PO-17357

Ombudsman's Determination

Applicant	Mr G
Scheme	IPM Personal Pension Scheme (the **SIPP**)
Respondent	IPM

Complaint Summary

Mr G has complained that IPM failed:-

- To follow his instructions in respect of the 2013 Lease between IPM and AH.
- To act timeously in dealing with the breach of covenants, in the 2013 Lease in respect of 'Signs' and 'Alterations', by AH.
- To obtain Counsel's Opinion on the basis advised by its legal adviser.

To put matters right Mr G wants IPM:-

- To apply at its own cost rectification of the 2013 Lease to reflect the terms of the Sale Agreement.
- To reimburse him Counsel's fees of £2,860 and the SIPP legal fees debited from the pension fund.

Summary of the Ombudsman's Determination and reasons

The complaint should not be upheld because:-

- While IPM's failure to draw Mr G's attention to the fact that the 2013 Lease did not include the exact terms he had instructed amounts to maladministration, there is no evidence of financial loss arising from this to the SIPP.

- While IPM's maladministration has caused Mr G some distress and inconvenience, it is not considered to be significant.

- There is no basis to order IPM to seek rectification of the 2013 Lease to reflect the terms of the sale agreement.

- IPM's decision not to proceed further with legal proceedings against AH in respect of the signage and fixtures was properly made.

- There is no basis for IPM to reimburse Mr G Counsel's fees and reimburse the SIPP legal fees that IPM has debited from it.

Detailed Determination

Material facts

1. Extracts from the Trust Deed & Rules (2012), the Sale Agreement and the 2013 Lease are provided in the Appendix.

2. IPM is the administrator of the SIPP. Its Trustee company, IPM Personal Trustees Ltd, is the owner and Landlord of a property (**the Property**) held within the SIPP. The Property was leased to Mr G in May 2006. From the Property Mr G operated a law practice (**the Company**). In June 2006 Mr G signed a Property Management Agreement with IPM, which confirmed his appointment as Managing Agent of the Property.

3. The Property displayed the Company's name on two fixed wooden bi-lingual signs. The smaller of the two signs hung from an ornamental quill apparatus. The larger sign was fixed to an exterior wall.

4. On 4 June 2013:-

   - Mr G informed IPM that he was in the process of selling the Company. He said the prospective purchaser, AH, had asked that the 2006 Lease on the Property be surrendered, and a new lease be granted to it on substantially the same terms as the existing lease except for the following three variations:-

     1. The term was to be for a period of 24 years with a break clause after 17 years.

     2. The initial rent was to be £17,000 per annum with three yearly rent reviews with no downward rent review.

     3. The Directors/Shareholders were to give personal guarantees in respect of the rent. This obligation would cease on ceasing to be a Director or Shareholder providing that there was always a minimum of eight personal guarantees in place.

   - In response IPM provided Mr G with a letter of comfort regarding the lease of the Property and a new lease checklist "to summarise the agreed heads of term of any new lease". IPM asked if the letter was sufficient and that Mr G look through the checklist and if there were any points that required clarifying to let it know. Schedule B of the checklist stated:

     "The New Lease will provide for personal guarantees from the director shareholders on a joint and several basis to pay the rent reserved by the New Lease and to observe and perform the covenants therein contained providing always that on retirement of a Director who ceases to be a shareholder his or her personal liability shall cease subject to there always being a minimum of 8 personal guarantees in place in respect of the rent payable and the covenants to be performed under the terms of the Lease."

- Mr G asked that the letter be amended to state that the new lease would be substantially on the same terms as the existing lease except for the three numbered points he had previously advised to IPM.

- IPM provided a revised comfort letter, dated 4 June 2013, stating that "the new lease will be on substantially the same terms as the existing one save for" the three variations noted in paragraph 4 above. IPM informed Mr G that the solicitor it normally used was Matthew Waite & Co (**MWC**). It said MWC had its own lease template which should broadly be in line with the existing lease, but it would send MWC a copy of it for reference, so it could make sure that was the case.

5. On 27 June 2013 Mr G returned the checklist to IPM. He said the letter of comfort set out the three main variations from the 2006 lease to be surrendered. He asked IPM to correspond directly with AH in connection with the proposed new lease and if IPM had any further queries to contact him.

6. On 2 July 2013 MWC wrote to IPM enclosing drafts of the Deed of Surrender and lease for its approval. MWC said it had not included any express provision in accordance with the terms of Schedule B of the New Checklist. MWC said:

   "It is possible, for example, that two of the directors of the company may simply retire and not be replaced. In these circumstances it cannot be acceptable merely for two independent guarantors to replace the retired directors without IPM having some right to vet the suitability of the new guarantor. My view, therefore, is that we should leave the provision out of the lease for the time being and see what the tenants suggest. One option would be to deal with this by way of [a] side letter."

7. On 21 August 2013 Mr G wrote to IPM returning the counterpart Deed of Surrender duly signed. Mr G said he had received a fair copy of the proposed Lease (the **2013 Lease**) and confirmed it had his approval.

8. Following an examination of the Property and communication between Mr G and IPM, on 3 December 2014 IPM sent AH a letter. It requested AH to confirm that it intended to carry out necessary repair/decorative work to the Property and provide details of the outside signage on the Property, which had been changed without its consent being sought. On the latter matter it said under clause 26 of the 2013 Lease the Tenant was not permitted to attach any signs to the outside of the Property or display any signs inside the Property so as to be seen from the outside without its consent as Landlord.

9. AH replied that it hoped to carry out some internal decorative work in the New Year. However, the overall decoration of the property was in a reasonably good condition. AH gave its assurance that the maintenance and redecoration of the building would be kept under review. AH provided a copy of the sign that was due to go up outside the Property. It said Building Regulations did not allow it to replace the previous sign with another wooden one, which had fallen-down because it had rotted. As it was a health and safety issue it was required to replace it using different material.

10. Mr G commented on AH's response. Concerning the signage, he said:-

    - The design was approved but the signs must be bi-lingual.
    - The hanging sign must be suspended from the original fixture which had been removed and was missing.
    - Both signs must be of wood which was a stipulation of the original planning permission. The property was situated in a conservation area. If AH was seeking to rely on Building Regulations then written notification was required that the wooden signs were inappropriate and in breach of the Regulations.
    - AH's representative had been informed of the above a month ago.
    - Any signs that did not comply with the above would be removed at AH's expense.

11. IPM wrote to AH on 23 December 2014. It said it would not permit any works until it was satisfied that appropriate steps had been taken to comply with the conservation area. It requested confirmation that the sign would be bi-lingual and would be suspended from the original apparatus and that both signs would be of wood. It said if AH was to rely on building regulations then it would require written confirmation that wooden signs were not acceptable.

12. An AH telephone note, dated 7 January 2015, of a call with IPM says:-

    - IPM explained that Mr G was not satisfied with IPM's response (as agreed with AH) before Christmas.
    - Its response to IPM was as discussed and agreed with IPM. It was not breaching either Planning or Building Regulations. It did not trade as "….." and therefore it would not be added to the sign. It had been advised by Building Control to use material other than wood for the sign.as it would last longer.
    - It repeated its view to IPM that the whole issue had only blown up because it had changed the name on the sign from JRL to AH and Mr G did not like it.
    - IPM confirmed that it had agreed everything was fine before Christmas and that AH had sent a mock-up of the sign for IPM's file which had raised no objection.

