

Ombudsman's Determination

Applicant	Mr Philippe Pollet
Scheme	Optimum Internal Pension Plan
Respondent(s)	Optimum Capital Ltd

Complaint Summary

Mr Pollet has complained that OCL have failed to process his transfer request which has caused him a financial loss.

Summary of the Ombudsman's determination and reasons

The complaint should be upheld against OCL because they should have made the transfer in reasonable time after Legal and General returned the completed discharge form.

Detailed Determination

The Plan's Rules

1. Rule 9.1 ('Member's Right to A Recognised Transfer') says:

"A member has a right to request that the "cash equivalent" of all the accumulated funds, assets and other rights held within any or all arrangements under the scheme should be transferred in accordance with section 169 of the 2004 Act to:

- Another registered pension scheme; or...

The transfer must be made by a direct payment between the trustees/scheme administrator and the administrator or trustee of the other scheme...

The scheme administrator will make enquiries of the proposed receiving scheme to satisfy itself that the receiving scheme qualifies as a registered pension scheme...Unless satisfactory evidence is received, the scheme administrator will not transfer funds..."

Material facts

2. The Plan (a money purchase occupational pension scheme) was provided by OCL (the Provider/Principal Employer and a Trustee).
3. The setting-up of the Plan was outsourced to Tudor Capital Management Ltd (**Tudor**), who were appointed to provide trustee services and administer the Plan (a Trustee and the Scheme Administrator). A Pensioner Trustee was also appointed.
4. Over the period 2008 to 2010, the relationship between OCL and Tudor soured – OCL was unhappy with Tudor's administration of the Plan (including claims for member tax relief not being submitted properly).
5. Tudor provided trustee services to a number of occupational pension schemes. In April 2010 the Pensions Regulator suspended Tudor from acting as trustees following the institution of criminal proceedings by HM Revenue & Customs (**HMRC**) – two directors of Tudor were subsequently found guilty and jailed for pension tax fraud.
6. HBOS chose to freeze the Plan's bank account until the account mandate was transferred away from Tudor.
7. A new scheme, the OIPP Pension Scheme, was established by trust deed dated 26 September 2008. The intention being that Plan members would be transferred to the OIPP Pension Scheme (away from Tudor) for future contributions. Mr Pollett remained in the Plan.
8. In September/October 2009, OCL appointed a pensions lawyer (Mr Ramage) to liaise with HMRC concerning payment of pension relief at source for the Plan. OCL terminated its retainer with Mr Ramage in late 2010. In April 2011, OCL appointed Addleshaw Goddard (**AG**) as their new legal adviser.

9. Tudor was removed as a Trustee of the Plan, with effect from 10 August 2010, and by a letter dated 22 February 2012, OCL removed Tudor as the Scheme Administrator.
10. Plus Minus LLP was appointed as the new Scheme Administrator. They were subsequently replaced by A.C.T.S. Global Limited (**ACTSGL**), who also acted as the second Trustee - The date of ACTSGL's appointment is not clear, but an amending deed made on 8 July 2013, notes Optimum Capital Ltd as Principal Employer and Current Trustee and ACTSGL as Current Trustee and Scheme Administrator.
11. On 17 October 2012, Square Mile Asset Management (an independent financial advisor – **the IFA**) emailed OCL that it had been instructed by Mr Pollett to investigate his pension options. The IFA requested: a current transfer value, full contribution history, full schedule of charges, projection of benefits to normal retirement age and full discharge forms.
12. The next day OCL replied that:
 - £21,794.87 was currently held in two bank accounts: HBOS and Banque Internationale A Luxembourg (**BIL**);
 - but because of “some issues” with the Plan’s previous administrator , HBOS were not disclosing information to OCL and therefore it (OCL) was unable to provide the balance of the information that had been requested;
 - Mr Pollett was fully aware of the situation.
13. On 22 October 2012, the IFA emailed OCL that Mr Pollett wanted to transfer his benefits and asked what actions were needed to enable the transaction.
14. The same day by email OCL:
 - informed AG that Mr Pollett wanted to transfer his benefits into a SIPP and asked if it could proceed with the transfer by asking Mr Pollett to sign the same paperwork that had been used for a member transfer;
 - replied to the IFA that it was checking the requirements with its pensions lawyer.OCL’s email was copied to ACTSGL.
15. OCL chased AG for their reply on 26 November 2012. AG replied:
 - assuming HBOS would actually transfer the cash then Mr Pollett would not be required to sign a waiver of liability in the form that had been used for the previous member transfer as Tudor was no longer the Plan’s administrator;
 - the Plan’s new administrator ACTSGL had the power under the Plan’s rules to effect the transfer so there would not be a breach of trust;

