PO-11717

Ombudsman's Determination

Applicant	Mr M
Scheme	Namulas SIPP (**the SIPP**)
Respondent	Namulas Pension Trustees Limited (**Namulas**)

Complaint Summary

Mr M has complained that Namulas:-

- allowed the conversion of one of the Properties from commercial to residential use to complete, incurring tax liabilities for the SIPP;
- sold the Properties held by the SIPP below the market value;
- failed to act on an instruction to transfer to a new provider causing a proposed investment to fall through;
- caused him enormous time disruption and lost income of £175,000;
- incurred adviser's fees to remedy its own failures and charged these fees to the SIPP;
- caused him considerable distress and inconvenience.

Summary of the Ombudsman's Determination and reasons

The complaint should not be upheld against Namulas because:-

- Namulas did not cause the conversion of the Properties from commercial to residential use.
- the Properties were sold at a price within the bounds of reasonableness given the circumstances.
- it was reasonable to refuse to allow Mr M's requested transfer to be made whilst there was a potential tax liability to be applied to the SIPP.
- as a whole, Namulas has discharged its duty as the trustee of the SIPP appropriately and in line with the Scheme rules.

Detailed Determination

Material facts

1. Mr M is the beneficiary of the SIPP and Namulas is the sole Trustee.

2. The operation of the SIPP is governed by the Trust Deed. The relevant powers are set out in Appendix 1 below, and include; the power to delegate; the power to appoint scheme advisers; a limitation of liability and indemnity; the power to instigate and defend legal proceedings, and complete discretion to settle or compromise any claims or other matters relating to the SIPP; and, the power to dispose of assets which pose significant legal risk to the trustee or where funds are required to meet any liabilities due from the SIPP.

3. The SIPP owns 50% of two properties in Scotland, one, a terraced building (Property A), and the second, a garage in a nearby street (Property B, collectively **the Properties**). The remaining 50% of the Properties was owned by a second SIPP, of which Namulas is also the Trustee and a second individual, Mr E, is the beneficiary.

4. In 2002, Namulas jointly appointed Mr M and Mr E as Managing Agents for the Properties through a Property Management Agreement (**PMA**). Following this, Mr E undertook actions on behalf of, and at the request of, Namulas in relation to the Properties.

5. Prior to the events complained of, the Properties were leased on a commercial basis to Firm A and rent was paid to the SIPPs.

6. On 30 September 2011, Firm A sub-leased the property to Firm B. Mr M is a director of Firm B.

7. Mr M signed the license to occupy on behalf of Firm A, and on behalf of Firm B. Mr E signed the license on behalf of Namulas. Among other things, the license provided that:

   - Firm B would pay the licence fee/rent as directed by Firm A.
   - Firm B could share possession of all or part of the Properties with 3rd parties it chooses and can grant sub-licences to those 3rd parties and allow them to grant sub-sub licences to any other 3rd parties on terms approved of by Firm B.

8. On 24 September 2012, Mr M corresponded with a Mr S about the Properties and a potential sale and conversion of the Properties to residential use. Mr E was copied into this correspondence. In this correspondence, Mr M confirmed:

   > "You and I have agreed the outline of a deal (£490k for the office – with £30k of that deferred until you can release it from your site … and £85k for the garage) but, as discussed, that is subject to Namulas' approval (and amongst other things they will need a letter from panel selling agents confirming they have marketed the property in the usual way and recommending the offer for

> acceptance as the best available in the market at the time of sale…). As I've said to you, Namulas are the decision-makers in all this. They are independent of (and not bound by) [Mr E] and I and they will make up their own minds. They are not easy to deal with (as SIPP trustees they have very strict rules to adhere to and they do – I fear the whole deferred consideration thing might be more than they can cope with) and there is a risk that they might just say "no" to a sale.
>
> Presumably you will need to get a change of use to resi[sic]? To be clear, any deal couldn't be conditional on that (quite apart from any view Namulas might have, [Mr E] and I wouldn't be prepared to delay or carry the risk of that not coming through) and the conversion costs would be for you. Any deal would be on an "as it stands just now" basis."

9. In 2012, a planning application was submitted to the local council by architects on behalf of Firm C, a business owned by Mr S. This proposed a change of use from "office space to residential". The current or most recent use was recorded as office space.

10. In January 2013, Firm A was dissolved.

11. In February 2013, the planning application was approved by the local council.

12. On 24 March 2013, Mr M received correspondence from Mr S that he was looking at an alternative to installing a sprinkler system in Property A. He went on to confirm that, "I have about 3 weeks work once this is agreed."

13. On 18 April 2013, Mr M received correspondence from Mr S stating that he had instructed his architect to "…go for a second escape out the rear…" instead of a sprinkler system.

14. On 1 May 2013, Firm B changed its name to Firm D.

15. On the same date, Mr M signed two documents on behalf of both Firm D and Firm E. Mr E signed on behalf of Namulas. In signing the documents Mr M assigned the license to occupy the Properties from Firm D (previously Firm B) to Firm E.

16. Additionally, the documents confirmed the assignment of a further sub-licence to occupy the Properties from Firm D to Firm E. This sub-licence granted occupancy to Firm C and Mr and Mrs S ('**the Occupants**') on a personal basis.

17. Around this time, on an unknown date, the Occupants started occupying the Properties.

18. In June 2013, a planning application was submitted to the local council by architects acting for Firm C requesting permission for the proposed rear doorway on Property A to be granted. This document confirms the current or most recent use as residential.

