

## Ombudsman's Determination

<b>Applicant</b>	Miss A
<b>Scheme</b>	Simply Tiles Ltd Directors Pension Scheme ( <b>the Scheme</b> )
<b>Respondents</b>	The Trustees of the Simply Tiles Ltd Directors Pension Scheme and AJ Bell Trustees Limited ( <b>AJ Bell Trustees</b> ) collectively ( <b>the Trustees</b> ); AJ Bell Trustees also acts as the Professional Trustee.  A J Bell Limited

### Complaint Summary

Miss A has complained that the Trustees failed to properly consider her rights, and those of her sisters, when exercising discretion in relation to the Scheme death benefits following the death of their father (**Mr M**).

Miss A says that while the nomination form (**the EoW**), which the Trustees are relying on was completed in 2004, and signed by Mr M, the original nomination details were not completed by him. Miss A says her uncle, the deceased's brother (**Mr S**), later changed the nomination in his favour and initialled the changes.

Miss A also says there is no evidence that Mr M was aware of the change in the nomination, or even of the original nomination. Miss A says that the Trustees' decision to award the death benefit to Mr S is perverse. Further, that the period since Mr M's death has been marked by persistent maladministration by the Professional Trustee and the Administrator, causing substantial delay and distress.

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

The complaint should be upheld against the Trustees of the Scheme as the previous decision was improperly made because they failed to take into account all relevant factors such as:

- the circumstances and manner in which the EoW was completed are such that it makes the EoW invalid and the Trustees should not have relied on it when making their decision; and

- the Trustees did not consider what Mr M's wishes would have been shortly before his death and when approving his Will.

The sequence of events and specific unusual circumstances in this case have led me to conclude that the only appropriate and fair way in which to deal with the matter is for me to now make the distribution decision. I do so by directing that 75% of the Scheme assets attributable to Mr M are to be paid, in equal shares, to Miss A and her two sisters. The remaining 25% of Mr M's assets are to be paid to Mr S.

There was also an inordinate delay in reaching a decision which could have been avoided if there had been a more robust process adopted by AJ Bell Limited and the Professional Trustee, including direct discussion with the lay Trustees. This may now result in a tax liability being payable and, if so, this should be borne by the Scheme but only after the above distribution has been made.

The complaint should also be upheld against AJ Bell Limited in its capacity as an administrator (carrying out acts of administration in relation to the Scheme), for persistent maladministration, including the delay and a failure to have an appropriate process to identify and remedy the flaws in procedure which took place in this case.

I direct AJ Bell Limited to pay £6,000 to Miss A and her two sisters, divided into equal shares, for the exceptional distress and inconvenience this has caused them.

## Detailed Determination

### Material facts

1. Mr M died on 4 November 2013, while in active membership. He was survived by his three adult children, Miss A and her two sisters. The Trustees decided that the value of the Scheme death benefit, amounting to £105,224, less administration fees, should be paid to Mr S.
2. The Scheme was established on 31 March 2004, on a money purchase basis. Mr M was one of three members who were also individual trustees of the Scheme. It was a small self-administered scheme (**SSAS**). The other two members were Mr S and his former spouse, now Mrs E (**the Member Trustees**). The Professional Trustee and AJ Bell Limited, which provided administration services to the Trustees, are part of the AJ Bell group of companies. Clause 1.1 of the Trust Deed appointed all the Trustees, jointly, as Scheme Administrator.
3. Mr M's total pension contributions amounted to £166,866, and together with borrowings, were used to purchase a commercial property in February 2006, for the sum of £325,000 (**the Property**).
4. The Scheme's definitive trust deed and rules, adopted in November 2007 (**the Rules**), state:

Rule 7: 'Lump Sum Death Benefits' "On the death of a Member the Trustees may pay a lump sum death benefit which is either permitted by the Lump Sum Death Benefit Rules [as in section 168 of the Finance Act 2004] or by regulations made under section 164 of the Finance Act [2004] or otherwise permitted by HMRC..."

Rule 7.2: "The Trustees may pay or apply such lump sum... to or for the benefit of one or more Eligible Recipients in such proportions as they think fit..."
5. Under the Rules 'Eligible Recipients' are to be determined "...on the basis of reasonable enquiries made by the Trustees". The definition includes the member's dependants; persons interested in his estate; any other Member; and a person "he has nominated to the Trustees in writing ..."
6. Rule 20.4 of the Rules gives the Trustees and the Scheme Administrator absolute power to exercise discretion in relation to the distribution of death benefits. Rule 20.4 states that the Trustees and the Scheme Administrator may take account of any wishes expressed by the member.
7. Under the Scheme Rules, Mr M's Fund is that share of the Scheme's assets that the Trustees determine are attributable to him.

