

## Ombudsman's Determination

Applicants	Mr and Mrs X
Schemes	Hornbuckle SIPP's ( <b>the SIPP's</b> )
Respondent	Hornbuckle Mitchell Ltd ( <b>HML</b> ) (now trading as Embark Services Ltd)

## Outcome

1. The complaint made by Mr and Mrs X against HML is partly upheld, but there is a part of the complaint I do not agree with. To put matters right for the part that is upheld, HML should:
  - reimburse Mr and Mrs X the fees payable to HML and their solicitors to carry out the transfer of the SIPP's' administration to Liberty SIPP Ltd (**Liberty**) totalling £3,534; and
  - pay Mr and Mrs X £2,000 for the significant distress and inconvenience which they have suffered dealing with this matter.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mr and Mrs X complain that HML, having upheld their latest complaint about the substandard administration for the SIPP's in January 2015, wrongly decided not to pay them and their IFA further compensation because they considered that the redress already paid for previous poor service was sufficient.
4. Mr X contends that HML had promised him during a meeting which took place in December 2013 that their administrative service for the SIPP's would improve and he was left with no choice but to transfer the SIPP's to another provider, Liberty, when HML's service continued to be unsatisfactory.
5. In order to put matters right, they would like HML to compensate them and their IFA in full for the additional costs which they have incurred carrying out the transfer and for dealing with their complaint as follows:

a) Liberty (transfer of property fees and initial property fees)	£600
b) BRM Solicitors (legal fees for transferring the property to	£4,104.55

the new trustees)

c) Eversheds Solicitors (fees for providing HML with legal advice)	£1,800
d) The IFA (fees for selecting possible scheme providers)	£7,000
e) The IFA (fees for formulating and presenting the complaint made by Mr and Mrs X)	£6,375 plus VAT of £1,275
Total	£21,154.55

A breakdown of the IFA fees under (d) and (e) may be found in the Appendix.

### **Background information, including submissions from the parties**

6. Mr X and his wife Mrs X were members of the SIPP's which had invested in a property.
7. In March 2013, Mr X complained to HML, via his IFA, about a tardy VAT payment from the SIPP's to HM Revenue and Customs (**HMRC**) and also the generally poor standard of service provided to date.
8. As a gesture of goodwill to Mr and Mrs X, HML refunded the annual administration fees to the SIPP's for that year of £490 each plus VAT and also paid the costs incurred by the IFA in assisting them with their complaint and other related issues of £1,000 plus VAT in March 2013. Mr and Mrs X accepted their offer of compensation in settlement of this particular complaint.
9. Mrs X submitted through Headland Property Management (**Headland**) the invoices received for maintenance services provided to the property. During the period July 2013 to October 2013 she encountered increasing difficulties getting HML to pay the invoices promptly from the SIPP's despite sending them numerous reminders to do so for which she received no reply.
10. In September 2013 Mr X complained, via his IFA, about the substandard level of service provided by HML. In October 2013, HML responded questioning Headland's involvement in dealing with the property invoices. Mr X pointed out to them that HML had previously approved this arrangement. HML considered Mr X's response and again confirmed that it was a "bona fide and appropriate" arrangement. HML then agreed tardily to pay the invoices.
11. Serious consideration was already being given at this time to transfer the SIPP's to another provider by Mr X but before making a decision, he requested a meeting with HML.

