

Ombudsman's Determination

Applicant	Ms Y
Scheme	Alexander Chapel Associates Ltd SSAS (the Scheme)
Respondents	The Trustees of the Alexander Chapel Associates SSAS (the Trustees)

Complaint Summary

1. Ms Y has complained that the Trustees have failed to implement her pension sharing order.

Summary of the Ombudsman's Determination and reasons

2. The complaint should be upheld against the Trustees because they have not implemented the pension sharing order.

Detailed Determination

Material facts

3. Under a pension sharing order made by Bristol County Court on 23 September 2009, Ms Y became entitled to a pension credit of 43.31 % of her ex-husband Mr Y's benefits under the Scheme.
4. The Trustees at that time were Mr Y, Mr C, Mr H, Mr T and a "pensioneer trustee", Mr X. The members of the Scheme were Mr Y, Mr C, Mr H and Mr T, all of whom had an equal interest in the Scheme.
5. The pension sharing annex stated that the pension sharing order should be implemented by the person responsible for the Scheme within the period of four months beginning with the later of:

 "the day on which this order takes effect; or

 the first day on which you are in receipt of ...the pension sharing order including this annex..."
6. Mrs Y's solicitors sent a copy of the pension sharing order to Alexander Chapel Associates Ltd, the company sponsoring the Scheme, on 17 December 2009. The Trustees received relevant information about the pension sharing order in or before February 2010.
7. Mr X told Ms Y's financial adviser in a letter dated 8 March 2010, that the Scheme was going to be wound up because the principal employer had been put into liquidation. He said the Scheme's main asset was a commercial property (**the Property**), "valued in the region of £940,000 although a fresh valuation is being obtained prior to it being marketed for sale"; each member had an insurance policy of about £75,000 with Scottish Equitable, which would be cashed in; there were also some smaller cash deposits. Mr X also said that it would seem sensible for Mrs Y to transfer her entitlement in cash rather than "in specie" because of the impending sale of the Property.
8. On 30 March 2010, an estate agent recommended to Mr T that the Trustees should put an asking price of £950,000 on the Property, with a view to achieving a sale of at least £840,000.
9. In a letter dated 11 May 2010, Mr X told Ms Y's financial adviser that Mr Y's one quarter share of the Scheme assets, including the recently surrendered Scottish Equitable policy and the Property, totalled £321,320: his share of the Property was given a value of £212,500 (therefore based on an estimated Property value of £850,000) and his share of the cash deposits was £108,730.

10. Mr G (appointed as Ms Y's representative) contacted Mr X in July 2010. Mr G said that Mr T had told him that the Property was being marketed for sale but no buyer had been found. Mr G added that Ms Y wanted her share of Mr Y's pension fund to be paid in cash, but as Mr Y's part of the Scheme did not have the cash available there were the following alternatives:-
 - the trustees could borrow cash or switch assets so Mr Y had more cash and a smaller share of the Property, or
 - a share of the Property could be transferred to Ms Y's own pension scheme so she would receive rental income; or,
 - Ms Y could become a member and trustee of the Scheme with 43.31% of Mr Y's share of the Scheme.
11. Mr X told Mr G that the other trustees were not keen to transfer their share of the cash fund to Mr Y in exchange for his share within the Property, as they were unsure how much cash the sale would realise. Mr X was not keen on the other proposals. He suggested that Mr Y's cash fund should be used to make a payment on account to Ms Y, with the balance being paid to her once the Property had been sold.
12. Alexander Chapel Associates Ltd went into voluntary liquidation on 3 August 2010. This event triggered a winding up of the Scheme, which has still to be completed.
13. Mr X ceased acting as pensioner trustee so Mr G had subsequent correspondence with the Trustees directly.
14. At a meeting with Mr T and Mr Y in March 2011, Mr G was told that:-
 - The Alexander Chapel business no longer existed, but Mr T and Mr Y had set up a new company operating from the Property and were paying a reduced rent of £1,500 a month into the Scheme.
 - Mr H had transferred his cash share to Australia, where he now lived, and was waiting for his 25% share from the sale of the Property.
 - Mr C had taken his tax free lump sum and was also waiting for his share from the sale of the Property.
 - Mr T and Mr Y were unsure of the exact value of the Property and therefore did not want to pay the other two Trustees their share based on an unrealised Property valuation.

