

## Ombudsman's Determination

<b>Applicants</b>	Mr Christopher Brown and Mr Andrew Maybery (Joint Trustees in Bankruptcy of the late Mr S Elsworth)
<b>Scheme</b>	Alba Life Personal Pension Scheme
<b>Respondent(s)</b>	Phoenix Life Limited

### Complaint Summary

The complaint brought by the Applicants against Phoenix Life Limited is that they have incorrectly paid out the death benefit that was payable under the Scheme to the wrong party.

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

The death benefits payable on Mr Elsworth's death are to be paid in accordance with the rules of the Scheme; they are not payable as of right to the Joint Trustees in Bankruptcy. Even so, the complaint should be upheld against Phoenix Life Limited to the extent that the correct decision-maker, in accordance with its own procedures, has yet to make a decision.

## DETAILED DETERMINATION

### Scheme's governing documentation

1. At the time of the late Mr Elsworth's death, the Scheme was governed by a Resolution dated 5 October 2010 which also adopted Rules at that same time.
2. Clause 2 (Constitution) of the Resolution says,

“2.1 The Trustee shall hold the assets invested in accordance with the provisions of this Resolution as trustee of those assets under irrevocable trust. The Member shall not be co-trustee of such irrevocable trust. Such assets shall be held under the legal control of and by (or in the name of) the Trustee except that the Trustee may appoint a nominee to hold or have control of those investments, assets and monies.

...

2.4. Unless the Provider determines otherwise the Scheme shall be operated in accordance with the Policy. However, that Policy shall be subject to the provisions of this Resolution and the Rules and in the event of conflict this Resolution and the Rules shall override the Policy.”
3. Clause 13 (Investments) of the Resolution says,

“13.1 Subject to the following provisions of this Clause and to any applicable legislation, all contributions to and other amounts held by or received by the Scheme shall be invested by the Trustee in the Policy applicable to each Member and such investments shall be subject to the terms of that Policy”.
4. Clause 20 (Forfeiture and bankruptcy) of the Resolution says,

“20.3 Where a court order has been made in relation to a Member under Chapter V of Part IX of the Insolvency Act 1986 (Effect of Bankruptcy on Certain Rights, Transactions, etc), the Scheme Administrator may take all steps as are necessary to comply with such an order, including making such adjustments in relation to benefits payable to or in respect of the Member as they consider necessary.”
5. Rule 2.2 (Policies for Members) of the Rules provides,

“2.2.2 An individual who is a Member of the Scheme (...) may apply for one or more Policies to provide benefits in respect of that individual under the Scheme. Each Policy shall be subject to the Resolution and to such other terms as the Provider shall decide. Each Policy shall be set up by the Scheme Administrator and held by the Trustee on trust for and in the name of the individual and may consist of one or more Personal Investment Accounts.”

6. Rule 4 of the Rules deals with lump sum benefits on death and rule 4.2 specifically where a member dies before age 75. Rule 4.2.3 provides that the Member's Personal Investment Account, including the Member's Unsecured Pension Fund, shall be payable as a lump sum. Further, Rule 4.2.1 says any lump sum payable shall be paid by the Scheme Administrator in line with rule 6.6 (Payment of lump sum death benefits) which says,

“6.6.5 Where Rule 6.6.2, 6.6.3 or 6.6.4 does not apply, the Scheme Administrator shall pay or apply any lump sum payable under this Rule 6.6 to or for the benefit of one or more of the Relatives, Dependants, personal representatives (or executors) or nominated beneficiaries of the deceased Member or any person who is entitled to an interest in the Member's estate (other than a trustee in bankruptcy or creditor), in such shares as the Scheme Administrator shall decide. The following provisions apply to any such payment.

...”

#### **Other literature**

7. Guidance dated 29 January 2009 on the payment of discretionary lump sum death benefits from the Pearl Group Limited (now Phoenix Group Holdings) says,

“1.2 Pearl has formally delegated its discretion to its outsource partners and requires each outsourcer to establish a Pension Death Claim Forum (PDCF) for the purpose of exercising that delegated power. The terms of reference for the PDCF are shown in section 6 of these guidance notes.

1.3 As part of the claim process, section 7 sets out the payment information that Pearl expects to be obtained before discretion is exercised.

1.4 In general the PDCF can deal with the discretionary payments arising whilst referring some cases back to Pearl to consider. For smaller claims less than £15,000 in value the guidance on when claims can be paid without the need to involve PDCF or Pearl is shown in section [8] of these notes”.

