CAS-59054-Y3C4

Ombudsman's Determination

Applicant:	Mrs Y
Scheme:	David Whitehead & Sons Limited Small Self Administered Scheme (the **SSAS**)
Respondents:	Mr L
	Rowanmoor Executive Pensions Limited and Rowanmoor Trustees Limited (**Rowanmoor**)

Complaint Summary

Mrs Y has complained that the Trustees of the SSAS have failed to pay her the death benefits to which she is entitled in a timely manner. In particular, Mrs Y has complained that Mr L is doing all he can to frustrate and delay the process, including failing to provide Rowanmoor with an up to date portfolio valuation.

Summary of the Ombudsman's Determination and reasons

The complaint is upheld against Mr L because his actions in relation to the payment of Mrs Y's benefits amount to breach of his fiduciary duty as a trustee.

Detailed Determination

Material facts

1. David Whitehead & Sons Limited (the **Company**) was a participating employer in the Lonrho Textiles Pension Plan (the **Lonrho Plan**) until 1996. Following a management buy-out, the Company was/is owned by Mr L and his wife. Mr L was/is the Company's managing director. Mr Y was also a director and the Company's secretary and accountant.

2. The SSAS was established in 1996. It is currently governed by a Trust Deed and Rules dated 6 April 2006 (the **Trust Deed and Rules**). Extracts from the Trust Deed and Rules are provided in Appendix 1.

3. There were two members of the SSAS; Mr L and Mr Y. They were both also trustees of the SSAS, together with a professional trustee company. The first professional

trustee, appointed in 1996, was Cartwright Trustees Limited (**Cartwright**). It was replaced by Scottish Mutual Assurance plc in 2001, which was, itself, replaced by James Hay Pension Trustees Limited in 2005. Rowanmoor was appointed in April 2006, having acquired James Hay Pension Trustees Limited's small self-administered scheme business.

4. Mr L and Mr Y were both also members of the Lonrho Plan. Mr L was a member of the directors' section and Mr Y was a member of the standard section. Following the establishment of the SSAS, transfer payments were made from the Lonrho Plan in respect of both Mr L and Mr Y. Mr L's transfer payment amounted to £63,311 (including a share of a surplus). Mr Y's transfer payment amounted to £146,689 (including a share of a surplus).

5. An initial actuarial valuation of the SSAS was undertaken in 1996 by Cartwright (the **1996 Valuation Report**). The report stated:

> "The members' entitlement to benefits are determined by the contributions made to the Scheme on their behalf and the investment income earned on these contributions, but are subject to the maximum benefits allowable under Inland Revenue regulations."

6. The 1996 Valuation Report recorded that there were two members: Mr L and Mr Y. Their remuneration was recorded as £32,136 and £27,052 respectively. It stated that the objective of the valuation was to calculate, on the basis of given assumptions, the maximum annual contributions which might be paid to the SSAS in the future without the members' benefits exceeding Inland Revenue limits. It then explained the actuarial methods used.

7. The 1996 Valuation Report stated that the present value of the SSAS' retirement benefits (liabilities) was £674,433. The actuary said that, based on the information supplied and the assumptions described in his report, the benefits payable from normal retirement date were unlikely to exceed Inland Revenue limits if annual contributions did not exceed:

	Basis 1	Basis 2
Mr L	£20,709	£17,185
Mr Y	£42,586	£23,755

Basis 1 assumed level annual contributions and made no allowance for the receipt of the transfer values. Basis 2 made allowance for the anticipated level of the transfer payments.

8. A further actuarial valuation of the SSAS was undertaken in 2000. The valuation report (the **2000 Valuation Report**) stated that, as at 13 September 1999, the value of the SSAS' assets was £310,389, including the transfer payments. This was made up of £233,379 insured assets and £77,010 cash on deposit. The actuary said she had been advised by the managing trustees that the insured assets had been

notionally allocated to the member on whose life the policy was written. With regard to the non-insured assets, the actuary recorded these as shared 30% to Mr L and 70% to Mr Y. The 2000 Valuation Report stated that the maximum contributions permitted by the Inland Revenue expressed as a percentage of each year's remuneration were 42.6% for Mr L and 47.7% for Mr Y. Mr L's remuneration per annum was stated to be £35,940 and Mr Y's was £30,270. The maximum contributions were, therefore, £15,310.44 and £14,438.79 respectively.

9. According to a 2003 actuarial valuation report (the **2003 Valuation Report**), the SSAS' assets were valued at £434,642 as at 30 September 2002. However, this included a transfer payment in respect of protected rights for Mr L which the actuary noted should not have been accepted. He said he was taking steps to have the transfer payment moved to an appropriate arrangement. The 2003 Valuation Report recorded that the annual contribution for Mr L was 41.3% of his remuneration. The annual contribution for Mr Y was 58.3% of his remuneration. Mr L's remuneration for the year ending January 2003 was recorded as £38,871 and Mr Y's was £32,738. The actuary also recorded that Mr L had joined the Lonrho Plan in 1988 and Mr Y had joined in 1974[1]. The value of benefits remaining in the Lonrho Plan were £7,931 and £46,381 respectively and represented Mr L's and Mr Y's contracted-out rights (Guaranteed Minimum Pensions (**GMP**)).

10. The 2003 Valuation Report noted that the purpose of the valuation was to check that the intended contributions to the SSAS and the resulting benefits were within Inland Revenue limits. It recorded total employer contributions in each of the years ending September 2000, 2001, and 2002 at £20,000. The total member contributions in each of these years was £2,954. The 2003 Valuation Report concluded:

> "The maximum contributions permitted by the Inland Revenue for the current triennium are set out below:
>
> | | | |
> |---|---|---|
> | Annual contribution | [Mr L] | [Mr Y] |
> | expressed as a percentage | 41.3% | 58.3% |
> | of each year's remuneration | | |
> | in the first year of the triennium | £16,070 | £19,080 |
> | based on current remuneration | | |
>
> These contributions are the maximum contributions for the member to all schemes of the Employer.
>
> I confirm that the current level of the members' contributions being paid towards the scheme is within Inland Revenue limits.

