

## Ombudsman's Determination

Applicant	Mr S
Scheme	Namulas SIPP ( <b>the SIPP</b> )
Respondent	Namulas Pension Trustees Limited ( <b>Namulas</b> )

## Outcome

1. I do not uphold Mr S' complaint and no further action is required by Namulas.

## Complaint summary

2. Mr S complains that:-
  - Namulas has been unable to confirm which Trust Deed and Rules (**the Rules**) are in force for the SIPP.
  - Namulas has unilaterally changed the Rules. In particular, Mr S can no longer borrow against the SIPP or use an overdraft facility. In addition, Namulas is now able to force a sale of the SIPP's asset, in order to pay its own fees.
  - The SIPP asset has lost value. In particular, Namulas has tried to force a sale below market value.
  - The SIPP fees are unreasonable. In particular, the SIPP asset was mis-sold to Mr S, as he was not made aware of the fees that would be applicable before he made the investment. He has also not been receiving a pension from the SIPP as Namulas has ceased collecting rent from the tenant.
  - Namulas failed to carry out sufficient due diligence on the suitability of the SIPP when it commenced, and when the property was purchased in 2005.

## Background information, including submissions from the parties

3. On 30 July 1997, Mr S signed a declaration enabling the establishment of the SIPP under the Rules (**the Declaration**). As part of the Declaration, Mr S agreed to pay fees to Namulas in accordance with the Technical Details Brochure (**the Brochure**).
4. On 1 August 1997, the SIPP was established.

5. In 1999, Mr S used funds held within the SIPP to purchase a commercial property.
6. On 20 February 2002, the Rules were amended. The primary purpose of the amendment was to account for the fact the SIPP provider had changed.
7. In 2004, the commercial property held in the SIPP was sold and the funds placed in the SIPP's bank account. In 2005, the funds in the SIPP's bank account were used to purchase a second property (**the SIPP Property**). The SIPP Property is a mixed-use property and it is the main SIPP asset. Mr S used a financial adviser (**IFA**) that was not employed or affiliated with Namulas to assist him with the purchase of the SIPP Property.
8. Prior to the purchase of the SIPP Property, on 14 March 2005, Namulas sent a fax to the IFA and said:

“I can confirm that the property application form is in order in principle. Our understanding in relation to the property is that the property includes a residential flat, which is to be occupied by a caretaker/manager. We will therefore require the solicitor appointed to act in relation to the purchase to vary the existing lease to incorporate the following wording:

“not to permit or suffer any person to sleep or reside in the Demised Premises except that a person (“the Caretaker”) who is not a “connected person” ...may sleep or reside in the Demised Premises if and only if the Caretaker manages the Demised Premises on behalf of the Tenant and he/she sleeps or resides at the Demised Premises strictly in accordance with the terms of his contract of employment...””
9. On 23 March 2005, the solicitor acting in relation to the purchase (**the Solicitor**) wrote to Namulas asking for its requirements. On 31 March 2005, Namulas replied to the Solicitor in writing, and provided the requested information.
10. Between 3 and 5 May 2005, there were exchanges between the Solicitor and Namulas concerning the residential flat that formed part of the SIPP Property and the Deed of Variation (**the Deed**). During this period, Namulas confirmed to the Solicitor:-
  - Inland Revenue regulations prohibited the purchase of a residential element of a commercial property subject to an assured shorthold tenancy agreement.
  - Prior to the exchange, Namulas required written confirmation that notice to quit had been given to the tenant of the residential flat.
  - Vacant possession would be required at the time of completion.
  - An employee as part of their employment contract could occupy the residential flat.
11. On 24 May 2005, the Solicitor wrote to Namulas and said:

“We can now confirm that the position concerning the residential tenant has been resolved. The tenant is an employee of the occupational business tenant...”