8. Section 8 effectively says if the ‘nomination’ matches the ‘payment information form’ and next of kin and there is no dispute then payment is to the nominee. If there is a dispute, or if the other information does not match, a referral is made to the PDCF.
9. A separate undated and unsigned PDCF terms of reference document has been provided for some 30 schemes, including the Alba Life Personal Pension Scheme. It says,

“1.1 The discretionary powers of Phoenix Life Limited so far as they relate to lump sum death benefits under the rules of the schemes listed in the Appendix have been delegated to Capita Life and Pensions Ltd by means of a Delegation of Discretionary Power for the time being. Such delegation may be

rescinded by Phoenix Life Limited giving written notice to Capita Life and Pensions Ltd and for such period that Phoenix Life Limited may state.”

“1.9 Decisions by the committee must be unanimous otherwise the matter should be referred to Phoenix Life Limited for a decision. ...”

“1.10 The PDCF may also escalate cases to Phoenix Life Limited for a decision where:

1.10.1 the PDCF considers difficult issues arise or the decision may be controversial; or

1.10.2 the PDCF is unsure about the correct interpretation of the policy documentation, scheme rules or the general law relating to the exercise of the discretion.”

## Legislation

10. Section 306 (Vesting of bankrupt’s estate in trustee) of the Insolvency Act 1986 (“**the 1986 Act**”) says,

“(1) The bankrupt’s estate shall vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee.

(2) Where any property which is, or is to be, comprised in the bankrupt’s estate vests in the trustee (whether under this section or under any other provision of this Part), it shall so vest without any conveyance, assignment or transfer.”

11. Section 366 (Inquiry into bankrupt’s dealings and property) of the 1986 Act says,

“(1) At any time after a bankruptcy order has been made the court may, on the application of the official receiver or the trustee of the bankrupt’s estate, summon to appear before it –

(a) ...

(b) any person known or believed to have any property comprised in the bankrupt’s estate in his possession or to be indebted to the bankrupt,

(c) ...

The court may require any such person as is mentioned in paragraph (b) or (c) to submit a witness statement verified by a statement of truth to the court containing an account of his dealings with the bankrupt or to produce any documents in his possession or under his control relating to the bankrupt or the bankrupt’s dealings, affairs or property.”

12. Other extracts from the 1986 Act say,

“436 Expressions used generally

...

“property” includes money, goods, things in action, land and every description of property wherever situated and also obligations and every descriptions of interest, whether present or future or vested or contingent, arising out of, or incidental to, property”

### **Material Facts**

13. In January 1992 Mr Elsworth joined ‘The Life Association of Scotland Strata Personal Pension Scheme’ which subsequently changed its name to the ‘Alba Life Personal Pension Scheme’ (**the Scheme**). This followed The Life Association of Scotland being renamed Alba Life Limited after it was acquired by Britannia Life Limited in 1999. The ownership of Alba Life Limited has changed over the years. In 2006 a High Court order transferred the business of Alba Life Limited to Phoenix Life Limited (**Phoenix**), when the latter became the Provider and Scheme Administrator of the Scheme. The Trustee, however, remained Alba Life Trustees Limited (**the Pension Trustee**).
14. In connection with his membership of the Scheme a pension policy (numbered 63823829) (**the Policy**) was also taken out in 1992. At the time of his application for the policy Mr Elsworth nominated his wife to be considered for any lump sum death benefit under the Scheme, on the understanding that such a benefit was at the discretion of the Scheme Administrator.
15. Following a Bankruptcy Petition presented in the Sheffield County Court on 28 January 1998, Mr Elsworth was adjudged bankrupt on 16 March 1998.
16. Messrs Brown and Maybery (**the Bankruptcy Trustees**) were duly appointed as joint trustees of the estate of Mr Elsworth with effect from 21 August 2000.
17. Alba Life Limited (now part of Phoenix Life Limited) were notified of this appointment on 11 September 2000 and given a copy of the Bankruptcy Order from 1998.
18. In a letter dated 14 September 2000 to Mr Brown, Alba Life Limited acknowledged the Bankruptcy Trustees’ interest in the pension policy.
19. In 2001 there was correspondence between one of the Bankruptcy Trustees and Alba Life Limited. Mr Brown said they wanted to give Mr Elsworth the opportunity to “buy back” this pension policy from them. Also, details of what benefits could be claimed in June 2010, when Mr Elsworth reached age 50, were requested.
20. Whilst Phoenix is the Provider and Scheme Administrator for the purposes of the 2004 Finance Act, the day-to-day administration is carried out by Capita Life and Pensions Limited (**Capita**) on behalf of Phoenix. Capita correspond on Phoenix’s

headed notepaper and so subsequent reference to Phoenix could relate to the actions of Capita and its employees on Phoenix's behalf.

