

## Ombudsman's Determination

Applicant	Mr S
Scheme	Hornbuckle SIPP ( <b>the Plan</b> )
Respondent	Embark Services Limited, trading as Hornbuckle ( <b>Hornbuckle</b> )

## Outcome

1. I do not uphold Mr S' complaint and no further action is required by Hornbuckle.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mr S' complaint against Hornbuckle is that it failed to make him aware that by paying to the Plan a compensation payment received from the Financial Services Compensation Scheme (**FSCS**), he would incur a tax charge and would lose Fixed Protection 2014 (**FP14**). Mr S considered that Hornbuckle had been negligent and had not treated him fairly.

## Background information, including submissions from the parties

4. Mr S was a solicitor. When he joined the Plan he received a copy of Hornbuckle's terms and conditions. He paid substantial contributions to the Plan over several years. In February 2014, he applied for FP14 (in order to give himself a protected lifetime allowance of £1.5m) as he was retiring and was not intending to pay further contributions to the Plan. When Mr S received his FP14 certificate from HM Revenue & Customs (**HMRC**) in December 2014, he did not inform Hornbuckle.
5. In 2015, Mr S and Hornbuckle, as the Plan trustees, successfully applied for £50,000 compensation from the FSCS for poor investment advice received which had led to a failed investment.
6. In April 2015, FSCS told Mr S that the compensation payment would be sent to Hornbuckle by cheque, and asked Mr S who the payee should be. Mr S asked for the payment to be made to the Plan.
7. Hornbuckle told Mr S in an email dated 6 May 2015 that a Third Party Contribution Form H104 (June 2014 version) which it attached would need to be completed and

returned. Mr S completed all sections of the form himself and returned it to Hornbuckle about one hour later (even though it stated that his financial adviser should complete section 7 – Verification of identity). In section 2 - “Employment status” Mr S wrote that he was not employed and was “retired, not drawing pension”. In section 6 – “Source of funds” he wrote “Compensation payable by FSCS arising out of failed Arch Cru investment”.

8. In a letter to Mr S dated 19 May 2015, Hornbuckle said “I can confirm that a contribution of £50,000 was received by cheque into the pension scheme account on 01 May 2015...A tax reclaim of £12,500 has also been requested in accordance with HM Revenue & Customs rules.”
9. Hornbuckle sent Mr S a pensions savings statement in September 2016, which showed a gross contribution of £62,500 for the tax year ending on 5 April 2016.
10. Mr S queried this with his financial adviser, and in November 2016, the financial adviser told him that his FP14 status might have been lost as a consequence of the payment made.
11. When Hornbuckle was informed of this, it told the financial adviser that it was previously unaware that Mr S had obtained FP14 status; it said that it was his responsibility to notify Hornbuckle about it. Hornbuckle also said it could refund up to £3,600 gross, as that amount would have been a permitted contribution in any event, but it could not refund all the payment as it was not a genuine error for HMRC purposes.
12. In December 2016 Mr S asked Hornbuckle to write to HMRC, to unravel the payment made and to return the excess tax relief to HMRC. Hornbuckle replied that it was unable to do this for him as the payment was made under his control and therefore did not constitute a genuine error.
13. Mr S wrote to HMRC on 1 February 2017, saying that a genuine error had been made by Hornbuckle, and asking for the transaction to be unwound so that his FP14 status could continue.
14. In its reply dated 10 April 2017, HMRC confirmed that the payment of £50,000 was not a tax relievable pension contribution; it was an “impermissible transfer” for the purposes of the Finance Acts; HMRC said that the payment breached the FP14 requirements, so in accordance with the legislation, FP14 status had been lost; Mr S could apply for Fixed Protection 2016 (**FP16**) in order to give himself a lifetime allowance of £1.25m.
15. In June 2017, after discussions with Hornbuckle, £47,120 was repaid to Mr S and the “excess” tax relief of £11,780 was repaid to HMRC.
16. On 19 June 2017, Mr S sent a formal complaint to Hornbuckle, seeking recovery of £62,500 (equal to tax of 25% on the difference between the lifetime allowances of £1.5m under FP14 and £1.25m under FP16).

17. On 29 June 2017, Hornbuckle replied that it was Mr S' responsibility to notify Hornbuckle of his FP14 status; the FP14 application form explained that FP14 would be lost if any contributions were made after 5 April 2014; Mr S had declared on the form that he had sufficient earnings and Hornbuckle had no responsibility to conduct an earnings check; it was an individual tax matter for Mr S to resolve with HMRC; Hornbuckle could not refund more than had already been refunded, and the tax relief obtained incorrectly had been returned to HMRC.
18. In a letter to Hornbuckle dated 6 July 2017, Mr S pointed out that it was clear from the way he had completed the Third Party Contribution Form that he had no income, but Hornbuckle had failed to investigate this further; Hornbuckle had not scrutinised the completed form sufficiently as shown by the fact that he had completed section 7 himself although the explanatory note said it was to be completed by his financial adviser. Mr S also said that Hornbuckle owed him a fiduciary duty of care; its contribution forms in previous years had included a warning about losing protection but the form he was asked to complete in 2015, did not contain that warning, and he noted that a warning had been added in a later version, dated January 2016.
19. In its reply dated 17 July 2017, Hornbuckle pointed out that unused annual allowances from several earlier tax years could be used in order to pay further contributions; it said it had no duty to keep Mr S updated about changes to pensions legislation or to highlight lifetime allowance issues.
20. Mr S then contacted us, appointing his financial adviser as his representative. Mr S sought compensation for his perceived loss of £62,500 and the stress that he had been caused. In its formal response to the complaint, Hornbuckle said that it was unaware of Mr S' FP14 status until December 2016, or January 2017, because Mr S (or his financial adviser) had not sent Hornbuckle a copy of his FP14 certificate; his financial adviser was aware that Hornbuckle had not received those details; it was the responsibility of Mr S and his financial adviser to comply with HMRC's contribution limits, and not Hornbuckle's duty to give him financial advice.
21. Hornbuckle confirmed that after it had been established that there were no earnings to support the payment of £50,000, it had been able to refund most of it, keeping the maximum permitted amount of £2,880 (£3,600 gross) in the Plan.
22. Mr S' financial adviser commented that Hornbuckle had failed to tell Mr S that the compensation payment would be treated as a member contribution, and failed to make checks on Mr S' relevant earnings; the Third Party Contribution Form did not refer to the risk of losing FP14; Hornbuckle's negligence and poor administration processes had caused Mr S a loss of £62,500 because FP16 was less valuable to him than FP14.