13. In January 2015 Mr G emailed AH that he had been appointed Property Manager. On the signage he said:-

    - He reiterated that the signs must be bilingual (to comply with the … Language Act) and should be of wood as the property was in a conservation area.
    - He said the hanging sign could be secured to the existing fixture so that it did not swing in windy conditions.

- He required an explanation as to the whereabouts of the original fixture which had been removed.

- It was his intention to arrange for the new signage to be removed within 7 days if contact had not been made with him by a representative(s) of AH so that these requirements could be discussed.

14. On 22 January 2015 AH replied to Mr G and sent a copy of its response to IPM:-

    - It did not accept his standing as Property Manager to make representations on behalf of IPM, the Landlord. It had been in direct contact with IPM and the issue of signage had been agreed. It would continue to correspond with IPM directly until it received written confirmation from IPM to the contrary.

    - Referring to clause 26.2 of the 2013 Lease, it did not require IPM's consent to attach signs. The signs that had been erected were expressly exempt from the consent provision.

    - It was fully aware of the provisions of the …. Language Act and confident that it was not in any breach relating to its signage.

    - If he interfered or instructed others to interfere with its signs there would be an immediate application for an injunction for breach of quiet enjoyment and damages.

    - He might want to consider whether his purporting to act as Property Manager conflicted with his role as Consultant to AH and his duty to act in its best interests.

    - The original feather fixture and the old wooden sign had been retained but were not to be re-affixed to the Property. It would be held to the Landlord's order.

15. Mr G requested IPM to send a letter to AH stating that it did not approve the signs and explain that he was acting as its Property Manager. Mr G said he believed that there had been a further breach of the terms of the 2013 Lease by the removal of the two fixed signs, one of which was missing. The actions constituted an external structural alteration for which prior written consent was required from the Landlord in accordance with clause 25.1 of the Lease. Mr G said that the liquidator of the Company had to instruct solicitors DTM Legal of Chester (**DTM**) to act on its behalf in connection with matters arising out of the sale agreement. Mr G said he hoped DTM would accept instructions from IPM to deal with these issues as well.

16. On 29 January 2015 IPM asked Mr G if he could ask DTM if it was prepared to act for IPM. Assuming that was acceptable it would then arrange for formal instructions to be issued. IPM said it would reply to AH that he was acting as the Property Manager, but regarding the other issues it felt it would be best to wait and see whether DTM would act for it. IPM said it would also suggest a meeting between AH and Mr G to try and resolve matters. The same day IPM emailed AH that Mr G had been appointed Property Manager.

17. On 6 February 2015 Mr G asked IPM to confirm by email that it had given no permission or approval about the new signs and that it had informed AH that he was the Property Manager. Not receiving the required confirmation, Mr G escalated his request to a formal complaint on 16 February 2015. Shortly afterwards IPM notified Mr G it had referred the matter to its client liaison office and that DTM had agreed to act for it.

18. On 10 March 2015 Mr G emailed DTM. He said that while he understood that it had some reservations about the interpretation of the word "appropriate", it was an umbrella term meaning "appropriate" to the character of the building, the surrounding environment (which was a conservation area) and finally the demographics of the area (which was predominantly Welsh speaking). By resisting use of the Welsh language on signage AH was interfering with the Landlord's and his right as a Property Manager to deem the incorporation of the Welsh language as appropriate and give right to the submission of an interference application to the …. Language Commissioner.

19. On 13 March 2015 IPM issued its response to Mr G's complaint. It said:-

    "In summary, we are sorry that you feel let down by IPM in this matter but in truth we were in a difficult position, in attempting to satisfy your requirements as the scheme member while not breaching either our responsibilities as landlord or the terms of the Data Protection Act. We believe that our actions were reasonable in the circumstances, but we will endeavour to ensure that you are more satisfied with our service moving forward."

20. The same day DTM emailed AH. Concerning the Landlord's fixtures and fittings and signage it said:-

    - Its client required the fixture that had been removed to be reinstated and the signage hung from the fixture.

    - As clause 26.2 was ambiguous it had reviewed the original Plc document which was used in the drafting of the clause. It was clear that clause 26.2 should have read:

      "The Tenant shall not attach any Signs to the exterior of the Property or display any inside the Property so as to be seen from the outside (except Signs of a design, size and number and in a position that are appropriate to the Property and the Permitted Use), (without the consent of the Landlord, such consent not to be reasonably withheld)."

      It was clear that what was intended by the drafting was that the exception bound AH and did not excuse the need for the Landlord's consent. The literal interpretation that AH was relying on did not work. The original signage was wooden. It was necessary for all signage to be appropriate to the Property which IPM did not accept it was. IPM had not agreed the signage. The signage failed to

display the Welsh language. It was 'appropriate' for the signage to be bilingual like the other businesses in the area.

21. Various communication exchanges followed over the next eight months. Each party maintained its position.

22. On 9 November 2015 DTM informed Mr G that there was a dispute between IPM and AH as to what had been agreed regarding signage. DTM said there were no conditions set out in the Sale Agreement on signage and the 2013 Lease did not provide any conditions other than the design, size and number in a position appropriate to the Property and the permitted use without the consent of the Landlord, with such consent not be unreasonably withheld or delayed. It had therefore asked AH for evidence that building control had confirmed that it should use some material other than wood for the sign.

23. The same day Mr G emailed DTM. He said:-

- "…." was the …. for Law. It was nothing to do with a trade name, merely a bilingual form of signage. The word would precede the company name. The use of bilingual signs was commonplace in the area.

- AH was alerted on 23 December 2014 that the proposed signage was unacceptable and specific requirements were set out in the letter from IPM. The original fixtures should be replaced, and bilingual names could be displayed on them.

- He had always accepted that AH had bought the trading name of JRL and it was up to AH whether it used it or not.

- The "mock-up" of the designs were approved subject to the amendments recorded in IPM's letter. No permission was given to remove the fixtures. Neither was permission sought to vary the materials used for the new signage.

- The apparatus and wood signs were designed and erected at the request of the Local Planning Authority. Obviously, health and safety issues were considered by the planners at that time.

- It was significant that AH had been unable to produce any written evidence giving approval for removal of the fixtures and erection of the new signage.

24. On 22 November 2015 Mr G again contacted DTM. He said:-

- Clause 10(ii) of the Sale Agreement provided:-

  "The Seller will use their best endeavours to procure the grant of a new Lease to the New Company or the Existing Partnership as the case may be by IPM Personal Pension Trustees Ltd in substantially the same terms as the existing Lease to the Seller subject to the following provisions being incorporated".

- A copy of the existing 2006 Lease was attached to the Sale Agreement. Provision 3.6 on signage said:-

  "not to display any advertisements on the outside of the property or which are visible from the outside unless the Landlord consents (and the Landlord is not entitled to withhold that consent unreasonably)".

- This differed from the final version in the 2013 Lease and supported DTM's original contention that the drafting of the 2013 Lease was defective.

- He was not consulted about the drafting of the 2013 Lease, which was left to the solicitor acting for IPM. It was not substantially in the same form and differed considerably from the 2006 Lease. AH was aware of the terms of the 2006 Lease as it was a party to the Sale Agreement.

