PO-9121

Ombudsman's Determination

Applicant	Mr R
Scheme	Yorsipp Self Invested Pension Plan (the **Plan**)
Respondent	Yorsipp Trustees Limited (the **Trustees**)

Outcome

1. I do not uphold Mr R's complaint and no further action is required by the Trustees.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr R's complaint against the Trustees is that they failed to ensure that the buildings insurance was in place for an asset of the Plan.

Background information, including submissions from the parties

4. In December 2006, Mr R made an application to set up the Plan, a self-invested personal pension (**SIPP**), with Yorsipp Ltd. Yorsipp Ltd and the Trustees are the administrators and the trustees of the Plan, respectively. Under section 10 of the application form, which he signed, he agreed to be bound by the Rules.

5. Clause 28 of the Trust Deed and Rules of the Plan, which states that the Trustees and Yorsipp Ltd shall be entitled to all the indemnities conferred on trustees by law and that they shall not be liable for any acts or omissions not due to their own deliberate bad faith, is set out in the Appendix.

6. In May 2011, Mr R included a property (the **Property**) as an asset of the Plan. The Property was purchased partly through the funds in the Plan and the balance was financed via a loan through Royal Bank of Scotland (**RBS**). The total sum paid was £525,000 and the loan accounted for £160,000 of that figure.

7. In line with the Rules, the Property was held in the name of the Trustees. Under a lease dated 28/29 May 2007 (the **Lease**), the Trustees became the named landlord and GS Limited the tenant (the **Tenant**).

8. In October 2011, the Trustees obtained a property insurance quote, including buildings insurance cover of up to £2.75 million, for the Property. The Trustees passed the quote on to Mr R via his independent financial adviser (**IFA**). In November 2011 Mr R confirmed to the IFA that he was happy to proceed with the insurance as quoted.

9. On 23 February 2012, Mr R signed a Property Management Agreement (the **Agreement**) which stated:

> "1. The Member is appointed as manager of the Property and will in a competent and professional manner and at sole cost and expense of the Member:-
>
> 1.1 Obtain and advise the Trustee of the building insurance and loss of rent, service charges, insurance requirements for the Property from time to time, including obtaining details, reinstatement valuations therefore based on independent professional survey as and when requested."

10. Clause 2 of the Agreement says:

> "2.1 The Member shall have no authority, without the express written consent (beyond the mere terms of this Agreement) of the Trustee to bind the Trustee legally in any way;…"

11. The Trustees obtained an insurance quotation for the Property for the period between 16 March 2012 and 15 March 2013, which Mr R agreed to. The policy in respect of this insurance was in the name of the Trustees.

12. The Trustees say that at a meeting on 29 May 2012, Mr R advised them that he wanted them to continue to deal with the buildings insurance for the Property and they agreed. They also say that in July 2012, with the Tenant's rental payments in arrears, he informed them that he wanted to look for alternative buildings insurance cover upon renewal.

13. In November 2012, the Tenant's rental payments fell back into arrears and the loan and insurance payments were defaulted on.

14. On 7 March 2013, the Trustees obtained a quotation for renewal of the insurance cover for the Property. However, on 14 March 2013, Mr R informed them, by email, that alternative cover had been arranged on a like for like basis at nearly half the cost quoted by Yorsipp.

15. On 15 March 2013, Mr R provided the Trustees with a copy of a policy document for the period 16 March 2013 to 15 March 2014. The policy was in the name of the Tenant with Mr R and the Trustees as interested parties.

16. On 30 April 2014, Mr R advised the Trustees that the Property was up for sale. The Tenant was in rent arrears and RBS issued a formal demand for £149,353.14.

17. In an email dated 6 June 2014, the Trustees told Mr R that they needed either a new tenant, a new lease or the Property sold. They said that they thought it was time the Property went out on the open market; and as they had not been able to make the repayments on the loan they feared that the matter would be passed on to the recoveries department at RBS. They asked him whether he was able to obtain the insurance documents. Mr R responded the same day by email saying that he was meeting with a potential buyer. He said that he had forgotten to ask about the insurance, but would do that now.

