

Ombudsman's Determination

Applicant	Mrs Y
Scheme	Berkeley Burke SIPP (the SIPP)
Respondents	Berkeley Burke

Outcome

1. I do not uphold Mrs Y's complaint and no further action is required by Berkeley Burke
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs Y has complained that Berkeley Burke failed to supply her with her client file and failed in their duty of care to her in that they did not carry out proper due diligence with regard to her proposed investment in GFI Teak.
4. She asks for a full refund of all fees, a full refund of the money she transferred in to the SIPP together with interest, and further redress for the distress and inconvenience she has been caused.

Background information, including submissions from the parties

5. On 15 October 2012, Mrs Y completed and signed an application to establish a Self Invested Personal Pension (**SIPP**) with Berkeley Burke. This showed her husband's name as Michael Y.
6. The SIPP was to be funded by a transfer from a Personal Pension Plan with Friends Life. A statement from Friends Life, dated 28 January 2013, showed the transfer value to be £20,990.18.
7. The SIPP trustee bank account statement for the period ending 17 January 2014, showed a transfer value of £20,990.18 being received on 31 January 2013. The statement also showed that, on 7 February 2013, £13,325.00 was paid out to purchase an equity holding in 'Belem Sky Plantation', the remaining £7,665.18 being retained as cash in the bank account.

8. The statement showed that a scheme fee of £491.88 had been deducted on 19 February 2013.
9. Mrs Y also completed and signed an Alternative Investment Declaration which showed that £13,325 was to be invested in GFI-Teak, a company investing in teak plantations in Brazil.
10. Part 14 of the Application is entitled 'Advice Waiver'. In this section Mrs Y indicated that she had not been advised by a Financial Services Authority (**FSA**) regulated Financial Adviser on the establishment of the SIPP, transfers and any ongoing investments in it, but had made the decisions herself.
11. As a result of this statement, a number of other notes in Part 14 became relevant. These included:

"I understand that I should seek advice from an FSA regulated Financial Adviser regarding the setting up of a SIPP and that I do not require and do not seek advice in this respect from Berkeley Burke SIPP Administration Limited"

"I am comfortable with the level of investment risk I have selected"

"I have read and understood the above conditions and accept that the SIPP has been established on an execution only basis"
12. The Alternative Investment Declaration also included the following statements:

"I confirm that I have considered the information prospectus and/or other offer documents provided by the product provider and I am fully aware that this investment is High Risk and/or Speculative, may be illiquid and/or difficult to value or sell and confirm that I wish to proceed."

"I acknowledge that for other NON FSA REGULATED INVESTMENTS, I have been recommended to seek professional advice from a suitably qualified and authorised adviser and have chosen not to seek advice for this transaction."

"I am fully aware that Berkeley Burke SIPP Administration Limited act on an Execution Only Basis, as directed by me as scheme member and that Berkeley Burke SIPP Administration Limited has not provided any advice whatsoever in respect of this investment or the SIPP."
13. Berkeley Burke wrote a 'welcome' letter to Mrs Y on 24 January 2013. In this letter they made it clear that the application had originated from Michael Y of Prime Financial Services and submitted by Marcus James.
14. The letter said that Berkeley Burke had a process to assess whether or not investments were capable of being held within a SIPP in line with HMRC guidance. It continued by saying:

“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. The responsibility for assessing the ‘suitability’ of any investment within your SIPP rests with you and your professional advisers. If you have any doubts about the investment options proposed, you should seek advice from a suitably authorised and qualified adviser. Berkeley Burke SIPP Administration Limited are not authorised to provide financial advice.”

15. The letter also set out a number of warnings as follows:

- The asset may be illiquid.
- HMRC/FSA Rules may change in future and that could alter the acceptability of the investment.
- 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.
- You would be strongly advised to seek financial advice of the investment and any related issues before proceeding.

16. Mrs Y has signed a statement to confirm that she had read the issues set out in the welcome letter; to say that she had not received any form of financial incentive to take out the SIPP; to indemnify Berkeley Burke against any losses or liabilities in respect of her investment; and to acknowledge that she had not received advice from Berkeley Burke. She also confirmed that she understood that it was her responsibility to have independent financial advice if she thought it appropriate.

