PO-644

Ombudsman's Determination

Applicant	Mr and Mrs E
Scheme	Bema Engineering SSAS (**the Scheme**)
Respondent(s)	Clifton Asset Management Plc (CAM), Morgan Lloyd Administration Ltd (MLA), Morgan Lloyd Trustees Ltd (MLT).

Complaint Summary

1. Mr and Mrs E's complaint against CAM, MLA and MLT concerns the investment advice they received from CAM, MLA and MLT:

    - CAM, MLA and MLT incorrectly informed Mr and Mrs E that they could hold certain machinery as assets; and
    - CAM, MLA and MLT delayed in rectifying the matter.

Summary of the Ombudsman's Determination and reasons

2. The complaint should be upheld against CAM, MLA and MLT because:-

    - CAM, MLA and MLT should have been put on enquiry from 8 August 2006 that the advice they had given Mr and Mrs E in relation to holding certain machinery as Scheme assets was incorrect. Mr and Mrs E relied on this advice and have incurred a tax liability.
    - The solution to the problem proposed by CAM, MLA and MLT was unreasonable and in any event did not prevent Mr and Mrs E from incurring a tax liability as a result of the information and services provided to them.
    - The delay in resolving the matter constitutes maladministration and has resulted in Mr and Mrs E having had to make significant efforts to resolve the matters themselves.

Detailed Determination

Finance Act 2004 (FA 04)

3. The FA 04 came into force and introduced a new tax regime for pension schemes.

4. The scheme is a small self-administered pension scheme (SSAS) and defined under the FA 04 (paragraphs 1 to 5 of Schedule 29A), as an occupational pension scheme which is an "investment-regulated pension scheme" as one or more of its members "is or has been able (directly or indirectly) to direct, influence or advise on the manner of investment of any of the sums and assets held for the purpose of an arrangement under the pension scheme relating to the member." (Paragraph 1(2)(b) of Schedule 29A to the FA 04).

5. If an investment-regulated pension scheme invests in taxable property, scheme members and the scheme are liable for tax. Sections 174A, 185A, 273A and Schedule 29A to the FA 04 make provision for tax charges where an investment regulated pension scheme holds investments that are taxable property.

6. Taxable property under the FA 04 includes residential property and, as relevant to Mr and Mrs E's complaint, "tangible moveable property", essentially things you can touch and move such as cars, vans and office furniture. The tax consequences of investing scheme assets in taxable property are severe and summarised in paragraphs 7 and 8 below.

7. The member is subject to the unauthorised member payment charge at 40% on the relevant unauthorised payment value. The scheme administrator is liable to a scheme sanction charge, which is generally 15% of the unauthorised payment value and, if certain limits are exceeded, the member may also be subject to an unauthorised payments surcharge of 15% of the value.

8. Other consequences of investment in taxable property include capital gains tax (also at 40%) on the disposal of the asset.

Material Facts

9. The Scheme was established in June 2006 by a trust deed and rules dated, 16 June 2006, after a new tax regime was introduced in relation to pension schemes with effect from 6 April 2006 as a result of the FA 04.

10. CAM offers specialist services (including in relation to SSASs) to business and individuals throughout the UK. MLA and MLT were established by CAM to carry out administration and trustee services for SSASs established with them.

11. Mr and Mrs E appointed CAM to provide services in relation to the Scheme. The client agreement between Mr and Mrs E and CAM was signed by Mr and Mrs E and on behalf of CAM, on 16 June 2006.

12. Mr and Mrs E attended a meeting with the CAM Managing Director and Client Liaison Manager on 15 June 2006, to discuss their requirements (the 15 June Meeting). As set out below MLT became the professional trustee and scheme administrator in relation to the Scheme with day to day administration carried out by MLA. Ongoing support was to be provided to Mr and Mrs E by CAM.

13. Following the 15 June Meeting, the Board of Bema Engineering Limited (the Company) met on 21 June 2006 (the Company Board Meeting) and decided that a pension contribution would be made to the Scheme of £48,500 (£38,800 in respect of Mr E and £9,700 in respect of Mrs E).

14. It was also agreed at the Company Board Meeting that certain machinery (including a wire eroder, milling machine and lathe) (the Machinery) would be purchased by the Scheme in lieu of the monetary contribution and the Machinery leased back to the Company for a five year term at a cost of £1,164 per month plus VAT.

15. At a meeting of the Scheme trustees on the same day as the Company Board Meeting (21 June 2006), it was resolved that the Machinery (valued at £48,500) would be accepted by the trustees in lieu of a monetary contribution by the Company of that amount to the Scheme.

