

Ombudsman's Determination

Applicant	Mrs N
Scheme	Hornbuckle Mitchell SIPP (the SIPP)
Respondent	Hornbuckle Mitchell (HM)

Outcome

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

Complaint summary

3. Mrs N is represented by Mr M of Broom Consultants Ltd (**BC**). Mr M says Mrs N's complaint is that:
 - She has had a catalogue of mistreatment by HM, culminating in her losing her pension and her pension fund.
 - Specifically, she instructed HM to buy a plot of land based on the boundaries shown in a valuation report and they failed to register the correct boundary with the result she did not own the whole of the property she had instructed it to buy.
 - HM's actions have created an aggravated neighbour who has made Mrs N's life a misery and HM has not defended the beneficiary's rights or interests.

Background information, including submissions from the parties

4. Mrs N was introduced to HM by BC. The SIPP was established in August 2013. £350,116 was transferred-in from several pension arrangements over the period to 2 October 2013.
5. HM is the SIPP's Trustee and Embark Services Limited (a wholly owned subsidiary of Embark Group), trading as Hornbuckle, is the Administrator of the SIPP.
6. As relevant the SIPP's 2012 Terms and Conditions (**T&C**) say:-
 - 'Introduction':

“We do not provide any investment management or advisory services under these *terms and conditions*. You are responsible for selecting investments for your plan. You are responsible for selecting investments, monitoring investments or investment performance.”

- Clause 13.1, ‘Making Investments’:

“You are responsible for selecting and giving us instructions about investments for your *plan*. “

- Clause 15, ‘Commercial property’:

“Neither we nor the *independent trustee* [HM Trustees Limited] give advice in respect of property investment in your plan. You are responsible for any choice of property investment in your *plan* and for any loss or liability arising from that investment.

All commercial property in your plan will be held and any associated borrowing will be made in the name of the independent trustee.

When purchasing or selling any commercial property, we will instruct or appoint only approved third parties. This will include surveyors, environmental specialists, solicitors, insurance consultants, property administrators and property managers.”

The Property

7. With the SIPP application was an application to purchase a site including commercial property, Novem Kennels (the **Property**), to be leased by HM (on behalf of the SIPP) to Mrs N. In addition to the Property the site contained a house and garage, also owned by the Property vendor (**Mr E**). Mrs N rented these from Mr E outside the SIPP.
8. In section 7 of the property and land purchase application Mrs N entered “SELF” as the property manager. Under section 10. ‘Declaration’ is stated:

“I confirm that if there is no Property Manager detailed in the Property Management section then I will be the Property Manager for the property.”
9. Herbert Reeves & Co Solicitors (**Herbert Reeves**) was appointed by Mrs N to act in connection with the purchase.
10. GH Chartered Surveyors (**GH**) prepared a Red Book (RICS) valuation of the Property (dated 8 October 2013) for HM and Mrs N. The Red Book valuation marked the boundary of the Property excluding the bungalow and garage, with the boundary drawn tight against the wall of the bungalow. The Property’s market value was given as £300,000 and its rental as £15,000 per annum.
11. The valuation report states:

“The property comprises an extensive range of either derelict or dilapidated dog kennels, cattery, office/reception and ancillary staff buildings on a level site adjacent to an owner’s residence and garage, the latter two buildings being excluded from this report. We would note, however, that the applicant is renting the adjoining house from the vendor.”

12. Under ‘Services’, it says:

“We note that all main services, i.e. gas, water, drainage and electricity are installed but there is no separate WC facility at present. We have not carried out any specific tests of the services and assume they are all functioning.”

13. On 23 October 2013, Mr M wrote to HM’s property team, in answer to some questions which they had put to him about the intended conveyance. This contains multiple references to the plan attached to the Red Book valuation. The letter started by clarifying the scope of the property to be purchased. Mr M wrote:

“Since the application was submitted there has been a fundamental change in the agreement between Mrs N and the vendor and she is no longer purchasing the full site – just the bit marked within the red line on the valuer’s report for a purchase price of £300,000.”

14. In November 2013 Mrs N submitted a proposal for refurbishment works totalling £41,010. Mrs N commented that the materials for the works would be purchased at the beginning of the project to save money and time.
15. The same month HM confirmed to Herbert Reeves that it was happy to proceed with the purchase of the non-residential element of the Property at a cost of £300,000.
16. Around this time a fall-out between Mrs N and HM occurred. In December 2013 HM staff were instructed not to speak with Mrs N, other than to direct her to BC if she called.
17. On 12 December 2013 HM informed BC that Charles Russell Speechlys LLP (**Charles Russell**), one of HM’s panel of commercial property solicitors, would act for the scheme and had been passed the vendor’s solicitors details to liaise with them directly.
18. On 16 December 2013 the vendor’s solicitors emailed Charles Russell:
- “Thank you for your letter 13th December 2013. However we were advised that Hebert Reeves & Co. were acting for the Purchaser and have been in touch with them since July last. They are holding draft contract and all supporting documentation.”
19. On 19 December 2013 BC emailed HM to say that Mrs N had agreed to use HM’s nominated solicitors and property managers, noting that it did not understand why Herbert Reeves had been removed when it had already completed the work. BC noted that:

"[Mrs N's] solicitor is ready to complete and as far as the lease is concerned this is a standard document. I am sure the new solicitors will not be charging to re-do everything and will contact [Mrs N's] solicitors to get all the information as quickly as possible... I await your urgent confirmation that everything is now agreed and that completion will indeed take place by Tuesday 24 December at latest."

