

Ombudsman's Determination

Applicant	Mr N
Scheme	NJA Pension Scheme (the Scheme)
Respondents	The Trustees of the Scheme (the Trustees)

Outcome

1. Mr N's complaint is partly upheld. To put matters right for that part of the complaint that I have upheld, the Trustees shall pay Mr N £500 in respect of the significant distress and inconvenience which Mr N has suffered.

Complaint summary

2. The complaint relates to the following matters:
 - The Trustees' failure to keep accurate records of Trustees' meetings;
 - The Trustees' failure to produce Scheme accounts in a timely manner;
 - The Trustees' failure to rectify a shortfall in income paid to Mr N;
 - The level of fees that the Trustees incurred in respect of the Scheme;
 - The Trustees' refusal to appoint either Mr N as new trustee of the Scheme, and the Trustees' refusal to allow Mr N to nominate new trustees;
 - A payment made by the Trustees to a Mr Z in 2014;
 - A planning application in respect of the trust property made in 2014; and
 - The Trustees' valuation of the Scheme property in 2017.

Background information, including submissions from the parties

3. On 27 January 1986 the Scheme was established by Nigel Jason Associates Ltd (**NJA**). Mr A (the father of Mr N) and his business partner (**Mr V**) were NJA's two directors. They became the initial members of the Scheme. Mr A's family owned 76% of NJA's shares and Mr V held the remaining 24%.

4. Mr A and Mr V were appointed as initial trustees of the Scheme, together with the Scheme actuary (**the Actuary**).
5. The Scheme's principal asset is a multi-tenanted property in Lancashire. This consists mainly of workshops and storage units. Its recorded value has fluctuated over the years. In April 2015 it was valued at £608,000. In the Scheme accounts for April 2017 it was valued at £750,000. In subsequent Scheme accounts it was valued at £700,000.
6. Between November 1998 and June 2000 Mr N and his brother (**Mr X**) were additional directors of NJA.
7. In 2004, MJF SSAS Trustees Ltd (**MJF**), a company associated with the Actuary, replaced the Actuary as a trustee of the Scheme.
8. Mrs A (the wife of Mr A) later became an additional member and co-trustee of the Scheme.
9. On 1 November 2007, Mr A, Mrs A and Mr V commenced drawing benefits from the Scheme.
10. In July 2012, Mr A found out that he had cancer. On 26 December 2012 Mr A died, without leaving a valid Will. This left Mr V as sole director of NJA. In line with Mr A's completed expression of wish form, his pension fund was allocated to provide benefits for Mrs A.
11. As at 23 February 2013, the Scheme asset value was calculated to be £552,028, including £540,000 for the property investments. The Scheme asset value was apportioned as follows, subject to tax:
 - Mr A: £212,668
 - Mrs A: £216,061
 - Mr V: £123,299.
12. On 24 April 2013, Mrs A died. In accordance with her completed expression of wish form, her share of the pension fund (including her late husband's) in the Scheme was allocated equally to Mr N and Mr X.
13. On 14 July 2013, the Trustees informed Mr N's solicitor that the pension funds that had been allocated to Mr N's late parents would become payable to their family, namely Mr N and Mr X.
14. Mr N informed the Trustees that his late parents would have wanted him to take over the management of the Scheme property. The Trustees agreed to let him do so, on an unpaid basis. The level of rent subsequently collected and paid into the Scheme fell significantly. After some tenants left, they were not replaced. Property maintenance and cleaning standards deteriorated. In June 2014, the Trustees decided to appoint Mr V as property manager in place of Mr N, on a remunerated basis. After Mr V's appointment, increased levels of rents were collected by the Trustees.

15. On 17 June 2014, Mr V applied to the local council for planning permission to redevelop the Scheme property for residential purposes. The application did not mention Mr V's co-trustee or the Scheme, but referred to a company named NJA Self Storage Ltd. The Trustees paid the professional fees arising in respect of the application. After an intervention from Mr D (the appointed representative of Mr N and Mr X) the local council refused to grant planning permission.
16. On 15 August 2014, Mr V incorporated a new company (**LSL**).
17. On 28 August 2014, a trust deed (**the 2014 Deed**) was executed by the Trustees and LSL. The 2014 Deed had been drafted by solicitors DLA Piper LLP (**DLA**), acting on behalf of the Trustees. Under the 2014 Deed:
 - LSL was appointed as principal employer of the Scheme in place of NJA;
 - the Scheme rules were amended so that the Trustees could unilaterally remove a participating employer; and
 - invoking that provision, the Trustees removed NJA as a participating employer.

Mr N and Mr X were unaware of the existence of this deed - and its effect - until 2017.