12. On 10 June 2005, the Solicitor sent the duplicate Deed to Namulas for execution. On 16 June 2005, Namulas returned the executed duplicate Deed.
13. On 24 June 2005, Mr S signed a Property Management Agreement (**the Agreement**) with Namulas. This Agreement appointed Mr S as the agent to, “manage, supervise and provide services for the operation and use of the property.” The Agreement said:-

“Without prejudice to the generality of the foregoing, the Member shall:-

  - 1.1 ensure that all rents, insurance premiums and service charges (if any) payable under the Lease are paid to [Namulas] in a prompt and timely manner...”
14. On 6 April 2006, the Rules were again amended. The primary purpose of the amendment was to bring the Rules in line with recent legislative changes.
15. On 18 May 2007 and 16 July 2008, the Rules were subject to further amendments. The primary purpose of these amendments was to account for the fact the SIPP provider had changed.
16. On 1 August 2008, the Rules were amended again. The primary purpose of this amendment was to amend clause 14.1 to allow Namulas to borrow money for the benefit of the SIPP, where directed by Mr S.
17. On 2 January 2015 (**the January 2015 Letter**) Namulas wrote to Mr S and informed him that the fee structure at the time had been in place since 2012. In that letter, it informed Mr S that it had made some changes to the fees that apply around the acquisition and on-going servicing of a commercial property via the SIPP. Included with this letter was a copy of the SIPP property fee menu, which came into effect in April 2015.
18. On 10 January 2017, the current Rules came into effect.
19. On 5 March 2018, Mr S emailed Namulas with concerns about the SIPP. In particular, he complained that he had been mis-sold the SIPP. Mr S believed that the SIPP was unsuitable for him because of the high costs and charges which resulted in him not being paid a pension for several years. He also queried which Rules were in force for the SIPP, and why there had been unilateral changes to how the SIPP was run. He was dissatisfied that the Rules had been changed to allow Namulas to sell assets within the SIPP without the member’s consent.
20. On 10 August 2018, Namulas responded to Mr S and confirmed that it had not sold him the SIPP. It suggested that the SIPP may not be a suitable product for him, given the number of concerns he had about it. It also suggested that he should consider a

different retirement product or work with an IFA to generate the income he wanted from the SIPP.

21. On 11 December 2018, following a series of communications between the parties, Mr S sent Namulas a letter outlining his current complaint, as set out in the Complaint Summary, paragraph 2 above. In clarifying his concerns, he stated that he was “most concerned about the mis-selling, lack of due diligence and withholding of information on the part of [Namulas], and whether the clause allowing the unilateral change, or total withdrawal, of major benefits is legal.”
22. In response to Mr S’ complaint, Namulas said:
  - The current Rules in force for the SIPP were those dated 10 January 2017, which took effect from 1 April 2015. Namulas acknowledged that Mr S had been given inconsistent information regarding this in the past and offered him £500 in recognition of any distress or inconvenience this may have caused.
  - It was unclear which rules Mr S was complaining had been unilaterally changed. In any event, Namulas had always had the power to amend the Rules.
  - Namulas would consider requests from Mr S to borrow against the SIPP, and it would allow borrowing in appropriate circumstances.
  - The SIPP had never had an overdraft facility. The bank statements Mr S had produced, showing a negative bank balance, reflected transactions which were pending at the time and not an authorised overdraft.
  - Namulas had not tried to force a sale of the SIPP Property at below market value. Furthermore, whilst SIPP assets may be sold to pay for any fees due, Namulas would only take such action in exceptional circumstances. As it had yet to take such action, and it had not currently engaged an agent to sell the SIPP Property, it could not comment further on this.
  - Namulas did not sell the SIPP or the SIPP Property to Mr S. In relation to its fees, it was not clear exactly which fees Mr S was complaining about. However, Mr S had signed the Declaration agreeing to pay its fees when the SIPP was set up. Since then, there had been regular fee reviews and Namulas had always informed its clients of fee changes by bulk mail. Furthermore, Mr S would have been able to see Namulas’ fees from his SIPP bank statements. If he was unhappy with Namulas’ fees, he could consider transferring to another provider.
23. In relation to Namulas’ last comment, Mr S has said that he could not find another SIPP provider who would accept an in-specie transfer.
24. Between 15 April 2021 and 7 May 2021, there were further exchanges between Mr S and Namulas concerning his complaint.