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12. On 4 December 2013 Mr X met with HML to seek an explanation for their poor administration of the SIPP's during 2013. The minutes of the meeting record promises by HML that they would:
  - process all future invoice payment requests within five working days of receipt;
  - organise online access to the SIPP's' group bank account for him by the time he returned from a holiday in February 2014; and
  - acknowledge all future correspondence from his wife regarding the SIPP's.
13. As a gesture of goodwill, HML offered to refund 50% of the annual administration fees for the current year to Mr and Mrs X of £245 each plus VAT in recognition of poor service, which they accepted.
14. On 5, 10, and 11 February 2014 Mrs X submitted invoices to HML which needed to be paid urgently. She received eight similar e-mails from HML, the first of which was sent on 27 February 2014, informing her that the invoices were being dealt with and she would hear from them again soon. On 19 March 2014, HML sent Mrs X two more e-mails, one to apologise for the delay in paying the invoices and the other to inform her that they were reviewing the invoices before authorising payment because they had recently introduced more stringent checking procedures to ensure that invoices relating to tenant expenses were declined.
15. HML subsequently also told Mrs X that they would pay all the outstanding invoices by 21 March 2014 but the first payment was not made until 26 March 2014 with others paid later.
16. In March 2014, HML asked Mr X to pay fees totalling £570 plus VAT for the "administration of an office building, annual administration/monitoring (adherence to loan conditions) and block insurance facilitation". It later transpired that HML had incorrectly requested payment of the fees relating to adherence to loan conditions from the SIPP's. As a gesture of goodwill, HML issued a credit note for the whole amount requested even though the fees for the other two duties totalling £470 plus VAT were still payable.
17. HML were only able to provide Mr X with online access to the SIPP's' group bank account in March 2014 and did not supply him with monthly bank statements whilst access was unavailable.
18. In March 2014, the IFA discovered that HML had mistakenly overpaid their fees due from the SIPP's by £1,080. £360 was due to the IFA every three months but in October and December 2013 HML paid them £1,080 and £720 respectively. When the IFA queried why they had received these payments, HML accepted that they had made a mistake and the overpayment was subsequently used by HML to offset against the fees payable to the IFA in 2014.

19. In September 2014, Mr X decided to transfer the SIPP's' administration to Liberty. In his view, HML's sustained poor service amounted to a breach of trust and as he no longer had any confidence in their ability to administer the SIPP's properly, he considered the transfer to be necessary and justified. During the course of the transfer process, the IFA says that they had to (a) undertake comprehensive research and due diligence for each prospective SIPP provider including conducting interviews and (b) complete all relevant paperwork for the SIPP transfer to Liberty. It was during this transfer process that another mistake made by HML was discovered by Liberty. The IFA contends that:
- in July 2013, HML should have split the SIPP's' monies which Mr X and Mrs X had allocated for investment in unit trusts via the Cofunds platform using the same split for their shares of the property, i.e. 95.67% for Mr X and 4.33% for Mrs X;
  - HML had instead used a wrong split of 65.16% for Mr X and 34.84% for Mrs X based on an incorrect split (as shown on the 2013 SIPP annual statements) for their shares of the cash held in the SIPP's' group bank account;
  - as this group bank account was used for depositing the rental payments from the property, the cash held in it should also have been split between Mr X and Mrs X in the same proportions as their shares of the property;
  - they had accepted the wrong split provided by HML in good faith;
  - the onus had therefore been on HML to check that there were no errors on the instruction forms completed by Mr and Mrs X before sending them to Cofunds with the monies; and
  - Liberty subsequently have had to rectify this mistake by transferring an appropriate amount from Mrs X's share to Mr X's share of the SIPP's' assets.
20. In January and February 2014, HML only collected 95% of the regular monthly contributions for Mr and Mrs X's Cofunds investments by mistake because the fund into which the remaining 5% was invested had been closed. HML also encountered problems paying Mrs X's contribution in February 2014 to Cofunds due to insufficient funds held in the group bank account for her. HML also failed to obtain online access for Mrs X to her Cofunds investments in the SIPP by mistake. Mr and Mrs X say they had to involve their IFA to rectify these problems during April/May 2014.
21. In their letter dated 26 January 2015 to Mr X, HML apologised for all their historical errors and for continuing to provide a poor administrative service. They also said that:
- they could not agree to his request to waive the transfer fee and to pay the IFA's fees incurred by helping him deal with this matter;
  - they have already paid adequate compensation totalling £1,940 plus VAT to him and Mrs X and £1,000 plus VAT to the IFA in recognition of their past mistakes;
  - although they accept that further mistakes were made after the compensation was paid, they did not consider any additional redress to be appropriate; and

