

Ombudsman's Determination

Applicant	Miss E
Scheme	Thomas Andrews and Partners Pension Scheme (the Scheme)
Respondent	Phoenix Life (Phoenix)

Outcome

1. I do not uphold Miss E's complaint and no further action is required by Phoenix.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Miss E's complaint is about the charges that Phoenix have deducted from her pension plan from July 2012 onwards.

Background information, including submissions from the parties

4. Miss E had initially brought a complaint to us about the charges that Phoenix had deducted from the Scheme. However, as she did not bring her complaint to us until 29 June 2015, we can only investigate the charges deducted by Phoenix since July 2012.
5. Miss E is a partner of Thomas Andrews and Partners (the **Partnership**). In 1990 the Partnership set up the Scheme with the Life Association of Scotland (**LAS**) for the five partners at that time. The Scheme was set up under the LASPEN Private Portfolio Personal Pension Scheme (the **LASPEN Scheme**), a unit-linked personal pension plan for self-employed people with the option to invest in a range of pooled funds and a private fund.
6. LAS was taken over in 1993 and closed to new business in 1997. In 1999 it was acquired by Britannia Life Assurance Ltd and renamed Alba Life Limited (**Alba**). The ownership of Alba has changed over the years. In 2006 a High Court order transferred the business of Alba to Phoenix.
7. In September 1990, Miss E, plus her four fellow partners at the time, signed a form (the **Proposal**) requesting LAS Pensions Management Limited (known as LASPEN) to establish a private fund for them. A paragraph on the Proposal states: "We

understand that in connection with the Fund LASPEN will levy charges, details of which will be set out in a statement to be issued by LASPEN”

8. An extract from a booklet for the LASPEN Scheme, which is based on information as at 1 May 1989, sets out the charges as:
 - a contribution charge of up to 5% of each contribution, reduced to 4.75% on contributions in excess of £250,000 per annum;
 - a per member charge of £40 per annum paid at the beginning of each scheme year plus £45 per member when a contribution is made;
 - 0.25% per annum of the fund value (minimum of £12.50 per month);
 - for the Pooled Fund option, a bid/offer spread on the funds, of not more than 5% depending on the fund;
 - for the Private Fund option, an extra 0.125% per annum of the fund value under £200,000 and a £600 annual charge (£360 if the fund is fully invested on deposit);
 - for investment transactions over 10 per annum a £25 charge;
 - third party fees (eg stockbroker fees) will be charged to the fund;
 - all charges will be index linked.
9. There is no mention in the charges set out in the 1989 booklet of a property charge. This charge is included in documents subsequently issued by Alba and Phoenix showing the charges for the LASPEN Scheme. A 2002 document shows the charge as an initial charge of £930 and £310 per annum thereafter; while a 2016 document shows the charge to be an initial charge of £1,380 and £440 per annum thereafter.
10. A document setting out the ‘Product Particulars’ of the LASPEN Scheme as at 1 January 1991, shows the charges to be the same as those shown in the 1989 booklet.
11. In 1990 a property (the **Property**) was bought by Scheme. The purchase of the Property was financed by a mortgage of £275,000 with the Bank of Wales. The Property which was originally owned by Alba is now owned by Phoenix.
12. Three of the five original members have left the Partnership. The only two remaining members are Miss E and Mr S.
13. In March 2006 Alba wrote to Mr S in response to a complaint. The complaint was about the rent on the Property and whether it was capable of being reviewed to a level less than that allowed by the lease. The complaint was not upheld. In their response, Alba offered to review the rent provided the Partnership agreed to five points. One of the five points was that the Partnership pays the outstanding charges,

which Alba had not been able to deduct from the fund due to the fact that the Partnership had not paid them pension contributions or direct rental income, in full.

14. The evidence shows that statements of the valuation of the fund and income and outgoings for February 2007, August 2010 and February 2011 were sent by advisers to the Scheme to Mr S. These statements showed that monthly charges were being made under the Scheme and these charges were a private fund charge, a management charge and a property charge. The total charges for February 2007, August 2010 and February 2011 were £126.37, £174.81 and £154.86, respectively.
15. In 2012, Phoenix entered into a contract with HSBC Bank (**HSBC**) to provide a range of investment administration, fund accounting and pricing, custody and other services across Phoenix's range of assets. As a result HSBC took over the administration of the Scheme.
16. In 2014, there was an exchange of correspondence between HSBC and Miss E regarding the charges made under the Scheme. A complaint was made by Miss E and Mr S with regard to the value of the fund and the level of charges. On 24 December 2014, in response to the complaint, Phoenix wrote to Miss E and Mr S saying:
 - the intended operation of the Scheme is that the Partnership pays the rent and pension contributions to them and these amounts are used to pay the loan and to provide investment into the fund;
 - the only other payment made into the fund was an amount of £10,000 in September 1990, which represented £2,000 for each of the five members;
 - their records show that early attempts were made by the Partnership to reduce both the rent payable to them and to amend the terms of the loan, but this was rejected;
 - since around 1995, or earlier, no money has been paid by the Partnership to Alba or Phoenix, and instead payments were made directly to the bank in respect of the mortgage;
 - when no payments were made to them, the fund accrued charges as described in their product literature and these are currently a flat scheme charge of £1,510 per annum, a per-member charge of £8.45 per month taken by cancelling units, a flat charge per property of £420 per annum and a fund management charge of 0.375% per annum;
 - the total monthly charges (made up of the private fund charge, management charge and property charge) for 31 August 2012, 31 August 2013 and 29 August 2014 are £185, £190 and £184, respectively.

