Ombudsman's Determination

Applicant	Mr R
Scheme	James Hay Modular iSIPP (**the SIPP**)
Respondent	James Hay Partnership (**James Hay**)

Outcome

1. Mr R's complaint is upheld and to put matters right James Hay shall:

   - put Mr R back into the same financial position he would have been in if the cash from the SIPP had been transferred to Interactive Investor (**II**) on 7 September 2020 and invested in the Baillie Gifford Japanese Smaller Companies Accumulation Fund (**the Baillie Gifford Fund**);
   - reimburse his platform charges between 7 September 2020 and 16 October 2020; and
   - pay him £1,000 for causing him serious distress and inconvenience.

Complaint summary

2. Mr R complained that James Hay caused delays to the transfer of his holdings in the SIPP and did not keep him updated on how the transfer was progressing. He had wanted to invest the cash but was not able to during the transfer. He has said that the delay and poor communications caused him to incur financial loss and suffer serious anxiety, impacting on his long-term health.

3. Mr R asked to be reimbursed for financial loss, the charges he paid during the transfer process, and to receive an award for the distress caused to him by James Hay's delays. Mr R submitted that his total award should be at least £150,000.

Background information, including submissions from the parties

4. On 30 July 2015, Mr R opened an account in the SIPP (**the Account**). On the SIPP's application form (**the Application Form**), Mr R selected an option to use stockbroking services provided by Selftrade, now known as EQi, which streamlined the trading of some assets in the SIPP. As Selftrade was a separate company to James Hay, Mr R was required to agree to Selftrade's Terms and Conditions.

5. The Application Form stated that applicants should read Selftrade's Terms and Conditions and Order Execution Policy. The declaration on the Application Form also stated:

   > "If I have indicated that I wish to use the services of Selftrade….I accept and agree that I am solely responsible for all decisions relating to the purchase, retention and sale of the investments forming part of my Modular iSIPP, and you have not carried out and shall not in future carry out any review of Selftrade….I am responsible for checking these matters and ensuring that Selftrade is suitable for my investment objectives."

6. Paragraph 18 of the SIPP's Terms and Conditions stated:

   > "We [James Hay] shall not be responsible or liable (and will not compensate you) for any loss, liability, cost, expense, fees or missed profit that you or your SIPP suffer where a Financial Adviser, Investment Manager or Stockbroker or other third party you have appointed has caused the loss."

7. Mr R transferred two pension arrangements to the Account: a defined benefit pension arrangement valued at £1,178,658.04 and a defined contribution personal pension valued at £32,973.62. While he received financial advice on the transfers to the SIPP, he subsequently self-managed his investments in the Account.

8. Mr R has said that in March 2020, he became concerned about the impact of the Covid 19 pandemic on the Account, so he sold his equity funds, and retained the proceeds as cash (**the Cash**), amounting to approximately £627,000. This represented approximately 50% of the total value of the Account. The balance remained invested in four assets. One of the assets was the Vanguard UK Inflation Linked Gilts Fund (**the Vanguard Fund**), held in the James Hay Investment Centre, while the other three were assets held via Selftrade (**the other assets**).

9. Mr R then became concerned about the possible implications of the UK's departure from the European Union at the end of the transition period on 31 December 2020, so he wanted the Cash to be held in Japanese Yen rather than Sterling. As the SIPP did not have a Japanese Yen option, he decided to transfer his benefits to II. He understood that while the transfer (**the Transfer**) was in progress, the Cash would not be invested in markets.

10. On 22 May 2020, Mr R signed the James Hay Transfer Discharge Form (**the James Hay Form**). This was part of a larger document called "Transferring your SIPP away from James Hay Partnership" **(the Transfer Document**). Instructions on the James Hay Form stated that the account holder should complete Sections one to five, before sending it to the new pension scheme for completion of Sections A and B. Section A required information about the receiving scheme and Section B was for identifying any assets that could not be transferred in-specie. On the James Hay Form, Mr R confirmed that he wanted to transfer his assets in-specie.

11. Section six of the James Hay Form referred to a section of the Transfer Document headed "Guide to the transfer process". On page two of the Transfer Document, it stated:

> "In-specie transfers. On receipt of a completed request, we will conduct due diligence checks, cancel any regular investment centre sales, and liaise with the receiving scheme to arrange the registration of any investments that are being transferred in-specie. Once the investments have been successfully transferred in-specie, we will forward any cash remaining in your SIPP bank account to the new provider, after outstanding charges have been settled, before closing your SIPP."

12. On page three of the Transfer Document, it stated:

> "The transfer process can take time to complete, as we are reliant on third parties for part of the process. We are therefore unable to guarantee that any transfer to a receiving scheme will be completed by a specific deadline."

13. Mr R completed the James Hay Form and sent Sections A and B to II, and Sections one to five to James Hay. These were received by II and James Hay on 22 May 2020 and 25 May 2020 respectively.

14. James Hay has said that there was no covering letter with the James Hay Form, and Sections A and B were missing. On the first page, Mr R had written a note saying that he had informed his financial adviser of the Transfer. He had also ticked a box confirming that he had not received advice from an authorised firm.

15. On 4 June 2020, Mr R told James Hay that II required its discharge form (**the II Form**) to be signed and returned by James Hay. Mr R asked James Hay how long the Transfer would take. On the same date, James Hay requested Mr R's membership number, which Mr R has submitted was already included on his first message.