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- they were not responsible for incorrectly splitting the SIPP's funds invested with Cofunds.
22. Mr and Mrs X complained to the Ombudsman. They consider that all their expenses relating to the transfer should be reimbursed by HML otherwise they would suffer significant financial losses in their SIPP's through no fault of their own. In their view, the fees which they are claiming are incontestable and flow from the actions which resulted in the complaint. They also consider that the IFA's involvement in the complaint was essential to deal with the lengthy and technical responses submitted by HML.
23. HML provided a detailed breakdown of their fees incurred relating to the transfer as:
- HML (invoiced in October 2014)
- £960 (including VAT) for transferring out a non-standard investment to Liberty
- £600 (including VAT) for transferring out a standard investment to Liberty
- £174 (including VAT) for a drawdown review for Mr X charged prior to the transfer to Liberty
- Eversheds (no invoice available)
- £1,800 for the cost of the legal advice provided to HML
- Additional financial losses claimed by Mr and Mrs X include:
- Liberty (no invoice available)
- £600 for the transfer of the scheme property and initial property fees.
- BRM Solicitors (invoiced in January 2015)
- £4,104.55 (including VAT) for conveying the property to the new scheme trustees.
- The IFA (invoiced in April 2015)
- £7,000 (including VAT) for intermediation with SIPP providers relating to complaint and subsequent SIPP transfer. This work included selecting and interviewing possible SIPP providers and completing all necessary statutory and client care paperwork.
- The IFA (no invoices available)
- £7,650 (including VAT) for formulating and presenting the complaint and also advising Mr and Mrs X (further details of these fees may be found in the Appendix).
24. HML says that:
- Mr and Mrs X could have used The Pension Advisory Service (**TPAS**) which provides free and impartial advice to assist them with their complaint to me;

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- they neither had a contract with the IFA nor agreed to cover the IFA's costs in dealing with the complaint;
- the costs which Mr and Mrs X are now claiming were not incurred directly as a result of HML's failure to provide an improved administrative service for the SIPP's as agreed in the December 2013 meeting with Mr X;
- they had no involvement in the decision made by Mr and Mrs X and their IFA to transfer the SIPP administration to Liberty;
- the IFA would have incurred lower fees if its managing director had delegated some of his tasks that he carried out to his subordinates and did not undertake some apparently superfluous ones;
- Mr X may have incurred additional charges as a consequence of his decision not to use one of Liberty's "panel solicitors" who are regulated and have an extensive knowledge of pension schemes;
- it is unreasonable to expect them to be liable for the "non-panel" solicitors' fees particularly when they have not received a breakdown of the costs; and
- they accept that they incorrectly collected only 95% of Mr and Mrs X's monthly contributions for their Cofunds investments in January/February 2014.

25. The complaint made by Mr and Mrs X was considered by one of our Adjudicators who concluded that further action was required by HML. The Adjudicator's findings are summarised briefly below:

- In their letter dated 26 January 2015 to Mr X, HML accepted that the majority of his complaints were justified and should therefore be upheld. Despite acknowledging their continuing errors, HML decided that no further compensation was appropriate because they deemed that the amount of redress already paid for their substandard administration service was adequate.
- HML's decision did not however take into account that they subsequently failed to deliver on their promise made to Mr X during their meeting in December 2013 that their level of service for the SIPP's would improve significantly in the future.
- The fact that HML had introduced more rigorous checks on invoices in early 2014 did not excuse them from failing to pay the invoices submitted by Mrs X in February 2014 on a timely basis particularly after they had reassured Mr X in December 2013 that he would see a marked improvement in the level of their administration service for the SIPP's. Taking nearly two months in some cases to pay an invoice clearly constitutes maladministration on HML's part. It was therefore understandable that Mr and Mrs X should now be seeking further compensation for the additional unnecessary costs and inconvenience which they and the IFA have experienced as a consequence of this failure.

