - Mr and Mrs E say that they are being asked by Sanlam to meet the legal costs incurred as a result of the rent arrears. The Adjudicator did not consider that to be an unreasonable request. Sanlam act as the administrators of the SIPP and any costs incurred as a result of legal advice regarding rent arrears and the pursuit of a tenant for those rent arrears fall as a cost to the SIPP and not Sanlam.
 - Sanlam also decided, following legal advice and in light of the evidence it received, not to pursue an action against Miss A. The Adjudicator did not consider that to be an unreasonable approach. Mr and Mrs E could, however, ask Sanlam to pursue the action but they would be responsible for meeting any costs incurred.
18. Mr and Mrs E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr and Mrs E have provided their further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr and Mrs E for completeness.
19. Mr and Mrs E say they are highly trained Financial Advisers of many years' experience and are used to dealing with matters of this standing.
20. All payments from the tenant were directed to Sanlam and not Killens, when apparently, Sanlam say that should have been Killens' administrative responsibility for the collection of the rent. Sanlam never actioned this and Mr and Mrs E say they

were never told that they should consult with Killens concerning this matter. Sanlam, insisted that the rent was sent to the SIPP, so it was in total control, as Landlords or "owners" of the property. Sanlam never informed them that Killens were dealing with matters as Land Agents. Sanlam also failed to pay Killens, as Land Agents, for any services apart from one valuation inspection, which Mr and Mrs E insisted upon in order to obtain a valuation of the land, as the tenant had failed to respect the property and they were concerned of the state of it.

21. Mr and Mrs E say that Sanlam told them that they should not have any dealings with the tenant and they complied with this request. Sanlam should have sorted this out before the six months of rental arrears had been accumulated.
22. Mr and Mrs E also say the Adjudicator failed to mention, that from the outset Sanlam had not collected the insurance payments due on the property from the tenant, Sanlam should not have deducted the premiums from the SIPP. Six years of insurance premiums of over £600 per year amounted to quite a sum and a considerable loss for Mr and Mrs E. They say that, therefore, Sanlam failed in its role as "owners." Sanlam said it was the SIPP provider's responsibility to pay the insurance premiums.
23. Mr and Mrs E also say they may be forced to seek alternative legal redress if they cannot achieve a satisfactory outcome. The whole situation is most unprofessional and there has been 'a huge amount of negligence'. As highly qualified and experienced financial professionals this is not what they expect from providers of financial services who should be "treating their customers fairly". In this regard Sanlam have 'massively failed'.

Ombudsman's decision

24. Mr and Mrs E say they are financial advisers of many years standing and as such I would have expected them to understand how a SIPP operates. The property was an investment of the SIPP and all income from investments should be paid into the SIPP. The agreement that Mrs and Mrs E made with Killens was for it to collect the rent and little else. This did not mean that Killens had to have the rent paid to it direct but it was incumbent on Killens to check that this was received.
25. Mr and Mrs E say they were not told to contact Killens. But as financial professionals they should have been aware of the agreement they had made with Killens and should not have needed to be reminded of this. The loss of rent due to Miss A's failure to pay this cannot be recouped from Sanlam, it is one of the risks associated with investing in property. Mr and Mrs E are free to pursue Miss A for the outstanding rent but that would be at their cost and the cost cannot be passed on to Sanlam.
26. Mr and Mrs E have said that Sanlam failed, from the outset, to collect the insurance premiums on the property. But responsibility for the collection of insurance premiums would normally be one for the property manager, which, was either Mr and Mrs E, or

PO-17273 & PO-17315

Killens. Killens appointment was a restricted one and does not appear to have included all aspects of property management so the collection of the insurance premiums may have been the responsibility of Mr and Mrs E rather than Killens. I therefore find that the fault for the non-collection of the insurance premiums cannot be wholly blamed on Sanlam.

27. For the reasons I have given, I do not uphold the complaint.

Anthony Arter

Pensions Ombudsman
27 February 2018