

Ombudsman's Determination

Applicant	Mr S
Scheme	The Ryland Group Pension Scheme (the Scheme)
Respondent	Prudential

Complaint Summary

1. Mr S' complaint concerns the error Prudential made in 2014, in transferring his pension that was subject to a Pension Sharing Order (**PSO**) in favour of his ex-wife, to his pension with Rowanmoor (**the SSAS**).

Summary of the Ombudsman's Determination and reasons

2. The complaint is upheld against Prudential because:
 - it provided Mr S with incorrect information; and
 - this situation has caused Mr S distress and inconvenience.

Detailed Determination

Material facts

3. Mr S was previously a member of the Scheme. On 21 October 2011, following his divorce, 100% of Mr S' benefits in the Scheme were allocated to his ex-wife, Ms S, through a PSO. On 2 November 2011, Ms S' solicitor wrote to Prudential to inform it of this, and enclosed a copy of the sealed Order and Pension Sharing Annex (**the Annex**).
4. The following day, Prudential wrote to Ms S outlining its requirements to enable it to implement the PSO. This included Ms S sending it the decree absolute and court order both dated and stamped by the court, and her completing and returning a questionnaire if benefits were to be transferred to a different provider.
5. On 4 December 2011, Prudential sent a reminder letter to Ms S. It did not receive a response from Ms S so it closed its case.
6. On 20 February 2014, Mr S' independent financial adviser (**IFA**), wrote to Prudential and requested information about Mr S' benefits in the Scheme. On 7 March 2014, Prudential responded to the IFA in writing. It provided the requested information and confirmed:

"We have not been notified of any Earmarking Order, Pension Sharing Order or Bankruptcy Order associated with this scheme."
7. In December 2014, Mr S requested his benefits from the Scheme be transferred to the SSAS. The amount transferred and paid into the SSAS on 30 December 2014 was £52,309.43. Prior to this transfer, Mr S transferred his benefits from three other pensions he had, and, in January 2015 he also transferred the funds he had in another pension scheme. The other transfers he completed were:-
 - 10 December 2014 - £54,755.64 from Equitable Life.
 - 10 December 2014 – £3,965.28 from Standard Life.
 - 12 December 2014 - £1,534.51 from Equitable Life.
 - 20 January 2015 - £13,808.14 from Friends Life.
8. In February 2015, Mr S transferred £50,000 from the SSAS to his solicitors and this amount was then loaned to his business (**the Business**) in March 2015. At the time the loan was made to the Business, the value of the SSAS was £121,938.51. The Business subsequently failed and the outstanding loan amount of £44,532.81 was written off by the SASS.
9. In 2018, Ms S contacted Mr S as she was concerned that she had lost her pension from Prudential. Subsequently, on 26 November 2018, the IFA contacted Prudential to query the value of Mr S' benefits in the Scheme, as at 21 October 2011.

10. On 3 December 2018, Prudential replied to the IFA by letter and informed him that the value of Mr S' benefits as at 21 October 2011 was £47,946.32. Prudential also said:

"The [PSO] was received and noted on our records on 3 November 2011."

11. Following this, there were further exchanges between Mr S and Prudential, concerning the recovery of the incorrectly transferred funds to the SASS. On 12 March 2019, the IFA raised a complaint on Mr S' behalf to Prudential. In summary he said:-

- Mr S' retirement circumstances had potentially been significantly and detrimentally affected because of errors made by Prudential.
- Prudential had confirmed that the PSO had been fulfilled following a request for the funds to be transferred to Rowanmoor.
- Mr S understood and expected that Prudential had this matter in hand. Given the passage of time and errors made, Mr S felt it was appropriate for Prudential to compensate him for the situation in which he had now been placed through no fault of his own.

