

## Ombudsman's Determination

Applicant	Mr Y
Scheme	The Royal London Personal Pension Scheme (No 2) (the <b>Scheme</b> )
Respondent	Royal London

### Complaint Summary

1. Mr Y's complaint concerns the encashment of his pension pot, following a fraudulent claim by his then wife. Specifically, he is seeking redress for:-
  - 1.1. Loss of potential investment returns.
  - 1.2. Any additional tax liability he may incur due to his inability to transfer his funds within the time limit set by the relevant tax authorities in New Zealand.
  - 1.3. Legal fees he has incurred in connection with this matter.
  - 1.4. The non-financial injustice he has sustained.

### Summary of the Ombudsman's Determination and reasons

2. Royal London failed to undertake sufficient checks into the authenticity of the application to encash Mr Y's pension pot on the grounds of serious ill-health. The complaint is partly upheld to the extent that Mr Y has sustained serious non-financial injustice as a direct consequence of Royal London's failure to exercise reasonable care in connection with the application.

### Detailed Determination

#### Material facts

3. Mr Y was a member of "The Scottish Life Personal Pension Scheme." It was subsequently renamed "The Royal London Personal Pension Scheme (No 2)".
4. In May 2012, on or around the time Mr Y joined the Scheme, he transferred in the sum of £112,195 into his individual fund (the **Fund**). He subsequently relocated to New Zealand.

5. A deed of amendment adopting revised Scheme rules, dated 4 December 2006, names Royal London Mutual Insurance Society Limited as the Provider, Administrator and Trustee of the Scheme. Rule 2.1: Constitution of Scheme, states:

“Where the Scheme is established under trust, the assets of the Scheme shall be vested in the Trustee upon irrevocable trusts, to be applied in accordance with the Rules.”

6. Rule 25 of the Scheme rules (the **Rules**), “Alternative Application of Individual Fund”, provides, among other things, for payment of a serious ill-health lump sum.
7. Under Rule 25, where a member is suffering from “serious ill-health,” the scheme administrator may pay the member’s entire benefit entitlement as a lump sum. Before paying out the “serious ill-health lump sum,” the scheme administrator must have written evidence, from a registered medical practitioner, that the member has a life expectancy of less than 12 months.
8. On 13 September 2015, Mr Y’s wife, Mrs Y, set up a joint bank account (the **Bank Account**) without his knowledge or consent. Mr Y subsequently separated from Mrs Y sometime in October 2015.
9. On 19 October 2015, Royal London received an email from Mrs Y, claiming to be Mr Y, enquiring about serious ill-health benefits.
10. The email was from a Gmail account in Mr Y’s name. It said:

“hi there

I have a Scottish Equitable Policy in the name of [Mr Y] dob [...], .I now live in New Zealand and have been trying to contact someone for a few weeks now and I am terminally ill with cancer and want to draw down my benefits. I have a letter from my specialist confirming my diagnosis so would urgently like to know how to draw this down

Thank you.

[Mr Y].”

11. Royal London received a second email from the same account. It said:

“hi there sorry i [SIC] meant to say the policy was with Scottish life. i [SIC] cannot locate the plan number.”

12. On 20 October 2015, Royal London received a further email from the same account. It said:

“hi there I have managed to find my policy number... I urgently need a response to this please. My life expectancy is less than 3 months and I need to make sure my wife and infant son are going to be okay financially once I have gone. I am attaching a copy of my doctors [SIC] letter [(the **Letter**)]

confirming the same and need urgent confirmation on the next steps. MY time is limited and i [SIC] need to ensure that my wife and son are going to be okay. [SIC] thanks for your urgent reply and attention.”

13. The Letter was dated 1 October 2015 and was on Waitemata District Health Board’s letterhead. It was purportedly from a Consultant Haematologist at North Shore Hospital (the **Hospital**) in Auckland. The Letter advised:

“RE: [Mr Y]

The above mentioned patient is a married non smoking 46 year old male with a two year old son. He is currently under my care for acute lymphocytic leukemia [SIC] (date of diagnosis 18/11/2014) [SIC] All avenues for treatment up to this point have been explored and we are now at a point where the patient has become unresponsive to any treatment regime. In my expert medical opinion on examination today this patient has a life expectancy of 3-4 months and I feel it is prudent that any investments that are held are paid out urgently so that my patient can enjoy whatever time he has left with his wife and young son and is confident that they are financially secure when [SIC] is no longer around to provide for them. I thank you for your kind and urgent attention to this matter.”