19. On 9 August 2013, the planning application was approved.

20. On 17 February 2014, according to the records held by the local council, Property A became liable for Council Tax instead of commercial Business Rates.

21. On three occasions in early 2014, Mr M received email contact from Namulas in which it queried its understanding that the leaseholder, Firm A, had been dissolved in January 2013 and asked who was occupying the property. It received no response from Mr M.

22. On 2 July 2014, Mr S emailed Mr M, stating:

> "…I need a lease for [Property A], back dated from January, showing a rental but stating that this rent is not paid until mortgage comes through or until sale completes.
>
> Is that possible?
>
> I don't know what else to do here. As above the lending/mortgage market is being tightened. This regulated/unregulated "thing" is also a factor as I live here."

23. On the 4 July 2014, Mr M signed a Declaration of trust between Firm F and Mr S. This showed that the shares in relation to Firm F were held by Firm G on trust for Mr S, as the beneficiary.

24. Mr M, in his role as director of Firm F then signed a Short Assured Tenancy (SAT) agreement under the terms of Section 32 of the Housing (Scotland) Act 1988. The agreement granted residential tenancy rights to the Occupants personally and encompassed both Properties. The agreement was dated 29 January 2014 and the term of the agreement was stated to be 1 February 2014 to 31 January 2015, with rent payable of £1,450 per month.

25. The Occupants paid a non-refundable deposit of £42,000 to Firm H, another business owned by Mr M. This was subsequently paid in instalments into the SIPP by Firm E. Namulas confirms that the rent instalments were paid with the reference of the dissolved Firm A.

26. On 16 December 2014, Mr M, on behalf of Firm E, and Mr E acting on behalf of Namulas signed a notice of termination of occupancy for the Properties and served it on the Occupants.

27. On 18 December 2014, the Occupants' solicitor wrote to Mr E stating that the Occupants had been in occupation for two years, apparently without any authority from Namulas. The Occupants requested that Namulas consider selling Property A to them and a particular firm of surveyors be instructed to seek a valuation. The letter also stated that Property A was being used as the Occupants' principal residence and that Mr E may wish to make Namulas aware of this fact for tax purposes.

28. In late 2014, and early 2015, Mr E attempted to access the property but was refused entry by the Occupants. At this time Mr M and Mr E appointed a firm of solicitors, Harper Macleod, to raise eviction proceedings against the Occupants.

29. On 2 March 2015, the Occupants contacted Namulas and informed it that court action was being undertaken in its name to evict them. The call transcript shows that the Occupants informed Namulas that the Property had been occupied as a residential property for over a year. The Occupants advised Namulas that they would be making a counter claim for an alleged rental payment of £40,000 made to Mr M and/or Mr E and a further £175,000 allegedly spent converting the Property A to residential. A hearing was listed for 6 March 2015.

30. On becoming aware of the eviction proceedings, which were listed before the Sheriff court on 6 March 2015, Namulas appointed Eversheds to represent it.

31. On 4 March 2015, Namulas discussed the matter with Mr E. The call transcript has been provided and relevant passages are set out in Appendix 2.

32. The hearing listed for 6 March 2015 was continued to 13 March 2015. On 7 March 2015, Mr M wrote to Namulas criticising its handling of the situation since it had been involved.

33. On 12 March 2015, Eversheds, on behalf of Namulas, wrote to Harper Macleod stating that it had no authority to undertake the eviction proceedings, but that the strategy remained to secure eviction with Eversheds acting for Namulas.

34. On 13 March 2015 the eviction proceedings were called on and continued to 20 March 2015. The same day Eversheds advised Namulas of its views on what needed to be done with the property and why, including setting out its then understanding of the residential status of the properties.

35. On 20 March 2015 the Sheriff gave directions for the preparation of detailed pleadings and a hearing for debate was fixed for 28 April 2015. Also on 20 March, Eversheds updated Namulas by email, including its view that as a matter of property law the licence to occupy had been terminated and as a result the tenant did not have the right to remain in the property.

36. On 28 April 2015 a different Sheriff decided that the appropriate procedure for disposal of the issues in the proceedings was proof, with the result that a hearing with a time estimate of 6 days was set for 26 August 2015.

37. Discussions were held between Mr M, Mr E, Namulas and Eversheds over the following months. Mr M argued that Mr E had been entitled to pursue the eviction proceedings on the basis of the PMA. Namulas disagreed. A dialogue was established between Eversheds and Mr M in order to ascertain the facts and to inform the litigation strategy. At his request, pleadings in the litigation were disclosed to Mr M for his comment. Mr M and Eversheds disagreed about various aspects of the appropriate litigation strategy.

38. Over this period Namulas confirmed that it would appoint a surveyor for the purpose of valuing the Properties. Agreement was reached with Mr M and Mr E to appoint DTZ, an independent, RICS registered surveyor.

39. On 22 June 2015, DTZ inspected the properties.

40. On 31 July 2015, a valuation report was completed by DTZ, providing a total market value of £760,000; £675,000 for Property A and £85,000 for Property B, based on

> "…its current residential use with vacant possession on the basis that vacant possession can readily be obtained under such tenancies."

41. DTZ also provided a valuation assuming commercial use in early 2013, stating the total value as being £630,000; £550,000 for Property A and £80,000 for Property B.

