

Ombudsman's Determination

Applicant	Mr M
Scheme	The Eddom Pension Fund
Respondent	Rowanmoor

Outcome

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

Complaint summary

3. Mr M's complaint is that a portfolio of investments in his SSAS was encashed in 2005 without his approval or knowledge. Mr M says the action has caused him a financial loss as some of the investments sold have since substantially increased in value.

Background information, including submissions from the parties

4. Mr M is the sole member of the SSAS.
5. In 1990 Mr M's company (the **Company**) got into financial difficulty.
6. Under a Deed of Variation, in October 1995 the Liquidator used its power of appointment and removal to remove Mr M and Harewood Ridgeway Professional Services Limited as Trustees of the SSAS and appointed Fairmount Trustee Services Limited (**Fairmount**) as the Professional Trustee.
7. Mr M wrote to Fairmont on 1 November 1995. He said he was totally against its appointment. Fairmont informed Mr M that it had no power to appoint or remove trustees and that he had been removed as a Trustee by the Liquidator. In a letter from Mr M to James Hay, dated 27 June 1996, Mr M acknowledged that he was "effectively not in charge of the fund".
8. In October 1996 a Deed removed Fairmont and appointed James Hay Pension Trustees Limited (**James Hay**) as the sole Trustee.

9. Clause 3(b) of the SSAS' Trust Deed & Rules says the Trustee has the:
- “Power to sell call in or convert into money any such investments securities and property thereof respectively”.
10. The SSAS included a property which had been leased to the Company. The property was sold in December 1999 to pay the sum owed to the Liquidator.
11. The SSAS also held a portfolio of investments (The Eden portfolio). Eden Group Plc (formerly Kyte Securities a division of Kyte Group Ltd) provided dealing services on an execution only basis.
12. On 29 January 2001 Eden Group wrote to Mr M:
- “On the information you have given us we have categorised you as a Private Customer.
- We will provide dealing services on an execution only basis in the investments listed in our Terms and Conditions.
- ...
- All payments made under this agreement will be paid to [Mr M]...
- ...
- This agreement may be terminated by one month's notice on either side or without notice in the event of a serious breach of its terms.”
13. Mr M says following the 2001/2 stock market crash he decided to sit on the portfolio which had reduced in value to approximately £17,000 (from £45,000 at the end of 2000), as he had some years to go before retirement age and he knew that markets usually recover.
14. Mr M says the last communication he received from James Hay was dated 15 March 2004 with no notification of any fees being owed. He says all communication was done by fax.
15. In June and July 2004 James Hay wrote to Mr M with invoices for payment. Both letters were returned undelivered in October 2004.
16. On 22 October 2004 James Hay instructed Eden Group to encash £3,000 from the portfolio and pay it into the SASS' bank account. It asked Eden Group to seek Mr M's instructions for details of which holdings to sell. It said if Mr M's instructions were not forthcoming it authorised Eden Group to use its discretion to sell sufficient holdings to raise the required liquidity. It said the funds were required as a matter of urgency.
17. An internal James Hay email dated 28 January 2005 says:
- “As you are aware this scheme is a long standing debtor” and asks if progress has been made “to get some more funds to pay our fees”.

18. Mr M says in 2005 he moved (from Alicante to Valencia) and sent a fax confirming his new address to James Hay.
19. Mr M does not have a copy of the fax and Rowanmoor says it has no record of receiving a change of address notification from Mr M.
20. Mr M says knowing there was money in the SSAS' bank account and that share dividends of approximately £550/£600 were being paid-in annually he decided to leave the SSAS' investments alone.
21. On 8 March 2005, to meet outstanding fees and the cost of any future fees that would continue to accrue as per the Client Agreement, James Hay instructed Eden Group to encash the portfolio. £17,780 was duly paid into the SSAS bank account on 22 March 2005.
22. Rowanmoor was formed from a management buyout of the SSAS division of James Hay in September 2006. Some of the current Directors at Rowanmoor were Directors at James Hay when the Eden portfolio was sold.
23. The fees raised from 2004/5 totals £16,385.78 (inclusive of VAT).
24. On 2 February 2017 Mr M emailed Rowanmoor confirming his current address. In the same email he said:

“There is a portfolio of shares which you don't seem to have. I have found the last statement I have and enclosed the statement of securities held [in the SSAS as at 16 January 2001] from the Kyte group”

Mr M said some of the shares had increased substantially in value, especially the Amazon shares, and some would also pay dividends.
25. Rowanmoor informed Mr M that the Eden portfolio (formerly Kyte) had been sold and the full proceeds paid into the SSAS' bank account in March 2005. It said its records showed that there was only a bank account held as a current asset of the SSAS with a small balance remaining in it. Rowanmoor asked Mr M what his plans were for the SSAS going forward and suggested that he might want to discuss his options with a financial adviser.
26. Mr M replied that he was concerned that the share portfolio had been cashed in by James Hay without his knowledge or authorisation. He said the shares had been purchased as long term investments and their sale had caused him a financial loss. He said he would be seeking legal advice.
27. Rowanmoor responded detailing the surrender of the Eden portfolio. It said:-
 - It understood that the principal employer to the SSAS entered liquidation at some point in 2002 and he (Mr M) was declared bankrupt which left James Hay as sole Trustee.

- As the principal employer was unable to settle any ongoing fees and costs incurred by the SSAS the liability automatically passed to the SSAS,
- It understood that Mr M was living abroad during this period and James Hay was unable to contact him at his last known address in Alicante.
- It had no record that he had notified his change of address or acknowledgment of any correspondence that continued to be sent to him.
- Due to these circumstances, the managing director of James Hay, acting as sole Trustee and signatory of the SSAS, took the decision to surrender the portfolio to meet the fees that were outstanding and the cost of any future fees that would continue to accrue as part of the Client Agreement.
- Correspondence continued to be sent to the Alicante address into 2006, including a set of accounts to 31 December 2005, which showed that the portfolio had been sold.

28. Mr M replied:-

- He had not been made bankrupt and should not have been removed as a Trustee.
- Whilst the principal employer could not cover fees, he was able to when required. Additionally, there would have been approximately £600 per year of dividends coming into the SSAS.
- The last communication he received from James Hay was in March 2004. There was no notification of any outstanding fees and in 2005 the portfolio had been sold to cover fees without any authority or his agreement. This amounted to mismanagement of the SSAS assets for the sole benefit of James Hay.
- All communication at the time had been by fax. He was trying to find a copy of the fax he sent advising his change of address. Nevertheless, not being able to contact him was not a reasonable excuse. A simple letter from its office to his parents had found him and he had contacted it within three working days.
- The whole reason he held the shares for long term was to make up the losses incurred when the market crashed in early 2000.
- He had briefly spoken with Slater Gordon and they had sent him a link to the fraud investigation into the actions of a Director of James Hay during the same period 2001/2005. Whilst he did not want to go down the legal route or contact a newspaper he wanted his money back for the portfolio as if it was now sold less its (Rowanmoor's) fees

29. In April 2017 Rowanmoor said it had reviewed all the files and, in the circumstances, it said it was required to refer the matter to its insurers before commenting further.
30. The following month Rowanmoor emailed Mr M:-
- There was clear evidence on file that he knew he was not a Trustee of the SSAS. The Liquidator had used the power of appointment under the SSAS' documentation to remove him as a Trustee of the SSAS and appoint Fairmont as the Professional Trustee. This was evidenced by a deed dated 24 October 1995. He had written to Fairmont on 1 November 1995 and Fairmont had informed him that he had been removed as a Trustee.
 - Given that his removal as a Trustee was valid and was brought to his attention, this left Fairmont as the sole trustee. Under the governing documentation of the SSAS the investment powers rest solely with the Trustees. Therefore, they rested solely with Fairmont until it was replaced by James Hay as Trustee by a deed of variation dated 4 October 1996, to which the Liquidator was a party. Consequently, James Hay as sole Trustee was perfectly within its rights to encash the share portfolio.
 - It was evident that every effort had been made to keep in contact with him, but for long periods of time it received no reply from him to its correspondence.
31. Mr M subsequently complained to this office.

