

Ombudsman's Determination

Applicant	Mrs Joan Whitehead
Scheme	Progressive Foundries Retirement Benefits Scheme (the Scheme)
Respondent(s)	Mattioli Woods Trustees Limited (MW Trustees)

Complaint summary

Mrs Whitehead has complained that MW Trustees refuse to finalise the transfer of her late husband's benefits following his death.

Summary of the Ombudsman's determination and reasons

The complaint should not be upheld as the transfer was not complete at the date of the member's death with MW Trustees being entitled to put a stop on the transfer on the member's death.

DETAILED DETERMINATION

Material Facts

1. Mrs J Whitehead's son Mr G Whitehead has power of attorney for her and is acting on her behalf.
2. Mr E Whitehead, the late husband of Mrs Whitehead, was a member of the Scheme, which is a small self-administered scheme. The Scheme is governed by a Trust Deed dated 14 November 2011 between Fabex Ltd (the principal employer), MW Trustees and the late Mr E Whitehead. MW Trustees and Mr E Whitehead were the trustees of the Scheme. Mr E Whitehead's funds have been in drawdown since prior to 2006.
3. Mr E Whitehead had been exploring a transfer to an overseas scheme in Guernsey where he lived. A letter from HMRC of 8 November 2012 said that the La Vie Retirement Savings Plan (**the La Vie Plan**), which is based in Guernsey, had the appropriate tax status as a "qualifying registered overseas pension scheme" or "QROPS".
4. Mr E Whitehead wrote to MW Trustees on 27 November 2012 to say that he wished to transfer his benefits from the Scheme to the La Vie Plan. He asked for the details of the next steps needed to transfer.
5. The late Mr E Whitehead's advisers say that an application to join the La Vie Plan was completed on 10 December 2012. A certificate of membership showing Mr E Whitehead as a member of the La Vie Plan was completed on 17 December 2012.
6. A letter of 20 December 2012 from MW Trustees to Mr E Whitehead asked him to provide a HMRC APSS263 form in respect of the La Vie Plan, a memorandum of understanding and a number of other forms in order for the transfer to proceed. A transfer-out application form had a receiving scheme declaration that confirmed that the transfer value would be applied to provide pension benefits for the member.
7. Mr E Whitehead's advisers say that they completed the transfer paperwork required by MW Trustees on 3 January 2013, but it was not sent back to them until 15 January 2013.

8. Amongst the paperwork was a Memorandum of Understanding between the trustee of the La Vie Plan, Mattioli Woods plc and MW Trustees, Mr E Whitehead and the business from whom he was talking financial advice. It recited that Mr E Whitehead wished to transfer and the intention that the transfer should be made, subject to listed covenants which were witnessed by the parties under the memorandum. The substance of the covenants was that Mattioli Woods plc and MW Trustees would be indemnified by the trustee of the La Vie Plan and Mr E Whitehead in relation to any future costs or liabilities arising from the transfer.
9. In an email of 16 January 2013 MW Trustees asked the trustees of the La Vie Plan to complete a declaration. The trustees of the La Vie Plan responded on 21 January to say that the completed declaration had been posted.
10. Mr E Whitehead died on 3 February 2013.
11. On 4 February 2013 the trustees of the La Vie Plan sent an email to MW Trustees asking for an update on the transfer's progress. MW Trustees responded saying:

“The documentation is with the bank to close the pension scheme account and make the payment, which we expect to be this week.”
12. MW Trustees say that they became aware of the death of Mr E Whitehead on 4 February 2013.
13. A letter of 5 February 2013 from MW Trustees to Mr G Whitehead said that as the bank had not completed the transfer at the time they were informed of his father's death the payment had now been suspended. They asked that he contact them when he felt able to do so. In the meantime the funds would be retained within the Scheme's HSBC account and would continue as a registered UK pension scheme.
14. Mr G Whitehead made a complaint to MW Trustees on 7 March 2013. He was unhappy with the time that had been taken to process his father's instructions. He had been advised that MW Trustees were wrong to cancel the transfer. He asked for an explanation.
15. MW Trustees responded on 15 April 2013 saying that they had reviewed the events that had taken place. They said they had temporarily suspended, and not prevented, the transfer. MW Trustees had become the sole trustee of the Scheme

