

Ombudsman's Determination

Applicant	Mrs T
Scheme	The Bodhfryd 1967 Limited SSAS (the SSAS)
Respondents	Bespoke Pension Services Limited (Bespoke)

Outcome

1. I do not uphold Mrs T's complaint and no further action is required by Bespoke.

Complaint summary

2. Mrs T has complained that Bespoke:-
 - (i) Actioned an invalid statutory pension transfer request as Mrs T did not have a valid statutory right to transfer to an occupational pension scheme and that Bespoke failed to check whether she was an "earner."
 - (ii) Failed to ensure that proper advice was obtained under section 36 of the Pensions Act 1995 and that advice received from Broadwood Assets Ltd was not compliant with this provision. Mrs T and her representative have confirmed that they have no objection to this element of the complaint not being investigated as the point was not upheld in the Pensions Ombudsman's Determination in PO-16688 and it is unlikely that a different conclusion would be reached.
 - (iii) Failed to adhere to the Pension Regulator's guidance in relation to pension liberation and pension scams.

Background information, including submissions from the parties

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
4. Mrs T had two pensions, a deferred pension from the HBOS Pension Scheme and a personal pension scheme with Zurich.
5. In 2014 Mrs T received a cold call from a person offering a free review of her pension position and agreed to meet with an adviser. The adviser was a representative of

First Review Pension Services (**FRPS**) an unregulated introducer company who visited Mrs T at her home and presented her with the opportunity to invest in a Cape Verde resort development.

6. Mrs T's representative says the FRPS representative presented Mrs T with an extensive documentation pack requiring signature on various documents to:-
 - Instruct a company called DLW Company Formation Services Ltd to set up a company, called "Bodhyrd Road 1967 Limited", a non-trading company. The company was incorporated on 11 August 2014.
 - Enter into an Administration Services Agreement between Mrs T and Bespoke under which Bespoke agreed to provide administration services to the Trustee (Mrs T) of the SSAS.
 - Set up a Trust Deed between Mrs T and Bodhyrd Road 1967 Limited appointing Mrs T as the sole trustee of the SSAS.
 - Enter into a Directors Service Agreement, purporting to record an employment relationship between Mrs T and Bodhyrd Road 1967 Limited.
 - Register the SSAS with HMRC for tax purposes on 11 September 2014.
 - Provide Mrs T with an advice letter dated 4 November 2014, from an unregulated firm called Broadwood Assets Limited, for a fixed fee of £100 plus VAT concluding that Cape Verde was a suitable investment for the SSAS.
 - Provide Mrs T with a pre-printed letter from her to Bespoke instructing it to action an investment of a specific amount to be made in "the Cape Verde investment opportunity offered by The Resort Group plc" and referring to the advice letter from Broadwood Assets Limited.
7. On 24 September 2014 Bespoke sent transfer requests to the HBOS Pension Scheme and Zurich. Mrs T transferred her Zurich entitlement on 29 October 2014 and then her HBOS Pension Scheme entitlement on 16 February 2015 to the SSAS and invested funds in the Resort Group in Cape Verde.
8. Initially Mrs T invested £67,700 into an unbuilt unit at the White Sands Resort. In November 2015, this was switched to a one-third investment in an apartment in the Dunas Beach Resort. Mrs T also invested £13,387 into a one-sixteenth investment in a different apartment at the Dunas Beach Resort.
9. Mrs T's representative says that in subsequent SSAS valuation reports Bespoke have described the SSAS' value as being a combination of the cash held in the SSAS account and the cost price of the investments (£81,087). There is no secondary market for fractional investments of this nature in Cape Verde and the cost price is not accepted to represent the true value of Mrs T's investment. The true value is either nil or a nominal value.

