

Ombudsman's Determination

Applicant	Mr T
Scheme	Traction Seabert & Co Ltd RBS (the Scheme)
Respondent	PIM Trustees Limited (PIM)

Complaint Summary

Mr T has complained that PIM has failed to action his request to withdraw money from the Scheme.

Summary of the Ombudsman's Determination and reasons

The complaint shall be upheld against PIM because it has failed to meet Mr T's reasonable requests for payment of income drawdown from the Scheme. Furthermore, Mr T has suffered a severe level of distress and inconvenience due to the delay.

Detailed Determination

Material facts

1. Mr T's date of birth is 18 January 1939.
2. The Scheme is a workplace pension scheme, established in 1970. Mr T and his wife are the sole members. PIM was appointed as trustee and administrator in 2001.
3. Mr T says he retired in 1999 and took a tax-free cash sum. For several years after that he took the maximum allowed annual income withdrawal. The income withdrawal rules changed in 2015, after which he asked PIM to organise the withdrawal of a larger amount, he believes £30,000, and this was done. After this he says he took no further money from the fund, until he tried to withdraw £20,000 before the end of the financial year in 2019.
4. Mr T has confirmed that he has no other pension provision apart from the State Pension.
5. PIM is a professional trustee firm of which Mr M J Woolley (**Mr Woolley**) is the sole director and shareholder.

6. The majority of Mr T's fund is invested in Southbank Capital (**Southbank**), described as "a bridging and development finance specialist" operating in the property market. Mr Woolley is both a director and shareholder of Southbank.
7. On 12 February 2019, Mr T wrote to PIM to ask to take £20,000 from his fund before the end of the financial year. On 28 March 2019, Mr T's wife emailed Mr Woolley to reconfirm the request.
8. On 1 April 2019, Mr Woolley responded by email. He said there was approximately £7,000 in the Scheme's bank account, but that the other investments "will take a while to redeem". He advised that the £7,000 less basic rate tax could be paid before the end of the financial year.
9. Mr T accepted the £7,000 immediate payment, but said that, because the next payment would not now be until the new financial year, he would like to withdraw a further £30,000 as soon as possible. He followed this request up by email on 15 May 2019.
10. Mr T emailed Mr Woolley on 3 June 2019, and again on 24 June 2019, to express his disappointment at the lack of response to his request. In the second of these emails, he said that unless he received positive, written information he would make a formal complaint. Having heard nothing, he emailed again on 29 June 2019 to say unless he had written confirmation, by 6 July 2019, that the requested funds were in the process of being transferred he would be submitting a formal complaint.
11. Further chasers went without response.
12. Mr Woolley finally replied to Mr T on 21 February 2020 (**the February Letter**). He apologised for the delay in responding and said:-

"The original investment has paid a total of £40,666 of dividends to the scheme. The end of the payments coincided with a fundamental change in the market for the assets that we had been purchasing and a period of illness for me. Since that time I have been looking to source further funds for either reinvestment or alternatively to allow the purchase of the shares. However, there may be a resolution to this matter by the middle of 2020. Until the company can redeem the shares, there is no alternative but to hold them.

To end this I have kept the company from liquidation and covered the costs of accounting and reporting. Without that there would be no scope for the redemption of the shares.

The outcome for the scheme is there is currently no immediate prospect of the funds being realised from this investment..."

13. A pension scheme return for the Scheme, dated 31 March 2019, was sent to Mr T by PIM. This showed an asset of £100,000 named Southbank as an investment and total assets of £133,697.

Summary of Mr T's position

14. The Scheme represents Mr T's only private pension provision, so he relies on it for income.
15. Despite the positive balance shown in the Scheme return, PIM was unable to pay the full £20,000 as requested by Mr T for the tax year 2018-19.
16. PIM has become evasive and has failed to respond to Mr T's many emails requesting money to which he is entitled, or to explain why the funds are not seemingly available.
17. Having been informed that PIM did not have funds to pay the initial £20,000 in full, and no guarantee that the £30,000 would be paid, Mr T has become increasingly concerned in respect of the management of his pension and PIM's inability to provide funds.
18. These concerns were heightened in March 2020 when the Brighton Magistrates Court handed down a £10,000 fine to Mr Woolley following an investigation by the Pensions Regulator.

Summary of PIM's position

19. Following my Preliminary Decision, PIM has agreed to pay £2,000 to Mr T for the severe distress and inconvenience he has been caused by its maladministration.
20. PIM agrees that the fine handed down in the case brought by the Pensions Regulator did relate to the activity of Southbank and related to the delay in providing archived information.
21. PIM confirms that the current Scheme value is currently held in Southbank, but that £30,000 is not immediately available from the Scheme bank account. This is because Southbank is illiquid at the current time.
22. PIM says there are a number of reasons for this, the primary of which is the lack of trading in the recent years. It says it is still confident that Southbank will be in a financial position in the near future to pay funds to the Scheme. However, that is dependent on a number of current transactions being completed and funds realised. Until those funds can be realised, Southbank is unable to pay any sums to the Scheme.
23. PIM confirms that the Scheme will be repaid sums by Southbank, which it hopes to be imminent. It says it regrets that it has not been able to meet the demands of Mr T and that it has been limited in what it can confirm to him due to the circumstances.
24. It said that as soon as the circumstances of Southbank change it will make the payments to the Scheme

