PO-5881

Ombudsman's Determination

Applicant	Mr N
Scheme	The Essential SIPP
Respondent(s)	Stadia Trustees (**Stadia**)

Complaint Summary

Mr N has complained that Stadia failed to undertake the appropriate level of due skill, care and diligence in allowing him to invest his self-invested personal pension plan (**SIPP**) in African Land.

Summary of the Ombudsman's Determination and reasons

The complaint should not be upheld because it was not Stadia's role to undertake the level of due diligence suggested by Mr N.

1. On 6 April 2012, Mr N completed an application to establish an "Essential SIPP" with Stadia. As part of that application he signed a "Pensions transfer declaration" which said:

   > "I confirm that the transfer of my occupational pension scheme(s) is to be conducted on an execution only basis. I have not sought or received independent financial advice. I understand that I will have limited regulatory protection".

2. The application went on to explain the difference between complex and non-complex investment products. Complex products were noted as including "Non-FSA regulated investments" and "Certain land and property investments". Notes explained the various risks associated with investments.

3. As part of the application Mr N confirmed that he fully understood all risks associated with the selected investments; that he had received and read the product literature; that he understood that the Essential SIPP was a member-directed arrangement and that he had not received any advice regarding the suitability of the investment from Stadia. Finally, he confirmed that he was investing in a complex product as defined and that he understood and accepted the associated investment risks.

4. Elsewhere in the application Mr N acknowledged that if he had not sought the advice of an FSA regulated independent financial adviser and still wished to proceed with the investment, Stadia would consider this an 'execution only' transaction. As a result Mr N would give up any recourse to the Financial Ombudsman or the Financial Services Compensation Scheme (**FSCS**).

5. A letter from Stadia to Mr N dated 10 July 2012, thanked him for sending in his application to establish his Essential SIPP. It asked him to complete and return an Investment Instruction Form which was attached.

6. The letter went on to say:

   > "We note from your Attitude to Risk Questionnaire that you state you have received no financial advice other than "from Stadia Trustees". Please be aware that although Stadia Trustees compile a Risk Assessment Profile for each client, we do not offer financial advice regarding specific investments."

7. The Risk Assessment Form completed by Mr N gave a contradictory picture. On the one hand it indicated that he was not cautious, that he felt comfortable about investing in the stockmarket and that he did not generally look for the safest type of investments. Also, that he found investment and other financial matters easy to understand and that he was willing to take substantial financial risk to earn substantial returns.

8. However, on the other hand whilst it indicated that he was prepared to take some financial risk, he was not prepared to take his chances with high risk/high return investments. He said that he had previously bought and sold alternative investments on his own initiative and that he held investments with an above average level of risk which he had held for a long time, including during periods of market volatility.

9. He also said that he did not have a risk profile of above average, high risk or very high risk; and that he rated his knowledge of shares, managed funds, property and investments only as 2 on a scale of 1 to 10.

10. On the same form Mr N completed an "Additional Statement for Unregulated Investments". In this he agreed with the statement that "whilst Stadia Trustees Limited will not knowingly permit any investment to be made where it is clear the tax charges would be triggered, Stadia Trustees Limited have not provided you with any investment, legal or financial advice whatsoever as to the suitability of the transaction, or whether a tax charge could be triggered."

11. Under the heading "Investment Risks", Mr N answered the following questions positively:

    - Do you understand that this investment may be difficult to sell at a fair price or at all, and as a result it may impact on your ability to take retirement income or provide benefits for your dependants in the event of your death?
    - Are you comfortable that the investment performance may be volatile and you may lose a significant part or all of your investment?
    - Do you understand that the investment should be considered to be a high risk component of any investment portfolio and do you recognise that it is prudent to diversify your pension investment?
    - Are you aware that the investment is unlikely to be suitable for more than a small percentage of your overall retirement fund?
    - Do you agree that you do not in any way rely on Stadia Trustees Limited or their employees to provide any form of investment advice or confirmation of the suitability of this investment for your pension?

12. Under the heading "Scheme Member Statements and Declaration", Mr N confirmed that he was sufficiently well funded for his retirement that he could afford to make a speculative investment and that he understood that an investment may reduce in value and that the pension scheme may not receive back the amount originally invested.