10. Mrs T's representative says that in February 2013, the Pensions Regulator issued an action pack headed "Pension liberation fraud- the predators stalking pension transfers" (**Scorpion Guidance Action Pack**). The guidance was primarily addressed to administrators and trustees of pension schemes holding a consumer's pension where the circumstances of the transfer and/or features of the receiving scheme carried some of the warning set out in the Scorpion Guidance Action Pack.
11. Mrs T's representative says that this guidance must clearly apply to the administrators and trustees of a receiving scheme. The receiving scheme's administrators and trustees are equally, if not better placed to identify the presence of warning signs on a pension transfer and act to prevent consumer detriment. Bespoke were the administrators of the proposed receiving scheme and were bound to comply with the Pensions Regulator's guidance. The representative considers that the following warning signs were present with Mrs T's pension transfer:-
- Mrs T had received an unsolicited call.
 - Mrs T had received advice to transfer a defined benefit pension and invest in unregulated products.
 - The SSAS had only recently been registered with HMRC on 11 September 2014.
 - The sponsoring employer Bodhyrd Road 1967 Limited had been only incorporated on 11 August 2014.
 - At the time of transfer Mrs T was not and never intended to be employed by the sponsoring employer. She was a foster carer in receipt of an allowance from the local council as and when she fostered children.
 - The intended investments were non-standard, unregulated, high risk and overseas. There was a pre-existing relationship between Bespoke, FRPS and the Resort Group.
 - Mrs T was required to open a Metro bank account for the SSAS.
 - Mrs T was told by the unregulated advisers that she could expect very high returns better than her existing scheme. This was a significant warning sign given that Mrs T was moving away from a high value defined benefit scheme without regulated advice.
12. Mrs T's representative says that as well as these warning signs Bespoke ought to have identified that there was a significant conflict of interest. Specifically, FRPS had introduced Mrs T to Bespoke and provided her with advice to transfer to the SSAS and invest in Cape Verde. FRPS was owned and directed by a director who was also a director of a company within the Resort Group structure. It was or ought to have been obvious to Bespoke that the whole transfer and investment structure was being orchestrated by the Resort Group.

13. Mrs T's representative also says that Bespoke had a clear discretion as to which assets it allowed into its SSAS structure. Bespoke should have used its discretion to refuse to allow any investment into fractional investments as the nature of the investment structure was not "commercial property or land" and included an unacceptable risk, as:-
- There was no direct proprietary interest in the fractional investments into which Mrs T invested.
 - The Resort Group required an initial payment of 100% of the investment cost up front yet at that point the dormant company through which the investment was made had only entered into a Promissory Contract. Under Cape Verde law, good legal title does not pass unless a Public Deed is entered into. The Resort Group retained legal title over the resorts enabling it to retain security for its commercial borrowing on the land, for which investors had paid the full price of the units.
 - There were obvious valuation and liquidity concerns given the structure of the investment and there was no market under which a membership in a dormant UK company could be traded.
 - There was a lack of diversification for any members introduced by the FRPS/Bespoke procedure.

In light of these warning signs, it is Mrs T's view that any reasonable diligent SSAS administrator, acting in accordance with the Pensions Regulator's guidance would have identified all of the warning signs set out above. Bespoke ought to have communicated these warning signs to Mrs T and ought to have refused her SSAS application and proposed investment.

14. In late 2017 Mrs T was contacted by Metro Bank who informed her that it was terminating its link with Bespoke and that she should obtain a further bank account provider. In 2021, Mrs T's representative says Mrs T contacted her to complain about Bespoke's actions in wrongly encouraging her to transfer her two pension plans and invest them in the overseas investment. Mrs T is concerned that she has lost access to the funds that were transferred.

Adjudicator's Opinion

15. Mrs T's complaint was considered by one of our Adjudicators who concluded that no further action was required by Bespoke. The Adjudicator's findings are summarised below.
16. Mrs T's complaint is concerned with the level of due diligence which she and her representative believe should have been carried out by Bespoke. The representative contends that Bespoke "actioned an invalid statutory transfer request". But Bespoke did not action any transfer request. Bespoke may have relayed the applicant's

transfer requests to the transferring schemes, but it was the transferring schemes that “actioned” the requests.

17. Even if there was no statutory right to transfer in this instance, that did not mean that a transfer was not permitted and it is likely that there was either a contractual right or a right under the Rules of the transferring schemes to transfer or, in the absence of a right to transfer, it may have been at the provider/Trustee’s discretion, and therefore there would have been no reason for Bespoke to question why the transfers were taking place.
18. Bespoke as the receiving scheme would not have been in a position to have known whether the member had a trust-based or contractual right to transfer as they would not have had access to the transferring scheme rules. This was manifestly an issue for the transferring scheme provider/Trustees to satisfy themselves of. The statutory right to transfer is clearly intended as a right to be used in relation to the transferring scheme, and so is a matter between the transferring scheme and member and does not involve the receiving scheme until the transfer has been actioned.
19. Mrs T’s representative appears to believe that in the absence of a statutory right to transfer (and there appears to be some doubt as to whether the applicant was an “earner” or not at the time of the transfer), then any transfer should not have taken place. However, as stated above, the member would either have had a contractual/trust-based right to transfer or the right to request one (so that it would have been at the discretion of the provider/Trustees). If, therefore, the transferring provider/Trustees were satisfied that the transfer could proceed, then it would be open to the receiving scheme to accept it.
20. The Administrator of the receiving scheme would not have been under any obligation to check whether there was a statutory right to transfer or not. The Administrator had an obligation under the Administration Agreement for “Administering transfer payments into the Scheme” and to carry out their services according to “all applicable laws, regulations and orders which apply to the Scheme”. However, accepting a transfer, even if it was made without a statutory right, was not breaching any laws, regulations or orders.
21. Until the transfer has taken place, the duty of care in relation to the member’s assets lies solely with the transferring scheme provider/trustee as they hold those assets. The transferring scheme is the entity that puts a transfer into effect and so they are responsible for ensuring that any due diligence is carried out beforehand. The Pensions Regulator’s Trustee Guidance does state that Trustees of pension schemes have a responsibility to prospective members, but this is clearly a Trustee responsibility and not a Scheme Administrator one. Similarly, any responsibilities that a receiving scheme might have in relation to ensuring that transfers are bona fide would be a matter for the Trustee (that is the Applicant in this case) and not the Administrator.

