

complaint

Mr L has complained that he was wrongly advised by BDO Northern Ireland (BDONI) to release funds from his pension to invest in an unregulated property development. In particular, he says:

- the investment scheme hadn't received HMRC approval, nor had this been sought;
- he was assured the scheme was suitable because of its low risk and guaranteed income stream;
- BDONI was aware it involved a 'substantial' amount of his pension.

background

The background to this complaint and my provisional findings were set out in the attached provisional decision dated 7 June 2019. I wasn't minded to uphold Mr L's complaint for the reasons given in that decision.

Mr L said the investigation was thorough but it appeared was largely based on information supplied by BDONI. He considered there were a number of inaccuracies, and that I had accepted BDONI's portrayal of him as a sophisticated and high risk investor. He didn't agree any notes by BDONI to that effect should be accepted without supporting evidence. He added he'd be happy to discuss his and his business past history, which was not disclosed with BDONI and did not involve taking high risk. The net worth of the business in mid-2009 was *'a little under £2m and not the several million pounds referred to'*.

At the time of BDONI's presentation in 2009 the only investments he had were his pensions, which he was told were not high risk, and less than 300 inherited Lloyds Banking Group plc shares. He had never personally been involved in investment markets. Mr P, who had advised Mr L and his family on pensions for many years, could confirm his risk profile as other than high risk.

His recollection was that the presentation, made principally by BDONI, enthusiastically supported the HMO property scheme because it would be a suitable way of repaying a pension debt, whilst cautioning against other uses of the funds because of the potential 70% tax bill. They also confirmed they had indeed introduced BDONI clients to the scheme using the HMO property model, which was the only suitable investment mentioned at the presentation. They referred to their professional indemnity cover at the presentation.

He and his son asked Mr P to accompany them to the presentation, and whilst Mr P was 'not as enthusiastic' about the scheme he had not carried out the extensive research into it that BDONI had. Their prior experience in investing in residential property was the purchase of a number of apartments which were let out and managed by friends and acquaintances who had years of experience in that sort of business. He was told that this would not be considered high risk.

Borrowing to buy residential property only happened when they invested in the HMO scheme. They were not determined to invest in the scheme, but had instead been considering the purchase of the premises occupied by their business using funds from the business and his pension. That would have had the support of Mr P and their accountants, but did not have the potential return on investment of the HMO scheme.

Mr L said he believed compensation in respect of final decisions had been paid to a number of other investors and wondered how their circumstances differed from his – and whether 'affordability of the loss' was a major factor in the decision.

BDONI didn't have any further comment to make in response to the provisional decision.

my findings

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

I understand why receiving my provisional decision out of the blue was disappointing to Mr L after such a long wait to learn of the outcome of the Financial Ombudsman Service's investigation. But I'd like to assure him that I have considered the specific circumstances of his case very carefully and have reconsidered them before making this final decision.

I'm not able to comment on other complaints or compare them to Mr L's case as we consider each case on its own individual merits. BDONI also reserves the right to choose to settle complaints before or after they've been referred to the ombudsman service if it wishes to do so. It hadn't offered to settle Mr L's complaint, having raised some of the issues about his attitude to and capacity for risk about which Mr L is now concerned.

But to answer Mr L's point, capacity for risk – which includes his ability to bear some loss – is a relevant consideration in any complaint. It need to be considered alongside the attitude to risk itself. But it's not the sole basis on which we determine the outcomes of complaints.

As a service we are, to some extent, reliant on information supplied by the respondent business because it is required by the regulator to keep records of the advice process. This 'fact finding' of Mr L's circumstances and objectives is a contemporaneous record, as are his recollections of the advice he received. I've taken both parties' evidence into account.

I would tend to agree, from the summary that Mr L has given, that he didn't have much past experience of buying and selling investments (outside his pension). However after discussing this with Mr L BDONI recorded – and told Mr L in its suitability reports – that he was willing to take a high degree of risk with this particular investment. It warned him that the investment (and the strategy used to achieve it) wasn't appropriate for him if he didn't want to take that high risk approach.

Irrespective of his personal investment experience Mr L comes across as a successful businessman – and I don't think the difference between his business being worth about two or several million pounds makes a distinction there. I thank Mr L for his offer to discuss his business background in more detail, but it's not in dispute that he is not involved himself in financial services and I've not credited him with a significant level of financial sophistication in reaching this decision. So I don't think I need to know more of the specifics about his background to reach a fair and reasonable decision on this case.

