

Ombudsman's Determination

Applicant	Mr Clive Darlaston
Scheme	IPS Self Invested Personal Pension Plan (the SIPP)
Respondent	IPS Pensions Limited (trading as the James Hay Partnership) (IPS)

Complaint Summary

Mr Darlaston complains that IPS failed to keep accurate records of three overseas property investment deposits held in the SIPP and consequently overvalued the SIPP fund for the purposes of calculating the retirement benefits available to him. He alleges that IPS:

- incorrectly treated the £70,000 which he paid into the SIPP in March 2007 as a personal contribution instead of a partial payment to cover the cost (£110,799) of assigning the SIPP interest in one of the properties to him;
- subsequently claimed income tax relief of £19,744 on this payment by mistake;
- effectively loaned him £40,799 from the SIPP (without any interest due) until he paid this amount into the SIPP some seven years later;
- failed to notify him at any time that he had to repay this "loan";
- overpaid the amount of tax free cash available to him from the SIPP by £20,031 in April 2008 which HM Revenue and Customs (**HMRC**) will treat as an unauthorised payment if it is not repaid;
- failed to carry out his request to transfer the residual SIPP fund to Hargreaves Lansdown on a timely basis; and
- has generally provided a substandard service dealing with this matter.

Summary of the Ombudsman's Determination and reasons

The complaint should not be upheld against IPS because they have offered Mr Darlaston an equitable compensation package to address the financial loss to him as a consequence of their mistakes administering the SIPP which clearly constitute maladministration on their part. They are also entitled to seek recovery of the overpaid tax free cash for reinvestment in the SIPP from Mr Darlaston in the circumstances.

Material facts

1. The SIPP was established in May 2005. Mr Darlaston and IPS are its co-trustees. IPS is also the SIPP administrator accountable for recording details of the SIPP assets and the movement of monies to and from the SIPP bank account. Mr Darlaston is responsible for providing them with accurate values for these assets and transactions. All SIPP investments, payments and loans must be authorized by both IPS and Mr Darlaston.
2. Shortly after setting up the SIPP, Mr Darlaston gave IPS a mandate to potentially invest the SIPP monies in three overseas property developments as follows:

- Almenara Golf Villa No 4 (**Almenara**) in Spain;
- Apartment 21, Royal Amarilla Golf (**Apartment 21**) in Spain; and
- f Apartment B304, Amarilla Golf and Country Club (**Apartment B304**) in Tenerife.

3. During July/August 2005, IPS paid the following deposits on these properties:

<u>Property</u>	<u>Deposit</u>
Almenara	£112,650
Apartment 21	£75,329
Apartment B304	£81,912

4. No further payments were made for these property developments from the SIPP. Each property was shown in IPS's records as a SIPP asset with a value equal to the deposit payment.
5. In late 2006, Mr Darlaston (via his solicitor) instructed IPS to assign the interest acquired by the SIPP in the Almenara property to him. IPS informed his solicitor that they would be happy to sign the assignment contract after Mr Darlaston had done so.
6. On 28 December 2006, IPS notified Mr Darlaston that:
 - from 1 January 2007, they would no longer be sending him quarterly statements showing the transactions made in the SIPP bank account; and
 - they would provide him with on-line access to the SIPP instead and also send him an annual statement of all the SIPP transactions.
7. In February 2007, Mr Darlaston informed IPS that he was unable to pay the full amount required to assign the SIPP interest in Almenara to him of £110,799 because his father had died recently and he had to help his mother financially until probate was sorted. He said that he only had about £90,000 available but when another investment matured in a few months' time, he should probably be able to pay the entire amount.