- The compensation paid so far by HML only reflected an agreed amount of redress for earlier levels of poor administration. This represented an acceptable level of compensation in recognition of past errors but did not account for their and the IFA's continued time consuming involvement dealing with this matter.
- Mr X had given HML every opportunity to maintain their relationship but there was seemingly little prospect of their service ever achieving an acceptable level. Mr X's request that HML should now compensate him and his wife by reimbursing HML's transfer fees was reasonable.
- A very considerable amount of time was spent by the IFA dealing diligently with the problems caused as a direct result of the maladministration identified. During this time, they would have incurred reasonable additional expenses which they would not otherwise have incurred. These expenses should be reimbursed on the basis that they are as much resulting financial injustice as any lost benefits.
- However, in compensating the IFA it is right to have regard to the fact that any process takes some time, and that in any business transaction there is scope for matters to go awry. Part of the cost of dealing with the matter would have been within the normal range of the IFA's business activities (including ordinarily problematic ones).
- The IFA considers that the cost of their time spent should be assessed using the hourly rate which their office manager and senior administrator would charge. Their proposal was appropriate as the work that they had to do was done at indirect expense in terms of potential for lost profit.
- A reasonable level of compensation payable to the IFA for time spent in dealing with the matter was £2,000 plus VAT.
- It is unclear from the evidence why HML thought that the split of the cash held in the SIPP's' group bank account should be 65.16% for Mr X and 34.84% for Mrs X. But if as Mr X says the split should have been 95.67% for him and only 4.33% for Mrs X, it is reasonable to assume that he (with the IFA's assistance, if necessary) should have spotted this mistake which was clearly shown on the 2013 SIPP statements.

26. Mr and Mrs X did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr and Mrs X provided their further comments which I do not consider should change the outcome. I will therefore only respond to the key points made by Mr and Mrs X for completeness.

## **Ombudsman's decision**

27. There is no doubt from the evidence presented that HML had continued to provide Mr and Mrs X with a substandard level of service for the SIPP's and made mistakes even after their meeting with Mr X in December 2013, i.e.:

- failing to process all invoice payment requests received in February 2014 within five working days of receipt;
- failing to organise online access to the SIPP's' group bank account for Mr X by February 2014; and
- incorrectly asking Mr X to pay fees totalling £570 plus VAT relating to adherence to loan conditions.

28. Further mistakes made by HML prior to December 2013 also came to light during 2014, i.e.

- overpaying the IFA's fees due October and December 2013 by £1,080; and
- splitting the SIPP monies in July 2013 between Mr and Mrs X using the wrong proportions, although I bear in mind that the member Trustees of this scheme also had a duty supervise those allocations.

29. These errors in my view, constitute maladministration, (though because of the timings of their discovery, only those in paragraph 28 could properly be considered as part of the reason for the decision to transfer). HML and (Liberty following the transfer) have, however, now taken the appropriate remedial action to rectify all of the errors by:

### **HML**

- paying all the invoices and providing Mr X with online access to the SIPP's' group bank account albeit tardily during March/April 2014;
- rescinding their request for £570 plus VAT for fees relating adherence to loan conditions and waiving their fees for "administration of an office building" and "block insurance facilitation" as a gesture of goodwill in recognition of their error; and
- offsetting the overpaid IFA fees of £1,080 against fees payable in 2014; and

### **Liberty**

- transferring an appropriate amount from Mrs X's share to Mr X's share of the SIPP's' assets so that are now split in the correct proportions of 95.67% for Mr X and 4.33% for Mrs X.

30. I therefore conclude that there is no evidence of a continuing deficit within scheme funds as a result of the errors made.