16. On 5 June 2020, Mr R asked James Hay for a direct telephone number. When he had telephoned its general number, he had been put on hold for an hour and then been cut-off. He wanted to discuss how long the Transfer would take.

17. Mr R has said that by this time, he had become more positive about equity markets, and he was concerned that the Cash was not invested in markets.

18. On 6 June 2020, James Hay asked II to complete and send Section A. On the same date, Mr R has said that James Hay sent the II Form to II.

19. On 9 June 2020 and 12 June 2020, Mr R chased James Hay for a response. On 12 June 2020, James Hay replied with an update about Section A being outstanding.

20. On 29 June 2020, II sent its transfer request and Section A to James Hay. It requested a list of assets to be transferred in-specie. James Hay has said that this was the point when it could begin processing the Transfer.

21. On 9 July 2020, James Hay told Mr R that it had received Section A, but it had a backlog of transfers and was not currently able to meet its service level target. It had a plan to address the issue, but it was taking longer than expected. The James Hay representative said that because of Mr R's large Cash holding, prioritisation of the Transfer would be requested.

22. On 10 July 2020, II chased James Hay for the list of in-specie assets.

23. On 13 July 2020, James Hay confirmed to II that the Vanguard Fund was the only asset to be transferred in-specie from the James Hay Investment Centre. James Hay asked for registration details and confirmation that II could accept the asset. On 14 July 2020, II confirmed that it could, and provided the registration details.

24. Mr R has said that on 27 July 2020, II asked James Hay to provide a date for when assets would be received. On 4 August 2020, James Hay replied saying that it was experiencing delays and would deal with the Transfer in due course.

25. On 14 August 2020, James Hay instructed Selftrade to transfer the other assets in-specie, and to liaise directly with II.

26. On 17 August 2020, James Hay transferred the Vanguard Fund in-specie to II.

27. On 18 August 2020, Mr R complained to James Hay. He said that it had not replied to his messages, and he had not been able to speak to anyone directly for an update. He thought that the Transfer was taking too long, and it was making him very anxious. He had been told by II that James Hay was at fault and would not provide a target completion date. Mr R said that he believed that James Hay's delay could result in him incurring financial loss, as he wanted to hold the Cash in Japanese Yen. He confirmed that the current exchange rate was £1 = ¥139.45, and he would pursue James Hay for any financial loss resulting from subsequent adverse exchange rate movements.

28. On 21 August 2020, James Hay told Mr R that the Transfer had been instructed and would be implemented shortly. It apologised for taking longer than expected. The representative said that he would ask his manager to consider refunding Mr R's platform charges with effect from when James Hay had received the James Hay Form. It was suggested that Mr R could request further fee deductions later. James Hay said it was not able to transfer the Cash in stages. On the same date, James Hay reissued the in-specie transfer instructions to Selftrade, as the 14 August 2020 instructions had allegedly not been received. On 24 August 2020, Selftrade received the instructions, and started processing the Transfer.

29. On 1 September 2020, Mr R telephoned James Hay. He said that there was £400,000 missing from both his James Hay and II online accounts, and he was very worried. He was told that he would be called back, but by the next day he had not received a call, so he sent James Hay a message.

30. On 4 September 2020, James Hay telephoned Selftrade to check it had received the reissued instructions. On the same date, James Hay apologised to Mr R and updated him on progress. It said that it was unable to confirm a target completion date, but it was unlikely to be before October 2020. James Hay said that it would not refund Mr R’s platform charges.

31. On 14 September 2020, Selftrade transferred the other assets in-specie to II.

32. On 22 September 2020, Selftrade requested the Account’s bank details from James Hay, although James Hay has said that it had already provided them. On the same date, Mr R told James Hay that it looked as though there had been no progress on the transfer of the Cash, and market movements had increased his expected financial loss from the delays. He had received no update and wanted to escalate his complaint to James Hay’s Board. He wanted to be contacted by a senior manager.

33. On 24 September 2020, Mr R formally complained to James Hay and asked for a senior manager to contact him. On the same date, James Hay said that his complaint had been passed to the Customer Relations Team, who would contact him shortly.

34. On 25 September 2020, James Hay confirmed the Account’s bank details to Selftrade.

35. On 30 September 2020, James Hay told Mr R that it had chased Selftrade for an update, and that the remaining cash balance with Selftrade was in the process of being sent to the Account’s bank account. It said that the Customer Relations Team would contact him about his complaint.

36. On 6 October 2020, James Hay received confirmation from Selftrade that the other assets had been transferred in-specie to II.

37. On 9 October 2020, Mr R asked for a member of James Hay’s Board to telephone him. By 14 October 2020, he had not received a call, so he sent another message. On the same date Mr R sent a message by “LinkedIn” to James Hay’s Chief Executive Officer (**the CEO**). He received an acknowledgement from the CEO’s assistant but did not receive a response from the CEO.

38. On 14 October 2020, Mr R told James Hay that he had not received a response. On the same date, James Hay replied saying that it would arrange for the Cash to be transferred as soon as possible. It apologised, said that it was putting in place new measures and resources, and he would be contacted with an update.

39. On 15 October 2020, the following events occurred:-

- Mr R sent a message by “LinkedIn” to James Hay’s Head of In-Specie Transfers. He said that he was having another sleepless night worrying about what had happened to his money. He was concerned that he had been a victim of fraud. He asked to be telephoned with an update.

