

Ombudsman's Determination

Applicant	Mr N
Scheme	Bank of America Merrill Lynch UK Pension Plan (the Plan)
Respondents	Bank of America Merrill Lynch UK Pension Plan Trustees Limited (the Trustee), Capita

Outcome

1. Mr N's complaint against Capita is partly upheld. The complaint against the Trustee is not upheld. To put matters right (for the part that is upheld), Capita shall pay Mr N £1,000 in respect of the serious non-financial injustice it has caused.

Complaint summary

2. Mr N's complaint is that Capita, the administrator of the Plan, gave him incorrect information that Equitable Life, the Plan provider, could not carry out his instructions to sell his holding in the Far Eastern Fund (**the Fund**) in the manner that he wanted to.

Background information, including submissions from the parties

3. Mr N contacted Equitable Life, in early April 2015, to find out about selling his units in the Fund to allow him to take advantage of the new pension freedoms. Equitable Life told him he had to provide any instructions via Capita.
4. Mr N says that he called Capita on 10 April 2015 and asked it to relay a series of automated orders to Equitable Life, for the coming week to reduce his investment in the Fund (the **Contingent Order**). Mr N says that this is where one order is placed leading to stock being sold in tranches over a period of time. Capita called him back later in the evening, after markets had closed, to say Equitable Life would not accept a Contingent Order. Mr N says Capita induced him to consider making a series of daily separate orders (the **Separate Order**) to mimic the Contingent Order.
5. On 12 April 2015, Mr N emailed a letter to Capita containing an instruction to sell 6,877.311 units of the Fund (the **First Order**). He said, "I will seek to sell the remainder of the holding (of the remaining 20,000 shares) in several further sales within the next week or so".

6. Mr N says he then discussed this with Capita on 13 April 2015. He wanted to spread the sale of the units to smooth out any fluctuations in the unit prices. He asked Capita to look into how this could be done and what the applicable unit prices would be. He said Capita told him, after calling Equitable Life, that the price would be that day's price, as long as the order was received before 5pm. Mr N then asked Capita to proceed with the First Order before the deadline of 5pm.
7. Mr N has provided correspondence from Equitable Life in which it confirmed that it received a call from Capita on 13 April 2015. During this call, Capita said that Mr N had called over the weekend to ask about switching from the Fund into cash. According to Equitable Life, Capita said:-

“Apologies, we have not done a lot with the AVC plans for quite a while now and any knowledge has passed away. [Mr N] has contacted us over the weekend asking us to make an urgent transaction basically moving one of his investments in the Far Eastern Fund in to cash. I just wanted to check, because he is very time sensitive on this, how we can go about passing that instruction on to you”.
8. Equitable Life says that it confirmed the instruction should be in writing and Capita agreed to email the instructions.
9. Capita placed the First Order with Equitable Life on 13 April 2015. Mr N asked for confirmation of the sale as he wanted to know the unit prices used.
10. The next day, Mr N says that he spoke with Capita to request confirmation of the previous day's sale, but Equitable Life was unable to provide it. He put off making a further sale instruction in the meantime as he says Capita informed him that Equitable Life had said the First Order had used the next day's unit prices. Mr N was disturbed by this as he had expected the same day's prices, but said he would go ahead with selling another tranche of units.
11. Mr N placed another instruction to sell 5,000 units from the Fund on 15 April 2015 (the **Second Order**). Subsequently, Mr N decided to await confirmation of the sale for the Second Order before going ahead with any further trades. Capita received confirmation of the Second Order on 28 April 2015 from Equitable Life, which Mr N was very unhappy about. Mr N says that, by this time, the unit price had fallen further and he faced making a loss if he carried on with the trades.
12. Mr N wrote to Capita on 17 June 2015, complaining about the service he had experienced from Equitable Life. He said that he had intended to sell his holding in the Fund over the course of the week commencing 13 April 2015. By selling over the course of the week, he would eliminate the risk of selling the Fund on a “bad day” if the markets took a downturn. He said that Capita had asked him to put the order for Monday 13 April 2015 in writing. Mr N said that he delayed subsequent switch requests because Equitable Life was unable to provide prompt confirmation of the previous sale values. He said he hoped the unit prices would improve but, even weeks later, the Fund seemed to be in a downward trend. He was now under a time

constraint to realise cash from the units to allow him to utilise the pension freedoms and take his tax free lump sum. Mr N said he wanted to complain to Equitable Life about his losses.