- ACTSGL should make all the usual checks to ensure that Mr Pollett wanted to transfer to a proper SIPP consistent with HMRC requirements;
 - OCL should ask Mr Pollett to sign a standard discharge of liability and transfer request form and asked if OCL had one;
 - They suggested that if HBOS was still being difficult OCL should forward the IFA's emails onto HBOS and say its failure to process the cash transfer may be considered as an act of maladministration by the Pensions Ombudsman.
16. There followed an exchange of emails on 10 December 2012, between OCL and AG. OCL asked AG for a standard discharge of liability and transfer request form. AG asked OCL to send a copy of the transfer form it was currently using so that it could be reviewed. OCL sent the form that Tudor had previously provided it with.
 17. On the same day OCL emailed the IFA that it wanted to sort out the transfer but required advice from its pensions lawyer.
 18. Hearing nothing further from OCL, on 30 January 2013, the IFA formally complained to OCL regarding its inability to provide the previously requested information.
 19. On 20 February 2013, OCL emailed Mr Pollett (apparently in response to an email sent by Mr Pollett on 13 February 2013) thanking him for his email confirming his acceptance of his pension transfer. OCL asked Mr Pollett for a letter from the administrator of his new scheme accepting the transfer from the Plan and said that a transfer form and valuation (of his Plan benefits) would be provided once the letter had been received.
 20. The same day Mr Pollett replied that his earlier email had been misunderstood, he had not yet decided to transfer but required a transfer form and valuation to review and then he would decide.
 21. On 5 March 2013, OCL emailed Mr Pollett bank statements (HBOS and BIL) for his holdings in the Plan and a transfer discharge form (in the name of OCL and ACTSGL) for completion and return.
 22. In July 2013, Mr Pollett and Legal & General (Mr Pollett's SIPP provider) signed the form, which Legal & General returned to OCL with a copy of the application form that Mr Pollett had completed for the SIPP and a request for the transfer payment to be made on 9 July 2013.
 23. Legal & General and Mr Pollett chased OCL for the transfer payment in August 2013.
 24. On 29 August 2013, OCL informed Mr Pollett that it was working on the transfer process, a valuation of his asset with BIL was awaited and it was chasing its pensions lawyer for an opinion and advice concerning some legal points following HMRC's action against Tudor.

