

## Ombudsman's Determination

Applicant	Mrs L
Scheme	Pentos Forman SSAS ( <b>the Scheme</b> )
Respondents	The other Trustees of the Pentos Forman SSAS ( <b>the other Trustees</b> )

## Outcome

1. Mrs L's complaint against the other Trustees is partly upheld and further action is required by the Trustees as a whole (**the Trustees**). To put matters right, the Trustees shall within 28 days:
  - (i) Draw up a policy on how to manage conflicts of interest;
  - (ii) following this and within a further 28 days the Trustees shall reconsider the decision to award the death benefit to Mrs L, including a decision on how any death benefit is to be paid; and
  - (iii) as the death benefit has not been paid within two years a tax charge of 55% of the amount paid will be due if this is paid as a lump sum or as an in-specie transfer. This tax shall be paid before any payment to a beneficiary. Furthermore, the Trustees shall consider how the death shall be paid either as a cash sum or in specie transfer or the purchase of an annuity.
  - (iv) If no agreement can be reached, then the Trustees shall appoint an independent expert in accordance with rule 8.4 of the Scheme rules.

## Complaint summary

2. Mrs L has complained that she has been denied access to her pension for 10 years and that she has been treated unfairly by the other Trustees who do not keep her properly informed and have withheld important details regarding her pension.
3. Mrs L has also made a number of other complaints regarding the administration and trusteeship of the Scheme as follows:-
  - i. The Scheme Administrator and the other Trustees have received part payment of their pensions in 2015 without her consent while she has not received anything.

- ii. She was expected to receive a reduced share of the fund.
- iii. She is being treated unfairly; the Scheme Administrator does not keep her properly informed and has withheld important details regarding her pension.
- iv. Decisions are regularly made without her knowledge.
- v. There has been conflict within the Scheme and the Scheme Administrator refuses to employ a third party professional to resolve these issues.
- vi. The Scheme Administrator refuses to employ a legal adviser who is experienced in this area of law and who is impartial.
- vii. The Scheme Administrator and the legal representative supposedly acting for the Scheme have repeatedly failed in their duties. Whenever she has challenged this, her daughter has been used as a scapegoat.
- viii. She has been paying for three quarters of the legal fees associated with this dispute since 2008.
- ix. Significant amounts of the fund have been wasted irresponsibly.
- x. Trustees' meetings are used to intimidate her and to force her into making snap decisions without full possession of the facts. These instances are not reflected in the minutes of the meetings.
- xi. She is not allowed to bring a third party to meetings, and she cannot afford to bring a legal adviser because of the financial difficulty she has been placed in by the Scheme Administrator.
- xii. The exit strategy which was agreed unanimously in 2015 has not been moved forward by the Scheme Administrator, risking the proposed purchaser walking away.
- xiii. The actions of the Scheme Administrator and his legal adviser are causing further threats that she will not receive her pension.

### **Background information, including submissions from the parties**

- 4. Mrs L and the other Trustees are aware that I can only investigate complaints relating to events that occurred three years prior to the complaint. Mrs L's complaint was received on 17 December 2018 and events which occurred more than three years prior to this date will not be considered. Any references to dates prior to December 2015 are included for historical background.
- 5. The other Trustees have also raised counter complaints against Mrs L saying that Mrs L's concerns over her daughter's business has prevented them from winding up the Scheme and drawing their benefits. All the members are over age 70 and some have serious medical issues.

6. The other Trustees and Mrs L have agreed that I should look at the complaints from Mrs L and the counter complaints from the other Trustees together in order that a resolution can be found to the ongoing issues.
7. Mrs L was appointed as a Trustee of the Scheme in April 2008. Rule 8.4 of the Definitive Trust Deed and Rules of the Scheme dated 29 April 2008 says:

“Decisions at Trustee meetings (or sub-committee meetings) must be unanimous. If the Trustees cannot reach a unanimous decision on any matter (excluding decisions relating to the termination or winding up of the Scheme) the matter shall be referred to an expert unanimously appointed by the Trustees whose determination shall be binding on the Trustees. The costs of any such expert shall be an expense of the Scheme for the purposes of clause 15.”
8. Mrs L’s husband was a member of the Scheme. He died on 17 September 2008 and the Trustees agreed that Mr L’s beneficial interest in the Scheme should be passed to Mrs L.
9. The background to the dispute was previously set out in the Deputy Pensions Ombudsman’s Determination (**80871/1**) of July 2011, which is set out below in paragraphs 10 to 32.
10. The main asset of the Scheme is a property called Upper Skilts Farm (**the farm**). The farm is made up of an assortment of buildings and land. During 2006 there were discussions between the Trustees about selling the farm, so that members could take their pensions from the Scheme. There was disagreement from the outset. Some Trustees thought the best price could be achieved by selling the farm intact. Others favoured selling the various lots separately.
11. In 2007 Pentos Forman Limited went into administration. A valuation dated 27 March 2007, by a Fellow of the Royal Institution of Chartered Surveyors (**FRICS**) said that the farm was worth £1,800,000 if sold as one property, but £1,910,000 if sold in separate lots.
12. On 18 July 2008, Rowanmoor Pensions Limited (**Rowanmoor**), the professional trustee, wrote to the member trustees urging them to compromise and reach agreement concerning the sale. In an exchange of emails on 30 July 2008, Mr S (the Scheme Administrator), said that one of the tenants, a riding school run by Mrs L’s daughter, owed the Scheme £84,128.20 in unpaid rent, and Mrs L confirmed that an unspecified amount was outstanding.
13. A long correspondence then ensued between Mr S, Mrs L’s husband, who was then also a Trustee, and Rowanmoor about the amount owed to the Scheme by the riding school. No agreement was reached.
14. Mrs L’s husband died on 17 September 2008 and in January 2009 Mrs L said that she wanted to buy the part of the farm occupied by her daughter’s riding school. All but two of the Trustees wanted the farm sold as one property.

15. During 2008, there was copious correspondence between Mr S and Mrs L's daughter about outstanding water bills. The matter remained unresolved.
16. A Trustees' meeting took place on 29 October 2008. The minutes recorded that all the Member Trustees agreed they wanted to retire and take their benefits from the Scheme. There was a vote on how to sell the farm. Mrs L voted for it to be sold as separate lots. Two of the Member Trustees abstained, and the rest voted for the farm to be sold as one property.
17. On 19 January 2009 another Trustees meeting apparently took place. It is unclear who attended or what was discussed. Mrs L was excluded, and minutes are not available.
18. Correspondence about the riding school owned by Mrs L's daughter then ensued, with Mr S arguing with Mrs L and her daughter over the amounts owed. Nothing was resolved.
19. On 21 May 2009, Rowanmoor wrote to the Member Trustees, pointing out that the late Mr L's death benefits needed to be settled within two years of his death in order to avoid a tax charge. Rowanmoor expressed concern about the lack of agreement about selling the farm, and the continuing dispute about money owed by Mrs L's daughter. Rowanmoor noted that monthly Trustee meetings were taking place without its involvement and requested copies of minutes. (Mrs L was excluded from these meetings and minutes are not available.) In an email dated 30 June 2009 to Mr S, Rowanmoor said that it would not agree to resolutions passed in meetings from which trustees had been excluded.
20. Arguments continued about the amount of water used by the riding school and the amount of rent it owed to the Scheme.
21. All the Trustees attended a meeting at the farm on 26 August 2009, together with Mrs L's solicitor. The minutes state that Rowanmoor advised the other Trustees that the farm needed to be sold by 17 September 2010, to ensure sufficient funds were available to pay the death benefit in respect of Mrs L's late husband. If that did not happen, the payment would be subject to tax. There was a discussion about whether the farm should be sold intact, or as separate lots. Some Trustees said they had received professional advice that it would be advantageous to sell the farm intact. Mrs L's solicitor said that the professional advice he had obtained expressed the opposite view. Mrs L said she wanted the riding school and part of the farmhouse transferred to her, as payment of her late husband's death benefit. The trustees agreed that Mrs L would make a formal offer for their consideration.
22. The Trustees also discussed the issue of rent due from Mrs L's daughter's riding school. It emerged that no valid lease had ever been executed, and it was likely that the rent paid was below the commercial rate. Rowanmoor explained that a commercial level of rent was a HM Revenue and Customs (**HMRC**) requirement, and any underpayment of rent would be treated by HMRC as an unauthorised payment and taxed accordingly.

