

## Ombudsman's Determination

Applicant	Mr D
Scheme	Bryt Pension Scheme ( <b>the Scheme</b> )
Respondents	Clifton Asset Management Ltd ( <b>Clifton</b> ) Morgan Lloyd Trustees Limited ( <b>Morgan Lloyd</b> )

## Outcome

1. I do not uphold Mr D's complaint and no further action is required by Clifton or Morgan Lloyd.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mr D has complained about the information received from Clifton in respect of the assets held within the Scheme and Morgan Lloyd's decision to accept the assets.

## Background information, including submissions from the parties

4. Mr D was the director and owner of Bryt Ltd.
5. In October 2006, Clifton issued a mailshot offering alternative business funding options to which Mr D replied.
6. On 15 December 2006, Clifton wrote to Mr D explaining its proposal. It proposed that a Small Self-Administered Scheme (**SSAS**) be established and that approximately £147,000 be transferred into it from Mr D's existing pension provision. The SSAS would be administered by Morgan Lloyd Administration Services and Morgan Lloyd Trustee Limited would act as Independent Trustee. The SSAS would purchase Intellectual Property from Bryt Ltd for an approximate value of £140,000 and then lease it back to Bryt Ltd for a five-year period.
7. The intellectual property would need to be independently valued and a lease rate agreed. The suggested monthly cost was £3,360 and, once received by the Scheme, this would be invested through a suitable strategy. A sample valuation was provided for provision to Bryt Ltd's accountant. Clifton would receive £15,000 for the

arrangement, and Morgan Lloyd would be paid £110 per month in addition to £375 for administering the intellectual property purchase.

8. In March 2007, the Trust Deed and an Administration Services Agreement was established between Bryt Ltd, Morgan Lloyd, Mr and Mrs D (co trustees), and Morgan Lloyd Administration Services Limited, establishing the Scheme.
9. On 1 April 2007, Mr and Mrs D signed a Terms of Business with Clifton and a fact find document. The fact find included the following statements:

“The business has a requirement for £145,000 cash which will be used to repay the bank Lloyds and to fund business expansion.”

“Alternative funding issues were discussed... These were dismissed.”

“[Clifton] recommended an I.P. purchase of two trademarks “NAANPOT”... and “WTR”.”
10. The fact find records a further discussion:

“Meeting by telephone 12 April 2007...

[Mr D] has recently used the Bryt pension fund to transact a sale & leaseback of IP for £145,000...”
11. On 10 April 2007, a valuation report for the trademarks NANNPOT and WTR was issued by CS Consultancy, which I understand was Bryt Ltd’s accountants. This was signed by a Mr Tyrrell. It stated: -

“In this instance a figure of £145,000 would seem to be appropriate.”
12. CS Consultancy also signed a Hire Agreement, confirming: -

“... in our opinion, the above hire arrangements are based on a commercial rate of return for the pension fund.”
13. On 16 April 2007, the Morgan Lloyd, and Mr and Mrs D, signed the sale and leaseback agreement for the two trademarks discussed above. The purchase price would be £145,000 and they would be leased back to Bryt Ltd for £3,335 per month over five years.
14. On 25 April 2007, a suitability report was issued by Clifton. This effectively recommended the arrangements that had already been put in place and are described above. It included the following statements, including original emphasis:

“Morgan Lloyd (**Clifton Group Company**) to be appointed as the Independent Pension Trustee.”

“Affordability

You have stated that the costs are affordable and will remain affordable to the company now and in the future.”

“There is the possibility of a potential reduction in benefits at scheme retirement age as a result of:

...

5. The company going out of business.”

**“The Independent Trustee (Morgan Lloyd)**

...

The Independent Trustee must have the expertise, understanding and level of administration that we demand. The role of the Independent Trustee is to effectively police the scheme and all transactions They are responsible for the following:

Standard scheme documentation including initial registration of the scheme

Inland Revenue consultation/negotiation

Record keeping

Attendance at one trustee meeting per year”.

