

Ombudsman's Determination

Applicant	Mr John Brian Richardson
Scheme	The Carey Pension Scheme SIPP (the SIPP)
Respondents	Carey Pensions UK LLP (Carey Pensions) Carey Pensions Trustees Limited

Complaint Summary

1. Mr Richardson has complained that Carey Pensions were negligent in that they did not carry out proper due diligence with regards to his proposed investment in Green Oil Plantations (**GOP**).

Summary of the Ombudsman's Determination and reasons

2. The complaint should not be upheld because it was not Carey Pensions' responsibility, as trustee and administrator of the SIPP, to carry out the level of due diligence suggested by Mr Richardson.

Detailed Determination

Material facts

3. Carey Pensions received Mr Richardson's application to establish the SIPP on 10 July 2012.
4. Mr Richardson says that he is a complete novice with regard to the complexity of pensions and that his previous personal pensions were very simple.
5. He says that in early May 2012, he received an unsolicited telephone call from a company called In4orm. In4orm convinced Mr Richardson that it would be beneficial to him to allow them to review his existing pension arrangements.
6. Mr Richardson met with In4orm on two occasions in May 2012. The outcome of those meetings was that In4orm suggested he should consider transferring his existing pensions into a single arrangement investing primarily in GOP.
7. In a letter dated 29 June 2012, In4orm told him that advice regarding his pension transfer would come from The Pension Specialist, "who are authorised and regulated by the Financial Services Authority", but that he had declined the advice and wished to proceed on an insistent basis. Mr Richardson says that he was persuaded not to take advice by In4orm and the fact that there would be a fee of £1,000 payable for the service.
8. The letter continued by saying:

"You understand that when it comes to choosing the investments within the SIPP, the choice is entirely yours. You chose from several options I presented to you and I also made it clear that you had the freedom to look at the whole market for any other SIPPable investments"
9. The letter confirmed that Mr Richardson had chosen to invest £30,000 in Green Oil Australia. It explained that this investment was not regulated by the Financial Services Authority and was not covered by the Financial Services Compensation Scheme.
10. However, his application, dated 10 July 2012, was for direct clients, that is those who are acting without financial advice. The opening paragraph of the form said:

"This form should be used if you are a client establishing a SIPP without advice. You have made this decision independently and are aware of the implications of this decision".
11. The application showed that Mr Richardson wished to make an investment of £30,000 in GOP by transferring funds from two existing pension arrangements.
12. GOP was an Unregulated Collective Investment Scheme (**UCIS**).

13. A minute of a meeting dated 21 September 2010, confirmed that Carey Pensions had considered the investment in GOP to ensure that it was a suitable investment for their SIPP wrapper. The minute shows that Carey Pensions had reviewed the brochure, application forms, buyback agreement, website and commentary on the investment by Enhance Support Solutions Limited (**Enhance**). The meeting concluded that, based on the information provided, there did not appear to be a tax charge liability for the investment and that, therefore, it was in order to proceed with transfers into this investment.
14. However, the meeting also agreed that the following would be required:
 - Alternative Investment Member Declaration and Indemnity for each client who wished to transfer into this investment;
 - Alternative Investment Adviser Notification Letter signed by each adviser;
 - Carey Pension Trustees UK Ltd Limitation of Liability Wording added to all contracts and assignment documents as follows

“The liability of Carey Pension Trustees UK Ltd, hereunder, shall not be personal and shall be limited to the assets of the Carey Pension Scheme – Name of Scheme and Scheme Reference Numbers. All liabilities shall cease when the said Carey Pension Trustees UK Ltd ceases to be a Trustee of the scheme.”
15. On 3 August 2012, Carey Pensions sent Mr Richardson a letter which acknowledged receipt of his application to open the SIPP. Enclosed with the letter were the Terms and Conditions and the Key Features.
16. On 18 September 2012, Mr Richardson signed an application to lease purchase a plot of land pre-planted with green oil producing trees.
17. On 1 October 2012, Mr Richardson signed a SIPP Member Instruction and Declaration. This confirmed, amongst other things, that this was his instruction as the Scheme Member to Carey Pensions as SIPP Operator and Trustee.
18. In this document Mr Richardson also confirmed that:
 - he had carefully considered the information provided by Green Oil Plantations and had a good understanding of the investment;
 - Carey Pensions had suggested a range of 0-50% of his fund be invested in this fund, but that the decision of the amount invested rested with him and his advisers;
 - Carey Pensions as the Administrator, and Carey Pension Trustees UK Ltd, as the Trustee of the Scheme, act on an Execution Only Basis on his instruction.
 - Neither Carey Pensions nor Carey Pension Trustees UK Ltd had provided him with any advice, including investment advice.

