

The complaint

Mr S complains about the transfer of his ISA by Cofunds Limited trading as Aegon, referred to as “Cofunds” or “the transferor”.

He says Cofunds unnecessarily delayed his instructions to sell down and transfer his stocks and shares ISA to a new provider, referred to as “the transferee”.

What happened

In my provisional decision of late April 2021, a copy of which is quoted below and forms part of this final decision, I said I wasn’t minded to uphold the complaint. In summary, I said:

“...provisionally I’m minded to agree with the investigator’s conclusions for much the same reasons. I’m not going to uphold this complaint.

On the face of the evidence, and on balance, despite what Mr S says, I’m unable to safely say that Cofunds behaved unreasonably.

But before I explain why this is the case, I think it’s important for me to recognise Mr S’s strength of feeling about this matter. He has provided detailed submissions to support this complaint, which I’ve read and considered carefully. However, I hope he won’t take the fact my findings focus on what I consider to be the central issues, and not in as much detail, as a discourtesy.

I’m mindful that the investigator has given Mr S until June to respond but I thought it would be helpful to make clear my provisional thoughts based on the available information that Mr S will no doubt consider and respond to in due course.

The purpose of my decision isn’t to address every single point raised. My role is to consider the evidence presented by Mr S and Cofunds, and reach what I think is an independent, fair and reasonable decision based on the facts of the case.

In deciding what’s fair and reasonable, I must take into account the relevant law, regulation and best industry practice, but I’m not bound by this. It’s for me to decide, based on the information I’ve been given, what’s more likely than not to have happened.

I note that the transfer request (covering letter) addressed to Cofunds was dated 14 February 2020, but the attached transfer authority form (signed by Mr S) was dated 03 February 2020, which suggests that he gave his authority (to the transferee) some 10/11 days before the request (addressed to Cofunds) was drafted.

I also note, what appears to be a scanned/faxed document receipt, is dated 21 February 2020, which suggests that Cofunds (probably) didn’t get the transfer request until that date.

In any event, I note that the valuation – dated 27 February 2020 – was obtained within days and in due course sent to the transferee, most likely on the same day, although the actual document is undated.

I note Cofunds said:

“As requested, please find enclosed a valuation dated the 27/02/2020 along with confirmation of ISINs. We now await your confirmation, in writing to proceed with the Re-Registration”.

In the circumstances, I don't think Cofunds behaved unreasonably by seeking confirmation from the transferee, which I'm satisfied it did within a timely manner.

I understand that on 9 March 2020, Cofunds received a call from Mr S's advisers who said that nothing should be sold on his account until the funds were settled. I note at the time there was only one suspended fund – the M&G property fund – which required re-registration, so Cofunds only drafted the stock transfer form and nothing else.

But shortly after, in the time that it received confirmation of its stock transfer (on 11 March 2020) there was another stock – by the name of Janus Henderson – which also became suspended and required re-registration. This isn't something that Cofunds could've foreseen at the time, or envisaged having to deal with on top of the other suspended fund and instructions. I note that Cofunds made the transferee aware of this second fund on 30 March 2020 – in good time – and made clear that it would proceed as previously instructed, unless told otherwise.

Cofunds chased the transferee on 6 April and 20 April 2020, about the second fund, as it hadn't heard back. It wasn't until 21 April 2020, Cofunds received instructions to proceed with processing the second suspended fund – in other words, it confirmed that it would take the units in-specie – and the sell down of the rest of the account. This meant Cofunds had to draft another stock transfer form to request the units, which was likely to take more time. In the circumstances, I don't think Cofunds was wrong not to proceed with matters until it had heard back from the transferee about how it should proceed.

I note Cofunds says:

“We didn't receive a response until 21 April despite sending the e-mail on 30 March. They informed us they would take the units in-specie, which meant we had to draft another stock transfer form to request the units. We did this and again referring back to the IFA's request did not sell down the funds as we were still awaiting transfer confirmation from Janus Henderson.”