13. Mr N then sent a letter dated 29 June 2015 to Capita instructing it to switch the remaining 15,000 units (7500 units on each consecutive day) from the Fund to cash (the **Third and Fourth Order**). He noted that the previous confirmation letters from Equitable Life said: "The terms for switching are not guaranteed".
14. Mr N complained to Equitable Life on 1 July 2015. Mr N says that he sold out his position for less than he would have received had the Contingent Order been accepted. He mentioned his email to Capita explaining what he was trying to achieve by selling the units in the Plan.
15. Equitable Life wrote to Mr N on 10 July 2015 and did not uphold the complaint. Equitable Life apologised for incorrect information given to Capita on 15 April 2015, when it said that Mr N would receive the unit prices for the same day as his switch request. Equitable Life said that switch requests received before 5pm are processed using the next day's prices. It confirmed that Capita submitted fund switch requests in the week commencing 13 April 2015, which were to be placed daily, as and when Capita received Mr N's confirmation. This was so that Mr N could decide, based on unit price movements, whether or not to proceed on each day. Accordingly, the First Order was received on 13 April 2015 and the unit prices for 14 April 2015 were applied. The Second Order was received on 15 April 2015 and the unit prices for 16 April 2015 were used. It said that the Contingent Order would have been accepted. Equitable Life said that the Fund unit prices fell and Mr N did not submit any further switch requests. It did not agree that Mr N's decision not to proceed with further switch requests was due to its error concerning the applicable unit prices. It refused Mr N's request to put him in the position he would have been in had the daily switches taken place together.
16. On 13 July 2015, Capita sent an email to Mr N. Capita said that it had made a request to Equitable Life in the weeks leading up to the Contingent Order. This was to enquire about the best method for achieving a spread of withdrawal dates/unit prices to help mitigate Mr N's fears around selling such a large holding on the worst possible day. Capita said Equitable Life informed it that no such process would be possible. Capita said this is why it asked Mr N to issue individual switch instructions as and when he wanted any elements of the Fund to be switched.
17. Mr N sent an email to the Trustee on 16 October 2017. He said that he gave the Contingent Order to Capita on 10 April 2015 to sell his entire stake in the Fund in stages. He stated that Capita called him back about an hour later to say that the order was unacceptable to Equitable Life, which was incorrect.
18. There followed numerous correspondence between all the parties, including Equitable Life.

19. Mr N complained to the Trustee under the Plan's Internal Dispute Resolution Procedure (**IDRP**). He said that he had suffered a loss of £36,900.47, because he would have received £613,822.15 from the sale of his units in the Fund, instead of £576,921.68, if the Contingency Order had been executed.
20. The Trustee issued its first stage IDRPs response to Mr N's complaint on 18 April 2018. The Trustee said that it was unclear whether Capita made an error when it informed Mr N that Equitable Life would not accept the Contingency Order. Capita has said that Equitable Life provided this information which it then passed on to Mr N, although Equitable Life has now said that the Contingent Order would have been acceptable. Regardless, the Trustee said that Mr N was able to replicate the effect of the Contingent Order as shown by his request on 12 April 2015. Mr N did not proceed with this, which would have resulted in the same outcome as the Contingent Order. Regardless of whether incorrect information was provided to Mr N, any loss he suffered was as a result of his decision not to proceed with the Separate Order and mitigate his loss.
21. Mr N disagreed with the Trustee's decision and asked for it to be reviewed under the second stage of the Plan's IDRPs. Particularly, Mr N did not agree that he had a duty to mitigate his losses.
22. On 11 January 2019, the Trustee upheld the second stage IDRPs decision. It added that Mr N's original instruction on 10 April 2015 did not comply with Capita's requirements for such orders to be made via letter, approved email address or via their online system (**Hartlink Online**). It said that Mr N may consider that he did not have a duty to mitigate his losses, but the Trustee's advisers consider it to be an established legal principle.
23. Equitable Life also wrote to Mr N on 18 January 2019, stating that it did not find any record of a request from Capita between 10 July 2008 and 13 April 2015 regarding his account.
24. While we were reviewing Mr N's complaint, on 13 December 2019, Capita responded to Mr N. Capita summarised Mr N's complaint and said that, as it had already been addressed internally, it was now for the Pensions Ombudsman to review the complaint. Capita added that its telephony provider in April 2015 was MVS but, after approaching MVS it said that it no longer holds such records dating back to the period in question.
25. Mr N's position is as follows:-
 - He is claiming a loss of £36,852.33.
 - He says that Capita failed to execute the Contingent Order he placed in the early afternoon of 10 April 2015. Capita has provided differing reasons for this, but he believes that it simply forgot to place the Contingent Order. The Contingent Order was for Capita to sell portions of his holding in the Fund, starting with 6811.311 units on the following Monday, and the remaining