Nevertheless, the experience Mr L has of running a business suggests to me that he would have raised issues with what BDONI said in its suitability report if he did not feel it reflected the risks he was prepared to take. He took the prudent step of taking Mr P along to the presentations with him, who was a UK regulated adviser and so, in my view, familiar with the advice process BDONI was undertaking and why it was undertaking this.

From what Mr L has said, there was an alternative plan for investing some of his pension scheme which also involved investing in property – potentially with less risk because it was a commercial premises connected with his business. But on comparing that with what was on offer from the HMO scheme, Mr L seems to have been attracted to the potentially higher returns. So he had a lower risk and a higher risk option, and due to the relationship between

risk and potential reward, there is of course a plausible reason why Mr L chose the higher risk route on this occasion.

I don't think it's reasonable for me to conclude that Mr L could have believed that BDONI was underwriting any potential loss he might suffer. I've seen a copy of the presentation slides about the HMO scheme which Mr L refers to, and they don't give any such undertaking from BDONI.

As I said in the provisional decision I can't comment on the tax implications of the pension debt strategy, given that it was acknowledged at the time it was potentially subject to challenge from HMRC. But that does in itself explain why it's unlikely many other investment schemes would have been utilised in connection with this model – it was needing to be employed here because residential property can't be held within a pension. And the evidence I've reviewed, including Mr L's further comments, suggests he was attracted to the potentially higher returns in residential property compared with commercial property.

It's worth noting that the bulk of Mr L's non-pension assets were also invested in 'buy to let' residential property, but Mr L doesn't consider this presented undue risk. Residential property investing is undoubtedly very popular in the UK but it does carry risks which can be overlooked in light of its popularity – and these are not just confined to the effect of borrowing (gearing). The valuation of property is a matter of opinion rather than fact – it can be affected by market sentiment and become illiquid; there's no guarantee Mr L could let the property and achieve the desired rent in all market conditions; and there is the risk of over-concentrating assets in one particular sector.

Mr L is of course entitled to his view that concentrating his non-pension assets into this sector was an acceptable risk to him despite these potential issues. The risks of the HMO scheme were clearly higher because borrowing and a counterparty would be involved, and there were HMRC implications – but these risks were spelled out to Mr L. So his opinion regarding his own residential property investments doesn't strongly suggest to me that BDONI would have been able to deter him from investing in this scheme – given that he was more attracted to it, despite the risks, than holding commercial property within his pension.

my final decision

I'm sorry to disappoint Mr L once again after the patience he's shown with the ombudsman service but I'm not persuaded to change my decision that his complaint shouldn't be upheld. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 30 August 2019.

Gideon Moore
ombudsman

Provisional decision of 7 June 2019

circumstances

Mr L was introduced to BDONI in June 2009 for the purposes of making a potential investment in a residential property scheme. The manager of that scheme, who I'll call "Mr B" was present at the meeting.

The scheme involved depositing cash sums with Mr B's company which would use them to buy properties to be renovated as houses of multiple occupation (HMOs). Until the work on each HMO had been completed and the property could be transferred to the investor, they would be paid a rate of interest (10%pa) by the company. Following transfer of the property, it appears that the scheme would continue to co-ordinate the payment of rents collected for a guaranteed term of five years, after which the investor had the option to continue with or sell the property. As an HMO would count as residential property, it was not possible to hold such an investment within a pension.

BDONI recorded the following details on its file:

- Mr L was aged nearly 54 and married with two dependent children.
- He had a family business worth several million pounds and, together with his wife, a small self-administered (pension) scheme (SSAS) with Rowanmoor valued at £1.4m.
- Those arrangements were looked after by his existing financial adviser ("Mr P") of 15 years' standing, who was regulated in the UK.
- His knowledge of pensions wasn't very extensive.
- Mr B had previously explained to Mr L how a SSAS worked, and the flexibility of this type of arrangement.
- BDONI explained that Mr L could withdraw benefits from his pension to invest elsewhere (until April 2010 the minimum pension age was still 50). But he could also sell a pension scheme asset to himself, resulting in a 'pension debt', which he would then repay over a number of years.
- The risks involved in the pension debt process were explained, including the potential tax charges of up to 70% if it was subsequently deemed an unauthorised payment by HMRC.
- Mr L would like to continue working with Mr P as his adviser but in conjunction with BDONI. BDONI was willing to either look after Mr L's whole SSAS, or just the portion that could be transferred out to a SIPP to facilitate the pension debt arrangement.
- Mr L had already signed up to a few units in the property scheme and estimated his pension should purchase another eight.
- The existing SSAS couldn't be used for this because BDONI worked with a specific SIPP provider with specialist knowledge. A formal schedule would need to be drawn up with the SIPP provider for the repayment of the debt with interest, to ensure it was on an arm's length basis.
- Mr L asked if he could use the arrangement to invest in something other than the property scheme, which BDONI confirmed he could. It said that the debt arrangement itself was only appropriate for clients with a high attitude to risk, and that Mr L understood and was comfortable with this.
- The difference between drawing benefits from the pension and a plan debt was discussed. The plan debt remained an asset and wouldn't affect the paper value of the pension, on which benefit calculations were based. So BDONI said that if pension benefits weren't needed, Mr L shouldn't withdraw them.