20. On 3 January 2014, the HM Managing Director – Key Clients and Technical (**Mr W**) emailed BC confirming HM's requirements to move the Property purchase forward:-
 1. The appointment of Charles Russell to deal with the Property purchase and lease.
"[Mrs N] to request her current solicitors to email me all the completed documentation so that we can avoid any further delays. Charles Russell have confirmed that they will review the documentation on a light touch basis and only make changes if absolutely necessary."
 2. The appointment of Lambert Smith Hampton (**LSH**) to act as Property Manager on behalf of the SIPP.
 3. Insurance to be put in place prior to completion.
21. Mr W said:

"I know that your preference is for the client to go via yourselves rather than direct to us, but given the circumstances I have confirmed that I am happy for [Mrs N] to contact me if she requires any information or updates."
22. Herbert Reeves duly emailed Charles Russell:

"We understand that you will be acting on behalf of Hornbuckle Mitchell Trustees in connection with their proposed purchase of the above-mentioned property.

At the request of [Mrs N] and the Vendor's Solicitors, we attach the following:-
 1. Draft Contract
 2. Official copy entries and filed plans of Title Numbers EX199724 and EX204299.
 3. CPSE
 4. Local Search
 5. Drainage Search".
23. The plan in the draft contract showed a different boundary for the Property to that marked on the plan included in the Red Book valuation prepared by GH.
24. On 15 January 2014 Mrs N chased completion asserting that her previous solicitors had done all the searches and contracts and was ready to complete and Charles Russell were repeating work already done.

25. On 16 January 2014 the CEO of HM emailed Mrs N to explain that completion was delayed:

“Due to the query on the purchase of the bungalow. The partial transfer for the land needs to be completed by the vendor’s solicitor.”

26. On 16 January 2014 a Senior Associate at Charles Russell emailed BC and copied-in HM. He advised that he was continuing to liaise with the vendor’s solicitors in relation to agreeing the purchase documents. He said:

“In the meantime you will be aware that a lease is to be granted to [Mrs N] simultaneously on completion of the purchase. I therefore attach a draft lease which I would be grateful if you could pass on to [Mrs N] for approval...

I also attach the plan that will be attached to the lease showing the extent of the property edged in red.

If this is approved [Mrs N] can sign on the last page where indicated and her signature will need to be witnessed...The signed, but undated, lease can then be returned to me in anticipation of completion.”

In an aside to HM he said:

“once the lease is approved I will send a hard copy to you when the other documents have been agreed.”

27. The boundary of the Property marked on the lease matches the boundary on the plan in the draft contract of sale submitted by Herbert Reeves.
28. The next day HM asked BC if Mrs N had signed the lease. HM confirmed LSH’s costs for acting as the property manager and said that LSH would commission a survey of the Property to ensure the refurbishment works had been completed to an acceptable standard at a cost of £1,000 plus VAT. HM asked for confirmation that this was acceptable.
29. A member of staff at BC notified HM that Mrs N had come into the office and had signed the lease. Concerning the other points she said:
- “I will have to confirm once I have referred these to the client and to [Mr M, also of BC].”
30. The Property purchase was completed on 31 January 2014 and the lease was put in place.
31. The Land Registry ‘Transfers of Part of registered title(s)’ states:
1. Title numbers out of which the property is transferred: EX204299 and EX199724 (as to part).

3. Property:

Novem Kennels Arterial Road North Benfleet Wickford SS12 9JG

The property is identified on the attached plan and shown: edged red.

“The Transferor [Mr E] hereby grants to the Transferee [HM] and their successors in title the following rights:

12.6 Full and free right and liberty to the free passage of electricity and other services from and to the Property through along and into the Conducting Media which are now in or under the Retained Land.”

32. The plan, signed by Charles Russell on behalf of the Transferee, shows the same boundary as shown on the plan in the draft contract of sale submitted by Herbert Reeves.
33. Mrs N complained to HM about delays in purchasing the Property. HM upheld the complaint on the grounds that it could have provided timelier responses to correspondence from Mrs N and BC. But found that this had not resulted in a financial loss and no compensation was offered.
34. On 22 September 2014 Mr E contacted HM. Mr E said:-
 - He was having problems with Mrs N.
 - The condition of the sale of the Property to Mrs N was that she would also purchase the bungalow. To date this had not occurred and Mrs N had not informed him by when she would complete the purchase.
 - He was in a dilemma as to what to do with the bungalow.
 - The kennels could not operate without permanent residence on site. Recently Mrs N had sited a mobile home on the Property, but the Council planning enforcement department had asked her to remove it as it was not permitted.
 - More importantly, if the bungalow was occupied by a third party, then a boarding licence would not be granted because of the noise issue.
 - Mrs N was still occupying the bungalow, but was steadfastly refusing to pay rent, claiming that she would add it to the completion amount which he had told her was unacceptable.
 - He was now minded to sell the bungalow, if he could not bring the matter to a close. Ultimately this would mean the kennels would have to close. As it was green belt land it would render it all but worthless.

Mr E asked HM for its thoughts on the matter.

35. After consulting with Charles Russell HM referred Mr E to the solicitor who had handled the transaction as the SIPP was not a party to the proposed purchase of the bungalow and notified BC of the matter on 10 October 2014.

