

Ombudsman's Determination

Applicant	Mrs D
Scheme	Powerdrive Executive Pension Scheme – SSAS (the Scheme)
Respondents	AJ Bell Trustees Ltd (AJ Bell) Mr Andrew Cliff (Mr Cliff)

Outcome

1. Mrs D's complaint against Mr Cliff, but not against AJ Bell, is upheld. No further action is required by AJ Bell. However, to put matters right Mr Cliff should pay Mrs D interest on the payments already made to her and also pay her the balance of the death benefit, plus interest. In addition, he should pay her compensation of £500 for the significant non-financial injustice she has suffered.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs D's complaint against AJ Bell and Mr Cliff is about the delay in the dispersal of the lump sum death benefit due to her on the death of Mr Thompson.

Background information, including submissions from the parties

4. Mr Thompson was an active member the Scheme, a Small Self-Administered (**SSAS**), until his retirement in 2011. He was a trustee of the Scheme together with AJ Bell, the professional trustees, and Mr Cliff. AJ Bell Ltd are the administrators to the Scheme. Mr Cliff is an active and only remaining member of the Scheme. Therefore the current trustees of the Scheme (the **Trustees**) are AJ Bell and Mr Cliff.
5. The rules of the Scheme are set out in the Definitive Trust Deed and Rules dated 11 July 2007. The relevant rules which are 17.5 and 15.1 are set out in the Appendix.
6. The main asset of the Scheme is a property (the **Property**). The Trustees receive rental income from the tenants of the Property which gives the Scheme a degree of liquidity.
7. Mr Thompson died on 16 January 2013. AJ Bell say that at the date of his death the value of his share of the fund was around £137,000.

8. Mrs D is Mr Thompson's sister and she was nominated in his expression of wish form as a beneficiary. In February 2013 her solicitors contacted AJ Bell informing them that she was Mr Thompson's executor and enquired about his pension fund.
9. In the correspondence between AJ Bell and Mrs D's solicitors, between February and November 2013, AJ Bell explained that the issue the Trustees have is how to raise the liquidity in the Scheme in order to pay Mr Thompson's beneficiaries. They said that Mr Cliff was considering whether to sell the Property or to arrange borrowings to raise the funds.
10. Correspondence between AJ Bell and Mrs D's solicitors continued.
11. In January 2014, in response to a complaint made by Mrs D, AJ Bell said that they had been in regular contact with Mr Cliff, and his representatives, to try to arrange the payment of death benefit to Mr Thompson's beneficiaries. They explained that Mr Cliff had two current issues that needed to be resolved before any benefits can be paid. They had provided him with as much information as they could to help him reach a conclusion.
12. In July 2015, the Trustees paid Mrs D and two other beneficiaries £15,000 each as part payment of Mr Thompson's death benefit due from the Scheme. In July 2016, the beneficiaries were paid a further £5,000 each. These payments were made from the rental income the Trustees received.
13. In response to our enquiries, AJ Bell say that Mr Cliff disputes the distribution of assets between himself and Mr Thompson and until this matter is resolved they are unable to make much more progress with the sale of the Property. They have no control over the process. They are in regular contact with Mr Cliff and his representatives to ensure that the matter is progressed as quickly as possible and they are providing regular updates to the beneficiaries.
14. Mr Cliff's response to our enquiries is set out below.
 - It was not communicated to him the effect Mr Thompson's death would have on the pension fund.
 - The distribution of the pension fund did not relate to the balance of the holding contribution. Mr Thompson's contribution to the Scheme did not reflect his share of the pension fund.
 - Mr Thompson pushed ahead with the purchase of the Property knowing that this could not be funded effectively.
 - Mr Thompson did not disclose his health issues.
 - He holds Mr N, the advisor who helped to set up the Scheme, fully responsible for the current situation. Mr N never explained to him the consequences and repercussions to the Scheme upon the death of Mr Thompson.

Adjudicator's Opinion

15. Mrs D's complaint was considered by one of our Adjudicators who initially concluded that both AJ Bell and Mr Cliff would be required to pay Mrs D interest on the payments already made to her and also pay her the balance of the death benefit, plus interest. In addition, they should pay her compensation of £500 for the significant non-financial injustice she has suffered. The Adjudicator's findings are summarised briefly below:
- the Trustees are responsible to ensure that any benefits are paid to the beneficiaries of the Scheme in a timely manner;
 - the decision to either sell the Property or to arrange borrowing could have been made within three months of Mr Thompson's death;
 - while it is appreciated the sale of the Property or arranging borrowing, to pay Mrs D the remaining lump sum, will take some time, the Trustees have taken little or no action over the last, approximately, four years to progress matters;
 - the reasons given by Mr Cliff for the delay (i.e. a dispute about the split of the pension fund between him and Mr Thompson and the fact that Mr N had not explained to him the implication to the pension fund if Mr Thompson died) are not matters that can be taken into consideration;
 - as a trustee of the Scheme Mr Cliff should have understood, at the time the Scheme was established, the effect a member's death would have on the pension fund.
16. However, on receiving AJ Bell's response to the Opinion the Adjudicator reconsidered the matter and concluded that the complaint should only be upheld against Mr Cliff. In their response to the Opinion, AJ Bell said:
- as professional trustee of the Scheme they have a different role to Mr Cliff, who is now the sole member trustee;
 - under rule 17.5 of the Rules, all decisions which fall to be made by the Trustees are to be made by those trustees who are members by unanimous agreement – only Mr Cliff is able to decide whether to sell the Property or arrange borrowing to raise funds to pay the beneficiaries;
 - although under rules 15.1 and 15.2 of the Rules Mr Cliff would require their consent to sell the Property or arrange borrowing, at no time have they withheld consent – in fact, they have throughout the period since Mr Thompson's death endeavoured to procure that Mr Cliff takes such action as is necessary to facilitate the payment of the death benefit to the beneficiaries;
 - Mr Cliff has not co-operated with them to resolve the matter;

