

Ombudsman's Determination

Applicant	Mr T
Scheme	The Tenco Executive Pension Scheme (the Scheme)
Respondent	James Hay Partnership (James Hay)

Complaint Summary

1. Mr T has complained that James Hay caused an undue and avoidable delay in the transfer of his pension to a new provider. As a result, he lost the opportunity to invest in the stock markets immediately following the Brexit referendum result on 23 June 2016.

Summary of the Ombudsman's Determination and reasons

2. The complaint shall be upheld, because due to James Hay's unreasonable delays Mr T has lost the opportunity to make a financial profit. To compensate him for this, James Hay shall pay £43,700 (plus interest) to his new pension plan.

Detailed Determination

Material facts

3. Mr T had cash and stocks with Barclays Stockbrokers (**BSB**) in the Scheme, which was a small self-administered scheme. He also had cash with James Hay, of approximately £220,000. Following receipt of a notice from BSB that it would be closing its pension trader accounts from 30 June 2016, Mr T emailed James Hay on 24 March 2016, to start the process of transferring the Scheme.
4. In an email dated 6 May 2016 Mr T told James Hay:

“...we can then organise a transfer of cash and equities in specie from Barclays to a SIPP provider – this must be done before 30th June otherwise Barclays will unilaterally liquidate to cash, which I do not want.”
5. In a telephone conversation with James Hay on 10 June 2016, Mr T said he was “desperately keen to be back in the market before Brexit.” He talked about being in

limbo and needing the cash back with James Hay so he could get back in the market again.

6. In a second telephone conversation on the same day, Mr T told James Hay that: "My target is before the 23rd, that's key to me really that this cash gets transferred over to [Hargreaves Lansdown]'s platform."
7. In an email dated 23 June 2016, the date of the Brexit referendum, Mr T complained to James Hay that the transfer had still not been made.
8. On 11 July 2016 James Hay received the cash element of Mr T's BSB portfolio.
9. On 11 August 2016 Mr T emailed James Hay to complain about the time that the transfer was taking. Among other things, he said that he had "made it clear at various times that it was of great importance that the transfer be completed before Brexit". Mr T said that his intention was to invest in the FTSE 100 Index immediately after the referendum if the result was an exit vote which resulted in a fall in that Index. Mr T pointed out that the FTSE 100 Index had dropped to approximately 5,700 following the vote, and it had now recovered to 6,800.
10. Mr T said it was completely unacceptable that nothing had been done by James Hay from March 2016 until sometime in June/July 2016, despite the number of calls he made and the assurances he received from various James Hay staff members. Mr T said there had been no sense of urgency and weeks passed when it was unclear what was being done. In addition, he said James Hay's inability to produce accurate documentation caused further delays.
11. On 19 August 2016, in accordance with Mr T's instructions, £250,000 in cash was transferred from James Hay to Mr T's new self-invested personal pension plan (**SIPP**) with Hargreaves Lansdown. On 26 August 2016, six out of seven lines of stock were transferred in-specie to the new provider. The final line of stock was transferred in-specie on 3 October 2016.
12. In its response to Mr T's complaint on 20 January 2017, James Hay said it was not aware of his intentions until his email of 6 May 2016 said he wanted to transfer cash and stock from BSB to the new provider. James Hay said BSB's notice of the closure of pension trader accounts warned that a transfer could take up to eight weeks, but this timescale was optimistic given the various parties involved.
13. James Hay said it carried out its duties in a satisfactory manner and within acceptable timescales, with two exceptions. Firstly, its email of 15 April 2016 overlooked Mr T's email of 24 March 2016, and he did not receive a response until 21 April 2016. Secondly, from emails exchanged on 6 June 2016 it should have been aware of Mr T's intentions to make a partial transfer.
14. James Hay also said the first reference Mr T made to the referendum vote was in his email of 23 June 2016, on the same day as the vote. While it may have been his intention to speculate on the outcome of the vote through his new SIPP, Mr T still had

the option of using the Saxo Capital Markets trading facility which he had used previously. James Hay did not uphold Mr T's complaint in respect of the transfer delays. However, it accepted that there were two instances of maladministration on its part, and it offered £100 to Mr T in recognition of this.