16. The trustees of the Scheme and the Company entered into a leasing agreement in relation to the Machinery on 4 July 2006, with the first payment of £1,164 per month plus VAT due on 28 June 2006, followed by 59 monthly payments of £1,164 plus VAT.

17. MLT wrote to Mr and Mrs E on 6 July 2006, confirming receipt of the signed lease documents, arrangements for the standing order lease payments. MLT also confirmed that they had sent VAT forms to the VAT office to register the Scheme for VAT and confirmed MLA's fees.

18. Mr and Mrs E say that there was some indication in 2006 that there might be a problem with the SSAS, but this is disputed by CAM, MLA and MLT. It is accepted that the CAM Managing Director sent a report to Mr and Mrs E dated 14 August 2006 (the August 2006 Report), following the 15 June 2006 Meeting. The August 2006 Report confirms Mr and Mrs Es' requirements as discussed at the 15 June Meeting.

19. In the first paragraph of the August 2006 Report the CM Managing Director says:

> "I now provide you with a summary of all areas discussed and actions agreed upon during our recent meeting (15/06/06) of which you were both present, along with myself [the Managing Director] and [the Client Liaison Manager]. I have provided the advice and recommendations with [the Client Liaison Manager] providing the ongoing administration and support."

20. The section of the August 2006 Report headed "Small Self-Administered Schemes (SSAS) states:

> "SSASs were discussed in great detail as this type of occupational pension scheme can combine your retirement planning and corporate funding requirements.

21. The section of the August 2006 Report headed "Agreed Action" states:

> "After discussion, it was agreed that a SSAS would be an appropriate arrangement with existing funds being transferred in. I understand you have existing pension arrangements to the value of approximately £70,000 (precise details provided under separate cover)."

22. The section of the August 2006 Report headed "Trustee Investment Premiums" states:

> "The monthly premiums consist of the investment of lease income as a result of the latest sale and leaseback transaction, and will be directed from the Trustee Bank Account towards insured pension funds as a Trustee Investment.
>
> 2 X £582 per month to AXA
>
> Trustee Investment contributions will be treated within the scheme as a "non-earmarked" benefit. The benefits will be calculated and divided accordingly at retirement by the scheme actuary."

23. Mr and Mrs E were initially joint signatories on the Scheme bank account, but on 12 February 2007, MLT wrote to them (the MLT Letter) advising them as follows:

> "In assuming this role [scheme administrator], Morgan Lloyd Trustees Limited became **solely** responsible for any tax charges that may occur on the Scheme. The board have therefore decided that Morgan Lloyd will be the sole signatory on all Trustee Bank Accounts."

MLT went on to say:

> "Should any legitimate tax charges arise, Morgan Lloyd Trustees Limited reserve the right to draw a cheque from the Scheme account prior to the consent of the General Trustees."

24. The CAM Managing Director contacted Mr and Mrs E on 2 January 2008, to advise them verbally that CAM's interpretation of "tangible moveable assets" differed from that of HM Revenue & Customs (HMRC) and suggested CAM would put it right. Mr and Mrs E regularly contacted CAM about the matter and asked for the position to be explained in writing.

25. Mr and Mrs E were also advised on 2 January 2008, by the CAM Managing Director, to surrender the AXA Sun Life (AXA) policy referred to in the August 2006 Letter,

which Mr and Mrs E agreed to. The policy was surrendered and a new policy effected with Clerical Medical (CM).

26. CAM, MLA and MLT maintain that a settlement agreement between themselves and Mr and Mrs E was reached and signed on 12 November 2008. By virtue of clause 2.4, the settlement agreement was intended to constitute a full and final settlement of any claims Mr and Mrs E had against CAM, MLA and MLT. It is argued that this agreement was misplaced and only re-discovered by CAM, MLA and MLT in March 2013. Mr and Mrs E deny seeing or signing this settlement agreement.

27. On 29 September 2009 the CAM Managing Director wrote to Mr and Mrs E to explain the problem i.e. that HMRC considered the Machinery to be tangible moveable property and therefore taxable when held in a SSAS under the provisions of the FA 04 (the CAM September Letter). He said that CAM had acted reasonably, were currently discussing the issue with HMRC and had obtained an opinion from a leading QC.

28. In the CAM September Letter the CAM Managing Director explained the tax implications of the problem and set out a proposal whereby Mr and Mr E could enter a settlement agreement with CAM, MLA and MLT enabling CAM to deal with HMRC on behalf of Mr and Mrs E and other affected clients (the Settlement Agreement).