20,000 units in lots of 5,000 on the following days, ensuring that it would be completed by 17 April 2015.

- Capita called him back after market hours to say that Equitable Life had refused to accept the Contingent Order. He says Capita then induced him to enter an alternative order by making separate daily orders starting on 13 April 2015, but with unit prices for the next working day of 14 April, meaning he would have missed on the unit prices for 13 April. He subsequently did not execute these orders as he felt he was “flying blind with the contradictory and confusing feedback that [he] received from [Equitable Life]”.
- He said that he would have received £5,261.83 less if he had gone ahead with the Separate Order. Alternatively, had Capita sold out his entire Fund in one go, this would have resulted in a profit of £398.17 more than the Contingent Order.

26. The Trustee’s position is as follows:-

- The Trustee has not seen any evidence of the telephone call between Capita and Equitable Life, on 10 April 2015, or of dishonesty by Capita.
- Regardless of whether Capita provided incorrect information to Mr N, it is the Trustee’s view that he did not suffer a loss. Mr N’s original instruction to Capita by telephone did not comply with Capita’s process for instructions to be made by letter, approved email address or via Hartlink Online.
- As the Trustee is unable to reach a view on the allegation of breach of duty by Capita, it cannot accept responsibility for any potential loss caused to Mr N.
- Mr N could also have mitigated any potential loss by completing the Separate Order, in the week of 13 April 2015, to mimic the Contingent Order. Mr N chose not to do so due to concerns over the performance of Equitable Life. Mr N assumes that he would have completed the Contingent Order, even though he did not complete the Separate Order due to his concerns. The Trustee is of the view that any causal link was broken when Mr N decided to place separate orders to mimic the Contingent Order, but then failed to complete them.

27. Capita’s response to Mr N’s complaint is as follows:-

- There is no copy of the recording of the telephone call between Capita and Equitable Life, on 10 April 2015, about the possibility of placing the Contingent Order. During this call, Equitable Life informed Capita that it was not possible to place the Contingent Order. Capita informed Mr N of this later the same day. As the call on 10 April 2015 was raising a general question about the Plan, and not related to any member, it is likely Equitable Life cannot locate or identify the call. Capita did not have call recording equipment in place at the time, but it now does for calls to the helpline.

- Mr N subsequently decided to mimic the Contingent Order by placing separate orders on consecutive days. Capita informed Mr N that the orders would have to be put through as separate requests. Accordingly, Mr N made separate switch requests from the Fund to cash on 12 and 15 April 2015 and two other switch requests on 29 June 2015.
- Mr N would only have received confirmation of the Contingent Order after all the trades had been finalised. Capita does not believe that Mr N's hesitation to submit consecutive additional switch requests until he had received confirmation of the previous request was a reason not to proceed. Capita would have provided verbal confirmation to Mr N had he asked.
- There is no indication its staff acted dishonestly or induced Mr N to place an alternative order.

Adjudicator's Opinion

28. Mr N's complaint was considered by one of our Adjudicators who concluded that the complaint should be partly upheld against Capita. The complaint was not upheld against the Trustee. The Adjudicator's findings are summarised below:-