8. At the time the Scheme was established, AJ Bell Limited prepared announcement letters and nomination of death benefit forms (**the Forms**) for each member. Mr M signed his EoW in respect of the Scheme benefits but without filling out the details of his chosen beneficiary. Mr S is, however, named as the nominated beneficiary on the EoW, as he added his own name and placed his initials next to this section.
9. AJ Bell Limited says that it dated the Forms as at 31 March 2004, the date the Scheme was established, and the EoWs for the members were returned to the independent financial adviser, Mr P Parr, PPA Financial Planning Ltd (**the Adviser**), for safe keeping as he was the main point of contact for the Scheme. AJ Bell Limited did not take any action in relation to Mr S's amendments and say that it did not notice them.
10. Mr Parr says that the EoWs were all completed and signed by the members at the same time, but the wrong name was inserted on Mr M's EoW; this was corrected and initialled by Mr S. Mr Parr does not appear to have noticed that the changes had not been initialled by Mr M and the form had not been completed and then signed by him.
11. On 14 January 2008, the Member Trustees signed a trustee resolution formally agreeing the apportionment of funds between members. Mr M's agreed share of the fund of £219,104, as at 31 December 2006, was £98,596 (45%).
12. In April 2008 and April 2013, AJ Bell Limited wrote to Mr Parr and recommended that members keep their expression of wish or nomination form up to date.
13. In his will, executed on 4 August 2013, Mr M bequeathed the remainder of his estate, after payment of his funeral, testamentary expenses, debts and legacies, to his three daughters to be shared equally (**the Will**). The Will was signed in the presence of Mr S and two witnesses: Mr E and Mrs S (then known as Ms N).
14. Mr E says that Mr S prepared the Will in advance and read it out to Mr M before it was signed. Mr E says that Mr S acknowledged to Mr M that everything was being left to Mr M's three daughters, when asked by Mr M "if everything was in the will". Mr E says that he understood "everything" to mean the deceased's estate. Mr E says he also read the Will, and any benefits to be paid from the Scheme were not mentioned in it; he assumed that any pension benefit would form part of the estate. Mr E says it was clear at that time that Mr M wanted to leave everything to his daughters. Mr E says Mr S had the opportunity to clarify whether any pension benefit was excluded from the estate, but he failed to do so.
15. Mrs S says that Mr M gave Mr S permission to prepare the Will in advance. Mrs S says that at no time during his illness did Mr M mention his Scheme pension benefits to either her or Mr S. Mrs S disputes Mr E's account that Mr M asked if everything was in the Will. Mrs S says she, rather than Mr S, read the Will to Mr M before it was signed.

16. Following Mr M's death, on 20 June 2014, AJ Bell Limited wrote to Mr Parr enclosing a death benefit information form for completion. The form required details to be provided of the deceased's next of kin and family; his children; remoter issue or other dependants; and whether they were financially dependent on the member. The form also asked for a copy of Mr M's Will.
17. On 23 September 2014, the two remaining members signed a trustee resolution formally agreeing the apportionment of funds between members. Mr M's agreed share of the fund of £315,045, as at 31 December 2013, was £141,355, approximately 45% of the fund.
18. AJ Bell Trustees say that the share of the Scheme funds allocated to Mr M was stated in the trustee resolution formally approving the annual accounts, as at 31 December 2013, and, other than the Property, the Scheme's only asset was the rental income from the Property.
19. On 6 March 2015, the Property was valued at £230,000 by commercial property consultants (**the Valuation**). AJ Bell Trustees say that Mr M's share of the assets was £105,224 based on the Valuation, approximately 45%.
20. On 5 October 2015, the Trustees notified each of Mr M's daughters that they were proposing to distribute funds to Mr S in accordance with their late father's nomination made in 2004, and requested their comments by 25 October 2015.
21. On 12 October 2015, following an enquiry from Miss A concerning the distribution of the death benefits, Mr S explained that AJ Bell Limited was intending to distribute the death benefit by 4 November 2015.
22. On 4 February 2016, AJ Bell Limited notified Miss A of the Trustees' decision to distribute the death benefits in accordance with Mr M's nomination, and requested that she confirm in writing whether or not she had any objections.
23. On 10 February 2016, Miss A replied that the EoW had been amended but not countersigned or dated, and directly conflicted with the Will, which clearly expressed her father's intention of how he wanted his entire estate to be distributed.
24. AJ Bell Trustees says that the standard procedure for obtaining information in death cases, including identifying all potential beneficiaries, is undertaken by AJ Bell Limited who gather the information on behalf of the Professional Trustee. This involves gathering the relevant details and preparing a 'death benefit summary form' (**the Summary**), with its recommendation on how the benefits should be distributed which would then be considered by the Professional Trustee and the member trustees. It says the other trustees would have the option to approve it or make an alternative recommendation.

25. AJ Bell Trustees says that the information that was collated and considered by the Trustees was: the completed death benefit information form; the letter of 20 June 2014 to Mr Parr; the Announcement and EoW, dated 31 March 2004; the Will and probate; and the Summary.
26. AJ Bell Trustees has provided documentary evidence of the fact-finding process it completed following Mr M's death, the procedures it used to establish the existence of other potential beneficiaries and their personal circumstances.
27. The Summary records that Mr M made a nomination in favour of Mr S; the deceased's estate was to be divided equally between the three daughters and they had been given an opportunity to comment on the suggested distribution of funds. The Summary recommended that the entire death benefit should be paid to Mr S in his capacity as eligible recipient and nominee of the deceased.
28. AJ Bell Trustees say that an internal investigation was carried out when the Trustees received Miss A's' complaint and, as it included some issues concerning the completion of the EoW form which the Trustees were not aware of at the time of their original decision, enquiries were made of Mr M's daughters and the extent to which they were dependant on him. AJ Bell Trustees say that the outcome of the investigation was a decision to review the initial decision.
29. AJ Bell Limited has provided copies of its letters to the daughters, dated 2 June 2016, requesting confirmation of whether they were financially dependent on Mr M. Their responses confirmed that Mr M had no financial dependants at the time of his death, and that they were not financially dependent on their father.
30. On 9 June 2016, the Trustees held a meeting (**the June Meeting**), to review the original decision to exercise their discretion in favour of Mr S. The original decision had been made by an exchange of correspondence, AJ Bell Trustees say that the review was carried out in light of the EoW irregularities raised in Miss A's letter of complaint, and also other details received from Mr M's daughters, as well as from Mr Parr.
31. The minutes of the June Meeting record that:-
  - the Chairman raised the issue of Mr S' conflict of interest given his position as Trustee and nominated beneficiary. The Trustees agreed to Mr S taking part in initial discussions due to his background knowledge and then for him to withdraw from the meeting;
  - Mr S stated that he had not recalled his brother's nomination, nor the exact circumstances of when it had been made, but acknowledged that it was likely that he had mistakenly inserted his then wife's name (now Mrs E) on the form and so replaced her name with his, initialling the change, and that Mr M was not present at the time;

