

Ombudsman's Determination

Applicant	Miss E
Scheme	Novia SIPP (the SIPP)
Respondents	Novia Financial plc (Novia)

Outcome

1. I do not uphold Miss E's complaint and no further action is required by Novia.

Complaint summary

2. Miss E's complaint is that Novia has prevented the transfer of her Self Invested Personal Pension (**SIPP**) holdings to a different provider. Miss E's representative has said that there is no reason to withhold the transfer as the scheme administrator for the receiving scheme is willing to accept the entire fund via an in-specie transfer, including any closed funds.
3. Miss E has also complained that Novia was unable to process a partial transfer because the SIPP was in drawdown.

Background information, including submissions from the parties

4. Miss E opened her Novia SIPP in 2014, having transferred in funds from a previous provider in September of that year on the advice of her financial adviser. She also crystallised the entire SIPP and designated it into drawdown in September 2014. She took her first income withdrawal in October 2017 and has taken a withdrawal annually thereafter.
5. At the time Miss E requested the transfer out of her Novia SIPP, there was a range of funds in the SIPP, including several illiquid, closed funds held within bonds as described in the Offering Memorandum for each bond.
6. On 27 March 2019, Assured Trustees Ltd (**Assured Trustees**), the authorised scheme administrators for the receiving scheme, notified Novia of Miss E's intention to transfer her SIPP. Assured Trustees provided:-

- A letter of authority signed and dated by Miss E on 6 March 2019.
 - A letter requesting the transfer.
 - Discharge forms.
 - A transfer application form.
 - A transfer-out warranty form.
 - A receiving scheme Declaration form
7. The transfer-out warranty form confirmed that Miss E wanted to transfer her entire SIPP holdings. This form offered the choice of a cash transfer or in-specie transfer, also known as a “re-registration”. Both options had been circled. The receiving scheme Declaration form confirmed that Assured Trustees had made an undertaking that the receiving scheme was a UK Registered pension scheme.
8. On 29 March 2019, Novia wrote to Miss E to ask for confirmation as to whether the transfer was to be carried out as a cash transfer or on an in-specie basis.
9. Miss E responded that her transfer would be a combination of cash and in-specie transfer. She said that an in-specie transfer would be required for the closed bonds held within her SIPP, unless Novia could encash them before transfer.
10. Novia explained that the closed bonds in which Miss E was invested were non-transferrable holdings within her SIPP. This meant they could not be re-registered with the new pension provider. Novia also confirmed it was not legally possible to arrange a partial transfer from a drawdown arrangement such as the SIPP. As a result, Novia would be unable to action her request to transfer her SIPP holdings.
11. On 29 March 2019, Miss E replied to Novia and said:-
- Novia had committed a direct breach of pension legislation [in refusing her a transfer of her pension holdings].
 - If Novia’s contention about closed funds was correct then she would have expected Novia to refuse to accept these investments into the SIPP in the first place.
 - If Novia would not transfer all assets within 7 days she would report the matter to the Financial Conduct Authority and the Pensions Ombudsman.
 - She quoted the Pensions Schemes Act 1993, Section 94 (**PSA93 S94**) (see Appendix) which provides that a member of an occupational or personal pension scheme has the right to a cash equivalent transfer value of any benefits which have accrued under the transferring arrangement.
 - She quoted PSA93 Section 95 (**PSA93 S95**) (see Appendix) and argued that this permitted the transfer value to be moved to a new arrangement by making a

written application, requiring the existing managers to use the cash equivalent for acquiring transfer credits in an occupational pension or rights under a personal pension scheme “which satisfies prescribed requirements in each case and where the trustees or managers of the scheme are able and willing to accept the transfer”.

- She pointed out that the definition of an occupational pension scheme could be found in PSA93 Section 1(1) (**PSA93 S1(1)**) (see Appendix).

12. On 12 May 2019, Novia responded to Miss E’s complaint and said:-

- Miss E’s points regarding PSA93 S94 were noted, but the legislation she quoted was designed to ensure occupational pension schemes would provide a transfer value where the investments within such schemes were not unit or market linked. It explained this generally applied to defined benefit or final salary schemes. It said Miss E’s funds were held in a SIPP, and therefore the requirement under the Act did not apply.
- Much of Miss E’s SIPP was invested in closed funds, held in bonds which were not transferrable while the underlying funds contained within them were closed. They would not become transferrable until the fund manager [of each fund] opened the funds.
- The situation was also compounded by the fact that the SIPP was in drawdown and Miss E was receiving an income from it. Novia said legislation required that a pension in drawdown may only be transferred as a whole. Any closed funds would prevent the transfer of a drawdown plan. As it was not permitted under pension regulations to arrange partial transfers, Novia was unable to comply with Miss E’s instructions.