8. In March 2007, IPS received the agreement for the assignment of contractual rights in Almenara from the SIPP to Mr Darlaston. Accompanying the agreement was a cheque from Mr Darlaston for £70,000 made payable to the SIPP. IPS confirmed receipt of this cheque but mistakenly designated it as a personal contribution into the SIPP.
9. IPS signed and returned the agreement to Mr Darlaston's solicitors. Legal title in the deposit interest for Almenara was therefore transferred from the SIPP to Mr Darlaston in his personal capacity.
10. In May 2007, IPS sent Mr Darlaston an annual transaction statement showing that he had made a personal contribution of £70,000 into the SIPP and the income tax being claimed on it would result in a further £19,743 being credited to the SIPP. They also sent him a statutory money purchase illustration and a statement of contributions received in the input period 6 April 2006 to 5 April 2007. These documents also showed that he had paid £70,000 into the SIPP as a member contribution.
11. Mr Darlaston instructed IPS in December 2007 to pay him a tax free lump sum of £60,046 and nil income. He also sent them a cheque for £35,000 representing a personal contribution into the SIPP. IPS complied with his request in January 2008. The SIPP fund value upon which this transaction was based included the incorrectly reclaimed tax relief and the original value of the interest in Almenara (£112,650) that had been legally assigned to Mr Darlaston. It also did not allow for the £40,799 which Mr Darlaston owed to the SIPP.
12. In April 2008, Mr Darlaston contributed a further £28,000 into the SIPP and asked for a tax free cash lump sum of £48,031 to be paid to him. The same mistakes described in the paragraph above were made by IPS in their calculation of the SIPP fund value. If the correct value had been used, the maximum tax free cash available would only have been £28,000.
13. There has consequently been an unauthorized payment of £20,031 from the SIPP to Mr Darlaston (if this payment is not returned to the SIPP).
14. Unauthorized payments have to be reported to HMRC by the scheme administrator of a registered pension scheme. Where an unauthorized payment arises, the member is required to declare the payment on his/her personal tax return and a charge equal to 40% of the payment will be payable as a freestanding tax charge as part of his/her personal tax liability. In addition, a scheme sanction charge equivalent to 40% of the unauthorized payment will also be payable from the member's scheme. This can be reduced to 15% if the member can provide evidence to the scheme administrator that he/she has paid the personal liability himself/herself.
15. In May 2008, IPS sent Mr Darlaston a transaction statement and an illustration which both showed the value of his personal contributions to the SIPP and also the amount of any benefits paid from the SIPP since May 2007.
16. In February 2009, Mr Darlaston authorized IPS to provide Applewood Asset Management LLP (**Applewood**) details about the SIPP. IPS informed Applewood that

they had treated the £70,000 as a personal contribution from Mr Darlaston upon which tax relief had been reclaimed and also that the SIPP still had three deposits in overseas property investments including Almenara. They also failed to mention that Mr Darlaston still owed £40,799 to the SIPP.

17. In July 2009, IPS sent Mr Darlaston an annual review pack which included detailed information about the assets held within the SIPP. It listed three overseas property investments (including Almenara with its original value of £112,650) and did not show the £40,799 owed by Mr Darlaston. The covering letter accompanying the pack stated:

“I would be grateful if you could review your report and contact us immediately if you believe any of the data is incorrect.”
 18. IPS sent Mr Darlaston his 2011 annual review pack which also included the aforementioned errors in November 2011.
 19. In February 2012, IPS explained to Mr Darlaston how his current SIPP fund value was split between uncrystallised and crystallised elements of £11,858 and £82,084 respectively. They also provided him with an estimate of the maximum income available from the crystallised value of the SIPP fund if a “GAD review” was carried out.
 20. In April 2012, Hargreaves Lansdown (**HL**) sent a letter of authority to IPS requesting a transfer of the remaining SIPP fund to them.
 21. Mr Darlaston informed IPS on 3 May 2012 that HL had refused to accept an in-specie transfer of the three overseas property interests held in the SIPP set at zero value. He also said that he was prepared leave the property interests in the SIPP and transfer the remaining SIPP assets across to HL if IPS reduced their SIPP administration fee. IPS replied that most of the SIPP fund could be transferred if sufficient cash was retained to meet ongoing SIPP fees and expenses.
 22. In his letter dated 4 May 2012, Mr Darlaston informed IPS that the transfer was being hindered by the “worthless properties” and suggested two possible solutions, i.e.:
 - he purchased all three property interests from the SIPP for a nominal sum of £10,000; and
 - he left £2,000 as cash in the SIPP along with each property interest and transferred the rest to HL.
- The second option, however, was not possible because HMRC rules did not allow a partial transfer out of crystallised funds. (Further details may be found in the paragraphs below).
23. In June 2012, Mr Darlaston informed IPS that his preferred option was to arrange for an independent assessment of the property values and for a solicitor to transfer those interests out of the SIPP to him personally.