21. Following changes in legislation raising the minimum retirement age to age 55 with effect from 6 April 2010, the Bankruptcy Trustees were unable to claim any benefits in June 2010 when Mr Elsworth was aged 50.
22. Mr Elsworth died, intestate, on 16 April 2011.
23. Following notification on 19 April of Mr Elsworth's death, Phoenix wrote on 26 April 2011 to Mrs Elsworth saying that as her husband was declared bankrupt they had written to the insolvency service to see if they still had an interest in his pension policy. Meanwhile, they asked her for the death certificate.
24. On the same day Phoenix sent a letter to Mr Brown of Hart Shaw Chartered Accountants (**Shaw Hart**) informing him of Mr Elsworth's death and noting the Bankruptcy Trustees may have an interest in the Policy. Phoenix requested the original Policy Document and Deed of Assignment, but also said that if their interest had ceased could a Letter of Disclaimer be duly completed by an authorised signatory on behalf of the company.
25. The letter to Hart Shaw was returned to Phoenix on 13 May 2011 and marked by the Royal Mail as "addressee has gone away".
26. After taking steps to trace the Bankruptcy Trustees, Phoenix's letter of 26 April was re-issued to Hart Shaw on 13 June 2011 using a new address. Another letter was sent on 5 July saying Phoenix was waiting a reply in order to proceed with the claim.
27. Mr Brown replied on 15 July 2011 saying he had received their letters of 13 June and 5 July 2011 and went on to say,

"The above policy vests with the Joint Trustees. In view of the death of Mr Elsworth, it is now appropriate to claim the full value of the policy for the benefit of the Bankruptcy Estate.

Accordingly, I shall be grateful if you will forward a statement of the current surrender value of this policy together with the appropriate claim forms".

28. In a letter dated 22 July 2011 addressed to Hart Shaw, Phoenix said their personal pension scheme was approved under Chapter IV I III Part XIV of the Income and Corporation Taxes Act 1988. Accordingly, Section 11 (or 13 in Scotland) of the Welfare Reform and Pensions Act 1999 ("**WRPA 1999**"), which came into force with effect from 29 May 2000, meant the above contract would not vest with the Bankruptcy Trustees. They also said the only other circumstance that the Bankruptcy Trustees could claim on the above pension is if the petition for bankruptcy was filed prior to 29 May 2000 but declared bankrupt after 29 May 2000.

29. On 22 July 2011 Phoenix also sent a letter to Mrs Elsworth telling her that in respect of the non-protected rights the Rules of the Scheme stated that if the personal pension plan was held under an individual trust, death benefits must be paid to the trustees of that trust and then it was up to the trustees to pay any benefits in accordance with the Trust Deed. However, if there was no individual trust then Phoenix, as Scheme Administrator, had discretion as to whom payment of the non-protected rights death benefits should be made. They requested a number of documents and forms from Mrs Elsworth.
30. On 1 August 2011 Phoenix received back from Mrs Elsworth the following documentation:
- Bereavement Claim Form – completed by Mrs Elsworth in her capacity as the Personal Representative;
  - Lost Policy Declaration;
  - Spanish Death Certificate (Civil Register in Las Palmas, Gran Canaria);
  - Spanish Medical certificate giving cause of death (cerebral haemorrhage);
  - Statement from the British Vice-Consul at Las Palmas, Grand Canary;
  - Grant of Probate issued by the High Court of Justice (Leeds);
  - Mrs Elsworth's Passport;
  - A letter from Jobcentreplus awarding a bereavement payment to Mrs Elsworth.
31. The Grant of Probate appointed Mrs Elsworth as the personal representative of the late Mr Elsworth and said by law the Administration of all the estate devolved to and vested in the personal representative. The claim form said Mr Elsworth was survived by a legal spouse and they were living together at the date of death, there were no children (or anyone else) dependent on him or whose relationship was one of mutual financial interdependence and there was nobody else who should be considered as a potential beneficiary. The personal representative indicated that the benefits (about £11,700) should be paid to her.
32. As the claim was for less than £15,000 the file was reviewed by an individual (LB) within the Technical Support Team of Capita.
33. A completed checklist form confirms 'LB' (who deals with death claims and also sits on the formal pension death claim forum) took the decision. At the top of this checklist it is written in hand "Elsworth (TIB case)". The checklist form summarizes the information sent by the personal representative. The checklist also records "N/A" against the question "Any other relevant information from the file". On 10 August 2011 a decision was made by LB on behalf of Phoenix to pay the death benefits to the spouse, Mrs Elsworth.

