

## Ombudsman's Determination

Applicant	Mr Y
Scheme	The Patrick Eddery Pension Fund ( <b>the Fund</b> )
Respondents	Patrick Eddery Limited ( <b>the Company</b> ) Barnett Waddingham LLP ( <b>BW</b> ) Emma Louise Owen and Frank Rawlins Jarvey, together the former trustees of the Patrick Eddery Pension Fund ( <b>the Trustees</b> )

### Complaint Summary

1. Mr Y's complaint concerns the Trustees' decision not to pay him a proportion of the death benefits from the Fund, following his father's (**the late Mr Y**) death. He believes the Trustees did not exercise their discretion appropriately, as they did not consider him as a potential beneficiary when deciding how the death benefits should have been distributed.
2. He also believes that BW failed in its duty as Fund Practitioner (**Practitioner**), to act in the interest of the beneficiaries, in relation to the distribution of the death benefits.
3. He says both BW and the Trustees' actions have caused him significant distress.

### Summary of the Ombudsman's Determination and reasons

4. Mr Y's complaint is partly upheld. To put matters right, Emma Louise Owen (**Miss Owen**) shall pay Mr Y £500 for the significant distress and inconvenience caused. No further action is required by Frank Rawlins Jarvey (**Mr Jarvey**), BW or the Company.

## Detailed Determination

### Material Facts

5. The late Mr Y died on 10 November 2015. At the time, he was the sole member of the Fund, and he and his partner, Miss Owen, were the trustees of the Fund. Following the late Mr Y's death, another trustee, Mr Jarvey, was appointed on 24 February 2016. Mr Jarvey along with Miss Owen, then became the Trustees of the Fund.
6. Mr Jarvey was not a professional trustee. He and the late Mr Y were good friends, and he knew Ms Owen. After Mr Jarvey's appointment, the Trustees decided to award the full death benefits to Miss Owen.
7. Between 15 December 2015 and 3 September 2016, at Miss Owen's request, the Trustees made advance payments to her in respect of the death benefits. On 28 October 2017, the Trustees decided to pay Miss Owen the remaining death benefits in the form of a "dependant's flexi-access drawdown fund."
8. In April 2018, Mr Y emailed BW to query if he was entitled to any death benefits from the Fund. He also asked BW for details of the Fund's assets, the value of the Fund and copies of statements of all the Fund's financial transactions since the late Mr Y's death.
9. In response, BW said:

"In order to comply with legislation and regulations, the Trustees need to give us authority to do so in order for us to then provide information in relation to the pension scheme to parties who are neither a member, nor a trustee of the scheme.

We do not have authority from the Trustees to disclose scheme information to you. Accordingly, I cannot comment on information or correspondence relating to the pension scheme. To do so would be in breach of various aspects of legislation and regulation.

I understand from our conversation that at the time of your father's passing you had not yet attained age 23 and were still in full time education, the costs of which were, you say, funded by your late father. In this case we do not disagree that you did at that stage potentially meet the definition of a dependant. However, death benefits under the scheme are paid at the discretion of the Trustees. In exercising that discretion, the Trustees would give due regard to the deceased member's Expression of Wishes, had they completed one. There is no requirement for death benefits to be paid to any dependant."

10. Following BW's response there were further exchanges between Mr Y and BW, concerning the payment of the death benefits under the Fund. This resulted in Mr Y making a complaint to BW, which was not upheld.

**Mr Y's position**

11. Mr Y said in summary:-

- 11.1. At the time of the late Mr Y's death, he (Mr Y), was a "qualifying dependant" under the Fund, as he was under age 23.
- 11.2. With the assistance of BW, Miss Owen made herself the sole financial beneficiary of the Fund after the late Mr Y had died.
- 11.3. Miss Owen failed in her duty as trustee, to act in the best interest of the Fund and pay potential beneficiaries a proportion of the death benefits.
- 11.4. There was a conflict of interest on Miss Owen's part, and BW failed to address this in its role as "adviser".
- 11.5. When he raised this issue with BW, he was told that death benefits were paid at the sole discretion of the Trustees. However, this did not allow the Trustees to "abuse" their position of trust for personal financial gain, to the detriment of others.
- 11.6. The decision to pay death benefits to Miss Owen amounted to a breach of trust because it had been made prior to the official appointment of Mr Jarvey. Miss Owen did not have the basic knowledge and understanding needed to fulfil her role as trustee.
- 11.7. Although, as a dependant, he did not have an automatic entitlement to receive benefits from the Fund, the Fund's Trust Deed and Rules (**the Rules**) gave the Trustees discretion as to whom death benefits were paid.
- 11.8. As a dependant he was a potential beneficiary. The Trustees had a duty to give all potential beneficiaries impartial consideration, when using their discretionary powers, to decide who should be paid a death benefit. He did not believe it was done in this case.
- 11.9. BW said it is not for a Practitioner to instruct the Trustees on how the death benefits should be distributed. However, BW did instruct Miss Owen on how a proportion of the death benefits should have been distributed.
- 11.10. While there may be a significant difference between the level of liability and involvement of BW in comparison with the Trustees, he believes BW's misconduct was of a "very serious nature" and BW should be held accountable for its actions.
- 11.11. In its role as Practitioner, BW had to authorise any payment made from the Fund. If BW had known that the Trustees had failed to pay death benefits in accordance with the Rules, BW had a legal duty to report any breaches made by the Trustees.