The notes suggest Mr P had been tasked with establishing if any transitional protection would be lost on making transfers out of the SSAS, however there is a somewhat confused picture on this point – as there's also evidence of Mr P himself asking BDONI about the

implications for transitional tax free cash protection. Ultimately BDONI confirmed to Mr P in October 2009:

'Our report highlights that you have advised which pensions should be transferred to the... SIPP. BDONI have simply facilitated the paper work in relation to these transfers. I can confirm that BDONI are providing the advice in relation to the investment of the...SIPP cash into the... Offshore Cash fund. You are not deemed to have provided any advice on the setting up or investment within [the] SIPP.'

An undated 'Scheme Debt Credit Paper' noted that '[BDONI] feels that [Mr L] is a good client for the scheme debt concept and is comfortable that the loan repayments would be made as advised.' This was apparently in reference to Mr L's net worth and the profitability of his existing business, for which BDONI had seen accounts.

In a later September 2009 meeting note, BDONI recorded that:

- Mr L was unsure about how much of the SSAS he wanted to transfer to the new SIPP provider. A protected rights plan, the Aegon SSAS investment and a trustee investment plan (TIP) had no penalties for transfer, but some of the other plans did. Mr L was thinking of transferring only the first two totalling £175,000.
- *'[BDONI] fully explained that the pension scheme would still be intact after scheme debt and also explained that once... property investment had been undertaken it will provide sufficient income to the pension in order to repay the debt.'*
- If Mr L later required a pension income he could take it from the debt repayments that would increase liquidity in his SIPP.
- A paraplanner at Mr P's IFA firm had a number of questions to raise with BDONI about the HMO property scheme. BDONI explained the concept of the scheme but in terms of the financial workings Mr L would need to speak to the scheme himself. It was his own decision whether he wanted to invest.
- Because the debt repayment would only cause pension growth at 2% above the base rate, it was unlikely to have any adverse pension lifetime allowance (LTA) implications. And as an asset within the pension, the scheme debt was already exempt from inheritance tax.

As a result of this meeting Mr L agreed to transfer the two plans above into a new SIPP. BDONI collected some further information about his income and assets at around this time. It noted he received a 'substantial' income from his family business. He had £625,000 of equity in his home and cash assets of £20,000. His pension was by far his main asset.

BDONI's September 2009 'pension planning report' set out:

- Mr P had attended the meetings with Mr L and was receiving a copy of the report. He'd agreed with Mr L to transfer but BDONI was to recommend a suitable vehicle. Mr P would be giving Mr L ongoing advice.
- The ramifications of transferring had been discussed between Mr L and Mr P, so BDONI hadn't compared charges or checked for the existence of Guaranteed Annuity Rates (GARs).
- Mr L had a 'high' attitude to risk. This was defined as *'...willing to accept a high level of risk in return for the potential for higher returns in the longer term. They recognise that this may result in the value of their portfolio fluctuating, possibly significantly, in the short term. They are aware that the risks are such that a significant percentage of the capital sum could be lost.'*
- BDONI set out what a high risk asset allocation might look like, but because Mr L was looking for liquidity the entire transfer of about £165,000 would go into a unit trust investing in a 'cash' fund. This investment would in due course be sold by the SIPP to Mr L personally, to create a pension debt.

- Mr L took *'an active interest in following investment markets'*. He was aware he could lose all or part of his investment, and had been comfortable with fluctuations in the value of his investments in the past.
- The risks following investment in the SIPP included:
 - past performance was no guarantee of future returns;
 - investment values may go down as well as up and he may not get back the full amount invested;
 - some investments, including property or unlisted company shares, may not be readily realisable;
 - the transfer wasn't guaranteed to provide greater benefits than remaining with the existing provider.
- Unlike a SSAS, the SIPP cannot have more than one member and cannot provide company loans. Mr L also didn't intend drawing pension benefits in the near future.
- For this advice BDONI would charge 3% of the amount transferred (subject to a minimum of £5,000) and ongoing fees of £500 per year, to be taken from Mr L's SIPP. Other work will be invoiced separately.
- The provider itself would charge £425 for setting up the SIPP (plus £75 per transfer) and then had a £500 annual management charge.