13. Stadia issued an "Investor Declaration" letter to Mr N. It said:

    "Following your completion of the application form and Attitude to Risk Questionnaire, Stadia Trustees Limited are concerned that your Adventurous attitude to investment risk falls outside the parameters that we consider appropriate given your proposed investment."

14. The letter went on to detail a diverse investment portfolio which it said was as prepared by "Morningstar" and was a recommended asset allocation based on attitude to risk and investment time horizon.

15. However, the letter said that, if Mr N wished to proceed with his selected investment, Stadia required him to understand the following:

    - Whilst Stadia Trustees Limited have undertaken appropriate due diligence on your selected investment, this is a "paper exercise" to confirm that they exist and seem to provide the services described. However Stadia cannot be held responsible for the financial propriety of the company or the underlying investment.
    - The acceptance of the investment for holding within a SIPP does not indicate any judgement on behalf of Stadia Trustees Limited in respect of the performance of the investment. Stadia Trustees Limited are your trust administrators.
    - In the event that the investment does not perform as expected, Stadia Trustees Limited will not be liable for any loss that you suffer as a result of your decision to invest howsoever that loss arises.

16. At the conclusion of the letter, Mr N was asked to sign an acknowledgement. This said:

    > "I confirm that I have read this letter and understood the advice given in it. I confirm that that [sic] I have decided, of my own free will, that I wish to proceed with the investment, I fully accept that Stadia Trustees cannot be held liable for any financial loss that I might suffer howsoever that loss might arise as a result of my proceeding with the investment and I agree that any Regulator or Statutory Authority may be told that I have received the advice in this letter".

17. Mr N signed the letter and dated it 30 June 2012.

18. On 27 July 2012, Mr N completed a Member Investment Instruction Form. On this he opted for what he acknowledged was a non-regulated investment of £144,000 in Australian Carbon Credits and £3,900 in African Land.

19. On the form Mr N declared that he had read and understood the terms and conditions of the investment and that he authorised Stadia to make the purchase. He also confirmed that he understood the risks associated with the investment and that he had carried out his own due diligence on the investment to his full satisfaction.

20. Finally, he confirmed that he had not received any investment or other advice regarding the investment from Stadia.

21. On 2 August 2013, Stadia wrote to Mr N to say that the FCA had taken a number of investment firms to court over schemes it believed were illegal, including African Land. The allegation was that the firms were promoting and operating Collective Investment Schemes (**CISs**) in the UK illegally and without FCA authorisation.

22. A note at the end of the announcement said:

> "Stadia Trustees Ltd is a SIPP Operator. It does not give financial or investment advice, has never held itself out to do so, or ever acted for you in that capacity. These investments are not regulated and as such are not protected by the Financial Services Compensation Scheme therefore if you have any concerns you may wish to seek independent financial advice".

23. Further information regarding the court action was sent to Mr N on 15 August 2013, and on 30 August 2013, he was issued with a report detailing the value of his SIPP, together with a Statutory Money Purchase Illustration and fee invoice.

24. Mr N wrote a letter of complaint to Stadia on 27 November 2013. He complained that:

- Stadia's due diligence process was not discharged properly.
- The enhanced due diligence process for dealing with a UCIS was not discharged properly.
- By reason of these two complaints there had been a breach of trust.

25. The complaint referred to Final Guidance released by the FCA on 8 October 2013, in particular the section relating to Due Diligence. The relevant wording is set out in the Appendix to this document.

26. Mr N says that had Stadia undertaken the appropriate level of due skill, care and diligence they would not have allowed him to invest into an Unregulated Collective Investment Scheme (**UCIS**) via a SIPP, as it clearly was not an appropriate or suitable product to be held in a SIPP.

27. He says that Stadia have failed in their regulatory responsibilities and their responsibilities as a trustee.

Conclusions

28. Mr N has invested in an unregulated speculative asset. I imagine that he did so in search of high investment returns.

29. Mr N and his advisers have made a number of points in response to my initial view of the case. However, I am not persuaded that these fundamentally alter my position on the merits of Mr N's complaint.