- James Hay told Mr R that his complaint had already been raised and was currently being reviewed by the Customer Relations Team. A senior member of staff had been asked to prioritise and complete the Transfer.

- Mr R contacted his financial adviser for help. He told his adviser that he was extremely worried. His adviser said that he would investigate the matter.

- James Hay has said that the Account’s bank account received £45,236.88 from Selftrade.

40. On 16 October 2020, James Hay sent the Cash, amounting to £626,919.94, to II.

41. Mr R has said that, on 20 October 2020, he found out that the Cash had been transferred. On the same date, Mr R informed James Hay that he could now quantify his financial loss from not being able to switch the Cash to Japanese Yen. He confirmed that the exchange rate at the time was £1 = ¥136.482. He also said that he wanted a refund of his platform charges from the date he had signed the James Hay Form and he wanted someone to contact him.

42. Mr R has said that by the time the Cash had been received in his II Self-Invested Personal Pension (**the II SIPP**), his view was that he had already missed out on the recovery in equity markets. So, he retained it as cash, denominated in Sterling, and waited for another market downturn.

43. On 21 October 2020, James Hay confirmed to Mr R that the Transfer had completed. On the same date, Mr R proposed a settlement to James Hay on his complaint as follows:

- reimbursement of £13,609 for his financial loss from not investing the Cash in Japanese Yen between 18 August 2020 and 20 October 2020; and

- refund of James Hay’s charges totalling £873.

44. On 26 October 2020, Mr R consulted his doctor as he was experiencing an irregular heartbeat, palpitations, and the feeling of not being able to breathe. The doctor has said that Mr R’s anxiety increased during the period of the Transfer, and that this was the likely cause of his symptoms. The doctor also said that events during this period had taken their toll on Mr R’s physical and mental health, and he confirmed that, on one occasion, Mr R had said that he had woken up at 4:00 am in a state of panic.

45. On 30 October 2020, Mr R emailed and messaged James Hay chasing it for a response to his proposed settlement. On the same date, James Hay replied to Mr R's complaint, offering to refund some of his charges, but it did not accept his proposed settlement.

46. By 29 December 2020, there had been no market downturn, so Mr R decided to invest the Cash. He carried out the following transactions in the II SIPP:

- Purchased units in the Baillie Gifford Global Income Growth Fund for £300,032.06; and

- Purchased units in the Legal & General Health and Pharmaceuticals Index Trust for £300,000.

47. He retained the balance as cash.

48. During The Pensions Ombudsman's (**TPO**) investigation, James Hay confirmed that for pension transfers, it attempted to reply to requests and queries within three to five working days, and to send final cash balances within five working days of receiving confirmation that assets have been transferred.

Mr R's position

49. James Hay caused a delay of 92 calendar days, and the Transfer should have been completed on 20 July 2020.

50. During a telephone call with Selftrade, he was told that an in-specie transfer would usually take one month. It was shocked to hear that the Transfer had taken almost five months. Mr R has said that James Hay informed him that an in-specie transfer could take up to 12 weeks but would normally take six to eight weeks. This was corroborated by other pension companies he subsequently contacted.

51. While some actions were carried out by Selftrade, he had instructed James Hay to carry out the Transfer. He believes that James Hay had overall responsibility for the Transfer, including ensuring that Selftrade carried out its actions within reasonable timeframes.

52. James Hay had incorrectly blamed Selftrade for part of the delay. Selftrade had received instructions from James Hay on 24 August 2020, and processed them on the same day. This was the first communication Selftrade had received from James Hay about the Transfer. There had been a problem raised about a fee settlement with Selftrade, which had caused a delay to the transferring of the cash balance to James Hay. Selftrade told him that it had closed his Selftrade account on 6 October 2020.

53. Having effectively "frozen" his assets, James Hay had then tried to dictate how he should invest his money by telling him that it would carry out a loss assessment after he had switched the Cash to Japanese Yen.

54. During his 30 years of working in financial markets, he had developed an expertise in Japanese equities. He had actively managed the Account, mainly in equity markets, completing £4.58 million of transactions since 2015.

55. He usually held around 10% of his pension assets in cash but due to the sale of his equity funds prior to the Transfer, it had increased to around 50%. This was why he had made it clear to James Hay that the Transfer was urgent, and this was acknowledged on 9 July 2020, when it said the Transfer would be prioritised. Since 31 December 2020, the II SIPP had less than 10% allocated to cash.

56. At the start of the Transfer process, he had wanted to invest in Japanese Yen, and as this had been the basis of his initial complaint to James Hay in August 2020, he felt that he had to continue with it while complaining directly with James Hay. However, while gathering evidence to support his complaint to TPO in May 2021, he had more fully considered how he would have invested the Cash if it had been received on 20 July 2020. Given that by then his view on equities was positive, he would have carried out the following:-

- Increased his equity allocation to his long-term average by investing in the Baillie Gifford Fund. He had previously invested £522,000 in the Baillie Gifford Fund in the Account during the period September 2017 to March 2020.

