DRN-4822382

Financial Ombudsman Service

## The complaint

The complaint in this case relates to the advice given to the late Mr C by Howard Taylor Associates ('HTA') to transfer his Standard Life and Co-Operative personal pensions into to a Self-Invested Personal Pension ('SIPP'). Mr C's daughters, Mrs S and Mrs V, have complained that this advice was unsuitable and has caused financial loss.

## What happened

In March 2012 Mr C underwent an advice process with HTA that resulted in his two personal pensions with Standard Life and Co-Operative being transferred into a SIPP held with Hartley. Overall, a combined amount of around £41,800 was transferred to the new SIPP with £30,000 of this subsequently being invested in Unregulated Collective Investment Scheme's (UCIS) ultimately investing the monies in land. The remainder of the transferred funds were left in cash within the SIPP.

The advice documentation detailed that Mr C was aged 51, a self-employed builder with income of around £20,000 per annum. It was recorded Mr C had two existing pensions, wanted to retire at 65, had a 15–20-year investment time horizon and had a high attitude to risk (ATR).

Both existing pensions were invested into with-profits funds however the advice documentation noted that Mr C did have additional investment experience via shares, AIM stocks, antiques, and stamps.

It was noted that the existing pensions had a limited fund range available and that Mr C's objective of investing in land could be met via a transfer to a SIPP.

Mr C accepted the advice, and his pensions were transferred.

In September 2013 a warning letter was sent to Mr C by HTA confirming that the Financial Conduct Authority had concerns around the SIPP sales process that had been used by HTA.

As such Mr C was being offered the opportunity to have the advice reviewed.

In August 2015 the outcome of this review was communicated to Mr C. This confirmed there were no areas of concern, and the advice was considered suitable.

Mr C sadly passed away in April 2020.

On 29 November 2021 a complaint was registered with HTA by Mrs S and Mrs V (via their representative) on behalf of late Mr C.

HTA issued their response to the complaint on 22 December 2021. This stated that the complaint had been brought too late. HTA referenced the September 2013 warning letter and the annual general meetings which were held to keep investors updated on the progress of the land investments. As well as the meetings, HTA noted that the minutes of these meetings were forwarded to investors each year. Given this information HTA stated Mr C would or should have known he had cause to complain much earlier, and as such the

complaint had been brought too late.

On 31 January 2022 the complaint was forwarded to this service.

Our investigator looked into things and concluded the complaint had been brought in time.

Whilst the complaint had originally been set up as though it was the late Mr C's estate making the complaint, our investigator noted that as the pension sat outside of the estate it should be Mrs S and Mrs V (as the pension beneficiaries) who were recorded as the complainants.

Regarding our jurisdiction in this case the investigator concluded that the 2013 letter would not have caused concern as this was superseded by the 2015 outcome letter which confirmed that advice was suitable.

Our investigator additionally noted that as the complaint had been brought by Mrs S and Mrs V, it was when they (and not the late Mr C) became or ought to have become aware they had cause to complain that needed to be considered.

As there was no evidence that Mr C had ever discussed his pension with Mrs S or Mrs V the investigator concluded the complaint had been brought in time and could be considered further.

Following this the advice given to Mr C was assessed, with the investigator concluding that this was unsuitable. The investigator stated that had appropriate advice been given, Mr C would most likely have remained in his pre-existing pensions and recommended redress based on this conclusion.

HTA did not agree.

In response to the findings issued HTA (through their representative) noted that the complaint was originally set up as though it had been made by the estate of Mr C and questioned why this had been changed.

In addition, it was noted that the rules detailing who is eligible to make a complaint refer to "beneficiaries" of policies. In this case the trustees of Mr C's pension had not made their decision as to who the beneficiaries of the policy would be, and as such Mrs S and Mrs V's status as "potential beneficiaries" did not entitle them to bring a complaint.