- he understood that the investment was an Unregulated “Alternative Investment” and as such was considered high risk and speculative.
19. Documents to ensure that Mr Richardson obtained full registered title to his plot under the GOP investment were emailed to him on 11 December 2012. On the same day he confirmed his acceptance and agreed for Carey Pension Trustees to sign the documents on his behalf.
 20. In 2013, GOP went into administration and Mr Richardson believes he has lost his investment as a result.
 21. Mr Richardson has made a detailed submission, but in summary he has said that his pension has been wiped out as a direct consequence of it being transferred to the SIPP and invested in GOP. He considers that Carey Pensions failed in their duty to him by transferring his pensions in to the SIPP, and by investing his fund in an esoteric, illegally traded, investment. He says that at no point did they warn him of the risks and issues involved.

Conclusions

22. Rule 7.2 of the scheme rules says:

“The Scheme Administrator shall, in relation to an Individual Fund, exercise the powers in Rule 7.1 only in accordance with any directions given by the relevant member...”
23. Rule 7.1 provided the Scheme Administrator with wide ranging investment powers, including under 7.1.3:

“in units, unit trusts or mutual funds or other common investment funds or securitised issues or any other form of collective investment.”
24. Mr Richardson has set out the sequence of events in some detail for me. He makes the point that Carey Pensions did not contact him to verify his requirements or to check that he understood the arrangement he was entering into.
25. However, in this he fundamentally misunderstands the role of Carey Pensions as administrator and trustee of the SIPP. Much of his submission places Carey Pensions in the role of adviser. This was not their role and the documentation signed by Mr Richardson acknowledges this.
26. Mr Richardson has described himself as a complete novice with regard to pensions. I do not doubt that this is true and that he may, to some extent at least, have been poorly advised by In4orm. In my view, it is questionable whether a SIPP was the appropriate pension vehicle for a fund of £30,000, or that GOP was a suitable investment.

27. However, I can only consider the merits of his complaint against Carey Pensions. He might well have grounds for complaint against In4orm through the Financial Ombudsman Service, which he should consider.
28. Mr Richardson has to take some responsibility for the management of his own affairs. He has to accept responsibility for the statements he agreed to in the forms that he signed and the undertakings and agreements that he made. He may argue that he was misled by In4orm, but I cannot hold Carey Pensions responsible for that. If he was unsure about the agreements he was entering into he should have asked questions at the time and not signed until he was satisfied he fully understood the risks.
29. I am satisfied that in following Mr Richardson's instructions to invest part of his SIPP in GOP, Carey Pensions were acting in accordance with the scheme rules.
30. Mr Richardson has invested in an unregulated speculative asset. He says that he was merely acting in accordance with the advice he was given by In4orm. There is certainly nothing in the scheme rules to prevent him from investing in this type of asset.
31. Whilst Mr Richardson took advice regarding the investment, it is not suggested that Carey Pensions provided advice. The question for me in relation to Mr Richardson's complaint against Carey Pensions is whether they carried out appropriate due diligence and whether it was maladministration to make the asset available within the SIPP. And in considering whether there was maladministration I have to consider Carey Pensions's legal obligations to Mr Richardson, and whether they acted consistently with good industry practice.
32. Carey Pensions acted as trustee and administrator of the SIPP. I have, therefore, considered their obligations to Mr Richardson in both roles.
33. 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.
34. 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.
35. 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".

36. 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”.
37. In my opinion the statutory duty of care does not apply to Carey Pensions 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 administrator. The trustee has a very wide power of investment but the contractual documentation with Mr Richardson make clear that investments will be selected by the member personally.
38. The limit of Carey Pensions’ 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.
39. If the duty of care applied then Carey Pensions 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.
40. I have also considered whether there were wider due diligence responsibilities applicable to Carey Pensions by the regulator, the Financial Conduct Authority, previously the Financial Services Authority (FSA), as Mr Richardson has suggested.
41. 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. 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.
42. 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.

43. 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 although Mr Richardson has said that he received advice relating to the specific investment about which he is now complaining, the application that he completed was for a direct client, that is one acting without advice. Furthermore the letter to him, dated 29 June 2012, from In4orm implies that, although, he was given details of a number of possible investments, he was not specifically advised to select this one and that it had been his choice alone. In view of this I am not persuaded that this aspect of the regulator's review applies in this case.
44. The basic checks which Carey Pensions undertook were sufficient to meet the requirements imposed on them by the regulator and HMRC for such investments at that time.
45. 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 with appropriately and/or control their exposure to investments that SIPP operators may not retain control over.
46. 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.
47. Following a second thematic review of SIPP operators the FCA issued updated guidance in October 2013. This guidance 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.
48. The FCA followed this up by conducting a third thematic review of SIPP operators in 2014.

49. 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.
50. 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 Richardson's investment had already been received before any of the more recent guidance was issued.
51. It is natural that Mr Richardson 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.
52. While I have some sympathy for the position Mr Richardson now finds himself in, Carey Pensions 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.
53. I do not uphold the complaint.

Anthony Arter

Pensions Ombudsman
15 March 2016