- 11.12.If BW failed to do so, as a professional regulated company working within the pension industry, it would be within the Pensions Ombudsman's (**the PO**) power to make a decision on whether BW followed the "strict code of conduct and duty of care they are legally bound by."
- 11.13.BW has emphatically denied any wrongdoing on its part when acting as Practitioner. It has also "vigorously defended the trustees'...conduct and actions associated with running [the Fund] and distribution of death benefits."
- 11.14.BW said as Practitioner, its role did not extend to giving instructions on the distribution of death benefits. However, evidence shows that BW acted outside the scope of a Practitioner, and its initial response to The Pensions Ombudsman (**TPO**) appears to be dishonest and misleading.
- 11.15.When responding to the complaint, BW assured TPO that a Trustees Resolution (**Resolution**) was made prior to each death benefit payment being made. However, this was untrue, as BW later admitted that it had no knowledge that Miss Owen, in her role as trustee, had made a payment to herself without a Resolution being made for that payment.
- 11.16.After being contacted by BW, his mother queried if he or his siblings were entitled to any death benefits. BW had no authority to advise on benefits payable from the Fund but responded to his mother's query.
- 11.17.The first class of beneficiary under Rule 22.1.1 is the individual's relative. Yet, BW informed his mother that it would be very difficult for him and/or his siblings to claim any death benefits.
- 11.18.BW did not enquire about his or his siblings' ages. This is particularly important as he was under age 23 at the time, and so was a qualifying dependant under Rule 22.1.2. Dependant was the second class of beneficiary under the Rules.
- 11.19.Notes of a telephone conversation between Miss Owen and BW evidenced that Miss Owen intended to use the Fund's money to repay bank debts the late Mr Y's estate owed. The deed to appoint the second trustee had not been executed at the time of that telephone call. Yet, the notes showed BW's willingness to create a Resolution, knowing that the funds were going to be used to repay debts.
- 11.20.In August 2016, BW advised Ms Owen on what it thought the maximum amount of the next lump sum death benefit payment should be, and it also created a Trustees' Minute in this regard.
- 11.21.BW instructed Miss Owen, as trustee, to first choose the amount she required and to arrange for Mr Jarvey to sign the Resolution and return it to BW. BW explained that only when it had received the signed Resolution could the payment be made.



- 11.22. This clearly showed that BW gave detailed advice relating to the distribution of the death benefits. It also evidenced that BW was aware that the Trustees had not acted in the best interest of all potential beneficiaries when exercising their discretionary powers. BW was also complicit in the Trustees not doing so.
- 11.23. During an ongoing investigation on another complaint, BW had informed Miss Owen that she could not wind up the Fund in case the respondent to that complaint was required to make a remedial payment.
- 11.24. BW knew that the Fund could have a potential asset resulting from this case but allowed the Trustees to wind up the Fund anyway.
- 11.25. Although the Trustees were “ultimately responsible” for decisions relating to the distribution of the death benefits, he did not believe this in itself exonerated BW from all accountability related to its involvement, conduct and decisions. It also did not exonerate BW from being potentially liable for the significant distress its actions have caused.
- 11.26. BW held a position of responsibility and had a duty of care to ensure the Fund was administered and run correctly.
- 11.27. It is a legal requirement that trustees have fundamental knowledge of pension and trustee law, as well as knowledge of the duties and responsibilities of a trustee. After reviewing correspondence between Miss Owen and BW, he believed that it was “utterly implausible” that BW could have been unaware that Miss Owen lacked both “the competence and knowledge” necessary to fulfil her role as a trustee.
- 11.28. BW could have intervened and: (i) advised the Trustees of the advantages of seeking legal advice; (ii) advised the Trustees to appoint a professional independent trustee; (iii) remind the Trustees that it was “imperative” they identified and gave consideration to all potential beneficiaries when using their discretionary power; and (iv) explained the importance of the Trustees addressing and documenting any potential conflict of interest.
- 11.29. While BW may not have been legally required to intervene, he believes there is an argument that in not doing so, BW wilfully ignored the Trustees’ failure to act in the best interest of the Fund and all potential beneficiaries.
- 11.30. He finds BW’s conduct in responding to TPO, by falsely claiming the Trustees made Resolutions for all payments and failing to notify TPO of the Fund being wound up, mid investigation, drastically increased TPO’s workload, delayed the complaint procedure and created significant additional distress.
- 11.31. Miss Owen has not provided details of Mr Jarvey’s involvement, if any, with the decision of how the death benefits were to be distributed. The Resolutions contain inconsistent and contradictory information in relation to the lump sum

death benefit payments paid to Miss Owen. Resolutions were not made for each payment made to her.

