

Ombudsman's Determination

Applicant	Mr N
Scheme	The Mountain Private Pension SSAS (the SSAS)
Respondent	Hornbuckle

Outcome

1. I do not uphold Mr N's complaint and no further action is required by Hornbuckle.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr N's complaint against Hornbuckle is about delays, incorrect information and poor customer service, from 2011 to 2015. He calculates the total cost of resolving these issues to be more than £14,000.

Background information, including submissions from the parties

4. In November 2011, Mr N joined the SSAS. He and two other parties were appointed member trustees. Hornbuckle was appointed administrator and corporate trustee.
5. In October 2014, following numerous instances of maladministration, including but not limited to delays, incorrect information and poor customer service, the SSAS was transferred to a new administrator, Talbot & Muir (**T&M**).
6. In December 2014, Mr N raised several complaints against Hornbuckle.
7. In March 2015, Hornbuckle responded to Mr N's complaint. The key points were: -
 - It upheld the complaint in relation to: delays issuing Land Registry documents; failure to provide a consistent standard of service; delays responding to correspondence, failure to provide a single point of contact; failure to confirm payments leaving scheme account; and provision of incorrect information to Mr N's financial adviser Grant Thornton (**GT**), T&M and his accountant, Churchgate Accountants.
 - But it did not uphold the complaint in relation to: failure to issue rental invoices, and the incorrect calculation of tax payable on income. Whilst it had issued these historically, it

was the responsibility of the Property Manager to send rental invoices to the tenant, and the tenant was aware when to pay rent as outlined in the tenancy agreement.

- Nor did Hornbuckle uphold the complaint in relation to the alleged incorrect calculation of tax. Hornbuckle said it informed T&M that it (Hornbuckle) had used the correct tax code provided by HMRC. Tax had been correctly deducted from income payments.
- Hornbuckle was sorry Mr N felt obliged to leave, due to his poor experience with it, but it was unable to waive its SSAS Takeover Fee. But it agreed to reduce it to £875 plus VAT, which it believed was appropriate redress.

8. In July 2015, Hornbuckle wrote to Mr N again. The key points were: -

- It outlined the background to a loan made by the SSAS to Mountain Farms Limited, which T&M suggested might be deemed an unauthorised payment. The regulations required that a loan be secured by a first charge over an asset of sufficient value.
- T&M's concern was that this had not happened. After consulting its legal advisers, Hornbuckle agreed that HMRC might consider that an unauthorised payment had occurred. So Hornbuckle had investigated whether it was responsible.
- But Hornbuckle said it did not know, until 29 February 2012, when Mr N informed it, that completion of the land transfer had occurred. In his email dated 29 February 2012, Mr N noted that he was aware of the requirement for a legal charge. If Hornbuckle had been made aware of completion, the loan would have been repaid against the purchase price, and a potential unauthorised payment would have been avoided.
- However, Hornbuckle stated if HMRC considered a later £40,000 payment to be an unauthorised payment, it would agree to meet the cost of any financial penalty. So it was upholding this part of Mr N's complaint.
- In Hornbuckle's view, Mr N should seek independent legal advice, and consult with HMRC, emphasising that it was always the intention for a charge to be put in place before any loan from the SSAS to the Company.

9. In August 2015, Hornbuckle wrote to Mr N again. The key points were: -

- Mr N said that Hornbuckle had failed to issue correct amortisation calculations in March 2012. Hornbuckle accepted it had not done so. After investigating the matter, it agreed to accept Mr N's calculations.
- Regarding its failure to settle outstanding invoice "1351", it understood this was Mr N's claim for his work pursuing the complaints. Hornbuckle did not agree to pay this.

10. In November 2015, HMRC wrote to T&M about the potential unauthorised payment. It said: -

"In the circumstances of this particular case we concur that a genuine error has occurred."

11. In May 2016, Hornbuckle wrote to this Office. It reiterated which issues it was upholding and why. It reconfirmed its total offer as follows: -

“... we offered [Mr N] the waiving of 50% of the SSAS takeover fee which totalled £875 plus VAT. Further to this we would like to offer [Mr N] a further £500 for the distress and inconvenience caused as full and final settlement of this case. Please note that we have already refunded £3,000 worth of fees back to the scheme in 2014 making a total of £4,375 that has been waived or refunded in our offer.”
12. In June 2016, Mr N wrote to this Office with his comments. He said the total cost of resolving the issues Hornbuckle had caused was more than the £14,000. He provided a breakdown of this figure. He also said “On top of this the stress and strains of all these issues combined have been harrowing.”

