

Ombudsman's Determination

Applicant	Mr D
Scheme	Hogg Robinson (1987) Pension Scheme (the Scheme)
Respondents	Trustees of the Hogg Robinson (1987) Pension Scheme (the Trustees)

Outcome

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

Complaint summary

3. Mr D's complaint against the Trustees is that they have said that they do not have the power to implement all the terms of a county court consent order in the manner that he wanted.

Background information, including submissions from the parties

4. Mr D was a senior executive of Hogg Robinson, a retirement benefits consultancy. Mr D and his first wife Mrs D were divorced in 1999. A county court consent order was drafted by lawyers acting for Mr D and Mrs D, the relevant provisions of which are set out in the Appendix hereto.
5. On 17 May 1999 Mr D's divorce lawyer sent the draft order to the Secretary to the Trustees and asked him if he could confirm "that the proposed Orders 6 & 7 are acceptable to the Pension Trustees".
6. The Trustees held a meeting on 19 May 1999. The minutes included the following item:

"EARMARKING OF PENSION BENEFITS

It was noted that a draft Court Order had been received in relation to the earmarking of benefits in connection with the divorce proceedings of [Mr D]. The Court Order was confirmed as being in accordance with Pensions Act provisions. Therefore, IT WAS RESOLVED THAT Mr [X], Company Secretary, Hogg Robinson plc, should respond to the solicitors involved on behalf of the

Trustees to the effect that the Trustees would comply with the Court Order upon its issue.”

7. Mr X, who was also the Secretary to the Trustees, wrote to Mr D’s divorce lawyer to confirm that the Trustees had accepted and approved proposed clauses 6 and 7. On 24 May 1999 Mr D’s divorce lawyer emailed Mr D to inform him of this news.
8. The district judge’s signed consent order, in the same terms as the draft, was dated 20 July 1999. Later that year Mr D sent a copy to Mr X, saying “any calculations made and/or benefits paid should be cross referenced against the Court Order”.
9. Following their divorce, both Mr D and Mrs D married other people.
10. In 2005 Mr D discussed the Scheme benefits with a director of Entegria Ltd (then the Scheme administrator) who was also the Scheme actuary at that time. In an email on 4 August 2005 he informed Mr D:

“The earmarking legislation does not extend to dependants’ pensions. Hence, the Court Order doesn’t direct that the trustee should pay the specified amount. Rather it binds you to nominate [Mrs D] as a dependant and to specify the amount of pension payable as £24,000 per annum plus indexation from May 1999. There is no difference in amount between death before and after retirement. In the event of you predeceasing [Mrs D], it would then be for the trustees to consider whether they should exercise their discretion in [Mrs D’s] favour...However, even if the trustees were to say at this time that they would consider continuing the pension to another party, then there could be no certainty that they would pay it to a particular person.”
11. On 28 December 2005 Mr D wrote to another director of Entegria Ltd, instructing him as follows:

“...please take this letter as confirmation that, on my death, I wish the whole of my WDAR [meaning a pension payable to a widow on the member’s death after his retirement] to be paid to the survivor of Mrs D and my wife, [Mrs X], if only one of them survives me. Otherwise, [Mrs D] should receive £24,000 p.a. plus LPI [meaning annual increases] and the balance should go to [Mrs X]. On the subsequent death of [Mrs D], if [Mrs X] survives her then I would ask the Trustees to pay the whole of the WDAR to [Mrs X]. ”
12. Mr D drew his retirement pension at age 60 in 2006. On 10 July 2006 Mr D sent a letter to the Secretary to the Trustees, to remind them that his Scheme benefits were subject to a court order, and to ask if the Trustees could take his wishes into account when exercising their discretion.
13. On 22 December 2010 the Secretary to the Trustees wrote to Mr D to summarise recent email exchanges. The letter said that:

“You will recall that in October 2008 you wrote to me indicating that there was a potential defect in the original consent order agreed between yourself and your first wife...I have formally noted your request that [Mrs D] should be regarded as financially dependent and for the Trustees to address the partitioning of any excess pension benefits after your death accordingly. That is obviously a matter for the Trustees’ discretion and judgement at the time; her circumstances may change prior to that becoming relevant....I would repeat what I said in my email of 6 December. The conclusion is not what you had been hoping for, and it is regrettable that the [consent order] does not deliver the end result which you and [Mrs D] apparently intended. To the extent that the [consent order] is therefore defective in this respect, I assume that you will both be taking advice on how to address the matter with those responsible for the original drafting.”