34. A cheque for £11,723.79 (including interest of £14.57) was issued to Mrs Elsworth on 17 August 2011.
35. On 5 September 2011 Mr Brown wrote to Phoenix in response to their letter of 22 July saying he was seeking legal advice and he would revert back to them.
36. Phoenix responded by saying they had settled the death benefits to Mrs Elsworth.
37. In a letter dated 15 September 2011 to Phoenix, Mr Brown said as the Bankruptcy Petition and Bankruptcy Order were made in 1998 he did not believe Section 11 of the WRPA 1999 was applicable as that Act came into force after the presentation of the Bankruptcy Petition against Mr Elsworth. Accordingly, he considered the Joint Trustees were entitled to claim the value of Mr Elsworth's pension policy for the benefit of the bankruptcy estate.
38. A further letter from Mr Brown to Phoenix was sent on 19 September requesting details of the amount paid and saying Phoenix had failed to address the matter of the Joint Trustees possible entitlement to the proceeds of the policy.
39. Phoenix replied to Mr Brown saying they had contacted Mr Elsworth's financial adviser as correspondence held on file referred to the policy having been 'bought back' from the Trustee in Bankruptcy.
40. Mr Brown told Phoenix in a letter dated 9 January 2012 that there was no record of any funds having been received in respect of this policy being 'bought back' from the Joint Trustees. This option may have been explored in 2001 but did not happen.
41. On 9 February 2012 Phoenix stated in an undated letter to Mr Brown:

“... and confirm that as the deceased was made bankrupt in 1998, the benefits are not excluded from the deceased's estate. The Welfare Reform and Pensions Act 1999 does not apply as the deceased was actually declared bankrupt on 16 March 1998. It appears that confusion has been caused due to the date you were appointed as Trustee in Bankruptcy, as opposed to the date the order was made.

...

You responded to our letters on 15 July 2011 and asked for the relevant claim forms to be sent to you and it was at that time you were told that benefits had already been paid to Mrs Elsworth

With regard to the “buy back” referral, I enclose a copy of a letter from your office from 19 December 2001 ...



I have sought advice from our legal team regarding the payment of the death benefit to Mrs Elsworth and they suggest that you should attempt to mitigate your own loss and seek to recover the money from the widow”.

42. Mr Brown noted in his letter of 16 February 2012 to Phoenix that there was agreement that the benefits of the Policy were not excluded from the deceased's bankruptcy estate. His letter proceeded to repeat the correspondence history, though disputed it was not until 13 September 2011 when they were informed the benefits had been paid out. Mr Brown contended that the facts of this matter were that Mrs Elsworth was paid the proceeds of the Policy in error. She was paid on the assumption that the WRPA 1999 applied, when it did not. Further, she should not have received the proceeds until all parties were fully satisfied that she was entitled to such proceeds, which she was not. Consequently, he requested a cheque made payable to the Insolvency Services Account for the benefit of the bankrupt's estate.
43. On 19 March 2012 Phoenix responded to Mr Brown saying they had written to Mrs Elsworth informing her that the benefits for the policy were incorrectly paid to her and requesting that she either return the money to them or to Mr Brown.
44. Mr Brown replied saying he had no interest in the arrangements Phoenix were attempting to make with Mrs Elsworth. Any attempt by Phoenix to recover the money should not delay any payment in full to the Joint Trustees.
45. Phoenix says following this correspondence from Mr Brown the facts of this case were reviewed by both the legal department of Capita and a senior Phoenix Life colleague (i.e. the Pension Product Manager (SD) within Phoenix relating to all Alba pension products). A fresh decision was taken by 'SD' in which it was re-confirmed that the benefits had been paid out on the correct basis to Mr Elsworth's widow.
46. In a letter dated 19 April 2012 to Mr Brown, Phoenix said,

“Benefits on death from personal rights are payable at the trustee's discretion, and although we would consider any claim by the Trustee in Bankruptcy, the policy of Phoenix is to find more suitable beneficiaries, namely spouses/children in line with current practices.

As the member died whilst he was bankrupt, we considered the Trustee in Bankruptcy, as a potential beneficiary.

If we paid the death benefits to the deceased's estate, then this is effectively paying the money to the Trustee in Bankruptcy, and is not something that we should do when there are any other beneficiaries.

We would therefore normally pay to another dependant of the deceased member. Benefits were therefore paid in accordance with the scheme rules to the widow of the deceased.

We believe that we have acted in accordance with the rules of the scheme by providing written notification to you of the death of Mr Elsworth in April, June and July 2011 and we asked for confirmation that you held an interest in the policy.”

47. A firm of solicitors, h/w Keeble Hawson LLP (“**the Solicitors**”), acting for Messrs Brown and Maybery wrote to Phoenix on 2 July 2012 noting the WRPA 1999 did not apply. As a result, they said pursuant to section 303 (general control of trustee by the court) of the 1986 Act the benefit of the policy vested in their clients as Joint Trustees in Bankruptcy. They also said,

“As a result of the vesting of the benefit of the policy in our clients, the death of the Debtor was not relevant to the exercise of your discretion as Trustees of the policy as your power to make a payment did not arise. We note that you acknowledge in your letter of 19 March 2012 that the proceeds of the policy were wrongly paid to Mrs Elsworth and we agree that this is the case. However, this does not impact upon our clients’ entitlement to receive the benefit of the policy. You had no discretion as to whom to pay the proceeds of the policy given that it had vested in our clients and you had been notified by our clients on 11 September 2000 that they wished to claim the policy for the benefit of the Bankruptcy Estate.