The investigator was not minded to change their view. It was re-affirmed that the investigator had concluded it was Mrs S and Mrs V (as beneficiaries) who had brought the complaint, that they had a complaint with merit and that the causation of the complaint was the advice provided by HTA to Mr C. The investigator stated that the potential losses which had been incurred were not a consideration of the investigation as these would be calculated after the outcome had been agreed.

HTA did not agree and as such the case was passed to me.

I issued a provisional decision which stated:

*"I have initially considered our jurisdiction in relation to the complaint made.*

*There are two jurisdictional issues I need to consider. Firstly, whether Mrs S and Mrs V are eligible complainants and have the right to bring this complaint.*

*The complaint has been brought my Mrs S and Mrs V in their capacity as beneficiaries of their late father's pension. The rules covering who are eligible complainants are set out in the FCA handbook. DISP 2.7 cover these rules in detail with DISP 2.7.6 (4) stating:*

*"To be an eligible complainant a person must also have a complaint which arises from matters relevant to one or more of the following relationships with the respondent:*

*(4) the complainant is a beneficiary of, or has a beneficial interest in, a personal pension scheme or stakeholder pension scheme".*

*I have carefully considered the point that at the time of writing Mrs S and Mrs V have not been named as the beneficiaries of the pension by the pension trustees and as such are "potential" beneficiaries at this time. It could be considered therefore that they do not meet the eligibility criteria noted above.*

*However, Mrs S and Mrs V are noted as the sole beneficiaries named in his will. Whilst the pension sits outside of Mr C's estate and is not covered by his will this information would likely be considered by the pension trustees. In addition, the expression of wish form specifically covering the pension benefits was updated shortly before Mr C's death in February 2020. Given this I consider it extremely likely that Mrs S and Mrs V will eventually be named the beneficiaries of the pension.*

*It has been a considerable amount of time since Mr C passed away and there is currently no explanation available as to why the pension trustees have not finalised their decision as to the beneficiaries of the pension, however one explanation may be the uncertainty surrounding the illiquid assets currently held within it.*

*Given these illiquid assets are the subject of this complaint, and the given the high likelihood of Mrs S and Mrs V being named beneficiaries, I do not consider it reasonable to delay the progress of this complaint further. As such I have concluded they should be considered eligible complainants.*

*I have noted here that the complaint was originally noted as though it were the estate of Mr C making the complaint, with Mrs S and Mrs V acting in their capacity as the executors of the estate.*

*However, our investigator was correct to conclude that given the pension sits outside of Mr C's estate the estate itself has no interest in the value of the policy or its proceeds.*

*The investigator was correct to conclude the complainants in this case are Mrs S and Mrs V themselves as the (almost certain) beneficiaries of the policy. It is the beneficiaries that will receive the proceeds of the pension and therefore it is they who have been impacted by the advice given by HTA.*

*It is also worth noting that Mrs S and Mrs V are both the executors of Mr C's estate and the named beneficiaries for his pension benefits. As such Mrs S and Mrs V are entitled to bring a complaint on behalf of both the estate and themselves (as beneficiaries).*

*The second jurisdictional issue that must be considered is the timeliness of the complaint.*

*The FCA handbook contains the rules we must follow. DISP 2.8.2 states:*

*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, redress determination or summary resolution communication; 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; unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;*

*unless:*

*(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R or DISP 2.8.7 R was as a result of exceptional circumstances; or*

*(4) the Ombudsman is required to do so by the Ombudsman Transitional Order; or*

*(5) the respondent has consented to the Ombudsman considering the complaint where the time limits in DISP 2.8.2 R or DISP 2.8.7 R have expired (but this does not apply to a relevant complaint" within the meaning of section 404B(3) of the Act).*

*The complaint was made by Mrs S and Mrs V on 29 November 2021. With the advice being given to Mr C in 2012 it is clear that the complaint was registered more than six years after the event.*

*As such I have focussed this decision on point 2(b).*

*The complainants in this case are Mrs S and Mrs V – as beneficiaries of the pension plan.*

*As such, I must consider when they became aware, or ought reasonably to have been aware they had reason to complain about the advice given to their late father, and whether this was more than three years before the complaint was made.*