- On 20 July 2020, invested 50% of the Cash in the Baillie Gifford Fund at a unit price of £44.89, so he would have bought 6,984 units, and held the other 50% in Singapore Dollars at a rate of £1 to 1.7963 Singapore Dollars. Although he had intended to hold Japanese Yen, while reviewing his financial loss, he discovered that II did not have a Japanese Yen option, and Singapore Dollars was a reasonable alternative that was available.

- On 28 August and 4 September 2020, invested the Singapore Dollars in the Baillie Gifford Fund at an average unit price £46.20. The average exchange rate was £1 to 1.8153 Singapore Dollars, so he would have bought a further 6,643 units in the Baillie Gifford Fund.

57. In total, he would have held 13,627 units in the Baillie Gifford Fund.

58. When the Cash was received by II on 16 October 2020, the unit price of the Baillie Gifford Fund was £54.65, so his holding would have been valued at £744,715.55. As the Cash transferred was £626,919.94, he calculated his financial loss to be £117,795.61.

59. His justification for these transactions is set out in the Appendix.

60. During the period July 2020 to August 2020, the value of the Baillie Gifford Fund was broadly flat. Then, from early September 2020, it increased in value materially, until it reached a peak in early December 2020.

61. He provided evidence of his trading activity in early 2020 in his brokerage account with Interactive Brokers.

62. It had taken him around 80 hours to prepare evidence to support his complaint.

63. He was still suffering mentally and losing sleep over his complaint. He had consulted with his doctor and his heart had been monitored for irregularities for 24 hours. He believed that this was a result of the delays in the Transfer. He was subsequently diagnosed with fatty liver caused by hypertension. As his heart scan and diabetes test had been negative, his regular dizziness and headaches were caused by his medical conditions that he would have to live with.

64. He is aware of the High Court judgment in *Tenconi v James Hay Partnership [2019] EWHC 2285 (Ch)* (**the Tenconi Case**) in 2019. While the Pensions Ombudsman (**the PO**) had initially awarded £2,000 for distress and inconvenience but no financial loss, after the judgment, the PO had awarded £43,700 for financial loss. He believed that the Tenconi Case was similar to his own complaint.

65. He believed that he should receive an award of £28,000, being 2% of the value of the Transfer, for distress and inconvenience, plus financial loss. He also wanted a refund of the charges he had paid during the delay, amounting to £450. After taking inflation into account since submitting his complaint to TPO, he wanted a total award of at least £150,000.

James Hay's position

66. The Transfer should have been completed sooner but it did not agree that it could have been completed by 18 August 2020, the date Mr R told James Hay that he wanted to invest in Japanese Yen. If James Hay had acted more promptly, the Cash would have been sent to II on or around 15 September 2020, which would have allowed Mr R to switch to Japanese Yen sooner.

67. It did not provide the list of in-specie assets or request the relevant details to begin the Transfer after it had received Section A from II. It had also been slow to instruct Selftrade after receiving the details from II.

68. Selftrade had taken 21 working days to transfer the other assets in-specie to II, and a further 23 working days to return the remaining cash to the Account's bank account.

69. Communications with Mr R had been disappointing.

Adjudicator's Opinion

70. Mr R 's complaint was considered by one of our Adjudicators who concluded that James Hay was responsible for delaying the transfer of the Cash to II. The Adjudicator's findings are summarised in paragraphs 71 to 86.

71. In order to determine the duration of James Hay's delay, it was reasonable to allow five working days to carry out each action. By not issuing instructions to Selftrade until 14 August 2020, when they should have been issued by 6 July 2020, James Hay delayed the transfer of the Cash by 29 working days. There were no other actions by James Hay that contributed to the delay in transferring the Cash.

72. Some actions carried out by II and Selftrade also took longer than five working days. Mr R submitted that James Hay was responsible for the Transfer, including actions carried out by Selftrade. Page two of the Transfer Document said that James Hay would arrange the in-specie transfer and forward any remaining cash to a new provider. However, on page three it said that as it was reliant on third parties for part of the process, it could not guarantee that a transfer would be completed by a specific date. Selftrade was not part of James Hay and was selected by Mr R when he first opened the Account. Furthermore, paragraph 18 of the SIPP's Terms and Conditions says that James Hay was not responsible for any losses caused by a stockbroker. So, James Hay should not be held accountable for actions carried out by Selftrade.

73. James Hay should have transferred the Cash 29 working days earlier, on 7 September 2020. This delay amounted to maladministration, and Mr R should be put back into the same financial position he would have been in if the Cash had been transferred on this date.

74. In the Tenconi Case, the applicant missed out on an investment opportunity due to a delayed pension transfer resulting from maladministration. This case raised an issue that is referred to as the counter-factual scenario. The counter-factual is the difference between what the applicant would have done with the transfer if there had been no delay, and what the applicant actually did when it eventually arrived. This means that in order to determine whether Mr R suffered a financial loss as a direct consequence of James Hay's delay, the Adjudicator needed to consider what Mr R would have done with the Cash if it had been received on 7 September 2020.

75. When Mr R first initiated the Transfer, he had wanted to hold the Cash in Japanese Yen. When he complained to James Hay, he stated his potential financial loss in terms of the delay causing him to miss out on the appreciation of the Japanese Yen relative to Sterling. However, Mr R's view on the outlook for equities changed during the Transfer process. By July 2020, he has said that he had become much more positive about markets, so, investing in equities had become a greater priority for him than investing in Japanese Yen.