18. On 13 June 2014, the Trustees received a formal offer to purchase the Property for £380,000 by Mr Y. As Mr Y had difficulties in arranging funding to purchase the Property, it was agreed between Mr R, the Trustees and Mr Y that in the interim, and until the completion of the sale, Mr Y would occupy the Property under a Licence to Occupy (the **Licence**). The Licence provided that Mr Y was only responsible for insuring his own personal contents within the Property and made no provisions for buildings insurance.

19. The Tenant vacated the Property and Mr Y took occupancy of the Property in July 2014.

20. On 18 August 2014 there was a fire at the Property, which caused extensive damage. It was later said that, upon vacating the Property, the Tenant had cancelled the insurance.

21. The legal position is broadly that an exoneration/indemnity clause may exempt trustees from liability for all forms of conduct except actual fraud or dishonesty. It is also not possible to exclude liability for failing to exercise due skill and care in the performance of investment functions – but that was not an activity carried out by the Trustees in Mr R's case, so it is not something that needs to be considered further. Such exoneration/indemnity clauses can cover a wide range of conduct including negligence, gross negligence, innocent breaches and wilful default.

22. The leading case on the scope of exoneration clauses is *Armitage v Nurse and others* [1997] EWCA Civ 1279. The Court of Appeal (Millett LJ) held that this clause was effective to exempt a trustee from liability for loss or damage:

> "no matter how indolent, imprudent, lacking in diligence, negligent or wilful he may have been, so long as he has not acted dishonestly".

23. The line is therefore drawn at dishonesty, with which Millett LJ equated "actual fraud" under the above provision. The Court of Appeal held that to permit a trustee to act dishonestly would derogate from the "irreducible core of obligations" of honesty and good faith. So it can be said that a subjective test of dishonesty is relevant in the context of a trustee exoneration clause, except, perhaps, in the case of a professional trustee (*Walker v Stones* [2001] QB 902). In this case the test for dishonesty in relation to solicitor trustees had to take account of whether a genuine belief that the

deliberate breach was for the benefit of the beneficiaries was a belief so unreasonable that no solicitor trustee could have held it; distinguishing it from *Armitage v Nurse* [1998] Ch. 24. So it can be said that for professional trustees a slightly higher standard applies and he cannot claim that a breach of trust is honest, and therefore within the ambit of an appropriately worded exclusion clause, if it is so serious that no reasonable trustee could hold such a belief. However, Clause 28 of the Rules exonerates the Trustees from liability, except if the Trustees have acted in bad faith or dishonestly.

24. In response to our enquiries, Mr R comments are as shown below.

- The Trustees imply that he arranged for and obtained independent insurance for the Property, which he did not. This was something which the Tenant did entirely of his own volition.

- In 2014, he asked the Tenant, through a third party, to provide the Trustees with evidence that the buildings insurance cover for 2014-15 was in place. He has no idea whether this was done but he certainly asked, via a telephone call, for it to be conveyed.

- Not being a trustee he did not have the authority to obtain independent insurance for the Property. He is puzzled as to why the Trustees have gone to such lengths in discussing insurances under the Lease which had terminated prior to the fire of 16 August 2014 damaging the Property.

- With regard to the alternative building insurance cover obtained by the Tenant, this was undertaken with the full knowledge and approval of the Trustees and premiums were paid directly by the Tenant to the insurance company in clear breach of the terms of the Lease. The Trustees failed to correct this or put in adequate controls to monitor insurance payments.

- That the Trustees failed in their professional duty to ensure adequate building insurance under the Licence, which effectively replaced the Lease. He says that the Trustees also failed in their duty under the Lease.

- That under Clause 28 of the Agreement it is clear that he, as a member “shall have no authority, without the express written consent (beyond the mere terms of the Agreement) of the Trustee to bind the trustee legally in any way…”. At no time did the Trustees provide a document altering the terms of the Lease allowing him to act with such authority and neither did they provide any document which intimated express consent to bind him as a trustee.

- The Agreement related only to the Lease, which expired on the departure of the Tenant. He did not sign any agreement with regard to the management of the Property in relation to the Licence which effectively became the new lease.

- He cannot find any reference to dishonesty in Clause 28 of the Rules. The Rules are so general that it would be unrealistic to presume that the Trustees could not be liable in any situation for any wrong doing whatsoever. He considers that the Trustees have acted in bad faith in attempting to off-load their obligation of a duty of care in terms of ensuring that the Scheme was properly administered.