- 11.32. The information supplied suggests that the Trustees never considered anyone else, other than Miss Owen, in relation to the payment of death benefits from the Fund.
- 11.33. He believes the Trustees' decision needs to be reconsidered. However, he does not believe that the Trustees would be capable of reconsidering their decision in a "fair and impartial" way.
- 11.34. Any monies owed to the Fund after the late Mr Y's death belonged to the beneficiaries of the Fund. If the loans should have been repaid, it was the responsibility of the Trustees and principal employer to work in the best interest of the beneficiaries at all times, ensuring the outstanding debts were repaid to the late Mr Y's estate.
- 11.35. While acting as executor for the late Mr Y's estate, Miss Owen had meetings with the joint executor, solicitors and Barclays Bank where she agreed to use money from the Fund to repay debt belonging to the estate.
- 11.36. A document provided by Miss Owen showed that she had agreed to repay the estate debt at a meeting on 9 February 2016, but Mr Jarvey was not appointed until 24 February 2016. This proves that Miss Owen had predetermined how she would spend the money belonging to the Fund before the appointment of the second trustee.
- 11.37. He believed the Trustees did not obtain legal advice before deciding how the death benefits should be distributed. Miss Owen treated the Fund's money as if it belonged to her personally.
- 11.38. The Trustees were aware that TPO had accepted his complaint for investigation, so there was potential for money to be returned to the Fund. They were also aware that the Fund had a potential asset, as the PO could have directed that any previous death benefit payments be returned to the Fund. The monies returned would have been held in the Fund for potential beneficiaries.
- 11.39. The Trustees say they considered his complaint before winding up the Fund. By taking his complaint into consideration but deciding to wind up the Fund anyway, the Trustees made a deliberate and decisive decision not to act in the best interest of the Fund and any potential beneficiaries.
- 11.40. The Expression of Wishes Forms (**the Forms**) and dependants form, dated 23 October 2015, do not appear to have been completed by the late Mr Y, despite them both having a signature that resembles the late Mr Y's signature.
- 11.41. The dependant's form required any children under the age of 23 to be declared. This section was incomplete although he was under the age of 23 at

the time. So, he can only conclude that either the late Mr Y did not sign the Forms or did not have the mental capacity to complete them.

- 11.42. The Trustees have stated that the decisions on the distribution of the death benefits were made using only information on the Forms and the Will. Rule 22.1 stated the different classes of beneficiaries who could have received a lump sum death benefit. The first two classes listed were the individual's relatives followed by any person for whom drawdown may be provided (a dependant).
- 11.43. The Rules gave the Trustees discretionary power to make payments to beneficiaries, in such proportions, as the Trustees determined. However, the Trustees have not provided any evidence to show they personally gave consideration to any other potential beneficiaries apart from Miss Owen.
- 11.44. The Trustees decided to award Miss Owen the Fund's remaining money as a dependant's flexi-access drawdown fund using factually incorrect information.
- 11.45. In the Resolutions, the Trustees included a £6,000 non-payment while omitting a completed payment of £200,000. This evidenced not only the Trustees' lack of care and attention while performing their duties, but that the Trustees were willing to act dishonestly by signing a document they knew was neither accurate nor truthful. Miss Owen withdrew £21,000 from the Fund just weeks before signing the Resolution, but this was also omitted.
- 11.46. Miss Owen received over £200,000 more than the Trustees claimed in the Resolutions. It would be impossible for Miss Owen to claim she did not have any knowledge of those payments as she herself had authorised and made and received the payments personally.
- 11.47. The Resolution dated 28 October 2017, should not be accepted as a valid document and the subsequent payment of £72,709.51 to Miss Owen should not be treated as a legitimate payment. This Resolution should be deemed void and the money returned to the Fund.
- 11.48. This situation has been distressing for him.

### **BW's position**

12. BW provided TPO with: copies of the Resolutions where it was agreed that the Trustees would make advance payments of the death benefits to Miss Owen, and that the remainder of the death benefits would also be paid to her (these are set out in Appendix 2); a copy of the Rules; copies of the Forms signed by the late Mr Y on 31 July and 23 October 2015; a copy of the late Mr Y's nomination form dated 23 October 2013; and a copy of the late Mr Y's will (**the Will**). It also provided its comments on the complaint. In summary, it said:-

