DRN-3704868

Financial Ombudsman Service

The complaint

Mr P complains that ReAssure Life Limited failed to warn him about the risks involved in a pension transfer he was making to the Tallton Place Pension Scheme ("the Scheme"), set up by Ark Commercial Pension Planning LLP, in March 2011.

The Scheme was subsequently found to be a vehicle for pension liberation, the process by which pensions are accessed in an unauthorised way (before minimum retirement age, for instance). This can leave victims paying punitive tax charges to HMRC and having to deal with the consequences of having their pension invested in an inappropriate way, both of which apply in this case.

He is represented in this complaint by a Claims Management Company (CMC).

What happened

Mr P had set up a personal pension with Skandia (which is now part of ReAssure) in 2008. I'll refer to Skandia as ReAssure in the rest of this decision. ReAssure recorded that an FSA regulated financial adviser was associated with setting up this plan.

On 10 February 2011, Mr P signed a letter of authority allowing Ark Business Consulting LLP to "collate my scheme member information". The form noted that Ark would *"liaise directly with their sister firms who specialise in Pension Scheme*[s]*…Ark Commercial Pension Planning LLP…and Ark Commercial Retirement Planning LLP"*

However, it appears that by this point Skandia had already issued a transfer discharge form as that form bears a date of 1 February 2011. Mr P also signed this discharge form on 10 February to confirm that he wished to transfer to the Scheme and declaring it to be a contracted-out money purchase occupational pension scheme. The Scheme countersigned this form on 9 March 2011.

Mr P says his interest in the transfer was prompted by debts after the 2009 financial crisis. He received a call from a business associate who was promoting the Scheme, which was presented as a way to release cash from his pension (before age 55). He was age 47 at the time. Mr P's and similar schemes had been designed by an individual who he believed to be highly qualified in the industry and trustworthy, as a legitimate way of side-stepping the tax rules.

He's provided a flyer a firm called Asset Harbour sent him, offering access to *"a cash lump sum now"* by way of its Pension Reciprocation Plan (PRP). It explained, *"The PRP is not therefore a pension liberation vehicle. The PRP does however allow you to access an immediate lump sum. This is done in a way that is consistent with the rules associated with UK pensions…"* The flyer also bore Premier Pension Solutions SL's name and confirmed that firm was registered with the Spanish regulator and acting as an authorised as an agent of AES Financial Services Ltd – my understanding is that firm also operated from a branch in Spain under Spanish regulation at that time.

On 9 March 2011, Ark Commercial Pension Planning LLP wrote to ReAssure requesting it transfer Mr P's policy to the Scheme. In its covering letter Ark provided:

- The Scheme's Pension Scheme Tax Reference ("PSTR") number, describing the scheme as a UK Registered Defined Contribution Money Purchase Plan

- A pension transfer application form, declaring that the Scheme had a pension age of "55+" and asking ReAssure a number of questions about the ceding scheme.

- Mr P had signed a legal declaration on the form on 10 February 2011 consenting to Ark Business Consulting LLP processing his data, and it appears on 9 March 2011 Ark had inadvertently signed the section of the form directed at the transferring scheme to confirm the information it was providing was correct.

- Details of the bank account the transfer payment was to be paid into.

ReAssure says it received this letter on 14 March 2011. Having been satisfied that the Scheme had the necessary registration with HMRC, it transferred Mr P's pension on 16 March 2011 for £112,709, with a copy of the confirmation letter being issued to the FSA authorised adviser who was still attached to the plan. The letter explained, *"Please note it is no longer our policy to complete Receiving Scheme application forms. All the information you require is contained in this letter."*

Mr P received a little under half of his pension fund back by way of a loan from an associated member's pension scheme, after his scheme in turn lent to that member. He was told the remaining investment would be focused on London real estate, although there is some suggestion it was actually involved in property deals in Cyprus.

In June 2011 The Pensions Regulator ("TPR") announced that it had appointed independent trustees "Dalriada" to the Scheme because of concerns about the way it and associated schemes operated. Around the same time, Dalriada wrote to members, and issued a statement on its website, with further information. Further statements from the independent trustee followed, expressing concerns that the loans between members would be regarded by HMRC as pension liberation, and scheme funds had been invested inappropriately.