*Based on the chain of events above I can see no evidence that Mrs S and Mrs V were aware (or ought to have been aware) of any potential issues with their late father's pension before 29 November 2018.*

*There is no evidence they were involved in the advice process itself or the 2013 review of the advice. Even if they had been I note that in 2015 the outcome of the review was finalised, with this confirming that the advice was suitable. As such the whole review process would not have been a cause of concern.*

*Whilst Mr C would have received annual pension statements and the minutes from the annual general meetings held to discuss the land investments, there is no evidence of any of these being passed to, or discussed with either Mrs S or Mrs V.*

*Both the pension withdrawal made by Mr C in 2019 and the updating of the expression of wish form in 2020 are after the key date of 29 November 2018 and as such even if there were concerns at these times, and even if Mr C had communicated these concerns to Mrs S and Mrs V, the complaint would still have been registered within the regulatory timescales set out above.*

*Given I have concluded that Mrs S and Mrs V are entitled to bring this complaint, and that it has been brought within the relevant regulatory timescales, I have gone on to consider the merits of the complaint itself, namely whether the advice given to Mr C in 2012 was unsuitable and caused financial loss to his pension (and thus Mrs S / Mrs V's subsequent inheritance of that value).*

*The advice was given by HTA in 2012.*

*Prior to this in 2010 the financial services regulator (now The Financial Conduct Authority, then called The Financial Services Authority) issued their "Unregulated Collective Investment Schemes: Good and poor practice report".*

*Within this an example of poor practice in relation to advice on unregulated investments included "The firm recommended UCIS which actually made up almost 70% of his investment portfolio".*

*An example of good practice stated that "The firm set up a maximum portfolio proportion for UCIS investments within their customers' portfolio and monitored it on on-going basis. This level was between 3% and 5% and was backed-up by the Firms' robust and on-going due diligence and monitoring".*

*Given the advice was provided to Mr C in 2012 HTA would or should have been aware of the content of this report, however the advice does not align with the good practices identified.*

*£30,000 of Mr C's overall pension provision of around £41,800 was invested in unregulated collective investment schemes targeting positive returns based on increasing land values. This equated to around 71% of Mr C's pension provision, an amount well in excess of what had been communicated as "good practice" by the financial regulator around two years prior to the advice being given.*

*The advice exposed an unsuitable proportion of Mr C's pension provision to high risk, illiquid investments when he did not have the capacity to take such risks.*

*Overall, had suitable advice been given to Mr C I have concluded he would have remained with his existing pensions schemes."*

The provisional decision went on to provide redress instructions and asked all parties to provide any additional commentary or evidence that they wanted to be considered further prior to a final decision being issued.

HTA provided significant additional arguments which necessitated the issuance of another provisional decision. This did not amend the overall outcome regarding our jurisdiction, or the suitability of the advice provided by HTA.

This second provisional decision stated:

*"In response to the provisional decision both Mrs S and Mrs V simply confirmed they agreed with what I had said.*

*HTA did respond and provided further significant additional commentary. HTA's response challenged the outcomes I had reached in relation to our jurisdiction in this case and whether HTA owed any duty of care to Mrs S and Mrs V, given they had only ever provided advice to the late Mr C and further questioned the reasonableness of the redress instructions I had given.*

*Are Mrs S and Mrs V eligible complainants?*

*As included above DISP 2.7.6R(4) identifies two categories of possible complainant - a complainant who is (i) "a beneficiary of … a personal pension scheme" and, (ii) "or [a complainant who] has a beneficial interest in a personal pension scheme".*

*The investigators findings and the original provisional decision which have been issued in this case were produced at a time when it was unclear whether the late Mr C's pension trustees had made a decision as to the eventual beneficiaries of the pension.*

*However, since that time documentation has been provided which confirms Mrs S and Mrs V have been named as the beneficiaries of the pension. As such it is clear they can no longer be considered "potential" beneficiaries and now clearly meet the criteria of eligible complainants. I have therefore moved on to consider the other arguments out forward by HTA.*

