

Ombudsman's Determination

Applicant	Mr Colin Sampson & Mr Kevin Bottomley (the Applicants)
Scheme	Sampson Associates Pension Fund (the Scheme)
Respondent	Friends Life

Complaint Summary

1. The Applicants' complaint is that Friends Life:
 - a. did not offer them suitable investment options for the cash held in the Scheme;
 - b. instructed property managers and charged fees for the management of the commercial property held by the Scheme, which was a service they did not require;
 - c. required them to pay stamp duty land tax (**SDLT**) of £20,000 plus legal fees on a property transaction;
 - d. delayed in carrying out the transfer of the funds under the Scheme to their policies with AJ Bell; and
 - e. delayed in supplying details of the fees charged for the Scheme, that they had requested in June 2014.

Summary of the Ombudsman's Determination and reasons

2. The complaint should not be upheld against Friends Life because apart from one part of the complaint, I am unable to find maladministration by Friends Life. In respect of that part of the complaint where I have found maladministration, I am unable to find that the Applicants have suffered any injustice.

Detailed Determination

Material facts

3. The Scheme which had policies in Friends Life's Special Fund (the **Fund**) was originally set up with Sun Life, subsequently acquired by AXA, and then by Friends Life.
4. The Applicants brought a previous complaint to us against AXA. The decision given in respect of this complaint shows that: the Applicants decided to hold £750,000 as cash because they considered the financial markets to be unstable; they decided in the spring of 2009 to fully invest the cash held; they were aware in June 2009 that their financial adviser could not act as an investment manager; they were initially provided with list of funds by AXA, but the funds shown were not available under their pension arrangement; and on 6 August 2009, AXA provided a correct list of available funds.
5. A booklet (the **Booklet**) about the Fund explains:
 - a. The Booklet forms part of policy and should be retained with the latter.
 - b. Investments under the Fund are legally and beneficially owned by Friends Life.
 - c. As the Fund is not designed to hold cash in the long term, Friends Life retain with its custodians and/or in a separate bank account sufficient cash as it deems necessary to administer the investments. It pools the un-invested cash it holds in the Fund and invest this in the Luxembourg based AXA IM Cash mutual investment umbrella, which aims to provide investment returns in line with short term market cash rates.
 - d. Unless the funds are invested in commercial property only, all members must nominate an investment manager to deal with the day to day investment decisions and the management of their funds.
6. The assets of the Scheme included a property, 61 and 63 Islington Park Street (the **Property**).
7. On 27 May 2008, Friends Life wrote to all its policyholders regarding the changes to the administration and charges for schemes holding properties as assets. The letter states, under the section headed "New Property Valuation Service", that it had negotiated a valuation service package and the cost was £385 per annum per property. It said that the day to day administration would be taken over by Lambert Smith Hampton (**LSH**). The Applicants have confirmed that they received this letter.
8. The Property was a freehold commercial office on ground and basement level at 61 Islington Park and on two floors at 63 Islington Park, on 999 year leases. When the Property was first purchased by the Scheme, the upper floors of 63 Islington Park was in separate ownership and the Applicants subsequently purchased these and

converted them into self-contained residential flats. These flats were not assets of the Scheme.

9. On 14 May 2007 Lyons Davidson (**Lyons**), Friends Life's solicitors, wrote to Farrer & Co (**Farrer**), the Applicants' solicitors, with regard to the Property saying:
 - a. The proposal to grant a 999 year lease on the residential element was not acceptable to their client. The Scheme has post-A Day transitional protection and the granting of residential leases would remove that protection and their client is not willing to adopt that position.
 - b. Their client is concerned that HMRC would view the proposal to grant the commercial lease to a nominee for nil value/premium and the subsequent assignment of the same to [their client] as a tax avoidance scheme. Their client would not involve itself in such a scheme, unless it could rely on the confirmation of a tax expert that it would be acceptable to proceed with the proposal without the fund facing stamp duty land tax (**SDLT**). This would incur significant additional costs to the fund in seeking the advice of a tax expert and the risk of HMRC investigating the situation at a later date.
 - c. Their client does not believe that it has the power to grant the leasehold interest in the commercial element from it to a nominee even though it is transferred back to it the following day. The Property is an asset of the fund and the policy states that all assets are owned by their client both legally and beneficially. The members or beneficiaries of the scheme are not entitled to hold any of the assets on trust for their client.
 - d. It would not be possible to proceed on what is being proposed because the Property is an asset of the Scheme. Therefore, the only way to proceed is by selling the freehold with the immediate grant of a commercial lease to their client, but that would result in a SDLT liability for both transactions.
10. In an email dated 3 July 2007, to the Applicants, Farrer say:

"Sun Life are still considering whether the sum to be referred to in the freehold transfer is the sum of £640,000 (on the basis that the freehold is transferred subject to the obligation to grant the 999 year lease of the basement/ground at a value of £520,000 or £1,160,000. I think the value has to be £640,000 but, as you are aware, you have to pay SDLT on the value of £1,160,000".
11. On 20 July 2007, Lyons sent an email to Farrer saying that their client had serious concerns regarding the proposed freehold transfer value of £640,000 and nil premium for the grant of the 999 year lease. Consequently, the matter had been referred to its tax team for a decision.

12. On 14 August 2007, in an email to Farrer, Lyons say:

“As to the draft TR1 and Contract, the tax advice given to my client is that relief from SDLT will be available on the premium of £520,000 for the 999 year lease pursuant to Paragraph 5 of Schedule 4 to the Finance Act 2003 but only on the basis that the sale and leaseback are expressed in the contract to be in part consideration of each other.

My understanding of the tax advice given to my client is that the leaseback must not be dealt with by way of an express agreement for lease but to be partly in consideration of the sale or SDLT will become payable on the premium. My client is advised that they should not self-assess on the basis of a nil premium for the 999-year Lease and that notwithstanding the net balance of monies payable in respect of the transfer and leaseback will be £640,000...the value of the freehold is £1,160,000 and SDLT will be payable on that amount by your client if the relief is to be available to AXA on the 999-year Lease.

The tax advice given to my client is that if an attempt to characterise the transaction in the way suggested in your proposed structure (i.e. freehold consideration of £640,000 and nil premium for the Lease) were reflected in the SDLT returns and an enquiry is made by HMRC, they would expect HMRC to be successful in any challenge. I have amended the draft TR1 and Contract accordingly but will forward a copy of the revised draft Contract to AXA's tax adviser for their confirmation that it satisfies the points they have raised. If not, I will forward a further amended draft dealing with any further points raised by them”.

13. On 22 August 2007, in an email to Lyons, Farrer say that their tax partner states that the Agreement and Transfer should state that the consideration is the sum of £1,160,000 to be satisfied by the payment of £640,000 and the grant of the lease of the ground floor and basement. There should be no reference to a premium of £520,000 as there is no such premium payable.
14. Lyons responded to Farrer, by email, on 22 August 2007, saying that the tax advice received by their client is that £520,000 will have to be shown in its SDLT return as the consideration for the linked transaction.
15. In 2011, apart from the Property, the Applicants moved most of their funds from Friends Life to two new Self Invested Personal Pensions (SIPPs) with Barclays. The Applicants say that the reason they retained the policies with Friends Life was because it was not possible to hold a property in a Barclays SIPP. They added that they were restricted from moving all the cash held with Friends Life to Barclays and the money was left un-invested; over the past four years, save for £16,000, no cash held by Friends Life was invested. They claim that over the past four years £80,000 was not invested.

16. In January 2014, the Applicants informed Friends Life that they wished to move the funds under the Scheme to a Small Self-Administered Scheme with A J Bell.
17. In April 2014, in response to an email from the Applicants, Friends Life advised that the Scheme held approximately £54,793.61 in cash.
18. In June 2014, in an email, the Applicants complained to Friends Life that the administration of the Scheme had been poor and many serious errors had been made. They said that they have been unable to invest the cash held in the Scheme and even if they had managed to do so, the investment funds offered were either useless in that their performance was so poor and/or their range so small as to be harmful in investing funds; they had been charged fees for work imposed on them with regard to the Property, when they had no use for the work undertaken; and the fees had been excessive and Friends Life had sub-contracted out the management of the Property which they were managing quite successfully themselves.
19. In July 2014, in an email to Friends Life, the Applicants said:
 - a. When the Scheme was first set up, they managed the Property themselves and paid the rent to Sun Life. At the outset they did not have any spare cash to invest because they were paying down a mortgage on the Property. It was their intention that once the mortgage was paid off they would be able to invest the cash in the Scheme. They have been unable to invest their cash at any time and Friends Life, and their predecessors, had given them incorrect advice and information on multiple occasions.
 - b. Friends Life had sub-contracted out the rent collection to LSH when there was no need to do so.
 - c. They have been paying Friends Life and LSH fees, but have received nothing of value in return.
 - d. Due to Friends Life's failures and inadequacies they have had no choice but to move their pension fund to another firm – A J Bell.
 - e. They would like details of all fees paid, as previously requested, so that they can recover part or all these fees.
 - f. They asked Friends Life to transfer the cash held, which was the rent paid in, which approximated £80,000 and it refused to do so. When they suggested that they would complain to the Ombudsman, Friends Life immediately relented and transferred approximately £16,000 but it held the remainder of the cash until the Property was transferred.
 - g. When they first purchased 61 Islington Park Street, it was a freehold ground and basement office property and, in separate ownership, there were two floors of office above on 125 year leases. During the entire time the Scheme was with Sun Life this was acceptable. When AXA became involved, they