The property scheme wasn't specifically mentioned in this report. But BDONI also sent Mr L a subsequent pension planning report about creating the debt in January 2010, which said:

- He wanted to invest in the property scheme and BDONI wasn't advising him on the merits of doing so – he'd done his own due diligence into the scheme.
- He had a high risk profile, making setting up a plan debt appropriate. But *'Investing a high percentage of your pension fund in one sector carries additional risk and reduces investment diversification'*.
- The SIPP was unable to lend to Mr L (as the member), but if a debt was created then the HMRC rules – which were referred to in the report – allowed this to be repaid on an 'arm's length' basis. So the only option which met Mr L's objectives was for the SIPP to sell the unit trust to him personally – thereby establishing a debt between the two, as Mr L wouldn't immediately pay for the asset.
- He would then be able to cash in the unit trust but would be required to repay the amount of the resulting debt in line with a commercial agreement. The SIPP provider would charge £125 plus VAT in order to administer the scheme debt arrangement.
- It repeated the warning that tax charges of up to 70% might be suffered if HMRC classified the plan debt as an unauthorised payment.
- BDONI had facilitated similar arrangements without challenge from HMRC, and *'we are confident that the proposal operates within the rules as laid down, however, a future challenge from HMRC cannot be ruled out and BDONI cannot guarantee the scheme's effectiveness in the future.'*
- If the base rate increased the required debt repayments would too. Failure to repay the debt could in itself be deemed an unauthorised payment with the same tax implications. The total tax liability could amount to £115,500.

The offshore unit trust was sold to Mr L in February 2010 and documented in a pension investment report at that time, which repeated: *'BDONI have not provided any advice in relation to the merits or otherwise of investing in [the property scheme] and you have carried out your own due diligence on this investment.'* It again reminded Mr L that BDONI established he was a high risk investor and the plan debt was only appropriate for such an investor. As Mr L didn't want to draw pension benefits at that time, BDONI set out that the plan debt was the only option that met his needs.

However when Mr L and BDONI met to discuss the content of the report, BDONI recorded Mr L's wish was now to use the proceeds of cashing in the unit trust in his name to make a

director's loan to his company. He then intended to invest in the property scheme via his company and release money back to himself from the company when he needed to repay the debt. BDONI told Mr L that he should have life cover in place to protect his pension from an unauthorised payment charge in the event that he died before the debt had been repaid. Mr L's response was that he had sufficient life cover in place to cover this eventuality.

The resulting plan debt of about £165,000 was required to be repaid over 10 years (with the first payment deferred by a year), plus interest at bank base rate plus 2% per year. The agreement Mr L signed the trustees of his SIPP to repay the debt acknowledged the following:

'In the event that I fail in any way to adhere to making the above payments as they fall due, I accept that the trustees have the right to demand immediate repayment of the outstanding debt in full.'

Mr L had expressed interest in later releasing a further sum from his SSAS on the same basis. A further pension planning report followed in March 2010 covering a transfer of the TIP from the SSAS to Mr L's new SIPP, and a pension investment report covering the further pension debt in June 2010 – this time using an offshore cash bond for £147,000. The property scheme was again specifically mentioned, and the potential tax charges of £102,900 should this be deemed an unauthorised payment.

This involved further liaison on administrative matters between BDONI and Mr P's IFA firm, who were also involved in discussing Mr L's application for fixed protection from the lifetime allowance in November 2011. I understand that this was applied for and Mr L is no longer able to make pension contributions from earnings, but has a protected lifetime allowance of £1.8m.

Mr L reports that the arrangements worked well from late 2009 to mid-2012, with him initially receiving interest from the property scheme and eventually receiving three HMO properties (partly funded by mortgages). I take Mr L's statement to include both the investments he made personally and from his pension, as in later correspondence Mr L indicates that none of the money originating from his pension bought any properties.

Companies House also records that Mr L established a new property company in February 2011 with £275,000 of debtors, which is still active. In May 2012 he mentioned to BDONI that he was considering using his remaining SSAS funds, in part, to buy a new business premises. At that point he agreed with BDONI to consolidate the two plan debts into one debt totalling £307,000, being repaid on a quarterly basis.