- There is no recording of the telephone conversation between Mr N and Capita on 10 April 2015, so it is not possible to determine conclusively what was said during the call. Likewise, there is also no record or recording of the call Capita says it made to Equitable Life on the same day. Mr N has made repeated attempts to obtain records of Capita's call to Equitable Life, which Capita has been unable to provide. So there is no independent evidence that Capita made the call of 10 April 2015 to Equitable Life (or even the alleged earlier call some weeks before).
- The Adjudicator was satisfied that Capita provided incorrect information to Mr N about whether Equitable Life would accept a request such as the Contingent Order. The circumstances concerning how Capita came to be provided with the incorrect information is unclear. Capita says that it called Equitable Life to enquire about the possibility of making the Contingent Order on 10 April 2015 and it was told such an order was not acceptable. Subsequently, when Mr N questioned this, Capita said that it had spoken with Equitable Life some weeks before Mr N's request, to make a similar general enquiry, and was told that such a request would not be acceptable.
- Capita has given a conflicting account. If it had spoken to Equitable Life some weeks before, then it should have been able to respond to Mr N's enquiry of 10 April 2015 without calling Equitable Life again to clarify the same matter. Capita has not been able to explain this point, leading to the Adjudicator's opinion that Capita's comments regarding its calls to Equitable Life are unreliable. Based on the lack of available evidence, the Adjudicator was not

satisfied that such a call took place between Capita and Equitable Life prior to 13 April 2015.

- However, the Adjudicator was not persuaded that Mr N relied on the incorrect information to his detriment.
- Capita can only accept a switch request by letter, approved email address or via Hartlink Online. There is no evidence that the Contingent Order was an actual order placed by any of these methods, so the Adjudicator was unable to say that Mr N made an effective switch request on 10 April 2015.
- Mr N says that he relied on the incorrect information provided by Capita when he decided against placing the Contingent Order, and that there is no obligation on him to mitigate his losses. However, Mr N was provided with the means to achieve a similar outcome to the Contingent Order by placing the Separate Order, mimicking it. While this would have involved a little more work to provide the instructions daily, it would have had the same effect as the Contingent Order, which was to sell Mr N's holding in the Fund over the course of the week.
- By not following through with the Separate Order, Mr N failed to take steps to achieve the same outcome as the Contingent Order which would have mitigated his losses. It does not matter that Mr N did not know that he had been misled at this juncture. The relevant point is that he had an opportunity to achieve a similar outcome and he did not follow through with it. The Adjudicator was not of the view that Mr N would have completed the Contingent Order when, in the same circumstances, he did not complete the Separate Order.
- The Adjudicator accepted that Mr N spoke to Capita regarding his intention to divest his holdings in the Fund and to explore how that could be done to smooth out any fluctuation in the unit prices over the period of the switch. Mr N could have switched all the units in one go but the evidence demonstrates that he wanted to be able to switch his holding over a period and monitor the unit prices as he went along. This is because, after placing the First Order, he delayed placing subsequent requests to ascertain the applicable unit prices.
- Mr N says that the automated nature of the Contingent Order would have ensured that he did not get involved with enquiring about the switch process. The Adjudicator was not persuaded, as Mr N did not have to get involved in the switch process when he placed the First Order and Second Order. However, that is not what happened. Mr N requested confirmation of the First Order and delayed placing the Second Order. He also delayed the Third and Fourth Orders over concerns about the unit prices for the Fund and the service he had received from Equitable Life.

- The Adjudicator was satisfied that Capita's inadequate response concerning the incorrect information provided to Mr N caused him non-financial injustice. This caused serious inconvenience to Mr N, as is evident from his correspondence with Capita. As a result, Capita should make an award of £1,000 to Mr N.

29. Mr N did not accept the Adjudicator's Opinion. He made the following comments:-

- Equitable Life stated that its phone logs had not recorded general or specific calls relating to his account from Capita going back a month from 12 April 2015. Capita engaged in different lies regarding fictitious calls to Equitable Life in an attempt to justify its error. Nevertheless, Capita did not deny that he placed an actual Contingent Order on 10 April 2015. Capita's statement that he had an intention to place an order was referring to the substitute order of 13 April 2015.
- Capita lied and committed an act of criminal fraud in seeking to transfer the cost of its error to him. Capita has also refused to divulge details of its telephony provider or to provide itemised phone bills of the phone calls made. He does not have any liability to mitigate the losses resulting directly from the fraud. His loss is not simply the difference in value between what he would have realised had the Contingent Order been accepted and what he realised on selling the full position. It extends to being denied investment of those monies since then.
- Contrary to what the Adjudicator stated, he did enter an order with Capita and it did not tell him that he needed to place it in writing, email or by Hartlink.
- The Trustee is responsible for the actions of its agent, Capita, so he does not agree that the complaint should not be upheld against the Trustee.
- The Contingent Order would have only provided confirmation of the entire trade after it had been completed. This would have provided him with a contractual guarantee and he would not have been able to interfere in the trade. This is contrary to the Separate Order Capita had suggested to him which provided confirmation of each daily trade.