15. In June 2009, to reduce the monthly repayments, Clifton proposed that the lease be converted to a license. Additionally, the Scheme would purchase a domain name – [www.bryt.co.uk](http://www.bryt.co.uk) – from Bryt Ltd and license it back.
16. On 29 June 2009, a valuation for the license conversion and the purchase of the domain name was faxed from Tyrrell & Company Consultants LLP. This was signed by Mr Tyrrell, who had been appointed as Bryt Ltd’s Company Secretary in July 2008. An appropriate valuation of £40,000 was provided for the domain name; a revised valuation of £155,000 for the trademarks, on a license basis was also provided.
17. Two Licence Agreement Terms were drawn up, one for the trademarks and one for the domain name. For the trademarks, based on a valuation of £155,000, they would be licensed back to Bryt Ltd for £645 + VAT per month, for 59 months. For the domain name, the Scheme would purchase it for £40,000 and license it back to Bryt Ltd for £166.67 + VAT per month, for 59 months. At the end of the term, Bryt Ltd could repurchase the domain name. The license agreement was signed by Mr D and Mr Tyrrell, in his role as Company Secretary.
18. On 4 August 2009, an advice report was issued to the Trustees and Members of the Scheme. The stated objective was to raise a further £40,000 in capital for Bryt Ltd and reduce its outgoings due to market uncertainty.

19. The advice was for Mr and Mrs D to transfer further funds into the Scheme and to use those funds to purchase additional intellectual property from Byrt Ltd following an independent valuation. An error has been noted in the advice report, where it refers to intellectual property already owned by the Scheme.
20. On 26 March 2010, Savile Consultancy Ltd provided a valuation for a further trademark, "Byrt Brilliant Thinking" trademark – 2459177, to be used as security for a loan to the Bryt Ltd. I understand Savile Consultancy Ltd was not Bryt Ltd's accountant and Mr D was referred to it by Clifton. The valuation concluded, given the performance of Bryt Ltd in the previous years, that the trademark was worth £26,000.
21. On 28 April 2010, Savile Consultancy Ltd, issued a valuation report for the intellectual property, "Kinetic Energy Mint" brand, to be used as security for a loan to the company. The valuation given was £25,000.
22. On 30 April 2010, a Loan Agreement for £20,000 was signed between the Trustees and Byrt Ltd. The loan was secured against Trademark -2459177, "Bryt Brilliant Thinking", with a five year term.
23. On 3 June 2010, a suitability report was issued to the Trustees. It confirmed that there were existing licence fee arrears of £7,677.22, but that Byrt Ltd wished to borrow £12,000 from the Scheme to ease cash flow. The recommendation was for £20,000 to be borrowed. Using this Byrt Ltd would pay the arrears and have £12,000 residual to use for the business. "Kinetic Energy Mint" would be used as security and had recently been valued at £25,000 and was unencumbered.
24. On 31 January 2013, Bryt Ltd went into liquidation. A total of £248,216.82 was outstanding on the various licences and loans, but was written off by the Scheme.
25. On 2 April 2013, HM Revenue & Customs (**HMRC**) issued a notice of Assessment to Morgan Lloyd against the Scheme, for the period ending 5 April 2009. It issued a scheme sanction charge calculating the amount due as £73,850. Morgan Lloyd appealed this assessment.
26. On 4 May 2015, Mr D complained to Clifton stating: -

"...on the basis that it was an illegal scheme as it did not comply with SSAS regulations in many aspects of its set-up loan parameters, management and administration."
27. Mr D requested that the complaint be provided to Morgan Lloyd as he did not have contact details for it.
28. On 23 June 2015, Clifton and Morgan Lloyd responded. The respondents disputed that the Scheme was illegal and said that HMRC was issuing the assessment to protect its interests in case of a later tax liability arising. Morgan Lloyd was appealing the assessment. Clifton argued that the advice it had provided had met Mr D's requirements at the time.

29. Mr D subsequently made further representations arguing that the Scheme had breached HMRC's lending limit of 50% of the Scheme's assets.
30. On 18 August 2015, Clifton responded explaining that the lending had been limited to £20,000 and therefore the limit had not been breached. In respect of the advice, Clifton reiterated that it considered that the advice had been justified.