on Mr E Whitehead's death and had a fiduciary duty to act a certain way, including in the best interests of the Scheme's beneficiaries. They viewed that they had acted prudently and had taken action that was in the best interests of the beneficiaries. They asked for a copy of the advice taken relating to the transfer and any documentation regarding a legal view that the transfer should have completed. They raised a concern over the potential tax implications of a transfer.

16. On 17 April 2013 a response was sent by Mr G Whitehead's solicitor. He said they understood that MW Trustees' requirements under the rules of the Scheme had been met by the papers provided on 21 January 2013. That had represented the last of the information and documentation requested to affect the transfer. MW Trustees had otherwise agreed that the transfer had been made. They also understood that the bank holding the transfer monies had been instructed to pay to the La Vie Plan's trustee. His view was that agreement had been reached that the beneficial or equitable interest in the member's transfer had been transferred.
17. Mr G Whitehead's solicitor referred to section RPSM11104860 of the HMRC manual which deals with when a "benefit crystallisation event", or "BCE", has occurred for tax purposes:

"RPSM11104860 - Technical Pages: Lifetime allowance: Valuing benefits on BCEs: Transfer to a qualifying recognised overseas pension scheme - BCE 8

...

A **BCE 8** occurs when a member, before they reach age 75, transfers funds from a **registered pension scheme** to a **qualifying recognised overseas pension scheme**. This event catches transfers overseas from all types of **arrangement**.

...

Effective date of event

The effective date of the event is the date the assets/funds leave the scheme (not when they are received overseas).

The date a transfer can be said to leave a scheme is a legal question. It will be the point when a clear agreement is in place (including the completion of any transfer application and acceptance process) such that both schemes

accept that the beneficial or equitable interest under the registered pension scheme has been transferred.

The fact that the conveyance of any legal title to any assets being transferred may stray does not alter the above. This follows an understanding of law that it is not necessary to complete the formalities of transferring the legal title to an asset to convey the underlying beneficial interest. As a test of effectiveness, it should be considered that if the member died on a particular date would death benefits be payable from the transferring registered pension scheme.”

The Rules of the Scheme

18. Rule 12 provides that the trustees “may at their absolute discretion” make a transfer – specifying a QROPS as a permitted destination.
19. Rule 20 covers “Benefits following the death of Member”. This essentially says that on the death of the member for whom drawdown was being provided the trustees shall apply the member’s individual fund to either provide a dependent’s drawdown amount, a Scheme pension, an annuity or the payment of one or more death lump sum benefit amounts. There are also provisions for the monies to be reallocated to other members or the general fund.

Summary of Mrs Whitehead's position (as expressed by the solicitors acting for Mr G Whitehead and his mother)

20. There is a distinction to be made between legal and beneficial interest. The legal ownership of the assets lay with the trustees. The beneficial ownership resided with the persons for whose benefit the assets were held. The beneficial ownership was transferred from MW Trustees to the trustee of the La Vie Plan before Mr E Whitehead’s death and MW Trustees held the transfer value on a bare trust for the trustee of the La Vie Plan. That being the case MW Trustees should be to complete the physical transfer.
21. As reasons for this view they say:
 - The Trustees had exercised discretion under the Rules and communicated that to the trustee of the La Vie Plan (with no indication that it was revocable, which the Rules do not expressly permit). At this point the relationship

became that MW Trustees held the transfer on a bare trust of which La Vie Plan trustee was the beneficiary.

- The memorandum of understanding constituted an unconditional agreement to transfer, and if the exercise of discretion did not effect the transfer of the beneficial interest to the trustee of the La Vie Plan, then the memorandum did.