14. In the email exchanges that followed, Mrs Y, again claiming to be Mr Y, confirmed that Mr Y lived in New Zealand. She asked Royal London to respond via email.
15. On 21 October 2015, Royal London received further emails from the same account. The first email asked Royal London to “push someone” to contact Mr Y urgently as he was terminally ill so “every second counts.” The second email, which was sent approximately one hour later, asked Royal London to respond the same day and advise the next steps: the email said Mr Y could not “afford to keep wasting time.”
16. Royal London requested a copy of the Letter and a contact number for Mr Y. Royal London explained that it would need to have a telephone conversation with him before it could issue forms as a matter of urgency.
17. On 23 October 2015, around 4:30 am New Zealand time, Mrs Y telephoned Royal London in response to a telephone message it had left for Mr Y. She asked Royal London to clarify the next steps.
18. The call handler advised that Royal London required evidence of Mr Y’s date of birth, address in New Zealand and bank account.
19. When the call handler asked whether Mr Y was present, Mrs Y said that he was asleep and terminally ill.
20. Mrs Y confirmed that they were looking at the full cash lump sum option. She explained that this would then get “rid of” their mortgage in New Zealand and take a “whole pile of stress” from her, particularly as they had a small child.

21. Royal London's contemporaneous note of the conversation indicates that Mr Y was terminally ill and unable to speak at the time. The note also indicates that Royal London had agreed that it would speak to Mrs Y.
22. On 24 October 2015, Mrs Y emailed a copy of a statement for the Bank Account and a copy of Mr Y's UK photo driving licence. She asked Royal London to process the payment "as a matter of urgency" and indicated that Mr Y would be taking the "full lump sum option."
23. The next day, Royal London acknowledged receipt of the documentation. It requested a completed ill health claim form (the **Claim Form**) as confirmation that Mr Y's benefits were being settled.
24. Royal London advised that it would not be contacting any medical practitioners in connection with the claim. It also advised that Royal London would transfer the lump sum once it had received a completed Claim Form.
25. On 26 October 2015, following receipt of a signed Claim Form, Royal London sent an email to confirm that it would be transferring the sum of £154,982 into the Bank Account.
26. The same day, Royal London sent notification of the payment to Mr Y by post (the **October Letter**) and acknowledged receipt of the Claim Form. Royal London confirmed that its Chief Medical Officer had assessed his claim and it had been accepted on serious ill health grounds.
27. The payment was subsequently made by telegraphic transfer on 27 October 2015.
28. The following day, Mrs Y sent a follow up email to Royal London; she asked how long it would take for the payment to be authorised.
29. On 19 April 2016, Mr Y's financial advisers (the **Advisers**) contacted Royal London regarding the possibility of transferring the proceeds of the Fund to a pension arrangement in New Zealand.
30. On 4 May 2016, Mr Y emailed Royal London. He noted that Royal London had informed his Advisers that he had withdrawn money from his Fund. He said he was very concerned that a "considerable amount had gone astray."
31. Following further exchanges, during which Mr Y expressed concerns that Mrs Y had encashed his Fund without his knowledge or consent, Royal London agreed to provide him with a copy of the "claim file." Mr Y indicated there may have been a "mix up" and that he may be able to get the money transferred from his wife.
32. On 26 May 2016, Royal London emailed Mr Y a copy of the documents and the emails that it had received in connection with the claim.
33. On 6 June 2016, Royal London contacted Mr Y and asked him to acknowledge receipt.