36. Sometime after the Property purchase the Land Registry raised an issue with the application to register the land transfer as the plan submitted was based on an old ordinance survey plan. The vendor provided Charles Russell with a plan showing the same boundary as that shown on the plan included in the draft contract of sale and the completed contract of sale. Charles Russell also approached GH. GH provided a copy of the plan included in the Red Book valuation but stressed to Charles Russell that it was submitted with the valuation report for “general identification purposes only”.
37. On 7 July 2015 Charles Russell notified HM that the application was now back with the Land Registry for dealing. It said this in no way meant that the Property did not belong to the SIPP as the transfer was completed.
38. Mr E contacted HM in August 2015, noting that the Land Registry had not been updated to reflect the revised ownership of the Property and he therefore believed it was still his.
39. On 24 September 2015 Charles Russell notified HM that the Land Registry had completed the application to register the transfer. About a week later it provided HM with a copy of the registered plans for the Property - Title Numbers EX920704 and EX204299 - EX204299 is a field which formed part of the conveyance but is not relevant to the dispute which has arisen, which concerns the extent of title EX920704.
40. HM then raised a query because their staff member could not identify the boundary of the land in EX920704 which should be shown marked in red.
41. On 1/10/2015 Charles Russell replied :

“there is a red edging but it’s unclear. I’ve added emphasis on the attached.”
42. At some later point Mr E sold the bungalow to an unconnected third party. In June 2016 the new owners contacted HM regarding Mrs N living at the Property and issues they were experiencing.

The Property’s Refurbishment

43. Mrs N sourced a contractor for works, Mr T, trading as Kts Electrical Services (**KTS**).
44. On 30 January 2014 (the day before completion) Mr T emailed Mr W of HM “the first invoice to get the job started”. The invoice headed ‘Kts Electrical Services’ included a unique tax payer reference (**UTR**), stated it was ‘Invoice 1 of 3 for first stage payment’ and detailed the work to be done as:

“To build cattery
To lay base for cattery
To renovate kennel blocks A,B,C
To first fix and second fix kennel blocks A.B.C.

To run new drainage
Labour
Materials”.

45. The same day Mr W sent an internal email to HM's Property Team:

“On the assumption that we complete on the property I've been sent the first invoice for the remediation works being carried out. This is as per the initial work schedule agreed... I spoke with [Mrs N] earlier and she is happy for us to make payment on the initial invoice.”

46. On the 4 February 2014 Mrs N chased Mr W for the transfer of funds to KTS:

“Please I need this work started. You said a couple of days its heading for three or four now please transfer it tomorrow morning so that the builder can place the order for materials and get a delivery so he can get started asap please I don't want this to turn into round two”.

47. On 6 February 2014, under the guise of an email from her guard dog (which included a picture of the snarling dog held on a leash by Mrs N), Mrs N demanded that the payment be made.

48. The next day HM requested Mr T to submit an amended invoice – addressed to the SIPP for the work at the Property's address – which Mr T provided and the invoice was paid.

49. Sometime later that month / early March 2014 Mrs N reported Mr T and his then partner (who had worked for Mrs N previously) to the police as the sum paid to KTS was 'missing' (claimed to have been destroyed in a fire on 10 February 2014) and no refurbishment had been done.

50. On 11 March 2014 Mrs N asked Mr W how much she had left in the SIPP to do the building works as she required about £15,000 to complete phase one. Mr W replied approximately £7,400 was held in cash but it would normally require that she keep £1,250 in the current account. Mrs N said she would need to get an investor (her mother).

51. Towards the end of March 2014 Mrs N sourced another builder, L&M Property Services (**L&M**). Mrs N submitted an invoice for £23,000, £6,000 required on account.

52. On 31 March 2014 Mrs N emailed Mr W:

“Again been disappointed by the lack of communication from yourself. I no [sic] your busy and I'm not the only pension your dealing with but obviously it is the only one I have and I need to work for me. I seem to be going backwards not forwards. I need to move forward on the kennels. It is extremely frustrating for me as I have builders to start but they need funds please.

I'm very upset that I've been done over and let [sic] with nothing and don't have it covered.

So I need you to PLEASE deal with my numerous requests and sort [L&M] so the move forward can begin."

53. Mrs N chased HM on 2 April 2014. The same day:-

- Mr W informed Mrs N that he had asked "the team" to contact her directly as he had changed his role in HM and had moved away from the day to day running of the business. He said he hoped that it could resolve the issues at hand and get Mrs N up and running.
- HM's Key Account & Retention Team Manager (the **Manager**) informed Mrs N that it was liaising with its Technical team to establish what the next steps were.

54. On 4 April 2014 the Manager emailed Mrs N:-

- The SIPP was a "member directed product". This meant HM required instructions from Mrs N to complete any transactions. Mrs N should always liaise with her financial adviser before instructing it to do anything and its role was to ensure her instructions met HMRC rules and regulations and were not detrimental to the SIPP's fund.
- Her case was unusual in that monies paid to her builder had not been used as expected. It was understood that she had sourced the builder and after several telephone calls with Mr W instructed HM to pay KTS directly. As it received a correctly addressed invoice that clearly outlined the work to be completed the invoice was paid. It was sorry that the builder appeared to have disappeared with the funds. Regrettably this was not something covered by any insurance as it had followed her instructions.
- It was understood that at the current time the police were not intending to pursue their enquiries. A possibility to consider would be for HM to appoint a legal representative to try and locate Mr T to pursue him for the missing funds. This it could do on her instruction, but it would need to ensure that there were sufficient funds in the SIPP's bank account to cover the legal cost. However, the costs may outweigh the gain. Alternatively, she may want to consider appointing her own legal representative.
- Currently, there was £7,400 remaining in the SIPP's current account. But under the terms and conditions of the SIPP Mrs N was required to keep a minimum of £1,250 in the account.
- Concerning the new builder's invoice, it required further details including his VAT number (if applicable) and registration at Companies House – it appeared the builder's previous company had been dissolved in 2010. Additionally, it required

Mrs N to provide two quotes from other builders to compare their charges with L&M's invoice.

- Previous emails from Mrs N suggested that her mother had agreed to pay for any remaining works with current costs in the region of £17,000. If this was the case, a loan to the SIPP would need to be arranged and a formal agreement put in place.
- It appreciated that this matter had been ongoing for some time and regretted that it had not been able to approve any further works as yet. But it hoped she understood why it was being cautious. It had a responsibility to make sure the remaining funds were used appropriately.

