

PO-7126

Ombudsman's Determination

Applicant	Miss Donna-Marie Hughes
Scheme	Royal London Personal Pension (the Royal London Scheme)
Respondent(s)	Royal London Group (Royal London)

Complaint summary

Miss Hughes complains that Royal London refused to act on her request to transfer her benefits from her personal pension plan to the Babbacombe Road 1973 Limited SSAS.

Background

Pension liberation

1. Present tax legislation is designed to prevent access to pension funds before the age of 55 (other than in ill-health or as benefits following death) as part of the policy that encourages pension saving by giving tax advantages, with penalties if the advantages are abused by using funds other than for authorised purposes. There was also, at the material time, a limit on the amount that could be taken as cash at any age.
2. The practice of pension liberation involves a transfer away from a genuine pension scheme intended to allow access to a scheme member's pension savings before the age of 55, or to more cash than would normally be allowed. It is recognised as being contrary to the broad policy of encouraging pension savings and is of concern to the regulatory and tax authorities and those responsible for national pension policy. The businesses active in persuading people to indulge in such arrangements are likely to be doing so with their own financial gain put before the long term interests of the people with whom they deal. Charges made by businesses for making such arrangements are high and significant tax penalties that a member is likely to suffer may not have been explained. Some transfers have been fraudulently diverted to the advantage of the persons advertising the schemes and there is a suggestion of the involvement of organised crime in some pension liberation schemes.

PO-7126

3. Pension liberation is recognised in statute in sections 18 to 21 of the Pensions Act 2004, under which pension money is defined as having been liberated where a transfer value is paid from a pension scheme on the understanding that it would be secured to be used in an authorised way by the recipient, but it has not been. The Pensions Regulator is given power to make restraining and repatriation orders and the courts are given powers to order restitution. These provisions have no direct relevance to the matter I have to consider, however.

The statutory right to a transfer value

4. Section 94 of the Pension Schemes Act 1993 (PSA93), provides that a member of an occupational or personal pension scheme has a right to a “cash equivalent transfer value” of any benefits which have accrued under the transferring arrangement.
5. Section 95(1) of PSA93, says that a cash equivalent transfer value can be taken by making an application in writing to the managers of the transferring arrangement requiring them to use the cash equivalent in one of several ways set out in subsequent paragraphs. In summary, and so far as relevant, they are:
 - for acquiring “transfer credits” in an occupational pension scheme; or
 - for acquiring rights under a personal pension scheme;

which satisfies prescribed requirements in each case and where the trustees or managers of the scheme are able and willing to accept the transfer.

6. The definition of “occupational pension scheme” for this purpose is in section 1(1) of PSA93:

““occupational pension scheme” means a pension scheme -

(a) that -

(i) for the purpose of providing benefits to, or in respect of, people with service in employments of a description, or

(ii) for that purpose and also for the purpose of providing benefits to, or in respect of, other people,

is established by, or by persons who include, a person to whom subsection (2) applies when the scheme is established or (as the case may be) to whom that subsection would have applied when the scheme was established had that subsection then been in force, and

(b) that has its main administration in the United Kingdom or outside the EEA states,

or a pension scheme that is prescribed or is of a prescribed description;”

PO-7126

7. Subsection (2), referred to in the definition above as describing persons who can establish an occupational pension scheme, limits them to, in fairly complex terms that I do not need to reproduce here, employers of people who are in an employment of the description referred to in paragraph (a)(i), or persons who are themselves in an employment of that description, or persons representing the interest of either. Subsection (3) says that where a person in an employment is an office holder, their employer will be taken to be the person responsible for paying them.
8. Transfer credits are defined in section 181(1), as follows:

““transfer credits” means rights allowed to an earner under the rules of an occupational pension scheme by reference to a transfer to that scheme of his accrued rights from another scheme (including any transfer credits allowed by that scheme)”
9. That in turn leads to the definition of “rights” in the same section, being:

““rights”, in relation to ... transfer credits, includes rights to benefit and also options to have benefits paid in a particular form or at a particular time;”

Where “benefit” and “benefits” are undefined.
10. The definition of “earner” cross refers to section 3 of the Social Security Contributions and Benefits Act 1992.

