complaint

Mr N is complaining about pension advice given by Stephen Thomas Associates (STA) as appointed representatives of the On-Line Partnership Limited (On-Line). In particular he's concerned about the suitability of recommendations to:

- transfer two existing plans to a new provider with a self-invested personal pension (SIPP) option in 2006
- transfer the SIPP to a Qualifying Recognised Overseas Pension Scheme (QROPS) in 2013

background

The complaint was looked into by one of our adjudicators. He didn't think it should be upheld. I've summarised his findings below.

advice to transfer to the new provider with the SIPP option

In 2006 Mr and Mrs N had moved abroad and no further contributions were to be paid to Mr N's pension. The adviser noted in his recommendation letter that they agreed the "…*performance of the existing investment was critical*…". Mr N had about £80,000 invested in managed, stewardship and with-profits funds. Their assets (other than Mrs N's own pension) came to more than £175,000 – including premium bonds, cash and 'stocks and shares' ISAs.

The adviser recommended a transfer to a new provider that allowed Mr N to access a much wider choice of funds. Mr N's risk profile was recorded as being balanced *'with a skew to a more cautious approach'*, and the adviser set out a recommended investment portfolio. The 'non-protected rights' component of the transfer was to be held under the SIPP option in a range of externally-managed funds; constituting about 70% in company shares (equities) and the remainder in fixed interest and cash.

The 'protected rights' component couldn't be held under the SIPP option at that time, but was to be similarly invested in a similar range of mainly externally-managed funds. The transfers involved a payment of 3% initial commission to STA (which was collected gradually via an establishment charge of 0.25% per year); and 0.5% of the fund each year.

A review was conducted in June 2009 with some changes being made to the equity funds The adviser said that Mr N's attitude to risk *'continues to be of a balanced nature'.*

In the adjudicator's view, potentially investing in a range of externally managed funds could've offered the opportunity to achieve better fund performance. And while of course this wasn't guaranteed, he didn't consider the charges on the new contract were likely to be at such a level to lead him to conclude the advice was unreasonable.

QROPS advice

Mr N has picked up on the fact that a QROPS was first mentioned by STA itself in a letter of November 2010. It said Mr N *'was concerned about the tax position of this pension'* now that he intended to remain abroad. A QROPS would be regulated and recognised for tax purposes in the country in which it was established. The income would be taxed in the country of Mr N's residence and was free from UK inheritance tax.

STA also discussed a tax-efficient investment wrapper within the QROPS that was recognised in Mr N's country of residence; whereby only the growth element of any withdrawals taken would suffer tax. The letter was from a different adviser at STA than Mr and Mrs N had dealt with previously, and for whatever reason Mr N didn't proceed with the QROPS transfer at that time.

However following another meeting in April 2012 the original adviser at STA did send Mr and Mrs N paperwork for *'proposed'* QROPS transfers for both their pensions. Mrs N responded expressing some surprise as *'…we thought you were just going to look into things & let us know what the benefits would be. Before we go ahead & sign can you please explain what the benefits are & what charges would be involved…'.*

Again, it doesn't appear QROPS transfers took place at that time. However Mr and Mrs N had also signed terms of business for a different firm (business B, regulated in Gibraltar) in February 2012. The adviser they usually dealt with at STA was also a representative of business B. In April 2013 that adviser emailed Mrs N from his STA email address:

> *"I have been looking at the pension situation for* [Mr N] *and the benefits under possibly transferring to a Qrops.*
>
> *I will send you some separate notes on Qrops but a key point as you have been living* [abroad] *the length of time that you have is that you will be able to take an enhanced Pension Commencement Lump Sum.*
>
> *Taking an approximate value of £100,000 of the pension – if you decided to take the pension benefits from the Qrops at this time this would mean that a lump sum of £30,000 would be available to you...*
> *The £30,000 could also be used for short term cash needs and/or invested to support more income - perhaps a further £1500 per annum.*
>
> *Under a UK scheme rather than a Qrops the maximum pension commencement lump sum is £25,000…*
> *If you let me know whether you are thinking of taking benefits in the shorter term then I will finalise a recommendation for you.*
>
> *As an example recently we have established Qrops for clients and then soon after they have chosen to take benefits so there is a large amount of flexibility available.*
>
> *Also, a similar fund range to the existing* [SIPP] *portfolio can be set up for you."*

Mrs N replied, to the adviser's STA email address:

> *"*[Mr N] *is still debating what to do about his pension fund, he would like to know the following:*
> *1. Is there a charge for moving the pension from* [the SIPP]*, if so how much?*
> *2. Are there any setting up charges for Qrops, if so how much?*
> *3. If he took up the option of a £30,000 lump sum, could he leave this money in England? It would be better for him, I think, if you could send a comparison of all the options & charges."*

The adviser replied*,"Will get to you…"*. In July 2013 he completed an application in his capacity representing business B, for Mr N to transfer to a QROPS (a different provider than had first been mentioned in STA's first 2010 letter). Mr N signed that application. Above one

of his signatures were the adviser's credentials at business B, including a specific email address to that firm and details of its Gibraltar registration.