[1] The actuary had assumed continuous service and continued rights for the purposes of the valuation.

> Contributions can be paid at a lower level but not at a higher level than those shown. In particular it should be noted that if remuneration fluctuates, the maximum payable is the fixed percentage of that variable remuneration."

11. Mr L has provided a copy of a note which he has explained was attached to the 2003 Valuation Report. In this, the actuary says:

> "The last report was prepared as at 13 September 1999 and there have been no major changes, however, it would appear the assets have been split incorrectly in the last report. Therefore, I have re-visited the split since we took over this scheme.
>
> Also, the IFA confirmed the [Company] was part of the Lonrho Textile Group that was sold out in 1996. For the purposes of the calculations I will assume that the members are entitled to continuous service and continued rights.
>
> Also, the GMP value was incorrectly calculated in the report …"

12. On 26 March 2004, Mr L and Mr Y instructed the then professional trustee to disinvest certain funds. The funds involved amounted to £84,009 in respect of Mr L and £203,197 in respect of Mr Y. Mr L and Mr Y asked the professional trustee to make the transfer cheques payable to Norwich Union. The letter was signed by both Mr L and Mr Y.

13. On 20 January 2006, Mr Y wrote to an employee of Rowanmoor[2] (**JC**) (the **2006 Letter**). Mr Y signed the 2006 Letter as trustee. It was a response to a request for information dated 17 January 2006. In the 2006 Letter, Mr Y referred to an attached schedule of salary history[3]. He confirmed that no bonuses had been paid. Mr Y said:

> "During the lifetime of the SSAS, we have assumed that the employer contributions to the scheme would be split pro rata to the employee contributions … thus giving the following split for the year to September 2004, and any previous years as:
>
> [Mr L] £10,959
>
> [Mr Y] £9,041
>
> The member contributions are genuine contributions to the SSAS by [Mr L] and myself, which are represented by deductions each month from our respective salaries and paid into the SSAS bank account …"

14. In 2006, Mr Y began to draw an annual pension of £15,625. In addition, he took a lump sum of £84,005. Payment of the lump sum and pension was confirmed by a Trustees' Memorandum signed by Mr Y, Mr L and Rowanmoor in May 2006 (the **Trustees' Resolution**).

[2] Then James Hay Pension Trustees Ltd.
[3] A copy of the schedule has not been supplied to the Pensions Ombudsman's Office.

15. On 19 May 2006, Rowanmoor wrote to Mr Y confirming safe receipt of the Trustees' Resolution and that it had been signed by Rowanmoor. The author of the letter (**CN**) said she had telephoned Mr L that day to request a cheque be drawn for Mr Y's lump sum. She said Mr L would speak to Mr Y on Monday 22 May 2006.

16. In April 2017, Mr Y's share of the fund was valued by Rowanmoor at £192,697.

17. Mr Y died in March 2018. Mrs Y, was named on his expression of wish form as the recipient of any death benefits payable by the SSAS. She was also the sole beneficiary under Mr Y's will. Mrs Y submitted paperwork to claim a death benefit to Mr L in April 2018. He forwarded this on to Rowanmoor.

18. Mr L subsequently raised a query concerning his and Mr Y's respective shares of the SSAS' funds. Briefly, Mr L was of the view that he should have been allocated a larger share of the funds because he held a more senior position in the Company. He was also of the view that a transfer payment from the Lonrho Plan relating to a surplus in that scheme should not have been divided between him and Mr Y.

19. Mrs Y's claim to a death benefit was the subject of an application to the Pensions Ombudsman in 2019. Following an investigation by an adjudicator, Mrs Y's complaint was resolved on the basis that Mr L and Rowanmoor would appoint an expert, under Clause 8.4 of the Trust Deed (see Appendix 1), to decide the amount of death benefit payable to Mrs Y.

20. The first independent expert was appointed in December 2019 but resigned in February 2020. Robert Graham & Co, was appointed in February 2020. Robert Graham & Co is a SIPP and SSAS provider. It provides professional trustee, scheme administration and actuarial services.

21. Also in February 2020, Mr L and his wife signed a directors' resolution (the **Board Resolution**) allocating 100% of the employer contributions paid since the establishment of the SSAS to him. Mr L states that the minute was drafted by a solicitor who had been asked, by the first independent expert, to given an opinion on the status of the 2006 Letter. Mr L states that the solicitor's opinion was that the 2006 Letter was not binding and the allocation of the employer's contributions was a matter for the Company to determine. Mr L states that, in the absence of any instructions from the Company, the solicitor was asked to draft a minute for the board of the Company to execute.

22. Robert Graham & Co issued its report on 22 September 2020. A summary of the report is provided in Appendix 2. It concluded:

> "… subject to the legal point of whether an agreement made in a conversation between the directors counts as a company decision, we believe that the more credible split is the 54.80% to [Mr L] / 45.20% to [Mr Y] split."

23. In April 2021, in correspondence with Mr L's solicitors, solicitors acting for Rowanmoor said the amount payable to Mrs Y had been estimated to be £172,282, but an exact amount required a current portfolio valuation.

Mrs Y's position

24. It is submitted on Mrs Y's behalf:-

- Contrary to Mr L's assertion that he always responded to requests for information from Robert Graham & Co immediately and provided all the information requested, she was informed by Robert Graham & Co that, in March 2020, Mr L had refused to provide any additional information.

- Robert Graham & Co advised her that it had stopped work on its report because it required clarity and agreement on its role following the action taken by Mr L to allocate 100% of the employer's contribution to himself.