“(1) In this Part of this Act and Parts II to V below—

 - (a) “earnings” includes any remuneration or profit derived from an employment; and
 - (b) “earner” shall be construed accordingly.”
11. The prescribed requirements under section 95(1), in relation to transfers from occupational pension schemes, are set out in Regulation 12 of the Occupational Pension Schemes (Transfer Values) Regulations 1996 (the Occupational Schemes Transfer Regulations). The requirements for transfers from personal pensions are in the Personal Pension Schemes (Transfer Values) Regulations 1987 (The Personal Pension Transfer Regulations). The relevant requirement is the same in each, being that where the transferring scheme is registered under section 153 of the Finance Act 2004 (FA04), the receiving scheme should also be registered under that section.
12. Section 99 of PSA93, requires the trustees or managers to carry out the member’s requirements within a specified period – basically within six months of application, or, in the case of salary related occupational pension schemes, six months of the date of guarantee of the amount of the cash equivalent. It also provides:
 - that the Pensions Regulator can extend the six month period in specified circumstances;
 - for notification to the Pensions Regulator where payment is not made; and

- in the case of occupational pension schemes, for civil penalties to be imposed by the Pensions Regulator on trustees or managers who have not taken reasonable steps to comply.
13. In relation to transfers from occupational pension schemes, Regulation 13 of the Occupational Schemes Transfer Regulations specifies the circumstances in which the Pensions Regulator may grant an extension to the period for compliance with the member's request. In particular the Pensions Regulator may do so where the member has not taken all the steps that the trustees or managers may reasonably expect in order to satisfy them of any matter needing to be established, or has not provided the information that the trustees or managers reasonably need. There are no equivalent regulations relating to transfers from personal pension schemes, so there are no circumstances in which the Pensions Regulator or any other regulator can extend the six month period.

Tax legislation

14. Section 153 of the Finance Act 2004 (FA04) provides for the registration of schemes by the Inland Revenue. One condition of registration is that the instruments or agreements of the scheme do not entitle a person to "unauthorised payments".
15. Section 164 of FA04 lists types of payments that are regarded as "authorised member payments", which include "recognised transfers" under section 169. Section 169 says that a recognised transfer is a transfer of sums or assets to another recognised scheme (or a qualifying recognised overseas scheme).

"A "recognised transfer" is a transfer of sums or assets held for the purposes of, or representing accrued rights under, a registered pension scheme so as to become held for the purposes of, or to represent rights under-

- (a) another registered pension scheme, or
- (b) a qualifying recognised overseas pension scheme,

in connection with a member of that pension scheme."

16. "Member" is defined in section 151 of FA04, as follows:

"(1) In this Part "member" in relation to a pension scheme, means any active member, pensioner member, deferred member or pension credit member of the pension scheme.

(2) For the purposes of this Part a person is an active member of a pension scheme if there are presently arrangements made under the pension scheme for the accrual of benefits to or in respect of the person.

(3) For the purposes of this Part a person is a pensioner member of a pension scheme if the person is entitled to the present payment of benefits under the pension scheme and is not an active member.

PO-7126

- (4) A person is a deferred member of a pension scheme if the person has accrued rights under the pension scheme and is neither an active member nor a pensioner member.”
17. Sections 208 and 209 of FA04, provide that, where an unauthorised member payment is made, an unauthorised payment charge, and potentially an unauthorised payment surcharge, will be levied on the member (where living).
 18. Section 239 of FA04, provides for a “scheme sanction charge” to be paid by the person identified as the administrator of the scheme. A scheme sanction charge could (subject to some conditions not relevant) be payable if an unauthorised member payment was made. It would be at 40% of the payment subject to a deduction where an unauthorised payment charge has been paid.
 19. Also relevant are sections 157 and 158 of FA04, which provide that a scheme that makes ‘unauthorised payments’ that exceed a permitted threshold could face de-registration. If registration is withdrawn the trustees or managers become liable to pay a de-registration charge, assessed at a rate of 40% of the assets held by the arrangement immediately before registration was withdrawn.

General obligations

20. Regulation of pension schemes is divided between the Financial Conduct Authority (FCA) and the Pensions Regulator under different statutory regimes. Before the FCA came into existence, the Financial Services Authority (FSA) had the same responsibilities and there are no material differences between the regulatory regimes of the FSA and the FCA. (For convenience in this document I use “FCA” where I might otherwise have said “the FCA and the FSA before them”).
21. The FCA’s jurisdiction broadly includes providers of all pension schemes other than occupational pension schemes (activities concerning which are excluded from being a “regulated activity” in the relevant legislation). The FCA expects all firms within its jurisdiction to act in accordance with certain principles, which include acting with integrity, due skill, care and diligence, and treating customers fairly. More specifically, in relation to retail investment business (which includes pensions) the FCA expects firms to “act honestly, fairly and professionally in accordance with the best interests of its client”.
22. Trustees and managers of occupational pension schemes have general obligations in law, which there is no need to rehearse here in depth, to act in the best interests of beneficiaries, with due care, etc. However, since, as stated above, managing an occupational pension scheme is not a regulated activity, business and persons managing such schemes are not required to be authorised by the FCA.