25. On 10 September 2013, Mr Lestang, a Director of OCL, wrote to Mr Pollett informing him that:
- under rule 9 of the Plan's rules the administrator had the power to effect the transfer;
 - but Tudor had to date failed to comply with OCL's request that it actions the transfer;
 - Tudor had been suspended as a trustee of the Plan and three directors of that company were currently subject to HMRC proceedings for offences involving dishonesty;
 - as a consequence OCL was prepared to act unilaterally, without Tudor's involvement, to try and action his transfer request, but this in part was dependent on the co-operation of the Plan's bank account provider;
 - however, if OCL was able to action the transfer, strictly this could amount to a breach of trust, breach of duty, or maladministration by OCL.
26. In the same letter OCL asked Mr Pollett to sign a declaration that:
- he wished OCL to act unilaterally to transfer his funds in the Plan to another UK pension scheme details of which had been provided;
 - he had taken independent professional advice on the transfer and was satisfied that it was to an authorised UK pension scheme and that the transfer would qualify as a "recognised transfer" under the Finance Act 2004, even if it became necessary to make a further transfer of funds from the Plan to that scheme, or another appropriate pension arrangement of his choice, in respect of unpaid tax relief which was subsequently recovered on his behalf from HMRC in respect of his contributions to the Plan;
 - he would take no action against OCL or Mr Lestang (whether for breach of trust, breach of duty, maladministration or otherwise) in connection with the transfer;
 - he would pay any tax charge penalty or other liability that OCL or Mr Lestang may incur in relation to the transfer;
 - he would indemnify OCL and Mr Lestang against all costs, losses, penalties, fines, liabilities and expenses it incurred or suffered (whether or not incurred or suffered as a result of actions by HMRC) as a result of actioning the transfer.
27. Legal & General further chased for the transfer payment in October and November 2013. On 5 November 2013, OCL informed Legal & General that they were waiting to receive a signed discharge form from Mr Pollett to be able to finalise the transfer.
28. Mr Pollett was not prepared to sign the declaration because of the disclaimers contained within it and complained to our service.

29. Mr Pollett's SIPP with Legal & General is 100% invested in the Legal & General Pension Henderson European Selected Opportunities Fund (**the Fund**). The share class is 'A' accumulation. Consequently, any income earned is automatically reinvested (that is no income or dividends are paid out on a set date to investors).
30. The IFA was engaged by Mr Pollett to handle his complaint on a fixed fee of £2,500.
31. Mr Pollett is seeking suitable compensation for the transfer delay, including payment of the IFA's fixed fee and £1,500 for distress and inconvenience caused.
32. AG removed themselves as advisors to OCL in October 2013, and ACTSGL ceased as a Current Trustee and Scheme Administrator for the Plan in December 2014..
33. Recently OCL have appointed Irwin Mitchell as their legal adviser.

Summary of OCL's position

34. Mr Lestang says:
 - OCL is only the Plan's provider and not a pensions specialist;
 - Tudor was appointed to set up the Plan, administer it and provide pension advice;
 - ACTSGL was appointed as the Scheme Administrator to its second pension scheme (OIPP Pension Scheme);
 - the September 2013, disclaimer was issued because it was considered that Tudor remained the Scheme Administrator as it had failed to provide all material and documentation for the Plan when it was asked to resign;
 - they are willing to sort out Mr Pollett's transfer but want to make sure that they are in full HMRC compliance and never in breach of any pension rules;
 - Mr Pollett is not subject to the Plan's ongoing dispute with HMRC about retrospective pension relief at source.
35. On behalf of OCL Irwin Mitchell say:
 - since Mr Pollett first requested a transfer the Scheme has not had an appropriate administrator in place and could not have calculated or effected the transfer without being in possible breach of trust, breach of duty or maladministration;
 - OCL is seeking to effect the transfer but require the input of a professional administrator;
 - they are arranging for OCL to meet professional administrators with the aim of arranging an appointment;
 - as it is likely that this will take a period of time they have asked that OCL be allowed the maximum permissible time to effect the transfer.

