

Ombudsman's Determination

Applicant	Mr Michael Beasley
Scheme	Berkeley Burke Private Pension Plan (the SIPP)
Respondent	Berkeley Burke SIPP Administration Ltd (Berkeley Burke)

Complaint summary

Mr Beasley has complained that Berkeley Burke failed to carry out sufficient due diligence in respect of his investments into Green Oil Plantations and Harlequin Property.

Summary of the Ombudsman's determination and reasons

The complaint should not be upheld because it was not Berkeley Burke's responsibility to carry out the level of due diligence suggested by Mr Beasley in respect of investments chosen by him.

Detailed Determination

Material facts

1. In August 2011 Mr Beasley applied to open a Berkeley Burke SIPP. This followed advice from a regulated adviser, Harris Knights & Co Limited.
2. On 1 September 2011 Berkeley Burke sent a welcome letter to Mr Beasley. In that letter they noted his intention to invest in “Harlequin Property” and “Green Oil Plantations”. They then said:

“We have a process in place to assess whether investments are capable of being held within a SIPP in line with HMRC guidance. For the avoidance of doubt, acceptance of an investment by us in a SIPP does not mean we endorse the investment, nor it’s [sic] suitability to meet your own financial objectives or investment risk profile”
3. The letter went on to explain that the responsibility for assessing the suitability of any investment within the SIPP rested with Mr Beasley and his professional advisers. It made clear that Berkeley Burke were not authorised to provide financial advice.
4. The letter said that “for your particular investment proposition” there were a number of issues (listed as bullet points) that Mr Beasley should consider before entering into any contract. These included:
 - The investment is not covered by any UK Financial Services Compensation scheme (i.e.: FSCS & FOS).
 - The investment is an unregulated investment and is not covered by the FSA.
5. The letter said that Mr Beasley should note that Berkeley Burke SIPP Administration Limited could not be held responsible for any losses or liabilities that might arise from his investment decisions. He was asked to sign to say that he had read the “issues set out above” and that he indemnified Berkeley Burke against any losses or liabilities. He did so on 12 September 2011.
6. Mr Beasley invested £24,195 in Green Oil Plantations and £58,500 in Harlequin Property. In the Alternative Investments letters issued at the time Mr Beasley confirmed that he had considered the information prospectus provided by the product provider and that he was fully aware that this investment was high risk and/or speculative. He acknowledged that he had been recommended to seek professional advice, but had chosen not to do so. He also said that he was aware that Berkeley Burke acted on an execution only basis as directed by him and that they had not provided any advice in respect of this investment or the SIPP.
7. Green Oil Plantations entered administration in 2013.

8. Harlequin Property has been the subject of a number of warnings by the regulator and many investors have sought compensation from the Financial Services Compensation Scheme.
9. Mr Beasley says that as trustees, Berkeley Burke had a duty to provide a high standard of due diligence and offer suitable SIPP investments to its clients, especially those that have little or no previous investment experience.

Conclusions

10. The concept of a statutory duty of care as it applies in this case is defined in the Trustee Act 2000 (the Act). This Act was introduced principally to solve the problems faced by many private trusts and some charities that had investment powers restricted by the Trustee Investment Act 1961, which was no longer appropriate.
11. All trusts now have wide investment powers by virtue of the Act. There is also a new statutory duty of care to sit alongside common law trustee duties and responsibilities. There is an exemption for occupational pension schemes, but no specific exemption for SIPPs.
12. I have copied below an extract from the Explanatory Notes that accompany the statutory provisions. It reads:

“The duty is a default provision. It may be excluded or modified by the terms of the trust. This new duty will apply to the manner of the exercise by trustees of a discretionary power. It will not apply to a decision by the trustees as to whether to exercise that discretionary power in the first place”.
13. The provision to which the explanatory note refers is Paragraph 7 of Schedule 1 of the Act (which disapplies the Duty of Care contained in Part 1 of the Act). It states:

“The duty of care does not apply if or in so far as it appears from the trust instrument that the duty is not meant to apply”.
14. In my opinion the statutory duty of care does not apply to Berkeley Burke in relation to investments as explained in Paragraph 7 of Schedule 1 to the Act. The reason for this is that the selection of the investments is not a decision of the trustee. The trustee has a very wide power of investment but the contractual documentation with Mr Beasley make clear that investments will be selected by the member personally.
15. It is clear that the limit of Berkeley Burke’s responsibility as administrator is to consider whether or not an investment falls within the list permitted by HM Revenue & Customs (HMRC). Whilst they can choose not to allow an investment even if it is permitted by HMRC, there is no requirement on them to do so. HMRC allow SIPPs to invest in a very wide range of investments. The fact a specific type of investment is available to invest in a SIPP does not confer any suitability on the investment itself.

16. If the duty of care applied then Berkeley Burke would be required to arrange investments and periodically review them in the manner of occupational schemes and private trusts which would be entirely inconsistent with the purpose of a SIPP.
17. I have also considered whether there were wider due diligence responsibilities applicable to Berkeley Burke by the regulator, the Financial Conduct Authority previously the Financial Services Authority (FSA).
18. The FSA originally applied a relatively “light touch” in regulating SIPPs. In December 2008 the FSA commenced a review of SIPP business by examining the practices of SIPP operators. They decided to place increased focus on “Treating Customer Fairly” (TCF) which was at the forefront of their move towards a principles based approach to regulation. However, they gave authorised firms flexibility in deciding what fairness meant to them and how best to meet TCF requirements in a way that suited their business. With this flexibility came a responsibility on the authorised firms to be able to justify their approach to the FSA and demonstrate that a TCF culture has been implemented.
19. The report was issued in September 2009. It found that some SIPP operators:
 - fell short of the TCF requirements;
 - misunderstood their responsibility for the quality of the SIPP business they administer;
 - had accepted business without the necessary due diligence or without regard for future business planning; and
 - had problems with their systems and controls
20. This review recommended that SIPP providers should:
 - monitor and bear some responsibility for the quality and type of business introduced to them;
 - be responsible for the compliance aspects of individual SIPP advice;
 - routinely record and review the type and size of investments recommended by advisers; and
 - request copies of suitability reports.
21. This was aimed at ensuring providers put in place certain controls and systems designed to flag potential instances of unsuitable or poor investment advice. However, in this instance Mr Beasley has agreed that the specific investments about which he is now complaining were carried out without any advice or input from Harris Knights & Co Limited, or indeed any other adviser. Therefore, this aspect of the regulator’s review does not apply in this case.

22. In my view, the basic checks which Berkeley Burke undertook at the time were sufficient to meet the requirements imposed on them by the regulator and HMRC for such investments.
23. There is a wide spectrum among SIPP operators ranging from those who will accept all sorts of investment in their SIPP wrapper to those who limit the investments to tried and tested assets. But if HMRC allows an asset class to be invested in a SIPP, providers can follow suit although they need to consider whether it is worth the risk and the costs of allowing these additional investment capabilities within a SIPP given likely volumes.
24. Berkeley Burke may take a less conservative line than other providers in what they allow in their SIPPs. They are perfectly entitled to do this however and any investment which does not give rise to a tax/property charge may be put into one of their SIPPs.
25. While I have some sympathy for the position Mr Beasley now finds himself in, Berkeley Burke complied with their obligations, gave him clear warnings and explained they would not be liable for losses in the particular investments that he chose.
26. I do not uphold the complaint.

Tony King

Pensions Ombudsman
30 March 2015