

## Ombudsman's Determination

Applicant	Mr N
Scheme	RJS Pension Scheme ( <b>the Scheme</b> )
Respondent	Dalriada Trustees Limited ( <b>Dalriada</b> )

## Outcome

1. Mr N's complaint against Dalriada is partly upheld, but there is a part of the complaint I do not agree with. Although part of the complaint is upheld, no further action is required by Dalriada.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mr N has complained that Dalriada has failed to:
  - remove itself as Trustee of the Scheme;
  - transfer the Scheme benefits to the Supertrust UK Mastertrust Trust (**Supertrust**), resulting in loss of investment opportunity;
  - respond to correspondence about the Scheme to various parties including the members, their representatives and HM Revenue and Customs (**HMRC**), and;
  - provide a breakdown of the fees taken from the Scheme.

## Background information, including submissions from the parties

4. In making his complaint, Mr N is being represented by his accountant Isles and Storer.
5. The Scheme was established as a defined contribution, occupational pension scheme on 30 April 2010. The Scheme has three members including Mr N.
6. The principal employer to the Scheme, RJS 2010 Limited, was incorporated on 10 May 2010. Information filed with Companies House, indicates that RJS 2010 Limited is a dormant company that has not traded since it was incorporated. Mr N is listed as a Director of RJS 2010 Limited.

7. The Scheme was initially funded with a contribution of £400,000, however little documentary evidence is available to show how the contribution was apportioned between the three members.
8. Assets of the Scheme are invested in an approximate 50:50 split between cash and redeemable five year, 3% preference shares in Needham Gym & Fitness Limited (**Needham Gym**), a company for which Mr N also acts as Director.
9. Dalriada does not hold the preference share certificates or any documentation relating to the Needham Gym investment. It is however, documented that Mr N acts as a personal Guarantor to the shares.
10. To date, the Scheme has not received any dividend payments from the preference shares.
11. In early 2011, The Pensions Regulator (**TPR**) became concerned that some pension schemes, which it termed 'corporate pension trust' (**CPT**) schemes, were being used to purchase unlisted shares in companies associated with the members of the CPT scheme, in an attempt to use the assets of the Scheme other than for their intended purpose.
12. The CPT arrangements, which TPR is concerned about, are colloquially referred to as 'Pension Liberation' schemes. That is to say an arrangement whereby members try to access their pension benefits other than in accordance with HMRC rules.
13. On 31 May 2011, the Determination Panel of TPR appointed Dalriada as independent Trustee of the Scheme under Section 97 Pensions Act 2004.
14. In relation to Dalriada's appointment, TPR's Final Notice said:-

"The powers and duties exercisable by Dalriada Trustees Limited shall be to the exclusion of all other trustees of the Schemes pursuant to Section 8(4)(b) of the Pensions Act 1995.

Dalriada Trustees Limited's fees and expenses shall be paid out of the resources of the Schemes pursuant to Section 8(1)(b) of the Pensions Act 1995.

This order:

...

May be terminated, or the appointed trustee replaced, at the expiration of 28 days' notice from the Pensions Regulator to the appointed trustee, pursuant to Section 7(5)(c) of the Pensions Act 1995."

15. Section 16 of TPR's Final Notice, issued in relation to the Scheme<sup>1</sup>, explains the mechanics of how CPT schemes work in greater detail.
16. On 30 May 2012, Mr N wrote to Dalriada requesting that it resign as Trustee. In his letter Mr N also requested a copy of the Scheme accounts, details of the fees Dalriada had charged to the Scheme, copies of any correspondence Dalriada had with HMRC and details of any minutes from meetings Dalriada had concerning the Scheme.
17. Mr N's letter of 30 May 2012, also indicated that one of the three members of the Scheme, Mrs S, intended on taking her pension benefits in the near future.
18. Further correspondence followed and, on 19 October 2012, Dalriada wrote to Mr N saying, in summary:-
  - It was not possible to provide full, audited accounts for the Scheme as Mr N had not responded to an earlier request Dalriada had made concerning the unpaid preference share dividends. However Dalriada had prepared draft accounts based on the par value of the preference shares, with Needham Gym being treated as a debtor.
  - Dalriada has no legal obligation to provide Trustee minutes and the majority of decisions concerning the Scheme are made outside of formal meetings.
  - There has been no formal correspondence with HMRC regarding the Scheme. However, the investment strategy used by the Scheme, "has been used, principally, for the purpose of purchasing unlisted shares and so might be deemed tax avoidance," which is a matter HMRC may need to take a view on.
  - Dalriada charges on a time cost basis, at a rate of £120 per hour. Dalriada said that draft accounts were enclosed with its response detailing the fees charged. It also confirmed that it had not charged any legal costs to the Scheme.
19. On 5 June 2013, Mr N's solicitor, Paulley & Co, wrote to Dalriada setting out why it did not consider that the Scheme's investment in Needham Gym constituted Pension Liberation. Paulley & Co suggested that the Scheme had been, "swept up with all the rest" of the CPT schemes TPR was investigating and that the Scheme was, "an innocent bystander" which was, "standing in the wrong place at the wrong time."
20. Paulley & Co expressed concern that as a result of Dalriada's inaction, a significant proportion of the Scheme's assets remained in cash, resulting in a loss of investment opportunity. It also argued that Dalriada's fees were disproportionate to the size of the Scheme and the amount of work being undertaken. Paulley & Co requested that, in view of its comments about the Scheme, Dalriada should resign as Trustee, allowing a less expensive Trustee to be appointed.