I note Cofunds sent the transferee the ISA valuation the same day – 21 April 2020 – and the required acceptance was received on 27 April 2020 when it requested further information. Again, I don't think Cofunds could've acted sooner without receiving the acceptance from the transferee. The funds were sold down in May while transfer of the unsold funds took place. The full transfer was completed on 26 May 2020. In the circumstances, and on balance, I'm unable to blame Cofunds for the delays.

I'm aware Mr S says that he'd expect the funds to be sold down within two working days of the instructions, by 18 February 2020. But I don't think that would've been possible, given that Cofunds probably didn't receive the request until 21 February 2020, and then there were additional instructions.

But even if I'm wrong about the date when Cofunds received the transfer request – which on the face of the evidence I don't believe I am – there's nothing to say that unless a business performs a 'text book perfect' transfer, it's in the wrong. That's generally why the HMRC gives businesses up to 30 calendar days within which to transfer non-cash ISAs.

I appreciate Mr S says that Cofunds should've had a mechanism in place to complete the sale of funds first. I note he says that it shouldn't have been held back by having to complete stage two (confirming the transferee can receive funds) and stage three (transferring the funds) beforehand. But on balance, I don't agree, I can't blame Cofunds for following its own process, which I'm satisfied it did in a timely manner. It also had to deal with the additional suspended funds.

I note Mr S says the process – as he was led to believe – was that Cofunds wouldn't sell down the liquid funds until the frozen property funds – the (suspended) M&G Feeder property fund (and subsequently the Janus Henderson fund) – had been transferred in-specie.

I'm aware that a transferor is unlikely to transfer any holdings until the transferee has agreed with the valuation of the funds, and confirmed whether it can accept the holdings, usually within a specific period, before taking any further action. I'm aware that this is common industry practice, so I can't blame Cofunds for taking this course of action, before selling down the funds and transferring the cash.

I'm sure Mr S already knows, that the value of his investment is dependent on the stock market. The impact of the Covid-19 global pandemic on the financial market is not something that Cofunds could control or predict. So, I can't blame it for not being able to obtain a better price when funds were sold.

In summary, subject to any further submissions, I don't think that Cofunds has done anything wrong by following its own transfer process. I also don't think that this means Mr S was treated unfairly. I'm broadly satisfied that Cofunds still complied with Mr S's overall instructions to transfer his ISA, and it endeavoured to do so within HMRC guidelines. I don't think that it can be held responsible for delays outside of its control.

I agree with the investigator that the ICO maybe a better forum to deal with the SAR element of the complaint and whether or not Cofunds' response complied with its duty under the General Data Protection Regulation (GDPR). It's not something that we would consider.

I appreciate what Mr S says about other businesses transferring his assets sooner, by 24 February 2020. Be that as it may, in this case I'm only considering the actions of Cofunds and the fact another business took less time to transfer assets isn't evidence that Cofunds did something wrong because it took longer.

I understand that Mr S was planning to retire, and that a loss in value of his ISA may have caused him to change his plans, but in the circumstances, I can't blame Cofunds for this."

Mr S responded but didn't accept my provisional decision. I note he provided two responses, but in short, he said:

- He's unhappy about my issuing a provisional decision despite him being given until June 2021 to respond to the investigator's view after receiving a hardcopy of our file in response to his freedom of information request. Therefore, he doesn't believe that I've read the file, and has no confidence in my decision. In other words, my decision is unsound and fundamentally flawed because I haven't followed the timeline.
- He'd like a new ombudsman to look at the complaint and my decision struck from the record. He's also requesting an extension to 1 July 2021 to reply.
- The letter from the transferee dated 14 February 2020 in respect of himself (and an identical letter for Mrs S) pertaining to the sale of assets, made clear to sell down all assets except for the M&G Feeder Property, which was to be transferred in-specie.