15. On 25 January 2017 Mr T told James Hay that he did not accept its findings, as he found them inadequate and inaccurate.
16. Mr T said he was insulted by James Hay's suggestion that he could have used the Saxo Capital Markets trading account. Firstly, he was not informed of this at the time. Secondly and more importantly, the effect of the delays was that he did not know at what point the cash would be transferred from BSB to James Hay, or at what point after 16 May 2016 James Hay would transfer the cash to the new provider.
17. Mr T said this "was a fairly intolerable position which effectively neutralised [his] ability to invest during this important period of market volatility." Mr T asserted that once James Hay received the transfer request from his new SIPP provider on 16 May 2016 the cash element of the transfer should have been concluded. While the in-specie transfer could have taken slightly longer, he believed he would have been in a position to invest prior to 23 June 2016, had the delays not occurred.
18. James Hay replied to Mr T on 2 February 2017. It provided contemporaneous evidence which it said he appeared to have overlooked. James Hay said it corresponded with Mr T between 24 March and June 2016, contrary to his assertions. It said Mr T was informed on numerous occasions about BSB's requirements for a letter of instruction from him, in order to transfer funds from the account. It said that once the necessary paperwork had been completed, James Hay received the cash element of Mr T's BSB portfolio within 12 working days.
19. Mr T responded to James Hay on 3 February 2017. He said it did not address the point of why the whole process took so long. Mr T said there were only two things to do in relation to the cash transfer: the first was to bring it back to James Hay, and the second was to send it to Hargreaves Lansdown. As James Hay's response had failed to address the main point from his 25 January 2017 letter, he informed James Hay that he would refer his complaint to my Office.
20. Mr T told my Office that he would like James Hay to compensate him for his profit opportunity losses in the market, which he believed arose directly from its failure to get the cash back from BSB, and to transfer it to Hargreaves Lansdown by 23 June 2016. He maintained that the timescale to do so was adequate and reasonable, and James Hay knew it was his intention to conduct post-Brexit trade as he had informed it on a number of occasions.

Adjudicator's Opinion

21. Mr T's complaint was considered by one of our Adjudicators, who concluded that there had been maladministration on the part of James Hay. The Adjudicator's findings are summarised below:-

- The timeline of events showed that there had been maladministration by James Hay, and therefore Mr T's complaint should be upheld.
- Despite being aware that action needed to be taken by 30 June 2016, prior to receiving the cash from BSB on 11 July 2016, there were a total of 46 working days where there was no evidence that James Hay actively sought to progress matters and effect the transfer. That amounted to maladministration. From the moment James Hay became aware of Mr T's intentions, as the expert, it should have asked the relevant questions of all parties and processed the transfers efficiently. This did not happen. Mr T had to chase James Hay on a number of occasions to request updates and check that matters were progressing.
- After receiving the cash from BSB on 11 July 2016, it took James Hay 29 working days to transfer it to Hargreaves Lansdown. James Hay should have acted sooner. The transfer should have been completed before 23 June 2016, and certainly before 30 June 2016.
- The first mention that Mr T made of wanting to complete the transfer by the Brexit referendum date was during the two separate conversations with James Hay on 10 June 2016. No assurances were provided by James Hay during the first call. In the second call, the James Hay staff member said he appreciated that the deadline for the closure of the BSB account was 30 June 2016. However, Mr T said, "My target really is before the 23rd, that's key to me really that this cash gets transferred over to [Hargreaves Lansdown]'s platform". He explained this was so he could take the opportunity that a fall in the market will bring to "get some really good purchases in". James Hay did not give any assurances about this date, but the staff member said his colleagues would progress the transfer while he was on leave. This did not happen.
- Given the available time before the referendum vote, it was not unreasonable for Mr T to expect that the cash transfer would be completed before then.
- Although he was not given any assurances about a likely completion date, James Hay did not inform Mr T of any difficulties it was facing with the transfers.
- BSB's documentation requirements were not particularly onerous or difficult. Mr T had made it clear from the beginning that he wanted the transfers completed expeditiously.
- In its capacity as Scheme administrator, James Hay had not acted promptly to ensure that the transfers were completed by 30 June 2016. Had it done so, it was

likely that, on balance, the cash transfer would have completed even before the referendum vote on 23 June 2016.

- James Hay's actions caused significant distress and inconvenience to Mr T. A higher award was warranted in the circumstances because the loss of opportunity was substantial. In recognition of this, James Hay should pay Mr T £2,000.