- 12.1. The Rules gave the Trustees discretion as to the recipients of death benefits following the death of a member. Under those Rules, no dependant had a right to be granted any benefits following the death of a member.
- 12.2. Miss Owen did not make herself the sole beneficiary of the Fund. The Forms named Miss Owen as the sole preferred beneficiary of the Fund, in the event of the late Mr Y's death.
- 12.3. The Will included a similar disposition to the Forms. The Trustees obtained a copy of the Will to demonstrate that all relevant financial circumstances were considered when they decided on the distribution of the death benefits.
- 12.4. Prior to paying out the death benefits, the Trustees considered the Forms and the Will, and a new additional trustee was appointed. The Resolutions were also signed, prior to each payment, to agree the death benefits paid.
- 12.5. Although Mr Y met the definition of a dependant at the time of the late Mr Y's death, the death benefits were paid at the discretion of the Trustees in accordance with the Rules.
- 12.6. There was no obligation on the Trustees to make any particular payment of benefits to any individual, nor was there a requirement for death benefits to be paid to any dependant. The definition of a dependant also included "an individual who was financially dependent on the deceased member". Miss Owen fitted this definition.
- 12.7. There was no evidence to suggest that the Trustees acted inappropriately, without due consideration of the relevant financial circumstances or outside of the Rules and applicable legislation.
- 12.8. It did not fail in its duty as Practitioner. The death benefits were settled by the Trustees within the parameters of the Rules and legislation. It is not for a Practitioner to instruct the Trustees on how to distribute death benefits.
- 12.9. It understands Mr Y's complaint to be that he does not believe that the Trustees exercised their discretion appropriately, as they did not consider him a potential beneficiary when deciding how the death benefits should be allocated.
- 12.10. The Trustees gave due regard to all potential beneficiaries, prior to the payment of the death benefits. This is evidenced as follows:-
  - (a) Review of the Forms and the Will to establish the late Mr Y's wishes for his funds on his death, and to demonstrate that all financial circumstances were considered.
  - (b) The appointment of an additional trustee to assist Miss Owen with the decision on the distribution of the death benefits. This was not required by legislation and was not a mandatory requirement in order for death

benefits to be paid. So, Miss Owen was not in any way obliged to make an additional appointment to aid her decision. This step was taken to prevent any perceived conflict of interest.

(c) Consideration of the Pension Sharing Order (**the PSO**), which was set out to make a “clean break” between the late Mr Y and his family, and specified that the late Mr Y’s ex-wife (Mrs Y) would have no beneficial interest in the late Mr Y’s assets after the PSO was fulfilled.

(d) Corresponding with Mrs Y in respect of any death benefits due to her children, prior to settling the payment of death benefits in full.

12.11. It understands that there was no documentary evidence that the Trustees considered Mr Y as a beneficiary. However, its understanding was that Mr Y was considered as a beneficiary.

12.12. Its view is that the purpose of the Resolutions was to note how funds would be applied to achieve a proper designation of funds in line with the Rules and pension legislation, rather than to describe the thought process of the Trustees in reaching their conclusion.

12.13. There was no requirement under legislation or in the Rules to retain or provide documentary evidence relating to all potential beneficiaries.

12.14. Miss Owen was the person living with the late Mr Y. The late Mr Y had concluded an extensive financial settlement which the courts designed so that it would terminate his financial relationship with his “former family”, as was the court’s prerogative.

12.15. There was no requirement for death benefits to be paid to any dependant or other individual. The payments were made in accordance with the requirements of both the law and the Rules.

12.16. TPO was provided with the Forms the late Mr Y had completed over the years. The Form dated 23 October 2015, specifically asked for details of any dependants the late Mr Y had, including any children under the age of 23. The late Mr Y only put Miss Owen’s details on this form. This was also the case on the two previous Forms the late Mr Y had completed.

12.17. It is a common course of action for death benefits to be paid to a member’s surviving partner in this type of pension arrangement. It is also commonplace in small self-administered schemes for spouses of members to be a trustee of the scheme alongside the member. This is in order to have sufficient trustees to give a valid receipt for land, or to ensure that in the event of the death of a trustee, the trust was not left without a continuing trustee.

12.18. In this case, that situation was part of the reason an additional trustee was appointed. In addition, the Trustees also consulted the Will to ensure there was

no conflict. The Will also named Miss Owen as the late Mr Y's sole beneficiary, should she survive him.

- 12.19. Mrs Y contacted it in May 2016 and queried if her children could have a legitimate claim against the Fund for the payment of death benefits. It made the Trustees aware of the correspondence between itself and Mrs Y so the Trustees were aware that Mr Y was a potential beneficiary.
- 12.20. The death benefits were paid with the agreement of the Trustees. The correspondence between Mrs Y and itself demonstrates that consideration was given to the late Mr Y's children, prior to the remaining death benefits being settled. Nevertheless, the Trustees were, as the decision infers, entirely within their discretion to follow the expressed wishes of the late Mr Y.
- 12.21. The payments advanced to Miss Owen were £265,000 on 30 March 2016, £200,000 on 14 September 2016, £21,000 on 11 October 2017 and £72,709.51 on 12 October 2017.
- 12.22. A payment to Miss Owen to assist with funeral costs was agreed by the Trustees but the funds were never drawn. So, no payment of death benefits was made prior to the appointment of the additional trustee.
- 12.23. Death benefits were paid at the discretion of the remaining Trustees in accordance with the Rules and the law. By definition "discretion" gives the freedom to make a decision. It does not in its view, oblige the Trustees to provide discussion of how that decision was reached.
- 12.24. It does not believe that it has been demonstrated that the Trustees had failed to take into account anything relevant, failed to ask the correct questions as determined by the Rules, or failed to construe and follow the Rules correctly. It believes that the Trustees acted reasonably in their decision making.
- 12.25. It did not "vigorously defend" the Trustees. It described how the decision the Trustees made concerning the distribution of the death benefits was done in accordance with both the Rules and legal requirements.
- 12.26. It suggested that it would have been prudent to appoint another trustee, and this suggestion was accepted and implemented by Miss Owen.
- 12.27. It did not provide instructions to the Trustees on how death benefits should have been distributed. In its role as Practitioner, it provided guidance to the Trustees on the mechanics of paying death benefits from the Fund within the parameters of legislation and the Rules.
- 12.28. A Practitioner does not have the power to authorise or veto any decision a trustee makes. As stated in the Rules, the Practitioner did not have any authority for decisions. Its practice with those funds for whom it acts as Practitioner, is to be contacted prior to events happening. It has no control over what trustees decide to do.