12. On 26 April 2019, Prudential replied to Mr S' complaint. It explained why it had not implemented the PSO, and in summary also said:-

- As it had failed to complete the PSO, it continued to send Mr S annual benefit statements (**Statements**), suggesting that the funds in the Scheme were still his.
- In March 2014, it had incorrectly informed the IFA that it had not been notified of any earmarking order, PSO or bankruptcy order associated with Mr S' funds in the Scheme.
- When it received a request to transfer the funds to Rowanmoor, in December 2014, it should have realised at that point, that there was still an outstanding PSO. However, it failed to notice this on the file and sent the full fund value of £52,309.43 to Rowanmoor.
- It only realised the error in late 2018, when the IFA contacted it about the PSO. It was very sorry for these mistakes. It apologised for the service he had received and it was upholding his complaint on that basis.
- It accepted that it had acted incorrectly, however, Mr S would have been aware of the PSO, and that 100% of his funds in the Scheme had been allocated to Ms S.
- Therefore, Mr S knew the funds were not for his benefit, yet he still requested to transfer the funds.
- The funds were incorrectly transferred, and it must retrieve them as they were allocated to Ms S via the court. It must comply with the PSO.

- It will request £50,000 back from Rowanmoor, leaving Mr S with any fund growth and the additional £2,309.43. This was in lieu of any compensation in light of its errors.

13. On 8 May 2019, the IFA wrote to Prudential and said:

“ Mr [S] was aware of the [PSO] at the time of his divorce and presumed that the sharing order had been fulfilled in the absence of any correspondence or contact to the contrary from Prudential. As part of the subsequent transfer to Rowanmoor, clarification was sought and confirmation received that none existed. Mr [S] strongly refutes any inference that he requested the transfer of these funds in bad faith.

Mr [S] has again confirmed to me that he has not received any paperwork or contact from Prudential following his divorce. It remains his view that the outstanding [PSO] is a result of the inaction of Prudential and not a result of anything that he has failed to do...”

14. Subsequent to this letter, Mr S referred his complaint to my Office.

15. In February 2020, Prudential transferred £74,271.46 to Ms S. It wrote to Mr S on 3 March 2020, to inform him of this and said: “I can confirm the pension sharing order and transfer of 100% of your benefits to your ex-spouse has been completed.”

Summary of Mr S’ position

16. Mr S provided copies of the SSAS’ bank statements between December 2014 and May 2021. He was unable to provide a copy of the decree absolute but confirmed that he had since re-married. He explained what the payments made into the SSAS in July 2019 related to, and in summary also said:-

- He did not receive any Statements from Prudential following his divorce. Prudential did not have his address. It obtained his address from Rowanmoor without his consent.
- He was not aware that the funds in the Scheme no longer belonged to him. The IFA and Rowanmoor both checked with Prudential. Prudential confirmed to the IFA that there was no PSO on his funds in the Scheme and transferred the funds to Rowanmoor. Prudential also confirmed this to Rowanmoor when the transfer was made.
- He had many pensions and they were split up at the time of his divorce. He had no idea what policy was used by the courts and lawyers years later.
- Prudential provided incorrect information upon which he relied, and transferred the funds to the SSAS. At the time of his divorce, he had a number of pensions and believed that all matters had been fully resolved following a long and expensive divorce.

- Prudential made a mistake. It failed in its responsibility to fulfil the PSO. He does not feel it is correct for him to be penalised. Prudential has now paid his ex-wife the funds due to her, admitting its mistake in not implementing the PSO.
- Shortly after the transfer from Prudential, the SSAS made a loan of £50,000 to the Business. The Business subsequently failed, and this resulted in a write-off from the SSAS of £44,532.81. Had Prudential confirmed pre-transfer that the PSO had not been fulfilled, this would have changed his circumstances and prevented the loan to the business taking place.
- At the time he loaned the funds to the Business, he had fully utilised credit lines. He would have been unable to raise the money the SSAS lent to the Business without using the pension loan back facility.
- He has lost £44,532.81 and is now being asked to transfer another £52,309.43 to Prudential, because of its failure to implement the PSO. He is not willing to return these funds to Prudential as he has done nothing wrong.
- Prudential failed to execute the PSO, and failed to provide correct information to the IFA and Rowanmoor.
- Prudential states that “at the time of transfer, Mr [S] completed a Transfer Form and confirmed on this form that the policy was not subject to a Pension Sharing Order.” However, this form was completed in good faith as Prudential had confirmed to the IFA on 7 March 2014 that there was no PSO attached to his benefits in the Scheme. The transfer form confirmed the position exactly as advised by Prudential.
- He contends that he has done nothing wrong and believed that the matter had been settled with Prudential, as it had made the payment to his ex-wife. He cannot see that it is fair or just that he should have to pay for the failures of Prudential over something that was wholly within its remit and of its making.
- He has no other pensions. All his pensions were transferred to the SSAS in December 2014.
- As at 30 November 2020, the value of the SSAS was £82,876.29.