76. Mr R submitted that if the Cash had been received on 20 July 2020, he would have invested it in the Baillie Gifford Fund as follows:

- 50% on 20 July 2020;
- 25% on 28 August 2020; and
- 25% on 4 September 2020.

77. By 16 October 2020, when the Cash was received, he has said that he believed he had already missed out on the equity recovery, so he retained it as cash.

78. The Adjudicator was conscious that this scenario was with the benefit of hindsight. The case of *North Star Shipping v Sphere Drake Insurance* [2005] 2 Lloyd's Rep. 76 (**the North Star Shipping Case**)[1] was relevant here. The Court held that:

> "….such [hypothetical] evidence has to be rigorously tested by reference to logical self-consistency, and to such independent evidence as may be available."

79. Mr R provided TPO with information concerning his financial experience, which supported the view that he was an avid investor and had a good understanding of finance and investment markets. He also did not normally allocate more than 10% of his pension holdings to cash, so having 50% in cash was unusual.

80. During the period July to August 2020, when Mr R has said that he would have invested 75% of the Cash, the value of the Baillie Gifford Fund did not change markedly. He has said that by 4 September 2020, he would have invested the balance of the Cash in the Baillie Gifford Fund. From early September 2020, it increased in value materially, until it reached a peak in early December 2020.

81. It was impossible to establish with certainty exactly what action Mr R would have taken if he had received the Cash on 7 September 2020. However, the Adjudicator accepted Mr R's argument that he would have been fully invested in the Baillie Gifford Fund by 4 September 2020. The Adjudicator also accepted that Mr R would still have had the intention to invest the Cash in the Baillie Gifford Fund by the time he should have received it on 7 September 2020.

82. Mr R had an obligation to mitigate his financial position when he received the Cash on 16 October 2020. So, his financial loss was the increase in price of the units he would have bought with the Cash in the Baillie Gifford Fund, during the period 7 September 2020 to 16 October 2020, and this should be reimbursed to him by James Hay.

83. Given that Mr R did not have the opportunity to subsequently invest the additional value of the Baillie Gifford Fund, interest should be paid on the amount from 16 October 2020 to the date of the actual payment. It was appropriate for the court's judgment rate of 8% per annum (**the Judgment Rate of Interest**) to be applied to the amount.

84. James Hay should also reimburse Mr R for the platform charges he paid during the period 7 September 2020 to 16 October 2020. Interest should be added to the reimbursements calculated using simple interest and the base rate for the time being quoted by the Bank of England from the date each charge was paid to the date they are reimbursed.

[1] https://www.bailii.org/ew/cases/EWHC/Comm/2005/665.html

85. There were a number of occasions when James Hay was not prompt in responding to Mr R, and James Hay did not keep Mr R adequately updated with progress of the Transfer. This amounted to maladministration.

86. Due to Mr R’s chronic mental and physical condition, and the fact that James Hay failed to appreciate his anxiety and did not rectify the situation, James Hay’s maladministration caused Mr R to suffer serious distress and inconvenience. In recognition of this, James Hay should pay £1,000 to Mr R.

87. James Hay accepted the Adjudicator’s Opinion in respect of the duration of the delay, the rate of interest to be applied to the financial loss award and the amount of the distress and inconvenience payment. However, it did not agree with the basis of the loss calculation, and the complaint was passed to me to consider. James Hay’s comments are summarised below:-

- In the Tenconi Case, the Judge said:

  “It is perfectly possible that the PO will reach the conclusion that, on a remission, that Mr Tenconi's claim for substantive damages still fails or is a much smaller amount than he is claiming.”

- James Hay believes that the Judge intended that the PO should include consideration of when Mr Tenconi would have disinvested in the financial loss calculation. It said that it was for Mr R to provide evidence of what he would have done subsequently with the investment in the Baillie Gifford Fund. Without such evidence, the Adjudicator’s Opinion was not justified.

- In the Tenconi Case, it was noted that:

  “……….it may be necessary for a tribunal to be more sceptical than simply to accept what the investor says he would have done, and the PO should consider whether what the investor is now submitting is wholly/partially based on hindsight.”

- Also, in the North Star Shipping Case, it was held that hypothetical evidence had to be rigorously tested by reference to logical self-consistency. The burden of proof is on Mr R to demonstrate what he actually would have done had he received the Cash earlier.

- When Mr R complained to James Hay between August and October 2020, he was insistent that he wanted to convert the Cash to Japanese Yen, and he even calculated what he believed his loss to be. There was never any mention that he wanted to invest in anything but Japanese Yen, but in his submissions to TPO he says that he would have invested 50% in the Baillie Gifford Fund in July 2020. This is not consistent with what he said he wanted to do at the time.

- With the benefit of hindsight, it appeared that Mr R had changed his mind about how he would have invested the Cash. It would not be fair or reasonable to ask James Hay to compensate Mr R on the basis of a hypothetical investment, when this is not consistent with what his intentions were at the time in question.

- Converting the Cash to Japanese Yen was not an option available in the II SIPP. In circumstances where a customer has not taken swift action to mitigate losses and invest their money, and it cannot be sufficiently established what investments they might have made, James Hay considers it reasonable to use the FTSE UK Private Investor Balanced Index (**the Index**) to estimate what growth the money might have achieved had it been invested. This is widely considered to be a fair measure for most people who are looking for their investments to grow and are willing to accept some risks. Using the Index would result in a gain to Mr R of £10,156.10 during the delay period. In the event that the PO finds that the point of disinvestment is irrelevant, this amount represents Mr R's financial loss.