29. Mr and Mrs E also received a letter from the CAM Financial Director, dated 20 May 2010, which reiterated the points made in the CAM September Letter. This letter also provided details of the Settlement Agreement mentioned in the CAM September Letter.

30. Mr and Mrs E decided not to enter into the Settlement Agreement. There is no indication that they had seen the legal advice on which it was based and the terms are relatively complicated. There was also no guarantee that they would not eventually have to pay the applicable tax.

31. Instead, Mr and Mrs E did what they could to resolve any potential problem. Prior to receipt of the CAM September Letter they received a letter from MLA, which suggested how the Machinery could be transferred back to the Company. The Machinery was purchased by the Company from the Scheme on 17 November 2010.

32. Lawyers acting for CAM, MLA and MLT received a letter from HMRC dated 22 June 2007 which stated that:

> **"**Any machinery purchased after 5 April 2006 by an investment regulated pension scheme would be tangible moveable property and potentially taxable as such, no distinction is drawn in relation to the type or usage of the machinery."

33. Mr E received a letter from HMRC dated 15 March 2011 stating that there was additional tax due for the year ending 5 April 2007. HMRC also wrote to MLT. Mr and Mrs E appealed and payment of the tax was postponed.

34. Mr and Mrs E did not receive copies of the Scheme bank account statements until October 2011 and we have not seen any evidence that Mr and Mrs E were provided with copies of Scheme accounts. However, we understand that no such accounts were prepared. CAM, MLA and MLT say that this is due to the requirement for scheme accounts to be maintained no longer applying post A-Day.

35. Following receipt of the MLT Letter, Mr and Mrs E asked to be included as signatories on the Scheme bank account. They were eventually told that this would mean changing accounts, but no further action was taken.

36. Mr and Mrs E have had various dealings with HMRC in relation to the tax position of the Machinery held in the Scheme. In the course of their dealings with HMRC Mr and Mrs E have met with HMRC Pension Scheme Services. They have also provided information to HMRC outlining their situation as they accept the view of HMRC that the Machinery is tangible moveable property and therefore taxable if held within the Scheme.

37. Following their discussions with HMRC, Mr and Mrs E have withdrawn their appeals, paid the tax due and as a result of their co-operation with HMRC have been refunded the amount paid in respect of the unauthorised payments surcharge (£8,470.07).

38. In a letter to Mr and Mrs E, dated 26 October 2012, HMRC Pension Schemes Services said:

> "Further to our recent meeting and conversation, I am writing to confirm that, following your application to HMRC under s268(2) Finance act 2004 for the discharge of the unauthorised payment surcharges imposed and result of the pension scheme's acquisition of tangible moveable property, HMRC has accepted that in all the circumstances of the case it would not be just and reasonable for you to be liable to these surcharges."

39. In February 2013 the then Deputy Pensions Ombudsman at this office issued a provisional decision (the **2013 Provisional Decision**).

40. It later became apparent that there was a potential overlap of issues. On 12 June 2013 my office wrote to the Applicants, and CAM, MLA and MLT, informing them that, due to the overlap of the appeals to HMRC and the complaint to TPO and the possibility for contradictory decisions arising because of this overlap, the Deputy Ombudsman was going to postpone making a final determination until the appeals were resolved.

41. The relevant HMRC appeal was heard by the First Tier Tax Tribunal in the case of Morgan Lloyd Trustees Limited (as administrator of the Wren Press Pension Scheme) Hallam v The Commissioners for Her Majesty's Revenue and Customs UKFTT0131 (TC) (the FTT Case), which considered HMRC's definition of 'tangible moveable property'. It was handed down on 8 February 2017. CAM, MLA and MLT had

indicated they were considering appealing the decision and so Mr and Mrs T's case remained on hold pending expiry of the appeal period.

42. I issued a Provisional Decision on 8 November 2017 (the **2017 Provisional Decision**). This determination therefore takes into account the 2013 Provisional Decision, the FTT Case, and my recent Provisional Decision. It also takes into account submissions made by all of the parties' consequent to both Provisional Decisions.

Summary of Mr and Mrs E's position

43. Mr and Mrs E strongly deny that they signed a settlement agreement in November 2008.

44. Mr and Mrs E say that they relied on the information provided to them by CAM in relation to the Scheme when they decided to use the Scheme to purchase the Machinery in lieu of a monetary contribution. This was the main reason for establishing the SSAS.