- as no payments were made to the fund, and have not been made for around 20 years, these charges have been accruing against the value of the fund and there is also interest being charged on the debt balance, currently at the rate of 2.5% per annum;
- as the fund has no liquidity to pay any claims, members would not be able to take their benefits unless the outstanding charges are cleared either by direct cash payments to Phoenix or if the Property is sold to fund the debt;
- the statement as at the end of August 2014 shows that the charges, expenses and interest owed by the Partnership to them to be £74,154.02; and
- in recognition of an unacceptable amount of time they had taken to deal with the queries raised by the Partnership, they offered £200 as compensation.

17. In response to our enquiries Miss E says:

- the LASPEN Scheme was a new concept when it was first set up and the only ones who were familiar with it were the initial insurance brokers who help set it up;
- LAS did not have a clue of what to do, which is why the account went into arrears and resulted in the Bank of Wales asking the Partnership to pay the mortgage direct as LAS were holding on to the money;
- after LAS, Alba became involved and the Partnership's accountant and insurance broker were constantly involved in trying to sort out the charges;
- she only became aware of the charges in 2012 after one of the partners, who dealt with the accounts for the Partnership left, and she became involved;
- she asked Phoenix, who had by then taken over from Alba, for a meeting but they refused;
- she had spoken to Mr S and he did not understand the charges;
- Mr S says that the charges were not agreed and never have been agreed to and that the problem lay in not getting anyone to discuss the matter with him;
- Mr S says that regardless of what was shown in the statements in 2007 and thereafter, the charges were still a subject of contention and were never agreed by the Partnership;
- Phoenix have a duty of care to her and they have not justified their charges;
- even if she was to agree that the charges are contractual, Phoenix are in breach of the contract because of bad management of the Scheme;

- having been in the Scheme for 26 years, the Partnership is still being charged a huge amount of money by Phoenix; and
- she believes that Phoenix are making charges for doing absolutely nothing.

18. In response to our enquiries Phoenix say:

- the Partnership originally occupied the Property under a 15 year tenancy agreement which started in 1991, which required it to pay rent of £30,000 per year to Phoenix (previously Alba);
- the Partnership still occupies the Property;
- all five partners in signing the Proposal signed up to the charges;
- the key is whether the charges being applied are consistent with the literature issued at the commencement of the Scheme;
- the terms and conditions from January 1991 describes all charges apart from the per property charge, but the reason for this is that this document does not cover property as a permitted asset in a private portfolio;
- their letter of December 2014 provides details of the irregularities with the mortgage and the rent – the Partnership has not been making rental payments but instead have been making direct payment to the bank to cover the mortgage payments;
- they are expecting the mortgage on the Property to be paid by around October 2016;
- given the continued occupancy by the Partnership of the Property, it will need to pay rent to Phoenix to be applied to the fund; and
- if no rent is paid, each unpaid instalment will, for tax purpose, constitute an unauthorised payment to the Partnership from the fund, with all tax charges and penalties being applied to the fund.

Adjudicator's Opinion

19. Miss E's complaint was considered by one of our Adjudicators who concluded that no further action was required by Phoenix Life. The Adjudicator's findings are summarised briefly below.

- Miss E had signed the Proposal in September 1990, in which she agreed that charges would be levied by LAS, therefore she ought to have known before 2012 that charges were being deducted by Phoenix. By signing the Proposal, Miss E had agreed to the charges levied initially by LAS and now by Phoenix.