*HTA's duty of care*

*Regarding HTA's duty of care, I appreciate that HTA's advice was given to the late Mr C, with no interaction between HTA and Mrs S and /or Mrs V until the complaint was made.*

*However, HTA's duty of care required them to provide suitable pension advice to the late Mr C, the fact they failed in this duty negatively impacted the value of the pension. The value of the pension impacted both Mr C as the policyholder and the pension beneficiaries. As such HTA's duty of care covers not only the policyholder (the late Mr C) but also the beneficiaries of the policy (Mrs S and Mrs V).*

*In terms of the relationship of Mrs S and Mrs V to HTA, DISP 2.7.6R refers to, "a complaint which arises from matters relevant to one or more of the following relationships with the respondent" (DISP 2.6.7R (4) being one of those relationships).*

*The term, "matters relevant to" is broad and could include matters arising from the acts or omissions of the firm which established, operated, or wound up a personal pension scheme, and matters arising from the acts or omissions of a firm which gave advice as to a personal pension scheme.*

*In both cases, the complaint arises from matters relevant to the complainant's interest in the personal pension scheme.*

*Applying the ordinary meaning of "relationship" also supports this interpretation.*

*The Oxford English Dictionary defines "relationship" as "the fact or state of being related" and defines "related" as "connected".*

*Here, Mrs S and Mrs V are related to/have a relationship with HTA because they are the beneficiaries of the SIPP.*

*The activities of firms to which the compulsory jurisdiction relates are identified in DISP 2.3.1R which does not specify that the complaint must relate to an act or omission by a firm in carrying on activities for a specific complainant: there is no reference to complainants in DISP 2.3.1R.*

*As such applying the facts of this case to DISP 2.7.6R, I consider all the specific requirements in this Rule are satisfied: Mrs S and Mrs V have a "complaint" which arises from "matters" that are relevant to the relationship set out in DISP 2.7.6(4).*

*My view is that when HTA gave Mr C the advice to transfer for the purposes of investing in the unsuitable investments, it had a duty to consider, when giving that advice, the position of the beneficiaries of the pension. Mr C was asked to nominate beneficiaries as part of the advice process and as such HTA should have had in mind the beneficiaries and had a duty to take into account the ramifications of its advice, when giving its advice.*

*Within the additional commentary provided by HTA reference has been made to legal precents within House of Lords in White v Case [1995] 2 WLR 187. I believe HTA meant White v Jones [1995] 2 WLR 187 and having looked at the case I remain of the opinion that what I laid out within my provision decision remains reasonable.*

*Since White v Jones [1993] 3 WLR 730, common law has recognised that it is reasonably foreseeable that the failure of a solicitor to prepare a Will as instructed by a client would cause the intended beneficiaries' financial loss which could not be recompensed by the payment of damages to the client's estate.*

*The acceptance of instructions to prepare a Will created a special relationship between the solicitor and the intended beneficiaries in respect of which it was fair, just, and reasonable that the solicitor should be under a duty of care to the intended beneficiaries.*

*Otherwise, there would be no sanction for the solicitor's breach of a duty, imposed on him by law, to exercise due professional skill and care in carrying out those instructions.*

*The position of HTA is directly analogous to that of the solicitor in White v Jones: loss to the beneficiaries of the discretionary trust arising from the firm's unsuitable financial advice was reasonably foreseeable and it is fair, just, and reasonable to permit the beneficiaries to claim against the firm upon Mr C's death.*

*Gorham v British Telecommunications Plc [2000] 1 WLR 2129 CA is also considered relevant in this case. The position at law is that beneficiaries have a cause of action in negligence against an adviser for losses suffered because of unsuitable advice given to a deceased pension scheme member.*

*In Gorham the Court of Appeal found that an adviser owed a duty of care to the beneficiaries because it was clear that Mr Gorham was concerned for his dependants should he predecease them, and it was expected that any advice given would cover the interests of the dependants. It was normal for the issue of the interests of the dependants to arise where a pension policy was being negotiated. The principles set out in White v Jones [1995] 2 AC 207 applied to the situation in the Gorham case. Just as a solicitor drafting a Will owed a duty of care to the potential beneficiaries under the Will, a pension adviser owed a duty of care to the potential beneficiaries under the pension scheme.*