- Mr L was asked to transport a box of evidence from the first independent expert appointed, which subsequently declined the case, to Robert Graham & Co. During that time, it appears that he opened documents which were not addressed to him and which were marked private and confidential.

- Neither she nor her family have provided Rowanmoor with letters and papers.

- Mr L has asserted that there is a conflict of interest because her son works for Rowanmoor. Her son began working for Rowanmoor in 2010, which was after his father had begun to draw his benefits. Mr L was aware, in 2018, that her son worked for Rowanmoor and did not raise an issue at that time.

- Mr L has argued that he was not involved in the process for agreeing Mr Y's retirement benefits. However, the Trustees' Resolution was signed by him and quoted Mr Y's lump sum and annual pension. Mr L also signed a standing order mandate allowing pension payments for Mr Y from the Company's payroll. He was in possession of the SSAS' cheque book and was contacted by Rowanmoor to arrange payment of Mr Y's lump sum.

- Throughout this process, Mrs Y has been told that, because she is not a trustee of the SSAS, little information could be provided to her. She had no input into the decision to appoint an independent expert nor did she receive full updates from Robert Graham & Co. In the circumstances, she should not bear any share of the cost of obtaining Robert Graham & Co's report.

Mr L's position

25. Mr L has made extensive submissions. What follows is, of necessity, a summary of the main points:-

- He did not seek to delay the process and frequently pressed Robert Graham & Co for its report. He was advised that the delay was caused by the Covid-19 pandemic.

- Throughout, he responded to requests for information from Robert Graham & Co immediately and provided all of the information requested. He was unable to provide copy P60s from 1996 because these had not been retained. He did not supply full copies of the Company's statutory accounts from 1996 to 2019, which amounted to between 10 and 15 pages per annum. Following a conversation with Robert Graham & Co, he did supply information about salaries and dividends (see below).

- The SSAS' share portfolio is maintained by a third party to whom Rowanmoor has direct access. Rowanmoor requested a valuation in October 2021 and this was provided.

- Any delays have been caused by the involvement of the Pensions Ombudsman's Office (**TPO's Office**) and the independent expert. The decision to refer the matter to the Pensions Ombudsman was made by Mrs Y and her family. The application to TPO's Office was made in June 2019, but the direction to appoint an independent expert was not made until November 2019; some five months later.

- Mr Y was an employee; whereas he was the owner of the Company. As the owner of the Company, he was paid a salary and also dividends. Following the management buy-out, eight employees continued to be employed by the Company. All were offered the opportunity to join the SSAS, but only Mr Y and he took this up. Mr Y was treated the same as the other six employees and there was no intention to enhance Mr Y's salary with employer contributions to the SSAS. The payment of pension contributions by the Company was intended solely as a tax efficient way for the owner to extract funds from the business. Through his actions, Mr Y effectively gave himself an unauthorised salary increase of around 30% per annum.

- Contrary to Robert Graham & Co's report, he and Mr Y did not fulfil broadly similar roles with broadly similar remuneration. Mr Y's total remuneration for the period 1996 to 2003 was £248,000; whereas his total remuneration for that period, as owner of the Company, was £640,000 when pension contributions (£150,000) and dividend income is included (see Appendix 3 for a breakdown of salary and dividend figures).

- Information about their respective salaries and his dividend receipts was provided to Robert Graham & Co, but this was ignored despite Robert Graham & Co acknowledging that dividends formed part of his remuneration.

- Robert Graham & Co also ignored legal advice provided for the previous independent expert as to the effectiveness of the 2006 Letter. Nor did Robert Graham & Co seek legal advice of its own, despite not being lawyers.

- On being appointed, Robert Graham & Co highlighted the fact that time had, to all intents and purposes, run out with regards to paying the death benefits within two years of Mr Y's death and queried why it had taken so long to reach this point. He was unable to comment other than to advise that the matter had been referred to the Pensions Ombudsman nine months previously.

- Robert Graham & Co referred to a directors' conversation in its report. There was no such conversation.

- He was not aware of any transfer of funds to Norwich Union. A small transfer of funds was paid into the SSAS by Norwich Union in respect of a KPMG pension he held. In 2005, there was a surrender of Scottish Mutual policies amounting to £337,005.87.

- He would have expected documents supplied to Robert Graham & Co by Mrs Y and her family and Rowanmoor to be shared with him, but this did not happen. He is aware that Robert Graham & Co also did not share documents supplied by Mrs Y and her family with Rowanmoor.

- He did not have a copy of 2006 Letter on his files and was told by Rowanmoor that it had been supplied by Mrs Y's family.

- He was not contacted by Rowanmoor at the time of Mr Y's retirement and was not contactable because he was out of the office. Mr Y was in possession of the SSAS' cheque book and cash book. Mr Y wrote the cheque for the £84,005 lump sum and made the entry in the cash book.

- He contacted the first independent expert in order to retrieve lever arch files containing his paperwork. When he collected these, inside one of the files was a torn brown envelope containing the papers from Rowanmoor. The first independent expert did not say that these papers were private and confidential or that they should not be read.

- Having read through the documents supplied by Rowanmoor, he identified a number of false statements made by Rowanmoor and documents which had been omitted from the evidence it had supplied.

- He received the report from Robert Graham & Co by email on 22 September 2020. He was not responsible for its distribution and is unable to say why it was not received by Mrs Y's family until October 2020.

- Having received the report by Robert Graham & Co, he believed the conclusions to be perverse. He did not agree with the report because it did not include the details about his entire remuneration package which Robert Graham & Co had requested.

- He contacted Cartwright, a firm of financial advisers, David Roberts & Partners Limited and one of its former employees (**Mr N**) who had been in post at the time

the employer's contributions were made. None of them had any information on file relating to the split of the employer's contributions.