- Mr S, Miss E's fellow partner, had been in correspondence with Alba since 2006 and had received statements which showed the charges made at least as early as 2007 and, therefore, he was definitely aware that charges were being deducted by Phoenix prior to 2012. In addition, Miss E says that the Partnership's solicitors and insurance broker have been involved in trying to sort out the charges. This reinforces the view that she ought to have known before 2012 that charges were being deducted by Phoenix.
 - With the exception of the property charge, both the private fund and management charges are listed in the 1989 LASPEN booklet.
 - Miss E says that LAS were holding the money the Partnership had paid and had not paid the mortgage. Phoenix have said that the Partnership have not made any payments (contributions or rental payments) to them for the last 20 years. Therefore, any fault by LAS to pay mortgage payments must have happened in the first few years after the Scheme was set up.
 - There has been a dispute between the Partnership and Phoenix, over at least the last ten years, regarding the rental payments due by the former and the charges deducted by the latter. There is no evidence of a complaint made by Miss E against Phoenix of mismanaging the Scheme. Even if there was some evidence to show that Phoenix had mismanaged the Scheme, it does not necessary mean that Phoenix are not entitled to deduct their charges.
20. Miss E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Miss E provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Miss E for completeness.

Ombudsman's decision

21. A summary of Miss E's response to the Adjudicator's Opinion is set out below.
- She did not have sight of the LASPEN booklet in which their charges were set out.
 - She does not agree with the amount Phoenix is deducting in charges. Taking an average figure of £2,192 a month, which is, for the most part, what they are paying, then over a period of 26 years they have paid a total of £683,904.44 for what was a £275,000 mortgage.
 - If they had paid £683,904.44, why hasn't the mortgage been paid off and where has the surplus gone?
 - Why did the Phoenix say in 2012, that the "scheme is that the Partnership pays the rent and pension contributions to them and these amounts are used to pay the loan and to provide investment into the fund". Phoenix knew that their

predecessors (ie LAS and Alba) did not pay the bank, and this resulted in the bank asking the Partnership to side step Phoenix and make payments in respect of the mortgage direct to them.

- Phoenix have not looked after her interest. Why did they not write to the Partnership suggesting that they administer the Scheme properly?
- The initial £10,000 paid into the Scheme was swallowed up in charges in a very short period of time and that has not been explained.
- The charges were not provided at the commencement of the Scheme. Had they been provided then she would not have personally entered into such an agreement.
- Why were they not told that “this document does not cover property as a permitted asset”? This was central to all that has been done.
- The Partnership does not own the Property. They pay rent to the owners of the Property, which happens to be the members of the Scheme.

22. My response to Miss E’s points above, is set out below.

- Miss E says she did not see or agree to the specific charging terms.. The contract which governs the charges, the terms of which Phoenix now have the benefit, was concluded in 1990 and the charges made according to those terms have been known about and disputed since at least 2006. My powers to make findings and provide redress are subject to the Limitation Act which imposes a six year time limit for contractual disputes. It is too late for me to consider arguments that the terms which govern the charges never became part of the original contract.
- As stated in paragraph 16 above, the charges for the whole Scheme for the months August 2012, August 2013 and August 2014 were £185, £190 and £184, respectively. There is no evidence to substantiate Miss E’s claim that the average monthly charge for the Scheme is £2,192.
- As Miss E’s complaint is restricted to the charges being made from July 2012 onwards, I cannot comment on any part of her complaint which relates to charges before that date. However, in their letter of 24 December 2014 to Miss E, Phoenix said that the total charges, expenses and interest owed by the Partnership as at the end of August 2014 was £74,154.02 and this is a lot lower than her estimate of £683,904.44.
- For the Scheme to work properly, the Partnership must pay rent and pension contributions to Phoenix monthly. Phoenix in turn makes monthly payments to the bank in respect of the mortgage payments and invests what remains, if any, together with pension contributions after charges are deducted. However, since 1995 no money, pension contributions or rent, has been paid to Phoenix by the

Partnership. Instead the Partnership have been making mortgage payments direct to the bank. Apart from an initial pension contribution of £10,000, there have been no other pension contributions. Therefore, since 1995 there have been no monthly pension contributions or any surplus from the rent after the mortgage is paid, for the charges to be deducted. The matter concerning the outstanding charges has been ongoing since 2006.

- The Scheme could not operate properly because the Partnership had made no pension contributions or rent payments to Phoenix for a number of years.
- I would agree that the initial payment of £10,000 has been swallowed up in charges. However, the reason for this is because no payments were made by the Partnership to Phoenix for a number of years. Phoenix cannot be blamed for this. I agree that the Partnership pays rent on the Property, but the Property is owned by Phoenix. The Property and other assets of the Scheme are held by Phoenix for the benefit of the Scheme members. The fact that Partnership pays the mortgage payments direct to the bank does not mean that Phoenix cannot levy the charges owed to them under the Scheme.

23. For the reasons given above, I do not uphold Miss E's complaint.

Karen Johnston

Deputy Pensions Ombudsman
2 December 2016