PO-1791

Ombudsman's Determination

Applicant	Mr and Mrs Cooper (**the Executors** of the late Mrs Worden's Estate)
Representative	Ward Hadaway
Scheme	Ken Ballard Limited Retirement Benefits Scheme (**the Scheme**)
Respondents	Mr I and Mrs B Ballard (**the Trustees**)
	McCabe Ford Williams (**MFW**)

Complaint summary

The Executors are complaining about the refusal to pay to the estate the benefit they say is due in respect of the failure to pay Mrs Worden a pension before she died.

Summary of the Ombudsman's determination and reasons

The complaint should not be upheld against the Trustees or MFW because:

- Mrs Worden did not complete the necessary form to obtain her pension benefits;
- following her death the process the Trustees adopted in seeking to give effect to the purpose of the Scheme, the wishes of Mrs Worden and assessing the claims of potential beneficiaries was not inappropriate;
- under the 'new' or 'old' Deed of the Scheme payment could not be made to Mrs Worden's estate.

DETAILED DETERMINATION

The ‘old’ Deed and Rules

1. As relevant,

Rule 4 (a) (‘Benefits’) says:

“The Scheme shall provide one or more of the following benefits in respect of a Member:

a retirement pension;

in the case of a Member who dies after retirement on pension survived by his spouse or a named Dependant, a pension payable to such surviving spouse or named Dependant;

in the case of a Member who dies while in the service of the Employer survived by his spouse or a Dependant, a pension payable to such surviving spouse or Dependant

a lump sum payable on the death of a Member while in the service of his Employer;…”

Rule 13 (‘Payment of Death Benefits’) says:

“Any lump sums…which become payable on the death of a Member shall except as otherwise provide by Section (b) of this Rule be held and applied by the Trustees for the benefits of the Member’s surviving spouse and/or children or other relatives or Dependants or such of them and in such shares and for such interests and in such manner as the Trustees may decide or, at the Trustees’ discretion, the whole or any part of any such benefit may be paid to the legal personal representative of the Member.

For the purpose of this Section of this Rule the term “Dependant” shall have the meaning given to it in Rule1but may also at the discretion of the Trustees be extended to include any other individual or, in the case of lump sums payable…body nominated by the Member for this purpose provided such nomination has been made by the Member to the Trustees in writing.”

Dependant is defined in Rule 1 (‘Definitions’):

“Dependant” means in relation to any Member and child of the Member who has not attained age 18 or is still alive receiving full-time educational or vocational training and any child of the Member or any individual who in the opinion of the Trustees was financially dependent on the Member at the date of the Member's death provided always that in relation to a Member who has retired on pension any individual who in the opinion of the Trustees was financially dependent on the Member at the date of his retirement on pension shall also be included as a Dependant.

The 'new' Deed and Rules

2. As relevant clause 3.12 says:

> "The Trustees SHALL HOLD the Scheme Assets UPON IRREVOCABLE TRUST … to apply the income and if appropriate the capital towards providing Benefits for and in respect of such employees of Participating Employers in accordance with this Deed. All Scheme Assets are held by the Trustees in common to provide Benefits for and in respect of all Members of the Scheme."

As relevant clause 8.1 says:

> "The Scheme will operate, and any benefits provided by the Scheme, will be on a money purchase basis…the Scheme may provide any benefits to or in respect of any Member, which would not be an Unauthorised Payment."

Material Facts

3. Mrs Worden and Mrs Ballard (Mrs Worden's mother) and Mr Ballard (Mrs Worden's brother) were the Trustees of the Scheme.

4. Hazell Carr were the Scheme's Administrator prior to May 2010. Subsequently their role was that of an Authorised Practitioner, appointed by Mr Ballard acting as Scheme Administrator.

5. MFW are the Scheme's Accountants and provide ad-hoc advice to the Trustees.

6. Mrs Worden retired from her employment at the family's butcher shop in August 2007, then aged 60.

7. The Trustees say that Hazell Carr wrote to Mrs Worden about her retirement in May 2007.

8. Mrs Worden together with Mrs Cooper met with MFW on 4 October and 12 November 2007.

9. The day after the October meeting MFW wrote to Mrs Worden enclosing a copy letter which they had sent (same day) to Hazell Carr informing them that Mrs Worden had retired and requested that they correspond with her directly.