- He was very anxious to resolve the matter as he had recently sold his house with a view to moving away.

25. DTM acknowledged Mr G's emails. It said it did not think there was arguable case to rely on the 2006 Lease when the parties entered into the 2013 Lease, which was subsequent to the Sale Agreement. Both parties had been legally advised. Therefore, reverting back to Clause 26 of the 2013 Lease was required. The clause provided that consent was required from the Landlord. There was a clear dispute of fact between IPM and AH as to what had been agreed by IPM as Landlord. DTM said it would revert back to AH with his comments and if the signage was not agreed then he would need to take action to enforce the same under the 2013 Lease.

26. On 18 December 2015 IPM emailed Mr G:-

    "I think on the basis of us being clear to Allington Hughes, we need to put them on notice that we will be issuing proceedings if they do not provide signage in accordance with your requirements."

27. Mr G replied to IPM that the layout of the signs was acceptable subject to the amendments that had been sought a year ago.

28. In January 2016 Mr G asked IPM if DTM had made any progress in the matter and then DTM directly to provide an update. DTM replied that the reason no legal action had been taken was because it did not consider "the case to be that strong in terms of demanding the signage change etc". DTM said:-

    "We have discussed the drafting of the clause and what we say it intended but clearly Allington Hughes have a different argument. There will be substantial legal costs involved with litigation which I can set out but suspect it may put you off taking such course of action which of course would be in the name of the Pension Fund in any event and subject to their instructions. If you would like to obtain Counsel's opinion on the strength of your case before making any decision then please let me know and I will obtain a quote."

29. IPM replied to DTM and Mr G that as Trustee it did not feel it would be prudent to pursue the matter further.

30. Mr G gave his opinion that it was in the Landlord's interests to take Counsel's Opinion.

31. On 26 April 2016 Mr G emailed IPM. Concerning the signage and fixture he said he would abide by the decision of Counsel if it was unfavourable and supported the view of DTM which appeared to be volte-face from its earlier advice. He said the 2013 Lease had been prepared by IPM's solicitors on IPM's behalf. As Trustee of the fund IPM owed a duty of care to him as the beneficiary if, as suggested by DTM, the relevant part of the 2013 Lease had been drawn in ambiguous terms. At its expense IPM should rectify the 2013 Lease to reflect what was originally intended. If this could not be agreed then as Trustee it could make an application to the Court to achieve this. Mr G asked IPM to confirm that Counsel would now be instructed to advise on the matter.

32. On 9 May 2016 IPM copied to Mr G DTM's summary of its advice so far. IPM said:-

    - It would now settle DTM's invoice.

    - Referring to DTM's summary, DTM remained of the opinion that AH was under no obligation to display bilingual signs. AH was holding the original sign and would restore it at the end of the lease term. Alternatively, the sign was available for collection.

    - Regarding the signage clause in the 2013 Lease, IPM had spoken with MWC who had confirmed the clause was in its standard form, which it had used for hundreds of other such transactions, without dispute. It had also queried the matter with DTM who were of the view that whilst the clause was slightly vague there was no chance that a court would decide that MWC had been negligent.

    - DTM did not see any merit in proceeding with the case and given that there was no loss of income to the SIPP, or damage to the property, IPM believed it would be failing to act as a prudent trustee if it ignored DTM's advice and incurred more legal fees.

    - It appreciated that he would be disappointed by its response, but it must protect the value of the pension scheme.

33. In reply Mr G said:-

    - IPM and DTM seemed to be under the impression that there was only one sign which had been the subject of protracted correspondence. There were in fact two signs. The first was suspended from apparatus attached to an exterior wall of the building. The sign had been replaced on different apparatus. He believed the original apparatus was held in the building's cellar/strong room. No permission had been given for the apparatus to be taken down. The content and wording of

the replacement sign was a different matter which had been discussed at length in earlier correspondence. The second, larger sign, was missing. It was also of wood and had been attached to an exterior wall of the building. There were two separate issues. The first, the wrongful removal of the Landlord's fixtures/equipment, and the second, the wording on the new signs.

- He did not accept what MWC had said. When he sold the Company the Sale Agreement provided for a new Lease in substantially the same form, as the 2006 Lease with certain variations which he had communicated to IPM. These related primarily to the term, the rent and rent revues, guarantors and replacement guarantors.

- He was not a party to the 2013 Lease and MWC dealt directly with AH. The provisions of the 2006 Lease relating to fixtures and signage was varied. He was not consulted about this. It was naïve to suggest that a "one size fits all" lease was appropriate. MWC should have drawn to his attention the changes as no premises of this type were identical to others.

- He had not taken legal advice when the 2013 Lease was prepared. He had relied on the skill and judgment of MWC.

- He did not believe that MWC had diligently exercised its duty of care.

34. Mr G asked IPM what it proposed to do about the missing sign and the discrepancies between the 2006 Lease and the 2013 Lease. IPM responded:-

- DTM had offered to collect the first sign. It could also ask DTM to collect the second sign.

- Usually such matters would be dealt with by a managing agent simply visiting the Property to query the position. But as one was not appointed, in this instance these responsibilities passed to him as per the terms of the Property Management Agreement. If he felt he could no longer act as such it required him to appoint a professional agent to carry out the role.

- Concerning the signage clause, a copy of the draft 2013 Lease was sent to him prior to its completion and he had approved it in writing on 21 August 2013. It was satisfied that the signage clause was in standard form and that the 2013 Lease was fit for purpose.

- Ultimately AH had clearly breached the terms of the 2013 Lease by not obtaining IPM's consent to change the signs, but DTM believed that if IPM took legal action to enforce rectification it would be costly and without any real gain to the pension scheme. Additionally, the court may consider that it was being unreasonable in withholding consent.

- It would not be taking any action in respect of the 2013 Lease as it believed it to be set on standard commercial terms and he had approved a draft copy prior to completion.

35. On 19 May 2016 Mr G emailed IPM:-

- He reiterated the situation in respect of the two signs.
- Concerning the position of Property Manager, he said he had never declined the role. He had raised the issues with AH, who reluctantly accepted his position following a letter from IPM. Thereafter AH had refused to comply with his requests. As he had no legal identity or standing in a dispute between IPM (as Landlord) and AH (as Tenant) he had referred the matter to IPM.
- He did recollect checking the draft 2013 Lease to ensure that the contractual amendments had been made. However, he did not deem it necessary to check the other clauses as the remainder of the Lease was supposed to be the same as the 2006 Lease. Clearly other changes had been made and MWC should have drawn them to his attention, but it did not.
- He was pleased that IPM agreed that AH had breached the terms of the Lease. In fact, there had been two breaches. The first, removal of the Landlord's fixtures without permission, and the second, failure to obtain consent to the new signage. There had also been the removal/destruction of the fixed larger sign.
- He did not believe for one minute that a court would find the Landlord unreasonable in the present instance. The suspending apparatus and the signs were of a special nature that added to the character of the building which was in a conservation area. The building was much less distinguished as a result. He could not imagine a …. speaking judge having any sympathy for the Tenant, especially for failing to have bi-lingual signs.
- He maintained that Counsel's Opinion should be taken. He did not believe a claim would be unsuccessful and costs normally followed the event. That would not be to the detriment of the pension fund but would restore the status quo.
- IPM's proposed course of action did not protect his investment.