Between August and October 2012 there was a hiatus in the payments being made. They were initially told that this was because there was a cash flow problem that would soon be sorted out. In January 2013 all payments ceased. Mr B was declared bankrupt shortly afterwards.

The plan debt had to be switched to an interest-only basis in April 2013, which BDONI said it couldn't guarantee would prevent unauthorised payment charges. However my understanding is that the quarterly interest-only payments towards the plan debt are up to date and the plan debt arrangement hasn't been called into question. It appears that since that time Mr L has reverted to using Mr P for investment advice on the funds held within the SIPP.

Mr L has sold two of the properties, but says the proceeds were insufficient to repay the outstanding mortgages. He'd been able resume receiving rental payments directly from an

agent for the third property. Again, I believe this is reference to other properties Mr L didn't buy with the proceeds of his pension.

Mr L's formal complaint

Mr L complained to BDONI in October 2014 in the terms I've set out above. He referred to having independent advice to make his complaint, although my understanding is that one of the original promoters of the property scheme had also been involved in the complaints Mr L (and others) raised.

BDONI acknowledged Mr L's complaint but noted that it was near-identical to others it had received and replied '*...I do not propose to engage in any further correspondence with [the promoter] (whether or not via you).*' My understanding is that BDONI believes the scheme's promoter was pivotal in Mr L's decision to invest. It didn't provide a final response to Mr L's complaint, but it later decided to instigate a review of a number of clients who had invested in the same scheme. It wrote to Mr L on that basis in May 2015:

'We intend to provide redress to those customers we establish have suffered losses as a result of any failings on our part. Our redress settlement will provide customers who have been affected with compensation more promptly and with more certainty than if those customers were to pursue third parties who may have contributed to their loss directly. Nonetheless, as part of any settlement agreement, we may require the assignment of any rights customers may have against third parties including [the property scheme] and those persons involved with your investment.'

Mr L asked the ombudsman service to continue its investigation, telling us he felt he'd be surrendering his rights for no guaranteed outcome. He gave us an account of his dealings with BDONI and answered a number of questions from our adjudicator. In summary, he said:

- A friend of his son worked for the property scheme and told him about the idea of buying HMO properties in mid-2009.
- He and Mr P then went to a presentation where BDONI were present. They asked how it was possible to invest in this way and couldn't be told 'otherwise everyone would be doing it'.
- He felt that by investing in this scheme he'd be getting ahead of the game by investing in residential property, as it had been ruled out within a pension.
- They were told that they needed to be careful in making sure that the money was repaid to the pension and not spent in such a way that it couldn't be recovered.
- On the basis that the property investment was good for the pension money they thought it would be good for the family business's money, as his company already held residential flats. His company's accountants (who were not BDONI) ensured the investments were properly accounted for.
- As it became difficult to obtain lending on HMO properties, they set up the new property company to achieve this – but weren't successful in obtaining lending to buy properties with the pension money. So the funds were left in deposit with the property scheme and have now been lost.

The limited evidence of statements we have from the property scheme does suggest Mr L invested some further tranches of cash which weren't facilitated from his pension by BDONI:

- £33,454 at the same time as his first investment
- a further £120,000 later in 2010 plus £105,000 in August 2011.

Mr P has reminded Mr L that he '*...crystallised another Aegon Pension and took a tax free lump sum of £231,657.87 and transferred that across to (as far as I am aware) purchase*

property through [the scheme]’. It doesn’t appear that BDONI was involved in any of these further investments, although I am aware Mrs L did make an investment using her own pension (with which BDONI was involved, and I understand she has complained about this separately).

Mr L provided a copy of the slides from the property scheme presentation he attended with BDONI. BDONI is mentioned as the “company tax adviser”, although a different firm is listed as the “client tax adviser”. There is no further mention of BDONI in the slides, but I’m also aware that BDONI’s name appears as ‘Accountants and Tax Advisers’ on a brochure for the scheme. We asked BDONI to comment on the allegation that it had backed or endorsed the scheme by virtue of its name. It didn’t agree that it had given permission for its name to appear on any promotional material.

The adjudicator has attempted to establish what evidence is available to substantiate the return (such as it was) Mr L received from the investment; in view of BDONI’s earlier willingness to consider if it should pay compensation. Mr L provided some evidence from his bank statements of the payments going to and from the SIPP, his personal and company accounts, and the property scheme.