Mr P agrees that he became aware there was an issue with the Scheme in around 2013. He says that the full extent of the problems and how much of the funds were recoverable wasn't yet entirely clear. At that time he joined a group of Ark victims seeking to recover their losses from those who were involved in designing and operating the scheme. However, he says that these efforts didn't get very far.

This led him to approach the CMC in July 2020, asking them to look into what else he might be able to do. Mr P's CMC complained to ReAssure in January 2021 that it failed to carry out adequate due diligence into Ark Commercial Pension Planning LLP. It said its lack of regulation by the Financial Conduct Authority put Mr's funds at risk, and no advice was given by an FSA-authorised adviser. Mr P feels that ReAssure should've noticed that it was an occupational scheme with which he had no association and therefore, should have raised this with him.

ReAssure responded that it wasn't authorised to provide Mr P with advice, so it was not in a position to question his decision to transfer. It wasn't required to check if the receiving provider was authorised by FSA; rather, that it was registered with HMRC, which the Scheme was.

My understanding is that there has been a complex process of appeals ongoing between Dalriada (representing scheme members) and HMRC as to the extent of unauthorised payment or sanction charges payable by Mr P and the Scheme. HMRC is maintaining the position that tax charges are payable. Although there is the possibility of further appeals, Mr P either has paid or is preparing for the possibility that he will have to pay such charges.

Our investigator didn't think the complaint should be upheld, but he was unable to resolve the dispute informally, so the matter was passed to me to decide. Mr P's CMC's objections were that:

- The speed at which the transfer took place, on the balance of probabilities, makes it highly unlikely that any thought went into the transfer – particularly given it was of significant value.
- ReAssure's file shows no evidence any checks into the Scheme were carried out, including the most basic checks with HMRC to ensure the scheme was registered or any contact with Mr P himself.
- Whilst industry guidance was limited in terms of what was expected of ReAssure at the time, in the absence of any checks or discussion with their client, it is difficult to conclude that they met their obligations under the FCA Principles for Businesses.

ReAssure also argued that Mr P had raised his complaint too late under our rules. Although the investigator didn't agree with this argument, he said that the ombudsman would also address it, as I will do below.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

<u>Has the complaint been brought in time?</u>

The time limits to refer a complaint to the Financial Ombudsman Service are set out at DISP 2.8.2R in the regulator's handbook. This provides that, unless the respondent consents or there are exceptional circumstances:

> *'The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*
> *(1) more than six months after the date on which the respondent sent the complainant its final response…; or*
> *(2) more than:*
> *(a) six years after the event complained of; or (if later)*
> *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint; …'*

Mr P's CMC raised his complaint with ReAssure in January 2021, which is more than six years after the transfer took place in March 2011. Mr P therefore referred his complaint outside the six-year period provided for in DISP 2.8.2R. It follows that the issue I must decide is whether, in the alternative, he referred his complaint within the three-year period. To determine if that is the case, I need to ask whether Mr P was aware (actual awareness), or ought reasonably to have become aware (constructive awareness), of his cause for complaint against ReAssure before January 2018.

The DISP rules provide their own time limits for the referral of complaints to the ombudsman service. In interpreting and applying those rules, I am not bound by the provisions of the

Limitation Act. Nonetheless, I have taken the position at law into account as a relevant consideration in the analysis. I've also taken into consideration the fact that the word "complaint" in DISP 2.8 is an italicised (defined) term in the rulebook. The glossary to the FCA handbook defines 'complaint' in relation to DISP as follows[1] (with my emphasis):

> *'…any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about* ***the provision of, or failure to provide, a financial service,*** *claims management service or a redress determination,* ***which****:*
> *(a) alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and*
> *(b)* ***relates to an activity of that respondent****, or of any other respondent with whom that respondent has some connection in marketing or providing financial services or products… which comes under the jurisdiction of the Financial Ombudsman Service'*

It follows that when asking when the three-year period might have started to run against Mr P, I'm mindful that actual or constructive awareness on his part merely that he might have suffered financial loss, will not be enough. In order for the three-year clock to start to tick, a person must be aware (in an actual or constructive way):

1. Broadly, that a loss has been or may be suffered;
2. That this is a result of some act or omission, and
3. On whom responsibility for that act or omission rests.