36. IPM maintained its position and treated Mr G's email as a complaint. On 16 June 2016 it gave its response to Mr G:-

- As Pension Trustee it had an obligation to act in the best interests of his pension scheme at all times. IPM was not able to consider external matters such as personal disputes or the aesthetics of the local area surrounding the Property.

- IPM and DTM were aware that two signs had been taken down. Mr G was aware that the hanging sign was available for collection. AH had advised DTM that the fixed second sign had been disposed of by the contractors who erected the new sign. It therefore appeared there was no possibility of it being retrieved. IPM apologised for previously suggesting that the sign may still be at the Property.

- IPM had pursued the possibility of legal action against AH to force AH to reinstate the hanging sign and replace the fixed sign with a new wooden sign of a similar style to the old one. DTM had corresponded at length with AH in the hope of persuading AH but without success. DTM then advised that it was of the opinion that the case was not strong enough to justify the substantial legal fees which would result from taking the matter through the courts. As Trustee IPM believed it had no choice but to follow that advice.

- Mr G had confirmed that he received and checked a draft copy of the 2013 Lease before it was finalised, but he did not check the signage clause. The Lease was in its standard form and was entirely appropriate for a transaction such as this. Also, IPM had looked through the 2006 Lease and did not believe that there were any provisions which would have afforded greater protection.

- While IPM appreciated that his relationship with the tenant may have made his position more difficult as Property Manager, IPM had suggested on 12 May 2015 that he arrange a meeting with the tenant but two days later he had called to confirm that he did not want to meet with any employee of AH. If this remained the case it may be prudent that he consider appointing a professional agent.

- Taking any further legal action would be counterproductive. Ultimately, the Tenant promptly paid the rent and the change in signage would not have affected the property value. Any further legal action was likely to be extremely expensive and the benefit to the scheme, even if successful, would be at best marginal.

- The only genuine impact that the change of sign would seem to have was to slightly alter the style of the area. Unless the local authority contacted IPM to advise that the Property was in breach of planning contracts that was not a matter which affected the SIPP.

- While IPM was sorry that one of the signs appeared to have been lost by the Tenant, IPM did not believe there was any recourse available to it, at a reasonable cost, which would remedy the issue. Nor did IPM believe that the issue had any material bearing on the SIPP. Also, IPM was satisfied that the Lease prepared by MWC was suitable.

37. Mr G replied to IPM on 26 July 2016:-

- He had not previously made a formal complaint but IPM had chosen to treat his queries as such.

- It seemed IPM was confused as to the terms of the Lease relating to type and content of signs and those relating to Landlord's fixtures. There were different provisions in the Lease relating to both. Landlord's fixtures had been removed without permission. One apparatus for a hanging sign was still held in the premises. The second apparatus had apparently been destroyed. The Tenant clearly authorised its removal and disposal. But IPM had sought no compensation. DTM had indicated the relevant statutory provision to enable this to be done.

- IPM had not responded to his proposal of obtaining Counsel's Opinion.

- Concerning IPM's statement that the 2013 Lease was in standard form. His express instruction was that the new Lease was to be in the same form as the 2006 Lease with only notified amendments being incorporated in the new Lease. DTM had identified errors of drafting leading, in part, to the current problems relating to the type and content of the signage. Clearly neither IPM nor MWC followed the instructions given or IPM failed to instruct MWC properly.

- He declined a suggested meeting with AH because he knew from previous meetings that it would be unproductive to proceed in this way because of AH's negotiator's attitude and AH's reluctance to accept him as Property Manager.

- Legal fees had been incurred for advice that confirmed that AH was in breach of the covenants in the Lease. There was some weakness in the case relating to the content and type of sign as a result of poor drafting which IPM and MWC were responsible for.

- Paradoxically, IPM had stated that it did not want to incur legal or other costs which would deplete the value of the pension fund but had suggested that another Property Manager be appointed which presumably would be an additional expense to the pension fund.

- It followed from the above that IPM's approach was inconsistent and it had not dealt comprehensively with the issues that had been raised.

- The matter required formal resolution and the pension fund should be reimbursed the legal fees expended in pursuing it because of the shortcomings he had identified. The advice received confirmed breaches of covenant by AH. IPM was the Landlord. Ignoring obvious breaches did not rectify matters. It was ignoring his advice as Property Manager. He had an intimate knowledge of the building and the locality and was an experienced commercial property lawyer with some 45 years' experience.

- His response should be treated as a formal complaint.

38. IPM replied that while Mr G may not have intended his email of 19 May 2016 to be treated as a complaint there was no doubt that it constituted a clear expression of dissatisfaction and therefore under FCA regulations it was obliged to treat it as a formal complaint. Its final position was as per its 16 June 2016 letter and while it appreciated that he was unhappy with its conclusions it was not changing its position.

39. Mr G complained to the Financial Ombudsman Service (**FOS**). FOS referred Mr G to the Pensions Advisory Service (**TPAS**). TPAS contacted IPM and asked:-

- Why it would not accede to Mr G's request to seek Counsel's Opinion?
- As Mr G was the beneficiary and felt seeking Counsel's Opinion desirable, despite the expense, should not it as Trustee act in accordance with his wishes, particularly in view of Mr G's legal/property experience?
- For its comment on Mr G's claim that legal fees had been wasted and his comments on the drafting of the 2013 Lease.

40. IPM replied:-

- In the vast majority of cases it would follow the instructions of its scheme members when dealing with investment decisions, which it considered this matter constituted.
- However, as per FCA guidelines, it would not follow instructions blindly and to the detriment of the SIPP. It had asked DTM (who Mr G had selected) to take action against AH. After corresponding with AH and considering the matter at length DTM had advised that it did not believe IPM's case was strong enough to take further action.
- Additionally, the pension fund had suffered no financial loss so it could see no benefit to the pension scheme in further pursuing the matter.
- Its policy was to follow the advice of legal professionals, except in very special circumstances. Given that it could see no benefit to the pension scheme, even with a successful outcome to legal proceedings, it did not consider this was such a case.
- As that it had followed the legal advice provided, it did not understand the suggestion that it had wasted legal fees. In truth it had shielded the pension scheme from such wastage by refusing to take the matter further.
- Concerning the 2013 Lease, while it appreciated that this was not drafted in the same form as the 2006 Lease, it was drafted in line with the standard template, which it had used in hundreds of separate transactions without problem. The signage clause was clear, and while DTM informed Mr G that it believed it to be slightly vague it also stated that it was debatable and that no court would feel that there was any negligence in the drafting. There was no clause in the 2006 Lease

which would have offered any greater protection. Consequently, in truth it was an academic point.

41. Following consultation with Mr G the TPAS adviser wrote again to IPM advising that Mr G's request for Counsel's Opinion seemed reasonable and sensible. Given the issue regarding signs, dual language, the character and the environment of the Property, as well as Mr G's experience of legal issues, Mr G was in a good position to judge the justification of seeking Counsel's Opinion, any costs of which would of course be borne by the SIPP. DTM had offered, in January 2016, to provide a quotation for Counsel's Opinion and to set out the costs of litigation. The TPAS adviser suggested that IPM obtain the costings, notify Mr G and liaise with Mr G regarding the viability of pursuing legal action.