23. The dispute over water bills was also discussed as well as the rent payable by another tenant who occupied an office on part of the site. Mr S again raised that Mrs L's daughter had not paid recent water bills. Mrs L said the bills had been paid. The Trustees were told that Pentos Forman Limited was now in liquidation, and the liquidator intended to make a claim for £61,000 against the Scheme. The minutes do not say what this amount represented.
24. Mrs L obtained a valuation of the farm from a FRICS surveyor. The surveyor said that the farm was worth £1,625,000, whether sold as one property or separate lots.
25. On 13 January 2010, Mrs L's solicitor sent her formal offer to the other Trustees. It was that the Scheme retained the office building included within the property. The rest of the farm would be transferred to Mrs L. Mrs L would take on the liability for 50% of the Scheme's mortgage debt, and 50% of the liquidator's claim.
26. The other Trustees discussed Mrs L's offer at a meeting from which she was excluded, despite her request to attend. Rowanmoor did not attend the meeting, and subsequently resigned as a trustee. Mrs L's offer was rejected on 24 January 2010. The other Trustees said they did not want the Scheme to be left with a tenanted office building with an uncertain rental value, and 50% of the Scheme's mortgage liability. They felt that Mrs L wanted to "cherry pick" the best parts of the farm. The other Trustees said that they wanted to put the farm on the market as one property, pay off the Scheme's debts and draw their pensions.
27. On 23 April 2010, Mrs L's daughter registered a unilateral notice with the Land Registry against the title of the farm.
28. On 14 July 2010, the other Trustees met with Mrs L's financial adviser and proposed to sell the farm in five lots, so that Mrs L had the opportunity to purchase the lots she wanted. In a letter dated 28 July 2010, Mrs L rejected the proposal. Mrs L said that the lots she wanted should be transferred to her when the farm was sold, as there was not much time left before HMRC imposed a tax charge on the death benefits.
29. In October 2010, the Trustees asked National Westminster Bank (**the Bank**), to whom the farm was mortgaged, to vary the mortgage terms so as to allow part of the farm to be transferred to Mrs L. The Bank did not give a decision one way or the other. (The trustees made a formal complaint to the Bank about its handling of their application, and its failure to make a decision.)
30. On 3 December 2010, Counsel advised the other Trustees that it was extremely likely that the riding school operated by Mrs L's daughter had security of tenure under Section 23(1) of the Landlord and Tenant Act 1954.
31. The Trustees subsequently agreed informally to sell the farm in lots, in such a way that the rights of the tenants, particularly the riding school, were protected.
32. In 2010, the other Trustees of the Scheme brought a complaint 80871/1 to The Pensions Ombudsman (**TPO**) and said that Mrs L was delaying and frustrating the

sale of the pensions property portfolio, the sale of which would enable all trustees to take their benefits. The other Trustees said Mrs L's refusal to sell the property was penalising them as they were unable to take their benefits.

33. The complaint from the other Trustees was not upheld by the then Deputy Ombudsman who said:

"I am not considering a dispute between the trustees. I have been asked to determine whether Mrs L improperly prevented the other members of the Scheme from accessing their benefits. But to do this it is necessary for me to consider the actions of all the trustees and not just Mrs L, insofar as they affected the payment of members' benefits.

...

I have concluded that Mrs L's actions did not go so far as to constitute maladministration. Certainly, she was determined that the farm should be sold in lots. She obtained professional advice indicating that doing so would not involve a loss to the Scheme. Whilst Mrs L's stance may have contributed to the delay in payment of members' benefits, so did other factors, such as the existence of a protected tenant, the apparent reluctance of the Bank to make a decision and the threat of a claim by the liquidator of Pentos Forman Limited.

The applicants also contributed to the delay. They held inquorate trustee meetings which could not move the process forward. Trustee decisions needed to be unanimous, so excluding Mrs L from meetings, and not ensuring Rowanmoor's attendance, was pointless and improper. Given that Mrs L held a dissenting view, it was all the more important to ensure her attendance at trustee meetings."