- 12.29. It was not an authorised signatory on the Fund's bank account, so it had no control over the payment of death benefits.
- 12.30. The correspondence does not show that it gave Miss Owen advice about how death benefits should be paid. Miss Owen had indicated that a further death benefit payment was required, and BW made a suggestion to restrict the amount to £200,000 "purely from a scheme administration point of view."
- 12.31. No payment was made prior to the Resolutions being signed. So, if the Trustees were not in agreement to make the payment, they would not have signed the Resolutions.
- 12.32. It was not aware that the payment of £21,000, to Miss Owen on 11 October 2017, had been made until after the event. So, it was unable to provide a Resolution for that payment.
- 12.33. It apologised if Mr Y felt that its previous response was misleading. All paperwork was provided to TPO, so the audit trail is clear for those records.
- 12.34. The information given to Mrs Y was generic death benefit guidance. This information was available to the public.
- 12.35. Its initial email, following the late Mr Y's death, was sent to five of the Trustees' advisers, and Miss Owen was copied in. It does not agree with Mr Y's comments and can find no evidence that the Trustees did not act in the best interest of the Fund when it distributed the death benefits.
- 12.36. Had it felt that there was a cause to intervene, it would have provided further guidance, which the Trustees may or may not have acted on.
- 12.37. It "strenuously" refutes Mr Y's claim that it made false claims and attempted to deceive TPO. This is a very serious accusation, with no evidence, so it asks that the I address this in my Determination.
- 12.38. It understands that the Trustees had significant correspondence with the solicitors who arranged the Will. The Trustees also consulted the Will, which is a legal document relating to the disposition of the late Mr Y's other assets on death, and the Trustees, correctly, also referred to the Forms.
- 12.39. The Trustees gave appropriate weight to the fact that the late Mr Y's divorce settlement, the Will and the Forms were definite that his "former family", rightly or wrongly, were not entitled to any beneficial interest from his assets on death, having been substantially provided for under the divorce settlement. The settlement itself set out that Mrs Y had no beneficial entitlements relating to the late Mr Y on his death.
- 12.40. It is in no position to judge definitively whether or not this situation had caused Mr Y distress and inconvenience, although it is sympathetic to Mr Y's emotional response.

- 12.41. It feels it has demonstrated that it responded to queries raised by Mr Y as best as it could. This is an unfortunate set of circumstances.
- 12.42. While the investigation on another complaint was ongoing, TPO had said it could not advise what should happen with the Fund. However, the decision to keep the Fund open or not, would not have prejudiced [Miss Owen's] complaint. The decision of whether or not to wind up the Fund was one for the Trustees to make.
- 12.43. As TPO was content for the Fund to be wound up while an investigation was ongoing previously, it did not see any reason why the stance should now be any different.
- 12.44. Due to the accumulating costs for running a Fund with no assets, the decision was made to wind it up. The Fund was wound up once all death benefits were settled, so there are no longer any Trustees to reconsider the decision. There were also no assets in the Fund since the late Mr Y was the only member.
- 12.45. So, it "would be an exercise of little worth" for the Trustees to now revisit and re-document their original decision.
- 12.46. It does not believe there are any potential liabilities due. Even if I decided that the Trustees should have reached a different decision, the liabilities would fall against the Fund itself and not the assets. In a defined contribution pension fund, the liabilities to members and beneficiaries are not greater than the value of the net assets of the Fund. In this case the net assets are nil.

### **The Trustees' position**

13. The Trustees provided a copy of the Will and Larke v Nugus document (**the Nugus document**) and said in summary:-
- 13.1. Miss Owen did not make herself the sole beneficiary of the Fund. The late Mr Y named Miss Owen as the sole beneficiary, many years prior to his death and there is documentation that proves this. The Trustees followed the late Mr Y's wishes.
- 13.2. There was no evidence that Mr Y was in full-time education at the time of the late Mr Y's death, nor that the late Mr Y was funding this.
- 13.3. Mr Y had been very rude to the late Mr Y prior to his death and their relationship had broken down.
- 13.4. BW advised them that it was not a legal requirement to have two trustees for the Fund. In an email dated 7 January 2016, BW suggested that it may be worth considering appointing a new trustee should anything happen to Miss Owen.
- 13.5. BW confirmed that it was not a legal requirement to document reasons for how the death benefits were distributed.