42. While maintaining its position IPM said that it would go back to Mr G and inform him that he was free to pursue the matter through the courts "as this seems to be your wish. We certainly do not mean to be obstructive towards our members and have merely sought to act as prudent trustees."

43. IPM subsequently emailed Mr G. It said it would obtain a quotation of the likely costs of Counsel's advice on the matter.

44. On 1 March 2017 IPM requested DTM to take the matter of breach of covenant by AH to Counsel on its behalf. It asked DTM to send its first draft of instructions to Counsel to Mr G so that he had a chance to check it was in order and provide any input. IPM gave its authority for DTM to liaise with Mr G.

45. DTM asked IPM to clarify the questions being asked of Counsel. It had received a copy of Mr G's complaint. There appeared to be a conflict of interest as Counsel was being questioned whether, or not, IPM had failed to instruct MWC properly and that amendments had been made to the 2013 Lease without reference to Mr G. When Mr G was sent the 2013 Lease for signing he did not check that it contained all the amendments. Was the advice restricted to the signage and the fixtures or was it intended to be wider and include allegations of failure to carry out instructions?

46. Mr G emailed DTM that surely it was in IPM's interest to know whether there had been a breach of duty on its part or on the part of MWC. If Counsel advised that there had been then clearly DTM would have to decline further instructions and he would have to consider other options.

47. IPM informed DTM that it required Counsel's Opinion on the signage and fixtures issue only.

48. Later IPM notified TPAS that it had informed Mr G it believed that instructing Counsel to determine whether the signage clause was ambiguous would effectively be asking whether it had failed to instruct DTM correctly, and that this would constitute a conflict of interest. DTM shared the same view. When it agreed to instruct Counsel, it was on the understanding that it was purely to ask whether there was a likelihood of success

in taking further enforcement action against AH. If Mr G wished to take further advice as to whether IPM was negligent in letting the Property then he would need do that himself.

49. Mr G subsequently obtained Counsel's Opinion on the signage and guarantor issues. Mr G has not submitted a complete copy of Counsel's Opinion, on the grounds that the Opinion includes comments that are not relevant to this complaint. From the extracts provided, Counsel makes the following comments on the signage issue:-

- Assuming the signs and apparatus belong to IPM as Landlord and owner of the Property, once taken down from the wall they become chattels.
- Provided AH had retained the items, IPM ought to be able issue a claim for them to be delivered up. However, before issuing proceedings, a request for them to be delivered should be made, to avoid the possibility of IPM being penalised in costs.
- But if AH had disposed of the wall sign such a claim would be pointless. In which case IPM could seek damages, albeit it was questionable whether that would be proportionate. The small claims track for cases up to £10,000 was generally non-costs bearing,
- It appeared that AH's contention was that Landlord's consent did not apply to 'appropriate' signs. On this basis the requirement for Landlord's consent would only bite on signs that fell into the 'inappropriate' category. But it is unlikely that is the intention of clause 26.2. The clause includes a requirement that the Landlord's consent not be unreasonably withheld. On AH's basis the Landlord would only be called upon to consent in cases where the sign was 'inappropriate' to the "Property and the Permitted use". But it was hard to conceive of an unreasonable refusal of consent for an inappropriate sign. Equally, it was doubtful that it was intended that the request for consent would even be made for inappropriate signs.
- The Sale Agreement and letter from IPM of 4 June 2013 indicate that AH and IPM intended for the 2013 Lease to be substantially the same as the 2006 Lease. Clause 3.6 of the 2006 Lease is a covenant not to display any external advertisements without consent.
- While linguistically it was possible to read clause 26.2 as AH wants, it is not the most natural use of the language and does not accord with common or business sense.
- Nevertheless, AH appeared to allege that IPM gave its consent orally. But under clauses 1.9 and 37.4 of the 2013 Lease consent means consent given in deed or by the Landlord signing a written statement waiving the requirement for a deed.
- More doubtful was whether IPM could reasonably refuse consent to AH's sign. From the papers provided it seemed that while the planner had some input into the original signage used, that may have fallen short of it being a requirement of

the Property's planning permission. Nevertheless, it seemed that AH may have asserted that it had planning permission for its sign, which presumably IPM could check reasonably easily.

- While appreciating the use of '…', and the original form of signage would be in keeping with the locality, it was less clear, and did not necessarily follow, that a sign which omitted the word, and which was plastic and wall mounted could reasonably be refused consent.

50. Mr G has not submitted a complete copy of Counsel's Opinion on the guarantor's clause, on the grounds that the Opinion includes comments that are not relevant to this complaint. Mr G says that Counsel made the following comments:-

- The 2013 Lease did not accurately set out all the terms of or comply with the provisions set out in clause 10 of the Sale Agreement.
- The 2013 Lease was not substantially in the same terms as the 2006 Lease,
- IPM failed to follow Mr G's instructions with regard the 2013 Lease.
- The guarantor provision in the Sale Agreement was not incorporated in the 2013 Lease.
- It is not known if IPM negligently failed to instruct MWC to draft the 2013 Lease in accordance with Mr G's instructions as per the Sale Agreement or chose not to do so.
- It is not known if MWC ignored or negligently failed to carry out the instructions from IPM.
- The clumsy drafting of the 2013 Lease would appear to amount to negligence.
- Mr G was not the client of MWC and if he was to proceed (through the Company's Liquidator) it would be necessary to establish an extension to the "disappointed beneficiary" case of *White v Jones*.
- A trustee should obey the provisions of the relevant trust deed (Tolley's Pension Law Service, para E2.47). Clause 5.2 of the Scheme Rules 2012, which were relevant at the time of the new Lease was prepared says the Asset Trustee (IPM Personal Pension Trustees Limited) is to be directed by the Operator (IPM SIPP Administration Limited) in relation to an "individual fund" in accordance with the directions of the Member (Mr G). In the absence of any contrary evidence IPM ought to have followed Mr G's directions as to the content of the 2013 Lease. IPM's letter of 4 June 2013 indicates that it accepted Mr G's instructions in this respect.

- Mr G was not involved in the preparation or drafting of the new Lease. Immediately prior to the completion date of the Sale Agreement, IPM sent Mr G a copy of the Land Registry Schedule pro forma which did not confirm that the amendments had been made. Subsequently IPM sent Mr G an engrossment copy of the 2013 Lease which Mr G's Practice Manager perused to see if the relevant clause headings were included. They were not aware that the 2013 Lease differed substantially from the 2006 Lease. The new Lease headings confirmed that amendments had been made but the Practice Manager was not aware that they were in the incorrect form.

- It is impossible to determine whether there has been negligence or breach of the terms of the Sale Agreement without access to the files of IPM or MWC, which is unlikely unless a Court orders or TPO has residual powers to request the same.

Mr G's position

51. Mr G says:-

- He is not a commercial solicitor / property lawyer. He is a specialist in agricultural law and elder client law.

- Confidentiality was paramount to the sale of his Company. The only persons in the Company aware of the details of the transaction were himself and his Practice Manager. Practically all correspondence was via her computer and she was privy to the terms of the transaction.

On the guarantor's clause

- The preparation of the new 2013 Lease should have been straight forward. MWC prepared the 2006 Lease and obviously had a template for it. As no indication to the contrary was given it was assumed that MWC would use the template. Hence his belief that there was no need for a detailed scrutiny of the new Lease except to determine that the extra provisions from the Sale Agreement had been incorporated.