24. In September 2012, Mr Darlaston explained to IPS that he had been unable to find anyone to value the properties but wished to continue with the transfer to HL. IPS replied that if he left a minimum of £5,000 in the SIPP, a partial transfer could take place.
25. IPS received a letter from HL dated 5 October 2012 requesting all SIPP monies apart from £5,000 to be transferred to them. The letter also said that:
- “... we are happy to accept the partial transfer of the client’s uncrystallised funds. However, as the property within the IPS SIPP is currently held in crystallised funds, we will only proceed on the basis that this is re-allocated to the uncrystallised funds, and will therefore not breach legislation...”
26. On 17 December 2012, IPS informed Mr Darlaston that their compliance team had raised an issue with transferring the value of all three property interests into the uncrystallised element of the SIPP.
27. Mr Darlaston asked whether £5,000 from the crystallised instead of the uncrystallised element of the SIPP fund could be retained. IPS replied that they would ask their compliance team to consider this. They should have, in fact, informed him that it was not possible to carry out a partial transfer out of crystallised funds because this contravened HMRC rules.
28. IPS transferred £11,776 to HL representing the uncrystallised funds held within the SIPP. They incorrectly notified HL on 11 January 2013 that a further amount of approximately £88K would be transferred during the following week. This transfer did not take place when IPS realized their mistake.
29. Mr Darlaston eventually paid the £40,799 which he owed into the SIPP in March 2014.

Summary of Mr Darlaston’s position

30. As a busy executive, he was able only to briefly review the annual SIPP statements sent to him and did not spot the errors which IPS had made. He is paying for their services and believed that he could rely on them to administer the SIPP without making mistakes. He genuinely did not realize that he owed £40,799 to the SIPP but once it was pointed out to him, he rectified the position as soon as he could.
31. He considers that IPS, as SIPP experts, should be held accountable for 90% of the errors made and thus 90% of the penalties attributable to these errors.
32. He was unaware that IPS had provided him with on-line access to the SIPP in 2007.
33. His cheque for £70,000 was enclosed with the agreement for the assignment of contractual rights in Almenara. It should not have been necessary for IPS to seek elucidation from him on what this payment was for.

34. He asserts that:

- the investment which was due to mature in mid-2007 did not do so and this left him in severe financial distress at the time;
- this was his “reason” for forgetting that he owed £40,799 to the SIPP and not reminding IPS of the fact;
- his failure to pay this amount into the SIPP earlier was therefore mainly IPS’s fault;
- he originally argued (although he eventually gave up trying) that he did not owe £40,799 to the SIPP since the property had become worthless and the deposit was “lost”;
- the £40,799 debt and incorrect tax treatment of the £70,000 which he paid into the SIPP in March 2007 were errors made by IPS but corrected at his expense;
- it was also IPS’s error that his maximum tax free lump sum was overpaid by £20,031 in April 2008;
- the directors of the investment which was due to mature in mid-2007 now say that it might realise in 2015 or 2016; and
- if the investment does mature in 2015 or 2016, this may enable him to pay back the overpaid tax free cash of £20,031 by monthly instalments once he finds permanent work.

35. IPS argues that he could have invested the SIPP funds through them but they did not make him aware of their procedures (which are, in any case, not as straightforward as those of HL).

Summary of IPS’s position

36. They concede that they should not have:

- simply accepted Mr Darlaston’s word that the assignment value for Almenara of £110,799 would be settled completely within a matter of months in 2007;
- incorrectly retained the original value of Almenara of £112,650 in their records right up until the assignment value was finally paid in full by Mr Darlaston in March 2014; and
- treated the £70,000 received from Mr Darlaston in 2007 as a personal contribution to the SIPP, claiming tax relief of £19,743 on it by mistake.