14. Because of other disputes arising between Mr D and the Trustees this matter was not revisited until 2014. In July 2014 Xafinity (then the Scheme administrator) sent Mr D updated details of his retirement benefits, including WDAR, enclosing relevant extracts from the Scheme rules and the Scheme booklet. Mr D responded: “My understanding is that [Mrs D] has a legal entitlement in her own right to some share of my WDAR on my death. Please can you tell me exactly what it is.”
15. Xafinity’s reply of 1 August 2014 said “I presume that any right you think [Mrs D] might have to share of your WDAR would come from your divorce settlement. If so I think that is a question for the lawyers and not for Xafinity.” The Trustees then instructed their lawyers to advise them.
16. In a letter dated 3 November 2014 Xafinity apologised for the delay in responding and said that Mrs D did not have an entitlement to receive a pension of £24,000 per annum on his death, as Mr D had queried, because:
 - the pension payable on his death, as set out in the court order, fell outside the scope of the Matrimonial Causes Act 1973 (**MCA**);
 - payment of a pension following the death of a pensioner member is governed by the Scheme rules;
 - the persons potentially eligible under the Scheme rules to receive a pension were Mr D’s surviving spouse/civil partner (if any), his eligible children (if any) and any dependants nominated before he started his pension;
 - Mrs D was no longer his spouse, and she was not a nominated dependant because Mr D’s nomination of her in July 2006 was made after his own pension had started; and
 - even if her nomination had been made in time, the Trustees would still need to be satisfied that Mrs D was dependent upon Mr D at the date of his death; however, Mr D had stated previously that he did not consider Mrs D to be dependent on him. As such, she would not qualify as a dependant.

17. When Mr D disagreed with this analysis, the Trustees asked their lawyers to respond directly. Their letter of 23 April 2015 to Mr D said that the Trustees could not pay Mrs D an annual pension of £24,000 on his death, because:
- the only part of the court order directly applicable to the Trustees was paragraph 6, which imposed an obligation on the Trustees; however, this order had ceased to have effect on Mrs D's remarriage, under s.28 of the MCA;
 - paragraph 8 required Mr D to nominate Mrs D within 30 days, but there was no evidence of him having done that; this paragraph did not impose any obligation on the Trustees;
 - the pension payments envisaged by paragraph 8 were not within the options that the MCA provided for (specified periodical payments or lump sums); and
 - in order for Mrs D to be eligible to receive a dependant's pension following Mr D's death, she would need to satisfy the Nominated Dependant definition contained in the Scheme rules when Mr D died, but Mr D had said that he did not consider her to be dependent on him, and had not nominated her in time (before his pension started).
18. Mr D did not accept this explanation, and invoked the Scheme's internal dispute resolution procedure (**IDRP**). There was a delay by the Scheme secretary in completing Mr D's stage 1 request, so it was agreed that the matter should go straight to the Trustees under stage 2. The Trustees took legal advice and then wrote to Mr D on 4 March 2016 to reject his appeal, saying that:
- the Trustees would treat the nomination of Mrs D as having been made in time, because Mr D was adamant that he had made a valid nomination and it was clear from the correspondence that Mr D had intended to nominate her;
 - unlike paragraph 6, paragraph 8 of the court order did not impose any obligation on the Trustees to make payments; paragraph 8 only required Mr D to nominate Mrs D;
 - if paragraph 8 had been intended to require the Trustees to pay WDAR to Mrs D, it would have exceeded the county court's powers under the MCA, because the court could not bind the Trustees to make a payment that they were not able to make under the Scheme rules;
 - unless there was a Pensions Ombudsman determination requiring them to do so, the Trustees would not pay the WDAR to Mrs D when Mr D died because the rules did not allow that pension to be paid to a non-spouse; and
 - if Mrs D survived Mr D and was financially dependent on him when he died, the Trustees would be minded to pay a Nominated Dependant's pension to Mrs D, but they could not exercise that discretion in advance of his death.