18. No death benefits were paid by the Trustees until December 2014, when Mr N received a lump sum of £1,000.
19. In late March or early April 2015, a Mr Z contacted Mr N to inform him that Mr Z had made a loan of £6,000 to Mr A, which he wanted back. On 14 April 2015, solicitors acting for Mr Z wrote to Mr N. They asked him to repay the loan, threatening court action if he refused. They said that Mr Z had made the loan in 2012. Mr N signed an agreement, dated 17 April 2015, to repay the loan in full. Presumably because he did not have the cash readily available, Mr N asked Mr V to help him repay the loan. They agreed that the Trustees should repay the loan directly to Mr Z and reduce Mr N's pension fund by the same amount.
20. Between 16 and 28 April 2015, the Scheme's bank balance fluctuated between £12,710 and £8,820. £2,000 was paid to Mr Z. Mr V was paid £500 and Mr N was paid £139.50.
21. Between 7 May and 26 May 2015, the balance fluctuated between £12,316 and £7,401. Mr Z was paid £2,000, Mr V £500 and Mr N £209.25.
22. Between 1 June and 8 June 2015, the balance fluctuated between £8,653 and £9,912. Mr Z was paid £500, Mr V £607.98 and Mr N £69.75.
23. Between 19 June and 1 July 2015, the balance fluctuated between £7,544 and £9,364. Mr Z received £1,500, Mr V £500 and Mr N £139.50.
24. In June 2015, Mr D sent a complaint to the Actuary. Mr D said that the Trustees had provided insufficient information to Mr N and Mr X about their entitlements to income from the Scheme, no Scheme accounts had been provided to them, and it was unclear

why the Trustees had appointed Mr V as property manager and paid him a salary on top of his Scheme pension. Mr D said that Mr N and Mr X had been suffering severe financial difficulties and wanted to receive income drawdown. Mr D also asked to see the minutes of Trustees' meetings.

25. In an email dated 18 August 2015, Mr D warned the Actuary that failure to provide the information requested would result in the commencement of litigation against the Trustees. In response, the Actuary provided copies of the Scheme accounts. The Actuary said that there were no formal minutes because the Trustees did not hold face to face meetings; their decisions were usually taken after telephone conversations; all the decisions taken since the death of Mr and Mrs A had been summarised in an email sent to Mr D.
26. In October 2015, Mr N asked the Trustees to pay him and Mr X £500 per month, backdated to June 2015. Mr N also asked for any shortfall in payments to be made good, bearing in mind the amounts paid to Mr V. From November 2015, payments of £500 per month, backdated to July 2015, were paid by the Trustees to Mr N. Similar backdated payments were made to Mr X in December 2015. These amounts were increased to about £7,000 p.a. each in 2017. Overall, Mr N has received more money from the Scheme than Mr X, but less than Mr V. Mr D has estimated that Mr N has received about 2/3rds of the total received by Mr V.
27. In November 2015, Mr D complained to the Actuary that the Scheme accounts for 2013 and 2014 significantly overstated the value of the Scheme property.
28. Mr D sent a lengthy list of complaints to the Actuary on 22 December 2015. The Actuary responded to each item on 15 January 2016. He said that:
 - there were no Trustees' meetings, so none needed to be minuted;
 - as the Scheme was invested mainly in property, there was a limited amount of cash which could be used to pay regular income to beneficiaries;
 - Mr V's planning application had been made with good intentions, because if permission was granted it would enhance the value of the Scheme property;
 - the legal costs incurred by the Trustees in appointing a new principal employer of the Scheme and on other matters were a reasonable Scheme expense;
 - there was no obligation to provide property valuations or Scheme accounts to Mr N and Mr X within a specific timescale;
 - it was acceptable for the Scheme accounts to show a historic or cost value for property, to avoid the expense of commissioning a new property valuation each year;
 - the delay in commencing regular income payments to Mr N was caused by the need to satisfy anti-money laundering requirements; additional checks had been needed in respect of Mr X because he was unable to manage his own financial affairs, so payments for him had to be paid via Mr N, although there was no power of attorney in force;