34. On 7 June 2016, Mr Y confirmed that he had received the documents. He said he would contact Royal London in due course.
35. On 10 June 2016, Royal London explained that based on the medical evidence and documentation, submitted at the time of the claim, it had authorised payment of the entire proceeds of his Fund. Royal London acknowledged that Mr Y had subsequently advised that he was not terminally ill and had not made the claim. Royal London also explained that it had a duty to report the matter to HM Revenue & Customs (**HMRC**) and seek recovery of the funds.
36. Royal London requested the following:-
  - 36.1. An update on the current position.
  - 36.2. Confirmation on whether Mr Y had reported the matter to the police?
  - 36.3. Whether the Bank Account was held in joint names?
  - 36.4. Whether it was possible for Mr Y to retrieve the funds from Mrs Y, as he had initially indicated.
37. Royal London said that Mr Y was required to report the incident straightaway. It requested a response by 17 June 2016.
38. On 15 June 2016, Mr Y's legal advisers (the **Representative**) wrote to Royal London. Briefly, it said that:-
  - 38.1. Mr Y had notified the New Zealand government agencies that the Fund had been encashed by Mrs Y and that they had separated.
  - 38.2. Mr Y held Royal London liable for the encashment of his Fund; it should reinstate the current value immediately.
39. On 17 June 2016, Royal London confirmed that it was investigating the matter. It said that it had reported it to the police in the UK. Royal London requested confirmation the alleged fraud had been reported to the police in New Zealand. It also requested the case reference number.
40. On 26 June 2016, in response to an enquiry from the Representative, the Consultant Haematologist advised that she did not draft or sign the Letter. She confirmed that she had not treated Mr Y: he had not been seen at the Hospital at any time. She also said that the signature on the Letter appeared to have been forged and the Hospital letter head misappropriated. She said she would advise Royal London of this and report the matter to the police.
41. On 16 August 2016, in response to further correspondence from the Representative the same month, Royal London repeated that the matter should be reported to the police. It said that doing so without delay was likely to mitigate any loss Mr Y might otherwise suffer.

42. On 21 December 2016, following an email from Royal London, Mr Y said that he would report the matter to the New Zealand police at the appropriate time. He indicated that his Representative would advise him when to make the report, as it was handling the case.
43. Mr Y attached a copy of a form of authority (the **FOA**), which Royal London had asked him to complete so that it could release information to his Representative.
44. The FOA included the following statement:

“Where you have reported the matter, please provide the case reference and contact details for the New Zealand police. Where you have not reported the matter, you are confirming by signature of this Authority that you understand that your failure to do so is relevant to the extent to which Royal London is able to escalate your complaint with the relevant authorities in the UK and support the investigation into any returns of funds.”
45. Mr Y indicated on the FOA that he was concerned his pension pot had been fraudulently encashed. He also indicated that he had not reported the matter to the New Zealand police.
46. On 25 August 2017, the Representative indicated that it had made enquiries with the New Zealand police, but nothing had been communicated to the New Zealand police by the UK police or Royal London.
47. In 2018, Mr Y instructed London counsel through his Representative. The Representative said that this was a reasonable course of action because of the considerable sums involved. The Representative was not trained in the law of England and Wales or familiar with the recourse available in England.
48. On 11 November 2018, Mr Y made a report to the New Zealand police.
49. On 18 December 2018, the New Zealand police notified Royal London that it would be investigating a complaint it had received from Mr Y.
50. On 18 January 2019, in response to a request from its Criminal Investigation Branch, Royal London’s Financial Crime Consultant provided a witness statement to the New Zealand police.
51. On 26 April 2019, Mr Y’s dispute with Royal London was referred to The Pensions Ombudsman (**TPO**) for investigation.
52. On 27 May 2019, the New Zealand police contacted Royal London and advised that Mrs Y had admitted to sending fraudulent documents to Royal London and obtaining the proceeds of the Fund. It also advised that Mrs Y was due to appear in court on 27 May 2019.
53. On 19 July 2019, Mrs Y pleaded guilty to the charge of ‘obtaining by deception’.
54. On 30 August 2019, Royal London notified the Representative that:-

- 54.1. Royal London had now fully reinstated Mr Y's Fund, as if it had never been encashed.
- 54.2. Royal London had applied investment growth, backdated to the date the proceeds were paid out. This was despite the fact that Mr Y had delayed reporting the fraud to the authorities to help mitigate his loss. The current value of his Fund amounted to £209,071.80.
- 54.3. Mr Y had the option to transfer his benefits to an appropriate scheme or arrangement at any time.
- 54.4. Royal London had made the New Zealand police aware that it would be entitled to payment of any amount successfully recovered from Mrs Y.