- Mr S stressed that he would not have amended the form if it had not reflected his brother's wishes at that time;
  - Mrs E considered it likely that her name had been inserted on the EoW in error as she and Mr S had nominated each other;
  - the meeting Trustee Chairman had inspected the EoW and concluded that it was clear that Mrs E's name had originally been inserted. It was probable that neither AJ Bell Limited, nor Mr Parr, had noticed, at the time, that the EoW had been altered and initialled by Mr S and had not been counter initialled by Mr M;
  - the Trustees considered whether to postpone the review of their original decision until Mr Parr had reported back on whether the amended nomination had been sent to Mr M but had concluded that this would not change the outcome as they thought that the explanation provided was sufficient;
  - the matter of ensuring that all other relevant factors were considered was raised, particularly as Mr S' nomination had been made some years prior to his death;
  - the Member Trustees had advised that, apart from the deterioration in his health, they were not aware of any change in Mr M's circumstances at the time of his death; and
  - the Trustees considered it likely that neither Mr M, nor anyone involved in the preparation and execution of his Will, had considered his pension benefits. Consequently, the Will did not provide a clear indication of Mr M's intentions with regard to its distribution.
32. On 21 June 2016, AJ Bell Limited notified Miss A that the Trustees had decided to uphold their original decision to distribute the death benefits in their entirety to Mr S.
33. Miss A did not accept the Trustees' decision and made a complaint to this Office. The complaint was considered by an Adjudicator who concluded that the Trustees should consider afresh all the relevant matters: including the validity of the nomination form; whether Mr S was a potential beneficiary; what would have been Mr M's wishes at the time of his death; and, if the fresh decision resulted in a different distribution of the death benefit, then any tax liability that may occur was to be settled by the Trustees.
34. The Trustees did not accept the Adjudicator's Opinion and the complaint was passed to me to determine. On reviewing the file papers, I concluded that it would be appropriate to hold an oral hearing. An oral hearing was therefore held on 22 June 2017 at which evidence was given by the applicants; the lay Trustees; a representative from the AJ Bell Group's Legal Services Department; and Mr Parr. They were all subject to cross-examination. Further submissions in writing were then invited, and subsequently received, from the parties.

### Summary of Miss A's position

35. Miss A says she had not been aware that Mr S was the sole 'nominee' of the death benefits; at no time did her father mention to any of his daughters that he had left his pension benefits to anyone else. She questions whether her father had understood that the pension benefits would be excluded from his estate for distribution purposes.
36. She accepts that the EoW was signed by her father but says he did not complete it and, while Mr Parr says that the Forms were completed and signed at the same time, he does not state that it was witnessed.
37. Her father would have made sure he initialled any changes to the EoW. The changes Mr S made to the EoW, in his capacity as a trustee, raise ethical issues.
38. The delay in paying out the pension benefit has resulted in a huge tax liability. The Trustees should respect her late father's wishes, as evidenced in his Will, and give the Will precedence over the EoW.
39. The applicant's Counsel has also said:-
  - There has been persistent and serious maladministration by the Trustees and the Administrator. The maladministration has been conspicuously culpable in the case of the Administrator and Professional Trustee which charge for their services yet appear to have no understanding of the need to arrange and ensure a proper process of trustee decision-taking through a process of informed discussion and consideration by the Trustees as a body.
  - No decision was taken in respect of the death benefits by the Trustees within the two year period required to avoid adverse tax consequences.
  - There has been no Trustee Meeting exercising the discretionary power over death benefit under Rule 7 of the Scheme Rules and no purported trustee resolution under Rule 20 purporting to make such a decision.
  - The steps taken in communicating with the daughters, notifying them of a supposed decision, and subsequently holding a meeting to review a supposed decision, have all been based on a flawed approach:-
    - (1) That the nomination form could be accepted as a valid document evidencing Mr M's wishes.
    - (2) That evidence as to its completion, and reasons for it, could be adduced from Mr S (the person who made the amendment and stood to gain from it) 12 years later, and after Mr M's death, despite Mr M having no opportunity to comment, and could be taken into account by the Trustees.

(3) That the Will did not contain clear evidence of Mr M's wishes in respect of his pension benefits, including the Scheme pension, namely that they should pass to his daughters, and therefore the Will should be disregarded.

- The 2016 Trustee Meeting also proceeded on the flawed basis that a previous Trustee decision exercising the power had been taken, when no such decision had been taken.
  - The decision taken at the 2016 Trustee Meeting not to re-exercise the discretion cannot take effect as an original exercise of discretion: but even if it could, it is fundamentally flawed for all the reasons given.
40. Injustice and loss has been caused to Miss A and her sisters as Eligible Recipients by such maladministration.
41. The Pensions Ombudsman is invited first to direct/hold that there has been no decision exercising the Trustees' power in respect of the death benefit under Rule 7.2 and that the purported decision and review of the decision were invalid and of no effect. Principal grounds for this are (a) the absence of any meeting: the trustees never had a meeting or discussion and brought their minds to bear on exercising the discretion and given genuine and responsible decision to exercising the power; (b) they have proceeded on a flawed judgment as to the status and admissibility of the 2004 nomination form and as to the irrelevance of the 2013 Will: and (c) they have wrongly received evidence from Mr S as to the 2004 nomination form and its completion after Mr M's death and when Mr M has never confirmed it and is no longer in a position to do so.
42. A fresh valuation should be directed of the Property by a reputable valuer (different from the valuer previously selected), as the 2015 valuation is out of date and cannot be relied upon (especially given the major discrepancy of c.30% with the 31.12.13 valuation). The decision to be made should be based on a sound up-to-date valuation.
43. The course of directing these Trustees to take the decision afresh is neither practical nor fair to the Eligible Recipients; it would more likely than not lead to further legal complaint, delay and cost. This is so because:-
- (1) The constitution of the Trustees includes Mr S himself and his former wife.
  - (2) The way in which they have conducted themselves in the decision-making process and at the oral hearing indicates that they would be quite unable to approach the exercise of the discretion with a fresh and impartial mind. They are both utterly conflicted. Mrs E's evidence and the clear support she demonstrated for Mr S over the daughters shows that she is in no sense impartial.
  - (3) The Professional Trustee itself is in an invidious position as it has proceeded on the basis that the 2004 nomination form is valid and it has admitted and considered

one-sided, post the event, evidence from Mr S, his former wife and Mr Parr. It will be extremely difficult for the Professional Trustee, even if directed by the Pensions Ombudsman as to the criteria, to make a fresh decision with any degree of impartiality.