purchased privately, outside the Scheme, the upper two floors of this property which they converted to residential use. At this point they were forced to sell the freehold of the ground and basement back to themselves privately and then sell back a new lease to the Scheme. In doing so the Scheme incurred approximately £20,000 in SDLT plus considerable legal costs. They have taken advice and this transaction was totally unnecessary.

20. In July 2014, the Applicants wrote to HMRC saying that approximately seven years ago they had purchased the upper two floors of 61 Islington Park Street as private individuals and converted these floors for residential use. Friends Life had instructed them to sell the commercial freehold of this property to themselves outside the Scheme and simultaneously grant a 999 year lease and pay SDLT. They asked whether someone who purchased these floors and converted them would have had to transfer the freehold out of the Scheme, grant a 999 year lease and pay SDLT.

21. On 5 August 2014, HMRC wrote to the Applicants saying:

“The transfer of the freehold by the pension fund to you and your partner and the grant of a lease back to the fund [is] treated as an exchange for the purposes of stamp duty land tax. Where an exchange includes a major interest land the chargeable consideration is generally the market value of what is acquired but will be the actual consideration given if this is greater...

As you and your partner are acquiring the freehold interest the SDLT liability for your transaction is based on the value of that interest however if there is a written agreement for the sale of the freehold that provides for the lease back, the value of the freehold can take this encumbrance into account.

I note that you have already made a payment in respect of SDLT. If after including this informal opinion you wish to amend the self assessment included in your SDLT1 return you may do so at any time within 12 months of the filing date. The amendment can be made in a letter to this office and should show how and where the return is to be amended and give the UTRN number for the return. If the amendment entitles you to a repayment, a copy of the contract and transfer document should be included.

As the pension fund has acquired a leasehold interest the chargeable consideration for this transaction is the market value of the lease plus any rent that is payable. However Section 57A FA 2003 provides a relief in respect of the lease providing certain conditions are met...It is the pension funds responsibility to notify this transaction and pay any SDLT therefore if any amendment is required to this return it is the pension fund trustees that should make it.”

22. In September 2014, Friends Life wrote to the Applicants saying:

- a. According to its records, it originally contacted Farrer on 11 March 2014, to advise them that it had received a request for a transfer. As it did not receive an acknowledgement, it wrote to Farrer again on 8 April 2014, and received a reply on 30 April 2014, advising it that they were reviewing the transfer package but did not confirm that the transfer was to proceed.
- b. When processing any transfer, it must receive all necessary requirements before releasing any monies from the Scheme. The main reason for this is that it must have confirmation that the receiving arrangement is happy to receive the benefits, as once it has cancelled the policies it is unable to reinstate them.
- c. The instructions given in the completed standard transfer forms states that it will cancel the units held under the standard funds once all of the requirements for the full transfer have been received. The instruction to transfer the benefits held under the standard fund was received on 7 May 2014, and the benefits were paid by CHAPS on 13 May 2014.
- d. In order to proceed with the transfer of benefits under the private fund, it needed to wait for all of the legalities to be completed between the solicitors (ie Farrer and Lyons). Its servicing team received the final confirmation that the transfer was to proceed on 1 July 2014, and payment was made to A J Bell by CHAPS on 1 July 2014.
- e. If they were unhappy with the performance of the funds they were invested in, the fund switch facility was available. Its customers can choose from a range of funds. While it appreciates their concern over the investment growth of the funds, it manages each fund in line with its aims and investment strategy. It recommends that policyholders consult their financial adviser prior to making any decision to switch a unit holding into another fund.
- f. The private fund includes interest earned from the rental income and the commercial property. The performance of this fund is largely reflected by the market value of the property, which is effected by the property market in general.
- g. It understands that they had previously referred to the Financial Ombudsman information given in relation to the possibility of an external investment. This matter has been resolved following an Ombudsman determination.
- h. Part of the property management agreement under the Scheme, which they agreed to, is that the Property had to be for commercial use only. In 2006 legislation changed and this meant that it enforced restrictions for the Property to be used only for commercial use. Following improvement works on the Property in 2006, a surveyor inspected it for a valuation and found that