22. The Adjudicator has referred to a previous Determination, where I have said, in paragraphs 35-36 of PO-16688:-

“It seems likely to me that a SSAS was an unsuitable pension vehicle for Mr L to have transferred into. There seems little doubt that he did not appreciate the responsibilities he would be taking on as a Trustee or the complexities of the Scheme. It is plain to me that the use of a SSAS in these circumstances was an attempt to circumvent possibly more stringent requirements placed on other types of pension scheme in terms of investment responsibilities and possible regulatory oversight. This façade extends to the fact that a non-trading company was established to facilitate the Scheme and the Investment. This expense and complication would not have been necessary in a mainstream pension arrangement.

However, while it may not have been a suitable or appropriate arrangement for Mr L, there was no obligation on Bespoke to have advised him on the appropriateness of a SSAS for his circumstances or decline his business. It was entitled to accept his instruction however inadvisable it may have been”.

23. These comments are also relevant here as Bespoke had no obligation to warn of the suitability or otherwise of a SSAS.
24. Mrs T and her representative did not accept the Adjudicator’s Opinion and the complaint was passed to me to consider. Mrs T and her representative provided their further comments which do not change the outcome. I agree with the Adjudicator’s Opinion and note the additional points raised by Mrs T.
25. Mrs T and her representative has said that Mrs T’s argument is that she did not have a statutory right to transfer to an occupational pension scheme and that Bespoke should have checked and identified this and either refused to accept the application or, at the least, informed Mrs T of the correct position so that an informed decision could be made by her and the ceding schemes. For a pension to be transferred from one scheme to another there must be “action” from the ceding scheme and also action from the receiving scheme in setting up a new pension scheme to accept the pension monies, requesting a transfer from the ceding scheme and then receiving the pension monies,
26. Mrs T’s representative says that the evidence shows that Bespoke were instrumental in actioning Mrs T’s pension transfers after purportedly carrying out its own checks and setting up the SSAS structure for her. If Bespoke had stated that they were unable to set up a SSAS for her as she was not in receipt of employment income, or raised concerns about the issue to Mrs T it is unlikely the transfer would have proceeded.
27. Mrs T and her representative say that legally and practically, a pension transfer cannot be actioned by only a ceding scheme and that Bespoke must have and are evidenced to have played an instrumental part in actioning the pension transfers for her.

28. Mrs T's representative also says that the legal basis on which transfers of pensions from one occupational pension scheme to another occupational pension scheme is conducted is primarily that they meet the requirements of sections 94 and 95 of Pension Schemes Act 1993, that is that the member acquires a transfer credit being a right allowed to an 'earner'. Both the High Court and my predecessor as Pensions Ombudsman have accepted that this means for a member to acquire a transfer credit of this nature, they had to be an earner. It was a fundamental and basic requirement of the checks that Bespoke asserted that it was doing that it would check that Mrs T was an earner. Bespoke were clearly aware that the funding would come from pension transfers from existing schemes and not from any income generated by the proposed sponsoring employer which Bespoke knew would be a dormant company.
29. Given the fundamental importance of an individual being an earner, it is submitted that it must have been part of Bespoke's contractual and regulatory responsibilities to check this point when reviewing the SSAS application.
30. Mrs T's representative also says that Bespoke provided misleading information to the ceding schemes and it asserted that Mrs T did have a statutory right to transfer. The ceding schemes have submitted that they relied on the information provided by Bespoke. The ultimate responsibility for that must lie with Bespoke.
31. Mrs T's representative also contends that Bespoke ought to have been aware and acted consistently with the Scorpion Guidance Action Pack. The receiving scheme's administrators and trustees are equally if not better placed to identify the presence of warning signs. Bespoke were the administrators of the SSAS and were bound to comply with this guidance. At the time of Mrs T's application to Bespoke the relevant guidance was the Action Pack for trustees and administrators published in July 2014. The Adjudicator asserts that as the legal structure appointed Mrs T as a trustee, she took on those responsibilities herself. The Action Pack was clearly directed to pension professionals. Mrs T did not become a pension professional by reason of the structure of the SSAS. Bespoke's SSAS guidance clearly confirmed that it would be providing her with support and guidance.
32. Mrs T's representative says that the Adjudicator has said that "whilst the SSAS may not have been a suitable or appropriate arrangement for Mrs T, there was no obligation on Bespoke to advise on appropriateness or decline her business. Bespoke were entitled to accept her instruction however inadvisable it may have been." Mrs T's representative says in the complaint to Bespoke she set out in detail nine warning signs of a pension scam as presented to and known to Bespoke. Bespoke were undoubtedly in a far better position than a ceding scheme to identify these points - it had direct knowledge of the introduction method, the scheme structure and the proposed investment.
33. The Adjudicator's Opinion had not addressed any of these points, and this aspect of the complaint is not about suitability or appropriateness. The Scorpion Guidance Action Pack ought to have been adhered to by Bespoke who should have pointed out