22. Although Mr T accepted the findings of the Adjudicator, he did not accept the Adjudicator's opinion on the loss he had suffered, and the complaint was passed to me to consider. Mr T provided his further comments, which did not change the outcome.

My 2018 Determination

23. In my Determination dated 5 June 2018 (**my 2018 Determination**), I agreed with the Adjudicator's Opinion, and therefore only responded to the main points made by Mr T. I said:

"As Mr T did not go on to invest in the stock market when the cash transfer eventually completed in August 2016, Mr T does not agree that this resulted in only a loss of expectation. He asserts that his subsequent actions can only be relevant to mitigation of any loss. Mr T asserts that the correct test for when a loss may be reclaimed, is one that is directly caused by the fault of the defaulting party and within the contemplation of the parties. Mr T believes that both these tests were fully satisfied by the findings of the Adjudicator in the Opinion."

24. On this point, Mr T said:

"...the market fell to a level of 5700 (on the FTSE 100 index) in the immediate aftermath of the Brexit vote. The fact that it fell was fully foreseeable. I intended to buy that index on any fall occurring as a result of a Brexit vote and as you have found as a fact, [James Hay] was aware of this. The index had recovered to around 6800 by the time (19/8) the cash was finally transferred to the scheme at Hargreaves Lansdown, which had the required dealing platform.

I lost a 20% uplift during that period. I would not expect to claim a loss all the way up to current levels of 7600 as I could have been invested from the 6800 level when the cash was received. In fact the reason why I did not invest, once I had received the cash as I explained previously, was because I felt at levels near 7000 the market was overvalued. It seems therefore to be perverse and unfair to say that I did not suffer a loss because I did not invest and then lose money or make less money.

I was actually trying to mitigate any loss by not investing at 6800 as I felt it too high on fundamentals and in my view could have collapsed again. I therefore suggest that the difference between 5700 and 6800 is a perfectly sound

calculation of the quantum of loss i.e. 20% of the value to be invested being £50,000.

What I think makes matters worse, regardless of the BSB issues is that throughout this sorry episode James Hay held cash of approx. £220,000... and once they had received the transfer request from HL [on 16 May 2016]...could have transferred cash at any time, which would at least have made substantial sums available to invest on the 23rd June 2016. [The Adjudicator] also found as a matter of fact in [the] opinion that [James Hay was] aware of my intention to invest on a market fall if the vote was in favour of Brexit well before 23rd June. I agree that if that had not been the case, it could be suggested that I was inventing this intention after the event, but [the Adjudicator] found that [James Hay] knew the transfer was market sensitive.

The fact that [James Hay] apparently ignored that fact requires them to make good the loss as they caused it by their maladministration and it was foreseeable and in the contemplation of the parties.

In these circumstances I do not think that it is correct in law or equitable to find that I did not suffer a loss. Nor do I think there is any difficulty in calculating the quantum of the loss as set out above.

[The Adjudicator] found the following in [the] Opinion:

- (i) [James Hay] knew I wanted to invest on the 23rd June if the market fell
- (ii) [James Hay] should have been able to transfer cash to [Hargreaves Lansdown] before the 23rd June so that it was available for that purpose.

Therefore the loss was directly caused by [James Hay]'s maladministration and that loss was directly in their contemplation and foreseeable by them as they were on notice of my intention and knew that the transaction was market sensitive."

25. I responded to this point and said:

"Mr T is correct in principle about the applicable tests for assessing damages when loss has occurred. However, I do not agree that on the facts, the relevant tests can be satisfied.

In not completing the cash transfer sooner, and within a reasonable time, I accept that this maladministration by James Hay effectively caused Mr T to miss the opportunity to invest in the stock market, either before or immediately following the Brexit referendum and I do understand Mr T's frustration. However, unfortunately, the loss that Mr T is claiming, is neither measurable nor the exact nature of his investment within the reasonable contemplation of the parties.

While in principle, losses of this nature may be recoverable, I have not seen anything to suggest that Mr T informed James Hay of the specific shares he intended to purchase in the immediate aftermath of the vote, that he would have been able to purchase those shares in the amount he would have wished to, what price would have been achieved, and that these specific shares were then negatively affected by the outcome of the vote, before then recovering afterwards. The lack of certainty and the presence of so many variables mean[s] I cannot conclude what actual loss Mr T has suffered (if any) or that it was reasonably foreseeable to James Hay that Mr T would suffer the losses he is now claiming.