Regulation

23. In February 2012, the Pensions Regulator published a press release directed to the public headed "Warning against early release pension offers". The Pensions Regulator noted that it had published details of investigations in two cases, which had resulted in the appointment of an independent trustee, and including advice to pension scheme members about pension liberation schemes, including comments from HM Revenue and Customs (HMRC) and the FSA. At the same time, the Pensions Regulator published a factsheet "Pension Liberation Fraud" giving information for scheme members and the FSA published its own material directed to consumers.
24. A year later, in February 2013, the Pensions Regulator published "Pension liberation fraud. An action pack for pension professionals" in conjunction with a number of bodies including HMRC and the FSA, directed to trustees, administrators and providers. It says:

"Looking out for pension liberation fraud

When processing a transfer request, trustees and administrators may be in a position to identify the warning signs that suggest that pension liberation fraud is occurring.

If you are a trustee or administrator, and any of the following criteria apply to a transfer request you have received, then you may be about to transfer a member's pension to a scheme designed to liberate their funds. Here are some of the things to look out for:

- Receiving scheme not registered, or only newly registered, with HM Revenue & Customs
- Member is attempting to access their pension before age 55
- Member has pressured trustees/administrators to carry out transfer quickly
- Member was approached unsolicited
- Member informed that there is a legal loophole
- Receiving scheme was previously unknown to you, but now involved in more than one transfer request"

The action pack goes on to set out check lists that could be used if any of the above applied. The nature/status of the scheme	
Is the scheme to which the member wants to transfer:	How to establish
<ul style="list-style-type: none"> • newly registered with HMRC? • if the scheme is a self-invested personal pension (SIPP), not registered with the Financial Conduct Authority (FCA)? 	<ul style="list-style-type: none"> • Ask the pension scheme in question for documentary evidence
<ul style="list-style-type: none"> • sponsored by a newly registered employer? • sponsored by a dormant employer? • sponsored by an employer that is geographically distant from the member? 	<ul style="list-style-type: none"> • Obtain employer information from scheme in question • Check with Companies House for details of the employer status (www.companieshouse.gov.uk)
<ul style="list-style-type: none"> • sponsored by an employer that doesn't employ the member? 	<ul style="list-style-type: none"> • Ask the member
<ul style="list-style-type: none"> • connected to an unregulated investment company? 	<ul style="list-style-type: none"> • Ask the receiving scheme for details of their investment service providers • Check these providers with the FCA (www.fca.org.uk/register)

Description/promotion of the scheme	
Do descriptions, promotional materials or adverts:	How to establish
<ul style="list-style-type: none"> include the words 'loan', 'savings advance', 'cash incentive', 'bonus', 'loophole' or 'preference shares'? allude to overseas investments? hint at unusual, creative or new investment techniques? 	<ul style="list-style-type: none"> Ask the member for copies of promotional materials, emails or letters about the scheme Ask the member about the way the receiving scheme has been described to them over email/text/phone

The scheme member	
Has the member:	How to establish
<ul style="list-style-type: none"> been advised by an 'introducer'? been advised by a non-regulated adviser? taken no advice decided to transfer after receiving cold calls, unsolicited emails or text messages about their pension? 	<ul style="list-style-type: none"> Ask the member about how he/she became aware of the receiving scheme Check whether advisers are registered with the FCA at www.fca.org.uk/register
<ul style="list-style-type: none"> pressured the trustees/administrators to 	<ul style="list-style-type: none"> Check whether member

<p>carry out the transfer as quickly as possible?</p> <ul style="list-style-type: none"> mentioned that your pension scheme has transferred funds to this arrangement before? 	<p>has contacted trustees/administrators to hurry along transfer since first submitting request</p>
<ul style="list-style-type: none"> not received documentation from the new scheme? 	<ul style="list-style-type: none"> Check whether member has received documents
<ul style="list-style-type: none"> been told they can access their pension before age 55? been misled about the potential tax consequences? 	<ul style="list-style-type: none"> Review promotional material for receiving scheme

25. The pack continues:

“Answering 'yes' to any of these questions individually does not necessarily indicate a dangerous pension liberation arrangement, but if several features are present there may be cause for concern.

...

