

Ombudsman's Determination

Applicant	Mr S
Scheme	Namulas SIPP (formerly the Self Invested Personal Harvester Pension Scheme) (the SIPP)
Respondent	Liverpool Victoria Friendly Society Ltd (LV=)

Outcome

1. Mr S's complaint against LV= 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, LV= should arrange to pay Mr S £500 compensation in recognition of the distress and inconvenience caused to him by the maladministration identified.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr S contends that the administration charges which the current SIPP administrator LV= has levied are unfair because:
 - they are not justified by the amount of administrative work which LV= has actually undertaken for the SIPP; and
 - they are disproportionate to the rental income generated by the property held as an asset in the SIPP.
4. He also complains that:
 - he experienced problems recouping rent arrears from Mr W, a former tenant of the property, because LV= had failed to countersign a licence to occupy for Mr W in March 2012;
 - LV='s failure to prepare a lease in January 2013 via their solicitors for Mrs R to sign on a timely basis led to her leaving the property in August 2013 resulting in a loss of potential rental income plus associated legal costs;
 - LV= failed to satisfactorily assist him deal with an insurance claim in 2014 for water damage to the property whilst Mr B was the tenant there; and
 - LV= improperly tried to force a sale of the property in 2014 because if they had taken into account the lost rental payments from Mr W and Mrs R and

also the proceeds from the insurance claim, there would have been sufficient money in the SIPP to cover its costs.

5. In order to put matters right, Mr S would like LV= to compensate him by:
 - refunding the 2012 and 2013 SIPP administration charges totalling £3,000;
 - paying the lost rental income and associated legal costs incurred dealing with the leases for Mr W and Mrs R of around £21,000 into the SIPP;
 - paying his drawdown income for the three years during which it was not paid;
 - paying him an award to recognise the distress and inconvenience which he has experienced dealing with this matter; and
 - amending the SIPP fee charging structure so that they do not exceed 1% of the property rental income.

Background information, including submissions from the parties

6. Mr S established the SIPP on 30 July 1997 by signing and returning to LV= an application form (**the Form**) which included the following declaration:

“I hereby apply to become a member of the SIPP and agree to be bound by the Trust Deed and Rules thereof and by the SIPP Technical Details Brochure current at the date of this application...

I agree that:

(iii) In return for the services to be provided by Namulas Pension Trustees Ltd (**the Trustee**), I agree to pay the charges set out in the SIPP Technical Details Brochure current at the date of this application.

I authorise the Trustee to realise investments under the SIPP attributable to me in order to pay annual charges and transaction charges and in order to settle any third party charges payable in respect of investment transactions...”

7. The Establishing Deed and Rules dated 4 June 1992 was amended by several Deed of Amendments over the years and then superseded by the Trust Deed and Rules dated 6 April 2006 (**the 2006 Deed**).
8. Sections 8.2, 8.3, 13.8 and 13.11 of the 2006 Deed (as shown in the Appendix) allows LV= to sell the SIPP assets including the property in order to meet the SIPP fees and expenses.
9. When Mr S initially set up the SIPP it was on the basis that he would make a regular cash contribution which would be invested in with profits units or funds of his choice as shown on the SIPP application form.
10. A range of management charges is listed on page 3 of the SIPP policy document, followed by a statement ‘The Society has the right to vary the investment management charge and administration charge at any time for existing plans...

Charges will be increased should the Society consider it appropriate in order to meet its expenses and other costs at that time.'

11. On 17 March 2005 Mr S applied to invest in a commercial property at 97/99 Winner St, which was let on a 20 year lease at a rent of £18,000 per year ('**the property application**'). The occupant at the time was Mr S's company. The application form required the rent to be invested in the SIPP. Section J of the property application asked for the name and address of the managing agent if responsibility for the property is not to be undertaken by the Member(s) personally. This section was marked 'N/A'. Section L of the property application set out a fee menu. This section was struck through and marked 'please see fee menu attached.'
12. On 24 June 2005, Mr S signed and returned the Property Management Agreement (**the Agreement**) to LV=. This stated:

"Recitals

The Trustee has resolved to appoint the Member as managing agent for the Property for the purposes hereinafter mentioned and the Member is willing to accept such an appointment.