- as a retired member, Mr V had been receiving pension payments from the Scheme before any death benefits became payable, so it would be unfair to reduce Mr V's future pension payments;
 - when the statutory pension freedoms were introduced in April 2015, the Trustees had allocated the death benefits in a manner that was designed to avoid income tax, and the Trustees had acted fairly and equitably having regard to the different classes of beneficiary in the Scheme;
 - there was no requirement in the Scheme rules to appoint the beneficiaries of death benefits as Scheme trustees, and
 - in any event, the Trustees did not consider Mr N to be suitable to act as a trustee, bearing in mind that the income received by the Scheme had fallen substantially while Mr N was managing the Scheme property. The Trustees thought that Mr X was also unsuitable for trusteeship because they understood that he could not manage his own financial affairs.
29. Up to January 2016, the Trustees had paid approximately £9,500 to Mr N, for the benefit of Mr N and Mr X equally.
30. Mr X was taken into care by his local council, which opened a bank account for him. Subsequent payments by the Trustees for Mr X were paid into that account.
31. On 20 May 2016, a solicitor acting for Mr N emailed the Trustees to complain about their management and administration of the Scheme, alleging a breach of duty. DLA refuted all the complaints.
32. In October 2016, the family home of Mr N and Mr X was sold. By then, mortgage payments were in arrears and essential maintenance had not been carried out.
33. A copy of the 2014 Deed was given to Mr D in May 2017.
34. In a letter to Mr N's solicitors on 14 July 2017, DLA said
- “Under the Scheme, your client is eligible for consideration for death benefits which are payable at the Trustees' discretion. At the present time, the Trustees do not intend to pay any additional income to your client, over and above that currently being paid.”
35. Mr N complained to the Actuary about the level of fees paid by the Trustees since his parents had died, and the amount of pension paid to Mr V.
36. The Actuary replied that there was no requirement for Scheme benefits to be paid in proportion to the 76/24% company shareholdings held by the family and Mr V. The Actuary also pointed out that the Scheme rules allowed the Trustees' legal costs to be met from the Scheme.
37. When Mr D first contacted us in 2018, on behalf of Mr N and Mr X, he provided details of a wide range of complaints he had made against the Trustees. On 14 January 2019, having considered the matter, we told Mr D that we would investigate only the following matters:

- Trustees' failure to keep Scheme minutes and provide Scheme accounts;
 - Trustees' failure to rectify the shortfall in death benefit payments;
 - Execution of the 2014 Deed;
 - The level of the Trustees' fees and costs arising;
 - Trustees' refusal to appoint Mr N or Mr X as a trustee of the Scheme;
 - Trustees' payment to Mr Z;
 - The planning application in 2014; and
 - The property valuation in 2017.
38. In its initial response on behalf of the Trustees, MJF said it had considered both Mr N and Mr X to be vulnerable individuals. It said it had acted cautiously in its dealings with Mr D because it was aware that he had been jailed for financial fraud.
39. On 6 March 2019, MJF provided its formal response to the complaints. It said that:
- As the Trustees' business was conducted by phone and email, there were no formal meetings to be minuted. The Trustees' day to day administration was delegated to MJF, which stored all correspondence, phone notes and supporting papers on a document management system.
 - Following the death of Mrs A, some death benefit payments had initially been made on an ad hoc basis when requested. The Trustees delayed allocating the bulk of the funds until legislative changes became effective from April 2015, because it was known that the taxation position would then become more favourable. There had been some delays in Mr N providing satisfactory identification to the Trustees, and a need to correspond with the Office of the Public Guardian regarding Mr X's financial dependency.
 - When the Trustees were informed that Mr X was under the care of a council social worker, they stopped making payments to Mr X and redirected his payments to Mr N.
 - Mr N had expressly authorised the Trustees to pay Mr Z in respect of the loan made to Mr A.
 - Mr V was already receiving pension income from the Scheme when Mrs A died, so the Trustees considered it reasonable for existing instalments to be maintained.
 - Each member's share of the Scheme was reduced to reflect the income paid to him.

- The Trustees had no obligation to tell Mr N about the execution of the 2014 Deed.
 - The Trustees' costs and legal fees had increased in recent years, but this was not due to poor management. Legal costs had been incurred in dealing with repetitive complaints made by Mr D. It was not unreasonable for the Trustees to instruct solicitors when they were being threatened with legal action.
 - The property management fee paid to Mr V was not excessive. It was comparable to that of an independent property manager. Since his appointment, increased rents had been paid into the Scheme.
 - Property cleaning and repair costs had risen, because these tasks had been neglected while Mr N was acting as property manager.
 - There was no legal obligation to appoint Mr N or Mr X as Scheme trustees, and in view of their mental health it was considered to be inappropriate.
 - MJF, the co-trustee, was independent of the Scheme employer and the Scheme beneficiaries.
 - Planning permission for residential use of the Scheme property had been sought in order to increase its value prior to its proposed sale, which would be for the benefit of each beneficiary. The Trustees had no obligation to inform Mr N or Mr X about the planning application.
 - The 2017 Scheme accounts had valued the property at £750,000 because the Trustees had hoped to sell the property for that price, but the deal eventually fell through. An independent valuation of £700,000 was used subsequently.
 - There was no deadline for producing the Scheme accounts, and no obligation to provide Mr N or Mr X with proof that the numbers shown in the accounts were correct.
 - Mr D's frequent demands were vexatious, and it would have taken the Trustees even more time and money to respond in more detail on each of the points he had raised.
40. In subsequent correspondence with my Office, among other matters, Mr D asked for a formal ruling on whether the 2014 Deed was valid, and the consequences of it being declared invalid. Having considered the matter carefully, Mr D was informed that I would not be able to make a finding on whether the 2014 Deed was valid, and that I would base my findings on the presumption that the terms of the 2014 Deed were fully effective.