10. On 16 October 2007 Hazell Carr wrote to Mrs Worden:

- requesting her confirmation that she had retired on 6 August 2007, that this was the date she had left the service of Ken Ballard Ltd and she was looking to take her benefits from then;
- urged her to consult her financial adviser "who will be able to inform you of the retirement option that best suits your circumstances";
- advised if she wished to crystallise her benefits in the Scheme they would require her completion of their 'Benefit Crystallisation Form' (which was enclosed);
- if the form was not fully completed it could result in delays in settling her benefits;
- following their receipt of the fully completed form a benefit quotation would be issued;
- once she had accepted the quotation they would progress the settlement of benefits;
- charges for their work would apply, details of which were available on request.

11. The Benefit Crystallisation form requested various information, including: confirmation of the proposed crystallisation date, the amount of retirement fund to be crystallised and how the benefits were to be taken (income drawdown or annuity and or pension commencement lump sum), details of whether she was entitled to an Enhanced Lifetime Allowance and any other crystallisation events and a pension commencement lump sum declaration. Mrs Worden did not return the form.

12. Hazell Carr issued similar letters to Mrs Worden in November 2007 and at the end January 2008 (the latter apparently after Mrs Worden had telephoned them), but the form was not returned.

13. MFW say the Trustees had no direct contact with Hazell Carr or Mrs Worden about her retirement after January 2008 and "it was left to Hazell Carr to deal with Mrs Worden's pension entitlements".

14. In February 2008 the Trustees obtained a valuation of the freehold property held by the Scheme.

15. When Mrs Worden died on 20 August 2010 her benefits under the Scheme remained uncrystallised.

16. A previous complaint (85331/1) was made by the Executors, alleging a failure by the Trustees and Hazell Carr to provide information requested within the timescales specified by the Occupational Pension Schemes (Disclosure of Information) Regulations 1996.

17. That complaint was upheld against the Trustees only, but no actual financial loss had accrued to Mrs Worden's estate – since the information was eventually provided - so no direction was made.

18. At that point, there was no indication as to how the estate would be distributed but mention was made of a dispute concerning the applicable Trust Deed and Rules:

19. The Scheme was constituted by a Declaration of Trust dated 27 January 1988. According to the Respondents, this Declaration and the rules were replaced by a new Trust Deed and Rules with effect from 6 April 2006. This document was signed by Mrs Worden and Mr and Mrs Ballard and witnessed by John Manners (who is said to have been Mrs Worden's independent financial adviser).

20. Clause 3.1 says:

> "This Deed replaces any previous trust deeds and/or rules adopted in respect of the Scheme, from the effective date on Page 1."

21. Page 1 is undated.

22. There are two references within the Deed to suggest that a particular date/period for signature was intended – in the definition of Pensioner Trustee 'prior to 6 April 2006' and at 6.8, refers to Members joining the Scheme after 5 April 2006 needing to sign an undertaking regarding contributions.

23. The significance of this date is 'A' Day pension changes, which the Respondents say was the entire rationale behind preparing a new Trust Deed.

24. The previous determination did not (need to) rule on the validity of the new Trust Deed. It held that (para 37-38) if the new Deed is effective:

> "Clause 8.1 gives wide discretion (by the use of the word "may" to pay benefits "in respect" of Mrs Worden as long as they would not be unauthorised payments under the Finance Act 2004. A lump sum payment (within specified limits) to a person or persons determined by the Trustees as appropriate recipients – or a pension to a dependent (as defined) would not be unauthorised payments.
>
> If the undated Deed was regarded as ineffective, the previous Declaration of Trust and rules would still be operative and they contain the appropriate discretions."

25. Mrs Worden does not appear to have completed an Expression of Wish (nomination form). Her Will left £5000 to Mr and Mrs Cooper and bequeathed to three minors (not her blood relatives) "All the remainder of my property...To be held in Trust until each reaches 40 years of age - to be divided equally."