As Mr T was not going to invest in all the FTSE 100 companies, his suggestion that his loss be based on the difference between the low and high points of the index on the relevant dates cannot work.

Around the time of the Brexit referendum vote, many astute investors such as Mr T would also have had the same idea of using the potential significant fall in the market to bring “some good purchases in”. Nevertheless, this would all have been speculative in nature since the most affected shares, the numbers available for purchase and the exact low points of any of the companies was not known until the actual event had occurred. If the chosen shares were then available to buy, the price would most likely have impacted the quantities that would have been purchased.

Also, given that the predominant feeling prior to the vote was that we would remain in the Economic Union, and if the vote had gone that way the market may easily have risen, many sophisticated investors would have hedged their bets and invested some of their liquid assets prior to the vote. There is no proof that Mr T might not have decided to do this.

I agree that had Mr T gone on to make purchases following the completion of the transfer in August 2016, it would have confirmed his intention to invest. However, I accept Mr T’s assertion that he sought to mitigate his losses by not buying at the high levels. The fact that he did not do so at that point does not mean that he suffered no loss but it does mean there is simply no evidence of the shares he had in mind to buy and the specific foreseeability of the claimed losses here.

Mr T has also asserted that James Hay had approximately £220,000 which it could have transferred to Hargreaves Lansdown from 16 May 2016. From the evidence available to me, Mr T requested a specific amount of £250,000 to be transferred in cash, following receipt of the cash held by BSB. He did not expressly instruct James Hay that it could carry out two cash transfers to his new SIPP. This is an argument borne out of hindsight in my view and on this point, I do not find that maladministration occurred.

Ultimately, I agree with the Adjudicator's finding that Mr T's claim can only be redressed, and James Hay liable, in respect of non-financial loss due to the lost opportunity. I also agree that in recognition of the significant impact of James Hay's maladministration in this case, a higher award is warranted.

Therefore, I uphold Mr T's complaint to the extent that he has suffered a loss of expectation.

Within 28 days of this Determination, James Hay shall pay Mr T £2,000 in recognition of the very significant distress and inconvenience caused by its maladministration."

Appeal to the High Court

26. Mr T then appealed to the High Court on a point of law. After an oral hearing, leave to appeal was granted. Mr T submitted firstly that in finding in my 2018 Determination that the loss was not reasonably foreseeable or not in the reasonable contemplation of the parties, I had erred in law because there should be no difficulty in reasonable foreseeability in a case such as his.
27. Secondly, Mr T submitted that I was wrong in what was referred to as "the measurability issue", because I said in my 2018 Determination that the loss claim was not measurable and explained later that there cannot be precision or certainty in what he would have done and therefore the loss cannot be claimed because it is not measurable.
28. Thirdly, Mr T contended that having found maladministration in favour of him, it would be necessary for me to consider the counter-factual, namely what would have happened had the money arrived at a "non-negligent" date or after being transferred without negligence or maladministration; however my 2018 Determination did not focus on the counter-factual.

High Court Judgment

29. On 12 June 2019 the High Court (Charles Hollander QC sitting as a deputy judge) allowed the appeal. His judgment included the following paragraphs:

"[13] I first of all deal with the question of foreseeability. When a customer asks for his pension pot to be moved from one provider to another it is obvious that it is for the purpose or the possible purpose of investment; and it is equally obvious that if there is a delay through maladministration of the transfer that the investor will or may lose the opportunity to invest over that period, and if there are spikes or perceived spikes in the market during that period that is likely or foreseeable to cause the investor loss. That would satisfy reasonable

foreseeability, and the conclusion that the loss is not in reasonable contemplation of the parties is not one that can be sustained.

[14] The second point on measurability...the Ombudsman appears to hold that it was necessary for Mr [T] to identify the specific shares he intended to purchase and to show that he was able to purchase those shares in the amount he wished, what price, and that those specific shares were negatively affected by the outcome of the vote. I appreciate there are questions of fact here, but that is putting far too high a test. It is perfectly possible for an investor to say, "I cannot say exactly what shares I would have invested in but, given that I could see that there was likely to be a spike in the market after a particular event, if I had had the money available then I would have been able to take advantage of that, and the precise loss is a matter of quantification not a question of recoverability". Having accepted...that the maladministration by James Hay effectively caused Mr [T] to miss the opportunity to invest in the stock market, he is putting forward far too high a test for Mr [T] to satisfy, and he is, with respect, confusing questions with recoverability of damage with quantification of damage.