30. I accept that the FCA Conduct of Business Sourcebook (**COBS**) rules are relevant to this case, although some of those rules do not apply to the activity Stadia was conducting (for example, they were not providing advice) and others have the status of guidance, rather than a requirement.

31. Specifically, under Rule 2.1.1 Stadia were required to "act honestly, fairly and professionally in accordance with the best interests of its client." I do not find that Stadia set aside their professional duty to Mr N by carrying out insufficient due

diligence on the African Land investment. Their primary role was to check that it was a permissible investment and this aspect was carried out.

32. Even if I were to find that there had been a breach of this section of the COBS rules, I would have to consider whether Mr N would have acted differently had this not occurred. There would have been no duty to stop him from making the investment, if that was his choice. In this instance I am satisfied that Stadia had provided Mr N with sufficient warning of the risks, and the option of a more diverse portfolio had been raised, and yet he continued with the investment.

33. Mr N appears to have been largely persuaded of the investment by a third party adviser. That advice was taken even though the adviser was not regulated to provide advice. The application with Stadia was made and completed on the basis that it was an execution-only one.

34. Further, Chapter 9 of COBS is relevant only to a firm which manages investments. Managing investments is defined in COBS as "managing assets belonging to another person in circumstances which involve the exercise of discretion." Stadia's role was to execute trades and hold, within the SIPP, investments that Mr N had chosen. Stadia did not exercise any level of discretion in respect of those investments, and I therefore conclude that Chapter 9 of COBS cannot be held as applicable in this case.

35. The question for me in relation to Mr N's complaint against Stadia is whether they carried out appropriate due diligence and whether it was maladministration to make the asset available within the SIPP. In considering whether there was maladministration I have to consider Stadia's legal obligations to Mr N, and whether they acted consistently with good industry practice.

36. Stadia acted as trustee and administrator of the SIPP. I have, therefore, considered their obligations to Mr N in both roles.

37. If I deal firstly with their obligations as trustee, 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.

38. 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.

39. 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".

40. 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".

41. In my opinion the statutory duty of care does not apply to Stadia 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 N made clear that the investments were selected by him personally.

42. The limit of Stadia'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.

43. If the duty of care applied then Stadia 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.

44. I have also considered whether there were wider due diligence responsibilities applicable to Stadia by the regulator, the Financial Conduct Authority (**FCA**) previously the Financial Services Authority (**FSA**).

45. Since April 2007 SIPPs have been regulated by the FSA/FCA, who have carried out a number of thematic reviews of providers and set out principles and examples of good practice. But these do not have the same status as legislation, so just because a provider may not follow good practice in one aspect does not necessarily mean there is maladministration.

46. On the other hand, if there are a number of points in a complaint where a provider appears to have departed from good practice of FCA principles, then the outcome may be different.

47. In 2008 the FSA commenced a thematic review of SIPP businesses by examining the practices of SIPP operators. They decided to place increased focus on “Treating Customers Fairly” (TCF) which was at the forefront of their move towards a principles based approach to regulation.

48. Whilst the outcome of this review is relevant to Mr N’s case, the FSA 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.

49. 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.

50. 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.

51. This was aimed at ensuring providers put in place certain controls and systems designed to flag potential instances of unsuitable or poor investment advice.

52. However, in this instance Mr N has said that he did not receive advice relating to the specific investment about which he is now complaining.

53. Furthermore, whilst Stadia were not able to give advice, they made very clear that the investment was unregulated and provided a number of warnings to Mr N about the high level of risk he was taking with this type of investment.

54. Stadia also made clear that if the investment did not perform as expected they would not be held liable for any losses suffered as a result.

55. Mr N chose to ignore these warnings and confirmed that he could afford to make this speculative investment.

56. Mr N has said that he did not fully understand the documents he was signing due to his lack of financial knowledge. Whilst I acknowledge that this may be true to an extent, the numerous warnings issued by Stadia were clear and, at the very least, should have alerted Mr N to consider obtaining financial advice were he in any doubt as to the wisdom of his investment selection.

57. I am satisfied that the basic checks which Stadia undertook, and the warnings they gave, were sufficient to meet the requirements imposed on them by the regulator and HMRC for such investments at that time.