Conclusions

36. Under Rule 9.1 a member has a “right to request” a transfer. It does not specifically say that a member has an *automatic* right to the transfer itself but there is no proviso purporting to provide a decision-making discretion on the trustee or the administrator, only that the administrator will make enquiries to ensure the receiving scheme is a registered pension scheme (or qualifying recognised overseas pension scheme) and if sufficient evidence is not received, the administrator will not transfer.
37. In the absence of any reference to a discretionary decision-making power, my view is that a transfer becomes mandatory on request provided the receiving scheme is a registered pension scheme (or qualifying recognised overseas pension scheme).
38. It is not disputed that Mr Pollett has a statutory right under the Pension Schemes Act 1993, to take a cash equivalent to another registered pension scheme. Mr Pollett’s L&G SIPP is a registered pension scheme.
39. The general statutory requirement is that the trustees (or managers) of a money purchase scheme must process a transfer within 6 months of the date of its request. If they do not do so, they must notify the Pensions Regulator/request an extension.
40. It is inadequate for OCL to say that there was a problem with the administrator because as a Current Trustee OCL has a joint duty to comply – so OCL must process the transfer itself or appoint another administrator and make sure the transfer is completed.
41. In any event, Rule 9.1 says the transfer must be made by a direct payment between “the trustees/scheme administrator”, it does not say the power is *only vested* in the administrator.
42. Tudor appear to have been removed as a Trustee and Scheme Administrator prior to Mr Pollett’s transfer request. Consequently, this should not have held up the transfer payment to Legal & General.
43. ACTSGL’s involvement in this matter is not clear. OCL say that they were appointed as the Scheme Administrator for the OIPP Pension Scheme. But the Plan’s July 2013 Deed of Amendment notes ACTSGL as a Current Trustee and the Scheme Administrator. Prior to this date, in October 2012, Mr Lestang copied ACTSGL in email correspondence between himself and AG concerning the transfer and the March 2013 discharge form issued to Mr Pollett was in their (OCL’s and ACTSGL’s) joint names.
44. However, it is not clear whether ACTSGL was subsequently made aware that OCL had received the completed discharge form from Legal & General and it does not appear to have been involved in the issuance of Mr Lestang’s September 2013 letter

requesting Mr Pollett to sign a further disclaimer. Nonetheless Mr Pollett has not complained against ACTSGL.

45. OCL is the only constant throughout and it has breached its duty as a Current Trustee by not ensuring that the transfer was processed.
46. OCL was entitled to use its standard disclaimer as advised by AG, (that is the discharge form subsequently signed by Mr Pollett and Legal & General). But they had no right to request a further disclaimer in September 2013, in relation to excluding any further liability against OCL – it is an attempt to ‘settle’ any potential possible claims against them in respect of anything that they may have done in return for doing something they have no legal right to refuse.
47. For these reasons I uphold the complaint against OCL.
48. Legal & General sent the completed discharge form to OCL on 9 July 2013. My view is that one month from that date would have been reasonable time to disinvest Mr Pollett’s holdings with HBOS and BIL (on or about 23 July 2013) and then make the payment to Legal & General (on or about 1 August 2013).
49. Mr Pollett’s SIPP holds 100 per cent accumulation shares in the Fund. His financial loss is therefore the cost of purchasing the difference (if any) between the accumulation shares that he would have purchased in the fund if the transfer value amount calculated on 23 July 2013, had been paid to Legal & General on 1 August , and the accumulation shares that can be purchased in the fund when the current transfer value is paid by OCL to Legal & General.
50. This whole matter has inevitably caused Mr Pollett distress and inconvenience. In recognition of this I consider that he should be paid £500 as compensation.
51. Concerning the payment of the IFA’s fixed fee. It was Mr Pollett’s decision to engage the IFA to handle his complaint. He could equally have referred the matter to the Pensions Advisory Service for no charge. I therefore do not find that OCL should pay this sum.

Directions

52. Within 56 days of this Determination OCL shall:
 - calculate Mr Pollett’s transfer value as at 23 July 2013, and request that Legal & General confirm the number of accumulation shares that this amount would have purchased in the Fund on 1 August 2013 (A);
 - request the disinvestment of Mr Pollett’s holdings in the Plan and pay the sum to Legal & General;
 - ask Legal & General to confirm the value of the accumulation shares that this sum has purchased (B) and if the value of (A) invested since 23 July 2013, exceeds (B) to confirm the cost of purchasing the additional accumulation shares required to replace the loss.in the Fund.

PO-3658

53. Within 10 days of receiving the information from Legal & General pay the cost of purchasing the additional accumulation shares in the Fund to Legal & General for investment in the SIPP.
54. Within 10 days of this Determination OCL shall pay Mr Pollett £500 for distress and inconvenience caused.

Anthony Arter

Pensions Ombudsman
21 July 2015