### **Summary of Mr Y's position**

#### 55. Submissions on behalf of Mr Y:-

- 55.1. Mr Y's claim for a reinstatement of the Fund was not dependant, or conditional, on any finding or acknowledgment of guilt by an offender. Mr Y is a beneficiary of a trust fund with Royal London. The duty of trustees towards beneficiaries of a trust is high. Essentially, it is to restore the trust fund where there is loss.
- 55.2. The duty is found in many cases that follow the House of Lords' decision in *Target Holdings v Redferns* [1996] AC 421, which states:

“the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either that the assets lost to the estate or compensation for the loss...That specific restitution is not possible then the liability of a trustee is to pay sufficient compensation to the trust to put it back to what it would have been had the breach not been committed. Common law rules of remoteness and causation do not apply; that is the liability is more than for other relationships in contract or general tortious duties of care. Thus, in paying the fund wrongfully the liability of the trustee is to restore the trust fund. This extends to making good the loss by restoration of any benefit or increase to which the trust would be entitled that is the loss at restoration and not at the date of deprivation.”
- 55.3. The level of liability is higher than the common law standard of reasonable care. The “adminicle” is found in Royal London reinstating the trust fund. However, there is no logic in Royal London not compensating any further consequential loss Mr Y has suffered.
- 55.4. Royal London acted on Mrs Y's instructions without carrying out adequate checks to determine that the claim was with Mr Y's authority and not fraudulent. “Its notable failure was not to engage with the member's own lawyer, notary public or other agencies to verify the truth of claims being made...That failure allowed the commission of the fraud even in the circumstances of a systemic failure.”

- 55.5. Royal London did not contact or speak to Mr Y directly when making the unauthorised payment and took the risk of error. Royal London made no attempts to independently verify his alleged terminal illness, and purported wish to claim his benefits. Royal London considered it appropriate to pay out the proceeds of the Fund on the basis of a forged letter on hospital letter head. “It is no answer” to say the fraud was clever or sophisticated. Fraudsters are clever: Royal London should have had effective measures and checks in place.
- 55.6. The events or circumstances that Royal London considered to be genuine are all too common to fraudsters: whether it is a disappointed member of the family or a third party. It is for Royal London to be “suspicious” and to question and verify any potential claims. The Letter is an example of inadequate verification on the part of Royal London. It should have raised “red flags.” What business is it of a medical haematologist to recommend liquidation of investments? Royal London accepted the Letter without questioning its authenticity. It is clear that the haematologist’s signature was simply cut and pasted into the Letter.
- 55.7. It cannot be accepted that Royal London is absolved by its own decision to take a risk that exposed the Fund and Mr Y to loss. Royal London has not denied the breaches that have occurred in this case at any time.
- 55.8. Royal London did not take civil action against Mrs Y in New Zealand or in the UK. There is no reason to suspect that Mrs Y would not have admitted the claim and a summary judgment entered.
- 55.9. Although this is a civil issue, Royal London insisted that Mr Y report the matter to the New Zealand police. To “speed things up” he reported it. However, Royal London left the case “open ended” and relied on the outcome of the police investigation. It is possible that the New Zealand police may not have taken any action in connection with the alleged fraud. Royal London failed to explain why Mr Y should have to wait for the outcome of a process over which he had no control.
- 55.10. As early as 15 June 2016, Mr Y was able to inform Royal London that Mrs Y had admitted responsibility for the fraudulent claim. It should have proceeded on that basis and recovered the funds. The matter was referred to the UK police. Although the Representative made enquiries to Royal London, it was unclear what further action was needed.
- 55.11. Soon after the fraud was discovered, and Royal London notified, the Representative visited police in Auckland where Mrs Y lived. The Representative made several enquiries and representations with the aim of getting the UK police to support the action taken by the New Zealand police. The police did not give the matter the attention he expected. This may be attributed to the nature of the offence, “Domestic deceit.” The process was



further frustrated because Royal London did not provide the UK police with references for submission to the New Zealand police.