26. In October 2011 MFW (acting on behalf of the Trustees) wrote to Hazell Carr that as Mrs Worden's Will did not leave any of her estate to her only child (a daughter, Mrs R) and as the Scheme was intrinsically established for the benefit of the Ballard family, the Trustees wanted to know if they could leave Mrs Worden's interest in the

Scheme to Mrs R and whether they needed to consider any other issues before finally deciding what they should do.

27. Hazell Carr replied:

> "…the trustees can make payment to Mrs Worden's daughter and there are no issues with this decision. Whether there are issues for the recipient in receiving this is not our concern and we cannot comment on that."

28. In July 2012 the Trustees decided that Mrs Worden's third interest in the Scheme's net assets should be transferred into a Discretionary Trust set up for the benefit of Mrs R.

29. The transfer was to be completed by an in-specie lump sum, consisting of the part transfer of the property owned by the Scheme.

Summary of the Executors as represented by Ward Hadaway

30. Ward Hadaway say:

- prior to her retirement the Trustees failed to explain to Mrs Worden her retirement options;
- following her retirement they failed in their fiduciary duty to arrange to put Mrs Worden's pension into payment;
- the October and November 2007 meetings between Mrs Worden (accompanied by Mrs Cooper) and MFW were to arrange for her pension to be put into payment;
- one of the reasons Mrs Worden did not submit the Benefit Crystallisation Benefit Form was that the valuation of the property in February 2008 was unrealistically low;
- despite Mrs Worden's requests and her patent medical difficulties (Mrs Worden was suffering from cancer and became progressively less able to pursue her legal rights) the Trustees and MFW failed to put her pension into payment;
- under Rule 6 of the old Deed Mrs Worden was entitled to a scheme pension on her retirement, without any action on her part, so her claim passes to the estate;
- the Trustees failure to put Mrs Worden's pension into payment amounts to an egregious breach of trust, as there was a conflict of interest among the Trustees as regards their duty as Trustees and self-interest as they were aware that to put the deceased's pension into payment would have required the sale of the farmland asset (representing the main value of the Scheme) which the Trustees were unwilling to do;
- the Trustees decision to transfer what is purported to be the deceased's interest in the Scheme to a discretionary trust for the benefit of Mrs R is an unauthorised payment from the Scheme under the old Deed or new Deed;

- Rule 4(a) of the old Deed provides for a discretionary lump sum payable only on death while in service and there is no evidence that Mrs R (who was 23 and estranged from her mother) was financially dependent on Mrs Worden so she would not qualify in any event as an eligible beneficiary;
- under the old Deed the Scheme is defined benefit, under the new Deed it is money purchase which fall's foul of Rule 18 and Section 67(2),(3) and (G) of the Pensions Act 1995;
- even if the new Deed was valid it would not permit any payment of benefit to any person other than the member (as defined) or the member's estate. The new deed contains no power to distribute death benefits and no class of beneficiary.
- they have seen no evidence that there has been a transfer of property by way of an in-specie lump sum to Mrs R.

Summary of The Trustees position

31. The Trustees say:

- they were not obliged to put Mrs Worden's pension into payment when she stopped working;
- as Hazell Carr were employed as the Scheme's Administrator it was left to them to deal with Mrs Worden's pension entitlement;
- in anticipation that the completed Benefit Crystallisation form would be returned a valuation of the property held in the Scheme was obtained in late February 2008;
- but Mrs Worden's benefits remained uncrystallised as she did not complete the form;
- consequently there was no debt due to the estate in respect of an unpaid pension for her;
- on Mrs Worden's death the Trustees were required to deal with the uncrystallised benefits;
- they did not hold a nomination made by Mrs Worden and subsequent enquiries did not produce one;
- they duly exercised their discretion (after seeking advice from Hazell Carr) and an in-specie lump sum of Mrs Worden's share of the property owned by the Scheme was transferred into a discretionary trust for the benefit of her daughter.

Summary of MFW's position.

32. MFW say:

- they have never acted as the Scheme's Administrator, they are the Scheme's Accountants and provide advice to the Trustees;
- after meeting with Mrs Worden in October 2007 they asked Hazell Carr to deal directly with Mrs Worden about her retirement;
- Hazell Carr notified the Trustees that the new Deed from Pensions A-day (6 April 2006) superseded the old Deed;
- it is this Deed which is and was the governing documentation when Mrs Worden died.