44. The discretion should, it is submitted, be exercised:-
  - (1) Disregarding the 2004 nomination form; but
  - (2) Having regard to the Will;
45. The discretion should accordingly be exercised having regard to Mr M's wishes as expressed in 2013, to award the death benefit to the daughters in equal shares. The relevant factors all point to exercising the discretion in its entirety in favour of the daughters, not Mr S.
46. As is apparent from the financial evidence lodged by each of the three daughters, whilst their earnings position differs, none of them has substantial personal wealth. It is not the case that Mr M made financial provision for them during his lifetime nor was he in a position to do so. Whilst Mr M's estate passes to the daughters, the major asset is his minority shareholding in the Company. Mr S is the other major shareholder as well as holding (with the other executor) Mr M's estate's shares as co-executor. There appears to be a dispute between the daughters and Mr S in relation to the shares and Mr S's conduct of the affairs of the Company. Whether this will lead to litigation or compromise (e.g. Mr M's estate being bought out based on an independent valuation) remains to be seen. The current position is uncertain, and there is clearly a risk of cost, delay and litigation prejudicial to the daughters before the position is resolved and any benefit can be derived from Mr M's shares.
47. The considerations above further underline why the discretion should be exercised in the daughters' favour both (a) on an objective assessment and (b) because it is inconceivable that Mr M would have wished for any part of the death benefit to pass to Mr S, rather than to his daughters.
48. Any award of compensation for financial loss in relation to the death benefit may have to await the actual decision made.
49. In the event of the decision being made in favour of the daughters, it follows that they will have sustained loss through the maladministration complained of in respect of any tax payable by them as recipients, which would not have been payable had the benefit been paid to them within the two year period.
50. The Administrator and the Trustees, alternatively the Administrator and the Professional Trustee alone, ought to be directed to pay compensation to the daughters in respect of the amount of any such tax. The responsibility for the two year delay lies principally at the door of AJ Bell, both as Administrator and as Professional Trustee. As between the Trustees the position may be compared with a breach of trust case, where there is a professional trustee such as a solicitor

whose fault it is for not advising his co-trustees against, and thus forestalling the breach of trust, and he will in effect bear the loss by being ordered to indemnify his co-trustees.

51. The daughters ought also to be compensated for the disappointment and distress that they have sustained and for the delay in receipt. That award should be made against the Administrator and all three of the Trustees.
52. It ought to make no difference to the daughters whether the compensation is borne by the Respondents personally or out of the remaining funds of the Scheme held for the benefit of Mr S and his former wife, so long as the death benefit paid is exhaustive of Mr M's Scheme benefits and no deduction is made from it. In principle it is submitted that the compensation should be borne personally and without recourse to any indemnity out of the Scheme. AJ Bell Limited, as Administrator, would have no right to be indemnified out of the assets of the Scheme. As to the Trustees, it is submitted that they ought not to be entitled to rely on the exoneration clause or any right of indemnity out of the assets of the Scheme given that they must be well aware that they held no trustee meeting and had no trustee discussions as a body throughout the two year period in which the decision required to be taken (or indeed afterwards until 9 June 2016).
53. Finally, the daughters have expressed concern, given Mr S' position as executor, that the assets of the Company (in which Mr M's estate has a substantial interest) should not be used in any way either for legal costs or for compensation. The Pensions Ombudsman is not invited to make a direction about this as it does not relate to administration of the Scheme, but it was felt right to place the concern on record.

### **Summary of the Trustees' position**

54. It is not accepted that there has been persistent and serious maladministration by the Trustees and the Scheme Administrator. As indicated in its evidence at the oral hearing, AJ Bell Trustees did not consider that the death benefits claim had been progressed as well as it should have been and this was one of the reasons why the Professional Trustee called the review meeting on 9 June 2016. However, it is contended that the extent of any shortcomings was not such that it constituted persistent and serious maladministration. The Trustees then reviewed the award at that meeting and the decision they made was one which, on the basis of the evidence given, a reasonable body of trustees could have made.
55. Under the Rules any death benefits payable do not form part of the deceased's estate and are paid under a discretionary trust. Mr M had an opportunity to update his nomination at any time, including at the time of making his Will, but the Trustees did not receive a new nomination.