## **Adjudicator's Opinion**

25. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by Namulas. The Adjudicator's findings are summarised below.
26. Mr S had previously raised complaints against Namulas regarding the SIPP. These complaints had already been determined or considered by The Pensions Ombudsman (**TPO**) or the Financial Ombudsman Service, respectively. He had also raised new complaints since those, which the Adjudicator had investigated.
27. For the avoidance of doubt, only the complaint as outlined in the Complaint Summary section, paragraph 2 above, had been included in the Adjudicator's investigation.
28. Firstly, the evidence indicated that Namulas did give Mr S conflicting information concerning the Rules in force for the SIPP. In particular, it previously told him that the Rules in force were those dated 6 April 2006, subject to the amendment brought into effect on 1 August 2008. However, this was incorrect as the Rules in force are those dated 10 January 2017.
29. Namulas had clarified the position and offered Mr S £500 for any distress and inconvenience caused by its errors.
30. The role of TPO is to investigate complaints of maladministration and whether any such maladministration had led to a financial or non-financial loss. In the case of non-financial loss, the lowest award which TPO would recommend or direct is £500, for significant distress and inconvenience.
31. The Adjudicator could not see that Mr S had suffered a financial loss as a result of receiving conflicting information about the Rules relating to the SIPP. In addition, while the Adjudicator appreciated that Mr S may have been caused some frustration and inconvenience through receiving conflicting information, she was not persuaded this was significant. Overall, Mr S had not demonstrated that it had affected him significantly.
32. However, Namulas had made Mr S an offer in line with TPO's award for significant distress and inconvenience. So, the action Namulas had taken to correct its error, was more than reasonable in the Adjudicator's view.
33. As Trustee, Namulas has the power to make changes to the Rules. The original amendment power can be found in Rule 11 of the establishing Rules for the SIPP, dated 4 June 1992.
34. In the absence of Mr S highlighting any specific rule changes he believed were unlawful, the Adjudicator could not investigate his complaint about this further or conclude that there had been maladministration. The Adjudicator's role was not to carry out an audit of the SIPP, nor the way the SIPP had been managed historically. Mr S was asked to be more specific with his concerns, but his responses largely

raised new questions and concerns. The Adjudicator could not investigate new complaint issues, they needed to be raised with Namulas formally first.

35. In relation to being able to borrow against the SIPP, Mr S had not provided evidence of any specific borrowing request that had been denied by Namulas. Also, Namulas had confirmed that it would consider borrowing requests.
36. However, there was no evidence that the SIPP had ever had an authorised overdraft facility and Mr S had provided no evidence that one must be provided. So, it was the Adjudicator's view that there was no maladministration in Namulas withdrawing an overdraft facility or not offering one.
37. Mr S was also unhappy with the increased fees which the SIPP had experienced over time, and the potential for Namulas to force a sale of the SIPP Property in order to settle those fees.
38. Regarding the value of the SIPP Property, this would be determined by market conditions and not Namulas' actions. The Adjudicator noted that Namulas had previously indicated that the SIPP Property may need to be sold, where it had been unoccupied for a period of time and the SIPP was running at a deficit. However, the SIPP Property was subsequently tenanted and no further action was ever taken.
39. Generally speaking, trustees are the legal owners of pension scheme assets and may manage those assets accordingly. In particular, the establishing Rules for the Scheme, under Rule 5(D), states that:

“[Namulas] shall have the same full and unrestricted powers of investment and changing investments and dealing with trust moneys and property comprised in the Scheme in all respects as they would have were they absolutely and beneficially entitled thereto.”
40. However, trustees must act in the financial interests of beneficiaries, and the above provision confers a power on Namulas only where it is necessary to allow Namulas to comply with its overall obligations. In other words, Namulas has stated that it has the power to sell or dispose of assets, and this is true to an extent. However, it may only be reasonable for it to use this power in certain circumstances. As Namulas has yet to force a sale of the SIPP Property, and says it currently has no intention to do so, the Adjudicator could not comment on this further.
41. The parties appeared to be in agreement that Namulas did not sell Mr S the SIPP or the SIPP Property. Mr S has said that while this may be the case, he could not make an informed decision about the SIPP or his investments without clear information concerning Namulas' fees.
42. The Adjudicator was of the view that Mr S was made aware of, and agreed to, Namulas' fees when the SIPP was first established and when he purchased the SIPP Property. In particular, he signed the Declaration, which confirmed he would be liable to pay the fees set out in the Brochure.