[15] The final point which is tied up with the first two issues is the counter-factual issue. The counter-factual here is the difference between what would have happened if, on the balance of probabilities, [if] the money had arrived by the "non-negligent" date, which seems to be 23 June, as against what did happen when the money did arrive in August, by which time the market had recovered. I think the Ombudsman has at times lost sight of that counter-factual because his findings in the paragraphs to which I have referred run together Mr [T]'s intentions before and after the referendum.

[16] I recognise that there was a difficulty in assessing the counterfactual because Mr [T] had hoped that the money would have arrived prior to the referendum, in which case he might have taken certain different steps, but the counter-factual for the purpose of considering whether damage has been suffered must consider what Mr [T] would have done if the money had been received at the date at which the money should have arrived had there not been maladministration which – although it is not entirely clear whether the date given is 23 or 30 June from the Ombudsman's findings – it seems that he is indicating that the money should have arrived on 23 June and that is the relevant date. What might have happened if the money had arrived prior to 23 June is not part of the counter-factual, although it might be relevant evidence against which to judge what Mr [T] would have done if the money had arrived on 23 June.

[17] In the light of what I regard as those errors of law, it is right for me to remit the determination back to the Ombudsman.

...

[21] It seems to me that on the remission, the approach that the Ombudsman ought to adopt is, first of all, having reached a conclusion that there was maladministration, to identify the date by which the money should, on the basis of James Hay acting without maladministration, have arrived. It seems to be (on the basis of his previous decision) probably 23 June, although it is not quite clear whether the finding is 23 or 30 June: the difference in the position between 23 and 30 June may or may not matter.

[22] Once that initial conclusion has been reached, the Ombudsman must recognise that the burden is on Mr [T] to show that, had the money arrived by that date, what he would have done. On the basis of that counter-factual he will say that there was an obvious opportunity to invest, and the evidence shows that he was aware from the outset that there was going to be a post Brexit opportunity in the event of a leave vote. If that is accepted, and if it is accepted that he was going to invest or would want to invest, it does not mean that he needs to show precisely which share he would have bought, although the Ombudsman will need to consider the nature of the portfolio he was likely to have bought. The Ombudsman will also need to consider whether what he is now submitting is in part or whole based on hindsight. For example, is he being over optimistic, would he actually have done what he says he wanted to do, why he did not do it anyway with other money he had, perhaps, and perhaps consider his pattern of investing and what sort of shares he would have bought and to what extent they rose in value in the relevant period. Sometimes it may be necessary for a tribunal to be more sceptical than simply to accept what the investor says he would have done. These are all factual questions for the Ombudsman.

[23] I emphasise however this is not a “loss of a chance” case. Loss of a chance cases involve consideration of the chance of what a third party would do. Where the issue is what the plaintiff would have done, one has to consider the matter as to balance of probabilities. The fact that Mr [T] had a prior intention prior to the referendum to do something different is not in itself conclusive. A canny investor may have intended to do one thing if the money had arrived on one day but actually, if the money arrives on a different date, taken advantage of a different opportunity. These are matters for the Ombudsman to consider. It is for the Ombudsman to determine whether any loss has been suffered and, if so, what it was. I express no view, as I have said, on what the result should be, but I cannot myself reach a conclusion because it needs further information in order to determine the matter.”