55. Mrs N replied that the builder was not registered for VAT or with Companies House. She said he had a lot of work coming up and would be busy. She said she wanted HM to sort the matter out. She said. "I need my kennels now. Need to start the business asap."

56. HM replied to Mrs N:-

- It believed it would be beneficial if she discussed the next steps with her financial adviser before she made any decisions.
- Due to the problems already experienced it needed to ensure that the new builder she had chosen was legitimate and had the appropriate insurances in place to protect her SIPP. It also needed to make sure that the quote he had provided was fair and reasonable – this was why it had asked for additional quotes. Without these the builder's invoice she had submitted would not be paid.
- She had advised that her mother was prepared to give her the money, rather than it being loaned to the SIPP. She might want to consider her mother making a 'gift' to the SIPP as a contribution, this would enable tax relief to be claimed and therefore provide additional funds. This was something she needed to discuss with her financial adviser.

57. HM wrote again to Mrs N on 14 April 2014. It said to proceed it required a formalised payment of invoice process to minimise the potential risk to the SIPP. To do this it insisted on the following:-

- Checking that the items on the invoice were genuine landlord expenses. To do this the quote should include a breakdown of work items and costs to ensure it only paid those items specifically the responsibility of the landlord.
- That the contractor was an independent professional providing a service to a required standard which would be overseen by the property manager. The chosen contractor must pass its due diligence in terms of Companies House checks, website verification, VAT registration, etc.
- Terms of Business should be submitted with the detailed quote.

- Two competing quotes to validate the market rate for the scope and standard of the work tendered.
- Obtaining a new Red Book valuation post works
- A new fully repairing and insuring lease to be drawn up.

58. In the same letter:-

- HM informed Mrs N that L&M was not acceptable to it as it could not locate the individual or the firm to undertake checks. The invoice submitted included no name for the bank account details. Therefore, it could not verify the end recipient.
- It reiterated that it needed clarification on whether the stated £17,000 payment from her mother was to be treated as a loan to the SIPP or a gift.
- It said until the above issues were fully resolved – in particular the appointment of an appropriate contractor monitored by a professional property manager – the matter would not be reconsidered.

59. In September 2014 Mrs N confirmed her agreement to the appointment of LSH as the property manager.

Events from 2015 to the transfer of the SIPP

60. On 23 January 2015 HM emailed BC that its block insurance provider was unable to offer cover on the Property and the premium charged by an alternative insurer (Coversure) exceeded the funds remaining in the SIPP's current account. It informed BC that it had decided to sell the Property as the SIPP could not support the Property and to cover the debts the SIPP was accruing.

61. HM requested a disposal report (the **Disposal Report**) for the Property from LSH. As relevant section 2.3 'Utilities' says:

"Electricity and water to the property is received from the dwelling house on adjoining land that is not owned by the SIPP. There is correspondence to suggest that [Mrs N] rented the house and had agreed to buy it. The owner of the house is now selling the property and has told [Mrs N] that she will need to arrange independent utility supplies. If there is any prospect of [Mrs N] trading from the property, this aspect requires further investigation.

Initial enquiries from Charles Russell solicitors confirm that the transfer of the property contains the right to connect into and use the conduits that serve the property but which are situated on the retained land."

62. In early March 2015 LSH prepared a draft letter to Mrs N:-

- As no rent had been paid into the SIPP, HMRC could consider that she had received an unauthorised benefit.

- HM was unable to allow the present situation to continue.
 - As it appeared that she was unable to pay the rent or arrears HM required her to co-operate with HM and LSH in resolving the current position by selling the Property. If her co-operation was not forthcoming then the Trustees would have no alternative but to proceed with disposing of the Property.
 - If it did not receive her confirmation that she would co-operate by 10 April 2015 it would arrange for the Property to be sold.
63. HM subsequently decided not to issue the letter and the report was put on hold a) “because of the ongoing complaint around the Contractor and payment of works that didn’t complete” and b) Mr W was going to meet with Mrs N and BC to try and resolve the situation.
64. Mrs N complained to HM about :-
- The decision to the sell the Property.
 - The appointment of LSH.
 - LSH not responding to her queries following its request that she provide bank statements to evidence that rent payments had not been kept by her.
 - HM not providing confirmation of the review it had undertaken when settling the invoice of K Turner.
65. On 8 April 2015 HM wrote to Mrs N. In rejecting her complaint HM said:-
- On its decision to sell the Property
- As Mrs N had no means of repaying the outstanding rent, it would confirm to HMRC that an unauthorised payment had occurred and as a consequence tax charges would apply to Mrs N and the pension fund.
 - To ensure it carried out its fiduciary duty as Professional Trustee it had put in place the insurance cover with Coversure and had covered the premium shortfall (£1,276) with the intention of reclaiming the amount from the proceeds of the Property’s sale.
 - Its initial decision to force the sale was not taken lightly and only after all available avenues to resolve the issue had been explored.
 - However, it had subsequently reappraised the most viable means of finding a resolution and Mr W would contact her to discuss the options available which may conclude in a satisfactory solution for both parties.