- 55.12. Criminal proceedings, if successful, impose penalties in the public interest. Restoring the trust fund would have been a matter for the civil courts as a private remedy. While reporting the matter to the police would have been an alternative line of enquiry it is “irrelevant” to the recovery of funds. In fact, prosecution did not assist in recovering the funds.
- 55.13. Mr Y is not responsible for the loss he has suffered or the “delays and obstruction” on the part of Royal London that were not relevant to the proper pursuit of the recovery of the trust funds.
- 55.14. Contributory negligence requires Mr Y to breach a duty he owes to protect or recover his property or rights and interests. If the alleged failure to report the matter to the police is irrelevant or remote, then there is no basis for a finding of “contributory negligence.”
- 55.15. Royal London’s liability is “well demonstrated” without reference to any complaint made to the police or information provided by the police. It was negligent in this case; it is not absolved from its liability by demanding that Mr Y take a course of action over which he had no control.
- 55.16. Any assertion that Mr Y could have mitigated his financial position is unfounded. Royal London has forced him to pay legal fees when the issue had no real connection with the recovery of the trust funds and sought to profit from its own “defects and prejudices.” This should have been a simple “debt recovery.” Royal London obstructed the process, refused to answer their enquiries, and withheld information.
- 55.17. Mr Y would have transferred out the proceeds of his Fund to a pension arrangement in New Zealand around May 2016. The funds would subsequently have increased in value by approximately 5% per annum.
- 55.18. If Mr Y had been able to complete the transfer, within four years of taking up residency in New Zealand, the transfer would have been tax free. Mr Y started what he considered to be a transfer process in good time before the expiry of the four year time limit. Depending on the ruling by the Inland Revenue in New Zealand, he could face a tax liability of 24,896 New Zealand dollars.
- 55.19. Mr Y has so far incurred legal fees amounting to 28,745.02 New Zealand dollars. The fees are reasonable and were incurred as a direct result of Royal London’s breach of trust and/or negligence. At the very minimum, it should reimburse a substantial portion of those fees.
- 55.20. Despite the breach of trust, and extensive exchanges with the Representative, Royal London did not immediately reinstate the Fund or make good Mr Y’s considerable investment loss.

55.21. The proceeds of the Fund represented approximately 85% of the value of Mr Y's total pension savings. Since discovering the fraud, Mr Y has suffered considerable distress and anxiety over his financial future. Royal London failed to address the matter in any meaningful way. Its refusal to consider his rights, including his right to a reinstatement of his funds, and attempts to abrogate responsibility to the New Zealand police and TPO, has compounded matters.

## 56. Summary of Royal London's position

- 56.1. Apart from the fact that it did not speak to Mr Y, Royal London followed its normal settlement process.
- 56.2. "Anti-fraud" controls are applied at the payment stage. Royal London applies a risk based approach to these controls, which are dependent on various factors. For example, product type and the value involved.
- 56.3. Mrs Y said that Mr Y was unable to speak due to his illness and the time difference at the time of her telephone call to Royal London. In view of this, and the value of the claim, it referred the matter to its Financial Crime Team.
- 56.4. Royal London considered that it was dealing with a terminally ill and vulnerable customer. The decision was made to process the claim, subject to the provision of additional documentation.
- 56.5. The October Letter was sent to the address Royal London held on file, which was the same address shown on the Bank Statement. It is also the same address that Mr Y provided on the FOA.
- 56.6. Royal London does not accept that the fraud committed by Mrs Y did not amount to a criminal act. As a regulated entity, it was keen for the matter to be addressed in the appropriate way. Royal London involved its Financial Crime Team, reported it to the UK authorities and repeatedly requested that Mr Y and his Representative make a report to the appropriate authorities in New Zealand.
- 56.7. Mr Y and his Representative had identified Mrs Y as the party that made the claim. Royal London was concerned that they were unwilling to accept any responsibility to ensure that the crime was reported and dealt with appropriately. Until it was reported by Mr Y in New Zealand, the UK authorities could not act. The New Zealand authorities said they could not investigate the matter based on a report from Royal London.
- 56.8. It was necessary for Mr Y to take the appropriate steps to bring the matter to the attention of the authorities so that it could be properly investigated. If Mr Y had reported it to the New Zealand police in May 2016, it would have been resolved earlier, minimising his legal expenses.