19. Mr D then complained to the Trustees that if some parts of the draft consent order in 1999 were unworkable the Trustees should not have approved them. He admitted that he had not suffered a financial loss, but said he had a moral obligation to ensure that the right thing was done for Mrs D.

Adjudicator's Opinion

20. Mr D's complaint was considered by one of our Adjudicators, who concluded that no further action was required by the Trustees. The Adjudicator's findings are summarised briefly below:-
- The complaint turned on the correct interpretation of the court order made by a district judge, drafted by lawyers instructed by Mr D and Mrs D. The Pensions Ombudsman did not have jurisdiction to investigate and determine whether the draftsmen were negligent. The Pensions Ombudsman's statutory role was limited to investigating allegations of pension scheme maladministration.
 - Mr D thought that the court order meant that the Trustees would definitely pay Mrs D a pension of £24,000 plus annual increases on his death. The Trustees agreed with Entegria Ltd and Xafinity that the court order did not have the effect that Mr D wanted, so there was no dispute that a problem had occurred.
 - The pension provisions of the court order were in paragraphs 6, 7 and 8. As Mrs D had remarried and Mr D had taken his retirement pension after age 60, only paragraph 8 of the court order was now relevant. It was clear from the introductory wording of the court order and the wording of paragraph 8 that it imposed a direction on Mr D ("The Respondent do irrevocably nominate...") but it imposed no obligations on the Trustees. Indeed, the Trustees were not even mentioned in paragraph 8.
 - The legal advice obtained by the Trustees was that Mrs D would have no entitlement to receive WDAR if Mr D died before her. As Mrs D was no longer married to Mr D, the Adjudicator agreed that Mrs D would not be entitled to receive a surviving widow's pension.
 - The lawyers had concluded correctly that, if Mr D predeceased Mrs D, the Trustees would then have to decide whether or not Mrs D satisfied the conditions for a Nominated Dependant's pension, as set out in the rules of the Scheme. Both the nomination test and the dependency test would have to be satisfied before the Trustees could exercise their discretion. It was established case law that trustees could not fetter the future use of their discretionary powers, so they could not reach a binding decision on that while Mr D was still alive.
 - Although Mr D had admitted that he had not suffered any financial loss, the outcome was clearly frustrating for Mr D, as the court order did not have the effect that he had intended; Mr D said that the Trustees should not have agreed to wording that was defective. However, there were no grounds for recommending that the Trustees should make any payment to Mr D for his distress and inconvenience. The Trustees were not responsible for drafting the court order. Before the Trustees confirmed their acceptance of the order, drafted by Mr and Mrs D's lawyers, they

took professional advice on it from a senior consultant of Entegria Ltd, who attended the Trustees' meeting on 19 May 1999. That company was not named as a respondent to the complaint. Entegria Ltd said that the proposed order was in accordance with pensions legislation. In accepting the proposed order, neither the Trustees nor Entegria Ltd made any representations to Mr D that each and every provision of the court order would have the effect that Mr D was intending. In the circumstances, Mr D had not shown that the Trustees' conduct in this matter amounted to maladministration.

- Therefore Mr D's complaint should not be upheld.

21. Mr D did not accept the Adjudicator's Opinion, and the complaint was passed to me to consider. Mr D provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr D for completeness.

Ombudsman's decision

22. In his correspondence, Mr D expressed the view that I should instruct the Trustees to apply the court order as he intended. However, the wording of the court order is legally binding, and paragraph 8 does not provide for a pension to be paid automatically to Mrs D if she survives Mr D. My jurisdiction is set out in the Pension Schemes Act 1993 and regulations made thereunder. It does not empower me to make an order which would effectively amend the terms of the court order. That is a matter for the court.
23. Mr D pointed out that on 4 August 2005 he received an email from the then Scheme actuary which said "I think you can be confident that [Mrs D] would receive £24,000 per annum (plus the indexation) of any pension payable on your death..." and did not clarify that, in order for Mrs D to receive the dependant's pension, there would need to be financial dependency on Mr D immediately prior to his death. Mr D said he should be able to rely on the information in that email. However, the same email also said that "the Court Order doesn't direct that the trustee should pay the specified amount...In the event of you predeceasing [Mrs D], it would then be for the trustees to consider whether they should exercise their discretion in [her] favour." Therefore I do not consider that the email constituted advice which misled Mr D. In any event, it was not sent to him by the Trustees.
24. I thank Mr D for clarifying that the letter of 22 December 2010 from the Secretary to the Trustees was intended to refer to several matters, and only the last page referred to the WDAR. Mr D considered that he should be able to rely on the passage which said "I have formally noted your request that [Mrs D] should be regarded as financially dependent and for the Trustees to address the partitioning of any excess pension benefits after your death accordingly." However, the letter also said "That is obviously a matter for the Trustees' discretion and judgement at the time." In other words, Mrs D would not qualify as a dependant simply because, at an earlier date, Mr D had