45. Mr and Mrs E say that they were only made aware of the potential tax problem resulting from the Scheme's investment in Machinery in January 2008 when CAM, MLA and MLT, should have been aware of the problem at the time of the August 2006 Report, as they had suggested they had expertise in this area of pensions. As joint trustees they say they should have been made aware of the problem at the earliest possible time. Mr and Mrs E did not appreciate the implication of the tax issue until they received tax assessments in 2011.

46. Mr and Mrs E say that they relied on the expertise of CAM, MLA and MLT on the basis of the 15 June Meeting, the August 2006 Letter, the MLT Letter and otherwise. Mr and Mrs E did not receive Scheme bank statements, accounts or information, enabling them to be properly informed about the Scheme. They only received copies of the Scheme bank account statements from June 2006, after MLT became sole signatory following the MLT Letter.

47. In addition to the Machinery they initially transferred to their previous pension arrangement, Mr and Mrs E then took out a policy with AXA (making payments of £582 x 2 per month from June 2006 to 28 March 2008; making a total of £24,444) to form part of the SSAS, but the policy was surrendered early for a value of £17,017.98 and a new policy effected with CM.

48. Mr and Mrs E have transferred some funds out of the SSAS but were concerned to learn that there is only £27,248 remaining in the SSAS which MLT will not release pending confirmation of a Scheme sanction charge.

49. They say that once they decided not to agree to the Settlement Agreement they did not get any information or assistance from CAM, MLA or MLT. In any event, Mr and Mrs E say that CAM, MLA and MLT dealt with HMRC, they do not have a disagreement with HMRC and accept HMRC's decision.

50. Mr and Mrs E's concern relates to the information and administration services (including dealing with HMRC) provided to them by CAM, MLA and MLT, in relation to the Scheme.

51. Mr and Mrs E also complain about the delays by CAM, MLA and MLT in dealing with this matter.

52. Following the 2017 Provisional Decision and further submissions from CAM, MLA and MLT, Mr and Mrs E submit that:-

53. They were never advised that CAM was dissolved. There is another Clifton Asset Management Plc (07206291) which is still in existence. Company number 3455324 was re-named Clifton 310311 Plc on the 30 March 2011, being the date that HMRC sent letters informing their clients of the tax penalties regarding the Sscheme. On the same day company number 07206291 was renamed Clifton Asset Management Plc. To the consumer it would appear that CAM had been continually trading under the name since January 2006.

54. They have received correspondence from Clifton Consulting Ltd, Clifton Wealth Ltd and Clifton Compliance Ltd. All have the same mix of directors.

55. CAM, MLA and MLT state that they are not aware of any Scheme sanction charge but they also state that HMRC is yet to rule on the application for discharge of the scheme sanction charge. They also state that they need security over Mr and Mrs E's monies to account for this.

56. They have provided proof of their payment of the authorised payment charges to CAM, MLA and MLT via their legal representative.

57. They do not accept CAM's, MLA's and MLT's assertion that they stand to be put in a better position than they would have been but for CAM's, MLA's and MLT's maladministration. Mr and Mrs E had to purchase the machinery back from the Scheme at a cost of £10,457.50, pay solicitors costs of £2,726, lost any growth on the money CAM, MLA and MLT still hold in the Scheme bank account, and had to pay an unauthorised payment charge (this totalled £31,010.89, of which £8,470.05 was later refunded).

Summary of CAM, MLA and MLT's position

58. CAM, MLA and MLT, represented by solicitors, Veale Wasborough Vizards (**VWV**), say that Mr and Mrs E's complaint is not within my jurisdiction as it relates to investment advice and it did not specify maladministration. In any event, VWV say that Mr and Mrs E have not demonstrated that there has been maladministration.

59. CAM, MLA and MLT say that Mr and Mrs E's complaint is out of time and it is not reasonable to investigate it at this point. They say that Mr and Mrs E were informed

verbally of the issue which has led to this complaint in 2008, and officially in writing on 29 December 2009.

60. CAM, MLA and MLT say that in around August 2006 they made a voluntary disclosure to HMRC and HMRC confirmed that the investments could give rise to a tax charge.

61. They also say that HMRC only issued the relevant tax assessments in 2011.

62. CAM, MLA and MLT argue that Mr and Mrs E cannot bring the current claim by virtue of signing the 2008 settlement agreement.

63. CAM, MLA and MLT say that MLA and MLT act for pension schemes and members where they have agreed to the Settlement Agreement, and CAM, MLA and MLT have continued to fund the legal costs.

64. CAM, MLA and MLT understand that Mr and Mrs E have paid the relevant tax charges and maintain there has not been a delay in resolving the matter.