34. Mrs L also made a complaint (**PO-1209**) to TPO in 2013, concerning the other Trustees failure to complete an in-specie transfer and the other Trustees refusal to pay Mrs L's legal and other professional fees. The former Pensions Ombudsman did not uphold Mrs L's complaint and said:-

"Following your husband's death, you took professional advice about taking your benefits from the Scheme. You decided on an in-specie transfer of part of the property which was the Scheme's principal asset. As you said in your email dated 5 December 2013, you "never ever veered away from this decision." However, your proposal created difficulties for the other trustees, who preferred selling the property intact. Your daughter's business occupied part of the property and she was in dispute with the trustees about the terms of her tenancy. There were differences in valuations, planning permission had to be obtained and the mortgagee's consent was required.

You and the trustees both instructed solicitors concerning the in-specie transfer. The trustees' costs were paid from the Scheme and as a Scheme member you had to pay your own legal fees. Despite the trustees eventually agreeing to the in-specie transfer, it did not proceed. This was principally due to the NatWest Bank's failure to give its consent as mortgagee of the property. You subsequently reached

agreement with the trustees, by way of a different arrangement that did not involve an in-specie transfer.

You expected the trustees to pay your solicitors' bill as well as theirs, but they had not consented to this, and were not required to do so. It was reasonable for the trustees' costs incurred in dealing with your request to be met from the Scheme, and for you to pay your own legal fees in respect of a matter that you had initiated. The in-specie transfer was abandoned, but it does not necessarily follow that the trustees became liable for the fees you incurred."

35. The then Ombudsman referred to the Deputy Pensions Ombudsman's Determination in July 2011 and said:-

"I see no good reason to differ with this finding. Essentially, in addition to external factors, both [Mrs L] and the trustees caused delays."

36. Since July 2011 there has been a continuation of the dispute and no agreement has been reached. There was an offer made by developers, in 2015 on the remaining farmland, but this failed to materialise as there were issues regarding the tenant's lease of the stables. Part of the farm buildings were however sold.
37. The other Trustees used the sale of the farm buildings to remove the majority of their funds from the Scheme via transfers out, in order that they could receive some of their benefits. A residual benefit may be payable to the other Trustees once a resolution can be found to the dispute. The principal employer Pentos Forman Limited was dissolved in April 2012.

## Adjudicator's Opinion

38. Mrs L's complaint was considered by one of our Adjudicators who concluded that further action was required by the Trustees. The Adjudicator's findings are summarised below.
39. These complaints from Mrs L and the current complaints from the other Trustees are all centred around how Mrs L's entitlement to the death benefit, following her husband's death, should be distributed and to subsequently find a way to allow all members to receive their entitlements and for the Scheme to be wound up.
40. Mrs L has made a number of complaints which the Adjudicator has listed in paragraph 3 above. The Adjudicator reviewed the complaints and concluded that some of them are unfounded or out of time. The Adjudicator listed below the complaints raised, as set out in paragraph 3 above, and his comments on these were:
- i. The Scheme Administrator and the other Trustees have received part payment of their pensions in 2015 without her consent while she has not received anything. **Comment:** It is true the other Trustees have received part of their pension benefits by way of transfer to other pension arrangements. The other Trustees had a statutory right to their benefits and a transfer. Mrs

L was informed of the partial distribution in August 2013 and thus this element of the complaint is outside of TPO's three-year limitation period in which to accept a complaint.

