complaint

Mr N has complained that Baker Tilly Financial Management Limited (Baker Tilly) has caused him a financial loss as a result of its involvement with a Pension Sharing Order (PSO).

background

Mr N was divorcing his wife (Mrs N). It was agreed Mr N would give up some £365,000 of his accumulated personal pension fund to Mrs N as part of the divorce settlement.

Baker Tilly proposed an arrangement whereby Mr N would transfer his personal pension fund to a self invested personal pension (SIPP) with a new provider (Provider S). Mr N would then take tax free cash from his new SIPP, leaving about £405,000 of residual fund. The PSO would then be applied whereby approximately 90% of the £405,000 would be transferred to Mrs N for the purchase of an annuity in her name. The aim was to set the percentage so that a sum close to £365,000 would be transferred to Mrs N for this purpose.

The transfer to the new SIPP was completed in February 2014. Mr N took his tax free cash and paid Baker Tilly's invoice of £5,500 for the work it agreed to carry out. This left almost exactly £400,000 in the SIPP. In order for Mrs N to receive some £365,000 as a result of a PSO the percentage was revised slightly upwards to about 91%.

Mr N was keen to resume his employer pension contributions as soon as possible. Since 2013 these pension contributions had stopped while the divorce settlement was being agreed. By March 2014 Mr N's employer had about £20,000 of backdated contributions to make up for him. The employer wanted to make this good before the end of the 2013/14 tax year.

Baker Tilly became satisfied that Mr N's outstanding contributions could be added to the SIPP before the end of the 2013/14 tax year *and* before the PSO was to be applied. Baker Tilly had asked Provider S if the PSO could be applied only to the crystallised element of the SIPP the £400,000 or so held in cash after tax free cash had been taken and Baker Tilly's invoice paid. Provider S had said:

> *"…the pension share order percentage of the total fund value would then be taken from the crystallised portion of the plan value*"

A lump sum contribution of about £20,000 and three further monthly contributions worth another £10,000 or so became added to the SIPP between late March 2014 and July 2014 – that is before the PSO was applied. To clarify, the SIPP was worth some £431,000 as of late July 2014 of which about £30,000 represented uncrystallised benefits.

Mrs N received £388,780.28 from Mr N's SIPP as a result of the PSO directing that 90.13% of the total value of the SIPP be transferred to her. This was almost £24,000 more than I understand had been agreed between Mr and Mrs N. As soon as Mr N realised this he raised concerns with his Baker Tilly adviser (who had moved to another financial adviser business in June 2014). Mr N's concerns escalated to a formal complaint with Baker Tilly.

Mr N's complaint was investigated by Baker Tilly. The complaint wasn't upheld. Baker Tilly was satisfied that it had acted in accordance with Mr N's instructions (and that of his solicitor).Baker Tilly also said:

> "*The wording of the Consent Order is a matter for each party's legal representatives and it would not be necessary or appropriate for Baker Tilly Financial Management Ltd to comment on it. It appears that an agreed figure of £365,000…..was changed to 90.12% of the fund value. We are not able to comment on when or why that change was made, or by whom.*
>
> *If the additional lump sum had not been paid…….there would have been a legal requirement to disclose it to your ex-wife's solicitor so it could be taken into account in the divorce settlement.*
>
> *We did specifically tell you to put other planning needs on hold until after the PSA had been applied. This included the investment of funds and also contributions.*"

Mr N referred his complaint to us. .

One of our adjudicators investigated it and wrote to Baker Tilly to explain why it should be upheld. I've summarised the adjudicator's reasoning as follows:

- Provider S applied the PSO exactly as it said it would do. This was to apply the agreed percentage to the total SIPP value but only physically take the funds from the crystallised element. However what Provider S did was clearly not what was intended by Baker Tilly.

- Baker Tilly should have realised that what Provider S said it would do meant that any new pension contributions would have the PSO percentage applied to them. So Baker Tilly should have either not endorsed the new contributions being made before the PSO was applied or maybe recommended an alternative strategy – perhaps to invest the employer contributions in a different personal pension policy (that wasn't subject to the PSO).