On the appointment of LSH

- During the process of purchasing the Property it emailed BC on 3 January 2014 (copying-in Mrs N) that it required LSH to act as Property Manager for the SIPP, as Mrs N was renting the Property from the SIPP and it required LSH to oversee the building works necessary to improve the Property.
- While, at that time, it took no further action to appoint LSH, in September 2014 it received an email from Mrs N, forwarded by BC, instructing that HM be informed that a property manager should be appointed. The same day BC informed HM that it had notified Mrs N that the Property Manager would be LSH and requested paperwork to complete the appointment. Later that month it emailed BC acknowledging Mrs N's instruction and confirmed that LSH would be appointed subject to Mrs N's acceptance of the £2,000 annual fee. It also outlined the duties and responsibilities of the role of a property manager. The same day BC advised that Mrs N had raised two queries. Firstly, she wanted to know who appointed the property manager and, secondly, could she cancel or decide that she did not want a property manager or would the SIPP be tied to LSH. HM confirmed: a) that it had authority to appoint a property manager, albeit it would wish to see that Mrs N was in agreement with the appointment, b) it would always suggest that a property manager should be appointed and c) Mrs N could cancel any arrangement with LSH, subject to the relevant notice period being served.
- The following month it emailed BC a Management Agreement for LSH. It said it had a duty of care to the SIPP to ensure that the issue of non-payment of rent was addressed. On 10 October 2014 BC replied that whilst it had not received back from Mrs N the signed contract HM should proceed with the appointment. It informed BC that it would appoint LSH. As Professional Trustee it duly signed the Management Agreement and submitted it to LSH.

On LSH not responding to Mrs N queries

- On 6 November 2014 it received a copy of the signed Management Agreement from LSH. The next day LSH advised that it had visited the kennels and provided photographs. On 10 November 2014 it received a further email from LSH that it would be emailing Mrs N to request proof of financial hardship and confirmation that she was unable to settle the outstanding rent due to the SIPP. LSH duly emailed Mrs N and copied-in HM. Later that month Mrs N requested LSH to provide information regarding the Property purchase and the invoice submitted by Mr T of KTS. LSH provided Mrs N with a copy of the contract and the invoice from KTS, information relating to the residential property adjacent to the kennels and correspondence relating to the settlement of the contractor's invoice.
- In January 2015 LSH chased Mrs N for the information it had requested. Initially she said she was unwilling to provide it but later did so. HM received copies of

Mrs N's bank statements and a breakdown of her income and expenditure on 23 January 2015. It notified BC that it appeared, on the evidence provided, that Mrs N had no financial means of settling the outstanding rent due to the SIPP.

- While it might not have had sight of all the correspondence between Mrs N and LSH, it appeared from the correspondence it had seen that there had been regular contact between Mrs N and LSH, specifically on the issue of obtaining evidence of financial hardship.

On settling the invoice from KTS

- Mrs N sourced KTS to undertake the building work and provided comparable quotes for the work to be undertaken.
- During the process of settling the invoice it queried with Mrs N whether the payment should be made in stages. Mrs N informed it that the entire amount should be paid to allow the builder to order the material to undertake the work. It therefore settled the invoice in full on the instruction of Mrs N.
- It had acted in good faith in making the payment to KTS.

66. On 14 May 2015 Mr W, Mr M (of BC) and Mrs N met to resolve the issue of the Property held in the SIPP. Mr W's note of the meeting says:-

- The options discussed were:
 - Mrs N did nothing. In which case HM would force the sale and recover outstanding fees due.
 - Mrs N buys the Property from the SIPP at the current valuation of £120,000.
 - The Property remained in the SIPP and was developed by Mrs N so that it was viable as a kennels.
- Mrs N confirmed she had sufficient funds to develop the Property.
- Mr M advised that Mrs N did not have sufficient funds to buy the Property from the SIPP. Nevertheless, the crystallisation of a £180,000 loss by selling the Property now was advice he was not comfortable in giving.
- It was made clear to Mrs N by Mr W that if she did not comply or failed to provide the required information then HM would have no option but to sell the Property and recover the costs. Mr M confirmed to Mrs N that HM was within its rights to do that and Mrs N confirmed that she fully understood this.
- Mr W reiterated HM's requirements to allow the development of the kennels to proceed.

- Mrs N confirmed she fully understood and accepted what was required.
- Mr M advised that sufficient funds would be made available to pay HM's outstanding fees, including its reimbursement of the insurance cover it had paid, and its fees for the next couple of years.
- Mr W agreed to put in writing all of the requirements and the steps that needed to be taken.

67. An email from Mr W to Mrs N dated 1 June 2015 said:

“Steps Required:

- Before any work could commence we will need a full specification of the works to be carried out to bring the kennels up to standard.
- A detailed schedule of works and the proposed timescales.
- Having considered this we would then need to prepare a licence for works for the tenants to carry out and agree the timescale.
- The existing lease will need to be surrendered, an arm's length surrender valuation will be required and then a re-grant made based on the works as detailed above.
- The value of the works carried out would need to be assessed in line with the new lease and the length of any rent free period agreed.
- We would also require both OMV and OMR pre and post works to create the new lease terms.
- All of these requirements to be provided by a Hornbuckle panel solicitor and LSH.”

68. On 24 September 2015 HM received a Letter of Claim for Professional Negligence from Giles Wilson acting on Mrs N's behalf. HM denied the claim in whole.

69. On 28 April 2017 Deputy District Judge (**DDJ**) Slaney ordered that Mrs N, as Tenant, give HM possession of the Property and pay the outstanding rent. In giving his decision DDJ Slaney considered the defence's argument that a rent free period had been agreed as it was referred to in Mr W's email dated 1 June 2015. DDJ Slaney said:

“The other limb of the defence put forward to me today is that there is to be a rent free period that was agreed. It is referred to in the email [Mr W's email of 1 June 2015], but I can't see that that was agreed and if it is agreed that the current arrears are just short of £51,000 and that covers the whole period of the occupation, it seems to me that no rent free period was in fact agreed as the rent claimed for that period and/or that the arrears would not have been accepted by [Mrs N].”