65. CAM, MLA and MLT's legal representative supplied submissions to my office on 30 April 2013, as a response to the 2013 Provisional Decision, the material points of which are as follows: -

- The 2013 Provisional Decision should have gone into more detail when discussing tax charges.

- The definition of 'tangible moveable property' that the Ombudsman used in the 2013 Provisional Decision included 'office furniture' which isn't included in any definition CAM, MLA and MLT is aware of.

- CAM, MLA and MLT dispute there was some indication in 2006 that there might be a problem with the SSAS, as reported by Mr and Mrs E, which was reflected in paragraph 16 of the 2013 Provisional Decision.

- The HMRC guidance in relation to tangible moveable property was conflicting and the full extent of the changes to that legislation were not immediately apparent. The advice that was given to Mr and Mrs E was provided when there was no Registered Pension Scheme Manual to accompany the changes to the tax legislation and therefore nothing to explain the effect of the change to the definition of 'personal chattels' to 'tangible moveable property'.

- There is an assertion of delay on the part of CAM, MLA and MLT in the 2013 Provisional Decision. Dealing with HMRC can be a protracted process, especially in complex cases, which does not appear to have been considered in the 2013 Provisional Decision.

- Mr and Mrs E were offered a settlement agreement and could have taken legal advice at that time but chose not to.
- CAM, MLA and MLT raised numerous points in relation to the accuracy of the original figures in the 2013 Provisional Decision; these have been addressed in the revised directions below.
- CAM, MLA and MLT feel that an award of £1,500 for distress and inconvenience is too high.

66. Following the 2017 Provisional Decision VWV on behalf of CAM, MLA and MLT submit that:-

67. The company which on 16 June 2006 was known as "Clifton Asset Management plc" (number 3455324), was dissolved on 29 November 2016, and therefore no longer exists.

68. A copy of an agreement apparently signed by Mr and Mrs E has been provided. No case has been made out that the signatures were forged or that there is any other explanation as to why an apparently signed document exists. This document cannot just be ignored. It should take effect according to its terms. If Mr and Mrs E did not understand the meaning or significance of the agreement, that is not in itself a basis for holding the agreement to be void or voidable under principles of contract law.

69. There cannot have been any maladministration or breach of duty prior to 8 August 2006. The directions should be approached on the basis that there was no maladministration or breach of duty prior to 8 August 2006. Namely:-

70. The reference to 50% is not understood and the unauthorised payment occurred prior to August 2006, and therefore the related tax charge cannot have been caused by wrong advice given from 8 August 2006.

71. The period between 2006 and 2010 needs to be more clearly identified.

72. Mr and Mrs E are liable in tax for any income generated by the machinery during this time. Lease payments were only in fact made between May 2006 and May 2007 (the balance is in arrears). Accordingly, CAM, MLA and MLT should only be liable for any tax charges relating to the period 8 August 2006 and May 2007.

73. Any scheme sanction charge arising from the unauthorised payment prior to August 2006 cannot have been caused by wrong advice given from 8 August 2006.

74. There is no explanation in the determination as to why CAM, MLA or MLT are said to have given wrong advice in relation to the acquisition or surrender of the AXA policy. The policy was acquired in June 2006, so it is not clear how the acquisition can have flowed from wrong advice given from 8 August 2006.

75. It is not clear that the administration fees flow from any wrong advice given on 8 August 2006.

76. Any access to the schemes remaining assets needs to consider the security held over the monies in respect of the possible scheme sanction charge: specifically, there is no proof that Mr and Mrs E have paid the unauthorised payments charges which have arisen (the scheme sanction charge can be higher if this is unpaid); and in any event, HMRC has yet to rule on the application for discharge of the scheme sanction charge.

77. Bema has benefited from corporation tax deductions as a result of the in-specie contribution of machinery to the Scheme. The shares in Bema belong substantially to Mr and Mrs E, and the tax relief would have a positive effect on the company valuation.

Conclusions

78. The first issue to determine is whether a settlement agreement was signed by Mr and Mrs E and Mr Greenway on behalf of CAM, MLA and MLT in 2008. On the balance of probabilities, I find that such an agreement was not signed by Mr and Mrs E and is not a valid compromise of their rights. The evidence does not support its mutual agreement and validity and it is implausible that CAM, MLA and MLT would have misplaced an important document such as a settlement agreement for a period of five years.