- Whether the employer contributions made between March and July 2014 should have been disclosed (as part of the divorce settlement) was a red herring – the key point was that Mr and Mrs N had agreed a transfer amount of some £365,000. The aim had always been to put a strategy in place to achieve exactly this.

Baker Tilly didn't accept the adjudicator's findings. Baker Tilly largely reaffirmed what it had already said. For example, Baker Tilly said that while the ceased regular contributions accrued in Mr N's employer's bank account they didn't have to be disclosed to Mrs N. But once the contributions were maintained (or added to Mr N's pension arrangements) they formed part of the pension fund value and became subject to the PSO.

my findings

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, I've reached the same conclusions as the adjudicator and largely for the same reasons.

There's no dispute that what was intended as a result of the strategy devised by Baker Tilly didn't materialise. My understanding is that the whole idea was for Mrs N to have an annuity purchase amount of some £365,000.

I appreciate that Baker Tilly originally advised Mr N to cease further pension contributions while the divorce settlement had yet to be implemented. But Baker Tilly changed its position because it felt that the letter it had constructed for Mr and Mrs N to sign meant that Provider S would only take the PSO percentage from the crystallised portion of the SIPP. I say this because Baker Tilly's email to Mr N's solicitor *and* Mrs N's solicitor dated 6 March 2014 explained:

> "*This is important as we are about to make contribution from Jim's assets into the pension into the uncrystallised part before the tax year end. Without the additional agreement, Suffolk Life will apply the PSO across all assets in the Pension (including the contribution made).*"

So the fact that Mr N would have additional contributions added to his pension arrangements was known to all parties. Importantly Mrs N (or her solicitor on her behalf) didn't then claim a right to any portion of these additional contributions. This was because a sum approximating to £365,000 had been agreed. All parties (except Provider S which was not copied in on the email of 6 March 2014) were working towards that amount.

I also appreciate that there is significant work involved in arranging and implementing a divorce settlement, particularly where a PSO is involved. I also accept that exactly when the PSO was to be applied would have been unknown. But if Baker Tilly had correctly interpreted what Provider S was going to do, and indeed had to do, then Baker Tilly could have set out a strategy to deal with it.

An example would have been to allow the £20,000 or sum lump sum contribution before the end of tax year 2013/14 without the regular contributions recommencing. Some £420,000 would have been in the SIPP and a revised PSO percentage of something like 87% could have been written in so that Mrs N still received the agreed sum (approximating to £365,000). Mr N's employer could then have caught up the contributions a second time during the tax year 2014/15 *after* the PSO had been applied.

Or, as the adjudicator suggested, all of the contributions made between March and July 2014 could have been placed in a pension arrangement not written into the PSO. I note that Mr N had accrued pension benefits in another scheme which wasn't part of the PSO.

I think the point is that, because Baker Tilly didn't understand what Provider S was going to do, and indeed had to do, this meant that Mr N suffered a loss and Mrs N was paid more than had been agreed and more than she'd have received if Baker Tilly had got things right.

Baker Tilly might say that Mrs N should have returned the extra amount. But Mrs N has been paid what the PSO said she should get. So it's probably unlikely that she could be required to repay the excess.

fair compensation

In assessing what would be fair compensation, my aim is to put Mr N as close to the position he would probably now be in, but for Baker Tilly's mistakes.

Mr N's SIPP has remained in cash since the PSO was applied. I think Mr N would have invested differently from shortly after the PSO was applied if Baker Tilly hadn't made the errors which led to too much being paid to Mrs N. I can't say *precisely* what Mr N would have

done shortly after the PSO, but I am satisfied that what I have set out below is fair and reasonable given Mr N's circumstances and objectives when he invested.

what should Baker Tilly do?

To compensate Mr N fairly, Baker Tilly must:

- Compare the performance of Mr N's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investment. If the *actual value* is greater than the *fair value*, no compensation is payable.