Operative Provisions

The Trustee appoints the Member as agent ...to manage, supervise and provide services for the operation and use of the Property in accordance with the terms of this agreement...

The duties of the Member shall include all management functions required for the proper and efficient management and operation of the Property in accordance with the principles of good estate management...

...the Member shall:

1.1 ensure that all rents, insurance premiums and service charge (if any) payable under the Lease are paid to the Trustee in a prompt and timely manner

1.13 obtain and advise the Trustee of the building insurance and loss of rent requirements from time to time, including obtaining detailed reinstatement valuations based on independent professional survey on each third anniversary of the date of this agreement unless the property is being insured under the Trustee's block policy.

Termination

2.1 This agreement may be terminated by either party at any time by giving to the other party of not less than three calendar months' prior written notice.

2.2. Upon termination of this agreement the Member shall provide all information and documentation to the Trustee to permit a smooth and quick

transfer of the services assumed by the Member under this agreement to a newly appointed managing agent.”

13. On 5 July 2005 the Trustee wrote to Mr S advising him that they would own the property on his behalf and act as landlord. They would provide rent demands for the tenant records, and VAT invoices if appropriate. They clarified that as he had chosen to insure the property himself he should send them the current insurance schedule and if he did not they would insure with their own agents. They clarified: ‘As property manager, it will be your responsibility to ensure that the tenant complies fully with all aspects of the lease...’The property was subsequently tenanted by different occupants. Difficulties arose collecting rents, concluding leases, and resolving insurance issues which resulted in a dispute about who was responsible for resolving commercial letting issues generally.
14. On 7 September 2009 a Mr R wrote to the Trustee saying he had been directed to them by their member, Mr S. He said he was appointed managing agent in 2005 when the property was acquired and to date had no payment for his services. He therefore enclosed an account and asked for payment. This letter was marked that the request needed the member’s consent.
15. In addition to paying the costs associated with the management of the property out of SIPP funds, the Trustee continued to deduct fees according to their current SIPP property fee menu. These include drawdown charges, lease fees and an annual management fee. Mr S challenged the right to charge the fees.
16. In April 2015 Mr S brought his complaint to the Ombudsman.

Adjudicator’s Opinion

17. Mr S’s complaint was considered by one of our Adjudicators who concluded that no further action was required by LV=. The Adjudicator’s findings are summarised briefly below:
 - By signing the Form, Mr S agreed to be bound by the Trust Deed and Rules and therefore pay the fees levied by LV= calculated using a basis determined by them.
 - LV= has generally charged Mr S the correct fees for activities undertaken for the SIPP in accordance with those specified on the appropriate tariff of charges.
 - The mistakes made by LV= when charging fees clearly constitute examples of maladministration on their part.
 - LV=, however, have already put things back as they should have been if these mistakes had not occurred by taking the appropriate corrective action.

- If Mr S considers the administration fees charged by LV= to be too high, it has always been open to him to transfer the SIPP administration to another pension provider offering more competitive rates.
 - The responsibility of carrying out the duties for claiming rental income from tenants at the property and making insurance claims lay with Mr S and not LV=.
 - It was ultimately Mr S's responsibility in his capacity as property manager to ensure that all the rent was collected from Mr W which unfortunately he was unable to do so.
 - The blame for Mrs R's departure from the property in August 2013 did not rest with LV=. Mrs R could have chosen to stay but decided not to continue with her application for a lease after finding "a better deal elsewhere".
 - Any rent arrears or tenancy issues which Mr S has incurred cannot therefore be attributable to maladministration on the part of LV=.
 - LV= did not mislead Mr S when they initially told him that they would contact Mr B directly in order to deal with the insurance claim. It was chiefly Mr B and not LV= who had delayed this claim.
 - In their capacity as landlord, LV= were justified in making commercial decisions that a landlord would make when no rental income was received such as selling the property when it became clear that the property was no longer a feasible investment for the SIPP.
18. 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.