79. This decision is reached on the basis of subsequent communications between Mr and Mrs E, my office and CAM, MLA and MLT:-

    i. Mr and Mrs E received confirmation in writing from Neil Greenway, Managing Director of CAM, on 29 September 2009, explaining that the machinery invested in by the E Scheme in 2006 was deemed by HMRC to constitute tangible moveable property and would be subject to a tax charge. There is no mention of any previous settlement agreement entered into by Mr and Mrs E in this letter. In fact, at the bottom of the second page of the letter it states ‘following discussions regarding the above [proposal to liaise and negotiate with HMRC] you decided not to proceed with our proposal. I called you again to urge you to reconsider your stance but you again said that you would deal with this matter as and when this issue was raised by HMRC’. Had a settlement agreement been signed by Mr and Mrs E there would have been no need to send this letter, the agreement would have been mentioned in the letter by Mr Greenway who was present when it was supposedly signed and it would not have stated that Mr and Mrs E were not proceeding with CAM’s proposal.

    ii. On 22 July 2010, Mr and Mrs E met with Ellis Organ who asked them to sign a settlement agreement dated 9 June 2010. It is unclear why Mr Organ would have asked them to do this if they had already signed

a settlement agreement. On the same day Mr Organ sent an email to Mr E informing him of the contents of the settlement agreement and suggested that Mr and Mrs E seek independent legal advice regarding the settlement agreement. If Mr and Mrs E had been aware of a previous settlement agreement it is unclear why they did not mention it in July 2010 (prior to bringing any complaint to TPO). It also appears that they would have sought legal advice prior to entering into any settlement agreement had they been aware of its consequences. On 22 September 2010, a letter was sent to Mr and Mrs E stating that they had not returned the 'written agreement' and that they had not 'joined the campaign'. If Mr and Mrs E had already signed a written settlement agreement, there was no need for them to return another.

iii. In March and August 2012, VWV on behalf of CAM, MLA and MLT, exchanged a number of letters in respect of a Part 36 settlement. If a settlement had already been reached between the parties, then such discussions would have been unnecessary;

iv. There is no evidence to suggest that Mr and Mrs E were being underhand in their communications with CAM, MLA and MLT post November 2008. Their interactions appear to have been genuine and they seem unaware of any settlement agreement having been reached in 2008.

80. Considering the points set out in paragraph 79 above, I am satisfied that I am not prevented from determining this complaint by a valid, enforceable settlement agreement.

81. CAM, MLA and MLT say that Mr and Mrs E's complaint is out of time. However, CAM, MLA and MLT say themselves that there has been ongoing dialogue with HMRC and the tax assessments were only issued in 2011. It was not until then that it was clear to Mr and Mrs E that the Machinery held within the Scheme attracted tax charges. I do not agree the complaint is out of time.

82. CAM, MLA and MLT also clearly stopped carrying out their duties in relation to the Scheme once Mr and Mrs E (reasonably in my view) refused to enter into the Settlement Agreement.

83. The fact that this was not Mr and Mrs E's fault was acknowledged by HMRC when they refunded the unauthorised payment surcharge.

84. CAM, MLA and MLT say that the complaint is outside my jurisdiction because it relates to investment advice. However, Mr and Mrs E's complaint relates to the information received concerning HMRC practice and tax legislation and the ongoing administration of the Scheme.

85. To come within my jurisdiction CAM, MLA and MLT need to be "concerned with the administration" of the Scheme (Britannic Asset Management v Pensions Ombudsman [2002] 49 PBLR (the "Britannic Case"). In the Britannic case at first instance Lightman J said (paragraph 20):

> "…In my view the Claimants are correct when they say that "administering the Scheme" means (in whole or in part) eg inviting employees to join, keeping records of members, communicating with members, calculating benefits, providing benefit statements, paying benefits when due, keeping documentation up to date, dealing with governmental or regulatory agencies (Inland Revenue, DWP, OPRA) etc, it will no doubt involve running the fund, investing and managing the Scheme's assets. The ultimate responsibility for all those acts will usually lie with the trustees, but (1) if someone else carries out the day to day running on their behalf that person may be a manager; (2) if someone is otherwise involved with an act of administration for the trustees (whether by carrying out such an act or advising on it) that person may be concerned with the administration of the Scheme. But the touchstone is whether he is engaged to act, or advise, in or about the trustees' affairs in running the Scheme."

86. CAM provided information concerning the ability of the Scheme to invest in the Machinery. MLA and MLT have ongoing responsibility, as does the CAM Client Liaison Manager, to provide support to Mr and Mrs E and ensure that the Scheme is administered correctly and complies with tax legislation and HMRC rules. Therefore, I find that CAM, MLA and MLT are concerned with the administration of the Scheme.

