

Ombudsman's Determination

Applicant	Mr R
Scheme	Aegon Personal Pension Plan (the Plan)
Respondents	Aegon

Outcome

1. I do not uphold Mr R's complaint and no further action is required by Aegon.

Complaint summary

2. Mr R has complained that Aegon was negligent when agreeing to transfer the benefits in the Plan to the Bovey Cranbrook Retirement Benefits Scheme (**the Scheme**).

Background information, including submissions from the parties

3. Mr R had a personal pension plan with Aegon and in late 2012, Portland Wealth Associates (**Portland**) wrote to Aegon to say that Mr R had given it authority to request pension discharge forms and details of his current pension plan.
4. On 7 December 2012, Aegon wrote to Portland with details of the transfer value available and enclosed the transfer discharge forms.
5. On 17 December 2012, Marley Administration Services Ltd (**Marley**) wrote to Aegon and said it was acting as administrator of the Scheme and enclosed the transfer authority from Mr R requesting a transfer be paid to the Scheme. Marley also said the Scheme was authorised by HMRC and enclosed a copy of the Scheme's registration document.
6. On 28 December 2012, Aegon paid a transfer value of £12,722.08 to the Scheme.
7. Mr R's representative says that Aegon failed to carry out sufficient due diligence tests on the transfer request and failed in its duty of care to Mr R. Aegon had a fiduciary duty of care to Mr R and a breach in that duty of care arose when Aegon sent the transfer payment to the Scheme which screamed from the documentation as being a scam.

8. Mr R's representative says that these negligent principles can be tested against "The Caparo Test" (Caparo Industries plc v Dickman). Firstly, was the damage that Mr R suffered "reasonably foreseeable". Mr R's representative says that from his review of the contemporaneous paperwork, he is of the opinion that alarm bells should have been ringing in Aegon's offices from the outset, but the repeated warning signals were ignored.
9. Portland was not authorised and regulated by the Financial Services Authority (now the Financial Conduct Authority (**FCA**)). Aegon should have checked the FSA register which records that Portland is an unauthorised company and says:

"This is a firm that we have been told is either operating regulated activities without the correct authorisation or is running a scam. We strongly suggest you avoid dealing with unauthorised firms like this."
10. The second red light is the covering letter from Marley dated 17 December 2012. The letter does not say that Marley is a regulated and authorised business. Also, bearing in mind that the original enquiry came from Portland, Aegon should have been concerned as to who or what Marley actually was and why Portland's involvement had ceased.
11. Thirdly, Aegon should have carried out additional checks on the Scheme and it would not have been unreasonable for Aegon to contact Mr R to establish why he was joining this occupational scheme and whether he was actually working for Bovey Cranbrook.
12. Mr R's representative also says that regulated firms, especially insurance companies like Aegon, have extensive duties of care to ensure that money is not lost and need to comply with the FCA's core principles as well as the relevant COBS rules. If corners are cut for the benefit of shareholders, it is not the Mr Rs of this world who should be picking up the tab.
13. Aegon say that when dealing with Mr R's transfer application, it carried out such due diligence as was fair and reasonable for a provider to carry out, given the industry standards at that time. The due diligence required at the time of the transfer by the various authorities is set out in various Pension Ombudsman determinations. It was to check if the receiving scheme was registered with HMRC.
14. At the time of the transfer, Aegon had no other information which would have alerted it to the need for further diligence. It is important to note that the transfer of Mr R's funds was carried out in 2012, many months before The Pension Regulator (**TPR**) issued its guidance in February 2013.
15. The following year, in February 2013, TPR issued guidance and an action pack for pension professionals on the diligence to be carried out before transferring funds to another scheme. This was as a consequence of the growing number of people losing money through pension liberation scams. Aegon subsequently changed its procedures on 19th March 2013.

