

Ombudsman's Determination

Applicant	Mr Y
Scheme	Barnett Waddingham SIPP (the SIPP)
Respondents	Barnett Waddingham (BW)

Outcome

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

Complaint summary

3. Mr Y has complained that BW failed to carry out sufficient due diligence when he transferred £174,000 from the SIPP to the Salmon Enterprises Pension Scheme (**the Scheme**).

Background information, including submissions from the parties

4. Mr Y took out the SIPP with BW in November 2006 and transferred additional funds from his occupational pension scheme into the SIPP in March 2010.
5. During the period between late 2009 and early 2010 Mr Y attended presentations by Wightman Fletcher McCabe (**WFM**) on possible property investments. Mr Y says WFM claimed that it had devised a method whereby assets in a pension scheme could be used to fund other investments, including residential investment properties which would normally be excluded from investment in a pension scheme, via a bespoke pension trust. WFM further explained that the bespoke pension trust could make loans to a trading company set up by the investor in order to make these alternative investments.
6. Mr Y was interested in this type of property investment and at a further meeting with WFM he was advised that:
 - the Scheme was both legal and tax efficient. It was not against the law and would not result in any tax charge.

- The loan funds would be received by Mr Y in a personal capacity and he would not be required to set up a trading company.
 - The loan funds could be used to fund deposits on investment properties.
 - The loan had to be regarded as being made on commercial terms.
 - WFM charged an initial fee of £1,000 and £700 a year. WFM also charged 1% of the value of monies transferred into the Scheme.
7. Mr Y therefore agreed to transfer £174,000 from the SIPP to the Scheme. The transfer was completed on 16 June 2010. Mr Y subsequently received a loan from the Scheme of £144,944. The balance of the funds remained in the Scheme and was invested in foreign exchange. The balance of funds has also been lost.
8. In March 2015 Mr Y received a demand from HMRC for a tax charge of 55% on the money loaned to him from the Scheme.
9. Mr Y and his representatives say that the Scheme was a fraudulent pension liberation scheme and at the time of the transfer, the Scheme's administrators Tudor Capital Management Limited (**TCM**) was being investigated for fraud. Subsequently the directors of TCM were arrested in 2010 and were jailed for fraud and tax evasion in 2013.
10. Mr Y says that TCM wrote to BW on 11 June 2010 requesting the transfer and enclosed details of the Scheme including the fact that a Mr Lau was a trustee. Mr Lau was the regulated financial adviser at WFM who had advised Mr Y of the benefits of the Scheme and the advantages outlined in paragraph 8 above.
11. Mr Y and his representatives have received a copy of BW's file and say that this shows that BW conducted a search of HMRC's online register on 11 June 2010 which confirmed that TCM were the administrators. It appears that other than checking the register BW did not carry out any further investigation into the employer Salmon Enterprises (UK) Limited, the Scheme or TCM. If BW had carried out the most cursory or basic checks it would have identified that there were several extremely concerning features of the Scheme including:
- Salmon Enterprises (UK) Limited was incorporated in August 2009 and there was no evidence of any trade being carried out. Mr Y was not an employee of the company.
 - Mr Lau was a trustee of the Scheme, the company secretary and sole shareholder. He was also the financial adviser who recommended the Scheme to Mr Y, a clear breach of his fiduciary duty. There was a clear conflict of interest in Mr Lau acting as both Mr Y's financial adviser and receiving commission on the transfer and acting as a trustee and officer of the employer.
 - The Pensions Regulator had published a determination notice dated 15 April 2010. The notice said that TCM had been suspended from exercising any

functions as a trustee of any trust scheme pending consideration of proceedings against it for an offence involving dishonesty or deception.

- The directors of TCM were specifically named as being affected by the notice.
- BW was not provided with any of the Scheme documentation and did not request this. It is therefore difficult to understand how BW concluded that the Scheme complied with the requirements of an occupational scheme and the relevant tax legislation.
- If BW had taken the six months allowed to investigate the Scheme, it would have been aware of the final notice issued by the Pensions Regulator on 23 June 2010 confirming the suspension of TCM and its directors.
- BW owed Mr Y a duty to act with due skill and care as could reasonably be expected from a reasonably competent SIPP operator.
- BW were under an obligation to comply with its regulatory obligations. Under the then FSA's Principles of Business and Principles 2,3, 6 and 10 BW had a duty under:
 - (a) Principle 2 - to conduct its business with due skill and diligence;
 - (b) Principle 3 - to take reasonable care to organise and control its affairs responsibly and effectively with adequate risk management systems;
 - (c) Principle 6 – to pay due regard to the interests of its customers and treat them fairly; and
 - (d) Principle 10 – to arrange adequate protection for clients' assets when they are responsible for them.

The risk of pension liberation was well known in the pensions industry in 2010 and BW was required to have appropriate risk management systems and controls in place to address the risk of financial crime and be able to demonstrate that a risk assessment is undertaken regularly.