88. Mr R responded to James Hay's comments as follows:-

- During 2020, his preference was always to invest in Yen-based investments. He and his bank were recommending Japan at the time and developments at the end of August 2020 made him feel extremely positive about Japanese equities. There were three positive factors in particular:-

    - The resignation of Japan's Prime Minister, Shinzo Abe and the instatement of the moderniser, Yoshihide Suga, who expressed a determination to stimulate the domestic economy, digitalise Japan and increase trade with China and the United States.

    - Japan only had a small second Covid 19 peak and looked better placed than other Asian countries.

    - On 31 August 2020, Warren Buffett announced his first major investment in Japanese equities.

- He invested in the Baillie Gifford Fund on various occasions between 2017 and 2020, and his last purchase in the Account was the Baillie Gifford Fund. This was his default fund to buy when he had a positive view on Japan. He had confidence and experience in investing in the Baillie Gifford Fund. He is confident that he would have invested the Cash in the Baillie Gifford Fund on 7 September 2020.

- On 21 October 2020, he offered James Hay a settlement based on a Japanese Yen calculation. This was before he had read the Tenconi Case, and before he had understood what calculation method could be used by the PO or High Court. He had expressed a desire to be invested in Japanese Yen, although he did not specify whether it was cash or equity, but his view changed from late August 2020, when he became very positive about Japanese equities. Even if he had held the Cash in Japanese Yen on 18 August 2020, which was not possible with II anyway, he would have fully invested it in Japanese equities in late August to early September 2020. He believes that this is consistent with his investment style.

- He and his bank were still positive on Japanese equities in October 2020. When he received the Cash on 16 October 2020, he immediately looked into investing it in the Baillie Gifford Fund. However, he was put off by the sharp rally since Summer 2020, and he did not want to “chase it”, as he feared it was overheated and the risk/reward profile was not as positive as it was in late August to early September 2020. Instead, he decided to wait for a buying opportunity when the price dipped. Unfortunately, the price kept on rallying for the rest of the year, and he gave up the thought of investing in the Baillie Gifford Fund, as he believed “that boat had sailed”. Instead, he invested elsewhere in December 2020. He submitted that James Hay’s delays cost him more than the rally from 7 September 2020 to 16 October 2020, but he fully understood the parameters of the financial loss calculation.

- His offer of settlement with James Hay on 21 October 2020 included the following statement:

  > “In the event that we cannot resolve this matter without involving third parties, I reserve the right to add to my damages in terms of stress, time and inconvenience, as well as other missed investment opportunities caused by the delay”.

  He submits that this shows that he felt strongly at the time that he had been prevented from making other profitable investments.

- Apart from when he “panicked” by selling all his equity holdings at the height of the Covid 19 pandemic in March 2020, his minimum holding period for any fund in the Account was 73 days. The Baillie Gifford China B Fund (**the China Fund**) during 2017 had experienced a similar performance to the Baillie Gifford Fund in 2020. He had invested £300,000 in the China Fund on 10 May 2017, and within six months it had increased by 35%. He sold less than a third of his holding on 5 September 2017, and then similar amounts on 13 December 2017 and 27 March 2018. He fully exited in March 2020. He believes that this is clear evidence that he would not have sold his holding in the Baillie Gifford Fund prior to 16 October 2020, despite it already having achieved good growth.

- He would not have invested in the Index. He made his last UK investment in 2015, when he allocated 10% of his portfolio. His equity investments were always Asian-centred, and he has a clear track record of investing substantial amounts in Asia, and in particular Japan, where he has financial expertise and experience.

89. I have considered James Hay's and Mr R's comments, but they do not change the outcome. I agree with the Adjudicator's Opinion

Ombudsman's decision

90. James Hay agrees with the Adjudicator's Opinion, except in respect of the method of calculating financial loss that was incurred during the period of delay between 7 September 2020 and 16 October 2020. That, therefore, is the only point I consider here.

91. I accept that Mr R's original complaint to James Hay was about not being able to invest the Cash in Japanese Yen, and that up to October 2020, he continued to state that his financial loss should be linked to the change in exchange rates between Sterling and Japanese Yen during the delay period. However, while it is perhaps surprising that Mr R did not first check whether he could invest in Japanese Yen before initiating the Transfer to II, the fact is that Japanese Yen was <u>not</u> an option available in the II SIPP (and it is clear that he did not know that this was the case when making his initial, mistaken, claim to recover loss on the basis of changes in the exchange rate). On this basis, Mr R could not have invested the Cash in Japanese Yen if the Transfer had been completed on 7 September 2020. So, Mr R's financial loss cannot be linked to the change in exchange rates between Sterling and Japanese Yen. Rather, I have to ask myself what Mr R would have done had he been confronted by that investment decision, and been unable to invest in Japanese Yen, when the transfer should have completed on 7 September 2020.

92. In Mr R's subsequent submission to TPO, and after having more fully considered the actions he would have taken, he argues that by 4 September 2020[2], he would have invested all the Cash in the Baillie Gifford Fund. This was because his view on the outlook for equities changed during the Transfer process. By July 2020, he says that he had become much more positive about markets and investing in equities had become a greater priority for him than investing in Japanese Yen. So, in the Adjudicator's Opinion, if the Cash had been received on 7 September 2020, Mr R would have fully invested it in the Baillie Gifford Fund.