30. Capita said that it had noted Mr N's comments but its position on the matter remained unchanged. It said that the name of the telephony provider in April 2015 had been provided to Mr N in December 2019 and call logs relating to the matter were no longer held. It also provided a response from Utmost Life and Pensions (**Utmost**), successor to Equitable Life. Utmost said that there was no established process specifically for Contingent Orders. Utmost said that it would ensure that it set up the requisite dated orders for the number of units or value, as instructed. Fund values would be calculated daily and an automated letter would be sent to the trustees/administrators following each individual switch. If the switch is dependent on achieving a particular minimum value, Utmost would contact the trustees or

administrators to find out if the switch should go ahead or not. Any unprocessed switches could be cancelled if the request was received in good time.

31. The Trustee said that its position remained unchanged and it had no further response to Mr N's comments. It agreed with the Adjudicator's Opinion.

32. After reviewing Capita's and the Trustee's response, Mr N provided further comments. He said:-

- The Adjudicator's recommendation of £1,000 was inadequate and does not compensate him for his loss.
- The term "Contingent Order" adopted by the Adjudicator is, in his view, a "workout order" and his purpose was to mitigate the risks of selling the Fund in a single transaction i.e. smoothing.
- The Opinion neglected to point out the inconsistencies in the stories of Capita relating to its conversation with Equitable Life on 13 April 2015 (when it said that it had not done a lot with AVC plans and any knowledge had passed away) and the error that Equitable Life could not take a Contingent Order, including the differing stories about alleged calls to Equitable Life.
- The Opinion incorrectly stated that Capita called him back about an hour after his initial call on 10 April 2015. This lack of attention to details underlines the incorrect analysis of the Opinion. The Opinion did not mention correspondence between Capita and Equitable Life in 2015 which contradicts Capita's case. Among other correspondence, Equitable Life's letter of 18 January 2019 contradicts Capita's submissions.
- The Opinion repeated Capita's assertion that he merely had an intention to make an order on 10 April 2015, rather than making an actual order. Capita referred to a draft letter he sent to Capita asking for input during his complaint with Equitable Life. The Opinion overlooked his editing of this draft and should have resolved the inconsistency in his favour.
- The lack of telephone recordings of Capita's alleged calls to Equitable Life indicates deliberate deceit by Capita. The Adjudicator refused to follow this point with Capita and seek fraud or deceit. This would have been helpful and the Pensions Ombudsman had a wider responsibility to do so. The Adjudicator's refusal to question Capita as he requested, when added to other omissions, is evidence of bias against him.
- He clearly relied on the incorrect information Capita provided to him on 10 April 2015 to his detriment. The Separate Order would not have mimicked the Contingent Order as it was over a different period. Regarding mitigation, he did not act unreasonably in his timing of the disposal of the Fund. The Opinion suggests that, with the benefit of hindsight (which he did not have) he could have chosen the timing better.

- He would like the complaint to begin anew.

33. Mr N's complaint has been passed to me to consider. I have noted Mr N's further comments, but these 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 N for completeness.

Ombudsman's decision

34. From the onset, I would reiterate that, due to the copious amount of correspondence accumulated on the complaint, I am unable to mention every piece of correspondence. I will refer to the relevant correspondence as far as it relates to my decision.
35. Mr N's complaint is essentially that he placed an order to sell the Fund on 10 April 2015 in such a way that the effects of any price changes would have been smoothed over the course of the sale. This is what has been referred to as the Contingent Order. Capita says that it contacted Equitable Life on the same day and was told that the Contingent Order could not be accepted. This subsequently turned out to be incorrect. In the meantime, Mr N was persuaded to consider placing a replacement order, the Separate Order, which would mimic the Contingent Order and allow him to sell the Fund via daily orders over the week commencing 13 April 2015. Mr N subsequently decided against this series of daily orders due to dissatisfaction with Equitable Life and the Fund was eventually divested over different trades ending on 1 July 2015. Mr N says that if the Contingent Order had been accepted, he would have made a profit of £36,852.33 compared to what he actually received. He says that the Separate Order would have resulted in a loss of £5,256.83.
36. Mr N's complaint is addressed under separate headings.