70. Mrs N's application for permission to appeal the April 2017 Court Order was struck out on 11 January 2018.

71. In March 2018 Mrs N notified HM that she had a buyer for the Property. HM decided that the sale of the Property without the eviction of Mrs N was in the best interests of the SIPP.
72. The Property was valued at £80,000 by an independent surveyor and sold for this amount to Scaloble Limited¹. Following the payment of HM's legal costs and outstanding fees the SIPP was credited with £35,890.47.
73. The SIPP was transferred (£31,429.84) to Elevate, part of Standard Life, in early August 2018.
74. Mrs N, in her capacity as beneficiary, has instructed Wixted and Co Solicitors to investigate potential professional negligence claims against:-
 1. HM (as Professional Trustee) and Embark Services Limited (as administrator of the SIPP) in relation to "the administration and steps taken with regard to the running of and establishment of her SIPP".
 2. GH Chartered Surveyors in relation to the red book valuation dated 9 October 2013.
75. While preliminary notices have been issued, in accordance with pre action protocol, no formal letter of claim has been issued in respect of either claim.

Mrs N's position as represented by Mr M of BC

76. Mr M says:-

On the Property

- While BC was never officially removed, Mr W made it clear that he would be dealing directly with Mrs N regarding the property purchase.
- Based on the Red Book plan, the bungalow had no access to the rear and even opening a window would trespass on the kennel land. That was deliberate to ensure Mrs N could buy the bungalow (which Mr E promised to sell to Mrs N) when the kennels started producing income.
- Mrs N instructed HM to buy the Property for the agreed sale price and based on the boundary shown in the Red Book plan.
- HM paid Mr E the valuation price without buying the correct plot. The correct boundary for the Property was not registered with the Land Registry. Mrs N was not aware of this until some years later when Mr E put up fences cutting off her land.
- Mrs N was told that Mr E had been in contact with HM and negotiated the boundary of the Property after it had been sold. This resulted in Mr E claiming

¹ Scaloble Limited changed its name to Jack Bass Limited. Mr M (of BC) is a Director of the company.

back land that had clearly been valued and sold as agreed in the Red Book valuation. Mr E defrauded HM.

- HM's failure to register the Property's boundary as per the Red Book valuation created the situation where Mrs E was evicted from the bungalow and it was sold on.
- HM reneged on a rental amnesty on the Property, which resulted in an unauthorised payment fine.

On the Property's refurbishment

- Mr W agreed the advance payment to KTS. But payments should have been dripped out as work was completed. It was for HM, as Trustee, to ensure that sufficient comparative quotes were in place, regardless of Mrs N's wish to appoint a specific builder. Mrs N only knows about dogs, not SIPPs. She is not a sophisticated investor and as such needed to be told.
- Mr E evicted Mrs N from the bungalow when she could not pay the rent. This was mainly due to her money for the refurbishment of the kennels having been carelessly handed over by HM to KTS. Therefore, Mrs N could not renovate the kennels and get income in from running the kennels.

HM abandoned Mrs N

HM gave Mrs N no support:-

- When the first builder (Mr T of KTS) absconded with the refurbishment payment, making it impossible for the works to be done. Meanwhile LSH, who HM appointed to oversee the work, still took its fees.
- When it was pointed out that the registered boundary for the Property was wrong.
- When the bungalow eviction notice was issued.
- When electric and water to the Property were cut off by the new owners of the bungalow, despite the Red Book valuation showing that Mrs N had the right to access electricity and water from the bungalow.

77. Mr M says he is not a mere bystander. Scaloble Limited purchased the Property from HM, with the intention of allowing Mrs N to buy it back at the earliest opportunity. He has already transferred one section into Mrs N's name to allow her to move her mobile homes onto the site.

HM's position

78. HM say:-

- It is a bare trustee. Its role is to administer the SIPP in line with legislation and HMRC rules / guidelines. It is not authorised to provide financial advice. As Trustee it holds the assets of the SIPP for the member. It does not make any decisions about the investments with the scheme or take any advice or direct any action or act as a mediator.
- It does not accept business from clients directly. All referrals must come from an IFA.
- BC refer to Mrs N as a vulnerable person who does not understand the workings of a SIPP. But presumably BC conducted suitability reports and ensured that the product it recommended to Mrs N was suitable for her needs.
- There were no issues with the establishment of the SIPP.
- All decisions on investments are made by the member. It did not provide any advice in relation to the purchase of the Property. It acted on the instruction for the SIPP to purchase the Property.
- HM's files suggest that the purchase of the Property was recorded correctly, albeit later than it should have been due to an issue with the original plan submitted.
- HM has been unable to evidence that it lost any documentation, or that this was confirmed to Mrs N. With effect from 20 December 2013, all of its staff were directed not to communicate via telephone with Mrs N – there are no notes on file to suggest there was a discussion with Mrs N relating to the property valuation prior to this. Furthermore, as the valuation provided by GH is on its systems this does not indicate that it was ever misplaced. All correspondence, whether coming in or out of its business, should be uploaded to its electronic filing system.
- Similarly, there is no evidence to suggest HM contacted Mr E regarding the purchase of the property. Indeed, there was no communication with Mr E until September 2014, when he contacted HM regarding issues he was experiencing with Mrs N. HM responded on 25 September 2014 to confirm it was unable to assist with the residential issue, and suggested Mr E discuss the matter with his solicitor. It should also be noted that the email address used by Mr E is the one detailed on the 'Contact Us' section of its website; had Mr E communicated with HM prior to this, he would have been aware of the property team email addresses it uses for purchases and sales.
- It did not remove BC from Mrs N's SIPP / acting as her financial adviser. BC has always been documented on its systems as Mrs N's financial adviser.
- Mr W's 3 January 2014 email to BC, copied to Mrs N, confirmed HM's requirements to progress the Property purchase and provided a direct point of contact to assist Mrs N to conclude the transaction expeditiously. Around that time HM considered BC to be a 'key account'. Consequently, it did as much as it could

to assist the firm and its mutual clients. While Mr W assisted with the purchase he proffered no financial advice to Mrs N.