22. MW Trustees had been provided with all the information and documentation it requested prior to the decision to transfer the benefits being made. They and the trustees of the La Vie Plan had reached agreement that the member's Scheme benefits would be transferred. If it was legitimate for the transfer to be made before 3 February 2013 then it would be legitimate on or after 3 February 2013 as the transfer "had taken place" at the point of the agreement to it by the Trustees and merely needed to be finalised by the physical transfer of the assets.
23. By way of a second strand of argument, as a matter of law the legal transfer had already been effected. Mrs Whitehead relies on *Re Rose* [1952] EWCA Civ 4. This is an authority for the proposition that equity treats a gift as complete where the donor (in this case MW Trustees) has done all in his power to divest himself of the property (in this case the transfer value), and to vest it in the transferee (in this case the La Vie Plan's trustee). By issuing instructions to the bank to transfer the monies to the QROPS trustee, MW Trustees had, in equity, completed the transfer.
24. I am referred to certain paragraphs of Halsbury's Laws of England dealing with the equitable assignment of a chose in action.
25. The fact that MW Trustees could have issued instruction to the bank to reverse the payment reflects the contractual relationship between MW Trustees and the bank, not MW Trustees and the trustee of the La Vie Plan. The fact that such an instruction could have been issued does not make giving the instruction proper; it would not undo the legal transfer if given.
26. But for the death of Mr E Whitehead the actual physical transfer would now have been affected. Once the transfer is agreed and has legally taken place a trustee cannot change its mind.

27. The first consequence of the legal transfer having been made prior to the member's death is that on his death benefits payable will be in accordance with the rules of the La Vie Plan.
28. MW Trustees' comments about the HMRC's concerns over overseas transfers were irrelevant as the La Vie Plan has at all times been registered as a QROPS. Their duty in relation to the transfer request was to establish that the La Vie Plan was such a scheme, which it was.
29. Mr G Whitehead says that the injustice caused is being denied access to Mr E Whitehead's benefits. He has ceased employment to assist in the provision of care for Mrs Whitehead. They were both beneficiaries of Mr E Whitehead and would benefit from the transfer value being effected and being able to realise the benefit of their entitlement under the La Vie Plan. They would be tax disadvantaged in relation to the member's benefits if payments were made under the Scheme rather than the La Vie Plan.
30. Mr G Whitehead is concerned that MW Trustees may seek to withhold monies that it had incorrectly analysed are due to HMRC and pay this over to them. The time and costs of obtaining a repayment of such monies was a matter of concern.
31. To put things right Mr G Whitehead asks that I direct that the transfer is made to the La Vie Plan. He is also concerned about charges that may be levied by the Trustees in connection with the delay to the transfer. He asks that no charges apply from 3 February 2013 onwards, or for a direction confirming the extent to which charges can be deducted from any transfer value.

Summary of MW Trustees' position

32. The authority to transfer funds to the La Vie Plan was being processed by HSBC at the time of Mr E Whitehead's death and they took the decision to suspend the transfer immediately until the ramifications of the transfer were known. This decision was taken to prevent a liability from being applied to Mr Whitehead's share of fund, to any beneficiary and to MW Trustees.