## **Adjudicator's Opinion**

31. Mr D's complaint was considered by one of our Adjudicators who concluded that no further action was required by Clifton or Morgan Lloyd. The Adjudicator's findings are summarised briefly below: -
  - The Adjudicator initially clarified that this Office could not consider the suitability of the advice provided by Clifton as it does not fall within the Office's jurisdiction. This Office could however consider whether the factual information provided was accurate.
  - There were certain inaccuracies in the suitability reports, but these did not influence the outcome of the complaint.
  - Intellectual property is a legitimate investment for a pension scheme, and is not in itself contrary to HMRC investment rules.
  - The HMRC assessment of the Scheme centred on the valuation of the intellectual property, but had not recently been progressed. Regardless of that, this Office could reach a view on the complaint.
  - The Adjudicator could see no evidence that the Scheme was being operated 'illegally' as suggested by Mr D. The information provided by Clifton in respect of the Scheme's investments was factually correct and the Adjudicator could not see that the complaint about Clifton could be upheld.
  - Morgan Lloyd, as the independent trustee, had received written advice in accordance with Section 36 (3) and (4) of the Pensions Act 1995 when accepting the investments. Although the suitability reports were issued after the transactions had occurred, that was an acceptable approach as per the Financial Conduct Authority's guidelines, COBS 9.4.4.
  - The Adjudicator acknowledged that there appeared to be a close correlation between the sums required by Bryt Ltd and the valuation of the assets. There was also a compressed timeline between the valuation happening and the transaction going ahead. This raised questions about the process, and suggested that the valuation was a formality, with a preconceived asset value, rather than a genuine independent valuation.
  - The Adjudicator also doubted the independence of the 2009 valuation as the individual valuing the asset was also Bryt Ltd's Company Secretary.

- However, the Adjudicator's concerns over the valuations were balanced against Mr D's position as a Trustee of the Scheme and Director of Bryt Ltd. Mr D had not objected to the valuations despite the Company Secretary's possible conflict of interest and, as a Trustee, he had the same responsibilities as Morgan Lloyd.
  - In respect of the 2010 loan, the suitability of lending to a company that was already failing to meet its obligations seemed questionable, but formal financial advice had been received and Mr D accepted the recommendation. In these circumstances it could be said that Morgan Lloyd should have stopped the loan going ahead.
  - There was a possible conflict of interest between Clifton and Morgan Lloyd as associated companies, but it was disclosed at the outset and a conflict does not automatically equate to a poor outcome. Mr D was able to make an independent decision whether to proceed.
  - Mr D was best placed to assess the risk the Scheme was taking by continuing to invest in Bryt Ltd. The suitability reports explained that this was a high risk strategy and Mr D was a moderate risk investor, but that discrepancy was a question of suitability, and not something this Office could address.
  - Whilst the outcome of the approach was unfortunate, Mr D must have understood Bryt Ltd's finances and prospects. If he did not think the valuations were realistic, or the repayments affordable for Bryt Ltd, he ought to have declined the advice and acted in the interests of the Scheme as a trustee.
32. Mr D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr D provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr D for completeness.

### **Ombudsman's decision**

33. Mr D maintains his concerns over the advice received and the valuations provided.
34. Mr D highlights the closeness between the target figures and the valuations eventually given for the assets, suggesting that the target figure was essentially given to the valuer to be endorsed. Whilst I agree with the point Mr D has made, and it seems unlikely that the valuations were robust and independent, I cannot ignore Mr D's involvement. Mr D agreed to the appointment of his accountant for purposes of providing the valuation; and, questionable valuations would have been just as doubtful at the time as they are now.
35. It is arguable that if Mr D pressed this argument, this Office would need to conclude that the complaints had been brought out of time because he had reason to know that the valuations were questionable at the time. But putting that aside, Mr D was the

Director of Bryt Ltd and the creator of the assets. I consider he ought to have had an idea whether the valuations were appropriate.

36. I appreciate Mr D was reassured by the advice he was receiving, and Clifton may have promoted the approach to pension investment with ambitious claims. I also accept these types of arrangements are complex. But the suitability of the advice is not something I can assess, and Mr D was the most appropriate person to conclude whether the valuation was realistic and whether the repayments were affordable.
37. However, without making any finding on the quality of the advice, it may also be that the advice was suitable and that the losses stem from the failure of the business. I cannot ignore the fact that, whatever the suitability of the advice, Mr D has in effect had the benefit of these funds through the continued funding of his business. It would not be just for him to benefit from these funds twice if I were to direct Clifton or Morgan Lloyd to redress the pension scheme's loss.
38. Therefore, I do not uphold Mr D's complaint.

**Anthony Arter**

Pensions Ombudsman  
20 June 2018