56. The name originally entered on Mr M's (signed but undated) EoW form was that of Mrs E and, as the EoW was completed incorrectly, it was amended to read Mr S and initialled.
57. The Trustees are satisfied all the nomination forms were completed by Mr S on behalf of the Scheme members, and that Mr S corrected and initialled the deceased's EoW after initially (incorrectly) inserting Mrs E's name. While the Trustees acknowledge that Mr M may have signed a blank form, the Trustees are satisfied that his EoW reflected his wishes at that time.
58. By implication the fact that Mr M signed the form and gave it to Mr S, having discussed his wishes with Mr S, without actually completing the details of the nominee, could be taken by a reasonable body of trustees as an indication that he had authorised Mr S to complete the details on his behalf and trusted him to do so in accordance with his wishes.
59. The fact that a nomination is nine years old does not mean that it is not a valid factor to be taken into account in the exercise of a discretion concerning an award of death benefits. In the particular circumstances, it was appropriate for the Trustees to take account of the existence of the nomination, the period of time since it was made and any intervening changes in circumstances of the deceased, such as the making of his Will, which might indicate that his wishes had changed. They were factors taken into account when the recommendation was made to the Member Trustees by the Professional Trustee, which they accepted.
60. It is clear from the evidence given at the oral hearing that neither Mr S nor Mr M gave any indication of express consideration to the existence of the SSAS at the time that the Will was made, in the absence of which it is reasonable to assume that either situation could have pertained: (a) Mr M considered that the SSAS was outside of the estate when he approved the terms of the Will that Mr S had prepared for him; or (b) Mr M considered the SSAS to be part of "everything".
61. Whilst it is accepted, that at the time he executed his Will Mr M would have been most unlikely to have appreciated that his interest in the SSAS did not form part of his estate, especially given his health at the time, it does not by extension mean that it would have been inconceivable. Nor does it by extension mean that it would have been inconceivable for Mr M to have made a nomination other than in favour of his daughters if it had been expressly drawn to his attention. He would generally have been aware of the value of his interest in the SSAS, as a consequence of him being involved in the approval and signing of the annual accounts of the scheme each year, and the contributions paid to the SSAS by the principal employer, of which he was a director and shareholder.
62. Although the existence and terms of the Will were a valid factor which the Trustees should, and did, take into account, the Will did not automatically override the nomination. There was no evidence put forward at the oral hearing to establish that

was the case, nor can it be inferred from the surrounding circumstances that it was a clear and unambiguous expression of the deceased's wishes in respect of his interest in the SSAS.

63. It is acknowledged that the evidence about Mr M's family relationship, frustration and feelings are, in view of the new evidence put forward at the oral hearing, valid factors which the Trustees would need to take into account if they are required to re-exercise their discretion. If any of Mr M's daughters had responded to the Trustees' letter of 5 October 2015, before the decision was made and provided details of those matters, they would have been valid factors which the Trustees would have taken into account when they exercised their discretion. Similarly, if any of Mr M's daughters had provided details to the Trustees before the review meeting on 9 June 2016, they would have been factors which the Trustees would have taken into account when they reviewed their decision.
64. It is incorrect to say that a Trustee decision was not made prior to the expiry of the two-year period. This is evidenced by way of the letter sent to the executor on 3 November 2015, informing her of the outcome. Mr S elected to take the death benefit award by way of a Flexi-Access Drawdown Pension. If the discretion was re-exercised in favour of the three daughters, that would result in the award of Uncrystallised Funds Lump Sum Death Benefits.
65. The value of the Property in the accounts to 31 December 2013 was, as stated in note 3 to the accounting policies, based on the cost price of £325,000, which was in turn supported by a valuation undertaken on 8 June 2005. So, the fall in value took place between the date of the purchase in 2006 and the date of the valuation, 6 March 2015, not within the 16 months period referred to. Both valuations were prepared by RICS surveyors. At the time the 2015 valuation was carried out, the Property was let at a rent of £18,000 per year, whereas at the time of the 2005 valuation the market rent was in the opinion of the valuer £26,000 per year.
66. It would in any event have been necessary to obtain an up-to-date valuation in order to calculate the amount of the death benefits award. It is AJ Bell Trustees' standard practice not to rely on a valuation for HMRC purposes that is more than 6 months' old. There is no evidence to indicate that the timing of the decision in relation to the award of death benefits had any impact on valuation such that it constituted maladministration. There has been no evidence put forward which indicates that the valuation, which was carried out by a RICS surveyor, is unreliable.
67. AJ Bell Limited had made an initial recommendation to the directors of the professional trustee, AJ Bell Trustees, in relation to the award of death benefits on 25 September 2015. It was following the review of that recommendation by a director of AJ Bell Trustees, that it was considered appropriate to contact the three daughters of the deceased in order to give them an opportunity to comment on the proposed award. This was because they had been named as the beneficiaries under the deceased's Will, which was made shortly before his death and many

years after the nomination. This was agreed with the Member Trustees and resulted in the letter of 5 October 2015 being sent to Mr M's three daughters, which was signed by or on behalf of all of the Trustees.

68. As to the service AJ Bell Limited provides, it gathers the information and then makes a recommendation to the Professional Trustee in relation to the award of death benefits. The Professional Trustee then in turn makes a recommendation to the Member Trustees, who decide whether or not to accept the recommendation or make an alternative award. Under clause 17.5 of the Scheme's Trust Deed and Rules, it is the Member Trustees who must unanimously make the decision, with any participation of the Professional Trustee being disregarded. In the normal course of events this process is dealt with remotely, given the nature of SSAS schemes, which are small uncomplicated trusts, without formal meetings being held, with the outcome being recorded by way of a written resolution of the trustees, albeit in this particular case, although a resolution was drafted, it was not signed by all of the Trustees.
69. On the basis of the reasonable investigations undertaken at the time, it was not unreasonable for the Trustees to exercise their discretion on the basis that the nomination was valid, given that it had not been identified from the electronic copy of the nomination that it had been corrected. The correction itself should not be the determining factor, because if Mr S had not first made the error when he completed the form, the nomination would not have been challenged on that basis, notwithstanding that Mr M signed a blank form and authorised Mr S to complete the details on his behalf. It was normal practice for the exercise of the discretion to be dealt with remotely rather than at trustee meetings as it was not cost-effective to hold meetings.
70. It is not correct to say that the Trustees did not have any or any proper regard to Mr M's Will. The fact that the Trustees had proper regard to the Will is evidenced by the fact that the letter of 5 October 2015, which was signed by or on behalf of all of the Trustees, was sent to the three daughters because they had been identified as eligible beneficiaries as a consequence of them being beneficiaries under the Will, as well as being the surviving children of the deceased.
71. When the circumstances surrounding the completion of the Nomination Form became apparent, the Professional Trustee then convened the review meeting in order for the Trustees to consider whether it would be necessary for the discretion to be re-exercised.
72. If the Professional Trustee were directed to re-exercise the discretion, the individuals who were involved in the previous exercise and review of that decision would not take part in the process. The re-exercise would be undertaken by other directors of the Professional Trustee, so it is not accepted that the Professional Trustee would not be able to act impartially.