- After the letter of 4 June 2013 there was no correspondence between his Company and IPM in relation to the 2013 Lease, in spite of his invitation to contact him. He did not see a draft of the Lease prior to its completion.

- The first he and his Practice Manager knew of the new Lease was when she received what purported to be a copy of the agreed Lease. But what had been sent was a copy of the Land Registry summary incorporated in a Lease. He did not see it, but his Practice Manager informed him that it was not apparent that there were clauses incorporating the specific requirements (detailed in the 4 June 2013 letter). He asked her to obtain a copy of the final document which was received very close to the completion date of 31 August 2013. His Practice

Manager told him that the clauses were included, and he assumed, wrongly, that the new Lease was in the same format as the 2006 Lease.

- He did not read the documentation before completion took place. Firstly, because he had not been alerted to the changes and secondly because he was heavily engaged in preparing for completion, including the drawing up of chattel inventories; preparing stock in trade schedules and draft work in progress lists as well as debtor details. Had he received notification at any stage of the wholesale amendments that had been made then he would have intervened.

- IPM acknowledged that the 2013 Lease was to be substantially the same as the 2006 Lease. The 2006 Lease comprised some 18 clauses over 10 pages, but the 2013 Lease comprises 43 clauses over 37 pages.

- IPM as the freeholder had discretion as to the terms of the 2013 Lease and either failed to instruct MWC properly or chose to ignore his request to incorporate the terms of the Sale Agreement.

- IPM failed to inform him of the wholesale changes to the new Lease. There has been a deliberate breach of trust committed in deliberate disregard of his proper instructions. IPM cannot hide behind rule 8.3.

- As the person having an intimate knowledge of the property and representing the other contracting party he should have been consulted about the changes in view of the provisions of rule 5.2.

- He does not accept IPM's proposition that the guarantor's clause is stronger. The problem with it is that it does not provide for a replacement guarantor to be put forward on the retirement of a director. Two of the original directors have now retired and their ability as retirees to pay a proportion of the rent on insolvency or liquidation of the Lessee must be severely reduced. This cannot be said to be in his best interests as a beneficiary nor in the interest of the Trustees.

- IPM should now apply, at its own cost, for rectification of the 2013 Lease to reflect the terms of the Sale Agreement in accordance with rule 8.5.8.

- Unless he issues proceedings for disclosure of the files of IPM and MWC, IPM will be able to conceal what actually happened in breach of its fiduciary obligations to him in his capacity as the SIPP Member.

On the signage issue

- The removal of the signs has distracted from the intrinsic value of the Property and the conservation area. This cannot be described as conduct by a trustee to protect the value of an asset held within a member's fund.

- Likewise, the refusal by AH to use bilingual signage detracts from the area in which Welsh is the first language of over 50% of the indigenous population.

- IPM is reluctant to disburse legal fees, on what Counsel has now advised him was a valid objection to signage and treatment of Landlord's fixtures by AH, however it is willing to appoint a Property Manager in his stead, albeit he was and remained prepared to act in that capacity, at a cost to the pension fund, was a contradiction in terms about what adds value to the pension fund.

- The pension fund has already been depleted by legal fees that did not produce any outcome. Since then he has incurred Counsel's fees of £2,860. IPM should reimburse the pension fund for the initial legal fees and himself for Counsel's fees.

IPM's position

52. IPM says:-

On the guarantor's clause

- It initially instructed MWC to draft the clause as per Mr G's specific instructions; however, MWC subsequently advised that the clause would not be acceptable, as it could lead to Directors retiring and being replaced by entirely inappropriate guarantors chosen by the tenant without reference to IPM.

- It was therefore amended, to detail a more rigorous requirement which would prevent the individual guarantor's obligations ceasing, without an acceptable replacement first being found. The draft lease detailing this revised guarantor clause was then sent to Mr G, and he responded in writing confirming his approval.

- IPM accepts it could have specifically pointed out that the clause had been slightly changed, but IPM did not believe it had failed in its duty as Trustee in light of the facts that:-

    - Mr G saw and approved the draft 2013 Lease.

    - Mr G was at the time a practicing solicitor, familiar with property law.

    - IPM's solicitors believe the Guarantor's clause is actually stronger than initially intended.

On the signage issue

- IPM would like to stress that in the vast majority of cases it will follow scheme member instructions when dealing with investment decisions. IPM considered this matter to be an investment decision. However, in accordance with FCA guidelines, it will not follow instructions blindly and to the detriment of the SIPP. IPM appointed DTM to take legal action against AH, who after corresponding with AH, gave its opinion to IPM that the case was not strong enough to take further action and suggested it drop the matter.

- In addition to the legal advice IPM received, there is the fact that the SIPP has suffered no financial loss from the removal of the two signs. This is purely a question of whether a sign fits with the overall style of the neighbourhood; and while this may be of significance for Mr G, IPM did not believe that it was of any real importance to the SIPP.

- IPM's policy is to follow legal advice, except in very special circumstances. Given it could see no benefit to the SIPP, even in the event of a successful outcome to legal proceedings, IPM does not consider this matter to constitute such a case. It therefore followed the advice of DTM.

- IPM does not understand Mr G's assertion that legal fees have been wasted. It simply followed legal advice and attempted to shield the SIPP from such wastage by refusing to take the matter further.

Conclusions

53. I should say at the outset that I have read and considered the significance of the points Mr G's Counsel has made, albeit Mr G has not provided a full copy of Counsel's Opinion. In any event, I have come to my decision independently weighing up all the arguments made, the evidence provided, and the law.

On the guarantor's clause

54. The Property is owned by IPM, as Trustee, on behalf of the SIPP. IPM is also the Landlord.

55. In 2012 Mr G requested IPM to lease the Property to AH, on the basis of substantially similar terms to the then existing 2006 Lease with himself.

56. The 2013 Lease is between IPM and AH (as the Tenant). Mr G is not a party to the 2013 Lease.

57. For this complaint based in negligence to succeed, Mr G needs to show that IPM owed him a duty to carry out his instructions with reasonable care and skill, that they breached this duty and this breach caused him foreseeable loss. It is not in dispute that IPM did not draft the guarantor clause or any part of the 2013 Lease; IPM instructed its Solicitors to draft the lease. Therefore, the specific question for me to consider is whether IPM failed to exercise reasonable care and skill in supervising the drafting of the lease to ensure that it accorded with Mr G's instructions, including drawing Mr G's attention specifically in respect of material changes to the terms they had agreed with him.

58. It is arguable that the guarantor clause in the 2013 Lease weakens Mr G's position and IPM could have done more to alert Mr G of the changes, however Mr G has not provided any evidence of financial loss to the SIPP arising from IPM's handling of this issue.

59. Mr G says the legal fees of DTM (which were charged to the SIPP) and his Counsel's fees incurred in relation to this matter are financial loss. I do not agree.