Events surrounding 10-13 April 2015

37. There are no recordings of the telephone calls of 10 April 2015 between Mr N and Capita, or of the alleged call between Capita and Equitable Life. Capita says that its telephony provider no longer has any record of the calls and it serves me no useful purpose to pursue this line of enquiry. All parties agree that the calls between Mr N and Capita took place, although the timing is unclear.
38. It is also accepted by all parties that this is when the incorrect information was provided to Mr N. It was reasonable for Mr N to have accepted the incorrect information provided by Capita as Capita said that it had received it direct from Equitable Life. Mr N was not able to deal directly with Equitable Life and was reliant on Capita to deal with Equitable Life on his behalf.
39. For me to direct redress be paid, Mr N would need to demonstrate that he has, as a result of the incorrect information, acted in good faith to his detriment and where possible taken steps to mitigate any loss.

40. Equitable Life has confirmed in its correspondence that it has no record of any calls from Capita prior to 12 April 2015 relating to Mr N. Capita has given various reasons why that may be the case, but none appears to stand up to scrutiny. The Opinion has already identified the inconsistencies in Capita's account. I would expect Equitable Life to have a record of at least one of those calls. Furthermore, Equitable Life's record of Capita's call on 13 April 2020 reveals that Capita was seeking information on how best to achieve Mr N's aim of divesting the Fund. This made no reference to any previous conversation with Equitable Life regarding the issue.
41. On balance, the lack of telephone recordings and the information that Equitable Life provided do not support the claim that Capita contacted Equitable Life about Mr N prior to 13 April 2015. It appears that the source of the incorrect information provided to Mr N was from Capita and not from Equitable Life. This means that, while it remains unclear how Capita came into possession of it, Capita has to accept responsibility for passing the incorrect information on to Mr N.
42. So, while it is clear that Mr N spoke with Capita regarding the Contingent Order, it is less clear that Capita relayed that request to Equitable Life. I have referred to the Contingent Order as a request because it was not evidenced in writing as it would have been required to be if Capita/Equitable Life were to act on it. Mr N has insisted that the Contingent Order was an actual order he placed with Capita and not simply an enquiry of his intention. Even if Mr N meant it to be an order rather than an initial enquiry or intention ultimately leading to an order, it was a requirement for it to be in writing, which it was not.
43. Mr N says that Capita did not ask him to put his order in writing on 10 April 2015. In Capita's correspondence with Mr N (when Mr N asked Capita for help with his draft letter to Equitable Life) Capita suggests that the Contingent Order was simply an intention at that stage. I note that Mr N disagrees with this but as there is no evidence of the actual Contingent Order, it is difficult to see it as more than just an expression of what Mr N was planning to do. This might also explain why Capita did not ask Mr N to put it in writing, as it did when it spoke later with him and asked him to put the Separate Order in writing. Mr N put the Separate Order into writing on 12 April 2015, so it was likely that Capita told him about the importance of doing so on 10 April 2015, probably when Capita called Mr N back. At this stage, Mr N was unaware that he had been misinformed that Equitable Life would not accept the Contingent Order, but he had been informed of an alternative, the Separate Order, and his request of 12 April 2015 was in accordance with this alternative method.
44. Mr N would not have known that the information he was given concerning the Contingent Order was incorrect, so the good faith criteria is met. I find that Mr N relied on the incorrect information given to him and this initially caused him to commence going ahead with the Separate Order. For reasons related to his dissatisfaction with the service he had received from Equitable Life, and not with Capita or the Trustee, he decided against continuing with the Separate Order. I consider this broke the causal link between the incorrect information provided to him and his reliance upon it.