- ii. She was expected to receive a reduced share of the fund. **Comment:** This element of the complaint concerns discussions in 2009 and 2010 over the sale of parts of the property to enable the death benefit to be paid before expiry of the two-year limitation. The sale did not proceed and, again, it is outside of TPO's three-year limitation period.
- iii. She is being treated unfairly; the Scheme Administrator does not keep her properly informed and has withheld important details regarding her pension. **Comment:** The other Trustees deny any such treatment and say that Mrs L has been kept fully informed of all the issues associated with the Scheme. The Adjudicator saw no evidence of Mrs L not been properly informed in the recent dealings of the Trustees and surmised that Mrs L was referring to the exclusion from meetings in 2011 which was the subject of previous Determinations and is outside TPO's three-year limitation period.
- iv. Decisions are regularly made without her knowledge. **Comment:** Other than the exclusion from meetings in 2011, referred to above, the Adjudicator found no evidence of any such decisions being made without Mrs L's knowledge.
- v. There has been conflict within the Scheme and the Scheme Administrator refuses to employ a third-party professional to resolve these issues. **Comment:** The other Trustees say that Mrs L misunderstands the role of the Scheme Administrator and that as a Trustee she is also a Scheme Administrator. The Adjudicator agreed that all the Trustees were legally the Scheme Administrator and that the person who had been acting as Scheme Administrator had purely been acting in that capacity to ensure that the Scheme met its statutory duties.
- vi. The Scheme Administrator refuses to employ a legal adviser who is experienced in this area of law and who is impartial. **Comment:** Mrs L has complained about the involvement of the legal adviser that the Trustees employed. Mrs L was not happy with the advice provided but that is not sufficient to say that a legal adviser was inexperienced or impartial. It is for the Trustees to ascertain the need for professional advice.
- vii. The Scheme Administrator and the legal representative supposedly acting for the Scheme, have repeatedly failed in their duties. Whenever she has challenged this, her daughter has been used as a scapegoat. **Comment:** This issue again relates to the failed in specie transfer in 2010 and is outside of TPO's three-year limitation period.
- viii. She has been paying for three quarters of the legal fees associated with this dispute since 2008. **Comment:** This issue also refers to the legal costs



which were referred to in the Pensions Ombudsman's Determination in 2011 and is outside of TPO's three-year limitation period.

- ix. Significant amounts of the fund have been wasted irresponsibly. **Comment:** Mrs L has not provided any evidence to support this assertion.
  - x. Trustees' meetings are used to intimidate her and to force her into making snap decisions without full possession of the facts. These instances, however, are not reflected in the minutes of the meetings. **Comment:** Mrs L has not provided any evidence to support this complaint.
  - xi. She is not allowed to bring a third party to meetings, and she cannot afford to bring a legal adviser because of the financial difficulty she has been placed in by the Scheme Administrator. **Comment:** Mrs L has attended meetings with a third party.
  - xii. The exit strategy which was agreed unanimously in 2015 has not been moved forward by the Scheme Administrator, risking the proposed purchaser walking away. **Comment:** The evidence provided by the other Trustees shows that the sale failed because the Scheme was unable to provide vacant possession to the purchaser.
  - xiii. The actions of the Scheme Administrator and his legal adviser are causing further threats that she will not receive her pension. **Comment:** Mrs L has not provided any evidence to support her claim.
41. The Adjudicator felt that the first issue to decide was whether the Trustees had correctly determined who should be the beneficiary of Mr L's death benefit. The Trustees had agreed that Mrs L should be the beneficiary of the death benefit but the problem that has arisen is how that death benefit should be distributed. Mrs L has been insistent that she wants to receive all or part of the death benefit as a transfer of the land that her daughter's business occupies, but the other Trustees have concerns over how the value of that land is determined and what the effect would be on their residual entitlements. The other Trustees are also aware that Rule 8.4 of the Definitive Trust Deed and Rules of the Scheme dated 29 April 2008 says that "Decisions at Trustee meetings (or sub-committee meetings) must be unanimous."
42. In the Adjudicator's view the Trustees' focus on Rule 8.4 that all decisions must be unanimous has led to the current impasse and it is necessary to re-examine this Rule 8.4 in respect of the distribution of the death benefit.
43. The Adjudicator said that in previous Determinations I had set out some clear guidance as to what a decision maker needs to do when exercising a discretion such as the payment of a death benefit. In exercising a discretion, the decision-maker should:-
- ask the correct questions;

- direct itself properly in law, in particular it must adopt a correct construction of the rules/regulations governing the Scheme;
- take into account all relevant, but no irrelevant factors; and
- arrive at a decision that is not perverse, that is a decision which a reasonable person could have made.

