

Ombudsman's Determination

Applicant	Mr E
Scheme	Apek Design Pension Scheme (the Scheme)
Respondent	Mr Eric Hill

Outcome

1. I do not uphold Mr E's complaint and no further action is required by Mr Hill.

Complaint summary

2. Mr E says that Mr Hill arranged the valuation of a property held by the Scheme, which he failed to disclose. Mr E says that the valuation resulted in an inflated pension commencement lump sum (**PCLS**) being paid to Mr Hill and a third member trustee.
3. Mr E argues that the valuation ought to have been disclosed to him and the failure to do so stopped him from taking his benefits at that time. The property has now declined in value and as such, Mr E has lost the opportunity to access benefits at the higher valuation.

Background information, including submissions from the parties

4. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
5. The Scheme was subject to an amended Trust Deed and Rules dated 2 January 2007, with Mr Hill, Mr E and a third individual trustee. Alliance Trust Pensions Limited acted as an Independent Trustee.
6. In 2007, the Scheme owned a property which the sponsoring employer leased.
7. On 17 September 2007, the property was valued by a RICS surveyor at £500,000. The property had been previously valued in 2005 at around £400,000.
8. Around this time Mr Hill and the third trustee crystallised a portion of their funds and took a PCLS on the basis of the £500,000 valuation. Mr E did not.
9. In 2017, the property was sold by the Scheme for £402,444.

The parties' submissions

10. Mr Hill has said:-

- 10.1. When the decision to take a PCLS was taken in 2007, the then pension advisers asked that the trustees arrange for a new valuation. There was no formal procedure for this, and he understands that each of the trustees was made aware of the requirement for a further valuation and its outcome.
- 10.2. He does not accept that there was any conflict of interest and neither he nor the third trustee took any lead in the valuation other than to appoint a suitable valuer.
- 10.3. The trustees worked together and met regularly. The decision to draw a PCLS was known to all so it is surprising that Mr E says he had no knowledge.
- 10.4. The accounts were provided at the end of the year and schedules of investment valuations would be supplied by the pension advisers. Clearly this updated valuation was overlooked when communicating with the accountants.
- 10.5. There is no longer any record of correspondence from the period.

11. Mr E has said:-

- 11.1. He does not question the need for the valuation or that the valuation was undertaken by a legitimate firm.
- 11.2. However, it was kept secret from him and the difference between the 2007 valuation and the 2014 sale price highlights that the valuation was inflated and out of kilter with market prices.
- 11.3. There is clear collusion between the valuer and Mr Hill in the arrangement of the valuation and he chose not to report the valuation to him as a trustee or the independent trustee. It is fanciful for Mr Hill to suggest that it was an oversight not to provide the valuation to the accountants, who he was in regular contact with. Further, it would be expected that Mr Hill would have noted this omission when reviewing the scheme accounts.
- 11.4. Mr Hill was vociferously against others involving themselves in the communications with the accountants.
- 11.5. The Scheme's adviser did not consider the property within its investment strategy reviews.
- 11.6. While he was verbally informed of the PCLS being paid to Mr Hill and the third trustee, the calculation of these benefits was not reported to him.
- 11.7. The crux of the complaint is that the "valuation was used exclusively for the tax-free benefit calculation of Mr Hill and [the third trustee] and reflected a 25% increase of the property value reported in the annual accounts and then by

withholding this re-valuation at the time and then year on year until discovery by me in December last year deprived other trustees of any benefit of the higher valuation.”