part of it was already being used for residential purposes. This was a breach of the lease agreement. Over the following months negotiations took place between the parties (ie the Applicants, Friends Life, and the solicitors for both parties) regarding the use of the Property, the purchase of the freehold and other issues. The reason why they were required to purchase the freehold and grant a lease back of the commercial element to Friends Life was to avoid tax charges and scheme sanctions in respect of the breach. Therefore, any changes that happened at that time were a mutual agreement between the parties and the avoidance of unnecessary charges and fees drove the negotiations.

- i. It had no comment to make on HMRC's letter of 5 August 2014, and suggest that they refer this to their solicitors.
- j. It had investigated the complaint about the delay in transferring the funds to A J Bell and was unable to find any evidence that it had caused this.
- k. It enclosed statements of the fees and charges made between 2009 and 2014, and confirmed that the fees and charges applicable at the time of the transfer were correct and therefore it is unable to refund the £13,212.67 that had been requested.

23. As the Applicants were unable to resolve their complaint with Friends Life, they brought their complaint to us.

Summary of the Applicants' position

- 24. They were restricted from moving all the cash held with Friends Life over to Barclays in 2011 and the money was left un-invested. They were not offered a suitable investment option.
- 25. The only information they received regarding options for investments was on a single document provided by AXA/Sun Life on 6 August 2009. The document showed the following funds: Cash, Fixed Interest, With Profits (SLAS) Distribution, Property, UK Equity, Europe Managed, Global Equity, Japan, Far East, Global Distribution, Reserve, Index Linked, Retirement, Overseas, Higher Income, Global Managed, Ethical, North America, Pacific and Building Society. They were unable to find any further information regarding these investments and AXA/Sun Life never provided them with any further information.
- 26. The funds that were transferred to Barclays totalled approximately £700,000 which has grown since 2011 to in excess of £1,500,000.
- 27. The reason they retained their policies with Friends Life was because of the Property which produced an annual rent income of £40,000. It was not possible to hold the Property in the SIPP's with Barclays. The Property was eventually transferred to an arrangement with A J Bell.

28. They were instructed by Friends Life to sell the freehold of the commercial office from the Scheme to themselves, and issue a 999 year lease on the commercial office and pass the lease back to the Scheme. The value of the freehold was set at £400,000 and Friends Life appointed Lyons solicitors to deal with this matter. Lyons insisted that SDLT was paid on the transfer and £20,000 plus associated legal fees was deducted from the Scheme. The transfer took place in 2007 and they now have written confirmation from HMRC that where such a transfer takes place, and a back to back lease is issued to the scheme so that there is no transfer value, then no SDLT is payable. They have asked Friends Life for £20,000 plus a further £20,000 because their fund with Barclays doubled in value since that £20,000 was deducted from the Scheme. Friends Life has not paid the refund requested.
29. They called HMRC after reading an article in the Telegraph newspaper in 2014 concerning the application of SDLT. They were informed that they were incorrect and SDLT was payable. They then wrote to HMRC because they refused to accept what they were told. They were informed that where there is no transfer of value and the issue is a back to back 999 year lease, SDLT relief would have applied. The problem is that the time limit has run out on reclaiming the SDLT.
30. Lyons had made the error and only they can claim back the SDLT.
31. The service they had from Friends Life was unsatisfactory. They had no option but to exit the Friends Life's policies. They would like Friends Life to refund all exit charges and the fees paid to LSH.

Summary of Friends Life's position

32. There were a range of funds available and the Applicants could have sought independent financial advice if they wished to switch funds at any time.
33. Information regarding changes to the administration and charges for schemes holding property assets were conveyed to members in a letter dated 27 May 2008.
34. It is unable to comment on the correct position regarding SDLT and have suggested to the Applicants that they refer the matter back to their solicitors for clarification. The letter the Applicants received from HMRC in August 2014, indicates that further guidance is available from HMRC and a review was possible within 12 months of the SDLT return.
35. It appreciates that the Applicants have been frustrated by the delay in processing the transfer of the Property to the arrangement with A J Bell. However, they have found no evidence to indicate that it caused any unnecessary delay.
36. Details of the fees correctly charged were given to the Applicants in their letter of 18 September 2014.