31. However, given the history of the matter, and the fact that the problems were not resolved despite promises of improved service, I consider that the decision to transfer was a justified response, and HML should not be entitled to recover their own costs associated with that process because it was their own maladministration which caused them to be incurred. I am not persuaded that the subsequent costs of transferring to the Liberty SIPP should be recoverable. To arrive at that conclusion I would have to be satisfied that all of those costs flowed directly from breaches of the HML contract or breach of trust. I do not consider that Mr and Mrs X have demonstrated that. They were free to choose another provider, but HML had accepted no contractual liability to pay for the costs charged by the receiving scheme and I can see no evidence of those costs flowing from a breach of trust.
32. I come now to the costs incurred taking advice from the IFA. In this case the IFA stood in the shoes of Mr and Mrs X to ensure that the rectification processes were correctly completed. However, there is a distinction between the costs incurred liaising with a scheme in order to cure the maladministration itself and any professional costs incurred thereafter complaining to the Ombudsman.
33. The Ombudsman service is free and, save for the possibility of costs arising as a result of appeals to the Courts from my determination, an applicant who is unsuccessful is not generally at risk of having costs awarded against him or her. Thus I do not follow the general practice of the Courts (where an unsuccessful applicant would be at risk) of automatically awarding costs to a party who has been successful. I do not generally consider that any award should be made to account for the time spent by an applicant in bringing the complaint to The Pensions Ombudsman or the Pensions Advisory Service as both organisations offer a free service to the public and will help an applicant through the process of dealing with them.
34. However, when the applicant or his/her representative has completed reasonable work to help sort out an issue with the respondent itself, I will consider making an award to account for expenses directly incurred as a result of any maladministration which I find to be proved. In the case of Mr and Mrs X, they already had an IFA who did extra work for them when things went wrong. I consider it was reasonable for them to allow the IFA to continue to act on their behalf, to sort out the administration failures historically and as they came to light during the process of transfer. However, in this case I have been provided with no evidence of hours billed to achieve that outcome. The losses claimed are set out in the Appendix and they do not relate to that activity. Moreover it has not been demonstrated that all of the costs claimed have actually been billed. In those circumstances I conclude there is no sufficient evidence of loss incurred directly as a consequence of the maladministration and I am restricted to considering the distress and inconvenience caused. I accept that it was significant, requiring IFA assistance to resolve at some cost.
35. I therefore partly uphold the complaint made by Mr and Mrs X and make the following direction aimed at remedying the injustice.

**Directions**

36. Within 21 days of the date of this determination, HML should:

- reimburse Mr and Mrs X the fees payable to HML and their solicitors to carry out the transfer of the SIPPs' administration to Liberty totalling £3,534; and
- pay Mr and Mrs X £2,000 in respect of their distress and inconvenience.

**Karen Johnston**

Deputy Pensions Ombudsman  
24 May 2017

## APPENDIX

### **Fees claimed for selecting and interviewing possible SIPP providers and subsequently completing all necessary statutory and client care paperwork**

**Managing Director:** 21 hours @ £250 per hour = £5,250.

- Initial telephone conversation with prospective providers
- Research and due diligence in respect of prospective providers
- Conducting interview process with each prospective provider

**Office Manager:** 14 Hours @ £125 per hour = £1,750

- Sourcing prospective providers for initial contract
- Assisting in the research and due diligence process
- Attending the interview process with each prospective provider
- Completion of all relevant provide paperwork in association with ultimate transfer

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### **Fees claimed by IFA for “formulating and presenting the complaint and advising Mr and Mrs X throughout”**

**Managing Director:** 22 hours @ £250 per hour = £5,500

- Telephone conversations with clients
- Meetings with Mr X as documented:
  - 16 meetings lasting 1 to 1.5 hours each with Mr X between 18 February 2014 and 14 December 2016. The total number of hours spent in these meetings was 20.
- Compiling and researching responses to the Pensions Ombudsman
- Researching HML’s misguided statements and providing evidence against;

**Office Manager:** 7 hours @ £125 per hour = £750

- Ongoing research; reading and absorbing relevant information in relation to the case for each respective item of correspondence
- Formulating appropriate responses for each item of correspondence, i.e. reviewing previous letters and constructing appropriate content for each letter

**Senior Administrator:** 1 hour @ £125 per hour = £125

- Typesetting and layout of each item of correspondence

Total Fee = £6,375 plus VAT @ 20% of £1,275 = £7.650