60. In relation to DTM's fees, it appears those fees were incurred in the exercise of IPM's functions under the SIPP Rules. Rule 6.1 provides IPM the power to "…… do anything expedient or necessary for the support and maintenance of the Scheme or the benefit of the Beneficiaries…" and Rule 6.4.1 provides the specific power to appoint any solicitor in relation to the whole or any part of the Scheme. IPM instructed DTM in accordance with this power and Mr G agreed to the instruction of DTM. IPM then decided not to incur any further legal costs following DTM's advice that the case lacked a prospect of success, there was no evidence of financial loss or evidence of loss of income to the SIPP, or damage to the property. I do not consider that DTM's fees arose as a result of any negligence or breach of trust by IPM, as alleged, rather in my view, these costs were incurred in exercise of IPM's functions, they were properly chargeable to the SIPP and do not constitute financial loss for the purposes of a legal action.

61. In relation to Counsel's fees, Mr G reached his own independent decision to incur those costs, despite the advice from DTM regarding the merits of his case. That was Mr G's own decision and he bears the costs arising from that decision. Counsel's fees do not constitute financial loss to the SIPP.

62. There is no evidence that the value of the SIPP has diminished as a result of IPM's alleged negligence, therefore regardless of whether or not it could be said that IPM breached its duty of care to Mr G, there is no basis for me to award full damages because there is no evidence of financial loss.

63. Mr G says IPM's conduct amounts to a breach of duty. I disagree. I do not see any evidence of a deliberate disregard by IPM of Mr G's instructions. IPM instructed MWC to draft the 2013 Lease. While I have not seen a copy of IPM's instructions to MWC, it is clear from MWC's letter of 2 July 2013 to IPM that MWC were sent the checklist that contained the three provisions and MWC provided its advice on why it did not include the guarantor clause in particular. IPM accepted MWC's advice, which it was entitled to do and was reasonable. I do not see any breach of trust in this regard.

64. I disagree with Mr G that rule 5.2 (which relates to the Trustee's duties in relation to the exercise of its investment powers) assists him in this complaint. I believe IPM was entitled to have regard to MWC's legal advice in the interest of the SIPP.

65. Rule 5.2 is not an absolute Rule, it is subject to exceptions, one of which is that IPM is not required to direct the Trustee to exercise its powers in accordance with the Member's instructions where such exercise would lead to a breach of any other provision of the Rules (Rule 5.2.1). Rule 6.1 states that "…..the Operator is granted all the powers, rights, privileges and discretions it may require for the proper implementation of the Scheme, <u>including the performance of all duties imposed by law</u>" (my emphasis). Rule 6.1 therefore implies into the scheme rules, the legal

requirement on IPM (as administrator) to exercise its powers in the best interest of the SIPP.

66. In relation to the guarantor clause, IPM have said "….. we did initially instruct Matthew Waite & Co to draft the clause as per the member's specific instructions; however, we were subsequently advised by Matthew Waite that the clause would not be acceptable, as it could lead to Directors retiring and being replaced by entirely inappropriate guarantors chosen by the tenant without reference to IPM." In relation to the signage clause, IPM has stated that MWC advised IPM that the clause included in the new Lease was a standard clause that had been used for hundreds of transactions without dispute. I should also add in relation to Mr G's requests for IPM to commence legal proceedings, IPM decided that it would be failing to act with prudence if it ignored DTM's legal advice about the merits of the claim and pursued proceedings despite there being no evidence of financial loss to the SIPP.

67. There is no dispute that IPM did not follow or direct the Trustee to follow Mr Laing's instructions in relation to the new Lease, however I believe that IPM will likely have the benefit of the exception in Rule 5.2.1 in that they decided it was prudent to accept the legal advice and I believe IPM has an arguable case that the decision was reached in the interest of the SIPP.

68. Having agreed to follow Mr G's instructions in relation to the new Lease, it would have been good practice for IPM to alert Mr G of the change in position, following advice from MWC, which meant that his instructions could no longer be followed to the letter. I accept that IPM sent the draft Lease to Mr G and Mr G responded approving the Lease. Mr G has said that he was heavily engaged in preparing for completion and he did not consider the lease in detail. Whilst Mr G should have properly read the new Lease, given that the three lease variations were a key component of pre-completion correspondence that Mr G had emphasised and IPM seemed to acknowledge were an important consideration for Mr G, my view is that IPM should have drawn Mr G's attention to the fact that the new Lease did not include the exact terms he instructed it to include. IPM's failure to alert Mr G amounts to maladministration and this has caused Mr G distress and inconvenience. However, I do not believe that the maladministration committed by IPM is significant, and I only make an award for distress and inconvenience where the maladministration has been significant; I am of the view that an apology is sufficient in this case.

On the signage and fixtures

69. It is arguable that the provisions on signage in the 2013 Lease potentially weakens Mr G's position in that the 2013 Lease (Clause 26.2) provides an exception from the requirement to seek the Landlord's consent for signs that are of a design, size and number and in a position appropriate to the Property and the Permitted Use. AH has sought to rely on this exception. There was no such exception under the 2006 Lease and the position with regard to signage appeared clearer under the 2006 Lease.

70. Under Mr G's tenancy the Property displayed two wooden bilingual signs in JRL's name. One of the signs hung from a commissioned fixture.

71. Sometime after AH became the Tenant it appears that the hanging sign fell down due decay. AH removed the hanging fixture and put it and one of the signs in storage. The other sign appears to have been discarded when it was replaced. The two replacement signs are not wooden or bilingual. IPM's prior consent to replace the signs with the new signs was not obtained.

72. With Mr G's agreement IPM appointed DTM to commence legal proceedings against AH.

73. Various communications passed between IPM, DTM, Mr G and AH. Mr G and AH maintained their respective opposing positions. DTM subsequently advised IPM that it saw no merit in proceeding with the case.

74. Following the involvement of TPAS, IPM revised its position and agreed to obtain Counsel's Opinion on the signage and fixtures issues. However, Mr G wanted IPM to also ask Counsel whether the signage clause in the 2013 Lease was ambiguous and had been drafted negligently.

75. IPM, as Trustee, is required to act in Mr G's best financial interest, as the SIPP Member. But that does not necessary have to coincide with what Mr G wants.

76. It seems to me that IPM's decision not to proceed further with legal proceedings against AH was properly made.

77. I say this because it is clear to me that in making its decision, IPM considered the facts, abided by the SIPP's Trust Deed & Rules, sought legal advice (which it decided to accept) and deemed that AH's actions had not caused a financial loss to the SIPP's pension via a reduction to the intrinsic value of the Property. As it may it viewed the matter in commercial terms.

78. Rule 8.6 provides that "The Operator shall not be obliged to bring, pursue, defend or appeal any proceedings or decision in relation to the Scheme."

79. While Mr G does not agree with IPM's decision it was one that IPM could reasonably make. My view therefore is that there are no grounds for the Ombudsman to remit the matter back to IPM.

80. I have also considered whether there might be a basis for an alternative remedy (that is, as opposed to remitting the matter to IPM) in Mr G's favour, arising from the drafting of the signage clause. It is not in dispute that IPM did not draft the clause or any part of the 2013 Lease; IPM instructed its Solicitors to draft the lease. Therefore, the question for me to consider is whether IPM failed to exercise reasonable care and skill in supervising the drafting of the lease to ensure that it accorded with Mr G's instructions (including drawing his attention specifically to material changes to what they had agreed with him). As stated above, it is arguable that the signage clause in

the 2013 lease weakens Mr G's position and IPM could have done more to alert Mr G of the changes, however Mr G has not provided any evidence of financial loss to the SIPP arising from IPM's handling of this issue. There is no evidence that the new signage has diminished the value of the Property, therefore regardless of whether or not it could be said that IPM breached their duty of care to Mr G, there is no basis for me to award full damages because there is no evidence of financial loss.