73. It is not accepted that the Ombudsman is, in the circumstances of the case, able to exercise the discretion in place of the Trustees. Even if the Ombudsman were able to do so, it is contended that he would not be able to do so in the particular circumstances. The usual remedy in such circumstances would be a direction to re-exercise the discretion. In the circumstances, there are no grounds for believing that, if ordered to re-exercise their discretion, the Trustees would fail to do so properly and impartially. If the Trustees did fail to do so, then under clause 7.1 of the trust deed and rules the death benefits would fall to be paid to Mr M's executors and dealt with as part of his estate.

### **AJ Bell Limited's position**

74. It is not accepted that the delay lies principally at the door of AJ Bell Limited, which is neither the Scheme Administrator, nor the Professional Trustee. The circumstances are not such that it is appropriate to draw a comparison with a breach of trust case, as there is no evidence or allegation of any breach of trust on behalf of any of the Trustees. The only allegations are of maladministration, so it would be wholly disproportionate to order AJ Bell Limited and/or the Professional Trustee to indemnify the claimants.
75. AJ Bell Limited is not the Scheme Administrator. It merely provided administration services to the Trustees, who were themselves the joint scheme administrators. Whilst it is accepted that, if the Ombudsman awards any compensation to the claimants, it should not result in any deduction being made from Mr M's Scheme benefits, there are not considered to be any grounds for the rights of any of the Trustees or AJ Bell Limited to exoneration or an indemnity out of the other Scheme assets to be excluded, given that none of them acted, nor has it been alleged that they acted or omitted to act, knowingly and deliberately in bad faith.

### **Conclusions**

76. Dealing firstly with the administration point, my jurisdiction in relation to scheme administrators includes those carrying out 'acts of administration' in respect of a scheme. While the Trust Deed specified that the Trustees were jointly appointed Scheme Administrators, it is abundantly clear that AJ Bell Limited carried out numerous and substantive acts of administration in relation to the Scheme. For the purposes of this Determination, the complaints relating to the administration of the Scheme properly fall against AJ Bell Limited.
77. It is a well-established principle in cases such as this, that the decision on the distribution of the lump sum death benefit under the Scheme is an absolute discretion to be exercised by the decision-makers. I may only interfere with the exercise of a discretion if the decision-makers have acted improperly in reaching their decision in the sense that:
- a. they failed to take into account all relevant factors or took into account irrelevant factors;

- b. they asked themselves the wrong questions;
  - c. they misdirected themselves on a point of law, for example, by adopting an incorrect interpretation of the relevant rule; or
  - d. they arrived at a perverse decision, i.e. a decision no reasonable decision-maker, properly advising themselves of all the relevant circumstances, could reach.
78. It is clear from the Rules that it is for the Trustees to decide, after making the appropriate enquiries, who the 'Eligible Dependants' are. These Eligible Dependants include the member's dependants; persons interested in his estate; any other member and; a person he has nominated to the Trustees in writing.
79. The evidence received and discussed at the oral hearing shows that the Trustees did give consideration to Mr M's EoW and concluded at their meeting, in June 2016, that it did validly express the wishes of Mr M at the time that it was signed. But there was no proper attempt to validate this. Mr M had not completed the relevant section of the EoW and does not appear to have received a copy of the form showing his brother as the sole beneficiary. The witnesses who gave evidence to the Trustees on this point were the ones involved and/or benefiting. Other, neutral, parties who might have been able to give evidence about the family and business circumstances were not pursued. I find, therefore, that the circumstances of the manner in which the EoW was completed and relied upon are such that it makes the EoW invalid and the Trustees should not have relied on it when making their decision.
80. The applicant and her counsel have also raised a number of issues regarding the process followed in reaching a decision, and the delay in making it such that no decision was made within a two year period necessary to avoid adverse tax consequences. On this latter point, I agree with the position put forward by the Trustees that a decision was made in October 2015, just before the expiry of the two year period, but I am not satisfied that the process followed by the Trustees and AJ Bell Limited was robust enough, or that the decision was made properly.
81. AJ Bell Trustees has explained that due to cost issues the decision making process for payments of death benefits is done remotely. The process AJ Bell Trustees and AJ Bell Limited use is to obtain information on the deceased and then make a recommendation to the Trustees. There is no meeting, not even a conference call to discuss the circumstances of the deceased, and whether the Trustees have all relevant information to allow them to make a decision. In this instance the AJ Bell Limited recommendation was accepted by the Professional Trustee and lay Trustees, and it was made on the premise that the nomination was valid and that the Trustees making that decision were able to do so. But as Miss A's counsel has pointed out both Mr S and Mrs E were conflicted. Also, the decision taken was not validly recorded as a resolution of the Trustees. Thus, I find that the decision made

by the Trustees in October 2015, was improperly made as they failed to take into account all relevant factors.