43. Section eight of the Brochure outlined Namulas' fees, and also stated that:
- “The level and form of these charges will be reviewed regularly and may be increased at any time.”
44. Namulas had confirmed that fee changes were confirmed by bulk mail, and the Adjudicator was also satisfied that Mr S had access to bank statements for the SIPP. As such, on balance, it was the Adjudicator's view that Mr S had agreed to fee increases and he had been notified of the fee changes since his SIPP was set up.
45. Mr S may not be happy with the current level of fees charged to the SIPP, and the fees may be high in relation to the income generated by the SIPP. However, it did not necessarily follow that there had been maladministration.
46. Namulas had suggested that Mr S may wish to consider working with an IFA to review whether the SIPP is an appropriate product for him and how he might manage his retirement funds going forward. The Adjudicator believed this was a reasonable suggestion. In particular, it was likely that there would be some providers who would accept an in-specie transfer from him, and an IFA may be able to help Mr S identify those providers. Alternatively, an IFA may be able to help Mr S review whether the SIPP Property is suitable for his needs and consider other options if not.
47. It was the Adjudicator's opinion that the complaint should not be upheld.
48. Following the Adjudicator's Opinion there were further exchanges between TPO, Mr S and Namulas, concerning the points in the Complaint Summary (paragraph 2 above).
49. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider.
50. Mr S provided his further comments which do not change the outcome.

### **Summary of Mr S' additional comments**

51. Namulas claims that the primary aim of the changes to the Rules were to alter the Scheme provider, but there were also several important changes to the Rules to allow the new provider to take more profit. These were not advised to the members contrary to the Rules.
52. The Adjudicator stated that Namulas would allow borrowing against the SIPP, and his previous request to borrow had not been declined. But his pension payments of £400 per month stopped in August 2021. This is causing him great hardship. He requested a loan facility to allow pension payments to continue, but as yet, seven months later, has had no response. Such borrowing is permitted by HMRC as “unauthorised borrowing.” Up to 50% of the value of the asset can be borrowed, and can be repaid when the current situation is sorted out.

53. The Adjudicator is aware of his unfulfilled request but still maintains that there has been no maladministration by Namulas in this regard. His request for a loan does not seem unreasonable considering the SIPP Property has over £100,000 in equity.
54. It is the Adjudicator's Opinion that Namulas did not sell him the property in the SIPP, either in 1999 or in 2005. However, Mr S said that the IFA, who is recorded as selling the product, was paid a large commission, as recorded in the original application. He was either an employee or agent of Namulas. There is a definite contractual capacity between the pension provider and this sales person. In whatever capacity, both the pension provider and Namulas, as the SIPP Trustee, had a duty of care to ensure that the information given to him was accurate, and that the investment was appropriate for his circumstances.
55. The Adjudicator said that Namulas suggested the SIPP may not be a suitable product for him. He questioned why, if this is the case, Namulas proceeded with opening the SIPP.
56. The Adjudicator did not include his due diligence concerns in her investigation. He questioned whether it was fair that the questions of due diligence and duty of care should be ignored.
57. Namulas claims that it had not tried to force the sale of the SIPP Property. However, he has produced evidence that it has frequently threatened to do so and this had forced him to accept tenants on less favourable terms, to his financial detriment.
58. He questioned how an IFA would be able to assist him.
59. It is not true to state that he would have been informed by bulk mail of all the charge increases in fees and charges. He also did not receive any notification of other changes to the Rules.
60. Maladministration is defined as "bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude and so on." He considers that Namulas has been guilty of some of these faults.
61. The Adjudicator's conclusions are perverse based on a fair balance of the evidence. The purpose of setting up and contributing his lifetime savings to a pension fund was for the insurer to provide an income for his old age. Namulas has failed in this role. This is maladministration on a big scale and TPO should be an impartial and independent decision maker in the complaint process.

### **Ombudsman's decision**

62. Following the Adjudicator's Opinion and further correspondence, Mr S' main contention appears to be the suitability of the SIPP for his personal circumstances and the due diligence that Namulas completed when he established the SIPP and when he purchased the SIPP Property in 2005.