They also accept that they should have sought clarification from Mr Darlaston on what the payment of £70,000 was for.

37. Mr Darlaston was partly responsible for them making these errors because he had failed to ask them to prepare a formal schedule showing the loan amount, its duration and repayment terms in order to “commercially validate what he wanted to achieve if unforeseen events affected his ability to settle this debt”.

38. Moreover, there is no evidence that Mr Darlaston asked them why:

- they had treated the £70,000 as a personal contribution and reclaimed tax relief of £19,743 on it; or
- the SIPP's interest in Almanera was still showing the original value both on-line and in paper valuations of the SIPP assets (before it was discovered by IPS).

39. Mr Darlaston has benefitted from these mistakes by being able to withdraw monies from the SIPP in 2008 which he was not entitled to without having to pay a tax penalty. He also received an interest free loan of £40,799 from the SIPP for over seven years.
40. Mr Darlaston has not fully considered his obligations and responsibilities as a co-trustee of the SIPP. He should have been aware of the correct values of all the SIPP assets and therefore be in a position to query the figures used to calculate the benefits available to him. If he had done this, then their errors could have been corrected much earlier.
41. They would also expect Applewood to have shared the SIPP information sent to them with Mr Darlaston and for him to have identified the errors.
42. Mr Darlaston had examined the information in the 2011 annual review pack before contacting them in November 2011 about his maximum income limit. He did not, however, notice the errors and omissions concerning the property interest and loan at this time.
43. Mr Darlaston chose to invest the SIPP pension monies in overseas property developments that have not materialized and has been left with legal interests in the SIPP that cannot be simply written off or transferred to him at a value of his choosing.
44. The overpayment of tax free cash for £20,031 in April 2008 needs to be returned by Mr Darlaston to the SIPP or declared as an unauthorized payment to HMRC. They are committed to address the financial loss to him and the SIPP. If the overpayment is not returned, they will meet the cost of the scheme sanction charge which will consequently be levied to the SIPP by HMRC of £3,004.66 (i.e. 15% of the overpayment) and any tax liabilities imposed by HMRC for registering this unauthorized payment late.
45. They will pay Mr Darlaston £3,004.66 regardless of whether he actually returns the overpaid tax free cash to the SIPP. This compensation payment is therefore being offered as a payment to him personally even if the SIPP does not actually incur the scheme sanction charge.
46. They have not offered to meet the further freestanding tax charge payable to HMRC of 40% of the overpayment (i.e. £8,012.43) because if Mr Darlaston had drawn this as taxable income, then income tax would have been payable by him.
47. They would arrange for a refund of any increased administration fees levied to the SIPP between 1 January 2015 and when he is able to eventually transfer the SIPP to a new provider which would not have been charged under the administration fee structure in place prior to 2014. The refund will be arranged at the point of final transfer

but will not extend to a refund of any of their fees incurred through him taking advantage of the new pension freedoms introduced in April 2015.

48. They accept that they communicated poorly with Mr Darlaston in respect of his request for a partial transfer out to HL in 2013. It is arguable whether any transfer should have taken place at all. In recognition of this, they are prepared to arrange a refund of the administration fee deducted from the SIPP in December 2012 relating to this partial transfer request of £300 by crediting it back into the SIPP.
49. They are also willing to increase their “distress & inconvenience” compensation payment to £500.
50. If the overpaid tax free lump sum is returned by Mr Darlaston to the SIPP, they have calculated that it would be possible to transfer a further £303 to HL (i.e. the difference between the revalued uncrystallized value of the SIPP in January 2013 of £12,079 and the sum that was transferred to HL purporting to be the total value of his uncrystallized value at that time).
51. They accept that there have been instances of delays in responding to some of Mr Darlaston’s questions and concerns but this was caused in part by the complicated issues involved.
52. It was not their responsibility to advise Mr Darlaston on either how to invest monies held in the SIPP or how best to extract those investments from the SIPP if any problems were to occur. They are not regulated to provide any investment, tax planning or pension advice to him. As a co-trustee, he should take personal responsibility for researching and implementing options. The fact that he is now faced with some difficult investment decisions is not a failing on their part but simply a reflection of the service being provided.
53. Mr Darlaston had agreed when he established the SIPP to indemnify them for all investment decisions taken. This includes a conscious decision on his part not to invest funds held as cash. He had been free to invest the cash funds as and when he saw fit. The fact that he chose not to invest and now believes this may have lost him SIPP revenue is not something that they can be held accountable for. He was under an obligation throughout to mitigate any loss he now claims for investment growth by investing the SIPP monies whilst with them (after seeking independent professional financial advice).