Next steps if you have concerns

Contact the member to establish their understanding of, for example, the type of scheme they'll be transferring to. You may also want to direct the member to the Pensions Advisory Service (TPAS), who can help them understand the potential tax consequences of the transfer if any part of the arrangement is deemed as unauthorised. ...

Communicating with the member may also allow you to establish answers to more of the questions above, where you've been unable to answer them with

the information you have available. If your concerns remain then you should alert the relevant authority ...

Delaying a transfer when you have concerns over liberation

Should you have concerns regarding a transfer request you may wish to seek your own legal advice. Trustees have a duty to carry out a member's transfer request where the legislative requirements are met. This includes a member having made a valid application requesting the transfer.

If, for example, a member requests a transfer to obtain transfer credits in an occupational pension scheme, but 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.

For example, in certain circumstances where a scheme describing itself as an occupational pension scheme is sponsored by a dormant company, which has never actually traded, the trustees may conclude that it does not have the necessary characteristics of an occupational pension scheme.

We can't predetermine any future regulatory action we may take on any particular case. However, where the transferring trustees or administrators have reason to believe that member funds may be liberated and can evidence their concerns, then this would be a relevant factor to the regulator when deciding whether it would be appropriate to take action in respect to a non-payment of a transfer.

For example, where a trustee has obtained evidence that subsequent to a member's transfer then monies would be passed back to the member before their normal minimum pension age, this factor would be given significant weight by the regulator in assessing whether it would be appropriate to pursue any action in relation to a non-payment of a transfer.

The Pensions Regulator would expect trustees/managers to be able to demonstrate that they have taken steps to establish the legitimacy of an arrangement where they have delayed making a transfer for that reason."

26. The Pensions Regulator's guidance was updated in July 2014 but it is not significantly different.

The issue

27. The issue that arises in this case can be straightforwardly expressed and is typical of one presenting itself across the pensions industry in relation to pension liberation. Put simply, it concerns where the balance lies for those responsible for the management of a scheme when a transfer request is thought possibly to be for the purpose of pension liberation. On the one hand, the member has statutory transfer

rights and, usually, transfer rights under the transferring scheme. On the other, the trustee, manager or provider has regulatory and other general responsibilities to act in the member's interests and with due care – and it must act consistently with the tax legislation or risk financial penalty.

28. I understand that there has been a range of approaches across the industry, with some schemes and providers taking a protective attitude towards their members, building (and sharing) databases to help them to identify transfer requests that are likely to be for pension liberation, and others adopting a more permissive stance. Also, schemes and providers may have modified their respective approaches over time as experience has grown.
29. No doubt in some cases in which a scheme or provider contacts the member offering information and/or asking questions, as advocated by the Pensions Regulator, the member will simply drop the application – whether because they realise from the information that the transfer is not in their interests or they retain their original impulse but give up in the face of an obstacle.
30. In those cases, the scheme or provider will not need to look beyond the prima facie evidence that the transfer was for the purpose of pension liberation. But where the member persists, the trustee, manager or provider will need to make a judgment about what evidence is needed and how much further to look for it before concluding whether or not the member has a right to transfer.

Basis of my decision

31. I have jurisdiction to decide complaints of injustice due to maladministration and disputes of fact or law. The two often overlap. There will not have been maladministration by a body that makes a reasonable decision in an honest belief that it is acting correctly. However, where I am determining legal rights, I must do so in accordance with legal principles – in substance reaching a decision equivalent to the decision that a court could have reached, and I must provide the same legal remedy as a court would in the same circumstances. The position is helpfully summarised in *Arjo Wiggins Limited v Henry Thomas Ralph* [2009] EWHC 3198(Ch), paragraphs 13 to 15.

Miss Hughes' case: Material facts

The Royal London Scheme

32. The Royal London Scheme was established by Deed Poll by the Royal London Mutual Insurance Society Limited, which is also the Scheme administrator. The company's relevant activities are regulated by the FCA (and previously by the FSA).
33. The material rules of the Scheme are set out below:

“10.2 The Scheme Administrator may at its absolute discretion make a transfer of an Individual Fund (or an amount representing it, whether in whole or in part) to another *registered pension scheme* or *qualifying overseas pension*

scheme, to provide such benefits under the other scheme as may be offered by the Administrators or managers of the other scheme.”