Ombudsman's decision

Charges

19. Mr S considers that the tariff of administration charges set by LV= for the SIPP is unfair because all the rental income generated by the property essentially has to be used to pay off the administration fees incurred and is therefore unavailable to provide his retirement benefits. He also contends that some of the activity based/SIPP drawdown charges have not been justified by the amount of work which LV= actually carried out for the SIPP.
20. I cannot impose charging policies upon pension providers such as LV= and can only therefore consider whether the fees paid are correct based on what was agreed.
21. In Mr S's case, by signing the SIPP application form and the property application form, he agreed to be bound by the Trust Deed and Rules and to pay the fees levied by LV= calculated using a basis determined by them and as shown on the fee menu

which is updated periodically. LV= cannot now produce the original fee menu which was in place when the property application form was signed, but they have produced more recent fee menus upon which their rates of charge are based. Mr S argues that the charges which could be levied were limited to those shown on page 3 of the SIPP policy document under the heading 'Our Charges'. I disagree. In signing the property application form he also agreed to a menu of SIPP property charges.

22. Mr S has also argued that some of the charges levied are unfair. I disagree. He argues that the charging terms must be interpreted according to the Regulations which govern fairness in consumer contracts, specifically Regulation 5(1) of the Unfair Terms in Consumer Contracts Regulations 1999 'UTCCRs'. (Although he makes reference to Unfair Contracts Terms Act 1977, what he has reproduced in his submission is actually Regulation 5(1) of the UTCCRs. This is therefore what I have considered). It is clear that the menu of charges was disclosed and these Regulations do not preclude the use of variable fee menus. In any event I do not consider that the increase in fees about which Mr S is complaining is due to increases under a term permitting variation of the fee rates. The additional fees which he is now incurring relate in large part to his decisions to invest in the commercial property and commence drawdown.
23. Mr S makes the point that he cannot easily move to another pension provider offering more competitive rates without liquidating his assets. I accept that, but LV= cannot be held responsible for any lack of availability of alternative property SIPPs.
24. I conclude that LV= has generally charged Mr S fees for activities undertaken for the SIPP in accordance with those specified on the appropriate tariff of charges. In particular, I agree with LV='s view that they were entitled to charge additional drawdown fees for income payments not taken on the anniversary date of Mr S's original drawdown, 17 November..
25. LV= have accepted that they should not have charged Mr S fees attributable to non-standard leases for the property and have already reimbursed three such incorrect deductions to the SIPP. They maintain that the remainder of the fees were charged correctly. Mr S has not argued that they were not due, rather that they were unfair, a point which I have dealt with above.
26. LV= have also reimbursed £600 to the SIPP for the fee charged in respect of the property sale which did not take place and refunded £573.42 from a property insurance premium which was incorrectly deducted because they had mistakenly believed that the property was unoccupied at the time of calculation.
27. These mistakes made by LV= when charging fees constitute maladministration on their part. However I am satisfied that LV=, have now put things back as they should have been if these mistakes had not occurred by taking the appropriate corrective action.

28. In so far as LV= charged fees which were not due I consider that the first part of Mr S's complaint can be upheld.

Property management issues

29. I do not uphold the complaint in so far as it relates to property management issues for the reasons below.

30. By signing the Agreement, Mr S consented to being appointed as the managing agent for the property by the Trustee and to carry out all the duties required for its "proper and efficient management and operation" which included collecting rent from tenants and making insurance claims on a timely basis for the Trustee. It also became his responsibility to negotiate the terms of a lease with the tenant and to provide LV='s appointed solicitors (or prior to 2006, his own solicitors subject to the approval of LV=) with relevant details so that they could prepare the lease.

31. Mr S contends that LV= appointed Mr R to act as property manager shortly after he signed the Agreement in June 2005 and consequently had to reappoint him to this role when Mr R resigned in 2012 due to illness. LV= have refuted his contention and say that they would only have appointed a property manager on Mr S's instructions.