We consider that our clients are entitled to the surrender value of the policy at today’s date (disregarding any payment you have made ...) ... and confirmation that such sums will be paid to our client without further recourse.

As we consider that you have a legal liability to make payment to our clients, it is not appropriate for this matter to be referred to the Financial Ombudsman Service or the Pensions Advisory Service as you have suggested as the matter will need to be determined by the Courts if you do not agree to our request”.

48. Phoenix responded on 16 July 2012 to the Solicitors referring to clause 6.6.5 of the rules. They maintained that benefits in respect of personal rights on death were payable at the discretion of the Pension Trustee and they had done nothing wrong.
49. Further correspondence ensued, with the Solicitors saying in September 2012 that Phoenix had not addressed all the issues – including a request for information pursuant to section 366 of the 1986 Act (Inquiry into bankrupt’s dealings and property) – and Phoenix reiterating their stance believing the matter was concluded.
50. The Solicitors pursued matters arguing that Phoenix had dealt with policy monies without lawful authority and that their clients were entitled to seek orders that they appear before the Court to provide the information they had requested. If a response was not provided within seven days, proceedings would follow.

51. Phoenix treated the letter of 13 December 2012 from hlw Keeble Hawson LLP as a complaint but after carrying out its own internal investigation they wrote to the Solicitors on 13 May 2013 stating their position remained unaltered.

**Summary of Messrs Brown's and Maybery's position**

52. The Policy vests in them, as Joint Trustees in Bankruptcy. Their request for the surrender value of the Policy is made pursuant to sections 303 (General control of trustee by the court), 306 (Vesting of bankrupt's estate in trustee) and 366 (Inquiry into bankrupt's dealings and property) of the 1986 Act.
53. As a result of the vesting of the benefit of the Policy in them, the death of Mr Elsworth was not relevant to the exercise of the Pension Trustee's discretion because their power to make a payment did not arise.
54. In Phoenix's letter of 19 March 2012 they acknowledged the proceeds of the Policy were wrongly paid to Mrs Elsworth. They agree. But this does not impact on their entitlement to receive the benefit of the policy. There was no discretion as to whom to pay the proceeds of the Policy given it had vested in them.
55. They consider the decision of the Court of Appeal in *Patel v Jones* [2001] EWCA Civ 779 and the judgment of Mummery LJ at paragraph 36 to be pertinent. In particular, this said "The legal right to the basic pension and to the basic lump sum were vested in Mr Patel before he was made bankrupt. He had a present legal right to compel the payment of scheme benefits in the future and on certain contingencies. That right was a "chose in action" within the very wide description of "property" in section 436 of the 1986 Act. The fact that the occasion for payment of pension benefits did not occur until Mr Patel was made redundant after the bankruptcy is irrelevant to the existence and vesting of the right, as is the fact that the right may have no immediate value (see *de Rothschild v. Bell* [2000] QB 33). What matters is that the right to future payment existed at the date of the bankruptcy order. It was "property." It accordingly vested in the trustee".
56. They consider that all of the benefits (including death benefits) under the Policy were in fact vested in them upon their appointment as Joint Trustees in Bankruptcy. As such, Mr Elsworth's death did not trigger the payment of any death benefits to anyone and the position is that the Bankruptcy Trustees should still have their full entitlement to claim the benefits under the Policy.
57. Further, with regard to *Re Landau* [1997] 3 All ER 322 at paragraph 328 it was held that "Mr Landau's bundle of contractual rights under the policy constitutes a chose in action and it had this character at the time of the bankruptcy order. On the fact of it, therefore, it fell within the definition of property". They consider that the death benefits were one of the bundle of contractual rights under the policy for Mr Elsworth and, as such, were property which vested in them too.

58. The fact that the death benefits vested in them can only ever be of theoretical significance as, if either of the Bankruptcy Trustees were to die, they would automatically cease to be Trustee in Bankruptcy. They would be immediately replaced and the death benefits could never fall to be paid. For this reason, the retirement benefits should still be due to the bankruptcy estate.
59. As a matter of logic and policy, it cannot be correct that a bankrupt estate should be deprived of an asset which it would have otherwise been entitled to by the death of the bankrupt. They consider that this would be unprecedented.
60. It is not for the Joint Bankruptcy Trustees to attempt to mitigate the loss and seek to recover the money from the widow. The Joint Bankruptcy Trustees should not suffer a loss in this matter; they should have been passed the proceeds of this policy that were wrongly sent to Mrs Elsworth.
61. Looking at Phoenix's checklist and the documents they considered when making their decision about the payment of death benefits, while the Bankruptcy Trustees note that Phoenix have stated correspondence from them would have been on file it does not appear that there is any documentary evidence that Phoenix considered either
  - whether to make the death benefit payment to the Bankruptcy Trustees, or
  - whether their discretion had arisen given the vesting of the policy in the Bankruptcy Trustees.