- BC was due and received an adviser payment from the SIPP in 2014. HM continued to communicate with BC in the same way it communicates with the financial adviser of any other client. It kept BC abreast of the Property purchase transaction, including matters pertaining to the Lease which was an integral part of the purchase. It has numerous communications with BC, in its capacity as Mrs N's financial adviser throughout the lifespan of the SIPP.
- Concerning the payment to KTS. Mrs N was keen that the payment be made as soon as possible and pressed for payment prior to HM's receipt of an invoice. Whilst the tone of the email she sent (in the guise of an email from her dog) was not clear, it certainly could be construed as threatening /intimidating behaviour. The invoice was paid the next day. In hindsight, additional checks could have been conducted in relation to the ultimate recipient of the funds. But Mrs N sourced the builder and clearly authorised / instructed the invoice to be paid by the SIPP.
- BC's comment that Mrs N "only knows about dogs, not SIPP's", leads it to question why BC felt it was suitable to recommend a SIPP product to Mrs N.
- It did not abandon Mrs N following the completion of the Property purchase. In April 2014 Mr W notified Mrs N that his position in HM had changed and the manager of its Key Accounts Team contacted Mrs N and confirmed this area would now be responsible for her SIPP, any further issues, going forward. Given the main transaction, the Property purchase, had been completed it was reasonable that the day-to-day administration of the SIPP should revert back to the Key Accounts Team - the contact point between the client / BC and other areas within HM. This service was maintained until around mid-2016, when HM's business model was adjusted and all clients/Financial Advisers reverted to contacting HM's functional teams directly or via HM's Client Servicing Team.
- It was not HM's responsibility to record the Property purchase with the Land Registry. That responsibility rested with Charles Russell.
- HM cannot comment on the actions of Mr E in relation to the bungalow, the eviction of Mrs N from this property and the subsequent sale of the site. It has no evidence that it assisted Mr E with the bungalow's sale to an unconnected third party.
- Its decision to sell the Property was due to the liabilities of the SIPP exceeding its receipts. Its letter of 8 April 2015 to Mrs N detailed its position. The issues were subsequently discussed with Mrs N and her IFA (BC) and it was made clear that if Mrs N took no action it would sell the Property and recover outstanding costs.

- On 24 September 2015 it received a Letter of Claim from Mrs N's then solicitors (Giles Wilson) for HM to pay for improvements to the Property. It responded on 18 December 2015, explaining that it considered there had been a fundamental misunderstanding of HM's role in relation to the purchase and management of the Property and the nature and restrictions of the SIPP had not been considered.
- Court proceedings were initiated against Mrs N due to her residential occupancy of the Property following her eviction from the bungalow. Issues with neighbours and damage to their property and unauthorised alterations to the Property prompted a Right to Forfeit submission with the Court, which was upheld. In doing so it maintained the best interests of the SIPP.
- In late August 2017 it received a request to transfer the SIPP to InvestAcc. But after discussing the SIPP's position (rent arrears and court proceedings against Mrs N), InvestAcc confirmed that the transfer was not to proceed.
- In early November 2017 it received a request to transfer from Matioli Woods (MW). Initially HM informed MW that it would not permit the transfer due to the rent arrears. But on 1 December 2017 it informed MW that the transfer could proceed and asked MW to confirm its willingness to accept it. Mrs N's solicitors were similarly informed on 15 December 2017. It heard nothing further from MW.
- In March 2018 Mrs N advised that she had found a buyer for the Property. It decided that the sale of the property without the eviction of Mrs N was in the best interests of the SIPP.
- As the land has been sold it is not for HM to enter disputes about boundaries. The boundaries for the Property were clearly documented at the Land Registry.
- The SIPP owned the Property for a little over four years. It is not responsible for the lack of rent crediting the SIPP or the dilapidation of the Property over that period. That is the responsibility of Mrs N, in her capacity as Tenant.
- There is nothing to be returned to Mrs N as BC has suggested.

79. Since setting out its position HM has provided further information obtained from Charles Russell. Charles Russell has informed HM:-

- The old ordnance survey plan that was attached to the lease and submitted to the Land Registry was supplied by Mr E.
- The Land Registry rejected the plan because it did not match the position on the ground. Charles Russell then asked GH if it could use the plan that was attached to the Red Book valuation. GH agreed and Charles Russell sent it to Mr E's solicitors for approval and signature by Mr E. However, Mr E did not sign the plan but instead signed and returned another plan. This was the revised plan that was registered with the Land Registry.

Adjudicator's Opinion

80. Mrs N's complaint was considered by one of our Adjudicators who concluded that no further action was required by HM. The Adjudicator's findings are summarised briefly below:-