The receiving scheme

34. The arrangement to which Miss Hughes wished to transfer is known as the Babbacombe Road 1973 Limited SSAS. By a trust deed dated 30 June 2014, a trust was established by Babbacombe Road 1973 Limited, defined as “the Principal Employer” and Miss Hughes, defined as “the Trustee”.
35. Recital 1 of the Trust Deed says “The Principal Employer wishes to establish a scheme known as the Babbacombe Road 1973 Limited SSAS under irrevocable trusts with effect on and from the Commencement Date to provide retirement benefits for or in relation to persons admitted to membership of the Scheme.”
36. Clause 1.1 of the Trust Deed says “The purpose of the Scheme is to provide benefits consistent with the Scheme’s status as a Registered Scheme, Occupational Pension Scheme and a SSAS”.
37. The Rules of the SSAS say:
1. **“Eligibility**
 - a) Subject to Rule 1.2, there shall be only one Member of the Scheme, who shall be the same person as the first Trustee of the Scheme and shall be admitted to membership on and from the Commencement Date.
 - b) The Trustee, with the consent of the Administrator, may invite additional Employees to membership of the Scheme upon such terms and conditions as may be agreed by the Trustee and the Administrator, provided that:
 - i. There shall be no more than 11 Members in the Scheme; and
 - ii. Each member shall be appointed as a Trustee in accordance with Clause 15”.
- [There is no Rule 1.2, so it is assumed Rule 1(b) is the Rule referred to in 1(a)].
38. The clauses relevant to benefits provide (in summary) that a member can elect to have the “Member’s Individual Credit” (being the amount of contributions by or in respect of them, transfer payments, any allocation or reallocation of any part of the Fund in accordance with the Rules) applied in providing a lifetime annuity, a lump sum, Income Withdrawal or Drawdown pension or any other way permitted by the Pension Rules or the Act (Finance Act 2004) without triggering an Unauthorised Payment or De-registration charge”.
39. The Schedule to the Rules contains the following definitions:
- ““Administrator” means a person who agrees to be the scheme administrator within the meaning of section 270 of the Act

and carry out the administration of the Scheme pursuant to the Trust Deed and Rules and in accordance with the Administration Agreement;”

““Employee” means an employee or director of the Principal Employer;”

““Employment” means employment as an Employee with the Principal Employer;”

““Member” means a person who has joined the Scheme under Rule 1;”

““Principal Employer” means the company which is the first party to the Trust Deed or any successor under the Terms of the Trust Deed.””

40. Rule 6a says: “The Principal Employer shall pay contributions of such amounts and at such times as it from time to time notifies to the Trustee and the Administrator...”
41. Rule 6c says: “The Principal Employer may terminate its contributions to the Scheme by giving one week’s notice in writing thereof to the Trustee and the Administrator. Such termination shall constitute a Default Event. On receiving such notice (if any) the Administrator shall notify the Members.”
42. Rule 13 “Transfers in” says: “The Trustee may with the consent of the Administrator accept a transfer payment from a Registered Scheme or where the transfer would constitute a Recognised Transfer. On receiving the transfer payment, the Administrator will allocate the Member’s Individual Credit accordingly.”
43. According to the records held at Companies House, the Principal Employer is a UK based company incorporated on 4 June 2014. The registered address is Miss Hughes’ home address in Devon but the nature of business was not supplied. No accounts have yet been filed.
44. The Babbacombe Road 1973 Limited SSAS was registered with HMRC as a registered pension scheme on 3 July 2014. The registration was submitted by Bespoke Pension Services Limited (**Bespoke**).
45. Bespoke say that the company is currently dormant. It is not trading at present, Miss Hughes is the only individual employed by the company and she does not currently receive a salary from the company.

The transfer application

46. Miss Hughes was 41 when she made her application to transfer to the Babbacombe Road 1973 Limited SSAS. The value of her pension plans with Royal London was £8,359.71.
47. The transfer application and accompanying paperwork were submitted on Miss Hughes’ behalf by Bespoke on 23 July 2014.