Conclusions

Friends Life did not offer suitable investment options for cash held in the Scheme

37. The Applicants say, and we are also aware from their previous complaint, that in August 2009 AXA provided them with a list of funds they could invest the cash held under the Scheme. Therefore, the Applicants had the option to invest the cash held in any of the funds listed.
38. The fact that the Applicants felt that the funds are not suitable investment options is not Friends Life's fault. The decision as to the types of funds offered for investment, and the aims and strategies of those funds, is a commercial decision taken by Friends Life.
39. The Applicants say that they were unable to find any information about the funds and they were never provided with any information. If the Applicants were unable to find the information, they could have contacted Friends Life, or its predecessor AXA, and requested further information. There is no evidence to show what enquiries they had made to find any information or when these enquiries may have been made.
40. For the above reasons, I am unable to find maladministration by Friends Life and therefore do not uphold this part of the complaint against it.

Friends Life instructed property managers and charged fees for the management of the Property

41. In May 2008 Friends Life wrote to all its policyholders holding properties as assets informing them about the changes to the administration and charges. The Applicants confirmed that they received this letter at the time. Therefore, the Applicants were aware of this matter in 2008. However, they did not bring this complaint to us until September 2014, over six years later.
42. Under Regulation 5 of The Personal and Occupational Pension Schemes (Pension Ombudsman) Regulations 1996 (SI 1996 No. 2475), (**the 1996 Regulations**), I cannot investigate a complaint received more than three years after the applicant became aware (or reasonably ought to have become aware) of the matters complained about. As the Applicants were aware of this matter for more than three years before bring the complaint to me, I cannot investigate this part of the complaint.
43. However, even if I could investigate this matter, the complaint cannot be upheld against Friends Life for the following reasons:
 - a. The Booklet states that investments under the Fund are legally and beneficially owned by Friends Life. Therefore, it is entitled to appoint a property manager to manage any property which is an asset under the Fund.
 - b. Friends Life had given notification of the changes in 2008, but there is nothing to show that the Applicants had objected to the change at that time.

Friends Life required them to pay SDLT of £20,000 plus legal fees on a property transaction

44. The SDLT of £20,000 was paid in 2007 and therefore the Applicants should have been aware of this part of their complaint at that time. However, they say that it was only in 2014 that they became aware that the payment of the SDLT was an error.
45. The Applicants say that they were informed during a second telephone conversation with HMRC in 2014 that where there is no transfer of value and the issue is a back to back 999 year lease, SDLT relief would have applied. However, HMRC's letter of 5 August 2014, does not corroborate this information. The letter says that if there is a written agreement for the sale of the freehold that provides for the lease back, the value of the freehold can take this encumbrance into account. It also says that section 57A of the Finance Act 2003 provides a relief in respect of the lease provided certain conditions are met (the conditions were not specified). The letter does not provide confirmation that the payment of the SDLT of £20,000 was an error.
46. Friends Life had taken advice from Lyons on this matter. There is nothing that leads me to believe that that advice was incorrect.
47. I am therefore unable to find maladministration by Friends Life and do not uphold this part of the complaint against it.

Friends Life delayed in carrying out the transfer of funds to their policies with A J Bell

48. Friends Life says that the Applicants had requested the transfer in March 2014, but it was unable to proceed because Farrer was reviewing the transfer package. It received the instruction to transfer the benefits held under the standard fund on 7 May 2014 and transferred the funds by CHAPS to A J Bell on 13 May 2014.
49. Friends Life says that before it proceeded with the transfer of funds from the private fund, it needed to wait for the legalities to be completed between the solicitors - Farrer and Lyons. It received final confirmation that the transfer was to proceed on 1 July 2014 and made a payment by CHAPS to A J Bell on the same day.
50. I would agree that it would not have been appropriate for Friends Life to proceed with the transfer until it received the necessary forms and instructions. Therefore, I am unable to find that any delays in the transfer of the funds was due to Friends Life and do not uphold this part of the complaint against them.

Delay by Friends Life's in supplying details of the fees charged which the Applicants had requested in June 2014

51. In June 2014, the Applicants requested details of the fees and charges paid by the Scheme. This information was provided by Friends Life in September 2014. In my view, Friends Life could, and should, have provided this information sooner than they did and the delay in doing so is maladministration. However, I am unable to find that the Applicants have suffered any significant injustice as a consequence of this.

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52. For the reason set out above I do not uphold this part of the complaint against Friends Life.

Anthony Arter

Pensions Ombudsman
14 December 2015