---

<sup>1</sup> <http://www.thepensionsregulator.gov.uk/docs/DN2116109.pdf>

21. On 27 August 2014, Mr N completed an application to transfer benefits from the Scheme to the Supertrust.
22. On 26 September 2014, Mr N wrote to Dalriada explaining that he had sought HMRC's opinion about whether the preference shares constituted an unauthorised payment. Mr N's letter said:-

“HMRC determined that the investment did not constitute an unauthorised payment or benefit. It was a simple process to obtain this determination, and it is suggested that Dalriada could, and should, have sought the same at an early stage.”
23. Mr N's letter reiterated that Dalriada should accede to his request to transfer to the Supertrust.
24. On 24 October 2014, Mr N wrote to Dalriada chasing up the request to transfer to the Supertrust. Mr N said that he had provided confirmation that HMRC approved the proposed structure of the Scheme and complained that as a result of withholding the transfer, Dalriada had failed to invest the Scheme funds in an appropriate way leading to loss of investment opportunity for the Scheme members. Mr N said that if Dalriada did not respond within 28 days, he would invoke the formal internal dispute resolution procedure (**IDRP**).
25. On 25 November 2014, having not received a reply from Dalriada, Mr N wrote to it again, requesting that his complaint be dealt with in line with the IDRP.
26. Dalriada did not provide an IDRP response to the complaint and, as a result, the matter was escalated to this Office.
27. In its submission to this Office, Dalriada has said, amongst other things, that it did not receive Mr N's letters dated 26 September 2014, 24 October 2014 or 25 November 2014. Nor, it says, did it receive the letter from Mr N's solicitor dated 5 June 2013.
28. On 19 March 2015, HMRC wrote to Dalriada to explain that it was seeking to protect its position by notifying the Trustee of the intention to apply a 40% scheme sanction charge in relation to the initial contribution of £400,000. HMRC took the view that the investment in Needham Gym may have resulted in an unauthorised member payment and said that it would continue to investigate this with a view to applying an unauthorised payments charge.
29. After the complaint was referred to this Office, there was further correspondence between the parties which I have detailed below.
30. On 9 March 2016, Dalriada wrote to Mr N in his capacity as a Director of Needham Gym, pointing out that dividends, which totalled £23,409.84 as at 29 February 2016, had not been paid to the Scheme. Dalriada's letter said, “in the event Needham Gym and Fitness Limited is unable to meet both the outstanding dividend and redemption

obligations, the Guarantor [Mr N] would become liable under the terms of the Personal Guarantee.”

31. On 29 June 2017, Dalriada wrote to Mr N detailing the fees applied to the Scheme since it was appointed as Trustee and enclosing copies of the Scheme's reports and accounts.
32. On 14 September 2017, HMRC informed Mr N that it was no longer seeking to apply the unauthorised payments charge. Separately Dalriada has appealed the scheme sanction charge, but the outcome of this appeal is not yet known.

### **Adjudicator's Opinion**

33. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by Dalriada. The Adjudicator's findings are summarised briefly below:-
  - Section 97(5) of the Pensions Act 2004 gives TPR the power to appoint an Independent Trustee to the Scheme. Further, Sections 8(4)(b), 8(1)(b) and 7(5)(c) of the Pensions Act 1995, provide that the Independent Trustee can be appointed to the exclusion of all other Trustees, can be remunerated using funds from the Scheme, and may only be removed with the consent of TPR.
  - Dalriada has been properly appointed as Trustee by TPR, under the relevant legislation. Although Mr N may find it desirable for Dalriada to resign and be replaced with an alternate Trustee, this can only happen with the agreement of TPR.
  - TPR has not consented to Dalriada being removed, so, by refusing to resign, Dalriada has not made an administrative error. Consequently this part of the complaint cannot be upheld.
  - Clause 8 of the Trust Deed and Rules sets out that it is the Trustee of the Scheme that has the power to make investment decisions, at its absolute discretion. The relevant part of the clause states: -

“The Trustees shall, subject to complying with any statutory restrictions on the investment of pension scheme assets, have power to invest, apply or transact with the whole or part of the Fund in their absolute discretion and as though they were beneficially entitled.”
  - Thus it is Dalriada, rather than Mr N who has the power to make investment decisions.
  - Mr N has not been forthcoming about the status of the preference shares in Needham Gym. Further, the requisite dividends have not been paid in to the Scheme since 2012. Consequently, Needham Gym has correctly been accounted for as a debtor to the Scheme in the accounts.