Adjudicator’s Opinion

13. Mr N’s complaint was considered by one of our Adjudicators who concluded that no further action was required by Hornbuckle. His findings are summarised briefly below:
 - There was no need to make a finding on the following issues as Hornbuckle had upheld them: delays issuing Land Registry documentation; delays responding to correspondence and failure to confirm payments leaving the account from 2013; failure to issue rental invoices from 2013; failure to provide a dedicated administrator and offer a consistent standard of service after 2013; provision of incorrect information to GT, T&M and Churchgate Accountants.
 - Hornbuckle had upheld these issues, but made no offers specific to each one. So the Adjudicator considered whether Hornbuckle’s total offer was reasonable.
 - Mr N had queried an annual fee of £3,000. Hornbuckle agreed that, as Mr N had told it he wished to transfer the SSAS to another provider, the fee would be cancelled. This was processed the next day. Hornbuckle was entitled to apply this fee, so it was not obliged to cancel it. So its offer to waive it was reasonable.
 - Mr N said he had incurred costs of more than £2,500, based on his professional rate, trying to resolve problems Hornbuckle had caused. But Hornbuckle was not required to pay this, as no-cost assistance was available to Mr N from the Pensions Advisory Service (**TPAS**). TPAS was signposted to Mr N in all Hornbuckle’s responses.
 - A potential unauthorised payment was not, in the end, deemed by HMRC to be an unauthorised payment. So there was no loss to Mr N. A payment of about £40,000 from the SSAS to the Company in March 2012, should not have been made if there was no charge over the relevant property. But as the matter had been corrected, and no loss resulted from this omission, there was no need to make a finding on this.

- Hornbuckle’s fee for transferring the SSAS to another administrator was payable in advance, as outlined in its fee schedule. The relevant fee (£1,750 plus VAT) could have been applied in full. But Hornbuckle agreed to halve it to £875, to recognise various errors and omissions. This offer was reasonable in the circumstances.
 - Hornbuckle’s total offer had a value of £4,375 that is, a refund of the £3,000 annual fee, a halving of the SSAS takeover fee, of £875 + VAT, and £500 in recognition of distress and inconvenience. An offer of £500 would have been too low. However, the value of the current offer was sufficient. In the Adjudicator’s view, it was unlikely the Ombudsman would award further redress. Further, no direct loss had resulted from not applying a charge against the property. So there was no need for Hornbuckle to pay a further award.
14. Mr N did not accept the Adjudicator’s Opinion and provided extensive further comments. The key points were as follows: -
- He did not think Hornbuckle had made good its various omissions by offering £500. And it should not have presented an offer to waive a £3,000, which should never have applied, as part of the overall offer.
 - Hornbuckle’s mistake, with regards a 5-year amortisation of the loan back, could have resulted in £16,677.39 less income for the SSAS, had he not discovered it. His claim for £200 in costs in this regard was conservative.
 - Every loss the SSAS had suffered was a personal loss of income to the member trustees, as they had now retired.
 - He had made conservative provision for the various losses the SSAS had incurred across all the complaints raised. He was still seeking more than £14,000.
 - Even this figure would not fully compensate the other member trustees for their stress and anxiety, caused by Hornbuckle’s “incompetence”, most of which was uncontested.
15. Hornbuckle provided its further comments but accepted the Opinion. The Adjudicator shared Hornbuckle’s further points with Mr N. The Adjudicator then emailed Mr N on 21 September 2017. The key points were: -
- The evidence indicated the annual fee was payable in full. Hornbuckle explained any emails to the contrary were incorrect, and did not reflect its fee policy. As Hornbuckle was entitled to apply the fee, its offer to waive it was reasonable.
 - Hornbuckle had miscalculated an amortisation figure. This would have left the SSAS with £16,000 less income. Hornbuckle should not have made the mistake. And Mr N should not have had to discover it himself. But since this loss never materialised, no further award was appropriate.
 - The Ombudsman’s approach, where there has been maladministration causing “non-financial injustice”, was to direct awards to recognise the distress and inconvenience

caused. The Ombudsman would not usually direct Respondents to reimburse Applicants directly for their time, nor at their professional rate.