42. On 12 August 2015, on consideration of the situation, Eversheds advised Namulas that the eviction proceedings carried a very high degree of risk, and proposed that a negotiated settlement with the sale of the Properties to the Occupants would be a "satisfactory outcome". This advice also considered the alternative options of dropping the eviction proceedings and allowing occupancy of the property until January 2016, which were discounted.

43. This advice was communicated to Mr M the same day. In its letter to Mr M Eversheds requested he answer a number of questions which it said it had asked previously and which remained unanswered. It explained that it considered that the answers might affect its view of the prospect of success. It confirmed that pursuing the eviction, in its view, "…carried a very high degree of risk and will require significant expenditure."

44. The letter also highlighted that there were no funds in the SIPP available to pay legal fees or the mortgage.

45. Mr M and Mr E challenged this position, requested Eversheds clarify its logic and complete a risk assessment schedule in relation to the eviction proceedings. Eversheds declined to complete the risk assessment.

46. Mr M also did not accept DTZ's valuation and referred the issue to his preferred surveyor for consideration, who then conducted an informal paper-based valuation of the Properties.

47. Over the course of August 2015, negotiations on the value of the Properties took place between Namulas and the Occupants:

- On 19 August 2015, at Mr M and Mr E's suggestion, Namulas put forward an offer of settlement of £984,291, taking account of the perceived values of the Properties, claimed license fee arrears and legal fees.

- On 24 August 2015, Mr M's preferred surveyor confirmed to Namulas by telephone that in his view Property A should be valued at approximately £750,000 and Property B at

£100,000. The preferred surveyor also confirmed that although his valuation was higher, DTZ's valuation was "not wrong".

- On 25 August 2015, a counter offer of £575,000 was made by the Occupants. This was rejected by Namulas on the basis that, among other things, rent had not been paid on the premises since December 2014. That offer was increased to £595,000 on the same day. This was also rejected by Namulas.
- On 26 August 2015, the day of the Court hearing, Namulas put forward a counter proposal of £650,000.
- The Occupants' legal representatives rejected this on the basis that they would not increase their offer above £595,000, but were persuaded to put the proposal to the Occupants for consideration. Having done so the Occupants made an improved offer of £605,000.
- A final counter offer of £610,000 was made by Namulas and this was agreed by the Occupants.

48. The settlement figure remained unacceptable to Mr M but was recommended for acceptance by Eversheds on the basis that it was within the acceptable range of values given all the material facts, evidence and arguments.

49. On 27 August 2015, a Namulas board meeting ratified the settlement.

50. On 30 September 2015, an application was made for a completion certificate in relation to the building works at the property. A certificate of completion for the conversion of the property from commercial to residential was issued on 21 October 2015.

51. The sale of the Properties was completed on 19 November 2015, at which point Mr M instructed Namulas that his pension fund should be transferred to an alternative provider immediately. Namulas declined that request on the basis that in its view the Properties had been converted to residential use, the SIPP might be subject to an unauthorised payment tax charge and surcharge and that matter needed to be resolved before the funds could be transferred.

52. On 22 December 2015, Namulas wrote to HMRC notifying it of the change of use to residential and the possibility that an unauthorised payment had been made.

53. Dissatisfied with the handling of the situation Mr M complained. Namulas rejected the complaint on the basis that it had acted appropriately, on legitimate legal advice and no financial loss had been suffered as a result of Namulas' actions.

Summary of Mr M's position

54. Mr M has made extensive submissions which I have grouped for clarity.

The Property Management Agreement

- Mr E, under the PMA, was entitled to appoint Harper Macleod to act on Namulas' behalf.
- Under the PMA Mr E was Namulas' Managing Agent and fulfilled that role with its knowledge and consent. As such, under agency law, every discussion and agreement made by Mr E was also discussed, agreed and known by Namulas. So Namulas was aware of the position of the Properties from the outset.

The change of use and eviction litigation in March 2015

- I should focus my consideration of his complaint on the circumstances as they stood on 4 March 2015, the date on which Namulas took control of the eviction proceedings ('**the control date'**). At that date Property A was not a residential property.
- Namulas' decision to deny Harper Macleod authority to act meant the eviction proceedings did not progress on 6 and 13 March 2015. The Sheriff had already indicated that he was minded to order eviction on 6 March 2015. As such, Namulas failed to secure eviction twice in March 2015.
- On becoming aware of the intended eviction, Namulas ought to have taken the simple step of asking the Court to stop all conversion works. It did not.
- Eversheds acted 'as agents for Namulas' and any failing of Eversheds to understand the law or procedure is irrelevant to Namulas' liability to him. By not pursuing the eviction proceedings with urgency in March 2015 Namulas breached its fiduciary duty' to Mr M.
- Mr M highlighted (with photographic proof) that a rear exit to Property A was not in place until July 2015, and that had been a condition of the planning application for conversion of the property. It was not until after that had been completed that the completion certificate was issued, by which time Namulas was in control of the Properties. Namulas is therefore responsible for allowing Property A to become residential.
- Property B, the garage was never residential on any view.
- Mr M had obtained legal opinion from a QC (dated June 2016), who concluded that against the tests in the Pension Tax Manual (**the PTM**) the Properties were not residential at the control date.
- Namulas gave misleading information to HMRC, because Property B was never a residential property; the Properties were not residential at the time that it became aware of the eviction proceedings; the completion certificate for the conversion of Property A was not applied for until September 2015, and was not granted until

October 2015; and because it said that it had decided to dispose of the Properties as soon as it was aware of the residential element.