82. I am also concerned that AJ Bell Trustees' process for dealing with death benefits in SSAS cases is driven by cost concerns; that should not be the determining factor when making decisions on the distribution of death benefits. The main determinant should be to ensure that the correct decision is made and all relevant information has been obtained and discussed by the Trustees. I strongly recommend that AJ Bell Trustees and AJ Bell Limited review their processes for dealing with similar cases in future.
83. Where I find that a decision has been improperly made I would normally ask the Trustees to make their decision afresh. However, in this rare instance I have decided not to do so. Two of the three Trustees are conflicted. One made an improper amendment to an EoW, which was to his financial advantage and the other two failed to notice this irregularity when purporting to exercise their joint trustee discretion. AJ Bell Trustees has suggested that I refer the matter back to AJ Bell Trustees, as the Professional Trustee, to make a fresh decision whereupon they will appoint a different director to review the matter and make a new decision. Miss A and her Counsel have said that it would be difficult for the Professional Trustee to make a fresh decision with any degree of impartiality. I have carefully considered the arguments made by all parties and have reviewed the case law on this point. I agree with Miss A and her Counsel.
84. In particular, in the case of *Saffil Pension Scheme v Curzon [2005 EWHC 29 (Ch)]*, the Court reviewed the relevant authorities to consider the circumstances where the Ombudsman would be entitled to reach his own conclusion on payment of a benefit rather than remit the matter back to the trustees. Where trustees have made a flawed decision in the absence of important, missing information, due to an administrative error; that could generally be corrected and the decision fairly re-made by those trustees (the Court referred to *Kerr v British Leyland (Staff) Trustees* 26 May 1986 unreported), so remission was appropriate. However, in *Saffil* since the Trustees had access to all the necessary information and yet reached a perverse decision, the Ombudsman was entitled to then make the decision in their stead.
85. Here, the Trustees had access to all the necessary information but failed to request other evidence and instead gave maximum weight to an invalid EoW form. Having decided to review again, they then adopted a similarly inappropriate process of reconsideration. These were actions that no reasonable trustee would have carried out. In the circumstances, I have decided to assess the distribution that a reasonable trustee would make.
86. The first matter to be resolved is the value to be placed on Mr M's share of the assets. Miss A has questioned the fall in value of the property, from £315,000 in the accounts as at the 31 December 2013 to £230,000 in March 2015. AJ Bell Trustees

has explained how the property valuation was derived in the accounts and why a fresh valuation was carried out in March 2015. I find the explanation provided by AJ Bell Trustees to be reasonable and I do not think any useful purpose would be served by obtaining a further property valuation. Thus, I will continue on the basis that Mr M's share of the assets is approximately 45% of the property valuation and amounts to £105,224.

87. I would also at this point wish to make some comments on the role of the financial adviser, Mr Parr. During the course of the oral hearing it became abundantly clear to me that Mr Parr had failed to fulfil the duties of an adviser in his dealings with Mr S and the Trustees. At the outset, Mr Parr arranged for the SSAS to be established with AJ Bell but provided no advice on the role and responsibilities of Trustees or the importance of maintaining correct documentation.
88. On asking Mr Parr the question of whether he had provided any advice or mentioned the role and responsibilities of Trustees to Mr S and his fellow lay Trustees Mr Parr said, in effect, that the Trustees were responsible people and had to take responsibility for their own actions. I find that to be an irresponsible reply as Mr Parr had a duty to provide information on the SSAS and highlight not only the advantages of the SSAS but also the risks and administrative requirements of such a scheme.
89. Furthermore, once the EoWs were completed these were sent to Mr Parr but he failed to notice that Mr S had completed the form for Mr M and that the forms were undated. On questioning Mr Parr over these aspects, Mr Parr said it was the policy at his firm not to alter any forms or make any alterations to these. When asked did he have any responsibility with regard to the EoWs and whether he would have contacted the client over these errors, Mr Parr said if people send him forms and do not date these then he cannot make the changes.
90. I find the policy followed by Mr Parr to be akin to sticking his head in the sand and basically saying that once the SSAS is sold, he has no further responsibility for ensuring that the documentation is correct and valid. I would have expected and, no doubt, the lay Trustees would have expected their adviser to review the documents and let them know if anything was amiss. If that had been done then it may have avoided some of the later issues. I strongly recommend that Mr Parr reviews the policy he has adopted and also whether he has the appropriate knowledge and understanding to be advising on these pension contracts. I will be reporting the matter to the FCA.
91. Returning to the evidence heard at the oral hearing and notwithstanding his improper and misguided decision to amend the EoW, which was a matter for Mr M only to address, I found Mr S to be an otherwise credible witness. A great deal of background information was provided on the relationship between Mr M and Mr S, and Mr M and his daughters. There was general recognition that Mr S had provided

help and support to Mr M over the years and especially in the latter years when he battled with his illness.

92. Mr S had invited his brother to join the company he had set up and the two brothers had helped to make the business a success. But problems began to develop around 2008 when Mr S says he noticed a change in his brother and it took some time for the reason for that change to come out.
93. Mr M's illness had led to him taking a lesser role in the business in 2011 when he had stopped running one of the shops. Mr S arranged for his brother to enter rehabilitation in 2012. The business continued to pay him a full salary throughout this period until he left rehabilitation. Mr M did not return to the business but Mr S continued to support his brother by paying him sufficient monies to cover his bills. These payments continued until Mr M's death in November 2013.
94. Mr S continued to be concerned at his brother's illness and noticing a further deterioration in his brother's health was instrumental in arranging for the Will to be drawn up and signed.
95. The Will allowed for all of Mr M's assets to be split equally between his three daughters. It is impossible to say, with any certainty, that Mr M thought that the Will would include his pension assets in the SSAS.
96. The Trustees have said, in submissions to this office, that they believed Mr M never considered the pension benefit at the time he was approving his Will. That may be so, but I do not consider that it is sufficient to say that the deceased never considered the pension benefit at the time that he was approving his Will. If the Trustees believed that then they should have asked the question 'what would have been Mr M's wishes if he had considered this question at that time?'
97. I am of the view that, on the balance of probabilities, if that question had been asked at the June meeting the Trustees would have said "Mr M would have wanted at least some of the death benefit to be paid to his daughters." But the Trustees concluded that as there was no clear indication of Mr M's wishes they would abide by their previous decision to award the death benefit to Mr S in reliance of the invalid EoW form. I find that to be a perverse decision.
98. Knowing as they do now that the EoW was wrongly completed, albeit that the Member Trustees, and especially the Professional Trustee should have noticed this at the outset of their deliberations; they essentially had no reliable, contemporaneous or independent evidence to support the distribution they made. How did they try to obtain contemporaneous evidence? They asked the person who had acted improperly and stood to gain from it, how it had come about and what he believed his brother would have wanted, before proceeding with the same distribution decision, accepting the explanation and deciding not to wait for further input from Mr Parr. This is a process that no reasonable trustee would have adopted in the circumstances.