41. Mr D has also sent complaints about more recent events, but they fall outside the scope of this investigation, which relates to the complaints he submitted on 8 May 2018. My Office explained to Mr D that we would investigate some, but not all, of the complaints he had submitted.
42. Mr X died in December 2019 without leaving a valid Will.

Adjudicator's Opinion

43. The 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 below:-
 - It was clear from the length and tone of the correspondence that there were significant tensions between Mr D and the Trustees.

Failure to keep minutes of Trustees' meetings and to notify decisions made

- In many cases, it was the practice of pension scheme trustees to hold face to face meetings. However, since 2013 the Trustees had consisted of only two parties, Mr V and MJF. MJF explained that their communications were conducted by telephone, email or post. Therefore, there were no formal meetings to be minuted.
- This approach was consistent with the rules of the Scheme. Under Rule 8 (see Appendix) the Trustees were permitted to make decisions by written resolution or in a meeting or otherwise (including by telephone or email). There was therefore no obligation to hold face to face meetings.
- Rule 7 (see Appendix) required the Trustees to keep such books and records as required for the proper administration of the Scheme. In the Adjudicator's view it would be maladministration if the Trustees failed to keep a written record of the decisions they made. That was because trust beneficiaries were entitled, under trust law, to know what decisions had been made that would or might affect them. It seemed clear from the amount of questions that Mr D had asked on behalf of Mr N and Mr X that they had not been kept fully informed by the Trustees.

Failure to provide Scheme accounts in a timely manner

- With regard to the disclosure of information, including scheme accounts, statutory regulations applied to most UK pension schemes in addition to the requirements of trust law. However, there were exceptions. If there was only one member left in a scheme, the beneficiaries of death benefits were not entitled to receive information under those regulations. That was because, although they were beneficiaries, they did not constitute "members". So, in this case, Mr V was a member, but Mr N and Mr X were not "members". That meant that they were not entitled under statute to receive copies of the Scheme accounts. Therefore, the Adjudicator did not think this part of the complaint should be upheld.

Failure to rectify the shortfall in benefit payments

- No death benefits were paid between April 2013, when Mrs A died, and December 2014. The Trustees were aware in 2013 that Mr N and Mr X were the appropriate beneficiaries of the death benefits. The Trustees defended their position by saying that they were awaiting the proposed pension freedoms, so that they could pay death benefits in a tax efficient manner. However, the pension freedoms were first mentioned in the Budget speech in March 2014. That was nearly one year after Mrs A died. In the Adjudicator's view that did not excuse the lack of any payments before then.
- Mr D had complained that the payments made to Mr V, Mr N and Mr X did not fairly reflect the percentage shareholdings of Mr V and the two brothers. However, there was no correlation between those two matters.
- Mr V was already drawing his pension when Mrs A died, and it was reasonable for the Trustees to take the view that his existing level of pension, which was being relied upon, should be protected. In contrast, Mr N and Mr X became beneficiaries only in April 2013 when Mrs A died.
- The Scheme was invested mainly in property. Mr A had agreed to that. The downside of that arrangement was that it was an illiquid form of investment that was unable to pay large sums quickly. That did not cause a problem while Mr A and Mrs A were alive, but there was a limited amount of cash available to the Trustees each year to provide lump sum death benefits.
- The Scheme rules provided that the Trustees might impose such restrictions as to timing and amounts of payments as they reasonably considered necessary. In the Adjudicator's view, it was not unreasonable that the Trustees should seek to protect the level of income being paid to Mr V as an existing pensioner before making payments to Mr N and Mr X. However, it was unreasonable of the Trustees not to release any death benefits until the end of 2014.
- In the Adjudicator's view this part of the complaint against the Trustees should be upheld, because there was an unreasonable delay – about 20 months - before the Trustees released any money to Mr N and Mr X.

Not appointing Mr N and Mr X as trustees

- Under Rule 4.1 of the rules governing the Scheme, the power of appointment and removal of trustees was vested in the Principal Employer, not the Trustees. That meant the power was originally vested in NJA and was currently vested in LSL. There was no obligation on the Principal Employer to appoint Mr N or Mr X as trustees, or to allow them to nominate new trustees. For these reasons the Adjudicator was of the view that this part of the complaint should not be upheld.

The fees and costs incurred by the Trustees

- Mr D claimed that the Trustees had racked up excessive fees and costs since Mr A and Mrs A died. Before 2014 the annual fees and costs were less than £30,000, but in recent years they had risen to over £50,000.

