

Ombudsman's Determination

Applicant	Mr N
Scheme	Zest Projects Pension Scheme (the Scheme)
Respondents	James Hay Partnership (James Hay) Planning Together (Planning Together)

Outcome

1. Mr N's complaint is upheld. To put matters right Planning Together shall calculate Mr N's investment loss, in accordance with the directions set out in paragraph 73 below, and pay him £1,000 in respect of the serious distress and inconvenience caused.
2. In addition, James Hay shall pay Mr N £1,000 for the serious distress and inconvenience caused and also refund its transfer out fee.

Complaint summary

3. Mr N has complained about the length of time it took for the Scheme to be earmarked, the non-investment of his funds, and the delayed transfer to another pension provider.

Background information, including submissions from the parties

4. Over the course of July 2015, Planning Together corresponded with James Hay about the possible establishment and administration of the Scheme on behalf of four individuals linked to Zest Projects Limited.
5. Eventually, an arrangement was proposed whereby the Scheme would be established with a series of bank accounts alongside investment accounts, which would allow the member trustees of the Scheme to invest their funds individually.
6. On 20 August 2015, Planning Together issued a suitability report to Mr N, and the three other prospective members. The recommendation was to establish the Scheme and transfer in other pension funds in order to purchase a commercial property.

7. The recommendation letter stated:

“We have established a Small Self-Administered Scheme (SSAS) and consolidated your pension assets within the arrangement to enable you to purchase the commercial premises...

You agreed the property ownership to be split 25% each with Paul to initially fund Chris's shortfall. The intention is for Chris to have made a contribution by the time the VAT is returned so that he will be in a position to equalise at that time.

We are to establish individual bank accounts into which the balance of the Transfer Values will be paid together with your own proportion of rental and future contributions. At our last meeting we discussed an investment strategy for these funds which we detail below.

The SSAS operates on a pooled fund approach where particular assets can either be specifically or notionally earmarked, this allows the facility to trade assets, which is not available to SIPP. Because of the pooling of assets the cost of administration is lower...

Planning Together are allocated a dedicated Account Executive, who handles all day to day administration of our clients' plans...

Remuneration

As detailed in our fee agreement an initial fee of £1,500 will be charged to meet the costs of our advice and implementation of this recommendation, and £500pa thereafter...

SSAS : Investment Recommendation

Attitude to Risk

We have completed a risk questionnaire resulting in a risk profile 6, detailed below and I recommend the funds are invested within a Fidelity Investment Account.

...

The other associated charges are as follows:

Adviser Charge – On-going services 0.75%”

8. Planning Together was retained to advise on the investment of the surplus funds in excess of the property purchase price.
9. On 8 July 2015, Mr N's pension benefits were transferred into the SSAS. Planning Together was nominated as the Scheme's contact.
10. In February 2016, following delays, the property purchase completed.

11. On 29 February 2016, Planning Together wrote to another member trustee setting out a provisional split of the Scheme's cash assets. In respect of Mr N's share, Planning Together calculated it to be "55.13% = £53,140".
12. On 1 March 2016, Planning Together asked Mr N whether he was happy to invest.
13. On 16 March 2016, Mr N confirmed the investment should go ahead.
14. In May 2016, the SSAS received a VAT refund on the property purchase.
15. On 6 June 2016, Planning Together contacted James Hay and asked if the cash had been earmarked and split. James Hay confirmed that it had been. In fact, although accounts had been set up, no earmarking had taken place, or funds transferred into the different accounts.
16. On 21 June 2016, having been chased, James Hay confirmed that "the cash has been split into individual bank accounts."
17. On 12 July 2016, Planning Together queried if an account had been set up to receive Mr N's cash and why the cash had not been split between the individual accounts.
18. On 12 July 2016, Planning Together emailed James Hay and said:

"...I trust it can be treated as a priority, I emailed [James Hay employee] on the 6th June asking had the pooled account been split into the individual accounts and have heard nothing since, bearing in mind the stockmarket has gone ballistic I hope we are not going to be faced with a compensation claim for loss of profit, if we are it will be batted straight to James Hay."
19. On the same day, James Hay confirmed it would investigate the issues and provide a full response. It is unclear how this was subsequently followed up.
20. In October 2016, Mr N contacted Planning Together to enquire about the investment performance of the residual funds and was told that the surplus funds had remained in cash.
21. On 12 October 2016, Mr N emailed Planning Together saying:

"To confirm our earlier discussion that the pension fund cash element has yet to be reconciled by James Hay. As such the funds have not yet been invested as identified in line with our chosen risk profile. This is obviously disappointing and very concerning given the slump in the period since June. You have stated that James Hay have agreed to make recompense for any losses as a result of the delay in investing the cash element which is reassuring."
22. In December 2016, Planning Together emailed James Hay, saying:

"Following our various conversations as you are aware the 4 members made transfers into the SSAS in order to fund the property purchase. The agreement was that they would all own an equal share of the property and [another

member trustee] also made contributions to ensure his 25% share. The James Hay administrator at outset was [James Hay employee] and he insisted that as part of the initial process we obtained Barclays mandates for each member to take their excess cash over and above what was required to fund the purchase and costs so that individual investment accounts could be established for [the member trustees], there would be no excess for [a member trustee] initially but this would start building as the rent started rolling in. The VAT was refunded at the beginning of May which we did not pick up on at the time and I then emailed [James Hay employee] in June as attached. Subsequently [a member trustee] started going through divorce proceedings so the instruction was for his excess to remain in cash. We are still waiting for James Hay to confirm the cash balances held in [Mr N's] and [a member trustee's] individual accounts, I have still not been able to discuss their investment strategies although we completed risk profiles and therefore we know the funds where they would have been invested. The Scheme position has now changed, the company have suffered a down turn in their business and for this reason they have accepted an offer for the premises however, it does not alter the fact that we still have to calculate the losses suffered by [the member trustees] due to James Hay's lack of activity over the past 6 months. We also have to confirm to [a member trustee] how much cash he has available for his pension share. I have asked Zest to check what rental payments have been made which they are to confirm. As you will see from the attached emails, I have drawn to James Hay's attention on more than 1 occasion that there will have to be a calculation of loss due to delays and maladministration. I trust you will get back to me within days with a timescale rather than the usual situation where we have to chase."

23. On 13 January 2017, a call note shows that Planning Together and James Hay discussed the situation. It was agreed that James Hay would review whether it would be possible for earmarking to be backdated to the outset of the Scheme.
24. In March 2017, the property was sold.
25. On 21 March 2017, James Hay confirmed that it would look to earmark the Scheme from the date of the property purchase. A Trustee Resolution would be prepared and issued to the Trustees for agreement.
26. Subsequently, an issue regarding rent and invoices chargeable to the Scheme was discussed. This was resolved by May 2017.
27. On 2 June 2017, Mr N chased Planning Together regarding the reconciliation and his funds remaining in cash.
28. On 4 July 2017, Planning Together chased James Hay.
29. On the same day, James Hay confirmed it was still working on the reconciliation, a meeting with a senior colleague was planned for the following week, and an update would be provided following the meeting.

30. On 10 July 2017, James Hay confirmed the meeting had been postponed until 13 July 2017.
31. On 17 July 2017, Planning Together chased James Hay due to the lack of progress.
32. On 20 July 2017, James Hay explained that it was proving difficult to reconcile the Scheme in order to allocate the property shares 25% each, due to one of the member trustees not having sufficient funds at the outset to fund that share. The process required to meet this preference was complicated and time consuming, but it would do its best.
33. Over August 2017 a further complication arose due to a VAT refund due on the sale of the property,
34. On 21 August 2017, James Hay confirmed that the VAT complication should not prevent the reconciliation completing.
35. On 29 August 2017, James Hay asked the member trustees to confirm a number of assumptions and that they were happy to proceed on the basis of those assumptions.
36. Across early September 2017, there were a series of emails between the member trustees in which James Hay's assumptions were disputed.
37. On 20 September 2017, James Hay provided a fund split to Planning Together, which was then communicated to the member trustees.
38. On 21 September 2017, Mr N complained to Planning Together that his fund had remained in cash and its actions in relation to this.
39. On 28 September 2017, Planning Together informed Mr N that it had forwarded his complaint to James Hay for it to respond to.
40. On 25 October 2017, Mr N chased Planning Together for its response to his complaint.
41. On 11 December 2017, Mr N appointed a new independent financial advisor (**IFA**) to act as his "servicing agent".
42. On 8 February 2018, James Hay responded to the concerns raised in Mr N's complaint. It highlighted that whilst the earmarking calculations had taken some time, they were very complicated, and, in its view, the time taken did not constitute a delay. In respect of the lost investment opportunity, James Hay argued that irrespective of the earmarking, the Scheme's funds could have been invested at any time.
43. Over early 2018, another member trustee raised a series of concerns with the fund split that James Hay had provided. This resulted in an alternative fund split being provided.
44. On 17 April 2018, the member trustee who had queried the fund split confirmed the original fund split had been agreed by the trustees and could be relied upon. James