the presence of these warning signs to Mrs T and allowed her to make her own, informed decision about whether to go ahead.

Ombudsman's decision

34. Mrs T and her representative have raised a number of issues regarding the transfers that were made to the SSAS that is administered by Bespoke. The broad substance of their argument is that Bespoke was aware of the way in which Mrs T was introduced to the Cape Verde investment and that it played a greater role than as an administrator in facilitating the transfers. As such Bespoke should have taken account of the Pensions Regulator's guidance regarding spotting warning signs of potential scams and provided Mrs T with information on the warning signs so that she could make an informed decision.
35. As referred to in paragraph 11 above Mrs T's representative has suggested that the provisions of the 2013 Pensions Regulator's pension liberation action pack (**the Scorpion Action Pack**) should apply equally to the Scheme Administrator of a receiving scheme as to the Trustees/administrators of a ceding scheme. I have considered this matter carefully, but I can find no indication that this should be the case.
36. The principal danger being warned of in the 2013 Scorpion Action Pack is pension liberation, which is not a factor in the present case. The guidance was updated in July 2014 to replace many of the 2013 warnings about pension liberation with similar warnings about pension scams.
37. The Scorpion Action Pack clearly envisages any pension liberation or scam taking place post-transfer, and therefore places responsibility for trying to prevent it on transferring schemes. Everything in the Scorpion Action Pack is accordingly concerned with the checks to be carried out by transferring schemes prior to transfer. This can be seen in the following extracts: *"Is the scheme to which the member wants to transfer:....."*, *"when processing a transfer request....."*, *"If.....the trustees of the transferring scheme have reason to believe that the receiving arrangement is not a legitimate occupational pension scheme they should consider carefully whether the application is validly made, and if not whether they have any duty to process the transfer....."*. In addition, there are numerous references to seeking confirmation about various issues from the *"member"* which, prior to transfer, can only mean the member of the transferring scheme.
38. The Scorpion Guidance Action Pack can therefore only be applicable to the trustees/administrators of the transferring scheme, and in particular the Trustees, as they hold the assets in trust for the scheme members and other potential beneficiaries and have fiduciary duties towards those members. This may be seen in the Trustee Guidance issued by The Pensions Regulator: *"A trustee is a person or company, acting separately from the employer, who holds assets in the trust for the*

beneficiaries of the scheme. Trustees are responsible for ensuring that the pension scheme is run properly and that members' benefits are secure."

39. There are no equivalent responsibilities in the Scorpion Action Pack for the Trustees of a receiving scheme, let alone for the Scheme Administrator of such a scheme. To suggest otherwise would be to imply that the Scheme Administrator owed some sort of fiduciary duty towards the members, and yet there is nothing in the relevant part of the Finance Act 2004 or in any case law to suggest that this might be the case. There would be no benefit in a receiving Scheme Administrator carrying out due diligence on itself and the scheme which it administers, and there is nothing to suggest that The Pensions Regulator would have intended this to be the case when it drew up the Scorpion Guidance Action Pack.
40. With regard to Mrs T not being in receipt of employment income, it is clear from the subsequent High Court ruling in the case of Hughes v Royal London [2016], that provided the other requirements for a statutory transfer right were made out, members did not need to be in receipt of earnings from an employer sponsoring the occupational pension scheme to which they wish to transfer their pension. Earnings from another source were sufficient. Therefore, this was not relevant to Mrs T's complaint.
41. I do not uphold Mrs T's complaint.

Anthony Arter CBE

Deputy Pensions Ombudsman
29 August 2023