### **Summary of Phoenix's position**

62. Their position is detailed in their correspondence dated 19 April 2012, 16 July 2012, 29 November 2012, 7 February 2013 and 30 May 2013.
63. They accept some of the information initially sent to the Bankruptcy Trustees via Hart Shaw was misleading and they have apologized for these errors.
64. They have acted in accordance with the forfeiture clause within their Scheme's rules and strongly refute the claim from the Joint Trustees in Bankruptcy that benefits were wrongly paid to Mrs Elsworth.
65. Their powers to make a decision about the distribution of death benefits are derived from the Scheme's rules, as adopted by the Pension Trustee. Their process is set out in material which has been supplied.
66. They acknowledge that pension scheme assets do form part of the bankrupt's estate. It follows that the Bankruptcy Trustees could have "stepped into" Mr Elsworth's shoes and requested that they take some action (for example, make a transfer in accordance with the Rules to another arrangement). However, the Bankruptcy Trustees failed to do this.

67. It remains their belief that the case law of Jones v Patel (and others referred to in this complaint) does not fetter those rights that Phoenix has to exercise their discretion in accordance with the Scheme's rules.
68. As noted in the judicial reasoning in Patel, the statutory objective of the relevant provisions of the Insolvency Act 1986 is that all a debtor's property capable of realization should be vested in the trustee in bankruptcy for him to realize and distribute the proceeds among the creditors. A death benefit, by definition, falls outside of a debtor's estate as upon death it is paid to the nominated or discretionary beneficiary under the Scheme's rules.
69. As outlined in Jones v Patel it is the legal right to the basic retirement pension and retirement lump sum which were vested in Mr Patel before he was made bankrupt. Mr Patel had a present legal right to compel the payment of scheme benefits in the future and on certain contingencies. The decision in Jones v Patel was limited to confirming that those legal rights were a chose in action and would therefore be determined property and would transfer.
70. The issue of discretionary payments is also examined in Jones v Patel by Mummery LJ who confirms that it (in relation to the discretionary enhanced benefits) is not necessary that there should be a legal entitlement to the enhanced benefits themselves for them to qualify as an interest ... incidental to property.
71. The decision in Jones v Patel did not consider what the position would be as regards death benefits.
72. Save for his entitlement to nominate a beneficiary for the death benefit, the late Mr Elsworth held no entitlement to fetter the discretion of Phoenix to determine the best option for the payment of the death benefit under the Scheme's rules. Therefore the Bankruptcy Trustees cannot now demand an entitlement which is greater than the entitlement under the property that has vested in them.
73. Their understanding is that Jones v Patel does not override the scheme documentation itself and does not invalidate the Trust Deed and Rules. Therefore, on the death of the member the Trust Deed and Rules must be followed, as to do otherwise would mean the Pension Trustees are in breach of their legal duties. Thus, if a member dies whilst he is bankrupt, or even if the bankruptcy has been discharged but the Bankruptcy Trustees are still in office, they should consider them as a potential (but not certain) beneficiary.
74. They asked the Joint Trustees in Bankruptcy if they held any interest in the benefits payable from the Policy. In the time it took them to respond, benefits had already been paid to the widow in accordance with the Scheme's rules. They had previously told Mr Brown that the policy benefits did not vest with the Trustee in Bankrupt. When considering the claim in August 2011 they did not consider that there was any dispute and hence the case was not referred to the PDCF.

75. In reply to an investigation query of who decides if a death claim is 'in dispute' or if there is a 'potential for dispute' and at what point would this be identified, Phoenix says anyone involved in a claim can deem this to be in dispute or have the potential of being in dispute resulting in a referral to the PDCF at that time.
76. With regard to the view that only two or more officers (e.g. Directors) of Phoenix could make such decision on behalf of the Company, it would be neither prudent nor effective to refer every claim to the Board of Directors. The Board delegates to certain qualified individuals, including SD, authority to approve certain payments. For commercial reasons of confidentiality, they do not wish to disclosure evidence of the delegation.
77. Even though the correct process has not always been followed, ultimately the correct decision-maker (i.e. SD) has reviewed the case and is satisfied that a decision has been made in line with section 2.5. of the guidance of the payment of discretionary lump sum death benefits.