13. Miss E did not accept this response.

Adjudicator’s Opinion

14. Miss E’s complaint was considered by one of our Adjudicators, who concluded that no further action was required by Novia Financial plc. The Adjudicator’s findings are summarised below:-

- As outlined in each bond’s Offering Memorandum, these bonds were issued on the basis that they were likely to be illiquid. They were non-transferable, and could not be traded on any share exchange
- There is no evidence to suggest the funds held within these bonds are distressed, even if the bonds are closed.
- Until each individual manager confirmed the bonds had become liquid and could be traded, the bonds could not be removed from the SIPP, despite any transfer

rights conferred upon Miss E by PSA93. Such a removal would be treated as an unauthorised payment by HMRC and would incur tax charges.

- Legislation mandated that a partial transfer could not be made but, that notwithstanding, HMRC would only permit a partial transfer if Miss E's pension rights were uncrystallised. As she was already in drawdown at the time of her pension transfer request, this would also have prevented any partial transfers.
- Since the closed funds could not be transferred, and the funds were in drawdown, neither a partial nor a full transfer could be made.

15. Miss E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Miss E and Novia have provided their further comments which do not change the outcome. I agree with the Adjudicator's Opinion and note the additional points raised.

16. Miss E's further comments are as follows:-

- All five of the bonds into which she had invested were now past their maturity date, with no return of investment as yet. This indicates that the bonds must be in default, and therefore in distress.
- At least two of the bonds had been valued at zero by the Financial Services Compensation Scheme (FSCS) in August 2020.
- Novia's refusal to allow the transfer out of the SIPP was against her human rights, in accordance with The Human Rights Act 1998 Part II The First Protocol, Article 1, Protection of Property, on the basis that "every natural or legal person is entitled to the peaceful enjoyment of his possessions".
- What consideration for the Human Rights Act had Novia made before allowing her to invest in such funds, where to do so would later breach her human rights?
- The Human Rights Act applies in this case because Novia carries out a public function by collecting tax relief on behalf of HMRC. While investing in bonds is a private function, such an investment cannot be made without the public function being carried out by the product provider, Novia. She believes the private and public functions go together hand in hand; one cannot be done without the other.
- As a result of Novia's lack of consideration for her human rights when deciding what investments were allowed on its platform, Novia had breached her human rights of peaceful possession of her property.
- On this basis, any tax charge arising from a transfer of her funds out of the SIPP should be borne by Novia as she was only in this position due to Novia's negligent failure to consider her human rights before permitting the investment in non-transferrable bonds to be held within the SIPP.

- Novia had sent her mixed messages. In previous communications, Novia had stated that she may also wish to transfer her existing Novia account to another provider. However, when she attempted to do so, Novia refused to permit the transfer. Misleading statements were a violation of the Financial Conduct Authority's (**FCA**) Conduct of Business Rules (**COBS**) under which regulated firms such as Novia must operate. Specifically, COBS 4.2.1R1 which states that a firm must ensure it communicates in a fair, clear and not misleading manner. Novia had a legal obligation to follow this COBS rule.
- In December 2019 it was reported to Novia that one of the directors of all six bonds was also the founding director of the investment adviser. This was clearly a conflict of interest. However, Novia had ignored this information, thus breaching the FCA's Principles for Businesses (**PRIN**) numbers 1, 2 and 6, which state a firm must conduct its business with integrity, with due skill care and diligence, pay due regard to the interests of its customers, and treat them fairly.
- In respect of The Personal Pension Schemes (Restriction on Discretion to Approve) (Permitted Investments) Regulations 2001, a statutory instrument, she could see nowhere in the list of permitted SIPP investments (**the List**) any non-transferrable corporate bonds. If Novia had considered the List, her investments would not have been accepted for holding within her SIPP.
- A consideration of all of the above should result in her complaint being upheld.

17. Novia's further comments are as follows:-

- Investments held within any pension are not the personal possessions of the SIPP holder but rather the SIPP provider is the legal and beneficial owner. Therefore, Miss E holds only a beneficial interest in the funds within the SIPP. As such, Novia believes the Human Rights Act does not apply.
- Miss E's current situation is not the fault of Novia but has been caused by her financial adviser, who recommended the pension transfer from the previous provider into the Novia SIPP. That adviser recommended the investments. Further, he knew that some of them were illiquid at the time he recommended the commencement of drawdown to Miss E.
- In respect of the alleged breaches of COBS rules, it apologises for any impression of inconsistent messaging given in correspondence with Miss E. Novia said it was designed to work with FCA-authorised advisers rather than directly with SIPP holders. When there is no longer an adviser of record, it is in the best interests of SIPP holders to engage a new adviser or alternatively to transfer the SIPP to a provider that is better suited to dealing directly with customers. Novia was merely reminding Miss E of her options in this respect.
- The investments held by Miss E were available to all financial advisory firms, and any specific conflicts of interest in this respect would be a matter for disclosing or managing by Miss E's financial adviser. Such a conflict of interest would not, of

itself, mean that an investment could not be made available to a wider range of customers and financial advisory firms.