*It is also useful to consider provisions that applied before the eligible complainant rules were simplified in 2008.*

*Prior to 6 April 2008, the eligibility rules allowing beneficiaries of personal pension schemes to complain to the ombudsman service were included under DISP 2.4.*

*The eligible complainant categories were split as:*

*(1) customers (DISP 2.4.7R),*

*(2) potential customers (DISP 2.4.8R) and*

*(3) indirect complainants (DISP 2.4.10R).*

*The relevant rule which covers beneficiaries of personal pension schemes was included under the third class of indirect complainant and, in particular, DISP 2.4.10R(2)(b) as a complaint which "is derived from another person and which arises from any of the circumstances described in DISP 2.4.12R."*

*Eligible complainants: indirect complaints - DISP 2.4.10R*

*"A person is an eligible complainant if:*

*(1) he is not, and has not been, a customer or potential customer of the firm or VJ participant in relation to the subject matter of the complaint; and*

*(2) he has a complaint against the firm or VJ participant which either:*

*(a) arises out of a relationship which he has with the firm or VJ participant as described in DISP 2.4.11 R or DISP 2.4.12 R (4); or*

*(b) is derived from another person and which arises from any of the circumstances described in DISP 2.4.12 R; and*

*(3) he falls into one of the classes of persons in DISP 2.4.3 R(1)."*

*DISP 2.4.12R*

*"The circumstances relevant for DISP 2.4.10 R(2)(b) are:*

*(1) that the complainant is a beneficiary under a trust or estate of which the firm or VJ participant is trustee or personal representative; or*

*(2) that the complainant is a person for whose benefit a contract of insurance was taken out or was intended to be taken out; or*

*(3) that the complainant is a person on whom the legal right to benefit from a claim under a contract of insurance has been devolved by contract, statute or subrogation or;*

*(4) that the complainant is the beneficial owner of units in a collective investment scheme, and the firm or the VJ participant is the operator or depositary of the scheme*

*(5) that the complainant is a beneficiary of, or has a beneficial interest in, a personal pension scheme or stakeholder pension scheme."*

*Members and beneficiaries of personal pensions could bring complaints to the ombudsman service as 'customers' – members as direct consumers, and beneficiaries as customers who did not directly receive advice but who nonetheless fell within the duty of care owed by the adviser.*

*The eligibility rules were updated and moved from DISP 2.4 to DISP 2.7 on 6 April 2008.*

*The drafting of DISP 2.7.6R grouped all the eligible complainant relationships under one rule in DISP 2.7.6R rather than the previous three separate categories of customer, potential customer, or indirect customer.*

*The FSA published a consultation paper (CP06/05) on the regulation of personal pension schemes and SIPPs in April 2006 when the new regulated activity of establishing, operating and winding-up a personal pension was created. The consultation paper is informative of the regulator's intention when the eligible complainant category of beneficiaries of personal*

*pensions or stakeholder pensions was first introduced in DISP 2.4.12R(5).*

*The consultation paper included section 8 which discussed complaints and compensation arrangements.*

*Paragraphs 8.20 and 8.21 of CP06/05 specifically contemplate complaints being made against advisers as well as the operators of pension schemes:*

*"8.20 An individual may receive advice from a firm, for example about whether he should join a particular personal pension scheme. The individual will be a customer within DISP 2.4.7R and so will be an eligible complainant.*

*8.21 Where an individual takes advice on the purchase of assets to invest in a particular SIPP, the trustees or other operator of the scheme will buy the investment. But, as explained earlier, the member will be acquiring rights under the scheme and will be able to complain to the FOS in respect of the advice."*

*Paragraphs 8.22 and 8.23 go on to explain that a beneficiary who may not be a member of the scheme should be eligible to complain to the ombudsman service:*