87. I consider that providing incorrect information regarding tax issues relating to the Scheme, administering the Scheme incorrectly and failing to make good any errors in a reasonable manner, is maladministration. CAM, MLA and MLT did not take reasonable steps to remedy the position when they discovered their error.

88. Essentially Mr and Mrs E's complaint is about the information and administration services (in particular in dealing with HMRC) provided to them by CAM, MLA and MLT. They invested the Scheme assets in the Machinery as they understood this to accord with HMRC practice.

89. In Mr and Mrs E's dealings with CAM, MLA and MLT the impression was given that they had the necessary expertise regarding the legislation and rules governing a SSAS, and so provide them with the necessary Scheme administrative and trustee services.

90. The FTT Case concluded that machinery was tangible moveable property under the FA04, and therefore did attract tax charges.

91. However, in reaching its decision the FTT considered the discharge provisions under section 268 of the FA04. In particular, the FTT considered that HMRC guidance on tangible moveable property in relation to machinery was highly unclear until it

published information on its website on 25 July 2006. The FTT decided that advisers should have been put on enquiry from 8 August 2006 regarding the meaning of tangible moveable property.

92. That means that prior to 8 August 2006 a reasonable adviser, in the view of the FTT, would not have been aware that 'tangible moveable property' had a broader meaning than under the previous regime. Following the FTT's reasoning this means that scheme administrators should be entitled to relief in relation to transactions entered into prior to 8 August 2006.

93. Mr and Mrs E entered into their transaction on 4 July 2006. Therefore, following the FTT decision the scheme administrator is likely to obtain relief from the scheme sanction charge under section 268(7) of FA04, on the basis that a reasonable adviser would not have been aware at that time that the transaction would attract tax charges.

94. Indeed, this is clear on the basis that Mr and Mrs E have been exonerated from the unauthorised payments surcharge under section 268(3) of FA04.

95. As such it is my view that prior to 8 August 2006, CAM, MLA and MLT cannot be said to have misadvised the Scheme and their tax advice was reasonable in June and July 2006.

96. However, upon discovering that the transaction would attract tax charges, CAM, MLA and MLT say that they voluntarily informed HMRC of the transaction. They did not inform Mr and Mrs E that their transaction attracted tax charges until January 2008. In fact, Mr and Mrs E were sent a report in August 2006 by the Managing Director at CAM without any suggestion that the transaction would attract tax charges.

97. I consider that the delay in keeping Mr and Mrs E informed constitutes maladministration. I also consider the failure to put the issue in writing until September 2009 to be maladministration. Mr and Mrs E were essentially kept out of the loop for 17 months before being informed that there had been an issue with the transaction. Mr and Mrs E were only advised on 17 November 2010 to transfer the machinery back to the company. Between 2006 and 2010 Mr and Mrs E are liable in tax for any income generated by the machinery during this time.

98. As advisers, scheme administrator and professional trustee, CAM, MLA and MLT clearly had a duty to update and inform Mr and Mrs E, provide them with copies of any obligatory or reasonably requested Scheme returns, accounts and statements, and update them in relation to the potential Scheme sanction charge and otherwise. Mr and Mrs E only received Scheme bank accounts dating from June 2006 in October 2011.

99. CAM, MLA and MLT do not believe that the 2013 Provisional Decision goes into enough detail in relation to HMRC's charging procedures. What is included in the 2013 Provisional Decision, and repeated here is merely a summary of the substance

of the relevant parts of the Finance Act 2004, and I am satisfied that a detailed discussion in relation to HMRC's charging procedures is not necessary.

100. In relation to the point CAM, MLA and MLT made, as detailed in paragraph 65 of this Determination, the government website (https://www.gov.uk/guidance/pension-trustees-investments-and-tax) gives guidance to trustees for pensions investment and tax and describes tangible moveable property as 'things you can touch and move for example cars and vans or office furniture'.

101. CAM, MLA and MLT submit that losses must have been caused by wrong advice given from 8 August 2006, to be recoverable. As of 4 July 2006 (when Mr and Mrs E entered into the transaction for the machinery), there was no maladministration, because as noted in the FTT case, an advisor acting reasonably should not be taken to have been put on notice that the machinery was taxable at that date. However, CAM, MLA and MLT are liable for maladministration after this date, due to their failure to properly advise Mr and Mrs E on the clarified state of the law in this respect after 8 August 2006, being the latest date on which the FTT case held that a reasonable adviser would have been on notice that the machinery may be taxable. Had CAM, MLA or MLT notified Mr and Mrs E of the issue, in say, August or September 2006, they could have negotiated a settlement with HMRC at that stage. But because of CAM, MLA and MLT's failure to notify them Mr and Mrs E were unable to do so. As CAM, MLA and MLT have raised issue with the proposed directions in the 2017 Provisional Decision I address each below, for the avoidance of doubt.