- Novia was satisfied that it had fulfilled its duty of care to Ms E and was not acting for its own benefit in relation to the investments held in the SIPP.
- In respect of the claim regarding the List of investments that may be held in a SIPP, it believed Miss E was referring to obsolete legislation.

Ombudsman's decision

18. Miss E contends that all of her closed bonds are in distress and two have been valued at zero by the FSCS. Novia's August 2020 valuation shows a positive value for each bond. However, the value of the assets of itself is not relevant to this complaint. It is the fact that the bonds are closed which is relevant, because their current closed status (together with the SIPP being in drawdown) prevents their transfer to another provider.
19. Miss E contends that her human rights have been breached by Novia. However, Miss E made these investments in the knowledge that they were illiquid, untradeable, and non-transferrable. I do not consider Novia could have breached Miss E's human rights when she was the one who selected these investments at the time of opening her SIPP.
20. Further, the excerpt Miss E quoted from the Human Rights Act, goes on to state that:-

"The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contribution penalties."
21. This proviso means that the right in question is a qualified right, and the relevant pensions legislation and HMRC regulations can be applied, regardless of any potential situation where the Human Rights Act may otherwise apply.
22. Accordingly, Novia is within its rights to refuse a transfer that contravenes both relevant legislation and HMRC rules. It is also within its rights to avoid any action that would result in it being in breach of the law.
23. I do not consider that Novia has breached COBS 4.2.1R1, either by asking Miss E to appoint a new adviser (it was a condition of her SIPP that she appoint an adviser), or by reminding her of the potential to transfer out if she preferred to take that course of action. Such a reminder is merely that. It does not infer that such a transfer would be possible; each fund's status would only be assessed if and when a transfer request was received by Novia.
24. In respect of the alleged conflict of interest, I do not consider this to be a breach. The assets were already in the SIPP at the point Miss E says the issue was reported to

Novia. It was not something of which Novia was made aware when the SIPP was opened. Further, being made aware of the potential conflict of interest in December 2019 could not have assisted either Novia or Miss E in transferring her closed bonds to a new SIPP provider.

25. In any event, if Miss E believes a breach has occurred, she can report this to the Financial Conduct Authority.
26. Regarding the List of suitable assets, The Personal Pension Schemes (Restriction on Discretion to Approve) (Permitted Investments) Regulations 2001 lapsed on A-Day in April 2006 and was replaced by the Finance Act 2004. Accordingly, the content of the List no longer applies.
27. Having reviewed the evidence and considered the further points raised by Miss E and Novia, I conclude that there was no maladministration on the part of Novia.
28. I do not uphold Miss E's complaint.

Anthony Arter

Pensions Ombudsman
3 November 2020

Appendix

The Pension Schemes Act 1993 Part 1 Preliminary

1. Categories of pension schemes

“In this Act, unless the context otherwise requires:-

“occupational pension scheme” means any scheme or arrangement which is comprised in one or more instruments or agreements, and which has, or is capable of having, effect in relation to one or more descriptions or categories of employments so as to provide benefits, in the form of pensions or otherwise, payable on termination of service or on death or retirement, to or in respect of earners with qualifying service in an employment of any such description or category.

“personal pension scheme” means any scheme or arrangement which is comprised in one or more instruments or agreements and which has, or is capable of having, effect so as to provide benefits, in the form of pensions or otherwise, payable on death or retirement to or in respect of employed earner who have made arrangements with the trustees or managers of the scheme for them to become members of it.”

The Pension Schemes Act 1993 Part IV, Chapter IV, Section 94: Right to cash equivalent

1. "Subject to the following provisions of this Chapter:-

- a) a member of an occupational pension scheme acquires a right, when his pensionable service terminates, to the cash equivalent at the relevant date of any benefits which have accrued to or in respect of him under the applicable rules; and
- b) a member of a personal pension scheme acquires a right to the cash equivalent at the relevant date of any benefits which have accrued to or in respect of him under the rules of the scheme."

2. "In this section the applicable rules" means:-

- a) any provision which the rules of the scheme do not contain but which a scheme must contain if it is to conform with the requirements of Chapter I; and
- b) the rules of the scheme, except so far as Chapter II or III overrides them; and
- c) any provision of Chapter II or III which overrides any of the rules of the scheme;

"the relevant date" means, subject to regulations under section 98(4):-

- a) the date of the relevant application, or
- b) in the case of an occupational pension scheme, if it is later, the termination date;

"the relevant application" means any application which the member has made under section 95 and not withdrawn."