- An employee of Rowanmoor informed him that Mr N was dead and that this was why he had not been contacted.
- He was not surprised that Mr N did not have any information about the split of the Company's contributions because there was no information.
- The lack of evidence indicates that Rowanmoor relied solely upon the 2006 Letter to determine the split of the employer's contributions.
- Rowanmoor failed to provide Robert Graham & Co with a copy of the 2006 Letter.
- Rowanmoor failed to interview JC even though he has established that JC is now working for the Embark Group, which includes Rowanmoor.
- The correspondence between JC and Mr Y was conducted without his knowledge whilst he was both trustee of the SSAS and owner of the Company. He was not copied into the "Strictly Personal" correspondence between JC and Mr Y. This correspondence concerned Mr Y's own pension benefits but was written in his capacity as a trustee of the SSAS. This is a conflict of interest and a breach of his fiduciary duty to Mr L.
- The 1996 Valuation Report is the most significant of the three actuarial valuation reports which were produced for the SSAS. Rowanmoor only supplied Robert Graham & Co with the 1999 Valuation Report and the 2002 Valuation Report.
- No instructions were issued by the Company as to the split of the employer's contributions between the members of the SSAS.
- Rowanmoor has failed to respond to his requests for information about its processes. In particular, it has failed to disclose how the process of calculating Mr Y's retirement benefits was evidenced as having been completed and who signed it off, given that JC was an unqualified pensions administrator at the time.
- He believes that Mr Y's pension benefit calculations were wrong and were agreed, unchecked, by an unqualified person.
- Instead of responding to his requests for information, Rowanmoor appointed solicitors and threatened him with legal action. He was forced to appoint solicitors to defend himself. His solicitors have requested information from Rowanmoor and, until they receive answers to their queries, he is unable to move the matter of Mrs Y's benefits forward.
- He agrees to be bound by the Determination to the extent that he will provide information requested by Rowanmoor relating to the SSAS' portfolio valuation as at 21 December 2021 and 5 April 2019 to enable it to calculate the death benefits.

- While he agrees that it is unacceptable that the matter of Mrs Y's death benefits is outstanding after three and a half years, he does not agree that he should compensate her for any distress and inconvenience. This is because of the potential fraud and breach of fiduciary duty on Mr Y's part which he has uncovered and the delays by TPO's Office.

- He does not agree that he should be held responsible for any tax charge because the decision to refer the matter to the Pensions Ombudsman was taken by Mrs Y and her family.

Rowanmoor's position

26. Rowanmoor submits:-

- Following the adjudicator's opinion, it was agreed that an independent expert would be appointed and that its findings would be binding on the trustees.

- Robert Graham & Co's report was issued in September 2020 and it is happy to proceed with the recommendations and ensure that death benefits are paid to Mrs Y.

- Mr L did not accept Robert Graham & Co's conclusions. It has reviewed Mr L's complaints and it does not believe that the issues which he has raised would alter the conclusions reached by Robert Graham & Co.

- It acknowledges that one of its employees informed Mr L that Mr N was dead. This was a genuine error and its employee had confused Mr N with someone else with a similar name. Ultimately, Mr N was not able to provide any information relating to the dispute.

- It had suggested to Mr L that Cartwright could be contacted but that it would require his authority to do so. No authority was provided by Mr L.

- If death benefits are not paid in accordance with the conclusions reached by Robert Graham & Co, it will attempt to obtain a court order to enforce the report's findings.

Conclusions

27. As trustees of the SSAS, Mr L and Rowanmoor have a duty to act in accordance with the SSAS' governing documentation. They have a duty to act in the best financial interests of the trust's beneficiaries. They also have fiduciary duties.

28. The Courts[4] have described the actions of a fiduciary as follows:

> "A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may

[4] *Bristol and West Building Society v Mothew* [1996] 4 All ER

> conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal."

29. Case law has established that, broadly, the duties of a fiduciary are:-

- Not to put themselves in a position of actual or potential conflict with the interests of the person to whom they are a fiduciary without express consent. Potential or possible conflict arises where there is "a reasonable apprehension of a potential conflict, not a mere theoretical possibility"[5];
- Not to derive personal profit from their position as a fiduciary; and
- To keep information received by them during the subsistence of the fiduciary relationship confidential.

30. The Pensions Regulator also provides guidance for the trustees of occupational pension schemes on identifying and managing conflicts of interest. It says:

> "A conflict of interest may arise when a fiduciary … is required to take a decision where:
>
> 1. the fiduciary is obliged to act in the best interests of his beneficiary; and
> 2. at the same time he has or may have either
>   1. a separate personal interest or
>   2. another fiduciary duty owed to a different beneficiary in relation to that decision, giving rise to a possible conflict with his first fiduciary duty, which needs to be properly addressed."

31. The Pensions Regulator explains that a conflict of interest can result in actions or inactions which are not in the best interests of the trust's beneficiaries.

32. The evidence indicates that Mr L has breached his fiduciary duty because he failed to identify that he had a conflict of interest when making a decision about the death benefits payable on Mr Y's death. Clause 9 of the SSAS' Trust Deed and Rules allows a trustee to delegate a decision (see Appendix 1) and I can see no reason why Mr L did not take this approach from the outset.

33. Following the investigation of Mrs Y's previous complaint, Mr L agreed to the appointment of an independent expert, under Clause 8.4. However, he has since refused to accept Robert Graham & Co's conclusions and has brought a separate complaint to me against Rowanmoor[6]. He continues not to acknowledge or mitigate the conflict of interest he has as both trustee and beneficiary of the trust.

34. Mr L raised a number of issues with Robert Graham & Co's decision. I have dealt with these under his complaint against Rowanmoor. I have found that there are no

[5] *Marks and Spencer v Freshfields Bruckhaus Deringer* [2004] 3 All ER 773
[6] CAS-35438-M6P6

grounds for setting aside Robert Graham & Co's decision. Mr L, as a trustee of the SSAS, is bound to implement Robert Graham & Co's findings under Clause 8.4.