Conclusions

Mrs Worden's pension

33. MFW say the Trustees and MFW failed to put Mrs Worden's pension into payment.

34. I do not think that is right. Hazell Carr acting on behalf of the Trustees wrote to Mrs Worden on three occasions after she retired from her employment detailing what they required from her to progress a pension claim. Mrs Worden failed to complete and return the Benefit Crystallisation form that was enclosed on each occasion.

35. The onus was on Mrs Worden to complete the form. If she did not understand it, or what she was required to do, she should have sought advice from an independent financial adviser – Hazell Carr urged her to do so and made it clear that they could not offer her such advice.

36. I understand that Mrs Worden was in poor health, but the Trustees were not required to do more than was done.

37. It has latterly been suggested that it may have been a conscious decision by Mrs Worden not to return the Benefit Crystallisation form because she considered the 2008 valuation of the property to be understated. Whatever the reason Mrs Worden did not complete the form. As a result the Trustees were not required to put her pension into payment.

The process the Trustees adopted following Mrs Worden's death

38. Following Mrs Worden's death I do not consider the process the Trustees adopted to make their decision was inappropriate.

39. The Trustees reasonably enquired about a nomination form (which was not forthcoming - it appears Mrs Worden did not complete one), considered the contents of her Will, the executors claim that death benefits should be paid to the estate and obtained advice from Hazell Carr as to whether a payment to Mrs R could be made

and if there were any other issues they needed to consider before deciding what to do.

The Trust Deed and Rules

40. If the new Deed was effective, whilst much shorter and less specific than the old Deed, the wide discretion under clause 8.1 does permit the Trustees to make a payment to Mrs Worden's daughter. As the payment was an uncrystallised funds lump sum death benefit, permitted in a Money Purchase Scheme under Schedule 29 (15)(1) of the Finance Act 2004, it is not an unauthorised payment under Section 168 of the Finance Act 2004. [I have found that The Trustees were not responsible for failing to put Mrs Worden's pension into payment but, even had they been, the payment to her daughter was not unauthorised because factually it remained uncrystallised funds].

41. Ward Hadaway say the new Deed is invalid and suggest that the old Deed implies that the Scheme is Defined Benefit (**DB**). A lump sum death benefit is allowed on a DB Scheme under Schedule 29 (13) of the Finance Act 2000, within 2 years of a Member's death – provided the Scheme's Rules allow it.

42. Ward Hadaway say that Rule 4 does not permit a lump sum payment where a member dies after retirement (only whilst in service) and in any event one could not be paid to Mrs R here.

43. But if the old Deed was effective, this means that the estate could not have received it anyway (as her benefits were uncrystallised).

44. This may well have been an error because Rule 13 envisages ways of distributing lump sums which have become payable and it seems unlikely that it could not have been intended that the Scheme cannot distribute (in such a circumstance) but keep hold of such funds.

45. Rule 13 extends the class of potential recipients, including children. 'Children' is not defined in the old Deed. It should therefore be given its natural meaning which is not diluted by age or dependency requirements. So Mrs R would qualify as a recipient (without a need to be under 18 or otherwise financially dependent).

46. Both Deeds would permit the Trustees, subject to following a fair and reasonable process, to select Mrs R as a suitable beneficiary. Only the new Deed would actually permit the payment under Clause 8.1. The old Deed appears to have missed out the appropriate trigger clause to make such a payment in these circumstances. This seems likely to have been unintended. It may be that a purposive interpretation of the Deed by the courts would infer such a trigger but, whichever way the case is viewed, the estate could not have received the payment. Ward Hadaway's point that the estate retains the accrued right to Mrs Worden's pension would only apply had she completed the formalities to put her pension into payment. As she did not do so, and

did not nominate another, the Trustees were left with the qualified powers by Deed, and no accrued right transferred to the estate.

47. I therefore do not uphold the complaint.

Jane Irvine

Deputy Pensions Ombudsman
23 March 2015