17. In February 2015, the Serious Fraud Office (**SFO**) announced that it had opened a criminal investigation into alleged fraud concerning GFI-Teak.

18. Mrs Y says that Berkeley Burke failed to carry out due diligence relating to the investment. She also says that there was a failure to disclose the commission paid to Marcus James which would have an impact on her investment return.

19. On 14 October 2014, Mrs Y’s advisers made a subject access request under the Data Protection Act 1998 (the **DPA**) to obtain a copy of all documents relating to her held by Berkeley Burke. Berkeley Burke initially responded to Mrs Y to say that under the DPA and rules set by their regulator and company policy they would not provide the information direct to intermediaries. Following the intervention of the ICO in February 2015, Berkeley Burke did provide the information requested.

Adjudicator's Opinion

20. Mrs Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by Berkeley Burke. The Adjudicator's findings are summarised briefly below:

- Mrs Y's complaint about access to her file had already been dealt with by the Information Commissioner's Office (the **ICO**).
- It was not Berkeley Burke's responsibility, as trustee and administrator of the SIPP, to carry out the level of due diligence suggested by Mrs Y.
- Mrs Y had invested in unregulated speculative assets. It seemed likely that her application for the SIPP originated with her husband, Michael Y of Prime Financial Services.
- Mrs Y said that she was advised to enter into the investment through an unregulated adviser and said that Berkeley Burke should have done more to protect her from unregulated advice.
- Berkeley Burke provided sufficient warnings regarding the investment in their letter of 24 January 2013, including strongly advising that Mrs Y should seek financial advice before proceeding. Mrs Y signed the authority to show that she had understood the issues and understood that it was her responsibility to take Independent Financial Advice if she considered it necessary. That she did not do so was her decision alone.
- Mrs Y also signed the application in which she indicated that she had taken her own advice and had not been advised by a FSA regulated adviser.
- Furthermore, there were clear warnings included in the Alternative Investment Declaration.
- With regard to that part of Mrs Y's complaint concerning the payment of commission to the introducer and the possible effect of this on her investment, the trustee bank statement showed that a gross scheme fee of £491.88 was deducted on 19 February 2013. This was made up of a scheme establishment fee of £200 plus VAT and an annual administration charge of £209.90 plus VAT, which were in line with the published schedule of fees. The statement showed that the full value of Mrs Y's transfer from Friends Life had been applied to her investment with the balance being held in the trustee bank account.
- With regard to the selected investments themselves, Berkeley Burke acted as trustee and administrator of the SIPP.
- All trusts have wide investment powers by virtue of the Trustee Act 2000 (the **Act**). There is also a statutory duty of care to sit alongside common law trustee

duties and responsibilities. However, the statutory duty of care did 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 was not a decision of the administrator. The trustee had a very wide power of investment but the contractual documentation with Mrs Y made clear that investments were selected by the member personally.

- Also, the limit of Berkeley Burke's responsibility as administrator was to consider whether or not an investment fell within the list permitted by HM Revenue & Customs (**HMRC**). It was Berkeley Burke's prerogative whether or not to allow an investment permitted by HMRC. They were not required to allow all permitted investments. 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 did not confer any suitability on the investment itself.
- 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.
- The Adjudicator also considered whether there were wider due diligence responsibilities applicable to Berkeley Burke by the regulator, and or the Financial Conduct Authority (**FCA**), previously the Financial Services Authority (**FSA**).
- A thematic review carried out by the FSA in 2008, 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.
- This was aimed at ensuring providers put in place certain controls and systems designed to flag potential instances of unsuitable or poor investment advice.
- In this instance Berkeley Burke had told Mrs Y that the investment was unregulated, was high risk and/or speculative, and that if she had any doubts about the investment she should seek advice from a suitably authorised and qualified adviser.

- The Adjudicator considered that Berkeley Burke had provided sufficient warnings to Mrs Y regarding the investment without actually providing investment advice, which they were not authorised to do.
 - Although further reviews and guidance have been issued by the FSA and FCA, Mrs Y had already established her SIPP by the time these came into effect. Current levels of knowledge and understanding, or present standards of practice, could not be applied to a past situation.
 - Berkeley Burke complied with their obligations at the time, gave Mrs Y clear warnings and explained they would not be liable for losses in the particular investments that she chose.
21. Mrs Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs Y provided her 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 Mrs Y for completeness.