requested that to be the case; the matter would need to be considered at the relevant time (on Mr D's death), and fortunately that event has not yet occurred.

25. Lastly, Mr W contended that he should be able to rely on a letter dated 12 April 2016 from the company secretary, who also happened to be the Secretary to the Trustees at that time. The letter was sympathetic to the problem that had arisen, and said "the trustees as a body approved the clear and obvious intent of the wording in the Consent Order but now say that the rules do not allow for this intent." However, it is apparent that the intent of the wording was not clear and obvious, as has been shown by subsequent developments. The Trustees' duty is to do what the words of the court order say, not what Mr D had intended them to say. Furthermore, the letter made clear that it was not written by the Trustees.
26. Although this matter has been frustrating for Mr D, he has not suffered a financial loss; his pension benefits are calculated as provided under the rules of the Scheme and he has not been financially prejudiced as a consequence of the wording of paragraph 8 of the court order.
27. Therefore, I do not uphold Mr D's complaint.

Anthony Arter

Pensions Ombudsman
18 July 2017

Appendix

Relevant extracts from court order dated 20 July 1999

“BY CONSENT IT IS ORDERED AND DIRECTED THAT (SUBJECT TO DECREE NISI BEING MADE ABSOLUTE):

...

6.(a) As from the date of the Respondent's retirement under the terms of his pension with the Hogg Robinson 1987 Retirement and Death Benefits Scheme (“the Scheme”) the Trustees or Managers of the Scheme shall cause a pension calculated as follows to be paid to the Petitioner [Mrs D] on behalf of the Respondent [Mr D]:

- (i) 35% per annum of the Respondent's pension accrued at 1 July 1999 (£33,341.38) under the Scheme will be earmarked for the Petitioner;
- (ii) This earmarked pension will be increased according to the formula set out in Order 5 above up to the date of payment and adjusted in the same way, if any, as the Respondent's pension as a direct result of the Respondent's pension being paid before or after the Respondent's normal retirement age of 60;
- (iii) In the event of the Respondent opting to surrender any of his pension for tax free cash at the date of his retirement then an equivalent portion of the Petitioner's earmarked pension will also be surrendered for cash to her account;
- (iv) In payment the Petitioner's pension will be increased according to the formula set out in Order 5 above and paid to the Petitioner monthly in advance under the terms of the Scheme through their joint lives;

(b) any such payment by the Trustees or Managers of the Scheme shall be treated for all purposes as a payment made by the Respondent as the party with pension rights in or towards his liability under the Order.

7. The Respondent do irrevocably nominate within 30 days from the date of this Order [for so long as the periodical payments order contained in Order 4 above shall subsist] the Petitioner to receive £24,000 per annum together with the indexation contained at Order 5 above from 1 May 1999 to his death-in-service at Hogg Robinson plc before his 60th birthday of the widow's death-in-service pension, together with the balance of the widow's death-in-service pension provided that the Respondent has not remarried.

8. The Respondent do irrevocably nominate within 30 days from the date of this Order that in the event of his death after age 60, or his earlier retirement, and the Petitioner not having pre-deceased him, the Petitioner to receive a widow's death-in-retirement pension equal to £24,000 per annum together with the indexation contained at Order 5 above from 1 May 1999 to his death after age 60 or early retirement of the widow's death-in-retirement pension, together with the balance of the widow's death-in-retirement pension provided that the Respondent has not remarried.”