- 13.6. In a letter dated 2 August 2016, BW confirmed it was satisfied that the death benefits were being paid in accordance with the late Mr Y's wishes, and in line with the Rules.
- 13.7. Mr Y is using this complaint as a personal attack on Miss Owen. The late Mr Y made his wishes clear in the Will and Forms. He expressed his feelings concerning his children not making an effort to keep in touch with him.
- 13.8. The Nugus document stated that the late Mr Y had provided for Mrs Y upon divorce, and having provided for his children, what was left was to be disposed of as he wished. This document also proved that the late Mr Y satisfied the legal test for capacity for the purposes of making the Will.
- 13.9. The legal advice sought on the distribution of the death benefits was the Will and the Nugus document that was drawn up by the late Mr Y's solicitor. The Forms were also used in this regard, as they had been consistent for years.
- 13.10. The Fund was wound up in accordance with the Rules. The Fund had no assets and liabilities at the date of wind up.
- 13.11. The Trustees acted in good faith, in accordance with the Rules and in line with guidance received from BW and TPO on 6 June 2018. The Trustees feel that this is a "personal vendetta" against Miss Owen.

### **Preliminary Decision and Oral Hearing**

14. I have previously sent all parties to the complaint my Preliminary Decision and all parties made further submissions, which I have considered. They do not, however, change my decision on the outcome of this complaint. As part of his further submissions, Mr Y requested an oral hearing.
15. I have the power to hold an oral hearing under the procedural discretion contained in Section 149(4) of the Pension Schemes Act 1993. However, I tend not to exercise my discretion unless I am of the view that a complaint cannot be determined without me hearing directly from the parties.
16. After careful consideration of Mr Y's request, I decided that there are sufficient documents on which to make a sound decision and determine Mr Y's complaint without the need for an oral hearing.

### **Conclusions**

17. As a preliminary point, I note that the Trustees decided to wind up the Fund during the course of TPO's investigation of this complaint. Although, I understand the reasons for doing so, as detailed in paragraphs 12.44 and 13.10 above, where there is ongoing litigation, the Trustees and BW were quite wrong to wind up the Fund. If any decisions I make below are affected by this, I will address it accordingly.

18. I have carefully considered the information that all parties to the complaint have provided. The issue at the heart of the complaint is whether the Trustees properly exercised their discretion when they decided to whom the death benefits should be paid.
19. The starting point in such cases is always what the Rules state. The Rules determine the circumstances in which death benefits may be paid, to whom they may be paid, the conditions which they must satisfy, the amount of the benefits, and the way in which decisions concerning the benefits must be taken. Relevant extracts of the Rules are set out in Appendix 1.
20. My role is limited to ensuring the decision-making process was correctly followed. I can only interfere with the decision if the decision-maker: failed to take something relevant into account or took something irrelevant into account; reached a decision no reasonable person could have reached; failed to ask the correct questions as determined by the Rules; or failed to construe and follow the Rules correctly.
21. I note that Mr Y has raised a number of points concerning BW's conduct in relation to its responses to my Office and the distribution of the death benefits. I have not found BW's conduct in relation to its communications to my Office misleading or dishonest.
22. In relation to BW's conduct concerning the distribution of the death benefits, the Rules prescribed that death benefits were awarded at the discretion of the Trustees. So, ultimately, the Trustees were responsible for determining who the potential beneficiaries were, and what proportion, if any, of the death benefits should be awarded to any class of potential beneficiaries.
23. I find that BW cannot be held responsible for any decisions the Trustees made in this respect. Similarly, I find that the Company cannot be held responsible for any decisions the Trustees made in relation to the distribution of the death benefits. In any event, the Company was dissolved on 1 January 2019.
24. In this case, the death benefits which could have been awarded were:-
  - A drawdown arrangement for one or more surviving Dependants.
  - Payment of one or more lump sum death benefits.
25. The Rules set out who is entitled to receive a lump sum payment. There was no requirement that the lump sum must be paid only to dependants, nominees or successors. Under the Rules, the lump sum could have been paid to a number of individuals, including the deceased member's relatives, and any person nominated for this purpose by the member.
26. Before deciding how to exercise their discretion, the Trustees needed to identify those to whom benefits could be paid under the Rules (the potential beneficiaries). In this case, the potential beneficiaries were the late Mr Y's relatives, such as Mr Y, a nominee or any person entitled under the Will to any interest in the estate.