Mr G said that Ms Y probably preferred a transfer to her own pension arrangement, and suggested that a formal valuation of the Property should be obtained.
15. Alexander Chapel Associates Ltd was dissolved on 14 April 2011.
16. In a letter dated 28 September 2011, the Property was professionally valued at £690,000.

17. There was no further progress on implementing the pension sharing order due to various disagreements between all the Trustees regarding payments into and out of the Scheme, so Ms Y brought her complaint to my office in July 2012.
18. In March 2013, Mr S, representing Mr Y and Mr T, said it was their intention to resolve the matter amicably by implementing the pension sharing order. Mr S added that due to the poor economic climate it had not been possible to sell the Property.
19. Mr G replied that Mr S had not mentioned that Mr Y and Mr T were still using the Property as a trading address for their new company, and were not trying to sell it. He understood that Mr C was considering taking legal action against Mr Y and Mr T in order to force through the sale of the Property. Mr G added that he had not received a current valuation of Mr Y's share which would enable him to ascertain Ms Y's share.
20. Mr S disagreed with Mr G's comments, saying that Mr Y and Mr T were both keen to sell the Property, and a sale in May or June 2013 was now likely. Their continuing trading in those premises was not a secret. They were occupying a small part of the building on a licence caretaker basis, and were paying rent that would be taken into account in the Scheme accounts; when the Property was sold Ms Y's share of the fund would be crystallised. However, Mr Y and Mr T could not provide all the information requested; a formal valuation was needed, and Scheme accounts were outstanding for several years. To action this would need the agreement of all the Trustees, not just Mr Y and Mr T.
21. Mr S informed this office on 4 July 2013, that the Property had recently been sold for £700,000.
22. Mr S gave the following information on 27 August 2013:-
 - The accounts and financial statements for the Scheme had not been prepared for "some time".
 - Mr Y and Mr T wanted to prepare up-to-date accounts, but they were now in dispute with Mr C and Mr H.
 - Mr C and Mr H had brought a complaint to my office against Mr Y and Mr T, alleging various shortcomings in their administration of the Scheme.
 - Only after the Scheme accounts had been prepared (which would take into account all the transactions made by the Trustees) would it be possible to ascertain Ms Y's share.
 - Mr Y was aware of the time limits to implement the pension sharing order, but he could not do so without the Scheme accounts being prepared and approved by all the Trustees.
 - Mr S wanted me to direct all the Trustees to prepare Scheme accounts before Ms Y could be paid.
 - Mr S wanted the costs in maintaining the Property which were paid by Mr Y and Mr T to be divided pro-rata amongst all the Trustees before establishing each individual's share within the Scheme.

23. In response, Mr G said that he was aware of Mr H's dissatisfaction with Mr Y and Mr T for not pushing through the sale of the Property. Mr G also said that he had recommended an accountant to the Trustees in order to prepare accounts for the Scheme.
24. Our investigation of this complaint was subsequently suspended for a long period, with the parties' agreement, because we were informed by them that genuine and concerted attempts were being made by the Trustees to resolve amicably the various disagreements between them which impacted on the value of the Scheme assets. However, it eventually became clear that these attempts had failed.
25. On 19 May 2017, after much further correspondence with all the parties, one of our Adjudicators sent a letter to them all to set out formally his thoughts on Ms Y's complaint. The letter concluded that if the matter were to be referred to the Pensions Ombudsman he would hold the Trustees' failure to implement the pension sharing order to be unreasonable and to amount to maladministration; Ms Y's 43.31% share should be based on the Property value estimated in May 2010 and was therefore worth £139,142.71 at that time; the Pensions Ombudsman would require that amount to be transferred by the Trustees to Ms Y's pension arrangement, plus interest from 11 May 2010, to the date of transfer calculated at 1% above the base rate from time to time quoted by the reference banks, and the Pensions Ombudsman would also require the Trustees to pay Ms Y £1,000 for her serious distress and inconvenience. The letter asked Ms Y and the Trustees whether they would agree to a settlement on those terms, to bring the matter to a close.