35. Mr L has sought to argue that Mr Y's retirement benefits were incorrectly calculated; largely because he considers that a greater portion of the SSAS' assets should have been allocated for his own benefit. In order to make his case, Mr L has sought to discredit Rowanmoor's administration processes. For example, he argues that the retirement benefits calculations were undertaken and signed off by JC; whom he describes as an unqualified pensions administrator. It is clear from the evidence that this was not the case. The calculations were undertaken by Rowanmoor's actuarial department and 'signed off' by the SSAS Trustees, including Mr L, under the Trustees' Resolution in 2006.

36. In addition, Mr L sought to have 100% of the employer's contributions retrospectively allocated for his own benefit by means of the Board Resolution in February 2020. Mr L has said that the Board Resolution was drafted by a solicitor on the basis that the 2006 Letter was not binding and the allocation of the employer's contributions was a matter for the Company to determine. I have not had sight of the legal advice Mr L refers to, but I have had sight of the SSAS' Trust Deed and Rules. Contrary to Mr L's assertion, Rule 5.1 provides:

> "5.1 The Employers shall make **such contributions to the Scheme as the Principal Employer may from time to time agree with the Trustees**. ..." (Emphasis added)

37. There is no evidence of any agreement between the Company and the Trustees to allocate 100% of the Company's contributions to Mr L. In fact, the evidence tends to suggest that such an agreement was highly unlikely to have been made. This is for two reasons: a Company contribution of £20,000 in any of the years in question in respect of Mr L would have exceeded Inland Revenue limits as advised by the SSAS' actuaries; and Mr Y (as a trustee) is unlikely to have agreed to nil Company contributions being allocated for his benefit. The first of these reasons is sufficient, on its own, to suggest that no such agreement was, or could have been, made between the Company and the Trustees. This is because Rule 5.2 provides:

> "5.2 An Employer may at any time pay additional contributions to the Trustees provided that this **does not prejudice Registration** and the Trustees are satisfied that this will not result in the Scheme being treated as having made an Unauthorised Payment …" (Emphasis added)

38. In his role as trustee, Mr L would have been well aware that the contributions he was/is seeking to have allocated for his own benefit were in excess of the Inland Revenue maximums for the tax years in question, as calculated by the SSAS' actuaries at the relevant times.

39. Mr L has suggested that the dividends he received as a shareholder/owner of the Company should have been included in his remuneration. Mr L is a member of the

SSAS in his capacity as an employee of the Company; that is, as a consequence of his role as a director, not as owner of the Company. The dividends Mr L receives as owner of the Company are not paid to him as part of his remuneration as a director. Rule 5.1 provides that the Employer (the Company) shall contribute: "only such sums as relate exclusively to the benefits to be provided **in respect of employment with that Employer**" (my emphasis). The Company can only make contributions to the SSAS in order to provide benefits which relate to employment by the Company; not ownership of the Company.

40. The actuaries calculated the maximum contributions on the basis of remuneration information provided to them at the relevant times. This was clearly set out in the valuation reports they provided and not queried by Mr L at the time. I see no reason to re-write history at this late stage.

41. Mr L's action, in signing the Board Resolution as a director of the Company, clearly demonstrates his failure to acknowledge or take steps to manage his conflict of interest.

42. As a consequence of Mr L's failure to acknowledge and/or mitigate the conflict of interest he has as a trustee and beneficiary of the SSAS, the matter of Mrs Y's benefits remains undecided. It is now over three and a half years since Mr Y died. In that time, Mrs Y has been without the benefits to which she is entitled under the SSAS Trust Deed and Rules. She has also been required to pursue the matter, not once but twice, with my Office. While I acknowledge that Mrs Y has had the benefit of support from her family, I have no doubt that the process has been extremely distressing for her; not least because Mr L has also sought to cast doubt on Mr Y's integrity.

43. For example, Mr L has sought to portray the calculation and payment of Mr Y's retirement benefits as having been concealed from him. He fails to acknowledge that, as a trustee, he signed the Trustees' Resolution in 2006 agreeing to an annual pension of £15,625 and a lump sum of £84,005 for Mr Y. Robert Graham & Co also noted that Mr L was the sole signatory on a fax sent to McMillan & Co, dated 12 June 2006, instructing them to pay Mr Y's pension via the Company's payroll at £1,302.08 per month. He can hardly then argue that he did not know what Mr Y would be receiving. The fact that Mr Y may have been the one to write the lump sum cheque and update the cash book does not detract from this. Indeed, Mr Y's actions in writing the cheque and updating the cash book are not indicative of someone seeking to conceal matters.

44. With regard to delay, I am well aware that cases referred to my Office take longer to process than is ideal. However, referral of a matter to an independent expert under Clause 8.4 does not require a direction from me. Mr L could easily have facilitated this long before it was pointed out to him by my Adjudicator in 2019.

45. On the matter of referral to Robert Graham & Co, I note the suggestion that Mrs Y should not bear any part of the cost of its report. Whilst I understand her position, I

find that this was a legitimate action by the SSAS Trustees and Clause 15 of the Trust Deed and Rules provides for such costs to be paid from the Fund.

46. I uphold Mrs Y's complaint against Mr L.

Directions

47. Within 28 days of the date of my Determination, Mr L shall provide Rowanmoor with any additional information it requires to put Robert Graham & Co's determination into effect. In particular, Mr L shall provide Rowanmoor with any portfolio valuations it requires in order that it may accurately calculate Mrs Y's benefits.

48. Given the amount of time which has elapsed since Mr Y's death, it is possible that the payment of any lump sum death benefit may result in a tax charge[7]. Mr L shall ascertain from Rowanmoor whether and, if so, how much the additional tax liability is. Mr L shall reimburse Mrs Y for any additional tax charge she incurs because of the late payment of her benefits.