It is necessary to confirm the notional value of the SIPP to be used when applying the benchmark so that the correct comparison against Mr N's current position is made. I note Mr N's email to his Baker Tilly adviser dated 2 August 2014. It indicates that Mr N was expecting £365,026.50 to been transferred to Mrs N instead of the £388,780.28 that was transferred. As the crystallised fund value just before the PSO was applied was £400,712.60 this means that Mr N should have had £35,686.10 left in the crystallised part of his SIPP as of 23 July 2014.

Mr N made a new one-off gross contribution of £20,402.09 on 27 March 2014 followed by regular monthly gross contributions of £3,315.01 from 1 May 2014.Regular contributions have continued to be made until now.

I consider it is reasonable to say that Mr N should have been invested according to his risk profile within, say, four weeks of the PSO being applied. I appreciate that as of late July 2014 Mr N was dealing the Baker Tilly adviser at another business but it is Baker Tilly's actions and inactions that led to the problems. I can understand Mr N wanting the problems to be resolved and I expect he believed they would be. And I can see that Mr J told Mr N on 28 August 2014 that he had "*asked for a report request to be packaged up to put in place an investment strategy for your SIPP – this is being treated as an in-flight case as mentioned to you*". Mr N made it clear on 6 August 2014 he was "*anxious to move* [his] *pension forward*".

So, after careful consideration, my view is that the benchmark should apply from 22 August 2014 which is four weeks after the PSO was applied. The SIPP monies were already waiting and there was already a clear idea of how Mr N wanted to invest – I can see from Baker Tilly's compliance paperwork that he was happy with a passive discretionary fund management approach and that he'd been effectively categorised as a medium risk investor.

So £35,686.10 of crystallised funds needs to have the benchmark applied from 22 August 2014 to the date of settlement, along with all of the new contributions made between 27 March 2014 and 22 August 2014. Then the regular contributions made after 22 August 2014 need to have the benchmark applied from the date of investment to the date of settlement.

If there's a loss, Baker Tilly should pay such amount as may be required into Mr N's SIPP, allowing for any available tax relief and/or costs, to increase the pension plan value by the total amount of the compensation and any interest.

If Baker Tilly is unable to pay the total amount into Mr N's SIPP, perhaps because he has already utilised his available tax relief, it should pay that amount direct to him. But had it been possible to pay into the SIPP, it would have provided a taxable income. Therefore the

total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mr N's marginal rate of tax at retirement.

For example, if Mr N is likely to be a basic rate taxpayer in retirement, the *notional* allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mr N would have been able to take a tax free lump sum, the *notional* allowance should be applied to 75% of the total amount.

We know in this case we are dealing with both crystallised and uncrystallised funds so there will be two separate calculations. It seems to me that a cash sum in respect of the notional crystallised loss should be 80% of the calculated gross figure (allowing for basic rate tax). And that a cash sum in respect of the notional uncrystallised loss should be 85% of the calculated gross figure (allowing for tax free cash on the first 25% and then applying basic rate tax).

Baker Tilly should also pay to Mr N £400 for the distress, trouble and upset this whole matter has unnecessarily caused him.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Mr N's SIPP with Provider S	still exists	FTSE WMA Stock Market Income Total Return Index	22 August 2014	date of settlement	not applicable

actual value

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

fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

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

Any withdrawal, income or other payment out of the investment should be deducted from the *fair value* at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I will accept if Baker Tilly totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

I have decided on this method of compensation because:

- Mr N wanted capital growth and was willing to accept some investment risk.

- The WMA index is made up of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.

- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr N's circumstances and risk attitude.

- Mr N has not yet used his pension plan to purchase an annuity.

my final decision

I uphold the complaint. My decision is that Baker Tilly Financial Management Limited should pay the amount calculated as set out above.

Baker Tilly Financial Management Limited should provide details of its calculation to Mr N in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr N to accept or reject my decision before 5 February 2016.

Lesley Stead
ombudsman