- HMRC has assessed the Scheme as liable for a £160,000 scheme sanction charge. Although the scheme sanction charge is being appealed, HMRC's Tax Tribunal has not made a final ruling on this. Accordingly, the scheme sanction charge has been properly accounted for as a liability on the Scheme's financial accounts.
- As Trustee, Dalriada has a fiduciary duty. Thus, Dalriada must balance the responsibility of ensuring there are sufficient liquid assets to allow members to take their benefits, against the need for making investments to return revenue to the Scheme.
- The Scheme has considerable liabilities and one of the members, Mrs S, intends to take her retirement benefits 'in the near future'. In view of this Dalriada has not acted improperly by retaining cash and refusing to invest the residual assets of the Scheme, not invested in Needham Gym, in other investments. The Adjudicator was of the opinion that in the circumstances the investment strategy Dalriada has adopted is prudent and is consistent with its duties as Trustee.
- Dalriada's refusal to allow the Scheme to be transferred to the Supertrust, whilst the matter of the scheme sanction charge remains outstanding, is not unreasonable.
- There have been repeated delays, on the part of Dalriada, in providing information and responding to Mr N's requests. It is evidenced that Mr N chased Dalriada for a response on numerous occasions by both email and letter but Dalriada failed to reply, or failed to reply in a timely manner.
- Dalriada has said that it did not receive Mr N's letters dated 26 September 2014, 24 October 2014 and 25 November 2014, nor that sent by his solicitor on 5 June 2013. The letters were correctly addressed however and, given that the vast majority of mail in the UK reaches its intended destination, it is more likely than not that Dalriada will have received at least some of the letters Mr N sent.
- When Mr N failed to receive a response to his letter dated 30 May 2012, he sent reminders by email on 23 July 2012, 30 August 2012 and 2 October 2012. The email chain confirms the correct contact details were used and that the emails were not returned as undelivered. However, it was not until 19 October 2012, after nearly 4½ months, that Dalriada acknowledged receipt of, and responded to, Mr N's request. These delays are unreasonable and amount to maladministration.
- However, Clause 6.1 of the Trust Deed and Rules exonerates the Trustee from any liability unless it is shown there has been an intentional breach of trust. Dalriada has not knowingly committed breach of trust, so, although this part of the complaint can be upheld on a finding of maladministration, no compensation be paid for the distress and inconvenience caused by Dalriada's failure to respond, in view of the exoneration clause.

- Dalriada confirmed in its initial correspondence that it would, “write to [Mr N] under separate cover setting out a summary of the fees charged to date.”
  - However, when asked to demonstrate that it had done so, Dalriada was unable to show that it had provided Mr N with the promised summary. It was only after several reminders had been sent by the Adjudicator that Dalriada provided the summary information.
  - As Trustee, Dalriada has a duty under Regulation 13 of the Occupational Pension Schemes (Independent Trustee) Regulations 2005 [SI 2005/703] (**the Disclosure Regulations**), to provide information about its scale of charges and the actual charges applied in the previous 12 months. Dalriada failed to meet its obligations under Regulation 13 but, for the same reasons as with Dalriada’s failure to respond to Mr N’s queries, Dalriada cannot be instructed to pay any redress for the injustice arising from its administrative errors.
34. In response to the Opinion, Dalriada accepted that occasionally there was a delay in responding to Mr N. However it disputed that it did not respond to Mr N’s email of 30 May 2012, until 19 October 2012. Dalriada said that during this period there were email exchanges with Mr N and that the email dated 23 July 2012, which the Adjudicator has said was chasing a response to the May 2012 email, was actually in response to an email Dalriada sent Mr N on 20 July 2012.
35. Isles and Storer, acting on Mr N’s behalf, did not accept the Adjudicator’s Opinion. In essence Isles and Storer’s position is that it requires, and is entitled to receive, a greater level of information about Dalriada’s fees. Further correspondence between the Adjudicator and the parties followed. This can be summarised as:-
- Although Isles and Storer dispute that the Scheme is a vehicle for Pension Liberation, by virtue of The Pensions Regulator appointing Dalriada, there is, presumably, some concern that this is an issue. However that is not a matter for this Office to determine; it is an issue for HMRC to decide.
  - Dalriada has said that it is waiting for further information from Mr N, in relation to the preference shares in Needham Gym, before it is able to fully resolve some of the wider issues with the Scheme. This information has been requested on several occasions, but it does not appear that Mr N has provided this information. Thus the delay in reconciling the issues with the Scheme is not entirely due to Dalriada’s failure. The unresolved issues with the Scheme will require co-operation from both sides in order to reach a conclusion.
  - Dalriada charges on a time cost basis, this is not uncommon and there is nothing unusual in this practise. The scale of Dalriada’s fees is a commercial matter for Dalriada to decide and is not something this Office would usually determine. It is not for Mr N or his representative to, “assess the appropriateness of these expenses” as they have suggested.