She shared this information with BDONI, but it seems BDONI remains concerned that there is difficulty establishing that the money from Mr L’s pension has been completely lost – when he did obtain a return on other sums he invested in the property scheme. As a result of the above impasse I would like to extend my apologies for the length of time it has taken for Mr L’s case to reach this stage.

Given that BDONI didn’t originally issue a final response to Mr L’s complaint, I haven’t been able to establish that it has set out at any point whether it stands by the advice it gave Mr L. However that doesn’t have a bearing on the view I must independently reach on whether I think BDONI provided suitable advice. I’m aware as a result of a number of other complaints this service has received that BDONI doesn’t consider its actions caused the investment losses in the particular circumstances of a case such as Mr L’s. Should BDONI wish to expand on its position further, it can of course do so in response to this provisional decision.

For completeness, I should add that any previous indications BDONI may have given about a possible review do not bind it to making an offer of compensation to Mr L. As our adjudicator recently informed both parties, in view of the complexity of the case an ombudsman will be issuing a provisional decision on the merits of Mr L’s complaint. It now falls to me to issue that provisional decision.

my provisional findings

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

did BDONI advise Mr L to invest in the property scheme?

I’m satisfied based on Mr L’s testimony that BDONI wasn’t responsible for introducing him to the idea of investing in the property scheme; that seems to have unfortunately come about through a family connection. I’ve also taken into account Mr L’s admitted prior experience of investing in residential property through his own company. That indicates in my view that he had a predisposition for making this type of investment and an understanding of the likely returns it could generate.

Mr L's testimony also refers to some (short-lived) speculation, several years earlier, that pension funds would be able to invest in residential property. His awareness of this further suggests in my view that this had been something he'd been hoping to do *within* his pension had it been possible to do so. So weighing all of this up I think he would have been attracted to the idea *both* of extending his involvement in residential property investments – and also using his pension fund to do so.

I've considered carefully what Mr L has said about the presentation he went to, and BDONI's attendance. There doesn't seem to be any doubt that BDONI had been advising Mr B and others on setting up the property scheme, and that there was some arrangement in place for referring customers to BDONI who wanted to invest using their pension. However BDONI denies that it agreed for its name to be used to promote the scheme itself. I'm not satisfied that BDONI's attendance at the event, or its name being mentioned as an associated party on the brochure, constituted it promoting the scheme or being responsible for claims made by the promoters (who were separately responsible) of the returns available.

Furthermore and whilst Mr L may understandably now see it differently, I'm not satisfied in any event that getting this apparent endorsement by BDONI was pivotal in Mr L's decision to invest in the scheme at the time. I note that he went on to invest further sums from his own capital, which I haven't been able to establish BDONI discussed with him in specific detail. Those investments apparently turned out better than the ones he made from his pension. But I don't consider Mr L could reasonably have expected BDONI to be responsible for those investments because he made his own choice to make them. So I think Mr L would still have wanted to invest money from his pension even if there had been a clearer separation between BDONI's involvement with the scheme and as his adviser.

Mr L says in his complaint that BDONI described the property scheme as 'low risk', although I note that the formulation of the complaint is identical to others this service has received. That's not to say that there in all likelihood probably was a very positive spin placed on the scheme by the promoters themselves, because this wasn't a regulated investment scheme subject to the oversight of the FCA. But I'm mindful of how the complaint has been brought about when considering if I can accept this as an accurate recollection of how BDONI itself described the scheme to Mr L.

BDONI's position is that it didn't advise Mr L to invest in the property scheme. So the file note that *'once... property investment had been undertaken it will provide sufficient income to the pension in order to repay the debt'* causes me some concern. Whilst it isn't necessarily a verbatim statement of what BDONI said to Mr L in the meeting, considering the position BDONI has taken I would expect it would have wanted to be careful not to give assurances as to the likely returns Mr L might expect.

However Mr L had already invested in residential property and would, in my view, have been aware that the returns were dependent on the properties being rented, and indeed in this case sourced and refurbished by the counterparty – Mr B's company. I don't consider Mr L was financially unsophisticated or that he would have come across this way to BDONI – even if, as it initially noted, he didn't have much experience of pensions themselves. So on balance, I can't say that BDONI was giving guarantees about the property scheme, on the basis of which Mr L then invested. And I'm not persuaded Mr L would reasonably have thought it was a 'low risk' scheme, even if it seems to be the case that he didn't fully appreciate what *all* the risks were.