99. The question then arises as to what proportion of the death benefit should be awarded to Mr M's daughters. Evidence has been provided of the provision that Mr M made for his daughters throughout his lifetime and what they will receive from his estate. Mr S has also provided evidence of his support for his brother and of their relationship.
100. There is a great deal of evidence to show that Mr S supported his brother throughout his illness, arranged for his rehabilitation treatment and continued to ensure that he received an income during this period. There has also been evidence given at the oral hearing that Mr M was a generous man in the way he supported his daughters and others. I am of the view that, on the balance of probabilities, in addition to providing for his daughters it is likely that Mr M would not want the business he set up with his brother to fail or be left in difficulties. Furthermore, I find it difficult to accept that a man with a generous nature such as Mr M would not want to acknowledge the support he had received from his brother and would want to return some of the money that had been expended in supporting him.
101. I find that Mr M would have wanted some of the assets he had in the SSAS to remain as future security for his brother. I therefore find that an appropriate division of Mr M's assets in the SSAS would be for it to be divided equally amongst his three daughters and Mr S, that is 25% to each. I am sure all the parties appreciate, despite the strength of their own particular views and beliefs, the difficulty for any independent third party now called upon to evaluate Mr M's wishes and intentions, as they stood at the time of his death; and there is no perfect answer. However, taking into account all the evidence I have examined and also the evidence provided at the Oral Hearing, I am satisfied that this is an appropriate and fair distribution in all the circumstances.
102. Miss A and her counsel have asked that any award to her and her sisters should not be subject to tax and that the Member Trustees and AJ Bell Trustees should bear responsibility for any tax that may be due. AJ Bell Trustees has said, as Mr S elected to take the death benefit as a flexi-access drawdown pension, any payment would result in the award of Uncrystallised Funds Lump Sum Death Benefits. As such, I understand that as Mr M was under age 75 at the date of death and payment is being made after 6 April 2016, and more than two years after Mr M's death, the benefit would be taxable. I agree that it would be incongruous to expect the daughters to suffer further financial detriment as a result of the delay in finalising the decision.
103. The Trustees are however entitled to an indemnity under clause 18.1 of the Trust Deed which prevents the Trustees being personally liable for any breach of duty or omission except for any act or omission knowingly and deliberately committed in bad faith. Having examined the case law, I am unable to find that the Trustees' actions reach the legal threshold for bad faith and I must therefore direct that any such tax liability should be borne by the Scheme and not the Trustees personally. However, I have concluded that it would be unfair to reduce the entitlement I have

directed in favour of beneficiaries not responsible for causing any tax charge to be triggered, particularly where there would have been no charge had the process been carried out properly by others. I direct, therefore, that the distribution should be made before allowing for (deducting) any anticipated scheme sanction charge. Nevertheless, if insurance was taken out by the Scheme, then a claim should be made on this before the Scheme itself has to bear the cost of any such tax charge.

104. Clause 18.2 of the Trust Deed also entitles the Professional Trustee and administrators to be indemnified out of the assets of the Scheme in relation to any tax liability, except for any act or omission knowingly and deliberately committed in bad faith. I do not find that the Professional Trustee and administrators have acted in bad faith but I do find that there was an inordinate delay in reaching a decision and that this has led to a tax liability being payable. The other Trustees relied on the Professional Trustee and AJ Bell Limited, as administrator, to guide them through the process and I find that this process was too remote. There should have been more interaction and discussion between the Professional Trustee and the other Trustees which could have led to the decision being made properly and within the two year timespan.
105. Miss A has also mentioned that the case has caused considerable distress to both her and her sisters and that this issue has been ongoing for over three years. I agree and sympathise with the position that Miss A and her sisters find themselves in. I would normally award a sum, to be payable by the Trustees, for the distress and inconvenience Miss A and her sisters have experienced. However, given the indemnity afforded to the Professional Trustee, as outlined above, any compensation would fall to be paid from the Scheme. I have therefore not directed any further award in this respect against that respondent.
106. However, AJ Bell Limited, in its role as administrator, is not indemnified under the scheme in relation to liabilities other than tax. In all the circumstances of the case, I consider that it is appropriate for AJ Bell Limited to pay an award to Miss A and her sisters in recognition of the very significant distress and inconvenience caused by its ineffective procedures and maladministration.
107. The Trustees have pointed out that there is not sufficient liquidity within the Scheme to make payment within 28 days and have suggested an alternative arrangement for meeting the directions below. I have no objection to the Trustees coming to an acceptable basis of payment with Miss A and her sisters as long as the overall spirit of the directions are followed and they receive the equivalent of 75% of Mr M's assets in the Scheme.
108. I therefore uphold the complaint and make the following directions.

## **Directions**

109. Within 28 days the Trustees shall pay an amount equal to 75% of Mr M's assets in the Scheme to Miss A and her two sisters to be divided in equal proportions. Any tax liability is to be accounted for by the Trustees to HMRC and paid by the Scheme (subject to paragraphs 110 and 111 below).
110. Payment should be made before allowing for or deducting any anticipated scheme sanction charge, so the beneficiaries' entitlement, as set out above, is not prejudiced by the maladministration of the Trustees and Administrator.
111. If the Scheme has insurance, then the Trustees should make a claim on this policy in respect of the tax liability which will now be raised by the late distribution.
112. Within 28 days, AJ Bell Limited shall pay £6,000 to Miss A and her two sisters, to be divided in equal proportions, in respect of the exceptional distress and inconvenience caused by their maladministration.

**Anthony Arter**

Pensions Ombudsman  
29 June 2018