Adjudicator’s Opinion

12. Mr E’s complaint was considered by one of our Adjudicators who concluded that no further action was required by Mr Hill. The Adjudicator’s findings are summarised below:-
 - 12.1. There was no evidence that the RICS surveyor inflated the property’s value or that Mr Hill improperly influenced the valuation. The value being undertaken prior to the 2008 financial crisis may explain the drop in value between 2007 and 2017.
 - 12.2. The main issue was whether Mr Hill ought to have shared the valuation with Mr E and if that did not happen, whether that caused Mr E a financial loss. The Adjudicator concluded that he would have expected Mr E, as a trustee, to have received a copy of the valuation for information purposes if nothing else, but there is no evidence that he was provided with it and so on balance the Adjudicator took the view that Mr E was not aware of it at the time.
 - 12.3. However, there would only have been a financial loss because of the failure to share the valuation if Mr E would have acted differently had he received it.
 - 12.4. The Adjudicator considered whether Mr E would have taken a PCLS in 2007 or around that time as he says he would. But, having considered Mr E’s circumstances and subsequent actions the Adjudicator took the view that Mr E would not have acted differently. In particular, the Adjudicator noted that Mr E took no benefits from the Scheme between 2007 and 2014, and his age in 2007, 57, was perhaps too young to consider taking benefits at that time and it would be reasonable to anticipate the value of his funds to increase further before retirement.
 - 12.5. The Adjudicator calculated that the increased 2007 valuation would have allowed a higher lump sum of approximately £7,250, but concluded that this amount of additional PCLS is unlikely to have motivated Mr E to take benefits in 2007 if he had no wider plans to do so.
 - 12.6. Notwithstanding the above, in order for Mr Hill to be liable for Mr E’s perceived loss, under Rule 6.2 of the Trust Deed & Rules, it must be proved that he acted in “personal conscious bad faith”, and in the Adjudicator’s opinion there was insufficient evidence that this was the case.
13. Mr E did not accept the Adjudicator’s Opinion and the complaint was passed to me to consider. Mr E provided further comments which do not change the outcome. I agree with the Adjudicator’s Opinion and note the additional points raised by Mr E.

Ombudsman's decision

14. Mr E has argued that he would certainly have acted differently had he been aware of the higher valuation in 2007. He describes his circumstances as changing very quickly and significantly. In March 2008 he established a new company and says he considered taking benefits from the Scheme. When establishing the new company he was using his savings and taking a financial risk, including having limited or no income for the first 12 months. Mr E suggests that had he known of the increased value he would have taken a partial withdrawal to meet his short term deficit, but instead used expensive short term unsecured loans. Through his actions Mr L denied him this opportunity.
15. While I understand Mr E's suggestion that the higher valuation may have meant he took benefits in 2007 or early 2008, I am not persuaded that this was more likely than not. In 2008, it was less common to access pension funds on an ad hoc, partial basis, as it is today. Additionally, I consider it significant that this option was open to Mr E regardless of the higher valuation, but he chose not to do so. This indicates that his funding situation was not insurmountable using resources outside of his pension. In the circumstances, on the balance of probabilities, I find that the higher valuation was not significant enough to cause him to act differently and I have seen no contemporary evidence to support the stance that he would have done so.
16. Mr E has also outlined a deteriorating relationship between him and Mr Hill in 2007, which he argues motivated Mr Hill to deliberately withhold the increased valuation of the property. Deliberately not sharing the valuation might cause Mr Hill to be said to have been acting in personal conscious bad faith, as required by the Trust Deed & Rules, for him to be found personally liable.
17. While I have no doubt Mr E and Mr Hill's relationship may have been deteriorating in 2007, in order to find Mr Hill liable to provide redress to Mr E, there must be a loss stemming from personal conscious bad faith. On my analysis of Mr E's decision around taking benefits, I concluded that he would not have acted differently had he known of the higher valuation. Therefore, even if I were to conclude that Mr Hill had deliberately hidden the higher valuation from Mr E, which for the avoidance of doubt I am not saying that this is the case, it has not caused Mr E a financial loss as the value would have inevitably reduced prior to him taking benefits.

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18. On the evidence available, I do not find that Mr E has suffered a loss as a result of Mr Hill's apparent omission of sharing the higher valuation in 2007.
19. I do not uphold Mr E's complaint.

Anthony Arter CBE

Deputy Pensions Ombudsman
29 October 2024