16. The question of how soon pension companies should have introduced new procedures after the new guidelines came out was considered in the Pensions Ombudsman Determination of Hughes and Aviva on 18 May 2015 (PO-6375). In that Determination the Ombudsman held that “The Pensions Regulator did not issue guidance to providers about pension liberation and pension scams until February 2013. That could be regarded as a point of change in what might be regarded as good industry practice.”
17. As the Ombudsman pointed out in the Hughes Determination referring to transfers prior to February 2013, he could not apply current levels of knowledge and understanding of pension liberation/scams or present standards of practice to a past situation.
18. So, applying the principles of the Hughes case which Aegon believes sets out what a reasonable pension provider should do in these situations, it is Aegon’s position that there was neither breach of duty nor maladministration on the part of Aegon.
19. In any event, even if as a result of Aegon’s due diligence it had warned Mr R against transferring, there is no evidence that he would have taken that advice and refrained from transferring. What is also absolutely certain from all the Pension Ombudsman’s decisions on the subject is that at the time of his transfer, Mr R had a statutory right to transfer.
20. The law regarding the right to a statutory transfer is set out in the Pension Schemes Act 1993. Section 93 states that Mr R has a right to a cash equivalent transfer value from his Aegon pension.
21. To trigger this statutory right, Section 95(1) states that Mr R has to make an application in writing, and he complied with this requirement in 2012. Also, as part of the transfer process, Aegon satisfied itself that the receiving scheme was registered with HMRC by receiving a copy of the HMRC certificate. Aegon had no right to refuse Mr R’s request to transfer.
22. In summary Aegon does not accept that there was any maladministration or any breach of duty in its administration of this transfer. Mr R gave a clear instruction to transfer and Aegon carried out that request in accordance with his statutory right to transfer.
23. There was nothing about the receiving scheme’s behaviour or documentation that aroused suspicions or would have aroused suspicions in a reasonably competent pension administrator.
24. Aegon is sympathetic to Mr R’s unfortunate circumstances. However, Aegon does not believe that this was due to any failings on its part and Aegon was not responsible for any maladministration or breach of duty.

Adjudicator's Opinion

25. Mr R's complaint was considered by one of our Adjudicators who concluded that the complaint should not be upheld. The Adjudicator's findings are summarised below.
26. This complaint is concerned with the level of due diligence that Aegon was required to carry out at the time that a request was made to transfer Mr R's benefits to the Scheme. It is similar in context to another complaint that the Pensions Ombudsman has determined in PO-16475 and it is worth repeating here paragraphs 40 and 41 of that Determination:

"However, as highlighted by the Adjudicator, this matter cannot be viewed with the benefit of hindsight and it is the circumstances at the time of transfer which are of importance.

Essentially Prudential had a statutory and contractual duty to transfer Mr T's funds which it was required to act upon when it received his paperwork, unless there were any indications of why the transfer should not go ahead, such as those concerning pensions liberation. The page preceding the Checklist in the Scorpion Guide provided an outline of potential warnings which could suggest pension liberation fraud activity was taking place, However, there is no indication that Prudential had any reason for concern and accordingly, it did not make any of the further enquiries suggested in the Checklist"

27. The Adjudicator reviewed the Ombudsman's decision in PO-16475 and also took account of Aegon's comments. At the time of the transfer, there were no signs that the Scheme was a pension liberation arrangement. It was not until later in 2013 that TPR recognised that the Scheme and a number of other similar schemes were being used for pensions liberation and appointed Dalriada Trustees Limited (**Dalriada**), as the trustee to the Scheme. The transfer was processed also before TPR published its guidance on pensions liberation and scams and things to look out for.
28. The level of checks carried out by providers at the time was to check that the scheme to which the transfer was to be made was registered with HMRC and did not appear on any warning lists. Aegon said that the checks it carried out did not throw up any concerns. It is also worth pointing out that TPR's guidance and later guidance from the Pensions Scams Industry Group only required additional checks to be carried out if the initial checks highlighted any concerns.
29. Therefore, although Mr R's representative has pointed out a number of possible concerns that could have been identified at outset, it was not standard practice, at the time of the transfer, to carry out these additional checks.
30. The High Court judgment in *Hughes v Royal London* ([2016] EWHC 319 (Ch)), held that the statutory right to transfer trumped significant concerns about pension liberation. In such situations, a transferring provider cannot withhold the transfer. The

best it could do would be to warn the member of the risks but ultimately, it would be the member's decision whether to proceed.