81. As with the guarantor's clause my view is that IPM should have drawn Mr G's attention to the variation in the signage and fixtures clause included in the 2013 Lease. IPM's failure to do this amounts to maladministration which has caused Mr G distress and inconvenience. However, I do not believe that the maladministration committed by IPM is significant. Again, I am of the view that an apology is sufficient in this case.

82. Mr G has specifically asked that I order IPM to seek rectification of the 2013 Lease to reflect the terms of the sale agreement. I do not believe this is a remedy I can provide, because my view is that a Court is unlikely to issue Mr G such an Order and I do not believe that I can.

83. Mr G is not a party to the 2013 Lease and he has no proprietary interest in the property in question, so I do not consider that he has any standing to apply to the Court for an Order for IPM to seek rectification of the Lease. If Mr G was to pursue this matter in the Courts, I do not believe his claim would succeed given this procedural point, therefore as the Court is unlikely to award the Order he seeks neither can I. This is in accordance with the decision in *Edge v Pension Ombudsman and another* [1998] Ch 512 where the Judge held that the Pensions Ombudsman does not have the power "to direct remedial steps to be taken that are not steps that a court of law could properly have directed to be taken" (paragraph 520).

84. In addition, I do not consider that a claim for rectification would succeed on the facts because the remedy is provided in quite limited circumstances where contracting parties agree that due to a mistake or oversight the contract does not reflect their common intention and there is no suitable alternative remedy other than rectification. I cannot see that IPM and AH have any such agreement.

On the recovery of costs

85. Mr G is seeking for IPM to reimburse him Counsel's fees and reimburse his SIPP the legal fees that IPM has debited from the SIPP.

86. My view is that there is no basis for such a recovery. Mr G agreed to the appointment of DTM. Under the SIPP's Trust Deed & Rules (Rule 8.5) the SIPP is liable for the cost of DTM's advice. Mr G decided to obtain Counsel 's Opinion. Therefore, that cost is for him to bear not IPM.

87. Under Rule 8.3, IPM are liable for costs arising from "its own deliberate breach of trust committed in deliberate disregard of the proper instructions of the relevant Member". There is no evidence of a deliberate breach of trust by IPM or a deliberate disregard of instructions, so Mr G is not entitled to recover Counsel's fees or DTM's fees from IPM.

Anthony Arter

Pensions Ombudsman
16 January 2019

Appendix

Trust Deed & Rules – effective 1 May 2012

88. Rule 5.2 says:

> "In relation to any Individual Fund, the Operator shall direct the Asset Trustee to exercise its powers [of Investment] in Rule 7.1 in accordance with (and only in accordance with) any directions given by the relevant Member or Dependant, except where to do so would in the opinion of the Operator:
>
> 5.2.1 lead to a breach of any other provision of the Rules, provision of a benefit not specifically permitted by the Rules or the making of a *scheme chargeable payment*;…"

89. As relevant rule 8 says:

> "8.3 None of the Operator [IPM SIPP Administration Limited], the asset Trustee [IPM Personal Pension Trustees Limited] or the Bank shall be liable, responsible or chargeable in any manner whatsoever for any acts or omissions not due to its own deliberate breach of trust committed in deliberate disregard of the proper instructions of the relevant Member or Dependant, or actual fraud,
>
> 8.4 If the inclusion of any words in Rule 8.3 would at law render ineffective the protection of the Operator or the Asset Trustee or the Bank then the clause is to be read with such words omitted.
>
> 8.5 The Operator may, without the agreement of any Beneficiary and to the extent permitted by section 256 of the Pensions Act 2004, recover out of the relevant Individual Funds any fees or charges imposed by the Operator or Asset Trustee in accordance with such terms as may be notified from time to time together with any losses, liabilities, costs, charges or expenses (including any fees, charges or expenses of persons appointed pursuant to Rule 6) or other amounts the Operator or Asset Trustee or the Bank may suffer to incur in connection with or in relation to:
>
> …
>
> 8.5.3 any proceedings brought by or on behalf of a Beneficiary;
>
> 8.5.4 any other proceedings;
>
> …
>
> except to the extent that such amounts:
>
> …
>
> 8.5.8 are suffered or incurred by the Operator or Asset Trustee or Bank as a result of its own deliberate breach of trust committed in deliberate

disregard of the proper instructions of the relevant Member or Dependant, or actual fraud."

The Sale Agreement

90. Clause 10 says:

"(i) The Seller will use on Completion and subject as hereinafter mentioned in clause 10(v) surrender the existing lease on the Premises to IPM Personal Pension Trustees Limited.

(ii) The Seller will use their best endeavours to procure the grant of a new Leases (hereinafter called "the New Lease") to the New Company or the Existing Partnership as the case may be by IPM Personal Pension Trustees Limited in substantially the same terms as the existing Lease to the Seller subject to the following provisions being incorporated.

(iii) The New Lease will be for a period of 24 years from the Completion Date and the initial rent payable under the terms of the New Lease will be £17,000 per annum and thereafter reviewed ay three yearly intervals.

(iv) The Directors of the New Company or the Existing Partnership as the case may be will in the New Lease provide personal guarantees and where appropriate on a joint and several basis to pay rent reserved by the New Lease and to observe and perform the covenants therein contained.

(v) The Seller will until the grant of the New Lease hold the premises as bate trustees for the Buyer."

The 2013 Lease

91. Clause 1.9 says:

"References to the consent of the Landlord are to the consent of the Landlord given in accordance with clause 37.4".

92. Clause 25.1 says:

"The Tenant shall not make any external or structural alteration or addition to the Property without the landlord's prior written consent, such consent not to be unreasonably withheld or delayed.

93. Clause 26.2 says:

"The Tenant shall not attach any Signs to the exterior of the Property or display any inside the Property so as to be seen from the outside except Signs of a design, size and number and in a position that are appropriate to the Property and the Permitted Use, without the consent of the Landlord, such consent not to be unreasonably withheld or delayed."

94. Clause 37.4 says:

> "Where the consent of the Landlord is required under this lease, a consent shall only be valid if it is given by deed, unless:
>
> 37.4.1 it is given in writing and signed by a person duly authorised on behalf of the Landlord; and
>
> 37.4.2 it expressly states that the Landlord waives the requirement for a deed in that particular case."

95. Clause 43.2 says:

> "If an Act of Insolvency occurs in relation to a guarantor, or if any guarantor (being an individual) dies or becomes incapable of managing his affairs the Tenant shall, if the Landlord requests, procure that a person of standing acceptable to the Landlord enters into a replacement or additional guarantee and indemnity of the tenant covenants of this lease in the same form as entered into by the former guarantor."

96. Provision 2.1 of the Schedule – Guarantee and Indemnity says:

> "The liability of the Guarantor under paragraphs 1.1(a) and 1.2(a) shall continue until the end of the term, or until the Tenant is released from the tenant covenants of this lease by virtue of the Landlord and Tenant (Covenants) Act 1995, if earlier."