44. The Adjudicator was of the opinion that, although the Trustees agreed that Mrs L should be the beneficiary of the death benefit, they did not fully comply with the above guidance and did not ask the correct questions or take into account all relevant factors. The questions that the Trustees did not ask was whether Mrs L had a conflict of interest and how any death benefit was to be paid.
45. Although Mrs L was a Trustee of the Scheme, she was also at the time that the decision was made a potential beneficiary of the death benefit and had a conflict of interest. A conflict of interest arises when a trustee is required to make a decision which, in line with their fiduciary duties, is in the beneficiaries' best interests, but in addition, they have a personal interest in the decision or owe a fiduciary duty to another beneficiary or entity.
46. In the Adjudicator's opinion, Mrs L had a conflict of interest in respect of the payment of the death benefit, firstly because she was a potential beneficiary and secondly because she had an interest in ensuring the continuation of her daughter's business. Therefore, the other Trustees should have considered how best to avoid Mrs L's conflict of interest.
47. The Adjudicator said that I will not normally interfere with a decision unless I consider the decision process to be flawed in some way or find that the decision is perverse, that is a decision which no reasonable person could have made. I cannot overturn a decision simply because I would have acted differently. If I find that there has been a flaw in the process, I will normally instruct the decision maker(s) to revisit the decision. In exceptional circumstances I may impose a decision.
48. The Pensions Regulator (**TPR**) published in November 2013 a Code of Practice No.13 (the **2013 Code**) entitled 'Governance and administration of occupational defined contributions trust-based pension schemes', which applied to the Trustees. The 2013 Code was replaced by a new code<sup>1</sup> in July 2016 (the **2016 Code**).
49. TPR's codes of practice are not binding in their nature. However, I am required to take them into account, insofar as they are relevant, in determining complaints made to this Office.
50. Paragraph 143 of the 2013 Code, states that the statutory requirement, under section 249A of the Pensions Act 2004, to have in place an effective system of governance,

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<sup>1</sup> Code of practice no: 13: 'Governance and administration of occupational trust-based schemes providing money purchase benefits'

includes a requirement for pension scheme trustees to ensure that they have processes in place to manage their conflicts of interest.

51. The **2016 Code** includes a section entitled 'Conflicts of interest'. TPR's expectations regarding the steps that pension scheme trustees should take to manage conflicts of interest are set out in paragraphs 61 and 62 of the 2016 Code:-

"61. Conflicts of interest may arise from time to time in the course of running a pension scheme, either among trustees themselves or with service providers or advisers. Part of the requirement in law to establish and operate adequate internal controls<sup>2</sup> includes having processes in place to identify and manage any conflicts of interest.

62. We expect these controls to include, as a minimum:

a written policy setting out the trustee board's approach to dealing with conflicts

a register of interests (which should be reviewed at every regular board meeting)

declarations of interests and conflicts made at the appointment of all trustees and advisers

contracts and terms of appointment to require advisers and service providers to operate their own conflicts policy and disclose all conflicts to the trustee board."

52. The Adjudicator had seen no evidence to suggest that the other Trustees or Mrs L took any steps to manage any conflict of duty or interests in relation to the Scheme, or that any policy was in place to do so.
53. In many schemes trustees manage this conflict of interest by agreeing that a conflicted trustee should withdraw from discussions and the decision-making process. The trust deed and rules may require unanimous decisions, and, in this event, the withdrawing trustee should first share information that is relevant to the decision before further discussion takes place between the remaining trustees.
54. The Adjudicator was of the view that the Trustees should draw up a policy document outlining how they will manage conflicts of interest.
55. As a consequence of Mrs L's conflict of interest, the Adjudicator was of the view that the Trustees should revisit their decision to award the death benefit to Mrs L and:-
- (i) Draw up a policy on how to manage conflicts of interest;
  - (ii) Reconsider the decision to award the death benefit to Mrs L, including a decision on how any death benefit is to be paid;

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<sup>2</sup> i.e. in accordance with section 249A of the Pensions Act 2004

- (iii) As the death benefit has not been paid within two years a tax charge of 55% of the amount paid will arise if this is paid as a cash sum or an in-specie transfer. This tax should be paid before any payment to a beneficiary.