## **Conclusions**

### *The right to receive death benefits*

78. The Policy was established in 1992 for and on behalf of Mr Elsworth in connection with his membership of the Scheme and the benefits payable from it.
79. The main issue here is that the Bankruptcy Trustees consider the Policy vests in them thereby entitling them to the Policy's proceeds on Mr Elsworth's death whereas Phoenix argues that on Mr Elsworth's death the Scheme Administrator for the Pension Trustee was entitled, in line with the Scheme's rules, to exercise their discretion as to whom the death benefit should be paid.
80. The Policy Schedule from 1992 says that Mr Elsworth is the Member of the Scheme but does not say who the policyholder (owner) for the Policy is.
81. Rule 2.2.2 says a member may apply for a policy but making an application does not necessary mean that he is the policyholder. That rule also says each policy is held on trust by the Pension Trustee for and in the name of the individual. Further, clause 2.1 of the Scheme's governing Resolution says the Pension Trustee must hold the assets invested, as trustee of those assets, under irrevocable trust and they are under their legal control. The member must not be co-trustee.
82. In my opinion the Pension Trustee would need to be the policyholder in order to be the legal owner of the Policy, as the Policy forms the assets under the Scheme from which benefits are payable to any respective beneficiary. Mr Elsworth is not named as the policyholder. It follows that, in accordance with rule 2.2.2, the Pension Trustee is the legal owner of the Policy. Mr Elsworth, therefore, had a beneficial interest in the Policy, and would be able to exercise any options he might have had under the Scheme and/or the Policy.

83. Following Mr Elsworth's bankruptcy the Bankruptcy Trustees would effectively have stepped into Mr Elsworth's shoes, and have the same rights and interest in the Scheme's benefits held within the Policy that Mr Elsworth previously had. They, too, would have been able to have undertaken any of the options that he had. For instance, this might have included requesting that the benefits were transferred to another arrangement or requesting that the benefits are put into payment at a particular early retirement date. The options would also have included making a new death benefit nomination (which they did not do).
84. Given the options that the Bankruptcy Trustees have, the Policy will fall within the definition of "property" within the 1986 Act. But that by itself does not mean the Bankruptcy Trustees are entitled to the policy proceeds until they were payable to them.
85. Section 306 (2) of the 1986 Act covers the situation where property which is to be comprised in the bankrupt's estate vests in the trustee then it shall do so without conveyance, assignment or transfer.
86. The Bankruptcy Trustees contend that all rights under the Policy vested in them on their appointment; the death of Mr Elsworth was irrelevant as they already had the right to receive death benefits as such right vested in them on their appointment. I do not agree with this contention.
87. When the Bankruptcy Trustees stepped into Mr Elsworth's shoes on their appointment they effectively assumed his rights to compel the payment of benefits in the future and on the happening of certain contingencies in the manner set out in the Scheme's rules. Such rights did not include the payment of death benefits because, as argued by Phoenix, Mr Elsworth had no entitlement to fetter the discretion of Phoenix to determine the best option for payment of the death benefit under the Scheme's rules. It follows that the Bankruptcy Trustees did not assume that right on their appointment.
88. There is nothing, in my view, in the common law authorities in this area that supports a different conclusion. The Solicitors, acting on behalf of the Bankruptcy Trustees', have argued that the decision in *Jones v Patel* and another [2001] All ER (D) 313 (May) provides that the Bankruptcy Trustees had a legal right to compel payment of the death benefits. In that case, the Court found that an entitlement to pension benefits was 'property' to which s.306 of the 1986 Act applied. The Court found that the legal right to the pension and lump sum were vested in the member before he was made bankrupt (and not the scheme's trustees); this was because he had the legal right to compel the payment of these benefits in the future and on certain contingencies. The benefits in question in this case are clearly distinguishable from the present circumstances, as Mr Elsworth did not have a legal right to compel the payment of death benefits – he was able to nominate a beneficiary but that was the full extent of his powers, the discretion to pay the benefit was Phoenix's.

89. Under the Scheme's rules, payment of the death benefit is at the discretion of Phoenix in their capacity as Scheme Administrator. Under rule 6.6.5 they may pay the death benefit to a range of beneficiaries, including relatives, dependants, personal representatives (or executors) or nominated beneficiaries of the deceased member or any person who is entitled to an interest in the member's estate in such shares as they shall decide. Payment of the death benefit is, therefore, an exercise of discretion on the part of Phoenix (which they have delegated, in turn, to the PDCF at Capita).
90. The Bankruptcy Trustees could have submitted a nomination form to include themselves as a "nominated" beneficiary (although it is unlikely it would have any bearing given the express prohibition of payment to trustees in bankruptcy in rule 6.6.5 and a nomination is not binding), but they failed to do so. It follows that Phoenix did not have any obligation to pay the Bankruptcy Trustees as a potential beneficiary.
91. Given this conclusion, it is my view that the Bankruptcy Trustees are not entitled to receive the death benefit payable on Mr Elsworth's death and that, accordingly, Phoenix did not act incorrectly in not paying it to them.