- When contacting HMRC Namulas should have provided all information and documentation, not a diluted account of events which served its purpose. Namulas had a conflict of interest.

- Namulas had been dishonest in its submission to this Office regarding the date the properties were converted to residential use. Both he and Mr E had agreed to appoint an independent surveyor to determine whether the properties were to be regarded as commercial or residential.

- It is for HMRC to determine the date that the property became residential and the PTM shows that "whilst in the course of…conversion… property is not residential property." As the conversion was not completed at the time Namulas became aware of the circumstances, it cannot have been a residential property.

- The Occupants had no right to buy the properties.

- The Occupants had no rightful claim to tenancy from Namulas or anyone able to grant it. The claim of a sub-tenancy was granted to the Occupants by a shelf company, Firm F, owned fully by the Occupants. Eversheds and other legal opinion was dismissive of this claim for tenancy and so the eviction should have been pursued and the property sold on the open market.

- Mr M argues that the SAT agreement is a 'red-herring'. It was signed by him as nominee at the instruction of Firm F, and Mr S was mentally fragile. Eversheds had dismissed this document and the Occupants' own solicitor had conceded that there was no lease in place.

- The Occupants did not have an implied tenancy. This argument failed on the basis that no duration had been agreed, no rent was paid, and the landlord cited was 100% owned by the Occupants.

- The case presented by the Occupants at the eviction hearing had no merit. It had been described as "total rubbish"; "legally irrelevant"; "entirely misconceived"; "entirely irrelevant" by Harper Macleod and two advocates/barristers. Mr M suggests these individuals were acting for Namulas at the time (because Mr E was Namulas' agent).

- A further barrister instructed by Mr M and Mr E had reported that the Occupants' pleadings were "very poor" and the Court hearing should proceed. Should the proceedings not go ahead it "would be a flagrant breach by Namulas of its fiduciary duties". The Occupants were perpetrating an "obvious fraud".

- Eversheds' advice was contradicted by two advocates/barristers and a solicitor at Harper Macleod, and a further independent advocate/barrister. Namulas should have questioned why this was the case.

The Settlement Agreement

- Namulas had rejected Mr M's preferred surveyor on the basis that its expertise was in residential property. This demonstrates that Namulas did not think the property was residential.
- Namulas made no attempt to challenge the Occupants' counterclaim for £160,000 capital expenditure spent on the Properties, despite what Mr M has said was the Occupants' admitted fraud.
- The DTZ valuation could not be relied upon due to the "very real risk of corruptive influences" in the local property market. This was borne out by the delayed valuation and the reliance on flawed sales data.
- The board meeting minutes do not reflect an objective, balanced or reasoned analysis of the circumstances.

Other matters

- Namulas and Eversheds had obvious conflicts of interest. Namulas sought no independent legal advice solely for the benefit of the SIPP, as opposed to its commercial interests.
- Eversheds' representative made five separate requests for Mr M to provide him with an indemnity in respect of the acts and omissions of Namulas. Mr E was party to those requests, and it appears that those requests are now being denied.
- Mr M and Mr E had agreed to Namulas' choice of surveyor within four working days, so the delay in the valuation being provided was not their fault.
- Namulas was aware from the outset that the Occupants had admitted to committing VAT fraud and had acknowledged that the Occupants' story was an evolving and inconsistent one.
- Mr M has been unable to work full time since 2003. Between 2008 and 2015, Mr M was frequently absent from work and Mr E supported Firm B, Mr M's business, in his absence. Mr E may have made payments to Namulas under the wrong reference, but that was "either an oversight or an attempt to ensure the SIPP did not suffer from another administrative blunder by Namulas". Mr M was never involved in making any payments to Namulas.

- Namulas cannot rely on the Trust Deeds beyond those documents originally made known to him and agreed. Any unilateral changes made by Namulas would be subject to the Unfair Contract Terms legislation and void and unenforceable. Further, Namulas had breached the contract and therefore it cannot be relied upon.

Summary of Namulas' position

55. Neither Mr M nor Mr E, under the terms of the PMA, had scope to enter agreements, as they did with the Occupants, without Namulas' consent or commence the eviction proceedings and appoint solicitors in Namulas' name.

56. Mr M and Mr E had breached the PMA under clause 1.10, by failing to keep Namulas informed of all matters relating to the management and maintenance of the Properties. In particular, they failed to inform Namulas of matters adversely affecting the Properties.

57. Alternatively, if Mr M and Mr E were not aware of the change of use from commercial to residential, they had breached the agreement under clause 1.7 as they cannot have been regularly inspecting the Properties.

58. Namulas had made clear that once Eversheds was appointed, Harper Macleod was in no way acting for the SIPP, and the SIPP would not be responsible for any legal costs incurred.

59. Mr M may argue that the eviction proceedings would have been successful, but Eversheds' advice was that those proceedings carried a, "very high degree of risk and will require significant expenditure." Mr M was invited to enter discussions about the settlement strategy, but instead requested that Eversheds complete a risk assessment in relation to whether the Court hearing should go ahead. This was an unreasonable request in the circumstances.

60. Following that legal advice, Namulas settled and the Properties sold for a total of £610,000. Previously the Occupants had made an offer of £545,000. Mr M and Mr E had set an unrealistic price in relation to what they thought was an acceptable sale price. Negotiation was necessary and taking account of all the circumstances the negotiated price was appropriate.

Conclusions

61. Mr M has raised a significant number of arguments, in extensive submissions, both before and after I issued a preliminary determination, which I have read and attempted to summarise above.