I've said the property scheme itself was unregulated. But where the advice involves a personal pension (such as a SIPP), the personal pension itself is a specified investment – and it's caught by the regulated activity *advising on investments*. So what the Financial

Ombudsman Service can consider is the advice Mr L received to transfer from the SSAS to the SIPP, and to make a succession of investments, including the plan debt, within the SIPP.

transfer from the SSAS

I note that BDONI sought to limit its responsibility for any losses caused by transferring *from* the SSAS into the SIPP. But that doesn't make any difference to the fact that it was recommending the SIPP itself – for the sole purpose, as far as I can see, of facilitating a plan debt. So the key issue is whether arranging a plan debt was suitable for Mr L. If it was, I can accept that there was a need to transfer from the SSAS to the SIPP given the specialist administration involved.

BDONI would still have been responsible for checking if Mr L stood to lose benefits from transferring from the SSAS to the SIPP, as that's part and parcel of advising that a transfer was suitable. But I've taken into account that Mr P also continued to be involved in Mr L's financial planning. It doesn't appear that there were any penalties to transfer the SSAS investments, but in regards to any other features of the existing plans Mr L held (and there may, of course, have been none of note) it's likely Mr P's firm would have been more familiar than BDONI of what those were. So in the particular circumstances of this case I think BDONI did enough to caution Mr L to discuss these aspects of the existing SSAS with his adviser.

did the pension debt arrangement require HMRC approval?

I've considered Mr L's suggestion that BDONI was secretive about what the approach was. That may have been true of the presentation they attended, but in the reports it issued BDONI was transparent about the HMRC regulations it was relying on.

A pension debt arrangement was explained at a specific page in HMRC's Registered Pension Schemes Manual (RPSM). It began by explaining that loans from a pension scheme to members (or those connected to members) were not permitted, and any such loans made will be taxed as an unauthorised payment. However it went on to explain that a debt could exist where a pension scheme had sold an asset to a member, but the member hadn't paid for the asset straight away. And that debt would then be formalised in an agreement for it to be repaid on an arm's length basis.

The apparent contradiction between a pension debt and a loan means there were potentially significant risks to giving advice in this area, as it was based heavily on BDONI's interpretation of the HMRC rules. I think BDONI was right to recognise that its method of releasing money from the SIPP along these lines could potentially be subject to challenge. But that doesn't mean it was required to register or otherwise gain approval for a plan debt to be set up. I'm not aware that HMRC requires advice given by a tax adviser on a pension to be disclosed, as it may do when certain tax planning 'schemes' are used outside a pension.

It's clear that BDONI's advice on the pension debt arrangement was based on the RPSM, and the arrangement was also accepted by Mr L's SIPP provider. The regulations already catered for the possibility that the arrangement could subsequently be deemed an unauthorised payment (with the associated tax charges), and this risk was disclosed to Mr L in BDONI's advice. But the Financial Ombudsman Service isn't a tax authority, so ultimately any determination on the compliance of the arrangement is a matter for HMRC itself.

Mr L's complaint has come about not because the pension debt arrangement has been called into question, but because of the failure of the investment he made. So the question for me to answer is whether the advice was suitable for Mr L overall. Whilst it doesn't appear

that BDONI actually advised Mr L to invest in the HMO property scheme, the issue is the extent to which BDONI *should* have taken Mr L's expressed intentions with investing the money into account in its overall advice that a plan debt was suitable for him.

was BDONI's advice to set up the pension debt arrangement suitable?

Although BDONI didn't always refer to the property scheme in its notes and letters as the purpose of the investment, it needed to take the ultimate destination of the funds into account when it advised Mr L. That's because in order to ensure that it was providing suitable advice, the regulator's rules required it to take into account Mr L's investment *objectives*. Rule COBS 9.2.2 refers:

- (1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:
 - (a) meets his investment objectives;
 - (b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and
 - (c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.
- (2) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.
- (3) The information regarding the financial situation of a client must include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.

Mr L's objectives weren't just to release funds from his pension, but to invest those funds in the HMO property scheme. I can't see that Mr L had any need to release the funds had it not been for the scheme. So even though on the facts of this case BDONI didn't recommend the property scheme to Mr L, in order to ensure its advice was suitable overall I consider it needed to take into account, and ensure Mr L understood and could afford to bear, the risks both of:

- the pension debt arrangement being challenged by HMRC;
- the failure of the counterparty or investments involved in the HMO property scheme Mr L was using the debt to invest in (which was not a regulated scheme).

BDONI gathered some cursory, but not particularly detailed information about Mr L's wider financial situation – although that is perhaps explained by the overlap between it and Mr L's other adviser. But it still needed to 'know its client'. And in the specific circumstances of this case I'm not satisfied that BDONI having fuller information about Mr L's circumstances, or expressing reservations about the risks involved, would have altered his clear preference to utilise his pension for residential property investment.