Ombudsman's decision

22. Mrs Y disagrees that the FCA/FSA guidance on the SIPP market cannot be applied retrospectively.
23. Regarding the investments matching the amount invested she says this appears to have been misinterpreted as she is referring to the duty of the trustee to ensure the asset purchased has the same value as the investment made. She says this is not the case and the Trustees were aware of this as the introducer received 15% of the client fund invested indirectly which had an immediate impact on the value of her investment.
24. Mrs Y says that too much emphasis is being placed on her signed disclaimers. She says the trustee has a duty of care to her and should have made further enquiries with her about the introducer of the business to ensure there was no other influence or that she thought she was getting advised in some capacity.
25. Mrs Y believes it is for a court to decide whether or not the statutory duty of care applies to Berkeley Burke in relation to investments as explained in the Trustee Act 2000.
26. Mrs Y believes that the Trustee Act and Pensions Act have been breached and asks for the two entire acts to be checked to ensure this is not the case.
27. With regard to the retrospective application of guidance, in January 2015, the FCA published the following statement:
- "Firms have a right to be confident that their actions are measured against the standards, rules and principles in place at the time. Indeed, there are legal

restrictions on applying regulatory standards with retrospective effect, in particular if we sought to remove vested rights or if the consequences of our approach were unfair. Furthermore, firms, as made clear in our enforcement guide, can only be judged where, at the time of an action, a breach of principles was reasonably predictable. In addition, the FCA has, in a number of speeches by senior executives, shown a desire to a predictable and consistent regulator. We have therefore been concerned that there has been criticism from firms that we (and our predecessor) have on occasions acted in a retrospective manner; that we looked at issues with the benefit of hindsight and judged them on standards that had not been in place at the time. If there was evidence of this, it would be something we would take very seriously”.

28. The FCA continued by saying the following about the role of the Financial Ombudsman, but which is equally applicable to my role:

“The Ombudsman is required...to make decisions based on what is fair and reasonable in all the circumstances of the case. The Ombudsman does so taking into account relevant law and regulations; regulators’ rules, guidance and standards; codes of practice; and (where appropriate) what the Ombudsman considers to have been good industry practice at the relevant time. This is wider than the rules and guidance that come under the remit of the FCA. Individual complaints are decided on their own facts and do not make precedents”.

29. As this statement makes clear, my decision in any case has to be based on the merits of the case itself and the relevant regulations and practice applicable at the time.
30. With regard to the payment of 15% commission to the introducer of the business, it may well be that such a payment was made, although, as the Adjudicator explained, there is no evidence to show that. But regardless of whether it was made or not, I am not persuaded that this indicates anything untoward with the arrangement. Furthermore, I am satisfied that Mrs Y established this arrangement with the help of her husband, a financial adviser, and that she did so in the full knowledge of the financial commitments she was entering into.
31. Mrs Y signed a statement to confirm that she had read the issues set out in the welcome letter and to say that she had not received any form of financial incentive to take out the SIPP. She also said that she understood that it was her responsibility to have independent financial advice if she thought it appropriate. I consider that this provided sufficient confirmation for Berkeley Burke to be satisfied that there was no other influence being applied to coerce Mrs Y into establishing the SIPP.
32. Mrs Y says that too much emphasis is being placed on her signed disclaimers and that Berkeley Burke should have made further enquiries. I do not agree. The statements signed by Mrs Y were clear and unambiguous, and there is no evidence

to suggest that Mrs Y was put under any pressure by a third party to sign them. I do not consider it reasonable to expect Berkeley Burke to have investigated further or to have questioned whether or not Mrs Y really understood the implications of the decisions she was making.

33. And with regard to whether or not the Trustee Act and the Pensions Act have been breached, I am satisfied that the relevant provisions of both have been considered and I agree with the Adjudicator's comments.
34. Therefore, I do not uphold Mrs Y's complaint.

Anthony Arter

Pensions Ombudsman
12 July 2016