- Given the instructions, why wasn't the sale expedited? There was no need for Cofunds to check if the transferee would accept the fund.
- Cofunds is in breach of several of its Terms and Conditions (T&C's) and regulations relating – in particular the FCA Consumer Outcomes relating to treating customers fairly, such as:
 - T&C 7.10.3, Cofunds clearly didn't agree to accept the instructions, otherwise the sale would've gone through immediately.
 - T&C 11.1 says Mr S can close the product any time, it doesn't say after double checking with the transferee, despite instructions to sell all liquid assets and transfer illiquid funds.
 - Under T&C 3.1.2 the transfer must complete within 30 days and Cofunds failed to do this. There's no mention of ignoring instructions to sell is allowed. Failing to sell the liquid assets was a breach of treating customers fairly.
 - Any new instructions were as a result of Cofunds failing to carry out previous instructions and mitigate loss. The doctrine of '*proximate cause*' identified the failure to sell immediately to mitigate any loss by failing to carry out their instructions in the first instance.
 - The T&C's should be followed within the spirit of FCA guidelines. Cofunds haven't treated him and Mrs S in good faith and breached its duty of care towards them.
- I've failed to ask myself the basic questions:
 - Is there a financial loss? To which the answer is yes.
 - Have Cofunds adopted a different process to mitigate the loss – the answer is yes.
 - Therefore, Cofunds is responsible for Mr S's losses and it's their fault.
- I've referred to a "Mr H" and "Mrs H" in my decision, who are these people? I'm either incompetent, I've given no attention to detail or I've cut and pasted the material from another decision and therefore I've no independence.
- I've misunderstood the complaint. Cofunds didn't sell immediately following his instructions. The sale should've taken place immediately – to protect him from the market going down – therefore he's been treated unfairly, in particular "**Outcome 6: Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.**"
- He's referenced some cases where complaints have been upheld against Cofunds in relation to transfers.
- I seem to suggest that it's acceptable for Mr S to 'accept the downside risk' whilst Cofunds talked to the transferee about the re-registration of illiquid assets. By deferring sales of the liquid funds, Mr and Mrs S have lost out financially.
- The investigator and I seem to be unaware of Lord Bingham's judgement in R (O'Brian) v Independent Assessor [2007] 2 AC 312 para 30 about consistency. I haven't addressed the issue.
- He's demonstrated that another company acted in a timely way, so Cofunds has behaved inconsistently.
- I'm more concerned about Cofunds than a person who is reliant on limited funds during his retirement. I've given the large organisation the benefit of the doubt.
- Cofunds may have followed its own procedure but nevertheless breached its requirement to treat customers fairly.
- I've shown a patronising tone.
- Not completing the transfer within 30 days shows that Cofunds hasn't acted in his best interest.
- Reaching my decision before receiving Mr S's evidence shows a basic and fundamental flaw in my judgement. I've suggested that my experience is worth more than looking at the case with fresh eyes. This has therefore negated my argument as specious and unfair.

Cofunds has no further points to make.

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.

Having done so, my decision remains the same as set out in my provisional decision, for the same reasons.

Notwithstanding the points made by Mr S, I don't consider that any new material points have been made. I'm still satisfied that the key points remain the same, and have been considered by me, in my provisional decision (PD).

I'm sorry that Mr S (and Mrs S) have felt the need to complain about the service they've received as a result of me issuing my PD when I did. I did make clear in my PD that I was aware that they'd been given until June 2021 to respond to the investigator's view once they'd received further information. I said:

I'm mindful that the investigator has given Mr S until June to respond but I thought it would be helpful to make clear my provisional thoughts based on the available information that Mr S will no doubt consider and respond to in due course.

I didn't envisage that my PD – provided in good faith and in the hope that it might help Mr and Mrs S to narrow down their objections – would cause upset. My efforts to assist them have had the opposite effect to what I intended, and I am sorry about that. I note Mr S says that he might've been able accept what I said, had I not issued a PD and explained things differently.

I apologise for using the wrong abbreviation for Mr S and Mrs S. This was only once, and it was an oversight on my behalf, it doesn't mean that I'm not paying attention to detail. In any case, I'm sorry for any upset caused.

I also apologise if I've come across in my tone as patronising, that's certainly not my intention. I appreciate what Mr S says about my not asking the three fundamental questions, but our starting point is to consider whether (or not) a business is at fault before looking at financial loss. So, whilst a customer might've suffered a financial loss, it's immaterial if its not attributable to a mistake by the business.