33. HMRC had a critical view of some QROPS for alleged breaches of regulation. As a result they imposed onerous obligations upon the administrators and trustees of UK registered pension schemes where a transfer to a QROPS was sought. Earlier in 2012 Mr E Whitehead had made attempts to transfer to an overseas scheme that was not on HMRC's list, which MW Trustees refused despite aggressive attempts from the overseas scheme company. This created an early cause for concern regarding the process.
34. They had not refused to finalise the transfer of Mr E Whitehead's benefits following his death. The SSAS continues to hold Mr Whitehead's pension benefits, now defined as the death benefits in favour of Mrs J Whitehead, and they are not holding monies on a "bare trust" or for the benefit of the receiving scheme's trustees.
35. Their primary concern with the proposed transaction is whether or not it will attract tax charges and have undisclosed ramifications on the beneficiary. Their view is that the dispute regarding the legally binding nature of the transfer is a secondary consideration.
36. It was not correct that Mr G Whitehead is detailed as being the "beneficiary" or "dependent" for his father's Scheme benefits." The Scheme files hold a signed letter of intent that states that Mr G Whitehead is only a beneficiary upon the death of both Mr E Whitehead and his wife. Whilst Mrs Whitehead is alive, she remains the sole beneficiary of the pension benefits.
37. As neither Mattioli Woods plc, nor MW Trustees Limited, provided any advice regarding the transfer to a QROPS, evidence as to the advice that was given has been requested. Importantly, as Mr E Whitehead's widow is the beneficiary of the funds, they have requested sight of any ongoing advice, to ensure there is suitability behind the advice. It was not clear if the advice provided to Mr Whitehead took into account death benefits for Mrs Whitehead. Or if consideration was made for Mr Whitehead's death within five years of being deemed as a non-resident in the United Kingdom. They had also been informed that Mrs Whitehead suffers from Alzheimer's, which created a necessity to ensure that the decision to transfer takes into account the suitability of the move her as beneficiary and dependent. (In fact Mr G Whitehead did later agree to provide to MW Trustees a copy of the advice taken

in relation to this matter. However MW Trustees made no further comment on this, including whether they would now proceed with the transfer).

38. The assertion that the transfer should have been finalised on or shortly after 3 February 2013 with no additional involvement of MW Trustees is refuted. They had a fiduciary duty to ensure that death benefits are dealt with in an appropriate manner. Proceeding with the transfer upon awareness of the member's death would not only have created punitive tax charges payable from the transfer value, but could have caused a liability to the Scheme administrators of £495,000. For this reason, they can only be seen as acting in the benefit of all parties.
39. In all cases like this there will be differing opinions and contradicting interpretations of HMRC guidance. An example of this is the references to RPSM 11104860 and their own conflicting view that the pension fund remains in situ following the monies not transferring. HMRC guidance can be open to interpretation.
40. Mr G Whitehead had alleged that the transfer being unpaid has potential adverse tax consequences. They were unsure how this could be the case, when Mr E Whitehead's pensionable income was treated as exempt from UK tax with effect from 6 April 2010 and so Mrs J Whitehead's death benefits would also be exempt.
41. If they had transferred to a QROPS at any stage after the instruction was given to transfer, not only would a tax charge would have been triggered, but there would have been inheritance tax implications. Regarding the inheritance tax implications they believe that HMRC would say that a significant "transfer of value" would have taken place at the time of the transfer from the UK pension to the QROPS with this being subject to IHT at the lifetime rate of 20%.
42. The tax charges applying to Mr Whitehead's fund would be, at best, the same whether or not the transfer took place, because a payment from a QROPS, which would otherwise be treated as a "special lump sum death benefit" (which includes a drawdown pension fund lump sum) and is still treated as one if that payment is made and if the member has been a UK resident at any point over the preceding five tax years. HMRC have confirmed that Mr E Whitehead ceased to be a UK Resident for pension tax purposes with effect from 6 April 2010 so that lump sum tax charges would continue to apply to the assets of the Scheme until 2015. Even if

the monies are held in a QROPS, a special lump sum death benefit charge will be levied against the recipient at 55%. On the assumption that the transfer had been concluded before Mr E Whitehead died, tax charges would have applied to any payment made by a QROPS in the same way they would have applied to a UK registered pension scheme.

43. If Mr G Whitehead is adamant that the payment should still proceed to a QROPS, and they are satisfied that sufficient consideration has been given to the implications of this (specifically in regard to Mrs J Whitehead), the transfer can proceed. However, as 55% tax will be due in any event (without further consideration of any potential inheritance tax liability which remains a concern for Mrs J Whitehead and not the ceding scheme administrator/trustees), the tax will need to be deducted prior to transfer and paid accordingly to HMRC. Unfortunately, based on evidence received, MW Trustees Limited, as scheme administrator, cannot rely on the receiving scheme or Mr G Whitehead to report the liability to HMRC which would result in MW Trustees becoming ultimately liable. Alternatively, irrefutable justification will need to be provided to demonstrate that a 55% tax charge will not be triggered by the transaction. They were concerned that a QROPS company are giving financial advice which may not be in the interest of the beneficiary and likewise that critical decisions are being steered by Mr G Whitehead in his belief that he is the beneficiary of the Scheme.