102. I approached bullet point one of the directions on the basis of seeking a fair apportionment in relation to the losses suffered by Mr and Mrs Y to reflect the post 8 August 2006 maladministration, not just in terms of advice but limiting the opportunity for Mr and Mrs Y to negotiate a more favourable settlement with HMRC, in relation to the overall tax position, due to failure to communicate the problem in a timely fashion.

103. Turning to bullet point two I do not see that CAM, MLA and MLT could be held responsible for losses on the sale of the machinery; however, the post 8 August 2006 maladministration did cause the losses in respect of any tax charges payable on the machinery between 8 August 2006 and 16 November 2010. Because, had CAM, MLA and MLT notified Mr and Mrs E that the machinery was taxable, any tax charges between these dates could have been avoided.

104. In respect of bullet point three, the same reasoning applies.

105. With regard to bullet point four, CAM, MLA and MLT submit that because the purchase of the AXA policy pre-dates 8 August 2006, no liability flows from it. However, there was significant on-going maladministration post 8 August 2006, as a result of which I find that CAM, MLA and MLT should be held liable for the AXA policy in addition to 50% of the unauthorised payment charge.

106. Bullet point five reflects again the significant post 8 August 2006 maladministration.

107. With regard to bullet point six, for the avoidance of doubt, when referring to access means access according to the Rules of the Scheme which are subject to legislation.

108. Lastly CAM, MLA and MLT state that there is a danger the directions will put Mr and Mrs E in a better position than they would have been but for CAM's, MLA's and MLT's maladministration. I do not agree and see no reason why Mr and Mrs E should be required to give value for any ancillary benefit they may or may not obtain as a result of CAM's, MLA's and MLT's maladministration. This is not a case of "double counting" where CAM, MLA and MLT are required to pay more than they ought but rather that Mr and Mrs E may obtain a separate benefit.

109. CAM, MLT and MLA submit that the 2013 Provisional Decision's proposed award of £1,500 for distress and inconvenience was too high. However, Mr and Mrs E were clearly concerned about the significant amount of tax HMRC was asking them to pay. The initial delay by CAM, MLA and MLT, and eventual cessation of communications with Mr and Mrs E, caused them a considerable amount of distress and inconvenience. As such I have decided that an increase in award from the 2013 Provisional Decision is warranted. Furthermore, this case has been on hold due to the pending FTT case and my determination should properly reflect the current, revised approach of this office and of the courts in respect of awards for non-financial injustice.

110. I have been told that CAM Plc (03455324) was dissolved in November 2016, and therefore no longer exists. However, a company with the same name (CAM Plc), and the same address, and same directors, is still registered at Companies House albeit under a different company number (07206291). It seems unusual that upon dissolution a company with exactly the same name remained in place and continued trading (its name having been changed from Sprintstep Plc to CAM Plc at this time). It is worthy of note that following the 2013 Provisional Decision indicating that the complaint would be upheld against CAM Plc and shortly prior to the FTT case reaching its decision at the beginning of 2017, CAM Plc (03455324) was dissolved. A fact told to my office after the issue of the 2017 Provisional Decision. I find that CAM Plc, MLA, and MLT, are equally liable for their actions in respect of Mr and Mrs E's complaint. Should my directions need to be enforced it will be a matter for CAM Plc to persuade the court that there is no legal entity against which judgment can be enforced.

Directions

111. Within 56 days of the date of this Determination CAM, MLA and MLT (the amounts to be divided equally between them) shall:

- pay 50% of the unauthorised payments charge which was imposed as a consequence of their maladministration post 8 August 2006;
- pay any tax charges incurred in respect of the machinery, between 8 August 2006 and 16 November 2010;

- pay any scheme sanction charge;
- pay an amount equal to the premiums which were paid by Mr and Mrs E in respect of the AXA policy, £24,440 (less the surrender value of £17,017.98), £7,422.02;
- reimburse MLA's administration fees of £2,378.20;
- pay £2,500 to Mr and Mrs E in recognition of the very significant distress and inconvenience they have suffered; and
- in respect of MLA and MLT, accept Mr and Mrs E's instructions as trustees and provide for them to be joint signatories on the Scheme bank account, so they can access the Scheme's remaining assets of £27,248.

Anthony Arter

Pensions Ombudsman
20 March 2018