30. My office then asked Mr T and James Hay for their further comments.

Summary of Mr T's position

31. Mr T submitted further comments to my office. His position is as follows:

- He had wanted the funds to be made available by 23 June 2016, in order to take advantage of market falls of 10-20% which he regarded as highly likely in the immediate aftermath of a “leave vote”.
- James Hay was aware by 10 June 2016, that he was keen to be back in the market before 23 June 2016, and its delays had prevented him from making a profit. Mr T commented: *“I had been planning the potential investment into a post Brexit dip for a long time but was prevented from executing it by the maladministration of James Hay”*.
- His detailed submissions demonstrated a logical and consistent nexus of evidence about his investment dealing, competence and integrity.
- He was an experienced private investor with substantial net assets. He had held senior positions in the financial services sector.
- He had previously invested mainly in equities and indices. Over time had moved his personal equity holdings to ISAs and pension funds. At the time of the Brexit referendum the FTSE 100 index would have been an ideal investment, as it allowed investment in world class international companies with excellent spread and lack of risk concentration, and index investment had the simplicity and speed required to take advantage of the sharp drop in value caused by the “leave vote”. In comparison, the FTSE 350 index experienced greater returns from greater losses, but he was not basing his loss on that index because he had never intended to invest in it.
- With regard to the Brexit vote, his sole intention was to buy at unusually low market levels if the opportunity arose.
- He had restricted his claim to the FTSE 100 Index rise from 5,788 to 6,800.
- He did not buy at the 6,800 level in August 2016 because he considered most financial markets to be overvalued and not conducive to value investing.
- James Hay was wrong to maintain that he should have invested then to mitigate his loss.
- Investing the Scheme’s cash instead of converting some of his equities held in ISAs was advantageous because it would have avoided a short-term liquidity problem and a potential tax burden.
- If his claim were to succeed, it would be appropriate for any award to be made to the SIPP, not to him personally, as the money would have been invested in a pension scheme.
- James Hay had misunderstood the basis on which the deputy judge had remitted the case to me, especially the point that as, on the facts, a loss of investment opportunity was foreseeable in 2016 I should consider the counter-factual position.

- The compensation to be awarded to him should be based on the full amount that he could have invested, £250,000, not based on an arbitrarily determined smaller amount; that would be inconsistent with the evidence he had supplied.
- Interest should be added to the compensation award for the period from 19 August 2016 (when the award should have been made to him) to the actual date of payment. Mr T cited the case of Sempra Metals Ltd v Inland Revenue Commissioners [2007] UKHL 34 [2008] 1 AC 561, in support of this. In this case the judge said: “A claimant can plead and prove his actual interest losses, including compound interest, caused by late payment of debt, breach of contract or in tort as special damages, subject to remoteness, mitigation of loss etc i.e. the cost of borrowing or the lost opportunity to invest the money.”

Summary of James Hay’s position

32. James Hay submitted further comments to my office. Its position is as follows:

- Mr T had not offered any new evidence that he would have invested his funds had the money been available sooner, so his claim should be rejected.
- Mr T took a conscious decision, based on his substantial financial experience, not to invest in August 2016 when he had the funds to do so; therefore, he did not take any action to mitigate his position.
- Mr T’s claim was based on hypothetical acts with the benefit of hindsight. The case of North Star Shipping v Sphere Drake Insurance [2005] 2 Lloyd’s Rep 76, was relevant, as it held that hypothetical evidence had to be rigorously tested by reference to logical self-consistency, and to such independent evidence as may be available.
- The date by which the money should have arrived was 30 June 2016, the date mentioned in Mr T’s instructions of 6 May 2016, not 23 June 2016 as he had asserted.
- If there was any loss (which James Hay denied), it should be calculated by reference to the FTSE UK Private Investors Balanced Total Return Index, which was used by the Financial Ombudsman Service. This contained a mix of diversified indices representing different asset classes. It was considered to be an appropriate and fair measure of comparison for those wanting capital growth and prepared to accept some investment risk to achieve higher returns. Alternatively, the FTSE All-Share Index could be used, which was capitalisation-weighted and comprised about 600 traded companies.

Conclusions

33. I note the deputy judge’s analysis of the issues and his comments on the approach that I should adopt, now that this matter has been remitted to me.