63. The SIPP was established in 1997 and Mr S purchased the SIPP Property in 2005, following advice from an IFA that was not employed or affiliated to Namulas. Fees being paid to the IFA does not confirm that the IFA worked for or was affiliated to Namulas. The fees that Namulas paid to the IFA would have been what Mr S would have agreed to pay the IFA at the time.
64. As the Trustee of the SIPP, it was Namulas' responsibility to ensure that the investments in the SIPP were appropriate in accordance with what is acceptable by HMRC, and ensuring no unauthorised activities occur.
65. Mr S asserts that Namulas should not have allowed him to purchase the SIPP Property as it had a residential element. Prior to the purchase of the property in 2005, Namulas wrote to the Solicitor and informed it of its requirements to facilitate the proposed purchase, and the Solicitor confirmed that the issue of the residential flat had been resolved. I find that Namulas fulfilled its duty of care and completed sufficient due diligence in relation to the purchase of the SIPP Property, before the purchase was completed.
66. It is the member's responsibility to continue to monitor the suitability of the SIPP for themselves, as their personal circumstances change. It is not Namulas' responsibility to advise Mr S of what he should do if the SIPP is no longer suitable for him.
67. I do not find that Namulas failed to complete sufficient due diligence at the time that Mr S established the SIPP in 1997 or when he purchased the SIPP Property in 2005. It would have been the responsibility of the IFA to have checked that the SIPP, or the purchase of the property within the SIPP, was suitable for Mr S' circumstances at the time. The SIPP no longer being suitable for Mr S' circumstances did not result from any maladministration on the part of Namulas.
68. One of the issues Mr S has raised is that he is no longer getting an income from the SIPP and this is causing him financial hardship. He asserts that he is in this position because Namulas had ceased collecting rent from the tenant. Namulas has explained that Mr S is not being paid an income from the SIPP because there is insufficient cash in the SIPP to do so.
69. The Agreement that Mr S signed in 2005, appointed Mr S as the agent to manage the SIPP Property. As the property manager, it is Mr S' responsibility to ensure that the tenant pays the appropriate rent.
70. Mr S has explained that he is in a difficult financial situation because of issues with the SIPP Property, but I do not find that this is due to Namulas' maladministration.
71. Regarding the provision of loans to members of the SIPP, it is ultimately Namulas' decision to decide the appropriate circumstances for providing members with a loan. Namulas says it is not against permitting borrowing in principle, but it would need to review each request to consider if it were possible under HMRC rules. Any decision Namulas makes not to grant Mr S a loan would not automatically amount to maladministration.

72. Regarding Mr S' concerns about Namulas forcing a sale of the SIPP Property, I note that in a letter dated 7 May 2021 Namulas said:
- “...the [Rules] give us the authority to sell a property where we are aware that a residential element is held in order that the investments held within the Plan adhere to HMRC regulations regarding allowable investments.
73. However, Namulas subsequently confirmed to TPO that it had not instructed any agents to sell the SIPP Property.
74. The SIPP Property is the only asset in the SIPP, and as such it is the only asset that Namulas can recover its fees from. Namulas also has to ensure that it adheres to HMRC rules in relation to properties held within the SIPP. I find that there has been no maladministration by Namulas to date, in relation to its comments concerning the sale of the SIPP Property. Furthermore, I am unable to make a decision that Namulas' actions would amount to maladministration, should it decide to force the sale of the SIPP Property in the future, as it would depend on the circumstance at the time of the sale.
75. It would be wrong to describe Namulas as an insurance company in this particular situation. It did not sell Mr S an annuity or other guaranteed source of income for life, from his pension benefits. Namulas provides a SIPP wrapper in which the SIPP Property is held, and it is this investment that provides retirement income. If that income is insufficient to meet Mr S' needs that is not Namulas' responsibility.
76. Concerning the fees applicable to the SIPP, Namulas has provided a copy of the January 2015 Letter, and copies of the SIPP Property fee menus, prior to 2015, that it said were sent to members by bulk mail. I find that, on the balance of probabilities Mr S would have been aware of the fees that were applicable to the SIPP, and any changes to those fees, following the commencement of the SIPP. So, there was no maladministration by Namulas in this regard.
77. I appreciate this situation is causing Mr S stress. For this reason, he may wish to consider appointing an IFA to discuss his options in relation to the SIPP and the SIPP Property.
78. I do not uphold Mr S' complaint.
79. If Mr S has not yet accepted the £500 offer and wishes to do so, he should contact Namulas directly.

**Anthony Arter**

Pensions Ombudsman  
16 June 2022