- 56. With regard to a policy on how to manage conflicts of interest, the Trustees should consider TPR's code of practice and ensure that a register of interests is drawn up and explain how any trustee will manage that conflict. The Adjudicator realised, from his reading of previous correspondence, that Mrs L may dispute that she is conflicted in respect of her daughter's business, see paragraph 46 above, it was his view that she is conflicted. In order to progress matters the Adjudicator was of the view that this conflict of interest policy should be drafted within 28 days of the finalisation of this complaint.
- 57. The Adjudicator also considered the second point, see paragraph 55 (ii) above. Once the conflict of interest policy has been finalised the Trustees should reconsider their decision to award the death benefit to Mrs L and agree how any payment is to be made. The Adjudicator was of the view that Mrs L is conflicted in this matter as she is a potential beneficiary and should refrain from voting on this issue. If Mrs L is confirmed as the beneficiary of the death benefit, the Trustees will have to decide how the death benefit is to be paid, bearing in mind that there is a potential 55% tax charge, irrespective of whether this is paid in cash or as an in-specie transfer of the land that Mrs L's daughter's business occupies. Any tax charge would have to be paid before any payment or in specie-transfer is made to Mrs L.
- 58. Mrs L and the other Trustees have made claims that the other party has held up the payment of their benefits and this has been discussed in previous Determinations from this office. The previous Ombudsman referred to the delays in his 2013 Determination (PO-1209) and the previous Deputy Pensions Ombudsman's Determination (80871/1) in July 2011, and said that both Mrs L and the other Trustees had 'caused delays'. The Adjudicator did not disagree with those previous Determinations.
- 59. The Adjudicator was of the opinion, therefore, that any tax charge arising on the payment of the death benefit should be met from the Scheme before any payment is made to the beneficiary. Each member and Mrs L should pay a proportion of the tax charge in line with their original proportion of the overall fund, before the payment of partial transfers to the other Trustees, if the Trustees agree after their reconsideration that Mr L's share should be awarded to Mrs L.
- 60. Additionally, the Trustees will have to agree how the death benefit is to be paid once any tax charge has been settled. Although Mrs L has previously been insistent that she wanted an in-specie transfer of the land that her daughter's business occupies, this would not readily realise funds to meet any tax settlement. It is, therefore, appropriate that the Trustees consider how best to realise the best price for the property. It has previously been suggested that the whole property should be auctioned but Mrs L has resisted this.

61. During the course of this investigation Mrs L has made a proposal to settle the matter via her financial adviser. Mrs L has proposed that she takes on full responsibility for the 55% tax liability if there is a transfer of the property to her. The financial adviser has estimated that the potential tax liability on the other Trustees would be more than any residual share of funds that they may have left in the Scheme. The other Trustees would then be able to resign as trustees and Mrs L would remain as the sole trustee.
62. Mrs L's proposal was forwarded to the other Trustees who did not agree to the proposal as they felt it did not adequately address the issue of conflicts of interest outlined in the first Opinion or the best way to realise funds.
63. The Adjudicator was of the view that the only way to achieve the true market value of the property is to put it into auction and he suspected that HMRC would also be content with such a proposal, as it would provide a more realistic way of calculating any tax due. It would also show that the Trustees are acting in the interest of all members and allow the other Trustees to realise their remaining entitlements.
64. The Trustees should also consider whether the death benefit should be paid as a lump sum which will be subject to an 55% tax charge, as has been explained in paragraph 1 above. Alternatively, the Trustees could consider if it would be better to purchase an annuity for Mrs L. If an annuity were paid to Mrs L, in respect of a benefit due before 6 April 2015, the payment of a dependant's annuity would be taxable as pension income of the recipient. Mrs L would therefore pay tax at her marginal rate.
65. It was the Adjudicator's opinion that Mrs L should consider her position carefully. She has said that she is in financial difficulties and suffering hardship. Mrs L should therefore decide if she wants to receive any death benefit as a cash sum or as an annuity, bearing in mind the tax charge payable on either route. She should also let her fellow Trustees know of her decision before any reconsideration of the death benefit. Mrs L also has a duty to act in the best financial interests of all the members of the Scheme and in the Adjudicator's opinion the only realistic route to realise funds is to put the property up for auction.
66. In conclusion it was the Adjudicator's opinion that to move this matter forward the Trustees should within 28 days of the finalisation of this complaint revisit the decision to award the death benefit to Mrs L and:-
  - (i) draw up a policy on how to manage conflicts of interest;
  - (ii) following this and within a further 28 days the Trustees should reconsider the decision to award the death benefit to Mrs L, including a decision on how any death benefit is to be paid; and
  - (iii) consider how best to pay the death benefit either as a cash sum or by the purchase of an annuity for Mrs L.