Summary of Mr T and Mr Y's position

- Mr S said that the suggested settlement is not acceptable to them because it is based on an inappropriately high estimate of the Property value: the Property was professionally valued at £690,000 in September 2011 and was sold for £700,000 in June 2013, but property values in 2008- 2010 were generally lower than in 2013, so the Property would not have been worth as much as £690,000 in 2009; to make a more precise calculation of the pension share for Ms Y a retrospective valuation of the Property in September 2009 should be obtained, as that was when the Trustees should have obtained one. Mr S informed us on 4 August 2017 that he had put this in hand, but it has still not been obtained.

Summary of Mr C and Mr H's position

- Their representative said that the suggested settlement is acceptable to them, provided that any enforcement that is needed is against the Scheme funds. The revised proposal put forward by Mr T and Mr Y is also acceptable, provided that the cost of providing the new valuation does not fall on Mr C or Mr H or the Scheme.

Summary of Ms Y's position

- Mr G said that the suggested settlement is acceptable. The relatively high valuation figure is “balanced” by the low rate of interest to be added since 2010. As most pension fund investment returns have been significantly higher over the same period, it would be unfair to recalculate her pension share by reference to a retrospective, lower valuation, as suggested by Mr T and Mr Y. Furthermore, if the Trustees had collected market rents between May 2010 and the Property sale in July 2013, the amount collected would have largely made up the difference in the value of the Property on those two dates.
26. Unfortunately, the retrospective valuation, as at September 2009, has still not been produced. Mr S said that two proposed valuers had pulled out; the main problems that they identified were a lack of access to the Property, the fact that the Property had subsequently been converted from offices into a dwelling, and a lack of comparable valuations available in 2009.
27. In the circumstances, I have decided that in order to avoid further undesirable delay I should now make a final, binding determination based on the information that has been gathered from the parties since 2009.

Conclusions

28. In order to reach a conclusion on Ms Y's complaint, I need to consider who was responsible for implementing the pension sharing order and decide at which point it should have been implemented. In addition, I need to consider whether the delay and failure to implement it caused any injustice.
29. I note that Mr C and Mr H brought applications to me against Mr Y and Mr T for failing to correctly administer the Scheme. That is a separate matter, which has been concluded, and has nothing to do with Ms Y and her pension sharing order. Therefore, I will limit myself here to the complaint brought by Ms Y.

Implementation

30. According to the pension sharing annex, the pension sharing order was to be implemented by “the person responsible for the pension arrangement”. That means the Trustees, who are jointly and severally liable.
31. The Trustees should have implemented the pension sharing order within four months of 23 September 2009, the period stated in the pension sharing annex. Mr X had received the pension sharing order and was corresponding about it, with Ms Y's financial adviser, in February 2010. The clock started ticking from this point, so the pension sharing order should have been implemented on or before June 2010.
32. According to section 29(4) of the Welfare Reform and Pensions Act 1999 (the **Act**) (see Appendix), the valuation to be used is the valuation applicable on the day before the pension sharing order was issued.

33. Mr X supplied an estimated valuation, not from the day before the pension sharing order was issued, but as at 11 May 2010. It is not clear why the Trustees could not have obtained a formal valuation as at the date stipulated by the Act, but for the sake for concluding this matter without further delay the May 2010 estimated valuation will suffice, as I consider that it is sufficiently close to the relevant date. Ms Y should not be penalised because the Trustees failed to obtain a professional valuation until September 2011, two years after the pension sharing order was made.
34. The Act does not say that pension scheme assets must be realised, but it does require the Trustees to use the asset values to calculate a cash equivalent transfer value (**CETV**), which will be the basis of the pension credit for Ms Y.
35. There is no dispute that the Trustees have failed to do this. The Trustees needed to allocate 43.31% of Mr Y's share of the Scheme to Ms Y, so she could have that benefit in the Scheme, or transfer it to another pension arrangement.
36. Ideally, the Trustees should have created a pension credit for Ms Y and notified her representative of it. In order to pay the pension credit, the Trustees should have utilised the total cash funds in the Scheme and paid her share. If there was insufficient cash readily available, and the Trustees could not borrow the extra cash needed, then the Property should have been sold. Ms Y could then transfer her pension credit to her own pension scheme. In this case, however, there was sufficient cash in the Scheme to pay Ms Y's pension credit. Each of the Trustees should have transferred money from his own individual share of the Scheme to finance the transfer. Once the Property had been sold, each of the Trustees would be able to claim back his share from the proceeds.
37. The Trustees' argument that the Property first needed to be sold is unsound. The Act does not require the Property to be sold before the pension credit has been established, unless there is no cash available within the Scheme. However, Mr Y and Mr T effectively made the Property sale a pre-condition of implementing the pension sharing order, which is not what the Act requires. Indeed, to sell any commercial property within a period of four months is likely to be impossible in many cases.
38. The Trustees failed to implement the pension sharing order within a period of four months, as was required. I consider that the Trustees' failure to do this amounts to maladministration, which has, undoubtedly, caused Ms Y significant distress and inconvenience and an award should be made in recognition of this.
39. Under section 33 of the Act (see the Appendix), scheme trustees can apply to the Pensions Regulator to extend the four months' period on specified grounds, such as, where the financial interests of the scheme members generally will be prejudiced if the trustees do what is needed to discharge their liability for the pension credit within the implementation period. However, the Trustees did not do this, so have no defence to their failure to implement the pension sharing order.