---

[2] The reference by Mr R to what he would have done "by 4 September" predated the conclusion, and acceptance by the parties, that the transfer should have, other things being equal, completed on 7 September 2020. While this is, obviously, before 7 September 2020, the two dates are close enough to be taken into account when judging what he would have done if the transfer had completed on 7 September 2020 (indeed, I also note that the 4th was a Friday and the 7th a Monday, and so they are consecutive business days). This is in line with the Tenconi Case, where the judge comments that "*what might have happened if the money had arrived prior to 23 June* [the date the transfer should have completed in that case] *is not part of the counter-factual, although it might be relevant evidence against which to judge what Mr Tenconi would have done if the money had arrived on 23 June."*

93. James Hay refers to the Tenconi and the North Star Shipping Cases. In particular, in the Tenconi Case, the Judge said that the PO should consider whether what the investor was submitting was based on the benefit of hindsight, and in the North Star Shipping case, that evidence had to be rigorously tested by reference to logical self-consistency.

94. That is indeed the process I have followed here. Having established that, but for James Hay's maladministration, the transfer would have completed on 7 September 2020 (a point accepted by James Hay), I now need to reach a decision on what investment decision Mr R would have made at that point. The Tenconi Case recognises that this is a factual question for the Ombudsman but emphasises that the burden is on Mr R to show what he would have done, had the money arrived on the correct date.

95. To assist in that analysis, the Tenconi Case (at paragraph 22) sets out that Mr R need not "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."

96. However, I do, as James Hay correctly point out, "need to consider whether what [Mr R] is now submitting is in part or whole based on hindsight. For example, is [Mr R] 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."

97. Clearly, Mr R would not have invested in Japanese Yen had the transfer successfully completed on 7 September 2020. That option did not exist, and so it cannot be said to be 'hindsight' that he is now arguing that he would have made a different choice, notwithstanding that it is the intention he expressed in advance of the transfer. Rather, he would have had a real choice to make on 7 September 2020.

98. Mr R had worked in financial markets for 30 years and he says that he is an expert in Japanese equities. I have no reason to doubt that. He was also an active investor in the Account, for example, he decided to sell his entire equity holding at the start of the Covid 19 pandemic in March 2020. Mr R says that he normally allocates no more than 10% of his pension holdings to cash, so holding 50% in cash was unusual. Mr R also submitted a detailed and compelling explanation to TPO of why he would have invested in Japanese equities by investing in the Baillie Gifford Fund, a fund that he had invested in before and had confidence in. Mr R's market views during this period are set out in the Appendix. So, given this and Mr R's professional background, I find it reasonable to assume that Mr R was a sophisticated investor and had detailed knowledge of investing in Japanese equities and the Baillie Gifford Fund.

99. Indeed, I am of the view that he is the sort of 'canny investor' envisaged by the Tenconi Case – one who might "…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".

100. To address the 'hindsight point', I have also asked myself why Mr R did not make the investments he said he would have done on 7 September 2020, at the point the Cash was actually received. By the time the Cash was received in the II SIPP on 16 October 2020, Mr R says he believed he had already missed out on the recovery in equity markets. So, he decided to retain it as cash, and wait for another market downturn. He eventually reinvested on 29 December 2020 in two other funds, as the market downturn did not materialise.

101. However, during the period July 2020 to August 2020, the unit price of the Baillie Gifford Fund remained broadly flat, and then from early September 2020, it started to increase materially. So, the Baillie Gifford Fund achieved strong returns during the delay period, between 7 September 2020 and 16 October 2020, and which continued to near the end of the year.

102. In Mr R's submission to TPO, he says that the II SIPP should have received the Cash on 20 July 2020, in which case he would have invested in the Baillie Gifford Fund as follows: 50% on 20 July 2020, 25% on 28 August 2020 and 25% on 4 September 2020. So, he says that he would have been fully invested in the Baillie Gifford Fund by 4 September 2020. His reasons for this are also set out in the Appendix. A fundamental event which Mr R perceived as being positive for markets, was the resignation of Japan's Prime Minister, Shinzo Abe, and his replacement by Yoshihide Suga. Mr R also says that his argument that he had a positive outlook for Japanese equities during July and August 2020 was supported by the fact that he was recommending the asset class to his clients from late August 2020.

103. I accept that it is impossible to establish, with certainty, exactly what action Mr R would have taken if the Cash had been transferred on 7 September 2020. I am also conscious that investing half of his entire pension in a single asset class and actively managed fund could be considered quite risky. However, based on his investment experience and knowledge of the Japanese market, and the advice that he and his bank were giving to their clients at the time, I accept Mr R's argument. So, on the balance of probabilities, I find that on 7 September 2020, Mr R would have intended the Cash to be fully invested in the Baillie Gifford Fund to access the Japanese equity market.

104. If it cannot be determined what exact investments would have been made by Mr R on 7 September 2020, James Hay suggested that I should use the Index as a basis for estimating Mr R's losses. However, for the reasons given above, I am satisfied that Mr R would, on the balance of probabilities, have invested in the Baillie Gifford Fund – and so I need not consider this point further.