*"8.22 Members of a personal pension scheme, or other beneficiaries under the scheme, need to be able to complain to the FOS about the activities of persons carrying on the new regulated activity, and in particular those operating or winding up the scheme. An example of a beneficiary who may not be a member of the scheme would be the widow or widower of a deceased member who might be eligible for benefits under the scheme on the death of their spouse.*

*8.23 These members and beneficiaries will be able to complain to the FOS as 'eligible complainants' if they are customers within DISP 2.4.7R or have an indirect customer relationship under DISP 2.4.10R-2.4.12R. We propose to amend DISP to make it clear that these members and beneficiaries can be 'eligible complainants'. We propose a similar change for stakeholder pension schemes."*

*The consultation paper therefore demonstrates the regulator's intention that members and beneficiaries of personal pension schemes should be entitled to bring complaints against those who have provided advice in respect of those schemes. The FSA consultation paper from 2008 (CP07/14) confirms that simplification of the eligibility rules in DISP 2.4 as re-drafted in DISP 2.7.6R was not intended as a substantive change to the categories of eligible complainants.*

*Beneficiaries of personal pension schemes were always intended to be eligible to complain about advice given to the pension scheme member either as customers or as indirect complainants notwithstanding the removal of the separate category of indirect complainant in the new drafting of the rules.*

*GEN 2.2.1R of the FCA Handbook sets out that the Rules must be interpreted in light of their purpose. In this case I believe that the likely purpose of DISP 2.6.7R was to permit beneficiaries or those who have a beneficial interest in a personal pension scheme to complain about the advice given to set up that scheme – here to Mr C to set up the SIPP and transfer his pre-existing Standard Life and Co-Operative pensions into it. As such, I have concluded Mrs S and Mrs V are eligible complainants.*

*As part of their response HTA have again referred to the letters sent to Mr C in 2013 and 2015 about the advice they provided, stating that these letters should time bar this complaint. I however have not changed my mind on this. As stated in the provisional*

*decision, I must consider when Mrs S and Mrs V became aware of a reason to complain and on that basis the complaint is considered to have been brought in time.*

*Within their response HTA have stated that this conclusion appears to have been reached without any investigation of this issue being undertaken. However, the provisional decision issued was based on all the evidence supplied by all parties. Mrs S and Mrs V have been asked to provide their commentary and evidence on numerous occasions, both before the investigator issued their findings and before I issued my provisional decision. HTA have also been afforded numerous opportunities to provide any and all evidence they wished to be given consideration. As such I believe all issues had been thoroughly investigated before my provisional decision was issued.*

*Overall, I have concluded that Mrs S and Mrs V are eligible complainants, and that the complaint has bene brought within the regulatory timescales allowed.*

*On that basis it is the merits of the complaint that now need to be considered.*

*In line with the content of the provisional decision issued, the advice is not considered consistent with the 2010 "Unregulated Collective Investment Schemes: Good and poor practice report".*

*Had suitable advice been given Mr C would have been advised to retain his existing pension.*

*An additional point made by HTA related to the redress instructions I provided, noting that the redress calculation I outlined was to run past the date of Mr C's death with this being inconsistent with the outcome I had reached.*

*Here I would like to add further clarification.*

*The redress calculation should still be run until the date of the final decision. However, the notional value from Mr C's previous pension provider should end at his date of death. The actual value of Mr C's pension at this date should be compared to the notional value from his previous provider. Any loss calculated at this date should then have interest added at 8% from that date to the date of this final decision."*

Both HTA and Mrs S and Mrs V were invited to provide any further comments or evidence they wanted me to take into consideration before a final decision was issued.

**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.

Mrs S and Mrs V responded simply to confirm that they had no further comments to make.

HTA provided further commentary in a number of areas:

- The issuance of the 2013 and 2015 letters should have reasonably caused Mr C to have concerns about the advice HTA had provided and as such the complaint had to be brought by 2018 in order for it to be considered in time.

- The level of knowledge Mrs S and Mrs V had about the pension investments recommended by HTA in 2012 and when they were, or ought to reasonably have been aware, there were potential issues with the pension / underlying investments.