32. The Agreement permits a third party to be formally appointed as the property manager if either Mr S or the Trustee terminated the Agreement. I have not seen any evidence to show that the Agreement was terminated by either party and can consequently only conclude that it has been valid at all times. LV= paid Mr R for his services as authorised by Mr S but there is no evidence that they appointed him as managing agent.

33. I am consequently satisfied that the responsibility for recovering rental income from tenants at the property and making insurance claims lay with Mr S and not LV=.

34. Mr S alleges that he has effectively been "working in the dark" managing the property because LV=:

- issued rent invoices to tenants directly but did not send copies to him;
- accepted rent payments directly from tenants but did not inform him accordingly once received;
- failed to respond to his questions or provided confusing and tardy responses which have been "overtaken by events"; and
- did not give him the necessary support to carry out his functions properly.

35. LV= has strongly refuted all his allegations. In particular, they say that:

- in their capacity as landlord of the property, they would routinely issue rent demands and accept rent payments directly from tenants;

- if Mr S as property manager, wanted to take on this responsibility, they would have allowed him to do so;
 - they would have sent Mr S copies of their rent demands if he had requested them; and
 - they sent him regular bank statements which showed rent payments received.
36. In my view, if Mr S did not consider that he was receiving adequate support from LV= to ensure that the tenants were paying their rent on time, the onus was on him to notify LV= of what he required in order to perform his duties as property manager efficiently. I have seen no evidence that LV= would not give him the necessary assistance in order for him to fulfil his role.
37. Mr S also alleges that the problems which he experienced recouping rent arrears from Mr W was caused by LV='s failure to countersign a licence to occupy for Mr W in March 2012.
38. In June 2013, Mr S contacted LV= because he was concerned that Mr W had vacated the property without paying all the rent which he owed. LV= replied that they had been trying to contact Mr W at his home address about this matter without any success. LV= sent Mr W further reminder letters in June and July 2013 seeking payment of rent arrears totalling £3,718.33 but did not receive a reply. Mr S was unable to provide LV= with new contact details for Mr W and in October 2013, LV= asked him for instructions on what they should do next but he did not reply.
39. LV= deny that inability to collect rent was caused by their failure to execute the lease and I have seen no evidence that it was. LV= say that they offered to pursue Mr W for the rent arrears using a debt collector but Mr S declined their offer because he considered it too expensive.
40. I conclude that the failure to collect Mr W's rent arrears was not caused by LV='s failure to sign the licence to occupy but by a more general failure to decide how to proceed. It was ultimately Mr S's responsibility in his capacity as property manager to ensure that all the rent was collected from Mr W and to make decisions about how to enforce collection.
41. Mr S also alleges that it was as a consequence of the failure of LV= and their appointed solicitors to prepare a lease in January 2013 on a timely basis for Mrs R to sign which led to her leaving the property in August 2013 resulting in a loss of potential rental income plus associated legal costs.
42. LV= say they had to seek clarification on certain issues from Mr S before they were in a position to draft the lease and in the meantime a licence to occupy was prepared so that Mrs R could occupy the property in February 2013.
43. Mr S instructed LV='s solicitors to discontinue drafting the lease in May 2013. LV= informed Mr S in June 2013 that he still had to pay their solicitors fees and if Mrs R

wished to remain in the property then she had to continue with her application for a lease. If she did not do this, LV= said that Mrs R would then have to vacate the property because it was not acceptable for her to be there without a formal lease in place.