Mr M's position

Mr M says:-

- He doubts that every effort was made to contact him in 2005.
- There was always cash coming into the SSAS account and therefore there was no reason to sell the shares. The share sale account showed there was over £1000 in cash from dividends in the account. Dividends from just two companies, United Utilities and Legal and General, were paid on a regular basis and amounted to £500/£600 per annum based on historical records from year 2000.
- There has been a breach of trust by James Hay/Rowanmoor. A Trustee must always act in the best interest of the schemes beneficiary/beneficiaries. In this case the James Hay/Rowanmoor acted negligently for the benefit of itself.
- Fees charged by James Hay from 2000 to 2005 were over £7,000 and by Rowanmoor from 2005 to date £16,385. This is for doing very little work.
- Rowanmoor has since told him that when his company was liquidated in 2002, leaving no principal employer, he should have been advised by James Hay to come out of the SSAS and invest the funds into something more suitable. Its non-action amounts to negligence.

Rowanmoor's position

Rowanmoor says:-

- The funds paid into the SSAS in late October 2003 had been paid to Mr M on 5 November 2003.
- While the portfolio was receiving dividends, the dividends did not cover James Hay's/its fees. When the portfolio was surrendered the dealing account balance was £340.92. Fees outstanding at that time amounted to £2,849.38 and dividend income would not have covered fees charged in respect of the scheme. For the year to 31 December 2004, dividend income was only £518 and interest on cash deposits was £17. Administration fees totalled £2,133 and Mr M had also been drawing a pension which had resulted in equities held in the Eden portfolio being surrendered
- It had no record of Mr M's change of address and he did not seek to make contact for over a decade. Its responsibility was to ensure that the SSAS was administered throughout this period in accordance with HMRC regulations and fees were raised for doing so. The disinvestments from the SSAS portfolio were the only viable option to recover the administration fees and as Trustee of the SSAS it was permitted to take this course of action.
- Its notes suggest that the decision to surrender the remainder of the portfolio in full was made to cover the immediate fees due and those for the following year. This would have resulted in a significant proportion of the portfolio being surrendered and further ongoing decisions to be made as to what needed to be surrendered going forward. As it was unable to contact Mr M at the time to obtain his requests for what should be surrendered and when the view was taken that there was no benefit in retaining the portfolio and continuing to make ad hoc disinvestments which would have incurred dealing transaction charges each time.
- From 1 July 2006 it reduced the annual fee to £250 when the SSAS became less active and Mr M was uncontactable. The fee was increased each year in line with the national average earnings index. Additional fees were charged to cover the SSAS accounts and the submission of the registered pension scheme return.
- Neither James Hay nor Rowanmoor were authorised to advise Mr M.
- Its records show that following receipt of the returned mail on the 18 October 2004 the system was updated to reflect that correspondence should no longer be issued to the address. Regrettably a bank statement was issued in error in December 2004 (and returned in March 2005), and then a set of scheme accounts in 2005.
- It cannot determine the steps that were taken to trace Mr M at the time however there were less avenues for tracing individuals in 2004 than there are now. In 2016 it completed a large anti-money laundering exercise and as a result instructed a firm of solicitors to attempt to trace Mr M. This did not provide any further information on Mr M's address but did manage to locate an address for his father. It used this to

make contact with Mr M. Prior to the trace it did not hold details for Mr M's father as next of kin.