12. Mr Y says he should be awarded the following compensation:

- (a) £29,056 in respect of the amount that remained in the Scheme plus the return that he would have earned on the investment if he had received appropriate advice; and
- (b) The potential tax liability of 55% in respect of the sum loaned to him. The current sum sought by HMRC is £89,265.90. This is subject to an appeal that will be heard by the Tax Tribunal.

BW's response

13. BW say it is always difficult to review actions that were taken several years ago and is mindful of what was expected in 2010 compared to current practice. BW did obtain evidence that the Scheme was correctly approved by HMRC and its rules allowed for the transfer to be paid by the trustees who were Mr Y and the trustee company, BWSIPP Trustees Limited. As co-trustee Mr Y would have been a signatory to the cheque for the transfer payment. At that time, it was not industry practice for further research to be carried out.
14. BW is aware of the Pensions Ombudsman's decision in PO-13268 where a Mr S complained against Equitable Life in respect of a transfer that was made to the Scheme in September 2010. As stated in that decision "it was not until February 2013 that industry good practice changed and more rigorous due diligence on transfers became typical". It is now known that Tudor Capital or TCM had been suspended by the Pensions Regulator, but BW would not have been aware of this fact as the Ombudsman confirmed in PO-13268 that the Pension Regulator did not publicise its determinations until 2014.
15. BW believes its due diligence was of a typical industry standard in 2010 and therefore the complaint should not be upheld.

Adjudicator's Opinion

16. Mr Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by BW. The Adjudicator's findings are summarised below.
17. It is clear that Mr Y was a victim of a pension liberation scam and is now faced with a tax demand from HMRC in respect of the loan that he received. Mr Y and his representatives argue, in effect, that if BW had carried out a greater degree of due diligence then the transfer would not have taken place and Mr Y would not now be facing a large tax demand.
18. The question of the level of due diligence that should be carried out by providers in respect of transfers before 2013 has been the subject of a number of determinations by the Pensions Ombudsman and BW has referred to complaint number PO-13268 which concerned a similar transfer to the Scheme in September 2010. The applicant in that case made a number of similar arguments and it is useful to reflect on what the Adjudicator and Ombudsman concluded in that complaint.
19. The Ombudsman agreed with the Adjudicator's Opinion and the following are an amalgam of both their findings:
 - "Under current case law, where an individual has a statutory right to transfer, the transferring scheme is obliged to process the transfer despite any concerns it might have about the quality of the receiving scheme. The Adjudicator could see no reason to conclude that Mr S did not have a statutory right to transfer.

- Mr S' transfer request was made in 2010. It was not until February 2013 that industry good practice changed and more rigorous due diligence on transfers became typical. At the time of Mr S' transfer, expectations on the extent of due diligence undertaken on transfers were lower.
- The Salmon Scheme was able to provide its Pension Scheme Tax Reference (**PSTR**), evidence that it was registered with HMRC, and it declared that it would provide benefits in accordance with the relevant legislation. Normal industry practice, at that time, was to ensure that these requirements were met by the receiving scheme. The Adjudicator did not take the view that Equitable Life was required to do more.
- The Adjudicator accepted that by the time of the transfer Tudor Capital had been suspended by TPR, but that Equitable Life could not have been aware of this fact as TPR did not publicise its Determinations until 2014. So, this fact was unknown to Equitable Life.
- The Adjudicator also accepted that there was a discrepancy in the business Mr Ray was representing. Initially he appeared to act for the IFA, but later acted for the administrator of the Salmon Scheme. The Adjudicator noted that Mr Ray did not appear to have represented himself to Equitable Life, as acting for the IFA at any time, so it could not have picked up on this possible discrepancy. But even if he had, and Equitable Life noticed that he had acted for both the IFA and the administrator, such a change in role could easily be explained and this would not have been sufficient for Equitable Life to have blocked the transfer.
- Queries were raised by Equitable Life on whether the Salmon Scheme allowed unsecured pension arrangements and whether it could accept the transfer. The Adjudicator noted that there was no reason the Salmon Scheme could not have provided an unsecured pension facility, and once it had confirmed this point to Equitable Life, there was no obstacle to the transfer. Although Equitable Life could have requested sight of the Salmon Scheme rules to investigate this issue further, such a request was not typical and there was no reason for it to further question what it was being told.
- The Adjudicator acknowledged that Equitable Life could have written to HMRC to check the status of the Salmon Scheme. However, such a request was not standard due diligence in 2010, and Equitable Life had no reason to doubt the Salmon Scheme's registration given that evidence of registration had been provided, the Adjudicator could not see any reason for Equitable Life to question the status of the registration at the time.
- Further, even if HMRC had been contacted, whilst Tudor Capital had been suspended from acting as a Trustee, it was only acting as administrator for the Salmon Scheme. In these circumstances the Adjudicator was not persuaded

that the Salmon Scheme would necessarily have been deregistered by HMRC in 2010.