- Much of these costs related to the legal fees that the Trustees had incurred since 2013. The Trustees were entitled to take legal advice on Scheme matters, and to help them respond to complaints made against them, especially if the complainant implied that legal proceedings might be instituted.
- Mr D had submitted a series of complaints since 2014, often in a considerable amount of detail, that the Trustees had to address. In 2016 Mr N engaged lawyers to argue his case, so it was not surprising that the Trustees then did the same in response. In 2017 Mr N instructed a different firm of solicitors to correspond with the Trustees' lawyers. The preparation of the 2014 Deed for the Trustees also required legal input. Also, the Trustees were entitled to take legal advice before responding to a formal complaint that was made to the Financial Ombudsman Service before Mr D contacted my Office. In the circumstances, the Adjudicator considered that the fees incurred by the Trustees were reasonable.
- Mr D had queried other costs incurred by the Trustees since 2013, such as property repairs and renewals, cleaning, telephone bills and property management fees. In the Adjudicator's view, the explanations that MJF gave in its formal response letter of 6 March 2019, were satisfactory. It seemed that the appointment of Mr N as Scheme property manager was not as successful as one would have hoped, with the result that additional costs were incurred to rectify the position. Therefore, the Adjudicator thought that this part of the complaint should not be upheld.

The payment to Mr Z

- A copy of a note from Mr N dated 17 April 2015, consenting to repay Mr Z the loan of £6,000, had been disclosed. There was no evidence that the note had been signed under duress, or while Mr N was of unsound mind. The Adjudicator concluded that it represented Mr N's wishes at that time. In practice, the repayments had been made by the Trustees for Mr N's own convenience as he did not have the cash readily available, and with his consent a similar amount was then deducted from his pension fund.
- That was a rather unusual arrangement. Whether HM Revenue and Customs would apply any tax charges was a separate matter, on which it was not necessary for the Adjudicator to comment. However, as Mr N had clearly agreed to the repayment, the Adjudicator was of the view that Mr N could not make a successful claim against the Trustees in respect of this matter.

The 2014 planning application

- The Trustees were entitled to seek planning permission for real property that they held in the Scheme, and to meet the costs from Scheme funds. The granting of planning permission would be expected to increase the value of the Scheme property. That would ultimately be for the benefit of the Scheme beneficiaries. There was no obligation on the Trustees to inform Mr N of any such application.

- Mr V had not mentioned his corporate co-trustee or the Scheme on the application form, and he named the wrong company. The Scheme employer was NJA, not NJA Self Storage Ltd. In the Adjudicator's view, these errors were not material because no financial injustice arose from them. The costs that the Scheme incurred would have been the same if the application form had been completed properly. Therefore, the Adjudicator did not consider that this part of the complaint should be upheld.

Valuation of the Scheme property in 2017

- The Trustees were entitled to obtain formal property valuations at whatever intervals they thought appropriate, and to meet the cost from Scheme funds. In this case, the main property was valued at £750,000 in the 2017 accounts, having been valued at £608,000 for the previous two years. The Trustees explained that they were hoping to sell the main property for £750,000, so that is why that figure appeared in the 2017 accounts. After the deal fell through, a lower figure - £700,000 – was shown in subsequent accounts. The property had not yet been sold.
- In the Adjudicator's view, the increase from £608,000 to £750,000 sounded rather optimistic. However, these figures did not affect the share of the funds allocated for Mr N, so the Adjudicator did not consider that this part of the complaint should be upheld.

Conclusion

- The Adjudicator agreed with part of the complaint.
 - Firstly, the Adjudicator agreed that the Trustees had failed to keep Mr N and Mr X informed about their Scheme benefits. However, that omission had not caused any financial injustice, as it did not directly affect the calculation of the Scheme death benefits. Therefore, the Adjudicator was of the view that I would not make any award for this.
 - Secondly, the Adjudicator considered that the Trustees should have released some death benefits before December 2014, some 20 months after Mrs A died. If more money had been paid to Mr N, his interest in the Scheme now would be correspondingly smaller. However, he had suffered non-financial injustice in that the money was not made available to him at an earlier stage when he had needed it, even though the Trustees were able to spend money on other matters. The Adjudicator considered that the delay in making payments had caused Mr N significant distress and inconvenience.
- In many cases that would cause the Adjudicator to conclude that the applicant should receive an award for non-financial injustice causing him significant distress and inconvenience. However, if I were to make such an award against the Trustees, they would be entitled to be reimbursed for that amount out of the Scheme assets. That was because the Scheme rules included an indemnity

clause. Such reimbursement would not be in the best interests of the applicant as it would deplete the pension funds available to him. Therefore, in these circumstances, the Adjudicator concluded that no award should be made against the Trustees.

- The Adjudicator's comments and conclusions on the merits of Mr X's complaint were similar to his comments and conclusions on Mr N's complaint. Mr X had died after the Adjudicator's investigation into his complaint had commenced. No administrator of Mr X's estate had been appointed yet to represent him. Mr D's appointment as Mr X's representative in this matter had come to a natural end. This meant that, for the time being, Mr X's complaint to my Office could not be pursued.