Mitigation

45. I am satisfied that Mr N relied on the incorrect information given to him and that this caused him, in the first instance, to place the Separate Order.
46. Mr N has referred to what he wanted to achieve by divesting his stake in the Fund. He wished to smooth out any variation in value by divesting the Fund over several trades in the week commencing 13 April 2015.
47. There is a dispute over whether Mr N has suffered an actual financial loss directly as a result of the misinformation provided to him. Mr N says that his loss is the difference in the pricing of the Fund between what he would have realised had the Contingent Order been accepted and what he actually realised on selling his total holding in the Fund. He was also denied the investment opportunity of the monies in the Fund had it been divested by the placing of a Contingent Order. On the other hand, Capita and the Trustee say that as Mr N did not follow through with the Separate Order which was to mitigate for the inability to place the Contingent Order, any causal link to the misinformation was broken and they are not responsible for the outcome of his decision to depart from the Separate Order.
48. It is for Mr N to demonstrate what he would have done had he not been provided with incorrect information. I understand Mr N's view that he did not know that there was anything to mitigate until July 2015, when Equitable Life informed him that the Contingent Order would have been acceptable. He says that he would have placed the Contingent Order and not interfered with it as he did with the Separate Order.
49. Having been told that the Contingent Order was not acceptable, Mr N had the opportunity to mimic the Contingent Order by putting in the Separate Order. This would have been separate consecutive daily orders to divest the Fund commencing on 13 April 2015.
50. Mr N does not believe that the Separate Order would have mimicked the Contingent Order because he considers that it was over a different period, I do not believe that is the case. The understanding was that the Separate Order would be put in daily from 13 April 2015 and would spread the risk of divesting the Fund over that week, as was the intention with the Contingent Order, so it would have been over the same period. Unlike, the Contingent Order it would not have been automated; Mr N would need to place a separate written order for each sale, but it would have had a similar outcome. The separate written instructions could have been provided all at once with a separate sale instruction for each day in the week commencing 13 April 2015.
51. Mr N started placing the Separate Order on 13 April 2015, but paused the process as he was dissatisfied with the service received from Equitable Life. This was nothing to do with Capita or the Trustee, so I place no responsibility on them for his decision. Mr N suggests that the Adjudicator expected him to have the benefit of hindsight and to

have chosen better timing in divesting the Fund. That is not the case. Mr N is entitled to decide how and when he wants to divest the Fund.

52. Mr N was presented with an alternative to the Contingent Order, which would have closely mimicked it and mitigated the effects of the incorrect information provided to him. By not proceeding with the Separate Order, on balance I cannot hold that Capita should remain responsible for the outcome of whatever else Mr N decided to do in divesting the Fund.
53. Utmost has also said that even if a Contingent Order is accepted, unprocessed switches with the order can still be cancelled. This indicates that, once commenced, the Contingent Order could have been stopped by Mr N. This is relevant because Mr N has suggested that the Contingent Order could not be stopped or interfered with. Based on Mr N's actions with regard to the Separate Order, it is reasonable to say that in similar circumstances with the Contingent Order, Mr N could have made the same decision. Mr N was able to cancel any unprocessed switches and I have not seen any reason to believe that he would have done otherwise. This is not a decision taken with the benefit of hindsight, but simply looking at what Mr N did in similar circumstances.
54. Mr N also cancelled the rest of the Separate Order because of his dissatisfaction with Equitable Life and not because of anything related to the incorrect information from Capita or other action by Capita.
55. As Mr N decided to postpone the Separate Order and spread the rest of the switches over a longer period to assess the market and fund value, Mr N cannot benefit from hindsight and so obtain the same outcome by raising a complaint as he would have achieved under the Contingent Order. It is possible that had Mr N proceeded with the Separate Order, I may have been reached a different decision.
56. While I am satisfied that Mr N relied on the incorrect information regarding the unavailability of the Contingent Order, the link between that and his ultimate decision was broken when he departed from following the Separate Order which he had put in place of it. Accordingly, Capita and the Trustee are not responsible for any difference between what Mr N actually received and what he may have received under the Contingent Order. The only outstanding injustice is in relation to the distress and inconvenience caused to Mr N when he realised he had received incorrect information regarding the Contingent Order.
57. On this point, I agree with the award recommended by the Adjudicator. Mr N should receive an award in respect of the serious distress and inconvenience caused to him by Capita's maladministration. As the responsibility for the misinformation lies with Capita, I do not uphold the complaint against the Trustee. Due to the present circumstances with Covid-19, I have extended the usual period for Capita to make the payment to Mr N.
58. I partly uphold Mr N's complaint.

PO-24436

Directions

59. Within 31 days of the date of this Determination, Capita shall pay £1,000 to Mr N in respect of the serious non-financial loss caused to him.

Anthony Arter

Pensions Ombudsman
14 July 2020