62. I appreciate that Mr M wants me to examine all of the issues which he has raised in his complaint. However, some of these are not issues that this Office can properly determine. For instance, the suggestion that there was complicity or fraud between Namulas and the Occupants and Mr M's view that Eversheds were incompetent and/or motivated by conflict of interest are not matters which I can make a decision

about. The first issue is alleged to be a criminal act, and I do not have jurisdiction to determine criminal liability. The second is a complaint about the professional conduct of a firm of solicitors, and as Mr M is aware, this Office is not the relevant organisation for complaints about solicitors. I do however understand his views on these points. I have read his submissions on them in order to understand the background to the issues and the context in which he makes his other submissions and considered carefully how Namulas approached their risk assessment over the period March to October 2015.

63. For clarity I will address the complaint in the terms that it was submitted to this Office on the complaint form.

The change in use and eviction litigation as at March 2015

64. I do not find that Namulas were negligent or responsible for maladministration resulting in the Properties' conversion to residential use. In particular, I do not consider that failing to pursue the eviction proceedings substantively on 6 and 13 March 2015 caused the properties to become converted to residential use in circumstances which amounted to a breach of fiduciary duty to Mr N.

65. Namulas became aware of the situation with the Properties in March 2015 when it was contacted by the Occupants shortly before the Court Hearing for the eviction proceedings, by which time the change of use was well advanced if not complete. Mr M disputes the conclusion that change of use was well advanced and has referred me to evidence of the incomplete state of the rear fire door, and legal opinion from 2016 on the issue of whether the tests under the PMA were met at the control date. I can see his argument that the Properties were not yet residential according to the PMA test. I can also see the reason he feels so strongly that the March hearings should have been pursued as a matter of urgency because it would have prevented any further building works. However, my role is not to decide whether the properties were or were not residential at the control date according to the PMA definition. It is to make findings about whether Namulas has breached its duty to Mr M or been responsible for maladministration. I therefore have to consider the picture as it presented to Namulas who, four days before the eviction hearing, knew nothing of the pending litigation in its name and was wholly unaware of the circumstances of the occupation, the situation which Mr E described to them as 'a mess' which was in the process of being cleared up. From the outset Namulas were presented with polemically opposite allegations of sharp practice and dishonesty, from the occupants on one hand and Mr N and Mr E on the other. I accept Mr M's argument that the Occupants' account of the situation could not simply be relied upon (and I have not relied upon it in reaching my conclusions). However, Namulas lacked the usual document set from which they could readily ascertain the Occupants' status objectively. I have considered Mr M's argument that if Mr E was Namulas' agent then legally Namulas could be imputed with knowledge of what he knew, but that does not alter the fact that at the control date Namulas in fact knew little of relevance other than what they were being told by the parties to the dispute.

66. The call transcripts from the initial communications between the Occupants and Namulas suggest that the Occupants were already living in the Properties at the time. Leaving aside whether other things said by the Occupants were true or not (I have formed no view) the bald fact of their occupancy and the fact that they were intent on converting the property appeared undisputed. This is consistent with Mr S' email sent on 24 March 2013 saying that "I have about 3 weeks work once this is completed."

67. The objective evidence available also indicates that the Properties were being used residentially prior to Namulas becoming aware of the situation. Council Tax was being paid on Property A from January 2014; the application for a change of use had been approved in February 2013; more recent planning applications showed Property A being used residentially. I understand Mr M's point that he did not make the applications; the Occupants did. Nevertheless, they are part of the evidential picture which presented at the control date. Mr M has taken issue with the view I expressed in my preliminary determination that the residential SAT agreement for both the Properties, was significant. He has clarified that the agreement which he appeared to have signed on 29 January 2014, was actually not in place until July 2014. I accept his submission on that point, but I think that only goes to underline the difficulty faced by Namulas at the control date. The document trail which led to the occupation by the Occupiers does very little to explain how they came into occupation and the terms on which they occupied. It was bound to take Namulas some time to catch up with the chain of events which had led to the situation which was revealed to them on the control date.

68. Regardless of whether it conferred any legally enforceable occupancy rights over its duration (and I accept the argument that Firm F could not grant rights it did not itself have), I cannot see how Mr M can reasonably hold Namulas at fault for not knowing that Property A's status was not residential over the period ostensibly covered by the SAT agreement. If Mr M did not consider the property to be residential, I cannot see any reason why he would have entered into a residential tenancy agreement. He says he did it as nominee for Firm F, on instruction. I do not think that detracts from the inference that both he and the Occupiers were at the time acting as though the premises were residential and it is very difficult to fault Namulas for believing the same.

69. On the basis of the evidence I have set out above, and the legal advice which was available to Namulas at the time, I consider it was reasonable for it to take the stance that the Properties had passed the threshold to meet the PTM test to be classed as a residential property. I therefore do not agree that it was necessary for Namulas to take urgent steps to reverse the situation or stop any conversion works as Mr M suggests. It took stock of the situation which presented, took legal advice on the means to mitigate the risks associated with the eviction proceedings and acted upon it. It did in fact pursue the eviction proceedings, albeit not with the sense of urgency Mr M would have liked. I cannot fault that approach. Moreover, there is no indication in the correspondence from Mr M around that time that he asked Namulas to take

steps to prevent the property from becoming residential and no evidence that he then considered it possible.