## Adjudicator's Opinion

23. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by Hornbuckle. The Adjudicator's findings are summarised below:-
- As a consequence of the payment of £50,000 to the Plan in 2015, Mr S had lost his FP14 status, and most of the payment later had to be refunded to Mr S, so there was no dispute that a problem had occurred.
  - Although Mr S was a solicitor, he was not a pensions or tax expert. However, he applied for FP14 himself, showing that he had a reasonable awareness of the tax implications of making further contributions to the Plan. Mr S was not legally obliged to inform Hornbuckle or his financial adviser when he obtained a FP14 certificate in December 2014, but it would have been prudent for him to do so.
  - In the Adjudicator's view, the main difficulty in upholding the complaint was that Mr S should have remembered that he had obtained a FP14 certificate in May 2015, when he corresponded with Hornbuckle about the proposed payment to the Plan, and he should have informed Hornbuckle accordingly. Unfortunately, he did not do that, so Hornbuckle did not know that he had FP14 status. Therefore, it was not Hornbuckle's fault that the payment was made to the Plan, as Mr S directed, and consequently Mr S' FP14 status was lost.
  - Mr S had claimed a loss of £62,500. This represented 25% of the difference between the protected lifetime allowances of £1.5m under FP14 and £1.25m under FP16. However, Mr S had not yet drawn his retirement benefits, so he had not yet incurred a lifetime allowance charge. Whether he incurred such a charge in future would depend on the law in force at the applicable time. Therefore, at this stage, any loss was hypothetical, not actual. The Adjudicator noted that I do not award compensation for hypothetical losses.
  - It was therefore the Adjudicator's opinion that this complaint should not be upheld.
24. Mr S did not accept the Adjudicator's Opinion, and the complaint was passed to me to consider. Mr S 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 S for completeness.
25. Mr S reiterated several points. He said that Hornbuckle did not inform him or his financial adviser that the compensation payment would be treated as a relievable member contribution; he thought that Hornbuckle should have checked whether he had relevant earnings to justify making the contribution to the Plan. Mr S also queried Hornbuckle's duties as a SIPP provider. Mr S also said that he was not a sophisticated investor, and had no idea of the complexities surrounding the reinvestment of a compensation payment, so it was unreasonable to place this responsibility on him personally; he considered that Hornbuckle owed him a duty of care which it had breached.

## Ombudsman's decision

26. It was unfortunate, to say the least, that Mr S (or his financial adviser) did not inform Hornbuckle in 2014 or 2015 that he had obtained FP14 status. Mr S' problems arose from that omission.
27. Hornbuckle's role is to act as SIPP administrator, and its responsibilities towards Mr S are set out in the terms and conditions document that, as a member of the Plan, Mr S had signed up to. The following provisions are relevant to the points that Mr S has raised recently:
- Section 1 states under the heading "Important" "We do not provide any investment management or advisory services under these terms and conditions."
  - Section 6 requires the member to appoint a financial adviser, and says "The Financial Adviser can provide you with financial advice about the suitability of using the plan and with administration and implementation services related to the investment of and decisions about your plan."
  - Section 7.2 says "You authorise us and the independent trustee: to rely on, and treat as fully authorised and binding on you, any decision or instruction which purports to have been given by you without further enquiry by us..."
  - Section 8.3 states that "We will claim the basic rate tax relief from HMRC on the contributions made by you or on your behalf."
28. I am satisfied that under these provisions Hornbuckle had no responsibility to check whether Mr S had relevant earnings in 2015, and it did not have a duty to give him advice on contribution restrictions or tax implications. Those are matters for a professional financial adviser or tax consultant. Hornbuckle was entitled to act on Mr S' instructions.
29. A member of a SIPP has more onerous responsibilities than a member of a stakeholder or group personal pension plan, hence Hornbuckle's requirement in its terms and conditions that Mr S should appoint a financial adviser to give him financial advice.
30. I note that Mr S considers that he is not a sophisticated investor, but he was confident enough to complete and return the Third Party Contribution Form, without recourse to his financial adviser, about one hour after he received it from Hornbuckle.
31. In addition, I cannot find that Mr S has suffered a financial loss as a consequence of authorising the compensation payment to be made to the Plan. As Mr S has not yet drawn his benefits from the Plan a lifetime allowance charge has not been triggered, and it is unclear whether Mr S will become liable for such a charge in future as that will depend upon the law in force at the relevant time. I do not award compensation for losses that have not yet occurred.

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32. Therefore, I do not uphold Mr S's complaint.

**Anthony Arter**

Pensions Ombudsman

30 November 2018