Summary of Prudential's position

17. Prudential said:-

- It had not received a copy of the decree absolute of divorce issued by the court before making the payment to Ms S.
- Although Prudential has now paid Ms S the amount of pension she was entitled to under the PSO, it would like Mr S to repay the funds it had transferred to the SSAS in error.

- Once the error was discovered, it tried to recover the funds from the SSAS but Rowanmoor confirmed that there were insufficient funds in the SSAS to do so.
- Mr S has been able to access funds to which he was not entitled. Prudential has now put Ms S in the position she should have been in, but it (Prudential), has lost out because of Mr S' refusal to return those funds.
- Mr S was liable, under the PSO, to transfer the funds to Ms S. It was for Mr and/or Ms S to ensure that Prudential was furnished with the correct documentation to implement the Annex.
- The Annex itself makes clear that Mr S' liability under the PSO is triggered once the decree absolute is made, but that Prudential's liability to implement it is not triggered until it has received all of the relevant documentation.
- It had not received that documentation so was unable to act on any PSO, until all its requirements were met. The most it could have done at the time was add a note saying that there was a possible PSO.
- It considers that Mr S has been unjustly enriched, ultimately at Prudential's expense. For it to make out a case for restitution of the incorrectly transferred funds, for unjust enrichment, it considers that it needs to show the following:
 - (a) Mr S was enriched;
 - (b) the enrichment was at its expense;
 - (c) the enrichment was unjust; and
 - (d) Mr S has no defence on which he can rely to refuse to return the funds.
- With regard to limb (a), since Mr S was not entitled to the funds when they were transferred to Rowanmoor, he became enriched when that transfer was made, either because he was then able to access it more easily or because it allowed him to secure a loan against those transferred funds.
- The test for enrichment is applied at the point when funds are received. The fact that Mr S later had to write off the funds does not mean that he was not enriched; that point would instead be relevant to any defence Mr S may wish to make.
- With regard to limb (b), the enrichment has ultimately been at Prudential's expense. Even if the funds transferred to Mr S were either his or Ms S', and not Prudential's, Prudential has since paid Ms S out of its own funds to make sure that she has not lost out.
- Prudential has therefore in effect stepped into Ms S' shoes and taken over her position as the party owed money by Mr S.
- With regard to limb (c), a mistake is sufficient grounds for rendering an enrichment unjust. Prudential has accepted that the payment was made mistakenly, since it

should have notified Mr S that there was an unimplemented PSO on the record, and there appears to be no dispute about this. However, this merely proves the point, since by agreeing that there has been a mistake Mr S must accept that he was not entitled to the funds.

- Prudential considers that it has made out points (a)-(c) above, and shown that Mr S was unjustly enriched at its expense. Accordingly, it is for Mr S to prove that he has a defence against Prudential's claim for restitution of the transferred funds to it.
- Mr S appears to rely on a change of position defence, namely that he only took out the loan he did because he had received the transferred funds. However, correspondence from The Pensions Ombudsman (**TPO**) says that almost all the funds were put towards the loan.
- Mr S' IFA also indicated in a telephone call that without the transferred funds, the loan would have been "impacted", though did not seem to suggest that it would have been impossible to take out the loan without the transferred funds.
- All of this suggests that Mr S may have been able to take out the loan without the transferred funds. If that is the case, he is unable to rely on the change of position defence.
- Mr S also appears to rely on a good faith defence, in that he believed he was entitled to the funds and had no reason to doubt that. However, Prudential disagrees.
- Mr S must have known that the funds were, or at the very least had been, subject to a PSO. The PSO is clear in that Mr S was not entitled to any of the funds as 100% was awarded to Ms S.
- There should therefore have been no ambiguity regarding this. It could understand if, say, 50% had been awarded to Ms S as Mr S would then be expecting funds from the Scheme, and he may not have been aware how much these funds were.
- However, when the divorce was finalised and the PSO agreed, and as soon as Mr S had received any correspondence from it regarding this policy, it would have expected Mr S to contact it and query this. It was unable to trace any such correspondence.
- Mr S has stated that he was told by his solicitor that they had implemented the PSO. Prudential has been unable to find any correspondence from his solicitor regarding this. Prudential cannot be held liable for any misinformation that Mr S' solicitor gave him.
- Prudential notes that Mr S does appear to have funds available to repay the transferred funds. As such, his assertion that he has no such funds does not appear to hold true.