*Exercise of discretion*

92. There are well-established principles which Phoenix (or its agent) should have followed in exercising their discretion. Briefly, they should:
  - have taken into account all relevant matters and no irrelevant ones;
  - have asked themselves the correct questions;
  - have directed themselves correctly in law (in particular, they must adopt a correct construction of the Scheme's rules);
  - not have arrived at a perverse decision.
93. A perverse decision is taken to mean a decision which no reasonable decision-maker, properly directing itself, could arrive at in the circumstances. If the above principles have not been properly followed, I can ask Phoenix (or Capita) to look at the matter again. However, I cannot replace Phoenix's decision with a decision of my own nor can I tell them what their subsequent decision should be (if I were to decide the matter should be remitted). The discretion remains for decision-maker to exercise.
94. For small claims the process is for certain members of Capita's claims or technical support team to make a decision unless the matter is in dispute – in which case it is referred to the PDCF.
95. It is evident that the initial decision-maker (LB) knew this was a Trustee in Bankrupt case as noted by "TIB case" appearing on the completed checklist. However, there are no explicit notes setting out the decision-maker's thoughts concerning any



possible payment to the Bankruptcy Trustees. Capita on behalf of Phoenix had asked the Bankruptcy Trustees if they still had an interest in the policy and had received a letter in July 2011 saying the Bankruptcy Trustees wished to claim.

96. Clearly another employee in the administration team of Capita incorrectly said in their letter of 22 July 2011 that the WRPA 1999 applied. Whether or not the decision-maker was under the same impression is unclear. Certainly the completed checklist form makes no reference to the WRPA 1999. If they had done so, then an irrelevant factor may have been taken into account. But the words on the checklist “NA” (i.e. not applicable) appear next to the question “Any other relevant information from the file”. So the ‘not applicable’ answer might suggest that this factor was not taken into account. If so, the failure to take an irrelevant factor into account cannot have caused any harm to the Bankruptcy Trustees.
97. Further, when Phoenix accepted in February 2012 that the WRPA 1999 did not apply, it did not amend its decision when later reviewing matters in April 2012.
98. That said, it is contended by Phoenix that at the time of the initial decision (August 2011) the claim was not in dispute. It may not have been as far as Phoenix was concerned but that position seems reliant on the contents of their 22 July letter. Since the Bankruptcy Trustees had indicated in their letter of 15 July 2011 their wish to make a claim it would appear there were competing beneficiaries. It therefore ought to have been obvious that there was a possibility that a dispute may subsequently arise. I regard that failure to recognise that a potential dispute could arise and so necessitate a referral to the PDCF as maladministration.
99. Since Mrs Elsworth and the Bankruptcy Trustees wished to both claim the death benefit, the decision should in all likelihood have been referred to the PDCF (and possibly be remitted to Phoenix itself). But that did not happen – even after a dispute subsequently arose. Phoenix says the claim has been reviewed by a senior employee of Phoenix after having sought advice from Capita’s legal team. I observe that Capita’s PDCF can refer matters back to Phoenix (or they must if a decision by the PDCF is not unanimous). Nevertheless, it is unlikely that one employee of Phoenix Life Limited can make a decision for the company – normally two directors or a director and company secretary would be required. So neither the PDCF nor Phoenix has taken a proper decision yet. Though Phoenix contends that the Pension Product Manager, SD, has delegated authority to make decisions on behalf of Phoenix, they are reluctant to freely share the evidence about such delegated power. I can therefore only make a decision based on the evidence before me.
100. Aside from the fact that Phoenix says it has a policy of considering others ahead of a trustee in bankruptcy or creditor, this matter should still have been considered by the PDCF (or remitted back to Phoenix) in accordance with its normal process.

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101. As I said above, I cannot replace Phoenix's decision with a decision of my own. As I am not satisfied that the correct decision-maker has so far considered the 'disputed' claim under Phoenix's own procedures I am remitting the matter back to them.

102. For the reasons given I uphold the complaint.

**Directions**

103. The PDCF (of Capita) or, if more appropriate, two or more Directors from the Board of Phoenix, is to make a fresh decision about distributing the death benefits under the Scheme, disregarding the fact that an equivalent sum has already been paid.

104. If the fresh decision results in a payment to the Bankruptcy Trustees, simple interest is to be added to the payment calculated at the average base rate for the time being payable by the reference banks from 10 October 2011 (i.e. three weeks after the Bankruptcy Trustees wrote to Capita/Phoenix) to the date of payment.

105. In the event that any tax liability results from any payment to the Bankruptcy Trustees, it is to be settled by the Phoenix.

**Jane Irvine**

Deputy Pensions Ombudsman  
30 March 2015