48. In addition to the evidence of HMRC registration, and signed confirmation from Miss Hughes that she wished to transfer and had been provided with literature regarding the risks of pension liberation, Bespoke enclosed a copy of the Trust Deed and Rules and an employment agreement between Miss Hughes and the Principal Employer dated 4 June 2014.
49. The employment agreement was witnessed by someone (the signature is unreadable) from a company called First Review Pension Services, based in Pride Park, Derby. Miss Hughes indicated in her transfer request that she had originally been contacted by First Review Pension Services. She said that she had expressed an interest in transferring her existing pension funds into a SSAS through which she had the opportunity to invest in Cape Verde (amongst others); and First Review Pension Services had then introduced her to Bespoke. Also recorded on the transfer request form, the receiving scheme's investment provider was said to be The Resort Group PLC. According to the brochure provided to Miss Hughes regarding the Cape Verde and other property investments, The Resort Group PLC was based in Gibraltar but its Support Office and exclusive UK promoter was named First Resort Property Services Ltd, also based in Pride Park, Derby.
50. On 8 September 2014, Royal London replied saying that they were not prepared to transfer Miss Hughes' pension to the requested scheme because they had been unable to satisfy themselves that a payment to the scheme would be used for the purposes of providing appropriate pension benefits under a registered pension scheme. They would consider any request to transfer to an alternative scheme.
51. Miss Hughes wrote to Royal London on 14 October 2014, challenging this decision. Although Royal London had not specified their particular concerns other than the wording above, Miss Hughes' letter sought to comment on concerns that they might have. If Royal London was concerned that they were unable to verify that the Scheme employer was a trading company or had any genuine employees, the letter said that as a matter of law, an occupational pension scheme can be established for directors as well as employees and it was simply not correct to say that the Scheme is not a genuine occupational pension scheme. This was a legitimate transfer request in favour of a genuine occupational pension scheme so Royal London would not incur any tax charges.
52. On 23 October 2014, Royal London again refused the transfer application. They added that a fiduciary duty to the member (i.e. the requirement to act in their best interests) overrides a member's statutory right to a transfer.
53. We published a number of determinations in late 2014/early 2015 covering many of the issues relevant to transfer requests and pension liberation concerns. As a result, a number of providers – including Royal London – carried out a further review of those cases where transfers had been refused. Royal London reaffirmed their decision in Miss Hughes' case and provided fuller details of their approach in their letter to this office of 26 March 2015 (which was sent to Miss Hushes' representative).

Summary of Miss Hughes' position

54. Miss Hughes' case was brought to this office by Bespoke, acting as her representative. She argues that it is entirely unjust for Royal London to refuse her statutory right to transfer to another fully registered scheme.
55. She also considers that the refusal has prevented the improved growth of her pension fund and claims compensation for loss of investment return.
56. Even if there were no statutory right to transfer, which is disputed, Royal London failed to consider their separate discretionary power under the scheme rules.

Summary of Royal London's position

57. Royal London say that they have carried out a further review of Miss Hughes' case, in the light of our recent determinations (published on our website www.pensions-ombudsman.org.uk) involving similar issues.
58. However, they do not consider that Miss Hughes has a statutory right to transfer and remain concerned about the status of the receiving scheme, the proposed investment and the extent of the advice which Miss Hughes has received.
59. In particular, Royal London say that Miss Hughes was initially contacted by a company which it believes operates through "cold calling" potential customers; the Principal Employer was only registered shortly before the transfer request; the SSAS was registered by HMRC only 3 days later; Miss Hughes' employment agreement is non-specific on role requirements and remuneration; the pro forma wording of correspondence sent in on Miss Hughes' behalf; the type of investment involved ("high risk") and the advice received (seemingly by non-regulated entities).
60. After considering all of the above and regulatory guidance, Royal London concluded that whilst it was not necessarily the case that the SSAS had been set up to facilitate pensions liberation, it appeared likely that the SSAS could not be correctly categorised as an occupational pension scheme so Miss Hughes did not have a statutory right to transfer to it. Once their statutory obligations had been considered, Royal London's Scheme Rules provided an absolute discretion as to whether to authorise a transfer and they were at liberty in the circumstances to decline the request.
61. Royal London do accept that they could have communicated more effectively with Miss Hughes to ensure she properly understood the nature of their concerns and the basis for the refusal decision.

Conclusions

62. As I note in paragraph 31, I must determine the matter in accordance with the law. So the primary question is whether Miss Hughes had a legal right to transfer. My approach is first to look at her rights under the Royal London Scheme and under statute. Also relevant are the tax and regulatory questions, but, in particular, she

could not be deprived of a statutory right by regulatory or other guidance (and there is no suggestion otherwise from the Pensions Regulator).

The Royal London Scheme Rules

63. The Scheme does not give Miss Hughes an absolute freestanding right to a transfer. Rule 10.2 (set out in paragraph 33) makes a transfer subject to Royal London's agreement, unless there is a statutory right. The only requirements are, whether in exercise of the statutory right or not, that the receiving scheme should be a Registered Pension Scheme or a Qualifying Recognised Overseas Pension Scheme (QROPS). The Scheme was registered by HMRC on 3 July 2014.

64. So looking narrowly at the rules, Royal London:

(a) had to pay the transfer if there was a statutory right

(b) had to withhold the transfer if the receiving scheme was not a registered pension scheme or a QROPS;

(c) in other circumstances had discretion to consent to the transfer.