- For the reasons stated above, Prudential considers that: (i) Mr S has been unjustly enriched at its expense; (ii) he can raise no valid defence to a claim for restitution; and (iii) he should therefore repay the funds.

Conclusions

18. There is no dispute that Prudential incorrectly informed Mr S' IFA that Mr S' benefits in the Scheme were not subject to a PSO, and that this resulted in the funds allocated to Ms S in the PSO being transferred to the SSAS. This clearly amounts to maladministration on the part of Prudential. Mr S has complained that Prudential has demanded that the transferred funds must be repaid. Prudential has relied on unjust enrichment in support of its demand.
19. In determining Mr S' complaint against Prudential, my role is to decide whether the demand by Prudential for Mr S to repay the funds, on the basis of its presented claim in restitution for unjust enrichment, is justified. It is not within my jurisdiction to make a general finding on whether Prudential can take the action it deems appropriate, as a claimant outside this process, whether in restitution or otherwise, against Mr S or the trustee of the SSAS.
20. The test for unjust enrichment that Prudential has referred to in paragraph 17 above is broadly correct. However, I do not consider that Prudential can successfully rely on unjust enrichment to demand that Mr S repay the funds.
21. The funds were transferred to the SSAS in December 2014, and it is clear that almost the total amount of the sum transferred by Prudential to the SSAS, was subsequently loaned to the Business in early 2015. The Business subsequently went into administration in November 2016. The Return showing details of the final creditors' voluntary winding up meeting regarding the Business, confirms that the SSAS did not recover any sums loaned to the Business.
22. Further, the shareholders of the Business were (as at the last Annual Return dated 9 April 2016): Erinbill (Holdings) Ltd and Grainger Holdings Ltd. The sole shareholder and director of Erinbill (Holdings) Ltd was Mr S, but this company was dissolved on 22 August 2017. Grainger Holdings Ltd is active but Mr S is not a shareholder or director of this company.
23. Additionally, at the time the funds were transferred to the SSAS, Prudential had not received a copy of the decree absolute. Without having received the decree absolute, Prudential could not have established that Ms S indeed had a legal entitlement to 100% of Mr S' entitlement under the Scheme. This is because her entitlement only took effect after the decree absolute was issued.
24. Therefore, it is difficult to accept Prudential's argument that Mr S was enriched by the transfer, either personally or through ownership of the Business. Almost the entire sum was transferred to the Business as a secured loan from the SSAS. The Business is now dissolved, and the liquidator's report confirmed that there was no distribution in

the liquidation to creditors, including the SASS, for the loan amount. So, Mr S was not enriched in a personal capacity.