70. I appreciate that in June 2016 Mr M sought legal advice from a QC which supports his stance that the Properties were not, in law, properly regarded as residential at the control date. However, that is not the issue which I have to decide. I am required to consider whether, given the circumstances with which they were presented in March 2015, the approach to risk management taken by Namulas was within their powers and reasonable. I have seen no evidence to suggest otherwise.

71. I also bear in mind that there is no evidence that had the proceedings been pursued on 6 or 13 March they would have resulted in immediate eviction. It is possible that proceedings would have had that outcome, but it does not appear to me that that outcome was more likely than not. It must depend on the arguments put forward and the conclusions of the Sheriff on the day, a point illustrated by the fact that, in the event, the matter was listed for a full hearing rather than being dealt with summarily.

Potential tax liabilities associated with change of use

72. Mr M has argued that Namulas' submission to HMRC was flawed and has jeopardised the SIPP's position when the assessment is made in regard to the Properties' status. I am unaware of any tax liability in fact being imposed by HMRC, so am unable to conclude that there has been any loss incurred as a result of anything which has been reported or not reported to them by Namulas.

73. In any event I do not consider that the report made by Namulas amounted to a breach of duty or maladministration. I have read the legal advice which Mr M obtained on this issue. I appreciate the argument that Property A is distinct from Property B and Property B may be considered commercial even if Property A is not, that their being let or licensed together is not determinative of their status under the PMA. I also understand that it is possible to argue that Property A, though in fact occupied residentially, was not necessarily 'residential' if it was not suitable for such occupation. I see the significance of the lack of a necessary rear fire entrance at the control date. However, the advice does not support the proposition that the property cannot be residential until a completion certificate has been granted. In those circumstances I cannot say that failure to draw attention to the absence of a completion certificate when reporting to HMRC was a breach of duty to Mr M. In any event the 2016 advice to which Mr M refers me was not available to Namulas when it reported to HMRC. In making its report it relied on the facts known to it at the time and the advice from Eversheds, with which its report was consistent. I conclude that Namulas acted reasonably when referring the matter to HMRC, and it is ultimately HMRC's decision whether either Property will be classed as residential and over what period.

74. HMRC will no doubt conduct its own enquiries and apply its own logic to the decision which it has to make.

75. I do not agree that Namulas had a conflict of interest when making reporting decisions in relation to the SIPP. It appears to me that the SIPP and its trustee had a shared interest in the conduct of the SIPP being legal. If the SIPP contained a residential property then both it and Namulas were exposed to the associated potential tax consequences. There was a shared incentive for the SIPP not to hold residential property.

The decision to settle the eviction proceedings and sale value

76. Mr M alleges that Namulas' decision to settle with the Occupants was flawed and that the Properties were sold at undervalue as a consequence. I disagree.

77. I can see no evidence to support Mr M's contention that it would have been better to press on with eviction proceedings in August or to leave the Occupants in situ until all possible licence to occupy had expired with the aim of selling at leisure on the open market. The legal advice obtained was to the effect that both of those options carried significant downside risks. Moreover, it is apparent that Eversheds, prior to its advice to settle, remained uncertain of all the facts which it considered were material to the eviction proceedings and which would be tested at proof. In its letter dated 12 August 2015 to Mr M, Eversheds stated:

> "A number of the questions raised in our letter of 3 June 2015 remain unanswered. We remain concerned that we are not in possession of the full facts. That is likely to be harmful to our prospects in the action."

78. I cannot see that these questions were ever answered by Mr M, who would have been a necessary witness of fact.

79. I also think it is notable that under clause 11 of the Trust Deed, Mr M as the Member was required to provide any reasonable information requested by Namulas, and that it was indemnified from any losses where that information subsequently was not provided.

80. I understand Mr M's argument that he had received conflicting advice about the prospects of the litigation and have considered his point that this should have caused Namulas to ask questions. I also understand his view that Eversheds' and, by extension, Namulas' risk assessment was inadequate. I have considered the email correspondence between Mr M and Eversheds over the period leading up to the settlement and can see that there was an open and frank exchange of views about the litigation strategy which gave Mr M an opportunity to put forward his views, that he did so, and that having considered them, Eversheds did not agree with them. I do not agree that relevant questions were simply left unasked. I am satisfied that there were no oversights that should have caused Namulas to question further the advice of their appointed advisers.

81. Given the evidential uncertainties of which Namulas were aware, the inherent risks of litigation and the associated costs, which the SIPP could not meet at the time, I do not think it was unreasonable for Namulas to accept Eversheds advice to settle the litigation.

82. Moreover, the position Namulas was taking as Trustee of his fund was explained to Mr M in frank and detailed terms. He was told in an email dated 14 August 2015 from the General Counsel of Swiss Re what legal advice Namulas were receiving, was provided with a copy of it, and told that although Namulas agreed that the occupiers should not be in occupation, Mr M's 'highly assertive approach' was considered potentially counter-productive to the prospects of success on the proof.

83. Mr M points out that Namulas might instead have opted to wait until January 2016 in order for the disputed right to occupy to expire. In effect this would temporarily concede occupancy rights to the Occupants. However, this option would incur costs, including the possibility of the mortgage defaulting, which the SIPP could not afford. I note that this option was considered and rejected.

84. Namulas clearly had a power to sell in these circumstances. In order for a complaint to be upheld against Namulas on this issue I would need to conclude that it had not considered all the relevant issues, not acted in the best interests of the beneficiary, or that it had acted irrationally. I can see no evidence to suggest that that was the case.