27. The Trustees were not under an obligation to specifically identify every possible individual who may have fallen within the range of possible beneficiaries; the obligation was to undertake reasonably sufficient enquiries and gather adequate information.
28. Once the Trustees had identified the potential beneficiaries, they had to exercise their discretion to decide to whom benefits should be paid. The Trustees had to consider relevant questions, and matters which they considered to be important, such as the financial status of the potential beneficiaries, the degree of financial dependency, and the age and need of the potential beneficiaries.
29. Trustees must not limit or 'fetter' their discretion by applying a set list of requirements or order of priorities for awarding benefits which is set out in the Rules. The Trustees do not have to pay benefits to every one of the potential beneficiaries or to pay each potential beneficiary equally. Provided that other requirements, such as considering all of the relevant information, have been complied with, the Trustees are permitted to prefer the interest of some beneficiaries over that of others.
30. Where there is more than one category of potential beneficiaries, trustees must have considered each category and decided whether or not to award benefits to beneficiaries within each category, rather than considering only one class of potential beneficiaries. Part of this complaint is that the Trustees preferred the interest of one beneficiary, Miss Owen, over the interest of others, such as Mr Y. However, choosing not to prefer Mr Y's interest is not, in itself, enough to make the decision improper. In order to set aside the decision, there would need to be more such as consideration of irrelevant, irrational or improper factors.
31. Trustees are entitled to consider a 'nomination' by the member. A nomination is an indication given by the member during the member's lifetime about the person or persons to whom he would like death benefits to be paid in the event of his death. It is important to remember that, where the trustees have a discretion about awarding death benefits, they must not unthinkingly follow the nomination. They are still required to properly exercise their discretion, including identifying and considering the potential beneficiaries, not just the person nominated by the member.
32. In this case, the Trustees decided to pay all of the death benefits to the individual who was the late Mr Y's nominee. It has been alleged that the Trustees have exercised their discretion improperly. This is because there was a conflict of interest, as the beneficiary who received the full death benefits, was Mr Y's partner and also a Trustee of the Fund.
33. Being both a trustee and a beneficiary presented a clear conflict of interest on Miss Owen's behalf. So, an additional trustee was appointed after the first Resolution was made to pay a lump sum to Miss Owen.
34. I understand that it is agreed by all parties that Mr Y was a potential beneficiary under the Rules. However, this did not automatically give Mr Y the right to a proportion of the death benefits.

35. As detailed in paragraphs 12 and 13 above, BW and the Trustees said that Mr Y was considered as a potential beneficiary for the payment of death benefits. However, for reasons explained in the same paragraphs, the Trustees decided not to award him a proportion of the death benefits.
36. I find that the Trustees were correct to consider Miss Owen as a potential beneficiary, as she was the late Mr Y's partner. But both BW and the Trustees failed to appreciate that Mr Y's entitlement to be considered as a beneficiary under the Fund was not compromised by the late Mr Y's financial settlement with Mrs Y.
37. BW and the Trustees treated the Forms and the Will as definitive, and did not appreciate that, although these documents were very relevant, the Trustees needed to make the decision rather than just automatically implementing their provisions. I therefore find that the Trustees' decision-making process failed to adequately consider Mr Y as an eligible beneficiary.
38. I would usually direct trustees to reconsider decisions where I find that all relevant matters had not been taken into consideration, and the trustees might not have made the same decision had they taken into account all relevant considerations.
39. However, the Trustees were aware of Mr Y's position before all the death benefits were distributed. Based on the evidence that I have seen, namely: (i) financial provision through the courts that had been made for Mrs Y's family; (ii) the Will named Miss Owen as the sole beneficiary; (iii) Miss Owen was the only person named on the Forms; and (iv) before the decision on the distribution of the death benefits had been made Miss Owen had agreed to use money from the Fund to repay debt belonging to the estate, I have no doubt, having considered all the evidence, that the Trustees, if asked to revisit their decision taking into account my findings, would reach the same conclusion.
40. This is so even had they understood that Mr Y was eligible to receive benefits. The evidence strongly suggests that the Trustees wanted the death benefits to be paid to Miss Owen. I have seen no reason why this would have been a perverse decision to reach, even had the Trustees properly considered Mr Y as a potential beneficiary.
41. Therefore, I have decided it would not be appropriate to direct the Trustees to retake their decision.
42. However, it is clear that the Trustees' failure to consider Mr Y as a potential beneficiary in his own right, has caused Mr Y significant distress and inconvenience. Had the Fund not been wound up, I would have directed the Trustees to pay Mr Y £500 in recognition of this distress and inconvenience. As the Fund has been wound up, and Miss Owen has personally benefited, I find that she should pay this amount to Mr Y.
43. No further action is required by Mr Jarvey, BW or the Company.
44. I uphold the complaint in part.

PO-24832

**Directions**

45. Within 28 days of the date of the Determination, Miss Owen shall pay Mr Y £500 for the significant distress and inconvenience he has experienced.

**Anthony Arter**

Pensions Ombudsman  
30 June 2022

## Appendix 1

### Relevant extracts from the Trust Deed and Rules of the Patrick Eddery Pension Fund dated 6 February 2012.

#### **“20 Benefits following death of Member**

20.1 On the death of a Member the Trustees shall apply his Individual Fund in such one or more of the following ways as the Trustees in their absolute discretion may determine

20.1.1 designation as available for the payment of Drawdown for one or more surviving Dependants in accordance with Rule 21.

20.1.2 payment of one or more ***lump sum death benefits*** in accordance with Rule 22,

20.1.3 reallocation in accordance with Rule 23,

20.1.4 to the extent it cannot be applied in accordance with the preceding provisions of this Rule 20 1, allocation to the General Fund.

...

