

## Ombudsman's Determination

<b>Applicant</b>	Mr Robert Goodwin
<b>Scheme</b>	Berkeley Burke SIPP (the <b>SIPP</b> )
<b>Respondent(s)</b>	Berkeley Burke SIPP Administration Limited ( <b>Berkeley Burke</b> )

### Complaint summary

Mr Goodwin has complained that Berkeley Burke failed in their duty of care to him in that they did not carry out proper due diligence with regards to his proposed investment in Green Oil Plantations.

### Summary of the Ombudsman's determination and reasons

The complaint should not be upheld because it was not Berkeley Burke's responsibility, as trustee and administrator of the SIPP, to carry out the level of due diligence suggested by Mr Goodwin.

## Detailed Determination

### Material facts

1. Berkeley Burke received Mr Goodwin's application to establish the SIPP on 5 December 2011.
2. Correspondence on file indicates that Mr Goodwin received advice from The Affinity Partnership Limited. Mr Goodwin affirms that this was the case and that he received advice from Mr Martin Ruston, an employee of The Affinity Partnership. An Application Confirmation, dated 7 November 2011, under the business header of The What Partnership, gave the introducer details as The Affinity Partnership.
3. The application showed that Mr Goodwin wished to make an investment of £40,000 in Green Oil Plantations.
4. Green Oil Plantations was an Unregulated Collective Investment Scheme (**UCIS**).
5. On 15 December 2011, Berkeley Burke sent Mr Goodwin a letter which acknowledged receipt of his application to open the SIPP from his "non-regulated agent Gordon Hogg at The Affinity Partnership Assets".
6. Mr Goodwin has questioned this statement. He says that Mr Ruston and The Affinity Partnership were regulated. He also says that he had no dealings with either Gordon Hogg or The Affinity Partnership Assets
7. 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."
8. 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.
  - You must be comfortable that any shortfalls would need to be made up either by the transfers of pension plans or by cash contributions from you and that you have the ability to facilitate and finance such matters should they arise.
9. In 2013 Green Oil Plantations went into administration and Mr Goodwin believes he has lost his investment as a result.

### Conclusions

10. Mr Goodwin has invested in an unregulated speculative asset. I imagine that he did so in search of high investment returns.
11. It appears that Mr Goodwin took advice regarding the investment, but it is not suggested that Berkeley Burke provided advice. The question for me in relation to Mr Goodwin's complaint against Berkeley Burke 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 Berkeley Burke's legal obligations to Mr Goodwin, and whether they acted consistently with good industry practice.
12. Mr Goodwin has raised the issue of whether or not he was advised or induced to enter into the investment through a regulated or unregulated adviser.
13. The fact that the Affinity Partnership was regulated appears to be confirmed by the company's letterhead which refers to The Affinity Partnership being regulated by the Financial Services Authority.
14. However, I am not persuaded that this is relevant to the complaint against Berkeley Burke. If Mr Goodwin took advice from a regulated intermediary then he should be able to take a complaint regarding the suitability of that advice to the Financial Ombudsman Service. The fact that I have considered his complaint against Berkeley Burke does not interfere with that right.
15. But even if Mr Goodwin was introduced to Berkeley Burke through an unregulated intermediary, I am satisfied that Berkeley Burke provided sufficient warnings regarding the investment in their letter of 15 December 2011.
16. Berkeley Burke acted as trustee and administrator of the SIPP. I have, therefore, considered their obligations to Mr Goodwin in both roles.

17. 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.
18. 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.
19. 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”.
20. 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”.
21. In my opinion the statutory duty of care does 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 is not a decision of the administrator. The trustee has a very wide power of investment but the contractual documentation with Mr Goodwin make clear that investments will be selected by the member personally.
22. The limit of Berkeley Burke’s 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.
23. 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.
24. I have also considered whether there were wider due diligence responsibilities applicable to Berkeley Burke by the regulator, the Financial Conduct Authority previously the Financial Services Authority (FSA).
25. In 2008 the FSA commenced a thematic review of the way in which they regulated 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.

26. 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.

27. This was aimed at ensuring providers put in place certain controls and systems designed to flag potential instances of unsuitable or poor investment advice.

28. In this instance Berkeley Burke told Mr Goodwin that his agent was unregulated, that the investment was unregulated and that if he had any doubts about the investment he should seek advice from a suitably authorised and qualified adviser.

29. In my view, Berkeley Burke provided sufficient warnings to Mr Goodwin regarding the investment without providing investment advice, which they were unauthorised to do.

30. Furthermore, the basic checks which Berkeley Burke undertook were sufficient to meet the requirements imposed on them by the regulator and HMRC for such investments at that time. Mr Goodwin has questioned this, but the fact remains that this investment was permissible within a SIPP and so the mechanics of how Berkeley Burke went about satisfying themselves that this was the case are irrelevant.

31. 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.

32. 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.

33. 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.
34. The FCA followed this up by conducting a third thematic review of SIPP operators in 2014.
35. 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.
36. 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 Goodwin's investment had already been received before the more recent guidance was issued.
37. It is natural that Mr Goodwin 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.
38. While I have some sympathy for the position Mr Goodwin now finds himself in, Berkeley Burke 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.
39. I do not uphold the complaint.

**Anthony Arter**

Pensions Ombudsman  
16 September 2015