85. Having received the advice from Eversheds, and following a provisional settlement with the Occupants, Namulas made its decision to ratify the settlement at a meeting of the Board of Directors on 27 August 2015. The minutes of the meeting run to eight pages and demonstrate that the Board gave significant consideration to the most appropriate way forward and had regard for the relevant evidence. The minutes document detailed consideration of litigation risk as their advisers perceived it and whether the offer was reasonable in the context of the valuations of the Properties, both from Namulas' appointed surveyor and Mr M's preferred surveyor. I note that when they inspected the premises, DTZ assessed how much per square foot appeared to have been spent on the conversion and this factor was considered by the Board when approving the settlement figure. I therefore do not agree with Mr M's view that the value of the Occupants' counterclaim was not evaluated critically.

86. Turning to Mr M's criticism of the DTZ valuation itself, I am not in a position to comment on the allegations about the local property market, but I note Mr M accepted DTZ's appointment in correspondence with Namulas, and as a RICS registered firm I see no reason why they ought not to have been appointed.

87. DTZ provided valuations on the basis of the Properties being residential, as at 2015, and commercial, as at 2013. Although Mr S' preferred surveyor provided a higher valuation, that was on a paper-based assessment only and the preferred surveyor also confirmed DTZ's valuation was "not wrong", albeit at the lower end of the scale.

In the circumstances I see no reason for Namulas not to have accepted the values provided by DTZ and relied upon them as a guide.

88. The eventual price accepted by Namulas for the Properties was £610,000. This is below the value provided by DTZ of £760,000 and very significantly below Mr M's opening negotiation stance of £984,000. Whilst DTZ's valuation was not met, the settlement must be viewed in the wider context and the numerous factors which Namulas perceived affected their ability to negotiate more rigorously. The board minutes provide a comprehensive explanation of the factors influencing the decision and how they were evaluated. I understand that Mr M does not agree with the evaluation of the risks inherent in the situation, but I do not agree that the minutes present no objective, balanced or reasoned analysis of the circumstances.

89. Under Clauses 13 and 17 of the Trust Deed Namulas had the complete discretion to settle and compromise on this matter and sell the investment where there were significant legal risks as the owner of the Properties. In the circumstances I am satisfied that Namulas acted rationally when ratifying the settlement and considered all the relevant information when making its decision.

Failure to transfer and lost investment growth

90. I do not find Namulas' refusal to transfer his SIPP to a SSAS in December 2015 can give rise to a claim for the investment loss arising from inability to purchase a separate commercial property. Given the identified potential tax liability and the referral to HMRC, it is reasonable for Namulas to have refused the transfer until that issue has been resolved and nothing has stopped Mr M from mitigating his loss by making investments through his SIPP in the meantime.

Lost income

91. Mr M has claimed for £175,000 lost income due to this matter and the disruption caused to his employment. I do not make awards for loss of earnings and, beyond stating that he has lost this amount, Mr M has provided no evidence of this loss. In any event I have found no negligence that could have caused such loss of income.

Professional fees applied to the SIPP

92. Mr M disputes Namulas' reliance on the Trust Deed when recovering professional costs from the SIPP. I have reviewed the Trust Deed and each subsequent amendment. Under the Power of Amendment, (Clause 11) Namulas could amend any and all provisions of the Deed, and there was no requirement for Namulas to consult Mr M when making amendments.

93. Under Clause 8 of the Trust Deed (as amended), dated 6 April 2006, Namulas is entitled to apply the costs of professional services arising in relation to the administration and management of the SIPP.

94. Mr M has not put forward any cogent reason why the provisions of the Trust Deed as amended are inapplicable.

95. For these reasons the complaint should not be upheld.

Karen Johnston
Deputy Pensions Ombudsman
11 January 2019

Appendix

Appendix 1

Governing Trust Deed and Rules of the National Mutual Personal Pension Scheme dated 6 April 2006

6. Power to delegate

6.1 The Trustee, the Provider and the Scheme Administrator may each delegate or authorise sub-delegation of any or all of its obligations an powers under this Deed, including any discretionary powers, to one or more persons (whether or not a Trustee) upon such terms as to remuneration, appointment, removal and resignation it shall decide. Such delegation may include the power to execute documents on behalf of the Trustee, the Provider or Scheme Administrator (as appropriate). For the avoidance of doubt, the consent of the Member is not required for any such delegation.

6.2 Except where the Trustee decides otherwise, the Trustee delegates to the Scheme Administrator (to the extent permitted law) all of its powers and duties under this Deed.

7. Scheme advisers

7.1 The Trustee, the Provider and the Scheme Administrator may from time to time engage and remunerate actuaries, solicitors, accountants, brokers, investment advisers or managers or such other advisers as they consider necessary or desirable in connection with the Scheme and on such terms as to remuneration, liability and indemnity and otherwise as they think fit.

The Trustee, the Provider and the Scheme Administrator, either acting singularly or jointly, shall not be responsible for any loss resulting from acting in good faith upon professional advice, whether or not obtained by them.

8. Fees and expenses

8.2 All expenses, charges, losses, liabilities, costs or other amounts that the Trustee, the Provider or the Scheme Administrator incur in connection with the administration, management and investment of the Scheme shall be paid by debiting the amount from the Member’s Personal Accounts in such manner as the Trustee decides and the Trustee may sell any asset in order to meet the amount due. To the extent that there are insufficient

monies in the Member's Personal Accounts, the outstanding sums shall be payable by the Member directly.