Hay's position was that reliance on the original fund split would have to be confirmed by all trustees signing a resolution.

45. In June 2018, one of the other member trustees complained to James Hay. In response, it upheld the complaint, agreeing that the earmarking should have been achieved sooner. In recognition of this, James Hay offered £600 to each member trustee. It did not accept that it was responsible for the lack of investment within the Scheme, highlighting that at any time the cash assets could have been invested regardless of the earmarking.
46. Despite the other member trustee chasing James Hay in May and twice in June, the necessary trustee resolution was not provided for signing until 2 July 2018.
47. On 16 August 2018, James Hay received a copy of the resolution signed by the trustees.
48. On 19 September 2018, the Scheme assets were transferred to the earmarked accounts.
49. On 28 September 2018, James Hay received a transfer request from a new pension provider for Mr N.
50. In the following months the necessary documentation was requested by and returned to James Hay.
51. On 20 December 2018, James Hay transferred Mr N's funds to a different provider.
52. On referral to this Office, in relation to the time taken for the transfer to complete, James Hay said that it considered the transfer had taken longer than it ought to have. It apologised and offered a refund of its Transfer Out Fee of £420 (£350+Vat), that had been deducted at the point of transfer.

Adjudicator's Opinion

53. Mr N's complaint was considered by one of our Adjudicators who concluded that further action was required by both Respondents. The Adjudicator's findings are summarised below:-
 - (i) The Scheme had a complicated structure, because of the property share allocations, but it should not have taken James Hay as long as it did to earmark the funds.
 - (ii) Although it had taken too long to complete the earmarking, the Adjudicator did not consider that this had caused the investment loss which Mr N had claimed. Investment decisions were the responsibility of the member trustees and ordinarily they would make decisions on the pooled investment of the Scheme's assets.
 - (iii) The evidence shows that Planning Together had taken the lead in arranging the Scheme and the intended investment approach. It had intended to charge for on-

going services in this respect. It was also Planning Together that had insisted that the Scheme be earmarked before investments were made.

- (iv) Planning Together blamed the investment loss on James Hay's failure to earmark, but that had not prevented the member trustees from investing. Planning Together could have recommended a pooled or notionally earmarked portfolio for the member trustees to consider, despite any complications there may have been due to the differing risk profiles.
- (v) Planning Together had, in fact, notionally earmarked the Scheme in February 2016, and that could have been used as a basis for the member Trustees to invest individually. Had this happened, it would have mitigated Mr N's investment loss.
- (vi) Planning Together had suggested to Mr N that James Hay would compensate him for the delay, but there was no evidence of such an agreement, and it did not excuse Planning Together's failure to advise.
- (vii) Planning Together was therefore responsible for the investment loss. In the absence of certainty as to how Planning Together would have advised Mr N to invest his funds, it was not possible for the Ombudsman to use a model portfolio in assessing the perceived investment loss. Instead, the Adjudicator recommended that Planning Together pay interest at the base rate for the time being as quoted by the Bank of England to the original transfer value and VAT refund received by the Scheme in February 2016.
- (viii) Planning Together should not be responsible for any investment loss following the appointment of the new financial adviser, in December 2017.
- (ix) The delay in earmarking persisted following the appointment of the new financial adviser, but that again did not prevent the member trustees investing from that point. As a result, James Hay was not responsible for the perceived investment loss following the appointment of the new financial adviser.
- (x) James Hay accepted that there had been a delay in processing the transfer request documentation that it had received in 2018, and offered to refund the transfer out fee. The Adjudicator deemed this appropriate redress for that delay.
- (xi) However, considering the very poor overall administrative service provided by James Hay, a severe distress and inconvenience award was also warranted. The Adjudicator recommended a payment of £1,000 be made in addition to the refunded transfer out fee.
- (xii) In respect of Planning Together, in addition to failing to arrange for Mr N's funds to be invested, it had dealt with his complaint inadequately, forwarding it to James Hay when it ought to have directly addressed his concerns. In view of that, the Adjudicator recommended it pay Mr N £1,000 for the severe distress and inconvenience caused.

54. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. James Hay and Planning Together accepted the Adjudicator's recommendations. Mr N provided additional comments.
55. Having reviewed the case, I took the view that the loss calculation proposed by the Adjudicator did not adequately reflect Mr N's losses. I instructed the Adjudicator to inform Planning Together that, as it maintains standardised portfolios for clients of different risk appetites the portfolio that Mr N's funds would have been invested in can be modelled with a reasonable degree of confidence and I proposed to uphold the complaint and award redress on that basis. Planning Together did not accept that proposal and made additional comments which I will address below.
56. Apart from the proposed redress, I agree with the Adjudicator's Opinion and I will respond to the key points made by Mr N and Planning Together for completeness.

Ombudsman's decision

57. Mr N considers that the redress offered by the Respondents, which he calculates to be approximately £2,780, does not sufficiently compensate him for the loss of investment growth or the stress, anxiety and frustration caused. This is worsened by the lack of compound investment growth until retirement. He highlights that the Bank of England base rate was only 0.25% over the period, while investment markets grew. Mr N has pointed out that Planning Together had proposed a portfolio that was suitable for his risk profile, and subject to rebalancing in line with its model portfolio, this would have been used over the period in question. In Mr N's view, this portfolio should be used to calculate the investment loss.
58. Mr N has also said that the appointment of the new financial adviser, due to the Respondents failings, cost him approximately, a further £4,000.
59. Until recently, in cases where I direct redress for financial loss, my stance where the correct position the Applicant ought to have been in is not certain, has been to award interest at the Bank of England base rate as proposed by the Adjudicator. However, on reflection, I am not satisfied that this is appropriate redress for investment loss, particularly given the base rate has been below inflation for some considerable time. It also does not reflect the fact that Applicants will have approached financial advisers and paid for advice in order to invest in something other than cash. A financial adviser would not realistically recommend an individual invest an entire portfolio in a fund that only provided base rate levels of return.
60. In this instance I have considered whether an alternative notional rate might be more appropriate. For example, the interest rate of 8% currently used by the Courts. However, I consider the circumstances of the case lend themselves more to relying on the investment return that would have been achieved had Mr N been able to follow Planning Together's advice and invested in line with its model portfolio. Planning Together has confirmed Mr N's suggestion that it operated a model portfolio structure based on a client's risk profile, subject to interim rebalancing. Given this fact, I am

satisfied that a loss calculation based on the model portfolio appropriate for his risk profile can be undertaken with a reasonable degree of confidence and that it accurately reflects Mr N's position.