40. I agree with the findings of our letter of 19 May 2017, and will direct the Trustees to implement the pension sharing order based on the Property's estimated value of £850,000 in May 2010. At that time Ms Y's 43.31% share was worth £139,142.71. This is what her pension credit should be, before interest is added.

Delay

41. The main reason for the delay, according to Mr T and Mr Y, was that they were waiting for the Property sale to be completed. As I have said, there was no need for the Property to be sold: its notional value should have been sufficient to calculate a pension credit for Ms Y.
42. In May 2010, Mr Y's pension fund included £108,730 in cash. One can reasonably expect that amount to have grown subsequently with interest as well as rental income received. It is quite conceivable that Mr Y's cash fund could have covered the amount due to Ms Y without the need for the sale of the Property to be completed. However, this is conjecture as we have not had sight of copies of the Scheme accounts which would show how much Mr Y holds within the Scheme. That is because no Scheme accounts have been published for several years. This omission was subject to a separate complaint made to me by Mr C and Mr H, which I do not need to go into here.
43. Mr G would like Ms Y to benefit from the rental income that the Scheme has received (or should have received) since the pension sharing order was issued. However, my role is to put Ms Y back into the position she would have been in had there not been maladministration by the Trustees. In this instance, this means her receiving her pension share within four months from the date that the pension sharing order was issued. The subsequent disagreements between the Trustees, concerning Property rental income that should have been received by the Scheme and other matters, can therefore be disregarded for this purpose.
44. In conclusion, there is no good reason why the pension sharing order implementation has been delayed. I agree with the findings of our letter of 19 May 2017, that the delay has prevented Ms Y from investing her pension share and has no doubt caused her significant distress. In upholding her complaint I will therefore include an award for her distress and inconvenience which has been exacerbated by the considerable delay, over a number of years, in implementing the pension sharing order.
45. Regulation 18 of The Pension Sharing (Implementation and Discharge of Liability) Regulations 2000 (SI 2000/1053) (see Appendix) to which Mr G referred, provides for the pension credit to be increased to the greater amount applicable (if any) if the valuation day were the actual date of payment by the Trustees, or by adding interest from the actual valuation day calculated as 1% above base rate. Unfortunately the Trustees have not been able to agree on preparing the outstanding accounts and actuarial valuations for the Scheme for several years, so it is not feasible to substitute

a contemporary valuation date. Therefore, I consider that interest should be added to the pension credit calculated as at May 2010.

Directions

46. Within 28 days of this Determination:

- the Trustees shall arrange for £139,142.71 to be transferred to Ms Y's pension arrangement (inside or outside the Scheme, as she elects) once they have received relevant details of Ms Y's pension arrangement from Ms Y or Mr G, with interest added from 11 May 2010 to the date of transfer at 1% above the base rate from time to time as quoted by the reference banks; and
- the Trustees shall pay Ms Y £2,500 as an award for the significant distress and inconvenience that they have caused her by failing to implement her pension sharing order in a timely manner.

Anthony Arter

Pensions Ombudsman
8 March 2018