- Even if the Trustees' failure to ensure building insurance cover was in place from the date of the Licence was not an omission constituting bad faith, it was grossly negligent and a breach of their duties under the Plan.

25. In response to our enquiries the Trustees' comments are as shown below.

- They agree that the Plan was used to purchase the Property which was subject to the Lease under which they became the landlord.

- They agree that the provisions of the Lease, up until its determination, provided that it was their obligation, as landlord, to arrange building insurance; with the cost of the insurance premium to be recovered from the Tenant. However, a SIPP, by its nature, is a "member-directed pension scheme", which provides the beneficiary, in this case Mr R, with a greater say in its running than other comparable pension plans. Moreover, he signed the Agreement, which expressly placed the obligation of insuring the Property on him. As such, their prima facie obligation to insure the Hotel during the currency of the Lease was contractually displaced by him.

- Mr R has commented that they did not note that the insurance policy was in the Tenant's name and not their name. In taking up responsibility for arranging the building insurance, as per the terms of the Lease, it was Mr R's duty to ensure that the insurance policy was in their name.

- Given that they were not privy to the interaction between Mr R and the Tenant as to the renewal of the insurance in March 2014, they disagree that this arrangement was accepted by them. In breach of the Agreement, he failed to inform them of the renewal.

- Under the Agreement, Mr R willingly gave himself the contractual obligation of obtaining buildings insurance thereby relieving them, as landlord, under the Lease from that responsibility.

- Around February 2013, Mr R advised them that he would be looking for alternative insurance on renewal of the cover. At the direction of Mr R, they sent the Tenant a copy of the then current insurance policy document, to enable the Tenant to obtain equivalent insurance cover. In line with the Agreement, in his capacity as the "appointed manager of the property", Mr R assumed responsibility for arranging insurance cover for the Property.

- Mr R had commented that they made "no attempt" to contact the Tenant to verify the buildings insurance cover for the Property. The obligation was on him to

provide them with the information and, in any event, they specifically asked him to forward a copy of the relevant insurance policy to them for the 2014/15 policy year. They never received this from him.

- They agree that the Tenant vacated the Property in July 2014, thereby ending the Lease. With the Lease determined the prime facie obligation on the landlord to ensure buildings insurance was in place fell away. Notwithstanding this, the Agreement remained in place and was not affected by the determination of the Lease.

- They disagree that ensuring that the Property benefited from building insurance at all times required someone who was either "*professionally qualified*" or an "*expert in that field*". Mr R has acknowledged that he was the designated property manager, who, in the previous two policy years, had ensured that building insurance was obtained. Therefore, in their view, he was responsible to ensure that the Property remained appropriately insured.

- They refute Mr R's allegations of negligence and, although they sympathise with him, they are not liable for the financial losses he alleges he sustained following the fire at the Property.

- If it is considered that they are responsible for arranging and ensuring adequate building insurance for the Property, which they refute, then the delegation of the responsibility was at the direction of Mr R. Furthermore, through signing the Member's Declaration, he became bound by the Rules, which provide that they are not liable for any acts or omissions which are not due to their own deliberate bad faith. There was no act of bad faith, deliberate or otherwise, in allowing him to manage the Property's insurance in his designated capacity under the Agreement.

Adjudicator's Opinion

26. Mr R's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustees. The Adjudicator's findings are summarised briefly below.

    - The Agreement does not alter the fact that the Property is held in the name of the Trustees, it just changes the responsibility for obtaining the building insurance cover to Mr R.

    - A copy of the building insurance cover policy for the period 16 March 2013 to 15 March 2014, shows the policy in the name of the Tenant. However, neither the Trustees nor Mr R queried this with the Tenant, or asked for the policy to be put in the Trustees' name.

    - There is no evidence one way or the other as to whether building insurance cover was in place for the period commencing 16 March 2014. The Trustees requested

the insurance documents but this was not until 6 June 2014, nearly three months after the date the building insurance should have been renewed.

- Mr R says that he had asked the Tenant, through a third party, to provide the Trustees with evidence that the building insurance cover was in place for 2014-15 but he had no idea as to whether it was done. Given that he was responsible for ensuring that the building insurance cover was in place, he should have contacted the Tenant himself and made sure that the Property was covered.