I appreciate what Mr S says about the T&C's, but with respect I don't agree with his interpretation. I'm not persuaded that Cofunds – by not doing what he expected it to do – is in breach of its T&Cs, or the six FCA Outcomes regarding treating your customers fairly, or that it hasn't operated within the spirit of those guidelines.

So, for example, I don't think by checking to see if the transferee is able to receive/accept suspended stock means that Cofunds has introduced an 'unnecessary step' in its process or that it hasn't actioned instructions immediately, such that it's in breach of the T&Cs and FCA regulation. I can't blame Cofunds for checking if the transferee was in a position to be able to receive the suspended funds. Despite what Mr S says I don't think this demonstrates that Cofunds hasn't complied with FCA Outcome 1. In my opinion it suggests that dealing with customers fairly – and ensuring that it can comply with their instructions – is central to its corporate culture.

As I've said in my PD, I'm aware that a transferor is unlikely to transfer any holdings until the transferee has agreed with the valuation of the funds, and confirmed whether it can accept the holdings, usually within a specific period. I'm aware that this is common industry practice, so I can't blame Cofunds for taking this course of action before selling down the funds and transferring the cash.

I'm mindful of Mr S's points about contract law, the doctrine of proximate cause and legal judgement, but as I've explained whilst I must consider the law, regulation and best industry practice, I'm looking at what's – in my opinion – fair and reasonable in the circumstances of this case. This is in no way to imply that the law, regulation or common industry practice – which I acknowledge I *must* consider – isn't fair or reasonable. I used this phrase as a reminder that as we provide an alternative dispute resolution mechanism I'm not required to 'interpret' points of law and issue a legal judgement.

I appreciate Mr S feels that my arguments are couched in generalisations rather than specifics. But as I've mentioned in my PD, it's not for me to go through every single point made, and it's not what I'm required to do in order to reach a fair and reasonable decision in this case.

I'm mindful of Mr S's point about the case of *O'Brian and others (FC) v Independent Assessor*. I note the case is about the assessment of compensation by the Secretary of State for those who have suffered punishment following a conviction which involved the miscarriage of justice, and not about financial services.

I note paragraph 30 is about an assessor's reason for departing from a 'predecessor's percentage'. I note it states: *"It is generally desirable that decision-makers, whether administrative or judicial, should act in a broadly consistent manner. If they do, reasonable hopes will not be disappointed."*

However, I also note that paragraph 30 goes on to state: *"He was not bound, and in my opinion was not entitled, to follow a previous decision which he considered erroneous and which would yield what he judged to be an excessive award"*.

So, paragraph 30, read in context would suggest I ought not to decide a complaint against a business, that on balance I don't believe has behaved unreasonably, just because in another case on similar facts another ombudsman decided differently. Whilst I acknowledge the need to be consistent in our approach, this is not at the cost of considering cases on their individual merits. In my opinion, part of consistency is also to consider each case on its individual facts. I should also make clear that unlike the courts, an ombudsman isn't bound by the decision of another ombudsman.

Whilst I appreciate what Mr S says about other businesses transferring his assets sooner, and how that relates to consistency/industry practice, I'm only considering the actions of Cofunds and the fact another business took less time to transfer assets isn't evidence that Cofunds did something wrong because it took longer.

Whilst I appreciate Mr S doesn't agree with my findings, that doesn't mean I've not considered all the pertinent points. I'm sorry if Mr S disagree with that.

In conclusion, despite what Mr S says I still don't think that Cofunds has behaved unreasonably by following its transfer process. I also don't think that this means Mr S was treated unfairly. I'm broadly satisfied that Cofunds still complied with his overall instructions to transfer his ISA, and it endeavoured to do so within HMRC guidelines. I don't think that it can be held responsible for delays outside of its control.

I'm sorry if Mr S still feels that my arguments are 'specious and unfair'. But on the face of the evidence, and on balance, I can't uphold this complaint and give him what he wants.

My final decision

For the reasons set out above, and in my provision decision, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 15 July 2021.

Dara Islam
Ombudsman