65. The rules could not of course deal with the possibility of a conflict between (a) and (b), which would be technically possible if the two sets of legislation were not a perfect fit for each other.

The statutory right to a transfer value

66. I now consider whether Miss Hughes's application met the statutory requirements for a request for a cash equivalent transfer value.

67. First, the receiving scheme needed to be an occupational or personal pension scheme. The Scheme superficially has the characteristics of an occupational pension scheme with its references to the inclusion of employers, employees and so on. The tests for an occupational pension scheme were considered in some detail by Morgan J in *Pi Consulting v The Pensions Regulator* [2013] EWHC 3181 (Ch). That case related to nine schemes to which the Pensions Regulator had appointed a trustee on the grounds that the schemes were devised for the purpose of pension liberation. The judge considered two tests to arise under the definition in PSA93 (see paragraph 7), the "purpose" test corresponding to (a)(i) and (ii) of the definition and the "founder" test corresponding to the rest of paragraph (a). (I do not need to set out Morgan J's judgment in any detail here.)

68. In that case, the judge assumed that the schemes were not mere shams. I take the same starting position here.

69. The minimum requirement for the Babbacombe Road 1973 Limited SSAS to pass the purpose test is that it should be "for the purpose of providing benefits to, or in respect of, people with service in employments of a description".

PO-7126

70. The Trust Deed says that the purpose of the SSAS is to provide retirement benefits for or in relation to persons admitted to membership of the Scheme.
71. It also says that Babbacombe Road 1973 Limited is to be the Principal Employer and the only provision for the involvement of another employer is the power in clause 28 to change the principal employer in certain defined circumstances.
72. A simplified interpretation of the Scheme's documents, described more fully in paragraphs 34 to 42, gives the following:
 - A Member has to be an Employee (from Rules 1(a) and (b));
 - An Employee is an employee or director of the Principal Employer (from the definition of "Employee");
 - Employment is employment as an Employee with the Principal Employer (from the definition of "Employment");
 - Principal Employer means the company which is the first party to the Trust Deed or any successor under the terms of the Trust Deed (from the definition of "Principal Employer");
 - There is no separate definition of 'employer.' However, any employer other than the principal employer can only be a party to the scheme by the power under clause 28 to change principal employers in certain defined circumstances.
73. The effect of the above is that members must be, or must have been, employed by Babbacombe Road 1973 Limited, as the Principal Employer, or another employer that has been substituted for the Principal Employer under clause 28.
74. So, although there is little by way of description of the nature of the employment itself, the rules have sufficient specificity to meet the minimum requirement of the test because the 'qualifying' employment is clear – currently employment with the Principal Employer.
75. The Scheme also met the founder test. It was established by Babbacombe Road 1973 Limited, being the employer of "people with service in employments of a description".
76. So the Scheme was, as it appeared to be, an occupational pension scheme.
77. The next test is whether Miss Hughes' application required Royal London to use the cash equivalent transfer value for securing transfer credits, being rights allowed to her as an earner (a person with remuneration or profit from an employment) under the rules of the Scheme.
78. Miss Hughes has provided an employment agreement between herself and the principal employer, dated 4 June 2014 (the day after the SSAS was registered with HMRC). Clause 4 says that she will receive "such remuneration as is agreed with the

Company in respect of any hours worked”. There is no further detail of any such agreement but, in any event, the company is not trading and Miss Hughes does not currently receive a salary. The literature provided to Miss Hughes by First Review Pension Services on how to establish the SSAS indicates that the company is not intended to trade. So she has not received remuneration from an employer that is connected to the Scheme.

79. Although, there is nothing in the legislation that expressly states that Miss Hughes’ status as an earner had to be in relation to a scheme employer, I find that it did. It would be a very strange result if people not in “employments of a description” who were earners in some other context (with earnings, however small or irregular, from some completely unconnected enterprise) could require a transfer value to be paid to the scheme, when other people not in “employments of a description” could not. It would give the reference to “earner” arbitrary consequences if it just means a person with any earnings from any source.
80. As Miss Hughes had no relevant earnings she was not an earner and so her request for a cash equivalent transfer value was not for securing transfer credits. She had no statutory right to take a cash equivalent transfer value.