49. In addition, within 28 days of the date of my Determination, Mr L shall pay Mrs Y £2,000 for the severe distress and inconvenience she has sustained as a result of his failure to acknowledge and manage his conflict of interest.

50. I am aware that Clause 13 and 14 of the SSAS Trust Deed and Rules provide for the Company to indemnify the Trustees against "any costs, claims, demands, expenses, proceedings and liabilities" except in cases of fraud. However, if the Company fails to indemnify the Trustees, the Trustees are entitled to be indemnified from the Fund. This raises the possible scenario that the Company will not indemnify Mr L and any tax charges and the payment for distress and inconvenience would be funded from the SSAS. If this were to occur, Mrs Y may well have grounds to make a further complaint to me against the Company on the grounds that this would, effectively, reduce her future entitlement.

Anthony Arter
Pensions Ombudsman

20 January 2022

[7] Section 206, Finance Act 2004

Appendix 1

Trust Deed and Rule of the SSAS

51. Clause 8.4 of the deed provides:

> "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 …"

52. Clause 9 of the deed provides:

> "… the Trustees may delegate and/or authorise the sub-delegation of all or any of their powers, duties, trusts or discretions (including this power to delegate) to any person …"

53. Clause 13 of the deed provides:

> "13 Exclusion of Liability
>
> 13.1 To the extent permitted by law and subject to clause 14 and sections 33 and 34 of the 1995 Act no Trustee shall incur any liability for:
>
> (a) the exercise or failure to exercise any power or discretion;
>
> (b) acting as a Trustee of the Scheme;
>
> (c) the acts and omissions either of co-Trustees, agents, Advisers or any other pension, or
>
> (d) any other act or omission.
>
> 13.2 Subject to clause 14 the Employers (on a joint and several basis) shall indemnify each and all of the Trustees against any costs, claims, demands, expenses, proceedings and liabilities which they may incur through acting as a Trustee of the Scheme except in cases of fraud by any Trustee (where the Trustee who committed fraud and any Trustee who knowingly ignored the fraud shall not be indemnified). Subject to section 31 of the 1995 Act, should the Employers fail to indemnify them (whether in full or in part) the Trustees shall be entitled to be indemnified from the Fund ..."

54. Clause 14 of the deed provides:

> "14 Limitation and extent of protection

14.1 The provisions of clause 13 shall not protect a Trustee in relation to any breach of trust arising out of fraud.

14.2 If the inclusion of any words in clause 13 and/or this clause 14 would at law render ineffective any protection given to any Trustee (whether given by law or under this Definitive Deed) then the clause is to be construed otherwise to the minimum extent necessary so that the protection would not be rendered ineffective.

…

14.4 No indemnity under clause 13 shall apply in respect of any loss or liability that is covered by any insurance policy or policy of indemnity. Where the terms of any such insurance or policy of indemnity provide that cover will only be provided to the extent that an indemnity is not available from another source, no indemnity under clause 13 shall have effect in relation to any liability which would otherwise be fully covered by the insurance of policy of indemnity."

55. Clause 16.1 of the deed provides:

"16.1 The Fund shall be vested in the Trustees as joint tenants and held by them upon irrevocable trusts in accordance with the terms of the Definitive Deed.

16.2 All monies, assets, investments and property received by the Trustees for the purposes of the Scheme shall form part of the Fund …"

56. "Fund" is defined as:

"… the monies, assets, property and investments held for by or on behalf of the Trustees on the trusts of and for the purposes of the Scheme and which from time to time constitute the fund of the Scheme. It includes (but is not limited to) contributions from Employers and Members, assets accepted or acquired by the Trustees for the Scheme and any resulting investment gains, returns or interest. This expression includes where appropriate any part of the Fund."

57. Clause 32 of the deed provides:

"32.1 Except as provided for expressly in the Definitive Deed the Trustees shall have full power to determine conclusively any questions or matters of doubt concerning the Scheme or the construction of the Definitive Deed …

32.2 Such determination shall be binding on all interested parties."

58. Rule 5 “Employer’s Contributions” provides:

> “5.1 The Employers shall make such contributions to the Scheme as the Principal Employer may from time to time agree with the Trustees. The Employers shall contribute only such sums as relate exclusively to the benefits to be provided in respect of employment with that Employer.
>
> 5.2 An Employer may at any time pay additional contributions to the Trustees provided that this does not prejudice Registration and the Trustees are satisfied that this will not result in the Scheme being treated as having made an Unauthorised Payment. Such contributions may be made either for the general purposes of the Scheme or for one or more of the specific purposes referred to in this Definitive Deed …”

59. Rule 8.3 provides:

> “At any time from a Member attaining Normal Minimum Pension Age … the Trustees may apply all or such part as they may determine of a Member’s Accumulated Credit towards the provision of a Scheme Pension or the purchase of a Lifetime Annuity.”