Business B issued a suitability letter (on its own letterhead) on the same day Mr N signed the forms, referring to a meeting they'd had. It explained that QROPS provider had been chosen in view of changes to HMRC rules. It also justified using an investment wrapper within the QROPS; again provided by a different company to the 2010 recommendation.

The transfer completed in September 2013. Mr and Mrs N continued to contact the adviser at his STA email address. He seems to have been happy to reply from that address, although it's clear from their emails that Mr and Mrs N increasingly felt he wasn't taking action on the points they asked about. STA does itself seem to have been involved at around this time in commenting on preparations (fund switches) for Mrs N to transfer to a QROPS. But that other transfer to a QROPS didn't subsequently take place. And we've considered a complaint from Mrs N separately.

The adjudicator didn't think On-Line was responsible for any advice on Mr N's successful QROPS transfer, as this wasn't given by STA. He noted that it was the same person who'd advised Mr N on his pension in 2006 and 2009. But from the documentation on file it was clear STA didn't ultimately advise on the transfer to his QROPS provider. He thought Mr N ought to have been aware that any advice had been given by business B. He referred to:

- the suitability letter on business B's headed paper;
- the application form Mr N signed confirming business B was the adviser;
- the acceptance letter Mr N received from the QROPS provider that stated business B was his adviser; and
- the fact that Mr and Mrs N had also signed a client agreement from business B.

Mr and Mrs N didn't agree with the adjudicator's findings. In summary they said:

- They'd never knowingly signed the client agreement for business B. They'd signed various forms and the adviser just told them where to sign. While they should have read the documents, they trusted the adviser.
- When they chased the policy document the adviser replied using an STA email address and there was other email correspondence about the QROPS from STA.
- They only received a copy of business B's recommendation letter after they requested STA send copies of its file. The advice was verbal, as were most of their dealings with the adviser. The letter was also dated after the application was signed.
- At the time they thought nothing of the QROPS provider's reference to business B. (They'd previously told us that they thought business B and the QROPS provider were one and the same.)
- On-Line said it didn't know the adviser worked for another business. If it was unaware of the situation then how could Mr and Mrs N know either? They felt they'd been duped by an adviser they should've been able to trust. They believed they were being advised by a UK business which had the appropriate protection in place.

But the adjudicator felt that Mr and Mrs N would've expected to have some form of written recommendation. On balance he thought it was likely the recommendation letter was issued. The adviser also sent *Mrs* N another letter about the investment of her fund on business B headed paper (and which she agreed she'd received). He said this suggested that the adviser wasn't trying to hide that business B was giving the advice. Neither the fact that

other email correspondence came from STA, or that On-Line mightn't have known about the adviser's other activities, altered which business legally gave the advice.

As Mrs and Mrs N didn't agree with the adjudicator's findings they asked for the case to be reviewed by an ombudsman. They still insisted that as far as they were concerned it was STA, a UK-based business, who gave the advice to transfer to the QROPS. They re-stated points they had previously made and added:

- Only after the QROPS had received the transfer did the provider confirm this under a covering letter from business B. At that point they didn't think too much of the fact that business B headed paper had been used. It was only when they didn't get the policy documents that they became concerned. And all the email correspondence about this was from STA.
- It would be interesting to find out when Mr N's pension was moved out of the SIPP. It appears the QROPS provider had received everything only nine days after the recommendation letter was meant to have been sent. They still doubt this letter was sent as it was dated after Mr N had signed the application.
- The later letter the adviser sent on business B headed paper was in reply to them asking for clarification about the transfer. It was this that alerted them to something being not quite right, as most of the advice was given at face to face meetings.

my findings

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

advice to transfer to the new provider with the SIPP option

At the time of the advice Mr N was 52 and his selected retirement age was 65. In my view this relatively long term meant that the impact of the set up charges on the new plan weren't such that it would be too difficult for it to outperform Mr N's existing policies. The illustration from 2006 showed that over the whole term to age 65, the overall impact of the charges (including commission) would only be 1.1% per year.

This illustration used one standard managed fund, whereas Mr N went into externally-managed funds. But I agree with the adjudicator that the selection of funds with a higher charge shouldn't fundamentally mean that they'll always underperform the cheapest funds in the range. There's certainly a risk that this might happen, as stronger growth is required to provide a greater return to offset the higher charge. But stronger growth, through the expertise of external fund managers, is what was being promoted by these funds. Whether that was achieved or not can only be seen with hindsight.

The SIPP element of the plan involved an additional annual charge of up to £310 (by 2015) plus some further administration costs. But considering the total value of Mr N's funds, I don't think this cost precluded the potential benefits of access to greater investment opportunity in the SIPP. And like the adjudicator, I've taken into account that the overall effect of the commission being paid was disclosed at the time – plus a small penalty taken from one of Mr N's original providers.