ReAssure's arguments were initially confined to only the first of these three points, saying that the DISP rules do not state the client has to be aware of who to complain to, rather they must be aware they have cause for complaint. If ReAssure's point is that the word 'complaint' in "cause for complaint" isn't underlined in DISP 2.8.2R (and therefore doesn't explicitly refer to the regulator's definition of 'complaint', I understand what it's saying.

However, the context of why DISP is referring to "cause for complaint" is equally important. It's cause for the complaint that is being made, rather than *any* complaint. Otherwise, to take that to its extreme, Mr P could be time barred from making a complaint about *any* subject because of his knowledge of cause for complaint about another, unrelated, subject. As per the FCA's definition, a 'complaint' is particular to the activity of a respondent, which I consider in Mr P's case would be the checks ReAssure carried out (or he considered should have carried out) when processing his pension transfer.

Soon after the transfer was arranged, Dalriada was appointed as trustee of the Scheme and started to send correspondence to members. There's an extensive library of this correspondence on Dalriada's website[2]. Even if I assume that there was enough in the updates Mr P received from Dalriada to make him aware that a loss had been or may be suffered, I think that in these circumstances, the natural and immediate response by a reasonable person in his position would be to attribute blame for the loss incurred to Ark, and potentially also to Asset Harbour/Premier Pension Solutions SL who promoted the scheme to him.

The key question I therefore need to ask is whether Mr P also ought reasonably to have known that there was a real possibility his loss was also attributable to failings by ReAssure to act in his best interests. It would be enough that he understood the 'essence' of the failings that may have occurred (such as a broad understanding that ReAssure had failed to take the steps expected of it to alert him where it thought a transfer was being made to a fraudulent, or otherwise inappropriate scheme).

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[1] https://www.handbook.fca.org.uk/handbook/glossary/G197.html
[2] https://www.dalriadatrustees.co.uk/scheme/ark/?type=announcements&id=1

However having been through the Dalriada correspondence at length, I've been unable to find anything which references the role a ceding scheme played (or should have played) in scrutinising such a transfer. And it isn't in dispute that ReAssure didn't raise concerns with Mr P about his transfer in 2011. Moreover, nothing in the process ReAssure followed indicates that Mr P would have thought it was putting his transfer under such scrutiny.

ReAssure has since picked up on the fact that Mr P joined an action group relating to the Ark Scheme in 2013. So I believe its point is now that Mr P ought to have learned about the second and third point above (alleged omissions in ReAssure's due diligence) from that group. But I've been provided with no compelling evidence that this is the direction that the action group pointed Mr P in. Mr P's explanation of the group attempting to address the cause of the problem – namely those who set up or promoted the schemes – is in my view plausible.

I'm aware that in some of the other schemes Dalriada took over, it *did* write to members (on or after around 2019) to make them aware of a favourable determination by the Pensions Ombudsman against a ceding scheme. I've not found reference to this determination in Mr P's correspondence from Dalriada, which is likely to be because transfers to the Scheme were made before specific guidance was issued by TPR to the industry in 2013 to prevent pension liberation. (I'll refer to this in more detail later.) This does however demonstrate that even when Dalriada became aware of a potentially successful cause for complaint against ceding schemes, it was within three years of when Mr P actually complained.

The timing of Mr P's complaint says more about the growing awareness, in the three years before Mr P complained, amongst consumers or their representatives that certain ceding schemes had failed in their due diligence of pension transfers. Mr P's complaint looks to me to be a product of that growing awareness, and I've seen no other basis on which I could conclude that Mr P had that awareness before January 2018. That being the case, I've moved on to the merits of the complaint.