- The Adjudicator, in his Opinion, did not recommend that Dalriada provide a more detailed breakdown of its fees, as Isles and Storer had requested. This was because any additional work Dalriada undertakes in relation to the Scheme, in excess of what Mr N is statutorily entitled to by virtue of the Disclosure Regulations, is likely to increase Dalriada's fees, which Mr N has already complained are excessive. The Adjudicator did not want to recommend a course of action which may ultimately prove detrimental to Mr N and/or the Scheme.
  - Although Mr N and his representative have concern about the quantum of the legal costs, in view of the amount of work required in order to understand the construct of the Scheme, these do not appear to be disproportionate.
  - Dalriada is being entirely conciliatory and is prepared to engage with Mr N and his representative on the issue of fees with the ultimate aim of winding the Scheme up and securing benefits for the members in another pension arrangement.
36. Mr N's representative and my Adjudicator reached an impasse, so the complaint was passed to me to consider. Acting on Mr N's behalf, Isles and Storer provided its further comments which do not change the outcome. I broadly agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Isles and Storer for completeness.

### **Ombudsman's decision**

37. Since Mr N's complaint was brought to this Office, the scope of the dispute has widened somewhat. I am limited to determining the complaint on the terms accepted for investigation.
38. Dalriada was appointed as Independent Trustee to the Scheme by TPR, in accordance with the power granted to it under Section 97(5) Pensions Act 2004. Dalriada's appointment was on the basis that it will be remunerated using funds from the Scheme, pursuant to Section 8(1)(b) of the Pensions Act 1995.
39. I find that Dalriada's appointment is valid in law. I am satisfied that Dalriada is entitled to charge fees to the Scheme and can only be removed as Independent Trustee with the consent of TPR.
40. There are unresolved issues with the Scheme relating to the unpaid dividends from the preference shares in Needham Gym and to the scheme sanction charge, although I accept this is subject to appeal. I do not find Dalriada's decision to refuse Mr N's investment instruction, or his request to switch to the Supertrust, to be unreasonable whilst these issues remain outstanding.
41. I agree that on occasion Dalriada failed to reply in a timely manner to Mr N's enquiries. This has been accepted by Dalriada and, as this amounts to an administrative error on Dalriada's part, so this part of the complaint is upheld.

42. With regard to the allegation of poor administration, the Adjudicator has cited an exoneration and indemnity clause within the Trust Deed and Rules, which, he says, prevents me from awarding compensation. This is incorrect. The Trust Deed and Rules do not prevent me from directing that Dalriada pay an award in respect of the distress and inconvenience which a person may have suffered as a result of a respondent's action or inaction. However, I will only direct that such an award is paid where I consider that the distress and inconvenience has been significant.
43. However, although I agree that Dalriada's actions are likely to have caused Mr N a modest amount of distress and inconvenience, I do not find this to be so significant that an award for non-financial injustice is warranted.
44. Following my Adjudicator's involvement, Dalriada provided Isles and Storer with a summary of the costs incurred since its appointment along with copies of the Scheme's reports and annual accounts. This satisfies the requirements under Regulation 13 of the Disclosure Regulations, so no further action is needed in relation to this.
45. Mr N, or Isles and Storer on his behalf, can request further information from Dalriada pertaining to its fees and the costs incurred. But any complaint about the provision of that information, including whether or not it satisfies the requirements of the Disclosure Regulations, would need to be dealt with as a separate matter.
46. Finally, Dalriada has informed this Office that it is willing to engage with Mr N with a view to resolving the outstanding issues affecting the Scheme. Dalriada has indicated that if this happens, it is willing to negotiate on the fees charged to date saying it would, "review the costs to date with [Mr N] face to face and agree with him a final cost for the wind up of the Scheme and get what funds there are into a more appropriate arrangement."
47. I therefore uphold Mr N's complaint in part. But, for the reasons I have given, no further action is required by Dalriada for the part of the complaint that is upheld.

**Anthony Arter**

Pensions Ombudsman  
19 February 2018