Conclusions

54. There is no doubt from the evidence presented that IPS has provided Mr Darlaston with a substandard level of service for the SIPP and made many mistakes whilst administering it over the years.

55. In particular, IPS should not have:

- agreed a partial payment from Mr Darlaston in 2007 of £70,000 in order to assign the contractual rights of Almenara to him without putting in place a written commercial loan for the remaining amount due of £40,799;
- subsequently treated the £70,000 payment as a member contribution from Mr Darlaston and claimed tax relief on it from HMRC by mistake;
- overpaid the tax free cash available to Mr Darlaston in April 2008 by £20,031;
- informed him that it was possible to transfer part of the crystallized SIPP rights to HL in 2012.

56. IPS has admitted these errors and taken appropriate remedial action in order to rectify them and put Mr Darlaston back in the position he would have been in had they not made the mistakes by:

- requesting that Mr Darlaston pay the £40,799 which he owed into the SIPP;
- correcting their records to show that the Almanera property rights have been assigned to Mr Darlaston;
- reimbursing HMRC the incorrect tax relief claimed on the £70,000 contribution from the SIPP;
- asking Mr Darlaston to return the overpaid tax free cash of £20,031 to the SIPP (in order to avoid the penal unauthorised payments charges payable by him and the SIPP to HMRC); and
- stopping the transfer of a further amount from the SIPP of around £88,000 to HL when they realised their mistake that a partial transfer out of crystallized funds was not possible.

57. Mr Darlaston complied with IPS's request to pay the £40,799 which he owed the SIPP in March 2014. In his view, the overpaid tax free cash of £20,031, however, should not be recoverable since it arose as a result of maladministration by IPS.

58. The starting point is that IPS has a right to recover that overpayment from Mr Darlaston. In some circumstances where an overpayment has arisen as a result of a mistake there will be a defence to an action for recovery (for example, if Mr Darlaston had entered into an irreversible financial commitment in the belief that his benefits were more than he was entitled to).

59. The onus, however, is on Mr Darlaston to show that he has irreversibly changed his position in reliance on the overpayment. He has not demonstrated this.

60. It is in my view relevant that Mr Darlaston was provided with annual statements of the contributions, tax relief and assets forming part of the SIPP which should have alerted him to the errors. A beneficiary cannot take advantage of a mistake he/she should have

spotted. It is incumbent upon any member of a pension scheme to ensure that, if fundamentally flawed data is displayed in benefit statements, the relevant person or department be notified so that corrections can be made. In this case Mr Darlaston had the additional duties of a co-trustee. He should have queried and tried to rectify the mistakes with IPS before the overpayment of the tax free cash was made in 2008.

61. IPS have accepted a degree of responsibility for the overpayment of the tax free cash to Mr Darlaston and in recognition of this, have offered him, in my view, a compensation package (recorded at paragraphs 44-49) which places him in no worse a position than if the overpayment had never occurred.
62. IPS has suggested that repayment of the overpaid tax free cash can be made over time, if necessary. I am sure that they will take Mr Darlaston's circumstances, and the fact that the overpayment was their mistake, into account in coming to a suitable arrangement. In the absence of agreement as to repayment terms, the parties may revert to me for further directions.
63. Despite the maladministration, in light of the proposals at paragraphs 44-49 which remedy the injustice caused, I do not uphold Mr Darlaston's complaint.

Karen Johnston

Deputy Pensions Ombudsman
23 September 2015