#### **22 Lump Sum Death Benefits following death of Member**

22.1 On the death of an individual, any part of his Individual Fund to be applied in accordance with this Rule shall, subject to Rule 22.2, be paid to such one or more of the following and in such proportions as the Trustees in their absolute discretion may determine.

22.1.1 the individual's Relatives,

22.1.2 any person whom Drawdown may be provided on that death (whether actually provided or not),

22.1.3 (on the death of a Member) any person nominated for this purpose by the Member,

22.1.4 (on the death of a Dependant) any person nominated for this purpose by the relevant Member (or if the Member made no nomination, the Dependant),

22.1 5 any person entitled under the individual's will to any interest in the individual's estate...”

## Appendix 2

### Extracts from the Trustees' Resolution signed on 11 March 2016

We [the Trustees] to the Patrick Eddery Pension Fund hereby note confirm and agree to all of the following: -

1. IT WAS NOTED with regret that [the late Mr Y] died on 10 November 2015.
2. IT WAS FURTHER NOTED that:
  - [The late Mr Y] had attained age 63 at the date of his death;
  - [The late Mr Y] had taken some benefits from the Scheme and as such his fund within the Scheme is partially crystallised;
  - [The late Mr Y] had completed an Expression of Wishes Form dated 23 October 2015 which nominates [Miss Owen] as his sole beneficiary.
  - The beneficiary [Miss Owen], has requested in her email dated 2 March 2016 to the Trustees for an advance payment of £265,000 in respect of the death benefits due under the Scheme.

IT WAS THEREFORE AGREED that:

- a. [Miss Owen] as a beneficiary, will receive an advance payment of death benefits due under the Scheme for an amount of £265,000 as a tax free lump sum death benefit in accordance with the Taxation of Pensions Act 2014 enacted by the Government on 17 December 2014 which is effective from 6 April 2015;
- b. The Trustees are aware that the contents of [the late Mr Y's] Will are being contested, however, the Scheme lies outside [the late Mr Y's] estate and death benefits are paid at the discretion of the Trustees.
- c. This payment is in accordance with [the late Mr Y's wishes] under his Expressions of Wishes Form dated 23 October 2015.

We hereby confirm and agree to all of the above as evidenced by our signatures below...

**Extracts from the Trustees' Resolution signed on 3 September 2016**

We [the Trustees] to the Patrick Eddery Pension Fund hereby note confirm and agree to all of the following: -

1. IT WAS NOTED with regret that [the late Mr Y] died on 10 November 2015.
2. IT WAS FURTHER NOTED that:
  - [The late Mr Y] had attained age 63 at the date of his death;
  - [The late Mr Y] had taken some benefits from the Scheme and as such his fund within the Scheme is partially crystallised;
  - [The late Mr Y] had completed an Expression of Wishes Form dated 23 October 2015 which nominates [Miss Owen] as his sole beneficiary.
  - The beneficiary [Miss Owen], has requested an advance payment of £200,000 in respect of the death benefits due under the Scheme.

IT WAS THEREFORE AGREED that:

- a. [Miss Owen], as a beneficiary, will receive an advance payment of death benefits due under the Scheme for an amount of £200,000 as a tax free lump sum death benefit in accordance with the Taxation of Pensions Act 2014 enacted by the Government on 17 December 2014 which is effective from 6 April 2015;
- b. The Trustees are aware that the contents of [the late Mr Y's] Will are being contested, however, the Scheme lies outside [the late Mr Y's] estate and death benefits are paid at the discretion of the Trustees.
- c. This payment is in accordance with [the late Mr Y's wishes] under his Expressions of Wishes Form dated 23 October 2015.

We hereby confirm and agree to all of the above as evidenced by our signatures below...



**Extracts from the Trustees' Resolution signed on 28 October 2017**

1. IT WAS NOTED with regret that [the late Mr Y], one of the members of the Scheme, died on 10 November 2015.
2. IT WAS FURTHER NOTED that:
  - the Trustees have obtained a copy of [the late Mr Y's] death certificate and a copy is attached to these minutes for reference;
  - the Trustees held funds within the Scheme in respect of [the late Mr Y] as at 12 October 2017 within a scheme bank account held with Lloyds, two loans to [the Company] (now in liquidation) and funds owed to the scheme in relation to a policy with M&G the "Remaining Funds");
  - [The late Mr Y] left a dependant named [Miss Owen];
  - [The late Mr Y] had completed an Expression of Wishes Form dated 23 October 2015 setting out his preference that funds be used to provide lump sums to [Miss Owen];
  - two lump sum payments of £6,000 and £265,000 have already been paid to [Miss Owen] under Trustees Resolutions dated 15 December 2015 and 11 March 2016, copies attached for reference;
  - the Trustees have seen a copy of [the late Mr Y's] Will and note the disposition of his estate.
3. IT IS HEREBY AGREED AND RESOLVED that:
  - The Remaining Funds are designated as a dependant's flexi-access drawdown fund for the benefit of [Miss Owen] as at 12 October 2017.
  - The Trustees shall be at liberty to deduct such amounts from the lump sum distributions noted above for payment of HM Revenue & Customs in partial or full settlement of any tax due...