56.9. Royal London did not treat Mr Y's case dismissively; it responded to all the communication that it received. It consistently conveyed the same message to his Representative. Namely, that it had reported the fraud to the UK police because it was clear the parties were dealing with a criminal act and that it should be reported to the proper authorities in New Zealand.

56.10. Royal London is unable to comment on Mr Y's tax position. It was within his control to expedite the matter by reporting the fraud. When he eventually reported it, the circumstances of what had transpired were quickly identified and his Fund was reinstated.

56.11. Royal London recognises that Mr Y has suffered considerable distress. Unfortunately, it was dealing with significant fraud: it was not appropriate for Royal London to ignore this.

## **Conclusions**

### *Breaches of trust*

57. Mr Y contends that Royal London acted in breach of trust by wrongfully paying out his funds. Moreover, it delayed providing a remedy in breach of its legal duty to reinstate those funds. According to Mr Y and his Representative, the fact that Royal London has since restored the Fund is an admission of the alleged breach.

58. Although it has reinstated the Fund, Royal London has not admitted that it is at fault in the matter.

59. As the provisions of the Scheme are written under trust, there was a trustee-beneficiary relationship between Royal London and Mr Y. Consequently, the principal legal relationship in this case was a fiduciary one.

60. In cases where there is a breach of trust resulting in a loss of trust property, a beneficiary's claim for that property is not comparable to a common law claim for tort damages. This is because the claim is not founded on an allegation of wrongdoing on the part of the trustees. The legal concepts of "remoteness" and "contributory negligence" have no bearing on the beneficiary's claim and there is no need to identify fault or negligence on the part of the trustees.

61. Royal London, as the Trustee of the Scheme, has a fiduciary duty to perform the terms of the trust. If it fails to do so, a Scheme beneficiary can make a claim for 'substitutive performance,' which subsists regardless of fault.

62. The proceeds of Mr Y's Fund were encashed in breach of trust. In this case, the breaches include the payment of a serious ill-health lump sum out of the Fund, when Mr Y was not in ill health, and payment of his benefits that was not in accordance with his instructions. Consequently, it is not necessary for him to prove that Royal London were at fault in order for him to make a valid claim for reinstatement of the Fund and

any associated investment returns. I find that Royal London has complied with its obligation to restore the Fund, and any associated investment loss.

63. However, it is important to distinguish between the claim for the Fund, the primary loss, and the claim for any consequential loss. While Mr Y is able to claim the Fund and investment returns without proving fault on Royal London's part, it does not follow that all consequential loss can be claimed in the same way, notwithstanding the fiduciary relationship. Mr Y's claim for reimbursement of his legal expenses and tax charges should be characterised as a separate 'reparation claim' to which different rules apply when determining liability. Reparation claims are reliant on finding a fault with a trustee's conduct, the loss claimed must be attributable to that fault and the application of legal principles such as "remoteness" and "contributory negligence" can be appropriate.
64. Royal London has not admitted fault in this case. Even if it had admitted fault, it would not, as referred to in paragraph 64 above, necessarily require any or all consequential loss to be remedied by Royal London.

#### *Consequential losses*

65. What remains for me to consider is whether Royal London were at fault when it breached the terms of the trust. Also, whether Royal London can be held responsible for causing the consequential loss, namely the loss which is not trust property. The issue of whether Royal London's breach of trust was wrongful or not also has a bearing on any maladministration award.
66. Mr Y contends that Royal London is responsible for consequential loss he has suffered because it took the risk of paying out the funds without properly verifying the claim. Specifically: (i) investment gains he would otherwise have achieved following a transfer to a qualifying arrangement in New Zealand; (ii) charges which may be levied by the New Zealand tax authorities; and (iii) his legal costs. Mr Y also contends that he has suffered non-financial injustice as a direct consequence of Royal London's maladministration.
67. I note that the matter of investment gains has already been dealt with. For Mr Y to succeed in his claim for the other consequential financial loss, he would need to successfully demonstrate that Royal London's breaches of trust were wrongful and that his tax charges and legal expenses were caused by acts and/or omissions on the part of Royal London and not by him. Regarding any maladministration award, there also needs to have been wrongdoing on Royal London's part.
68. Mrs Y's privileged position as the spouse, meant that she was able to, among other things, obtain her husband's driving licence and control over a joint bank account, which had been set up without his knowledge.
69. Royal London should have carried out further due diligence before paying out the funds. At the very minimum, it should have substantiated the authenticity of the claim by verifying the medical evidence, in particular the Letter from the Hospital, and

making further attempts to speak to Mr Y. I find that the failure on the part of Royal London to undertake sufficient checks amounts to a wrongful breach of trust and justifies a finding of maladministration.