Conclusions

44. Solicitors acting for Mrs Whitehead have put forward elaborate and overlapping arguments as to why the transfer should be regarded as complete, or that the assets are held on bare trust for the trustees of the La Vie Plan. I have not found what they have had to say easy to follow (or to summarise above). I did not find helpful the paragraphs from Halsbury's Laws to which I was directed.
45. A physical transfer of assets had clearly not taken place by the time of Mr Whitehead's death on 3 February 2013. All the funds were in the Scheme's bank account at the date of death. Mrs Whitehead's advisers say that the transfer instruction had been made prior to 3 February 2013 and so even if the funds had not been physically transferred the transfer was effective before that date (they say

a “legal transfer” has been made). They point to a telephone call of 29 January 2013 from Mr G Whitehead to MW Trustees and the emails of 4 February 2013 to and from the La Vie Plan’s trustee.

46. The email said that documentation was with the bank to close the pension scheme account and make the payment by the end of that week. As at 4 February 2013 the bank had been given instructions to make a transfer, but the transfer payment had not taken place before Mr E Whitehead’s death.
47. I do not find that it is right to separate the transfer of the beneficial interest from the transfer of assets so that the former happened before the latter, and the latter must unavoidably follow. The discretion to transfer has to be exercised consistently with the trust documents. In this case, a decision was made which, due to the turn of events, would have resulted in a physical payment that would take place when the discretion could no longer be exercised at all. There are two options: the first to regard the decision as irreversible, so making a payment which would otherwise have been in breach of trust acceptable (whether because it was held on a bare trust or otherwise); the other to regard the exercise of discretion as being contingent on there being no material change of circumstance. The second seems greatly preferable. The first approach leaves pension transfers decided on, but incomplete, in a kind of limbo, neither in one scheme nor the next, and waiting for disputes (such as this one) to arise.
48. In reaching that conclusion I have taken account of the fact that the discretion is not stated to be revocable. I do not think it had to be. And I think the Memorandum of Understanding is irrelevant other than as a record of intention.
49. The solicitors point to the wording in HMRC’s RPSM referring to the “Effective date of event”. It is not directly relevant. HMRC’s interest is in whether a benefit crystallisation event had taken place. No doubt they are correct to say that in some circumstances the beneficial interest may transfer in advance of the assets, but their observations on how and when this may happen have no special standing.

50. I am also referred to *Re Rose* case. The critical issue is not intent – there is no doubt that Mr E Whitehead and MW Trustees *intended* the transfer to go ahead and had taken the relevant steps for it to do so, the issue is whether the transfer was complete. In *Re Rose* a key question was whether a transfer of shares should be regarded as an incomplete gift. It was found that it could not, because Mr Rose had done everything that he could to make the transfer. Critically, the court considered whether he could have undone the gift and found that he could not. In this case the transfer could have been undone, because the bank could, quite lawfully as between MW Trustees and the bank, have been instructed not to make payment. If the transaction was reversible it was not complete. It is no help to Mrs Whitehouse's case to say that it should not have been undone, because it should have been treated as complete since that begs the question of whether it was indeed complete. In my judgment therefore no transfer had taken place at the date of Mr Whitehead's death.
51. There was no provision of the Trust Deed for making a transfer after the death of a member. However, MW Trustees seem to have taken the stance that that they could, if they wished, proceeded with a transfer after Mr E Whitehead's death. I do not need to explore what their reasons for thinking they had a discretion were, since they have not done so, do not intend to and, if they are right that they have a discretion, they have given reasons which are not perverse.
52. For the reasons given I do not uphold the complaint.

Tony King

Pensions Ombudsman
30 March 2015