

fos vs berkeley burke

So, the first ruling in relation to the role of a SIPP Operator, and the due diligence it undertakes on investments, has now come and gone. With the prospect of more to come, but allowing the dust to settle a little, what do we think are the implications for the SIPP market generally?

Doubtless it has added to the already turbulent environment that SIPP Providers currently exist in. SIPPs are almost undoubtedly being considered by claims management firms as a healthy replacement for the soon-to-end PPI claims experience, and we can expect to see much more activity in the way of court cases and FOS judgements over the next 12 months.

Firstly, it might be worth looking at what the judgement actually did and didn't do. To briefly recap, the Ombudsman had made a decision that Berkeley Burke had not acted fairly and reasonably in its dealing with the Claimant, consequently ordering Berkeley Burke to pay compensation. Berkeley Burke had then requested a Judicial Review of the decision on the grounds that it believed the decision was unlawful.

The ruling went in favour of FOS and we now move to the next step where Berkeley Burke seek grounds for appeal. But what has actually been decided here?



It's important to understand that what was being tested was whether the Ombudsman's decision was, or wasn't, unlawful, rather than whether it was necessarily the correct decision based on the facts of the complaint.

The judgement essentially reveals that:

- The Ombudsman is by law allowed to make up his or her own mind;
- In doing so, the decision the Ombudsman reached regarding this particular complaint was not unlawful. As a consequence, the Ombudsman's decision stands.

Mr Justice Jacobs did not, in our view, exercise any opinion as to whether the Ombudsman was right or wrong in reaching his decision, only that it was lawfully reached and therefore became binding. Indeed, it would have been interesting to see what the outcome might have been if it was the complaint itself that had been taken to court, rather than the decision-making processes of the Ombudsman. That might have had an entirely different outcome, or clarified matters far more extensively.

Be that as it may, what we consider is reinforced here is that the Ombudsman has discretion to make these decisions provided:

- The decision being made is within the context of what the law allows.
- The decision being made by the Ombudsman is not perverse.

In this case, where the test is against principles, not rules per se, it allows some large degree of flexibility in interpretation resulting in the potential for different decisions made by different individuals with similar circumstances.



It remains theoretically possible, therefore, that another Ombudsman reviewing the case could have arrived at a totally different conclusion (i.e. that Berkeley Burke were correct in their stance when it came to their dealings with the client), and provided it complied with the above requirements, that too would have been lawful.

Moreover, the case also highlights the fact that the Ombudsman, in making a decision, does not have to follow decisions made by another Ombudsman in cases where the facts are materially similar. Note, for example, that the Ombudsman was lawfully entitled to ignore or discount the decisions made by the Pensions Ombudsman in cases where the facts of those cases had material similarity to the Berkeley Burke case.

A number of parties have also commented that no precedents are set by the case. While this is, of course, legally correct, it is unlikely to be the case practically. We would largely expect the Ombudsman to reach the same conclusions in a number of similar cases and while each of those decisions would and must be justified on its own merits, it's unlikely the end result would be different from the case in hand.

Whatever the case, ultimately the judgement must now serve to reinforce the fact that a SIPP Provider must exercise its discretion to refuse a transaction on the grounds that it should not be held in a pension scheme. Not because it's not suitable for a particular individual (as that would stray into financial advice), but rather where the view might be that the investment could lead to material financial harm for the client.

Failure to do so could simply result in the Ombudsman exercising the same decision as has occurred in this instance and upholding a complaint against the Provider.

It has, of course, the potential to extend to any investment (standard and non-standard) as the duties imposed by the Regulator's Principles extend to all types of investment – though by their very nature, non-standard assets would carry a far greater degree of risk.

Ultimately, irrespective of some of the finer legal points concerning precedents, SIPP Providers must take care: the starting view is now inevitably that non-standard investments and SIPPs should be seen as a toxic mix and we suspect that there will be a rapid decline in appetite to allow them in future.

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