- Mr S reiterates the confusing relationships between Wightman Fletcher McCabe; Wightman Fletcher McCabe Ltd; and Tudor Capital, whose employees appear to be interchangeable, and implies this ought to have been considered more thoroughly by Equitable Life. Whilst I appreciate the argument, I am not persuaded that Equitable Life ought to have identified the fact that Mr Ray appears to have been acting for both the IFA and administrator.
- Mr S suggests that the Adjudicator takes the stance that the complaint should not be upheld because there is collective negligence between Equitable Life, TPR the FCA, HMRC and the Financial Services Compensation Scheme, and it would be impossible to blame Equitable Life specifically. Without commenting on the actions of the other bodies, I cannot identify any negligence or maladministration on the part of Equitable Life. It followed typical due diligence procedures at the time and acted on Mr S' request to transfer in an appropriate manner. Whilst there are oddities surrounding the transfer, which I have referred to, I do not find that Equitable Life would have been aware of both of the odd features, and unfortunately, it is only with hindsight and in the knowledge that the Salmon Scheme was a pension liberation vehicle that they stand out. Therefore, I am not persuaded that they were sufficient for Equitable Life to have undertaken additional due diligence, and as established in the case of *Hughes v Royal London*, any such concerns would not take precedence over Mr S' statutory right to transfer."

20. In the Adjudicator's view the conclusions reached in PO-13268 equally apply to Mr Y's complaint. The level of due diligence that BW carried out to confirm HMRC's registration of the Scheme was typical of the time. Although Mr Y and his representatives make much of the suspension of TCM by the Pensions Regulator, this information was not widely available as the Pensions Regulator did not issue its determinations until 2014, several years after the transfer had taken place.
21. Mr Y had requested a transfer and TCM had provided BW with the details of the Scheme's registration which BW checked independently. As the Scheme was properly registered and Mr Y had given his agreement to the transfer then BW had established that Mr Y had a right to a transfer.
22. Mr Y and his representatives have referred to a number of other checks that BW could have carried out, namely to research the background of the Scheme's sponsor, Mr Y's employment status with the sponsor and the relationship between the Trustee and TCM. These are all checks that have been recommended by the Pensions Regulator since February 2013 but were not common practice in 2010. The Adjudicator was of the view, on the balance of probability, that even if BW had carried out these checks and raised its concern with Mr Y over the Scheme sponsor it is unlikely that Mr Y would have taken a separate course of action. The fact that Salmon

Enterprises (UK) Limited had been only been established in 2009 would have been explained by Mr Lau as consistent with the new product that was being promoted.

23. Mr Y has also referred to the FSA's Principles of Business and questioned whether BW had adhered to these principles. The FSA's Principles of Business primarily apply to assets held within a firm's control. This complaint is more concerned with what happened to Mr Y's assets once they were transferred to the Scheme. The Adjudicator had seen no evidence that BW failed to maintain adequate risk management systems and controls whilst the assets were under its control. The level of due diligence BW carried out in respect of the transfer was reasonable at the time and whilst the Adjudicator had sympathy with the position that Mr Y now finds himself in, he did not consider that the fault for this lay with BW.
24. Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr Y has 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 Y for completeness.
25. Mr Y says that there is a clear distinguishing factor between this complaint and Mr S. Mr Lau was a qualified IFA and the principal of Wightman Fletcher McCabe and also an officer of Salmon Enterprises UK Limited (the sponsoring employer). That information was publicly available on FSA register and companies house. Even the most cursory of checks by BW would have revealed this clear conflict of interest and the obvious risk that this was a fraud.
26. Additionally, as a SIPP operator, BW were required to take into account the FSA principles of business in operating its business. The FSA rules/guidance make specific reference to pension liberation. To suggest that BW were only required to have regard to the risk of pension liberation in relation to assets held within the pension but were able to disregard such risks when agreeing to transfer out of a scheme is nonsensical.

Ombudsman's decision

27. Mr Y has said that there is a clear distinguishing factor between this complaint and Mr S and that if BW had carried out checks on the FSA register and with Companies House it would have picked up on Mr Lau's conflict of interest and that this was a potential fraud. But I find that is to view the position on the current standard of due diligence as opposed to the standard of practice in 2010. The industry standard at that time was to check that the new Scheme was registered with HMRC which BW did. It did not extend to checking for adviser conflicts.
28. Similarly, I find Mr Y's comments regarding BW's duty to comply with the FSA's principles of business to be based on hindsight and current practice and not the standard practice in 2010. I agree that the dangers of pensions liberation were known in 2010 but as highlighted in paragraph 19 above there were no particular aspects or features of the Scheme which would have indicated to BW at the time that it was a pension liberation vehicle. I agree that the Principles apply to the standard of

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diligence exercised over the transfer, but I do not consider that BW's actions fell below the standards of the day.

29. Although I have every sympathy for the position that Mr Y now finds himself in I do not find that the complaint has been proven against BW. Therefore, I do not uphold Mr Y's complaint.

Karen Johnston

Deputy Pensions Ombudsman
2 October 2019