

## Ombudsman's Determination

Applicant	Mr A
Scheme	Minerva SIPP ( <b>the SIPP</b> )
Respondent	InvestAcc Pension Administration Ltd ( <b>InvestAcc</b> )

## Outcome

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

## Complaint summary

2. Mr A has complained that InvestAcc should not have told him to instruct a solicitor, until it knew whether he would be able to proceed with the purchase of a property (**the Property**) within the SIPP.
3. Mr A argues that InvestAcc should have known from his initial enquiry that the SIPP would not be able to purchase the Property. As a consequence it was liable for what he now considers unnecessary solicitor and surveyor fees.

## Background information, including submissions from the parties

4. On 28 February 2018, Mr A emailed InvestAcc to ask whether the Property could be acquired within the SIPP. Mr A said, "Looking at the property below would you be able to tell me if it fits SIPP criteria. Not sure about the flat upstairs. Its (sic) leased out as one building and its (sic) not being used as a flat."
5. Within his email, Mr A shared the details for the listing of the Property, which said:  
  
"Retail investment fully let to Ladbrokes in town centre location."  
  
and  
  
"The former flat spread over two floors is currently not in occupiable condition but forms part of the lease to the Tenant."
6. InvestAcc responded to the email on the same date to say:

“In principle the property looks as though it would be acceptable for a SIPP purchase. We would require the usual valuation report and solicitors due diligence.

In terms of the flat upstairs as there is a commercial lease for the whole property this shouldn't be an issue. Providing the lease to Ladbrokes doesn't allow them to rent out the flat separately as a residential let, as you know the SIPP cannot allow residential property.

The other potential issue is that the tenants have linked the property with next door, the lease may however have provisions to reinstate the property to its original state at the end of the lease (all this would be confirmed by the solicitor if you decide to go ahead).”

7. On 12 April 2018:-

- Mr A emailed InvestAcc to confirm that he wished to proceed with the purchase of the Property within the SIPP.
- InvestAcc responded to say, “As the purchase is to proceed, please can you complete and sign the attached property questionnaire...”
- InvestAcc called Mr A's appointed solicitor for the purchase (**the Solicitor**). InvestAcc's call note of this conversation said:

“Spoke to solicitor to discuss proposed purchase as it has a residential element but this is included under the lease to the tenant – may be acceptable as isn't being used residentially but will need him to do further enquiries. [The Property] is also linked at the ground floor to next door which is under separate ownership so this will need looked into.”

- The Solicitor emailed Mr A. This email said:

“I have had a brief word with [InvestAcc] about the property and understand that the “residential element” will not cause the pension fund an issue because the whole property is let to Ladbrokes on one lease including the flat.

That being the case there is no compliance issue.

Whether this is a suitable investment is not a point on which I can comment until I have investigated title and conducted a full property due diligence exercise and for now is only something your pension advisers and surveyors could advise on, but there is nothing from the information provided which suggests that it is not, subject to the full investigation process supporting this, and the contract terms and those of the lease to which the property is subject, being acceptable.”

8. On 13 April 2018, Mr A completed and signed the InvestAcc 'Property/Land Questionnaire for purchases' (**the Questionnaire**). At the start of the Questionnaire InvestAcc states:

**"Important Note** – please read this before completing the Questionnaire

This Property Questionnaire is designed to provide a framework for supplying the information required to enable us to consider a proposal to purchase or acquire UK based commercial property and land. **Please ensure that it is completed in full as any missing information may cause a delay.**

In order to establish the suitability of a property as an investment we will require the following to be provided in all instances, even in those cases where the property is known to you:

1. A Valuation Report provided by a RICS qualified surveyor (or equivalent), in our required format.
2. Full searches are to be carried out by your chosen solicitor, appropriate to the nature of the property.
3. If there is an indication of asbestos, an asbestos report will be required.
4. If applicable, a valid Energy Performance Certificate (EPC) will be required.
5. A detailed Report on Title, to be carried out by your chosen solicitor.
6. Additionally we may require an Environmental Report on the property instances where there is some question over the property's environmental state. The cost of the report and any investigations will be at your or your pension fund's expense, and we may be unable to proceed if the response is unsatisfactory.

We will not be able to proceed to completion until we are in receipt of the above, and also we may decline the request to acquire the property at any time."

9. The Questionnaire links to the 'Guide to SIPP Property Purchase', within which is a Q&A section. Question 9 with the answer is:

**"Can I convert residential property to commercial property, in order that my SIPP can buy it?**

Three stages are required before we can consider buying it:

1. Permission must have been granted by the local authority for the change of use.
2. The property must then have been used commercially for that use.
3. There must be no residential element remaining."

10. Within his completed Questionnaire, Mr A confirmed that there was a residential element to the Property not “currently in occupiable condition but forms part of the lease”.
11. Within Mr A’s signed Questionnaire there was a declaration that stated:

“I acknowledge and accept that all costs associated with the property, including surveyors reports and solicitors fees will be the responsibility of my individual pension schemes and the costs thereof will be debited whether the proposed purchase completes or not.”
12. On 9 July 2018, InvestAcc received the report from the appointed surveyor (**the Surveyor**). This explained that, whilst the self-contained flat within the Property was not habitable at that time, it was defined as a residential flat, and that the tenant could choose to sub-let this to a residential tenant at any time.
13. Based on this, InvestAcc confirmed to Mr A that it would not be possible to purchase the Property within the SIPP.
14. On 11 July 2018, Mr A raised a complaint as he felt InvestAcc had previously confirmed that he would be able to purchase the Property. Mr A argues that the Questionnaire he completed in April 2018, along with the lease he provided, confirmed to InvestAcc that the residential flat could be sub-let by the tenant.
15. Mr A believes that InvestAcc should not have allowed the process of purchasing the property to commence, and that it has caused him to lose approximately £5,000 in funds from the SIPP for fees charged by the Solicitor and the Surveyor.
16. I note from the invoices Mr A has provided that the Solicitor raised fees of £2,086 for, “Acting on your behalf in relation to the negotiation, preparation and completion of the purchase of the above property.” The Solicitor raised a separate invoice of around £700 for arranging the required searches and the Surveyor charged fees of £1,080.