44. Mr N did not accept the Adjudicator's Opinion, and the complaint was passed to me to consider. Mr D provided his further comments which I have noted. However, I agree with the main substance of the Adjudicator's Opinion.
45. Mr D said that the Opinion lacked objectivity and ignored some relevant facts. He corrected some inaccuracies in the reported order of events and reiterated many of his earlier comments. Firstly, he said that there was no evidence that Mr A had received a loan from Mr Z in 2012; that seemed most unlikely because Mr A was terminally ill in the second half of that year. Mr D was of the view that the solicitor's letter, threatening court action, had coerced Mr N into agreeing the repayment in 2015.
46. In Mr D's view, the Trustees' main aim was to run the Scheme "as if it were [Mr V's] private fiefdom", and they had unduly favoured Mr V in the payments they had made. There was sufficient annual income to pay more money to Mr N. The Trustees had not kept Mr N informed of his benefit rights and options, or explained the effect of changes in legislation.
47. Mr D pointed out that the expenses listed in the Scheme accounts for 2014 and 2016 included telephone bills totalling £1,604 and £920 respectively, which were inconceivably large amounts.
48. Mr D said that some events relating to the Scheme since the date of Mr N's application to my Office in May 2018 should carry some weight and should not be ignored. For example, he said that Mr V had awarded himself a significant pension increase in 2020, and that was inconsistent with his duties as a trustee.
49. Mr D also drew attention to an out of court settlement between Mr N and Mr V in 2017 regarding a company bank loan that had been guaranteed.
50. Lastly, Mr D strongly disagreed with the Adjudicator's view that even if I were to uphold any part or parts of the complaint, I would not be able to make any award in favour of Mr N, because it would effectively deplete the pension funds available to him in future.

Ombudsman's decision

51. As Mr X has died, I will restrict my findings to Mr N's complaint. This concerns the following matters:

Failure to keep minutes of Trustees' meetings and to notify decisions made

52. I note that as the Scheme had only two trustees after Mrs A died, there were no formal meetings to be minuted. MJF explained that all the Trustees' communications were conducted by telephone, email or post. Therefore, the Trustees should not be criticised for failing to keep minutes.
53. Scheme beneficiaries are entitled, under trust law, to know what decisions have been made by the Trustees that would or might affect them. The fact that since 2014 Mr D has asked so many questions about the Scheme, on behalf of Mr N, strongly suggests that the Trustees had not kept Mr N fully in the picture.
54. With regard to benefits, the Trustees paid Mr N £1,000 in December 2014 and later made monthly payments of £69.75. These were increased to £500 following a request from Mr N in 2015, and later were increased again. However, despite protracted correspondence, the Trustees have not produced any documentation to show their decisions about the amounts that should be paid to Mr N from time to time, or any communications with Mr N to explain their decision-making. In my view that supports the complaint that the Trustees' provision of information to Mr N was inadequate, and that constitutes maladministration on the part of the Trustees. However, I do not consider that the Trustees had a duty to inform Mr N about the effects of the so-called pension freedoms in 2015.

Failure to provide Scheme accounts in a timely manner

55. Although Mr N is a Scheme beneficiary, he is not a Scheme "member" like Mr V. That distinction is important because Mr N had no legal entitlement to receive a copy of the Scheme accounts. Therefore, this part of the complaint is not upheld.

The payment to Mr Z

56. Mr D considered that Mr Z's demand for repayment of a loan in 2015 was a scam, as he thought no loan had been made to Mr A. This office's investigation is evidence-based, and Mr N clearly signed the agreement in April 2015 to repay a loan of £6,000 to Mr Z. No documentary evidence that Mr N was coerced or acted under duress has been supplied. Furthermore, Mr Z has not been named as a respondent to the complaint: only the Trustees are respondents. That means I would not be able to make a finding against Mr Z in any event. For those reasons, I do not uphold this part of the complaint.

Unfavourable treatment - Failure to rectify the shortfall in benefit payments

57. Mr D expressed the view that the Scheme was being run by the Trustees for Mr V's personal benefit, favouring him financially over other beneficiaries. In particular, Mr D

emphasised that the money paid to Mr V and Mr N did not match the respective shareholdings of Mr V and Mr N's family. I should point out that there is no direct correlation between the company shareholdings and the benefits payable from the Scheme. The Scheme benefits depend on the contributions that were made to the Scheme and the investment return on the Scheme assets, net of charges.