60. “Accumulated Credit” is defined as:

> “… in relation to any Member … that part of the Fund which is determined by the Trustees subject to the following provisions of this definition as relating to the relevant Person at that time, having regard to:
>
> (a) the contributions paid into the Scheme on behalf of the Person by the Employers and … by the Person;
>
> (b) any transfer amounts paid into the Scheme on behalf of the Person;
>
> (c) the income and capital position of the Fund (after allowing for expenses and other deductions); and
>
> (d) any other matters which the Trustees consider appropriate.
>
> Nothing in this definition shall confer on any person any right to any specific assets of the Fund which may be allotted to him on a notional basis for the sole purpose of determining the value of his Accumulated Credit from time to time. The Trustees may … have regard to the advice of an Actuary …
>
> The Trustees shall in exercising their powers to determine the Accumulated Credit in respect of a Person exercise them in such manner that they are satisfied that their determination will not result in an Unauthorised Payment, or in an Unauthorised Payment being treated as having been made …”

61. Rule 12.12 provides:

> "In respect of benefits expressed to be payable in accordance with this Rule ("Death Benefit"):
>
> (a) any Death Benefit shall be held separately from the rest of the Fund on discretionary trusts to be distributed on such terms and in such shares as the Trustees decide to or for the benefit of any of the deceased's Death Benefit Beneficiaries …
>
> (b) all Death Benefits shall be distributed within two years of the date of death of the deceased. If all or part of a Death Benefit remains unpaid at the end of two years from the date of death it shall be retained for the general purposes of the Scheme …"

Appendix 2

Robert Graham & Co Report

62. The main points in the report are summarised below:-

- The SSAS has been funded since establishment by: transfer payments; regular monthly employee contributions via the Company payroll; and a number of ad hoc employer contributions.
- The payments to the SSAS comprised:

  Transfers

  a. £206,529 from the Lonrho Plan in October 1997

  b. £496.82 from Norwich Union in December 1997

  Employee contributions

  a. £246.15 per month from September 1996 to March 2006

  b. £134.88 per month from April 2006 to January 2008

  Employer contributions

September 1996	£10,000
September 1997	£20,000
September 1998	£20,000
September 1999	£20,000
September 2000	£20,000
September 2001	£20,000
September 2002	£20,000
September 2003	£20,000
Total	£150,000

- The benefits paid to Mr Y comprised

Lump sum	£84,005	paid June 2006
Income	£3,580.72	paid June 2006
	£1,302.08	paid monthly from July 2008 to March 2018

- Allocation of transfer receipts

  a. Lonrho Plan £34,761 (28.62%) to Mr L

£86,678 (71.38%) to Mr Y

b. Norwich Union £496.82 (100%) to Mr L

- Allocation of employee contributions

  September 1996 to March 2006

  £134.88 (54.8%) to Mr L

  £111.27 (45.2%) to Mr Y

  April 2006 to January 2008

  £134.88 (100%) to Mr L

- With regard to £85,090 relating to a surplus in the Lonrho Plan, Mr L was of the view that this should be allocated solely to him because he had been a member of the directors' section, which had granted enhanced benefits compared to other sections of the Plan. Mr L had also argued that he had "fought with" the Lonrho Plan to get a share of the surplus and so should be entitled to it. In conversation, Mr L had appeared to accept that it was industry standard to allocate a surplus in proportion to the individual transfer values.

- All employer contributions had been allocated on the basis of 54.8% to Mr L and 45.2% to Mr Y. Mr L was of the view that the employer allocations should have been allocated entirely to him.

- Cartwright had confirmed that the transfer surplus received had been allocated to the members of the SSAS in proportion to their share of the pension liabilities in respect of the Lonrho Plan (28.62% to Mr L and 71.38% to Mr Y).

- The enhanced benefits granted by the directors' section should have been reflected in Mr L's individual transfer value; that is, it would have been relatively higher than Mr Y's transfer value for the same employment history. It had not been able to verify this.

- It had not seen any evidence that the surplus related disproportionately to any particular part of the Lonrho Plan.

- It acknowledged Mr L's role in securing a share of the surplus, but was not aware that this created 'ownership' of the surplus.

- Rowanmoor had provided the following documents in support of its allocation of the employer contributions:-

  - A letter of 17 January 2006 to Mr Y (at the Company's address) requesting a split for the £20,000 contribution paid in the year ending September 2004.

  - Mr Y's response dated 20 January 2006 (on Company headed notepaper) advising that, during this lifetime of the SSAS, it had been assumed that the

employer's contribution would be split pro rata to employee contributions; that is, £10,959 to Mr L and £9,041 to Mr Y.

- Mr L had provided a copy of a minute of a meeting of the Board of Directors of the Company, dated 17 February 2020, signed by himself and his wife as directors (the **Board Resolution**). This stated:

  "It was resolved that the total Contributions paid by the Company to the Scheme of £150,000 be 'allocated to [Mr L's] fund within the Scheme, and to [Mr L's] "Accumulated Credit" within the Scheme within the meaning of the Rules'."

- Mr L had obtained legal opinion and the following points were noted:-

  a. It was for the Company and not the Trustees to decide for whose benefit the employer contributions were made.

  b. The Company had resolved to allocate the contributions to Mr L.

  c. Mr Y's letter, of January 2006, had no legal standing because it had been written as a trustee, it was not unanimous, and it conveyed only an assumption as to the allocation of the contributions.

- It understood it was for the Company to determine how contributions were to be allocated between the members. If the Board Resolution was the Company's sole statement regarding the allocation of contributions, it would be reasonable to assume that any employer contributions should be allocated on that basis.

- It understood that there was no prescribed manner in which the Company might make a declaration or determination regarding the allocation of employer contributions; that is, it was not aware of any requirement, either in law or in the SSAS rules, which specified that a board resolution was required to determine allocation of the employer contributions.

- It, therefore, returned to the question of whether Mr Y's letter of 20 January 2006 could be accepted as evidence of the Company's determination of the allocation of employer's contributions. It considered the following to be relevant:-

  - Mr Y was a working director of the Company when he sent the letter.

  - The letter was written on Company headed notepaper.

  - The letter was a direct response to a request to the Company for confirmation of the allocation of employer contributions.

  - There was no evidence of any input from any other Company officers, but Mr Y was the finance director (or equivalent) and was generally authorised to convey Company decisions to third parties.

  - Mr Y had signed the letter as a trustee, but this was likely to be because he believed that this was the appropriate format in which to respond to the SSAS

administrators. It was probably not intended to invalidate his parallel authority as a director of the Company.