The relevant rules and guidance

Before I explain my reasoning, it will be useful to set out the environment ReAssure was operating in at the time with regards to pension transfer requests, as well as any rules and guidance that were in place. Specifically, it's worth noting the following:

- The Pensions Schemes Act 1993 gives a member of a personal pension scheme the right to transfer the cash equivalent value of their accrued benefits to another personal or occupational pension scheme if certain conditions are satisfied (and indeed they may also have a right to transfer under the terms of the contract). The possibility that this might be exploited for fraudulent purposes was not new even at the time of this transfer. However, the obligation on the ceding scheme was limited to ascertaining the type of scheme the transfer was being paid to and that it was a tax-approved scheme.

- The normal minimum pension age increased from 50 to 55 in April 2010, before Mr P had yet reached his 50th birthday. So he would have to wait a further five years to access his pension to alleviate his financial difficulties.

- At the time of Mr P's transfer, ReAssure was regulated by the FSA. As such, it was subject to the Handbook, and under that to the Principles for Businesses (PRIN) and to the Conduct of Business Sourcebook (COBS). There have never been any specific FSA rules governing pension transfer requests, but the following have particular relevance:

  - Principle 2 – A firm must conduct its business with due skill, care and diligence;

- Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly;
- Principle 7 – A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading; and
- COBS 2.1.1R (the client's best interests rule), which states that a firm must act honestly, fairly and professionally in accordance with the best interests of its client.

For context, it's also worth noting that following an increase in people accessing their pensions in an unauthorised manner, the Financial Services Authority (FSA) and TPR started issuing further warnings about "pension unlocking" or pension liberation from June 2011 onwards. This specifically referred to consumers transferring to access cash from their pension before age 55.

However, these further warnings post-dated Mr P's transfer. As did the introduction of further guidance from TPR on 14 February 2013 – the "Scorpion" campaign. The aim of the campaign was to raise awareness of pension liberation activity and to provide guidance to scheme administrators on dealing with transfer requests in order to help prevent liberation activity happening. The Scorpion campaign was endorsed by the FSA (and others). I highlight it here to illustrate the point that the industry's response to the threat posed by pension liberation was still in its infancy at the time of Mr P's transfer and that it wasn't until *after* his transfer that scheme administrators had specific anti-liberation guidance to follow.

<u>What did ReAssure do and was it enough?</u>

With the above in mind, at the time of Mr P's transfer personal pension providers had to make sure the receiving scheme was validly registered with HMRC. ReAssure had details of the Scheme's PSTR, but the CMC has questioned why it didn't ask for sight of the HMRC registration certificate itself. Even if I accept ReAssure should have done this, there is little doubt that the Scheme *was* registered with HMRC: that has never been questioned in the subsequent ten or more years of Dalriada operating it. So, I'm confident that the Scheme would simply have provided ReAssure with this certificate if ReAssure had asked for it.

There was also a continuing need for all pension schemes to remain vigilant for obvious signs of pension liberation or other types of fraud.

Pension liberation used to be known as 'trust busting' and was mentioned as early as 2002 in Inland Revenue practice notes. Notably, there was no specific guidance at that time on how to go about identifying whether a receiving scheme – if that scheme was correctly established and registered with HMRC – might nonetheless proceed to liberate funds. Nevertheless I would expect a well-run provider with the FSA's Principles and rules in mind to have been aware of the threats in the industry. That means if the provider came across anything to suggest their member was seeking early access to pension funds as part of a transfer, that would have been a cause for concern.

However, I'm satisfied nothing along these lines would have been apparent to ReAssure at the time of the transfer. Mr P's transfer papers wouldn't have given an indication that he was obtaining early access to his funds: the notation of a pension age of "55+" suggested the opposite. And, given the lack of guidance in place at the time, there was no expectation for ReAssure to contact Mr P to see how his transfer had come about. I haven't seen anything that ReAssure would, reasonably, have been aware of about the parties involved in the transfer that would have caused it concern.