44. In my view, LV='s requests were reasonable and I do not therefore consider that the blame for Mrs R's departure from the property in August 2013 should rest with them. Mrs R could have chosen to stay but decided not to continue with the lease after finding "a better deal elsewhere".
45. I conclude that while there were plainly issues to resolve in connection with the tenancies and the inability or unwillingness of occupiers to pay rent, Mr S has not produced evidence to show that these were caused by maladministration on the part of LV=. Specifically he cannot point to any responsibility which they had accepted under the terms of the agreement with him, with which they had not complied.
46. Turning now to the insurance claim; Mr S contends that LV= did not provide him with adequate assistance in dealing with an insurance claim in 2014 for water damage to the property whilst Mr B was the tenant there.
47. Mr S has drawn attention to the fact that the property was insured under the Trustees' block policy. However, this did not in my view relieve him of his duties as property manager. It was his responsibility to finalise the insurance claim after meeting the loss adjuster and builders. The onus was on him to seek assistance from LV= if he was unsure on what to do.
48. There is no evidence that in dealing with the insurance claim LV= failed to comply with the terms of their agreement with Mr S.
49. Turning to the sale of the property; Mr S asserts that LV= had improperly tried to force a sale of the property in June 2014 and use the proceeds to settle bills related to the property. At that time, the SIPP did not have sufficient funds in Mr S's Personal Account to pay these fees because of the problems summarised above. In light of the ongoing insurance claim, LV= extended the deadline for the sale of the property until August 2014 so that the site visit by the loss adjuster could take place and repair works could begin. LV= have now agreed not to seek to sell the property because the SIPP is "back in credit" and there is a new tenant in it.
50. The property was the only trust asset out of which the fees could be recovered. LV= considered that it could not permit unauthorised lending to Mr S to pay outstanding fees because this would have led to tax implications with HMRC. In those circumstances, I consider that in trying to force a sale LV= were acting reasonably in accordance with the power contained in the 2006 Deed which was not maladministration.

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51. In conclusion, it would appear that Mr S has not understood the level of personal responsibility he had taken on for the SIPP. I am however satisfied that the charging structure and property management responsibilities were made clear to him in the scheme documentation and subsequent correspondence.
52. Therefore I uphold Mr S's complaint in respect of the inaccurate levying of charges. That was maladministration and he incurred significant distress and inconvenience getting the charging issues resolved for which he is due some compensation in my opinion. I make an award at the minimum level which is generally awarded in this kind of case.

Directions

53. Within 21 days of the date of this Determination, LV= shall arrange to pay Mr S compensation of £500 in recognition of the distress and inconvenience caused to him.

Karen Johnston

Deputy Pensions Ombudsman
31 March 2017

APPENDIX

Relevant Sections of the 2006 Deed

Fees and Expenses

8.2 All expenses, charges, losses, liabilities, costs or other amounts that the Trustee, the Provider or the Scheme Administrator incur in connection with the administration, management and investment of the Scheme shall be paid by debiting the amount from the Member's Personal Accounts in such manner as the Trustee decides and the Trustee may sell any asset in order to meet the amount due. To the extent that there are insufficient monies in the Member's Personal Accounts, the outstanding sums shall be payable by the Member directly.

8.3. In the event that any Member or other beneficiary incurs any fees or expenses in relation to the operation and management of his Arrangement or Personal Account, the Scheme Administrator may agree to meet that fee or expense by payment from the relevant Arrangement or Personal Account and where requested by the Scheme Administrator, the Trustee shall sell any asset held in the Member's Personal Accounts in order to meet such fees or expenses where the Trustees consider it reasonable to do so.

13.8 Without being under any liability to assess the suitability of any particular investment, the Trustee may reject any investment if it considers appropriate to do so, including where the Trustee considers that the investment would involve it in significant risks as legal owner of the property. In addition, the Trustee may (but without any obligation to consider doing so) at any time dispose of the whole or part of the investment where it considers appropriate to do so, including where the Trustee considers that the continued holding of the investment would involve the Trustee in significant risks as legal owner of the property or where the sale proceeds are required in order to meet any payment due out of the Arrangement in respect of the relevant Member or beneficiary.

13.11 For the avoidance of doubt, the Trustee is entitled to recover from the Member's Personal Account and, separately, by an indemnity from the relevant Member or beneficiary any costs, charges, liabilities or expenses relating to the sale, purchase, ownership or management of any investment under the Scheme and may sell any asset held in a Member's Personal Account in order to meet such costs, charges, liabilities and expenses.