- HTA raised questions about Mrs and Mrs V's status as potential beneficiaries of the pension with this decision not being ratified by the scheme trustees.

- Issues were also raised about the redress recommended. Firstly HTA questioned whether the redress should run from the date of Mr C's death until the date of this decision given this is the period of time where Mrs S and Mrs V effectively owned the investments and secondly, HTA noted that Mr C accessed some of the pension in 2019 and stated that if the ceding schemes had been retained similar access would have required the policies to be annuitised. In that case, the subsequent annuities would have ceased on Mr C's death leaving no value for Mrs S and Mrs V.

I have dealt with each of these points in turn.

With regard to the 2013 and 2015 letters issued to Mr C I remain of the opinion that these are not the point at which Mr C would, or should, have had cause for concern about HTA's advice. I have previously explained my reasoning for this and as such am not going to repeat this rationale here. I would further note that, even if I was wrong about this point, it is the reasonable awareness of the beneficiaries which is key here.

HTA have questioned when Mrs S and Mrs V became aware of issues with their father's pension, noting that they must have been aware of it in order to deal with its administration upon his death. Whilst HTA have suggested further questions be put to Mrs S and Mrs V to clarify this I do not believe this is necessary. In a letter signed and dated 21 April 2021 Mrs S and Mrs V explained that in 2020 *"a family discussion was held shortly after my fathers diagnosis that would enable us all to talk about his wishes and affairs".*

It was following this discussion that the expression of wish for the Hartley pension was amended to include both Mrs S and Mrs V.

Overall, I see no reason to doubt the fact that issues with their father's pension only became apparent to Mrs S and Mrs V from this family meeting or possibly later upon his death.

Regarding Mrs S and Mrs V's status as potential beneficiaries, I would note here that Hartley have written to both Mrs S and Mrs V to ratify that they have been selected as the beneficiaries of the pension, and as such they are no longer considered "potential" beneficiaries.

Finally, I have considered HTA comments about the redress instructions below.

The redress instructions I have provided take into account the fact that but for HTA's advice Mr C would have retained his existing pensions and the value of those pensions would have been available to Mrs S and Mrs V (as the beneficiaries of the pension) upon Mr C's death.

I have further considered HTA's point that had Mr C retained the ceding pension schemes and accessed funds (as he did from the SIPP) in 2019, those ceding pensions would have to have been annuitised at that point, those annuities would have ceased upon Mr C's death, and as such Mrs S and Mrs V have not suffered any losses.

I do not agree that basing redress on the above chain of events would be fair. Whilst Mr C did access funds in 2019, assuming he would have done the same had the ceding scheme been retained is not something I consider reasonable.

Mr C took a lump sum from his SIPP in April 2019. I recognise *it's possible* that if he had remained in his existing plans, he might have started to take benefits at the same time and in

the form of an annuity. However, I don't think taking a fairly modest one-off lump sum from a SIPP is sufficient evidence for me to conclude that Mr C would have started a regular pension income from his existing plans.

Overall, I have concluded the redress instructions below remain fair. These account for the fact that the pensions should have been retained with their existing providers and allow any funds that were withdrawn by Mr C to be removed from the "fair" value side of the calculation, ensuring Mrs S and Mrs V are not over-compensated.

In summary, having considered the further points made by HTA I have concluded that the previously communicated outcomes in relation to our jurisdiction and redress instructions remain fair and reasonable. As such I have not amended either.

The redress instructions below remain unchanged from those previously provided.

**Putting things right**

My aim is that Mrs S and Mrs V should be put as closely as possible into the position they would probably now be in if Mr C had been given suitable advice regarding his pension.

I think Mr C would have remained with his previous providers; however, I cannot be certain that a value will be obtainable for what the previous policies would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given Mr C's circumstances and objectives when he invested.

**What must HTA do?**

To compensate fairly, HTA must:

- Compare the performance of Mr C's investment with the notional value if it had remained with the previous providers. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.