- Both the Trustees and Mr R should have checked, soon after 16 March 2014, that the building insurance cover had been renewed and asked for evidence of this.

- There is nothing in the Agreement that it related only to the Lease, as Mr R has claimed. Even if it did, at the time the building insurance cover should have been renewed the Tenant was still occupying the Property.

- Even if the building insurance cover had been renewed as at 16 March 2014, and the Tenant had cancelled it on vacating the Property, both the Trustees and Mr R should have checked that it was still in force soon after the Tenant had left and not just assumed that the cover was still there.

- Clause 28 of the Rules exonerates and indemnifies the Trustees against liability for any acts or omissions not due to their own deliberate bad faith. There is nothing to show that the Trustees have acted in a way which invalidates Clause 28.

- Both parties should have checked that there was building insurance in place at the time the Tenant vacated the Property. However, it cannot be found that the Trustees' failure amounted to an act of dishonesty and therefore they are covered by Clause 28 of the Rules. In any event, even if it was found that the Trustees were negligent Clause 28 of the Rules is wide enough on its natural meaning to cover negligence.

Ombudsman's decision

27. Mr N comments are set out below.

- Proving dishonesty by the Trustees is nigh on impossible which makes the Clause 28 totally one-sided. This means that any level of incompetence and/or negligence by either the Trustees or Yorsipp Ltd is deemed acceptable.

- While he accepts his degree of responsibility for the building insurance cover, the Trustees are also equally responsible for this. Both he and the Trustees should share the blame and the losses. He has effectively lost a private pension of some considerable size built up over very many years because of a one sided clause

which only allows the blame to accrue to the administrator if they have been dishonest, but not negligent or incompetent.

- It is very likely that he will now pursue the matter with the Financial Conduct Authority (**FCA**) and through the Scottish civil courts, with specific reference to unfair clauses in contracts and other legal conventions and dictum.

- Yorsipp Ltd are not trustees to the Plan and therefore cannot have the protection afforded to the Trustees. Why are the Trustees not actively investigating Yorsipp Ltd for this failure and seeking recovery on behalf of the member?

28. I have set out below my response to Mr N's comments.

- I can understand why Mr N feels that Clause 28 is one sided. However, the legal position is that the line is drawn at dishonesty and I am unable to find that the Trustees' failure to ensure that buildings insurance cover was in place was an act of dishonesty on their part.

- I agree that Mr N and the Trustees were equally responsible for ensuring the buildings insurance cover was in place. However, as I have stated, the Trustees failure to do so cannot be considered to be a dishonest act. I would therefore have to conclude that they are protected by Clause 28.

- The normal recourse when parties disagree with my decision is to appeal to the High Court in England or Wales, or the Court of Sessions in Scotland or the Court of Appeal in Northern Ireland.

- Mr N complaint as set out in the application he made is against the Trustees and not Yorsipp Ltd. Even if he had made a complaint against Yorsipp Ltd, they, as the administrators of the Plan, are protected by Clause 28. However, even if they were not protected by Clause 28 they have no responsibility for ensuring that the building insurance cover was in place in respect of the Property. Whether the Trustees wish to taken any action against Yorsipp Ltd is entirely a matter for the Trustees and is not something that I need to consider.

29. Therefore, for the reasons given above, I do not uphold Mr N's complaint.

Anthony Arter

Pensions Ombudsman
11 November 2016

Appendix

Clause 28 of the Rules say:

"The Scheme Trustee, the Scheme Administrator and any Service Provider shall be entitled to all indemnities conferred on trustees by law. Neither the Scheme Trustee, nor the Scheme Administrator nor any Service Provider shall be liable for any acts or omissions not due to their own deliberate bad faith.

Each member in respect of whose Member Fund any liability arises shall keep the Scheme Trustee, the Scheme Administrator and all such Service Providers indemnified against any loss, liability, obligation, demand, claim expenses or proceedings whatsoever…resulting from the exercise of any powers and discretions and against the consequences or any breach of trust or other breach of duty…but always except to the extent attributable to deliberate bad faith on the part of the Scheme Trustee, the Scheme Administrator or such Service Provider. The Scheme Trustee, the Scheme Administrator or such Service Provider shall be indemnified to the same extent from the assets of the scheme."