

Ombudsman's Determination

Applicant	Mr S
Scheme	Mr S's Small Self-Administered Scheme (the SSAS)
Respondent	James Hay Partnership (James Hay)

Outcome

1. I do not uphold Mr S's complaint and no further action is required by James Hay.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr S complains that James Hay misled him into believing that he could invest the SSAS funds at any time and without restriction into "land options" projects initiated by Sharba Homes Ltd. He says that he only set up the SSAS and transferred around £367K into it from a final salary pension arrangement in April 2013 because James Hay had categorically assured him verbally of this, via his Independent Financial Adviser (**IFA**).

Background information, including submissions from the parties

4. Mr S established the SSAS with the assistance of the IFA in March 2013 by signing and returning to James Hay an Application Form (**the Form**). He also completed a Member Questionnaire and by doing so, declared to James Hay that he agreed to be a member of the SSAS and to be bound by the Trust Deed and Rules (**the Trust Deed**).
5. James Hay are the professional trustees and administrators of the SSAS.
6. According to the "SSAS Property Resolution" (**the Resolution**), Mr S became a member trustee. The Resolution also said that:
 - the investment powers and duties in relation to property assets were delegated to Mr S in accordance with the provisions of the Trust Deed;

- in addition to any indemnities conferred on James Hay as the professional trustees by law or the Trust Deed, James Hay would not be liable for any act or omission of Mr J (or his advisers) in exercising his investment powers;
 - Mr S indemnified James Hay against any claim costs, actions or demands in relation to these delegated investment powers; and
 - Mr S confirmed that he had read and understood James Hay's Property Guidance Notes.
7. Mr S transferred approximately £367K representing the cash equivalent of his pension rights in a final salary pension scheme into the SSAS in April 2013.
 8. Mr S and his wife are directors of Sharba Homes Ltd.
 9. On 6 June 2013, Sharba Homes Ltd sent James Hay a draft contract for a "land options" project so that they could decide whether or not it would be acceptable as an investment for the SSAS.
 10. Sharba Homes Ltd said that if the investment was successful, the SSAS would receive its original investment plus a return of 20% of the "net project profit".
 11. James Hay replied that they would permit this investment in the SSAS if a few small amendments were made to the contract. They signed and returned the amended contract to Sharba Homes Ltd on 11 June 2013.
 12. Mr S subsequently invested £150K of the SSAS funds into this "land options" project in June 2013.
 13. In November 2014, Mr S tried to invest £75K into another "land options" project. James Hay declined his request after carefully considering his application and the response to their questions from Sharba Homes Ltd. They said that:
 - they had reviewed their procedures and introduced additional restrictions on esoteric investments in order to comply with the changes made in early 2014 by the Financial Conduct Authority (**FCA**) to their guidance;
 - they were legitimately entitled to provide a service on terms that they considered commercially prudent and viable; and
 - they were not obliged to provide him with copies of internal documents which were used purely for due diligence purposes upon which they based their decision.
 14. The IFA has provided a witness statement in support of Mr S's application. They say that:
 - Mr S told the IFA that it was important for him to be able to make further investments into "land options" projects in the future;

- they had therefore extensively questioned Mr D, a director of James Hay (now retired), on a number of occasions about Mr S's specific requirements; and
- Mr D had assured them verbally that it would be possible for Mr S to do this, but did not say that future requests would be subject to review by James Hay and might not be permitted.

15. In order to put matters right, Mr S would like James Hay to apologise for misleading him and to compensate him for:

- the SSAS administration fees, totalling £80K, associated with the aborted "land options" investment;
- the loss of investment opportunity in future "land options" projects; and
- the costs to transfer the SSAS administration to another provider.

16. James Hay have offered to waive payment of:

- the SSAS administration fees due in 2015 and 2016;
- the transfer out fee; and
- any proportional annual fee remaining due on wind up/closure of SSAS.

Mr S has declined this compensation offer made by James Hay in order to try settling his complaint on an amicable basis.