61. Planning Together has disagreed with this, and I have considered its arguments. It points to the fact that no rent was paid into the Scheme and so the mortgage was being met by the cash balance, and that James Hay incorrectly used the Scheme's cash reserve to meet another scheme's mortgage payments for several months in 2016. Neither error was Planning Together's fault.
62. While I note those issues, even had Mr N's share of the cash balance been invested rather than retained as cash, the Scheme would still have had sufficient monies available to meet the outgoings and so the investment would not have been impacted.
63. Planning Together has also pointed out that it proposed individual investment accounts to the member trustees rather than a pooled investment approach. I consider that my directions align with that approach.
64. It has also suggested that an instruction to invest would not have been possible immediately, in February 2016. It has said that the administrative steps required would have taken at least two months, and therefore the investment calculation should have a start date of mid May 2016, not February. I accept that there would have been some delay before the investments went ahead, but it seems more likely than not that it would have been achieved sooner than May 2016.
65. Planning Together refer to an email dated 16 March 2016, as the point when the member trustees confirmed their agreement to invest. I consider that to be an appropriate start date for the process of setting up the necessary accounts and instructions, and I consider a month from that date to be a realistic timescale for the investments to be made.
66. I note Planning Together's argument that the investment funds would not have been bought into, in full, immediately, and the purchases would have been staggered. I understand the reasoning behind that and agree that would have been a reasonable step to take had Planning Together been proactive at the time. But, ultimately it was not proactive and so I cannot say that this preferred practice on Planning Together's part should be implemented in the redress. Particularly, as there is no way of knowing exactly when Planning Together would have recommended the investments occurred.
67. Planning Together has questioned whether James Hay would in fact have agreed to the investment portfolio that it would have recommended. Given that the Funds recommended in the suitability report are all OEICs, and James Hay lists OEICs as permitted investments for SSAs, I cannot see any reason why they would not have been accepted.

68. Finally, Planning Together suggests that the proposed redress benefits from hindsight. It suggests that if the investments had proceeded and suffered a loss Mr N would have been complaining about the suitability of the investments. It adds:

“The redress proposed is wholly unsuitable and severely punishes our firm for the failings of others. In times of great market volatility that we have been experiencing over the past 5 to 6 years, we very rarely invest our clients cash into funds in one lump sum, we phase the investment in an attempt to buy in the dips and very conveniently, world stock markets suffered a big dip in the 1st quarter of 2018 and did not recover until the end of that year, a large part of the growth experienced over the previous 2 years would have been pulled back by the end of January 2018”

69. I do not accept that the proposed redress benefits from hindsight. The date range of the loss assessment was proposed by the Adjudicator on an impartial basis and without any reference to the performance of the markets. While Planning Together considers that the market's performance will unfairly benefit Mr T, that merely reflects the objectively recommended loss assessment and is not subject to hindsight. Therefore, despite Planning Together's view, I consider the investment loss calculation compared against the model portfolio to be appropriate.
70. Mr N has raised concerns about the delays and subsequent perceived investment loss that he attributes to James Hay for the period after Planning Together ceased involvement with the Scheme and a new financial adviser was appointed. Mr N considers those delays are not adequately redressed by way of the refunded transfer out fee. Again, I understand Mr N's frustration, but the perceived losses could have been mitigated at any time by the arrangement of suitable investments through his role as a member trustee, or through the new financial adviser.
71. I cannot find James Hay responsible for the lack of investment over this period as it had no power to recommend or make investments on Mr N's behalf. Although, the earmarking and transfer took an excessive period to complete, this is adequately redressed through the distress and inconvenience payment and refunded transfer out fee. I do not find James Hay responsible for the perceived financial losses over that period.
72. I uphold Mr N's complaints against Planning Together and James Hay.

Directions

73. Within 28 days of the date of this Determination, Planning Together shall:
- (i) undertake a loss assessment using the model portfolio appropriate for the risk profile 6, as set out in the suitability report and compare the performance of the model portfolio against the performance of Mr N's share of the Scheme between 16 April 2016 and 11 December 2017, when the new IFA was appointed;

- (ii) for the purpose of establishing Mr N's share of the Scheme, Planning Together is to use the share split calculated in its email dated 29 February 2016, which for Mr N was "55.13% = £53,140", account is to be taken of the additional funds received when the VAT refund was paid;
- (iii) should a financial loss be identified, Planning Together is to pay the loss into the pension arrangement of Mr N's choosing; and
- (iv) pay Mr N £1,000 for the serious distress and inconvenience which he has suffered.

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

- (i) pay Mr N £1,000 for the serious distress and inconvenience he has been caused and refund to him the Transfer Out Fee.

Anthony Arter

Pensions Ombudsman
13 November 2019