58. In October 2012, the FSA issued a guide for SIPP operators – Annex 1. They said that this guide had been updated "to give firms further guidance to help meet the regulatory requirements". It said that firms should have a clear set of procedures in place to help them deal appropriately with, and/or control their exposure to, investments that SIPP operators may not retain control over.

59. The guide also said that whilst firms were not responsible for the SIPP advice given by third parties, such as IFAs, the FSA expected SIPP operators to have procedures and controls in place that enable them to gather and analyse Management Information that will enable them to identify possible instances of financial crime and consumer detriment. It pointed out that there is a reputational risk to SIPP operators that facilitate SIPP investments that are unsuited to its members.

60. Following a second thematic review of SIPP operators the FCA issued updated guidance in October 2013. This is the guidance to which Mr N refers in his complaint, but which post-dates his investment.

61. This guidance focused on due diligence processes in five areas:

- Establishing and understanding the nature of an investment;
- Ensuring it is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation;
- Ensuring that an investment is safe/secure (custody of assets is through a reputable arrangement and any contractual agreements are legally enforceable);
- Ensuring an investment can be independently valued, at point of purchase and subsequently;
- Ensuring that an investment is not impaired (e.g. previous investors have received income if expected; any investment providers are credit worthy, etc.).

62. This guidance also made specific reference to UCIS and said that firms involved with such investments should:

- Have enhanced procedures for dealing with UCIS.
- Have KPI's and benchmarks linked to the sale of UCIS to monitor the business they are conducting
- Ensure that any third-party due diligence that they use or rely on has been independently produced and verified, or
- Undertake appropriate due diligence on each UCIS scheme – this due diligence, together with all research should be kept under regular review.

63. The FCA followed this up by conducting a third thematic review of SIPP operators in 2014.

64. This review focused on the due diligence procedures that SIPP operators used to assess non-standard investments, including UCIS. The FCA made clear that it expected all regulated firms to conduct their business with due skill, care and

diligence. SIPP operators were expected to conduct and retain appropriate and sufficient due diligence when assessing that the assets allowed in their SIPP were suitable for a pension scheme.

65. I have set out the details of the approach and guidance issued by the FCA in order to show how practice has developed over time. However, Mr N's investment had already been made before the more recent guidance in 2013 was issued.

66. It is natural that Mr N feels upset about what has happened in his case. But I cannot apply current levels of knowledge and understanding, or present standards of practice, to a past situation.

67. While I have some sympathy for the position Mr N now finds himself in, Stadia complied with their obligations at the time, gave him clear warnings and explained they would not be liable for losses in the particular investments that he chose.

68. I do not uphold the complaint.

Anthony Arter

Pensions Ombudsman
3 May 2016

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Appendix

Extract from the FCA's Finalised Guidance 'A guide for Self-Invested Personal Pensions (SIPP) operators' dated 8 October 2013

Due diligence

Principle 2 of the FCA's Principles for Businesses requires all firms to conduct their business with due skill, care and diligence. All firms should ensure that they conduct and retain appropriate and sufficient due diligence (for example, checking and monitoring introducers as well as assessing that investments are appropriate for personal pension schemes) to help them justify their business decisions. In doing this SIPP operators should consider:

68.1. ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid

68.2. periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme

68.3. having checks which may include, but are not limited to: o ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and

68.4. undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers

68.5. good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and

68.6. ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm

Due diligence in respect of Unregulated Collective Investment Schemes (UCIS)

UCIS are complex, opaque, illiquid and risky, and tend to invest in high risk ventures such as films, green energy initiatives and overseas property funds. They may not be covered by FOS or FSCS protections.

We have stated previously that UCIS are high risk, speculative investments which are unlikely to be suitable for the vast majority of retail customers.

We have created a UCIS landing page which set out our views on these risks, and includes a number of communications we have issued to the industry and consumers:

www.fca.org.uk/firms/financial-services-products/investments/ucis

If firms are involved with UCIS they should ensure that they:

- have enhanced procedures for dealing with UCIS
- have KPI's and benchmarks linked to the sale of UCIS to monitor the business they are conducting
- ensure that any third-party due diligence that they use or rely on has been independently produced and verified, or
- undertake appropriate due diligence on each UCIS scheme - this due diligence, together with all research should be kept under regular review