Section 95: Ways of taking right to cash equivalent

1. "A member of an occupational pension scheme or a personal pension scheme who acquires a right to a cash equivalent under this Chapter may only take it by making an application in writing to the trustees or managers of the scheme requiring them to use the cash equivalent to which he has acquired a right in whichever of the ways specified in subsection 2. or, as the case may be, subsection 3. he chooses.
2. In the case of a member of an occupational pension scheme, the ways referred to in subsection 1. are:-
 - a) for acquiring transfer credits allowed under the rules of another occupational pension scheme:-
 - (i) the trustees or managers of which are able and willing to accept payment in respect of the member's accrued rights, and
 - (ii) which satisfies prescribed requirements.
 - b) for acquiring rights allowed under the rules of a personal pension scheme:-
 - (i) the trustees or managers of which are able and willing to accept payment in respect of the member's accrued rights, and
 - (ii) which satisfies prescribed requirements.
 - c) for purchasing from one or more insurance companies such as are mentioned in section 19(4)(a), chosen by the member and willing to accept payment on account of the member from the trustees or managers, one or more annuities which satisfy prescribed requirements.
 - d) for subscribing to other pension arrangements which satisfy prescribed requirements.
3. In the case of a member of a personal pension scheme, the ways referred to in subsection 1. are:-
 - a) for acquiring transfer credits allowed under the rules of an occupational pension scheme:-
 - (i) the trustees or managers of which are able and willing to accept payment in respect of the member's accrued rights, and
 - (ii) which satisfies prescribed requirements;
 - b) for acquiring rights allowed under the rules of another personal pension scheme:-
 - (i) the trustees or managers of which are able and willing to accept payment in respect of the member's accrued rights, and
 - (ii) which satisfies prescribed requirements;
 - c) for subscribing to other pension arrangements which satisfy prescribed requirements.
4. In the case of the exercise of a right in respect of the cash equivalent of a member's protected rights, if any, under a scheme which is, or was formerly, a money purchase contracted-out scheme, subsection 2. is to be construed as if paragraph c) were omitted.
5. Except in such circumstances as may be prescribed:-

- a) subsection 2. is to be construed as if paragraph (d) were omitted; and
 - b) subsection 3. is to be construed as if paragraph (c) were omitted.
- 6. Without prejudice to the generality of subsections 2. and 3., the powers conferred by those subsections include power to provide that a scheme or pension arrangement or, in the case of subsection 2., an annuity must satisfy requirements of the Inland Revenue.
- 7. A member of an occupational pension scheme may only exercise the right conferred by this section on or before the last option date.
- 8. In subsection 7. “the last option date” means, subject to regulations under section 98, the date which falls:-
 - a) one year before the date on which the member attains normal pension age;
or
 - b) six months after the termination date, whichever is the later.
- 9. An application to the trustees or managers of the scheme under subsection 1. is to be taken to have been made if it is delivered to them personally, or sent by post in a registered letter or by the recorded delivery service.

Section 96: Further provisions concerning exercise of option under S.95

1. A member may exercise the option conferred by subsection (1) of section 95 in different ways in relation to different portions of his cash equivalent, but a member who exercises that option must do so:-
 - a) in relation to the whole of his cash equivalent; or
 - b) if subsection (2) applies, in relation to the whole of the balance mentioned in subsection 3.
2. This subsection applies where:-
 - a) the trustees or managers:-
 - (i) of an occupational pension scheme which is not a contracted-out scheme, or
 - (ii) of a personal pension scheme which is not an appropriate scheme, or
 - (iii) of a self-employed pension arrangement,are able or willing to accept a transfer payment only in respect of a member's rights other than his accrued rights to guaranteed minimum pensions or his protected rights; and
 - b) the member has not required the trustees or managers of the scheme from which he is being transferred to use the portion of his cash equivalent which represents those accrued or protected rights in any of the ways specified in subsection 2. or, as the case may be, subsection 3. of section 95.
3. Where subsection 2. applies, this section and sections 94, 95 and 97 are to be construed as conferring on the member an option only in respect of the balance of the cash equivalent to which the member would otherwise be entitled, after deduction of an amount sufficient for the trustees or managers of the scheme from which he is being transferred to meet their liability:-
 - a) in the case of a transfer from an occupational pension scheme, in respect of the member's and the member's widow's or, as the case may be, widower's guaranteed minimum pensions or the member's protected rights; and
 - b) in the case of a transfer from a personal pension scheme, of the member's protected rights."