70. In the majority of cases, redress for financial injustice will be redress for financial loss that the claimant has occurred as a direct result of a respondent's breach of trust or law and/or maladministration. In exceptional circumstances only, this can also include costs incurred in bringing a complaint against the respondent, including bringing the complaint to TPO, and more general costs incurred as a direct result of the respondent's actions.
71. As mentioned in paragraph 64 above, when considering consequential loss, legal principles such as remoteness and contributory negligence can apply. The rule of mitigation is another such example and requires an applicant to take steps to minimise his/her loss and to avoid taking unreasonable steps that increase their loss. It follows that if an applicant could have taken reasonable steps to mitigate their loss but failed to do so, I can decrease the amount of financial redress I may otherwise have directed.
72. I appreciate that by reporting the matter to New Zealand police, Mr Y found himself in a difficult position in relation to his personal circumstances. However, I do not consider that this amounts to extenuating circumstances that prevented Mr Y from making the report to the police at the time. I find that Royal London acted reasonably in the circumstances by insisting that he make a police report. I note that Royal London made its position clear, namely, that it would not reinstate the Fund unless Mr Y reported the suspected fraud to the police.
73. The evidence does not support the view that Mr Y reported the matter to New Zealand police at the time of the unauthorised withdrawal of the Fund. In taking this view, I have taken into the account the fact that in his application to TPO, Mr Y stated that a police report was made on 11 November 2018.
74. If Mr Y had reported the matter to the New Zealand police, when he first discovered that Mrs Y had encashed his pension, it is more likely, than not, that Royal London would have reinstated the Fund earlier. This would likely have minimised his legal expenses and any potential tax charge(s).
75. On balance, I am satisfied that Royal London acted reasonably in the circumstances by insisting that Mr Y make a police report.
76. I appreciate that Mr Y wanted to obtain legal advice when he first discovered that Royal London had paid out the proceeds of his Fund. That said, I do not consider that his claim for reimbursement of his legal expenses from Royal London to be reasonable in the circumstances. In taking this view, I have considered the fact that, when Royal London initially informed Mr Y in June 2016 that he needed to report the matter to the police promptly, he engaged his lawyers to correspond with Royal London on his behalf. A reasonable course of action would have been for Mr Y to

have promptly reported the suspected fraud to the New Zealand police and to have shared a copy of the police report with Royal London.

77. I find that Mr Y could have mitigated his consequential losses further by making an application to TPO, at no cost to him, rather than appointing legal counsel. In taking this view, I have considered the possibility that he has incurred legal expenses over and above what he would have incurred had he reported the matter to the relevant police authorities promptly.
78. Until such time as the tax authorities in New Zealand issue a ruling, any potential tax liability Mr Y may incur in connection with the transfer amounts to a hypothetical, rather than actual financial loss. Even if the ruling is not favourable, resulting in Mr Y incurring additional tax liability, I do not consider that this would materially change the outcome in the circumstances noting the significant amount of time it took for Mr Y to report the matter to the New Zealand police.
79. Mr Y was under a duty to mitigate his loss. I find that his failure to do so effectively has caused the consequential loss he is now claiming.
80. This is a very unfortunate set of circumstances and I empathise with Mr Y's position. I find that he is entitled to an award in recognition of the non-financial injustice he has suffered as a direct result of Royal London's role in the matter.
81. Mr Y's complaint is partly upheld.

### **Directions**

82. Within 28 days of the date of the Determination, Royal London shall pay Mr Y £1,000, in recognition of the serious distress and inconvenience which he has suffered.

**Anthony Arter**

Pensions Ombudsman  
28 October 2022