- under the Rules, they hold the Property jointly with Mr Cliff and, consequently, they cannot sell the Property or use it to secure borrowing without Mr Cliff's co-operation;
 - the Trustees' bank account is also held in joint names with Mr Cliff, therefore they cannot make payments without his co-operation.
17. Following AJ Bell's response to the Opinion, the Adjudicator wrote to Mrs D, AJ Bell and Mr Cliff on the 8 December 2016 informing them of a change in his decision and inviting comments. The only comment was from Mr Cliff who said that he had been in discussions with his accountant and had arranged for the Property to be valued.
18. I agree with the Adjudicator's decision, as summarised above.

Ombudsman's decision

19. Under rule 17.5 any decision of the Trustees to invest or disinvest under rule 15.1 requires the written agreement of the professional trustee, i.e. AJ Bell. The selling of the Property can be regarded as a disinvestment and therefore, it will require the written agreement of AJ Bell. AJ Bell have stated that at no time have they withheld their consent to sell the Property and I can see no evidence to contradict that.
20. Rule 17.5 also states that "all decisions which fall to be made by the Trustees to be made only by the Trustees who are Members by unanimous agreement". As Mr Cliff is the only member and a trustee, all decisions which fall to be made by the Trustees are to be made solely by him. While AJ Bell's permission is required to sell the property, their obligation extends only as far as their legal obligation to ensure that the sale complies with HM Revenue & Customs' rules; which means that the sale has to be agreed before they can provide the permission envisaged by rule 17.5. Consequently, the decision as to whether or not the Property is sold, or the decision to arrange borrowing, lies solely with Mr Cliff.
21. Until a decision is made about the sale of the Property, or to arrange borrowing, payment of the balance of the death benefit due to Mrs D cannot be made. I am therefore satisfied that the responsibility for delay in paying Mrs D the death benefit due to her lies with Mr Cliff and not AJ Bell.
22. Therefore, I uphold Mrs D's complaint against Mr Cliff and not against AJ Bell.

Directions

23. Within 28 days from the date of this determination, Mr Cliff is to pay Mrs D the following:
- simple interest on the £15,000 payment made in July 2015, calculated from 16 July 2013, six months after Mr Thompson's death, to 10 July 2015;

- simple interest on the £5,000 payment made in July 2016, calculated from 16 July 2013 to July 2016; and
 - £500 for the significant non-financial injustice Mrs D suffered.
24. In addition, within three months of the date of this determination, Mr Cliff is to arrange for the necessary funds to be available and for the Trustees to pay Mrs D the balance of the death benefit due to her plus interest.
25. The interest described above is the base rate for the time being quoted by the reference banks.

Karen Johnston

Deputy Pensions Ombudsman
11 January 2017

Appendix

Rule 15.1 says:

“For the purposes of the Scheme and subject to any restrictions imposed by legislation or HMRC or by the terms and conditions agreed between any Member and the Professional Trustee (if any), Scheme Practitioner (if any) of the Scheme Administrator, the Trustees may, anywhere, themselves or with others, acquire or dispose of any property, participate in or finance any company or business, deposit (whether or not at interest), lend or borrow money or other property, mortgage or charge any assets, enter any contract, undertake any obligation, give any indemnity or insure assets for any risk and amount.”

Rule 17.5 says:

“The Scheme shall comply with the requirement of Regulation 3(1)(h)(ii) of the Occupational Pension Schemes (Scheme Administration) Regulation 1996 (SI 1996 No. 1715)...and of any other regulations so requiring for all decisions which fall to be made by the Trustees to be made only by the Trustees who are Members by unanimous agreement, or, where a company is a Trustee of the Scheme, for any decision made by that company in its capacity as Trustee to be made only by the unanimous agreement of all the directors of that company who are Members, disregarding in each case the participation of a Professional Trustee in the making of a decision, provided that the prior agreement in writing of the Professional Trustee (if and for so long as there is a Professional Trustee which is a Trustee of the Scheme) and of the Scheme Administrator shall be required to any decision of the Trustees to invest or disinvest under Rule 15.1 or Rule 15.2, save for any investment or disinvestment decisions to which Rule 15.4 or 16 applies. The Scheme shall comply with this requirement in order to obtain exemption from the requirements of the 1995 Act or the Pensions Act 2004 which from time to time are expressed not to apply if this requirement is satisfied.”