34. At paragraph 21 of the judgment, the deputy judge considered that the approach I should take is “first of all, having reached a conclusion that there was maladministration, to identify the date by which the money should, on the basis of James Hay acting without maladministration, have arrived.”
35. In my 2018 Determination I said that “in not completing the cash transfer sooner, and within a reasonable time, I accept that this maladministration by James Hay effectively caused Mr T to miss the opportunity to invest in the stock market, either before or immediately following the Brexit referendum”.
36. I therefore turn to consider the date by which the money should have arrived, but for James Hay’s maladministration. The deputy judge notes that it is not quite clear whether the finding in my 2018 Determination is 23 or 30 June.
37. Mr T did not mention the referendum date in his emails to James Hay until 23 June 2016, the day of the vote. However, he did mention the referendum date in both of his recorded phone calls to James Hay on 10 June 2016.
38. Having considered the matter, and bearing in mind that it was much earlier in 2016 that Mr T first asked James Hay to implement the transfer, I am of the view that 23 June 2016 (not 30 June 2016) is the appropriate date by which the money should have been made available by James Hay for investment, had there been no maladministration on its part.
39. At paragraph 22 of the judgment, the deputy judge said that I should next “recognise that the burden is on Mr [T] to show that, had the money arrived by that date, what he would have done”, to establish the “counter-factual”. This requires considering a number of factual issues and reaching a decision on the balance of probabilities.
40. I consider that the evidence, primarily the calls between Mr T and James Hay on 10 June 2016, shows that: (a) Mr T was aware there was going to be a post-Brexit opportunity in the event of a leave vote, and (b) if there was a leave vote, Mr T was going to invest or would want to invest.
41. Mr T has stated that he would have invested the full £250,000 in the FTSE 100 Index immediately after the leave vote, at which point it was valued at 5,788, for the reasons set out in paragraph 29 above.
42. Mr T’s explanation of his attitude towards investing shows that although he was keen to buy if unusually low market levels arose, he was not by nature an impetuous investor. He generally took a long-term view to pension investment, whilst holding material amounts of cash outside his pension funds and ISA investments. Mr T has said that he has made few investments since the Brexit referendum despite long term historical trends showing that returns on shares generally outperform other investment classes.
43. Mr T has given me a detailed explanation of his attitude towards investment and put forward a good case for investing in the FTSE 100 Index, rather than in individual

stocks, had the money been available. In my view, his reasons for making that particular form of investment are well argued and seem plausible. I do not consider that the alternative indices suggested by James Hay are more persuasive. In my view, Mr T's comments are sufficient to satisfy the "logical self-consistency" test in North Star Shipping, even if no independent evidence is available as to what he actually would have done.

44. Mr T has detailed that he held equities in ISAs and a "significant balance of cash personally", but that he chose not to invest any of this in the FTSE 100 Index immediately after the leave vote, when he knew his pension transfer had not been completed. He has explained that doing so may have created a short-term liquidity problem and a potential tax burden. I acknowledge that the vehicle used to make an investment is significant and that investing through his SIPP would have been more advantageous to him and would have avoided these issues.
45. Mr T has stated that, when the transfer was completed in August 2016, he did not invest in the FTSE 100 Index because he considered most financial markets to be overvalued and not conducive to value investing at that time. He noted that most of the cash accessed from James Hay remains in cash, because he has had limited options to invest in the value position. I consider that this is consistent with the approach to investing that he has described.
46. It is, of course, impossible for me to establish with certainty exactly what action Mr T would have taken. I consider that, on the balance of probabilities, taking into account all of the evidence I have reviewed and set out in this Determination, Mr T would have invested the full amount of cash in the FTSE 100 Index immediately after the leave vote.
47. If £250,000 had been invested when the FTSE 100 Index level fell to 5,788 (immediately following the referendum result), a profit of about £43,700 would have arisen when that Index rose to 6,800 in August 2016. I consider that is the basic amount for which Mr T should be compensated.
48. Mr T has claimed that interest should be added to the compensation award for the period from 19 August 2016 to the actual date of payment.
49. There is no automatic right to interest on any amount that I direct to be paid, though I may direct interest to be calculated and added to that amount. I will generally direct interest to be paid where the claimant has been without an amount of money for a period of time and therefore unable to invest it and obtain a return.
50. Given that Mr T had the opportunity to invest in the FTSE 100 Index in August 2016 but chose not to, and has kept the vast majority of the transferred amount in cash, I consider it appropriate that interest is paid on the £43,700 from August 2016. In calculating interest I consider it appropriate for the court's judgment rate of 8% to apply.

51. I accept the point made by Mr T that any award should be paid to his SIPP, rather than directly to himself. That is because the investment profit would have accrued in Mr T's pension plan if the transfer to it had been completed in good time.
52. As James Hay has already paid Mr T £2,000 for his distress and inconvenience, following my 2018 Determination, I do not consider that another award for distress and inconvenience is appropriate here.

Directions

53. Within 28 days of the date of this Determination, James Hay shall pay into Mr T's SIPP £43,700, plus interest, in recognition of his lost investment opportunity caused by James Hay's maladministration. Interest means simple interest calculated at 8% per annum in respect of the period from August 2016 to the date of payment.

Anthony Arter

Pensions Ombudsman
12 August 2020