105. James Hay said that it believes the Judge in the Tenconi Case intended that the PO should also consider in his financial loss calculation when Mr Tenconi would have disinvested. Furthermore, James Hay submits that Mr R should provide evidence of what he would have done with the investment in the Baillie Gifford Fund subsequently. Given the strong returns achieved by the Baillie Gifford Fund from 7 September 2020 onwards, it is feasible that Mr R could have decided to crystallise some profit by selling some or all of his holdings before 16 October 2020.

106. However, he said that he and his bank continued to be positive on Japanese equities into October 2020, and he said that he was more likely to have continued to hold the investment beyond 16 October 2020. Mr R has also said that he was in a similar situation in 2017 with the high performing China Fund. While he did crystallise some profits by gradually selling his holding, it was over a 10-month period, and he did not fully divest until 2020. Mr R argues that, on balance, he would have sold half his holding in late October 2020 and the balance at the end of November 2020 "when the Tokyo COVID news hit" and yet the Baillie Gifford Fund was still trading at an elevated level (and, it is noted, above the 16 October 2020 level).

107. On balance, I find that it is more likely that Mr R would have sold all of his Baillie Gifford Fund in mid-October 2020 (and not held on to half for an additional month). As Mr R himself acknowledges, the fact that he chose not to invest in the Baillie Gifford Fund when the delayed monies did arrive from James Hay indicates that the investment had become less attractive to him and suggests to me that he may have taken profit around that time. For these reasons, I find that Mr R would have held the investment in the Baillie Gifford Fund during the entire period from 7 September 2020 to 16 October 2020.

108. I agree with the Adjudicator's Opinion that James Hay's maladministration caused Mr R to suffer serious distress and inconvenience. In recognition of this, James Hay shall pay Mr R £1,000.

109. I uphold Mr R's complaint.

Directions

110. Within 21 days of the date of this Determination, James Hay shall:

a) determine how many units £626,919.94 would have purchased in the Baillie Gifford Fund in the II SIPP on 7 September 2020;

b) determine the value of these units on 16 October 2020;

c) subtract £626,919.94 from b) and pay any resulting amount, plus the Judgment Rate of Interest from 16 October 2020 to the date of the actual payment, to the II SIPP;

d) determine the platform charges Mr R paid during the period 7 September 2020 to 16 October 2020, add interest calculated using simple interest and the base rate for the time being quoted by the Bank of England from the date each charge was paid to the date they are reimbursed, and pay the amount to the II SIPP; and

e) pay Mr R £1,000 for the serious distress and inconvenience caused to him.

111. Any related costs and charges, including, but not limited to, any unauthorised HMRC charges, scheme sanction charges and the cost of determining Mr R's financial loss should be borne by James Hay.

Dominic Harris

Pensions Ombudsman
8 February 2024

Appendix

Mr R has submitted the following as justification for his financial loss calculation:

“By July 2020, I was feeling very positive about equities. Global equity markets had very much stabilised from the March shocks from the pandemic thanks to the first wave having been controlled and co-ordinated central bank and government stimulus packages. There was also evidence of heavy investment in technology and growth stocks that were seen as beneficiaries of the world changes caused by the pandemic. I believed in July 2020 (as I have done ever since) that Asian equities were the most attractive globally owing to the very low pandemic infection rates relative to those in the western world. The Baillie Gifford Fund has exposure to the growth stocks that benefit most from the ‘New World’.

I believe I would have waited before switching out of Sterling as the currency had been very weak at the start of July 2020, close to lows versus the Japanese Yen and Singapore Dollar. However, in mid-August 2020, the pound rallied. I had a strong preference for Asian currencies, based on a much lower pandemic infection rate in Asia combined with big stimulus support packages to fund in the western world, which I perceived would weaken Sterling, Euros and the US Dollar in the mid to long term. With the Hong Kong Dollar and Chinese Yuan both pegged to the US Dollar, that left me with the Japanese Yen and Singapore Dollar as liquid currencies which would be acceptable alternatives to Sterling.

At the end of August 2020, the outlook for Japanese equities, and Japanese growth companies in particular, improved dramatically. On 28 August 2020, the Japanese Prime Minister, Shinzo Abe, who had clearly become much less effectual owing to declining health, resigned. Within two days Yoshihide Suga emerged as the very likely and basically uncontested successor. This was a very positive development for Japanese equities since Mr Suga is a moderniser, expressing a determination to stimulate growth and the domestic economy and ‘digitalise’ Japan, very good for growth stocks, doing away with outdated practices in corporate Japan and making Japan the ‘easiest place in the world to do business’. Mr Suga is also seen as much more of an international diplomat than his somewhat nationalistic predecessor, which is positive for business with China and the US in particular. This all happened at a time when a very minor second wave of pandemic cases had peaked and was falling away quickly. My bank was very bullish about these developments and from late August 2020, I was telling my own clients that they should buy Japan. This conviction to buy was further enhanced by the announcement that Warren Buffet was investing $6 billion in five different Japanese companies – a new foray for this much followed investor.

This was clearly a foreseeable investment opportunity. My conviction to Japanese small caps, as evidenced by my messages to my own clients at the time, became very high and so in order to raise my equity exposure in my overall portfolio to 45%, it is reasonable to assume that I would have switched out of my remaining cash and into the Baillie Gifford Fund over the week between 28 August 2020 and 4 September 2020, as the benign political situation unfolded.”