- It was reasonable for Rowanmoor to rely on Mr Y's letter as sufficient confirmation from the Company as to the allocation of the employer contributions. However, there was no positive evidence that this was the Company's determination regarding allocation. It would be helpful to consider ancillary evidence.

- It had modelled the fund shares based on the three allocations: the 54.8/45.2% split; the 100% allocation of employer contributions to Mr L; and the 100% allocation of employer contributions and transfer surplus to Mr L. Either of the latter two calculations would mean that Mr Y's benefits had been substantially overstated.

- It noted that Mr L had signed the Trustees' Memorandum, on 15 May 2006, confirming a lump sum of £84,005 and an annual pension of £15,625 for Mr Y. He was also the sole signatory on the fax sent to McMillan & Co, dated 12 June 2006, instructing them to pay Mr Y's pension via the Company's payroll at £1,302.08 per month.

- It accepted that Mr L would not have calculated the fund split himself, but he was a qualified accountant and would have had an intuitive feel for the magnitude of the figures. It was common knowledge that the lump sum represented 25% of the member's fund value. It questioned whether it was reasonable for Mr L to claim to have believed that Mr Y's sole receipts were £86,678 transfer value and £111.27 monthly contribution and yet signed off a lump sum of £84,005; implying a fund value of £336,021. The same applied if Mr L accepted that the transfer surplus had been split pro rata; albeit to a lesser extent. Alternatively, it indicated that Mr L had agreed to the split of employer contributions as indicated in Mr Q's letter.

- On the basis of its experience of small self-administered schemes, the common sequence of events relating to employer contributions was: the directors would decide what contributions should be paid; and the directors would then consider how the contributions should be allocated between the members. It suspected that, whilst the first step had been undertaken, the second step was not. It was, therefore, impossible to know or authentically recreate conversations which took place at the time or to state with any certainty how the employer contributions would have been allocated at the time.

- In its experience, it would normally expect a significant weighting in favour of a shareowner director. A company might view this as, in effect, a distribution of profit to key persons. It might relate to the amount of bonus or dividends payable to each person. Each company was different, so it was feasible that all or none of each year-end contribution could have been allocated to either Mr L or Mr Y.

- A split of 54.80% to Mr L and 45.20% to Mr Y appeared somewhat generous to Mr Y. It would have expected to see a split of 75% to Mr L and 25% to Mr Y. On this basis, Mr Y's lump sum and pension would have been overstated.

- It had been provided with two actuarial reports: 13 September 1999 and 13 September 2002. On the basis of the maximum contributions permitted for each member, as stated in the reports, allocating 100% of the £20,000 per annum employer contribution (in addition to employee contributions) would have meant that Mr L exceeded the maximum contributions limits.

Findings

- Transfer surplus - £85,090

  It was standard industry practice to allocate the value of a transfer of surplus in line with the proportion of each member's transfer sub-fund. Mr L had not produced any evidence that the surplus should have been allocated entirely to his share of the fund. His role in obtaining a share of the surplus did not entitle him to it. The transfer of surplus had been correctly allocated as £24.353 (28.62%) to Mr L and £60,737 (71.38%) to Mr Y.

- Employer contributions

  It was challenging to advise a single correct split of the employer contributions. It depended upon legal advice, which it was unable to provide.

  If the legal advice was that the only method of allocating employer contributions was via a written company resolution signed by all of the directors of the company or a similar document, it would be obliged to conclude that 100% of the employer contributions should be allocated to Mr L in line with the February 2020 Minute provided by Mr L.

  If there had been no reliable evidence for the allocation of employer contributions, it would have advised a split of 75% to Mr L, as a shareowner director, and 25% to Mr Y, as a non-shareowner director. However, it believed there to be sufficient evidence to form a view on the likely split and had, therefore, dismissed this approach.

  The key questions were:-

  - Was it credible that the company directors had, at the time of making the employer contributions, intended the split as set out in the 2006 Letter?

  - Was it correct to rely on unwritten statements and discussion which was later countermanded by the February 2020 Minute?

  It had assumed that verbal agreements between directors did count as a company decision, but would defer to legal advice. If its assumption was correct, it became a question of credible evidence.

It believed:-

- It was more likely than not that Mr Y had discussed the split of employer's contributions with Mr L, either at the time of his 2006 Letter or previously.
- It was not credible that Mr L would have approved the benefits being paid to Mr Y and believed that they were consistent with a 100% allocation of employer contributions to himself. It, therefore, believed that Mr L had agreed the 54.80/45.20% split.
- The actuarial valuation reports indicate that Mr L would have exceeded the maximum permitted contributions for himself on the basis of a 100% allocation of employer contributions.
- Mr L had appeared to accept the 54.80/45.20% split in an email of 8 October 2019 to the Pensions Ombudsman's Office.
- If Mr L had claimed a split of, say, 60/40% or 75/25% in his favour, it would have been harder to dismiss his claim.

Appendix 3

Details of salary and dividend payments

63. Mr L has submitted the following details relating to salary and dividend payments for the period from 1996 to 2003:

	Mr Y Salary	Mr L Salary & Dividends
1996	£31,000	£36,000 & £0
1997	£31,000	£36,000 & £0
1998	£31,000	£36,000 & £27,000
1999	£31,000	£36,000 & £31,000
2000	£31,000	£36,000 & £20,000
2001	£31,000	£36,000 & £20,000
2002	£31,000	£36,000 & £38,000
2003	£31,000	£36,000 & £66,000

Benefits paid to Mr Y between April 2006 and April 2011

64. Rowanmoor provided the following figures to Mrs Y in 2019

Pension commencement lump sum	£84,005
Pension April 2006 to April 2007	£16,601.52
Pension April 2007 to April 2008	£15,624.96
Pension April 2008 to April 2009	£15,624.96
Pension April 2009 to April 2010	£15,624.96
Pension April 2010 to April 2011	£14,322.88
Total	£161,804.28