Conclusions

25. I welcome PIM's agreement to pay Mr T £2,000 for the severe distress and inconvenience its maladministration has caused him. However, for the avoidance of doubt I have included this in my directions.
26. However, the remainder of PIM's response to my Preliminary Decision fails to deal adequately with any of my concerns. I have found a number of breaches by PIM of its duties and that it committed maladministration as I set out in the following paragraphs.
27. PIM has certain fiduciary duties that it must adhere to. These include, but are not limited to, the following:-
 - Acting in accordance with the trust deed and rules;
 - Acting prudently, responsibly and honestly;
 - Acting in the best interests of scheme beneficiaries; and
 - Acting impartially.
28. Mr T wrote to Mr Woolley several times throughout 2019 to request payment as per earlier drawdown payments that PIM had agreed to and paid. But the transfer of money to him has yet to take place. Mr Woolley has referred, in the February Letter, to difficulties with Scheme funding, as Mr T's funds are seemingly tied up in shares in Southbank, of which Mr Woolley is the Director. This raises concerns over whether Mr Woolley is acting in the best interests of members of the Scheme, and his impartiality.
29. PIM is responsible for ensuring that there is sufficient liquidity in the Scheme assets for payments as they fall due. Moreover, as sole director of PIM, Mr Woolley has responsibilities that are entirely separate from his responsibilities as Director of Southbank. This means that PIM must ensure that the Scheme has sufficient capacity so that Mr T's drawdown request is processed within a reasonable timeframe.
29. Other than via the February Letter, PIM has not updated Mr T. It has not produced any cogent reasons why Mr T's pension drawdown has not yet been paid. Mr T has reasonably requested payment of part of his fund as income drawdown. Taking into account industry good practice, I consider that the drawdown payment should have been made by 19 February 2019; one week after Mr T had submitted his request for payment of his fund.
30. PIM has seemingly ignored Mr T's request to drawdown from his pension and is in dereliction of its duties. This will, no doubt, have caused Mr T great inconvenience, considering that he has no other pension provision except for the State Pension and is no doubt relying on that money for day to day expenditure.
31. I find PIM's failure to pay Mr T inexcusable. PIM should pay Mr T the £30,000 income he has requested.

32. Furthermore, PIM has failed to reply to Mr T's many emails and has not addressed any of the concerns raised by him. This amounts to maladministration which has caused Mr T severe distress and inconvenience. PIM has had every opportunity to engage with Mr T so he can have access to his pension funds, but they remain in the Scheme. Therefore, I consider that this merits a payment by PIM to Mr T of £2,000.

Further Observations

33. Mr T has complained to my office about his inability to obtain funds from the Scheme and I am determining his complaint on that basis. I anticipate that the directions I make below will swiftly be acted upon by Mr Woolley as director of PIM, allowing Mr T to move forward. However, I should add that I have other concerns in relation to the underlying operation and investment strategy of the Scheme, albeit that is not what Mr T asked my office to consider and it would not necessarily aid him at this time to seek to change or extend his complaint. Mr T should note that, in the event that PIM does not comply with the Directions below in paragraph 43, in addition to his right to enforce the Directions through the County Court, it would still be open to him to make another complaint to my office concerning: Mr Woolley's actions as the sole director of PIM; and any acts and/or omissions by PIM in relation to the Scheme prior to his income drawdown request.
34. I also intend to bring these matters to the attention of the Pensions Regulator.

Conflict of interest:

35. Mr Woolley is the sole director of PIM, as well as being the sole director of Southbank. As such there is a clear conflict between Mr Woolley's interests in respect of Southbank and his duties as director of PIM.
36. In allowing this conflict of interest to have arisen and continue, it is possible that PIM has been acting in breach of its fiduciary duty, as a pension scheme trustee, to avoid conflicts of interest.

Statutory investment duties:

37. Section 36(1) of the Pensions Act 1995 (the **1995 Act**), includes the requirement for trustees to exercise their powers of investment in accordance with The Occupational Pension Schemes (Investment) Regulations 2005 (**the Investment Regulations**).
38. The Investment Regulations, which set out specific requirements in relation to trustees' exercise of their investment powers under section 36(1) of the 1995 Act, are restricted in their application to the Scheme, by virtue of Regulations 6(1) and 7(1), on the basis that the Scheme has fewer than one hundred members.

39. However, despite the above restriction, Regulation 7(2) of the Investment Regulations still requires trustees of schemes with fewer than 100 members to “have regard to the need for diversification of investments, in so far as appropriate to the circumstances of the scheme”.
40. Based on the information that I have received to date, it is difficult to see how PIM could reasonably claim that it has met the requirement under Regulation 7(2) of the Investment Regulations, given that £100,000 of the Scheme’s assets totalling £133,697 were invested in the same company.

Requirements under case law

41. Case law provides further requirements for trustees to meet in exercising their power of investment, including the following:-
- Trustees are required, in investing scheme assets, to take such care as an ordinary prudent person would take if he invested “for the benefit of other people for whom he felt morally bound to provide” (*Re Whiteley [1886] UKHL 1*).
 - Trustees must act in members’ best financial interests (*Cowan v Scargill [1984] 2 All ER 750*).
42. I cannot at this stage see how, in investing so much of the Scheme’s assets in Southbank, PIM could be considered to have complied with either of the requirements set out in paragraph 41 above.

Directions

43. I direct that within 21 days of the date of the Determination PIM shall make the following payments:-
- £30,000 to Mr T from the Scheme in respect of the income drawdown he has requested.
 - £2,000 to Mr T for the severe distress and inconvenience he has experienced.

Anthony Arter

Pensions Ombudsman
23 October 2020