Adjudicator's Opinion

32. Mr M's complaint was considered by one of our Adjudicators who concluded that no further action was required by Rowanmoor. The Adjudicator's findings are summarised below:-

- Under the SSAS' Trust Deed and Rules the Trustee has the power "to sell call in or convert into money any such investments securities and property and any part thereof respectively".
- The onus was on Mr M to inform James Hay/Rowanmoor of his change of address. Mr M says he sent a fax to James Hay in 2005. Rowanmoor has no record of the notification on file. Mr M does not have the fax and, more importantly, there is no proof that a fax was received by James Hay.
- After Mr M says he sent the fax Rowanmoor sent statements and accounts to Mr M's former address. This supports its position that no notification of a change of address was received by James Hay.
- The funds held in/paid into (from dividends) the SSAS account were insufficient to cover James Hay's fees. As Trustee, James Hay was empowered to instruct Eden Group to encash money from the portfolio. It asked Eden Group to contact Mr M for details of which holdings were to be sold, but if Mr M's instructions were not forthcoming it gave its authority for Eden Group to use its discretion to sell sufficient holdings to raise the required liquidity. In all the circumstances James Hay's actions do not amount to maladministration.
- Rowanmoor do not have a copy of the Client Agreement. Nevertheless, the fees charged from June 2004 do not appear to be excessive and the work that was done has been documented.

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

Ombudsman's decision

34. In respect of this matter Mr M says while Rowanmoor, as Trustee, has complied with the SSAS' trust deed and rules, it has not acted in his best interest as a pension scheme member nor has it been impartial, prudent, responsible and honest.

35. Mr M says no steps were taken to contact him prior to 2016 and that the same avenue to contact his next of kin existed on file in 2004. Mr M says his surname is not common. He says Hull's directory enquiries would have brought up several family members who could have given James Hay/Rowanmoor his contact details. Similarly, Spanish directory enquiries could have been used to trace him.
36. Nevertheless, the onus was on Mr M to ensure that James Hay/Rowanmoor had his current contact details. Mr M says he sent James Hay a fax in 2005 advising his change of address. Unfortunately, he does not have a copy of it. But more importantly he has no transmission confirmation of when he sent it or a contemporaneous acknowledgement from James Hay of its receipt. Mr M should have asked James Hay to confirm that it had received his notification rather than assume that it had.
37. Mr M maintains there is a link between the fraud by one or two directors of James Hay and the actions taken to sell the SASS' shares portfolio. But Mr M has provided no evidence to support his supposition.
38. Mr M says James Hay should only have instructed Eden Group to sell sufficient shares to cover the outstanding annual fees.
39. Rowanmoor says the decision was taken to encash the portfolio to cover the immediate fees and those for the following year; because there was no benefit in retaining the portfolio and continuing to make ad hoc disinvestments which each time would have incurred a dealing transaction charge.
40. It is not possible to determine whether the Trustee's decision has caused the SASS a financial loss, because it is not possible to compare the SSAS' position as a result of that decision to what it would have been if the decision had been taken to encash only sufficient shares to cover fees when they fell due. There are too many imponderables to recreate that situation. For example, each time a disinvestment was required we do not know which shares/investments would have been chosen for encashment.
41. As it has transpired Rowanmoor's fees from 2005 to May 2017 almost covered the value of the portfolio when it was sold.
42. In all the circumstances, my view is that the Trustees decision to encash the portfolio was not unreasonable.
43. Mr M disagrees that fees charged were reasonable. In particular, he says £6,368.52 was "plundered" between October 2004 and July 2005.
44. This sum (inclusive of 17.5% VAT) covered the following invoices:-
- | | |
|-----------|--|
| July 2003 | £1,368.88 – Annual Scheme Fee 2003/4. |
| June 2004 | £1,415.88 – Tax returns 2001/2, 2002/3 & 2003/4 plus Annual Accounts for years ending 31/12/02 and 03. |

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July 2004 £1,433.50 – Annual Scheme Fee 2004/5.

June 2005 £ 652.13 – Annual Accounts for year ending 31/12/04 plus tax return
2004/5.

July 2005 £1,498.13 – Annual Scheme Fee 2005/6.

45. Mr M would have signed a client fee agreement when the SSAS commenced. Unfortunately, neither Rowanmoor nor Mr M has a copy. Nevertheless, I agree with the Adjudicator that the fees charged do not appear to be excessive.
46. Mr M says he does not recall receiving a regular income from the SASS. Rowanmoor has provided evidence that Mr M was paid £4,500 in early November 2003.
47. I do not uphold Mr M's complaint.

Anthony Arter

Pensions Ombudsman
20 November 2018