Mr N hasn't made any further material comment on this transfer. But having taken all the available evidence into account, I haven't found grounds to reach a different conclusion to

the adjudicator. I think this transfer could have offered the opportunity, but not guarantee, of better fund performance. I haven't concluded it was unsuitable to make this transfer in 2006.

QROPS advice

I understand why Mr and Mrs N are concerned at the 'muddying' of both STA and business B's involvement in this transfer. There is little doubt that STA was considering transferring Mr N to a QROPS more than a year before he signed business B's terms of business. But I have to take into account that no transfer took place through STA in 2010 or 2012; it seems partly because Mr and Mrs N were themselves sceptical about the need to transfer, and the charges involved.

When the matter was raised by STA again in 2013, in my view it was only at a preliminary stage. It could be argued the email discussion concerned a future point at which Mr N might take benefits; in which case the adviser wanted to flag up the opportunity to take a higher amount of cash under QROPS. The email Mr and Mrs N have provided doesn't directly suggest Mr N's retirement was imminent. Mr N would've been about 60 at the time and not yet at his selected retirement age. No provider was being discussed (and in fact when Mr N later transferred it was to a different one than STA had originally mentioned in 2010).

The adviser was inviting comment from Mr N on the timing of his potential retirement and said a recommendation could then follow. So it's difficult to say this email in itself was a recommendation. Mr and Mrs N's reply once again showed some scepticism about the charges involved. Neither they nor STA have been able to provide any other correspondence for me to determine what further discussions might have taken place; and which company they were having any discussions with. If they mainly took place verbally, as Mr and Mrs N have said, I can't know whether his role for business B was disclosed or not.

I don't think the available evidence amounts to STA (rather than perhaps business B) making a personal recommendation to transfer. I can only assume that Mr N was satisfied with the information he got (from whichever company) in response to his and Mrs N's questions, and decided that he would transfer. But I would need actual evidence of a personal recommendation from STA; given the likelihood in my view that business B did actually make that recommendation itself as part of arranging the transaction for him.

I say all of this because I don't think Mr N can say that business B was unknown to him, given the large amount of documentation bearing its name. At the same time as he signed terms of business with it in 2012, business B also carried out a fact find. This had business B's logo on its first page, and details of its Gibraltar registration at the bottom of each page. The page Mr N signed stated clearly that *'This questionnaire is provided by* [business B]*'*.

That document was updated by the adviser in both July 2013 and April 2014, and business B's suitability letter corroborates that there was a meeting in July 2013. So if advice was given in that discussion or meeting I think it was most likely to have been from business B. And if so, I think Mr N ought to have been aware that was the case; not only because of the terms of business and fact find, but also the application forms he signed.

I understand Mr N's point about trusting the adviser and not reading every document carefully, but I think the sheer number of references to business B meant it couldn't reasonably have gone unnoticed. When making a substantial financial transaction like this I think it was reasonable for Mr N to make sure he understood who the different parties involved were. I don't think he could've assumed that business B was the QROPS provider; especially after he got a letter from the provider referring to business B as his adviser.

I can't comment on why Mr N might not have received business B's suitability letter. But the fact it can be produced is still indicative of business B's involvement. And I think this letter seems to have been issued more than a month before the transfer actually completed on 3 September 2013. It was dated when Mr N signed the forms to *begin* the transfer process. Whilst I can't comment on the regulatory rules applying in Gibraltar, this is similar to the situation in the UK when a suitability letter is usually issued shortly after the consumer has decided to go ahead with a transaction; but in order to provide a record of that discussion.

Mr N is entitled to point towards STA's obligations as a UK-regulated firm – some of which were (briefly) to act with integrity; skill, care and diligence; organise and control its affairs responsibly; pay due regard to the interests of its customers and treat them fairly; and make clear and not misleading communications. So in this context I think the email correspondence coming from an STA email address, particularly straight after the sale, perhaps should've been dealt with differently.

It could of course be that the adviser was replying from this address out of convenience. But I think he should've appreciated it was better practice to correspond on a sale business B had already transacted, using business B's email address. The same applies to On-Line who, whilst apparently being unaware of the adviser's activities for business B, was still responsible for his conduct to the extent that he was representing On-Line in these emails.

But does this make an overall difference to my findings? I'm not persuaded it does, because it doesn't change which company is likely to have actually advised Mr N (and is legally responsible for any such advice). I still think that's business B, and that Mr N already ought to have known this. So I don't see that the adviser's continued correspondence from an STA address after the sale makes a material difference here.

I also don't see how the remedy for these failings could ever involve unwinding the sale of a product for which I haven't concluded On-Line was legally responsible. Mr N has the right to complain to business B about its involvement. If he is still not satisfied, the adjudicator has given him the contact details of the Gibraltar Financial Services Commission.

my final decision

I do not uphold Mr N's complaint or make any award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 16 December 2016.

Gideon Moore
ombudsman