25. This is not to discount the possibility that Mr S was able to transfer the sum from the Business to himself, but I have seen no evidence that this occurred, and in the absence of any such evidence, I consider that Mr S cannot be said to have been personally enriched by the transfer. For completeness, even if the Business could be said to have been enriched by the transfer, it has now been dissolved and has legally ceased to exist.
26. Prudential argues that Mr S was enriched at its expense. The overarching issue with this part of Prudential's argument is that it is conflating two distinct payments: the transfer made from the Scheme to the SSAS, and the later transfer made from Prudential's own funds to Ms S' nominated scheme. The transfer from the Scheme to the SSAS occurred a significant period of time before the payment from Prudential to Ms S. In fact, the payment Prudential made to Ms S was made in February 2020, which was after Mr S had referred his complaint to TPO.
27. It is therefore difficult to accept the argument that any enrichment, if it did occur, could have been at the expense of Prudential. At the point Mr S might have been said to be enriched in December 2014, it could not have been at Prudential's expense, as the funds were not transferred from Prudential to Mr S, but from the Scheme to the SASS. It was only at a significantly later point that Prudential transferred funds from itself to Ms S.
28. It appears that Prudential is arguing that by "stepping into the shoes" of Ms S, it discharged a debt owed by Mr S to Ms S, and so it is entitled to recover those funds from Mr S. I do not consider that this argument is well founded.
29. At the point Prudential permitted and made the transfer from the Scheme to the SASS, despite the existence of a PSO in late 2014, it is likely that Ms S would have been able to have found a claim in negligence against Prudential, assuming for these purposes that Prudential had received a copy of the decree absolute. In that claim, her loss would be the value of the 100% interest in the Scheme, valued at the transfer day. This would not be straightforward to calculate as there was no transfer day, and the PSO implementation could not have been carried out properly due to Ms S' failure to provide information.
30. Prudential appears to have paid a sum representing that loss to Ms S, however calculated, and is now seeking to recover the amount transferred from Mr S. The sum paid by Prudential to Ms S appears to be an attempt to put her in the position she would have been in, had Prudential prevented the transfer from going ahead, and the PSO had been implemented. There is no corresponding action of negligence by Prudential against Mr S.
31. It was confirmed in the case of *Investment Trust v Commissioners for HMRC* [2017] UKSC 29, that receipt of a benefit does not in itself satisfy the requirement that a benefit is received "at the expense of" a claimant. It is necessary to identify the loss

that has arisen to the claimant through the provision of the benefit. So, I do not consider that Prudential can successfully argue that the two payments are linked in the manner it suggests, to establish that the enrichment was at the expense of Prudential. Further, Ms S also has no direct claim against Mr S, but only against Prudential. There is no direct claim by Ms S against Mr S, for Prudential to “step into the shoes” of.

32. So, I find Prudential has not successfully established that the enrichment was at its expense, but the position is more accurately summarised as Prudential compensating Ms S for her loss, and then seeking to recover that amount from Mr S. I note Lord Reed’s finding in *Investment Trust v Commissioners for HMRC* at paragraph 60 that “the purpose of restitution is not to compensate for loss, but to reverse the defective transfer.”
33. Notwithstanding my finding that Prudential has not established the first two limbs of the test, I have, for completeness, considered whether the enrichment was unjust.
34. Prudential relies on mistake to argue that the enrichment was unjust. Mistake is a potential basis on which an enrichment can be unjust. In order to establish mistake for the purposes of unjust enrichment, the mistake must be sufficient to invalidate the claimant’s intention to transfer a benefit to the defendant. In other words, had Prudential realised that the PSO had been made by the court (although not implemented) it would not have completed the transfer from the Scheme to the SSAS.
35. It is not in dispute that Prudential was informed about the PSO, and that it took action to chase Ms S for the documents required to implement the PSO. So, on balance it does seem that Prudential made a mistake in transferring the funds from the Scheme to the SSAS. This would likely apply even if this mistake was one which would not have been made by a reasonable person in Prudential’s position. The case of *Kelly v Solari* (1841) 152 ER 24, confirms that a careless mistake does not prevent recovery “however careless the party paying may have been in omitting to use due diligence to inquire into the fact.”
36. However, on its own, the fact that the transfer was made by mistake does not satisfy the three stage test to establish unjust enrichment. As set out above, in paragraphs 18 to 29, I do not consider that Mr S was enriched, or that the enrichment, if it occurred, was at the expense of Prudential.
37. Prudential correctly identify change of position as a potential defence to a claim of unjust enrichment. The test set out in the case of *Lipkin Gorman v Karpnale* [1992] 4 All ER 512, is that the defendant’s position “has so changed that it would be inequitable in all the circumstances to require them to make restitution”. For the defence to succeed, it has been established that certain conditions must be satisfied. The recipient must be able to show that:-
 - His/her circumstances have changed detrimentally and irreversibly;