58. Trustees have a duty to act in accordance with the Scheme rules. Where there are different classes of beneficiary, as in this case, the Trustees are not obliged to treat each class of beneficiary in the same way. In my view, the Trustees have had a difficult task in balancing the rights and expectations of the sole pensioner member, Mr V, and the beneficiary of the death benefits, Mr N. I consider that it was not unreasonable for the Trustees to conclude, when the death benefits first became payable to Mr N, that Mr V's level of pension income should be protected, as he was relying on it for his retirement income.
59. Furthermore, Mr V is a generation older than Mr N so, assuming normal mortality rates apply, Mr N can expect many more years than Mr V to draw money from the Scheme. I consider that the Trustees were entitled to take the age factor into account when determining how much to pay to Mr V and Mr N each year.
60. The Scheme has a current value exceeding £750,000, but as it has been predominantly invested in real property, with few liquid assets, there has been a limited amount of income for the Trustees to distribute each year. I would expect the Trustees to sell the Scheme property if they can obtain a reasonable price for it, and that will provide the liquidity that the Scheme needs. Unfortunately, achieving a property sale will take time, and the Trustees cannot make any progress until a willing buyer can be found. In the meantime, the amount of income available for distribution to Mr V and Mr N will be restricted, and the Trustees will need to consider carefully how the income should be applied each year.
61. There is another aspect of this that I am not satisfied with. After Mrs A died, there was a delay of about 20 months before the Trustees released any money to Mr N. I consider that delay should have been avoided, because Mr N's identity as a beneficiary was known to the Trustees, and there was some income in the Scheme at that time that could have been paid to him without compromising the amount of income payable to Mr V. The Trustees would have been aware that after his parents' deaths Mr N had little income to support himself. For those reasons I consider that this part of the complaint should be upheld against the Trustees.

Fees and costs incurred by the Trustees

62. Mr D considers that the fees and costs are excessive. One of the largest items of Scheme expenditure since 2014 relates to legal fees. The Trustees are entitled to take legal advice on Scheme matters, and to assist the Trustees in responding to complaints made against them, especially when the complainant threatens that legal proceedings might be instigated. The Trustees should not be criticised for taking legal

advice when they reasonably consider they need it. The Scheme rules permit reimbursement of such costs.

63. Apart from legal costs, the Trustees have been paying Mr V a fee for acting as Scheme property manager. Mr D has objected to this. Under the Scheme rules, the Trustees are entitled to employ agents and can remunerate them if they so wish. If Mr V ceased to act as property manager, the Trustees would presumably have to pay a third party to perform that role, and that might cost more than the fee that Mr V has been paid.
64. With regard to other expenses incurred by the Scheme, Mr D drew my attention to the telephone costs itemised in the Scheme accounts. I agree that the figures for 2014 and 2016 are substantial sums, £1,604 and £920 respectively. The Scheme accounts for other years show a smaller amount. A breakdown of those telephone costs cannot be obtained, but I understand that a shared telephone line was leased at that time, so the true cost for the Trustees may have been a smaller amount. The correspondence disclosed shows that in 2015-2016 there were a lot of communications between the parties and their advisers regarding various disputes that had arisen. Seen in that context, and as the expenditure impacts on the funds available to both Mr V and Mr N, I do not consider that this part of the complaint requires my further attention.

Not appointing Mr N as a trustee

65. Under the Scheme's governing documentation, the power of appointment of trustees is currently vested in LSL, as Principal Employer of the Scheme. LSL has no legal obligation to appoint Mr N as a trustee, or to allow him to nominate new trustees. This part of the complaint is not upheld.

The 2014 planning application

66. Mr D complained about the planning application. The Trustees were entitled to seek planning permission for real property that they owned, and to meet the relevant costs from the Scheme. If planning permission was granted it would be expected to increase the value of the property. That would be for the benefit of the Scheme and its beneficiaries. There was no obligation on the Trustees to inform Mr N that they had submitted a planning application.
67. It is clear that Mr V made some errors in the application form, for example, not mentioning the co-trustee and referring to the wrong company name, but this did not cause Mr N any financial injustice. The costs that the Scheme incurred would have been the same if the application form had not contained any errors. Therefore, this part of the complaint is not upheld.

Valuation of the Scheme property in 2017

68. Mr D complained about the valuation of the Scheme property. The Trustees are entitled to obtain formal property valuations of Scheme assets at whatever intervals they think appropriate, and they are entitled to meet the relevant costs from Scheme

funds. I note the value placed on the Scheme property has fluctuated from time to time. The true value will not be established until the property is sold. The differences in value have not affected the share of the funds allocated for Mr N, so this part of the complaint is not upheld.