On the Property

- Mr M says HM registered the wrong boundary for the Property with the Land Registry. This allowed Mr E to evict Mrs N from the bungalow and sell it.
- Charles Russell says the plan attached to the lease was provided by Mr E. It emailed the plan with the lease to BC, copying-in HM. Mrs N visited BC's office and signed the lease. Prior to signing the lease both BC and Mrs N had the opportunity to query the boundary shown on the plan but did not.
- If HM had looked at the plan it would not have known the boundary differed from that shown on the plan attached to the Red Book valuation. HM had no reason to compare the plans. It did not know that Charles Russell had obtained the old ordnance survey plan from Mr E.
- Subsequently Charles Russell notified HM that the Land Registry had an issue with the submitted plan. The Solicitor said the valuer (GH) had provided a revised plan and the application was now back with the Land Registry for dealing. That was not quite correct. Mr E did not sign the GH plan but signed and returned a further plan. This was the revised plan that was subsequently registered with the Land Registry. The boundary marked on the revised plan was the same as that marked on the lease plan, which Mr E had earlier supplied. While HM are liable for the actions of its appointed solicitor, it is not liable for the actions of Mr E.
- Nevertheless, the Property's boundary issue is not the underlying reason for Mrs N's difficulties. Mrs N must have known to run the kennels she had to be resident on site. To achieve that she had to independently (from the SIPP) rent or buy the bungalow from Mr E, as the SIPP could not hold residential property. She chose the latter option and appears to have entered into an agreement with Mr E to buy the bungalow at some later date.
- Mr M says the boundary line for the Property shown in the Red Book plan was deliberately drawn to ensure that only Mrs N could buy the bungalow as and when the kennels started producing income. If this was a key part of her business plan, it is perhaps surprising that Mrs N did not check the boundary line when she signed the lease.

- It was Mrs N's choice to adopt this risky strategy. But it unravelled when Mr T of KTS failed to carry out the work he had been paid to do with the SIPP's funds. The repercussions were that Mrs N was unable to renovate the kennels and generate an income from it, she paid no rent to the SIPP and could not afford to buy the bungalow from Mr E. However, it was Mrs N's decision to refuse to pay rent on the bungalow which ultimately led to its sale to a third party; thereby ensuring that the kennels were no longer viable. As a result, the SIPP was not able to sell the Property as a going concern and achieved a much lower resale value.

On the payment of KTS

- Mr M says HM failed to apply due diligence on KTS and should not have paid upfront Mr T's invoice. But that is applying the benefit of hindsight. Mrs N sourced KTS and repeatedly pressed for the payment of Mr T's invoice.
- HM obtained a requested revised invoice from Mr T. The invoice was a first stage payment and appears to have been in accord with an initial work schedule submitted by Mrs N. The invoice detailed the work to be done on the Property, included Mr T's address and his UTR.
- Mrs N sanctioned the invoice's full payment, to allow the builder to order the materials to undertake the work. Acting in good faith HM paid the invoice with funds from the SIPP.
- HM do not appear to have applied the same checks that it insisted on before rejecting the invoice from the second builder, L&M. But even if it had it would not have prevented what occurred with Mr T. When HM paid Mr T it had no reason to suspect that the work might not be carried out. HM cannot be liable for Mr T's subsequent actions.
- Mr M says HM gave Mrs N no support in the matter. But HM informed Mrs N that she could instruct it to appoint a legal representative to try and locate Mr T to pursue him for the missing funds, subject to the SIPP's funds being sufficient to cover the legal costs. However, HM warned Mrs N that the costs might outweigh the gain for the SIPP of taking such action. Mrs N decided not to proceed. As an alternative, HM possibly could have asked its solicitor to write a letter to Mr T threatening to take action to enforce him to undertake the work. Whilst it was not responsible for selecting investments for the SIPP, as trustee, it had some responsibility to protect the SIPP's assets. But it is not clear that this would have made any difference to the outcome. At most it amounts to HM being less helpful than it otherwise might have been, rather than amounting to maladministration on its part.

- Mr M says HM reneged on a rent free period. But in April 2017 DDJ Slaney found that no rent free period had been agreed by HM.

81. Mrs N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs N provided her 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 Mrs N for completeness.

Ombudsman's decision

82. Mrs N says she did not see the Plan when she signed the Lease at BC's office. But Charles Russell emailed both documents to BC and separately referred to each document in the email. If Mrs N did not see (or did not check) the plan that was not HM's fault.

On the Property purchase

83. Herbert Reeves forwarded to Charles Russell the documentation in connection with the purchase of the Property by Mrs N from the vendor (Mr E). The plan for the Draft Contract shows a different boundary to that on the plan included in the Red Book valuation prepared by GH. The subsequent 31 January 2014 contract between Mr E and HM Trustees Ltd mirrors the draft contract prepared by Herbert Reeves.
84. Sometime after the Property purchase the Land Registry raised an issue with the application to register the land transfer as the plan submitted was based on an old ordnance survey plan. Charles Russell approached GH. GH provided a copy of the plan included in the Red Book valuation but stressed to Charles Russell that it was submitted with the valuation report for "general identification purposes only". Mr E subsequently provided Charles Russell with a plan showing the same boundary as that shown on the plan included in the draft contract, completed contract and the lease.
85. While Mr M informed HM that the boundary for the Property purchase was to be as per the plan included in the Red Book valuation, this was in the context of clarifying that the land to be conveyed was only the Property, not the entire site as it had been documented in the original application. There is no evidence of an instruction from Mrs N to HM that the precise boundary of the Property to be conveyed should be that shown on the Red Book valuation as opposed to that shown on the plan in the draft contract provided by her previously appointed solicitors Herbert Reeves. I therefore cannot find that HM were at fault for proceeding to purchase the Property with boundaries as shown in the contract documentation.

On the payment of KTS

86. Mrs N says HM failed to make proper checks on KTS before paying the builder. I have seen no evidence that supports this claim. KTS provided a VAT invoice for part 1 of 3 parts of work and Mrs N cleared its payment. I do not consider that HM were

any more responsible for what happened as a result of payment to KTS than Mrs N. HM cannot be liable for Mr T's subsequent actions.

87. This is a very unfortunate set of circumstances. But I can see no grounds for me to uphold the complaint which Mrs N has made about HM.

88. Therefore, I do not uphold Mrs N's complaint.

Karen Johnston

Deputy Pensions Ombudsman
14 May 2019