I say this noting that there were already risks evident in buying residential property (including borrowing to do so) and letting it out, of which I think Mr L would reasonably have been aware. The risks were higher here because for an initial period, all of Mr L's investment would be handed over to a counterparty (which was not a bank) – and he would only receive interest, but an attractive rate of interest commensurate with the risk.

BDONI described Mr L as a high-risk investor, a classification with which he didn't disagree and, looking at the wider evidence, I think this is plausible in the circumstances. He had a sizeable pension fund, on a part of which he had the capacity to bear significant risk. He'd been willing to invest money through his business on letting out flats, and I note he was not

deterred from the pension debt arrangement, which BDONI affirmed was high risk and subject to penal tax charges if it was challenged. In fact Mr L increased the risk further, which was not on BDONI's suggestion, by routing the money through his own company – in an arrangement which would also have come within the purview of his company's tax adviser.

It's relevant to note in this case that Mr L's SSAS was already being advised upon by Mr P. We don't know what assets the SSAS was invested in but such a scheme is typically set up on the basis that it will allow access to higher risk investments (such as the business property Mr L later indicated he was considering buying). The SSAS was also of a sufficient size that Mr L could conceivably contemplate making investments into less liquid assets, as it gave him some capacity for loss.

In Mr L's complaint he said the investment was a substantial amount of his pension. It was a significant, but I don't agree substantial amount – unless perhaps the later tax-free cash sum (which BDONI doesn't seem to have been involved in releasing) is also taken into account. At the time Mr L initially wanted to invest £165,000, I'm persuaded that this was a portion of Mr L's pension that he was willing to put at risk for the potential of the attractive (but by no means guaranteed) returns of the property scheme.

Taking all of the above into account, it seems to me that had BDONI highlighted the risks of the property scheme itself in the same way as it highlighted the risks of the plan debt, it's unlikely Mr L would have been deterred from investing in it. BDONI could not of course accurately forecast that the scheme would fail, and when – and it's not entirely clear why it failed.

And having seen the process complete successfully, Mr L was then prepared to invest a slightly smaller second tranche from his pension in the scheme. I agree that this should reasonably have prompted BDONI to express greater concern about the total amount Mr L was investing, although I note that it did highlight to him that there was a risk of overconcentration in a single asset.

What's potentially of more concern in any case is that Mr L could have taken a similar amount of tax-free cash in the form of pension benefits to make the same investments. I appreciate there might have been issues with Mr L's lifetime allowance being crystallised if he took benefits, but I'm not satisfied this was weighed up against the risk of potential tax charges, even if BDONI did explain what those risks were. But my understanding is that at a later point, Mr L proceeded to use up his tax-free cash allowance to invest further in the property scheme anyway, and this was not on BDONI's advice.

So in my view Mr L is likely in the position he would always have been in, even if he'd started by accessing his tax-free cash sum first. Mr L's losses are also not due to tax charges he's suffered, but the failure of the property scheme.

The regulator's rules didn't prevent BDONI from carrying out a transaction Mr L was already very keen to make, if it was prepared to do so despite expressing reservations to Mr L about the risks involved. In the particular circumstances of this case, it would have been reasonable in my view for BDONI to believe that Mr L understood and accepted the risks if it had set these out in more detail. It would also have been credible that he would want to make both the tranches of investment that BDONI knew about, when taking into account his background and experience.

I have a lot of sympathy for the position Mr L finds himself in, if (as he believes is the case) his funds in the property scheme have been misappropriated. But this is effectively the

culmination of one of the risks that was always present in an unregulated investment scheme. Even if Mr L understandably downplayed that risk at the time on the basis of the confidence he had in the property scheme, I can't reasonably conclude that someone of his background and experience wasn't aware that this was, potentially, a key risk.

It may be possible to identify things BDONI should have done better, as I have done above – but that doesn't necessarily mean that its advice was given with such careless disregard for Mr L's circumstances that BDONI then becomes liable for investment losses actually caused by a third party. That's a matter for me to assess on the merits of each individual case and I'm not satisfied that this is the case here. BDONI could potentially have cautioned him better about his exposure to the risks in the scheme. But ultimately I think Mr L was determined to invest in it. So I realise that this will come as a considerable disappointment to Mr L, but I don't consider his complaint should succeed.

my provisional decision

I don't intend to uphold Mr L's complaint.

Gideon Moore
ombudsman