- The change of circumstances was caused by the payment; and
 - He/she is not disqualified from relying on the defence; in particular, that he/she has acted in good faith.
38. In this case, although I consider that Prudential has not successfully established a claim of unjust enrichment, for completeness, I have considered whether Mr S' circumstances changed detrimentally and irreversibly, and that the change of circumstances was as a result of the payment.
39. Having reviewed the SSAS' bank statements, I note that prior to the transferred funds from Prudential, the account balance was £58,275.43. This balance was made up of the funds that Mr S had transferred to the SSAS from the other pensions he held, as detailed in paragraph seven above (a payment of £1,980 was made from the SSAS on 18 December 2014). Shortly after the transfer was received into the SSAS, the loan was made to the Business. While the Business was still trading, I do not consider that Mr S' circumstances were changed detrimentally and irreversibly. This is because Mr S would have been able to recall the loan from the Business had he wished to. However, since the insolvency and dissolution of the Business, I consider that the change in circumstances is now irreversible.
40. The change in circumstances must have been caused by the payment. Mr S has submitted that he would not have made the loan to the Business but for the transfer from Prudential. I note that around the same time that the funds from the Scheme were transferred, a number of transfers totalling approximately £60,000 were made from unrelated schemes into the SSAS. Mr S has also submitted that the credit lines for his Business were fully drawn upon and he was only able to draw on the loan from the SSAS. On the balance of probabilities, I consider that Mr S would have made a loan in a similar, if not identical sum, had the transfer not been made. Accordingly, I do not consider that Mr S can show that the change of circumstances was caused by the payment.
41. Prudential appears to outline a good faith defence as a separate defence available to Mr S. This is not strictly correct. Rather, following the test set out in *Lipkin Gorman v Karpnale*, Mr S must have been acting in good faith to rely on the defence. In other words, even if Mr S changed his position detrimentally, if Mr S did not act in good faith, he cannot rely on a change of position defence.
42. To be able to rely on a change of position defence, Mr S must not have had actual knowledge that the funds had been transferred in error. The requirement of good faith would also not be satisfied if Mr S had reason to suspect that the payment had been made in error but continued to loan the funds to the Business anyway. This is sometimes referred to as having "Nelsonian" knowledge. I note that Mr S, through the IFA, did make enquiries concerning his benefit entitlement in the Scheme and Prudential informed him that his benefits were not subject to a PSO.
43. The issue of whether Mr S was acting in good faith is not clear cut. On one hand it was reasonable for Mr S to have relied on the fact that Prudential, whose obligation it

was to implement the PSO, informed him that the transfer was permissible. However, conversely, it is unlikely that he was unaware that 100% of the value of his benefits in the Scheme had been awarded to Ms S under the terms of the PSO. It would have been, at the very least, reasonable for Mr S to have made enquiries as to whether the PSO had been implemented.

44. On balance, I consider that the evidence shows that Mr S had the requisite “Nelsonian” knowledge that he was not entitled to transfer the funds to the SSAS. I do not accept that Mr S was unaware that the terms of the PSO allocated 100% of the benefits to Ms S, and in any event it would have been reasonable for him to check its terms before proceeding to request a transfer.
45. I accept that his IFA made enquiries, and that Prudential permitted the transfer, but I consider that he was aware that there was a risk that he was not entitled to the funds but decided to proceed anyway. Consequently, I consider that Mr S would not be able to rely on a good faith defence. However, for the reasons set out above in paragraphs 18 to 29, I do not consider that Prudential has successfully established the limbs of a claim of unjust enrichment. So, Mr S’ potential defence to that claim does not arise and I do not need to make a finding on whether Mr S can rely on a change of position defence.
46. I find that Prudential’s failure to: (i) inform Mr S about the unimplemented PSO in 2018; and (ii) its failure to stop the transfer from going ahead to the SSAS amount to acts of maladministration.
47. However, I do not consider that these acts of maladministration have caused Mr S distress and inconvenience for which he should receive an award. This is because the effect of these acts by Prudential was to the benefit of the SSAS and the Business. Accordingly, I make no direction that he should receive an award for distress and inconvenience.

Anthony Arter

Pensions Ombudsman
1 March 2022