## **Adjudicator’s Opinion**

17. Mr A’s complaint was considered by one of our Adjudicators who concluded that no further action was required by InvestAcc. The Adjudicator’s findings are summarised below:-
  - With regard to the upstairs flat, it was not correct for InvestAcc to say that the contents of the lease could influence the eligibility of the Property within the SIPP as there was a commercial lease for the whole property. However, it was not clear from Mr A’s initial enquiry whether the classification of use had been amended for the ‘former’ flat within the Property.
  - InvestAcc provided reasonable caveats about the requirements for holding residential property within a SIPP.

- Mr A signed his agreement to InvestAcc's terms, which advised him that solicitors and surveyors would need to be consulted, and there was no guarantee the acquisition would be approved.

18. Mr A did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr A provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the points made by Mr A for completeness.

### **Summary of Mr A's position**

19. The residential element should have been vetted by InvestAcc before the acquisition process commenced.
20. Mr A sent a copy of the tenancy lease for the Property, dated 22 April 2010, to InvestAcc which referred to the 'residential flat'.
21. Mr A argues that InvestAcc should also have known from this lease that the existing tenant was permitted to sub-let the flat, so InvestAcc ought to have known straight away that the Property could not be acquired by the SIPP.
22. Mr A did not know he had signed the declaration in the Questionnaire until after he had made his complaint to InvestAcc.
23. Mr A was told there were no compliance issues before he commenced the acquisition process in April 2018.

### **Ombudsman's decision**

24. Mr A has argued that InvestAcc ought to have known from his initial enquiry and the information he provided that the flat within the Property was residential, and so should not have allowed him to proceed with the acquisition process. However, the estate agent listing that Mr A shared with InvestAcc stated that the Property contained a 'former' flat, which could have meant that the change of use had been applied to the flat.
25. The tenancy lease Mr A provided to InvestAcc did refer to the flat as residential, however, the lease was created in 2010, and so would not have reflected any change of use applications after that time. I find that it was reasonable for InvestAcc to need further investigation to be undertaken before it could confirm whether the Property could be acquired by the SIPP.
26. Within the Questionnaire, Mr A told InvestAcc that there was a residential element, but that this was not in occupiable condition. Again, it is plausible to interpret from this that a change of use had been applied. I do not find that the information supplied before Mr A commenced the acquisition process was sufficient for InvestAcc to know with certainty that the Property still contained a residential element.

27. Mr A has argued that he was told the compliance had been confirmed. Mr A is referring to the comment made by the Solicitor, in the email to him dated 12 April 2018. The Solicitor's comment, quoted in paragraph 7, is in fact a conditional statement, based on several factors, and not a confirmation that the Property was compliant. In any event, this comment was made by the Solicitor and not InvestAcc. Mr A had the option to appoint one of InvestAcc's Panel Solicitors but Mr A chose to appoint his own. InvestAcc cannot therefore be held responsible for the actions of the Solicitor.
28. Mr A has claimed losses within the SIPP of around £5,000, but the invoices he has provided amount to approximately £3,866. I note that the Solicitor raised an invoice which included services for the 'negotiation, preparation and completion' of the purchase of the Property. As the Property was not in fact purchased it is not clear why Mr A is incorporating this fee into his perceived losses.
29. InvestAcc's comments on the relevancy of the sub-letting terms within the tenancy lease are incorrect. Instead, the definition it is based upon is the way in which the flat is classified, residential or commercial. HMRC defines a residential building as, 'a building or structure that is used or suitable for use as a dwelling.' HMRC also states, 'If a building is not currently in use then you need to look back at the last time it was used.' As I understand it, even though the flat was not in occupiable condition in 2018, the most recent use for the flat had been residential.
30. Had the classification of use been changed from residential, it is possible that Mr A could have purchased the Property within the SIPP without the unauthorised tax implications. The contents of the lease would not have any bearing on the eligibility of a residential property within a SIPP.
31. Whilst InvestAcc gave some incorrect information in its response to the initial enquiry, dated 28 February 2018, in the same correspondence, which was provided before Mr A proceeded with the acquisition process, InvestAcc gave him accurate warnings that residential property cannot be held within a SIPP. InvestAcc also informed Mr A that due diligence would need to be carried out before it could confirm the acquisition. I do not find that InvestAcc's incorrect comments have been of material detriment to Mr A, and so I do not make an award for non-financial injustice.
32. When Mr A told InvestAcc, on 12 April 2018, that he wished to proceed with the acquisition, InvestAcc sent the Questionnaire to him to complete. This included a declaration, which Mr A signed, of his agreement to InvestAcc's terms. InvestAcc is permitted to set its own terms and, if Mr A was not in agreement with them, he was not obligated to pursue the acquisition within the SIPP. Mr A has said he did not know he had agreed to the terms, however his signature on the declaration, dated 13 April 2018, confirms that he had been presented with these.

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33. I do not uphold Mr A's complaint.

**Anthony Arter**

Pensions Ombudsman  
9 December 2019