69. Mr D is of the view that some events relating to the Scheme since Mr N's application to my Office in May 2018, are relevant to his complaints, and I should comment on them. However, it is necessary to draw a line under the complaints and events listed in Mr N's application form, because otherwise my Office's investigation could continue indefinitely as and when any new facts or events are made known. Furthermore, unsatisfactory behaviour by a party after a specific date does not necessarily mean that there was unsatisfactory behaviour by the same party before that date. For these reasons I do not propose to comment on the events occurring since May 2018 that Mr D has reported.
70. Mr D also mentioned the settlement between Mr V and Mr N regarding a company bank loan, but I do not consider that to be relevant to this complaint as it does not involve the Trustees.
71. I am satisfied that the Trustees' involvement in this complaints process has reminded them of the duties and standards of care that they owe to all the Scheme beneficiaries, and that they will bear these in mind when making future decisions about the benefits payable to Mr N.
72. Except for the Trustees' provision of information and the time taken to pay any death benefits to Mr N, I consider that the explanations that the Actuary and Trustees have given in response to Mr D's complaints between 2014 and 2018, and in subsequent correspondence with my Office, have been sufficient.
73. Lastly, Mr D was very unhappy with the Adjudicator's supposition that I would not make an award against the Trustees, even if I were to uphold any part of the complaint, if that amount would be reimbursed out of the Scheme.
74. If a pension scheme contains an indemnity or exoneration clause, it entitles its trustees to recover from the scheme assets any costs or charges that they have to pay, except in such extreme circumstances as are prescribed in the scheme rules. In this case, the relevant provision is in Rule 6 (see Appendix) and the exception relates to "wilful and individual fraud or wrongdoing". Although, I consider that the Trustees' conduct in two areas amounts to maladministration, that is not to say that the Trustees are culpable of "wilful and individual fraud or wrongdoing". In my view there is a much higher threshold required for satisfying that term, and it has not been reached in the present case. I consider that the wording of the indemnity and exoneration provision in Rule 6 protects the Trustees in respect of this complaint.
75. The Scheme assets are not formally segregated for each member, but form one pool that is used to pay all outgoings. That means any reimbursement for the Trustees under Rule 6 would reduce the amount of Scheme assets available to provide benefits for all members and other beneficiaries.

76. However, I consider that it would be appropriate for me in this case to make an award to Mr N for the significant distress and inconvenience that he has suffered as a result of the Trustees' inactions. That is because the pension fund is larger than it would have been, had the Trustees paid more money to Mr N after his parents' deaths. Such an award goes some way to putting Mr N into the position he would have been in, had the Trustees been willing to release money to him more quickly, and should not materially prejudice other beneficiaries.
77. Therefore, I partly uphold Mr N's complaint.

Directions

78. Within 21 days of the date of this Determination, the Trustees shall pay Mr N £500 for the significant distress and inconvenience that they have caused him.

Anthony Arter

Pensions Ombudsman
18 August 2020

Appendix

Extract from Rule 6 “Trustees: liability, indemnity and remuneration

6.1 The duty of care under section 1 of the Trustee Act 2000 shall not apply to any Trustee in relation to the Scheme.

6.2 Subject to section 33 of the Pensions Act 1995, no Trustee or Scheme Administrator shall be liable for the consequence of any mistake or forgetfulness whether of law or fact of the Trustees or Scheme Administrator, their agents, employees or advisers or of any of them or for any maladministration or breach of duty or trust whether by commission or omission or for any other matter or thing except wilful and individual fraud or wrongdoing on the part of the person sought to be made liable.

6.3 The Trustees and the Scheme Administrator and each of them shall, to the extent permitted by section 256 of the Pensions Act 2004, be indemnified out of the Fund against any losses, liabilities, costs, charges or expenses or other amounts any of them may suffer or incur in relation to the Scheme in connection with:

6.3.1 any proceedings brought in order to comply, or procure compliance by any Trustee or Beneficiary or other person, with any obligation imposed by law or by this deed or any agreement made under it;

6.3.2 any proceedings brought by or on behalf of a Beneficiary;

6.3.3 any other proceedings;

6.3.4 any liability to tax or other imposition of any kind in respect of any payment to be made to or in respect of a Beneficiary;

6.3.5 the execution of the trusts of the Scheme generally

except to the extent that such amounts:

6.3.6 are recoverable under any policy of insurance and would not be recoverable but for this exception, or

6.3.7 are suffered or incurred as a result of wilful and individual fraud or wrongdoing on the part of the person concerned.”

Extract from Rule 7 “Trustees: duty to keep records etc

7.1 The Trustees shall keep such books and records in such form and manner and for such periods as may be required either:

7.1.1 for the proper administration and management of the Scheme; or

7.1.2 by section 49(2) Pensions Act 1995.”

Extract from Rule 8 “Trustees: Proceedings

8.1 Subject to the remainder of this rule, the Trustees may regulate their proceedings as they think fit and make decisions by written resolution (which may consist of one or more documents in similar form) or in meeting or otherwise (including by telephone, electronic mail and any other means or combination of means whether all participants are able to communicate with each other at the same time or not and whether constituting a meeting or not).”