The Tax legislation

81. It is a condition of registration under section 153 of FA04, that scheme rules do not entitle a person to unauthorised payments. It follows that, in relation to transfers, authorised payments must have been defined at least sufficiently broadly to cover transfers to which there is a right under PSA93. Otherwise a PSA93 right that amounted to an unauthorised payment would be in conflict with the requirement (though it could not be withheld).
82. The relevant requirements for Miss Hughes’ intended transfer to be a “recognised transfer” were that it was to be held for the purposes of another registered pension scheme or to represent rights under it, in connection with Miss Hughes as a member of that scheme.
83. The Babbacombe Road 1973 Limited SSAS was at the time a registered pension scheme, so the only remaining reasons for doubting the transfer’s status as an authorised payment would have been if the payment was not to be held for the purposes of the SSAS or to represent rights under it – or that Miss Hughes’ membership of the SSAS was in doubt.
84. As to the first matter, Bespoke asked for the transfer to be made direct to the Babbacombe Road 1973 Limited bank account, provided the appropriate details, confirmed that they were co-signatories and said that the payment was to be invested for Miss Hughes’ benefit. There is no evidence that there would then have been an unauthorised payment out of the receiving scheme (the trust deed contained specific investment powers in contemplation of the type of opportunity marketed to members) and Miss Hughes insists the opposite.

85. Turning to the second, as set out in paragraph 17, “member” is defined in FA04, as being one of an active member, a deferred member, a pensioner member (and a pension credit member, which is not relevant). The only possible category of membership would be an active member, for which there would have had to have been “presently arrangements made under the pension scheme for the accrual of benefits to or in respect of” Miss Hughes. She was not presently accruing benefits, but to the extent that the Babbacombe Road 1973 Limited SSAS would have been able to accept a transfer in respect of her, there were presently arrangements made for the accrual of benefits – even if actual accrual was contingent on a transfer.¹
86. But anyway, it would have required very little effort for Miss Hughes to accrue benefits quite independently of the transfer. A modest contribution to the SSAS was all that might have been required.
87. There was no reason to object to the transfer as being itself an unauthorised payment, therefore.

Regulatory matters

88. As I observed earlier, had a regulator’s guidance or rules been inconsistent with statutory rights, then clearly those rights would have taken precedence.
89. The application to transfer was made after the action pack of February 2013 referred to in paragraphs 24 and 25. The references in the action pack to the Pensions Regulator not taking action where transfers were delayed would not have been relevant since there are no penalties that the Pensions Regulator can levy in relation to a personal pension scheme. (And it is my understanding that the FSA/FCA would be unlikely to penalise a firm in relation to a single delayed transfer). Strictly the Pensions Regulator’s statements about trustees are not relevant to Royal London as an FSA/FCA regulated provider. But the guidance was endorsed by the FSA, so it is understandable that Royal London had regard to it – as well as to the earlier guidance for members issued by both the Pensions Regulator and the FSA.
90. The only directly relevant regulatory and general legal obligations would have been for Royal London to act with integrity, honestly and fairly, in the best interests of Miss Hughes (see paragraph 21) and consistently with the duty of care that they owed her. Miss Hughes was adamant that she wanted to transfer. Royal London say that they were acting in her best interests and this overrode any statutory right to a transfer.

Overall conclusions

91. As I found earlier, Miss Hughes did not have a statutory right to a transfer. Had one existed, Miss Hughes could not be deprived of it by regulatory or other guidance (see paragraph 62) so Royal London are not correct to say they could have overridden it by asserting they were acting in Miss Hughes’ best interests.

¹ Transfers to arrangements such as “section 32” policies and deferred annuities are presently permitted by HMRC and this reading of the definition is consistent with that. If the definition was read so as to only include as members those who were actually accruing benefits, then such transfers would not be authorised payments.

PO-7126

92. In the absence of a statutory right, Royal London were then entitled to decide under Rule 10.2 whether to permit the transfer. The information they obtained and reviewed gave them legitimate concerns about the transfer. The fact that there was no statutory right and a concern about unauthorised payments, at least until Miss Hughes made a contribution to the SSAS, are relevant factors Royal London would be entitled to take into account in exercising that discretion. It is clear from their recent review that Royal London considered there was no statutory right and then went on to assess whether they should nevertheless exercise a discretion to transfer. Having done so, they then exercised their discretion in a way they were entitled to under the rules of the scheme.
93. Royal London, though, did not ever explain their decision to Miss Hughes in those terms – as they have accepted during their recent review. If they had done so, it might have made Miss Hughes reconsider her transfer request or at least take further independent advice on her position. Having completed their due diligence and concluded that there was no right to transfer they should have been able to justify that to Miss Hughes.
94. I find that Royal London's decision not to pay the transfer value was consistent with the law. I do not uphold Miss Hughes' complaint.

Anthony Arter

Pensions Ombudsman
30 June 2015