It's important to recognise that the more extensive list of warning signs issued in 2013 hadn't yet been published, and it wouldn't therefore be reasonable to use hindsight to expect ceding schemes to act with the benefit of that guidance. This means that I can't fairly expect ReAssure to have considered as suspicious the fact that the Scheme was recently registered (which it might have learned, had it requested the HMRC registration certificate, as I understand the Scheme was established on 26 January 2011). And it means I don't expect ReAssure to have investigated, as a matter of course, the sponsoring employer's trading status, geographical location or connections to any unregulated investment companies or other parties involved.

I'm also satisfied ReAssure didn't have to be alarmed at every contact it received from third parties that weren't authorised by the FSA. From what I can see, none of the Ark companies mentioned were so authorised. But the FSA didn't regulate occupational pension schemes, so ReAssure wouldn't have expected to find the parties running those schemes or helping to administer them (which may include liaising with a member about a transfer-in) to be authorised by the FSA.

Where they were accompanied by the consumer's valid authority, a personal pension provider might also receive requests for information from other parties that might be engaged in some legitimate aspect of a consumer's financial affairs (accountants, tax or legal advisers, credit brokers, debt charities, introducers to authorised financial advisers and so on). But none of these other activities were required to be authorised by the FSA at the time either. So sending documents to Ark ahead of the transfer, which ReAssure likely did, wasn't problematic in itself and it wasn't something it needed to be mindful of when it came to processing the transfer. And when ReAssure received the transfer request itself, it came directly from Ark – which as the administrator of the Scheme, again did not require FSA authorisation.

I would expect a FSA-regulated personal pension provider at that time to take a proportionate approach to transfer requests, balancing consumer protection with the need to also execute a transfer request promptly (and in line with a member's legal rights). Taking all of this into account, and particularly where transfers to occupational schemes were concerned, my view is that it wouldn't have been practicable for a personal pension provider at that time, to have queried the regulatory status of every contact it had from third parties – or presume that there was a risk of harm from a third party involved in an occupational pension transfer purely because it was not FSA authorised.

For the avoidance of any doubt, I don't consider ReAssure decided to make the transfer purely on the basis that that there was a *different* FSA-authorised adviser attached to Mr P's plan at the time (and nor would that have been a satisfactory substitute for the other checks it *did* make). ReAssure couldn't know whether Mr P still had a relationship with that adviser or was in contact with them about making this transfer. That adviser had made no direct contact with ReAssure and from what I can see, the transfer payment letter was copied to the adviser as a standard procedure when an adviser is on the policy record.

Additional arguments

I've noted above that Ark had inadvertently signed a section of the form that ReAssure was meant to sign. With hindsight, this could be taken as an indication of the lack of professionalism of those involved in running the scheme, but I don't accept it had to have been seen that way by ReAssure at the time.

This point was underlined by what ReAssure wrote in reply to Ark, when it sent across the funds. It said that its policy was not to complete other parties' application forms. That's commonly an approach taken by other ceding schemes. The transfer of pension benefits

requires the transfer of a liability to the member from one scheme to another. So, two things have to happen: Mr P must discharge ReAssure of its liability (which he did in this case); and Ark must agree to take on the liability (which it also did).

It's therefore consistent with the stated approach ReAssure was taking at the time that it may not have noticed the section of the form Ark signed was actually intended for it to sign. What Ark required ReAssure to sign was a matter for Ark and Ark alone: if it additionally required ReAssure to sign the form for its own purposes, it could have insisted on ReAssure doing so. But the fact that this irregularity wasn't noticed by either party doesn't alter that the transfer was to an appropriately registered destination scheme which had agreed to take on the liability, and Mr P gave a full discharge to ReAssure for his benefits.

Conclusion

At the time of Mr P's transfer, ReAssure would have been expected to know the receiving scheme had a PSTR and the basis on which it was registered with HMRC. ReAssure was provided with this information. Beyond that, there was no requirement or expectation for it to have undertaken more specific, detailed, anti-scam due diligence. The FSA's Principles and COBS 2.1.1R meant ReAssure still had to be alive to the threat of pension liberation, and other types of scam if they were apparent, and act accordingly. But I'm satisfied there weren't any warning signs that ReAssure should, reasonably, have spotted and responded to.

My final decision

I do not uphold this complaint or make any award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 5 April 2024.

Gideon Moore
Ombudsman