67. In the event that no agreement can be reached on how to manage Mrs L's conflicts of interest, then rule 8.4 of the Scheme rules provides a solution. Rule 8.4 says;-

"If the Trustees cannot reach a unanimous decision on any matter (excluding decisions relating to the termination or winding up of the Scheme) the matter shall be referred to an expert unanimously appointed by the Trustees whose determination shall be binding on the Trustees. The costs of any such expert shall be an expense of the Scheme for the purposes of clause 15."

68. It was therefore the Adjudicator's opinion that this complaint should be partly upheld against the other Trustees as they did not properly consider Mrs L's conflict of interest when deciding to award the death benefit to Mrs L and how to realise assets to make any payment and pay any tax charge that arises.

69. Mrs L did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs L provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion and note the additional points raised by Mrs L.

70. Mrs L says that she feels that the majority of her complaint has been disregarded. Her complaint centres around events which took place in 2015 which she was not aware of until July 2018. The process of handling the complaint also changed part way through and she did not get the chance to submit all of the documented evidence to support her complaint. Mrs L has now submitted a number of documents to support her complaint which have been reviewed.

71. Mrs L also says that she cannot agree to resolving the Scheme's issues by way of a sale at auction. She has been advised that a sale at auction would not be in the best interests of the Scheme in the current climate.

72. Mrs L has also outlined an alternative proposal to resolve the matter which she says is the quickest way to bring this to a conclusion and she will be contacting the other Trustees about this. Mrs L says that that if the proposal is accepted by the other Trustees, then she would consider withdrawing her complaint.

### **Ombudsman's decision**

73. This is an unfortunate case as the history of this complaint does go back a number of years and Mrs L has not been able to access the share of fund that her husband had built up. The issue has been compounded by Mrs L's insistence on trying to retain the land that her daughter's business occupies and as no agreement could be reached within two years of her husband's death any lump sum payment or transfer of part of the property to Mrs L will now be deemed to be an unapproved payment and incur a tax liability.

74. Mrs L has submitted a number of documents to support her complaint which have been reviewed. These do not change my decision on the complaint or the action to be taken.

75. I find that this matter does need to be resolved and agree with the Adjudicator's conclusion that the Trustees did not ask themselves the correct questions or take into account all relevant factors when they previously agreed to award the death benefit to Mrs L. I, therefore, direct that the Trustees should now reconsider their previous decision to award the death benefit to Mrs L taking into account Mrs L's conflicts of interest and draw up a policy as to how to manage any conflicts of interest that a trustee may have. Following this the Trustees should reconsider the decision to award the death benefit to Mrs L, including a decision on how any death benefit should be paid. The Trustees should also be mindful of Mrs L's wishes in the matter.
76. Mrs L has also made an alternative proposal which she says she will bring to the attention of the other Trustees and would be the quickest way to bring this matter to a resolution. I would recommend that the other Trustees give proper consideration to Mrs L's proposal and if there is no agreement then the Trustees should proceed in line with the directions below.
77. I partly uphold Mrs L's complaint and make the following directions.

## **Directions**

78. To put matters right, the Trustees shall within 28 days of the date of this Determination:-
- (i) Draw up a policy on how to manage conflicts of interest;
  - (ii) following this and within a further 28 days the Trustees shall reconsider the decision to award the death benefit to Mrs L, including a decision on how any death benefit is to be paid;
  - (iii) as the death benefit has not been paid within two years a tax charge of 55% of the amount paid will be due if this is paid as a lump sum or as an in-specie transfer. This tax shall be paid before any payment to a beneficiary. Furthermore, the Trustees shall consider how the death shall be paid either as a cash sum or in specie transfer or the purchase of an annuity; and
  - (iv) if no agreement can be reached, then the Trustees shall appoint an independent expert in accordance with rule 8.4 of the Scheme rules.

**Anthony Arter**

Pensions Ombudsman  
13 June 2022