- If there is a loss, HTA should pay into Mr C's pension plan to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If HTA is unable to pay the compensation into Mr C's pension plan, it should pay that amount direct to Mrs S and Mrs V with the payment being made free of tax as this would be considered a death benefit for the beneficiaries.

- Income tax may be payable on any interest paid. If HTA deducts income tax from the interest it should tell Mrs S and Mrs V how much has been taken off. HTA should provide a tax deduction certificate in respect of interest if asked for one, so Mrs S and Mrs V can reclaim the tax on interest from HM Revenue & Customs if appropriate.

- Provide details of the calculation to Mrs S and Mrs V in a clear and simple format.

| Portfolio name | Status | Benchmark | From ("start date") | To ("end date") | Additional interest |
|---|---|---|---|---|---|
| Hartley | Still exists | Notional value | Date of | Date of | 8% simple |

| SIPP | but illiquid | from previous provider | investment | Mr C's death. | from the date of Mr C's death to the date of my final decision. |
|---|---|---|---|---|---|

***Actual value***

This means the actual amount payable from the investment at the end date.

It may be difficult to find the *actual* value of the portfolio. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case. HTA should take ownership of the illiquid assets by paying a commercial value acceptable to the pension provider. The amount HTA pays should be included in the actual value before compensation is calculated.

If HTA is unable to purchase the portfolio the *actual value* should be assumed to be nil for the purpose of calculation. HTA may require that Mrs S or Mrs V provides an undertaking to pay HTA any amount they may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan.

HTA will need to meet any costs in drawing up the undertaking.

***Notional Value***

This is the value of Mr C's investment had it remained with the previous provider until the end date. HTA should request that the previous provider calculate this value.

Any additional sum paid into the Hartley SIPP should be added to the *notional value* calculation from the point in time when it was actually paid in.

Any withdrawal from the Hartley SIPP should be deducted from the notional value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if HTA totals all those payments and deducts that figure at the end to determine the notional value instead of deducting periodically.

If the previous provider is unable to calculate a notional value, HTA will need to determine a fair value for Mr C's investment instead, using this benchmark: For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds. The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

The Hartley SIPP only exists because of illiquid assets. In order for the Hartley SIPP to be closed and further fees that are charged to be prevented, those investments need to be removed. I've set out above how this might be achieved by HTA taking over the investment, or this is something that Mrs S and Mrs V can discuss with the provider directly. But I don't know how long that will take.

Third parties are involved, and we don't have the power to tell them what to do. If HTA is unable to purchase the investment, to provide certainty to all parties I think it's fair that it pays Mrs S and Mrs V an upfront lump sum equivalent to five years' worth of wrapper fees (calculated using the fee in the previous year to date). This should provide a reasonable

period for the parties to arrange for the Hartley SIPP to be closed.

**Why is this remedy suitable?**

I've chosen this method of compensation because:

- Mr C wanted capital growth with the chosen benchmark broadly in line with the level of risk associated with his ceding pension schemes.

- If the previous provider is unable to calculate a notional value, then I consider the measure below is appropriate.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.

- The FTSE UK Private Investors Income ***Total Return*** index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.

- I consider that the level of risk associated with Mr C's previous pensions was in between, in the sense that he was prepared to take a level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr C into that position. It does not mean that Mr C would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr C could have obtained from investments suited to his objective and risk attitude.

Mr C's previous provider would have divested his pension upon being notified of his death and subsequently paid the pension proceeds to their chosen beneficiaries. The financial loss is established by comparing what the pension value would have been in Mr C's previous pensions and in his SIPP at the time of his death. Mrs S and Mrs V have been deprived of this sum from the date of their father's death until now. To compensate for this, I've added 8% simple interest on the loss figure between these dates which I consider reasonable in the circumstances.

Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 28 days.

**My final decision**

In line with the commentary above I am upholding this complaint and require Howard Taylor Associates to calculate and pay redress in line with the methodology outlined.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S and Mrs V to accept or reject my decision before 30 July 2024.

John Rogowski
**Ombudsman**