31. The Adjudicator did not know what Mr R's financial circumstances were at the time of the transfer, but he understood Mr R may have received an incentive from the Scheme or its associates for proceeding with the transfer. Therefore, it is possible that even if Aegon had raised some concerns with Mr R over the transfer, he may still have proceeded.
32. Mr R and his representative did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr R has provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the points made by Mr R for completeness.
33. Mr R and his representative say that the Adjudicator has taken a simplistic approach in taking the view that the guidance issued by TPR was a "watershed" moment. Prior to February 2013 pension providers such as Aegon still had a duty of care and would have been aware of the potential of pension liberation and pension scams.
34. Mr R's representative has referred to previous Ombudsman's determinations PO-12763 regarding Mr N and Northumbria Police, and PO-21489, regarding Mr Nash and the LGPS. He says that in PO-21849 the Ombudsman could not have been clearer that the TPR scorpion warnings were not pivotal to whether or not the respondent was negligent. Sections 53- 56 of PO-21489 mentions a number of 'red flags' which could have been picked and are analogous to the point of being a facsimile of what was going on with Mr R. In the representative's opinion it is alarmingly obvious that Aegon should have done more.
35. The representative also said that not only was Aegon taking instructions from a bogus employer, but, what to him is utterly unforgiveable, is that Aegon were dealing with a bogus IFA. The Adjudicator says (in paragraph 28 above) that there were no signs that the Scheme was a pensions liberation arrangement. Mr R's representative said that he cannot see any signs that it was anything but a pensions liberation arrangement.
36. The representative also said that the primary legislation is defectively worded which the Pensions Ombudsman clearly saw in his determination of Hughes and Aviva on 18 May 2015 (PO-6375). Why would anyone have a right to join the occupational scheme of a company that they had no occupation with? Even if Mr R had a right to transfer that did not prevent Aegon from doing more and stopping Mr R from being scammed.
37. The Adjudicator has also confirmed (in paragraph 9 above) that the necessary test of negligence is determined by *Caparo Industries v Dickman* [1993]. But the Adjudicator has not tested this against that benchmark, as that loss was reasonably foreseeable (see *Haley v LEB* [1965]). Negligence is an accumulation of what was known or should have been known at any given time, which, in this case, was December 2012.

38. The representative has also asked me to review the file and ask, “what should a large international pension company have known in December 2012?” In terms of the law Aegon were experts, had fiduciary duties of care to its customers, and had many lawyers. Did Aegon need a notice from the TPR, two months later, to know that there were pension scams afoot? Aegon completely failed in every aspect of its duty of care. “A simple check, taking a few seconds, of the alleged advisory firm’s regulatory status would have rumbled the position there and then”.

Ombudsman’s decision

39. I have every sympathy for the position that Mr R now finds himself in.

40. However, I find that the comments made by Mr R and his representative are all with the benefit of hindsight and are based on applying the current standards of due diligence to the position in 2012. At that time the due diligence requirements were much less onerous than at present. The checks carried out by Aegon in 2012, to ascertain whether the Scheme was on any warning lists, and checking its registration status, were in line with the standards employed by Aegon and other providers at that time. So, I do not consider that it would be reasonable for me to uphold the complaint against Aegon.

41. Mr R has also referred to the test of negligence, as being determined by *Caparo Industries v Dickman* [1990], and asked why the Adjudicator has not tested this complaint against that benchmark, that is, was this loss reasonably foreseeable? I understand Mr R’s argument but again find that it is raised with the benefit of hindsight and what is currently known about the Scheme. The checks carried out by Aegon in 2012 did not raise any concerns about the Scheme and it would have been reasonable at that time to allow the transfer to proceed as it was not reasonably foreseeable that Mr R would be the victim of a pensions scam.

42. I do not uphold Mr R’s complaint.

Anthony Arter

Pensions Ombudsman
9 March 2020