- With regards the loan back, Hornbuckle said it should not “take the lead” with HMRC, given its role leading up to the potential unauthorised payment. However, it provided guidance on how to resolve the issue with HMRC.
 - In its responses to Mr N's complaint, Hornbuckle had mentioned TPAS. As TPAS could have assisted Mr N at no charge, it was not reasonable for Hornbuckle to reimburse Mr N at his professional rate, nor for the other professional fees he incurred.
 - Most of Hornbuckle's mistakes were uncontested. But it did not agree with the amount of compensation Mr N was claiming. The Adjudicator still thought Hornbuckle's total offer was sufficient. This was because it was entitled to apply the annual fee, but had offered to waive it. So the total value of Hornbuckle's offer was more than £4,300.
16. There was further correspondence by email between the Adjudicator and Mr N. After reviewing the case, the Adjudicator said Hornbuckle had confirmed to Mr N, in its email of 18 August 2014, that its fees were paid in advance. But if a member left part-way through the year, the annual fee would be refunded on a pro-rata basis.
17. Hornbuckle confirmed, on 13 September 2017, that that was incorrect. In fact, its fees were payable annually in advance and non-refundable. The Adjudicator said Mr N would have moved to another administrator straight away, if Hornbuckle had made clear he could avoid the annual fee. So Hornbuckle should not present the waiving of the annual fee as a concession. But the remaining offer of £1,375, made up of £500 plus an offer to halve the SSAS takeover fee, which Mr N accepted could be applied, was still sufficient.
18. The Adjudicator continued to investigate the loan back. He obtained the following documents, including “Property Sale Application Form”, “SSAS Loanback Application Form”, “Deed of Appointment”, and “Scheme Rules”. He shared these with Mr N.
19. The Property Sale Form stated: -
- “I understand that any borrowing will be repaid to the lender from the sale proceeds before they are paid in to the pension scheme bank account.”
20. The SSAS Loanback Application Form stated: -
- “Any security is required to be lodged legally by a solicitor or a suitably qualified law firm. The funds cannot be moved to the borrower until this is complete and formally logged with the appropriate body. A first charge must be secured on the asset that is equal to or more than the value of the loan including interest.”
21. The Deed of Appointment and Scheme Rules included clauses relevant to unauthorised payments, but they did not refer to loan backs in specific terms. The

Adjudicator asked Hornbuckle to provide further documents specifically referring to loan backs, but Hornbuckle said there were none. It added the following comments: -

- It was unsure why the Adjudicator required information about Hornbuckle's loan back process. The complaint, as Hornbuckle understood it, was about delays in relation to the SSAS takeover and the level of fees raised.
 - Mr N was a joint member trustee of the SSAS with two other parties. Hornbuckle was the corporate trustee. All trustees had equal responsibility to ensure the SSAS, and any transactions, were administered in line with "HMRC legislation".
 - Its email of 21 October 2011 to Mr N clearly stated that a legal charge must be lodged with the Land Registry before the funds representing the loan back could be released. In its view, this email showed it had made Mr N aware of this requirement.
 - GT, which was copied into the email, was appointed financial adviser for the SSAS. It would have advised on the suitability of the loan back. It should have provided details of the loan back process, including Mr N's, and other trustees', responsibilities.
 - The SSAS loan back application form was completed to confirm the appointment of Taylor Vinters (**the Solicitors**). They were the solicitors instructed on the sale and purchase of the Property, to act on behalf of the SSAS, and register the Legal Charge with the Land Registry. It was the job of the member trustees to appoint the solicitor.
 - Hornbuckle did not agree that, as corporate trustee, it was solely responsible. The financial adviser and the member trustees had equal responsibility for ensuring the transaction adhered to HMRC legislation.
22. As Mr N did not agree with the Adjudicator's Opinion, the complaint was passed to me to consider. I agree with the Adjudicator's Opinion, and I will therefore only respond to the key points made by Mr N and Hornbuckle for completeness.

Ombudsman's decision

Annual fee refund

23. Regarding the £3,000 annual fee, I agree with the Adjudicator that Hornbuckle should not have presented this as part of the overall compensation. Hornbuckle has latterly confirmed, in its email to the Adjudicator of 13 September 2017, that all its fees are payable in full and in advance. This is supported by Hornbuckle's fee schedule.
24. So Hornbuckle provided incorrect information when it informed Mr N, on 18 August 2014, that the annual fee could be refunded on a pro-rata basis. I find it is more likely than not that Mr N would have transferred to the new administrator straight away, so avoiding the annual fee, if it had been made clear that the whole annual fee would be applied if he waited. So the true compensation figure is not £4,375 but £1,375; that is, £4,375 less £3,000. So what I must decide is whether that amount is reasonable, for the various instances of maladministration that make up this complaint.