17. Mr S says that:

- the fact that he applied for two successive "land options" projects supports his assertion that he had intended to invest in a series of such investments;
- James Hay have not provided any evidence to show either that they had warned him that he could not invest in such projects at any time in the future or to refute the IFA's recollections of events as detailed in his witness statement;
- James Hay have also failed to provide any evidence to demonstrate that the FCA made any changes in early 2014 which required them to review their procedures;
- James Hay have provided a substandard level of service for the SSAS;
- in particular, James Hay failed to administer the tax affairs of the SSAS properly to his "severe risk" and did not notify him of a change to their contact address; and

- in his view, James Hay's "general failure to perform professionally...discredits what little if any weight should be given their "evidence", which amounts to nothing more than defensive work and false claims about regulatory changes".

Adjudicator's Opinion

18. Mr S's complaint was considered by one of our Adjudicators who concluded that no further action was required by James Hay. The Adjudicator's findings are summarised briefly below:
- If James Hay had told the IFA that Mr S could freely invest the SSAS funds at any time, it would have been said in good faith with consideration given to the prevailing regulatory rules and their own requirements at the time.
 - James Hay are obliged by HM Revenue & Customs (**HMRC**), and the FCA, to operate with a level of due care and diligence and therefore, are entitled to constantly review their processes for SSAS investments to ensure they reflect the FCA's changing expectations on how they conduct their SSAS business.
 - Esoteric investments such as "land options" that might have been deemed as acceptable for the SSAS in the past do not necessarily guarantee that similar investments would be accepted going forward.
19. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr S for completeness.

Ombudsman's decision

20. Mr S contends that he only established the SSAS after receiving firm verbal assurances from James Hay via the IFA that he could freely invest the SSAS funds at any time. Apart from the IFA's recollections of the events, there is however no conclusive written evidence to confirm or deny what Mr D, a former director of James Hay, actually said to them.
21. Even if I accept that Mr D had made any such specific undertaking, I agree with the Adjudicator's opinion that it would have been said in good faith in light of the prevailing regulatory rules and James Hay's own requirements at the time. On the balance of probabilities, I therefore consider it most unlikely that Mr D would have made any particular promises or guarantees about the future that would not be supported by the SSAS documentation available to Mr S when the SSAS was established.
22. Each esoteric investment proposal is considered on its own individual merits and reviewed by James Hay when the application to invest is made. James Hay are

entitled to constantly review their processes for SSAS investments to ensure they reflect the FCA's changing expectations and updated review on how they conduct their SSAS business.

23. Esoteric investments that might have been deemed as acceptable by James Hay for the SSAS in the past do not necessarily guarantee that similar investments would be accepted going forward.
24. The FCA conducted a third thematic review of SIPP business in 2014 following their first and second reviews in 2008 and 2012 respectively, on how they regulated SIPP/SSAS business by examining the practice of SIPP/SSAS operators. The third review focussed on the due diligence procedures that SIPP/SSAS operators used to assess non-standard investments. The FCA made clear that it expected all regulated firms to conduct their business with due skill, care and diligence.
25. SIPP/SSAS operators were expected to conduct and retain appropriate and sufficient due diligence when assessing whether the assets allowed in their SIPP/SSAS were suitable for a pension scheme. Any decision to decline an investment which James Hay considers is contrary to their appetite for risk and investment policy is, however, a commercial matter solely for them. As such, I accept that James Hay are under no obligation to explain or divulge their reasons for making a commercial decision to no longer accept "land options" projects as an investment in a SSAS when Mr S made his second application in November 2014.
26. James Hay have conceded that their administrative service for the SSAS should have been better and in recognition of this, they have offered Mr S a compensation package which I consider entirely reasonable under the circumstances.
27. Although I sympathise with Mr S's unfortunate position, I do not consider that there has been any maladministration on the part of James Hay which has caused him any actual financial loss.
28. Therefore, I do not uphold Mr S's complaint.

Anthony Arter

Pensions Ombudsman
03 October 2016