…

8.4 Any legal fees incurred as a result of a dispute between the Member and the Trustee, the Provider or the Scheme Administrator (as the case may be) shall be payable by the Member, except where a court or tribunal orders otherwise.

10. Liability

10.1 The Trustee, the Provider and the Scheme Administrator shall not be liable for any act omission or breach of trust nor for any act or omission of any of its agents, delegates or nominees except where it is caused by its own wilful neglect or wilful default. The provisions of section 1 of the Trustee Act 2000 are hereby excluded.

10.2 The Trustee, the Provider and the Scheme Administrator shall be entitled to an indemnity from the assets of the Scheme, including from Member's Personal Accounts (without requiring the consent of the Member), in respect of any liability which it incurs in relation to the Scheme, except where it is caused by its own wilful neglect or wilful default.

10.3 This Clause 10 shall apply separately to the Trustee, the Provider and the Scheme Administrator. IF the inclusion of any words in this Clause 10 would at law render ineffective all or any part of the protection of the Trustee, the Provider or the scheme Administrator then this Clause 10 is to be read with such words omitted.

10.4 In this Clause, the words "Trustee" "Provider" and "Scheme Administrator" shall include any past Trustee, Provider or Scheme Administrator of the Scheme and any director or officer and past directors or officers of a corporate trustee or former corporate trustee or of any such Provider or Scheme Administrator.

11. Provision of information

11.1 Each Member and other beneficiary shall provide to the Trustee, Provider or Scheme administrator such information as they may reasonably request in relation to the management and administrator of the Scheme. The Trustee, Provider or Scheme Administrator shall not be liable for the consequences of the provision of any incorrect or incomplete information by or on behalf of the Member or of the failure of the Member to provider such information and shall be entitled to an indemnity from the Member's Personal Account (without the consent of the Member) in relation to any liability arising from the provision of such information or the failure to provide such information.

13. Investments

13.1 Subject to Clause 13.2 and to Clause 13.12, the Trustee shall have the same full and unrestricted powers of investing and changing investments as if they were the beneficial owners of the assets in each Member's Personal Account. All money held in or for the

purposes of the Scheme shall be placed in an account with a bank or invested in policies of insurance or in such other manner as the Trustee may determine, whether involving liability or not, and whether predicting income or not, and with or without security, provided that the Trustee may not invest in any asset which is prohibited for investment by Registered Pension Schemes by legislation or by HM Revenue & Customs.

…

13.8 Without being under any liability to assess the suitability of any particular investment, the Trustee may reject any investment if it considers it appropriate to do so, including where the Trustee considers that the investment would involve it in significant risks as legal owner of the property. In addition, the Trustee may (but without any obligation to consider doing so) at any time dispose of the whole or part of an investment would involve the Trustee in significant risks as legal owner of the property or where the sale proceeds are required in order to meet any payment due out of the Arrangement in respect of the relevant Member or beneficiary.

17. Legal proceedings

17.1 In addition to the powers conferred on the Trustee by general law, the Trustee may commence and pursue legal proceedings relating to the operation of the Scheme, its actions as Trustee or the rights or beneficiaries under the Scheme and may defend any such proceedings. The Trustee has complete discretion to settle, compromise or submit to mediation or arbitration any claim or other matter relating to the scheme.

…

18. Alteration

The Provider, with the consent of the Trustee, may by deed amend, alter, replace or repeal all or any of the provisions of this Deed (including this Clause) and all or any part of the Rules whether retrospectively or otherwise. No Member or other beneficiary is required to contest to any such amendment. Any such amendment must comply with the requirements

of Section 38 of the Pension Scheme Act 1993 (alteration of rules of appropriate pension schemes).

Appendix 2

4 March 2015 – call between Namulas and Mr E

“Mr E – The whole reason why they were afforded access was because they expressed an interest in buying it and now we can’t get them out. We’ve had to basically take them to court to get them back out of the premises. The people working for us on this are Harper McCloud [sic]. [The Occupants] are downright dishonest. We wouldn’t have got to this stage if we were dealing with people who were honourable.

Namulas – My concern is that we were not notified of any of this, and we haven’t instructed them to act on our behalf. As far as we were concerned Mayfield was in occupation because we’ve been still receiving rent for them.

Mr E – That whole aspect has been dealt with by [Mr M] the other side of the sip [sic], I was made aware that they were in there without any right to be in there and we needed to get them out. I thought under my property manager’s hat…

Namulas – you do not have the authority to instruct legal action against the tenants without informing us…

…

Mr E – No they were interested in buying it with a view to converting it to residential. They have just been getting on with it without actually… they are almost separated from the ida of having to buy it to do. They have just been in there and we have been trying to get them out and they have been using every means at their disposal to avoid doing it…

…

Namulas – So Mayfield aren't there? We've still been receiving rent. I'm a little bit confused about that.

Mr E – That's something that [Mr E] has been dealing with in terms of the whole Mayfield thing there. I've basically left him to deal with that aspect of it, I just got involved in this. Because I knew that there was somebody going in to have a look to see whether it would suit them to convert to residential. But again everything seems to have gathered and hurtled forward at a pace. I didn't think anything could get done because in the pension fund it had to be commercial. So there was certain lines, certain hurdles that had to be gone over. But this, it's a mess, and I'm not going to say anything other than that, it's a mess. What we're trying to do here is just clear the whole thing up."