Incorrect amortisation calculation

25. Regarding Hornbuckle's mistake in incorrectly amortising the SSAS loan back, I agree with the Adjudicator that this could have, but did not, result in a substantial loss of income to the SSAS. Hornbuckle should not have made the mistake. But it agreed to accept Mr N's figures, once he had pointed out this error.

Potential unauthorised payment

26. Most of the costs Mr N has claimed originate in work that had to be carried out to resolve a potential unauthorised payment that occurred in February 2012. The chain of events leading up to this payment is outlined in Hornbuckle's second response of 22 July 2015. I understand that Mr N has reviewed this letter and had the chance to comment on it.
27. In November 2015, HMRC said that it did not consider that the payment was an unauthorised payment. But I find Hornbuckle had a reasonable belief, in July 2015, that a potential unauthorised payment had occurred. So it acted reasonably when it recommended Mr N seek legal advice. Moreover, its reasons for not assisting further itself, in circumstances where it was previously involved in the transaction, were also reasonable.
28. Hornbuckle also pointed out, in July 2015, that Mr N could contact TPAS. TPAS could have assisted Mr N at no cost. With the benefit of hindsight, it could be argued HMRC only concluded that a genuine error had been made, because of the work that T&M carried out. However, without the benefit of hindsight, the position is less clear. So it would not be reasonable for Hornbuckle to reimburse the various costs Mr N says he incurred, resolving this issue with T&M and HMRC. In the end, it was Mr N's decision to leave Hornbuckle and appoint T&M. Some, albeit not all, of T&M's costs would always have been incurred by Mr N after he made that decision.
29. Mr N says at no point did Hornbuckle say security needed to be in place from the outset. But the Property Sale Application Form referred to the need for any borrowing to be repaid to the lender from the sales proceeds before being paid to the pension. And the SSAS Loanback Application Form referred to the need for security to be in place before any loan backs were carried out. In addition, it referred specifically to the need for a "solicitor" or a "suitably qualified law firm" to carry out this work.
30. There is no evidence that Hornbuckle told Mr N it could arrange this security itself. Nor is there any evidence that, before the property sale completed, Hornbuckle was instructed to arrange for security to be put in place. The reality is, it was not the £400,000 loan back that was considered to be a potential unauthorised payment. Rather, it was an earlier transaction, one that Hornbuckle was not party to, and was not aware of until after it had taken place, that resulted in a payment that was deemed a potential unauthorised payment. Hornbuckle's email of 21 October 2011 stated that the member trustees should keep it informed of progress and the final details. If Hornbuckle had been aware that the Company did not intend paying the

balancing part of the purchase price to the SSAS before the sale of the property completed, it could have informed Mr N that this might give rise to an unauthorised payment. But I cannot see that it was given this information. It does not seem to have been aware of completion before 24 February 2012, by which time the potential unauthorised payment had already occurred.

31. In conclusion, I find that Hornbuckle made reasonable efforts to make Mr N aware that no loan backs should be made until appropriate security was in place. It would have helped if Hornbuckle had explicitly told Mr N that security should be in place from the outset. But in the absence of any documents specifically outlining who is responsible for carrying out what actions in the loan back process, I find that Mr N, the other member trustees and Hornbuckle had a joint responsibility for ensuring it was carried out correctly. I find Hornbuckle adequately discharged its responsibilities in this regard, by informing Mr N, by way of its forms and email in October 2011, that security would need to be in place before any loan backs were carried out. So I do not find that Hornbuckle acted in maladministration with regards the provision of information about this process.
32. I do not think Hornbuckle could reasonably have foreseen that the completion funds would not be returned to the Solicitors, and then to the SSAS, such that the SSAS effectively “loaned” the Company the balance of the purchase price. So I do not find that Hornbuckle’s actions around this time amount to maladministration.
33. Therefore, I do not uphold Mr N’s complaint. This outcome is not intended to detract from the numerous failings admitted by Hornbuckle. But it acknowledges the principle that I will not uphold a complaint where the Applicant has received an acknowledgement of what went wrong, and a reasonable remedy, before the complaint was made to this Office. The offer is still available, so, If Mr N wishes to accept the offer of an additional £500, (on the basis the £875 + VAT takeover has already been waived), then he should contact it to make arrangements for this payment.

Karen Johnston

Deputy Pensions Ombudsman
26 January 2018